

## LOCATING THE CRIMINAL: CIVIL SANCTIONS, SEXUAL ABUSE, AND THE AMERICAN FAMILY

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*In the past decade, provoked by growing social anxiety about sexual predators, state and local restrictions affecting sexual offenders reentering the community have grown more numerous and more severe. In practice, these regulations have not reduced recidivism or otherwise improved public safety. Public attention and enforcement efforts strike at a largely imagined mass of stranger offenders while ignoring the reality of sexual abuse, in which children face the greatest risk of abuse within their own homes. The resulting sex offender laws seem sensible on their face, but are driven by moral impulses, not fact-based analysis.*

*Traditionally, the law's protection of privacy in the home has been treacherous for those in positions of weakness. Through incest exceptions and registration and notification exemptions, states demonstrably treat family crime less seriously than stranger crime. While violence within the family is a private issue, stranger offenders are seen as posing danger to all of the community. This article argues that in order to resolve the contradictions between the facts of sexual abuse and prevailing beliefs about the family, lawmakers have created laws that are not only ineffective, but actually counter-effective. These laws enable people to continue to ignore the larger problem of sexual abuse, which is committed primarily in families and by those close to their victims. By placing the blame for social disorder exclusively on stranger offenders, the safety of children is deemed accounted for, without having to institute the systemic change necessary to stop sexual abuse. In a more general sense, it allows the condemnation of child sexual abuse without rocking the patriarchal family boat.*

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## I. INTRODUCTION

Few things bring about a reaction as immediate and visceral as that of sex offenders.<sup>1</sup> No other crime is considered as horrible to self and community.<sup>2</sup> As described by one federal district court, “the crimes perpetrated by . . . [sex] offenders are so offensive to human dignity and so atrocious that many would be comfortable using any means necessary to prevent even the possibility of re-offense.”<sup>3</sup> In many contexts, criminal law recognizes rape as a fate equal to death: Of all nonlethal acts, a person has the right to use deadly force to repel a sexual assault.<sup>4</sup> In the past, rape convictions were subject to the death penalty, and more frequently so when the rape was of a child.<sup>5</sup>

In the past decade, provoked by growing social anxiety about sexual predators, state and local restrictions affecting sexual offenders reentering the community have grown more numerous and more severe.<sup>6</sup> These efforts are misguided. Public attention and enforcement efforts strike at a largely imagined mass of stranger offenders<sup>7</sup> while ignoring the vast majority of

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1. See, e.g., Eric Lotke & Herb Hoelter, *NCIA Issue Paper: Sex Offenses: Facts, Fictions and Policy Implications*, CIPA NEWSLETTER (Dec. 2006), <http://www.cjpc.org/Newsletters/December06Newsletter.htm#article2> (“Few offenses evoke more fear and loathing than sexual offenses. The idea stirs up images of innocent children deceived and victimized by scheming predators.”).

2. See, e.g., Janis F. Bremer, *Juveniles, Rehabilitation, and Sex Offenses: Changing Laws and Changing Treatment*, 29 WM. MITCHELL L. REV. 1343, 1346 (2003) (“A sexual offense in our society is generally seen as the most heinous of crimes, particularly if the victim is a child.”).

3. *Doe v. Miller*, 298 F. Supp. 2d 844, 846 (S.D. Iowa 2004), *rev'd on other grounds*, 405 F.3d 700 (8th Cir. 2005).

4. *People v. Landrum*, 429 N.W.2d 818, 820 (Mich. Ct. App. 1988), *rev'd on other grounds*, *People v. Hefflin*, 456 N.W.2d 10 (Mich. 1990); see also Don b. Kates, Jr. & Nancy Jean Engberg, *Deadly Force Self-Defense Against Rape*, 15 U.C. DAVIS L. REV. 873, 873-74 (1982).

5. In the past forty years, “[n]ine States—Florida, Georgia, Louisiana, Mississippi, Montana, Oklahoma, South Carolina, Tennessee, and Texas—have permitted capital punishment for adult or child rape for some length of time.” *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008) (holding that the death penalty cannot be applied for rape of a minor not resulting in death). In 2008, six states still maintained rape of a child as a capital offense. *Id.*

6. Sarah E. Agudo, *Irregular Passion: The Unconstitutionality and Inefficacy of Sex Offender Residency Laws*, 102 NW. U. L. REV. 307, 308 (2008).

7. In this paper, “stranger offender” denotes a sexual abuser who assaults a stranger. “Intrafamilial offenders” indicates those who abuse within the family. This article uses the term “intrafamilial abuse” as opposed to incest. Ruby Andrew explains, “[i]ncest’ encompasses a

actual perpetrators. Stranger rape cases constitute less than ten percent of sexual abuse,<sup>8</sup> while family members perpetrate between thirty and fifty percent of abuse.<sup>9</sup> In practice, these regulations have not reduced recidivism or otherwise improved public safety.<sup>10</sup> Some studies indicate exactly the opposite: Ultimately, they “may cause more harm than good.”<sup>11</sup> Moreover, these laws reinforce perceptions that sexual abuse consists solely of stranger rape cases.

This article argues that in order to resolve the contradictions between the facts of sexual abuse and prevailing beliefs about the family, lawmakers have created laws that are not only ineffective, but actually counter-effective. These laws enable people to continue to ignore the larger problem of sexual abuse, which is committed primarily in families and by those close to their

variety of sexual contacts between persons related by blood or affinity, without regard to the age or capacity to consent of the persons involved[.]” while “intrafamilial child sexual abuse” is “the problem of sexual abuse of children by family members.” Ruby Andrew, *Child Sexual Abuse and the State: Applying Critical Outsider Methodologies to Legislative Policymaking*, 39 U.C. DAVIS L. REV. 1851, 1858 n.31 (2006).

8. See, e.g., Jennifer M. Collins, *Lady Madonna, Children at Your Feet: The Criminal Justice System’s Romanticization of the Parent-Child Relationship*, 93 IOWA L. REV. 131, 164 (2007); Michael J. Duster, Note, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE L. REV. 711, 720 (2005).

9. Lotke & Hoelter, *supra* note 1; JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX 28 (2002); HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000), available at <http://www.bjs.gov/content/pub/pdf/saycrle.pdf>; David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, 4 FUTURE OF CHILD. 31, 31 (1994), available at [https://www.princeton.edu/futureofchildren/publications/docs/04\\_02\\_01.pdf](https://www.princeton.edu/futureofchildren/publications/docs/04_02_01.pdf).

10. Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & ECON. 207, 208 (2011) (finding “little evidence to support the effectiveness of sex offender registries, either in practice or in potential”); Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 AM. J. PUB. HEALTH. 412, 412 (2010) (“[E]vidence on the effectiveness of these laws suggests that they may not prevent recidivism or sexual violence and result in more harm than good.”); HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 3 (2007), available at <http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf> (“[O]ur research reveals that sex offender registration, community notification, and residency restriction laws are ill-considered, poorly crafted, and may cause more harm than good.”). *Contra* William Encinosa & Michael Roussis, *An Empirical Analysis of California Assembly Bill 488: Access to Information on Registered Sex Offenders over the Internet Reduces Recidivism*, 12 FLA. COASTAL L. REV. 429 (2011) (finding creation of internet registration site reduced recidivism in the first four years); See J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161, 192 (2011) (finding that “registration laws reduce the frequency of reported sex offenses” but notification regimes may increase the number of sex offenses).

11. HUMAN RIGHTS WATCH, *supra* note 10, at 3; see also Amanda Y. Agan, *Sex Offender Registries: Fear without Function?*, 54 J.L. & ECON. 207 (2011) (finding that available “data sets do not strongly support the effectiveness of sex offender registries.”).

victims. The notion that evil is embodied in strangers, and not in our family members, is far easier to accept. Violence against strangers has always been treated more severely than that against friends and family.<sup>12</sup> This position leads to sex offender laws that seem sensible on their face, but are driven by unjustified moral impulses, not fact-based analysis. In a more general sense, it allows the condemnation of child sexual abuse without rocking the patriarchal family boat.

Traditionally, the law's protection of privacy in the home has been treacherous for those in positions of weakness, typically women and children.<sup>13</sup> Through incest exceptions and registration and notification exemptions, states demonstrably treat family crime less seriously than stranger crime.<sup>14</sup> While violence within the family is a private issue, stranger offenders are seen as posing danger to all of the community. By placing the blame for social disorder exclusively on the shoulders of this latter group, the safety of children is deemed accounted for, without having to institute the systemic change necessary to stop sexual abuse. To face that reality of sexual abuse, in which children face the greatest risk of abuse within their own homes,<sup>15</sup> would require all of society to take responsibility for the pervasiveness of sexual abuse.

Current legislation must be restructured to address family abuse. The most essential thing law can do is take away exceptions that benefit intrafamily offenders. Developing greater awareness is the second step to stopping the epidemic. This will bring abuse out of the cover of the private sphere and into the public sphere.

Part I of this paper addresses the prevailing stereotype of sex offenders in contrast with the reality of sexual abuse in the United States. The discord between image and actuality results in ineffectual and deleterious regulation.

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12. See Robert J. Sampson, *Personal Violence By Strangers: An Extension and Test of the Opportunity Model of Predatory Victimization*, 78 J. CRIM. L. & CRIMINOLOGY 327, 328 (1987) ("It is the possibility of attack by strangers that seems to engender the most intense feelings of vulnerability and fear . . . . [T]he general public tends to 'equate strange with dangerous,' thereby rating victimization by strangers as one of the most serious and pressing crime problems.") (quoting CHARLES E. SILBERMAN, *CRIMINAL VIOLENCE*, CRIMINAL JUSTICE 8 (1978)); see also Marc Riedel, *Stranger Violence: Perspectives, Issues, and Problems*, 78 J. CRIM. L. & CRIMINOLOGY 223, 223-24 (1987) (discussing arguments "that the fear of crime is basically a fear of strangers").

13. See SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 129 (1989) ("The privacy of home can be a dangerous place, especially for women and children."); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 976 (1991); Naomi R. Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225 (1999).

14. See Andrew, *supra* note 7, at 1854 ("[M]any states offer a discounted criminal charge [and probation options] to perpetrators related to their victims.").

15. See HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, *JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT*, 30 (1999), available at <https://www.ncjrs.gov/html/ojdp/nationalreport99/frontmatter.pdf>.

Part II describes how the law has historically accorded the family special privileges and allowed the sphere of privacy to conceal violence within the family. Part III discusses how sex offender statutes are used to create the appearance of addressing sexual victimization while protecting the image of the family. Part IV proposes alternative legal means of addressing sexual violence.

This paper focuses on the sexual abuse of minors. Although young adult women are the most frequent victims of sexual assault,<sup>16</sup> the rhetoric and terms of laws are geared towards child victims. When “sexual offenders” are discussed in general terms, usually the term is meant to apply to abusers of children. Offenses against adults are viewed differently, typically described in terms of assault or rape, not abuse.<sup>17</sup> For the most part, sexual victimization of children is what grabs the public imagination. Sex offender statutes reflect this disposition. The Jacob Wetterling Act, for example, covers offenses against adults only if the offender has been deemed a “sexually violent predator.”<sup>18</sup> If the act involves a minor, however, the law includes a large breadth of crimes, such as nonsexual kidnapping.<sup>19</sup>

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16. LANE COUNCIL OF GOV'TS, MANAGING SEX OFFENDERS IN THE COMMUNITY: A NATIONAL OVERVIEW 15 (2003); SNYDER, *supra* note 9, at 12 (“[C]rimes against juvenile victims are the large majority (67%) of sexual assaults handled by law enforcement agencies.”); *Sexual Abuse Fact Sheet*, CRIMES AGAINST CHILDREN RESEARCH CTR., <http://www.unh.edu/ccrc/sexual-abuse/factsheet.html> (last visited Feb. 19, 2015) (“In 1999, 70% of forcible sex offenses and 97% of non-forcible sex offenses occurred against persons ages 0 through 17.”).

17. NAT'L CTR. MISSING & EXPLOITED CHILD., CHILD MOLESTERS WHO ABDUCT: SUMMARY OF THE CASE IN POINT SERIES 18 (Kenneth V. Lanning & Ann Wolbert Burgess, ed., 1995) [hereinafter CHILD MOLESTERS WHO ABDUCT] (“[T]he choice between the terms molestation and rape when referring to the sexual assault of children seems to be significant. The term rape is often chosen not because of a specific act, but for emotional emphasis or to define the victim more as a female than a child.”).

18. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994, 42 U.S.C. § 14071(a)(1)(B) (2006) (repealed and replaced by the Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. §§ 16901-16962 (2006)).

19. 42 U.S.C. § 14071(a)(3)(A)(i) (repealed 2006); *see also* Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 351 n.265 (2006) (citing examples).

## II. THE POPULAR IMAGE OF SEX OFFENDERS AND THE RESULTING LEGISLATION DOES NOT ACCORD WITH THE REALITY OF SEXUAL ABUSE

### A. *The stereotypical sex offender is the uncontrollable re-offending stranger.*

The common image of the sexual abuser is the inveterate pedophile, one who acts without remorse or even free will.<sup>20</sup> This popular image has solidified the image of sex offenders as “moral monsters.”<sup>21</sup> They have abused before and will continue to do as long as possible.<sup>22</sup> Therapy and other programs are ineffective.<sup>23</sup> He cannot be rehabilitated. He will never change. The only way to prevent further abuse is to isolate such a sexual predator from the community and prevent access to children for the rest of his life.<sup>24</sup>

A pronounced stereotype about sex offenders is their high rates of recidivism. Sex offenders are seen as mentally ill, and as such, incapable of controlling themselves. No form of treatment is effective in restraining their indomitable urges. As often expressed by legislators and others, sex offenders “are people that cannot stop their acts. They can’t help themselves. This is what turns them on. They can’t change their orientation; and here they are, being close to children and it’s abominable.”<sup>25</sup> The United States Supreme Court asserts, “[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sex assault.”<sup>26</sup> In one study, “[r]espondents estimated sex offense

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20. See, e.g., *State ex rel. Fulton v. Scheetz*, 166 N.W.2d 874, 885 (Iowa 1969) (“Our criminal sexual psychopath law is . . . designed . . . for the protection of the accused against punishment for acts beyond his control.”).

21. See John Douard, *Loathing the Sinner, Medicalizing the Sin: Why Sexually Violent Predator Statutes Are Unjust*, INT’L J.L. & PSYCHIATRY 36, 36-37 (2007).

22. Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES SOC. ISSUES & PUB. POL’Y 1, 19 (2007) [hereinafter Levenson et al., *Public Perceptions*].

23. *Id.*

24. *Id.* at 18-19.

25. Nancy Grace, *Federal Judge Greenlights Sex Offenders Living Near School Bus Stop*, (CNN television broadcast June 27, 2006) (quoting Caryn Stark, psychotherapist). Or, as Ann Landers put it, “the only molesters who can be considered permanently cured are those who have been surgically castrated. A drastic measure? Yes. But it’s the only one that is guaranteed to work.” Ann Landers, *There Is No Permanent Cure for Child Molesters*, L.A. TIMES, Aug. 2, 1995 at E4.

26. *Conn. Dept. of Public Safety v. Doe*, 538 U.S. 1, 4 (2003) (citations omitted).

recidivism rates to be around 75%.”<sup>27</sup> The sheer fact of the offense guarantees recidivism: “By committing the crime the first time, they’re admitting they can’t control their dangerousness.”<sup>28</sup> Statutes frequently point to the finding that, as the New Mexico legislature noted, “sex offenders pose a significant risk of recidivism.”<sup>29</sup> The likelihood of reoffense has justified civil restrictions applied by state and local governments and even civil institutionalization of sex offenders after they have served their criminal sentences.<sup>30</sup>

Public discussion and legislative debate emphasize the risk of sexual abuse by strangers, while rarely addressing abuse by family or acquaintances.<sup>31</sup> There is little conversation about the dangers within the home or those created by family and acquaintances. One study of newspaper articles addressing sexual abuse found that only four percent of articles mentioned intrafamilial abuse, while the other ninety-six percent focused on threats from strangers.<sup>32</sup> As talk show host Glenn Beck explained—and his guest, former New York governor George Pataki, agreed—“[w]e’re worried about our kids being kidnapped or raped or abused or shoved into a car. That’s what we’re afraid of.”<sup>33</sup> In response, children are kept closer and closer to home.<sup>34</sup>

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27. Levenson et al., *Public Perceptions*, *supra* note 22, at 17.

28. *Glenn Beck: Sex Offenders Put Back on the Streets* (CNN television broadcast July 16, 2007).

29. N.M. STAT. ANN. § 29-11A-2(A)(1) (2008); *see also* ALA. CODE 1975 § 15-20A-2(1) (2011); ARK. CODE ANN. § 12-12-902 (2008); FLA. STAT. ANN. § 775.21(3)(a) (West 2008); LA. REV. STAT. ANN. § 15:540(A) (2008); MASS. GEN. LAWS CH. 74 1 (2008); N.C. GEN. STAT. § 14-208.5 (2008); NEB. REV. STAT. ANN. § 29-4002 (West 2008); N.J. STAT. ANN. §§ 2C:7-1(A) (West 2014); OHIO REV. CODE ANN. § 2950.02(2) (West 2008), *unconstitutional as applied by* In re Bruce S., 983 N.E.2d 350 (Ohio 2012); OKLA. STAT. ANN. TIT. 57, § 581(B) (West 2008); S.C. CODE ANN. § 23-3-400 (2007).

30. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (“States have . . . provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety.”).

31. *See, e.g.*, James Poniewozik, *Mark Foley’s Real Sin Was . . . Breaking America’s Favorite Taboo*, TIME MAG., Oct. 16, 2006, at 36. Poniewozik notes that “[w]hen stranger predators are everywhere on TV, it suggests that they are everywhere in the real world: in your school yard, roaming your street, and—especially—climbing the DSL line into your kids’ bedrooms as if it were an ivied trellis.” *Id.* at 36.

32. *See* Jennifer C. Mitchell, Note, *Crime Without Punishment: How the Legal System Is Failing Child Victims of Intra-familial Abuse*, 9 J. L. FAM. STUD. 413, 416 (2007).

33. *Glenn Beck: Sex Offenders Put Back on the Streets*, *supra* note 28.

34. *See, e.g.*, NAT’L CTR. INSTS. & ALTERNATIVES, INC., TOWARDS MORE EFFECTIVE SEX OFFENSE LEGISLATION 10 (2007) (“A 1991 study found that in 1990, the radius within which children were allowed to roam on their own from home had shrunk to a ninth of what it had been in 1970.”); *Glenn Beck: Sex Offenders Put Back on the Streets*, *supra* note 28 (“In the ‘60s, . . . 90 percent [of children] were walking to school or riding their bikes. Now it’s down to 49 percent.”).

*B. Actual sexual abuse and sex offenders do not accord with the stereotypes.*

Stranger assaults constitute less than one in ten acts of child sexual abuse.<sup>35</sup> In contrast, family members perpetrated a surprising percentage of abuse. According to Bureau of Justice Statistics and the National Center on Institutions and Alternatives, which provide conservative figures, family members commit thirty-four percent of sexual abuse.<sup>36</sup> Forty-four percent “of men imprisoned for a sex crime victimized . . . [a] family member.”<sup>37</sup> A large percentage of these assaults are perpetrated by biological parents, stepparents and other guardians; approximately a quarter are perpetrated by birth parents.<sup>38</sup> In accordance with stereotype, however, the sex offender is most likely to be a man. “[A]pproximately 95% of offenders are male, whereas approximately 70% of victims are female.”<sup>39</sup> Fathers and male guardians commit almost all of parental sexual abuse.<sup>40</sup>

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35. Like all statistics, the numbers vary, but the findings have some consistency. *See, e.g.*, NAT'L CTR. INSTS. & ALTERNATIVES, INC., *supra* note 34, at 4 (stating seven percent); Collins, *supra* note 8, at 164 (stating ten percent); SNYDER, *supra* note 9, at 10 (stating three percent for “sexual assaults of children under age [six]”). In a handful of studies reviewed, the mean and median for stranger abuse was seven percent. *See, e.g.*, NAT'L CTR. INSTS. & ALTERNATIVES, INC., *supra* note 34, at 4 (citing Bureau of Justice Statistics (2004)). This paper uses ten percent, a commonly cited number that provides a conservative estimate of family and acquaintance abuse. *See, e.g.*, Collins, *supra* note 8, at 164; Duster, *supra* note 8, at 720.

36. Lotke & Hoelter, *supra* note 1; SNYDER, *supra* note 9, at 10; *see also* LEVINE, *supra* note 9, at 28 (“[R]eliable sources show that more than half, and some say almost all, of sexual abuse is visited upon children by their own family members or parental substitutes.”); Finkelhor, *supra* note 9, at 46 (“[I]ntrafamily perpetrators constitute from one-third to one-half of all perpetrators against girls and only about one-tenth to one-fifth of all perpetrators against boys.”). Forty-six percent of convictions for child sexual abuse involve offenses against family members. *See* Rose Corrigan, *Making Meaning of Megan's Law*, 31 LAW & SOC. INQUIRY 267, 291 (2006).

37. Lotke & Hoelter, *supra* note 1.

38. *See, e.g.*, Collins, *supra* note 8, at 164 (“[J]ust over one-fourth [of sexually abused children] were sexually abused by a birth parent.”); Mitchell, *supra* note 32, at 416-17 (“Of the more than three-hundred-thousand children estimated to have been sexually abused in 1993, more than 25% were abused by a birth parent.”); Andrew, *supra* note 7, at 1881 n.148 (“32% of child victims were assaulted by parents or guardians.”); Lynne Olman Lourim, Note, *Parents and the State: Joining Forces to Report Incest and Support Its Victims*, 28 U. MICH. J.L. REFORM 715, 717 n.12 (1995) (“In Michigan, parents commit the incest in approximately 55% of the substantiated child sexual abuse cases . . . .”); Jenny A. Montana, Note, *An Ineffective Weapon in the Fight Against Child Sexual Abuse: New Jersey's Megan's Law*, 3 J.L. & POL'Y 569, 594 n.114 (1995) (citing study of 1,058 felonious sexual assaults in Snohomish County, Washington where “22% were committed by natural parents, 15% were committed by other relatives; 9% were committed by stepparents”).

39. REBECCA M. BOLEN, CHILD SEXUAL ABUSE: ITS SCOPE AND OUR FAILURE 24 (2001).

40. *Id.* at 120 (“The most outstanding characteristic of parental sexual abuse is that approximately 99% is perpetrated by fathers or father figures.”) (citation omitted).

C. *Based on incorrect stereotypes, current sex offender laws are both ineffective and counterproductive.*

The actuality of sexual abuse and sexual offenders differs greatly from public perception. Contrary to stereotype, studies continually show that sex offenders have lower recidivism rates than those convicted of other criminal offenses.<sup>41</sup> Sex offenders “are among the least likely criminals to be rearrested for new crimes.”<sup>42</sup> While the results of individual studies vary, recent meta-analysis found, on average, “that the recidivism rate was approximately 5% at five years and 10% at 10 years.”<sup>43</sup> According to the National Center on Institutions and Alternatives, “3.3% of people imprisoned for child molestation were rearrested for another sex crime against a child.”<sup>44</sup> In comparison, however, “the general rearrest rate for people released from prison was 68%.”<sup>45</sup> Moreover, the likelihood that a sex offender will reoffend is alterable. With therapy programs, recidivism rates decreased by more than half.<sup>46</sup> Rates have also declined the more the offender is reintegrated into society.<sup>47</sup> Additionally, sexual offender profiles have become increasingly

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41. See, e.g., NAT’L CTR. INSTS. & ALTERNATIVES, INC., *supra* note 34, at 3; Levenson et al., *Public Perceptions*, *supra* note 22, at 17 (discussing how the myth of high sex offender recidivism originated); Joelle Anne Moreno, “Whoever Fights Monsters Should See To It That in the Process He Does Not Become a Monster”: *Hunting the Sexual Predator with Silver Bullets—Federal Rules of Evidence 413-415—and a Stake Through the Heart—Kansas v. Hendricks*, 49 FLA. L. REV. 505, 554 (1997);

42. Levenson et al., *Public Perceptions*, *supra* note 22, at 6.

43. KRISTEN M. ZGOBA, ET AL., *A MULTI-STATE RECIDIVISM STUDY USING STATIC-99R AND STATIC-2002 RISK SCORES AND TIER GUIDELINES FROM THE ADAM WALSH ACT* (2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/240099.pdf>. But see Roger Przybylski, *Chapter 5: Adult Sex Offender Recidivism*, OFFICE OF JUSTICE PROGRAMS, [http://www.smart.gov/SOMAPI/sec1/ch5\\_recidivism.html](http://www.smart.gov/SOMAPI/sec1/ch5_recidivism.html), (“The observed sexual recidivism rates of sex offenders range from about 5 percent after 3 years to about 24 percent after 15 years.”).

44. NAT’L CTR. INSTS. & ALTERNATIVES, INC., *supra* note 34, at 2.

45. NAT’L CTR. INSTS. & ALTERNATIVES, INC., *SEX OFFENSES - FACTS, FICTIONS AND POLICY IMPLICATIONS* (2006) (2007).

46. See *id.* at 3 (listing meta-analysis studies which found treatment reduced recidivism rates by 59%, 41%, and 37%); see also Bitna Kim, Peter J. Benekos & Alida V. Merlo, *Sex Offender Recidivism Revisited: Review of Recent Meta-analyses on the Effects of Sex Offender Treatment, TRAUMA, VIOLENCE, & ABUSE* 1, 11 (2015) (“Meta-analyses of sex offender treatments suggest a 22% reduction in recidivism.”); JILL S. LEVENSON, *POLICY INTERVENTIONS DESIGNED TO COMBAT SEXUAL VIOLENCE: COMMUNITY NOTIFICATION AND CIVIL COMMITMENT* (2003) [hereinafter LEVENSON, *POLICY INTERVENTIONS*] (“Cognitive-behavioral and systemic treatment programs reduced sexual offense recidivism from 17.4% to 10%, [effectively] reducing recidivism by almost 40%.”); NAT’L CTR. INSTS. & ALTERNATIVES, INC., *supra* note 34, at 2 (“With or without treatment, more than 87% of the once caught do not reoffend with another sex crime. With treatment, the likelihood of recidivating is even lower.”).

47. See Maaren Alia Choksi, *Sex Offender Re-Entry: A Summary and Policy Recommendation on the Current State of the Law in California and How to “Safely” Re-Introduce Sex Offenders into Our Communities* 29 (Jan. 27, 2006) (unpublished working paper), available at

effective at identifying which groups are most likely to re-offend.<sup>48</sup> Sex offender statutes respond to specific fears of children raped and assaulted by strangers. Such occurrences, however, rarely occur. While sufficiently upsetting, only a handful of children are kidnapped and killed by non-family members every year in the United States.<sup>49</sup> Of those few, not all suffer sexual assault.<sup>50</sup> When they do happen, however, the stories of sexual assault and murder are splashed across the news: Megan, Amber, Jessica and others, their names immortalized in law.<sup>51</sup> Terrifying and gruesome, we cannot look and we cannot turn away. In actuality, the danger of such brutal events is infinitesimal.<sup>52</sup> In our minds, however, the horror is vividly real.

Nonetheless, in a case study by the Mayo Clinic, “three-quarters of parents were afraid their children would be abducted; a third said it was a ‘frequent worry,’ more frequent than fretting over sports injuries, car accidents, or drugs.”<sup>53</sup> The probability of injury or death from one of these activities is massively greater than that of being abducted off the street by a stranger.<sup>54</sup> As Judith Levine points out, “if it happens to your baby, who cares about the statistics? Still, most parents manage to put irrational fears in perspective. Why, in spite of all information to the contrary, do Americans insist on believing that pedophiles are a major peril to their children?”<sup>55</sup>

Based on incorrect stereotypes, current legislation regarding sex offenders is both ineffective and counter-effective. Such statutes have not demonstrated a benefit to public safety. To the contrary, by increasing

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[https://www.law.stanford.edu/sites/default/files/child-page/183672/doc/slspublic/MChoksi\\_05.pdf](https://www.law.stanford.edu/sites/default/files/child-page/183672/doc/slspublic/MChoksi_05.pdf) (“One of the surest methods of guaranteeing the public safety is in developing a path through which sex offenders can rehabilitate themselves and decide to become productive members of society.”).

48. See Andrew J. Harris, *Risk Assessment and Sex Offender Community Supervision: A Context-Specific Framework*, 70 FED. PROBATION 36 (2006).

49. See DAVID FINKELHOR ET AL., U.S. DEPT. OF JUSTICE, NONFAMILY ABDUCTED CHILDREN: NATIONAL ESTIMATES AND CHARACTERISTICS 2 (Nat’l Incidence Studies of Missing, Abducted, Runaway, and Thrownaway Children) (2002) [hereinafter FINKELHOR ET AL., NONFAMILY ABDUCTED CHILDREN].

50. See *id.* at 2.

51. Sexual Predator Punishment and Control Act of 2006 (“Jessica’s Law”), CAL. PENAL CODE, § 3003.5 (West 2011), *unconstitutional as applied by* In re Taylor, No. S206143, 2015 WL 858277 (Cal. Mar. 2, 2015); Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. §§ 16901-16962; Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. §§ 14071-14073 (2006) (repealed and replaced 2006); Pam Lychner Sexual Offender Tracking and Identification Act of 1996, 42 U.S.C. § 14072 (2006) (repealed and replaced 2006).

52. See FINKELHOR ET AL., *supra* note 49, at 2.

53. LEVINE, *supra* note 9, at 24.

54. See *id.*

55. *Id.* at 26.

alienation of sex offenders, they can also raise recidivism rates.<sup>56</sup> Sex offender regulations primarily involve registration, notification and residency restrictions.<sup>57</sup> Under federal law, states face loss of federal funding if they do not adopt registration requirements.<sup>58</sup> The law also requires some form of “notification” making the information publicly available.<sup>59</sup> In some cases, the information is merely accessible, usually electronically.<sup>60</sup> In other localities, the police actively distribute alerts, posting signs around the neighborhood and dispensing photographs.<sup>61</sup>

The statutory designation of “sex offender” often contains offenders not commonly considered an inherent danger to society.<sup>62</sup> Some states make no distinction regarding the seriousness of the crime or determined dangerousness of the offender.<sup>63</sup> Depending on the regulation, sexual offenses include possession of child pornography, kidnapping a minor, public exposure, computer solicitation of a minor, providing a child with pornography, false imprisonment of a minor, obscenity, or conspiring to do any of these acts.<sup>64</sup> Maaren Alia Choksi queries:

Would it surprise you to know that, under California Penal Code 314.1, someone convicted of indecent exposure for urinating in public while drunk and not thinking anyone was around must register as a sex offender for the rest of his life? Is this the dangerous monster that we want to use public resources to track and target?<sup>65</sup>

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56. Amber Leigh Bagley, Comment, “An Era of Human Zoning”: *Banishing Sex Offenders from Communities Through Residence and Work Restrictions*, 57 EMORY L.J. 1347, 1381 (2008).

57. *Id.* at 1354 (“[C]ivil commitment, registration, notification, and zoning schemes[] are not alternatives to each other; rather, they are supplements, building an increasingly higher wall around sex offenders.”).

58. Adam Walsh Act, Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. § 16925(a) (2006).

59. 42 U.S.C. §§ 16918, 16920, 16921.

60. See Jill S. Levenson, David A. D’Amora & Andrea L. Hern, *Megan’s Law and Its Impact on Community Re-entry for Sex Offenders*, 25 BEHAV. SCI. & L. 587, 588 (2007) [hereinafter Levenson et al., *Megan’s Law*].

61. *Id.*

62. See, e.g., Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner’s Perspective*, 42 HARV. C.R.-C.L. L. REV. 513, 518 (2007); Lori Sue Collins, *My Life Before and After HB 1059*, 42 HARV. C.R.-C.L. L. REV. 501 (2007) [hereinafter Collins, *My Life Before and After HB 1059*].

63. See HUMAN RIGHTS WATCH, *supra* note 10, at 5.

64. Duster, *supra* note 8, at 763-64; see, e.g., *Doe v. Miller*, 298 F. Supp. 2d 844, 852-57 (S.D. Iowa 2004), *rev’d on other grounds*, 405 F.3d 700 (8th Cir. 2005) (listing covered offenses).

65. MAAREN ALIA CHOKSI, *SEX OFFENDER RE-ENTRY: A SUMMARY AND POLICY RECOMMENDATION ON THE CURRENT STATE OF THE LAW IN CALIFORNIA AND HOW TO “SAFELY” RE-INTRODUCE SEX OFFENDERS INTO OUR COMMUNITIES*, 22 (2006).

For example, the District of Columbia and twenty-nine states define statutory rape as a strict liability crime, but nonetheless, twenty-eight of these jurisdictions include it as a registerable offense.<sup>66</sup> For the strict liability statutory rapist, the law does not require intent; consequently, the offender has “not been specifically proven to have intended to sexually exploit a minor.”<sup>67</sup> These individuals are nonetheless labeled sex offenders for life.<sup>68</sup> In these cases, however, “in examining the connection between the offender’s conviction and the offender’s danger to the community, ‘no rational relationship exists between the statute’s purpose of protecting the public from known sexual predators and [the strict liability offender’s] designation as one.’”<sup>69</sup> Human Rights Watch recounts the story of a sixteen-year-old convicted of statutory rape for having sex with his 14-year-old girlfriend.<sup>70</sup> In his words, “[w]e were in love. And now we are married. So it’s like I am on the registry for having premarital sex. Does having premarital sex make me a danger to society? My wife doesn’t think so.”<sup>71</sup>

A large percentage of sex offender registries apply equally to sexual offenses committed by juveniles.<sup>72</sup> Depending on the study, over one-fourth of child sex offenders are juveniles.<sup>73</sup> Forty to eighty percent of them have

66. Carpenter, *supra* note 19, at 325. “[T]hree states allow a good faith mistake-of-age defense in all cases, and eighteen states that employ strict liability provide a limited-mistake-of-age defense where the victim is close to the age of consent as prescribed by statute.” *Id.* at 317.

67. *Id.* at 369.

68. *See, e.g., In re J.W.*, 787 N.E.2d 747, 757-58 (Ill. 2003) (upholding lifetime registration for twelve-year-old offender).

69. Carpenter, *supra* note 19, at 369 (alterations in original) (citing *State v. Robinson*, 873 So. 2d 1205, 1215 (Fla. 2004)).

70. HUMAN RIGHTS WATCH, *supra* note 10, at 73.

71. HUMAN RIGHTS WATCH, *supra* note 10, at 73.

72. *See In re J.G.*, 777 A.2d 891, 906 (N.J. 2001) (reviewing statutes).

73. *See, e.g., JOHN HUNT, CTR. FOR SEX OFFENDER MGMT, UNDERSTANDING THE JUVENILE SEXUAL OFFENDING BEHAVIOR 1* (1999), *available at* <http://www.prearesourcecenter.org/sites/default/files/library/understandingjuvenilesexualoffendingbehavior.pdf> (“[I]t is estimated that juveniles account for up to one-fifth of all rapes and almost one-half of all cases of child molestation committed each year.”); SUE RIGHTHAND & CARLANN WELCH, U.S. DEP’T OF JUSTICE, *JUVENILES WHO HAVE SEXUALLY OFFENDED: A REVIEW OF THE PROFESSIONAL LITERATURE 1* (2001), *available at* <https://www.ncjrs.gov/pdffiles1/ojjdp/184739.pdf> (“[I]n 1995, 15.8 percent of arrests for forcible rape and 17 percent of arrests for all other sex offenses involved persons under 18 years old.”); Pamela S. Richardson, *Mandatory Juvenile Sex Offender Registration and Community Notification: The Only Viable Option to Protect All the Nation’s Children*, 52 CATH. U.L. REV. 237, 242 & n.33 (2002) (citing Susan Warmbrunn, *Children Hurting Children: Some Sex Offenders Not Much Older Than Their Victims*, GAZETTE, June 11, 2000, at A1) (“[F]orty-three percent of assault victims who were six years old or younger when they were sexually assaulted were victimized by someone under seventeen.”).

been sexually abused.<sup>74</sup> While regulations vary by state, many jurisdictions treat them the same as adults.<sup>75</sup> In all courts, there has been an increasing push for juveniles to be tried as adults and at ever younger ages.<sup>76</sup> Additionally since 2006, federal law has mandated the inclusion of all minors convicted for an offense committed when over the age of thirteen “the offense adjudicated was comparable to or more severe than aggravated sexual abuse.”<sup>77</sup> Currently, all fifty states include minors on their sex offender registry.<sup>78</sup>

As a result, acts committed as children or teenagers—at a time when “[s]ome of the conduct reflects the impulsiveness and perhaps difficulty with boundaries that many teenagers experience and that most will outgrow with maturity”<sup>79</sup>—will influence the rest of their lives. Those who committed their offenses as juveniles do so with little awareness of the consequences:<sup>80</sup>

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74. RIGHTHAND & WELCH, *supra* note 73, at 3. Nevertheless, “abusive experiences of juvenile sex offenders have not consistently been found to differ significantly from those of other juvenile offenders.” *Id.* at xi (citation omitted).

75. HUMAN RIGHTS WATCH, *supra* note 10, at 8 (“In most states, children (age 18 and younger) who are convicted of sex offenses can be subject to registration, community notification, and residency restrictions. The recently passed federal Adam Walsh Act requires states to register children as young as 14.”).

76. *See, e.g.*, HUNT, *supra* note 73, at 5 (“The number of delinquency cases waived to adult courts increased [seventy-one] percent between 1985 and 1994. The age at which a juvenile may be tried as an adult has been lowered in over half of the states. Twenty jurisdictions have no minimum age restriction for trying a juvenile as an adult for certain serious crimes.”) (citations omitted).

77. Amie Zyla Expansion of Sex Offender Definition provision, 42 U.S.C. §16911(8) (2012). The act need not be actually carried out: “attempt or conspiracy to commit such an offense” also falls under statute. *Id.*

78. Forty-one states explicitly include certain child offenders adjudicated delinquent in juvenile court. OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, SMART SUMMARY: PROSECUTION, TRANSFER, AND REGISTRATION OF SERIOUS JUVENILE SEX OFFENDERS 14 (2015), *available at* <http://www.smart.gov/pdfs/SMARTSummary.pdf>. The remaining nine states, along with the District of Columbia, only require registration for those minor adjudicated as adults. *Id.* at 16 (“Each of these states has provided a mechanism by which the prosecuting attorney may seek enhanced consequences for a serious juvenile sex offender, not by way of sex offender registration based on a juvenile adjudication, but via prosecution in adult court.”).

79. HUMAN RIGHTS WATCH, *supra* note 10, at 8; *see also* *Roper v. Simmons*, 543 U.S. 551 (2005) (citing *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (“The susceptibility of juveniles to immature and irresponsible behavior means ‘their irresponsible conduct is not as morally reprehensible as that of an adult.’”).

80. For further discussion about this lack of awareness, *see, e.g., Roper v. Simmons*, 543 U.S. 551, 569 (2005) (observing that “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” (citations omitted)); Kevin Lapp, *Databasing Delinquency*, HASTINGS L.J. (forthcoming 2015) (“Young people are less able to process information quickly and thoughtfully, and have less general knowledge and

the eighteen-year-old who slept with his sixteen-year-old girlfriend, the ten-year-old who engaged in sex play with his six-year-old cousin, and the seventeen-year-old who flashed a party where a twelve-year-old was present.<sup>81</sup> While these acts are generally considered reprehensible and accordingly criminalized, the perpetrators are usually viewed as appropriate for rehabilitation and community reintegration. Their recidivism rates are lower than adult offenders,<sup>82</sup> and may be as low as four percent.<sup>83</sup> Like adults, only more so, these regulations cause great harm to those subject to them, without evidence that they serve the greater public good.

Residency restrictions are the largest growing area of law in sex offender regulations. While not required by federal law, thirty-six states now have some form of residency restrictions.<sup>84</sup> In the past decade, hundreds of municipalities have passed local zoning ordinances.<sup>85</sup> Depending on locality, residency restrictions ban sex offenders from living within five hundred feet to four miles from locations such as: bus stops, childcare facilities, churches, educational institutions, gymnasiums, neighborhood centers, parks, playgrounds, public swimming pools, public athletic fields, recreation facilities, schools (including all school property from preschool to high school, public and private), skating rinks, video arcades and youth centers.<sup>86</sup>

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experience to draw upon, leading to poorly reasoned choices. In addition, adolescents are less likely to consider the long-term consequences of their actions, and are more reward-sensitive and less risk averse than adults.”), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2576056](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576056).

81. See *Doe v. Miller*, 298 F. Supp. 844, 852-57 (S.D. Iowa 2004), *rev'd on other grounds*, 405 F.3d 700 (8th Cir. 2005); see also Duster, *supra* note 8, at 763.

82. RIGHTHAND & WELCH, *supra* note 73, at xvii (alteration in original) (“What virtually all of the studies show, contrary to popular opinion, is that relatively few [juvenile sex offenders] are charged with a subsequent sex crime.”); Richardson, *supra* note 73, at 250 (citations omitted) (“[T]he overall recidivism rate of juvenile sex offenders is substantially lower than the rate of adult sex offenders.”).

83. HUMAN RIGHTS WATCH, *supra* note 10, at 9 (“[I]n one study only 4 percent of youth arrested for a sex crime recidivated. Research also indicates that most adult offenders were not formerly youth offenders: less than 10 percent of adults who commit sex offenses had been juvenile sex offenders.”).

84. Cynthia Calkins, et. al., *Sexual Violence Legislation: A Review of Case Law and Empirical Research*, 20 PSYCHOL. PUB. POL’Y & L. 443, 444 (2014) (“Table 1: American Sex Offense Laws Survey”) (cataloguing sex-offender-specific legislation by state).

85. See Jill S. Levenson, *Collateral Consequences of Sex Offender Residence Restrictions*, 21 CRIM. JUST. STUD. 153, 153-55 (2008); Amy P. Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 OHIO ST. L.J. 1, 25-26 (2014).

86. For state residency restrictions governing sex offenders, see, e.g., ALA. CODE § 15-20A-26 (LexisNexis 2011); ARIZ. REV. STAT. § 13-3727 (2007); ARK. CODE ANN. § 5-14-128 (2013); CAL. PENAL CODE § 3003 (West 2008), *unconstitutional as applied in* *In re Taylor*, 343 P.3d 867 (Cal. 2015); DEL. CODE ANN. tit. 11, § 1112 (1995); FLA. STAT. ANN. § 947.1405 (West 2010 & Supp. 2015); GA. CODE ANN. § 42-1-15 (1997 & Supp. 2013); IDAHO CODE § 18-8329 (Supp. 2013); 720 ILL. COMP. STAT. ANN. 5/11- 9.3 (West 2002 & Supp. 2014); IND. CODE ANN. § 11-13-3-4

Some states include the vague “locations where children are the primary occupants or users”<sup>87</sup> and “place[s] [where] children regularly congregate.”<sup>88</sup> Prohibiting sex offenders from such places accords little safety. One thousand feet, for example, provides small protection: “You could throw a softball that far from a child’s school bus stop.”<sup>89</sup> To address the problem, developers have even designed “sex offender-free communities.”<sup>90</sup>

Consequently, sex offenders have been regulated right out of town, as is often the explicitly stated intent of the legislature.<sup>91</sup> In Georgia, the house majority leader crafted the state residency restrictions “to make it so onerous [that those] . . . convicted of these offenses . . . will want to move to another state.”<sup>92</sup> Many other localities have followed suit, afraid that displaced sex

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(LEXISNEXIS 2003 & SUPP. 2013); IOWA CODE ANN. § 692A.114 (West 2002); KAN. STAT. ANN. § 59-29A11 (2006); KY. REV. STAT. ANN. § 17.545 (West 2008); LA. REV. STAT. ANN. § 14:91.1 (2012 & Supp. 2015); MICH. COMP. LAWS ANN. § 28.735 (West 2012 & Supp. 2014); MINN. STAT. ANN. 244.052 (West 2010 & Supp. 2011); MISS. CODE ANN. § 45-33-25(4) (West 2007); MO. ANN. STAT. § 566.147 (West 2012 & Supp. 2015); MONT. CODE ANN. § 46-18-255 (2001); NEB. REV. STAT. § 29-4017 (2006); NEV. REV. STAT. § 176A.410 (2007); N.C. GEN. STAT. § 14-208.16 (2006); OHIO REV. CODE ANN. § 2950.034 (West 2003); OKLA. STAT. ANN. tit. 57, § 590 (West 2010); OR. REV. STAT. § 144.642 (2013); R.I. GEN. LAWS § 11-37.1-10 (2008); S.C. CODE ANN. § 23-3-535 (2008); S.D. CODIFIED LAWS §§ 22-24B-22 (2008 & Supp. 2014); TENN. CODE ANN. § 40-39-211 (2010); TEX. GOV’T CODE ANN. § 508.187(b) (West 2012); VT. STAT. ANN. tit. 28, § 710 (2005); VA. CODE ANN. § 18.2-370.2 (2009); WASH. REV. ANN. § 9.94A.030 (West 2010 & Supp. 2015); W.VA. CODE ANN. § 62-12-26(b) (LexisNexis Supp. 2013); WIS. STAT. § 301.48 (2006).

87. See OR. REV. STAT. § 144.642 (2013).

88. See FLA. STAT. ANN. § 947.1405 (West 2010 & Supp. 2014).

89. Nancy Grace, *Federal Judge Greenlights Sex Offenders Living Near School Bus Stop*, *supra* note 25; see also Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet from Danger or One Step From Absurd?*, 49 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 168, 174 (2005) (“Living 1,000 [feet] away compared to 900 [feet] doesn’t prevent anything . . . . It doesn’t matter where a sex offender lives if he sets his mind on reoffending . . . . He can just get closer by walking or driving. The 1,000-foot rule is just a longer leash, I don’t see the point.” (citing respondent in sex offender study)).

90. See, e.g., Emily Ramshaw, *Sex Offender Label Makes No Distinction! Registry Has Lasting and Devastating Effects*, DALL. MORNING NEWS (Oct. 2, 2006, 1:28 AM) (“I&S Investment Group, a Texas-based developer, broke ground this summer on a sex offender-free community in Kansas. It has already sold all 150 lots in its first sex offender-free development in Lubbock. (Residents convicted of sex crimes while they live there must pay a \$1,500-a-day fine.)”).

91. See, e.g., *Doe v. Miller*, 298 F. Supp. 2d 844, 850-52 (S.D. Iowa 2004), *rev’d on other grounds*, 405 F.3d 700 (8th Cir. 2005) (describing how the majority of the towns in the country were restricted, while in other towns, “barely two percent of housing [wa]s available”); Isaiah Thompson, *Sex Offenders Set Up Camp*, MIAMI NEWS TIMES (Dec. 13, 2007), <http://www.miaminewtimes.com/2007-12-13/news/sex-offenders-set-up-camp/full/> (reporting on situation in Florida, where “[i]n a city surrounded by water and barely a mile wide at its thickest, the 2,500-foot ordinance effectively made Miami Beach the first city in America to exile sex offenders . . .”).

92. HUMAN RIGHTS WATCH, *supra* note 10, at 100 (alternation in original) (quoting Georgia State House Majority Leader Jerry Keen).

offenders would relocate to their districts.<sup>93</sup> Repeatedly, industrial areas and high-end residential neighborhoods are the only places left in town.<sup>94</sup> Even the streets are forbidden: Homelessness violates some residency restrictions.<sup>95</sup> Others deny sex offenders access to emergency shelters: In the case of a hurricane, sex offenders must report to the local jail.<sup>96</sup>

For the most part, residency laws have proven ineffective. Studies have not found any correlation between the presence of residency restrictions and recidivism rates.<sup>97</sup> Despite these restrictions, sex offenders continue to have access to children. Except in rare cases, the statutes govern where sex offenders live, not what spaces they otherwise inhabit.<sup>98</sup> While certain states may impose curfews,<sup>99</sup> restricted individuals can still visit bus stops, parks and playgrounds throughout the day, the times when children are most likely to be there.<sup>100</sup> Usually, restrictions have no impact on access to private homes, where eighty-four percent of sexual assaults on children under twelve occur.<sup>101</sup> In a study conducted by Jill Levenson, sex offenders related the “chilling and ironic reality: ‘You can live next door to a minor but not a

93. See Meek, *supra* note 85, at 24-26 (discussing the “‘ripple effect’ as surrounding towns seek to keep undesirable individuals from moving into their communities.”).<sup>94</sup> See *e.g.*, Miller, 298 F. Supp. 2d at 851.

94. See *e.g.*, Miller, 298 F. Supp. 2d at 851.

95. See, *e.g.*, GA. CODE ANN. § 42-1-15 (1997 & Supp. 2013).

96. See HUMAN RIGHTS WATCH, *supra* note 10, at 103-04. In Florida, the state “directs registrants to report directly to prison in case of a hurricane.” *Id.* at 104.

97. See, *e.g.*, SEX OFFENDER MGMT. BD., REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 4, 12 (2004), available at <http://www.csom.org/pubs/CO%20Residence%20Restrictions%201.pdf>; MINN. DEP’T OF CORR., LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES: 2003 REPORT TO THE LEGISLATURE 9 (2003), available at [http://www.csom.org/pubs/MN%20Residence%20Restrictions\\_Lvl%203%20SEX%20OFFENDERS%20report%202003%20%28revised%202-04%29.pdf](http://www.csom.org/pubs/MN%20Residence%20Restrictions_Lvl%203%20SEX%20OFFENDERS%20report%202003%20%28revised%202-04%29.pdf); Calkins, et. al., *supra* note 84, at 455-56; Matt R. Nobles, Jill S. Levenson & Tasha J. Youstin, *Effectiveness of Residence Restrictions in Preventing Sex Offense Recidivism*, 58 CRIME & DELINQ. 491, 505-06 (2012).

98. See, *e.g.*, Doe v. Miller, 405 F.3d 700, 719 (8th Cir. 2005) (noting that the Iowa statute, “restricts only where offenders may reside,” but does not “prohibit them from accessing areas near schools or child care facilities for employment, to conduct commercial transactions, or for any purpose other than establishing a residence”); Duster, *supra* note 8, at 722.

99. See, *e.g.*, FLA. STAT. ANN § 948.30(1) (West 2014) (requiring a “mandatory curfew from 10 p.m. to 6 a.m.” for certain offenses).

100. See, *e.g.*, Miller, 405 F.3d at 712 (Iowa Code § 692A.2A allows offenders the freedom to access “areas near schools or child care facilities for employment, to conduct commercial transactions, or for any purpose other than establishing a residence.”); Bagley, *supra* note 56, at 1379 (“Current restriction schemes do not stop registered sex offenders from entering these zones, so children are not safe from encounters with registered offenders within these zones.”); Thompson, *supra* note 91 (“The minute their curfew ends, at 6 a.m., they are gone.”).

101. See SNYDER, *supra* note 9, at 6 tbl. 4. The number drops to 69% for “youth ages 12 through 17.” *Id.* at 6.

school.”<sup>102</sup> One respondent reasoned that these limits “serve[] no purpose but to give some people the illusion of safety.”<sup>103</sup>

More than being ineffective, these regulations can actually prove counterproductive. Sanctions affect daily living in a myriad of ways. These factors only increase the difficulty sex offenders have reintegrating into the community, a factor that has consistently been shown to reduce recidivism.<sup>104</sup> This includes participating in family and community activities, obtaining a job and having a stable place to live. Restrictions make all of these activities difficult, if not impossible. Residency restrictions interfere with the ability to live in their hometowns or even with their families.<sup>105</sup> Sex offenders are often forced into rural or other inaccessible areas.<sup>106</sup> Those without a firm residence may fail to register with the parole officer, falling off the state’s radar and increasing the number of sex offenders deemed missing from state rolls.<sup>107</sup>

Forced out of society, parole officers have been unable to find acceptable residences for their parolees. Without a place to live and unable even to be declared homeless, sex offenders have been assigned a “residence” beneath bridges, in the woods, or in parking lots.<sup>108</sup> In Miami-Dade County, they found places to live in “squalid campsites, tents, under trees and on brushy

102. Levenson & Cotter, *supra* note 89, at 175.

103. *Id.* at 174 (“The majority of respondents emphatically proclaimed that the 1,000-ft rule would have no effect on their risk of reoffense.”).

104. *See, e.g., id.* at 173 (recounting research in the field and study where “many offenders emphasized their need for social support and believed their risk increased with isolation from supportive family and friends”); TIM BYNUM ET AL., CTR. FOR SEX OFFENDER MGMT., RECIDIVISM OF SEX OFFENDERS 12 (2001) (“[S]ignificant differences in stable dynamic factors were discovered between recidivists and non-recidivists.”), available at <http://www.csom.org/pubs/recidsexof.html>; ERIC SELEZNOW, CTR. FOR SEX OFFENDER MGMT., TIME TO WORK: MANAGING THE EMPLOYMENT OF SEX OFFENDERS UNDER COMMUNITY SUPERVISION 2 (Kristin Little & Scott Matson eds. 2002), available at <http://www.csom.org/pubs/timetowork.pdf> (“[S]table employment is a contributing factor in helping reduce sex offender recidivism.”); NAT’L CTR. INSTS. & ALTERNATIVES, INC., *supra* note 34, at 11; Duster, *supra* note 8, at 753 (“One of the most important ways to help sex offenders prevent recidivist acts is to strengthen family bonds.”); Karin Gutiérrez-Lobos et al., *Violent Sex Offenders Lack Male Social Support*, 45 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 70, 71, 78 (2001).

105. Levenson & Cotter, *supra* note 89, at 175 (“[H]ousing restrictions increased isolation, created financial and emotional hardship, and led to decreased stability.”).

106. *See Doe v. Miller*, 298 F. Supp. 2d 844, at 850-52, 869 (S.D. Iowa 2004), *rev’d on other grounds*, 405 F.3d 700 (8th Cir. 2005).

107. HUMAN RIGHTS WATCH, *supra* note 10, at 116; *see also* Steve Friess, *One Survivor’s Crusade Reveals a Plague of Errors in Nation’s Sex Offender Registries*, TAKEPART (Apr. 17, 2015), <http://www.takepart.com/feature/2015/04/17/errors-sexual-offender-registries> (describing how the “mishmash of databases kept by federal, state, and municipal agencies is riddled with inaccuracies and mistakes. . .”).

108. Susannah Frame, *Investigators: Sex Offenders Have a Hard Time Finding Homes* (KING 5 NEWS television broadcast May 12, 2008).

hillsides.”<sup>109</sup> Offenders were assigned to bridges in Weston,<sup>110</sup> Fort Lauderdale<sup>111</sup> and Iowa.<sup>112</sup> In Washington, of “the 34 most dangerous sex offenders recently released,” close to half were released homeless.<sup>113</sup> Some sex offenders go underground instead of incriminating themselves.<sup>114</sup>

The statutes limit employment opportunities, which are already slim once employers become aware of the sex offender status.<sup>115</sup> The stigma itself further limits the ability to participate in the community.<sup>116</sup> Harassment may extend to all of the sex offender’s family and those with whom they reside.<sup>117</sup> Once publicly identified under community notification laws, sex offenders are shunned by the community, losing jobs and often moving away from their neighborhood.<sup>118</sup> Ultimately, “restricting where parolees live can actually do more harm than good . . . [Such] requirements tend to push them out of metropolitan areas where they are further away from job opportunities, families, treatment options and all the things we know that will reduce recidivism[.]”<sup>119</sup>

109. *Id.* (“If they’re lucky enough, they have a tent. If they’re not lucky enough, they find a bridge, a dumpster, anywhere where they can find a location to live.”) (quoting parole officer).

110. Thompson, *supra* note 91 (A Weston offender “was sent instead to live under a bridge in Miramar, where he sleeps in his car.”).

111. *Id.* (“[Fort Lauderdale] probation officers came up with six different bridges to which they planned to assign sex offenders on a rotational basis.”).

112. John Simerman, *CA: Sex Offender Proposition a Paradox – Prop 83*, *CONTRA COSTA TIMES* (Oct. 15, 2006, 10:39 AM), available at <http://www.freerepublic.com/focus/f-news/1719826/posts> (In Iowa, “people list[] truck stops as their residence, or under a bridge on Seventh Street, [or] a car parked in the Kmart parking lot.”).

113. Frame, *supra* note 108.

114. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 10, at 105 (quoting from Minnesota public radio discussing the impact of the residency laws: “We went from knowing where about 90 percent of them were. We’re lucky if we know where 50 to 55 percent of them are now.”).

115. SELEZNOW, *supra* note 104, at 1.

116. *See, e.g.*, Eric B. Elbogen, Marc Patry & Mario J. Scalora, *The Impact of Community Notification Laws on Sex Offender Treatment Attitudes*, 26 *INT’L J.L. PSYCHIATRY* 207, 210 (2003) (“[B]ecause they will be afforded little privacy, sex offenders under community notification will also probably be unable to lead a productive life, which may add stress and thereby increase chances of relapse.”).

117. *See* HUMAN RIGHTS WATCH, *supra* note 10, at 78-99.

118. *See* *Doe v. Miller*, 298 F. Supp. 2d 844, 865, 869 (S.D. Iowa 2004), *rev’d on other grounds*, 405 F.3d 700 (8th Cir. 2005); Montana, *supra* note 38, at 579 (“Community members . . . have made death threats against sex offenders, picketed outside the offenders’ homes and apartments, thrown rocks through offenders’ windows and physically assaulted offenders.”) (citations omitted); *id.* at 580-81 & n.51 (“Community notification laws create ‘a wandering nomadic tribe of sex offenders who go from town to town seeking anonymity to avoid negative repercussions when people find out they’re in the community.’”) (citation omitted).

119. Mark Martin, *California’s Most Unwanted: Restrictions on Residency Make Nomads of Paroled Sex Offenders*, *SFGATE* (June 2, 2006, 4:00 am) (quoting Jill Levenson), <http://www.sfgate.com/news/article/California-s-most-unwanted-Restrictions-on-2533723.php>.

Stricter civil consequences can also produce social pressure against reporting cases of sexual abuse involving family and acquaintance offenders.<sup>120</sup> Sexual abuse is already notoriously underreported and “one of the most commonly cited reasons for nondisclosure is fear of negative consequences for the perpetrator, a concern that has special force where the abuser is a family member.”<sup>121</sup>

### III. THE PRIVATE SPHERE OF THE FAMILY CONCEALS SEXUAL ABUSE

Civil sex offender laws perpetuate family privacy, which has served to keep out government interference and cloak sexual abuse. Traditionally, children have lacked a separate legal identity from their parents, inhibiting their ability to exercise their legal rights. Up through the twentieth century, intra-spousal and parent-child abuse were protected from the full legal repercussions accorded to stranger abuse.<sup>122</sup> In practice, current sex offender regulations serve to do the same thing as previous systems designed to protect the inviolability of the family. These laws enable abuse to continue while cloaked in rhetoric of protection.

#### A. *The state has historically protected the family.*

The state has traditionally provided the home and the family with a high level of protection from government oversight and intrusion. The state has an interest in preserving the integrity and independence of these units.<sup>123</sup> The family was an impenetrable structure; the home is proverbially “a man’s castle.”<sup>124</sup> A “locus of sanctity and inviolability,” the home was “free from arbitrary intrusion by government or others.”<sup>125</sup> The family is “the quintessential ‘private’ institution,” in which “protection from public

120. See *Kennedy v. Louisiana*, 554 U.S. 407, 445, *modified on denial of rehearing*, 554 U.S. 945 (2008); LANE COUNCIL OF GOVT’S, *supra* note 16, at 13-14 (“[R]eports suggest a decrease in the reporting of both incest offenses and juvenile sexual offenses by victims and by family members who do not want to deal with the impact of public notification on their family.”).

121. *Kennedy*, 554 U.S. at 445.

122. See, e.g., *Schneider*, *supra* note 13; *Cahn*, *supra* note 13.

123. See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990) (“The integrity of the family unit . . . [is protected under] the Due Process Clause of the Fourteenth Amendment.”) (citation omitted).

124. See 4 WILLIAM BLACKSTONE COMMENTARIES 223 (1765-1769) (“[T]he law of England has so particular and tender a regard to the immunity of a man’s house, that it stiles it his castle.”); see also Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 202-03 (1995) (“The home as castle appears in defenses of privacy rights sounding in tort law and in constitutional law, with a common theme of restricting access and keeping others out.”).

125. McClain, *supra* note 124, at 202.

interference remains the publicly stated norm [and] state intervention continues to be cast as exceptional . . . .”<sup>126</sup> While within the state authority, the family was given a level of autonomy from government authority, as well as granted exemptions to otherwise generally applicable laws, such as parent-child immunity and the marital rape doctrine.<sup>127</sup>

Both the law and society consider parents accountable for the well-being of their children. Historically, married women and children were considered akin to property.<sup>128</sup> For the most part, children did not have a separate legal identity, which worked both for their protection and to their detriment. As with a wife or a slave, the man of the house could not legally harm his own child:<sup>129</sup> Aristotle explained, “[t]here cannot be injustice in an unqualified sense *towards* that which is one’s own; and a chattel[] or child . . . is as it were a part of oneself; and nobody chooses to injure himself (hence there can be no injustice toward oneself).”<sup>130</sup>

Children lack legal agency and must rely on the protection of others, primarily their parents and other guardians.<sup>131</sup> The law accords parents the ability to act on behalf of their children, with a corresponding responsibility to provide for their care.<sup>132</sup> A parent can bring a suit on behalf of his child,

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126. Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1207 (1999).

127. See Schneider, *supra* note 13, at 976 (1991) (“The law claims to be absent in the private sphere and has historically refused to intervene in ongoing family relations.”). For example, tort law was “traditionally held . . . inapplicable to remedy injuries inflicted by one family member on another.” *Id.* In the nineteenth century, “[m]arital privacy was repeatedly used as a justification for failing to prosecute spousal violence.” Naomi R. Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225, 1233 (1999).

128. See Barbara Bennett Woodhouse, “*Who Owns the Child?*”: Meyer & Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992); see also Mason P. Thomas, Jr., *Child Abuse and Neglect Part 1: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 340 (1972) (“Under the English common law, the father’s right to the custody, labor, and services of his child was comparable to a property right . . .”). Woodhouse clarifies that a “property model asserts not that children are property but that our culture makes assumptions about children deeply analogous to those it adopts in thinking about property.” Woodhouse, *supra*, at 1042.

129. See e.g., Thomas, Jr., *supra* note 128, at 295-99 (“Under ancient Roman law the father had a power of life and death (*patria potestas*) over his children that extended into adulthood. He could kill, mutilate, sell, or offer his child in sacrifice.”); Marvin Ventrell, *The Practice of Law for Children*, 66 MONT. L. REV. 1, 4 (2014) (“Children [pre-sixteenth century] were seen as property, and as such, warranted no governmental protection from the property holders.”).

130. ARISTOTLE, THE NICOMACHEAN ETHICS 130 (J. A. K. Thomson trans., Penguin Classics 2004) (c. 384 B.C.E.) (emphasis added). For a more modern discussion of the principle, see McClain, *supra* note 124, at 212-13.

131. See *Hodgson v. Minnesota*, 497 U.S. 417, 482 (1990) (Kennedy, J., concurring in part and dissenting in part) (“The law does not give to children many rights given to adults, and provides, in general, that children can exercise the rights they do have only through and with parental consent.”).

132. See *id.* at 483. “The common law historically has given recognition to the right of parents, not merely to be notified of their children’s actions, but to speak and act on their behalf.” *Id.*

control her religious education or inflict corporal punishment.<sup>133</sup> In turn, parents are obligated to provide nourishment, guarantee a certain level of safety and ensure participation in an educational program.

As children belong first to their parents,<sup>134</sup> others are not to interfere with the relationship. In the courts, the “primary role of the parents in the upbringing of their children is . . . established beyond debate as an enduring American tradition.”<sup>135</sup> Parents are presumed to act to the benefit of their wards, as the “natural bonds of affection lead parents to act in the best interests of their children.”<sup>136</sup> Moreover, parents provide “what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.”<sup>137</sup> Under these circumstances, there is neither right nor need for the state to interfere.<sup>138</sup>

*B. Laws punish intrafamilial abuse less severely than stranger abuse.*

Intrafamilial violence has traditionally been treated less harshly than violence committed by strangers or acquaintances.<sup>139</sup> Family law simultaneously creates a specific set of obligations and “a system of exemptions from the everyday rules that would apply to interactions among

“Parents have an interest in controlling the education and upbringing of their children but that interest is ‘a counterpart of the responsibilities they have assumed.’” (quoting *Lehr v. Robertson*, 463 U.S. 248, 257 (1983)).

133. Nevertheless, there are limits to a parent’s authority. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (“[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.”).

134. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (“[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944))).

135. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

136. *Parham*, 442 U.S. at 602; see also *Troxel*, 530 U.S. at 68 (“There is a presumption that fit parents act in their children’s best interests.”); Thomas, *supra* note 128, at 293 (“Our laws and legal systems have developed over hundreds of years around the expectation that parents will love and protect.”).

137. *Parham*, 442 U.S. at 602.

138. *Hodgson v. Minnesota*, 497 U.S. 417, 445 (1990) (“[T]he family has a privacy interest in the upbringing and education of children and the intimacies of the marital relationship which is protected by the Constitution against undue state interference.”); *Troxel*, 530 U.S. at 58 (“[T]here is normally no reason for the State to inject itself into the private realm of the family to further question fit parents’ ability to make the best decisions regarding their children.”).

139. Carissa Byrne Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 WASH. U. L. REV. 343, 346 (2007) (“The idea that crimes between strangers are more serious than crimes between those who already know each other has been repeated so often that it has become the conventional wisdom in criminal law.”).

people in a non-family context.”<sup>140</sup> Husbands have been traditionally accorded extra privileges to abuse their wives physically and sexually.<sup>141</sup>

Today, many states have specific incest statutes that allow intrafamilial offenders to escape sexual assault convictions by pleading to an incest charge.<sup>142</sup> Such statutes typically carry lighter penalties and may not require jail time.<sup>143</sup> In twenty-six states, statutes create “preferential treatment for incest offenders.”<sup>144</sup> Other states allow preferential sentencing for intrafamilial offenders. In Hawaii, for example, an intrafamilial offender is eligible for expedited sentencing when the victim “is related to the defendant by consanguinity or marriage, or resides in the same dwelling unit.”<sup>145</sup> In Washington, “the special sex offender sentencing alternative” is available if, *inter alia*, the “offender had an established relationship with, or connection to, the victim such that the sole connection with the victim was not the commission of the crime.”<sup>146</sup>

Similarly, registration and notification statutes can function to the benefit of intrafamilial offenders.<sup>147</sup> In many states, the definition of a sexually violent predator excludes “those offenders who have had only incestuous victims,” because intrafamilial offenders are seen as unlikely to reoffend.<sup>148</sup> Under other statutory schemes, violence against strangers is counted as an increased risk factor.<sup>149</sup>

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140. Fineman, *supra* note 126, at 1207.

141. See Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 154 (David Kairys ed., 1990) (“Common law and statutory definitions of rape in most states carved out a special exception for a husband’s forced intercourse with his wife. Wife beating was initially omitted from the definition of criminal assault on the ground that a husband had the right to chastise his wife.”).

142. Andrew, *supra* note 7, at 1870 (discussing “incest loopholes,” as “illustrated by juxtaposing the statutes penalizing extrafamilial child sexual abuse and intrafamilial child sexual abuse”); Hessick, *supra* note 139, at 357. Similarly, “several states have statutory provisions that ‘mandate lesser penalties for spousal rape than for other rapes regardless of the force used.’” *Id.* at 355-56 (citations omitted) (describing how the Model Penal Code considers felonies more serious “where there is no voluntary social and sexual relationship between the parties”).

143. See Hessick, *supra* note 139, at 400 & n.235.

144. Collins, *supra* note 8, at 146. The states are: “Alaska, Delaware, Florida, Hawaii, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin and Wyoming.” *Id.* at 146-48. States such as New York and Illinois have only recently closed their loopholes. *Id.* at 173.

145. See, e.g., HAWAII REV. STAT. § 706-606.3(1) (West 2008 & Supp. 2013).

146. REV. CODE WASH. § 9.94A.670(2) (West 2010).

147. See Andrew, *supra* note 7, at 1872-73 (discussing exemptions from registration and California’s “one strike” law).

148. LEVENSON, POLICY INTERVENTIONS, *supra* note 46, at 35.

149. See Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1163-64 (2007).

A person convicted only of incest or acts within the home may be exempted from specific requirements.<sup>150</sup> Absent from the registration rolls, they are also exempt from residency restrictions. California allows sex offenders to apply for exclusion from the public internet registry if “(1) [the registrant was] the victim’s parent, stepparent, sibling, or grandparent; and 2) the crime did not involve either oral copulation or any type of penetration.”<sup>151</sup> In New Jersey, the level of notification considers the “likelihood of reoffense (with intrafamilial offenders having the lowest base rate of reoffense) . . . .”<sup>152</sup> An offender is considered “low risk” if he “sexually abuses [a] younger sibling, household member, biological child, stepchild . . . common law spouse’s child . . . [or] family member who does not live in the household.”<sup>153</sup> According to the guidelines, “[i]f past victims are all members of the immediate family or same household, then it may be determined that the offender is not a risk to community organizations or schools which would otherwise receive community notification.”<sup>154</sup> The family extends from nieces and nephews to “the children of any person living in the household” or in adjacent housing.<sup>155</sup> Similarly, under the New York *Risk Assessment Guidelines and Commentary*, the offender receives a higher dangerousness rating when the victim was “a stranger or a person with whom a relationship had been established or promoted for the primary purpose of victimization.”<sup>156</sup> This definition excludes family members.<sup>157</sup> The commentary specially clarifies that while it “is not meant to minimize the seriousness of cases where the relationship is . . . familial,” these situations create “a heightened concern for public safety and need for community notification.”<sup>158</sup>

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150. *Id.*

151. OFFICE OF ATTORNEY GEN., CAL. DEP’T. OF JUSTICE, APPLICATION FOR EXCLUSION FROM INTERNET DISCLOSURE, *available at* <http://www.meganslaw.ca.gov/pdf/Application.pdf> (last visited Feb. 6, 2015).

152. N.J. DEP’T L. & PUB. SAFETY, ATTORNEY GENERAL GUIDELINES FOR LAW ENFORCEMENT FOR THE IMPLEMENTATION OF SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS Exhibit E at 5 (2005), *available at* <http://www.state.nj.us/lps/dcj/megan/meganguidelines1-05.pdf>.

153. *Id.*

154. *Id.* at 31.

155. *Id.*

156. *See* SEX OFFENDER REGISTRATION ACT: RISK ASSESSMENT GUIDELINES & COMMENTARY (2006), *available at* [http://www.nycourts.gov/reporter/06\\_SORAGuidelines.pdf](http://www.nycourts.gov/reporter/06_SORAGuidelines.pdf) (“Factor 7”).

157. *See id.* at 12.

158. *Id.* at 12 & n.8.

C. *The structure of the family and the private sphere enables sexual abuse.*

The construction of the family facilitates abuse. The unequal power dynamics can lead to exploitation under the cover of privacy. When there is a congruence of interest, the privacy of the family accords protection to those within it. When there are fissures within the family, however, “the rhetoric of communal rights may serve to mask conflict and coercion behind an ideal of ideal family harmony and love.”<sup>159</sup> In the words of theorist Barbara Bennett Woodhouse, “[t]he caretaking unit, composed . . . by persons who are inherently and essentially in positions of inequality, is uniquely dangerous and more open, rather than less open, to abuse if completely privatized.”<sup>160</sup> According to certain feminist theories, “incest, as well as all child sexual abuse, is symptomatic of a society in which patriarchal norms are the standard . . . [and] is intrinsic to and derivative of a system of male supremacy.”<sup>161</sup> In studies, families with sexual abuse had more traditional divisions of labor and unequal power structures.<sup>162</sup>

The privacy of the home provides a shield for abuse, both physically and socially.<sup>163</sup> Above all, “[t]he privacy of home can be a dangerous place, especially for women and children.”<sup>164</sup> Parental figures are provided access to children by nature of their position. Intrafamilial offenders use “their private access and family authority” to control their victims.<sup>165</sup> Within the house, children are separated physically from observers and potential

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159. Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 984 (1993).

160. Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1253 (1999) [hereinafter Woodhouse, *The Dark Side of Family Privacy*].

161. BOLEN, *supra* note 39, at 118-19 (citations omitted).

162. *See id.* at 121; Lourim, *supra* note 38, at 719-20 (“The most common trait among incestuous families is a traditional, patriarchal structure in which the father maintains complete control over the family.”).

163. *See, e.g.*, Schneider, *supra* note 13, at 981-82 (highlighting how “[t]he police and the courts have historically failed to intervene” in cases of domestic violence because it “is perceived as a ‘private’ problem, neither serious nor criminal.”).

164. OKIN, *supra* note 13, at 129.

165. KENNETH V. LANNING, NAT’L CTR. FOR MISSING & EXPLOITED CHILD MOLESTERS: A BEHAVIORAL ANALYSIS 6 (4th ed. 2001); *see also* State v. Etheridge, 352 S.E.2d 673, 681 (N.C. 1987) (“The youth and vulnerability of children, coupled with the power inherent in a parent’s position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser’s purpose.”).

escape.<sup>166</sup> While fifty-seven percent of sexual assaults against adults take place within a residence,<sup>167</sup> the home is significantly more treacherous for minors. For children twelve to eighteen, over two-thirds of sexual assaults occur in a private residence.<sup>168</sup> For children under twelve, the number rises to eighty-four percent.<sup>169</sup>

*D. Intrafamilial offenders are as dangerous to society as stranger offenders.*

Intrafamilial sexual abusers are as harmful as sex offenders who assault strangers, if not more.<sup>170</sup> Intrafamilial abuse is both physically and emotionally more destructive. Family sexual abuse and other familial violence result in great injury,<sup>171</sup> particularly when the perpetrator is a birth parent.<sup>172</sup> One-fourth of “parent-child rapes resulted in major injury,” defined as “severe lacerations, fractures, internal injuries, or unconsciousness.”<sup>173</sup> Beyond physical injury, intrafamilial abuse causes psychological harm not seen with stranger abuse: “[T]he worst devastation is wrought not by sex per se but by the betrayal of the child’s fundamental trust.”<sup>174</sup> Intrafamilial sexual abuse generally consists of multiple incidents and persists over a course of years.<sup>175</sup> It also reaches beyond the family circle.

166. See Collins, *supra* note 8, at 159. “[C]hildren often need more protection at home . . . [.] [Outside the home] there will often be other adults or children present who could intervene . . . . In the home, children are more likely to be utterly alone.” *Id.*

167. SNYDER & SICKMUND, *supra* note 15, at 30; see LEVINE, *supra* note 9, at 28.

168. SNYDER & SICKMUND, *supra* note 15, at 30.

169. SNYDER & SICKMUND, *supra* note 15, at 30.

170. Finkelhor, *supra* note 9, at 46 (“[I]ntrafamily abuse is more likely to go on over a longer period of time and in some of its forms, particularly parent-child abuse, has been shown to have more serious consequences.”).

171. See Hessick, *supra* note 139, at 392 (“[V]iolent crimes committed by non-strangers tend to result in more serious injury to victims than comparable stranger crimes.”).

172. See Mitchell, *supra* note 32, at 417-17; see also Collins, *supra* note 8, at 164 (“[A] sexually abused child was most likely to sustain a serious injury or impairment when a birth parent was the perpetrator.”) (quoting ANDREW J. SEDLAK & DIANE D. BROADHURST, U.S. DEPT’ OF HEALTH & HUMAN SERVS., THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT: FINAL REPORT (1996)).

173. See LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS 21 (1997).

174. LEVINE, *supra* note 9, at 28 (“[T]he closer the relation . . . the more hurtful is the immediate trauma and longer-lasting the harm of incest.”); see also ANN M. HARALAMBIE, CHILD SEXUAL ABUSE IN CIVIL CASES 8 (1999).

175. See, e.g., DEBRA WHITCOMB, NAT’L INST. OF JUSTICE, WHEN THE VICTIM IS A CHILD 4 (2d ed. 1992) (“On average, each incest pedophile commits from 35-45 acts against one or two children.”); see SEDELLE KATZ & MARY ANN MAZUR, UNDERSTANDING THE RAPE VICTIM 256

In studies of offenders convicted of intrafamilial abusers, one-half admitted to having abused outside the family as well.<sup>176</sup>

#### IV. SEX OFFENDER STATUTES CREATE THE APPEARANCE OF ADDRESSING SEXUAL VICTIMIZATION WITHOUT THE NECESSARY STRUCTURAL CHANGE

As discussed above, sex offender restrictions as currently in place are ineffective and counterproductive. Advocates push these laws as necessary for the protection of children, yet they have not been shown to reduce sexual abuse. The enforcement and prosecution of these laws consume copious resources and keeps state agencies from pursuing other crime. Nonetheless, legal restrictions aimed at sex offenders continue to proliferate and to be propelled forward with ardent fervor.<sup>177</sup> While they fail to fulfill their stated rationale, these laws serve an ideological purpose. They create the appearance of adequately addressing the issue of sexual abuse, while refraining from substantive structural change.

Sex offender restrictions are framed as necessary to protect children.<sup>178</sup> This goal is considered an unambiguous and irrefutable positive aspiration. Those who dispute such legislation are looked at as placing children in danger for the benefit of the most abhorred in society. In practice, however, the current system of regulations serves to camouflage the lack of action to combat sexual abuse. The theory of cognitive dissonance provides some explanation of the psychological forces behind these decisions. This section addresses the ways in which people frame their understanding of sexual abuse in order to validate their beliefs about the family and about themselves.<sup>179</sup>

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(1979) (71% of incestuous abuse continues one year or longer, with the average duration ranging from 4.5 to 8 years.).

176. See Judith V. Becker, *Offenders: Characteristics and Treatment*, 4 FUTURE OF CHILD. 176, 178-79 (1994), available at [http://futureofchildren.org/futureofchildren/publications/docs/04\\_02\\_09.pdf](http://futureofchildren.org/futureofchildren/publications/docs/04_02_09.pdf); Mark R. Weinrott & Maureen Saylor, *Self-Report of Crimes Committed by Sex Offenders*, 6 J. INTERPERSONAL VIOLENCE 286, 292 (1991); see also Robin Fretwell Wilson, *The Cradle of Abuse: Evaluating the Danger Posed by a Sexually Predatory Parent to the Victim's Siblings*, 51 EMORY L.J. 241, 245-46 (2002) (discussing sexual abuse of other family members in addition to the primary victim).

177. For example, in the past few years, hundreds of municipalities have passed residency restrictions. See Levenson, *supra* note 85, at 153.

178. For a few examples of news articles in the past two years using the rhetoric of protection as a reason for the sex offender statutes, a quick search on Lexis using "'sexual offender' and protect w/1 (your or our) w/1 (child! or kid!)" yielded over six hundred articles.

179. See Michael A. McCann, *It's Not About the Money: The Role of Preferences, Cognitive Biases, and Heuristics Among Professional Athletes*, 71 BROOK. L. REV. 1459, 1480 (2006) ("To

A. *Cognitive dissonance occurs when there is a discord between action and self-identity.*

In psychology, cognitive dissonance is defined as the process by which people reject information that contradicts strongly held views about themselves or others.<sup>180</sup> The theory of cognitive dissonance posits that, “[i]f the gap between a person’s perceptions of her behavior and her ideals is large enough, creating sufficient discomfort, she will be motivated to reduce the discomfort . . . .”<sup>181</sup> The primary motivations are “the establishment of a sense of internal consistency”<sup>182</sup> and “the desire to see oneself in ‘self-affirming ways.’”<sup>183</sup>

People are driven to filter the information they receive in order to protect their self-image. Individuals generally perceive themselves as respectable people who “harbor[] good intentions and act[] in accordance with moral norms.”<sup>184</sup> This notion is central to one’s identity and is maintained even at great cost.<sup>185</sup> “[I]ndividuals have a psychological need for their cognitions—which include beliefs, feelings, and actions—to be consistent with each other.”<sup>186</sup> In practice, when people are in stressful situations, maintaining this image can require disregarding and reworking evidence that contradicts important beliefs and values. Addressing the discord between action and self-identity can take several forms:<sup>187</sup> “changing one’s behavior to meet the ideal; changing one’s perceptions of the behavior so that it seems to meet the

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ensure preservation of such selective views, individuals routinely make dramatic cognitive adjustments, including complete shielding of conflicting information.”)

180. J. C. Oleson, *The Antigone Dilemma: When the Paths of Law and Morality Diverge*, 29 CARDOZO L. REV. 669, 685 (2007) (“Cognitive dissonance occurs when one’s cognitions or behaviors are inconsistent with one another, creating a psychological pressure to restore consistency.”); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 658 (1999) (“Cognitive dissonance . . . “is the tendency to reject or downplay information that contradicts other, more favorable views about oneself.”).

181. Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 306-07 (1990); see Shadd Maruna & Heith Copes, *What Have We Learned from Five Decades of Neutralization Research?*, 32 CRIME & JUST. 221, 255 (2005) (“[C]ognitive dissonance is especially potent when a person’s self-concept is at risk.”).

182. Maruna & Copes, *supra* note 181, at 258.

183. McCann, *supra* note 179, at 1480.

184. *Id.*; see also Maruna & Copes, *supra* note 181, at 255 (“[I]ndividuals strive to preserve a sense of self that is consistent, stable and predictable, competent, and morally good.”) (citation omitted).

185. See Maruna & Copes, *supra* note 181, at 255-56.

186. Brent T. White, *Say You’re Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1287 (2006).

187. For a discussion of this process, see, for example, Maruna & Copes, *supra* note 181, at 254-55. See Altman, *supra* note 181, at 304-08.

ideal; and altering the ideal so that one's behavior now conforms to it."<sup>188</sup> Typically, people will adjust their notions of events to correspond to their ideas of who they are.<sup>189</sup>

Controlling and reducing personal tension and distress requires that a person perceive her actions as consistent with her beliefs about herself. Sexual abuse, taking into account the disparate ways the term is defined, is almost universally recognized as an unambiguous wrong. Customarily, people agree on the responsibility to support actions against moral wrongs. When a person is placed in a position where action against these wrongs contradicts their ideas about the family, cognitive dissonance results. According to dissonance theory, "if a person holds cognitions that are psychologically inconsistent (e.g., stealing is wrong, I have stolen something, I am a good person), he or she would experience dissonance and would in turn seek ways of reducing this dissonance."<sup>190</sup>

*B. To escape the discomfort of cognitive dissonance, sex offender fears are directed at strangers.*

This paper assumes, *arguendo*, that society considers sexual abuse as something harmful and immoral that should be eradicated. In addition, it assumes that individuals do not want to consider themselves as participants in structures that enable sexual abuse, and still less consider themselves or those similarly situated as perpetrators or as potential perpetrators of sexual abuses. These beliefs cultivate an inability to address intrafamilial sexual abuse, because when such abuse occurs all of the family becomes complicit in these immoral acts. Parents have an obligation to protect their children. Children belong to their parents. If something happens to a child, the blame generally falls on his or her parents. To target sexual abuse laws at addressing intrafamilial abuse would require a conceptual change in our notion of abuse. The private would be exposed as a site for danger. The public would be left as the possible sanctuary.

When a person admits that children are being harmed inside the home by family and friends, it is necessary to accept the possibility of dereliction in the obligation to safeguard these children. It is also necessary to accept

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188. Altman, *supra* note 181, at 307 (footnotes omitted).

189. See Maruna & Copes, *supra* note 181, at 255; Altman, *supra* note 181, at 306-07. In studies, participants "reduce the inconsistency between the behavior and their actual attitudes by changing their attitudes in order to maintain consistency." Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 611 (2002).

190. Maruna & Copes, *supra* note 181, at 255; White, *supra* note 186, at 1287 ("[I]ndividuals have a psychological need for their cognitions—which include beliefs, feelings, and actions—to be consonant with each other.").

that family members could be guilty of reprehensible behavior. In this regard, maintaining the privacy of the family does not protect the children; it protects those who take advantage of that privacy. To generalize, maintaining such privacy protects the head of the household, while leaving those less powerful—typically women and children—subject to violence.<sup>191</sup>

For the familiar not to be the locus of sexual abuse, an alternative site must exist. Defining the normal requires the abnormal; establishing the innocent necessitates the monster.<sup>192</sup> Placing the fear within the body of a class of sex offenders moves this danger as far away as possible. “If paedophiles [sic] are literally ‘evil personified’, then such evil can be exorcised by exclusion of these individuals from society.”<sup>193</sup> The rhetoric of child abuse focusing on the danger caused by strangers diverts attention from any possible harm existing within the family. It allows the continued perception of the family as a sanctuary and a moral good. Instead of taking responsibility for the potential “monsters” within the community, the community identifies the “deviants” at fault, and then banishes them, patting itself on the back for finding a solution: “[R]ather than indict the family, . . . we circle the wagons and project danger outward.”<sup>194</sup>

Parents and society generally have an affirmative obligation to address this great harm. To fail to act against sexual abuse, or to act ineffectively, would contradict most moral individuals’ conceptions of self. People participate in the existing social structure, which, in turn, creates incentives to view such structure as a rational and beneficial method of organizing society. Otherwise, public life is organized in an irrational and potentially harmful way.

## V. ALTERNATIVE POLICIES COULD EFFECTIVELY ADDRESS CHILD SEXUAL ABUSE

The most essential thing law can do is take away exceptions that benefit intrafamily offenders. Developing greater awareness is the second step to

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191. The generalization stems from the fact that, while they are certainly not responsible for all such acts, senior male figures in households are responsible for most of the violence that occurs within the family. Fathers, for example, commit ninety-nine percent of parental abuse. *See* BOLEN, *supra* note 39, at 120.

192. *See* LEVINE, *supra* note 9, at 48 (“Normal is problematic, because you can’t have normal without abnormal.”).

193. JENNY KITZINGER, *FRAMING ABUSE* 156 (2004).

194. LEVINE, *supra* note 9, at 29.

stopping the epidemic. This will bring abuse out of the cover of the private sphere and into the public sphere.

A. *Current sex offender statutes place the danger outside of the family.*

Sex offender statutes are not structured in the best way to prevent child abuse. Alternative forms could be substantially more effective. Current sex offender laws, however, have the weight of jurisprudence and accepted wisdom in their favor. In practice, they protect the myth of the family, valuing the private even when the private acts as a cover for violence.

Protecting children is vitally important. Safety is relative, however, and perceived safety is not the same as actual safety. Parents take responsibility for prescribing their children's lives. Within broad limits, they set up the structure they think is best: healthcare, education, and religion. Our Supreme Court maintains that parents have a constitutional right to structure the lives of their children.<sup>195</sup> Moreover, state interference in violation of those rights can be perilous. The laws create a bulwark around family structures, keeping interference away from the family and diverting attention from sexual abuse in the family. This wall can allow those in positions of weakness to be hurt within the sphere of privacy. The laws and social systems stress the intact family unit over stopping sexual abuse, based on "our reluctance to believe that parents—whom we expect to love and protect their offspring—could maltreat or abuse their own children."<sup>196</sup>

To overcome that reluctance requires a belief that the family is not necessarily a safe place and that parents cannot be relied on to be the sole arbiters of their children's lives. If that happens, the relevant jurisprudence may need to change as well: "Our laws and legal systems have developed over hundreds of years around the expectation that parents will love and protect."<sup>197</sup>

In addition, the more one perseveres with a certain set of actions and beliefs, the harder it is to break away from those preconceptions. Under "belief perseverance," people sustain previously held beliefs despite receiving contradictory evidence.<sup>198</sup> Once a set of beliefs solidifies,

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195. See *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000).

196. Thomas, Jr., *supra* note 128 at 293.

197. *Id.*

198. For further explanations of belief perseverance, see Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1599 (2006); Stern, *supra* note 189, at 604-05; Neal Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 45 (1997).

information is filtered to support that perception.<sup>199</sup> In this manner, one's original conclusion remains correct. This bias persists even in the face of powerful evidence to the contrary.<sup>200</sup> Belief perseverance makes it harder to dislodge stereotypes about sex offenders and sexual abuse.<sup>201</sup> Opinions on the nature of sexual abuse and sex offenders have been entrenched by both rhetoric and action. In a study performed by Jill Levenson, seventy-three percent of those questioned agreed that they might support sex offender regulation "even if there is no scientific evidence showing that they reduce sexual abuse."<sup>202</sup> Accepting contradictory evidence requires acknowledging that one was initially wrong and had acted on incorrect data. This action would contradict positive beliefs about oneself. Perceptions that have been acted upon become even more firmly ensconced and difficult to displace. The longer a belief is held, the more information is adjusted to support that concept, further entrenching that belief and continuing the process.<sup>203</sup>

On the most basic level, a few simple changes must be made. All incest exceptions should be removed, from criminal law to registration and residency restrictions. Current criminal incest laws should change "person" to "adult sex offender" so that they no longer apply automatically to adult-child sexual abuse, specifically indicate whether the statutes applies to adult-child relations, and indicate enhanced penalties. Additionally, when rating risk, intrafamilial offenders should not be considered less dangerous to the community. Intrafamilial abuse must not be a sign of a low level of harm or recidivism. The designation of "sexual predator," in practice and in law, should not be predicated on stranger abuse.

### *B. Changing legal norms will change social norms.*

While the law cannot mandate a change in social conceptions, it can alter some social perceptions by way in which legal system acts. Simply having

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199. Hanson & Kysar, *supra* note 180, at 646 ("[A]fter constructing a hypothesis or explanation, we tend to disregard evidence that contradicts that hypothesis and exaggerate evidence that confirms it."); see Feigenson, *supra* note 198, at 45 ("[T]he need to account for one's decisions tends to entrench people in mistaken judgments.").

200. Stern, *supra* note 189, at 591 ("[P]eople often maintain their attitudes and beliefs in the face of explicit disconfirming evidence."); Hanson & Kysar, *supra* note 180, at 650 ("[H]ypotheses . . . persevere even when the evidence that initially gave rise to them is thoroughly and completely discredited.").

201. Stern, *supra* note 189, at 609 ("[T]he perseverance effect . . . [is] particularly strong when the individual feels committed to an initial position and has generated reasons supporting the belief.").

202. See Levenson, *Public Perceptions*, *supra* note 22, at 14.

203. Hanson & Kysar, *supra* note 180, at 650 (discussing hypothesis-based filtering, where "the confirmatory bias [has] a self-reinforcing and escalating quality").

active moral condemnation with the judicial system has an impact. Changing the laws will change perceptions. Treating intrafamily abuse seriously signals to offenders that their behavior is not excusable.<sup>204</sup> Moreover, it is not a private matter to be resolved within the family. Instead, it is sufficiently egregious for the state to intervene. As many scholars have discussed, “[I]aws have an expressive function.”<sup>205</sup> They have the power to “meld[] symbols, stories, and visions into public statements about social ideals that are backed by the physically coercive power of the state.”<sup>206</sup> Castigation under the laws not only causes physical and emotional harm, preferably in proportion to the harm caused by the crime, but punishment also expresses social condemnation. As such, punishment has a symbolic meaning: “[I]n short, punishment expresses blame, and it is through this expression that we recognize certain actions as punishment.”<sup>207</sup> Thus, the laws alter social norms, which by themselves “are some of the most effective deterrents of criminal behavior.”<sup>208</sup>

C. *Addressing abuse through education is effective.*

“The best way to stop sexual abuse is to prevent it before it begins.”<sup>209</sup> For the most part, however, efforts at decreasing sexual abuse have targeted sex offenders after they have abused, instead of addressing sexual abuse before it occurs. Despite consistent statistics to the contrary, the possibility of harm within the home is rarely broached to children. In one study, close to a third of the parents stated that they had discussed sexual abuse with their children.<sup>210</sup> From that number, “only 53% mentioned that an abuser might be someone whom the child knew, and only 22% of those parents mentioned that an abuser might be a relative.”<sup>211</sup> The full nature of sexual abuse must be allowed to enter the public discussion. We must throw out the stranger stereotype and admit instead to the family and friend offender.

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204. Hessick, *supra* note 139, at 398 (“Treating violence within relationships just as seriously as violence between strangers will reinforce the message that non-stranger violence is entirely unacceptable behavior.”).

205. See Douard, *supra* note 21, at 38.

206. Corrigan, *supra* note 36, at 227.

207. Douard, *supra* note 21, at 38 (quoting Joel Feinberg, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95, 98 (Princeton Univ. Press 1970)).

208. See Hessick, *supra* note 139, at 398.

209. LANE COUNCIL OF GOV'TS, *supra* note 16, at 14 (“Public notification laws are tertiary prevention efforts at best, and the antithesis of prevention at their worst.”).

210. See Montana, *supra* note 38, at 603 & n.162 (citing JEFFREY J. HAUGAARD & N.D. REPPUCCI, *THE SEXUAL ABUSE OF CHILDREN* 317 (1988)).

211. *Id.*

Refusal to educate children correctly discards “the most powerful tool that parents and children have in the fight against child sexual abuse.”<sup>212</sup> Preventive actions should not only include children, but parents and professionals working with children, such as “teachers, physicians, mental health professionals, and law enforcement personnel.”<sup>213</sup> Working with these specialists, “the focus again should be educating these professionals on what sexual abuse is, the resources available to a victim of sexual abuse, and most importantly, the warning signs of sexual abuse.”<sup>214</sup> As a legislative matter, the federal government could require education programs in connection or in lieu of other legislation. Like Megan’s Law and other sex offender laws, the federal government could link the requirements to funding grants.<sup>215</sup>

*D. Law can be an effective tool against sexual abuse.*

Current laws encourage unproductive thinking trends. Creating more rigorous statutes, while the usual knee-jerk response, is not the answer: More efficient laws and enforcement are. The laws must focus on finding the many, the ordinary, instead of searching disastrously for the rare psychopath and abductor. The laws applied to family members might work if enforced properly. At the least, civil sanctions should require individual assessments of dangerousness.<sup>216</sup> Obligations and restrictions should be titrated to the results.

*E. Privacy can be protected under new legal norms.*

As with domestic violence, familial privacy has been used to conceal sexual abuse. Sexual abuse, however is not inherent in the family. You do not have to get rid of the family to end sexual abuse, but may need to change its structures so to bring the public eye into the private sphere.

There can be downsides to encouraging governmental interference in private homes. The family continues to be an essential structure in which to raise future generations, a task too great for any government to undertake. Attempts to legislate this process create its own risk: “[M]eddlesome state intervention in decision-making of caretakers poses severe risks to their

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212. *Id.* at 602; CHILD MOLESTERS WHO ABDUCT, *supra* note 17, app. Case in Point, Number 6, at 11 (“Educating our children about child abuse and how to react to sexual overtures is probably our best and only available defense against child sexual abuse today.”).

213. Jessica R. Ball, *Public Disclosure of “America’s Secret Shame”*: *Child Sex Offender Community Notification in Illinois*, 27 LOY. U. CHI. L.J. 401, 446-47 (1996).

214. *Id.* at 47.

215. *See* LEVINE, *supra* note 9, at 42.

216. *See* HUMAN RIGHTS WATCH, *supra* note 10, at 118.

ability to function effectively. It also undermines children's trust in the power and authority of their protectors."<sup>217</sup> While the autonomy of the family has enabled abuse, it also provides an important haven from potential harmful outside intrusions. We value the ability of parents to construct their family outside of the coercive force of the state. Privacy law enables parents to make decisions as to issues such as medical care, education<sup>218</sup> and religious training.<sup>219</sup>

Privacy is not inherently harmful. Privacy rights enable sexual autonomy, access to contraceptives, and other marital freedoms. The integrity of the family, however, can be maintained even as the state becomes more involved. This privacy must be reenvisioned. Anne Dailey, for example, offers "an alternative, progressive reconception of the relationship between the family and the state . . . [which] does not seek to eliminate family life, but rather to redeem it."<sup>220</sup> Barbara Woodhouse argues for a notion of family that incorporates "better ways to protect against the invasive and destructive intrusion of the state into the lives of caretakers than to create a fictional wall of privacy around an entity that does not exist."<sup>221</sup> Instead, the courts "could arrive at the same place by focusing on individual rights of adults and children as 'persons' that gain added force by being a part of mutual relationships that are reciprocal in nature."<sup>222</sup>

## VI. CONCLUSION

Sexual abuse is widespread. Before their eighteenth birthdays, approximately one-fourth of all women and one-seventh of all men are sexually abused.<sup>223</sup> Nonetheless, over eighty percent of sexual abuse remains unreported.<sup>224</sup> The number rises to ninety-eight percent for intrafamilial victims.<sup>225</sup> The increasing use of civil sanctions on sex offenders have been ill designed to stem this tide.

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217. Woodhouse, *The Dark Side of Family Privacy*, *supra* note 160, at 1260.

218. *See* *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925).

219. *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972).

220. Dailey, *supra* note 159, at 1020.

221. Woodhouse, *The Dark Side of Family Privacy*, *supra* note 160, at 1260.

222. *Id.*

223. *See* Shanta R. Dube, et al., *Long-Term Consequences of Childhood Sexual Abuse by Gender of Victim*, 28 AM. J. PREV. MED. 430, 433 (2005); Prevalence of Individual Adverse Childhood Experiences, CTR. FOR DISEASE CONTROL & PREVENTION (May 13, 2014), available at <http://www.cdc.gov/violenceprevention/acestudy/prevalence.html>.

224. William Winslade et al., *Castrating Pedophiles Convicted of Sex Offenses Against Children: New Treatment or Old Punishment?*, 51 SMU L. REV. 349, 363 (1998).

225. *See* KITTZINGER, *supra* note 193, at 156.

These statutes geared at halting stranger rape divert attention from the reality of sexual abuse. They serve to protect a perceived core institution—the family—at the cost of loss of protection for the overwhelming majority of victims of abuse. The rhetoric of “protecting our children from the evil lurking outside” serves as a distraction from the reality that abuse most commonly occurs within the family or other network of friends. Creating, for example, sexual offender statutes that forbid paroled offenders from living within miles of a school or playground appears valuable and sufficiently stringent, but allows the vast majority of sexual abuse to continue unabated.

Given a powerful social need not to examine family life critically and the substantial prevalence of sexual violence within the family, the resulting cognitive dissonance creates a collective blindness. As currently enforced, sexual offender laws do not serve to protect victims from sex offenders, most of whom are acquaintances and family members. Instead, they protect strongly held illusions about the nuclear family and support traditional patriarchal values.

There are strong reasons to create laws that preserve the rights of privacy for individuals. Policies aimed directly at preventing sexual abuse committed within the home could potentially whittle away at civil liberties and personal freedoms. On the other hand, drawing an absolute shield of privacy around the family makes it extremely difficult for society to respond to intrafamilial crimes in effective ways. While this circle of privacy has value, it must be crossed in order to protect society’s most vulnerable members.