

BANISHING ‘SEX OFFENDERS’: HOW MEANINGLESS LANGUAGE MAKES BAD LAW

Guy Hamilton-Smith*

I still think about you.

Our paths never crossed again, not since then. It's been decades now, that blue and beautiful day when you raped me.

How could a man let that happen to them? Those were the unspoken words I heard for years.

You were bigger than me. Older. You're still older, but I'm probably bigger now. All grown up.

I was eight. A man in my own eyes. In yours, too.

There's a lot about what you did that I don't remember, but one I do: that you told me to play pretend, though a different kind of pretend than the one to which I had become accustomed; to pretend that you had come home from work, as you pressed my face into the pillow of your bed.

The years went by. Sex terrified me for a long time. The body rendered a geography that terrified me. Invisible scars that I bore, from which I would find ways to recoil when someone stumbled upon them. I made those choices, and those choices led to other choices, and to still others.

It's not all your fault, either. My choices were mine.

Sometimes I fantasized about tracking you down, killing you. Some kind of bargain I could win with a pistol and a lack of better ideas. Sometimes I

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forgot about you altogether. Mostly I minimized you. If I convinced myself most of all that you hadn't hurt me, then you wouldn't have. That I could go back in time, undo the things you did to me.

I was fine.

But was I ever?

Tennessee Williams once wrote that time is the furthest distance between two places. As I write this, I am no more than ten miles from where our paths crossed—and yet, if that was on Earth, then here I write. Dispatches from Mars.

Did you move away? Are you still here?

Are you happy?

Do you have a family that cares for you?

A job that fulfills you?

A God who loves you?

I hope that you do.

Did you hurt anyone else?

Did your father do to you the things you did to me?

I hope you wonder about me, in the same way I wonder about you.

You set this thing in motion. My life. Pain and beauty and heartache. Wins and losses. Dumb luck. Strange as it sounds, I wonder if you'd be proud of me.

Do I call you a rapist? A child molester? Am I a victim? Or a survivor? What have I survived? What am I surviving?

I'll call you by your name. Like you called me by mine.

Do you still think about me?

Life is rich with paradox. The things I reached for to save me were really the things that were killing me. What I thought would bring me pleasure, really brought me pain.

A fellow prisoner once observed, some thousand miles and hundred years prior, that the actions of the common day made or unmade character, and I had been unmaking mine for a long time.

In the stillness of pre-dawn hours, the electric light from the control center, as it washed over my cell, was familiar to me.

Not unlike the many nights I sat in front of a screen, looking for ways to get numb. Image after image, believing the next one would be perfect. That the next one would save me. But more was never enough. Faces I'll never forget. Pain I will always be a part of.

I was told once, that prayer can sometimes just be an action. I came to bed one night, laid next to my girlfriend who was fast asleep, and sobbed. I wanted out, but didn't know how. Too afraid, or cowardly.

God, whatever that might be, heard me. I've heard tale that sometimes it's a boat, or a fire. Sometimes, a half-dozen police officers.

We walked from my apartment down the block to the station. I contemplated bolting into traffic, rather than face whatever was coming. They must have read it on me, two of them moving to take up the sidewalk between me and the street.

Through the doorway we approached, yet more paradox: things I was so afraid would kill me, turned out to be the things that would save me.

The freest I ever felt was in a pair of handcuffs, in a windowless room, answering the detectives' questions.

I wish I could have feigned ignorance.

But that would have been a lie.

And I was so tired of lying.

Words carry with them enormous power. I remember the rooms full of men and women who could not bring themselves to utter it. S.O. was the preferred nomenclature.

Not unlike a job title, sex offender is supposed to be something that you do. It connotes a present tense. Something that you are, unchangeable. That you shower in the morning, and get dressed, and head out into the world to commit crimes.

That was years ago.

This summer, my wife and I clutched one another, atop our battered couch. She was fired from her job for her choice of husband. Paying the price for the things that I did, long before we ever met.

Am I supposed to be a husband? A father? Children cannot choose their parents. For that, I will always be sorry.

And so, you're a part of my story. Me, a part of yours. And us, we're a part of many others.

Even writing this, I know, treads onto a minefield. We exist in an era of #metoo, but does that extend to me? Can I find a way to have space to express the things done to me, and to account for the harm that I have done? Can both of those things live in me, at the same time? To coexist?

They have to.

There is no other way.

We seek to reduce humanity, in all its complexity, into moments in time. Crystallized. Heroes we put on pedestals, or monsters we condemn to die. Felons and presidents. Sex offenders and teachers. Victims and survivors.

I've met my heroes, and I've met many monsters. The truth is neither of those things. The truth is yet more paradox.

I've been called a lot of things since we last met. Some kind. Some not. None of them, or rather, very few of them, true.

It would be easy, I think, for me to just lay all this at your feet. To make you the one responsible. Except that wouldn't be true, either.

We all go through life with damage, and hurt, and pain—and then we all decide what to do with that pain. I made my choices, and in so doing, I passed my pain onto others.

You called me by my name.

The judge, too, called me by my name.

I'll call you by yours.

Do you still think about me?¹

INTRODUCTION

As of 2018, there were nearly one million people in the United States that state and federal law compelled to register as sex offenders.² Men, women, and children, some as young as eight years old.³ Names, pictures, home (and sometimes work) addresses made publicly available to anyone with an internet connection—as are the home addresses of anyone else who

1. Adapted from Guy Hamilton-Smith, *By Any Other Name*, MEDIUM (Oct. 3, 2019), <https://medium.com/@guy.hamilton.smith/by-any-other-name-85efd0eb39f8>.

2. Andrew J. Harris et al., *States' SORNA Implementation Journeys: Lessons Learned and Policy Implications*, 23 NEW CRIM. L. REV. 315, 317 (2020).

3. MALIK PICKETT ET AL., JUV. L. CTR., *LABELED FOR LIFE: A REVIEW OF YOUTH SEX OFFENDER REGISTRATION 2* (2020), <https://jlc.org/sites/default/files/attachments/2020-09/Labeled%20for%20Life%202020.pdf>.

resides there.⁴ If you picture a map of the entire country, there are nearly a million little red dots marking homes, street corners, homeless encampments that warn, ostensibly, of danger. Alongside these dots is an invisible cage of local, state, and federal laws threatening arrest and felony prosecution for sometimes small deviations from hyper-technical requirements that even law enforcement often cannot understand.⁵ Many of the people on these lists have served their criminal sentences long ago but are still required to comply with rules not dissimilar from criminal parole, albeit with fewer constitutional protections. The United States is the only country in the world that does this.⁶

There is a lengthy history of the American experience with registries-as-crime-control devices,⁷ but modern sex offense registries did not begin to take shape until the early 1990s when high-profile and horrific crimes against children by strangers captivated the attention of a nation still nursing a hangover from the satanic child abuse panic of the 1980s.⁸ The logic of registries was one of containment: if we cannot ship our monsters off to an island, we will do the next best thing, contain them within our country—a sort of internal exile, or banishment. A panopticon made modern with technology and statutes and myths and animus.⁹

The gist of these first-generation registries was simply that people who were convicted of a relatively small set of sex offenses would be required to register with police because it was widely assumed that they would repeat

4. See, e.g., *Millard v. Rankin*, 265 F. Supp. 3d 1211, 1214-15 (D. Colo. 2017) *rev'd in part, vacated in part sub nom. Millard v. Camper*, 971 F.3d 1174 (10th Cir. 2020) (explaining what is required on notification). Given the nature of sexual violence, oftentimes this can even include the victims themselves, who then have to share the stigma and vigilante violence that can accompany life on registries. See Cynthia Godsoe, *#MeToo and the Myth of the Juvenile Sex Offender*, 17 OHIO ST. J. CRIM. L. 335, 351-52 (2020).

5. See, e.g., Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1116 & n.313 (2012).

6. See *id.*; HUM. RTS. WATCH, NO EASY ANSWERS: SEX OFFENDERS LAWS IN THE US 19 (2007), <http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf>.

7. Which this article is certainly not intended to be a thorough accounting of. For that, see Elizabeth Reiner Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, N.Y.U. REV. L. & SOC. CHANGE 727 (2013) (detailing the history of registries for crime control in the United States).

8. The McMartin Preschool criminal case and its multiple trials gripped the nation as allegations of satanic worship and molestation surfaced at this California school. The preliminary hearing for this case was the longest run in California history. See Mike McPadden, *What You Need to Know About the Bizarre McMartin Preschool Satanic Sex Abuse Trials*, ID CRIMEFEED (July 25, 2019), <https://www.investigationdiscovery.com/crimefeed/crime-history/5-facts-you-need-to-know-about-the-mcmartin-preschool-satanic-sex-abuse-trial>.

9. See, e.g., Patricia A. Powers, *Making a Spectacle of Panopticism: A Theoretical Evaluation of Sex Offender Registration and Notification*, 38 NEW ENG. L. REV. 1049, 1072-75 (2004).

their crimes again and again.¹⁰ Originally, this information was not supposed to be public—but rather, stay with law enforcement.¹¹ This rapidly changed in the wake of the murder of Megan Kanka, who is the namesake of Megan’s Law.¹² These laws became billed as an essential public safety tool: a way to sate the right-to-know impulse that runs deep in our country. Indeed, wide public dissemination of this information became a feature of these registries—inflaming an already inflamed sense of stranger danger.¹³

These new legal regimes spawned new legal challenges, a pair of which worked their way up to the United States Supreme Court. In 2003, the Court issued opinions in two consequential cases: *Smith v. Doe*¹⁴ and *Connecticut Department of Public Safety v. Doe*.¹⁵ These cases considered separate constitutional challenges to the lists: Ex Post Facto and Procedural Due Process, respectively.¹⁶

In *Smith*, the Court—over strong dissents, including one from the late Ruth Bader Ginsburg—declared that these registries were not punishment but were in fact necessary civil public safety tools, relying in part on the thoroughly debunked proposition that re-offense rates are “frightening and high.”¹⁷ In *Connecticut Department of Public Safety*, the Court found that Due Process does not require the government to afford someone a hearing on whether or not they are *actually* dangerous before putting them onto one of these registries, which presumes they are.¹⁸

The combined legal and practical impact of *Smith* and *Connecticut Department of Public Safety* was thus to render the question of dangerousness simultaneously irrefutable and irrelevant. While the stated purpose of these laws is to protect the public (presumably, the public only needs protection from individuals who are dangerous), their constitutional character is entirely indifferent to the question of *actual* dangerousness—thus resulting in something of a two-faced incoherence. On many state registry sites, you will find a statement that the placement of people on these websites is not an

10. See *Does #1-5 v. Smith*, 834 F.3d 696, 700 (6th Cir. 2016); see also Ira Mark Ellman & Tara Ellman, “Frightening and High”: The Supreme Court’s Crucial Mistake About Sex Crime Statistics, 30 CONST. COMMENT. 495, 506 (2015).

11. See *Carpenter & Beverlin*, *supra* note 5, at 1093-94.

12. See *Doe v. Poritz*, 662 A.2d 367, 372, 423 (N.J. 1995).

13. See Paul Renfro, *Sex Offender Registries Are Fueling Mass Incarceration And They Aren’t Helping Survivors*, JACOBIN (June 22, 2020), <https://jacobinmag.com/2020/06/sex-offender-registries-mass-incarceration>.

14. 538 U.S. 84.

15. 538 U.S. 1.

16. *Smith*, 538 U.S. at 89; *Conn. Dep’t of Pub. Safety*, 538 U.S. at 3-4.

17. 538 U.S. at 102-03; see also Ellman & Ellman, *supra* note 10, at 496.

18. See 538 U.S. at 7-8.

indication of dangerousness,¹⁹ leading one to perhaps wonder why people are placed on these lists to begin with.

In the wake of these 2003 decisions, state legislatures began something akin to a race to the bottom in terms of how onerous, burdensome, and punitive they could make their state registries since they were “not punishment.”²⁰ States eventually arrived at something not dissimilar in some instances from open-air prisons. The Third Circuit recently ruled that Pennsylvania’s sex offense registry was so onerous that it qualifies as “custody” for habeas corpus purposes.²¹ These new, second-generation registries have been referred to as “super-registration schemes.”²² Despite the developments of the last seventeen years, some courts content themselves to cite to *Smith* for propositions that have either long been debunked or no longer bear any semblance to reality.²³

The last two decades have seen an expansion of offenses that require registration. Juvenile registration. Lengthier registration periods. Death by a thousand cuts. Given this, it is no surprise that the numbers grew.²⁴ This enormous population of people has provided ready fodder for the media.²⁵ The Sixth Circuit recently described the experience with Michigan’s registry:

A regulatory regime that severely restricts where people can live, work, and “loiter,” that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and that requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe, is something altogether different from and more troubling than Alaska’s first-generation registry law. SORA brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families, with whom, due to

19. See, e.g., *id.* at 5 (providing an example of Connecticut’s disclaimer).

20. For an examination of the race to the bottom, see generally Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country*, 58 BUFF. L. REV. 1, 41 (2010) (describing the race to the bottom as a “race to the harshest”).

21. *Piasecki v. Ct. of Common Pleas*, 917 F.3d 161, 163 (3d Cir.), *cert. denied*, 140 S. Ct. 482 (2019).

22. *Carpenter & Beverlin*, *supra* note 5, at 1073.

23. For an example of a court’s refusal to consider the impact of the internet or the harshening and expanding laws, see *Millard v. Camper*, 971 F.3d 1174, 1184 (10th Cir. 2020) (citing *Smith v. Doe*, 538 U.S. 84, 90 (2003)).

24. See *Carpenter & Beverlin*, *supra* note 5, at 1081-82.

25. For an examination of the increasing media coverage on sex offenders, see Emily Horowitz, *Growing Media and Legal Attention to Sex Offenders: More Safety or More Injustice*, 2007 J. INST. JUST. & INT’L STUD. 143 (2007).

school zone restrictions, they may not even live. It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information.²⁶

As the Sixth Circuit indicated, registries have morphed into something altogether different than their first-generation versions, and indeed even expanded beyond sex offenses into other types of crimes.²⁷ Kansas puts almost all of its citizens convicted of crimes on a public registry.²⁸ Pennsylvania, until recently, registered parents who were convicted of custodial interference as sex offenders.²⁹ Utah has a white collar crime registry.³⁰ Animal abuse registries are spreading as a means of reckoning with animal abuse, despite opposition by groups such as the ASPCA.³¹

Modern registries have continued to spawn pushback from grassroots civil rights organizations, law professors, civil rights lawyers,³² as well as directly impacted people and their families.³³ Legal challenges continue to be pressed, with mixed results.

Recently, I gave a presentation at a conference of one of these legal organizations that formed in response to the proliferation of these laws. It was attended by a mixture of people—some families, some parents, some young people. Lawyers and therapists, but also just lay people. Civil libertarians, bleeding hearts, people desperate for some kind of hope.

26. *Does #1-5 v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016).

27. *Id.* at 702-03; *see also* *Rainer v. State*, 690 S.E.2d 827, 827-28 (Ga. 2010) (requiring a defendant convicted of robbery and false imprisonment to register as a sex offender).

28. J.T. Perkins III as told to Maurice Chammah, *Want to Escape a Criminal Past? Move to Alaska (Like I Did)*, MARSHALL PROJECT (May 3, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/05/03/want-to-escape-a-criminal-past-move-to-alaska-like-i-did>.

29. Jo Ciavaglia, *Convictions for Custody Interference Brand Pennsylvania Parents as Sex Offenders*, COURIER TIMES (July 23, 2017, 7:00 AM), <https://www.buckscountycouriertimes.com/news/20170723/convictions-for-custody-interference-brand-pennsylvania-parents-as-sex-offenders/1>.

30. *White Collar Crime Offender Registry*, UTAH OFF. ATT'Y GEN., <https://www.uttifraud.com/Home/Registry> (last visited Nov. 1, 2020).

31. *Position Statement on Animal Abuser Registries*, ASPCA, <https://www.aspc.org/about-us/aspc-policy-and-position-statements/position-statement-animal-abuser-registries> (last visited Oct. 27, 2020).

32. Such as the many attorneys and professors and advocates whose tenacity and bravery inspired me when I first began to get involved with this work.

33. For an example of grassroots efforts bringing attention to the registries, see JUDITH LEVINE & ERICA R. MEINERS, *THE FEMINIST AND THE SEX OFFENDER: CONFRONTING SEXUAL HARM, ENDING STATE VIOLENCE* 89 (2020).

Before I launched into my presentation, I asked a question: *How many of you are here because you are a sex offender or you have a loved one who is a sex offender?* Most everyone raised their hand. I did, too.

It was a trick question. There is no such thing. I read confusion, astonishment, and perhaps a couple who instantly understood what I meant. We talk about *sex offenders* like they are something real—a category of person that can be meaningfully described with a label that tells us something about who they are, what they do, how they spend their days. Those answers, in turn, inform what society must do about them, to them, with them.

In this essay, I explore the term “sex offender” and how it undermines our ability to understand and respond to sexual harm, how it undermines efforts at accountability, and how it deprives people of their humanity, which undermines efforts to do the things that society ostensibly wants from them: that is, to change and to be accountable for whatever harm they have caused.³⁴

To be sure, this is a difficult topic to write about, to read about, and to think about. It is an area of work and law and culture that is rich with pain. Sexual harm is something that has likely impacted most people’s lives, in one way or another, at one point or another: either by way of having been harmed, or having caused harm to someone else, or both. Perhaps it is one degree removed for you: perhaps it was a loved one, a friend. If not yourself, you probably know someone who has struggled to reckon with those scars.

My life is no different. The introduction to this essay is autobiographical. I was eight years old when I was raped by a boy twice my age. I was too young to understand why my parents were upset, when I told them what happened. It would not be until much later that I would understand that they were upset not *at* me, but on my behalf. It would not be until much later that I would realize that the person who raped me had likely been abused by his father.

I became very introverted for a time. I was bullied most days. I changed schools. My room was a sanctuary, where nothing could hurt me, and where I was in control. I felt safe. I was amongst the first generations to grow up with technology and the Internet, and I very quickly encountered pornography, where during my teenaged years I eventually got to the point where I downloaded almost everything that I saw. Most of it was legal, but some was not. In 2006, my girlfriend discovered those images on my computer and went to the police. I was arrested. It was in an interrogation

34. If any, as it is important to recognize that crimes are socially constructed and do not always track harm. Teenagers sexting may well be committing “crimes” and are prosecuted for it, but is it harmful? More profoundly, even when harm is considered, does our criminal legal system rectify that harm or simply compound it?

room flanked by detectives that, for the first time in my life, I was able to get really honest. My arrest, in many ways, saved my life. I am still friends with the woman who turned me in. For anyone who is curious about more of the details of my story, I did a Reddit Ask Me Anything (“AMA”) in 2017 that is available for anyone to read.³⁵

I was extremely fortunate. I had family and friends and a lawyer—things that I saw many people in criminal court did not have. Instead of going to prison, I went to law school. While being a lawyer had never crossed my mind before my arrest, the courtroom proceedings both terrified and intrigued me. I wanted to be a public defender. I wanted nothing to do with this area of the law. Fate, however, had other plans.³⁶

Of those million little red dots marking homes in neighborhoods or industrial areas or under bridges or in vacant lots, one of them marks my home. In Kentucky, I will be required to register as a sex offender for another thirteen years—until I am forty-nine years old.³⁷ Under federal law, or any state compliant with federal law, my registration obligation expired three years ago.³⁸ In Florida, I would be required to register for the rest of my life—and even after I die.³⁹ In Illinois, I would be referred to as a “sexual predator” and required to register for the rest of my life.⁴⁰ In addition to being an American, I am also a Canadian citizen, and if I move to Canada I would be done with all of this tomorrow.⁴¹ None of these determinations are made on the basis of my dangerousness or lack thereof—either in the past or the present. These labels, and the effects they impose on my life and the lives of my family, are almost entirely arbitrary and untethered to any inquiry into evidence or best practices.

35. See generally Guy Hamilton-Smith (u/gphs), REDDIT (Oct. 20, 2017, 9:28 AM), https://www.reddit.com/r/IAmA/comments/77n82n/my_name_is_guy_hamiltonsmith_i_am_a_law_school/ [https://web.archive.org/save/https://www.reddit.com/r/IAmA/comments/77n82n/my_name_is_guy_hamiltonsmith_i_am_a_law_school/].

36. I wrote more about how I found my way to this work here. See generally Guy Hamilton-Smith, *Dear Gay*, MEDIUM (May 17, 2018), <https://medium.com/@guy.hamilton.smith/dear-gay-3f1e779293c4>.

37. See KY. REV. STAT. ANN. § 17.520(3) (West 2010 & Supp. 2019).

38. 34 U.S.C.A. § 20915(a).

39. FLA. STAT. ANN. § 943.0453(11) (West 2015 & Supp. 2020). Florida has been known to keep people on their state registry, even after they die, for federal funding purposes. See Steven Yoder, *Florida's Sex Offender Registry Proves Inescapable*, THE APPEAL (Mar. 1, 2019), <https://theappeal.org/floridas-sex-offender-registry-proves-inescapable/>.

40. 730 ILL. COMP. STAT. ANN. 150/2, 150/7 (West 2007 & Supp. 2020).

41. See Canada Criminal Code, R.S.C. 1985, c C-46, §§ 490.012, .013 (indicating that judges may decline to require registration at all but may impose a registration requirement no longer than years for minor offenses). The reasons why I decided to stay are complicated and another essay that I have yet to write—but suffice it to say, I went to law school to fight for people who lacked fighters, and here we are.

I include my story here because I have to. The work that I do is not just policy work or scholarly work, but it is personal as well. Without it, this essay is not complete. It is because I am, or at least can be called, a scholar and an activist and an advocate and an ex-con and a survivor and a perpetrator and a felon and a writer and probably a lot of other things, too. All of those things are true, but are any of them the truth? Really, I am just a human being. The facts of my childhood do not excuse those of my teenaged and early-adult years. They are both simply facts of my story: things that happened to me and things that I did. They both brought me into this work.

Accountability for harm that we cause others is an important part of anything we might call justice—not just for survivors, but as I found, for people who cause harm as well. Without accountability, justice becomes a sham, a facsimile, hollow. As many survivors of sexual violence know, there is no accountability when we consider sexual violence most of the time—formal or otherwise.

At the same time, a picture of justice that becomes unmoored from considerations of proportionality and the opportunity for redemption becomes little more than a poison that diminishes us all: survivors, perpetrators, and our communities alike—including prisons, which are sites of sexual violence themselves.⁴²

We waste an enormous amount of humanity in this country on this project we call justice. There are 2.3 million people in prison,⁴³ an additional 4.5 million under formal criminal supervision,⁴⁴ and nearly 1 million people on public-conviction registries which function loosely as open-air prisons (and often send people back to actual prisons for failing to comply with technical requirements).⁴⁵

As I wrote, my life was saved in many different ways. I was privileged and lucky. What I hope to be able to articulate, and perhaps bring into being, is a vision of justice that I glimpsed: that we can work for a justice that leaves everyone better than how it found them, as opposed a decrepit thing that contents itself to make all suffer in equal measure.

42. For an example of sexual violence in prisons, see Jayla Burton, *Prisoner-on-Prisoner Sexual Harassment: The Prevalence, Severity, and Lack of Legal Recourse*, 20 BUFF. J. GENDER L. & SOC. POL'Y 91 (2012).

43. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>.

44. Alexi Jones, *Correctional Control 2018: Incarceration and Supervision by State*, PRISON POL'Y INITIATIVE (Dec. 2018), <https://www.prisonpolicy.org/reports/correctionalcontrol2018.html>.

45. David Feige, *Shawna: A Life on the Sex Offender Registry*, MARSHALL PROJECT (Sept. 17, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/09/17/shawna-a-life-on-the-sex-offender-registry>.

PART I: THE WEIGHT OF WHAT THE WORLD BELIEVES

Felon. Drug dealer. Rapist. Murderer. State departments of correction routinely refer to those in its charge as “offenders.”⁴⁶ It is baked into our legislation and regularly appears in our headlines without much thought.⁴⁷ USA TODAY recently ran a story with the headline “Sex Offender Loses COVID-19 Contract at VA After USA TODAY Asks Questions,” which presumed to expose some sort of scandal, but there was no allegation that the veteran who was the subject of the story had done anything wrong since 2006—the date of his offense.⁴⁸

Across criminal justice reform efforts, there is widespread agreement that we are too punitive, but only for what some refer to as the non-non-nons: non-sexual, non-violent, non-serious.⁴⁹ However, most people who are in prison are there for violent offenses.⁵⁰ Nevertheless, people in these categories—especially sex offenses—are carved out of criminal justice reform proposals.⁵¹ As Catherine Carpenter expertly observes, there is a raft of this type of “all except for” legislation that excludes people with past sex offense convictions for no reason other than animus.⁵²

As psychologist Gwenda M. Willis notes, ours is a tradition of calling people the things “we don’t want them to be.”⁵³ Our language locates and crystallizes people’s humanity in their worst moments: either the worst things that they have done, or in the case of survivors, the worst things that have ever happened to them. We signal that people’s value is either in the trauma

46. Though, some are recognizing the incongruity of that and at least trying to adopt different language—it is still fairly common. See Jessica Lee, *Not Wanting to Offend, Washington State Scraps ‘Offender’ Label for Inmates*, SEATTLE TIMES (Nov. 5, 2016, 10:56 AM), <https://www.seattletimes.com/seattle-news/crime/doc-scraps-offender-label-in-attempt-to-end-stereotyping/>.

47. See, e.g., 34 U.S.C.A. § 20911.

48. Josh Salman, USA TODAY (Aug. 11, 2020, 3:00 AM), <https://www.usatoday.com/in-depth/news/investigations/2020/08/11/convicted-sex-offender-got-lucrative-government-covid-19-contracts/3314931001/>.

49. Daniel Denvir, “*Non-Serious, Non-Violent, Non-Sexual*”: Fixing Our Mass Incarceration Problem Means Getting Past the Easy Steps, SALON (Oct. 26, 2015, 4:00 PM), https://www.salon.com/2015/10/26/non_serious_non_violent_non_sexual_fixing_our_mass_incarceration_problem_means_getting_past_the_easy_steps/.

50. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 185-87 (2017).

51. See, e.g., FLA. CONST. art. VI, § 4 (amended 2018), which excluded people with past sex offense convictions and convictions for murder.

52. Catherine L. Carpenter, *All Except For: Animus that Drives Exclusions in Criminal Justice Reform*, 50 SW. L. REV. 1, 9 (2020).

53. Gwenda M. Willis, *Why Call Someone by What We Don’t Want Them to Be? The Ethics of Labeling in Forensic/Correctional Psychology*, 24 PSYCH. CRIME & L. 727, 727-28 (2018).

they have endured⁵⁴ or that they are valued as repositories of our anger and anxiety for the trauma that they have inflicted. To the extent that we undermine human potential to change, to grow, to heal—to move beyond those worst moments—we ought to inquire why that is. That, for both survivors and those who cause harm, we locate their humanity in something other than the fact of their humanity. While we may be steeped culturally in a tradition of hate-the-sin-love-the-sinner, we have enormous difficulty separating the two.⁵⁵

This linguistic sleight-of-hand passes without much effort or thought. You *are* a convicted felon. You *are* a sex offender. You *are* a murderer. You *are* a survivor. These are true in one narrow sense: they are meant to communicate a fact about a person's past, however long ago. Whether or not that has much bearing on who they are today really depends. Even people with past sex offense convictions, who are adjudicated as “high risk” by actuarial measures, are no more likely than you to commit a sex offense after fourteen years in the community.⁵⁶ Yet our language, especially when we consider people with past sex offense convictions, presumes that we can infer from that past something that is true and meaningful about who a person is *today*—and not just something, but that it becomes one's central identity, the most relevant thing about them.

This labeling game that we play gives us an idea of how people spend their time and their role in society. What does a doctor do? A police officer? A priest? Those job titles surely paint some sort of a picture.

What does a sex offender do?

This present-tense language invites a simple, brutal logic to our policy responses: if we want to solve the problem of sex offenses, we simply get rid of the sex offenders. We banish them from our physical spaces,⁵⁷ we banish them from our digital ones as well.⁵⁸ We push them further and further out into the wilderness⁵⁹ until they just disappear from view and become someone else's problem.

54. As for the state, this *is* a survivor or victim's value—it legitimizes the discharge of state authority.

55. Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 1027-28 (2016).

56. R. Karl Hanson et al., *High-Risk Sex Offenders May Not Be High Risk Forever*, 29 J. INTERPERSONAL VIOLENCE 2792, 2807 (2014).

57. Approximately half the states have some form of housing banishment laws which, despite being untethered to any public safety benefit, remain extremely popular. See Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. UNIV. L. REV. 101, 103 (2007).

58. Guy Padraic Hamilton-Smith, *The Digital Wilderness: A Decade of Exile & the False Hopes of Lester Packingham*, 24 TEX. J. ON C.L. & C.R. 25, 30 (2018).

59. Beth Schwartzapfel & Emily Kassie, *Banished*, MARSHALL PROJECT (Oct. 3, 2018, 7:00 AM), <https://www.themarshallproject.org/2018/10/03/banished>.

This picture of sexual harm, however, is one that is nearly the inverse of reality. Most all sex offenses which are reported to authorities and ultimately cleared by arrest are attributable to people who are not (or would not have been) on a registry to begin with.⁶⁰ Stated differently, they are not recidivists, they are not “sex offenders.”⁶¹ Once people have been held to account for a sexual offense, the vast majority of them do not go on to commit additional offenses.⁶² Most common forms of sexual harm emanate from the people in our lives that we know, trust, sometimes even love, and depend on who are unimpeded by registration laws.⁶³

By locating these little red dots on a map to be the source of sexual harm, we elide its true nature. Thus, our framing of the very language that we use shores up an understanding of sexual violence and gender hierarchies that ultimately serves to perpetuate them.⁶⁴

Framing the central question about sexual violence in terms of managing the risk of recidivistic violence presupposes that recidivism is one of the central problems to be managed. It isn't. The alternative is to put recidivistic violence in its proper place, as a small part of the problem, and dismantle the regulatory regime that has been built on the wildly exaggerated myths about recidivism. To do this requires understanding that we have developed such a singular focus on recidivism because it serves to protect traditional gender hierarchies.⁶⁵

As I wrote above, accountability is important, but it is essential to remember that these systems are applied to people who have already been held accountable for an offense. Often, these individuals have exited the criminal system entirely yet continued to be subject to complicated legal regimes whose effect, if not intent, is to surveil and imprison.

60. Jeffrey C. Sandler et al., *Does a Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 PSYCH., PUB. POL'Y, AND L. 284, 284 (2008) (explaining approximately ninety-five percent “of all sexual offense arrests were committed by first-time sex offenders, casting doubt on the ability of laws that target repeat offenders to meaningfully reduce sexual offending.”).

61. Recidivism, in this context, means that a person's criminal behavior is interrupted by some sort of legal system involvement.

62. See Ellman & Ellman, *supra* note 10, at 504.

63. *Perpetrators of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/perpetrators-sexual-violence> (last visited Oct. 27, 2020).

64. ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 89-90 (2006); Rose Corrigan, *Making Meaning of Megan's Law*, 31 L. & SOC. INQUIRY 267, 271 (2006).

65. Eric S. Janus, *Preventing Sexual Violence: Alternatives to Worrying About Recidivism*, 103 MARQ. L. REV. 818, 821 (2020).

We spend an enormous amount of resources⁶⁶ punishing people who have already been held accountable for some crime instead of focusing on primary prevention efforts and services for supporting both survivors as well people who have caused or might potentially cause harm (or even investing into ensuring that people are held accountable in the first place).⁶⁷

While this approach of exceptionally severe treatment seems justified to many, it carries with it less obvious downsides. Because we are unable to see people in our lives as the monsters who come to mind when we think about sexual violence, we often do not think that they would be capable of such acts. Thus, this is arguably one reason why many survivors are not believed and, in turn, one reason why many do not report.⁶⁸ It is why those who do are sometimes shunned by their community. Because people who commit acts of rape and sexual assault are often well-liked, clean-cut, upstanding members of the community.⁶⁹ They do not present as monsters, and indeed can often present themselves as being guardians of sexual purity.⁷⁰ They are

66. It is difficult even to grapple with how much money and manpower we are truly dealing with. The costs of registries are not just in direct costs (e.g., maintaining the registries themselves), but sending police to conduct “compliance checks” and prosecuting those failures, increased dependence on public assistance for families who are impacted, civil litigation costs, etc. Despite federal SORNA having been the law of the land since 2006, most states are not compliant, with costs of coming into compliance far exceeding any loss of federal funds. See, e.g., *What Will it Cost States to Comply with the Sex Offender Registration Notification Act?*, JUST. POL’Y INST. (Sept. 2, 2008), http://www.justicepolicy.org/images/upload/08-08_FAC_SORNACosts_JJ.pdf.

67. Janus, *supra* note 65, at 822; see also Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C.L. REV. 206, 210-11 (2017).

68. LYNN LANGTON ET AL., U.S. DEP’T OF JUST. BUREAU OF JUST. STAT., VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006-2010, at 4 (2012), <https://www.bjs.gov/content/pub/pdf/vnrp0610.pdf>.

69. See, e.g., Janet McConaughy, *Ex-NFL Star Gets 18 Years for Drugging, Raping Women*, AP NEWS (Aug. 20, 2018),

<https://apnews.com/9c4f7f73e18e4e2e810ee35269388a9d>; Graham Bowley & John Hurdle, *Bill Cosby is Found Guilty of Sexual Assault*, N.Y. TIMES (Apr. 26, 2018), <https://nyti.ms/2HtzAoZ>; Susan Gilmore et al., *8 More Women Accuse Adams - Allegations of Two Decades of Sexual Harassment, Abuse - and a Rape*, SEATTLE TIMES (Mar. 1, 1992), <https://archive.seattletimes.com/archive/?date=19920301&slug=1478550>.

70. Mark Foley was the Republican co-chair of the United States House Caucus on Missing and Exploited Children when he was forced to resign after it became known that he was exchanging sexually charged messages with underage congressional pages. *Why Did Foley Keep Child-Protection Job?*, CHI. TRIBUNE (Sept. 30, 2006, 3:00 AM), https://www.chicagotribune.com/chinews-mtblog-2006-09-why_did_foley_keep_childprotection.html; see also, Michael Gold, *Anthony Weiner Released from Prison After Serving 18 Months for Sexting Teenager*, N.Y. TIMES (May 14, 2019), <https://www.nytimes.com/2019/05/14/nyregion/anthony-weiner-prison-release.html?searchResultPosition=4>; Kevin Diaz, *Congressman Joe Barton, Hit With ‘Sexting’ Revelation Bows Out of 2018 Race*, CHRÓN. (Nov. 30, 2017, 3:46 PM), <https://www.chron.com/politics/article/Congressman-Joe-Barton-hit-with-sexting-12395264.php>

not the image that comes to mind when we think of “sex offender”—and this incompatibility often lapses into a discourse that is centered on rape myths, shame, and an understanding of sexual harm that is out of step with reality. Stated differently: *He could not be a rapist because he is not a monster. Thus, she must be a liar.*

This phenomenon also works on our internal lives and how we reckon with our own conduct. Because the vast majority of people who are arrested for acts of sexual harm are “not sex offenders,”⁷¹ but nearly everyone hates “sex offenders,” this appears to be the product of a not insignificant degree of collective and individual cognitive dissonance. In other words, we view anyone who would cause sexual harm to another as a monster, and no one believes themselves to be a monster.⁷²

This binary view leaves little cultural room to have public-facing discussions about accountability and the nuanced realities of sexual harm. By framing sexual harm in terms of individual monstrosity, we also elide the structural role of money and power in its facilitation.⁷³

A recent example of this sort of dissonance was seen in Supreme Court Justice Brett Kavanaugh’s confirmation hearing.⁷⁴ Justice Kavanaugh was rumored to be on President Trump’s⁷⁵ shortlist of Supreme Court candidates in 2018. Christine Ford, a former acquaintance of Kavanaugh’s, then wrote letters to the media and to Congresswomen Anna Eshoo detailing allegations that, in the summer of 1982 while Ford and Kavanaugh were both high school students, Kavanaugh drunkenly sexually assaulted her.⁷⁶ Ford had

1/8; Liam Stack, *Dennis Hastert, Ex-House Speaker Who Admitted to Sex Abuse, Leaves Prison*, N.Y. TIMES (July 18, 2017), <https://www.nytimes.com/2017/07/18/us/dennis-hastert-released.html>.

71. See Sandler et al., *supra* note 60, at 284.

72. There are a lot of interesting things to say on this point, I think, about registries functioning as a sort of purification ritual—but those are all also beyond the scope of this essay.

73. Though beyond the scope of this essay, an apt and recent example of this can be seen in the case of Jeffrey Epstein. See, e.g., Jodi Kantor et al., *Jeffrey Epstein Was a Sex Offender. The Powerful Welcomed Him Anyway*, N.Y. TIMES (July 13, 2019), <https://www.nytimes.com/2019/07/13/nyregion/jeffrey-epstein-new-york-elite.html>.

74. See Ryan Thoreson, *Women Will Pay for the Mess of the Kavanaugh Confirmation*, N.Y. TIMES (Oct. 7, 2018), <https://www.nytimes.com/2018/10/07/opinion/who-will-pay-for-the-mess-of-the-kavanaugh-confirmation-all-the-women.html?searchResultPosition=1>. Or, another example would be Supreme Court Justice Clarence Thomas’ confirmation hearing. See Julia Jacobs, *Anita Hill’s Testimony and Other Key Moments from the Clarence Thomas Hearings*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/2018/09/20/us/politics/anita-hill-testimony-clarence-thomas.html>.

75. Who, himself, has had myriad allegations of having raped and sexually assaulted numerous women over the course of his life. See, e.g., *Transcript: Donald Trump’s Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html>.

76. Demetri Sevastopulo et al., *Brett Kavanaugh Hearing: Key Moments*, FIN. TIMES (Sept. 27, 2018), <https://www.ft.com/content/b3b4f3ac-c24d-11e8-8d55-54197280d3f7>.

independently passed a polygraph,⁷⁷ and after Kavanaugh's nomination, Ford's allegations were made public.

Ford testified about the alleged assault⁷⁸ and noted that she did not tell anyone of the assault until 2012 when she disclosed it during a therapy session with her husband.⁷⁹

One of the more (unfortunately) memorable aspects of the hearing was Kavanaugh's response, which could be described as indignant. He adamantly denied even the *possibility* that what Ford alleged transpired.⁸⁰ That she was making it up. A liar. Kavanaugh, in his own defense, submitted statements from many women who had known him, attesting to his character.⁸¹

Much of the discourse occurred along this binary—either that Kavanaugh was a monster or that Ford was a liar—leaving little room for a more nuanced discussion of some important aspects of Ford's allegation and Kavanaugh's response. Ultimately, Kavanaugh was confirmed, demonstrating the efficacy of his chosen tactic, Ford's testimony notwithstanding.⁸²

There was little room to explore what I see as a third, perhaps likely possibility given the testimony of both Kavanaugh and Ford: that Kavanaugh *did* assault Ford, but that he does not remember it happening. For Kavanaugh, in light of the evidence surrounding his prior drinking habits,⁸³ it seems plausible that for him it was just another summer night of partying. But that for Ford, it was something far different.

77. Though, it should be noted that polygraphs are so unreliable as to be inadmissible in criminal proceedings but are still routinely used as parts of “sex offender treatment” programs. See CAL. SEX OFFENDER MGMT. BD., POST CONVICTION SEX OFFENDER POLYGRAPH STANDARDS 1 (2017), http://www.casomb.org/docs/CASOMB_Polygraph_Requirements_1-2017.pdf.

78. Sevastopulo et al., *supra* note 76.

79. READ: Christine Blasey Ford's Opening Statement for Senate Hearing, NPR (Sept. 26, 2018, 5:48 PM), <https://www.npr.org/2018/09/26/651941113/read-christine-blasey-fords-opening-statement-for-senate-hearing>.

80. Sheryl Gay Stolberg & Nicholas Fandos, *Brett Kavanaugh and Christine Blasey Ford Duel with Tears and Fury*, N.Y. TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/us/politics/brett-kavanaugh-confirmation-hearings.html>.

81. Tara Golshan, *65 Women Who Knew Brett Kavanaugh in High School Defend His Character*, VOX (Sept. 14, 2018, 11:50 AM), <https://www.vox.com/2018/9/14/17860488/brett-kavanaugh-sexual-assault-georgetown-prep-defense>. Also, this plays on the notion that only people who are monstrous commit acts of sexual harm.

82. Sheryl Gay Stolberg, *Kavanaugh Is Sworn in After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html>.

83. Amanda Arnold, *All of Brett Kavanaugh's Classmates Who Have Accused Him of Lying*, THE CUT (Oct. 5, 2018), <https://www.thecut.com/2018/10/all-of-kavanaughs-classmates-who-have-called-him-a-liar.html>.

I say that this is possible because Kavanaugh's own calendar seems to corroborate that there was a party during the same timeframe that Ford alleged, and that Ford was able to accurately identify others in attendance at this party (as relayed by Kavanaugh's calendar).⁸⁴ Despite Kavanaugh's Janus-faced testimony that he "sometimes had too many beers" but "never blacked out" (seemingly as to preclude the possibility of an unremembered assault), those who knew Kavanaugh indicated that they did not find this position to be a credible one.⁸⁵

Is it possible that Kavanaugh, as a drunk teen, did assault Ford and simply does not recall it? It seems so, given the evidence of his drinking. He could not even admit that it was a possibility here, however, despite it seeming to be the most obvious and humane explanation. Even assuming that reading is the correct one, does it follow that he should suffer the consequences for the rest of his life? As noted above, the United States does place juveniles on public sex offense registries for acts not dissimilar from what Ford alleged.⁸⁶ The law certainly does treat some teenagers and young people who make mistakes much differently than others,⁸⁷ but whether that is fair or good is another matter entirely. Does the answer to that inquiry then change where—as here—there has been no accountability for that conduct? And what would accountability look like here? Would it mean that Kavanaugh should not be confirmed?

The point is not necessarily to suggest any answers to any of these questions, but more that we lack a vocabulary to even have that conversation at anything approaching a national level. The most probable (in my opinion) and humane response would have been to allow for its possibility, to admit that he could not say with certainty that what Ford alleged did not happen, and that if it did happen, that he wanted to find a way to make amends to her. But if that was the response, as opposed to casting Ford as little more than a partisan operative, it seems likely that he would have not been confirmed.

Playing on familiar and deeply-entrenched myths and tropes about sexual violence worked out for Kavanaugh, though worked to the detriment of something more nuanced, and humane, and that comports with the reality of almost all sexual harm: that people can cause harm in one instance, and at the same time, live exemplary lives in other respects. It is the answer to the

84. Li Zhou, *Brett Kavanaugh's July 1 Calendar Entry that Could Help Ford's Case, Explained*, VOX (Sept. 28, 2018, 1:40 PM), <https://www.vox.com/policy-and-politics/2018/9/28/17914174/brett-kavanaugh-calendar-christine-blasey-ford>.

85. Arnold, *supra* note 83.

86. Godsoe, *supra* note 4, at 350-51.

87. Josh Rovner, *How the Law Treats Kids Who Didn't Grow Up like Kavanaugh*, THE ATLANTIC (Sept. 18, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/how-the-law-treats-kids-who-didnt-grow-up-like-kavanaugh/570583/>.

question of how Kavanaugh could have scores of women attesting to his character on one side, and Ford testifying on the other, *and how they could both be telling the truth.*

PART II: THE WEIGHT OF WHAT YOU BELIEVE

Several years ago, a debate raged in my local paper's opinion section under the heading of something akin to *Should sex offenders be allowed in church?* I was not a churchgoer, but it was around that same time that I had a spiritual experience. I asked one of my friends in law school, who I knew was religious and who knew my story, if she would take me to hers.⁸⁸

I went to a service with her, and afterwards, I asked the priest to lunch so that I could tell him my whole story. So that I could ask if I could attend.

Over burgers and fries at one of those restaurants that does not stay the same thing for more than a year or two, I told him about my conviction, my spiritual experience, and how I would like to start attending church.

He looked at me with a "so what?" kind of expression on his face. He seemed annoyed. He kept chewing.

Well, I'm just wondering if you'll allow me to attend.

Why wouldn't I?

Because . . . I'm a sex offender.

Without missing a beat he said, *You're no different than anyone else.*

And so I went. I was not treated any differently from anyone else. I did not have a chaperone. I was not given any special set of rules. If anyone was assigned to surveil me, I could not tell. I worshipped. I prayed. I volunteered. I struggled with faith and doubt. I still do and probably always will. I became friends with people. I found community.

But I did not share my background with anyone else. I was scared. I did not know what others would think. I tried to leave the past in the past. While my employers and family and close friends knew, I was not public.

That all changed one week in 2014, when my ill-fated Kentucky bar exam application made national news.⁸⁹ Most mornings I would stop and get coffee before going into the office. That morning, I was staring at my own

88. Thank you, Hannah.

89. See Brett Barrouquere, *Sex Offender Who Finished in the Top Third of His Law Class Can't Take the Bar*, BUS. INSIDER (Jan. 6, 2014, 10:42 AM), <https://www.businessinsider.com/guy-padraic-hamilton-smith-fighting-to-take-bar-2014-1>.

face staring back at me from the newsstand. I was trending on Fox News.⁹⁰ I was terrified.

My priest called me a few days after the story broke. He said he wanted to give me a heads up: he had overheard people talking about my story, and Sunday was a few days away.

“Nothing is more dehumanizing than the absence of human companionship.”⁹¹ Nelson Mandela wrote that about his time in solitary confinement, and while I have never been in solitary confinement, when I read it, it struck a chord deep within me:

In our hyper-connected age, we don't need solitary to cut people off from human connection. Being labeled a sex offender, you carry your solitary with you, in your heart, and in your mind. When you put on your shoes to go mail letters or buy milk from the store, when you go out on a date, or try to find something to watch on Netflix, you may as well be on Mars. The indelible electronic mark you carry threatens to turn your own thoughts against you, unless and until you can find a way outside of the prison your own mind begins to construct for you. Until then, you die slowly, suffocating in shame.⁹²

To the extent that people *believe* themselves to be bad, or immutable, or beyond redemption, or beyond human companionship, it is a torturous condition in which to reside. To the extent that we tell people that the only thing that they can ever be is a criminal, why should they try to be anything but that?

Labeling theory is the idea that by saddling people with these labels perhaps we bring about the very behavior that we seek to vanquish.⁹³ Research indeed shows that public notification schemes are actually associated with an *increase* in re-offense rates, presumably by way of making it impossible for people to successfully reintegrate.⁹⁴ My experience has been that there is something uniquely cruel about a justice system that wants you to reintegrate, but then actively opposes and undermines that same reintegration. Once you come to believe that you are a sex offender, you inflict your punishment on yourself.

90. See *Sex Offender Looks to Gain Admission to Kentucky Bar*, FOX NEWS (Jan. 8, 2015), <https://www.foxnews.com/us/sex-offender-looks-to-gain-admission-to-kentucky-bar>.

91. NELSON MANDELA, *LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA* 334 (1995).

92. Guy Hamilton-Smith, *On America's Civil Death Penalty: The Sexual Offense Registry*, UNIV. CAMBRIDGE: COMPEN. PENOLOGY BLOG (2018), <https://www.compen.crim.cam.ac.uk/Blog/blog-pages-full-versions/guest-blog-by-guy-hamilton-smith>.

93. See HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 9 (1966).

94. See J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Affect Criminal Behavior*, 54 J. L. & ECON. 161, 192 (2011).

You put on armor in the morning, not unlike putting on clothes. You get ready for it. Sideways glances from neighbors and death threats and everything in between. You are ready for the hate and the judgment. You expect it. You can take it. You have no choice.

I went to church that Sunday, despite everything in me pulling me in the other direction to stay home. To hide. Before I opened the door, the faces of the people that I had come to know, had come to befriend, flashed through my mind. I typically saw their faces as friendly, smiling, inviting. I pictured them dark with anger, judgment, disgust. Open the door, brace for impact.

My immediate instinct was to turn and run, that I had made a huge mistake. Instead, I stepped forward. I avoided eye contact, staring at the floor, and made a beeline for my seat. There was something comforting about it, just sitting in it, even if I believed it was going to be for the last time. Even if it was going to be for the last time.

I closed my eyes and tried to steady my breathing. It was not long before I felt two people sit next to me—one on either side of me. I normally sat alone. People were here, I figured, to throw me into the street.

We got your back.

I recognized her voice, even at a whisper. There were two blue-haired matrons of this particular church, and in my ear was one of them. Opening my eyes, the other was sitting on the other side. They flanked me. During the peace, people kept coming up to me. I would extend my hand and get a hug instead. People said I was in the right place. People told me that they loved me.

I put on armor expecting to be cast out of that community, but instead I encountered love that cut right through me. You put on all that armor because you think it is going to keep you safe, but really it just keeps you trapped. I broke down and sobbed. I still do not know much about God, but whatever it was I experienced that day, I will never forget it and will always be grateful for it.

I took a chance and showed up. In turn, that community took a chance on me and showed up as well. In doing that, they gave me an opportunity to become more than the worst thing I had ever done. I had been living a torturous existence for years, my own solitary confinement.

They set me free.

PART III: GHOSTS

I write this in a very tenuous time. An era of COVID-19,⁹⁵ but post-Breonna Taylor,⁹⁶ post-George Floyd,⁹⁷ and before the 2020 presidential election. Despite registries disproportionately impacting people of color, they have largely been left out of recent conversations around racial justice. Defunding the police and reinvesting those resources into the community has rocketed from being a fringe theory amongst abolitionists to the mainstream.⁹⁸

Collectively, these proposals seek to reimagine things like community safety and, in turn, justice. We have traditionally seen justice in terms of years: the more punishment that we give to someone, the more justice that we have achieved. The flip side of that coin is that we measure the value of the harm that someone has suffered in those same terms. These harsh punishments we justify by way of appealing to the pain of others: that, if survivors have to suffer forever, why should not the people who cause harm, as well? Justice has been a question of how to make all suffer in equal measure—to take oftentimes already broken people and break them more.

Registries grew out of horrific crimes that would leave only those made out of stone unmoved. Names of dead women and children adorn legislation we sign into law, and each represents broken families and uncountable sleepless nights and rage and heartbreak and dreams the world will never know, and that words can scarcely capture.⁹⁹

The early 1990s and 2000s saw a raft of hyper-punitive legislation passed in the wake of tragic crimes we are only now beginning to reconsider the wisdom of.¹⁰⁰ It is easier to talk about why registries are bad in cases where it seems obvious that its application is unjust and illogical—like

95. See Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Aug. 6, 2020), <https://www.nytimes.com/article/coronavirus-timeline.html>.

96. See Richard A. Oppel Jr. et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Oct. 30, 2020), <https://www.nytimes.com/article/breonna-taylor-police.html>.

97. See Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Nov. 5, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

98. See John Eligon, *Distrust of the Minneapolis Police, and Also the Effort to Defund Them*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/04/us/minneapolis-defund-police.html>.

99. For a discussion of laws named after women and children, see Carpenter, *supra* note 20, at 23-26.

100. For example, the sisters of Polly Klaas—who was abducted and murdered in 1993—recently wrote an op-ed opposing a proposal in California to limit parole and more broadly lamenting that Klaas' legacy is tied to harsher criminal treatment with little benefit for community safety. Jess Nichol & Annie Nichol, *Op-Ed: Polly Klaas Was Our Sister. We Don't Want Unjust Laws to Be Her Legacy*, L.A. TIMES (Oct. 18, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-10-18/polly-klass-legacy-unjust-laws>.

placing children on registries. Recently, the mother of a young man on the registry who clearly was no threat, and could not even apprehend the myriad rules that would now govern his life, wrote an article titled “My Son is No Sex Offender.”¹⁰¹ It was well-written and heartbreaking, and resonated with the idea that many people have: that of course *her* son is no sex offender, but there are real ones out there. *Those people* are the ones we need to register and track and surveil and punish—at least, that is how the thinking typically goes.

Those people are the high-profile horror stories that stick out in people’s minds and were more or less the genesis of modern sex offense registries. But scratching the surface, things become both considerably more complicated and, arguably, more tragic. Consider Jessica Lunsford.

On February 23, 2005, nine-year-old Jessica Lunsford was abducted from her bedroom by a stranger—John Evander Couey.¹⁰² Couey lived less than 100 yards from Lunsford’s home, in a trailer that he shared with his sister and others.¹⁰³ Couey went to burglarize the home and “acted on impulse and took her.”¹⁰⁴ He kept her in his trailer for three days and sexually assaulted her before panicking and burying her alive near the trailer.¹⁰⁵ Couey, who had a 1991 conviction for a sex offense, was arrested and ultimately confessed. He was convicted at trial and sentenced to death—though he died of cancer before the death sentence was carried out.¹⁰⁶

It was the proverbial worst-case scenario: every parent’s nightmare. The question that it invited was an obvious and necessary one: what can be done to ensure that this never happens again? Couey’s actions were horrific, and so we “reached into [our] culture and pulled out the concept of evil and the concept of a cage.”¹⁰⁷

Jessica’s Law¹⁰⁸ became the response not only in Florida, but across the nation: tougher penalties, more onerous registration requirements. Jessica’s father, Mark, became “an outspoken advocate for tougher penalties for sex offenders who commit crimes against children,” despite himself having a

101. Carol Nesteikis, PERSUASION (Oct. 13, 2020), <https://www.persuasion.community/p/my-son-is-no-sex-offender>.

102. Answer Brief of Appellee at 1-3, *Couey v. State*, 21 So. 3d 812 (Fla. 2009) (No. SC07-1636) (unpublished table decision).

103. *Id.* at 3.

104. *Id.* at 20.

105. *Id.* at 20-21.

106. See John Frank, *Killer Couey Dies at 51*, TAMPA BAY TIMES (Oct. 1, 2009), <https://www.tampabay.com/archive/2009/10/01/killer-couey-dies-at-51/>.

107. Kleinfeld, *supra* note 55, at 1026.

108. See H.B. 1877, 2005 Leg., 107th Reg. Sess. (Fla. 2005).

“limited amount” of child pornography on his computer, somewhat complicating that narrative.¹⁰⁹

We like to believe that people are all one thing or all another thing, but anyone who has lived knows that this is not reality. People are a mixture of things. Good and bad, and all of the things in between. If Couey is an immutable monster, then of course the solutions are apparent: to kill, to cage, to track. But then Jessica Lunsford is still dead. He was, after all, already on Florida’s registry at the time of the killing. Far more unsettling is that Couey, too, was a human being, and to reckon with this without denying the atrociousness of his conduct provides new possibilities.

Couey’s attorneys put on mitigation for him at trial, and while it did not spare him the death penalty, it did reveal much about his past. The circumstances of Couey’s birth foreshadowed much of his life: he “was born prematurely to a teen mother, who delivered him shortly after [Couey’s] father pushed her from a moving automobile.”¹¹⁰ Couey was physically, sexually, and emotionally abused through much of his childhood.¹¹¹ As an adult, he experienced hallucinations stemming from brain damage and psychosis, and he had an IQ of 64.¹¹² He also had a significant history of substance abuse, arrests, and convictions.¹¹³

None of that excuses or undoes the pain he inflicted, the life that he stole. My point in raising Couey’s humanity here is not to excuse or absolve him. Rather, it is this: buried in a voluminous trial record is the fact that, before Couey broke into the Lunsford home on that February night, he was in Florida Department of Corrections custody where he sought mental health treatment that he was never given.¹¹⁴

If Couey had been given treatment, would Jessica Lunsford still be alive? Going back even further, if Couey’s parents had the resources and support *they* needed, might Couey’s trajectory have been different? If so, perhaps Jessica Lunsford would still be alive. She would have been twenty-five years old as I write these words.

These questions are unanswerable, but my point here is not to suggest the answers but to say that these were questions never asked to begin with.

109. According to one of the state prosecutors who prosecuted Couey, a “limited amount” of child pornography was found on Mark Lunsford’s computer, though he was not prosecuted for it. Rick Cundiff, *Child Porn Found on Lunsford Computer*, OCALA STARBANNER (July 19, 2005, 12:37 AM), <https://www.ocala.com/article/LK/20050719/News/604234922/OS>.

110. Initial Brief of Appellant at 33, *Couey v. State*, 21 So. 3d 812 (Fla. 2009) (No. SC07-1636) (unpublished table decision).

111. *Id.* at 34-37.

112. *Id.* at 37.

113. *See id.* at 15, 37.

114. *See id.* at 16.

Expanded mental health treatment for those in Florida's Department of Corrections custody was not one of the provisions of Jessica's Law. There are evidence-based models of re-entry and treatment that are effective, and that do not rely on our models of monsters and cages. We could, and should, ask—is it better to punish or to prevent?

Patty Wetterling, whose son Jacob Wetterling was abducted and killed by Danny Heinrich,¹¹⁵ was an early champion of sex offense registries. Indeed, her son was the namesake of earlier legislation. Wetterling, in more recent years, has come to oppose the current implementation of sex offense registries.¹¹⁶ In 2019, she gave the keynote address at a law school symposium examining residency restrictions for people with past sex offense convictions. Generally, Wetterling decried how ill-advised, bloated, and inhumane the current system has become, and that it did not square with Jacob's inherent sense of fairness:

It's amazing, what we've done, yet we want [people on the registry] to succeed. We take away jobs, we take away a place to live, we take away any kind of support, there's no community resources and often no treatment . . . I refuse to let the man who took Jacob take away the world that Jacob knew.¹¹⁷

CONCLUSION

I have lived most of my life under either the weight of the things that were done to me, or the things that I did. My experiences have left me with mostly questions, ones that I have raised here and cannot easily answer.

I do think, though, there are some questions I can answer. Would it help me to know that the person who raped me, himself a boy at the time, were placed on a sex offense registry? That he would have a lifetime of struggling with employment, and housing, and even finding community? That his future family would have to suffer the consequences for things he did well before he ever met them? That his children would get teased at school for having the misfortune of not being able to choose their parents?

None of that helps me, and all of that appalls me. Perhaps there was a time when that would have not been my answer. Perhaps I would have liked

115. See *In the Dark: Season 1*, APM REPORTS., <https://features.apmreports.org/in-the-dark/season-one/> (last visited Oct. 31, 2020).

116. See Jennifer Bleyer, *Patty Wetterling Questions Sex Offender Laws*, CITYPAGES (Mar. 20, 2013), <http://www.citypages.com/news/patty-wetterling-questions-sex-offender-laws-6766534>.

117. Patty Wetterling, Address at the Mitchell Hamline Law Journal of Public Policy and Practice Symposium (Feb. 28, 2019), <https://mitchellhamline.edu/law-journal/spring-2019-symposium/>.

all of that very much when I was angry. But I let go of my anger years ago, and what option would there be to undo any of that?

The things that would have helped me are things that I have accepted that I will never receive, which our systems and languages do not incentivize. An acknowledgement from him, and an apology, and to know that he worked to change—that he did not harm anyone else. And that he had healed from whatever was done to him.

Our criminal systems have little interest in such an arrangement. If I am no longer broken and demanding recompense, then it can no longer justify the righteousness of retribution on my behalf, nor the millions of dollars and many careers whose business it is in carrying that retribution out. Likewise, the government appears to have little interest in primary prevention as, if crime is prevented, then there is no one to punish.

This arrangement is one that sees me, and him, and maybe you, locked in some kind of eternal holy war. But does that serve either of us? Does it serve you?

Despite only some of these questions being answerable, I still think them important to ask, and I suppose that is why I wrote them. To at least have some place to ask them—to ask the universe, even with no expectation of an answer.

And, if you are reading this, I forgive you. Just as I hope I am forgiven.