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# A Crooked Picture: Re-Framing the Problem of Child Sexual Abuse

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# A Crooked Picture: Re-Framing the Problem of Child Sexual Abuse

## **Abstract**

This article discusses the problem of ending child sexual abuse using an allegory explaining that certain types of punitive solutions as solving the river "downstream", or in problem-solving mode, as opposed to "upstream", or in prospective problem avoidance. The thesis of this brief article is that our public policy is focused too far downstream. We rightly condemn child sexual abuse, but our public discourse frames the issue in a way that misdirects our public policy towards downstream solutions. If we truly want to protect our children from sexual abuse and end the cycle of violence, we need to reframe the way we seek solutions so that more of our resources and creative problem-solving are at the upstream end of the problem. We need to find out where the problem is dropped into the river—and why—so that we can address it before it harms children. This article encourages a reframing of the issue of child sexual abuse to address the problem more comprehensively and systematically. Part I is an introduction explaining the allegory and indicating how our current paradigm of child sexual abuse leads us astray in directing resources intended prevent child sexual abuse. Part II of this article delves into the origins of contemporary sexual predator laws, briefly tracing their roots in the feminist and conservative movements at the end of the twentieth century. Part III outlines the resulting legislation. Part IV examines the disconnect between the policy underlying sexual predator laws and the realities of child sexual abuse. Finally, Part V offers an alternative frame for addressing the issue of child sexual abuse.

## **Keywords**

Child sexual abuse, paradigm, sexual predator laws, recidivist, sexual offenders, child molesters, child abuse, preventative legislation, stranger danger, rape myths, learned behavior, sexual violence, rape law, moral panic, civil commitment, sexual offender registration, registration laws, notification laws, residential restrictions, sexually violent predators, SVP, Jacob Wetterling Act, Megan's Law, Adam Walsh Act

## **Disciplines**

Criminal Law

## A CROOKED PICTURE: RE-FRAMING THE PROBLEM OF CHILD SEXUAL ABUSE

Eric S. Janus<sup>†</sup> & Emily A. Polachek<sup>††</sup>

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### I. INTRODUCTION

In an audacious article, Victor Vieth sets out a plan to end child abuse in the next 120 years. “We can,” he says, “end cyclical child abuse and reduce from millions to thousands the number of

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children victimized over the course of any decade.”<sup>1</sup> Child abuse begets child abuse, so Vieth’s goal calls for preventing abuse before it occurs. To do this, we will need to reframe our fight against child sexual abuse. We will need to switch from a politically popular but empirically-challenged set of policies designed to punish and exile “sexual predators”—offenders who have already done their damage. We must adopt a more systematic and comprehensive approach designed to address sexual abuse broadly and effectively.

A popular parable tells the story of a villager standing by a river when she notices a baby floating in the current. She wades out and pulls the baby to safety, but another baby comes drifting down the river. As more babies appear, other villagers see the woman’s predicament and quickly join in rescuing the children. They organize watches and first aid to care for the babies. They save some, but lose others. Their efforts are heroic and disruptive of the normal life of the village. Others, meanwhile, appearing to reject these efforts, head upstream to find the cause of the epidemic of babies. They are criticized for abandoning the rescue effort and pursuing the uncertain goal of prevention. Arriving at the next village, they find the cause (not specified in the common telling of the parable), correct it, and put an end to the tragedy.

This allegory describes a key tension in public policy concerning child sexual abuse. As we address child sexual abuse, should our major efforts be directed “downstream,” after the harm has been done, or should we, as in the parable, seek to reduce child sexual abuse by paying more attention to root causes and other “upstream” aspects of the problem?

The thesis of this brief article is that our public policy is focused too far downstream. We rightly condemn child sexual abuse, but our public discourse frames the issue in a way that misdirects our public policy towards downstream solutions. If we truly want to protect our children from sexual abuse and end the cycle of violence, we need to reframe the way we seek solutions so that more of our resources and creative problem-solving are at the upstream end of the problem. We need to find out where the babies are being dropped into the river—and why—so that we can address the problem before it harms children.

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1. Victor L. Vieth, *Unto the Third Generation: A Call to End Child Abuse in the United States Within 120 Years (Revised and Expanded)*, 28 *HAMLIN J. PUB. L. & POL’Y* 1, 4 (2006).

Child sexual abuse is considered a particularly heinous crime due to the psychological trauma that can result.<sup>2</sup> We currently view the sexual abuse of children through a particular frame.<sup>3</sup> This frame focuses on the “sexual predator,” the mentally deranged stranger. It emphasizes recidivist crime and suggests that solutions for child sexual abuse reside in identifying the “worst of the worst” and physically removing them from society. In short, we have developed a public policy that focuses our attention, our concern, and our resources, far, far downstream, concentrating our attention and resources on those few who have already done the most damage.

Since the early 1990s, the United States has framed the issue of sexual abuse around the idea of the paradigmatic “sexual predator,” an archetype that portrays sexual offenders as a mentally disordered, highly recidivistic, and untreatable class. Ignoring the growing behavioral scientific knowledge about sex offenders and sexual violence, lawmakers have embarked on a campaign of preventive legislation designed to identify, and then segregate, sexual predators from society. Based on a counter-factual paradigm of sexual violence, these laws misdirect resources and distort our policy of prevention of child sexual abuse.

This article encourages a reframing of the issue of child sexual abuse to address the problem more comprehensively and systematically. Part II of this article delves into the origins of contemporary sexual predator laws, briefly tracing their roots in the feminist and conservative movements at the end of the twentieth century.<sup>4</sup> Part III outlines the resulting legislation.<sup>5</sup> Part IV examines the disconnect between the policy underlying sexual

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2. See David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, 4 THE FUTURE OF CHILDREN 31, 42 (1994).

3. A frame, which is also known as a schema, script, or cognitive model, is a method for organizing and interpreting events and experiences. John Douard, *Sex Offender as Scapgoat: The Monstrous Other Within*, 53 N.Y.L. SCH. L. REV. 31, 33 (2008/2009). For example, a person may frame an animal’s action as a bite if the individual perceived the animal as attacking, or as a nip if the animal was simply at play. *Id.* at 33–34 (citing Gregory Bateson, *A Theory of Play and Fantasy*, in APA RESEARCH REPORTS II (1972), reprinted in GREGORY BATESON, STEPS TO AN ECOLOGY OF MIND 177–93 (5th ed. 2000)). Individuals use frames when confronted with moral issues such as whether to classify larceny as theft or a necessary means for survival. Douard, *supra*, at 34. A prime example of this framing disparity is the legend of Robin Hood. *Id.*

4. See *infra* Part II.

5. See *infra* Part III.

predator laws and the realities of child sexual abuse.<sup>6</sup> Finally, Part V offers an alternative frame for addressing the issue of child sexual abuse.<sup>7</sup>

## II. HISTORY OF SEXUAL PREDATOR LAWS

Central to the development of sexual predator laws is the idea that sex offenders are moral monsters who must be excised from the community to protect the rest of society.<sup>8</sup> The desire to eradicate a “contaminated” group is not unfamiliar in our nation’s history— “[i]n the past, we have used categories such as race, gender, national origin, sexual orientation, and disability to put people into reduced-rights zones.”<sup>9</sup> Fear and loathing are instinctual psychological responses when confronted with the “other.” By disseminating the idea that the out-group is contaminated, society infuses the group with an internal quality that distinguishes its members from the rest of the public. This frame views the sex offender as a “degraded other,” and encourages the “the paradigmatic example of sexual violence [as] the rapist who was a deranged stranger.”<sup>10</sup>

### A. *The Feminist Movement*

The belief that sexually abusive behavior is an entirely internal—and individual—phenomenon influenced two political movements that were instrumental in the creation of sexual predator laws. The first was the feminist movement of the 1970s, which argued that sexual violence flourishes because social norms and values allow it to flourish.<sup>11</sup> Thus, feminists rejected the reductionist archetype of rapists as abnormal, dysfunctional individuals. For example, in one of the most well-known pieces of feminist and anti-rape literature, Susan Brownmiller asserted that

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6. *See infra* Part IV.

7. *See infra* Part V.

8. Professor John Douard argues that moral monstrosity stems from centuries-old philosophical ideology. *See generally* John Douard, *Loathing the Sinner, Medicalizing the Sin: Why Sexually Violent Predator Statutes are Unjust*, 30 INT’L J.L. & PSYCHIATRY 36, 40–42 (tracing the origins of the notion of the sex offender as a monster to the Renaissance, the Enlightenment, and the teachings of St. Thomas Aquinas).

9. ERIC S. JANUS, *FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTATIVE STATE* 5 (2006).

10. *Id.* at 5, 75.

11. *See id.* at 75–76.

rape was a tool men used to keep women repressed and in a state of fear.<sup>12</sup> Shortly thereafter, Susan Griffin published research concluding that rape was a *learned* behavior rather than an uncontrollable response born out of instinctual sexual desires or mental disorder.<sup>13</sup> Feminists also identified a set of “rape myths,” widespread societal notions that incorporated not only this psychological view of the rapist, but also the corollary notion that sexual misbehavior by “normal” men was covertly desired and encouraged by women. From these catalysts came the feminist hypothesis that rape and sexual assault were “the product of social conditions that normalized sexual violence.”<sup>14</sup> In an effort to combat this social learning process, feminists sought to move what was once private—the family and sexual relationships—into the public sphere, so that they could be addressed through the normal means of social control.

The feminist movement led to a series of legislative changes. Many states made both substantive and procedural changes to laws dealing with rape and sexual violence, many of which were designed to eradicate from the law the robust manifestations of the prevalent views and myths about rape. Rape reform changed the law in four ways: (1) the crime of rape went through a devolution, becoming many different types of sexual offenses; (2) states modified or abolished the requirement that victims “resist to the utmost;” (3) rape no longer needed to be corroborated by independent witnesses or evidence; and (4) many states enacted rape shield laws, preventing defendants from questioning victims about their prior sexual activities.<sup>15</sup> States also increased penalties for sexual assault convictions, increasing average sentences by twenty months in approximately ten years.<sup>16</sup>

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12. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 15 (1975).

13. See Rose Corrigan, *Making Meaning of Megan's Law*, 31 *LAW & SOC. INQUIRY* 267, 271 (2006) (citing SUSAN GRIFFIN, *RAPE: THE ALL-AMERICAN CRIME* (1977)).

14. Corrigan, *supra* note 13, at 271, 275.

15. See Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 *J. CRIM. L. & CRIMINOLOGY* 554, 559–60 (1993).

16. DORIS JAMES WILSON, U.S. DEP'T OF JUSTICE, NATIONAL CORRECTIONS REPORTING PROGRAM (1995), available at <http://www.ojp.usdoj.gov/bjs/dtdata.htm#ncrp> (finding that the average actual time served by rapists rose from forty-one months in 1985 to sixty-one months in 1996).

### B. *The Conservative Movement*

At the same time the feminist movement was influencing lawmakers, the conservative movement gained momentum as a counter-response to some of the feminist initiatives. Conservatives responded to the anti-patriarchy message underlying the feminist views of rape and sexual violence.<sup>17</sup> Aligning with the prevailing “law and order” ethos, feminist concerns about the seriousness of sexual violence struck a chord with conservatives. Conservatives and feminists made common cause in advocating for tougher penalties for sexual violence. They parted company, however, when it came to the analysis of the roots of sexual violence.<sup>18</sup> The conservative response to child sexual abuse emphasized personal responsibility and discouraged rehabilitative goals. But many conservative commentators also sought to undercut the feminist notion that widespread and traditional societal values were connected with sexual violence. The paradigmatic “sexual predator” served this conservative agenda well, placing responsibility for sexual violence in the aberrational stranger and absolving society of any responsibility for deviant sexual behavior.

### C. *Effect of Political Movements on Child Sexual Abuse*

Increased concern for and awareness of sexual violence in general, and child sexual abuse in particular, led to a rise in the number of reported sexual assaults against children, from 6,000 cases in 1976 to over 500,000 in 1992.<sup>19</sup> The media latched on to this dramatic increase, leading the public to believe that there was an epidemic of sexual violence against children.<sup>20</sup> This belief led to a disproportionate official response to sexual offending—a response many commentators have described “as moral panic.”<sup>21</sup>

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17. JANUS, *supra* note 9, at 82. Outspoken members of the conservative party, such as Phyllis Schlafly, countered feminist rhetoric by calling on family values and labeling feminists as “anti-family, anti-children and pro-abortion.” *Id.* (citing SARA M. EVANS, *TIDAL WAVE: HOW WOMEN CHANGED AMERICA AT CENTURY’S END* 6 (2003)).

18. Corrigan, *supra* note 13, at 272–73.

19. PAMELA D. SCHULTZ, *NOT MONSTERS: ANALYZING THE STORIES OF CHILD MOLESTERS* 7–8 (2005).

20. See, e.g., *To Catch a Predator* (NBC television broadcast) (primetime program showing the capture, arrest, and interrogation of individuals who believe they are soliciting sexual favors from children over the internet).

21. A moral panic occurs when the media portrays a class of persons as a threat to societal values, leading lawmakers and other community figureheads to



An example of this moral panic is the political response to the publication of a psychological study by Bruce Rind and colleagues.<sup>22</sup> Published in *Psychological Bulletin*, the peer-reviewed journal of the American Psychological Association, the study reported on the researchers' meta-analysis of child sexual abuse research. The authors concluded that, in contrast to popular belief, the "negative effects [of sexual abuse] were neither pervasive nor typically intense."<sup>23</sup> The study did not assert that child sexual abuse was never harmful. Nevertheless, the United States House of Representatives unanimously condemned the study, calling it "the emancipation proclamation of pedophiles."<sup>24</sup> Despite the sensitivity of the issue, the fact that a legislative body criticized and discouraged scientific study demonstrates the potential dangers of acting in response to moral panic.

### III. CURRENT SEXUAL PREDATOR LAWS

At the risk of oversimplification, we can say that the confluence of the feminist movement, conservative movement, and intense media coverage in the early 1990s led to the enactment of a series of laws addressed at the control of "sexual predators." Many of the laws claimed legitimacy through some reliance on the behavioral sciences.<sup>25</sup> But as a matter of fact, these laws were largely enacted in a typical pattern of moral panic. First, a horrific

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clamor for solutions and ways to cope with the threat. See Douard, *supra* note 3, at 41. See also Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 860 (2000) (describing moral panic that swept the nation in 1993 when Chicago police circulated flyers describing a new gang initiation that falsely stated that several families had died as a result of the initiation).

22. Bruce Rind, Philip Tromovitch & Robert Bauserman, *A Meta-Analytic Examination of Assumed Properties of Child Sexual Abuse Using College Samples*, 124 PSYCHOL. BULL. 22 (1998).

23. *Id.* at 22.

24. Jim Abrams, *House Condemns Child Sex Abuse Study*, ASSOCIATED PRESS (July 12, 1999), excerpted at <http://www.prevent-abuse-now.com/rebuttal.htm#Lost>.

25. Eric S. Janus & Robert A. Prentky, *Sexual Predator Laws: A Two-Decade Restrospective*, 21 FED. SENT'G REP., 90, 91-92 (2009). However, the American Psychological Association has cautioned courts on the use of medical categories, such as diagnoses from the Diagnostic and Statistical Manual IV-TR, in legal contexts, such as proving offenders' risk of future recidivism for violent crimes. See Brief for American Psychiatric Ass'n as Amicus Curiae at 4, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080). Furthermore, many predator laws are offense-based and do not require any individual assessment, thereby eschewing the behavioral sciences. Janus & Prentky, *supra*, at 92.

and highly publicized sexual homicide of a young woman or child captured the attention of a community.<sup>26</sup> The main suspect was usually a released sexual offender, igniting public outrage at the ex-convict's presence in the community.<sup>27</sup> Lawmakers then responded to the public outcry and quickly passed legislation that either created or expanded sexual predator laws on the pretense that loopholes in the previous iteration of legislation led to this crime.<sup>28</sup> From this consistent pattern of enactment, sexual predator laws have expanded and evolved into a complex series of provisions creating civil commitment, registration and notification laws, residential restrictions, and a variety of other provisions seeking to limit the proximity of offenders to children and other potential victims.

#### A. *Civil Commitment*

Among the most aggressive of the predator laws are those aimed at civil commitment. Often referred to as sexually violent predator (SVP) laws, these allow states to civilly commit, for an indefinite period of time, sex offenders who have been, or are about to be, released from prison.<sup>29</sup> By 2008, twenty states had enacted some form of SVP laws,<sup>30</sup> and Congress had passed a federal civil commitment program as part of the Adam Walsh Act.<sup>31</sup> SVP laws generally require a showing of four elements to support

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26. See Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 20 (2008) (citing the following sexual homicides: Jacob Wetterling (Minn., 1989), Polly Klass (Cal., 1993), Megan Kanka (N.J., 1994), Alexandra Zapp (Mass., 2002), Dru Sjodin (N.D., 2003), Jessica Lunsford (Fla., 2005), and others).

27. *Id.*

28. *Id.*

29. In Minnesota, if an incarcerated criminal was convicted of a sexual offense and poses a high risk of re-offending, the Department of Corrections must make a determination of that offender's suitability for commitment at least twelve months before the prisoner is scheduled for release. MINN. STAT. § 244.05, subdiv. 7 (2009). If the state does commit the sex offender, he or she is transferred directly to the Minnesota Sex Offender Program (MSOP) and remains in MSOP custody until a special review board declares the individual fit for release. MINN. STAT. § 253B.185, subdiv. 2, 9 (2009).

30. Janus & Prentky, *supra* note 25, at 91.

31. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, §§ 301, 302, 120 Stat. 587 (2006) [hereinafter Adam Walsh Act]. The Adam Walsh Act is also a memorial law named for Adam Walsh, who was abducted when he was six years old. Each provision of the Act is also named for a child victim of a highly publicized crime.

commitment. First, the state must show that the offender has engaged in sexually harmful conduct. Thus, most individuals committed under SVP laws are nearing the end of criminal sentences for sexual offenses.<sup>32</sup> Second, the offender must have a current mental disorder. Under Minnesota law, the state must show that the individual has a “sexual, personality, or other mental disorder or dysfunction.”<sup>33</sup> Third, the state must prove that the individual poses a risk of future sexual offending.<sup>34</sup> Finally, there must be a nexus between the offender’s mental disorder and the risk of recidivism.<sup>35</sup>

In their first incarnation in the 1930s and 1940s, sex offender commitment laws claimed benevolent intentions, finding support in progressive psychiatry and the notion that all human beings are redeemable.<sup>36</sup> This idealistic view faded, and the commitment laws adopted in the past two decades are frankly preventive. Treatment is relegated to a secondary purpose.<sup>37</sup>

Civil commitment serves as a convenient means of incarcerating sex offenders in a manner that “avoid[s] the tightly bounded, constitutionally circumscribed tools of criminal law.”<sup>38</sup> Politicians rationalize this material diminution in protections surrounding the restriction of individual liberty under SVP laws as a necessary cost to protect public safety. After all, states often restrict individual freedom to benefit the general public.<sup>39</sup> This cost-

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32. See MINN. STAT. § 244.05, subdiv. 7 (2009).

33. See MINN. STAT. § 253B.02, subdivs. 18b, 18c (2009).

34. See, e.g., MINN. STAT. § 253B.02, subdiv. 18b (2009) (stating that an individual must evidence “an utter lack of power to control the person’s sexual impulses and, as a result, is dangerous to other persons”); MINN. STAT. § 253B.02, subdiv. 18c(a)(3) (2009) (“A ‘sexually dangerous person’ means a person who . . . is likely to engage in acts of harmful sexual conduct . . .”).

35. See MINN. STAT. § 253B.02 subdivs. 18b, 18c (2009) (both using the phrase “as a result” to connect the offender’s mental disorder or abnormality to the risk of recidivism). See also Eric S. Janus, *Sexual Predator Commitment Laws: Lessons for Law and the Behavioral Sciences*, 18 BEHAV. SCI. & L. 5, 9 (2000) (providing a more detailed discussion of these four factors and the applicable laws in both Minnesota and Kansas).

36. See Janus & Prentky, *supra* note 25, at 91.

37. See *id.*

38. Eric S. Janus & Brad Bolin, *An End-Game for Sexually Violent Predator Laws: As-Applied Invalidation*, 6 OHIO ST. J. CRIM. L. 25, 25 (2008). See also Psychopathic Personalities Subcommittee, *Report*, in MINN. DEP’T OF HUM. SERVS., REPORT TO THE COMMISSIONER: COMMITMENT ACT TASK FORCE 45, 48–50 (1988) (advising that the state may circumvent the procedural safeguards of the charge-and-convict paradigm by civilly committing sex offenders).

39. See Janus & Prentky, *supra* note 25, at 90.

benefit analysis is said to support SVP laws so long as the benefit to society outweighs the harm to the individual.<sup>40</sup> Given the sensational media attention and moral panic surrounding sexual offenses, it is unsurprising that the public takes little issue with SVP laws.

Furthermore, courts have repeatedly upheld SVP laws against constitutional challenges.<sup>41</sup> These decisions clearly indicate that civil commitment is proper only so long as confinement is non-punitive and reasonably related to treatment purposes.<sup>42</sup> However, it is unclear whether courts are willing to monitor the implementation of these laws to ensure that states follow through on their promises to maintain a non-punitive purpose.<sup>43</sup> For example, the Minnesota Sex Offender Program (MSOP) has not released a single “patient” in the eighteen years since the civil commitment laws have become operational.<sup>44</sup> Despite this record, the Minnesota Court of Appeals recently refused to examine the persistent patterns of administration to determine whether the

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40. *Id.*

41. *See, e.g.,* *Kansas v. Hendricks*, 521 U.S. 346 (1997) (concluding that civil commitment under SVP laws does not constitute punishment and, therefore, upholding Kansas SVP laws against the constitutional challenges of violating double jeopardy and *ex post facto* incarceration); *see also In re Linehan*, 594 N.W.2d 867 (Minn. 1999), *cert. denied sub nom. Linehan v. Minnesota*, 528 U.S. 1049 (1999) (upholding Minnesota SVP laws against constitutional substantive due process challenges).

42. *See, e.g.,* *Kansas v. Crane*, 534 U.S. 407, 412 (2002) (warning that civil commitment may not become a “mechanism for retribution or deterrence”); *Hendricks*, 521 U.S. at 357 (holding that confinement should be reserved for only the most dangerous offenders); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994) (upholding Minnesota SVP provisions “[s]o long as civil commitment is programmed to provide treatment and periodic review”).

43. *See, e.g., In re Civil Commitment of Travis*, 767 N.W.2d 52, 67 (Minn. Ct. App. 2009) (holding that there is no precedent for judicial examination of the pervasive and systematic implementation of civil commitment laws to determine their constitutional validity).

44. *See* Larry Oaks, *Locked in Limbo*, STAR TRIB. (Minneapolis), June 8, 2008, at A1 (“Just 24 men have met what has proved to be the only acceptable standard for release. They died.”); Eric Janus & Nancy Walbek, *Sex Offender Commitments in Minnesota: A Descriptive Study of Second Generation Commitments*, 18 BEHAV. SCI. & L. 343 (2000) (“No individual committed after 1988 was on provisional discharge as of December 1999.”); Audio recording: Dennis Benson, Executive Director of Minnesota Sexual Offender Program, Minn. Senate Comm. Hearings, held before Health & Hum. Servs. Budget Div. (Feb. 4, 2009), *available at* <http://www.senate.leg.state.mn.us/media> [hereinafter Senate Hearings] (reporting that only one of approximately 500 committees in the MSOP currently resides in the transitional phase of treatment).

state's avowals of a proper purpose have been faithfully implemented.<sup>45</sup>

### *B. Registration and Notification Laws*

Those convicted sex offenders who escape civil commitment may still face long-term consequences after incarceration. Registration laws require convicted sex offenders to register with local law enforcement agencies for a period of time after their release from prison.<sup>46</sup> Notification laws require these agencies to notify the communities in which the sex offender lives and works of his or her presence.<sup>47</sup>

#### *1. Jacob Wetterling Act*

The first federal registration law was the Jacob Wetterling Act, which Congress passed as part of the Violent Crime Control and Law Enforcement Act of 1994.<sup>48</sup> This federal law required states to pass registration laws or forfeit 10% of federal crime monies.<sup>49</sup> The Jacob Wetterling Act mandated all sex offenders convicted of assaulting children to register with local agencies for ten years following their release from prison.<sup>50</sup> The Jacob Wetterling Act did not contain a mandatory notification provision—information about the location of the registrants' residences and places of employment remained with the local law enforcement agencies, which had the power to notify the public at their own discretion.<sup>51</sup>

#### *2. Megan's Law*

The Jacob Wetterling Act was superseded by Megan's Law. Like the Jacob Wetterling Act, Megan's Law is named after the victim of sexual homicide.<sup>52</sup> In 1994, just a year after President Clinton signed the Jacob Wetterling Act into law, seven-year-old Megan Kanka was raped and murdered by a neighbor who invited

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45. See *In re Travis*, 767 N.W.2d at 67.

46. See Corrigan, *supra* note 13, at 284.

47. See *id.* at 285–86.

48. Jacob Wetterling Crimes Against Children Registration Act, H.R. 324, 103rd Cong. (1993) [hereinafter Jacob Wetterling Act].

49. *Id.* at § 2(f).

50. *Id.* at § 2(d)–(e). Sex offenders who failed to register faced consequences under the enacted state laws. *Id.*

51. *Id.* at § 2(b).

52. Corrigan, *supra* note 13, at 268.

her to his home to play with a puppy.<sup>53</sup> The neighbor, Jesse Timmendequas, was a convicted and registered sex offender who previously victimized children.<sup>54</sup> Although local New Jersey law enforcement knew Timmendequas's whereabouts, they did not inform the community.<sup>55</sup> Outraged, Kanka's parents petitioned lawmakers to require the agencies to notify communities when a registrant took up residence.<sup>56</sup> In 1996, Congress amended the Jacob Wetterling Act and made notification compulsory.<sup>57</sup>

### 3. *Adam Walsh Act*

On July 27, 2006, President Bush signed into law the most recent, and most expansive, federal sexual predator law.<sup>58</sup> The Adam Walsh Act increased federal sentences for sexual crimes, implementing minimum prison terms of thirty years to life for sexual homicide, aggravated sexual abuse, or sexual exploitation of minors<sup>59</sup> and a minimum of ten years to life imprisonment for coerced sexual acts with minors.<sup>60</sup> In addition, Title I of the Adam Walsh Act contains the Sex Offender Registration and Notification Act (SORNA) which further expands the provisions of the Jacob Wetterling Act and Megan's Law. Like the previous federal sex offender laws, these provisions of the Adam Walsh Act require states to enact its provisions or forfeit 10% of federal crime funds.<sup>61</sup> Under these standards, state law enforcement agencies must provide a sex offender's information to all area schools, organizations with members who are vulnerable adults or children, and any other entity or person who requests such information.<sup>62</sup> All convicted sex offenders over the age of fourteen must register for a length of time as determined by the convicted offense.

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53. *Id.* at 267.

54. *Id.*

55. *Id.* at 296–97.

56. *Id.* at 267.

57. Megan's Law, 42 U.S.C. § 14071 (2000 & Supp. 2004) [hereinafter Megan's Law].

58. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006) [hereinafter Adam Walsh Act].

59. *Id.* at § 202(f)(1), 120 Stat. at 612–13.

60. *Id.* at § 202(f)(3), 120 Stat. at 613.

61. *Id.* at § 125(a), 120 Stat. at 598. These funds are allotted to the states under the Edward Byrne Memorial Justice Assistance Grant Program.

62. *Id.* at § 103, 120 Stat. at 591. The full name of the provision is the Jacob Wetterling, Megan Nicole Kanka, Pam Lyncher Sex Offender Registration and Notification Program. *Id.*

SORNA divides sexual offenses into three tiers. Tier III includes all sex offenders convicted of conspiracy sexual crimes, aggravated sexual abuse, or sexual abuse against a child under the age of thirteen.<sup>63</sup> These offenders must register for the rest of their lives.<sup>64</sup> Tier II offenders were convicted of a sexual offense against a minor and must register for twenty-five years.<sup>65</sup> Tier I is a catch-all provision that requires all other sex offenders to register for fifteen years.<sup>66</sup> Failing to register can result in a federal felony conviction.<sup>67</sup>

### C. *Residency Restrictions*

In addition to registering with local authorities, sex offenders must often comply with restrictions on where they may reside. Most residential restriction programs prohibit convicted sex offenders from residing within a certain distance, usually 500 to 2500 feet, of daycare centers, schools, parks, and other locations where children gather.<sup>68</sup> These laws attempt to prevent recidivism by segregating sex offenders from vulnerable populations. In the last decade, twenty-three states have enacted statewide sex offender residency restrictions.<sup>69</sup> In Minnesota, these laws are passed at the local level as ordinances.<sup>70</sup> Nationally, as a result of some more

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63. *Id.* at § 111, 120 Stat. at 591.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at § 113(e), 120 Stat. at 594.

68. See Grant Duwe, Minn. Dep't of Corrections, *Residency Restrictions and Sex Offender Recidivism: Implications for Public Safety*, 2 GEOGRAPHY & PUB. SAFETY 6, 6 (2009); MINN. DEP'T OF CORRECTIONS, LEVEL THREE SEX OFFENDERS: RESIDENTIAL PLACEMENT ISSUES 9–11 (2003) (warning the Minnesota legislature of the adverse effects that may result from the adoption of a 1500-foot proximity restriction for Level III Sex Offenders).

69. See GARRINE P. LANEY, DOMESTIC SOC. POLICY DIV., CRS REPORT FOR CONGRESS: RESIDENCE RESTRICTIONS FOR RELEASED SEX OFFENDERS 18–26 (2008), available at [http://www.criminallawlibraryblog.com/CRS\\_RPT\\_DomesticViolence\\_02-05-2008.pdf](http://www.criminallawlibraryblog.com/CRS_RPT_DomesticViolence_02-05-2008.pdf) (citing the statute and provisions of each state's sex offender residency restriction).

70. See *id.* (describing a study of those counties with residency restrictions and the likely impact of a statewide residency restriction). The Minnesota state legislature declined to enact a statewide law that would impose a specific distance restriction upon sex offenders released from prison. See LANEY, *supra* note 69, at 22. Instead, an end-of-confinement review committee evaluates and assigns a risk level to each offender prior to release. MINN. STAT. § 244.052, subdiv. 3(g)(1) (2009). If the offender's assigned risk level is sufficiently high, the committee *may* impose residency restrictions as a condition of the offender's release. *Id.* at

extreme provisions<sup>71</sup> many sex offenders are forced to live in unsafe conditions, such as under bridges,<sup>72</sup> conditions which are thought to impede both supervision and rehabilitation.

#### IV. DISCONNECT BETWEEN LAW, POLICY, AND REALITY

##### A. *Reframing the Empirical Assumptions Underlying Sexual Predator Laws.*

Unsurprisingly, distorted assumptions about the nature and prevalence of child sexual abuse have led to distortions in our approaches to prevention. To correct the errors in our public policy, we must begin by focusing carefully on what is known empirically about child sexual abuse, and reframing the questions we ask, and assumptions we make, to minimize these distortions.

Much of the concern and public panic surrounding the issue of child sexual abuse stems from incorrect assumptions about the prevalence of child sexual abuse. To determine prevalence rates for child sexual abuse, researchers agreed upon a general definition for child sexual abuse. Child sexual abuse occurs when a person engages in sexual activities with a child in a coercive context.<sup>73</sup> Sexual abuse can involve contact with the child, such as penetration, frotteurism, or sexual touching, but it can also include noncontact behaviors such as exhibitionism, voyeurism, and pornography.<sup>74</sup> In this definition, coercion occurs when: (1) an offender is older than the victim or has a greater maturity level, (2) the abuse takes place during a period when the offender is acting as a caretaker for the child, or (3) the offender employs force or fraud to cajole the child into engaging in abusive behavior.<sup>75</sup>

When contemplating a new frame for viewing and analyzing child sexual abuse, it is important to understand what is currently

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§ 244.052, subdiv. 3(k).

71. See, e.g., GA. CODE ANN. § 42-1-15 (1997 & Supp. 2009) (preventing sex offenders from living within 1000 feet of “areas where minors congregate,” including all school bus stops).

72. See Damien Cave, *Roadside Camp for Miami Sex Offenders Leads to Lawsuit*, N.Y. TIMES, July 9, 2009, at A14, available at <http://www.nytimes.com/2009/07/10/us/10offender.html>.

73. Finkelhor, *supra* note 2, at 33.

74. *Id.* Studies show that penetration is most common among adolescent victims, especially when the abusive relationship has occurred over a long period of time. *Id.* at 42.

75. *Id.* at 33.



known about the issue. First and most important, authoritative studies show that child sexual abuse is declining.<sup>76</sup> From 1992 to 2000, the number of reported child sexual abuse cases decreased by forty percent.<sup>77</sup> Although some scholars attribute this decline to extraneous factors, the Office of Juvenile Justice and Delinquency Prevention concluded that the decline was both real and statistically significant.<sup>78</sup>

Despite the decline, it remains true that most sexual violence is directed against the young.<sup>79</sup> Sixty-six percent of sexual offenders in prison in 1991 had assaulted victims under the age of eighteen.<sup>80</sup> One-third of all sexual assaults committed between 1991 and 1996 involved victims younger than twelve years.<sup>81</sup> Drawing from a host of research, it appears the individuals most vulnerable to sexual abuse are children between the ages of seven and thirteen.<sup>82</sup>

Turning from victims to perpetrators of child sexual abuse, the

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76. DAVID FINKELHOR & LISA M. JONES, U.S. DEP'T OF JUSTICE, EXPLANATIONS OF THE DECLINE IN CHILD SEXUAL ABUSE CASES (2004), *available at* <http://www.ncjrs.gov/pdffiles1/ojjdp/199298.pdf>. It should be noted that statisticians face many difficulties in calculating accurate offense rates. One obvious problem lies in the very definition of child sexual abuse. Various jurisdictions have different laws about who is a child. Finkelhor, *supra* note 2, at 34.

77. FINKELHOR & JONES, *supra* note 76, at 1 (stating that the number of substantiated cases decreased from 150,000 to 89,500 in the eight years leading up to the new millennium).

78. *Id.* at 2-3, 10-11. The bulletin authors explored six possible causes for the decline in substantiated child abuse cases: (1) changing standards with child protective services agencies, (2) child protective services excluding cases in which a caretaker was not the alleged abuser, (3) changes in data collection and analysis, (4) fewer reports from mandated reporters due to professional backlash, (5) fewer older cases coming forward, and (6) a real decline in incidents of abuse. *Id.* Data analysis from several states produced evidence supporting the last factor, leading the authors to conclude that the decline was real. *Id.* at 10-11.

79. In 1994, sexual assaults occurred at a rate of 4.4 per thousand for people under the age of twenty-five, 2.1 per thousand for those between the ages of twenty-five and forty-nine, and 0.1 per thousand for those over the age of fifty. CRAIG PERKINS & PATTY KLAUS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 1994, at 7 (1996), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv94.pdf>.

80. LAWRENCE A. GREENFELD, U.S. DEP'T OF JUSTICE, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 24 (1997), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/soo.pdf>.

81. HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 1, 12 (2000), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrle.pdf>.

82. *See* Finkelhor, *supra* note 2, at 48.

vast majority of child sexual offenders are male.<sup>83</sup> Those who sexually abuse children fall into one of three categories: family members, other acquaintances, or strangers.<sup>84</sup> Most sexual offenses against children are committed by family members or acquaintances.<sup>85</sup> The younger the age of the victim, the more likely it is that the offender will be known to the child.<sup>86</sup> Over 90% of offenders who sexually abused children under the age of twelve were family members or other acquaintances intimately associated with the victim as compared to approximately 60% of offenders whose victims were over the age of eighteen.<sup>87</sup> Strangers perpetrated just 3% of the sexual assaults against children under age six, and 5% of the sexual assaults committed against children between the ages of six and eleven.<sup>88</sup> In contrast, abuse within the family accounts for less than half of the cases reported in retrospective studies of adults.<sup>89</sup>

The fact that most child sexual abusers are known to their victims calls into question the effectiveness of civil commitment and registration laws. The majority of child sexual abusers are not deranged strangers lurking around dark corners, but intimates and acquaintances such as coaches and babysitters. Critics are even skeptical as to whether registration and notification laws could have saved Megan Kanka because many people in Megan's

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83. GREENFELD, *supra* note 80, at 21 (concluding that over 96% of all violent offenders and over 98% of sexual assault offenders are male).

84. Finkelhor, *supra* note 2, at 45.

85. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 23 (2006), *available at* <http://www.ncjrs.gov/pdffiles1/nij/210346.pdf> (strangers are responsible for only 10.8% of sexual assaults against girls and 15.7% of sexual assaults against boys); GREENFELD, *supra* note 80, at 11 (reporting that children are sexually assaulted by someone familiar to them in at least 90% of cases); Finkelhor, *supra* note 2, at 45 (“[V]ictims of abuse indicate that no more than 10% to 30% of offenders were strangers, with the remainder being either family members or acquaintances.”). In fact, the disproportionate number of offenders who are acquaintances of the victims can also be seen in sexual assaults and rapes against adult women. TJADEN & THOENNES, *supra* at 24.

86. GREENFELD, *supra* note 80, at 11.

87. *Id.* This trend applies to all sexual assaults, not just those involving children as victims. In a meta-analysis of more than two-dozen sets of statistical data collected at the national level, the Department of Justice Office of Justice Programs found that 37.7% of all victims of sexual assaults were related to their attacker and an additional 41.2% of the victims were somehow acquainted with the perpetrator. *Id.* at 24.

88. SNYDER, *supra* note 81, at 13.

89. Finkelhor, *supra* note 2, at 46.

neighborhood *did* know her attacker and his history.<sup>90</sup> Additionally, because so many incidents of sexual abuse are not reported to law enforcement officials, many offenders will never come in contact with the criminal justice system and will never have to register as a sexual offender.<sup>91</sup>

Furthermore, it is necessary to reframe the issue of child sexual abuse to focus on the root causes of the abuse rather than on a small number of repeat offenders. Civil commitment incapacitates a very small proportion of those offenders who will recidivate and provides no protection against initial (non-recidivist) sexual offenses. Consider the facts. Of the incidents of sexual abuse that occur on any given day, only a portion will be reported to the authorities. Of the reported cases, only a portion will be substantiated and prosecuted. Of prosecuted cases, only a portion will be convicted, and many will be placed on probation rather than sent to prison. Only a small percentage of those imprisoned will be civilly committed.

In addition to shifting the focus of child sexual abuse prevention to stopping the problem before it begins, it is necessary to reframe the policy to focus more on victims and their needs. Here is the sad irony of current legislation: although politicians name sex offender laws after victims of horrific and publicized crimes—the Adam Walsh Act being the *pièce de résistance* with seventeen victims “memorialized” in its provisions<sup>92</sup>—the laws focus on a small, atypical group of offenders without providing meaningful relief to victims. If sex-offender laws were truly about the victims and preventing sexual abuse in the future, they would include legislative provisions allocating funds for victim counseling and research into programs that address the underlying causes of abuse.<sup>93</sup>

Finally, a sex offender policy that truly cared about victims and prevention would focus on—rather than flout—the precious

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90. Tim O'Brien, *Would Megan's Law Have Saved Megan?*, N.J.L.J., July 8, 1996 at 1.

91. See R. Karl Hanson, *What Do We Know About Sex Offender Risk Assessment?*, 4 PSYCHOL. PUB. POL'Y & L. 50, 56 (1998).

92. See generally Adam Walsh Act, Pub. L. No. 109-248 (2006) (naming provisions after seventeen child victims of sexual crimes over the past seventeen years).

93. Cynthia A. King, Note, *Fighting the Devil We Don't Know: Kansas v. Hendricks, A Case Study Exploring the Civilization of Criminal Punishment and its Ineffectiveness in Preventing Child Sexual Abuse*, 40 WM. & MARY L. REV. 1427, 1462-63 (1999).

empirical knowledge that we have garnered about sexual violence. The rush, in multiple localities, to adopt residential restrictions on sex offenders is a prime example. The overwhelming weight of empirical evidence concludes that residential restrictions are counterproductive. To take one example, a 2003 study by the Minnesota Department of Corrections concluded that there was no correlation between level three sex offenders' proximity to schools and parks and the recidivism rates of these offenders.<sup>94</sup> Researchers note that sexual offenders "rarely established direct contact with victims near their own homes."<sup>95</sup> In fact, public safety becomes a problem when sex offenders live in confined spaces, such as under bridges, and create disturbances and dangerous situations requiring police intervention.<sup>96</sup> Furthermore, research in the Twin Cities area showed that residency restrictions compromised public safety because sex offenders who were unable to find stable housing were more likely to recidivate.<sup>97</sup> For example, the American Civil Liberties Union recently filed a lawsuit against Miami-Dade County in Florida alleging that a 2,500-foot residential restriction is unconstitutional and makes it more likely that sex offenders will "flee supervision and commit new crimes."<sup>98</sup>

*B. Disproportionate Impact on Juvenile Sex Offenders*

Perhaps unwittingly, registration and notification laws have a disproportionate—and harsh—impact on sex offenders who are themselves children. Juvenile offenders are responsible for a large percentage of sexual offenses committed against children.<sup>99</sup> In a national study, researchers found that 23% of sexual assault offenders were under the age of eighteen and 16% of these offenders were under the age of twelve.<sup>100</sup> The peak age for

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94. MINN. DEP'T OF CORR., LEVEL THREE SEX OFFENDERS: RESIDENTIAL PLACEMENT ISSUES, 2003 REPORT TO THE LEGISLATURE 9 (2003). See, e.g., Janus & Prentky, *supra* note 25, at 91 n.24 (listing studies from a several states that reached conclusions similar to the Minnesota study).

95. Duwe, *supra* note 68, at 8.

96. Cave, *supra* note 72.

97. Duwe, *supra* note 68, at 8.

98. Cave, *supra* note 72.

99. See Janus & Prentky, *supra* note 25, at 91; see also Judith V. Becker, *Offenders: Characteristics and Treatment*, 4 THE FUTURE OF CHILD. 176, 177 (1994) (stating that one study reports this number to be as high as 50% of sexual offenders).

100. SNYDER, *supra* note 81, at 8. Of these juvenile offenders, only 7% committed a forcible rape. *Id.* Juvenile offenders were more likely to engage in

juvenile sexual offending appears to be fourteen years.<sup>101</sup> A significant percentage of the sexual assaults committed against very young children were committed by children. Forty percent of perpetrators who victimized children under the age of six were themselves juveniles, and 39% of offenses against children between the ages of six and eleven were committed by juveniles.<sup>102</sup>

Some indices of juvenile sex offending have increased in recent years, and some media have translated the increase into frightening headlines.<sup>103</sup> But responsible researchers do not attribute the increased number of convicted juvenile sexual offenders to an epidemic of criminality or sexual deviancy. In fact, recidivism rates for juvenile sex offenders are as low or lower than recidivism rates for adult sex offenders, and lower than those for juvenile delinquents convicted of non-sexual crimes. Psychologist Robert Prentky found that only 7.5% of juvenile sex offenders were convicted of another sexual offense within twenty months of their release from incarceration.<sup>104</sup> Similarly low rates of reoffending were found in other studies.<sup>105</sup> Prentky ascribes the increase to the expanding reach of registration and notification laws and believes the statistics are skewed: “There aren’t more kids, there are more laws.”<sup>106</sup>

Most sexual predator laws include juvenile sex offenders. The Amie Zyla provision of the Adam Walsh Act requires states to

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fondling (19%), sodomy (23%), and sexual assault with an object (17%). *Id.*

101. *Id.*

102. *Id.*

103. Associated Press, *Sex Offenders Getting Younger, More Violent*, MSNBC, June 9, 2007, available at <http://www.msnbc.msn.com/id/19143411> [hereinafter MSNBC].

104. See Elizabeth Garfinkle, Comment, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163, 193–94 (2003) (citing Robert Prentsky [sic] et al., *An Actuarial Procedure for Assessing Risk with Juvenile Sex Offenders*, 12 SEXUAL ABUSE: J. RES. & TREATMENT 71, 73 (2000)).

105. See, e.g., Nicholas R. Barnes, *The Polygraph and Juveniles: Rehabilitation or Overreaction? A Case against the Current Use of Polygraph Examinations on Juvenile Offenders*, 39 U. TOL. REV. 669, 685 (2008) (stating that recidivism rates among juvenile sex offenders range from 5%–15%); Lorraine Reitzel & Joyce Carbonell, *The Effectiveness of Sexual Offender Treatment for Juveniles as Measured by Recidivism: A Meta-Analysis*, 18 SEX ABUSE 401, 413 (2006) (finding that only 7.37% of treated juvenile sex offenders and 18.93% of untreated offenders recidivated); Wright, *supra* note 26, at 27 (reporting that in a study of 300 juvenile sex offenders in Texas, only thirteen (4.3%) were re-arrested for a subsequent sexual offense).

106. MSNBC, *supra* note 103 (“We now have fairly draconian laws with very harsh sanctions that apply to juveniles.”).

include juveniles over the age of fourteen at the time of the offense in all sex offender registries and notifications.<sup>107</sup> States must enact some version of this provision to qualify for federal crime funds.<sup>108</sup> Thirty-eight states include the registration of juvenile sex offenders in sex offender registries without any restrictions, treating juvenile and adult sex offenders in the same manner.<sup>109</sup>

This equal treatment of juvenile and adult offenders illuminates the primary problem with juvenile sex offender provisions—lawmakers’ “failure to address the developmental aspects of juvenile offending, or the relationship or lack of relationship between sexual deviance and social offending in youth, or the contrast or similarities between juvenile and adult sex offending.”<sup>110</sup> The basic tenet of the juvenile justice system is that children are different from adults and can be rehabilitated.<sup>111</sup>

Here is a key irony. Children are, apparently, not competent to drink alcohol until they are twenty-one. They must wait until they turn eighteen for emancipation and the right to vote. Before age seventeen, they may not see R-rated movies without parental supervision. But at fifteen, they may register as sex offenders for, potentially, the rest of their lives.

Requiring children to identify themselves as sexual offenders for decades is directly at odds with the principle underlying all of these age-related restrictions on children: children attain full maturity and responsibility only late in adolescence and early in

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107. Adam Walsh Act § 111, 120 Stat. at 592–93.

108. *Id.* § 125(a), 120 Stat. at 598.

109. Richard L. Frierson, *The Mandatory Registration of Juvenile Sex Offenders and Commitment of Juveniles as Sexually Violent Predators: Controversies and Recommendations*, in 30 *ADOLESCENT PSYCHIATRY* 55, 57 (2008). Eleven of the remaining states will register juveniles as sex offenders under specified circumstances. *Id.*

110. Caitlin Young, Note, *Children Sex Offenders: How the Adam Walsh Child Protection and Safety Act Hurts the Same Children It is Trying to Protect*, 34 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 459, 465 (2008) (quoting FRANKLIN E. ZIMRING, *AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING* 86 (2004)). This failure to distinguish between children and adults represents a return to the beginning of this country’s history when the American criminal justice system lacked formal distinction between juveniles and adults. See Ellie D. Shefi, *Waiving Goodbye: Incarcerating Waived Juveniles in Adult Correctional Facilities Will Not Reduce Crime*, 36 *U. MICH. J.L. REFORM* 653, 656 (2003).

111. See Jeffrey J. Shook, *Contesting Childhood in the US Justice System: The Transfer of Juveniles to Adult Criminal Court*, 12 *CHILDHOOD* 461, 462–64 (2005); Emily A. Polachek, Note, *Juvenile Transfer: From “Get Better” to “Get Tough” and Where We Go From Here*, 35 *WM. MITCHELL L. REV.* 1162, 1166–67 (2009) (discussing the history of and theory behind the development of juvenile courts).

adulthood. Children grow and mature and change. Rehabilitation, in other words, of juvenile sexual abusers ought not be a dubious hypothesis, but rather an assumed a self-evident aspect of the normal developmental sequence for adolescents. Given the low rates of recidivism among juvenile sex offenders, the rehabilitative aims of the juvenile justice system, and the harsh consequences of registration and notification, requiring juveniles to register as sex offenders harms more children than it will protect.

C. *Over-focus on Recidivism*

Sexual predator laws are, at their base, aimed at preventing *recidivist* sexual violence. A basic tenet underlying the enactment of sex offender laws, including civil commitment laws, registration, and notification laws, is the belief that sex offender recidivism is high. This focus on recidivism is problematic for several reasons.

First, studies with the strongest methodology show that the recidivism rate for sex offenders is as low, and often lower, than re-offense rates for criminals convicted of non-sexual crimes.<sup>112</sup> Reporters and politicians paint a frightening picture for the general public, perpetuating the idea that sex offenders are monsters who cannot help but re-offend. Legislative pronouncements and findings supporting sex offender laws often spout statistics borne of fuzzy math. For example, during House debates regarding the passage of Megan's Law, Minnesota Representative Betty McCollum reported to Congress that the increase in violent crimes over thirty years from 200 to 700 incidents per 100,000 Americans represented a 500% increase, when in fact, this change represents a 250% increase.<sup>113</sup> Politicians also ignore the scientific research concerning sex offender recidivism rates. For example, the Florida Sexual Predator Act includes legislative findings stating that "sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety . . . [and] are extremely likely to use physical violence and to repeat their offenses."<sup>114</sup> Similarly, the Oklahoma

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112. See R. Karl Hanson, *Will They Do It Again? Predicting Sex Offense Recidivism*, 9 CURRENT DIRECTIONS PSYCHOL. SCI. 106, 106 (2000) [hereinafter Hanson, *Will They Do It Again?*].

113. Garfinkle, *supra* note 104, at 170 n.48 (2003) (citing 142 CONG. REC. H4452 (daily ed. May 7, 1996) (statement of Rep. McCollum)).

114. FLA. STAT. ANN. § 775.21 (West 2008).

civil commitment statute states that “[t]he Legislature finds that sex offenders who commit other predatory acts against children and persons who prey on others as a result of mental illness pose a high risk of re-offending after release from custody.”<sup>115</sup>

These assertions of high recidivism risk are simply incorrect. A comprehensive review of over sixty recidivism studies, reviewing information on 24,000 sex offenders, researchers found that only 13.4% of convicted sex offenders committed another sexual offense within five years of their release.<sup>116</sup> A more recent study from the United States Department of Justice followed 9,691 sex offenders released from prison in fifteen states, including Minnesota.<sup>117</sup> The study found that over a three-year period, only 5.3% of the sex offenders were arrested for committing another sexual offense.<sup>118</sup> Those convicted of sexually abusing a child re-offended at an even lower rate of 3.3%.<sup>119</sup> Although these numbers may not reflect unreported sexual crimes against children, “even with long follow-up periods and thorough searches, studies rarely find sex-offense recidivism rates greater than 40%.”<sup>120</sup>

The results of these recidivism studies show a clear disconnect between sex offender laws and reality. Civil commitment is premised on the need to protect society from repeat sexual offenders. However, even the most liberal estimate of recidivism shows that at least 60% of convicted sexual offenders will not

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115. OKLA. STAT. ANN. tit. 57, § 581(B) (West 2009).

116. R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 357 (1998). This study included both adult and juvenile offenders; some critics believe the juvenile sample population may lower the recidivism rates. See generally Hanson & Bussière, *supra*. However, another meta-analysis of seventy-nine studies of treated and untreated sex offenders found that only 14.4% of treated child molesters (25.8% of untreated child molesters) later recidivated. Lisa C. Trivits & N. Dickon Reppucci, *Application of Megan’s Law to Juveniles*, 57 AM. PSYCHOL. 690, 699 (2002).

117. PATRICK A. LANGAN, ERICA L. SCHMITT & MATTHEW R. DUROSE, U.S. DEP’T OF JUSTICE, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994*, 1 (2003). Minnesota was one of the fifteen states included in this study. *Id.* Although sex offenders can be female, this study looked only at male offenders. *Id.*

118. *Id.* at 38. Thirty-four percent of the re-arrested sex offenders were never convicted of the subsequent offense. *Id.* at 1–2.

119. *Id.* at 31. The researchers acknowledged the underreporting problem, but argued that it is unlikely that the recidivism rate for child molesters exceeds the 5.3% recidivism rate for all sex offenders. *Id.*

120. Hanson, *Will They Do It Again?*, *supra* note 112, at 106. See also Hanson & Bussière, *supra* note 116, at 348–62.



commit another sexual offense.<sup>121</sup> Given that Minnesota has the second highest number of civilly committed sex offenders,<sup>122</sup> the state may currently deprive any number of individuals of their liberty for no articulable reason. And because registration and notification laws apply to *every* convicted sex offender, it is inevitable that a great majority of these ex-convicts are baselessly subjected to community ridicule and hatred.

In addition to the false positive problem, civil commitment can also result in a high number of false negatives. Using Minnesota as an example, past studies showed a recidivism rate of approximately 18% with a follow-up period of a little more than six years.<sup>123</sup> Minnesota civilly commits between 4% and 5% of convicted sex offenders.<sup>124</sup> Assuming (optimistically) that every individual sent to MSOP was a recidivist, the state is incapacitating less than 30% of those individuals who will reoffend, leaving 70% of recidivists to return to the community.<sup>125</sup>

#### D. *Financial Impracticability*

In addition to the copious amounts of political and scientific resources dedicated to the prevention of recidivist sex violence, our current frame for addressing child sexual abuse requires significant monetary support. Although it may seem that SVP laws are worthwhile if they incapacitate even one future recidivist, the laws operate at a steep cost to the state, thus, to the public fight against sexual violence. The state of Minnesota does not have unlimited revenue and the resources used to fund sex offender commitments necessarily detract from thinly stretched dollars used for other prevention programs. In 2002, the state of Minnesota spent \$20 million on committed sex offenders, and this number rose to \$30.6 million by 2006.<sup>126</sup> In 2009, in the midst of the nationwide economic crisis, MSOP requested an emergency budget increase to prevent a \$25 million deficiency.<sup>127</sup> Less than an hour before

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121. *See id.*

122. Senate Hearings, *supra* note 44 (statement of Dennis Benson, Executive Director of Minnesota Sexual Offender Program). California has the most committed sex offenders with Minnesota in a close second, and this statistic is not per capita. *Id.*

123. JANUS, *supra* note 9, at 63 (citations omitted).

124. *Id.*

125. *Id.*

126. *See* JANUS, *supra* note 9, at 62 (citations omitted).

127. Senate Hearings, *supra* note 44 (statement of MSOP Executive Director

Dennis Benson, the Executive Director of MSOP, made this request to the legislature, the Minnesota Department of Human Services reported that family programs such as Minnesota Family Investment Program (MFIP) and food stamps were operating at a deficit.<sup>128</sup> Nevertheless, the Senate approved a \$16 million budget increase for MSOP.<sup>129</sup> This increase poses problems for all state-run programs, including primary prevention efforts to stop sexual violence.<sup>130</sup>

The cost of registration and notification laws, though less than civil commitment laws, is nonetheless not insignificant, especially in large metropolitan areas where there are large numbers of registered sex offenders.<sup>131</sup> Under the Adam Walsh Act, states must maintain a current photograph of each registered offender as well as a website that is available to the public, both of which require state resources.<sup>132</sup> Additionally, defendants charged with sexual offenses are less willing to enter into plea agreements knowing that they will have to register as sex offenders.<sup>133</sup> Trying these defendants expends limited court and public defender resources. Considering the ineffectiveness of notification laws, the potential harm arising from their over inclusiveness, and their disproportionate impact on juveniles, the cost of the program and detrimental effect on other efforts are difficult to justify.

## V. RECOMMENDATIONS FOR REFRAMING SEXUAL ABUSE POLICY

The current frame is aimed at preventing recidivists from committing future sexual offenses. We have argued in this essay that we must reframe the way we think about and attempt to prevent childhood sexual abuse, brining our focus and problem-solving further upstream, so that we approach the problem more comprehensively and systemically.

The first step must be to recognize that child sexual abuse is

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Dennis Benson).

128. *See id.*

129. Kevin Duchscherer, *Senate OKs Funds for Sex Offender Program*, STAR TRIB. (Minneapolis), March 27, 2009, at 4B, available at <http://www.startribune.com/politics/state/41952437.html>.

130. *See JANUS*, *supra* note 9, at 60.

131. Wright, *supra* note 26, at 33–34.

132. Adam Walsh Act §§ 118, 120, 120 Stat. 594, 596–97 (2006). Continuing the tradition of memorial laws, this provision is called the “Dru Sjodin National Sex Offender Public Website.”

133. *See* Corrigan, *supra* note 13, at 307.

not a problem unique to the criminal justice system. Rather, as Robert Freeman-Longo observes, “[i]t is a social issue, a religious issue, an economic issue, an emotional issue, a political issue, a spiritual issue, a health issue, an educational issue, a racial issue, a gender issue, and more.”<sup>134</sup> Because sexual abuse is a multifaceted problem, it requires a broad, multifaceted solution.<sup>135</sup> We are putting the great bulk of our resources—fiscal as well as political—into a solution aimed at a small portion of the problem.

A prime tool for refocusing the fight against sexual violence is the public health model.<sup>136</sup> The public health model was traditionally used to treat and prevent infectious diseases, such as smallpox, measles, and polio.<sup>137</sup> The methodology was expanded to deal with issues that are not “diseases” in the strict sense of the word, but that have “widespread negative effects on our society,” such as smoking, drunk driving, and the non-use of seatbelts.<sup>138</sup> The public health approach views an issue comprehensively and approaches the problem in a series of interventions derived from a systematic, empirically based examination of the problem’s causes.<sup>139</sup> Numerous organizations—such as the Center for Disease Control (CDC), World Health Assembly (WHA), American Psychological Association (APA), and the American Medical Association (AMA)—have declared generalized violence to be a societal problem and have attempted to implement a public health approach to violence prevention.<sup>140</sup> Returning to the allegory of the babies in the river, the public health model asks the villagers to follow the woman upstream to determine why the babies are falling into the river. In the case of child sexual abuse, the public health model requires policymakers to shift their focus from preventing recidivism among the “worst of the worst,” to policies that address the root causes of child sexual abuse.

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134. Robert E. Freeman-Longo, *Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 303, 304 (1997).

135. *Id.*

136. See Marsha Garrison, *Reforming Child Protection: A Public Health Perspective*, 12 VA. J. SOC. POL’Y & L. 590, 599 (2005); Janus & Prentky, *supra* note 25, at 93; Robin Fretwell Wilson, *Removing Violent Parents from the Home: A Test Case for the Public Health Approach*, 12 VA. J. SOC. POL’Y & L. 638, 638–39 (2005).

137. Hattie Ruttenberg, *The Limited Promise of Public Health Methodologies to Prevent Youth Violence*, 103 YALE L.J. 1885, 1889 (1994).

138. JANUS, *supra* note 9, at 116; see also Ruttenberg, *supra* note 137, at 1889.

139. JANUS, *supra* note 9, at 116.

140. Freeman-Longo, *supra* note 134, at 309-10.

As the root causes of sexual abuse are revealed, researchers must develop, evaluate, and implement three levels of intervention: primary, secondary, and tertiary. Secondary and tertiary interventions address individuals who have been convicted of a sexual offense. Secondary interventions concentrate prevention efforts and resources on those most likely to offend or re-offend.<sup>141</sup> Tertiary intervention focuses entirely on those with a history of offending to prevent or reduce recidivism rates.

The public health model differs from the current scheme in part because it also includes primary interventions. Primary interventions are proactive attacks on the root causes of sexual violence.<sup>142</sup> They address “attitudes, beliefs, and behaviors and thus stop sexual violence before it begins.”<sup>143</sup> Examples of primary interventions include public education about the problem of child sexual abuse, teaching children the difference between “good touches” and “bad touches,” training designed to change attitudes among adolescents about “date rape” and intimate violence, and showing children how to say “no” to those who want to engage in sexual behavior.<sup>144</sup> Primary intervention would also include better education and training for child-protection workers and closer monitoring of their cases.<sup>145</sup> In contrast to SVP laws, these primary prevention programs are relatively cheap and, in preliminary studies, have proven to be effective.<sup>146</sup>

The public health approach allows prevention efforts to focus on all types of sexual offenses, recognizing that not all sex offenders are the same.<sup>147</sup> Also unlike the federally imposed sex offender laws, the public health approach can create solutions that consider the needs of a particular community. In his article setting out a plan to end child abuse in the next 120 years, Professor Vieth asserts that “we can never launch effective prevention programs

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141. JANUS, *supra* note 9, at 116.

142. *Id.*

143. *Id.* at 118.

144. *Id.* See also Freeman-Longo, *supra* note 134, 317 (“Primary prevention will only happen with public education.”).

145. See Vieth, *supra* note 1, at 63 (setting out a plan for ending child abuse according to a specific schedule over the next 120 years).

146. See Deborah A. Daro, *Prevention of Child Sexual Abuse*, 4 THE FUTURE OF CHILDREN 198, 202 (1994); Freeman-Longo, *supra* note 134, at 319–20 (summarizing results that showed children to be capable of understanding the concepts of abuse and the methods for prevention).

147. Freeman-Longo, *supra* note 134, at 316–17 (noting the etiological differences between rape, child molestation, and other paraphilias).

unless these programs are designed at the local level by those closest to the situation and unless these programs are tailored to the dynamics unique to of each community.”<sup>148</sup>

In sum, the current frame for addressing child sexual abuse ineffectively directs political, scientific, and fiscal resources towards the prevention of recidivist sexual violence, which constitutes a small percentage of sexual offenses committed against children. We must reframe this policy and use our resources to uncover the causes of child sexual abuse and further develop primary prevention programs designed to reach a wide audience. When we focus on preventing child sexual abuse before it occurs, we will cast a wider net and perhaps discover why these babies fell in the river.

As a society, we ought to seek to eradicate the self-perpetuating scourge of child abuse. To make progress on this audacious goal, we must be careful to frame our efforts appropriately, asking—and then answering—the proper questions, basing our policies and laws not on moral panic or urban legends, not on headlines and easy sound bites, but on systemic and comprehensive empirical information about the prevalence and causes of child sexual abuse. We must abandon the facile narrative of the deranged stranger—the sexual predator—and begin to design our solutions in a way that takes full responsibility for the societal role in allowing the conditions under which sexual abuse can flourish. We have the resources, and can develop the knowledge to do this. All that is required is the will.

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148. Vieth, *supra* note 1, at 55.