

# Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform

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*The criminal regulation of sexual harm in the United States is afflicted by deep pathology. Although sexual harm appears before the law in a variety of forms—from violent rape, to indecent exposure, to the sexual touching by an older child of a younger child—the prevailing U.S. criminal regulatory framework responds to this wide range of conduct with remarkable uniformity. All persons so convicted are labeled “sex offenders,” and most are subjected to registration, community notification, and residential restrictions, among other sanctions. These measures purport to prevent the perpetration of further criminal sexual harm by publicizing the identities and restricting the residential opportunities of persons presumed to be strangers to their victims. But even as these measures render many subject to them homeless and unemployable, sexual abuse remains pervasive and significantly underreported in our schools, prisons, military, and between intimates in families. Thus, at once, the U.S. criminal regulatory regime constructs a peculiarly overbroad category of feared persons, compels a misguided approach to this population, and neglects the most prevalent forms of vulnerability to sexual predation and assault. This Essay argues that an alternative social institutional reform framework could address*

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*pervasive forms of sexual harm more meaningfully and with fewer problems than attend the prevailing criminal regulatory framework. This alternative framework would depart in large measure from purportedly preventive post-conviction criminal regulation, focusing instead on institutional, structural, and social dynamics that enable sexual violence and abuse.*

Introduction .....	1554
I. Misregulating Sexual Harm .....	1566
A. Registry .....	1573
B. Community Notification .....	1580
C. Residential Restrictions .....	1583
D. Monitoring and Sanctions .....	1591
E. Civil Commitment .....	1597
II. Revising Regimes of Excessive Criminalization and Punishment .....	1600
III. Reimagining the Regulation of Sexual Harm .....	1605
A. Social Institutional Reform .....	1606
B. Infrastructural Preventive Strategies .....	1615
C. Broadening Alternative Forms of Redress .....	1618
D. Shifting Sexual Discourse .....	1619
Conclusion .....	1621

#### INTRODUCTION

Even though most sexual abuse occurs between persons known to one another,<sup>1</sup> the U.S. criminal regulatory regime addressing criminal sexual harm focuses largely on convicted sex offenders presumed to be strangers to their intended victims.<sup>2</sup> While rape law reform is widely celebrated as an important feminist success,<sup>3</sup> this reform represents only a minor component of a much

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1. Less than 7 percent of sex crimes against all juveniles are committed by strangers. See HOWARD N. SNYDER, U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000). Approximately 75 percent of sex crimes involving adult victims are perpetrated by known assailants. See RICHARD TEWKSBURY & JILL LEVENSON, WHEN EVIDENCE IS IGNORED: RESIDENTIAL RESTRICTIONS FOR SEX OFFENDERS 3 (2008).

2. See, e.g., CHRYSANTHI S. LEON, SEX FIENDS, PERVERTS, AND PEDOPHILES: UNDERSTANDING SEX CRIME POLICY IN AMERICA (2011); LAURA J. ZILNEY & LISA ANNE ZILNEY, PERVERTS & PREDATORS: THE MAKING OF SEXUAL OFFENDING LAWS 118–19 (2009).

3. See, e.g., MARIA BEVACQUA, RAPE ON THE PUBLIC AGENDA: FEMINISM AND THE POLITICS OF SEXUAL ASSAULT 195 (2000) (noting among the successes of the feminist anti-rape movement “reforms in criminal law, gains in funding for rape research and service providers, institutional reform on the local level, and passage of the Violence Against Women Act” and that “[b]y any measure, the effectiveness of the anti-rape campaign cannot be denied.”); KRISTIN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE 1 (2008) (“For almost forty years a concerted campaign by feminists has transformed popular consciousness and led to the widespread growth of organizations designed to address the problem of sexual violence.”); Victoria Nourse, *The “Normal” Successes and Failures of Feminism*

broader transformation in the criminal regulation of sexual offending at the end of the twentieth and beginning of the twenty-first centuries.<sup>4</sup> Sexual assault legislative reform has been accompanied too by an array of hyper-punitive and largely ineffective post-conviction responses to sexual violence and abuse. In 1994, the year that the anti-rape movement won an important victory with the passage of the Violence Against Women Act (which appropriates funds for the prosecution of violent crimes against women), the U.S. Congress also passed legislation requiring states to implement sex offender registries.<sup>5</sup> Subsequently, with federal encouragement, jurisdictions across the United States have adopted sex offender registration, notification, and residency restriction laws—widely publicizing the identities of persons with sex offense convictions and prohibiting these persons from residing, and sometimes working or loitering, within a specified limited distance of parks, schools, bus stops, or other places where children may congregate.<sup>6</sup> These responses fundamentally neglect the feminist critique of sexual assault regulation that motivated substantive criminal law reform efforts in the first instance, particularly the pervasiveness of unredressed sexual violence and abuse between intimates.<sup>7</sup> Why, then, this predominant focus on registering and banishing stranger convicted offenders when the vast majority of sexual harm involves unreported violence and abuse between intimates?

The project of physically banishing and publicizing the identities of presumably sexually dangerous strangers, and on occasion indefinitely civilly confining these individuals, is often justified as a measure to prevent future sexual harm.<sup>8</sup> These laws were almost all enacted in the wake of vicious rape-

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*and the Criminal Law*, 75 CHI.-KENT L. REV. 951, 951 (2000) (“There is not a criminal law casebook in America today, nor a state statute book, that does not tell this story.”).

4. See, e.g., ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS 3–4 (2013) (“[A]ssumption[s] about the unalloyed success of the feminist rape law reform project [are] . . . profoundly misguided”).

5. See Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8, 16, 28, and 42 U.S.C.); Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994, 42 U.S.C. §§ 14071–73 (2012).

6. See, e.g., LEON, *supra* note 2; SANDRA NORMAN-EADY, SEX OFFENDERS’ RESIDENCY RESTRICTIONS 1–2 (2007).

7. See CORRIGAN, *supra* note 4, at 4–5; LEON, *supra* note 2; see also STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 10 (1998) (“Opponents of rape reform have managed to convince a wide audience that standards of permissible conduct are now dictated by ‘hypersensitive’ young women and by ‘radical’ feminists committed to a highly restrictive, Victorian conception of sexual propriety. . . . The reality is far different. The claim that legal rules, campus behavior codes, and company policies enshrine radically overprotective, puritanical rules of conduct is a myth.”); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1256 (2009) (“Historically, criminal law and family law have worked in tandem to produce a binary view of intimate life that categorizes intimate acts and choices as *either* legitimate marital behavior *or* illegitimate criminal behavior.”).

8. See, e.g., Andrew Ashworth & Lucia Zedner, *Prevention and Criminalization: Justifications and Limits*, 15 NEW CRIM. L. REV. 542 (2012).

kidnapping murders with the aim of bringing perpetrators to law enforcement's and communities' attention before they could harm others again.<sup>9</sup>

Yet, widespread sexual assault remains in U.S. military programs,<sup>10</sup> in the nation's elite colleges and universities,<sup>11</sup> in the locker room showers at Pennsylvania State University,<sup>12</sup> at the hands of the prestigious Horace Mann School's "Prep School Predators,"<sup>13</sup> and in prisons,<sup>14</sup> parishes<sup>15</sup> and families<sup>16</sup> around the country. A significant majority of these rapes and sexual assaults are

9. See generally LEON, *supra* note 2.

10. See generally DEP'T OF DEFENSE, ANNUAL REPORT ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES (2011).

11. According to the White House Task Force to Protect Students from Sexual Assault, one in five female students are sexually assaulted in college. See WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 2 (2014), available at <https://www.notalone.gov/assets/report.pdf>; see also Richard Pérez-Peña & Kate Taylor, *Fight Against Sexual Assaults Holds Colleges to Account*, N.Y. TIMES, May 3, 2014, [http://www.nytimes.com/2014/05/04/us/fight-against-sex-crimes-holds-colleges-to-account.html?\\_r=0](http://www.nytimes.com/2014/05/04/us/fight-against-sex-crimes-holds-colleges-to-account.html?_r=0) ("[A] group of women, identified then only by pseudonyms . . . became the talk of Columbia this past winter, when an article in a student magazine . . . described in detail their accounts of being sexually assaulted, and their frustrated searches for aid and justice from the university."); Caroline Tan, *Frat City?*, YALE DAILY NEWS, Feb. 24, 2012, <http://yaledailynews.com/weekend/2012/02/24/frat-city/> (describing fraternity initiation that entailed recruits chanting outside freshman dormitories, "No means yes, yes means anal"); Matthew Burgoyne, *Yale Bans "No Means Yes" Fraternity for Five Years*, MS. MAGAZINE, May 18, 2011, <http://msmagazine.com/blog/2011/05/18/yale-bans-no-means-yes-fraternity-for-five-years/>; Richard Pérez-Peña, *Yale Fulfills Vow on Sex-Misconduct Report*, N.Y. TIMES, Feb. 1, 2012, <http://www.nytimes.com/2012/02/02/nyregion/in-yale-report-52-complaints-of-sexual-misconduct.html>; *Yale and U.S. Resolve Sexual Harassment Claim*, N.Y. TIMES, June 15, 2012, <http://www.nytimes.com/2012/06/16/nyregion/yale-and-us-resolve-sexual-harassment-claim.html>.

12. See Joe Drape, *Sandusky Guilty of Sexual Abuse of 10 Young Boys*, N.Y. TIMES, June 22, 2012, <http://www.nytimes.com/2012/06/23/sports/ncaafotball/jerry-sandusky-convicted-of-sexually-abusing-boys.html?pagewanted=all>.

13. See Amos Kamil, *Prep-School Predators: The Horace Mann School's Secret History of Sexual Abuse*, N.Y. TIMES, June 6, 2012, <http://www.nytimes.com/2012/06/10/magazine/the-horace-mann-schools-secret-history-of-sexual-abuse.html?pagewanted=all>.

14. See, e.g., Christopher Glazek, *Raise the Crime Rate*, N+1, no. 13, Winter 2012, <https://nlusonemag.com/issue-13/politics/raise-the-crime-rate/> ("[T]he Justice Department finally released an estimate of the prevalence of sexual abuse in penitentiaries. . . . That's 216,000 victims, not instances. These victims are often assaulted multiple times over the course of the year. The Justice Department now seems to be saying that prison rape accounted for the majority of all rapes committed in the US in 2008."); see also ALLEN J. BECK ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008-09 (2010), available at <http://www.bjs.gov/content/pub/pdf/svpjri0809.pdf>.

15. See Jim Yardley, *Pope Asks Forgiveness From Victims of Sex Abuse*, N.Y. TIMES, July 8, 2014.

16. See, e.g., U.S. DEP'T OF HEALTH & HUMAN SERV., CHILD MALTREATMENT 23 (2010), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm10/cm10.pdf> (noting that 81.3 percent of child victims of reported maltreatment, including victims of both physical and sexual abuse, are abused by a parent). Although a separate statistical analysis of reported incidents of sexual assault of juveniles suggested family members perpetrated 34.2 percent of all assaults, there is a particular likelihood of underreporting of familial sexual assault due to the close relationship of the victim and the assailant. See SNYDER, *supra* note 1, at 10.

never reported to law enforcement.<sup>17</sup> Of 100 rapes committed, an estimated 5–20 are reported to police, 0.4–5.4 are prosecuted, and 0.2–5.2 result in conviction.<sup>18</sup> Accordingly, as the U.S. criminal regulatory regime governing sexual harm concentrates on publicizing, monitoring, and banishing presumably dangerous convicted strangers, most sexual violence goes unaddressed.<sup>19</sup>

At the same time, the registries and residential restrictions construct an extraordinarily broad identity category—sex offender—out of disparate and largely unrelated forms of sexual harm ranging from violent rape, to child pornography, to sexual touching by an older child of a younger child, to indecent exposure. Even though the looming figure of the stranger-child-kidnapper-rapist motivated enactment of the governing statutory framework, many individuals are subject to this regime after being convicted of significantly less heinous conduct, including offenses as minor as public urination or sex with an underage individual when the age difference between the parties is small and the sex is otherwise consensual.<sup>20</sup>

In fact, rather than prevent repeat criminal conduct, post-conviction sex offense regulation may actually be criminogenic.<sup>21</sup> Residency restrictions often render those subject to them unemployable, homeless, and at risk of harassment or even lethal violence.<sup>22</sup> In these respects, persons labeled sex offenders are

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17. See LYNN LANGTON ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006-2010, at 4 (2012).

18. See Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 157 (2012).

19. See Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 472 (2005) (“[R]ape is the least reported, least indicted, and least convicted non-property felony in America.”); ZILNEY & ZILNEY, *supra* note 2, at xiv (“[M]ost sexual violations occur between people who are known or related to one another.”); ERIC S. JANUS, FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 46 (2006) (“About 69 percent of female victims of rape were victimized by someone known to them. . . . Despite the ubiquity of sexual assault, a substantial proportion of sexual abuse is never reported to law enforcement authorities.”); see also *infra* Part I.

20. See, e.g., LEON, *supra* note 2, at 179–80 (discussing the cases of Ryan Johnson, who became a convicted sex offender after a citation for public urination that occurred when the toilets at his jobsite were occupied, and Genarlow Wilson, who spent two years in prison and was required to register as a sex offender after being convicted for having consensual oral sex when he was seventeen with a fifteen-year-old girl). The proportion of more-serious to less-serious sex-related convictions is unknown because there is not composite information available that captures the content of the conduct underlying convictions across multiple jurisdictions.

21. See J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior*, 54 J.L. & ECON. 161, 161–65 (2011) (arguing that “notification may actually increase recidivism” and that “convicted sex offenders become more likely to commit crimes when their information is made public because the associated psychological, social, or financial costs make crime-free life relatively less attractive”).

22. See, e.g., HUMAN RTS. WATCH, RAISED ON THE REGISTRY: THE IRREPARABLE HARM OF PLACING CHILDREN ON SEX OFFENDER REGISTRIES IN THE US 47 (2013) [hereinafter RAISED ON THE REGISTRY].

managed in ways that call the legal system into disrepute, quite possibly exacerbating rather than ameliorating relevant harms.<sup>23</sup> These problems are especially stark in cases involving persons convicted of minor offenses, such as indecent exposure or statutory rape, but the cruelty of various collateral sanctions is unjust and counterproductive even in the smaller number of cases involving persons convicted of very serious offenses.

Further, while registries and residential restrictions offer uncertain, if any, preventative effect against recidivism, most new convictions for sexual crimes involve individuals who are not registered sex offenders.<sup>24</sup> This incongruity between new convictions and existing sex offender registries undermines the assumptions that drive registration—namely that registration will enable quick identification of sexual perpetrators and allow law enforcement to monitor those persons most likely to sexually offend and recidivate. It is unlikely that the mismatch between new convictions and individuals on the registry is due to the fact that registration so effectively prevents what would otherwise be rampant offending by this population.<sup>25</sup>

Moreover, these criminal regulatory interventions do not improve the handling of sexual assault from the standpoint of survivors of sexual violence: rape remains vastly underreported at least in significant part because of the ill fit between the needs of survivors and the actual administration of the criminal legal process. Notwithstanding reform to rape statutes, a recent multi-jurisdictional qualitative empirical study of reporting and charging practices reflects:

Police are reluctant to take reports, dismissive of the seriousness of rape, and refuse to investigate cases based on the socio-economic positions of the victims and/or alleged assailant. Prosecutors routinely

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23. *See id.*

24. *See, e.g.,* Alissa R. Ackerman et al., *Who Are the People in Your Neighborhood? A Descriptive Analysis of Individuals on Public Sex Offender Registries*, 34 INT'L J.L. & PSYCHIATRY 149 (2011) (examining the heterogeneity of the population of registered sex offenders); Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 AM. J. PUB. HEALTH 412, 414 (2010) (reporting that 96 percent of all new arrests for sexual crimes in New York occurred among those without previous sexual crime convictions).

25. *See, e.g.,* J.J. Prescott, *Do Sex Offender Registries Make Us Less Safe?*, REGULATION, Summer 2012, at 48, 50–55 (exploring the various possible deterrent and criminogenic effects of sex offender registration and notification laws). Prescott concludes:

[T]he idea that notification regimes may make registered offenders more dangerous is consistent with the fact that notification causes these individuals significant financial, social, and psychological harm. . . . [There is] no evidence . . . that the threat of registration alone deters individuals from engaging in sex crime. . . . [I]f these laws impose significant burdens on a large share of former offenders, and if only a limited number of potential victims benefit from knowing who and where sex offenders are, then we should not be surprised to observe more recidivism under notification, with recidivism rates rising as notification expands.

*Id.*; *see also* Bob Edward Vásquez et al., *The Influence of Sex Offender Registration and Notification Laws in the United States*, 54 CRIME & DELINQUENCY 175, 187 (2006), available at <http://cad.sagepub.com/content/54/2/175> (Results do not “offer a clear or unidirectional conclusion as to whether sex offender notification laws reduce rapes.”).

and systematically decline to charge cases that they deem “difficult.” . . . Law enforcement officials offer endless reasons why rape allegations are not pursued: victims are described as too old or too young, too drunk or not drunk enough, too sexually experienced or too naïve. These attitudes and practices are not only present in “tough” cases such as rapes between acquaintances that hinge on consent rather than the presence of externally visible violence. They are seen in cases from across the spectrum of sexual assault: those involving strangers, family members, and intimate partners; cases involving victims of all ages; assaults involving coercion ranging from verbal threats to near-homicides.<sup>26</sup>

For these reasons, survivors do not generally perceive the criminal process as one that will offer them meaningful protection or repair.<sup>27</sup>

The extraordinarily punitive character of post-conviction sex offense regulations also makes survivors who have close personal or familial ties to their assailants reluctant to report not only out of fear or shame but because criminal conviction consequences that amount to permanent banishment are often undesirable between intimates (as opposed, perhaps, as applied to strangers).<sup>28</sup> Registration and notification measures create particularly strong disincentives to report among family members.<sup>29</sup>

The prevailing regulatory framework thus produces an irrationally configured, overbroad category of persons—registered sex offenders—and widespread fear of such persons, as well as draconian responses to this population. As it both over-criminalizes and over-punishes, this regime neglects the varied array of other, more specific structural and institutional reformist responses that might better address the reality of sexual harm between

26. See CORRIGAN, *supra* note 4, at 4 (relating results of “interviews with 167 rape care advocates . . . working at 112 local [Rape Crisis Centers] in six states across the country: Colorado, Kansas, Michigan, New Jersey, South Carolina, and Washington”).

27. See *id.*; see also Seidman & Vickers, *supra* note 19, at 472. Survivors routinely encounter a criminal regulatory regime “poorly equipped to protect against the immediate devastating consequences of assault.” See Seidman & Vickers, *supra* note 19, at 472.

28. According to one rape crisis advocate, “[P]art of the reason these cases don’t get prosecuted is also—and I worked with [local college students] for . . . years . . . —they don’t want to see them in orange overalls. They just want him to understand what he did and to learn how not to do it again.” CORRIGAN, *supra* note 4, at 220–21; see also JOYCE ALLAN, BECAUSE I LOVE YOU: THE SILENT SHADOW OF CHILD SEXUAL ABUSE 311 (2002) (examining Allan’s own experience as an adult survivor of child sexual abuse by her father and the deep ambivalence and ultimate rejection of criminal consequences as a response to her and her family’s abuse: “[M]y father was both victim and offender. Not either-or. Not black-white. Not good-bad”); see also Mary Fan, *Adversarial Justice’s Casualties: Defending Victim-Witness Protection*, 55 B.C. L. REV. 775, 776 (2014) (examining how the adversarial criminal process “exact[s] severe costs” on “victim-witnesses, especially in cases of traumatic crimes of sexual assault”).

29. As another rape crisis advocate explained, “[t]he majority of the women and men and children who we treat in our program are victims of . . . somebody in the family or someone close to the family. I think there are a million reasons why people don’t report anyway and [reporting and registration requirements are] one more to add to it.” CORRIGAN, *supra* note 4, at 220–21.

intimates in our central social institutions, as well as the needs of survivors of sexual harm.

The use of the term “sexual harm” rather than “sexual violence” or “sexual abuse” in this Essay’s title intends both to capture the overbreadth of the category “sex offender” and to focus attention on the actual behaviors and institutions that cause people to suffer harm, including criminal sex offense regulatory measures themselves. The core argument in the pages to follow is that if our aim is to reduce sexual harm and enable just, compassionate response to sexual violence and abuse, regulation ought to shift in large measure from supposedly preventive targeting of convicted sex offenders to a social institutional reform framework. Relatedly, specifying the “correct” content of the substantive criminal law of rape, which has occupied so much of the legal scholarship focused on sexual harm, will do little to address the broader problems of unredressed sexual violence, rape, and abuse.<sup>30</sup> Instead, a social institutional reform framework would expand the stakes and politics of regulating sexual harm to incorporate values of sex and gender equality, freedom, and pleasure rather than narrowing a reformist focus to the scope of what the substantive criminal law ought to or might most efficiently punish.

A social institutional reform framework would likewise shift from primarily scapegoating stranger predators to grappling with the difficult and painful role sexual harm plays in our most central social institutions and between intimates. René Girard, the anthropologist and literary critic, developed a theory of the “Scapegoat Mechanism” in a series of works culminating in a book entitled *The Scapegoat*.<sup>31</sup> Girard’s account illuminates some of the social resonance of the prevailing sex offense regulatory regime, which relies heavily on delimiting a broad scope of offending conduct and then scapegoating stranger sexual predators through various often-draconian post-conviction punitive “collateral” consequences.<sup>32</sup> The resonance of the status quo sex offense regulatory regime remains relevant to any reformist effort to confront its excesses. And Girard’s “Scapegoat Mechanism” suggests not a causal theory of how the status quo criminal regulatory regime came into being, but rather some of the psychosocial forces that contribute to its power and that

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30. Compare Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372 (2013) (arguing that rape law’s “much-maligned force requirement may not be so malign after all” and against the substantive criminal law’s definition of rape as simply “unconsented-to-sex”), with SUSAN ESTRICH, REAL RAPE 69 (1987) (“[T]he force standard continues to protect . . . conduct which should be considered criminal. It ensures broad male freedom to ‘seduce’ women who feel themselves to be powerless . . . and afraid . . . [and] to intimidate women and exploit their weakness and passivity.”), and SCHULHOFER, *supra* note 7, at 15 (contending that the requirement of force “places an imprimatur of social permission on virtually all pressures and inducements that can be considered nonviolent” and therefore “leaves women unprotected against forms of pressure that any society should consider morally improper and legally intolerable”).

31. See RENÉ GIRARD, *THE SCAPEGOAT* 14–15, 21–22 (Yvonne Freccero trans., 1986).

32. *See id.*

must be confronted to bring about its undoing.<sup>33</sup>

More specifically, through the scapegoat mechanism Girard describes how the profound conflicts in a society that arise from people's competing desires, values, and fears produce the phenomenon of the scapegoat—typically a category of persons—singled out as responsible for the problem.<sup>34</sup> The scapegoat is then targeted and eliminated, or attempts at elimination are made.<sup>35</sup> The figure of the scapegoat produces psychological relief and a moral bond or cohesion through practices of banishment.<sup>36</sup> But the effectiveness of

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33. As with any complex socio-legal framework, multiple factors contributed to the emergence of the prevailing array of statutory restrictions and criminal regulatory practices. The disproportionate application of harsh criminal measures to poor dispossessed people of color undoubtedly enables a harshness and overbreadth that would be less readily tolerated were it applied on a comparable scale to wealthier, more powerful white citizens. Complete and accurate racial and socioeconomic demographic data on convicted sex offenders are not readily available, but the disproportionate targeting of African Americans and Latinos across the criminal system for arrest, prosecution, and incarceration has been well documented. *See, e.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS* (2010); DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999). Other significant contributing factors almost certainly include intensive media focus on egregious acts of sexual violence perpetrated by strangers against young children and elected officials' inclination to "govern through crime." *See, e.g.*, JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); *see also* Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 *PSYCHOL. PUB. POL'Y & L.* 452 (1998). Simon posits:

The new generation of sex offender laws represents a shift toward the new penology combined with a strong appeal to populist punitiveness. This takes the form of managerialism (i.e., the divorce of institutional objectives from public goals) combined with gestures of identification with populist sentiments evoked by sex crimes. The new penology is generally agnostic toward treatment. The goal is waste management. Populist punitiveness is exceedingly hostile toward medicalization. The result is an important transformation of the sex offender from the most obvious example of crime as disease back to an earlier conception of crime as monstrosity. Sex offenders are our modern-day monsters, producing tidal waves of public demand.

*See id.* at 456. Of course, the identification of social, anthropological, and psychological factors that contribute to the entrenchment of sex offender regulation is not inconsistent with the fact that these contexts are produced by material, political, and historical forces. Rather, the scapegoat mechanism underscores social and social-psychological processes that operate in tandem with other political, economic, legal, and historical factors.

34. *See, e.g.*, René Girard, *Stereotypes of Persecution*, in *THE GIRARD READER* 107, 109–10.

35. Even when the scapegoat has committed a heinous act for which he is banished, the scapegoat mechanism still proceeds in a manner that attributes blame exclusively to the culprit rather than addressing broader causes and deeper sources of violence and unrest. *See id.* at 115.

36. More recent social-psychological research has explored in diverse experimental settings how the scapegoat hypothesis coheres with other social-psychological processes that contribute to maintenance of the status quo, though not with sex offender regulation as a particular focus of study. System justification theory, for example, holds that people are motivated to system-justify because doing so fulfills particular social and psychological needs, especially by reducing uncertainty (fulfilling epistemic needs), neutralizing threat (addressing existential concerns relating to security), and promoting conformity (satisfying relational motives towards solidarity). *See* John T. Jost et al., *System Justification: How Do We Know It's Motivated?*, in 11 *THE PSYCHOLOGY OF JUSTICE AND LEGITIMACY* 173, 178–80 (D. Ramona Bobocel et al. eds., 2010); John T. Jost & David M. Amodio, *Political Ideology As Motivated Social Cognition: Behavioral and Neuroscientific Evidence*, 36 *MOTIVATION & EMOTION* 55, 56 (2011).

this banishment is both imagined and real: it is imagined inasmuch as exclusion of a scapegoated class does not rid the community of the deeper sources of conflict; still, it registers very real effects on the lives and bodies of the scapegoats and in the social smoothing, anxiety-relieving results it engenders for the polity.<sup>37</sup>

Along these lines, then, this Essay will reveal how the prevailing criminal regulatory regime applied to persons convicted of sex offenses imagines sexual pathology to be located in dangerous strangers, who may be identified through often minor deviant behavior (consumption of pornography or public urination) and physically excluded from U.S. communities. This reduces collective anxiety and uncertainty by purporting to identify those persons likely to perpetrate sexual harm. Registration and notification requirements promise to publicize the identities of sexually dangerous strangers. Residential restrictions promise to remove these persons from our communities. And civil commitment statutes promise, where appropriate, to indefinitely civilly detain especially dangerous predators. This framework enables a greater sense of perceived safety and smoothes relationships in families, schools, churches, and other central social institutions, as the locus of any sexual threat is understood to be external to these spaces.

But the identification and attempted banishment of a category of stranger-predator sex offenders permit attempted elimination of a scapegoat population to substitute for the more disruptive and unsettling yet important and neglected work of understanding the pervasiveness of sexual harm within families, schools, churches, prisons, and the military. As this banishment approach avoids fundamental reform of those institutions, the persistence of sexual harm generates pressure for ever more misdirected enforcement. Hence the ultimate inefficacy of banishment efforts creates a strong impetus towards expansion of sex offense regulatory measures, both as the construct of the scapegoated stranger-predator class has become socially embedded and as a cadre of “sex offender” regulatory professionals (i.e., specialized probation officers, treatment monitors, specialized detention center staff) has emerged to manage this class of persons.<sup>38</sup> The unfolding of this process reinforces a longstanding

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37. Girard's scapegoat mechanism is an anthropological theory with a strong social-psychological dimension that accounts for broader practices of seeking to achieve social order through banishment. This argument bears an important relationship to but differs from Durkheimian criminal law scholars' accounts of “deep scapegoating,” which emphasize the use of crime policy to produce social cohesion in the face of a perceived but largely inchoate threat to the social order; by contrast, my analysis posits in the sex offending context a more targeted ostracism of a reviled and vulnerable class of persons in part as a means, even if unconscious, to avoid engaging more difficult and pressing forms of sexual harm in central social institutions and intimate relationships. See, e.g., Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 830 (2000); *The Anthropology of the Cross: A Conversation with René Girard*, in THE GIRARD READER 262, 266 (James G. Williams ed., 2001).

38. See *infra* Part I.D.; see also MICHEL FOUCAULT, *ABNORMAL: LECTURES AT THE COLLÈGE DE FRANCE 1974-1975*, at 308–09 (Arnold I. Davidson ed., Graham Burchell trans., 2003)

collective fantasy that renders sexual pathology external to the sexual normalcy of conventional family structures and social institutions.<sup>39</sup> This false appearance of “sexual normalcy” heavily emphasizes dreadful but infrequent stranger child-rape-kidnappings, even as ongoing sexual harm is left unexamined for the most part, and even as this regulatory regime produces other socially ostracizing impacts that may increase rather than decrease crime.<sup>40</sup> In the midst of these processes, the refinements of the substantive criminal law of rape of interest to criminal law scholars have become largely a sideshow.<sup>41</sup>

In summary, though unlikely to prove effective at countering widespread but unreported sexual harm, the scapegoat mechanism as applied to “sex offenders” offers psychological relief and social smoothing benefits while it neglects the true scope and depth of the very problems it purports to address. In particular, this banishment remedy neglects the feminist analysis of rape that motivated rape law reform efforts<sup>42</sup>—above all, the insight that sexual violence is normalized and embedded in conceptions of inviolable family privacy, in unequal gender relations, and in institutional hierarchies that maintain the secrecy, stigma, and shame associated with sexual abuse.<sup>43</sup>

Recognizing these problems as well as the inefficacy and excessive harshness of current regulations directed at sexual harm, advocates in particular jurisdictions have begun to call attention to the overbreadth and dysfunction of

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(exploring how a class of psychiatric professionals simultaneously constituted their professional power (“medically qualified power”) and constituted new categories of normative development and mental alienation or illness).

39. See, e.g., Murray, *supra* note 7; see also VLADIMIR NABOKOV, *LOLITA* (1955) (criticizing, in the form of a novel, the fantasy that the home is a special preserve of upstanding morality by rendering the dangerous stranger as a father).

40. The attachment to stranger-danger within the status quo criminal regulatory regime addressing sex offenses is also consistent with the tendency illuminated in the behavioral economics literature to overemphasize catastrophic but unlikely risks relative to more likely but less dramatically harmful outcomes. People tend toward a more pronounced fear of airplane accidents relative to car accidents, for example, and by extension perhaps a more pronounced fear of stranger kidnapping and rape of children than of sexual abuse at home or in church or school. See, e.g., CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT* (2002).

41. See generally CORRIGAN, *supra* note 4 (examining how changes in the substantive criminal law of rape are largely overwhelmed by other powerful social and legal forces influencing the conduct of prosecutors, judges, survivors, defendants, and juries).

42. See also Joseph J. Fischel, *Transcendent Homosexuals and Dangerous Sex Offenders: Sexual Harm and Freedom in the Judicial Imaginary*, 17 *DUKE J. GENDER L. & POL’Y* 277, 277 (2010) (arguing that the “‘sex offender’ has been juridically codified as the exhaustive figure of sexual amorality and dangerousness, a position vacated by the once homophobic but now more dignified juridical construction of the homosexual”).

43. On Girard’s theory, it is in part the collective yet unspoken awareness that the exclusion of the scapegoat is an unsustainable and unethical solution to deep social conflict that motivates the intense animus directed at the scapegoat. See, e.g., GIRARD, *supra* note 31, at 22 (“Despite what is said around us persecutors are never obsessed by difference but rather by its unutterable contrary, the lack of difference.”).

certain post-conviction U.S. criminal sex offense regulations.<sup>44</sup> In response, a few states have scaled back some of the worst excesses of these regulatory approaches.<sup>45</sup> These reform efforts have begun to reveal how it might be possible to confront other regimes of punitive excess, even in the face of strong and emotionally-laden popular attachment to a prevailing regime of harsh but counterproductive punishment.

Still, the retreat from over-criminalization and punitive excess in response to minor sex-related offenses, such as public urination or certain forms of statutory rape, fails to address the persistent problem of more pervasive, though under-headed, forms of sexual harm such as sex abuse in schools, families, the military, churches, and prisons. When the excesses of the criminal regulatory regime designed for sexually dangerous strangers are laid bare, the task remains of refocusing regulatory attention (and reconfiguring structures of domination and disempowerment) so as to reduce the risk of more common forms of sexual harm between intimates. This Essay thus aims to unmask the misguided contours of the status quo regime in a manner that might enable the important work of addressing (and reforming) those locations where interpersonal sexual harm is most prevalent. These central social locations and the problems within them differ from one another in significant respects, and each location is best approached in a context-sensitive manner rather than through broadly tailored provisions targeting “sex offenders” as a largely undifferentiated class: sexual harm in schools is produced and sustained by different institutional dynamics than those at issue in the military, which differ from those that arise in the context of the family and in prisons. The relevant problems and harms are vast, to some degree institution specific, and are likely not entirely eliminable. Nonetheless, the unmasking and mapping undertaken here open the exploration of a range of underutilized macro-level preventive regulatory ideas—a distinct, less common approach to what is referred to in criminal law scholarship as “preventive justice.”<sup>46</sup> These regulatory possibilities include external

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44. See, e.g., Lorraine Bailey, *San Diego Sex Offenders Upset Residency Limit*, COURTHOUSE NEWS SERVICE (Sept. 14, 2012), <http://www.courthousenews.com/2012/09/14/50302.htm> (“It is ‘unreasonable’ and ‘oppressive’ to forbid registered sex offenders from living within 2,000 feet of a school or park, a California appeals court ruled.”).

45. See, e.g., LEON, *supra* note 2, at 193 (“State legislators who in the past would not consider any revisions to existing sex offender policies that did not extend its punitiveness now acknowledge that there are problems. Advocates have noted that legislators are now willing to discuss reforms in private, whereas in the early 2000s, such doors to dialogue were closed.”).

46. Allegra M. McLeod, *Prison Abolition and Preventive Justice*, 62 UCLA L. REV. (forthcoming 2015); see also ANDREW ASHWORTH & LUCIA ZEDNER, *PREVENTIVE JUSTICE* 2 (2014) (“Preventive measures taken by the state in order to reduce risks to harm are legion. . . . Our concern lies with preventive measures that involve some element of coercion or loss of liberty, whether minor or substantial.”). Bernard E. Harcourt, *Punitive Preventive Justice: A Critique*, in *PREVENTION AND THE LIMITS OF THE CRIMINAL LAW* 252 (Andrew Ashworth et al. eds., 2013) (exploring how punitive preventive measures like “broken windows” policing, stop and frisk, and mass incarceration mask political choices about crime control in a cost-benefit rhetoric focused on efficiency and prevention that fails to make available the actual political stakes of “preventive justice,” as well as other possibly

institutional monitoring and auditing alongside efforts to combat institutional secrecy, stigma, and shame; related institutional transparency-forcing initiatives; the use of physical infrastructure, design, and community economic development projects as means of limiting interpersonal harm; empowerment of vulnerable populations; modes of restorative redress; vastly narrowed deployment of prosecutorial and punishment resources; and an expansion and opening of sexual discourse.<sup>47</sup>

This Essay unfolds in three parts. Part I seeks to illuminate how the dominant criminal regulatory regime focuses on sexual offending in ways that are draconian, ineffective, and unjust. Rather than examining the negative unintended consequences associated with discrete sex offense regulatory mechanisms, such as registration, community notification, or civil commitment,<sup>48</sup> Part I exposes how the interplay of the various regulations targeting sex offending renders this regulatory regime antagonistic to its intended preventive and other goals and contributes to additional violence and suffering for both accused persons and survivors of sexual harm.

Part I also explores why, despite the fact that it does more harm than good, this regulatory approach continues to capture widespread popular and political support—namely, because it alleviates social anxiety about the depth and difficulty of addressing pathologies in our schools, families, and churches, and instead locates the problems of sexual violence and abuse in a fantasy about how sexual harm might be eliminated primarily by identifying dangerous individuals to be publicly shamed and physically excluded from communities otherwise presumed to be harmonious. This analysis of the discourse of sex offense regulation draws on an array of sources: previously unexplored

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competing policy objectives such as poverty alleviation or educational equality); CHRISTOPHER SLOBOGIN & MARK R. FONDACARO, *JUVENILES AT RISK: A PLEA FOR PREVENTIVE JUSTICE* (2011) (presenting a detailed new model for the juvenile justice system that would focus on rehabilitation and reintegration into society).

47. In this regard, this Essay is part of a broader effort to understand the limits of and motivated attachment to excessively harsh, individualized, and overbroad criminal regulatory frameworks, which are all too often invoked as a means of managing complex social concerns. Simultaneously, in line with earlier and ongoing work, I hope to make more plausible social institutional reform alternatives that might better address the relevant human needs at stake in particular contexts. *See generally* Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 *GEO. L.J.* 1587 (2012); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 *AM. CRIM. L. REV.* 105 (2012); Allegra M. McLeod, *Exporting U.S. Criminal Justice*, 29 *YALE L. & POL'Y REV.* 83 (2010).

48. *See, e.g.*, JANUS, *supra* note 19, at 9 (focusing primarily on preventive detention, civil commitment, or what the author calls “predator laws”); NORMAN-EADY, *supra* note 6 (focusing on residency restrictions); Prescott, *supra* note 25 (focusing on registration); Prescott & Rockoff, *supra* note 21 (focusing on registration and notification); Simon, *supra* note 33 (focusing on civil commitment and notification measures as indicative of the emergence of a category of “monstrous sex offenders”); *see also* LEON, *supra* note 2 (examining critically the historical emergence of and shifts in sex offender regulation from 1930 to 2011 and identifying distinct regulatory frameworks including a focus on “sexual psychopaths” from 1930 to 1955, rehabilitation from 1950 to 1980, and containment from 1980 to 2011).

ethnographic and human rights reports on sexual offense regulation; court opinions; quantitative and qualitative empirical analyses of sex offender restrictions; critical theoretical and sociological scholarship on sexual harm; and a novel by Russell Banks, *Lost Memory of Skin*, which illuminates some of the more subtle yet profound social problems manifest in this criminal regulatory landscape. In combination, these sources provide overwhelming evidence of the misguided configuration of the prevailing post-conviction U.S. criminal regulatory framework governing sexual harm.

Part II examines advocates' efforts in particular jurisdictions to constrain the overreach and misdirection of sex offense regulation, offering a potentially broader model for ratcheting down regimes of over-criminalization and misidentification of harm by calling attention to the threats produced by criminal regulation itself.

Part III preliminarily explores what a more varied, preventive social institutional regulatory approach to sex offending would entail, both as a framework for regulating sexual harm alongside a significantly narrowed conventional prosecutorial and punitive focus, and (in only the broadest initial strokes) as a more general criminal law reform program. This framework contemplates how it might be possible to regulate sexual abuse and other forms of interpersonal harm in large measure outside the criminal law administrative domain.

## I.

### MISREGULATING SEXUAL HARM

The increasingly uniform post-conviction criminal regulatory framework for addressing sexual harm in the United States is, as this part will elucidate, dysfunctional, overbroad, and excessively punitive, and undermines just, effective, and compassionate response to sexual violence and abuse. This regime operates by (A) registering a large class of convicted sex offenders, (B) notifying the public of the identities of registered individuals, (C) imposing restrictions concerning where registered individuals may live, (D) monitoring registered individuals with harsh carceral consequences for failure to comply with applicable restrictions, and (E) for a limited number of persons believed to be especially prone to committing further sex offenses, indefinite civil confinement following completion of their criminal sentences.<sup>49</sup> This Part examines the various components of this regime and their interactions, revealing the myriad respects in which this criminal regulatory framework

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49. See, e.g., *United States v. Comstock*, 560 U.S. 126, 149–50 (2010) (holding that it is within Congress's authority to permit civil commitment of convicted sex offenders already in federal custody); *Seling v. Young*, 531 U.S. 250, 267 (2001) (upholding Washington State's procedures for civil commitment of certain convicted sex offenders); *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997) (upholding Kansas's procedures for civil commitment of certain convicted sex offenders under Kansas's Sexually Violent Predator Act).

perpetuates more damage than good. This Part tracks how this regime produces a feared category of persons, draconian responses to these persons, and misdirected fears. This regime naturalizes the composition of this feared category and these peculiar modes of response to this population, responses which include substantial carceral punishment for noncompliance with post-conviction sanctions such as reregistration.<sup>50</sup> Once the disconnect between this regime and the underlying problems surrounding sexual harm is clearly exposed, it will be more apparent precisely why different conceptual and institutional approaches are called for in the regulation of sexual harm.

Before turning to the specific components of the prevailing regime, it bears exploring further first an overarching problem that cuts across each of the various components: that is, the mismatch between the reality of commonly experienced sexual harm in the United States<sup>51</sup> and the focus of the dominant statutory framework on quite unusual offenses by presumably dangerous strangers.<sup>52</sup> These are horrific crimes, about which everyone is appropriately concerned, but they occur very infrequently and the measures that are imagined to reduce the risk of their occurrence are quite different than the measures that would meaningfully respond to other more common risks of sexual violence and abuse. Whereas the predominant criminal regulatory regime focuses on stranger rapes and murders, particularly of children, these awful offenses constitute a very small percentage of sexual assaults.<sup>53</sup>

This mismatch developed, as noted briefly above, as the reigning statutory framework came into effect in response to a small number of these egregious, violent crimes against young children, perpetrated by persons unknown to the victims' families.<sup>54</sup> The statutes enacted in the wake of these rapes and murders of children are almost all named after the young victims. Megan's Laws are named in memory of Megan Kanka, a seven-year-old girl who was sexually assaulted and murdered by a convicted sex offender living in her neighborhood.<sup>55</sup> Megan's Laws require adult sex offenders (and in many states, juvenile sex offenders) to register with the police and often to notify the community of their presence.<sup>56</sup> The Adam Walsh Act is named after a six-year-old boy who was kidnapped by a stranger from a Sears department store and

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50. See, e.g., *United States v. Kebodaux*, 133 S.Ct. 2496 (2013) (Thomas, J., dissenting).

51. See, e.g., TEWKSBURY & LEVENSON, *supra* note 1.

52. See, e.g., SNYDER, *supra* note 1.

53. See, e.g., TEWKSBURY & LEVENSON, *supra* note 1; SNYDER, *supra* note 1.

54. See Kelly M. Socia, Jr. & Janet P. Stamatel, *Assumptions and Evidence Behind Sex Offender Laws: Registration, Community Notification, and Residential Restrictions*, 4 SOC. COMPASS 1, 1 (2010).

55. See ZILNEY & ZILNEY, *supra* note 2, at 118; William Glaberson, *Stranger on the Block—A Special Report: At Center of 'Megan's Law' Case, a Man No One Could Reach*, N.Y. TIMES, May 28, 1996, <http://www.nytimes.com/1996/05/28/nyregion/stranger-block-special-report-center-megan-s-law-case-man-no-one-could-reach.html>.

56. See ZILNEY & ZILNEY, *supra* note 2, at 118.

decapitated.<sup>57</sup> The Adam Walsh Act makes it a felony to fail to register, establishes a classification scheme for the registration of sex offenders, and requires some offenders to re-register as often as every three months for life.<sup>58</sup> The Dru Sjodin National Sex Offender Public Website, administered by the Department of Justice (DOJ), is named after a twenty-two-year-old female college student, who was kidnapped and murdered by a convicted sex offender after he crossed state lines to commit the crime.<sup>59</sup> These and other measures try to address a broad array of sex-related convictions, but are tailored to respond to the figure of the vicious offending stranger who perpetrated the murder of the young person after whom the statute or database is named.<sup>60</sup> Similar statutes have proliferated nationally, with minimal local variation, in large measure because federal statutes condition federal criminal justice funding to states on state adoption of the relevant components of this regime.<sup>61</sup>

Criminologist Mona Lynch has powerfully captured how the figure of the dangerous stranger dominated the federal legislative debates leading to the enactment of the sex offense regulatory regime at the federal level. The relevant “predator was never described as a family member, neighbor, or friend of potential victims.”<sup>62</sup> Instead, as Lynch elucidates: “The prototypical offender/perpetrator was always characterized as a stranger and an outsider, even though only about 3 percent of sexual abuse against children is committed by strangers and 6 percent of child murders are committed by strangers.”<sup>63</sup>

In a statement typical of the legislative understanding of the target of the

57. *See id.* at 118–19; *see also* Rich Phillips, *Police: Drifter Killed Adam Walsh in 1981*, CNN (Dec. 16, 2008), <http://edition.cnn.com/2008/CRIME/12/16/walsh.case.closed/index.html>.

58. *See id.*

59. *See* DRU SJODIN NATIONAL SEX OFFENDER PUBLIC WEBSITE, <http://www.nsopw.gov/en-US/Home/DruSjodin> (last visited Sept. 2, 2014).

60. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified in scattered sections of 8, 10, 18, 21, 28 & 42 U.S.C.); 42 U.S.C. § 16901 (2012) (stating that the Adam Walsh Act was enacted “[i]n order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below,” and proceeding to list Jacob Wetterling, Dru Sjodin, and Polly Klaas among fourteen other child victims); *see also* Mona Lynch, *Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 LAW & SOC. INQUIRY 529, 545 (2002).

61. The Adam Walsh Act, for example, nationalizes certain registration and notification requirements. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified in scattered sections of 8, 10, 18, 21, 28 & 42 U.S.C.). The 1994 Jacob Wetterling Crimes Against Children and Sexually Violent Offender Act, named after a boy who was kidnapped at age eleven and whose fate remains unknown, and a subsequent 1996 amendment, condition federal grants to police departments on compliance with classification and notifications requirements. *See* ZILNEY & ZILNEY, *supra* note 2, at 118–19; *see also* Robin Morse, *Federalism Challenges to the Adam Walsh Act*, 89 B.U. L. REV. 1753, 1759 (2009); Emily A. White, *Prosecutions Under the Adam Walsh Act: Is America Keeping Its Promise?*, 65 WASH. & LEE L. REV. 1783, 1787 (2008) (discussing the conditioning of federal funds on state compliance with relevant sex offense registry and related measures).

62. *See* Lynch, *supra* note 60, at 545.

63. *See id.*

federal sex offender statutes, Representative Bill McCollum (R-Florida) cautioned: "It is well recognized that sexual predators are remarkably clever and persistently transient. The offenders are not confined within state lines, and neither should our efforts to keep track of them."<sup>64</sup>

Congress justified its uniform national approach to the problem of sexual harm with reference to the wily itinerant nature of the stranger sex offender and his or her persistent use of the internet to lure children to sexual danger. Former Senator Joseph Biden, then representing Delaware in the Senate, explained:

If any states fail to act [to establish registration systems] . . . there . . . [will] be a black hole where sexual predators can hide . . . . We now seek to build a system where all movements of sexually violent and child offenders can be tracked and we will go a long way toward the day when none of these predators will fall between the cracks.<sup>65</sup>

Congressman Charles Schumer (D-New York) similarly indicated:

I think that what people have to understand is . . . that sexual offenders are different . . . . Long prison terms do not deter them. All too often, special rehabilitation programs do not cure them. No matter what we do, the minute they get back on the street, many of them resume their hunt for victims, beginning a restless and unrelenting prowl for children, innocent children to molest, abuse and in the worst cases, to kill. So we need to do all we can to stop these predators.<sup>66</sup>

The targeted offender was thus understood to be at high risk of interstate flight, unknown to his or her victims, and unusually prone to recidivate.

Although there was no meaningful confirmatory evidence, legislators believed that the Internet and pornography served as tools used by child sexual predators to locate victims. According to Representative Sheila Jackson-Lee (D-Texas), who spoke in floor debates in 1997 and again in 1998:

So many of us can recount the tragedies of children in our community being dragged away from the safety and sanctity of their home and school . . . as a vicious sexual attack is perpetrated upon them. We certainly stand in support of moving forward to assist in creating an atmosphere where not one tree leaf or not one cover can keep us away from spotting a malicious child molester or sexual predator.<sup>67</sup>

Representative Jackson-Lee focused on Internet technology as especially productive of the sexual threat to children perpetrated by strangers:

The sickness of child predators is prevalent. It is growing. So many . . . jurisdictions have tried to track these sexual predators and work, if you will, to fight against this siege upon our

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64. 142 CONG. REC. H11,132 (daily ed. Sept. 25, 1996) (statement of Rep. Bill McCollum).

65. 142 CONG. REC. S3423 (daily ed. Apr. 17, 1996) (statement of Sen. Joe Biden).

66. 142 CONG. REC. H4453 (daily ed. May 7, 1996) (statement of Rep. Charles Schumer).

67. 143 CONG. REC. H7631 (daily ed. Sept. 23, 1997) (statement of Rep. Sheila Jackson-Lee).

community . . . . We must act to protect our young people from the scourge of child predators seeking to harm them through Internet communication, and we must act now.<sup>68</sup>

Relatedly, she explained: “I introduced an additional amendment to this legislation that would further protect our children from the types of predator who may be currently lurking behind our family computer screens.”<sup>69</sup> Representative Jim Bachus (R-Alabama) remarked further on the use of child pornography by strangers on the Internet to seduce children into situations of stranger sexual abuse:

[Most people] are surprised when they learn that child pornography is the tool of choice used by child molesters and pedophiles to entice young children into sexual activities. . . . Bottom line, let us remember that child pornography is used in every community in America to lure children into this child abuse.<sup>70</sup>

Representative Jennifer Dunn (R-Washington) proposed that the 1998 statute was “for families throughout the country who are doing everything they can to keep their children safe and innocent, but may not be aware of the pedophiles who are cruising the internet.”<sup>71</sup>

These ideas about stranger internet sexual predation circulating in congressional statements have informed Federal Bureau of Investigation (FBI) and other law enforcement investigative practices in the intervening years, though this focus on stranger internet sexual predation fails to reflect the available evidence about sexual violence and abuse and may in fact produce more problems than it resolves. Although crimes in which a young child is kidnapped, sexually assaulted, and killed by a stranger (through the internet or abduction in public) are so terrible and terrifying that they are seared into the public consciousness, they are a very small proportion of the many tens of thousands of child sex abuses and sexual assaults that occur each year. Reliable statistics on sexual abuse of children are difficult to obtain with estimates of victimization of girls ranging from 6 to 62 percent and for boys from 3 to 24 percent.<sup>72</sup> Some 89,500 instances of sexual abuse of children were substantiated in the year 2000 by child protective services organizations.<sup>73</sup> By

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68. 144 CONG. REC. H4493 (daily ed. June 11, 1998) (statement of Rep. Sheila Jackson-Lee).

69. *Id.*

70. *Id.* at H4497 (statement of Rep. Jim Bachus).

71. *Id.* at H4492 (statement of Rep. Jennifer Dunn).

72. See Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 214 (2001).

73. See DAVID FINKELHOR & LISA M. JONES, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN, EXPLANATIONS FOR THE DECLINE IN CHILD SEXUAL ABUSE CASES 1 (2004), available at <https://www.ncjrs.gov/pdffiles1/ojdp/199298.pdf> (reporting there were 89,500 cases of sexual abuse substantiated by child protective service agencies in 2000 and an estimated 150,000 cases of sexual abuse of children substantiated in 1992); MICHAEL C. SETO, PEDOPHILIA AND SEXUAL OFFENDING AGAINST CHILDREN: THEORY, ASSESSMENT, AND INTERVENTION viii (2008) (noting that “[t]he average rate of childhood sexual

contrast, DOJ estimates that approximately one hundred and fifteen children are abducted annually by nonfamily strangers, and less than half are later killed.<sup>74</sup> And, of the roughly forty-five children annually who are killed after being abducted by strangers,<sup>75</sup> it is unknown how many are subjected to sexual abuse.<sup>76</sup> Many tens of thousands of kidnappings of children are perpetrated each year by family members and family acquaintances.<sup>77</sup> Child kidnappings by strangers are almost always reported, but figures of reported and substantiated sexual assault and abuse likely underestimate the occurrence of these offenses because of underreporting attributable to survivors' fear, loyalty to the abuser, and shame.<sup>78</sup> Twenty percent of female college students report having been sexually assaulted, and many thousands of men and women are sexually assaulted in the military and in prisons each year.<sup>79</sup> But studies suggest that as few as 20 percent or less of people who are sexually assaulted report the offense and still fewer pursue criminal charges.<sup>80</sup>

Yet, as a primary manner of addressing the perpetration of sexual harm, FBI agents posing as children or purveyors of child pornography now routinely contact people in chatrooms or through floating ads seeking to entice strangers to reveal an intent to have sex with children or to purchase child pornography.<sup>81</sup> There is substantial indication that at least certain persons identified online by the FBI in this manner would not have chosen to pursue sex with children or child pornography without the encouragement of law enforcement agents; the defendants in at least some instances arguably perceived the agents as role-playing adults. Federal sentences in these cases are long, routinely ten years

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abuse recalled by adult respondents" in a multi-national study of 19 countries "was approximately 20% for women and 10% for men").

74. See HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 44 (2006), available at <http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf>; see also DAVID FINKELHOR ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, NONFAMILY ABDUCTED CHILDREN: NATIONAL ESTIMATES AND CHARACTERISTICS 2 (2002), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/196467.pdf> (reporting that in 60 percent of nonfamily stranger kidnappings the child survived and in 56 percent the child was recovered and returned to his or her parents within the study year).

75. See FINKELHOR ET AL., *supra* note 73, at 2.

76. See *id.* (noting that during the study year slightly less than half of the 115 child victims of stranger kidnappings were sexually assaulted by the perpetrator).

77. See HEATHER HAMMER ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, CHILDREN ABDUCTED BY FAMILY MEMBERS: NATIONAL ESTIMATES AND CHARACTERISTICS 2 (2002), available at <http://www.unh.edu/ccrc/pdf/MC17.pdf> (reporting 203,900 children were victims of a family member abduction in 1999); see also FINKELHOR ET AL., *supra* note 73, at 2 (noting over 58,000 child victims in the study year who were abducted by family friends and known family acquaintances); SNYDER & SICKMUND, *supra* note 74, at 44.

78. See, e.g., ALLAN, *supra* note 28, at 14–15.

79. See DEP'T OF DEFENSE, *supra* note 10; Glazek, *supra* note 14.

80. See, e.g., ZILNEY & ZILNEY, *supra* note 2, at 145.

81. See Adler, *supra* note 72, at 219 (arguing that "the burgeoning of child pornography may invite its own violation" and that the law may "perpetuate and escalate the sexual representation of children that it seeks to constrain").

and up to thirty years.<sup>82</sup> And the allocation of resources to this work has little, if any, demonstrated effect on widespread problems of sexual assault and abuse.

In *United States v. Poehlman*, for example, the U.S. Court of Appeals for the Ninth Circuit reversed a conviction and vacated a sentence exceeding ten years imposed on a man who the court found was entrapped by a government agent when he went online looking for adult romantic partners. Judge Alex Kozinski, writing for the majority, explained:

Mark Poehlman, a cross-dresser and foot-fetishist, sought the company of like-minded adults on the Internet. After graduating from high school, Mark Poehlman joined the Air Force, where he remained for nearly 17 years. Eventually, he got married and had two children. When Poehlman admitted to his wife that he couldn't control his compulsion to cross-dress, she divorced him. So did the Air Force, which forced him into early retirement, albeit with an honorable discharge. These events left Poehlman lonely and depressed. He began trawling Internet "alternative lifestyle" discussion groups in an effort to find a suitable companion. Unfortunately, the women who frequented these groups were less accepting than he had hoped. After they learned of Poehlman's proclivities, several retorted with strong rebukes. One even recommended that Poehlman kill himself. . . . Eventually, Poehlman got a positive reaction from a woman named Sharon. Poehlman started his correspondence with Sharon when he responded to an ad in which she indicated that she was looking for someone who understood her family's "unique needs" and preferred servicemen.<sup>83</sup>

Ultimately, "Sharon," a government agent, lured Poehlman through online exchanges into agreeing to be a "special teacher" to her daughters and to train them about sexual matters, including by having sex with them.<sup>84</sup> There was no suggestion that Poehlman had any such interest himself until Sharon, well into their correspondence, conditioned her affection on his willingness to discuss these matters and persistently requested exploration of this topic. Poehlman appeared to try to avoid the topic, though he expressed his love for Sharon.<sup>85</sup> In the end, Poehlman wrote Sharon emails expressing his willingness to play her game of sexually training her daughters; he was arrested when he travelled to meet Sharon in a hotel.

Other than the suggestions of members of Congress and the investment of

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82. See, e.g., 18 U.S.C. § 2423(a)–(e) (2012) (providing criminal sentences for various crimes involving transportation of minors, including: imprisonment for ten years to life for transporting a minor with the intent to engage in criminal sexual activity, imprisonment for up to thirty years for travel with intent to engage in illicit sexual conduct, and imprisonment for up to thirty years for engaging in illicit sexual conduct in foreign places).

83. *United States v. Poehlman*, 217 F.3d 692, 695 (9th Cir. 2000).

84. *Id.*

85. See *id.* at 696–99.

public resources in this approach to regulating sexual harm through internet stings, there is no proof that there is a meaningful correspondence between the class of persons likely to sexually harm children or adults and the class of persons who the FBI contacts on the internet. As a consequence, as Judge Kozinski wrote for the majority in *Poehlman*, it may be wasteful and “unnecessary for our law enforcement officials to spend months luring an obviously lonely and confused individual to cross the line between fantasy and criminality.”<sup>86</sup>

This dominant regulatory approach is thus especially wrong-headed insofar as it diverts attention and resources from addressing sexual abuse perpetrated with great frequency and without any elaborate engagement of the Internet. The problem is not just the rarity of stranger internet-originated sexual abuse or the diversion of resources to law enforcement operations concentrated on that problem, however, but that abuse and violence that occur between intimates are hardly considered at all.

In addition to this overarching mismatch between the dominant regulatory regime focused on especially dangerous strangers prone to internet sexual predation, and the complicated reality of sexual harm between intimates, this purportedly preventive framework entails another series of pathologies occasioned by its orientation toward scapegoating and banishment. The following sections will address each of the five key components of this purportedly preventive post-conviction regulatory framework—registry, community notification, residential restrictions, monitoring and sanctions, and civil commitment—their problems, and their interactions in turn.

#### A. Registry

A person convicted of a sex offense, upon release from custody or upon receipt of a sentence of supervised release, must register as mandated by federal, state, and local law.<sup>87</sup> One is required to record his or her name, address, and whereabouts; pursuant to some registry laws, one must submit a photograph, employment information, and other personal identifying details.<sup>88</sup> Reregistration may be required as often as every ninety days and an individual may be required to register for life.<sup>89</sup> Sixty percent of persons convicted of sex offenses are on probation or parole at any given time, and virtually all are subject to registration requirements.<sup>90</sup>

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86. *Id.* at 705.

87. *See, e.g.*, CAL. PENAL CODE §§ 290, 311 (West 2014); *Sex Offender Registration and Notification Act (SORNA)*, DEP’T OF JUSTICE, <http://www.justice.gov/criminal/ceos/subjectareas/sorna.html> (last visited August 31, 2014); *see also* LEON, *supra* note 2, at 117.

88. *See, e.g.*, *Sex Offender Registration and Notification Act (SORNA)*, *supra* note 88.

89. *See, e.g.*, LEON, *supra* note 2, at 117 (“By the end of the [twentieth] century, people with convictions for noncontact offenses such as indecent exposure and possession of child pornography were required to register for life as sex offenders.”).

90. *See* ZILNEY & ZILNEY, *supra* note 2, at 128.

Registration laws were enacted across the country in the wake of passage of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994, which established a national database of sex offenders and made states' receipt of federal anti-crime funds conditional on creating sex offender registries.<sup>91</sup> Registries respond to a perception of sex offenders as itinerant strangers, intent on perpetrating violent sexual harm on children outside their immediate circle of acquaintances. Legislators hoped that registration laws would enable law enforcement to gather information about offenders' whereabouts, to closely monitor dangerous individuals, and to readily identify suspects when a crime was reported.<sup>92</sup>

The registry effectively produces this peculiarly configured category, lumping a disparate assortment of individuals together.<sup>93</sup> Persons classified as sex offenders constitute a diverse group; apart from their legal status, these men and women have little else in common.

Since 1994, the class of persons subject to registration has grown exponentially. Thirteen states require registration for persons caught urinating in public (two of which require registration only if a child was present); at least five states extend registration requirements to persons who are caught visiting sex workers; thirty-two states apply registration requirements to persons whose convicted conduct amounts to flashing or streaking; and no fewer than twenty-nine states require registration for adolescents who have sex with other adolescents even where the sex is consensual but for the statutorily created impossibility of the younger party's consent.<sup>94</sup> Registered offenders convicted of child pornography-related offenses include teenagers who consensually take pictures of themselves and share them with other teenagers by text message—a common practice among approximately 20 percent of American youth referred to as “sexting.”<sup>95</sup> In seventeen states, registration is for life.<sup>96</sup>

Registration laws' broad reach, which produces this large and heterogeneous class of registered sex offenders, might be understood in reference to several law enforcement objectives and social forces—even though containment of sexual harm through monitoring databases is a daunting and likely ineffective undertaking. First, the sentences that sex offenders ultimately receive do not necessarily reflect the seriousness of their crimes, given the

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91. See, e.g., RAISED ON THE REGISTRY, *supra* note 22, at 15.

92. See 42 U.S.C. § 16901 (2012).

93. See, e.g., Ackerman et al., *supra* note 24, at 150–57.

94. See *Sex Laws: Unjust and Ineffective*, THE ECONOMIST (Aug. 6, 2009), <http://www.economist.com/node/14164614>; see also CORRIGAN, *supra* note 4, at 230 (analyzing Kansas's sex offender registry, which extends to convictions for “soliciting or promoting prostitution . . . and intent to manufacture drugs (primarily methamphetamines)”); JANUS, *supra* note 19, at 69 (explaining that Michigan's public sex offender registry has included teenagers convicted of having consensual sex with other teenagers).

95. See, e.g., Marsha Levick & Kristina Moon, *Prosecuting Sexting As Child Pornography: A Critique*, 44 VAL. U. L. REV. 1035, 1040 n.4 (2010).

96. See *Sex Laws*, *supra* note 94.

prevalence of plea and charge bargaining which may distort the actual conduct that may underlie any given conviction.<sup>97</sup> Imposing some registration requirements on all persons convicted of sex offenses, even relatively minor ones, may be an effort to ensure that more serious perpetrators do not slip through the cracks. Second, some believe that minor offenses may serve as a proxy for identifying potentially serious offenders. Although largely unsubstantiated, this belief has developed out of a desire to address the sexual harm perpetrated by a relatively small class of vicious, dangerous, sexually predatory persons who may not be identifiable otherwise until they have perpetrated grave harm. Additionally, the sense that sexual offending is prevalent despite under-reporting produces a pressure to “catch” and contain “sex offenders” wherever they may be found and with ever increasing purportedly deterrent severity—a sentiment reflected in the legislative history discussed earlier.<sup>98</sup> A further factor that may explain the tolerance for the massive expansion of registration requirements is the disproportionately socioeconomically subordinate and racial minority status of persons subject to criminal prosecution in general.<sup>99</sup>

Regardless of any available explanations for the emergence and growth of the registries, the overbreadth of the registration requirements has produced numerous problems. The large number of persons required to register undermines the rolls’ ability to identify genuinely dangerous individuals.<sup>100</sup> Maintaining such large rolls of sex offenders inhibits effective law enforcement.<sup>101</sup> It becomes difficult for law enforcement to distinguish serious from non-serious offenders and to appropriately prioritize resources.<sup>102</sup>

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97. See, e.g., Marc Galanter, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. 459, 512 (2004); John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL’Y 119, 120 (1992) (“[O]ur guarantee of routine criminal jury trial is a fraud.”).

98. See also Amy Adler, *To Catch a Predator*, 21.2 COLUM. J. GENDER & L. 130, 134, 157–58 (2012) (arguing that our identification with the predator in the popular network television series *To Catch a Predator* as well as our concomitant desire, disgust, and shame cause us to disavow that identification through the force of an increasingly punitive and incoherent legal structure).

99. Early in this nation’s history, the stereotype of the dangerous African American male rapist preying on white women was often invoked, and much of the racialized violence of U.S. criminal law administration took place in response to such allegations. See Stephen Robertson, *Separating the Men From the Boys: Masculinity, Psychosexual Development, and Sex Crime in the United States, 1930s–1960s*, 56 J. HIST. MED. & ALLIED SCI. 3, 5 (2001). It is unclear, though, whether the same patterns of racial disproportionality that occur in other contexts of criminal law administration are as pronounced in the context of sex offenses; in fact, there is some evidence that there is less racial disproportionality in mid- to late-twentieth and twenty-first century sex-related prosecutions than is the case for other crimes. See LEON, *supra* note 2, at 100–02, 106 (There is “less disparity in sex offense enforcement by race than the literature might have led us to expect.”).

100. See, e.g., ZILNEY & ZILNEY, *supra* note 2, at 126 (“[A]dding all sexual offenders to a registration list and notifying the public of all sexual offenders makes it next to impossible for law enforcement officials to keep track of everyone.”).

101. See *id.*

102. See *id.*

California, for example, registers more than 75,000 individuals on its online “Megan’s Law” database.<sup>103</sup> Approximately 1 in every 375 adults in California, of the state’s 28 million residents, is now a registered sex offender.<sup>104</sup>

In some instances, law enforcement has simply lost track of thousands of persons convicted of sex offenses due to the overwhelming enormity of its registries: in 2003, California “lost track of at least 33,000 sex offenders,” prompting the attorney general to acknowledge “our system is inadequate, woefully inadequate.”<sup>105</sup> In a survey conducted in 50 states in 2003, a child advocacy group found that “states on average were unable to account for 24 percent of sex offenders supposed to be in the databases.”<sup>106</sup>

A separate but related concern is that the majority of registered offenders pose little public threat, so considerable public resources are expended on maintaining the registries without good reason.<sup>107</sup> In general, persons on the registry are not particularly likely to commit additional sex crimes.<sup>108</sup> A study of nearly 10,000 male sex offenders in fifteen states found that only 5 percent were re-arrested for a sex crime within 3 years.<sup>109</sup> When the Georgia Registration Review Board assessed a sample of the 17,000 offenders on its registry in 2008, the Board found that 65 percent of registered offenders posed “little threat,” 30 percent posed some potential threat, and only 5 percent were “clearly dangerous.”<sup>110</sup> Contrary to popular and legislative perceptions, most convicted sex offenders are *not* especially likely to re-offend, or at least to be reconvicted.<sup>111</sup> In fact, numerous studies have shown that convicted sex offenders have lower recidivism rates than other categories of convicted offenders.<sup>112</sup>

What is more, the most worrisome offenders may not be identifiable based on past convictions.<sup>113</sup> Many sex offenders are not identified because their

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103. See LEON, *supra* note 2, at 119.

104. See *id.*

105. JANUS, *supra* note 19, at 67 (internal citations and quotation marks omitted).

106. See *id.*

107. See *Sex Laws*, *supra* note 94.

108. See Leslie Helmus et al., *Absolute Recidivism Rates Predicted by Static-99R and Static-2002R Sex Offender Risk Assessment Tools Vary Across Samples: A Meta-Analysis*, 39 CRIM. JUST. & BEHAV. 1148, 1148–49 (2012) (“The sexual recidivism rates for typical sex offenders are lower than the public generally believes. . . . Previous research has found that the overall sexual recidivism base rate is lower than commonly expected—often in the 10% to 15% range. . . . [L]arge studies in the United States have found rates as low as 3% . . . and as high as 35%.”).

109. See *Sex Laws*, *supra* note 94.

110. See *id.*

111. See *id.*

112. See LEON, *supra* note 2, at 142, 155; see also Marcus T. Boccacini et al., *Field Validity of the Static-99 and MnSOST-R Among Sex Offenders Evaluated for Civil Commitment as Sexually Violent Predators*, 15 PSYCHOL. PUB. POL’Y & L. 278, 278–314 (2009); R. Karl Hanson & Kelly E. Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, 73 J. CONSULTING & CLINICAL PSYCHOL. 1154, 1154–63 (2005).

113. See LEON, *supra* note 2, at 142, 155; see also Jennifer L. Skeem & John Monahan, *Current Directions in Violence Risk Assessment*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 38, 41

victims—children, students, prisoners, members of the military—are afraid to report the relevant misconduct, and the authorities responsible for monitoring the abusers are not externally incentivized to investigate and respond to the abuse in question. Hyper-policing of persons with past sex offense convictions—particularly convictions for statutory rape, public exposure, or soliciting a sex worker—will do little to nothing to address these broader problems of underreporting and underenforcement. The special focus on a broad class of persons with prior sex-related convictions is in fact counterproductive to the goal of responding proactively to risks of future sexual harm, at least without some other indications of a particular convicted offender’s likelihood to seriously offend.

Further, to the extent that convicted offenders fail to register or re-register, law enforcement resources are diverted to tracing and punishing technical violations. This is a particularly poor use of resources if the registrant is not otherwise a threat.

Insofar as registration requirements are actually retributive, as opposed to preventive in their motivation, retributive norms of publicity and proportionality are undermined by configuring registration as a backdoor punishment justified on a preventive rationale. And in some instances, penalties for failure to re-register are grossly disproportionate to the offense in question, a problem distinct from the already noted concerns about overbreadth of the registries. For example, in 2012, the California Supreme Court upheld a three-strikes, 25-years-to-life sentence for a sex offender’s failure to re-register.<sup>114</sup>

The harsh impact of registration is frequently unjust and disproportionate even absent severe collateral sanctions for failure to re-register; these measures are particularly excessive when the person is convicted as a child.<sup>115</sup> Many states require lengthy periods of registration with periodical reregistration, even for offenses committed by juveniles. This imposes decades of onerous requirements on young and middle-age adults who committed their offenses as very young persons.<sup>116</sup>

For example, at age fifteen, Jim T. was convicted in Arizona for molesting

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(2011) (“The violence risk assessment field may be reaching a point of diminishing returns in instrument development. . . . We hope that forensic psychology shifts more of its attention from predicting violence to understanding its causes and preventing its (re)occurrence.”).

114. See *In re Coley*, 283 P.3d 1252, 1256 (Cal. 2012) (“Petitioner[] . . . was . . . intentionally unwilling to comply with an important legal obligation, and thus his triggering criminal conduct bore both a rational and substantial relationship to the antirecidivist purposes of the Three Strikes law. . . . [W]e conclude that . . . the imposition of a 25-year-to-life sentence does not constitute cruel and unusual punishment under the circumstances of this case.”).

115. See, e.g., FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING (2009).

116. See HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 8–9 (2007), available at <http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf> [hereinafter SEX OFFENDER LAWS IN THE US].

his sister beginning when she was six and he was ten years old.<sup>117</sup> As a result, he was sentenced to three years in an adult lock-down facility where he was assaulted several times.<sup>118</sup> Jim T. must re-register every ninety days and is subject to community notification, addressed in the following section,<sup>119</sup> for the remainder of his life.<sup>120</sup>

In some jurisdictions, intensive reregistration requirements apply to youth who were convicted of relatively minor offenses, such as statutory rape for having otherwise consensual sex with a high school peer. For example, Dan M. was convicted for having sex with a fifteen-year-old when he was seventeen. Once in college, he was required to re-register every ninety days between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday, before the fifteenth of the month.<sup>121</sup> Dan M. explains how the registration requirements shape his life:

When my family and I go on vacation to visit relatives in other states I must always look up the law as to my duties regarding the list in a particular state. More than two weeks in New York I must register. More than three consecutive days in one county in Florida I must register. My parents moved to Arkansas. If you are in Arkansas you must register after 14 days. They take a statement and fingerprint you. It is always like starting it up all over again. I will be visiting my parents for more than 30 days in a year so I had to be assessed as to my level of risk to re-offend. I had to take a psychological test. I wanted to puke [the questions] were so disgusting. Is that the type of person people think I am? I am not attracted to children, or dead people. I would never rape anyone. . . . I am a good person who made a bad decision with a peer 16 months my junior seven weeks after my 17th birthday. My coach might send me to New York next summer to play baseball. I will have to be assessed by them too. I will have to do this for another 23 years. That is how long I have to register.<sup>122</sup>

These reregistration requirements will apply to Dan M. well into middle age, and he will continue to be subject to invasive reassessments of his sexual proclivities whenever he travels for personal or professional purposes.

The very severity and intrusiveness of these registration requirements may make it more difficult for survivors of sexual violence and abuse to seek recourse through the criminal process.<sup>123</sup> Even absent registration, the conventional criminal process is frequently re-traumatizing for rape and sexual

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117. *See id.* at 71.

118. *See id.* at 71.

119. *See infra* Section I.B.

120. *See* SEX OFFENDER LAWS IN THE US, *supra* note 116, at 71.

121. *See id.* at 74.

122. SEX OFFENDER LAWS IN THE US, *supra* note 116 at 74–75.

123. *See* CORRIGAN, *supra* note 4, at 233 (examining how registration requirements “contribute to the erasure of sexual assault in local communities and across the country” by “further discouraging identification, prosecution, and conviction of sex crimes”).

assault survivors, thus discouraging reporting.<sup>124</sup> These problems are exacerbated by registration, as judges, juries, prosecutors, and even survivors themselves may find the registration measures too harsh, further interfering with charging and conviction determinations as well as other operations of the criminal process.<sup>125</sup>

In a study of the sharp reduction in convictions for registerable offenses in South Carolina after the State enacted registration requirements, the authors found that “the percentage of cases with initial sex offense charges but non-sex offense charges at adjudication doubled.”<sup>126</sup> This suggests sex assault cases were re-charged to avoid registration and other consequences. Further, “cases involving registry-eligible charges were significantly less likely to result in guilty dispositions than cases involving nonregistry offenses.”<sup>127</sup> The authors posit that “online registration decreased the likelihood of convicting guilty defendants of sex crimes, possibly because judges, juries, defendants, and attorneys considered lifetime online registration too harsh a consequence for some defendants.”<sup>128</sup> The study’s authors conclude, “[O]nline registration could contribute to reduced community safety, by precluding punishment, treatment, and supervision for some guilty individuals who avoid sanctions altogether.”<sup>129</sup>

There is also evidence that persons charged with offenses subject to registry are less willing to accept a plea due to the severity of registration requirements. This leads more of these cases to either be dropped or go to trial, an outcome that often requires survivors to testify in a process that is typically re-traumatizing.<sup>130</sup>

Even without these complicating factors, however, registration with local law enforcement could only be meaningful as a crime control project if it was radically scaled back and transformed. For registration to serve its purported crime control purpose, the number of registrants would need to be limited to a relatively small, manageable group who have perpetrated serious crimes and whose risk to re-offend is considerable. (Though in these cases, registration would likely be unnecessary and redundant because these individuals would be

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124. See Yxta Maya Murray, *Rape Trauma, the State, and the Art of Tracey Emin*, 100 CALIF. L. REV. 1631, 1659 (2012) (“[R]ape victims in the United States . . . face the prospect of police incredulity and inaction.”); see also SUSAN J. BRISON, *AFTERMATH: VIOLENCE AND THE REMAKING OF A SELF* 108 (2002) (discussing the aftermath of Brison’s own rape and the criminal trial, which required her to recount her violent assault in public to be assessed against her assailant’s narrative in defense, requiring her to remain vigilant and immersed in all of the awful details so that it was only after the trial that she could leave the horror behind); Fan, *supra* note 28, at 776–78.

125. See CORRIGAN, *supra* note 4, at 233.

126. See Elizabeth J. Letourneau et al., *The Effects of Sex Offender Registration and Notification on Judicial Decisions*, 35 CRIM. JUST. REV. 295, 309 (2010).

127. See *id.* at 311.

128. See *id.* at 312.

129. See *id.*

130. See CORRIGAN, *supra* note 4, at 223–24; see also Murray, *supra* note 124, at 1659.

subject to intensive supervision and court-mandated treatment or incarceration in any event.) Further, the efficacy of registration would turn on substantively engaging and integrating supervised persons into a range of life activities that actually inhibit reoffending rather than simply sanctioning noncompliance in an ad hoc manner with arbitrary technical requirements and other degrading, criminogenic interventions. But this narrowed, more focused mode of registration of persons convicted of very serious offenses who are reasonably believed to be at high risk of re-offense could not constitute any major part of a regulatory framework for addressing more pervasive, often unreported sexual abuse and violence. In any case, any such drastically scaled back and rationalized registration regime bears no resemblance to current U.S. criminal regulatory practices.

Instead, as registration laws currently stand, the United States leads the world in the extremity of its sex offense registration requirements.<sup>131</sup> Due to their massive size, U.S. sex offender registration databases cease to serve as useful tools for identifying likely dangerous persons. They become instead a vehicle for humiliating a large class of citizens, including young people, in some instances for the entirety of their lives. And registration requirements create a category of feared persons that corresponds poorly with the reality of how sexual harm is perpetrated and experienced. These pathologies, organized around scapegoating and often-misidentified threats, are exacerbated by the community notification provisions with which registration laws are often paired.

### *B. Community Notification*

Community notification mandates operate in tandem with registration requirements in most jurisdictions.<sup>132</sup> Notification laws require that states and municipalities inform residents, employers, and schools of the presence of persons with registered sex offense convictions living in the area.<sup>133</sup> Often the whereabouts of the individuals in question are posted to the Internet with an accompanying photograph.<sup>134</sup> In other jurisdictions, interested parties must approach law enforcement with a request for information.<sup>135</sup> Notification may

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131. See generally CORRIGAN, *supra* note 4; LEON, *supra* note 2; *Sex Laws*, *supra* note 94.

132. See LEON, *supra* note 2, at 119.

133. See *id.*

134. See, e.g., *Sex Offender Management*, NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVS., <http://www.criminaljustice.ny.gov/nsor/> (last visited Aug. 31, 2014) (“This directory now posts multiple photographs of registered sex offenders, as they become available, to provide New Yorkers with additional information to keep their families safe.”); *North Carolina Sex Offender Registry*, NORTH CAROLINA DEP’T OF JUSTICE, <http://sexoffender.ncdoj.gov/search.aspx> (last visited Aug. 31, 2014); see also *Florida Sexual Offenders and Predators*, FLORIDA DEP’T OF LAW ENFORCEMENT, <https://offender.fdle.state.fl.us/offender/homepage.do;jsessionid=mZOT-nUaBdAxXkz6o+ISRI2FF> (last visited Aug. 31, 2014) (displaying images of “offenders” and “predators” and requesting that the public “[h]elp us locate these people”).

135. See ZILNEY & ZILNEY, *supra* note 2, at 119.

take place online, at community meetings, or by other means.<sup>136</sup> As of 2006, all fifty states had notification laws in place.<sup>137</sup>

Community notification produces serious, deleterious unintended consequences beyond the humiliation and resource drain occasioned by registration requirements. In the most extreme instances, community notification requirements expose persons convicted of sex offenses, even minor offenses, to vigilante violence and abuse. In 2013 in South Carolina, for example, a double murder was linked to a suspect who admitted he went through the sex offender registry looking for persons to kill; he had planned to kill more people in the coming days using the same approach, explaining to his victims, “I’m here to kill you because you’re a child molester.”<sup>138</sup> In enabling vigilante violence, community notification requirements operate in line with two broader trends: they rely on oversimplified punitive responses to complex social problems (“governing through crime”) and they pass considerable responsibility for maintaining social order back to communities and private security forces—a trend which some argue persuasively is a feature of a more general neoliberal penalty.<sup>139</sup>

Vigilante violence, even if rare, thus places convicted sex offenders subject to registration in a frightening bind: either be subject to felony reconviction and reincarceration for failure to register, or risk severe physical attacks and harassment. While this is obviously cruel as applied to persons convicted of minor offenses, the harshness entailed by the community notification regime—forcing a choice between social ostracism, or even lethal violence, and lengthy reincarceration—is unjust as a collateral sanction even as applied to individuals with more serious convictions.

Community notification may also undermine compliance with registration

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136. *See id.*

137. *See* LEON, *supra* note 2, at 119; *see also* Smith v. Doe, 538 U.S. 84, 105–06 (2003) (holding community notification laws constitutional on grounds that they are regulatory rather than punitive and therefore do not violate the ex post facto clause of the U.S. Constitution); Conn. Dep’t of Pub. Safety v. Doe, 538 U.S. 1, 4 (2003) (holding posting of photographs of convicted sex offenders on the Internet solely on basis of conviction and without a hearing does not violate the procedural due process clause of the Fourteenth Amendment of the U.S. Constitution).

138. *See* Alan Blinder, *Double Murder Seen as Part of Man’s Quest to Kill Sex Offenders*, N.Y. TIMES, July 26, 2013, [http://www.nytimes.com/2013/07/27/us/2-targeted-sex-offender-to-be-killed-officials-say.html?\\_r=0](http://www.nytimes.com/2013/07/27/us/2-targeted-sex-offender-to-be-killed-officials-say.html?_r=0). In 2006 in Maine, a gunman shot and killed two listed sex offenders; one of the men was convicted for having consensual sex with his fifteen-year-old girlfriend when he was nineteen years old. *See Sex Laws, supra* note 94. In 2005 in Washington State, another gunman posing as an FBI agent entered the home of two sex offenders he found on the Internet and murdered them. *See id.*

139. *See* SIMON, *supra* note 33, at 33–74; *see also* BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER 40–44 (2011) (“Neoliberal penalty facilitates passing new criminal statutes and wielding the penal sanction more liberally because that is where government is necessary, that is where the state can legitimately act, that is the proper and competent sphere of politics. By creating and reinforcing this categorical division between a space of free self-regulation and an arena where coercion is necessary, appropriate, and effective, neoliberal penalty has fertilized the growth of the penal domain.”).

requirements. In the words of one convicted offender:

Registration ain't all bad. . . . But, there are a lot of nuts out there so you got to be real careful. That's why a lot of ex-offenders don't register because they don't want people to know who they are and come kill them or burn down their house or something. . . . And now that I got to register I am on the Internet for ten years. My picture is on the Internet for ten years. I don't want nothing bad to happen to me, but I am afraid that registering on the Internet will make something bad happen, so that's why a lot of guys don't even register. They're afraid.<sup>140</sup>

Even without violence or persistent harassment, the social isolation produced by community notification poses further criminogenic risks. Community notification makes it hard for convicted offenders to reintegrate, diminishing the efficacy of informal social controls like employment and neighborhood oversight that have been repeatedly shown to inhibit criminal conduct.<sup>141</sup> Although there is some indication that drastically limited and down-scaled registration requirements may enable crime control, the available evidence suggests that community notification actually increases risks of recidivism as the psychological and social strain of community notification undermines individuals' capacities for legal compliance.<sup>142</sup>

Perhaps even more than registration, community notification is particularly burdensome and concerning when applied to young people whose culpability is lessened in virtue of their young age and whose vulnerability is greater. Louisiana imposes especially onerous requirements on convicted sex offenders, both adults and children, including requiring any youth between the ages of fourteen and seventeen who live in a city to mail a notification at their own expense to all of their neighbors within a one-mile radius, notifying them personally of their address and criminal record.<sup>143</sup> Further, the youth must take out a classified ad in the local paper and register with the local school superintendents.<sup>144</sup> At a judge's order, a young person (like convicted adults) may be required to display signs on his home or car labeling him as a sex offender.<sup>145</sup>

Community notification also produces disproportionate fear of dangerous but statistically rare child sexual predators residing around any corner. This fear, in turn, distracts attention from the locations where sexual harm most

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140. See MICHELLE L. MELOY, *SEX OFFENSES AND THE MEN WHO COMMIT THEM: AN ASSESSMENT OF SEX OFFENDERS ON PROBATION* 87 (2006).

141. See, e.g., ZILNEY & ZILNEY, *supra* note 2, at 126; see also Prescott & Rockoff, *supra* note 21, at 165.

142. See Prescott & Rockoff, *supra* note 21 at 165.

143. See Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 810–11 (1996).

144. See *id.*

145. See *id.*; see also LA. REV. STAT. ANN. § 15:542.1 (2012).

often transpires and encourages a range of strategies such as residential restrictions, addressed in the following section, that undermine efforts to reduce risks of sexual violence and abuse where such conduct most often occurs.

### C. Residential Restrictions

Numerous jurisdictions have enacted residential restrictions, severely limiting the areas in which convicted sex offenders are permitted to live.<sup>146</sup> Residentially restrictive statutes—often called Jessica’s Laws, after Jessica Lunsford, a nine-year-old girl who was kidnapped, sexually battered, and murdered by a convicted sex offender—vary in their severity and scope.<sup>147</sup> Some ordinances restrict urban residents from living within 1,000 feet of any place children may congregate, and other residentially restrictive ordinances establish a range of 2,500 or more feet.<sup>148</sup> Again, the purported rationale for the residential restrictions is that predatory, impulsive, convicted, pedophilic strangers will be inhibited from reoffending if they are not living near schools, bus stops, day care centers, or other locations where these individuals could more readily abduct and harm children.

Residential restrictions have come under criticism, both for their inhumanity and their inefficacy.<sup>149</sup> The restrictions routinely cause those subject to them to become homeless because individuals cannot find a place where they can live in compliance with the restrictions, particularly in urban environments.<sup>150</sup>

In Georgia in 2006, when the state began implementing a residency restriction that prohibited persons with sex-related convictions from living near school bus stops, police officers drove through neighborhoods measuring the number of feet between registered individuals’ homes and any place where children may congregate, especially bus stops.<sup>151</sup> Sheriff’s deputies determined that in Atlanta, every single one of the 490 registered sex offenders would be evicted, and nearly all of the 478 persons living in the suburban counties—some 473 individuals—would be forced to move.<sup>152</sup> An advocate at the

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146. See LEON, *supra* note 2, at 120.

147. See Stephanie Garry, *Lunsford’s Pain Vivid in Documentary “Jessie’s Dad”*, TAMPA BAY TIMES, May 2, 2008, <http://www.tampabay.com/news/publicsafety/lunsfords-pain-vivid-in-documentary-jessies-dad/485905> (discussing film documenting Jessica Lunsford’s father’s advocacy to establish laws in up to thirty states that impose tougher restrictions on convicted sex offenders, many of which include residential restrictions).

148. See LEON, *supra* note 2, at 120–21.

149. See, e.g., Jill S. Levenson, *Collateral Consequences of Sex Offender Residence Restrictions*, 21.2 CRIM. JUST. STUD. 153 (2008); Prescott, *supra* note 25.

150. See Karl Vick, *Laws to Track Sex Offenders Encouraging Homelessness*, WASH. POST, Dec. 27, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/26/AR2008122601722.html>.

151. See Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner’s Perspective*, 42 HARV. C.R.-C.L. L. REV. 513, 519 (2007).

152. See *id.*

Southern Center for Human Rights, working on this issue in the region at the time, described the pandemonium that transpired as a result:

It is difficult to describe the confusion and panic among people on the registry. . . . [O]ur office began to receive calls from registered sex offenders. There were calls from sobbing mothers and wives; people on the registry who were blind, disabled, and in wheelchairs; and people who were undergoing chemotherapy for cancer. There were more calls than I can count from people who told us they were considering suicide. . . . [S]heriffs' deputies began delivering eviction notices, sometimes in the middle of the night, giving residents just days to vacate.<sup>153</sup>

Ultimately, Georgia abandoned the most severe of its restrictions, though many convicted persons' lives in Georgia and other states remain severely disrupted by other sex offender residential restriction provisions.<sup>154</sup>

In California in 2010, registered sex offenders who had been rendered homeless in San Diego County challenged the residency restriction in Superior Court on the grounds that the restriction violated their "right to intrastate travel, their right to establish a home and their right to privacy and because it was not narrowly drawn and specifically tailored to the individual circumstances of each sex offender parolee."<sup>155</sup> More than 150 registered sex offender parolees rendered homeless by the restrictions filed habeas petitions challenging the constitutionality of the residency restrictions.<sup>156</sup>

The petitions of William Taylor, Jeffery Glynn, Julie Briley, and Stephen Todd, all persons with sex offense convictions living in San Diego County, were chosen to be the lead cases to establish an evidentiary record for assessing the "as applied" constitutionality of the restrictions. All four of these individuals were unable to locate stable residences due to the restrictions: "Taylor and Briley lived in an alley behind the parole office on the advice of their parole agents, Todd lived in the San Diego riverbed with other registered sex offenders who had no place to live, and Glynn lived in his van."<sup>157</sup>

Judge Michael Wellington held an eight-day evidentiary hearing in Superior Court before finding that the parole condition was impermissible. His decision was affirmed on appeal, when the California Court of Appeal for the Fourth District concluded:

[T]he blanket residency restriction exceeds the scope of its stated objective—the protection of children—because as applied it eliminates nearly *all* existing affordable housing in San Diego County for sex offender parolees, in essence banishing them from living within most

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153. *See id.* at 520.

154. *See id.* at 529; *see also infra* Part III.

155. *See* Bailey, *supra* note 44.

156. *See id.*

157. *See id.*

if not all of the County . . . , and because it treats all parolees the same regardless of whether his or her crime involved victimization of children or adults (and thus the need for the residency restriction in the first place). Glynn and Taylor are registered sex offenders because each of them committed a sex crime against an adult; there is no hint of pedophilia in their histories. The exclusion of parolees with backgrounds similar to Glynn and Taylor from living near schools and parks does not substantially protect children, but as the record here shows, it has a tremendous impact on such parolees' rights and liberty without bearing a substantial relation to their crimes.<sup>158</sup>

Although the restrictions have been struck down as applied in a blanket manner to all parolees, the court permitted similar restrictions to be applied with individualized consideration of particular offenders' cases.<sup>159</sup> Consequently, the problem of homelessness remains for many persons with sex offense convictions as a result of the residency restrictions, including in California.

The residency restrictions are not only inhumane, there are significant reasons to believe they do not effectively reduce or control crime. Because the restrictions generally only apply to residences, it is not clear that they even meaningfully inhibit interaction with potential victims, as a registered individual could readily access victims at a family member's home, at work, or elsewhere.

Further, the restrictions may push people into areas with less law enforcement oversight where the registered individuals and their families might be at risk. The Minnesota Department of Corrections has found that sex offenders are more likely to move outside locations where they can be meaningfully monitored *because* of the restrictions.<sup>160</sup> California officials found that the residency restrictions make it impossible in many places for convicted individuals to find a place for their families to live, forcing the state to place them "in motels or half-way house settings where multiple sex offenders live" at an expense to the state of approximately \$25 million annually.<sup>161</sup>

A proponent of the California residential restrictions, California Senator George Runner, acknowledged that homelessness had been an anticipated result of the restrictions, but that lawmakers intended GPS monitoring to control crime after offenders were displaced from their residences. Runner explained, "[W]e knew the consequence from the very beginning; that's why we included

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158. *In re Taylor et al.*, 147 Cal Rptr. 3d 64, 83 (Ct. App. 2012), *review granted and opinion superseded by* 290 P.3d 1171 (Cal. 2013) (citation omitted).

159. *See id.*

160. *See* LEON, *supra* note 2, at 120.

161. *See* Michael Rothfeld, *Panel: Take Another Look at Sex Offender Restrictions*, L.A. TIMES, Jan. 14, 2009, <http://articles.latimes.com/2009/jan/14/local/me-offenders14>.

GPS as well as residency requirements.”<sup>162</sup>

But GPS monitoring for 6,300 parolees in California in 2009 cost an estimated \$60 million and likely reduced the time of parole officers to engage in more meaningful forms of supervision and public safety-related work.<sup>163</sup> For this reason as well, the purported public safety benefits of residential restrictions are subject to considerable doubt.

Despite their inhumanity and questionable crime control benefits, the residency restrictions have spurred communities to use residential zoning as a “self-help” strategy for managing risks of sexual violence. For example, in Los Angeles, residents have begun to organize “pocket parks” in order to zone registered sex offenders out of neighborhoods.<sup>164</sup> The residents have converted small lots of undeveloped land near halfway houses and other apartment complexes into parks in order to effect the eviction of sex offenders who reside there.<sup>165</sup>

This collective focus or fantasy about the potential of residential restrictions to reduce sexual violence and abuse runs counter to the evidence about reducing the incidence of criminal offenses generally, instead enlisting communities in harmful, likely criminogenic projects of ostracism. Specifically, this approach disregards the substantial body of sociological and criminological scholarship that suggests that social engagement and institutional involvement, or “group-level effects,” reduce criminal offending.<sup>166</sup> These studies link structural context and the prevalence of effective social organizations with decreased interpersonal violence and neighborhood disorder.

The theory of group-level effects or neighborhood effects also accords with known social facts about the world: employers and community organizations convey social expectations and informally monitor those who participate in them. In a neighborhood where these institutions are functioning effectively, people tend to be discouraged and inhibited from engaging in criminalized pursuits, and have access to social supports in the event they find themselves struggling with addiction or other personal challenges. In other

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162. See Vick, *supra* note 150, at 3.

163. See *id.*

164. See, e.g., Angel Jennings, *L.A. Sees Parks as a Weapon Against Sex Offenders*, L.A. TIMES, Feb. 28, 2013, <http://articles.latimes.com/2013/feb/28/local/la-me-parks-sex-offenders-20130301>.

165. See *id.*

166. See Robert J. Sampson & William Julius Wilson, *Toward a Theory of Race, Crime, and Urban Inequality*, in CRIME AND INEQUALITY 37 (John Hagan & Ruth D. Peterson eds., 1995); Robert J. Sampson et al., *Does Marriage Reduce Crime? A Counterfactual Approach to Within-Individual Causal Effects*, 44 CRIMINOLOGY 465, 465 (2006) (analyzing data that “support[] the inference that states of marriage causally inhibit crime over the life course”); Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCI. 918, 923 (1997) (finding that a “combined measure of informal social control and cohesion and trust [was] a robust predictor of lower rates of violence”).

words, reasonable educational opportunities, access to employment, and informal institutional social controls are associated with improved public safety.<sup>167</sup> It is unknown what impact, if any, group-level effects have in the context of sexual offending, but to the extent social isolation, stress, and substance abuse wear down a person's defenses against destructive behavior generally, one might expect the same to hold in the context of perpetrating sexual harm.<sup>168</sup> The foundational idea, in any event, ought to apply to the regulation of sexual harm, namely that social institutions beyond the criminal law context are critical to the maintenance of social order and to organizing informal surveillance.<sup>169</sup> Correspondingly, a shift away from the effective banishment of convicted sex offenders might actually reduce those individuals' likelihood of offending and bolster opportunities for social integration and meaning-generating, constructive institutional involvement.

Russell Banks's novel *Lost Memory of Skin* illuminates some of the further more subtle dysfunction manifest in the residency restrictions' neglect of the importance of social connection. *Lost Memory of Skin* reveals the failure of social institutions and the role of social dislocation as well as hypocritical and arbitrarily puritanical attitudes towards sex in producing the very conduct classified as sex offending.<sup>170</sup> Banks's eerie account interweaves actual examples of sex offense regulatory measures with an imaginative literary rendering of sex offense regulation's harms and failings—one that captures the criminogenic effects of institutional failure more vividly than similar legal, scholarly, or policy accounts of the same phenomenon.

*Lost Memory of Skin* centers on the social dislocation of one fictional young male convicted sex offender, twenty-two year old "Kid," who is forced to sleep under a causeway in Florida in a sex offender encampment. Banks's novel draws this premise from the well-documented situation of sex offenders in Miami, Florida forced to live under a bridge due to the applicable residentially restrictive ordinance.<sup>171</sup>

Kid, like many convicted sex offenders subject to residential restrictions, was convicted of committing a sexual crime even though he never laid a hand

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167. See generally ARNOLD S. LINSKY & MURRAY A. STRAUS, SOCIAL STRESS IN THE UNITED STATES: LINKS TO REGIONAL PATTERNS IN CRIME AND ILLNESS (1986).

168. Of course, social institutional engagement will not serve to dissuade all persons from criminal conduct, and some conventional social institutions may be criminogenic. See, e.g., David Friedrichs, *Enron et al.: Paradigmatic White Collar Crime Cases For the New Century*, 12 CRITICAL CRIMINOLOGY 113, 119–21 (2004) (examining the criminal organizational culture of Enron as well as other major corporations, accounting firms, and law firms).

169. See Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 212 (2008) ("Well-run, well-targeted educational and vocational programs, substance abuse treatment, cognitive behavioral therapies, and reentry partnerships can reduce recidivism by 5-30 percent.").

170. RUSSELL BANKS, *LOST MEMORY OF SKIN* (2011).

171. See Greg Allen, *Sex Offenders Forced to Live Under Miami Bridge*, NAT'L PUB. RADIO (May 20, 2009), <http://www.npr.org/templates/story/story.php?storyId=104150499>.

on a supposed victim. In fact, the novel's title references the fact that Kid has never had any physical, sexual contact with human skin other than his own. But he is addicted to internet pornography, an addiction he developed at age eleven to fill the emptiness of his early adolescent existence: "watching pornography and masturbating were the only times he felt real."<sup>172</sup> He watched internet pornography for hours each day beginning in middle school and throughout his adolescence.<sup>173</sup> Kid was largely abandoned by his family, living with his single mother who left him alone for days at a time while she was off with various boyfriends. He describes his childhood in terms of a deadening isolation and social disconnection, finding respite only in online pornography, which was more readily available to him than other forms of social engagement.<sup>174</sup>

Kid's addiction to pornography and the punishment he ultimately suffers for distributing pornography in the military underscore the strange coexistence of the mass availability of pornography, often free of charge on the internet, alongside the arbitrary, episodic, extraordinarily punitive reactions to certain instances of pornography's circulation and consumption. Kid's story is neither anti-porn, nor pro-porn, but what Kid's experience makes clear is that it is not pornography that has led him to his current predicament—despite its pervasiveness and the arbitrary regulation of it—but the absence of socially connected engagement with his family, at school, or the military, which he joins in the hope of finding community before he is forced to leave.

*Lost Memory of Skin* begins with Kid's first visit to a library. Never having entered a library before his conviction, Kid enters a library for the first time to look up his own identity in an online database of sex offenders.<sup>175</sup> In narrating this visit to the library, Banks elucidates not just the irrationality of the residency restrictions as a crime control measure—Kid "can't remember there being any rules specifically against entering [a library] . . . . And children and teenagers probably come in here all the time"<sup>176</sup>—but also Kid's social disconnection. It was this social disconnection that resulted ultimately in Kid's arrest, when he was presumably chatting online with a law enforcement agent, "brandi18," who invited him to her home, first telling him she was eighteen and later conveying she was fourteen. This would have been Kid's first date.

Yet, even as Kid must live effectively on the street for the remainder of his life, presumably to prevent him from harming children, he may visit a public library. Or at least he thinks he may do so as long as it is not denominated in the residency restrictions as "a place where children

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172. See BANKS, *supra* note 170, at 412 ("[I]t felt better and less boring than not doing it...[s]o for years whenever he was alone with a computer he watched pornography and masturbated.").

173. *Id.* at 17, 135–37, 204.

174. See *id.* at 17.

175. *Id.* at 4.

176. See *id.*

congregate,” whoever its actual users may be.<sup>177</sup>

Banks hauntingly portrays both the strange construction of Kid’s identity as a “sex offender” and the perilous ostracism he experiences through the enforcement of the residential restrictions and other sex offender regulatory measures, including a GPS ankle bracelet that Kid is required to wear to monitor his compliance. Through his monitor bracelet, Banks writes, “the Kid feels intimately connected to the millions of other convicted sex offenders young and old and in-between, rapists and child abusers and men who exposed their genitals . . . men who talked dirty in Internet chat rooms . . . porn addicts . . .” as he imagines they are all “trembling leaves on the branches large and small of a vast electrical tree that casts its shadow across the entire country.”<sup>178</sup> This is the first sense of social connection that Kid experiences, one that unites him with people who have violently raped and to others who, like Kid, committed nonviolent, minor offenses, but who all experience a form of social banishment that makes it difficult to exist outside of this identity assignment and the degradation it entails. In Banks’s telling, though, this constructed identity and forced estrangement is no more harmful to Kid than the isolation of his youth, brought about similarly by the absence of social engagement. Through Kid’s story, Banks exposes part of how the residential restrictions mischaracterize the problem of sexual harm as one that can be resolved by removing certain, presumably pathological, individuals from existing social structures rather than by addressing the social institutional conditions associated with targeted forms of sexual harm in the first instance.

Banks focuses, in particular, on the institutions of the family, school, and the military. First, Banks explores Kid’s family and school, the spaces of his early life. Kid is so socially dislocated—both before his conviction and after—that life feels to him unreal, “not quite dead but not alive either.”<sup>179</sup> Still, Kid does not blame his largely absent mother or anything particularly horrible in his upbringing for his plight. In fact, Kid is ultimately at a loss as to how to explain it. Instead, Banks simply makes plain the absence of any mode of integration that connects Kid in any way to others—whether through his family, or school, or when he joins the military. Kid’s addiction to pornography deepens in the military, because as he describes it, “Everybody’s into porn, even the officers. . . . It’s practically un-American not to be into porn.”<sup>180</sup> Kid relates that “like all the guys in my outfit, I watched porn all the time on my computer.”<sup>181</sup> But U.S. military personnel cannot “distribute porn.”<sup>182</sup> Kid remarks on the precariousness of this distinction: “You can collect and swap

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177. *See id.*

178. *See id.* at 402.

179. *See id.* at 412.

180. *See id.* at 143.

181. *See id.* at 139.

182. *See id.* at 143.

skin magazines with your buddies. You can watch porn videos and share them with your homies. . . . But if you're U.S. military personnel you can't like distribute porn. . . . Which is a pretty fine distinction, if you ask me. Between consuming and distributing. You can be one but not the other."<sup>183</sup> Kid is at the bottom of his unit's hierarchy and "from the first day of basic guys gave me a lot of shit."<sup>184</sup> In order to endear himself to the men in his unit, Kid buys porn DVDs for the other men when he is off base one night; the following day there is a raid, and Kid is discharged from the military for distributing pornography.<sup>185</sup>

Ultimately, when Kid goes to meet "brandi18" by bus in the Florida exurbs after being discharged from the military, he is not sure whether he is engaging in fantasy or reality—that distinction, just like the one between consuming and distributing pornography, has become thoroughly blurred for him. Banks makes evident that the blurring is not caused by porn, or even really by the law enforcement agent "brandi18"'s misleading internet seduction, but is produced by Kid's social seclusion. After his conviction, Kid's dislocation is heightened by homelessness—his disconnection concrete and dramatized—but his dislocation is both the cause and the effect of his predicament.

Kid, like thousands of actual youths in the United States, will be a registered sex offender for life. Kid explains, "I only got to wear this electronic foot collar for ten. But even when I get to take it off I'll still be on the fucking registry for the rest of my life. I'll still be homeless and living under the Causeway or someplace like it that's more than twenty-five hundred feet from wherever there are kids gathered. . . . That's my fate, I'm pretty sure."<sup>186</sup>

Through Kid's story, *Lost Memory of Skin* dramatizes the unemployability, social isolation, and desperation of convicted sex offenders, as Banks also foregrounds a related pathology experienced by "us" not "them"—a social unraveling in the fabric of our urban spaces, our educational institutions, families, and military. This is a disconnection that also permits inurement to the cruelty and inefficacy of our criminal law's response to persons with sex-related convictions, to survivors of sexual violence, and ultimately desensitization to the actual contours of sexual harm, social injustice, and their pervasiveness.

Accordingly, in many urban jurisdictions, sex offender residential restrictions render those subject to them homeless, because there is nowhere one can live or work in city limits while complying with the restrictions.<sup>187</sup> As

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183. See *id.* at 143–44.

184. See *id.* at 139.

185. See *id.*

186. See *id.* at 205–06.

187. See Geraghty, *supra* note 151; Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Registry Restrictions*, 42 HARV. C.R.-C.L. REV. 531, 532–34 (2007); Vick, *supra* note 150.

with community notification requirements, socially ostracizing and physically banishing convicted sex offenders removes informally surveillant, socially integrative mechanisms (such as employment or neighborhood oversight) that are known generally to reduce crime.<sup>188</sup>

#### *D. Monitoring and Sanctions*

Beyond registration, notification, and residency restrictions, convicted sex offenders are subject to an array of additional forms of monitoring as well as sanctions for failure to comply with surveillance measures.<sup>189</sup> These measures, too, entail draconian and counterproductive effects.

Even if convicted persons are prone to reoffend, the means by which registered offenders are monitored in many jurisdictions are predicated on pseudoscience that does not accurately predict future offending. Penile plethysmograph testing provides a particularly invasive example of simultaneous dehumanization and inefficacy as applied to convicted sex offenders. A penile plethysmograph is an arousal test, which involves “placing a pressure-sensitive device around a man’s penis, presenting him with an array of sexually stimulating images, and determining his level of sexual attraction by measuring minute changes in his erectile responses.”<sup>190</sup> In *U.S. v. Weber*, Judge Marsha Berzon, writing for a panel of the U.S. Court of Appeals for the Ninth Circuit, explained the disturbing character of penile plethysmograph testing—widely used in monitoring persons with sex offense convictions—in terms that merit quoting at length:

Although one would expect to find a description of such a procedure gracing the pages of a George Orwell novel rather than the Federal Reporter, plethysmograph testing has become routine in the treatment of sexual offenders and is often imposed as a condition of supervised release. . . .

Prior to beginning the test, the subject is typically given instructions about what the procedure entails. He is then asked to place the device on his penis and is instructed to become fully aroused, either via self-stimulation or by the presentation of so-called “warm-up stimuli,” in order to derive a baseline against which to compare later erectile measurements. After the individual returns to a state of detumescence, he is presented with various erotic and non-erotic stimuli. He is instructed to let himself become aroused in response to any of the materials that he finds sexually exciting. These stimuli come in one of three modalities—slides, film/video clips, and auditory vignettes—though in some cases different types of stimuli are presented

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188. See, e.g., Sampson & Wilson, *supra* note 166; Sampson et al., *Does Marriage Reduce Crime?*, *supra* note 166; Sampson et al., *Neighborhoods and Violent Crime*, *supra* note 166.

189. See LEON, *supra* note 2, at 134–35.

190. Jason R. Odeshoo, *Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders*, 14 TEMP. POL. & CIV. RTS. L. REV. 1, 2 (2004).

simultaneously. The materials depict individuals of different ages and genders—in some cases even possessing different anatomical features—and portray sexual scenarios involving varying degrees of coercion. The stimuli may be presented for periods of varying length—from mere seconds to four minutes or longer.

Changes in penile dimension are recorded after the presentation of each stimulus.

Initially developed by Czech psychiatrist Kurt Freund as a means to study sexual deviance, plethysmograph testing was also at one time used by the Czechoslovakian government to identify and “cure” homosexuals. Today, plethysmograph testing has become rather routine in adult sexual offender treatment programs, with one survey noting that approximately one-quarter of adult sex offender programs employ the procedure. . . .

It is true that cavity searches and strip searches are deeply invasive, but [plethysmograph testing] is substantially more invasive. Cavity searches do not involve the minute monitoring of changes in the size and shape of a person’s genitalia. Nor do such searches last anywhere near the two or three hours required for penile plethysmography exams. Nor do cavity or strip searches require a person to become sexually aroused, or to engage in sexual self-stimulation. . . .

A reasonable finder of fact could conclude that requiring the plethysmograph involves a substantive due process violation. The procedure, from all that appears, is hardly routine. One does not have to cultivate particularly delicate sensibilities to believe degrading the process of having a strain gauge strapped to an individual’s genitals while sexually explicit pictures are displayed in an effort to determine his sexual arousal patterns. The procedure involves bodily manipulation of the most intimate sort. There has been no showing regarding the procedure’s reliability and, in light of other psychological evaluative tools available, there has been no demonstration that other less intrusive means of obtaining the relevant information are not sufficient.<sup>191</sup>

Judge John T. Noonan, Jr., in his concurrence in *U.S. v. Weber*, went further still in condemning the procedure:

[T]he Orwellian procedure at issue . . . [is] always a violation of the personal dignity of which prisoners are not deprived. The procedure violates a prisoner’s bodily integrity by affecting his genitals. The procedure violates a prisoner’s mental integrity by intruding images into his brain. The procedure violates a prisoner’s moral integrity by requiring him to masturbate.

By committing a crime and being convicted of it, a person does not

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191. *United States v. Weber*, 451 F.3d 552, 554, 562–63 (9th Cir. 2006) (internal citations and quotation marks omitted).

cease to be a person. A prisoner is not a mere tool of the state to be manipulated by it to achieve the purposes the law has determined appropriate in punishment. The prisoner retains his humanity and therefore has purposes transcending those of the state. A prisoner, for example, cannot be forced into prostitution to aid the state in securing evidence. A prisoner, for example, cannot be made to perjure himself in order to assist a prosecution. Similarly, a prisoner should not be compelled to stimulate himself sexually in order for the government to get a sense of his current proclivities. There is a line at which the government must stop. Penile plethysmography testing crosses it.<sup>192</sup>

The Court struck down the application of the plethysmograph in Webster's individual case on statutory and procedural grounds, though Webster's lawyer neglected to raise a substantive due process challenge. Quite apart from the specific result in this case, the opinions in *Webster* illuminate how plethysmograph testing transgresses widely held expectations of humane conduct of the criminal process. As with residential restrictions, this form of testing is morally condemnable in cases involving youthful offenders in light of their relative innocence, immaturity, and reduced culpability, as well as to adults convicted of minor offenses. But it is not just its overbroad application that is the source of injustice. There are lines of degradation and cruelty that criminal sanctions, especially collateral sanctions, ought not to cross even for more serious offenses. Many of the regulatory techniques applied to sex offenders, including plethysmograph testing, are indefensibly invasive and dehumanizing.

In addition to its degrading invasiveness, penile plethysmograph testing is an unreliable predictor of an individual's likelihood to perpetrate sexual harm.<sup>193</sup> Studies of the link between arousal and activity strongly suggest that persons are often aroused in ways that do not at all predict their sexual activity, and persons convicted of or prone to more serious offenses may seek to mask unconventional forms of arousal.<sup>194</sup> Simply put, plethysmograph testing

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192. *Id.* at 570–71 (Noonan, J., concurring); *see also* United States v. McLaurin, 731 F.3d 258, 264 (2d Cir. 2013) (“McLaurin’s only conviction for an actual sexual offense was for photographing his daughter topless in 2001. Ten years passed between that offense and the instant failure to register, and McLaurin has not been convicted or accused of any substantively sexual crime in that period. We fail to see any reasonable connection between this defendant, his conviction more than a decade ago, his failure to fill out paperwork, and the government-mandated measurement of his penis. In the end, we hold that the plethysmographic condition does not bear adequate relation to the statutory goals of sentencing to outweigh the harm it inflicts, that it involves a greater deprivation of liberty than is reasonably necessary to serve any of those statutory goals, and that it may not, consistent with substantive due process, be imposed on McLaurin.”); *Criminal Law — Sentencing Law — Second Circuit Holds Penile Plethysmography Condition Acceptable Only if Defendant-Specific and Narrowly Tailored to Compelling Government Interest.* — United States v. McLaurin, 731 F.3d 258 (2d Cir. 2013), 127 HARV. L. REV. 1839 (2014).

193. *See* W.L. Marshall & Yolanda M. Fernandez, *Phallometric Testing with Sexual Offenders: Limits to Its Value*, 20 CLINICAL PSYCHOL. REV. 807, 810–13 (2000) (assessing critically the reliability of phallometric testing, such as plethysmograph testing).

194. *See* Meredith L. Chivers et al., *Gender and Sexual Orientation Differences in Sexual*

purports to predict sexual activity on the basis of arousal, but the link between arousal and activity is complex and tenuous at best.<sup>195</sup> One may have sexually stimulating fantasies that one never acts on or that are played out only in consensual fantasy contexts, such as adult role play. Further, sexual violence may be perpetrated out of a desire to exercise power and domination over others in ways that are not primarily about sexual arousal or satisfaction.<sup>196</sup>

More broadly, the connection between serious psychological research and correctional systems is extremely limited. The work of psychiatrists and psychologists in corrections is resource strapped and largely practice based; and an array of paraprofessionals has emerged to meet the significant demand for sex offender monitoring.<sup>197</sup> These paraprofessionals often have limited training and very few conduct research or have academic affiliations.<sup>198</sup> In order to monitor convicted sex offenders, the paraprofessionals deploy tests that include invasive technologies of questionable reliability, including but not limited to penile plethysmographs and polygraphs.<sup>199</sup>

The harmful and counterproductive effects of notification, residential restrictions, and pseudoscientific testing are all the more condemnable because sanctions for failure to comply with these restrictions and requirements are severe, even punishable as felonies in many jurisdictions.<sup>200</sup> Prison sentences for noncompliance may be lengthy, as in this case of a convicted sex offender in Texas:

I was homeless—I went to two homeless shelters—told them the truth—I was a registered sex offender—I could not stay. . . . The 3rd shelter I went to—I did not tell them. I was allowed to stay. November 2002 I was to register again—my birthday. If I told them I lived at a shelter—I would be thrown out—if I stayed on the streets I would not have a [*sic*] address to give—violation. So I registered under my old address—the empty house, which was too close to a school. Someone called the police—I told them I did not live at that address anymore—I was locked up, March 2003. I was given a 10-year sentence for failure to register as a sex offender.<sup>201</sup>

These sanctions of lengthy imprisonment for failure to register even apply

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*Response to the Sexual Activities Versus Gender of Actors in Sexual Films*, 93 J. PERSONALITY & SOC. PSYCHOL. 1108, 1109 (2007).

195. *See id.*

196. *See* Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625, 643 (2005) (explaining how rape ought to be understood as “sexually invasive dehumanization”).

197. *See* LEON, *supra* note 2, at 134–35.

198. *See id.*

199. *See id.*

200. For instance, failure to register is a felony. *See, e.g.*, CAL. PENAL CODE § 290.018(b) (West 2014) (providing that a person who is convicted of a registerable felony sex offense who fails to register is guilty of a felony and a person who is convicted of a registerable misdemeanor sex offense who fails to register is guilty of a misdemeanor for the first violation and a felony for any subsequent violations); *see also* LEON, *supra* note 2, at 118.

201. *See* ZILNEY & ZILNEY, *supra* note 2, at 132.

to persons whose convictions or juvenile adjudications occurred when they were still minors. In one case, Lucas W. was adjudicated delinquent at age seventeen of aggravated sexual assault for having consensual sex with his younger girlfriend, though he later married her. He was subsequently arrested for failure to register and was sentenced to ten years in prison.<sup>202</sup>

Some facing these harsh carceral consequences were even younger at the time they were adjudicated: Ethan A. was eleven years old when he was accused by his stepmother of touching the genitals of his infant sister and his younger brother.<sup>203</sup> His first photograph for the registry was taken when he was thirteen years old. After Ethan A.'s release from juvenile detention, he worked hard to turn his life around, finding employment in an auto body shop to help his mother pay the bills and beginning a romantic relationship with a young woman in his community. Ultimately, though, when his employer learned of his registration status, he was fired. Several months later when Ethan A. went for his registration verification he was arrested for not reporting he had lost his job. Registered offenders in many states may be prosecuted for failure to provide notice of change of place of employment. Ethan A. was convicted of this felony offense and sentenced to three years incarceration.<sup>204</sup>

Even when the prosecution relates to sexual harm within the family, such as the sexual abuse of which Ethan A. was accused, the uniform application of extraordinarily punitive measures blurs the line between violent sexual abuse and children's behavior that may be socially inappropriate, harmful, and sexually-oriented, but relatively non-dangerous. This uniform treatment in collateral carceral sanctions is misguided, among other reasons, because it fails to attend to differences in culpability between the sort of behavior of which Ethan A. was accused and adult rape of children. Additionally, uniform treatment of a broad spectrum of offenses may increase the stigma and reporting fears of the survivor of childhood genital touching. By constructing relatively minor offenses as deserving of extreme punishment, these practices may also increase the likelihood that the experience will be remembered as especially painful and traumatic rather than inappropriate and unwanted but not permanently damaging.<sup>205</sup> Further, if the young victims are aware that their siblings or parents would face lifelong punitive sanctions, this could lead to a decline in reporting of offending behavior.

The excessive harshness and overbreadth of monitoring and sanctioning measures also raise legitimacy concerns that could impact law enforcement efficacy, because repeated studies have shown that perceived legitimacy

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202. See RAISED ON THE REGISTRY, *supra* note 22, at 66–67.

203. See *id.* at 89–90.

204. See *id.*

205. This is not to deny the trauma many survivors of childhood genital touching experience, but to suggest the criminal law's response to the sexual touching by an older child of a younger child may exacerbate the younger child's experience of suffering.

substantially influences rule-abiding behavior.<sup>206</sup> A significant majority of convicted sex offenders perceive the overbreadth and harshness of the prevailing criminal regulatory regime to be illegitimate. In one survey of convicted sex offenders, 75 percent responded that they did not view the notification and registration requirements as a deterrent to future offending, and most responded that they perceived these laws to be “unfair.”<sup>207</sup> One convicted sex offender explained,

When people see my picture on the state sex offender registry they assume I am a pedophile. I have been called a baby rapist by my neighbors; feces have been left on my driveway; a stone with a note wrapped around it telling me to “watch my back” was thrown through my window, almost hitting a guest. What the registry doesn’t tell people is that I was convicted at age 17 of sex with my 14-year-old girlfriend, that I have been offense-free for over a decade, that I have completed my therapy, and that the judge and my probation officer didn’t even think I was at risk of reoffending. My life is in ruins, not because I had sex as a teenager, and not because I was convicted, but because of how my neighbors have reacted to the information on the Internet.<sup>208</sup>

Another convicted offender relays that,

The rules are humiliating—a constant reminder. It’s hard to, in a manner of speaking, to move on and try to put things behind when you’re constantly reminded by the rules that you are a sex offender and the rules more or less make you feel like it just happened yesterday. . . . The rules don’t allow you to have a normal life and the rules are a constant reminder that you’re not a normal person.<sup>209</sup>

Yet another convicted sex offender explicitly conveyed that he believed that the restrictions may lead him or others to engage in new criminal behavior:

What they do to sex offenders now, I mean, I understand the intentions behind it, but what it really does with all the reporting, the money, the PO’s watching everything, the list [community notification], in many respects I think it is overkill and it has the potential to push people to that point where they re-offend.<sup>210</sup>

At a minimum, as a consequence of perceived unfairness, compliance is likely to be undermined insofar as perceptions of legitimacy impact compliance with the law. These problems relating to criminogenesis are compounded by

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206. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990) (demonstrating that people obey laws in large measure because they believe those laws to be legitimate).

207. See ZILNEY & ZILNEY, *supra* note 2, at 123.

208. See SEX OFFENDER LAWS IN THE US, *supra* note 116, at 6 (citing email communication from Jameel N. to Human Rights Watch, June 4, 2005).

209. See Richard G. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Managing High Risk Criminals or Exactng Further Vengeance?*, 18 BEHAV. SCI. & L. 375, 385 (2000).

210. See MELOY, *supra* note 140, at 93.

the dehumanizing and unreliable character of the restrictions and monitoring to which convicted sex offenders are subject, even those convicted of relatively minor, sometimes even victimless crimes.<sup>211</sup>

Apart from perceptions of illegitimacy, as noted earlier, the best available evidence suggests that notification requirements that make life especially onerous for persons convicted of sex offenses are likely to be criminogenic as they render it harder to obtain lawful employment and otherwise form social attachments that inhibit antisocial and criminalized conduct.<sup>212</sup> Any deterrent effect of these sanctions must be assessed in light of the violence and intolerance they visit on the lives of persons, including those adjudicated as children, who ought to be treated with some regard for their dignity as human beings.

These monitoring and sanctioning mechanisms also reinforce a conception of regulating sexual harm that focuses on individuals rather than on institutional practices that are conducive to pervasive sexual abuse, pseudo-scientific tests instead of more reliable predictive indications of instability and threat, and an overall mismatch between the behaviors to be regulated and the techniques used. These monitoring and sanctioning mechanisms are thus productive of misguided regulatory strategies and distract attention from macro-level social institutional reform efforts that might better limit risks of sexual violence and abuse.

#### *E. Civil Commitment*

Following a criminal sentence, a small number of sex offenders may be civilly committed in a secure facility similar to a prison but for its civil designation.<sup>213</sup> By 2007, twenty states and the federal government had enacted new civil commitment provisions that permit indefinite detention of convicted sex offenders after they have completed their sentence if they are deemed dangerous.<sup>214</sup>

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211. The onerous requirements placed on sex offenders are also unnecessary to incarcerate persons who perpetrate serious sex crimes: the number of people incarcerated for sexual offenses had already begun to increase prior to the widespread enactment of these restrictions and preventive prohibitions on residency, even though substantial problems with underreporting of sexual harm almost certainly persist. In 1980, there were approximately 20,500 persons incarcerated for sexual offenses. In 1990, that number increased to 63,600. By 1994, 81,000 sex offenders were housed in state prisons. Moreover, the increasing harshness of the regulatory regime followed decreasing rates of reported sexual offending. See PAMELA D. SCHULTZ, NOT MONSTERS: ANALYZING THE STORIES OF CHILD MOLESTERS 7 (2005); see also SEX OFFENDER LAWS IN THE US, *supra* note 116, at 23.

212. See, e.g., Prescott, *supra* note 25, at 50–55.

213. See, e.g., ZILNEY & ZILNEY, *supra* note 2, at 134–36.

214. See LEON, *supra* note 2, at 121; see also United States v. Comstock, 560 U.S. 126, 149–50 (2010) (holding that it is within Congress's authority to permit civil commitment of convicted sex offenders already in federal custody); Seling v. Young, 531 U.S. 250, 267 (2001) (upholding Washington State's procedures for civil commitment of certain convicted sex offenders); Kansas v. Hendricks, 521 U.S. 346, 371 (1997) (upholding Kansas's procedures for civil commitment of certain convicted sex offenders under Kansas's Sexually Violent Predator Act). The standards and processes

In his book *Failure to Protect*, Eric Janus demonstrates that though relatively few convicted sex offenders are civilly committed, the process and standards governing commitment are such that the confinement is often indefinite.<sup>215</sup> In particular, though state practices with regard to civil commitment vary considerably, once one is committed, the determination of dangerousness is difficult to contest because it is predicated on future propensities rather than conduct one has undertaken.<sup>216</sup> Between 1990 and 2007, there were approximately 2,700 sex offenders civilly committed, of whom only approximately 250 had been released.<sup>217</sup> Those who obtained release did so largely on the basis of technicalities rather than sentence completion.<sup>218</sup>

There are numerous troubling questions surrounding civil commitment practices. First, the fact that so few individuals are ever released from commitment suggests that civil commitment has become a “civil” shadow

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used to deem someone dangerous vary somewhat from state to state: in Kansas, a person may be civilly committed indefinitely after being charged or sentenced for a “sexually violent offense” and found to be a “sexually violent predator.” A “sexually violent predator” is defined under the Act as “any person who has been convicted or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.” *Id.* at 352. Kansas’s statute placed the burden of proof on the State. *See id.* Washington State’s Community Protection Act of 1990 similarly authorized the civil commitment of “sexually violent predators,” defined as persons convicted of or charged with a crime of sexual violence and who suffer from a mental abnormality or personality disorder that makes them likely to engage in predatory acts of sexual violence. WASH. REV. CODE § 71.09.010 (2014).

215. As the Supreme Court described in its opinion in *Seling v. Young*, the process of civil commitment typically commences when “a person who has committed a sexually violent offense is about to be released from confinement” and “the prosecuting attorney files a petition alleging that that person is a sexually violent predator.” *Seling*, 531 U.S. at 254 (considering the civil commitment process in Washington). “That filing triggers a process for charging and trying the person as a sexually violent predator, during which he is afforded . . . counsel and experts[,] . . . a probable cause hearing, and trial by judge or jury at the individual’s option. . . . At trial the State bears the burden to prove beyond a reasonable doubt that the person is a sexually violent predator.” *See id.* In California only about 2 percent of even those sex offenders referred for commitment are actually committed. *See* LEON, *supra* note 2, at 124; *see also* JANUS, *supra* note 19, at 27–34 (describing sex offender commitment trials as “Kafkaesque” and stating, “[p]redator cases incarcerate people for the status of being a dangerous mentally disordered person, so the relevant ‘facts’ are psychological constructs, whose only reality is in the expert judgment of mental health professionals. . . . Key information is based on the unsworn handwritten notes of institutional guards and attendants whose propensity for accurate and unbiased observation is unknown, and whose absence from the courtroom shields them from cross-examination”).

216. *See, e.g.*, JANUS, *supra* note 19, at 22–23, 63; LEON, *supra* note 2, at 121; *see also* Rachel Aviv, *The Science of Sex Abuse*, NEW YORKER (Jan. 14, 2013), <http://www.newyorker.com/magazine/2013/01/14/the-science-of-sex-abuse> (“After nearly twelve years in prison, John had become accustomed to the institutional life style, and he worried about his ability to adjust to the ‘real world.’ He wanted to move briskly through the stages of treatment, to prove his health, but no one could tell him when or how this would happen. After taking three orientation classes last summer, he spent the fall waiting to enroll in his next therapy group, ‘Introduction to the Process of Change.’”).

217. *See* Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, [http://www.nytimes.com/2007/03/04/us/04civil.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2007/03/04/us/04civil.html?pagewanted=all&_r=0).

218. *See id.*; *see also* LEON, *supra* note 2, at 122.

system for life sentencing in the sex offense context.<sup>219</sup> Perhaps not surprisingly, a study focused on public support for civil commitment provisions found that respondents supported civil commitment as an extension of an offender's punishment primarily in those instances where a convicted offender was perceived to have received too lenient a punishment, irrespective of the risk of recidivism.<sup>220</sup> This violates basic principles of criminal liability, eschewing values of proportionality in sentencing and effectively punishing persons for conduct of which they have not been criminally tried and convicted.

There is also marked variation and irregularity in the administration of civil commitment beyond its function as masked punishment for crimes a person is believed to be at risk of committing but has not yet committed. In one multi-state analysis of persons civilly committed as sexual predators, the authors found that in certain states—Washington, Florida and Wisconsin—committed sex offenders exhibited high levels of risk on the applicable risk assessment instruments, whereas in Nebraska, committed persons reflected far lower levels of risk.<sup>221</sup> The authors concluded that “when civil commitment dispositions appear to be based on something other than an empirically supported understanding of risk, it reduces confidence that the balance is being struck wisely.”<sup>222</sup>

A separate concern is that the financial cost of confining someone “civilly” for life—rather than in prison, following a full hearing, with appropriate procedural protections—is exorbitant.<sup>223</sup> New York spent approximately \$175,000 per committed person in 2010, with the national average running about \$96,000 per year, not including legal expenses.<sup>224</sup> California's 2007 budget for civil commitment was over \$147 million.<sup>225</sup> Whereas it costs \$110,000 per year to “civilly” confine a “sexually violent offender” in Arizona, the cost per year per prison inmate is \$20,564; the difference in Pennsylvania is between \$150,000 and \$32,304.<sup>226</sup>

Even though the civil commitment framework is enormously resource-intensive, it provides little meaningful therapy or other intervention. Lawyers

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219. See, e.g., JANUS, *supra* note 19, at 33 (“We are supposed to punish people for what they have done in the past, not because of who they are. . . . Where criminal prosecution requires specific allegations of a particular act that violates a specific law, predator cases allege vague future harm, at some unspecified place, under unstated circumstances, and at indefinite times. Predator cases are unambiguously about ‘who’ a person is.”).

220. See Kevin J. Carlsmith et al., *The Function of Punishment in the “Civil” Commitment of Sexual Violent Predators*, 25 BEHAV. SCI. & L. 437, 437–48 (2007).

221. See Julia E. McLawsen et al., *Civilly Committed Sex Offenders: A Description and Interstate Comparison of Populations*, 18 PSYCHOL. PUB. POL'Y & L. 453, 464 (2012).

222. See *id.* at 473.

223. See, e.g., ZILNEY & ZILNEY, *supra* note 2, at 141; see also McLawsen et al., *supra* note 221, at 472 (reporting that in Nebraska the typical cost of inpatient civil commitment is \$100,000 per person per year).

224. See LEON, *supra* note 2, at 123–24.

225. See *id.* at 123.

226. See ZILNEY & ZILNEY, *supra* note 2, at 141.

might well advise civilly committed persons not to attend therapy while detained, and not to engage frankly and openly in treatment, because misconduct admitted in that context could imperil their eventual release or result in new criminal charges.<sup>227</sup> In any case, most committed individuals never leave.<sup>228</sup>

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For all of these reasons the predominant U.S. post-conviction regime for regulating sexual offending is overbroad, ineffectual, inefficient, and likely criminogenic—exacerbating the social and individual pathologies it purports to address and neglecting the locations and institutional pathologies associated with the most prevalent sexual harms. This regulatory framework purports to address sexual harm, yet drains and misdirects law enforcement resources in a manner ill-suited to confronting prevalent forms of sexual violence and abuse. The regime is justified in popular and legal discourse on the grounds that it prevents future sexual harm, but it may well perpetuate more harm than it prevents or redresses. How, then, might this dysfunctional regime be reformed or substantially restrained?

## II.

### REVISING REGIMES OF EXCESSIVE CRIMINALIZATION AND PUNISHMENT

This Part explores how advocates in jurisdictions across the United States have sought to scale back the overbreadth and misdirection of certain sex offense regulations, countering tendencies toward scapegoating dangerous strangers by characterizing the dominant sex offense regulatory regime as itself productive of threat.<sup>229</sup> Advocates' work in this domain may serve as a model for future efforts to reform regimes of criminal regulatory excess in other contexts by identifying the ways in which criminal law's overreaching more generally threatens crucial shared values and social well-being, not only of those immediately impacted, but of all of us.

In Georgia, the Southern Center for Human Rights organized a major effort to scale back the harshness of sex offense regulations by bringing a class action lawsuit on behalf of all persons in Georgia subject to the sex offender registry and residential restrictions.<sup>230</sup> The Southern Center chose a lead plaintiff in the case, Wendy Whitaker, who captured pointedly the threats of overbreadth and excessive harshness imposed by the restrictions. Whitaker, now in her thirties, became subject to the residential restrictions and risked losing her home because she engaged in a single act of consensual oral sex with

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227. See Davey & Goodnough, *supra* note 217.

228. See ZILNEY & ZILNEY, *supra* note 2, at 141.

229. See LEON, *supra* note 2, at 193–94.

230. See Geraghty, *supra* note 151, at 528–29; see also Whitaker v. Perdue, No. 4:06-CV-00140-CC (N.D. Ga. Mar. 30, 2007) (order on motion to dismiss).

a fifteen-year-old boy in her high school class at the age of seventeen.<sup>231</sup> At the time, Whitaker pled guilty to sodomy and completed five years of probation, but the Georgia law required her to register as a sex offender and prohibited her from residing within 1,000 feet of a place where children congregate.<sup>232</sup>

In response to publicity generated by the lawsuit—much of it sympathetic to Whitaker’s disconcerting story—the Georgia legislature enacted a law to permit certain designated sex offenders, such as persons whose offenses are now considered misdemeanors, to petition a Superior Court judge to obtain release from the registry.<sup>233</sup> The legislative reform also removed retroactive application of residential restrictions, so that these restrictions no longer apply to the 13,000 or so registered sex offenders in the state who were convicted before June 4, 2003.<sup>234</sup> Advocates achieved these preliminary successes in Georgia not only by emphasizing the insecurity that the registry and restrictions create for sympathetic, non-dangerous persons like Whitaker, but also by selecting a plaintiff who called attention to the threat the overbreadth of the sex offender regulatory regime may pose to anyone. Additionally, advocates pointed to the threat to public safety created by the enforcement of registry and residential restrictions, which unnecessarily drain law enforcement resources.<sup>235</sup>

The ultimate victory in the Georgia Supreme Court, striking down the harshest form of the Georgia residency restriction, came in a separate case, *Mann v. Georgia Department of Corrections*, which called attention to the threat to property rights inherent in the restrictions.<sup>236</sup> In that case—brought by a forty-five year old man who was ordered to vacate a recently purchased home due to a conviction of lewd and lascivious conduct with a child in 2002—the Georgia Supreme Court found that the residency restriction constituted a violation of his Fifth Amendment right to be free from unreasonable government taking of his property.<sup>237</sup> In celebrating the victory in *Mann*, attorney Sarah Geraghty of the Southern Center for Human Rights relayed, “What this decision says is we value property rights and the legislature cannot simply snatch them away.”<sup>238</sup> This framing of residency restrictions as a threat to property rights proved successful before the Georgia Supreme Court as a

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231. See Peter Whoriskey, *Georgia Court Rejects Law on Sex Offenders*, WASH. POST, Nov. 22, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/21/AR2007112102091.html>.

232. See *id.* (discussing residency restrictions for registered sex offenders in Georgia).

233. See Bill Rankin, *Restricted by Registry No More*, ATLANTA J.-CONST., Sept. 18, 2010, at B1; Geraghty, *supra* note 151; Whoriskey, *supra* note 231.

234. See LEON, *supra* note 2, at 194.

235. See *id.* at 193–94 (“[S]tate legislators in Georgia have begun to have personal experience with the laws, as their own children and the children of their friends have been caught in the wide net.”).

236. See 653 S.E.2d 740 (Ga. 2007).

237. See *id.*

238. See Whoriskey, *supra* note 231.

manner of narrowing the overbreadth of sex offender restrictions, whatever its other political and legal connotations.

Threats to state budgets in times of relative economic austerity have also motivated some states to depart even from federally mandated sex offense regulatory requirements under the Adam Walsh Act, which conditions federal funds on states' establishment of systems for registration and reregistration of persons convicted of sex offenses.<sup>239</sup> Multiple states have declined to comply with the Adam Walsh Act and every state that has compared the price of compliance against the price of noncompliance has determined that noncompliance better serves their financial interests—the federal funds potentially sacrificed are more than recouped by not having to expend resources on the registry and associated enforcement processes.<sup>240</sup> In short, the threat of tightening state budgets outweighed other incentives to participate in the federally promoted framework.

In Ohio, reform to certain sex offense regulatory measures came about as public defenders filed hundreds of challenges to a requirement that courts reclassify all registered sex offenders according to their conviction offense, rather than, as had previously been the case, on the basis of a more holistic assessment.<sup>241</sup> Complying with this requirement would have involved a substantial allocation of court resources and undoubtedly the challenges summoned to mind the threat of depletion of scarce court resources to make possible the reclassifications: the statute at issue required reclassification of 26,000 registered offenders in the state.<sup>242</sup> Greene County Prosecutor Stephen K. Haller explained, "It's a mess. . . . To me it's an example of nonlawyers trying to pass legislation just because it's today's hot topic."<sup>243</sup> Ultimately, in response to lawsuits brought by public defenders challenging the reclassification, the Ohio Supreme Court found that the reclassification requirements violated the separation of powers doctrine of the Ohio Constitution.<sup>244</sup>

More recently, advocates in Ohio succeeded in persuading the Ohio Supreme Court to strike down altogether lifetime registration requirements for individuals placed on the registry as juveniles on the ground that this was cruel and unusual punishment under the Ohio and U.S. Constitutions.<sup>245</sup> Of course,

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239. See Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 479 (2010).

240. See *id.*

241. See Lou Grieco & Mark Gokavi, *Reclassifying Sex Offenders Sends Courts into Chaos*, DAYTON DAILY NEWS, July 21, 2010, [http://www.daytondailynews.com/news/news/crime-law/reclassifying-sex-offenders-sends-courts-into-chaos/nNFZ9/?\\_\\_federated=1](http://www.daytondailynews.com/news/news/crime-law/reclassifying-sex-offenders-sends-courts-into-chaos/nNFZ9/?__federated=1).

242. See *id.*

243. *Id.*

244. *Id.*; *State v. Bodyke*, 933 N.E.2d 753 (Ohio 2010).

245. See *In re C.P.*, 967 N.E.2d 729 (Ohio 2012); David Eggert, *Supreme Court Strikes Down Sex Offender Law*, COLUMBUS DISPATCH, Apr. 3, 2012, <http://www.dispatch.com/content/stories/local/2012/04/03/court-overturms-sex-offender-law.html>.

in focusing efforts on juveniles, advocates concentrated attention on a population already understood as relatively innocent, vulnerable, and less readily susceptible to scapegoating. Still, by emphasizing the cruel and unusual nature of lifetime registration requirements, and also by demonstrating the threat to core values and rule of law principles, advocates ultimately persuaded the Ohio Supreme Court that the juvenile registration provisions “shock the sense of justice of the community.”<sup>246</sup>

In a particularly unexpected turn of events, the application of the sex offense laws to young people even led Mark Lunsford, the father of rape and murder victim Jessica Lunsford, the namesake of Jessica’s Laws, to speak out against overbroad application of sex offense regulatory measures.<sup>247</sup> This came to pass when the laws threatened his own son.<sup>248</sup> Joshua Lunsford, then eighteen, was arrested for kissing a fourteen-year-old girl.<sup>249</sup> This alleged conduct, if proven, would have constituted criminal child sexual abuse in Ohio.<sup>250</sup> The girl’s mother reported the incident to the police.<sup>251</sup> Mark Lunsford commented to the *Tampa Tribune*: “We’re talking about Romeo and Juliet here, not some 36-year-old pervert following around a 10-year-old.”<sup>252</sup> The threat to loved ones, especially the threat posed by the overbreadth of the sex offense regulatory regime as applied to youth, has motivated even one of the most staunch proponents of these laws—a parent of a child victim—to reconsider their advisability.

In New Mexico, advocates partnered with another parent and victims’ rights proponent who initially supported passage of the sex offender registry laws. The former proponent had become concerned that the overbreadth of the registration laws was a threat to more general law enforcement objectives.<sup>253</sup>

As described in Part I, California’s sex offender residency restrictions have also been subject to a substantial and partially effective series of challenges, not by survivors or their families, but by convicted sex offender

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246. See *In re C.P.*, 967 N.E.2d at 746; see also *Sex Offender Registration and Notification: Hearing on S.B. 10 Before the H. Criminal Justice Comm.*, 2007 Leg., 127th Gen. Assemb. 4-5 (Oh. 2007) (statement of Jill Beeler, Office of the Ohio Public Defender), available at [http://www.opd.ohio.gov/AWA\\_Information/AW\\_SB\\_10\\_JEB\\_House\\_testimony.pdf](http://www.opd.ohio.gov/AWA_Information/AW_SB_10_JEB_House_testimony.pdf) (discussing implementation costs of the broad proposed registration requirements and their damaging effects on youth); *Sex Offender Registration and Notification: Hearing on S.B. 10 Before the H. Criminal Justice Comm.*, 2007 Leg., 127th Gen. Assemb. 1-3 (Oh. 2007) (statement of Jill Beeler, Office of the Ohio Public Defender), available at [http://www.opd.ohio.gov/AWA\\_Information/AW\\_SB\\_10\\_Beeler\\_2.pdf](http://www.opd.ohio.gov/AWA_Information/AW_SB_10_Beeler_2.pdf) (discussing the likely damaging effects of overbroad requirements and their damaging effects on youth).

247. See *Lunsford’s Brother Charged with a Sex Crime*, USA TODAY, May 31, 2007, [http://usatoday30.usatoday.com/news/nation/2007-05-31-lunsford-arrest\\_N.htm](http://usatoday30.usatoday.com/news/nation/2007-05-31-lunsford-arrest_N.htm).

248. See *id.*

249. See *id.*

250. See *id.*

251. *Id.*

252. *Id.*

253. See LEON, *supra* note 2, at 194.

parolees and their advocates, calling attention to the constitutional and legal threats posed by regulatory overreach. Persons subject to the sex offender registry in San Diego County, California brought suit challenging the residency restrictions on the basis of violations to their “right to intrastate travel, their right to establish a home and their right to privacy” and alleging the restriction “was not narrowly drawn and specifically tailored to the individual circumstances of each sex offender parolee.”<sup>254</sup> The blanket application without individualized consideration of residency restrictions was enjoined by the court and upheld on appeal in an opinion that notes throughout the threat to core constitutional principles posed by the blanket application of the residency restrictions.<sup>255</sup> At the time of this writing, an appeal is pending in the California Supreme Court.<sup>256</sup>

Along these lines, in Georgia, Ohio, New Mexico, and California, advocates worked with public defenders, prosecutors, victims’ rights proponents, and legislators to call attention to the threats posed by the governing criminal regulatory regime and the values undermined by the various restrictions.<sup>257</sup> Advocates underscored the threats to sympathetic, nonthreatening individuals like Wendy Whitaker, juvenile offenders in the Ohio case, to the rule of law, to property rights, to other core constitutional commitments, to public safety, to state budgets, and to law enforcement broadly in the face of resource constraints.<sup>258</sup> This reformist approach marshals political emotion by implicitly directing attention to the danger posed by the criminal regulatory status quo—a threat that may be perceived to outweigh the threat associated with targeted scapegoated sex offenders. This framing of the threat of criminal law’s excessive harshness and overbreadth might be similarly marshaled in other criminal law enforcement contexts from drug law enforcement to public order maintenance arrests targeting various misdemeanors that carry harsh and costly consequences.<sup>259</sup> Insofar as scapegoating of stranger sexual predators is largely sustained by perceived threat, this approach counters those processes by demonstrating how the status quo actually produces significant insecurity.

The successes of advocates targeting the excesses and overbreadth of sex offense regulations are significant, though their achievements should not be over-stated as the victories remain relatively limited and piecemeal in the face of a major continuing commitment to the status quo in sex offense regulation among political and legal actors and the public. Further, though advocates have

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254. See Bailey, *supra* note 44.

255. *Id.*

256. See *In re Taylor*, 290 P.3d 1171 (Cal. 2013).

257. See LEON, *supra* note 2, at 193–94.

258. See *id.*

259. See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 611 (2014) (exploring how mass criminal misdemeanor processing “sort[s] and regulate[s] the populations targeted”).

succeeded in provoking outrage at criminal regulatory overbreadth, the downscaling of particular forms of punitive excess in response to minor sex-related offenses does not provide better approaches to pervasive but under-attended forms of sexual harm, nor does it offer a way beyond indefinite civil confinement of persons convicted of serious crimes.

Beginning to move beyond a direct identification of competing threats, and to gesture towards a different framework within which to understand sexual harm, Patty Wetterling, the mother of child victim Jacob Wetterling—after whom the federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act is named<sup>260</sup>—has opposed invoking her son’s tragic kidnapping and disappearance as an occasion for unreasoned punitiveness. Wetterling is, she explained, “tired of tough. Everybody wants to out-tough the next legislator. ‘I’m tough on crime,’ ‘No, I’m even more tough.’”<sup>261</sup> In Wetterling’s words, “People want a silver bullet that will protect their children, [but] there is no silver bullet. There is no simple cure to the very complex problem of sexual violence.”<sup>262</sup>

The following Part will begin to explore whether and how macro-level preventive measures focused on social institutional, structural, and discursive reform might serve to more meaningfully address this complex problem.

### III.

#### REIMAGINING THE REGULATION OF SEXUAL HARM

The goal of this Part is to consider a range of preventive institutional, structural, and discursive responses concentrated on those locations where sexual harm is most pervasive. The sections that follow will consider how a preferable preventive framework for responding to sexual violence and abuse might focus on increasing accountability and transparency in institutions that are frequent sites of abuse and flattening hierarchies of power and privilege that produce particular vulnerability to sexual harm. Increased attention to and understanding of those institutions, relationships, and vulnerabilities would inform on an ongoing basis the content of further reform.

A social institutional reformist framework consists of institutional policy-focused, infrastructural design, and more general discursive and social dimensions. Such a framework would attend to institutional policy formation and physical infrastructural design so as to reduce risks of and opportunities for sexual assault. Relatedly, the expansion of modes of institutional and

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260. See ZILNEY & ZILNEY, *supra* note 2, at 118 (referring to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994, 42 U.S.C. § 14071–73 (2012) (repealed and replaced by the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 111 Stat. 2466 (codified in scattered sections of U.S. Code (2012))).

261. See LEON, *supra* note 2, at 194–95.

262. SEX OFFENDER LAWS IN THE US, *supra* note 116, at 2; see also ZILNEY & ZILNEY, *supra* note 2, at 118 (noting Ms. Wetterling’s misgivings about the value of community notification laws).

interpersonal redress in the aftermath of sexual assault would make available forms of recourse that are more attractive to survivors of abuse by intimates than the prevailing criminal regime. Shifting institutional policies to address forms of inequality that create vulnerability to harm is likewise critical. A meaningful social institutional reform framework would also confront taboos by openly discussing the realities of sex and sexual abuse, the power relationships that sustain those taboos, and facilitate more open and less repressive discourse about sex and power generally. It is these repressive dynamics that underlie so much of what is wrong in current practices regarding sexual harm. This framework would reserve conventional prosecutorial and punishment resources for those few sexual offenses that are most egregious, where no other response to sexual violence seems plausible at present. A macro-level preventive institutional focus along these lines would thus circumvent many of the violations of rights and infringements of fundamental rule of law and humanitarian principles entailed by focusing on individual targeted deterrence through preventive quasi-punishments.

My aim here, of course, is not to explore in depth what such an alternative framework might entail or to address its reformist potential in full. But this Part will preliminarily identify some of this framework's parameters, limits, and possibilities as a competing, alternative regulatory approach—and more fundamentally, as an alternative means of conceptualizing how to undertake some of the social regulatory work currently all too often carried out through criminal law enforcement.<sup>263</sup> This Part will move from the most specific and potentially realizable social institutional reforms to the most ambitious structural and social shifts that would be necessary to more fully and humanely grapple with sexual harm.

#### *A. Social Institutional Reform*

There are various social institutional reform measures that could function to prevent sexual harm by restructuring institutional reporting and response policies, reducing secrecy around sexual abuse (which would begin to transform associated institutional power dynamics), and increasing meaningful monitoring of institutions afflicted by widespread sexual violence. Given that much sexual abuse takes place in the military, schools, prisons, churches, and the family, rather than at the hands of dangerous strangers, it is critical to address the specific institutional practices that produce pervasive sexual abuse in these locations.

Institutional policies perpetuate sexual violence where members of those institutions—students, servicemembers, prisoners, parishioners—are not able to seek assistance from an independent party tasked with sensitively responding to

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263. See, e.g., Allegra M. McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 UNBOUND: HARV. J. LEGAL LEFT 109 (2013) (invited symposium).

violence and abuse and where other institutional practices subtly condone, or even facilitate, the violence in question. Although there is often marked institutional resistance to shifting internal policies of this sort, reform may become more feasible as the institutional policies in question are increasingly understood as themselves constitutive of sexual violence, and as individualized prosecutorial targeting is recognized as a profoundly limited measure in these contexts, regardless of its efficacy (or inefficacy) in other settings.

Sexual abuse, harassment, and violence in educational settings provide a first case in point: sexual harm in schools, colleges, and universities is sustained in significant part by institutional reporting policies and other institutional practices that simultaneously dissuade reporting, fail to respond to actual ongoing harm, and excuse and even subsidize institutional contexts associated with violence.<sup>264</sup> According to the 2014 Report of the White House Task Force to Protect Students From Sexual Assault, 20 percent of female college students experience sexual assault while in college.<sup>265</sup> Numerous educational institutions are under federal investigation for their treatment of sexual assault cases, including Princeton, Harvard, Ohio State, and Florida State Universities.<sup>266</sup> The problems giving rise to the investigations at these institutions are largely the nonresponse or extraordinarily insensitive response to numerous student complaints of rape, assault, and abuse.

One obvious cause of this nonresponse is the lack of independence and meaningful accountability of the school disciplinary boards, where administrators overseeing the process are not truly serving autonomously but are simultaneously interested in upholding the reputation of the school and hence minimizing negative reputational consequences that would follow from a report of sexual violence on campus.<sup>267</sup> Compounding this problem, disciplinary panels are generally not trained to properly address the sensitive subject matter at issue. For instance, one Columbia University disciplinary panel member asked a student reporting anal rape how forced anal sex as described by the student would be physically possible without lubrication.<sup>268</sup> This absence of independence coupled with such insensitivity dissuades reporting and conveys the distinct impression that the institution is not committed to addressing sexual violence when it occurs.

The Obama Administration has responded by mandating that colleges and universities lower the evidentiary threshold required for sanctions through

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264. See Michelle Goldberg, *Why the Campus Rape Crisis Confounds Colleges*, THE NATION (June 5, 2014), <http://www.thenation.com/article/180114/why-campus-rape-crisis-confounds-colleges#> (“[M]any victims find campus disciplinary boards more invested in protecting the school’s reputation than in seeking justice.”).

265. See WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, *supra* note 11, at 2; see also Pérez-Peña & Taylor, *supra* note 11.

266. See Pérez-Peña & Taylor, *supra* note 11.

267. See Goldberg, *supra* note 264.

268. See *id.*

campus processes to a “preponderance of the evidence,” not the stricter “clear and convincing evidence” standard many colleges and universities use.<sup>269</sup> But while this approach might result in more findings of guilt and more expulsions of accused students, it will not directly address the insensitivity and lack of independence of those involved in the process. Lowering the evidentiary threshold might well lead to an increase in punitive measures against perpetrators that could raise due process concerns, but would not cure the inadequacy of reporting and response processes at such institutions.

To address the relevant problems, the body tasked with handling reporting in universities (as well as in prisons and the military) would need to be truly independent and competent to handle the subject matter before it. Requiring independence and competence are more likely to produce improved institutional results than lowering the evidentiary thresholds.

Additionally, many survivors have little interest in harsh punitive consequences. Instead, they desire clear condemnation of the conduct and acknowledgment of the wrong, which suggests that the specific details of punishment outcomes and the evidentiary threshold producing them hold far less significance than a fair, independent, thoughtful process for restorative redress. Institutions could create such a restorative administrative process by investing resources in establishing an independent entity tasked with addressing sexual harm and sexual health on campuses. Also, presumably students who choose not to go through the criminal process, or to use the campus and criminal processes in tandem, seek a less conventionally punitive, formal mode of redress on campus.

Crucial as well to the institutional role in sexual harm in this context, colleges and universities are known for their subtle acquiescence and subsidy of activities associated with sexual violence, particularly fraternity and other campus social environments with excessive use of alcohol and cultural norms that celebrate sexual violence.<sup>270</sup> Universities and colleges should not necessarily prohibit such gatherings or student organizations, but nor should universities give substantial financial subsidy or tacit encouragement to these activities.<sup>271</sup> At a minimum, there is an affirmative obligation, arguably even a

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269. See Pérez-Peña & Taylor, *supra* note 11; see also RUSSELYNN ALI, ASSISTANT SEC’Y FOR CIV. RTS., U.S. DEP’T OF EDUC., “DEAR COLLEAGUE” LETTER ON SEXUAL VIOLENCE 10–11 (2011), available at [http://www.whitehouse.gov/sites/default/files/dear\\_colleague\\_sexual\\_violence.pdf](http://www.whitehouse.gov/sites/default/files/dear_colleague_sexual_violence.pdf) (public letter to college presidents advocating for a preponderance of the evidence standard for school sexual assault cases in order to conform these proceedings to Title IX discrimination cases).

270. See Olga Khazan, *The Dark History of EI, The Latest Frat Accused of Rape Emails*, THE ATLANTIC (Apr. 22, 2014), <http://www.theatlantic.com/health/archive/2014/04/the-dark-history-of-ei-the-latest-rape-email-frat/361056/> (documenting many chilling remarks celebrating rape culture posted online by members of the Epsilon Iota fraternity at American University); see also Lorenzo Ferrigno, *Wesleyan University Student Alleges Rape, Sues Fraternity, Members, Other Student*, CNN (Mar. 16, 2014), <http://www.cnn.com/2014/03/14/justice/wesleyan-university-rape-lawsuit/> (documenting the public rape of a Wesleyan student at a fraternity party).

271. See Elizabeth A. Armstrong et al., *Sexual Assault on Campus: A Multilevel, Integrative*

legal responsibility contemplated by Title IX, on educational institutions to facilitate forms of social engagement separate from fraternities and other sites that are frequently sexually violent or at least sexually discriminatory social contexts.<sup>272</sup>

Beyond universities and colleges, other institutions' practices and reporting processes countenance dramatic power imbalances prone to sexual and other abuse, and then actively dissuade reporting. The U.S. military's process of managing sexual assault reporting through the chain of command provides a case in point. From 2011 to 2012 alone, there were 26,000 reports of sexual abuse in the U.S. military.<sup>273</sup> Still, much sexual misconduct in the military goes unreported due to fear of retaliation.<sup>274</sup> The fact that the U.S. military retains sexual assault reporting within the chain of command means that a service member who has been assaulted by his or her superior officer may be instructed to report the offense to the officer who committed the assault and to rely on the assailant for any redress.<sup>275</sup>

*The Invisible War*, an award-winning and harrowing documentary film about rape in the U.S. military, reveals multiple instances of men and women being raped in the armed forces by the person in the chain of command to whom they were to report the incident.<sup>276</sup> Yet, legislation aiming to take the investigation and prosecution of rape cases out of the military chain of command failed on the Senate floor in March 2014.<sup>277</sup> An immediate remedy to the problem of widespread sexual violence and abuse in the military would be to take reporting out of the chain of command and to place reporting processes and investigation in a truly independent entity.

Institutional policies that promote sexual secrecy and shame, especially those that sanction survivors of sexual abuse, ought also to be a target for preventive reform. The punitive response to persons who have endured rape

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*Approach to Party Rape*, 53 SOC. PROBLEMS 483, 488–95 (2006).

272. Title IX, a civil rights law passed in 1972, bans sex discrimination in education; a regulation adopted in 2001 requires schools under Title IV to take action on sexual assault. See Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 225 (2011).

273. Scott Neuman, *Pentagon Issues Directive Aimed at Preventing Sexual Assault*, NAT'L PUB. RADIO (Aug. 15, 2013, 6:24 PM), <http://www.npr.org/blogs/thetwo-way/2013/08/15/212385789/pentagon-issues-directive-aimed-at-preventing-sexual-assault>.

274. See Johanna Lee, *The Quest for Military Sexual Assault Reform*, HARV. POL. REV. (Apr. 26, 2014), <http://harvardpolitics.com/united-states/quest-military-sexual-assault-reform/>.

275. See, e.g., Jennifer Steinhauer, *Sexual Assaults in Military Raise Alarm in Washington*, NY TIMES, May 7, 2013, <http://www.nytimes.com/2013/05/08/us/politics/pentagon-study-sees-sharp-rise-in-sexual-assaults.html?pagewanted=all>.

276. See Cassie M. Chew, *'The Invisible War' Changing the Conversation on Rape in the Military*, PBS NEWSHOUR (Feb. 18, 2013), <http://www.pbs.org/newshour/rundown/invisible-war-has-changed-the-conversation-on-rape-in-the-military/>.

277. See Helene Cooper, *Pentagon Study Finds 50% Increase in Reports of Military Sexual Assaults*, N.Y. TIMES, May 1, 2014, <http://www.nytimes.com/2014/05/02/us/military-sex-assault-report.html>.

and other offenses in the U.S. military, and the now repealed “Don’t Ask, Don’t Tell Policy” requiring sexual secrecy in the armed forces, serve as illustrative examples.<sup>278</sup> In some instances, persons reporting sexual assault in the military have been court martialed for adultery.<sup>279</sup>

Even absent direct sanctions against survivors such as adultery prosecutions, policies that promote secrecy surrounding sexual harm permit it to flourish in particularly damaging forms.<sup>280</sup> Like “Don’t Ask, Don’t Tell,” retaining reporting of sexual assault and abuse in the chain of command sends an implicit message not to report when the assailant is a supervising officer or when the person to whom the victim is to report is a superior officer closely associated with the assailant.

In one case that illustrates these problems and dynamics in the military context, Kole Welsch, a gay man who joined the military before the repeal of “Don’t Ask, Don’t Tell,” was violently raped by a superior male officer but kept the assault secret due to the insularity, shame, and punitiveness of the military’s policies regarding both disclosure of sexual orientation and reporting of sexual harm.<sup>281</sup> Welsch first enlisted when he was seventeen years old to avoid being sent to a religious conversion camp by his homophobic parents. He served in Iraq honorably and returned after his tour of duty to study at an ROTC college program in the United States. At that time, Welsch met his partner, the two fell in love, and they began to build a life together among a community of other gay but closeted men in the service. One evening during this period, a Sergeant with whom both Welsch and his partner were acquainted invited the two young men over to his home. Welsch and his partner knew the Sergeant, like them, to be gay and closeted. The Sergeant served them beer laced with a drug that rendered both unconscious and he proceeded to violently rape both men, leaving them brutalized.

After the assault, both Welsch and his partner were traumatized and

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278. See also JANET E. HALLEY, *DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY 2* (1999) (exploring how “Don’t Ask, Don’t Tell” generated more intense secrecy and suspicion around sexuality than an outright ban on gay service members, as military personnel, whether identified as “gay” or “straight,” worked to avoid exhibiting “conduct manifesting a propensity”).

279. See, e.g., Radhika Sanghani, *Military Rape: Fighting the Invisible War Inside the Armed Forces*, THE TELEGRAPH, Mar. 10, 2014, <http://www.telegraph.co.uk/women/womens-politics/10678790/Military-rape-Fighting-the-invisible-war-inside-the-Armed-Forces.html> (“Several of the victims were even charged with adultery after they reported the rapes, and the common theme for all the women was that the rape was bad—but the aftermath was just as bad, if not worse.”)

280. See Jessica A. Turchik & Susan M. Wilson, *Sexual Assault in the U.S. Military: A Review of the Literature and Recommendations for the Future*, 15 *AGGRESSION & VIOLENT BEHAV.* 267, 274 (2010) (exploring “negative normative beliefs in the military (e.g., beliefs about gender, sex, and culture)” that contribute to sexual violence).

281. See *A Monster, Snap Judgment*, NAT’L PUB. RADIO (May 16, 2014), <http://www.npr.org/2014/05/16/313138176/a-monster>. The subtitle of this NPR episode asks, “A man does the unthinkable to Kole Welsch and his partner, Kevin. But who is the real monster? The man? Or the institution that allowed it to happen?” *Id.* (subtitle to the audio file).

devastated, but they chose to keep the rape and attack secret because Welsch wanted to become an officer and feared that outing himself would not only violate “Don’t Ask, Don’t Tell,” but would also run afoul of the military’s policies that implicitly discouraged the reporting of sexual abuse. Both Welsch and his partner resolved to tell no one. But after a physical exam associated with a promotion within the service, Welsch was diagnosed with HIV, and he was told he could no longer serve because of his HIV status. He was discharged. Around this same time, Welsch learned that the Sergeant who had raped him was HIV positive. Welsch also learned that the same Sergeant was still pursuing young men, drugging them, and then infecting them with HIV; and this had happened to multiple other young gay men.

Welsch decided then to report the crime, but the military Criminal Investigation Division informed him the attack had occurred off-base so they had no jurisdiction. Meanwhile, the Sergeant was transferred to a desk job and allowed to stay in the military even though he was HIV positive.

Welsch described this experience in these terms:

What happened to us was so traumatic. It literally damaged my mind. I wasn’t able to concentrate. I felt scattered. I had a tremor in my hands. . . . It took me a long time to come back from that. It took years of therapy. I just kept trying and trying and I wouldn’t give up. After multiple years of effort, it became easier.

Two years after his discharge, Welsch went to the local police and reported the assault. Epidemiologists confirmed that the Sergeant was the source of the HIV infection for numerous of the men who had been assaulted. Local prosecutors in Pierce County Washington finally brought charges and the Sergeant pled guilty.

But when asked whether he feels pleased that his assailant was criminally sentenced, Welsch responds, in his own words, with “an unequivocal, ‘no.’” Welsch explains that, in his view, what happened to him

is the real result of ‘Don’t Ask, Don’t Tell’: It created a situation where people could be assaulted and everyone was afraid to talk about it. . . . The assailant was an insane person. The assailant was in an environment that stigmatized him for being gay and stigmatized him for having HIV. Some people say [the assault] should just be blamed on him, it was his responsibility. That opinion doesn’t hold water with me. I think that the U.S. military through its absolute negligence created a monster. I hold them responsible.

The repeal of “Don’t Ask, Don’t Tell” does not obviate the problem of sexual secrecy and shame in the military, because stigmatization of homosexuality persists and most of the military retains the ban on persons serving overseas who are HIV positive.<sup>282</sup> Moreover, the resistance to taking

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282. See Katie Miller, *Military Reverses Course on HIV+ People Serving Overseas*, OUTSERVE MAG. (Nov. 19, 2012), <http://outservemag.com/2012/11/military-reverses-course-on-hiv>

reporting out of the chain of command signals an institutional resistance to transparency and accountability when it comes to matters of sexual harm in the military.

A certain further related measure of institutional prevention in the military, as well as schools, prisons, and churches may be accomplished simply by maintaining rigorous mechanisms for external institutional monitoring and auditing. Authorizing outside monitoring and auditing entities to carefully assess and routinely publicize reports on sexual harm would go a long way toward encouraging those institutions to address abuse responsibly. This would maintain strong pressure on institutions with reputational interests to preserve to take reasonable measures to prevent misconduct and address it promptly where it occurs. Relying on outside entities would undercut the tendencies toward cronyism that render internal monitoring currently in place often meaningless. Furthermore, rather than over-punishing particular individual perpetrators exclusively, the state ought to sanction meaningfully institutions for not addressing reported instances of sexual assault.

External institutional monitoring and auditing of this sort is recommended by expert panels assembled to study pervasive sexual harm in both prison and educational environments.<sup>283</sup> First, prisons: sexual violence in prisons in the United States is endemic and largely unaddressed. And sexual harm in U.S. carceral institutions presents an institutional and structural crisis that a social institutional reform framework may more substantially address than the current approach to regulating sexual harm. In 2008 alone, there were an estimated 216,000 victims of sexual abuse in U.S. jails and prisons, according to DOJ: 69,800 inmates suffered rape by force or threat of force; 36,100 were known to have suffered “nonconsensual sexual acts involving pressure,” for example, coerced by blackmail or as payment of a jailhouse “debt;” 65,700 had sex with staff “willingly,” which DOJ considers to be rape; 45,000 victims suffered “abusive sexual contact” such as unwanted touching of the inmate’s penis, vagina, breast, or buttocks “in a sexual way.”<sup>284</sup> Yet, the internal grievance procedures in carceral institutions intended to address rape are notoriously inadequate. A 2007 survey of youth in custody by the Texas State Auditor’s Office found that “65 percent of juveniles surveyed thought the grievance

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-people-serving-overseas-2/ (explaining the Navy lifted its ban on HIV-positive sailors being stationed overseas in certain capacities, though most of the U.S. military still bans HIV-positive members from serving outside the country).

283. See *infra* text accompanying notes 287–89 and 292–94.

284. See Jill Filipovic, *Is The US the Only Country Where More Men Are Raped Than Women?*, THE GUARDIAN, Feb. 21, 2012, <http://www.theguardian.com/commentisfree/ci-famerica/2012/feb/21/us-more-men-raped-than-women> (reporting Justice Department’s estimates of prevalence of sexual abuse in U.S. penitentiaries) (citations omitted); Glazek, *supra* note 14 (“Crime has not fallen in the United States—it’s been shifted. . . . The statistics touting the country’s crime-reduction miracle, when juxtaposed with those documenting the quantity of rape and assault that takes place each year within the correctional system, are exposed as not merely a lie . . . but as the single most shameful lie in American life.”).

system [for reporting sexual harm] did not work.”<sup>285</sup>

To address these and related conditions, consistent with this Essay’s argument, the National Prison Rape Elimination Commission Report recommends not only individual prosecutions, but external oversight, monitoring, and reporting as important preventive measures in addressing sexual abuse in prisons:<sup>286</sup>

In particular, the Commission endorses the American Bar Association’s 2006 resolution urging Federal, State, and territorial governments to establish independent public entities to regularly monitor and report on the conditions in correctional facilities operating within their jurisdiction. Oversight by inspectors general, ombudsmen, legislative committees, or other bodies would work hand-in-hand with regular audits of the Commission’s standards.<sup>287</sup>

The absence of external oversight and limits on the capacity of litigation to redress institutional complicity in sexual violence contributes significantly to the pervasiveness of sexual harm in carceral settings.<sup>288</sup> External attention to those features of the institutional environment that enable such pervasive harm is crucial to addressing it.

In the university setting, monitoring is intended to occur through the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, or the Clery Act.<sup>289</sup> Under the supervision of the U.S. Department of Education, which has the authority to suspend financial aid eligibility or impose civil penalties in cases of noncompliance, this law requires all colleges and universities that participate in federal financial aid programs to maintain and relay information about crime on or adjacent to their campuses.<sup>290</sup> Clery Act enforcement and monitoring have proven insufficiently rigorous, however, to encourage robust action against sexual harm on college and university campuses.<sup>291</sup> As in the military setting, a core problem in educational institutions is that monitoring and auditing are often internal rather than external. And external sanctions are seldom applied at the institutional level to address recurring incidents of campus rape or sexual harassment.<sup>292</sup> But at a minimum, the Clery Act offers a framework for how more robust external monitoring or auditing might be conceived and implemented, providing for public reporting, access to other forms of data, and applications beyond

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285. NATIONAL PRISON RAPE ELIMINATION COMMISSION, REPORT 11 (2009), available at <https://www.ncjrs.gov/pdffiles1/226680.pdf>.

286. *See id.* at 97.

287. *See id.* at 10.

288. *See, e.g.*, 42 U.S.C. § 1997 (2012); 28 U.S.C. § 1915 (2012) (federal legislation interposing numerous barriers for prisoners seeking to access courts to challenge unconstitutional and otherwise unlawful conditions of confinement).

289. *See* 20 U.S.C. § 1092(f) (2012).

290. *See id.*; 34 C.F.R. § 668.46 (2014).

291. *See* Cantalupo, *supra* note 272, at 244–52.

292. *See id.*

colleges and universities to other social and educational institutions.<sup>293</sup>

Beyond schools and universities, the military, and prisons, the family is the institution most beset by sexual secrecy, shame, and abuse, and least often subject to intervention of the criminal law. Norms of familial privacy protect certain important values, such as freedom from state interference in intimate relationships, though they also allow sexual abuse in the family to persist. Unlike in the military and schools where reporting mechanisms and accountability within these institutions themselves could substantially improve upon the current situation, it is less apparent how this could occur in the context of the family. Still, permitting more opportunities for exploration and discussion in elementary schools, in workplaces, and elsewhere of the issues of violence and abuse that persist in the family could begin to disrupt the silence around sexual harm in the home and shift the power dynamics—gendered and otherwise—that sustain sexual abuse in that context.<sup>294</sup> Even violence within the family could be more meaningfully confronted if there were institutional spaces devoted to removing the stigma that prevents identification, self-help, and collective response.

Of course, the reality is that these are all deep and difficult problems, ones the prevailing criminal regulatory framework addresses poorly. The institutional efforts described here—including those focused on the family—aim to disrupt secrecy and shame, however imperfectly, and to transform the interpersonal dynamics and institutional practices that enable sexual violence by reducing the harm to, and the silence and vulnerability of, those most impacted. But the possibility of ridding ourselves entirely of sexual harm only exists within the fantasy framework of banishing the scapegoat. Regulation of sexual harm instead ought to aim to understand with more specificity and depth how our central social institutions give rise to this violence and then try to make it a less prevalent feature of our collective social lives, as well as respond to those harmed in ways that might help them recover. The mechanisms

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293. In response to the sex abuse scandal at Penn State, the University's trustees hired Louis Freeh to produce a report and recommendations as to how to better prevent and address sexual abuse at the school. Included in the Freeh report were 119 recommendations intended to prevent future incidents of sexual abuse. Some of the items include matters that bear directly on increasing external accountability and monitoring of the campus for problems associated with sexual abuse: in particular by completing external audits of Clery Act procedures and assigning oversight of Clery Act compliance to an individual in the Penn State police department, and allocating resources to permit that individual to satisfy the requirements of the Act. See FREEH, SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY 137–38 (2012).

294. See, e.g., David Finkelhor, *The Prevention of Childhood Sexual Abuse*, FUTURE OF CHILDREN, Fall 2009, Vol. 19, no. 2, at 169, 180–81. (“An international meta-analysis found that children of all ages who had participated in an education program were six to seven times more likely to demonstrate protective behavior in simulated situations than children who had not. . . . Although researchers have conducted no experimental evaluations of whether educational programs prevent sexual abuse, they have provided a variety of supportive empirical findings so far.”).

explored in this section are all means of flattening unequal power relationships and promoting institutional accountability that could likewise address other forms of currently criminalized conduct absent the criminal law's intervention.

### *B. Infrastructural Preventive Strategies*

Institutional reporting and monitoring reforms may serve to disrupt secrecy and shame and empower vulnerable persons; investment in infrastructure development and increased natural visibility and publicity are also potentially significant means of preventing sexual harm.<sup>295</sup> Examples of infrastructural preventive strategies include investment in design so as to increase natural visual transparency in spaces where incarcerated persons or young people interact with supervisory figures, as well as the construction and funding of shelters to enable persons at risk to leave the environment in which they are experiencing threat.

Existing studies of underreported sexual harm, including of sexual violence in prisons, recognize the importance of infrastructure, natural surveillance, and design.<sup>296</sup> According to the National Prison Rape Elimination Commission Report, in order to reduce the incidence of sexual assault in detention settings, correctional facilities must “assess[], at least annually, the need for and feasibility of incorporating additional monitoring equipment,” such as surveillance cameras and facility design.<sup>297</sup> According to the report, “Technologies are not replacements for skilled and committed security officers, but they can greatly improve what . . . officers are able to accomplish.”<sup>298</sup> Natural visibility is also crucial in carceral and other institutional contexts because much abuse is tolerated, enabled, or even perpetrated by the persons in charge of monitoring or preventing sexual harm, such as prison guards. Consequently, ensuring that as much potentially harmful conduct is generally open to public view is critical to the prevention of such harm.<sup>299</sup>

In one harrowing case of prison rape in Mississippi a twenty-three-year-

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295. See, e.g., VERA LUCÍA VECENTINI ET AL., INTER-AMERICAN DEV. BANK, PERU: METROPOLITAN LIMA URBAN TRANSPORTATION PROGRAM (PTUL) - NORTH-SOUTH SUBSYSTEM: LOAN PROPOSAL 5, 13, 38 (2004), available at [http://www.protransporte.gob.pe/pdf/info/publi2/PE-0187\\_e.pdf](http://www.protransporte.gob.pe/pdf/info/publi2/PE-0187_e.pdf) (proposing that improvements to citizen safety will be associated with improving public transport and street lighting); see also JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961) (exploring how vibrant, flourishing communities are produced through public, multi-use urban spaces).

296. See NATIONAL PRISON RAPE ELIMINATION COMMISSION, *supra* note 285, at 61.

297. See *id.*

298. See *id.* at 60.

299. See DEP'T OF JUSTICE REV. PANEL ON PRISON RAPE, REPORT ON SEXUAL VICTIMIZATION IN PRISONS AND JAILS 7–8 (2012), available at [http://ojp.gov/reviewpanel/pdfs/prea\\_finalreport\\_2012.pdf](http://ojp.gov/reviewpanel/pdfs/prea_finalreport_2012.pdf) (noting that facility design plays a significant role in maintaining low sexual assault incidence rates in jails and prisons); NANCY G. LA VIGNE ET AL., URBAN INSTITUTE, PREVENTING VIOLENCE AND SEXUAL ASSAULT IN JAIL: A SITUATIONAL CRIME PREVENTION APPROACH (2011), available at <http://www.urban.org/UploadedPDF/412458-Preventing-Violence-and-Sexual-Assault-in-Jail.pdf> (examining how increased visibility reduced sexual assault in jail).

old inmate wrote of being

raped at East Mississippi Correctional Facility in Meridian Mississippi, MS by a gang member. I was beat brutally and faced several facial and rectum [sic] injuries from this attack. [Then,] I was raped, robbed and assaulted by several gang members. . . . I was held hostage due to this attack by these gang members in a cell. I was threatened with knives and tormented by these inmates [sic] for several hours. I was raped from 11:30 p.m. @ nite [sic] until 3:30 a.m. in the morning. . . . As he raped me continuously all I could do was cry because one false move and I knew this guy would take my life. . . . If I had one wish I would wish that I never violated the law and shoplifting which [was] what got me in prison.<sup>300</sup>

This inmate's account suggests that increased visibility of physical spaces in jail and prison could effectively prevent offenses of this sort in contexts where physical design features allow such abuse to continue by enabling obscurity and vulnerability.<sup>301</sup> Further, the degree of over-crowding in facilities such that knives and other weapons move uncontrolled within the inmate population, as here, is brought about by incarcerating people convicted of minor offenses such as shoplifting. Reducing infrastructural problems, such as over-crowding and physical obscurity, would do much to address the problem of rape in prison.<sup>302</sup>

This infrastructural preventive approach is explored in more general terms in Neal Kumar Katyal's powerfully argued and provocative article, *Architecture as Crime Control*, in which he develops a theory of how design innovations might apply broadly as an alternative mechanism for conceiving of crime control.<sup>303</sup> Katyal proposes: "Government is already making choices about crime through architecture when it builds housing projects, government offices, schools, embassies, and other buildings."<sup>304</sup> Moreover,

[e]nforcement of rape laws can help avoid some stranger rape; but redesign of fire stairs, public spaces, and exterior lighting can prove far more effective (particularly given the reluctance of some victims to come forward). . . . Parent education and gun control might deter some crimes at schools, but changing schools' physical layout to enhance

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300. Hamilton Nolan, *The Story of One Prison Rape, In an Inmate's Own Words*, GAWKER (May 30, 2013), [gawker.com/the-story-of-one-prison-rape-in-an-inmates-own-words-510475353](http://gawker.com/the-story-of-one-prison-rape-in-an-inmates-own-words-510475353).

301. See LA VIGNE ET AL., *supra* note 299, at 2 ("When surveyed after the new cameras were installed, fewer inmates believed that consensual and forced sexual activity were likely to occur compared with surveys of inmates conducted before the cameras were put in place. Violence was also perceived as less likely to occur, and a smaller percentage of inmates reported being threatened or getting involved in fights.").

302. See Stewart J. D'Alessio et al., *The Effect of Conjugal Visitation on Sexual Violence in Prison*, 38 AM. J. CRIM. JUST. 13, 13 (2012) (finding states permitting conjugal visitation have significantly fewer instances of reported rape and other sexual offenses in their prisons).

303. See Neal Kumar Katyal, *Architecture As Crime Control*, 111 YALE L.J. 1039, 1133 (2002).

304. See *id.*

visibility may deter many more.<sup>305</sup>

Katyal's analysis regarding architecture and design conceptualizes in these terms some of the further preventive potential of infrastructure development as applied to sexual harm.

Also in this vein, investing in adequate shelters for persons fleeing abuse, whether children or adult spouses (with available meaningful wrap-around services) could potentially prevent future harm. This is true of even the most difficult-to-address family situations and functions without raising the concerns of individualized preventive approaches or drastic liberty intrusions.<sup>306</sup> It is a form of prevention organized around empowerment of vulnerable persons.

More generally, infrastructure and other community economic development initiatives that enable people to protect themselves hold considerable promise as preventive measures.<sup>307</sup> Undoubtedly, investing in lighting, shelters, and facility redesign would be resource-intensive. But so too is the dysfunctional purportedly preventive criminal regime described in the foregoing pages, and this alternative preventive approach may promise more tangible long-term benefit.

Other contexts where the criminal law currently serves as the primary mechanism for producing desired results—such as drug law enforcement—could similarly be re-conceptualized in terms of infrastructure development and reduced reliance on criminalization and incarceration. One example of non-criminal drug regulation along these lines is alternative livelihoods programming, which provides to persons involved in narco-sales and narco-cultivation resources to shift to alternative means of self-support, whether through crop substitution or other alternative employment.<sup>308</sup>

In the context both of regulating sexual harm and other forms of criminalized conduct, attention to infrastructure, increased visibility, and harm-reductive design are ways to limit exposure to and risks of sexual and other harm. Although the precise quantum of prevention is unknown, these methods have significant preventive potential and should be incorporated, particularly because their potential benefits are clearer and their drawbacks less pronounced than some of the current purportedly preventive approaches associated with the prevailing post-conviction criminal sex offense regulatory regime.<sup>309</sup>

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305. *Id.* at 1138.

306. *See* ELEANOR LYON ET AL., MEETING SURVIVORS' NEEDS: A MULTI-STATE STUDY OF DOMESTIC VIOLENCE SHELTER EXPERIENCES IV (2008), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/225025.pdf> ("Respondents reported that if the shelter did not exist the consequences for them would be dire: homelessness[,] . . . continued abuse[,] or death.").

307. *See id.*

308. *See, e.g.,* Allegra M. McLeod, *Exporting U.S. Criminal Justice*, *supra* note 47, at 162.

309. *See* LA VIGNE ET AL., *supra* note 299, at 1 ("Fewer . . . opportunities to commit violence should translate into fewer offenses."); D'Alessio et al., *supra* note 302.

*C. Broadening Alternative Forms of Redress*

Another macro-level institutional preventive innovation, beyond the internal institutional context, would involve broadening the range of alternatives to conventional prosecution and incarceration, and narrowing the focus of conventional criminal law responses to sexual harm. The availability of other means of seeking redress in the aftermath of sexual harm beyond conventional prosecution and incarceration might encourage greater numbers of survivors to come forward. The conventional prosecutorial process frequently retraumatizes survivors of sexual violence, particularly when the perpetrator is someone with whom the victim has a close, personal relationship (as is often the case).<sup>310</sup> Survivors may prefer more informal, less adversarial resolution.<sup>311</sup> In this regard, alternatives—whether restorative, mediation focused, or otherwise—might be conceived as a preventive innovation insofar as they may encourage a greater number of survivors of sexual violence to believe that meaningful recourse is available, making them more likely to come forward, and slightly shifting the balance of power in the situations where such harms transpire.<sup>312</sup> Although it may seem counterintuitive that a more lenient, less formal process would encourage greater reporting and less violence, given that the most common sites of underreporting are in institutions to which we have strong emotional ties—churches, schools, the military—and involve intimate relationships, particularly within families, a less punitive alternative framework might produce increased reporting benefits and lead to greater deterrence of sexual harm.<sup>313</sup>

In some relatively rare instances, conventional prosecution, incarceration or intensively supervised release may be at present the only available

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310. See Patricia Yancey Martin & R. Marlene Powell, *Accounting for the "Second Assault": Legal Organizations' Framing of Rape Victims*, 19 LAW & SOC. INQUIRY 853, 856 (1994) (“[W]omen whose cases were prosecuted were less well off psychologically six months after the rape than were those whose cases were not prosecuted, attributing this result to the effects of an adversarial legal system that subjects rape victims to challenge and duress.”) (internal citations omitted); see also Jamie O’Connell, *Gambling With the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 HARV. INT’L L.J. 295, 334 (2005) (“Retraumatization may be more common in legal systems that uncover legally relevant facts through an adversarial, party-driven process, such as that of the United States.”).

311. See Fan, *supra* note 28.

312. These alternatives might entail recognizing the possible advantages (and disadvantages) of configuring a criminal process not on what John Griffiths called a “Battle Model” of criminal procedure characterized by antagonistic interests decades ago, but instead a “Family Model,” based on “reconcilable . . . interests,” even a “state of love.” See John Griffiths, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 371 (1970).

313. See JOAN TABACHNICK & ALISA KLEIN, ASS’N FOR THE TREATMENT OF SEXUAL ABUSERS, A REASONED APPROACH: RESHAPING SEX OFFENDER POLICY TO PREVENT CHILD SEXUAL ABUSE 3 (2011), available at <http://www.atsa.com/sites/default/files/ppReasonedApproach.pdf> (“If no hopeful, rehabilitative solutions are available and made publicly known, people who witness signs of risk for victimization and/or perpetration may be less motivated to take the steps necessary to prevent child sexual abuse, intervene in situations of risk, and seek help when a child is sexually abused.”).

reasonable response to a person who inflicts serious harm upon another person. However, the focus of such strategies ought to be dramatically narrowed and focused. This position is neither pro-defendant nor pro-victim or survivor. Rather, it is a matter of thoughtfully channeling resources so as to reduce the incidence of victimization and to permit procedurally appropriate, individually tailored responses to those relatively few defendants and convicted offenders who perpetrate serious harm against other persons and for whom there is no other appropriate alternative at present. The overbreadth and draconian quality of the prevailing criminal regulatory regime serves both survivors and defendants poorly. Even for the most egregious sexual offenses, incapacitation through incarceration may be a nonideal response, but we have yet to identify any manageable alternative<sup>314</sup>—non-carceral alternatives may become increasingly plausible as we broaden alternative forms of prevention and redress, if we are able to “creatively explor[e] new terrains of justice, where the prison no longer serves as our major anchor.”<sup>315</sup>

#### *D. Shifting Sexual Discourse*

A final preventive strategy in addressing sexual harm is to proliferate more understanding, institutional mapping, and frank and genuinely open discourse about sex, sexuality, pleasure, and harm.<sup>316</sup> This would enable more informal and immediate response to risks of harm through discussion of potentially concerning situations with teachers, counselors, and family members, as well as within schools, prisons, churches, and especially families.<sup>317</sup>

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314. ZILNEY & ZILNEY, *supra* note 2, at 127–28.

315. See ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 21 (2003); McLeod, *supra* note 46.

316. But see MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY: AN INTRODUCTION 8 (Robert Hurley trans., 1978) (exploring “the case of a society which has been loudly castigating itself for its hypocrisy for more than a century, which speaks verbosely of its own silence, takes great pains to relate in detail the things it does not say, denounces the powers it exercises, and promises to liberate itself from the very laws that have made it function”). In contrast to the sexual discourses Foucault theorizes—as reproductions of power—the opening of sexual discourse proposed here would entail a fuller descriptive accounting of pleasures and harms detached from medical, psychological, or legal interactions. Foucault himself recognized that in the censorial discourse around sexuality, “[n]ot any less was said . . . on the contrary. But things were said in a different way; it was different people who said them, and from different points of view.” See *id.* at 27; see also Joseph J. Fischel, Sex and Harm in the Age of Consent 7 (Aug. 2011) (unpublished Ph.D. Dissertation, University of Chicago) (on file with author) (“[C]onsent is flimsy. Unlike an attentive lover, it will not always rescue us. It cannot do all the work of sexual adjudication assigned for it by law or by the social. . . . [S]ex that is regretted, unpleasant, or even harmful occurs in legally consensual relations. And some of the sex that occurs in legally non-consensual relations, between minors or between adults and minors, is formative, transformative, good, great, OK, or non-momentous. Perhaps more importantly, sex between minors and adults may in some instances be unjust whether or not the sex is wanted or consented to, in which case we, and the law, require another vocabulary for thinking sexual harm as meaning something other than consent’s violation.”).

317. See, e.g., CHRISTIANE SANDERSON, THE SEDUCTION OF CHILDREN: EMPOWERING PARENTS AND TEACHERS TO PROTECT CHILDREN FROM CHILD SEXUAL ABUSE (2004) (exploring

One of the significant but underappreciated barriers to reducing sexual abuse and violence is that some survivors are unable or unwilling to identify their experiences as such. Rather than simply a problem of under-reporting, certain youth subcultures normalize significant sexual harm, even rape. According to an analysis of forensic interviews with young women who had been sexually assaulted between 1995 and 2004, female youth routinely described “boys and men as natural sexual aggressors,” as “unable to control their sexual desires,” and assault was “often justified” in terms like these: “I never think it’s a big thing because they do it to everyone.”<sup>318</sup> One young woman in the study justified assault in these terms: “They grab you, touch your butt and try to, like, touch you in the front . . . but it’s okay.”<sup>319</sup> Another young female student reported nonchalantly that a man who rode on the bus to school with her “often threatened to come over to [her] house and rape [her].”<sup>320</sup> She continued: “that can be a little weird to hear. . . . He tells me it all the time, like the last time I talked to him. . . . It’s just hard to, like, why would he say that?”<sup>321</sup> Most young women interviewed reported they did not wish to make a “‘big deal’ out of their experiences.”<sup>322</sup> The interviewees also report consenting to sex out of fear of rape: “I shouldn’t have been there, my mom said I should’ve been home anyway, but I didn’t want to get raped so I had to.”<sup>323</sup>

More open exploration of experiences of sex, sexuality, pleasure, and sexual harm would also allow for reconfigured power relations as well as incremental redesign of the relevant formal regulatory mechanisms in reference to more complete and accurate information about the scope of the problems at hand. In some instances, law may have a responsive role to play. But in other contexts—either where relationships are such that formal legal intervention is unwelcome or where sex may be consensual even if unwanted—shedding light on relevant harms may be a project in which criminal law does not figure at all.<sup>324</sup> The possibility of reducing sexual violation and empowering those who would otherwise be sexually abused stands not only to decrease harm but also to increase the possibilities for all people to experience sexual pleasure and

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how engaging in frank discussion of childhood sexual abuse could be helpful to preventing such conduct).

318. Heather R. Hlavka, *Normalizing Sexual Violence: Young Women Account for Harassment and Abuse*, 28 GENDER & SOC’Y 337, 344 (2014).

319. *See id.*

320. *See id.* at 345.

321. *See id.*

322. *See id.* at 347.

323. *See id.*; *see also* *Girls* (Apatow Productions 2012) (HBO television series exploring young adult female sexuality, desire, and discomfort); Amanda Hess, *Was That a Rape Scene in Girls?*, SLATE (Mar. 11, 2013), [http://www.slate.com/blogs/xx\\_factor/2013/03/11/girls\\_adam\\_and\\_natalia\\_sexual\\_assault\\_and\\_verbal\\_consent\\_on\\_hbo\\_s\\_girls.html](http://www.slate.com/blogs/xx_factor/2013/03/11/girls_adam_and_natalia_sexual_assault_and_verbal_consent_on_hbo_s_girls.html).

324. *See* Robin West, *Sex, Law and Consent*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE 221 (Franklin G. Miller & Alan Wertheimer eds., 2008) (arguing for more nuanced differentiation between non-consensual sex, consensual but unwanted harmful sex, consensual and unwanted but harmless sex, and consensual and desired sex).

sexual intimacy.<sup>325</sup> This discursive project is by no means an easy or straightforward one. Much of what drives our moralistic, draconian, and irrational responses to sexual offending likely also informs our reluctance to engage in more transparent and honest sexual discourse and would likely color any associated more “open” discourse.<sup>326</sup> Nonetheless, misinformation and incomplete information have in significant measure driven our dysfunctional responses to sexual harm; more accurate information, with more honest analysis of where sexual pleasures, risks, and harms lie, would enable better informed responses.

#### CONCLUSION

The profoundly dysfunctional criminal regulation of sexual harm in the United States, based on purportedly preventive but misguided grounds, excessively targets relatively innocuous misconduct, exaggerates rare forms of egregious threat perpetrated by dangerous strangers, irrationally and excessively punishes misconduct misperceived as more significant than it is, and largely overlooks the institutions and intimate relationships most plagued by sexual violence and abuse. This Essay has offered an account of how this pathological regime operates, why it persists despite its deep inadequacies, and how its excesses have been ratcheted down in several jurisdictions. But the problem of addressing sexual harm persists, especially in our central social institutions—schools, churches, prisons, the military—and between intimates in families. The supposed preventive focus of the prevailing criminal regulatory regime targets convicted sex offenders and does little to address these more pervasive problems. In a preliminary attempt to consider regulatory preventive alternatives that would respond to these more prevalent sexual harms, this Essay concludes by beginning to explore how we might conceive of regulating sexual (and other forms of interpersonal) harm as a macro-level, social institutional reform project: shifting institutional practices with regard to sexual abuse reporting and redress; facilitating the ease of confronting sexual misconduct, including through empowerment of vulnerable populations; concentrating on design and infrastructure development that would reduce risks of sexual harm; proliferating alternatives to conventional prosecution and punishment; and inviting more open understanding, mapping, and honest discourse about sex, sexuality, harm, and pleasure.

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325. See Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309, 1312 (1992).

326. See generally FOUCAULT, *supra* note 316.

