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## Ending Recidivism: How a Judicial Paradigm Shift Could Prevent Recidivism by Sex Offenders

Geoffrey S. Weed

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# Ending Recidivism: How a Judicial Paradigm Shift Could Prevent Recidivism by Sex Offenders

Geoffrey S. Weed\*

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## I. Introduction

In my experience, recidivism by sex offenders is one of the most daunting problems facing our legal system today. It is also an especially terrible problem because many of the victims are children. Sexual predators victimize the most innocent, the most vulnerable. The damage they cause is just heart-rending.

- Hon. Maura Corrigan<sup>1</sup>

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\* Geoffrey S. Weed is a solo practitioner who lives in southeastern Michigan with his wife, Kristin, and daughters, Erin and Olivia. It is in loving dedication to them that he authored this Article.

1. E-mail from Hon. Maura Corrigan, Dir. of the Mich. Dep't of Human Servs., former Chief Justice of the Mich. Supreme Court, to author (Feb. 28, 2011) (on file with author).

On the evening of May 20, 1989, around dusk,<sup>2</sup> the Mansfield family gathered for a solemn occasion in the woods outside Tacoma, Washington.<sup>3</sup> Mr. Mansfield, who was a local schoolteacher,<sup>4</sup> had assembled his loved ones to bury the family cat.<sup>5</sup> A somber air must have hung over the funeral site. Nothing, however, could have prepared the Mansfields for the horror of what they were about to witness in that lonely place. To their astonishment, they watched as a seven-year-old boy wandered out from the trees, naked except for a pair of sandals.<sup>6</sup> The boy was filthy, covered in a mixture of mud and blood.<sup>7</sup> He was also in shock—his penis had been severed,<sup>8</sup> and he had been stabbed in the back.<sup>9</sup>

Later, it was determined that thirty-nine-year-old repeat sex offender Earl Shriner was the perpetrator of this inconceivably brutal crime.<sup>10</sup> Shriner had lured the little boy into the woods before raping him anally and orally, choking him,<sup>11</sup> stabbing him, cutting off his penis, then leaving him to die alone in the woods.<sup>12</sup> Tragically, Shriner was “out on bail pending trial on a rape charge” at the time of the assault.<sup>13</sup> Indeed, Shriner had a long history of assaultive behavior, especially against children.<sup>14</sup> He had previously kidnapped, beaten, strangled, stabbed, or killed at least six other minors.<sup>15</sup>

Recidivism among sex offenders is a serious societal problem. But because the current judicial paradigm does not account for the realities of mental illness, that paradigm cannot effectively combat sex-crime recidivism. Many sex offenders suffer from deviant sexual desires, called

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2. See BERNADETTE MCSHERRY & PATRICK KEYZER, *SEX OFFENDERS AND PREVENTIVE DETENTION: POLITICS, POLICY AND PRACTICE 2* (2009).

3. Michelle 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, 794 (1996).

4. *Id.*

5. MCSHERRY & KEYZER, *supra* note 2, at 2.

6. Earl-Hubbard, *supra* note 3, at 794.

7. Earl-Hubbard, *supra* note 3, at 794.

8. Earl-Hubbard, *supra* note 3, at 794.

9. MCSHERRY & KEYZER, *supra* note 2, at 3.

10. MCSHERRY & KEYZER, *supra* note 2, at 3.

11. Kate Shatzkin, *Boy Identifies Shriner At Trial -- Victim Testifies About Attack In Woods*, SEATTLE TIMES (Jan. 31, 1990), <http://community.seattletimes.nwsources.com/archive/?date=19900131&slug=1053698>.

12. Earl-Hubbard, *supra* note 3, at 794.

13. Earl-Hubbard, *supra* note 3, at 794.

14. See MCSHERRY & KEYZER, *supra* note 2, at 2.

15. See MCSHERRY & KEYZER, *supra* note 2, at 2.

“paraphilias,” that cause their antisocial behaviors. Thus, simply placing a sex offender in prison for some term of years is ultimately ineffective—once released, the underlying mental illness is still present and the offender will likely recidivate.

In recognition of this fact, the current paradigm largely relies on traditional psychological treatment to “cure” sex offenders of their paraphilias. Such treatment, however, is woefully ineffective. While the results of studies regarding the efficacy of treatment in preventing recidivism vary wildly, those studies that show the largest impact only demonstrate about a fifty percent reduction in recidivism. Since sex offenders often prey on the most vulnerable members of society,<sup>16</sup> such a reduction is simply inadequate.

The failure of the current paradigm is evident in the continued toll of recidivism by sex offenders upon society. This Article proposes that a new paradigm, informed not only by psychology but also by common sense, might effectively combat this social ill. Since neither prison nor psychological treatment can “cure” sex offenders of their deviant sexual desires, solutions with permanency are necessary. Remedies with such potential permanency include sentences of life without the possibility of parole, death sentences, electronic monitoring combined with residency restrictions, involuntary civil commitment, and castration (either chemical or physical).

Section II of this Article will attempt to define the problem of recidivism through both statistical analysis and a series of vignettes demonstrating the toll of individual sex offenders on society. In order to lay a solid foundation of knowledge for the discussion found in later sections, Section III will provide background information about the general psychology of sex offenders. Section IV, on the other hand, will focus on critiquing the current paradigm’s shortcomings and will emphasize the necessity of a new paradigm that accounts for the realities of the recidivism problem. Section V will provide a survey of techniques that, particularly in combination, may help to curb recidivism. Finally, Section VI will conclude, summarize, and act as an academic call to arms.

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16. See David Finkelhor et al., *The Victimization of Children and Youth: A Comprehensive, National Survey*, 10 CHILD MALTREATMENT 5 (Feb. 2005), available at <http://www.unh.edu/ccrc/pdf/jvq/CV73.pdf> (explaining that one in twelve children surveyed had been victimized sexually); Walter Pincus, *Debate: Megan’s Law and the Protection of the Child in the On-Line Age*, 35 AM. CRIM. L. REV. 1319, 1321–22 (1998). But see Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CALIF. L. REV. 163, 171–74 (2003).

## II. Recidivism by Sex Offenders: Defining the Problem

Everyone has his faults which he continually repeats: neither fear nor shame can cure them.

- Jean de LaFontaine<sup>17</sup>

There is little doubt that sex-offender recidivism<sup>18</sup> is a serious societal problem.<sup>19</sup> For several reasons, however, it is difficult to define that problem precisely.<sup>20</sup> First, different studies on the subject have utilized different criteria for determining rates of recidivism.<sup>21</sup> Secondly, statistical anomalies often arise when criminal charges or convictions are used as the criterion for defining recidivism.<sup>22</sup> In large part, such anomalies result from the fact that “[a] single charge of sexual assault may represent years of abuse of a single victim,” whereas “multiple charges of sexual assault may involve a single victim on a single occasion.”<sup>23</sup> The fact that many sexual assaults go unreported also substantially skews statistics about recidivism, although this problem is, by definition, an extraordinarily difficult one to account for in research.<sup>24</sup> Likewise, many of the extant studies on sex-offender recidivism monitored offenders over only over a brief window of time, a failure that yields misleadingly low rates of recidivism.<sup>25</sup> While longer-term studies

17. DICTIONARY OF QUOTATIONS 216 (Connie Roberts ed., 3d ed. 1998).

18. Black’s Law Dictionary defines “recidivism” as “[a] tendency to relapse into a habit of criminal activity or behavior.” BLACK’S LAW DICTIONARY 596 (9th ed. 2009). Practically speaking, however, it is difficult to formulate a precise definition for recidivism, especially as that term relates to sex offenses. For an exhaustive discussion of the problem of defining recidivism, see MICHAEL D. MALTZ, *RECIDIVISM* (1984), available at <http://www.uic.edu/depts/lib/forr/pdf/crimjust/recidivism.pdf>.

19. See Langan et al., *Recidivism of Sex Offenders Released From Prison in 1994*, BJS No. NCJ 198281 (Nov. 2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf>; see also Ron Langevin et al., *Lifetime Sex Offender Recidivism: A 25-Year Follow-Up Study*, 46 CANADIAN J. OF CRIMINOLOGY & CRIM. JUST. 531, no. 5 (2004).

20. Langevin et al., *supra* note 19, at 533.

21. Langevin et al., *supra* note 19, at 533 (discussing the varying criteria that have been used by studies in the past, including “sex offence re-convictions; any new charge or arrest for sexual offences; any type of new conviction; any type of new charge; self-report; or, less often, parole violations or number of court appearances”).

22. Langevin et al., *supra* note 19, at 534.

23. Langevin et al., *supra* note 19, at 534.

24. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 73–75 (2002) available at <http://www.wcsap.org/sites/www.wcsap.org/files/uploads/webinars/SV%20on%20Campus/Repeat%20Rape.pdf>.

25. Langevin et al., *supra* note 19, at 534 (explaining that numerous previous studies “had follow-up periods of less than three years”); cf. Hal Arkowitz & Scott O. Lilienfeld, *Once*

ostensibly present a more balanced view of recidivism, studies with a longer duration are not without their own statistical biases, including those caused by changes in the law or in the reporting practices of mental health professionals.<sup>26</sup> Finally, many studies on the subject of recidivism have consisted of small sample groups that “may not represent sex offenders in general” or may represent only one subclass of sex offender.<sup>27</sup> Indeed, many studies demonstrate a pronounced difference in recidivism rates between different subclasses, or “types” of sex offenders.<sup>28</sup>

With that landscape of potential problems in mind, this Article will attempt to define the problem of recidivism among sex offenders statistically while avoiding as many statistical pitfalls as practicable.<sup>29</sup> Of course, a truly exhaustive, seamless statistical definition of this problem is quite beyond the scope of this Article and has yet, in fact, to be compiled by any authority.

The general public seems to have a misconception about how prevalent recidivism actually is among sex offenders.<sup>30</sup> This misconception is likely attributable to sensational media coverage of sex crimes<sup>31</sup> and to fictional portrayals of sex offenders as “chronic repeaters.”<sup>32</sup> In fact, one recent study

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*a Sex Offender, Always a Sex Offender? Maybe Not: The Popular Perception of Incurable Sex Criminals May Be Quite off the Mark*, SCIENTIFIC AMERICAN, Apr. 3, 2008, available at <http://www.scientificamerican.com/article.cfm?id=misunderstood-crimes>.

26. See Langevin et al., *supra* note 19, at 535.

27. See Langevin et al., *supra* note 19, at 536.

28. LIN SONG & ROXANNE LIEB, WASH. STATE INST. FOR PUB. POLICY, ADULT SEX OFFENDER RECIDIVISM: A REVIEW OF STUDIES 1, 12 (1994), available at [http://www.wsipp.wa.gov/rptfiles/Soff\\_recid.pdf](http://www.wsipp.wa.gov/rptfiles/Soff_recid.pdf) (explaining that “rapists tend to have higher recidivism rates than child molesters, while incest offenders tend to have the lowest recidivism rates”).

29. Because all studies utilized likely have at least one notable flaw, those flaws will only be mentioned hereafter when they are likely misleading in the context of this article. Likewise, the term “recidivism” will be used as a sort of catch-all term encompassing any type of recidivism, including recidivism for a non-sexual offense. When referencing recidivism involving a sex offense, however, the term “sexual recidivism” or some other similar term will be used to differentiate recidivism involving sex offenses from recidivism involving any type of general criminal conduct.

30. Arkowitz & Lilienfeld, *supra* note 25.

31. TEXAS DEP’T OF STATE HEALTH SERVS., COUNCIL ON SEX OFFENDER TREATMENT: TREATMENT OF SEX OFFENDERS – FACTS, [http://www.dshs.state.tx.us/csot/csot\\_tfacts.shtm](http://www.dshs.state.tx.us/csot/csot_tfacts.shtm) (last updated July 5, 2005) (“The media’s portrayal of sex offenders has continuously misled the public that all sex offenders are sexually violent predators. Commentators, the media, and even academia use the terms ‘sex offender’ and ‘sexual predator’ in a virtually interchangeable manner. . . .”) (citations omitted).

32. Arkowitz & Lilienfeld, *supra* note 25.

indicated that “the general public believes that 75 percent of sex offenders will reoffend.”<sup>33</sup>

Luckily, many studies indicate that the reality of recidivism is not quite that dire.<sup>34</sup> While conflicting results exist,<sup>35</sup> one of the better-respected studies<sup>36</sup> demonstrated a sexual recidivism rate of 5.3% “within the first 3 years following their release” from prison.<sup>37</sup> The same study noted that forty percent of the sex crimes committed by those who recidivated occurred within the first year after release.<sup>38</sup> It was found that “sex offenders were 4 times more likely [than other offenders] to be rearrested for a sex crime,” as the sexual recidivism rate among other offenders was only 1.3%.<sup>39</sup> Roughly half of those randomly included in the sample were imprisoned for a sexual offense against a child; sixty percent of those child victims were under the age of thirteen.<sup>40</sup>

Contrastingly, there was “no clear association” found between the length of the prison sentence served by an offender<sup>41</sup> and the rate of sexual recidivism.<sup>42</sup> Likewise, most comparisons involving the age of the sex offender did not demonstrate a clear connection between age at the time of release and tendency to recidivate.<sup>43</sup> This is noteworthy because studies

33. Arkowitz & Lilienfeld, *supra* note 25.

34. *See, e.g.*, Langan et al., *supra* note 19; Langevin et al., *supra* note 19. *But see* Lisak & Miller, *supra* note 24, at 73–75.

35. *See, e.g.*, SONG & LIEB, *supra* note 28, at 5.

36. Langan et al., *supra* note 19, at 1. The study in question is particularly noteworthy and well respected because of its vast sample size of 9,691 sex offenders. This sample represented a full “two-thirds of all the male sex offenders released from State prisons in the United States in 1994.” *Id.* That sample size dwarfs the sample size of most other studies on the subject. *Cf., e.g.*, SONG & LIEB, *supra* note 28, at 6 (summarizing previous studies involving sample sizes anywhere between 86 and 560 [excluding one study with a sample of 16,000 that “estimated” recidivism rates]); Langevin et al., *supra* note 19, at 531 (sample size of 320).

37. Langan et al., *supra* note 19, at 24.

38. Langan et al., *supra* note 19, at 25.

39. Langan et al., *supra* note 19, at 1.

40. Langan et al., *supra* note 19, at 1 (noting that 4,295 out of 9,691 offenders had committed a crime against a child).

41. Langan et al., *supra* note 19, at 1 (showing that on average those studied had received a sentence of eight years’ imprisonment, but had only served an average of three-and-a-half years, which was forty-five percent of the sentence).

42. Langan et al., *supra* note 19, at 1.

43. Langan et al., *supra* note 19, at 1 (“While the lowest rate of rearrest for a sex crime (3.3%) did belong to the oldest sex offenders (those age 45 or older), other comparisons between older and younger prisoners did not consistently show older prisoners’ having the lower rearrest rate.”).

regarding general recidivism typically find that the incidence of recidivism decreases as offenders age—in other words, the older the offender, the less likely that the offender will recidivate.<sup>44</sup> Much of the statistical data about sex offenders do “not follow [that] familiar pattern.”<sup>45</sup> In fact, growing evidence indicates that sex offenders may actually become more dangerous as they age, a problem that poses distinct societal problems.<sup>46</sup>

Of the 272,111 total offenders tracked by this study, 9,691 (or 3.6%) were male sex offenders.<sup>47</sup> Those sex offenders had a lower rate of non-sexual recidivism (43%) over the three-year follow-up period than did other offenders (68%), and 38.6% of those sex offenders were returned to prison (for any cause, including technical violations of parole) within three years of release.<sup>48</sup>

Studies with longer follow-up periods, of course, tend to demonstrate higher recidivism rates.<sup>49</sup> One Canadian study attempted to monitor “lifetime recidivism rates” by monitoring each studied sex offender<sup>50</sup> for a minimum period of twenty-five years.<sup>51</sup> This study based its recidivism rate “on convictions or charges for any [offense].”<sup>52</sup> The results of the study showed a general recidivism rate for sex offenders of 80.4%, with a sexual recidivism rate of 61.1%.<sup>53</sup> Notably, 74.2% of those studied reported that they had committed crimes “without any legal involvement with authorities.”<sup>54</sup> When such “undetected crimes” were considered, the sexual recidivism rate climbed to a staggering 88.3%.<sup>55</sup>

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44. Langan et al., *supra* note 19, at 1.

45. See Laura Sullivan, *Sex Offenders Fill Geriatric Wards of U.S. Prisons*, All Things Considered, NPR (Jan. 3, 2007), transcript available at <http://www.npr.org/templates/story/story.php?storyId=6718593>.

46. Sullivan, *supra* note 45 (“It costs taxpayers more than \$75,000 each year to house a geriatric inmate—three times the cost of housing a younger man.” Illustrative evidence of this practical problem is demonstrated by the fact that one geriatric unit that was visited had “one full-time doctor, 14 nurses and 15 dialysis machines.”).

47. Langan et al., *supra* note 19, at 1.

48. Langan et al., *supra* note 19, at 1 (using “rearrest rate” as the criterion for general recidivism).

49. See, e.g., Langevin et al., *supra* note 19.

50. See, e.g., Langevin et al., *supra* note 19 (using a sample size of 320).

51. See, e.g., Langevin et al., *supra* note 19.

52. See, e.g., Langevin et al., *supra* note 19.

53. See, e.g., Langevin et al., *supra* note 19.

54. See, e.g., Langevin et al., *supra* note 19 (reporting of these “undetected crimes” varied by sex offender type—98% of exhibitionists reported that they had committed undetected crimes whereas only 9.1% of violent sex offenders made similar claims).

55. See, e.g., Langevin et al., *supra* note 19.



Of course, a dry statistical analysis of sex-offender recidivism fails to paint a particularly compelling picture of the problem. Bald numeric data cannot ever, it would seem, adequately convey the true human cost of any social ill, particularly when that cost is largely borne by victims left faceless in the statistical fray.

And few bear any cost more terrible than that borne by the victims of sex offenders.<sup>56</sup>

On the night of February 23, 2005, Jessica Lunsford was an ordinary nine-year-old girl, fast asleep in her bedroom in Homosassa Springs, Florida.<sup>57</sup> A previously convicted child molester named John Evander Couey broke in and abducted Jessica, taking her back to his own home in order to rape her.<sup>58</sup> To appease Jessica, Couey allowed her to bring a stuffed toy dolphin with them, but the two did not have far to travel—Couey lived less than 100 yards away.<sup>59</sup> According to Couey, he held Jessica for three days and forced her to stay in his closet most of the time, even when she had to urinate, while he smoked crack cocaine and got drunk.<sup>60</sup> Jessica was allowed to watch television reports that covered her abduction and was aware of the ongoing search for her.<sup>61</sup> Eventually, Couey took Jessica to a site within a few hundred yards of her own home, bound her hands, placed her inside a

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56. For a poignant discussion about how this cost can affect a survivor's life years after the offense, see LIZ SECCURO, *CRASH INTO ME: A SURVIVOR'S SEARCH FOR JUSTICE* (1st ed. 2011), which vividly depicts the struggle of one victim:

As the freshman girl struggled on the filthy sheets, the stranger pounding into her, she looked to the left and saw a light outside the window. It was an ordinary streetlight that cast a blue-white glow on the revelers on the fraternity-lined street called Rugby Road. She screamed, but no one could hear her. Her breathing became shallow, caught in her throat. She realized now, covered in saliva, sweat, semen, and stale beer, that she might never leave this room. She wished for one thing: that her parents would find her, that they would learn what had happened to her and fight for her. She thought of her friends, her family, her life, and how happy it had been. She could let go. She could stop struggling. She stopped screaming and her arms and legs ceased their manic dance of defense. She said to herself, "It's all right. You can sleep now. It won't hurt anymore." She swirled into the safe and warm cloak of unconsciousness and quiet.

I know this girl. Somewhere inside me she is alive and not broken.

This is her story.

*Id.* at 1.

57. *Drifter Says He Held Girl Three Days*, CNN.COM (June 24, 2005, 11:11 AM), <http://www.cnn.com/2005/LAW/06/23/lunsford.report/>.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

trash bag, and buried her alive.<sup>62</sup> Jessica's toy dolphin was found buried beside her.<sup>63</sup>

Mercifully, Jessica no longer has to bear the mental burden of what was done to her. The survivors of serial sex offender Phillip C. Garrido are not so lucky.<sup>64</sup> Garrido's first wife, Christine Murphy, describes Garrido simply as a "monster."<sup>65</sup> She still bears a scar on her face that Garrido inflicted when, in a jealous rage, he attempted to "'gouge' her eyes out" with a safety pin.<sup>66</sup>

Others have fared worse at Garrido's hands. In 1972, "Garrido was accused . . . of drugging a 14-year-old girl, taking her to a hotel room[,] and repeatedly raping her."<sup>67</sup> Because the victim refused to testify, that case never went to trial.<sup>68</sup>

One of Garrido's later victims, Katie Callaway Hall, got at least some measure of legal vindication.<sup>69</sup> In 1976, Garrido approached Hall in the parking lot of a California supermarket and asked her for a ride.<sup>70</sup> She agreed.<sup>71</sup> To repay her kindness, Garrido subsequently handcuffed and gagged Hall, took her to a mini-warehouse in Nevada, and repeatedly raped her over the course of five hours.<sup>72</sup> Hall escaped by fleeing the warehouse,

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62. *Id.*

63. *Id.*

64. See Nancy Dillon, *Jaycee Lee Dugard Found: Kidnap Victim Safe at Police Station 18 Years After Abduction*, N.Y. DAILY NEWS (Aug. 27, 2009), <http://www.nydailynews.com/news/world/jaycee-lee-dugard-found-kidnap-victim-safe-police-station-18-years-abduction-article-1.386201> [hereinafter *Jaycee Lee Dugard Found*]; Nancy Dillon & Corky Siemaszko, *Jaycee Lee Dugard Kidnapper Phillip Garrido's First Wife Christine Murphy Says He's a 'Monster'*, N.Y. DAILY NEWS (Aug. 31, 2009), <http://www.nydailynews.com/news/national/jaycee-lee-dugard-kidnapper-phillip-garrido-wife-christine-murphy-monster-article-1.397360>; *Suspect Faced '72 Rape Case*, N.Y. TIMES (Sep. 4, 2009), at A13, <http://www.nytimes.com/2009/09/04/us/04rape.html> [hereinafter *Suspect Faced '72 Rape Case*]; *Garrido Victim: 'He Had Me for 8 Hours. He Had Her for 18 Years'*, CNN JUSTICE (Aug. 31, 2009), <http://www.cnn.com/2009/CRIME/08/31/garrido.victim.lkl/> [hereinafter *Garrido Victim*].

65. Dillon & Siemaszko, *supra* note 64.

66. Dillon & Siemaszko, *supra* note 64.

67. *Suspect Faced '72 Rape Case*, *supra* note 64.

68. See *id.* (noting that Garrido was charged but the victim declined to testify).

69. See *Garrido Victim*, *supra* note 64 (stating that Garrido served ten years and was labeled a sex offender for kidnapping and raping Hall).

70. See *Garrido Victim*, *supra* note 64.

71. See *Garrido Victim*, *supra* note 64.

72. See *Garrido Victim*, *supra* note 64.

totally naked, when Garrido stepped out for a moment.<sup>73</sup> Garrido was sentenced to fifty years for kidnapping and raping Hall, but that has served as cold comfort.<sup>74</sup> Hall says that she has thought about Garrido every day since the incident and that the “trauma of her kidnapping has stayed with her all of these years.”<sup>75</sup>

Sadly, Garrido only served ten years of his fifty-year sentence, after which he was released, registered as a sex offender, and placed on lifetime parole.<sup>76</sup> Those preventive measures did little to deter him, as evidenced by his subsequent treatment of Jaycee Lee Dugard.<sup>77</sup> In 1991, when Dugard was eleven years old, Garrido “abducted [her] from in front of her South Lake Tahoe home” as she waited at a school bus stop.<sup>78</sup> Garrido held Dugard captive as a sex slave for eighteen years in a backyard compound in Antioch, California.<sup>79</sup> Dugard had two children of Garrido’s while she was captive.<sup>80</sup> She and her children were eventually rescued when a suspicious individual informed Garrido’s parole officer of the situation.<sup>81</sup>

When Garrido’s former victim, Katie Callaway Hall, saw a news report about Garrido’s arrest for what he had done to Dugard, she screamed, “Oh my god, Oh my god, it’s him.”<sup>82</sup> Hall trembled for hours afterward.<sup>83</sup> She commented, “I can’t imagine what Jaycee is going through. He had me for 8 hours. He had her for 18 years.”<sup>84</sup>

Unfortunately, the damage Garrido caused is far from unique; many sex offenders cut a destructive swath through society of similar width and breadth. As a case in point, one might survey the living victims of Byron Scherf.<sup>85</sup> In 1995, Barbara Bell was a real estate agent in the area of Spokane,

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73. See *Garrido Victim*, *supra* note 64.

74. See *Garrido Victim*, *supra* note 64.

75. See *Garrido Victim*, *supra* note 64.

76. See *Garrido Victim*, *supra* note 64.

77. *Jaycee Lee Dugard Found*, *supra* note 64.

78. *Jaycee Lee Dugard Found*, *supra* note 64.

79. Corky Siemaszko, *Jaycee Lee Dugard Awarded \$20M Settlement for 18 Years in Clutches of Kidnapper Phillip Garrido*, N.Y. DAILY NEWS (Jul. 1, 2010), available at <http://www.nydailynews.com/news/national/jaycee-lee-dugard-awarded-20m-settlement-18-years-clutches-kidnapper-phillip-garrido-article-1.465516>.

80. *Id.*

81. *Id.*

82. *Garrido Victim*, *supra* note 64.

83. *Garrido Victim*, *supra* note 64.

84. *Garrido Victim*, *supra* note 64.

85. See *Bell v. State*, 52 P.3d 503, 505 (Wash. 2002). (Victim of kidnapping and rape by paroled sexual offender brought suit against state for negligent parole supervision. State

Washington.<sup>86</sup> Bell received a call from Scherf about one of her home listings in a remote area, and the two agreed to meet at the house the next day.<sup>87</sup> During the meeting, Scherf “suddenly attacked [Bell] . . . grabbed [her] by the throat, choked her, and fell on top of her.”<sup>88</sup> When Bell began to scream, Scherf silenced her by saying that “he had killed several women before and would not hesitate to kill her as well.”<sup>89</sup> After retrieving a butcher knife from the kitchen, Scherf made Bell get into the trunk of his car, drove her to the middle of the woods, then raped her.<sup>90</sup> Bell was able to convince Scherf to spare her life only “by promising she would not report him to the police.”<sup>91</sup>

When Bell scheduled her appointment to meet with Scherf, she could not have known that “he was a two-time felon on parole” who had previously “kidnapped a young waitress and brought her to an abandoned house where he bound and raped her.”<sup>92</sup> Bell also could not have known or appreciated just how lucky she had been to escape with her life.<sup>93</sup> When Scherf had finished with his prior victim (the young waitress) he covered her in gasoline, lit her on fire, and left her to burn alive.<sup>94</sup> The young woman survived only “by wriggling, still bound, through a second-story window.”<sup>95</sup>

Because Scherf’s crimes against Bell constituted his third strike, he was sentenced to life imprisonment.<sup>96</sup> While incarcerated, it looked as if Scherf had begun to change his life, especially by volunteering “at the [prison] chapel where he worked as a janitor and clerk.”<sup>97</sup> On January 27, 2011, Scherf submitted a prayer request “asking others who attended the chapel” to pray for him regarding “very pressing temptations.”<sup>98</sup> Scherf’s prayer

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supreme court affirmed Superior Court jury verdict for the state).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* (stating that Scherf was a two-time felon on parole for kidnapping, raping, and setting another woman on fire).

94. *Id.*

95. *Id.*

96. *Suspect in Wash. Guard Killing Asked for Prayers*, SEATTLE TIMES (Feb. 11, 2011), available at [http://seattletimes.nwsourc.com/html/localnews/2014194835\\_apusprison\\_guardkilled1stldwritethru.html](http://seattletimes.nwsourc.com/html/localnews/2014194835_apusprison_guardkilled1stldwritethru.html).

97. *Id.*

98. *Id.*

request said, “I want to do the right thing but am really struggling.” On January 29, a lone female officer, Jayme Biendl, was assigned to guard the chapel.<sup>99</sup> Scherf waited until the two were alone in the chapel, then he strangled her to death.<sup>100</sup>

Not all repeat sex offenders, of course, are violent sexual predators like Couey, Garrido, and Scherf.<sup>101</sup> Many who recidivate resemble child molester Brach E. Norris much more closely.<sup>102</sup> In 1991, Norris was convicted of first-degree child molestation.<sup>103</sup> Unfortunately, in March of 1999, Norris became a sexual recidivist.<sup>104</sup> A man named Mark Hyndman had brought three of his children, including his five-year-old stepdaughter, “to a McDonald’s restaurant in Spokane, Washington, for a late lunch.”<sup>105</sup> After eating, Hyndman accompanied his children into “an enclosed play-room inside the restaurant” and watched as they began to play.<sup>106</sup> Hyndman noticed the forty-two-year-old Norris, who sat alone, watching the children.<sup>107</sup> During a subsequent conversation with Norris, Hyndman detected the smell of alcohol on the other man’s breath.<sup>108</sup> Later, Hyndman was briefly distracted by watching his youngest child at play, but returned his attention in time to see “Norris bend, reach down with one hand, and touch [Hyndman’s stepdaughter,] who had just come down the slide, between the legs.”<sup>109</sup> Hyndman grabbed Norris and informed the restaurant employees of what had transpired, but Norris got free and escaped.<sup>110</sup> Norris was subsequently apprehended and convicted of first-degree child molestation.<sup>111</sup> He was sentenced to life in prison without the possibility of parole.<sup>112</sup>

99. *Id.*

100. *Violent Three Strikes Offender Admits to Killing Monroe Prison Guard*, SKY VALLEY CHRONICLE (Feb. 12, 2011), <http://www.skyvalleychronicle.com/breaking-news/violent-three-strikes-offender-admits-to-killing-monroe-prison-guard-591200>.

101. *See, e.g.*, Norris v. Morgan, 622 F.3d 1276 (9th Cir. 2010); People v. Sigala, 191 Cal. App. 4th 695 (2011).

102. *See generally* Norris, 622 F.3d at 1276.

103. *Id.* at 1281. Norris was also convicted of non-sexual offenses in 1976 and 1999. *Id.* at 1282 n.4.

104. *Id.* at 1280–81.

105. *Id.* at 1280.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 1280–81.

111. *Id.* at 1281.

112. *Id.* Norris’s sentence was enhanced under Washington’s “two strikes” law. *Id.* For

Another example of a non-violent sex offender, like Norris, can be found in Jimmy Sigala.<sup>113</sup> Sigala was prosecuted when photographs he took “of his unclothed granddaughters, and one photograph of a granddaughter with [Sigala’s] penis in her mouth,” were found and reported.<sup>114</sup> Eventually, four of Sigala’s teenage granddaughters testified that he had systematically molested them.<sup>115</sup>

Granddaughter “J.” testified that Sigala had molested her “a few times per week” when she was thirteen years old.<sup>116</sup> Once, J. woke up to find that Sigala had penetrated her vaginally with his penis, “causing pain and bleeding.”<sup>117</sup> Granddaughter “A.,” on the other hand, was first molested by Sigala when she was twelve years old.<sup>118</sup> Over the course of the next six years, Sigala repeatedly touched A.’s breasts, digitally penetrated her vagina, and took nude photos of her while “directing her to smile.”<sup>119</sup> A.’s twin sister, “An.,” began her sexual servitude to her grandfather when she was sixteen.<sup>120</sup> Sigala touched An.’s breasts and vagina on numerous occasions, forced her to touch his erect penis, and also took pictures of her breasts.<sup>121</sup> Yet another granddaughter, “P.,” testified that Sigala began to molest her when she was only seven years old, touching her and rubbing his penis on her when she appeared to be sleeping.<sup>122</sup> By the time P. was eight, Sigala was routinely forcing her to “touch his penis with her hands and mouth . . . sometimes ejaculating in her mouth or on her chest.”<sup>123</sup> Once P. was a few years older, she was made to perform oral sex on Sigala “almost every day.”<sup>124</sup>

Needless to say, the demonstrative cases highlighted in this section are not intended to cover the vast universe of the sexual recidivism problem. Indeed, any such endeavor would be foolhardy. One of the saddest things about this topic is the fact that the variations are limitless—this section could continue on and on, interminably, because each offender, each victim, and

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further discussion about such laws, see Section V, *infra*.

113. *People v. Sigala*, 191 Cal. App. 4th 695, (Cal. Ct. App. 2011).

114. *Id.* at 697.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 698.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 697.

123. *Id.*

124. *Id.*

each offense is unique. No matter how fast one could write, new sexual offenses by recidivists would pile up even faster, demanding review.<sup>125</sup> Perhaps, in the end, this realization is the best definition that is possible. The societal problem of recidivism among sex offenders can be adequately, but not fully, defined by statistical analysis. Oddly, that same problem can also be adequately, but not fully, demonstrated by a single case study. But by neither statistical definition nor individual case study can the problem ever be truly understood. Rather, it is the type of problem that is understood only by those who reach the inexorable conclusion that it is too complex to fully understand.

### *III. The Psychology of Sex Offenders: Paraphilias, Recidivism, and Treatment*

There is no cure [for pedophilia] . . . It's like alcoholism. You can manage it. You mentally recondition yourself. But it never completely goes away.

- Jake Goldenflame<sup>126</sup>

In any attempt at definitional classification of a large group, one obvious problem is that some members of the group will not fit the definitional mold. This problem is so pervasive that it has cast a dark cloud of connotation<sup>127</sup> over the originally innocuous word “generalization.”<sup>128</sup> Yet, even with a full

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125. It is estimated that roughly 232,960 women were raped or sexually assaulted in the United States in 2006. *Violence Against Women in the United States: Statistics*, NAT'L ORGANIZATION FOR WOMEN, (Feb. 18, 2011) <http://www.now.org/issues/violence/stats.html#endref6>. That equates to over 600 victims of sexual crimes each day, even when only female victims are taken into account. *Id.* A conservative speculation that repeat sex offenders cause only ten percent of those assaults would still leave an author approximately sixty cases to research and catalogue each day, just to keep the author's head above water. To really delve into the problem, including past instances, would be impossible.

126. Peter Fimrite, *The Problem Now is How to Keep the Programs Going*, SAN FRANCISCO GATE (Mar. 8, 2004), <http://www.sfgate.com/news/article/The-problem-now-is-how-to-keep-the-programs-going-2783773.php>.

127. For an interesting example of the impact that such connotations can have, see Yolanda Woodlee, *D.C. Mayor Acted 'Hastily,' Will Rehire Aide*, WASH. POST, Feb. 4, 1999, <http://www.washingtonpost.com/wp-srv/local/longterm/williams/williams020499.htm> (discussing one incident where a mistaken connotation, that of racial bigotry, was assigned to the word “niggardly”).

128. According to the Merriam-Webster website, the word generalization is defined as “the act or process of generalizing;” “a general statement, law, principle, or proposition;” or “the act or process whereby a learned response is made to a stimulus similar to but not identical with the conditioned stimulus.” *Generalization* Definition, MERRIAM-WEBSTER.COM,

appreciation of the danger inherent in dealing in generalizations, this section must describe the psychology<sup>129</sup> of sex offenders in broad, generalizing strokes. Thus, admittedly, the following discussion of the psychology of sex offenders is riddled with generalities<sup>130</sup>—particularly psychological characteristics that are present in many sex offenders, or even most sex offenders, but not in all. It bears mentioning, however, that this section is not intended as a universal psychological mold into which all sex offenders will fit. Rather, the purpose of this section is to construct a basic scaffolding of knowledge in order to inform the discourse found in later sections.

The construction of any such scaffolding must begin with an explanation of paraphilias. Paraphilias are “recurrent, intense[,] sexually arousing fantasies, sexual urges, or behaviors” that involve “nonhuman objects,” “the suffering or humiliation of oneself or one’s partner,” or

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<http://www.merriamwebster.com/dictionary/generalization> (last visited Feb. 23, 2011). For a related discussion, see Bertjan Doosje, Russel Spears, & Willem Koomen, *When Bad Isn't All Bad: Strategic Use of Sample Information in Generalization and Stereotyping*, 69 J. OF PERSONALITY & SOC. PSYCHOL. 642 (Oct. 1995).

129. The very existence of “mental disease” is, in and of itself, controversial. See Steven K. Erickson, *The Myth of Mental Disorder: Transsubstantive Behavior and Taxometric Psychiatry*, 41 AKRON L. REV. 67, 67–68 (2008). Erickson describes how in the 1960s, psychiatrist Thomas Szasz penned a general indictment of psychiatry:

In 1961, psychiatrist Thomas Szasz wrote what would become one of the most controversial books in psychiatry that directly questioned whether traditional concepts of mental illnesses existed. The Myth of Mental Illness claimed that while psychiatry openly held mental illnesses as diseases under the rubric of the medical model, they really were mere arbitrary descriptions of behaviors that the profession itself had proclaimed to be illnesses. Szasz argued that since there were no identified lesions in the brain that could be attributed to mental illnesses, there was no evidence of disease. Without disease, mental disorders were not illnesses as traditionally understood in medicine. Consequently, mental illnesses were theoretical formulations describing behaviors that were declared by the profession as abnormal rather than based upon any empirically discovered finding. As such, mental illnesses, according to Szasz, were inherently, culturally, and socially bound and open to manipulation by the dominant social class. Thus, the professional formulations of mental illnesses were inherently a form of social control whereby society classified as mentally ill those with socially undesirable behavior. As Szasz famously put it, “if you talk to God, society calls it praying; if God talks to you, society calls you schizophrenic.”

*Id.* (footnotes omitted).

130. Contrastingly, stereotypes will be avoided as much as practicable. In this context, the word stereotype is defined as “something conforming to a fixed or general pattern; especially: a standardized mental picture that is held in common by members of a group and that represents and oversimplified opinion, prejudiced opinion, or uncritical judgment.” *Stereotype* Definition, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/stereotype> (last visited Nov. 5, 2013).



“children or other nonconsenting [sic] persons.”<sup>131</sup> In order to qualify as paraphiliac, the requisite fantasies, urges, or behaviors<sup>132</sup> must “occur over a period of at least 6 months”<sup>133</sup> and must “lead to clinically significant distress or impairment.”<sup>134</sup> Examples of such “distress or impairment” include instances where the paraphiliac behavior is “obligatory, result[s] in sexual dysfunction, require[s] participation of nonconsenting [sic] individuals, lead[s] to legal complications, [or] interfere[s] with social relationships.”<sup>135</sup> The foregoing “leads to legal complications” language is particularly relevant in the context of this Article.

There are many different paraphilias, each of which has its own paraphiliac “focus,”<sup>136</sup> and one individual may suffer from more than one paraphilia.<sup>137</sup> The American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (hereafter “DSM-IV”) identifies eight specific paraphilias: (1) exhibitionism, (2) fetishism, (3) frotteurism, (4) pedophilia, (5) sexual masochism, (6) sexual sadism, (7) transvestic fetishism, and (8) voyeurism.<sup>138</sup> The DSM-IV lumps all “other [p]araphilias that are less frequently encountered” into a “residual category, [entitled] Paraphilia Not Otherwise Specified.”<sup>139</sup>

The first of the specific paraphilias is exhibitionism, in which “[t]he paraphiliac focus . . . involves the exposure of one’s genitals to a stranger,” sometimes while masturbating.<sup>140</sup> In the majority of instances, individuals who act on exhibitionistic urges do not make any attempt at further sexual activity with the victim after genital exposure has occurred.<sup>141</sup> Thus, while certainly criminal when acted upon,<sup>142</sup> the urges of an exhibitionist are

131. AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 522–23 (Michael B. First et al. eds., 4th ed. 1994) (hereinafter “DSM-IV”).

132. For the sake of simplicity and brevity, these three manifestations (paraphiliac fantasies, urges, and behaviors) are hereinafter not always differentiated from one another but instead simply recognized as general paraphiliac activity.

133. DSM-IV, *supra* note 131, at 523.

134. DSM-IV, *supra* note 131, at 525.

135. DSM-IV, *supra* note 131, at 525.

136. DSM-IV, *supra* note 131, at 525–32.

137. DSM-IV, *supra* note 131, at 523.

138. DSM-IV, *supra* note 131, at 523.

139. DSM-IV, *supra* note 131, at 523.

140. DSM-IV, *supra* note 131, at 525.

141. DSM-IV, *supra* note 131, at 525.

142. See, e.g., Kevin O’Hanlon, *Woman Ticketed for Appearing Naked on Internet*, USA TODAY (Dec. 29, 2003), [http://www.usatoday.com/tech/news/2003-12-30-naked-lincolnite\\_x.htm](http://www.usatoday.com/tech/news/2003-12-30-naked-lincolnite_x.htm) (detailing the story of a woman who was ticketed after a picture of her

decidedly less violent than the urges of other types of paraphiliacs.<sup>143</sup> Exhibitionists have tremendously high rates of sexual recidivism, however, with one study indicating a ninety-eight percent recidivism rate when “undetected crimes” were taken into account.<sup>144</sup> Likewise, many of the victims of exhibitionists suffer mental trauma, and exhibitionistic behavior is often just one paraphiliac behavior “in an array of sexually deviant acts” performed by the offender.<sup>145</sup> In other words, in many cases exhibitionism may be only the tip of the paraphiliac iceberg.

Fetishism is another of the specific paraphilias without much violent import. Fetishists have a paraphiliac focus involving “the use of nonliving objects” such as “underpants, bras, stockings, shoes, boots, or other [ ] apparel.”<sup>146</sup> The paraphiliac often “masturbates while holding, rubbing, or smelling the fetish object or may ask [a] sexual partner to wear the object during [ ] sexual encounters.”<sup>147</sup> Transvestic fetishism is a type of fetishism in which a heterosexual male has a paraphiliac focus on cross-dressing.<sup>148</sup> Because fetishism and transvestic fetishism often do not involve activity that is, in and of itself, illegal, neither is of particular consequence in the discussion *infra*.

Conversely, illegality is always, by definition, implicated in acts of frottage.<sup>149</sup> In frotteurism, the “paraphiliac focus . . . involves touching and rubbing against a nonconsenting [sic] person,” usually in a crowded area that will facilitate escape.<sup>150</sup> For example, while on a busy sidewalk or in a

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exposing her breasts in a bar was published on the internet).

143. Sexual sadists, for example, who are discussed later in this section.

144. Langevin et al., *supra* note 19.

145. SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT 77 (D. Richard Laws & William T. O’Donohue eds., 2d ed. 2008).

146. DSM-IV, *supra* note 131, at 526. Note that if the fetish objects are used in cross-dressing, the paraphilia qualifies as travestic fetishism. DSM-IV, *supra* note 131, at 526.

147. DSM-IV, *supra* note 131, at 526.

148. DSM-IV, *supra* note 131, at 530.

149. In many jurisdictions, sexual contact that is not consensual constitutes a sexual offense even without an overt sex act or penetration. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.520e (West 2004). Likewise, at a minimum such contact meets the elements for common law battery. *See* BLACK’S LAW DICTIONARY, *supra* note 18 (“Criminal battery, sometimes defined briefly as the unlawful application of force to the person of another, may be divided into its three basic elements: (1) the defendant’s conduct (act or omission); (2) his ‘mental state,’ which may be an intent to kill or injure, or criminal negligence, or perhaps the doing of an unlawful act; and (3) the harmful result to the victim, which may be either a bodily injury or an offensive touching.”) (citation omitted).

150. DSM-IV, *supra* note 131, at 527.

crowded subway car, a frotteurist might “[rub] his<sup>151</sup> genitals against the victim’s thighs and buttocks or [fondle] her genitalia or breasts with his hands.”<sup>152</sup> Acts of frottage tend to decline in frequency gradually as the frotteurist ages.<sup>153</sup> Because frotteuristic crimes are non-violent, however, they are frequently considered to be a “nuisance crime” and penalties tend to be less severe than those for sexual crimes such as rape or child molestation.<sup>154</sup> This is potentially important because shorter sentences for frotteurists mean more temporal opportunity to recidivate.

While all of the paraphilias discussed thus far have largely been either violent or non-violent in nature, crimes by pedophiles can take either form.<sup>155</sup> Pedophilia involves a paraphiliac focus on “sexual activity with a prepubescent child,” generally one thirteen years old or younger.<sup>156</sup> In order to qualify as a pedophile, the offender must be at least sixteen years old and “at least 5 years older than the child,” but for those in late adolescence, “no precise age difference is specified, and clinical judgment must be used [considering] both the sexual maturity of the child and the age difference.”<sup>157</sup>

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151. Note that the DSM-IV uniformly describes the actions of paraphiliacs using masculine pronouns. *See id.* at 525–32. Nowhere is it specified whether this use of language is attributable to an assumption by the authors that nearly all paraphiliacs are male. *Id.* But such language may well be a simple failure to write with gender neutrality. For a discussion about avoiding sexist language, see ELIZABETH FAJANS & MARY R. FALK, SCHOLARLY WRITING FOR LAW STUDENTS: SEMINAR PAPERS, LAW REVIEW NOTES, AND LAW REVIEW COMPETITION PAPERS 118–19 n.1 (3d ed. 2005) (citing Virginia L. Warren, *Guidelines for Non-Sexist Use of Language*, 59 AM. PHIL. ASS’N PROC. 471 (1986)). In several places this Article uses such sexist language in referring to sex offenders as a male class. This is simply in recognition of the fact that vast majority of sex offenders are, in fact, male. RACHELLE GIGUERE & KURT BUMBY, CTR. FOR SEX OFFENDER MGMT., U.S. DEP’T OF JUST., FEMALE SEX OFFENDERS 1 (2007) available at [http://www.csom.org/pubs/female\\_sex\\_offenders\\_brief.pdf](http://www.csom.org/pubs/female_sex_offenders_brief.pdf) (explaining that “arrests of women represent only 1% of all adult arrests for forcible rape and 6% of all adult arrests for other sex offenses”).

152. DSM-IV, *supra* note 131, at 527.

153. DSM-IV, *supra* note 131, at 527.

154. SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT, *supra* note 145, at 150. Compare MICH. COMP. LAWS ANN. § 750.520e (West 2004) (outlining punishment for a sexual contact offense as “imprisonment for not more than 2 years or a fine of not more than \$500.00, or both”) with MICH. COMP. LAWS ANN. § 750.520b (West 2004) (stating the punishment for a sexual penetration offense as “imprisonment for life or for any term of years”).

155. For example, as discussed *supra* in Section I, compare the violent crimes of John Evander Couey with the non-violent crimes of Brach E. Norris or Jimmy Sigala.

156. DSM-IV, *supra* note 131, at 527.

157. DSM-IV, *supra* note 131, at 527.

Pedophiles come in a wide variety.<sup>158</sup> Some prefer male victims, others prefer female victims, and some are satisfied with either.<sup>159</sup> Some pedophiles “are sexually attracted only to children . . . whereas others are sometimes attracted to adults.”<sup>160</sup> There are pedophiles who limit their paraphiliac behaviors to “undressing the child . . . exposing themselves, masturbating in the presence of the child, or gentle touching and fondling of the child,” and there are other pedophiles who “perform fellatio or cunnilingus on the child or penetrate the child’s vagina, mouth, or anus . . . [using] varying degrees of force to do so.”<sup>161</sup> Similarly, while some pedophiles victimize only children they do not know, others prey exclusively on their own children<sup>162</sup> or on other children with a familial relationship to the pedophile.<sup>163</sup>

Excuses and rationalizations are common among pedophiles.<sup>164</sup> Prevalent examples include arguments that the sexual activity was intended as educational, was enjoyable to the victim, or was instigated by the child’s “sexually provocative” behavior.<sup>165</sup> It is noteworthy that pedophilia is often “chronic, especially in those [pedophiles] attracted to males.”<sup>166</sup> Indeed, “the recidivism rate for individuals with [pedophilia] involving a preference for males is roughly twice that for those who prefer females.”<sup>167</sup> Sadly, those who sexually assault children have one of the highest sexual recidivism rates found in any offender type.<sup>168</sup> Therefore, and also because crimes against children are so morally repugnant, pedophilia is one of the paraphilias of chief importance to the discussion that follows in later sections.

Conversely, sexual masochism is of little importance *infra*, except insofar as those who suffer from sexual masochism may die accidentally while acting out masochistic fantasies or may be victimized by offenders who

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158. See DSM-IV, *supra* note 131, at 527.

159. DSM-IV, *supra* note 131, at 527.

160. DSM-IV, *supra* note 131, at 527. Those pedophiles who are attracted only to children are called “Exclusive Type” pedophiles, while those who are also attracted to adults are called “Nonexclusive Type” pedophiles. *Id.*

161. DSM-IV, *supra* note 131, at 527.

162. Unless pedophilia is “associated with [s]exual [s]adism, the [offender] may be attentive to the child’s needs in order to gain the child’s affection, interest, and loyalty and to prevent the child from reporting the sexual activity.” DSM-IV, *supra* note 131, at 528.

163. DSM-IV, *supra* note 131, at 527.

164. DSM-IV, *supra* note 131, at 527–28.

165. DSM-IV, *supra* note 131, at 527–28.

166. DSM-IV, *supra* note 131, at 528.

167. DSM-IV, *supra* note 131, at 528.

168. Langevin et al., *supra* note 19.

use the sexual masochism of a victim as a fabricated defense.<sup>169</sup> Sexual masochism involves a paraphiliac focus on “being humiliated, beaten, bound, or otherwise made to suffer.”<sup>170</sup> One particularly dangerous form of sexual masochism is hypoxiphilia, which “involves sexual arousal by oxygen deprivation”<sup>171</sup> and sometimes results in accidental death.<sup>172</sup>

In stark contrast to sexual masochism, there is sexual sadism, which is decidedly violent in nature. The paraphiliac focus of sexual sadism is the actual derivation of “sexual excitement from the psychological or physical suffering (including humiliation) of the victim.”<sup>173</sup> Some sexual sadists are disturbed by their sadistic fantasies and refuse to act upon them, others find willing partners (who may suffer from sexual masochism) with whom to act out those fantasies, and still others act out violently<sup>174</sup> upon victims who do not consent.<sup>175</sup> Sexually sadistic fantasies “usually involve having complete control over the victim, who is terrified by anticipation of the impending sadistic act,” and sadistic activity often integrates acts indicative of dominance over the victim.<sup>176</sup> Such acts often include “forcing the victim to crawl[,] keeping the victim in a cage . . . [other types of] restraint, blindfolding, paddling, spanking, whipping, pinching, beating, burning, electrical shocks, rape, cutting, stabbing, strangulation, torture, mutilation, or killing.”<sup>177</sup> Unfortunately, sexual sadism “is usually chronic” and when victims who do not consent are involved, the sadist will likely reoffend until apprehended.<sup>178</sup> Generally, too, the sadistic behaviors are increasingly severe over time, tending ever more towards the infliction of serious physical

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169. DSM-IV, *supra* note 131, at 528. Such deaths or fabrications can result in both murder charges and charges for sexual assault. See, e.g., *Man Jailed for 'Bondage' Murder of Ex-Girlfriend*, BBC NEWS (Feb. 23, 2011), <http://www.bbc.co.uk/news/mobile/uk-england-dorset-12556487>.

170. DSM-IV, *supra* note 131, at 528.

171. The requisite oxygen deprivation may be accomplished “by means of chest compression, noose, ligature, plastic bag, mask, or chemical (often a volatile nitrite that produces a temporary decrease in brain oxygenation by peripheral vasodilation).” DSM-IV, *supra* note 131, at 529.

172. DSM-IV, *supra* note 131, at 529.

173. DSM-IV, *supra* note 131, at 530.

174. For a discussion about the extreme acts of one particularly violent, brutal sexual sadist, see JOHN GLATT, *CRIMES IN THE DESERT* (1st ed. 2002), which describes the sexual crimes committed by lust-murderer David Parker Ray in his “toy box.”

175. DSM-IV, *supra* note 131, at 530.

176. DSM-IV, *supra* note 131, at 530.

177. DSM-IV, *supra* note 131, at 530.

178. DSM-IV, *supra* note 131, at 530.

harm.<sup>179</sup> In severe cases, or where sexual sadism is concomitant with antisocial personality disorder,<sup>180</sup> the offender “may seriously injure or kill [ ] victims.”<sup>181</sup>

The final paraphilia that is specifically denoted by the DSM-IV is voyeurism.<sup>182</sup> Voyeurism “tends to be chronic” and is characterized by a paraphiliac focus on “observing unsuspecting individuals, usually strangers, who are naked, in the process of disrobing, or [are] engaging in sexual activity.”<sup>183</sup> As with frotteurism, ostensibly because voyeuristic crimes are seen as non-violent and less harmful, the applicable penalties are often less severe than those for other sexual offenses.<sup>184</sup> Victims who never learn of their voyeuristic victimization are, of course, not subject to the mental burdens that encumber victims of other sexual offenses, but those who learn of the crime can suffer great mental harm as a result.<sup>185</sup>

Despite the fact that they are not specifically enumerated in the DSM-IV, many other paraphilias have been identified. As previously mentioned, the DSM-IV groups all “residual” paraphilias into one category: Paraphilias Not Otherwise Specified.<sup>186</sup> Relevant examples of paraphilias that fit into this category, or that act as a sort of subclass of another paraphilia, include raptophilia (paraphiliac focus on rape),<sup>187</sup> erotophonophilia (“lust murder”),<sup>188</sup> hebephilia (pedophilia with preference for pubescent children),<sup>189</sup> ephebophilia (pedophilia with preference for late

179. DSM-IV, *supra* note 131, at 530.

180. Antisocial personality disorder is discussed in more depth later in this section.

181. DSM-IV, *supra* note 131, at 530.

182. DSM-IV, *supra* note 131, at 532.

183. DSM-IV, *supra* note 131, at 532.

184. Compare, e.g., MICH. COMP. LAWS ANN. § 750.520b (West 2004) (enunciating a punishment of “imprisonment for life or for any term of years” for certain sex crimes involving penetration) with MICH. COMP. LAWS ANN. § 750.539d (West 2004) (establishing a punishment of “imprisonment for not more than 2 years or a fine of not more than \$2,000.00, or both” for crimes involving, inter alia, photographing or recording a victim without consent in a place in which they are entitled to privacy).

185. See, e.g., Michael Y. Park, *Erin Andrews Has ‘Nightmares’ About Voyeur*, PEOPLE (Dec. 16, 2009), <http://www.people.com/people/article/0,,20331125,00.html> (discussing the highly publicized case of Erin Andrews, a female sports journalist who had voyeuristic video clips showing her naked in a hotel room released on the internet).

186. DSM-IV, *supra* note 131, at 523.

187. Edward D. Balyk, *Paraphilias as a Sub Type of Obsessive-Compulsive Disorder: A Hypothetical Bio-Social Model*, 12 J. OF ORTHOMOLECULAR MED. 29 (1997), available at <http://orthomolecular.org/library/jom/1997/pdf/1997-v12n01-p029.pdf>.

188. SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT, *supra* note 145, at 215.

189. Ray Blanchard et al., *Pedophilia, Hebephilia, and the DSM-V*, 38 ARCHIVES OF

adolescents),<sup>190</sup> infantophilia (pedophilia with preference for children under five years of age),<sup>191</sup> necrophilia (paraphiliac focus on sexual contact with the dead),<sup>192</sup> somnophilia (paraphiliac focus on sleeping or unresponsive partners),<sup>193</sup> zoophilia (paraphiliac focus on animals),<sup>194</sup> and zoosadism (zoophilia with a paraphiliac focus on sadistic sexual activity).<sup>195</sup>

Not only paraphilias, however, are important in understanding the psychology of sex offenders. For instance, although it is not a paraphilia, antisocial personality disorder (ASPD) clearly merits discussion. ASPD is characterized by “a pervasive pattern of disregard for[,] and violation of[,] the rights of others. . . .”<sup>196</sup> In order to be diagnosed with ASPD, an individual must demonstrate three or more of the following behaviors: (1) “failure to conform to social norms with respect to lawful behaviors[,] as indicated by repeatedly performing acts that are grounds for arrest;” (2) “deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure;” (3) “irritability and aggressiveness, as indicated by repeated physical fights or assaults;” (4) “reckless disregard for [the] safety of [oneself] or others;” (5) “consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations;” or (6) “lack of remorse, as indicated by being indifferent to[,] or rationalizing[,] having hurt, mistreated, or stolen from another [person].”<sup>197</sup> Many of those behaviors are, it would seem, fairly typical in repeat sex offenders, who by definition repeatedly commit deeds for which they are subject to arrest, often lie about their crimes, often commit repeated assaults on others, often have a reckless disregard for the safety of their victims, and sometimes show a total lack of remorse for (or rationalize) their actions. ASPD is dangerous in combination with any of the paraphilias

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SEXUAL BEHAV. 335, 335–50 (2008).

190. *Id.*

191. D.M. Greenberg et al., *Infantophilia—A New Subcategory of Pedophilia?: A Preliminary Study*, 23 BULL. AM. ACAD. OF PSYCH. & THE LAW 63, 63–71 (1995).

192. SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT, *supra* note 145, at 399.

193. ANTHONY FERGUSON, *THE SEX DOLL: A HISTORY* 12 (2010).

194. Colin J. Williams & Martin S. Weinberg, *Zoophilia in Men: A Study of Sexual Interest in Animals*, 32 ARCHIVES OF SEXUAL BEHAV. 523, 523–35 (2003).

195. Anil Aggrawal, *A New Classification of Zoophilia*, 18 J. OF FORENSIC & LEGAL MED. 73, 73–78 (2011).

196. DSM-IV, *supra* note 131, at 649.

197. DSM-IV, *supra* note 131, at 649–50. The individual also must be at least eighteen years old, have evidence of conduct disorder with onset before the age of fifteen, and demonstrate antisocial behavior at times other than during the course of a schizophrenic or manic episode. *Id.* at 650 (for more about conduct disorder, see *id.* at 90).

because those with ASPD “frequently lack empathy and tend to be callous, cynical, and contemptuous of the feelings, rights, and sufferings of others.”<sup>198</sup> Combined with a paraphilia, those characteristics would seem to increase an offender’s risk for both violence and potential lethality.

A discussion of many other psychological ailments would be apropos, but such a discussion—one including every germane disorder—is simply beyond the scope of this Article.<sup>199</sup> Several disorders that do warrant mention, however, even if cursorily, include psychotic disorders (especially schizophrenia),<sup>200</sup> delirium and dementia,<sup>201</sup> personality disorders (generally),<sup>202</sup> and impulse control disorders (especially intermittent explosive disorder).<sup>203</sup>

When viewed through a lens informed by psychology, it is rather easy to see the causal role of mental disease in the recidivism of sex offenders.<sup>204</sup> The existence of that role is difficult to support through direct citation to authority, however, because many offenders go undiagnosed<sup>205</sup> and doctor-patient confidentiality necessarily limits the availability of salient records.<sup>206</sup> Thus, simple applications of logic and analogical reasoning will have to suffice.

In the film *Braveheart*, while musing about how to subdue unrest in a vassal state, actor Patrick McGoohan once famously quipped, “The problem with Scotland is that it’s full of Scots.”<sup>207</sup> While simplistic, a similar statement might encapsulate the essence of the instant argument: the problem with sex offenders is that they commit sexual offenses. Or, even more simply, one might say that the problem with sex offenders is that they *are* sex offenders.

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198. DSM-IV, *supra* note 131, at 647.

199. For example, the DSM-IV spends 686 pages solely on substantive discussion of mental disorders. *Id.* at 1–686.

200. DSM-IV, *supra* note 131, at 273–315.

201. DSM-IV, *supra* note 131, at 123–65.

202. DSM-IV, *supra* note 131, at 629–75.

203. DSM-IV, *supra* note 131, at 609–23.

204. *Cf.* Erickson, *supra* note 129 (discussing the interaction of psychology and the law and arguing that “the creditability of both law and psychiatry has faltered” as a result of such interaction).

205. For a discussion of this problem, see Daniel P. Mears, *Mental Health Needs and Services in the Criminal Justice System*, 4 HOUSTON J. OF HEALTH LAW & POLICY 255, 265 (2004).

206. CONFIDENTIALITY AND MENTAL HEALTH 47–52 (Christopher Cordess ed. 2001).

207. BRAVEHEART (Paramount Pictures 1995).



The emphasis added in the last sentence was not accidental. In the precursors to the DSM-IV, variations of “homosexuality” were listed as mental disorders.<sup>208</sup> In fact, in “1973 homosexuality per se was removed from the DSM-II classification of mental disorders and replaced by the category Sexual Orientation Disturbance.”<sup>209</sup> This change resulted as “a compromise between the view that preferential homosexuality is invariably a mental disorder and the view that it is merely a normal sexual variant.”<sup>210</sup> That same debate about homosexuality is still alive and well today<sup>211</sup> and is contested vigorously “because participants on both sides believe that crucial moral answers hinge on its outcome.”<sup>212</sup> The issue really boils down to one of “determinism versus free will.”<sup>213</sup> The crux is that if homosexuals do not choose their sexuality, but instead are innately or genetically homosexual, then it would be unfair to judge a person’s homosexual status as being immoral.<sup>214</sup> Put differently, the moral question depends on whether homosexuals *are* homosexuals or *choose to be* homosexuals. Of course, a different volitional element can certainly be added to the equation; a person can innately be a homosexual yet choose to abstain from homosexual intercourse.<sup>215</sup> Thus, the argument becomes that a person’s status as a homosexual is not immoral but any intentional homosexual activity is.<sup>216</sup>

Why is this moral debate about homosexuality relevant to the problem of recidivism among sex offenders? Quite simply, the answer is that similarly controversial issues of human sexuality are implicated in the sexual recidivism problem. As defined above, paraphilias are, in part, “recurrent, intense[,] sexually arousing fantasies, sexual urges, or behaviors.”<sup>217</sup> By itself, this partial definition would seem to diagnose the majority of sexually interested adults as paraphiliacs—as a group, they are sexual beings subject

208. R.L. Spitzer, *The Diagnostic Status of Homosexuality in DSM-III: A Reformulation of the Issues*, 138 AM. J. PSYCH. 210 (1981).

209. *Id.*

210. *Id.*

211. See FRED FEJES, *GAY RIGHTS AND MORAL PANIC: THE ORIGINS OF AMERICA’S DEBATE ON HOMOSEXUALITY* (1st ed. 2008).

212. PSYCHOLOGICAL PERSPECTIVES ON LESBIAN, GAY, AND BISEXUAL EXPERIENCES 51 (Linda D. Garnets & Douglas C. Kimmel eds., 2d ed. 2003).

213. *Id.*

214. *Id.* at 51–52.

215. See ALAN CHAMBERS, *LEAVING HOMOSEXUALITY: A PRACTICAL GUIDE FOR MEN AND WOMEN LOOKING FOR A WAY OUT* (2009).

216. This article does not endorse or support any position, moral or otherwise, on the issue of homosexuality but rather includes this discussion merely for analogical support.

217. DSM-IV, *supra* note 131, at 522–23.

to recurrent, intense sexual fantasies and urges, and they engage in sexual behaviors.<sup>218</sup> Mentally healthy adults are only excluded as the definition continues, thereby describing the involvement of “nonhuman objects,” “suffering or humiliation,” or “children or other nonconsenting [sic] persons.”<sup>219</sup>

Clearly, paraphiliacs who act upon their deviant urges are morally blameworthy under traditional notions of jurisprudence if the acts in question violate another person’s rights.<sup>220</sup> A pedophile who makes a volitional choice to forcibly rape a young child, for instance, is morally blameworthy no matter the strength of the underlying sexual urge that precipitated the crime.<sup>221</sup> Despite that moral blameworthiness, however, the fact remains that under the disease-based model of modern psychology, that pedophile cannot be said to have chosen pedophilia. That same pedophile also cannot be said to have chosen to feel frequent, intense urges to engage in sex with minors.<sup>222</sup> People do not choose to suffer from mental disorders or the accompanying symptoms any more than they choose to suffer from physical disease. Thus, the problem with the pedophile is that he *is* a pedophile, not that he chooses to be a pedophile.

Imagine for instance, as difficult as it may be, a world in which consensual heterosexual intercourse was outlawed, even as between husbands and wives. Imagine also that heterosexual individuals had the same sexual fantasies and urges that actually exist in reality. In the imaginary world, what percentage of heterosexuals would repeatedly violate the law against heterosexual intercourse? Of course, because of the illegality of their actions, and the fact that they willfully chose to violate the law, the conduct of those “criminals” would be morally blameworthy.<sup>223</sup> But such criminals could hardly be blamed for the underlying heterosexual fantasies and urges that led to their crimes—heterosexuals innately have such thoughts and desires.<sup>224</sup> In this hypothetical, the problem with heterosexuals is that they *are* heterosexuals.

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218. See LINDA ROUSE, MARITAL AND SEXUAL LIFESTYLES IN THE UNITED STATES: ATTITUDES, BEHAVIORS, AND RELATIONSHIPS IN SOCIAL CONTEXT 163 (2002).

219. *Id.*

220. Otherwise, the sex offenders discussed *supra* in Section II would not have been subject to conviction for their actions.

221. Without acknowledgment of this basic axiom, determinism would reign supreme and it would be difficult to hold anyone morally accountable for any action.

222. DSM-IV, *supra* note 131, at 527.

223. Such conduct would be *malum prohibitum*, as defined *infra* at note 339.

224. See ROUSE, *supra* note 218, at 163.

If that hypothetical seems far-fetched, it is—at least somewhat. In a system where the majority of people are heterosexual, how much enforcement is likely of a law banning heterosexual intercourse entirely? Even so, there is some real-world precedent on point. Prior to the decision in *Lawrence v. Texas*,<sup>225</sup> for instance, heterosexuals were occasionally prosecuted under state laws banning consensual sodomy, even as between a husband and wife.<sup>226</sup> Indeed, in states with fault-divorce schemes, “sodomy and buggery” were sometimes important factors in determining fault.<sup>227</sup> A study performed the year before *Lawrence* was decided, however, indicated that among adults age twenty-five to forty-four, “90 percent of men and 88 percent of women [had] had oral sex with an opposite-sex partner.”<sup>228</sup> Further evidence for the prevalence of illicit pre-*Lawrence* oral sex can be found in the wealth of guidebooks and other literature on the subject that predates the *Lawrence* decision.<sup>229</sup> Apparently, the heterosexual masses did not wait for the *Lawrence* decision’s grant of permission before giving oral sex a try. Despite the potential criminal implications, the vast majority<sup>230</sup> had had heterosexual oral sex at least once. Why did they risk it? Because they had given into their natural sexual urges, even if acting on those urges was criminal.

Similar situations exist in the modern disease-based conception of alcoholism.<sup>231</sup> Again, under contemporary notions of jurisprudence, an alcoholic who kills a person while driving drunk is morally blameworthy

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225. *Lawrence v. Texas*, 539 U.S. 558 (2003).

226. See, e.g., *Violator of Ga. Sodomy Law Freed*, L.A. TIMES (Aug. 30, 1989), available at [http://articles.latimes.com/1989-08-30/news/mn-1460\\_1](http://articles.latimes.com/1989-08-30/news/mn-1460_1) (describing conviction of a man under Georgia law “after he admitted having oral sex with his wife”). For more discussion on this topic, see Richard Green, *Griswold’s Legacy: Fornication and Adultery as Crimes*, 16 OHIO N.U. L. REV. 545 (1989).

227. See Adriaen M. Morse Jr., *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605, 642 (1996).

228. William D. Mosher, Anjani Chandra & Jo Jones, *Sexual Behavior and Selected Health Measures: Men and Women 15–44 Years of Age, United States, 2002*, 362 ADVANCE DATA FROM VITAL AND HEALTH STATISTICS, Sep. 15, 2005, at 1, available at <http://www.cdc.gov/nchs/data/ad/ad362.pdf>.

229. See, e.g., IRVING ARETINO, *ORAL SEX: THE PSYCHODYNAMICS AND TECHNIQUES OF FELLATIO AND CUNNILINGUS* (1970); OLIVIA ST. CLAIRE, *203 WAYS TO DRIVE A MAN WILD IN BED* (1st ed. 1993); VIOLET BLUE, *THE ULTIMATE GUIDE TO FELLATIO: HOW TO GO DOWN ON A MAN AND GIVE HIM MIND-BLOWING PLEASURE* (1st ed. 2002).

230. The majority here is so large, comprising 90% of men and 88% of women, that it is extraordinarily unlikely that all of those acts of oral sex took place in states where the behavior was legal.

231. See MARIA GIFFORD, STACY FRIEDMAN & RICH MAJERUS, *ALCOHOLISM* 117 (2010).

because the alcoholic chose to drive while intoxicated.<sup>232</sup> That same alcoholic, on the other hand, cannot be said to be morally blameworthy for the intense urge to consume alcohol that precipitated the event—the alcoholic can no more be blamed for the urge to drink than a hungry person can be blamed for the urge to eat. It is, rather, the decision of the alcoholic to satisfy the urge that could be judged morally wrong.

This same interplay of logic explains how mental disorder causes recidivism among sex offenders. Just as many alcoholics “fall off the wagon” numerous times before finally banishing their demons,<sup>233</sup> sex offenders face the urge to recidivate even when actively trying to avoid their deviant behaviors.<sup>234</sup> As one source delicately puts it, “the expression of deviant sexual behaviors is thought to be the product of deviant sexual preferences.”<sup>235</sup> Likewise, “it is commonly thought that child molesters sexually abuse children because they have a deviant sexual interest in children, and that rapists prefer forced sexual contact with women to consensual sex.”<sup>236</sup> In other words, people seek to satisfy the basic sexual urges that they feel. Because heterosexual males experience sexual desire for sex with women, they seek to satisfy their desires by having sex with women. Because heterosexual women experience sexual desire for sex with men, they seek to satisfy their desires by having sex with men. Unfortunately, because rapists experience sexual desire for forcible sex, they seek to satisfy their desires by having forcible sex.<sup>237</sup> Likewise, because

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232. An apt statement of this concept can be found in the following excerpt:

The criminal law, by refusing to recognize alcoholism as a defense to a charge of driving under the influence of alcohol, takes the not irrational position that alcoholics are capable of avoiding driving while drunk. “Even among many who consider alcoholism a ‘disease’ to which its victims are genetically predisposed, the consumption of alcohol is not regarded as wholly involuntary,” Traynor v. Turnage, 485 U.S. 535, 549–50, 99 L. Ed. 2d 618, 108 S. Ct. 1372 (1988)—and certainly the conjunction of that consumption with a decision to drive a car cannot be thought wholly involuntary. If it were wholly involuntary, and the criminal law punished these unfortunates anyway, there might conceivably be a constitutional issue. *Despears v. Milwaukee County*, 63 F.3d 635, 636–37 (7th Cir. 1995).

233. See *Review Sees No Advantage in 12-Step Programs*, N.Y. TIMES (July 25, 2006), available at [http://www.nytimes.com/2006/07/25/health/25drin.html?\\_r=0](http://www.nytimes.com/2006/07/25/health/25drin.html?_r=0)

234. See Fimrite, *supra* note 126.

235. SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT, *supra* note 145, at 30.

236. *Id.*

237. There is a great deal of debate on this subject, which is discussed further in Section V, *infra*.

pedophiles experience sexual desire for sex with children, they seek to satisfy their desires by having sex with children.<sup>238</sup>

Supporting evidence for this position lies not only in contrived syllogisms, hypotheticals, and analogies, but also in the woeful inefficacy of traditional<sup>239</sup> psychological treatment at curbing recidivism by sex offenders.<sup>240</sup> At one point “[i]n the 1980s, the Correctional Service of Canada began to require weekly community treatment sessions for all sex offenders released in the Pacific Region.”<sup>241</sup> This afforded “a unique opportunity for comparing an unselected cohort of treated sex offenders” against “an untreated cohort [of offenders who were] released in earlier years.”<sup>242</sup> Hence, a study was conducted with an average follow-up period of twelve years.<sup>243</sup> Shockingly, no significant difference was observed in the rates of sexual, violent, or general recidivism between the treated and untreated groups.<sup>244</sup> The recidivism rates between the two cohorts “remained comparable [even] after controlling for [differing] length of follow-up, year of release, age, and seven static risk factors coded from official criminal history records.”<sup>245</sup> Likewise, when the quality of treatment<sup>246</sup> was taken into consideration, “no relationship to . . . recidivism rates” was readily

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238. See A. Scott Aylwin, John R. Reddon & Andrew R. Burke, *Sexual Fantasies of Adolescent Male Sex Offenders in Residential Treatment: A Descriptive Study*, 34 Archives of Sexual Behavior, no. 34, 231–39 (2005) (“There is widespread acknowledgement that deviant sexual fantasies are associated with deviant sexual behavior. . . .”) (citation omitted).

239. Non-traditional treatment, particularly chemical castration, is discussed further in Section V, *infra*.

240. See, e.g., R. Karl Hanson, Ian Broom, & Marylee Stephenson, *Evaluating Community Sex Offender Treatment Programs: A 12-Year Follow-Up of 724 Offenders*, 36 CANADIAN J. OF BEHAVIORAL SCI. 87 (2004) (demonstrating no difference in violent, sexual, or general recidivism between treated and untreated sex offenders).

241. *Id.* at 87, 89.

242. *Id.* at 89.

243. *Id.*

244. See *id.* at 94 (explaining that the treated group had a sexual recidivism rate of 21.1%, a violent recidivism rate of 42.9%, and a general recidivism rate of 56.6%, whereas the untreated group had a sexual recidivism rate of 21.8%, a violent recidivism rate of 44.5%, and a general recidivism rate of 60.4%).

245. *Id.*

246. The quality of treatment was determined by retrospective ratings. R. Karl Hanson, Ian Broom, & Marylee Stephenson, *Evaluating Community Sex Offender Treatment Programs: A 12-Year Follow-Up of 724 Offenders*, 36 CANADIAN J. OF BEHAVIORAL SCI. 90 (2004).

discernible.<sup>247</sup> Similar results from other empirical studies are regrettably common.<sup>248</sup>

Such ineffectiveness is hardly surprising, considering the Herculean task attempted by treatment programs.<sup>249</sup> To risk two consecutive mythological references, curing those afflicted with paraphilias is akin to untangling the Gordian knot.<sup>250</sup> As noted above, many of the paraphilias are considered to be “chronic.” In other words, “many professionals in the field [of psychology] consider deviant sexual behavior to be a life-long problem.”<sup>251</sup> Doubtlessly, the preferred outcome of any course of treatment would be a cure. Such a “magic bullet” cure, however, simply does not exist for sex offenders.<sup>252</sup> Indeed, several “influential organizations, such as the Group for the Advancement of Psychiatry, the American Bar Association, and the President’s Commission on Mental Health, [have] posited that . . . sexual offender treatment is an ineffective tool” and that treatment merely results in “the illusion of benevolence.”<sup>253</sup> In recognition of this hard reality, “it has been argued that the current goal of psychological treatment is to manage or control, rather than to cure.”<sup>254</sup>

One recent study that involved therapy seeking such management and control bears specific mention.<sup>255</sup> The study in question involved adolescent male sex offenders who were in a residential treatment program.<sup>256</sup> The participants “logged [their] sexual fantasies during their entire time in therapy,” including whether each particular fantasy was normal or deviant and whether the fantasy was accompanied by masturbation.<sup>257</sup> A fantasy was

247. *Id.* at 87.

248. See, e.g., M. Zgoba & Leonore M. J. Simon, *Recidivism Rates of Sexual Offenders up to 7 Years Later: Does Treatment Matter?*, 30 CRIM. JUST. REV. 155 (2005); L. Furby et al., *Sex Offender Recidivism: A Review*, 105 PSYCH. BULLETIN 3 (1989).

249. “Psychological treatment of sex offenders includes the traditional psychotherapies, insight therapy, and cognitive behavioral therapy.” SONG & LIEB, *supra* note 28, at 8.

250. Myth has it that the “Gordian knot” was presented as a challenge to Alexander the Great who, unable to untie the knot, sliced it apart with his sword. MICHAEL MACRONE, *IT’S GREEK TO ME!: BRUSH UP YOUR CLASSICS* 51–52 (2001). In modern parlance the term “Gordian knot” refers to a problem that is very difficult to solve. *Id.* at 52.

251. SONG & LIEB, *supra* note 28, at 8.

252. Cf. Hanson, Broom, & Stephenson, *supra* note 234, at 87; SONG & LIEB, *supra* note 28; Arkowitz & Lilienfeld, *supra* note 25.

253. Zgoba & Simon, *supra* note 248, at 159.

254. SONG & LIEB, *supra* note 28, at 8.

255. Aylwin, Reddon & Burke, *supra* note 238, at 231–39.

256. Aylwin, Reddon & Burke, *supra* note 238, at 231.

257. Aylwin, Reddon & Burke, *supra* note 238, at 234.

considered normal if it involved “consenting, age appropriate, non-related individuals that had never been victimized by the offender.”<sup>258</sup> Conversely, a fantasy “was considered ‘deviant’ if it involved persons who were age inappropriate<sup>259</sup> . . . were related, [or] were past victims.”<sup>260</sup> A fantasy was also considered deviant if it “involved coercion, sadism, or non-compliance;” if it involved staff members or animals; “or if it would in some way be detrimental if the fantasy were to be acted out.”<sup>261</sup>

The results of the study were far less than encouraging.<sup>262</sup> During the first five months of the study, reports of deviant sexual fantasies actually increased by about 380%.<sup>263</sup> The studied offenders initially reported having roughly twenty normal sexual fantasies and thirty-three deviant sexual fantasies per week.<sup>264</sup> After completing five months of residential therapy, the offenders reported 125 deviant fantasies per week.<sup>265</sup> After a full twelve months of residential therapy, the reported rate of deviant fantasies sunk back to forty-six per week.<sup>266</sup> At no point, however, even after a year of intensive treatment, did participants report having fewer deviant sexual fantasies than when they had begun treatment.<sup>267</sup> Furthermore, at all times during the study, deviant fantasies outnumbered normal fantasies, and offenders were far more likely to act on deviant fantasies, by masturbating, than to act on normal fantasies.<sup>268</sup> At times, those studied reported masturbating to deviant fantasies “almost daily.”<sup>269</sup>

Conflicting data does exist, however, indicative of the fact that treatment of sex offenders is at least partially effective in preventing recidivism.<sup>270</sup> One study found a sexual recidivism rate of 18.5% for untreated sex offenders, compared with a sexual recidivism rate of 10.9% for

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258. Aylwin, Reddon & Burke, *supra* note 238, at 235.

259. Aylwin, Reddon & Burke, *supra* note 238, at 235 (explaining that a person was considered age inappropriate if “more than 3 years younger or old enough to be socially inappropriate in a relationship with the offender”).

260. Aylwin, Reddon & Burke, *supra* note 238, at 235.

261. Aylwin, Reddon & Burke, *supra* note 238, at 235.

262. *See* Aylwin, Reddon & Burke, *supra* note 238, at 235.

263. Aylwin, Reddon & Burke, *supra* note 238, at 231.

264. Aylwin, Reddon & Burke, *supra* note 238, at 235.

265. Aylwin, Reddon & Burke, *supra* note 238, at 235.

266. Aylwin, Reddon & Burke, *supra* note 238, at 235.

267. Aylwin, Reddon & Burke, *supra* note 238, at 235.

268. Aylwin, Reddon & Burke, *supra* note 238, at 235.

269. Aylwin, Reddon & Burke, *supra* note 238, at 235.

270. *See* SONG & LIEB, *supra* note 28, at 9–11.

those who had been treated.<sup>271</sup> Another study attributed an eight percent reduction in the rate of sexual recidivism, from twenty-seven percent to nineteen percent, to the effectiveness of treatment.<sup>272</sup> Some studies on a smaller scale even indicate that treatment can cut the rate of sexual recidivism in half, with one study showing a reduction from thirty-five percent to thirteen percent.<sup>273</sup>

Ultimately, though, even such a pronounced reduction in sexual recidivism is inadequate when the human cost is considered. Assuming, *arguendo*, that treatment could reduce the lifetime incidence of recidivism to thirteen percent for all sex offenders, the societal risk would be still be untenable. According to one study, each day “about 234,000 offenders convicted of rape or sexual assault are under the care, custody, or control of corrections agencies.”<sup>274</sup> Of those offenders, “60% . . . are under conditional supervision in the community.”<sup>275</sup> That equates to 140,400 known sex offenders on release at any one time and does not include all of the other offenders that have served their entire sentence or never been caught. If “effective” treatment could lower the rate of sexual recidivism to thirteen percent, over 18,000 people would nevertheless be victimized by known sex offenders who had been released.

Such is the efficacy of traditional psychological treatment at curbing sexual recidivism.

#### IV. Changing the Paradigm

He that is taken and put into prison or chains is not conquered, though overcome; for he is still an enemy.

- Thomas Hobbes<sup>276</sup>

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271. R.J. McGrath, *Sex offender treatment: Does it work?*, PERSPECTIVES 24–26 (Winter 1995).

272. G.C.N. Hall, *Sexual Offender Recidivism Revisited: A Meta-Analysis of Recent Treatment Studies*, 63 J. OF CONSULTING AND CLINICAL PSYCH. 802 (1995).

273. SONG & LIEB, *supra* note 28, at 10 (describing the results of the “Marshall and Barbaree” study from 1988).

274. Lawrence Greenfeld, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault*, U.S. DEP’T OF JUSTICE, 1, 2 (1997), <http://www.bjs.gov/content/pub/pdf/soo.pdf>.

275. *Id.*

276. THOMAS HOBBS, LEVIATHAN (1651).



There is no doubt, no argument, no excuse: the blame for the societal damage wrought by repeat sex offenders lies squarely at the collective feet of the legal community. For far too long, it has been obvious to even casual observers that the legal system is ineffective in its redress of this problem.<sup>277</sup> For far too long, recidivism has remained a problem that is openly decried,<sup>278</sup> but relegated, as insoluble, to the jurisprudential back-burner. For far too long, the lamentations of victims have been met only by half-measures and empty assurances.

For far too long, the legal community has only tried; for far too long, it has failed.

The root cause of that failure is the current judicial paradigm, which is both antiquated and ineffective.<sup>279</sup> The primary problem with the current paradigm is that it, much like psychological treatment,<sup>280</sup> seeks only to manage the problem, rather than to solve it. In order to achieve such management, the current paradigm uses three main techniques: (1) imprisonment, (2) monitoring, and (3) treatment. When viewed as a potential solution, even a combination of such techniques is seriously flawed.

The first technique, when distilled to its essence, seeks to combat sex offender recidivism using tough sentencing laws.<sup>281</sup> Simply jailing sex offenders is effective, however, only if they are jailed permanently—a proposition that is both costly and impractical.<sup>282</sup> The harsh reality is that “[m]ost sex offenders do eventually return to the community.”<sup>283</sup> One large-scale study showed an average sentence length for sex offenders of only eight

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277. This assertion is borne out by the recidivism statistics cited in earlier sections.

278. See, e.g., Ben Tracy, *Outrage Growing over Repeat Sex Offenders: Known Predator John Gardner Charged with Killing Chelsea King; Experts Say Monitoring of Offenders Insufficient*, CBSNEWS.COM (Mar. 3, 2010), available at <http://www.cbsnews.com/stories/2010/03/03/eveningnews/main6264100.shtml>.

279. Admittedly, some states have made progress towards a new, progressive paradigm, as discussed *infra*.

280. For a discussion of this, see Section III, *supra*.

281. See, e.g., Emanuella Grinberg, *California Senate Passes Tougher Sentencing Laws for Sex Offenders*, CNN.COM (Aug. 24, 2010), [http://articles.cnn.com/2010-08-24/justice/california.chelseas.law\\_1\\_parole-terms-amber-dubois-chelsea-king?\\_s=PM:CRIME](http://articles.cnn.com/2010-08-24/justice/california.chelseas.law_1_parole-terms-amber-dubois-chelsea-king?_s=PM:CRIME).

282. See Sullivan, *supra* note 45 (“It costs taxpayers more than \$75,000 each year to house a geriatric inmate — three times the cost of housing a younger man.”).

283. Karen Kersting, *New Hope for Sex Offender Treatment: Research Suggests Psychological Treatment Helps Reduce Recidivism Among Convicted Sex Offenders*, 34 MONITOR ON PSYCH. 52 (2003), available at <http://www.apa.org/monitor/julaug03/newhope.aspx> (quoting Professor John Q. LaFond of the University of Missouri-Kansas City).

years.<sup>284</sup> The same study indicated that “[o]n average . . . offenders served [only] 3½ years of their 8-year sentence . . . before being released.”<sup>285</sup> Likewise, growing data indicate that sex offenders actually become more dangerous as they age.<sup>286</sup> Thus, even lengthy term-of-years sentences are ineffective at preventing recidivism.<sup>287</sup> When offenders are released, their underlying mental disorders remain. Again, the problem with the released sex offenders is that they *are* sex offenders—prison sentences do not cure paraphilias.<sup>288</sup> Hence, recidivism after release.

In acknowledgment that most offenders must eventually be released, the current paradigm utilizes monitoring programs to keep track of sex offenders who have been released into the community.<sup>289</sup> The federal Wetterling Act<sup>290</sup> is one example of such a monitoring scheme.<sup>291</sup> Monitoring programs generally require released offenders to “register with local authorities” and to notify such authorities of any change in address.<sup>292</sup> Enforcing registration

284. Langan et al., *supra* note 19, at 1 (conducting a study of 15 state prisons).

285. *Id.*

286. Sullivan, *supra* note 45.

In the geriatric ward of Pennsylvania's Laurel Highlands Prison, the floors are squeaky clean linoleum. The walls are painted in dull pastels. Dozens of inmates in hospital gowns line the hallways in wheelchairs, doing absolutely nothing.

Almost half of these men are sex offenders. They were once simply “dirty old men.” Now, sex offenders in their 60s, 70s and 80s—like the men here—are a growing problem in the nation's prisons. Experts say it's the only crime that offenders are more likely to repeat with age. The result has been an explosion in the number of elderly men behind bars.

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Two studies, one from 2003 from the Justice Department (Recidivism of Sex Offenders Released From Prison in 1994) and another from Norway (Recidivism Among Sex Offenders: A Follow-Up Study of 541 Norwegian Sex Offenders) suggest sex offenders are more likely to start committing crimes, or keep committing them, in old age.

*Id.*

287. *See, e.g.*, Garrido Victim, *supra* note 64.

288. *See supra* Section II.

289. A comprehensive sex offender registry scheme exists in the Justice Department's Dru Sjodin National Sex Offender Public Website, <http://www.nsopw.gov>. *See Dru Sjodin National Sex Offender Website*, U.S. DEP'T OF JUSTICE, <http://www.nsopw.gov/>. That registry includes sex offender data from all fifty states, as well as “U.S. Territories, the District of Columbia, and participating tribes.” *Id.*

290. 42 U.S.C. §§ 14071–73 (2006).

291. Garfinkle, *supra* note 16, at 166.

292. Julia A. Houston, *Sex Offender Registration Acts: An Added Dimension to the War on Crime*, 28 GA. L. REV. 729, 730 (1994).

can be difficult, however, and some commentators have noted that “only those who actually abide by the law” end up in the registry.<sup>293</sup> Likewise, studies generally indicate that registration as a sex offender has no impact on recidivism.<sup>294</sup> With the psychology of sex offenders in mind, this makes perfect sense. Registration as a sex offender does not have any impact on paraphiliac urges and desires. Thus, registration is ultimately ineffective in dealing with recidivism.

Further recognizing that most sex offenders will eventually be released, the current paradigm attempts to combat recidivism by those offenders with psychological treatment. In support of treatment as a potential solution, one commentator recently said, “there’s an emerging optimism that psychologists can deal with [sex offenders] and offer alternatives to continued incarceration.”<sup>295</sup> The problem, of course, is that the actual prognosis for treatment is quite poor.<sup>296</sup> As discussed earlier, at best such “emerging optimism” is founded on studies showing an approximate efficacy of fifty percent in reducing recidivism when compared to non-treatment.<sup>297</sup> Such data hardly seems to merit much “optimism.” There are hundreds of thousands of known sex offenders present in society at any given time.<sup>298</sup> Accordingly, even if treatment could reduce recidivism to a moderate ten to fifteen percent, that reduction would still be far from acceptable—recidivists would nevertheless victimize tens of thousands of people. Thus, relying on treatment alone to “cure” sex offenders seems more like offering a sacrifice than providing a solution. Treatment may be part of the solution, but it is certainly not the entire solution.

In the end, the proof is in the proverbial pudding. The failure of the current judicial paradigm is evident in the continued toll sexual recidivists

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293. *Id.* at 733.

294. *See, e.g.*, IOWA DEP’T OF HUMAN RIGHTS, DIV. OF CRIM. & JUVENILE JUSTICE PLANNING & STATISTICAL ANALYSIS CTR., THE IOWA SEX OFFENDER REGISTRY AND RECIDIVISM 10 (2000) *available at* [http://www.humanrights.iowa.gov/cjip/images/pdf/01\\_pub/SexOffenderReport.pdf](http://www.humanrights.iowa.gov/cjip/images/pdf/01_pub/SexOffenderReport.pdf).

295. Kersting, *supra* note 283 (quoting Professor John Q. LaFond of the University of Missouri-Kansas City). For more on Professor LaFond’s point of view, see JOHN Q. LAFOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS (1st ed. 2005).

296. *See* discussion *supra* Section III.

297. *See, e.g.*, SONG & LIEB, *supra* note 28, at 9–11; McGrath, *supra* note 271, at 24–26; Hall, *supra* note 272, at 802–09; Kersting, *supra* note 283.

298. *See* GREENFELD, *supra* note 274, at 4 (“On a given day about 234,000 offenders convicted of rape or sexual assault are under the care, custody, or control of corrections agencies. . . . Rape and sexual assault offenders account for just under 5% of the total correctional population in the United States[.]”).

take on society. Prison, registry, and treatment, even in combination, have failed to effectively regulate the problem. The answer, then, is a new paradigm, one informed by both common sense and psychology—one that actually seeks solutions. The techniques used by the current paradigm will likely be a part of the solution, but something more is needed. Innovation is called for.

Imagine, for instance, the sex offender as a caged, highly venomous snake that must be released into a room full of people. It would be absurd to release the snake into the room merely hoping that it had transformed into something less dangerous, that it was too old to strike, or that it had learned its lesson from time spent in the cage. Simple logic, then, would dictate the potential solutions. In this hypothetical situation, there are several ways to keep the room's occupants safe, all of which are permanent: (1) refuse to release the snake, (2) kill or otherwise disable the snake, or (3) remove the snake's fangs. When releasing a sex offender into the general population, the permanent options for keeping the public safe are more or less identical.

The snake metaphor is, of course, an oversimplification.<sup>299</sup> The amount of danger posed by any individual offender is, admittedly, unique. Accordingly, one crucial aspect of any solution to the problem of recidivism among sex offenders is an accurate system of offender classification by level of dangerousness. Some of the permanent solutions discussed in the next section may only be appropriate for certain types of offenders. For instance, highly violent sexual predators should probably never be released from prison or psychiatric wards. Some of the techniques discussed in the next section may, however, allow non-violent offenders to be part of the community without posing a danger to it. Many methods for classifying sex offenders by level of dangerousness have already been developed, particularly in the context of "sexually violent person laws," which are discussed at more length in the following section.<sup>300</sup> While a complete discussion of "actuarial risk assessment"<sup>301</sup> is beyond the scope of this Article, the continued development of such assessments is likely an essential part in curbing recidivism rates among sex offenders. Solutions must be tailored to individual offenders in order to ultimately be effective.

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299. It could also be viewed as a way of dehumanizing sex offenders, but it is not intended as such. Rather, the metaphor is included solely to serve the purposes of brevity and clarity.

300. See Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 AM. CRIM. L. REV. 1443 (2003).

301. *Id.*

*V. A Survey of Potential Solutions*

Every great and deep difficulty bears in itself its own solution. It forces us to change our thinking in order to find it.

- Niels Bohr<sup>302</sup>

Any initial attempt to solve a problem as vast as recidivism will likely be incomplete. This section is not intended as a definitive list, and the integration of numerous techniques may be necessary before anything approximating a “solution” is found for any one type of sex offender. Moreover, this section will include only a cursory overview of the listed techniques, with footnotes pointing the way toward more exhaustive literature on each. The hope, of course, is that readers may be inspired to formulate solutions or techniques of their own. In other words, the hope of this section is to begin a progressive dialogue regarding specific ways in which the current paradigm needs to be changed.

Incidentally, as one acquainted with the law might expect, most of what follows is also highly controversial. There are myriad constitutional issues involved and matters, particularly the death penalty,<sup>303</sup> that evoke invidious debate among reasonable minds. A discussion inclusive of all such underlying issues simply is not feasible here—the resulting work would be a treatise rather than a comment. Hence, where practicable, citations are provided to scholarly work on the subject at hand, with an eye towards impartiality. Suffice it to say that this Article does not suggest that all of the methods described below are necessarily constitutional; they are simply methods that show potential for preventing recidivism by sex offenders.

The United States Supreme Court has held that criminal punishment “is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution.”<sup>304</sup> In the context of this Article, however, the term “punishment” is not appropriate. Because the goal is to prevent recidivation, “retribution” is irrelevant. Likewise, while “punishment” may have a utilitarian deterrence factor towards certain types of criminals, the underlying psychology of sex offenders suggests that such deterrence would be of little utility with the instant problem.<sup>305</sup> Thus, the following discussion

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302. VICTOR WEISSKOPF, *THE JOY OF INSIGHT: PASSIONS OF A PHYSICIST* 63 (1992).

303. See Bryan A. Stevenson, *Two Views on the Impact of Ring v. Arizona on Capital Sentencing: The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 ALA. L. REV. 1091 (2003).

304. *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (citing *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in judgment)).

305. *Cf. id.* at 445 (“Assuming the offender behaves in a rational way, as one must to

describes “methods,” “techniques,” or “solutions,” not punishments. Those terms are not used, however, as an exercise in euphemistic writing. Instead, the point is to emphasize that retributive moral “punishment” is not pertinent in a discussion focused on ending recidivism.

Catalogued below are a number of methods that, when added to the current paradigm’s approach, may help to more fully curb recidivism among sex offenders. Included are sentences of life without parole (including so-called “Two Strikes” and “Three Strikes” laws), the death penalty, electronic monitoring combined with residency restrictions, involuntary civil commitment, and castration (chemical and physical). Each of these potential methods of dealing with sex offenders focuses on the key to success: permanence.

#### *Life Without Parole*

As discussed at some length in the preceding section, imprisonment is already utilized by the current paradigm quite regularly.<sup>306</sup> The trouble is that the current paradigm uses imprisonment of sex offenders primarily as a temporary solution.<sup>307</sup> As discussed in the last section, term-of-years imprisonment only affects recidivism while offenders are imprisoned. Once released, the sex offender is still a sex offender and remains dangerous. The snake has not magically transformed into a bunny rabbit.

Likewise, prison is an expensive proposition. For example, one state agency estimates that it costs approximately \$47,000 per year to house a single inmate.<sup>308</sup> Assuming that such an estimate is accurate, the cost of housing a single prisoner for thirty years would be over \$1.4 million, without accounting for inflation. Because there are hundreds of thousands of known sex offenders, life sentences are just not economically realistic on a large scale. Many states currently struggle to pay for the prisoners they already house,<sup>309</sup> so adding a glut of new inmates is not viable.

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justify the penalty on grounds of deterrence. . . .”).

306. In 1994 alone, approximately 13,000 sex offenders were released from prisons in the United States. See Langan et al., *supra* note 19.

307. See *id.* (discussing the relatively brief duration of the average sex offender’s sentence).

308. Legislative Analyst’s Office, California’s Nonpartisan Fiscal and Policy Advisor, *Criminal Justice and Judiciary: How Much Does It Cost to Incarcerate an Inmate?*, [http://www.lao.ca.gov/laoapp/laomenus/sections/crim\\_justice/6\\_cj\\_inmatecost.aspx?catid=3](http://www.lao.ca.gov/laoapp/laomenus/sections/crim_justice/6_cj_inmatecost.aspx?catid=3) (last visited Mar. 2, 2011).

309. See, e.g., Monica Davey, *Missouri Tells Judges Cost of Sentences*, N.Y. TIMES, Sept. 19, 2010, at A1, available at <http://www.nytimes.com/2010/09/19/us/19judges.html>; Jack

Nevertheless, there are certain offenders for whom lifetime confinement is probably one of the only safe options: sexually violent predators. A sexually violent predator is “a person who has been convicted of[,] or charged with[,] a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence.”<sup>310</sup> These are the Earl Shriners<sup>311</sup> of the world—people who have a long history of violently attacking others in sexual ways. In addition to life sentences, involuntary civil commitment might be appropriate for sexually violent predators, as might the death penalty.<sup>312</sup>

Some states have already successfully implemented lifelong sentences for repeat sex offenders.<sup>313</sup> This is largely through the use of so-called “Two Strikes” or “Three Strikes” laws.<sup>314</sup> While such laws may help lower recidivism rates, they are conspicuously lacking in that they allow for at least two sexual assaults before permanently dealing with the offender. In a “Three Strikes” jurisdiction, Victim Four, who is never assaulted, can sleep easy. Victims One, Two, and Three, on the other hand, may have a hard time understanding why a baseball metaphor is appropriate. Certainly, there are some sex offenders whose very first “strike” is indicative that the offender is unsafe to release. It was, after all, only Byron Scherf’s second swing-and-a-miss in which he raped Barbara Bell at knifepoint—his first strike had been raping a young waitress and then lighting her on fire.

### *The Death Penalty*

As a remedy for sexual assaults alone, the death penalty is currently unavailable to the states.<sup>315</sup> As described by the dissent, the Supreme Court’s 2008 decision in *Kennedy v. Louisiana* held “that the Eighth Amendment categorically prohibits the imposition of the death penalty for the crime of

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Dolan, *Despite Medical Parole Law, Hospitalized Prisoners are Costing California Taxpayers Millions*, L.A. TIMES, Mar. 2, 2011, <http://articles.latimes.com/2011/mar/02/local/la-me-prisons-20110302>.

310. Michael B. First & Robert L. Halon, *Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases*, 36 J. AM. ACAD. PSYCH. L. 443, 443–454 (2008).

311. See discussion *supra* Section I.

312. Both are discussed *infra*.

313. See, e.g., *People v. Barker*, 96 P.3d 507, 519 (2004); N.J. STAT. ANN. § 2C:43-7.1 (West 2003); MICH. COMP. LAWS ANN. § 750.520b(2)(c) (West 2004).

314. See, e.g., Kevin E. McCarthy, *Recent Developments on Washington State’s “Three Strikes” Law*, Jan. 8, 2009, available at <http://www.cga.ct.gov/2009/rpt/2009-R-0006.htm>.

315. See *Kennedy v. Louisiana*, 554 U.S. 407, 447 (2008).

raping a child.”<sup>316</sup> This is true “no matter how young the child, no matter how many times the child is raped, no matter how many children the perpetrator rapes, no matter how sadistic the crime, no matter how much physical or psychological trauma is inflicted, and no matter how heinous the perpetrator's prior criminal record.”<sup>317</sup> The logical conclusion to be drawn from *Kennedy* is that only those sexual assaults resulting in death bring the death penalty into the realm of sentencing options. Additionally, only thirty-five states had the death penalty available for any crime as of March 2, 2011; the other fifteen states and the District of Columbia did not.<sup>318</sup>

Thus, without a change in the law as it currently stands, death sentences cannot have a large role in curbing recidivism by sex offenders. Nevertheless, the death penalty is worthy of discussion as a potential method of dealing with sexual recidivists. It is, incontrovertibly, the best method at preventing recidivism of any sort, including recidivism by sex offenders. Recidivism is, after all, impossible for the dead. Likewise, for those sexually violent predators who do kill, or attempt to kill, victims, the death penalty would seem to be appropriate. It is the only method that guarantees that the offender will not recidivate. Risk of escape or violent behavior within prison is utterly negated by execution.

On the other hand, even if the death penalty were more widely available, it has several serious downsides as a potential option. Executions are, for one thing, quite expensive.<sup>319</sup> One retired California judge, who sentenced nine men to death in his time on the bench, now opposes the death penalty on financial grounds, stating that “[i]t's 10 times more expensive to kill them than to keep them alive.”<sup>320</sup> One state reportedly spent \$4.2 million dollars on every death sentence.<sup>321</sup> Additionally, as the Court noted in *Kennedy*, a conviction for sexual assault is a particularly dangerous basis for execution because such cases often turn solely on credibility: “[the victim] and the accused are, in most instances, the only ones present when the crime [is]

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316. *Id.* (Alito, J. dissenting).

317. *Id.*

318. Deanna Bellandi, *Ill. Governor Mulls Bill to Abolish Death Penalty*, FORBES.COM (Mar. 2, 2011), available at [http://www.forbes.com/feeds/ap/2011/03/02/general-us-death-penalty-illinois\\_8335180.html](http://www.forbes.com/feeds/ap/2011/03/02/general-us-death-penalty-illinois_8335180.html).

319. *To Execute or Not: A Question of Cost?: States Discover It's Cheaper to Imprison Killers for Life than to Execute Them*, MSNBC.COM (Mar. 7, 2009), available at [http://www.msnbc.msn.com/id/29552692/ns/us\\_news-crime\\_and\\_courts/](http://www.msnbc.msn.com/id/29552692/ns/us_news-crime_and_courts/).

320. *Id.*

321. *Id.*



committed.”<sup>322</sup> Indeed, regarding sexual assaults on children, the Court stated that “[t]he problem of unreliable, induced, and even imagined child testimony means there is a ‘special risk of wrongful execution.’”<sup>323</sup>

Overall, then, the death penalty is not currently a good option for dealing with recidivism by sex offenders in the United States on a large scale. Depending on future jurisprudential developments, however, that could all change. If the death penalty was available in more states, was less expensive, and was available as a sentence for sexual assaults that did not result in death, then it could be an effective weapon in the arsenal against sexual recidivism. Arguably, too, there is no better method of permanently dealing with sexually violent predators.

#### *Electronic Monitoring and Residency Restrictions*

As discussed earlier,<sup>324</sup> registration is ineffective at preventing recidivism by sex offenders. The problem is that registration fails to deal with the underlying psychological impetus for recidivism. Likewise, only those sex offenders who obey the law are effectively monitored—at any time a registered offender can decide to go underground. Indeed, studies have shown that offender registration has no noticeable effect on recidivism. Several states, however, have embraced new techniques that, while similar to registration programs, may ultimately be more effective.

The first of these new techniques is electronic monitoring. In 2005, in reaction to the death of Jessica Lunsford,<sup>325</sup> Florida passed the Jessica Lunsford Act,<sup>326</sup> which is more commonly known as “Jessica’s Law.”<sup>327</sup> Jessica’s Law introduced tough new restrictions on sex offenders, including the requirement that those who committed a sex crime against a minor “be subject to GPS monitoring for the remainder of [their lives].” Because Jessica’s Law is so new, there is little empirical data demonstrating the

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322. *Kennedy v. Louisiana*, 554 U.S. 407, 444 (2008) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987)).

323. *Id.* at 411 (citing *Atkins v. Virginia*, 536 U.S. 304, 321 (2002)).

324. *See supra* Section IV.

325. *See supra* Section II (describing Jessica Lunsford’s tragic death).

326. Karren J. Terry & Alissa R. Ackerman, *A Brief History of Major Sex Offender Laws*, in *SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS* 65, 89 (Richard G. Wright ed. 2009).

327. Jason Peckenpaugh & Joan Petersilia, *Controlling Sex Offender Reentry: Jessica’s Law Measures in California* 4 (2006), available at [http://www.law.stanford.edu/sites/default/files/child-page/266901/doc/slspublic/JPeckenpaugh\\_06.pdf](http://www.law.stanford.edu/sites/default/files/child-page/266901/doc/slspublic/JPeckenpaugh_06.pdf).

impact of the law on recidivism.<sup>328</sup> Some scholars, however, have speculated that GPS monitoring will effectively deter sex offenders.<sup>329</sup>

Such deterrence seems unlikely, though, when the psychology of sex offenders is considered. GPS monitoring, in and of itself, cannot deter the paraphiliac urges of an offender. In fact, one study, which involved only violent offenders, found that electronic monitoring had little impact on recidivism rates.<sup>330</sup> Conversely, for non-violent offenders the effects of electronic monitoring have yet to be accurately studied.

Even if monitoring proves to be ineffective as a deterrent, however, it still has potential as a technique to curb recidivism. According to one manufacturer of GPS monitoring devices, such devices can be “equipped with tamper detection and [ ] tamper-resistant security band[s] that [cannot] be removed.”<sup>331</sup> If an offender attempts to remove the GPS device, it notifies law enforcement.<sup>332</sup> As such, even if GPS monitoring was ineffective in deterring one recidivistic act by a released offender, monitoring would make apprehending and convicting that offender much easier, which would in turn prevent the offender from committing further assaults. GPS monitoring can also be used to prohibit sex offenders from entering into restricted zones.<sup>333</sup> Accordingly, pedophiles could be restricted from going to areas where their paraphiliac urges might be especially problematic, such as schools or parks. Viewed together, the ability to restrict and quickly apprehend sex offenders might be a useful tool in preventing recidivism. Additionally, the GPS technology is fairly inexpensive<sup>334</sup> and could in theory be paid for by the offenders, who could be required to seek gainful employment to subsidize the monitoring.

GPS monitoring might also be quite effective when used in combination with another increasingly popular method: residency restriction. As of 2007, nineteen states had some form of residency restrictions applicable to released sex offenders.<sup>335</sup> Such restrictions generally require offenders to live “a certain distance away from schools, child-care facilities, public swimming

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328. Terry & Ackerman, *supra* note 326, at 90.

329. Terry & Ackerman, *supra* note 326, at 90.

330. Michelle L. Meloy & Shareda Coleman, *GPS Monitoring of Sex Offenders*, at 262.

331. Adiant Solutions, <http://www.adiant-solutions.com/top-uses/law-enforcement.php> (last visited on Mar. 3, 2011).

332. *See id.*

333. *Id.*

334. *See id.*

335. Joseph L. Lester, *Off to Elba! The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 Akron L. Rev. 339, 351 (2007).

pools, public playgrounds, churches, or any area where minors congregate, such as parks, arcades, [or] school bus stops.”<sup>336</sup> The distance involved may be anywhere from 500 to 2000 feet, generally measured from the property lines.<sup>337</sup>

Many condemn residency restrictions as a technique for dealing with sex offender recidivism. It is argued that residency restrictions will be used as a modern form of banishment.<sup>338</sup> It is also argued that the felony punishments that accompany violations of residency laws are excessive, given that violations are often merely *malum prohibitum*<sup>339</sup>—status crimes requiring no particular *mens rea*.<sup>340</sup> Detractors further argue that residency restriction laws are shortsighted, prevent rehabilitation, and may lead to mass homelessness among sex offenders.<sup>341</sup>

Nevertheless, residency restrictions may be a very effective weapon against recidivism. When the psychology of sex offenders is taken into account, residency restrictions show great potential as applied to pedophiles. For a pedophile, living near a school or playground is a very dangerous thing. As the old saying so aptly puts it, “out of sight, out of mind.” Just as it is a bad idea for a dieter to keep a plate of cookies in plain sight on the countertop, it is unwise for a pedophile to be exposed to young children on a daily basis.

Thus, by minimizing the contact a pedophile has with children, residency restrictions may be an effective tool in reducing recidivism among pedophiles. This would be especially true where residency restrictions were concomitant with GPS monitoring. A pedophile could not only be required to live away from places where children gather, but could be required to stay away from those places altogether.

Unfortunately, for other groups of paraphiliacs, residency restrictions will likely have little or no effect. For a sexual sadist, for instance, the

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336. *Id.* (footnotes omitted).

337. Lester, *supra* note 335, at 351.

338. Lester, *supra* note 335, at 355.

339. “*Malum prohibitum*” comes from the Latin (“prohibited evil”) and is “[a]n act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral.” Black’s Law Dictionary, *supra* note 18.

340. See Lester, *supra* note 335 at 358. “*Mens rea*” comes from the Latin (“guilty mind”) and is defined in pertinent part as “[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime.” Black’s Law Dictionary, *supra* note 18.

341. Lester, *supra* note 335, at 359–60.

distance to a school is likely irrelevant. A grocery store<sup>342</sup> or college campus<sup>343</sup> might be just as fertile a hunting ground.

### *Involuntary Civil Commitment*

In the 1990's, many laws aimed at managing sex offenders were passed, including the controversial "sexually violent person" (SVP) laws.<sup>344</sup> SVP laws are the modern-day descendants of "the sexual psychopath laws enacted in the mid-20th century," which "authorized perpetual hospitalization or incarceration of individuals with histories of child sexual assault."<sup>345</sup> Modern SVP laws do not replace criminal incarceration.<sup>346</sup> Rather, such laws add an indefinite period of involuntary civil commitment to begin only after an offender is released.<sup>347</sup> In *Kansas v. Hendricks*,<sup>348</sup> the United States Supreme Court upheld the constitutionality of a Kansas SVP law.<sup>349</sup> The *Hendricks* decision has paved the way for involuntary civil commitment to be used broadly against sex offenders who pose a danger to society.<sup>350</sup>

From a standpoint of utility, involuntary civil commitment is preferable to imprisonment. First, civil commitment necessarily involves treatment,<sup>351</sup> whereas imprisoned sex offenders may refuse treatment even when it is offered.<sup>352</sup> Second, involuntary civil commitment effectively lengthens the period of incapacitation for sex offenders.<sup>353</sup> For example, the Kansas statute at issue in *Hendricks* provided that the offender would be held in "control, care and treatment until such time as the person's mental abnormality or

342. It was a grocery store parking lot in which Philip C. Garrido abducted Katie Callaway Hall, as discussed in Section II, *supra*. See also *Garrido Victim, supra* note 64.

343. See, e.g., PEGGY REEVES SANDAY, *FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS* (2d ed. 2007).

344. Janus & Prentky, *supra* note 300.

345. Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 17, 38 (2008).

346. Adam J. Falk, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment after Kansas v. Hendricks*, 25 *AM. J. L. & MED.* 117, 118 (1999).

347. *Id.*

348. *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997).

349. *Id.*

350. Falk, *supra* note 346, at 119–20.

351. Anne C. Gillespie, *Constitutional Challenges to Civil Commitment Laws: An Uphill Battle for Sexual Predators after Kansas v. Hendricks*, 47 *CATH. U.L. REV.* 1145, 1159 (1998).

352. JACKIE CRAISSATI, *MANAGING HIGH RISK SEX OFFENDERS IN THE COMMUNITY: A PSYCHOLOGICAL APPROACH* 157 (2004).

353. See Falk, *supra* note 346, at 118.

personality disorder has so changed that the person is safe to be at large."<sup>354</sup> Thus, the offender is removed from society after the criminal sentence expires, perhaps even permanently.

Unfortunately, like imprisonment, the price tag associated with involuntary civil commitment is a high one. One study on the subject monitored "the entire population of adults who were treated for psychiatric disorders in Maryland" for one year.<sup>355</sup> It was determined that the "average length of . . . stay was 6.1 days and the average cost per stay was \$4,944,"<sup>356</sup> which equates to roughly \$800 per day. While the study did not deal exclusively with involuntarily committed patients, it underscores how high the price of inpatient psychiatric treatment can be.

Thus, like lifelong imprisonment, involuntary civil commitment effectively prevents recidivism but is prohibitively expensive on a large scale. Both techniques are probably best, then, when saved for utilization against sexually violent predators.

#### *Castration*

At first blush, the concept of using castration to control sex offenders might seem novel. The truth, however, is that castration as a criminal sanction has existed throughout much of American history.<sup>357</sup> Also, the concept certainly has merit. As one commentator so aptly put it, "If one experiences sexual hungers of the sort that might cause problems, for example, a hunger for children, one is better off being less hungry."<sup>358</sup> Modernly, there are two different forms of castration, each of which has unique benefits and disadvantages: surgical castration and chemical castration.<sup>359</sup>

Surgical castration<sup>360</sup> "involves the removal of the testes, which are the source of testosterone and the male sex drive."<sup>361</sup> The concept is that "[w]hen

354. Jennifer Ann Smulin, *Protecting Life and Liberty: The Constitutionality and Necessity of Civil Commitment of Sexual Predators*, 52 DEPAUL L. REV. 1245, 1250 (2003) (quoting KAN. STAT. ANN. § 59-29a01 (1994)).

355. Samuel L. Brown, *Variations in Utilization and Cost of Inpatient Psychiatric Services Among Adults in Maryland*, 52 PSYCH. SERVS. 841, 843 (2001).

356. *Id.*

357. See Kris W. Druhm, *A Welcome Return to Draconia: California Penal Law 645, the Castration of Sex Offenders and the Constitution*, 61 ALB. L. REV. 285, 286–87 (1997).

358. *Id.* at 285.

359. *Id.* at 293–300.

360. The medical term for the procedure is "orchietomy." *Id.* at 294.

361. *Id.*

the testes are removed, the resulting loss of testosterone causes a drastic reduction in sexual desire and an inability to respond to sexual stimulus.”<sup>362</sup> Studies indicate that surgical castration is very effective as a means of reducing recidivism rates by sex offenders.<sup>363</sup> Various studies, for instance, have demonstrated reductions of anywhere from 81.8% to 72% in rates of recidivism. Studies also indicate that the majority of surgically castrated sex offenders report “very positive results and a general contentment with their new found [sic] freedom from unnatural sexual urges.”<sup>364</sup>

Unfortunately, there are several noteworthy downsides to surgical castration. First, unlike chemical castration, surgical castration is irreversible.<sup>365</sup> While this makes surgical castration a better permanent technique for dealing with sex offenders, it may also mean that surgical castration cannot legally be required of sex offenders.<sup>366</sup> Additionally, surgical castration does not always result in impotence, and offenders can willfully avoid impotence by taking anabolic steroids.<sup>367</sup> Likewise, despite the fact that most surgically castrated offenders report positively, a few reports exist where such offenders became even more violent or dangerous after the procedure.<sup>368</sup> Indeed, surgical castration has a lengthy list of potential side effects, including “premature aging, loss of body and facial hair, an increase in head hair, decrease of muscle mass, weight gain, and softening and thinning of the skin.”<sup>369</sup> Thus, informed offenders may opt not to undergo the procedure.

Like surgical castration, chemical castration lowers the levels of testosterone in the offender, thereby lowering sex drive.<sup>370</sup> This is achieved by treating the offender with “Depo-Provera, a drug composed of a synthetic form of the female hormone progesterone.”<sup>371</sup> Chemical castration lowers the testosterone level of an offender to that normally found in a pre-pubescent boy, which effectively reduces the ability to “sustain erections and

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362. *Id.*

363. *Id.* at 294–95.

364. *Id.* at 296.

365. *Id.* at 295.

366. This is due to various constitutional concerns that are beyond the scope of this Article.

367. Druhm, *supra* note 357, at 295.

368. Druhm, *supra* note 357, at 296.

369. Druhm, *supra* note 357, at 295–96 (footnotes omitted).

370. Druhm, *supra* note 357, at 297.

371. Druhm, *supra* note 357, at 297.

experience orgasms.”<sup>372</sup> The chemical castration treatments also generally reduce aggressive behavior in treated offenders.<sup>373</sup> Chemical castration is a reversible process and, once treatment ceases, the offender regains normal sexual function within ten days.<sup>374</sup> Conversely, the effects of chemical castration are more difficult to counteract with anabolic steroids than are the effects of surgical castration.

Even so, chemical castration has certain disadvantages as a potential method for dealing with sex offenders.<sup>375</sup> The primary disadvantage is that the process is quickly reversible. Thus, for chemical castration to be effective, it would likely require simultaneous electronic monitoring and frequent medical exams to check for compliance. Also, Depo-Provera does not always render the treated offender impotent; it is, instead, intended to create sexual ambivalence.<sup>376</sup> Chemical castration can also cause side effects, including “testicular atrophy, weight gain, nightmares, hot flashes, cold sweats, muscle weakness, insomnia, and occasional instances of diabetes.”<sup>377</sup> Finally, there is little extant data on the effectiveness of chemical castration—a drawback which puts those who oppose the practice on a high ground from whence they can hurl condemnations and receive little return fire. As such, chemical castration laws could be difficult to pass until further support becomes available.

Another practical benefit associated with both chemical and surgical castration is the fact that the offender is not imprisoned at the expense of the state. It is conceivable that any costs from chemical castration could be paid by the offender himself, unlike costs associated with imprisonment or civil commitment. Thus, chemical castration could be a very inexpensive method of dealing with sex offenders, particularly those who are non-violent. Chemical castration might be particularly effective when used in concert with electronic monitoring and residency restrictions. Such a combination would

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372. Druhm, *supra* note 357, at 297.

373. Druhm, *supra* note 357, at 297.

374. Druhm, *supra* note 357, at 298.

375. The various disadvantages are not discussed in great depth here, but plenty of scholarship exists on the matter. One press release by the ACLU likened chemical castration to experiments by Nazi doctors, “calling the legislation a ‘return[ ] to the dark ages of sexual psychopath laws and unfettered collusion between psychiatry and the state.’” *Id.* at 302–03 (1997) (citation omitted). The title of another article on the subject succinctly expresses its viewpoint: Larry Helm Spalding, *Florida’s 1997 Chemical Castration Law: A Return to the Dark Ages*, 25 FLA. ST. U.L. REV. 117 (1998).

376. Druhm, *supra* note 357, at 298.

377. Druhm, *supra* note 357, at 298.

effectively reduce an offender's sex drive, monitor his location, and help to minimize the temptations encountered.

There are many who oppose castration as a technique for dealing with sex offenders because they theorize that it will be ineffective.<sup>378</sup> The gist of the practical argument against castration is that sex crimes are about power, not sex,<sup>379</sup> therefore, castration will not deter sex offenders.<sup>380</sup> This argument is a familiar one, a veritable canon of feminism.<sup>381</sup> It is also an argument that is not supported by an understanding of the psychology of sex offenders.

In his *Meditations*, Marcus Aurelius wrote, "This thing, what is it in itself, in its own constitution . . . [a]nd what its causal nature (or form)? And what is it doing in the world?"<sup>382</sup> Viewed through this philosophical lens, it is clear that those who commit sex offenses are motivated differently than those who commit other violent offenses. If sex offenders acted merely out of violent or controlling impulses, why would sex play any part in their crimes?

Likewise, it must be considered that for many sex offenders, an erection is the weapon of choice. Castrating a sex offender can be likened to taking a firearm away from a murderer who has used it to kill in the past. While taking the gun away may not prevent the murderer from committing any sort of violent crime in the future, society is certainly better off with one less weapon at the murderer's disposal. While castrating a sex offender may not make that offender completely non-violent, it certainly impedes his use of his favorite weapon.

Additionally, the common argument against castration fails to fully appreciate the effects of lowering testosterone levels. By itself, testosterone does not cause violent behavior, so increasing levels of testosterone do not always result in aggression.<sup>383</sup> On the other hand, testosterone is, in fact, "necessary for violence."<sup>384</sup> Thus, by lowering testosterone levels, castration reduces both sex drive and aggressive inclinations. Therefore, regardless of

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378. *Will Chemical Castration Stop Sex Offenders?*, JET MAGAZINE, Sept. 23, 1996, at 16–18.

379. *See id.* at 17.

380. *Id.*

381. *See* JOANNA BOURKE, RAPE: SEX, VIOLENCE, HISTORY 408 (2007).

382. THE MEDITATIONS OF MARCUS AURELIUS (George Long trans. 2005).

383. Christopher Mims, *Strange but True: Testosterone Alone Does Not Cause Violence*, SCIENTIFIC AMERICAN (July 5, 2007), available at <http://www.scientificamerican.com/article.cfm?id=strange-but-true-testosterone-alone-doesnt-cause-violence>.

384. *Id.*



whether a sex offender is motivated by domineering violence or paraphiliac sexual urges, castration would logically help to prevent recidivism.

### VI. Conclusion

I do not think much of a man who is not wiser today than he was yesterday.

- Abraham Lincoln<sup>385</sup>

The majority of legal scholarship on the subject of sex offenses focuses on defending the rights of offenders. This is as it should be—sex offenders are a loathed class,<sup>386</sup> and it is often the role of the legal profession to protect such groups from unfair punishment and prejudice.<sup>387</sup> But, as the venerable Justice Cooley once put it, “Law students must not forget that they are fitting themselves to be ministers of justice.”<sup>388</sup> And justice is not only for the accused. It is also deserved by victims and by society at large. The failure of the current paradigm has served inequity on an unbearable level—justice has been denied its due. Thus, remedial measures must be taken. A new paradigm is necessary, one that incorporates the best parts of the old paradigm while openly seeking creative new solutions.

In the end, the conclusion is perfectly simple: more needs to be done to protect society from repeat sex offenders. The failure of the current paradigm is evident; it has largely ignored both the underlying psychology of sex offenders and plain common sense. The price for that failure has often been borne by the most vulnerable members of society.

If human history has proven one thing time and again, it is that supposedly indecipherable problems can indeed be solved using little more than imagination and perseverance. The problem described in this Article is vast; it is labyrinthine. Its solution will require a concerted effort by gifted minds. But such an undertaking is not just worthwhile: it is a moral imperative.

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385. JOHN WOODEN & DON YAEGER, *A GAME PLAN FOR LIFE: THE POWER OF MENTORING* 79 (2009).

386. Asmara M. Tekle, *Safe: Restrictive Covenants and the Next Wave of Sex Offender Legislation*, 62 SMU L. REV. 1817, 1822 n. 16 (2009).

387. See Steven Hecht, *From the Chair*, 24 L.A. LAWYER 8 (2001).

388. BENCHMARK: THE THOMAS M. COOLEY LAW SCHOOL MAGAZINE 29 (Special 35th Anniversary ed. 2008), available at [http://www.cooley.edu/about/\\_docs/benchmark/2008/Benchmark\\_35th\\_Anniversary.pdf](http://www.cooley.edu/about/_docs/benchmark/2008/Benchmark_35th_Anniversary.pdf).

Each and every victim deserves reform. Each and every victim deserves justice. Each and every victim deserves a voice.  
And their voices cry out to end recidivism.