

Fall 2003

The Quandary Of Megan's Law: When The Child Sex Offender Is A Child, 37 J. Marshall L. Rev. 73 (2003)

Timothy E. Wind

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Criminal Law Commons](#), [Juvenile Law Commons](#), [Law and Gender Commons](#), [Law and Psychology Commons](#), [Law and Society Commons](#), [Legal History Commons](#), [Legislation Commons](#), [Litigation Commons](#), [Sexuality and the Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Timothy E. Wind, The Quandary Of Meghan's Law: When The Child Sex Offender Is A Child, 37 J. Marshall L. Rev. 73 (2003)

<https://repository.law.uic.edu/lawreview/vol37/iss1/7>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

THE QUANDARY OF MEGAN'S LAW: WHEN THE CHILD SEX OFFENDER IS A CHILD

TIMOTHY E. WIND*

Ripped From the Headlines . . .

A seventeen-year-old boy was sexually molested by a registered sex offender at the Heart Maneuvers Christian Fellowship Church in suburban Chicago.¹ The offender was previously convicted for aggravated criminal sexual abuse of a person under sixteen and served three years in state prison.² Church officials were aware of the offender's history of sex abuse and had attempted to keep an eye on him.³ However, he was allowed to help at various functions at the Church during 1995 and 1996, during which time he allegedly fondled the boy on several occasions.⁴ The Church did not ask the sex offender to leave until he was accused of similar conduct by another church.⁵ He had been paroled only months earlier.⁶

A three-year-old girl was beaten and sexually abused by three brothers at the house where she was being babysat.⁷ The boys, described as mildly mentally handicapped, took turns abusing her

* J.D. Indiana University School of Law-Indianapolis, B.A. Loyola Marymount University-Los Angeles. Timothy Wind is a former law enforcement officer who served 14 years in the police agencies in Los Angeles and Kansas City.

I would like to thank and dedicate this project to my late father Edward Wind, who had constant faith in me and who passed away during the writing of this work. *I miss you pop.* I would also like to express my sincere thanks to Professor Henry Karlson, Indiana University School of Law-Indianapolis for assisting me after law school in the production of this work and for his advice on this project and his keen insight into the vast areas of American Criminal Jurisprudence and Juvenile Justice. Additionally, I would like to thank colleague and friend David (Dave) Brimm for his counsel, technical advice, and editing skills while developing and writing this work. Lastly, I would like to thank the editors and staff of The John Marshall Law Review for selecting my work for their distinguished law journal. Any errors or omissions in the research and writing of this project remain my own.

1. *Registered Sex Offender Charged With Molesting Youth at Church*, CHI. TRIB., Jan. 12, 2001, at B2.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Teen to be Tried as Juvenile in Attack*, INDIANAPOLIS STAR, Feb. 15, 2002.

and now face charges for the attack.⁸ The judge denied prosecutors' attempts to try the 15-year-old brother in adult court, finding hope for the boy's rehabilitation.⁹ None of the brothers have any prior convictions.¹⁰

A juvenile offender was convicted and sentenced for sexual assaults on ten children between the ages of seven and eleven.¹¹ All parties, including the prosecutors agreed that due to the juvenile's age, he needed treatment in addition to his sentence.¹² The juvenile sex offender will be treated as a juvenile until he turns twenty-one at which time he will serve his remaining sentence in an adult facility.¹³ He will also be required to report his name and information to the national sex offender registry.¹⁴

Rescuers found a teenage sex offender standing over the bodies of two children in an abandoned house in Oilton.¹⁵ The twelve-year-old had been raped and the seven-year-old girl had been strangled to death.¹⁶ The juvenile had been previously convicted of sodomizing a four-year-old boy and another minor who was a relative.¹⁷ The children had been playing in the front yard of the victim's house, located only a block from the business owned by the juvenile's family.¹⁸

A convenience store clerk was raped and left for dead during the course of a robbery by a fifteen-year-old juvenile.¹⁹ She was threatened with a knife, forced into a back room, beaten severely in the head and face, raped while she lay semi-conscious and stabbed in the chest and stomach.²⁰ Police arrested the juvenile two weeks later during another robbery and linked him to the sexual assault and robbery of the convenient store.²¹ The juvenile had a history of aggravated sexual assault.²²

8. *Id.*

9. *Id.*

10. *Id.*

11. *Child Molester's Sentence Divided Between Juvenile, Adult Systems*, KANSAS CITY STAR, July 2, 2002.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Sex Offender Registry Has Complex Legal Hurdles*, TULSA WORLD-NEWS, Feb. 26, 2002. See also <http://www.littlestangels.net> (creating a memorial to children who were sexually abused or killed by offenders).

16. *Id.*

17. *Id.*

18. *Id.*

19. John A. Hunter, et. al., *Juvenile Sexual Homicide*, FBI LAW ENFORCEMENT NEWSLETTER, March 1, 2000.

20. *Id.*

21. *Id.*

22. *Id.*

I. INTRODUCTION

"The portrait of the American sex offender increasingly bears the face of a juvenile."²³

Almost all parents experience nightmares about the multitude of harms that may befall their children in their early years of life.²⁴ As the aforementioned headlines reveal, the kidnap, rape, sexual assault, or murder of a child is more than any parent can bear.²⁵ These horrifying nightmares became a reality over the last decade for the parents of some children like: Kristi Blevins of Oklahoma,²⁶ Christopher Meyer of Illinois,²⁷ Zachary Snider of Indiana,²⁸ and Megan Kanka of New Jersey.²⁹ While these cases and many more like them spell untold tragedy, it is the latter case, that of Megan Kanka, that is most commonly associated with the subject matter of this paper: Megan's Law.³⁰ The aftermath of the abuse and murder of Megan launched an organized frenzy across

23. Carter Allen Lee, *When Children Prey on Children: A Look at Hawaii's Version of Megan's Law and its Application to Juvenile Sex Offenders*, 20 U. HAW. L. REV. 477, 477 (1998). Recently, statistics have shown a dramatic rise in the reporting of sexual abuse of children at the hands of other minors. *Id.* at n.1.

24. *Id.* at 478-79.

25. *Id.* See also Hope E. Durant, *A Message to Sex Offenders: Sex Registration and Notification Laws Do Not Infringe Upon Your Pursuit of Happiness*, 26 J. LEGIS. 293, 294 (2000) (explaining that Megan's barbaric killing "shocked the conscience of the nation").

26. Rhett Morgan, *Sex Offender Registry Has Complex Legal Hurdles*, TULSA WORLD, Feb. 26, 2002. See generally <http://www.littlestangels.net> (last visited Sept. 18, 2003).

27. Jessica R. Ball, *Public Disclosure of "America's Secret Shame": Child Sex Offender Community Notification in Illinois*, 27 LOY. U. CHI. L.J. 401, 401-02 (1996).

28. Brian J. Telpner, *Constructing Safe Communities: Megan's Laws and the Purposes of Punishments*, 85 GEO. L.J. 2039, 2039 (1997). See generally *Stevens v. State*, 691 N.E.2d 412 (Ind. 1997) (affirming death penalty sentence of Stevens, convicted for murdering Zachary Snider); Indiana Criminal Justice Institute, *Indiana Sex and Violent Offender Directory*, available at http://www.in.gov/serv/cji_sor (last visited Oct. 1, 2003) (displaying information about individuals convicted of one or more sexual or violent offenses); Clark Co. Indiana Prosecutors Office Web site available at <http://http://www.clarkprosecutor.org/html/death/rownew.htm> (last visited Oct. 1, 2003) (displaying death row inmate Christopher Stevens' picture and charge-conviction information).

29. Durant, *supra* note 25, at 293. See also Dale Russakoff, *Case Driving 'Megan's Law' Results in Murder Conviction: Jury to Decide Whether to Seek Execution*, WASH. POST., May 31, 1997.

30. Ball, *supra* note 27, at 412 n.63. New Jersey sex offender registration and notification laws are known and referred to as "Megan's Law," in memory of Megan Kanka. *Id.* at 413. See also *Doe v. Poritz*, 662 A. 2d 367, 372 (N.J. 1995) (noting that the national effort to enact sex offender notification laws in all 50 states are generally referred to as "Megan's Laws" although they may be coming after the death of another child in similar circumstances as Megan Kanka).

the nation.³¹ This frenzy spawned a “moral panic” at both the national and state level of government,³² to combat what has been termed as a “staggering” number of sexual assaults in the United States,³³ founded on the growing “fear that the nation’s children are at extreme risk.”³⁴ The numbers are indeed staggering: a hefty 300% increase in the number of sex offenders on record over a fourteen year period³⁵ with no end in sight. The number of victims and assaults indicate that sexual offenses are a problem of monumental proportions, especially in the case of children.³⁶

The obvious contempt for these offenders has provided motivation and overwhelming support for passage of special laws aimed at combating child sexual abuse in many state legislatures across the country as well as in Congress.³⁷ Washington state’s version of Megan’s Law passed without a single “no” vote.³⁸ Other versions passed with similar ease in Illinois and Virginia; in Florida, the law passed unanimously without any floor debate.³⁹ The Indiana Senate passed its version, dubbed Zachary’s Law, in June of 1994, with a thirty-nine to nine vote in the Senate.⁴⁰ The Indiana House of Representatives passed its version on a unanimous vote again without any floor debate.⁴¹

A review of sex offender studies beginning in the early 1980s reveal a significant number of sexual offenses, especially offenses where victims are children, are committed by persons under the age of eighteen.⁴² In the State of Hawaii alone during the mid-nineties, juveniles accounted for twelve percent of all forced rapes in the state.⁴³ Estimates suggest that approximately twenty

31. Daniel M. Filler, *Making the Case for Megan’s Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 315-18 (2001). The extensive use of overemphasizing legislative rhetoric concerning offenders, victims, and society helped fan the legislative flames. *Id.* See, e.g., Durant, *supra* note 25, at 293.

32. Filler, *supra* note 31, at 316-318; Durant, *supra* note 25, at 293.

33. Earl F. Martin & Marsha Kline Pruett, *The Juvenile Sex Offender and the Juvenile Justice System*, 35 AM. CRIM. L. REV. 279, 285-86 (1998).

34. Filler, *supra* note 31, at 318.

35. *Id.* The period in question is years 1980-1994.

36. Martin & Pruett, *supra* note 33, at 285.

37. Filler, *supra* note 31, at 316. The final vote tally in Congress was 418 to 0. *Id.*

38. *Id.* at 317.

39. *Id.* at 316-17.

40. S.B. 24, 2nd Reg. Sess. (Ind. 1994); Telephone Interview with Burgess Hicks, Legislative Assistant to State Rep. Jerry Torr, Indiana House of Representatives, (May 30, 2003). Ms. Hicks explained the debate in the General Assembly in roll call sessions which would reveal whether there was any debate and its nature, there was none. See also IN LEGIS-OLD 11-1994, 1994 Ind. Legis. Serv. P.L. 11-1994 (S.E.A.24). See, e.g., Ind. House J. 1994 Sess., Pub. L. No. 11-1994.

41. See Interview with Burgess Hicks, *supra* note 40.

42. Martin & Pruett, *supra* note 33, at 286-87 & n.34.

43. Lee, *supra* at note 23, at 480 n.32.

percent of rapes⁴⁴ and between thirty and fifty percent of all child sexual abuse is committed by juvenile males.⁴⁵ A 1992 study, conducted by the Family Research Laboratory at the University of New Hampshire, found that forty-one percent of sexual assaults on children ages ten to sixteen were committed by other youths.⁴⁶ This astonishing number suggests that other juveniles perpetuated nearly half of all sexual assaults on children.⁴⁷

Much of the fervor concerning child sexual abuse has understandably been from the heinous nature of the acts themselves.⁴⁸ However, other factors account for the advent of these laws. Victims, their families,⁴⁹ and communities have banded together in grassroots organizations to bring attention to the issue, and protect their children⁵⁰ as well as to find fault with the juvenile justice system.⁵¹ Other contributions such as endless legislative rhetoric⁵² and statistical misquoting in political bodies⁵³ contribute to fanning the flames of the Megan's Law conflagration.⁵⁴ The attacks on Megan's Laws have typically been aimed at the adult⁵⁵ pedophiles⁵⁶ or paraphile⁵⁷ child sexual

44. Martin & Pruett, *supra* note 33, at 287 n.35.

45. *Id.*

46. Sander N. Rothchild, *Beyond Incarceration: Juvenile Sex Offender Treatment Programs Offer Youths A Second Chance*, 4 J.L. & POL'Y 719, 720 (1996); Geeta Anand, *Teens Perpetrate Many Sex Attacks, Figures Show*, THE ORANGE COUNTY REGISTER, Mar. 18, 1995, A19, available at 1995 WL 5840066.

47. *Id.*

48. Filler, *supra* note 31, at 346; see, e.g., Telpner, *supra* note 28, at 2039 (noting that the public outrage over the gruesome events prompted state legislators to quickly pass greater restrictions on child sex offenders and enact ten bills in three months).

49. Stacey Hiller, *The Problem with Juvenile Sex Offender Registration: The Detrimental Effects of Public Disclosure*, 7 B.U. PUB. INT. L.J. 271, 272 (1998); see, e.g., Morgan, *supra* note 26 (noting that grassroots activism by mother of Oklahoma victim of a juvenile sex offender challenges the portion of the Oklahoma law that allows offenders to petition for classification).

50. See Lee, *supra* note 23, at 478-79 (stating that "public awareness of the dangers posed by previously convicted sex offenders has increased dramatically"); Telpner, *supra* note 28, at 2067 (noting that Megan's Laws allow communities to construct themselves as zones of safety).

51. *Id.* at 2047. Penology and offender programs have been perceived by the public as unable to impact recidivism, causing intense public discord with the justice system generally. *Id.* Federal sentencing guidelines removing federal parole, and three strikes laws are outcomes of this attitude. *Id.* See, e.g., Morgan *supra* note 26 (noting that victim's mother thinks Oklahoma sex offender law, which allows the juvenile court judge to decide who should be listed in the database, is improper and refuses to quit fighting until it is satisfactorily changed).

52. See Filler, *supra* note 31, at 318 *passim*.

53. *Id.*

54. *Id.*

55. *Id.* at 346. Both Federal and New York Legislators, in pushing for passage of versions of Megan's Laws, have engaged in story telling involving

offenders,⁵⁸ or sex offenders generally, regardless of age. Yet, it is widely known that juveniles form a large part of the offender population.⁵⁹

The juvenile sex offender poses the biggest problem for society and the law,⁶⁰ where their acts cross the bounds of natural normative sexual behavior, and challenge traditional juvenile criminal jurisprudence—the law. In both these areas, the juvenile sex offender is treated as an adult by the Megan’s Laws of most jurisdictions.⁶¹ Acts considered age-appropriate behavior or sex play in the past, now, for various reasons, create reportable

graphic or minute details such as “bearded” men, “specialty” condoms purchased at “Seductions,” and men abducting kids from a “pink bike into a black truck.” *Id.*

56. AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 302.2 (4th ed., 1998) [hereinafter DSM] Pedophilia is sexual activity involving a prepubescent child, usually age thirteen or younger. *Id.* The disorder generally begins in adolescence and those clinically diagnosed with pedophilia are aged sixteen or older and must be at least five years older than their victim. *Id.* They may or may not have a specific gender preference of their victim. *Id.* However, individuals preferring females tend to prefer those in the eight to ten year old range, while those preferring males prefer children that are slightly older. *Id.* Some pedophiliacs are only attracted to children, while some are attracted to children and adults. *Id.* The potential victims may be any child outside the family, however, some pedophiliacs limit the victims to those with family ties, victimizing their own children, stepchildren or relatives. *Id.* It is two times more likely that an individual who prefers males will return to prior criminal habits than one preferring females. *Id.* See also Telpner, *supra* note 28, at 2057 (explaining that a pedophile’s pathology indicates “deviant compulsions so ingrained in their psyches that it takes years of therapy and a monumental vigilance to restrain.”) Most experts consider it a disease or compulsion and may be an involuntary behavior. *Id.*

57. DSM, § 302.9 Paraphilia: is an umbrella term covering intense, recurrent sexually arousing fantasies, urges, or behaviors that involve children or other non-consenting persons occurring over a period of at least six months. Sex acts with children constitute a significant proportion of all reported criminal sex paraphilia acts. DSM classification is by the focus of the paraphilia activities involved such as: § 302.4 Exhibitionism, § 302.81 Fetishism, §302.84 Sadism, etc. *Id.* If no specific acts are present, then use of DSM § 302.9 is appropriate. *Id.*

58. Lee, *supra* note 23, at 480.

59. Anand, *supra* note 46, at A19. See also Rothchild, *supra* note 46, at 720 (noting that sex abuse by children has risen recently).

60. See Martin & Pruett, *supra* note 33, at 282 (explaining that sexual crimes are serious problems in today’s society and could potentially create long-term adult criminals).

61. ROBERT E. FREEMAN-LONGO, REVISITING MEGAN’S LAW SEX OFFENDER REGISTRATION: PREVENTION OR PROBLEM, THE AMERICAN PROBATION AND PAROLE ASSOCIATION, at 12 available at <http://www.appa-net.org/revisitingmegan.pdf> (last visited Oct.2, 2003). Sex Offender registration is done taking into account the youth’s maturity or developmental stage, thereby potentially creating long-term consequences for the convicted juvenile. *Id.*

offenses. Once the juvenile sex offender commits the reportable act, he or she often meets the threshold and comes under the ambit of the Megan's Law, wherein the law often requires the juvenile offender to endure treatment equivalent to an adult offender.⁶²

This paper focuses on the Megan's Laws, their rationales, goals and consequences generally as applied to the juvenile sex offender and the laws' impact on the offender's behavior and future in modern society.

II. BACKGROUND

*"A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."*⁶³

A. Historical Context

1. Crime-Punishment-Rehabilitation-Recidivism: The March of Criminal Justice

*"Sixty percent of [the inmates] were as sure to resume crimes as they were to be discharged from prison; [the other] thirty percent would in all probability do the same; and as to the remainder he could not form a confident opinion."*⁶⁴

The Megan's Law sex offender registration statutes followed a long history of criminal justice reform and juvenile justice administration in the United States.⁶⁵ Criminal punishment during the colonial era was grounded in religion, community and social hierarchy.⁶⁶ Paternalism and religious values were a dominating part of everyday life during the colonial era.⁶⁷ Crime was thought to be "virtually synonymous" with sin "because civil society was created to fulfill the will of God."⁶⁸ Therefore, the

62. Alison G. Turoff, *Throwing Away the Key On Society's Youngest Sex Offenders*, 91 J. CRIM. L. & CRIMINOLOGY 1127, 1135 (2001). There are no special rules or rights given to juveniles adjudicated as sex offenders, they must adhere to the same rules and standards as adult sex offenders. *Id.*

63. JOHN BARTLETT, *FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE* No. 5166 (Nathan Haskell Dole ed., Little, Brown, and Company 1919) (1855) available at <http://www.bartleby.com/100/338.55.html> (last visited Oct. 1, 2003).

64. Telpner, *supra* note 28, at 2046 n.66 (quoting ZEBULON BROCKWAY, *FIFTY YEARS OF PRISON SERVICE: AN AUTOBIOGRAPHY* 166 (reprint ed., 1969 (1912))).

65. *Id.* at 2043.

66. *Id.*

67. *Id.*

68. *Id.*

colonists considered any violation of colonial law a crime against God.⁶⁹ This thinking equated to prescribing public and private morals for behavior, and considered man “a depraved creature, cursed with original sin.”⁷⁰ Grounded in religious belief, confession and repentance were popular aspects of colonial justice, as was punishment, which also served the educational purpose of “correcting and teaching the weak.”⁷¹

This thinking allowed the offender to repent and eventually reintegrate into society, creating a form of early rehabilitation.⁷² Colonial citizens were even allowed to become prominent citizens and hold public office after violating many of the more salacious colonial laws.⁷³ Repeat offenders and those who committed more serious crimes were not invited back into their immediate communities, but instead were branded, mutilated, or forced to endure a “scarlet letter” that publicly marked them as sinners.⁷⁴ Persons considered to be a threat to society were banished or exiled; the underlying message being that these people were “incorrigibly harmful” and that they should be “cut off” from the community.⁷⁵ Repeat offenders fared the same, and could have been put to death as dangers to the well-being of the community.⁷⁶

The nineteenth century altered these common practices and established many of the modern concepts of corrections, including prisons, probation, and parole, which challenged the old colonial penal ways with a new impetus of social forces designed to impact crime.⁷⁷ Crime was a product of harmful influences and evils inherent in society; if crime was to be controlled, the offender must be removed from “the evil context” and rehabilitated.⁷⁸ Under the premise that criminals could be rehabilitated, the emergence of the prison institutions was conceived as the answer.⁷⁹ If a convicted criminal were placed in the right environment, the prison structure, regiment and spiritual atmosphere would set the offenders straight and improve the social structure.⁸⁰

But by the end of the nineteenth century, it could no longer be denied that prisons were not only “brutal and dehumanizing,” but

69. *Id.*

70. Telpner, *supra* note 28, at 2043-44.

71. *Id.* at 2044.

72. *Id.*

73. *Id.*

74. *Id.* See also Bredlie, *infra* note 283, at 512-13; Lee, *supra* note 23, at 513 (arguing that branding sex offenders provokes a “vigilante mentality”; Kabat, *infra* note 169, *passim*).

75. Telpner, *supra* note 28, at 2045.

76. *Id.* at 2044-45.

77. *Id.* at 2045.

78. *Id.*

79. *Id.*

80. *Id.*

also failed to live up to the vision of rehabilitating the offender.⁸¹ A high rate of recidivism hampered the idealistic vision of penal discipline.⁸² Indeed, some felt that prison itself set up the slippery slope of recidivism, placing an “indelible mark” upon prisoners, which outlasts the sentence in a severe way.⁸³ Reformers in the late nineteenth and early twentieth centuries set about trying to mend the broken idea that recidivism was a result of the inhuman penal reality.⁸⁴ Reformers felt that a new approach was needed that involved an attempt at determining which prisoners could be rehabilitated out of the general prison population.⁸⁵ As the twentieth century dawned, so did new penal concepts allowing courts to sentence offenders who were beyond help indefinitely, and release offenders who were suitable for rehabilitation on parole, thereby allowing decent prisoners to reenter society.⁸⁶

During the twentieth century, more effort was put into creating a more comprehensive and rehabilitative corrections model that moved further away from the idea of discipline. This movement was motivated by the belief that if the system improved the lives of offenders through the use of rehabilitative programs, then both the system and the offender would benefit.⁸⁷ Building on this idea, penology noted the special needs and desires of released prisoners, and so began the era of parole with work-release, halfway houses, and community-based programs that allowed the offender to reenter society with an eye toward a successful reemergence.⁸⁸

While these sources of success were promising, there were still problems. The programs could not fully address the ever-present issue of recidivism, and the public wanted more attention given to the problem.⁸⁹ So with crime rising, the “get tough” attitude toward crime became penology’s new mantra.⁹⁰ This was the dawn of yet another approach toward crime and punishment, one establishing the now familiar bright-line sentencing standards found in sentencing guidelines and the “three strikes you’re out” laws, designed to combat the repeat offender.⁹¹

81. Telpner, *supra* note 28, at 2046.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 2047.

88. Telpner, *supra* note 28, at 2047.

89. *Id.*

90. *Id.*

91. *Id.* See also United States Sentencing Commission, 28 U.S.C. § 991(b)(1)(B) (1996). The federal sentencing guidelines are a bright-line sentencing structure and were designed to “provide certainty and fairness in meeting the purposes of sentencing [and to] avoid[] unwarranted sentencing

Imposing punishment on offenders is a consequence of four classical rationales, appropriate to mention here, as they are an amalgamation of the historical aims of the criminal justice system: retribution, rehabilitation, deterrence, and incapacitation.⁹² All four rationales justify the decision to punish; no single aim is the only purpose for punishment.⁹³ Instead, punishment measures must be determined and undertaken with an understanding of the goals desired and the overall purpose of the process being undertaken by a court in sentencing or by a legislature in passing a law.⁹⁴

The more recent changes in punishment theory express the growing tension between society's competing desires to punish criminals and to reform them. The tension between these two different outcomes is frequently a driving force in the criminal justice system, and an important element in the juvenile justice system generally, and in Megan's Laws specifically.

2. *The Rehabilitation Idea: The Emergence of the Juvenile Justice System*

"We as a Nation have failed the juvenile justice system, which, in turn is failing us."⁹⁵

The roots of the modern juvenile justice system reach back to 1899, when Cook County, Illinois established the first juvenile court.⁹⁶ The creation of the juvenile court was the first implementation of a separate judicial system focused solely on the problems and misconduct of youthful offenders.⁹⁷ Juvenile court was driven by the idea that children should not be treated as criminals, but instead the state should act in the role of parent, protecting juveniles from the social harm that has befallen them.⁹⁸ The adult procedures were viewed with disfavor and considered contrary to the goals of a society dealing with youthful offenders.⁹⁹

disparities." *Id.* A typical "three strikes you're out" law provides that a felon, upon conviction of his third felony, is considered a career criminal and is thus subject to imprisonment from 25 years to life. Telpner, *supra* note 28, at 2047 n.82.

92. *Id.* at 2055.

93. *Id.*

94. *Id.*

95. Lee, *supra* note 23, at 497.

96. Martin & Pruett, *supra* note 33, at 280. The Illinois legislature created the special court to resolve legal problems related to dependent, neglected, and delinquent children. *Id.* These children required separate and different treatment before the law. *Id.* See also Mark J. Swearingen, *Megan's Law as Applied to Juveniles: Protecting Children at the Expense of Children?*, 7 SETON HALL CONST. L.J. 526, 549 (1997).

97. Swearingen, *supra* note 96, at 549; Lee, *supra* note 23, at 497-98.

98. Swearingen, *supra* note 96, at 549.

99. *Id.* at 549-50.

Society's role under "*parens patriae*" was not to determine guilt or innocence, "but rather to determine, 'what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.'"¹⁰⁰

The new juvenile justice system "used informal and flexible procedures," designed to understand and cure juvenile delinquency with the ultimate goal of rehabilitation.¹⁰¹ This protective concept known as "*parens patriae*," or the state as parent,¹⁰² was traditionally followed by the states in their "protective role as 'sovereign and guardian of persons under legal disability'."¹⁰³ Rehabilitation was the state's central purpose.¹⁰⁴ Juvenile courts all over the country began to develop a pattern of juvenile adjudication systems that used similar terminology for juvenile legal matters, replacing words such as "arrested" with "detained" and "convicted" with "adjudicated."¹⁰⁵

In the first two decades of the twentieth century, most states created separate juvenile court systems. Designed to endure for most of the twentieth century, the systems had a two-fold purpose.¹⁰⁶ First, was the creation of a venue that was especially

100. Rothchild, *supra* note 46, at 730-31. Juvenile court was created during the Progressive Era, 1880-1920, when widespread urbanization and industrialization was occurring. *Id.* at 730 n.53. Society's new found scientific faith believes that there is a scientific explanation and solution for the social problems of the day. *Id.*

101. Swearingen, *supra* note 96, at 549-50.

102. Rothchild, *supra* note 46, at 721 & n.14. "*Parens patriae*" literally means "parent of the country." *Id.* at n.14. It was originally used in England in the 1500's and referred to minors who inherited an estate from deceased parents. *Id.* The Chancery Court would oversee the estate until the child turned 21. *Id.* Since the state acts as the parent of the country, it had the duty to take over the role of the child's parents since the natural parents were dead. *Id.*

103. *Id.* at 721.

104. *Id.* at 721-22.

105. Stacie A. Howard & Craig T. Wormley, *Youth on Trial: Defending a Juvenile Sex Offender*, LOS ANGELES DAILY JOURNAL, Vol. 111, No. 79 (April 24, 1998), available at <http://www.criminalatty.com/pages/defending.html> (last visited Oct. 4, 2003).

106. Martin & Pruett, *supra* note 33, at 280; See also Victor I. Vieth, *When the Child Abuser is a Child: Investigating, Prosecuting and Treating Juvenile Sex Offenders in the New Millennium*, 25 HAMLIN L. REV. 47, 48-49 (2001) (quoting Minnesota Supreme Court Justice Sandra S. Gardebring). The Minnesota Juvenile Court has three purposes:

- 1) To provide a system with rehabilitation as its primary objective and with punishment as its secondary goal;
- 2) To have a highly individualized response focusing on a disposition tailored to the needs of the offending child as opposed to the seriousness of the offense; and
- 3) To give the juvenile court judge great discretion in designing the disposition order and to keep the juvenile court proceedings secret, to protect offenders from lifelong stigma associated with an adolescent

established to deal with children's special needs and to provide treatment and rehabilitation rather than criminal punishment.¹⁰⁷ Second, the system provided protection and treatment to other juveniles who were in need of care due to negligence, abuse, or were simply ungovernable.¹⁰⁸

The rehabilitative model of juvenile justice remained the predominant institution for dealing with juvenile offenders for approximately thirty years, until a shift began away from how one category of juveniles, the delinquent, was handled.¹⁰⁹ The shift in approach for delinquents went from one where the court's purpose was primarily to act in the youth's best interest, to one where the court's attitude favored punishment.¹¹⁰ One of the reasons for the shift was the growing pessimism in society during the 1970s concerning the weakening effect of the juvenile justice system on offenders.¹¹¹ Consequently, there were some departures from the rehabilitative "*parens patriae*" model.¹¹² However, the system had to account for both its central duty of rehabilitation and for the growing concern for community safety.¹¹³ Another reason for the shift was the "result of statistics that show[ed] that juveniles are not only committing more crimes, but increasingly serious and violent crimes."¹¹⁴ As state legislatures across the country began to increase the punishments for juvenile offenders,¹¹⁵ effectively criminalizing portions of the juvenile code or merging it into the adult criminal codes, they also sought ways to place children not suitable for rehabilitation into the adult courts.¹¹⁶

In 1984, California amended the language of the official policy and purpose for its juvenile law and placed an increased emphasis

error in judgment.

107. Martin & Pruett, *supra* note 33, at 280.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 280-81.

112. Rothchild, *supra* note 46, at 721.

113. Martin & Pruett, *supra* note 33, at 280-81 & n.7. See also Barry Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 971 (1995) (noting that while retaining the rehabilitative ideals, juvenile courts always retained some ability to deny offenders its jurisdiction and remand them to adult criminal court depending on the offense, charge, and prior history).

114. Swearingen, *supra* note 96, at 553.

115. Rothchild, *supra* note 46, at 722.

116. Martin & Pruett, *supra* note 33, at 281 nn.9-10. In the last thirty years, one-quarter of the states have rewritten their juvenile codes to "downplay[] the role of rehabilitation in the child's 'best interest' and acknowledge the importance of public safety, punishment, and individual accountability in the juvenile justice system." *Id.* at 281 n.9. "Procedural and substantive convergence of juvenile and criminal courts' has transformed the former from 'nominally rehabilitative welfare agencies into scaled-down, second-class criminal courts for [youth].'" *Id.* at 281 n.10.

on punishment.¹¹⁷ This was part of a movement to focus less on rehabilitation and more on punishment of juveniles as a direct response to the violent acts increasingly committed by juvenile offenders.¹¹⁸ Within the last decade, Indiana has also amended the policy and purpose for its juvenile law to reflect not only the need for "treatment, and rehabilitation" of juvenile offenders, but also the need to "protect the public" and "promote[] public safety and individual accountability by the imposition of appropriate sanctions."¹¹⁹

117. Howard & Wormley, *supra* note 105; *see, e.g.*, Cal. Welf. & Inst. § 202 (1998)

§ 202: Purpose; protective services; reunification with family; guidance for delinquents; accountability for objectives and results; punishment defined:

(a) The purpose of this chapter is to provide for the protection and safety of the public and each minor under the jurisdiction of the juvenile court and to preserve and strengthen the minor's family ties whenever possible, removing the minor from the custody of his or her parents only when necessary for his or her welfare or for the safety and protection of the public . . .

(e) As used in this chapter, 'punishment' means the imposition of sanctions. It shall not include a court order to place a child in foster care as defined by Section 727.3. Permissible sanctions may include the following:

(1) Payment of a fine by the minor.

(2) Rendering of compulsory service without compensation performed for the benefit of the community by the minor.

(3) Limitations on the minor's liberty imposed as a condition of probation or parole.

(4) Commitment of the minor to a local detention or treatment facility, such as a juvenile hall, camp, or ranch.

(5) Commitment of the minor to the Department of the Youth Authority.

'Punishment', for the purposes of this chapter, does not include retribution.

(f) In addition to the actions authorized by subdivision (e), the juvenile court may, as appropriate, direct the offender to complete a victim impact class, participate in victim offender conferencing subject to the victim's consent, pay restitution to the victim or victims, and make a contribution to the victim restitution fund after all victim restitution orders and fines have been satisfied, in order to hold the offender accountable or restore the victim or community.

118. Howard & Wormley, *supra* note 105; Swearingen, *supra* note 96, at 552-54.

119. IND CODE § 31-10-2-1 (1998). *See, e.g., E.H. v. State*, 764 N.E.2d 681, 686 (Ind. Ct. App. 2002) (applying the policy and purpose of the Indiana statute by vacating the sentence imposed by the district court because no evidence existed as to the offender's threat to the community and therefore the sentence did not promote the best interests of the juvenile or the community); *Clemons v. State*, 317 N.E.2d 859, 861 (Ind. Ct. App. 1974) (noting that the judge in juvenile court, in making decisions to either waive or retain jurisdiction, are influenced by the structure and purpose of the juvenile justice system itself).

3. Awareness and a New Breed of Offender: The Early Emergence of Sex Offender Laws

“Evidence that adults physically abuse children first jolted the national consciousness about 30 years ago. A new shock followed in the 1970s—that adults sexually abuse children.”¹²⁰

Until the 1930s, sex offenders were thought to be morally culpable for their crimes and therefore were dealt with in the criminal justice system.¹²¹ Then, a small number of states concluded that sex offenders were better dealt with in the mental health system.¹²² The first generation of sex offender laws, called “sexual psychopath statutes” were enacted in Illinois initially, followed by in Minnesota, Michigan, Massachusetts, Ohio, Wisconsin, and California.¹²³ Each statute had their own version that allowed for some kind of involuntary commitment of convicted offenders, or in some cases, offenders who were merely charged, but never convicted, of a sex offense.¹²⁴ Sex offenders found to be mentally ill or dangerous were confined to inpatient treatment facilities for care and control.¹²⁵

In the 1960s, approximately half the states had enacted some kind of similar sexual predator law that offered one of two brands of treatment to these new sexual offenders.¹²⁶ One version of the law allowed pre-conviction treatment once the offender was charged with a sex offense; the other allowed post-conviction treatment that required a conviction of a sex offense before the psychopath treatment could begin, which usually consisted of institutional or community-based treatment in lieu of imprisonment.¹²⁷ These laws were considered legitimate, because they both fulfilled the states’ “*parens patriae*” duty by treating

120. Claudia Morain, *When Children Molest Children, Adults Often Overlook Young Abusers*, S.F. CHRON., May 4, 1994, at F7 available at 1994 WL 4052299.

121. John Q. LaFond, *Special Theme: Sex Offenders: Scientific, Legal, and Policy Perspective: Sexually Violent Predator Laws and Registration and Community Notification Laws: Policy Analysis: The Costs of Enacting A Sexual Predator Law*, 4 PSYCH. PUB. POL. & L. 468, 469 (1998).

122. *Id.*

123. *Id.* at 469-70 & n.10.

124. *Id.* at 469-70 & 504 & n.10. Illinois enacted a sexual psychopath law in 1938. Sexual Psychopath Act, Ill. Comp. Stat. Michigan enacted a similar statute applicable to sexual psychopaths in 1937, but it was struck down by the Michigan Supreme Court on double jeopardy and due process grounds. LaFond, *supra* note 121, at 470 n.10. See Mich. Stat. Ann. 1938 Cum. Supp. § 28.1073(1) (1937); *People v. Frontczak*, 281 N.W. 534, 536-37 (Mich. 1938). *But see* *People v. Chapman*, 4 N.W.2d 18, 27 (Mich. 1942) (holding that a similar civil commitment was enforceable as the statute is not in conflict with the constitutional right against self-incrimination).

125. LaFond, *supra* note 121, at 470.

126. *Id.*

127. *Id.*

those in need of treatment, and satisfied their duties with respect to its police powers to protect society, its duty as sovereign.¹²⁸ This mental health approach was consistent with the prevalent attitude of rehabilitation of offenders that dominated the 1960s and early 1970s, and was a “bona fide” effort to treat sex offenders so that they may return to normal society.¹²⁹

By the 1960s, the women’s rights movement had begun spreading an awareness of women’s personal sexual rights, giving birth to increased awareness of issues of rape, sexual assault, and domestic abuse against women.¹³⁰ This new perception of previously-hidden behaviors demanded a new response from legislatures as well as the criminal justice system.¹³¹

Revelations of sexual abuse of children by adults surfaced by in the 1970s as well.¹³² However, rehabilitation of sexual offenders through the mental health approach remained the dominant approach to treatment during most of these two decades.¹³³ California repealed its mentally disordered sex offender commitment laws after the California Legislature “recognize[d] and declare[d] that the commission of sex offenses [was] not itself the product of mental disease,” which suggested that “coercive rehabilitation simply didn’t work.”¹³⁴

The 1980s saw other states follow California in repealing their mental disordered sex offender legislation, seeing the problem as one for the criminal justice system, not one for the mental health profession.¹³⁵ The 1980s brought even further attention to violent crime, which expanded public concern over unaddressed needs of violent crime victims,¹³⁶ and the beginning of a change in the nation’s view of sex offenders, which stemmed from the “law and order” movement that swept the country.¹³⁷ Public policy no longer supported rehabilitating sex offenders as a primary goal; the premise that treatment would reduce crime and make a safer nation no longer existed because of the soaring crime rates during the 1970s and 1980s.¹³⁸

128. *Id.* at 471 & n.15.

129. *Id.* at 471.

130. CENTER FOR SEX OFFENDER MGMT., OFFICE OF JUSTICE PROGRAMS-NAT’L. INST. OF CORRECTIONS, AN OVERVIEW OF SEX OFFENDER COMMUNITY NOTIFICATION PRACTICES: POLICY IMPLICATIONS AND PROMISING APPROACHES, 1 (Madeline M. Carter et al., eds., 1997), [hereinafter APPROACHES, CSOM] available at <http://www.csom.org> (last visited Sept. 24, 2003).

131. *Id.*

132. *Id.*; Morain, *supra* note 102, at F7.

133. LaFond, *supra* note 121, at 471.

134. *Id.* at 472-73.

135. *Id.* at 473.

136. APPROACHES, CSOM, *supra* note, 112 at 1.

137. LaFond, *supra* note 121, at 473.

138. *Id.* The violent crime rate rose fifty percent from 1971-1980. *Id.*

During this period, critics quickly pointed out that sex offenders were using the mental illness diagnosis and the mental health system as a way to escape accountability and avoid punitive prison terms for their crimes.¹³⁹ Some states enacted various sentence schemes to combat the growing sex offender problem moving toward a more aggressive stance toward sex offenders, seeking more prosecutions and longer prison terms.¹⁴⁰ By 1986, only five states had sex-offender laws relating to registration, and this registration was strictly for law enforcement agencies for official investigations, not for public knowledge.¹⁴¹ The ousting of sex offenders from American communities was about to rise to the top of the priority list with the case of a child molester in Washington State.

In 1989 and 1990, two separate crimes horrified Washington State and stoked the fires against sex offenders, especially those targeting children. Westley Dodd was convicted and executed for the abduction, rape and murder of two brothers.¹⁴² Shortly afterwards, a separate sexual assault was committed on a Tacoma boy who was later found naked and wandering a wooded area.¹⁴³ In both of these cases, the offenders who committed the crimes had long records of sexual offenses and past assaults, which prompted the Washington legislature in 1990¹⁴⁴ to expedite passage of the nation's first sex offender registration and notification law that "require[d] law enforcement to release and disseminate the registration information when 'relevant . . . [and] . . . necessary to protect the public.'"¹⁴⁵ Versions of the Washington law were also passed in several other states and were called "sexual predator laws" allowing for the confinement of offenders beyond their sentences if they were deemed to be at risk of offending again.¹⁴⁶ These laws differed from the sex offender laws of years past, which were essentially civil commitment laws, and instead were

139. *Id.* "Some legislatures came to feel that offenders were being released prematurely under [sexual psychopath] statutes, with a consequent danger to public safety." *Id.* at 473 n.29.

140. *Id.* at 473.

141. Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163, 164-65 (2003).

142. *Id.* at 165.

143. *Id.*

144. *Id.*

145. *Id.*; APPROACHES, CSOM, *supra* note 130, at 2. See WASH. REV. CODE § 4.24.550(1) (2003).

146. LaFond, *supra* note 121, at 474 & n.38. These states include: Washington, WASH. REV. CODE § 71.06.005 (2003), Florida, FLA. STAT. ch. 775.21 *et seq.* (2001), Wisconsin, WIS. STAT. § 980.01 *et seq.* (2003), and Kansas, KAN. STAT. § 59-29(a)01 *et seq.* (2001). See also APPROACHES, CSOM *supra* note 130, at 2 (noting that Louisiana and Oregon passed laws in 1992 and 1993 in response to heinous sexual assaults).

structured to allow these states to confine the offender longer if they could establish the confinement criteria set forth in the sexual predator statute.¹⁴⁷ The state had the burden of proving the offender was dangerous and showed little hope of rehabilitation by society, which then allowed the state to retain custody of the offender indefinitely as a threat to public safety.¹⁴⁸

With the clear trend toward punishment of sex offenders, treatment was still available, but not the central focus.¹⁴⁹ Civil commitment laws for sex offenders on the national level fell into disuse.¹⁵⁰ The Courts upheld challenges on double jeopardy and ex post-facto grounds for states attempting to keep sex offenders incarcerated who had served their time or received relatively light sentences.¹⁵¹ The body of American law known as sex offender laws was about to accelerate in new directions. More empirical research revealed a greater problem than earlier had been expected, and there would be new emphasis on controlling these offenders as the treacherous stories of sex offenders, like those at the beginning of this paper, made the news.

III. WHAT IS MEGAN'S LAW

*"Stern treatment is needed for sex offenders. . . because so many refuse to admit that their behavior is wrong or unusual. . . ."*¹⁵²

A. *The Catalyst*

1 *The Beginning of the Movement Towards Registration and Notification*

*A crime that sparked an almost overnight national movement to notify communities when sex offenders move in.*¹⁵³

Megan's Laws¹⁵⁴ have been enacted in all 50 states in

147. LaFond, *supra* note 121, at 474.

148. *Id.*

149. *Id.* at 474-75.

150. *Id.*

151. *Id.* at 475-76 & nn. 39-44. *See also* Kansas v. Hendricks, 521 U.S. 346, 371 (1997) (holding that after a precommitment judicial finding of dangerousness, and that the person suffers from a mental abnormality or disorder, a state may impose a involuntary commitment of a person who cannot control himself and poses a danger to the public).

152. Anand, *supra* note 46, at A19.

153. Russakoff, *supra* note 29, at A1.

154. "Megan's Law" as used throughout this article, refers to laws allowing public access to information about released sex offenders. These laws may include a requirement of registration of sex offenders, blood testing for DNA samples, civil commitment of offenders, and lifetime monitoring and supervision.

America¹⁵⁵ and are largely a by-product of the tragic rape and murder of seven-year-old Megan Kanka, on July 29, 1994, in Hamilton Township New Jersey.¹⁵⁶ Megan's death was gruesome; the killer covered her head with a plastic bag and then beat her, strangled her with a belt, and raped her lifeless body.¹⁵⁷ Megan was killed by a neighbor, Jesse Timmendequas, who lived across the street from Megan's house.¹⁵⁸ Megan was looking for a young playmate that lived next door to Timmendequas, but who was not home at the time.¹⁵⁹ She instead saw Timmendequas outside, and asked to see his new puppy she had heard about.¹⁶⁰ Timmendequas coaxed Megan to his bedroom under the pretext of showing her the puppy and within minutes, she was beaten and strangled to death.¹⁶¹ The tragedy grew more bizarre after the slaying; Timmendequas dumped Megan's lifeless body in a wooded park near the homes and later joined searchers to help locate the missing girl.¹⁶²

Unknown to the families in that New Jersey neighborhood Timmendequas was a twice-convicted sex offender,¹⁶³ having been convicted of attacks on children in 1979 and 1981,¹⁶⁴ and was described by a judge in sentencing as being a "compulsive, repetitive sexual offender."¹⁶⁵ In spite of this, Timmendequas served only seven years in prison for those earlier sex crimes.¹⁶⁶ Upon being released he found his way into Megan's Hamilton Township neighborhood. Megan's story twisted even tighter when it was learned that Timmendequas had been living in the house for over a year,¹⁶⁷ rooming with two other recently released sex offenders who had all met in the sex offenders' prison where they were serving their time.¹⁶⁸ In the months after Megan's death in 1994 three states and the federal government passed registration and notification laws¹⁶⁹ and in the years following Megan's tragic

155. Hiller, *supra* note 49, at 276 n.36; Garfinkle, *supra* note 141, at 167; Brian M. Epstein, *Megan's Law: How Should the State of Massachusetts Apply its Sex Offender Registry Laws in Light of Other Jurisdictions*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 247, 247 (2002).

156. Hiller, *supra* note 49, at 272.

157. *Id.*; Russakoff, *supra* note 29, at A1.

158. Russakoff, *supra* note 29, at A1.

159. *Id.*

160. *Id.*

161. *Id.*

162. Lee, *supra* note 23, at 478.

163. *Id.*

164. Epstein, *supra* note 155, at 247.

165. *Id.*

166. *Id.*

167. Russakoff, *supra* note 29, at A1; Lee, *supra* note 23, at 478.

168. Russakoff, *supra* note 29, at A1.

169. Alan R. Kabat, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake*, 35 AM. CRIM. L.

death, twelve states swiftly passed a version of Megan's Law into the law books.¹⁷⁰ The revelations surrounding Megan's death, compelled the federal government,¹⁷¹ the state of New Jersey,¹⁷² and all fifty states¹⁷³ to eventually take action to combat the predatory child sex offenders preying on "our nations most precious resource"—our children.¹⁷⁴

B. *The Response*

1. *Avenging Megan-Registration and Notification of Sex Offenders*

*"We must not allow this little girl's life to be taken in vain."*¹⁷⁵

Criminal registration laws were nothing new in federal jurisprudence or in that of some states. In the 1950's, federal law required any citizen who was addicted to, or used narcotics to register, before crossing the border,¹⁷⁶ and there were other registration schemes for many past unpopular groups, such as the Communists, foreign aliens, foreign agents, and gamblers.¹⁷⁷ California and Nevada currently have laws in place that require other types of offenders to register upon entering the respective states if the past offender will remain for a statutory duration of time.¹⁷⁸

REV. 333, at 359-APP. 1 (1998).

170. *Id.*

171. Hiller, *supra* note 49, at 272. On May 7, 1996 a unanimous House of Representatives passed an amendment to the Violent Crime Control and Law Enforcement Act of 1994 that disclosed registration information to the general public. *Id.* See 42 U.S.C. § 14071 (1994).

172. Garfinkle, *supra* note 141, at 166. On October 31, 1994, Governor Christine Todd Whitman signed "Megan's Law." *Id.* See N.J. STAT. ANN. §§ 2C:7-1 through 2C:7-17 (2003).

173. Hiller, *supra* note 49, at 276 n.36.

174. *Id.* at 271-72.

175. 142 CONG. REC. E732 (daily ed., May 8, 1996) (statement of Rep. Martini). See also Garfinkle, *supra* note 141, at 169 n.42 (noting that impassioned pleas were common in both Congress and in state legislatures over passage of Megan's Laws nationwide).

176. Ryan A. Boland, *Sex Offender Registration and Community Notification: Protection, Not Punishment*, 30 NEW ENG. L. REV. 183, 189 & n.29 (1995). For further information on this legislation, see 18 U.S.C. § 1407 (1958), repealed by PUB. L. NO. 91-513, Title III, §1101(b)(1)(A), Oct. 27, 1970.

177. Telpner, *supra* note 28, at 2049.

178. Boland, *supra* note 176, at 189 n.30. California requires registration of controlled-substance offenders and Nevada's statute requires registration of a class of habitual offenders. See, e.g., CAL. HEALTH & SAFETY CODE § 11590 (2003); NEV. REV. STAT. § 179C.010 *et seq.* (2002). See also Matson & Lieb *infra* note 202, at 3; but see Lambert v. California, 355 U.S. 225, 229 (1957) (noting that felony registration ordinance was, at most, a technique designed

Registration of sex offenders requires a working definition of just what is a sex offender generally, which would be helpful in understanding these offenders—both adult and juvenile. While an exact definition of the behavior is illusory,¹⁷⁹ it is important to have a starting point. The adult offender is typically someone who has been convicted of a sex crime, usually defined by the respective state's Megan's Law statute, which may also include elements other than sex crimes, such as kidnapping or battery of a child under a certain age, or someone who has been adjudicated as a "sexually dangerous person."¹⁸⁰ Under this definition, typically one who has been adjudicated as a youthful sex offender, or a juvenile convicted as an adult for a sex offense defined in the jurisdictions Megan's Law statute, will qualify.¹⁸¹ Both types of offenders typically must register with law enforcement authorities in the jurisdiction where the offender lives or, in some cases, works.¹⁸² Other helpful definitions exist for both adult and juvenile offenders within the social work genre; they loosely follow what social workers in the field have established as "contact that is sexual in nature and that occurs without consent, without equality, and as a result of coercion, manipulation, game-playing, or deception."¹⁸³

A caveat concerning juveniles is appropriate here: the behavioral science literature makes it clear that any "hard and fast rules for defining abnormal, deviant, or inappropriate juvenile sexual behavior are impossible to sustain" and must be viewed broadly.¹⁸⁴ Consequently, "it is the nature of the sexual activity and the circumstances in which it takes place that define the act as one deserving of legal intervention."¹⁸⁵

2. *The Federal Response*

*"The House passed legislation Thursday mandating automatic life sentences for two-time federal child sex offenders. . . . 'Take these sick monsters off the streets,' said the bill's sponsor, Rep. Mark Green (R. Wis.). 'End the cycle of horrific violence that is every child's nightmare.'"*¹⁸⁶

for the convenience of law enforcement agencies).

179. Martin & Pruett, *supra* note 33, at 282.

180. Epstein, *supra* note 155, at 251.

181. *Id.*

182. *Id.* at 252.

183. N.C. Div. of Social Services, Jordan Inst. for Families, UNDERSTANDING JUVENILE SEX OFFENDERS, CHILDREN SERVICES PRACTICE NOTES, Vol. 7, No. 2, May 2002 available at http://www.ssw.unc.edu/fcrp/Cspn/vol7_no2/understand_jso.htm [hereinafter OFFENDER NOTES].

184. Martin & Pruett, *supra* note 33, at 293.

185. *Id.* at 282.

186. '2 Strikes' Measure Against Pedophiles is Passed by House, CHI. TRIB., Mar. 15, 2002, at A.17 [hereinafter *Measure Passed*].

Even before the attack on Megan, Congress had begun debating the merits of the first of three sex offender registration laws that it would eventually pass. The first would allow states to receive a portion of a \$100 million federal grant to cover expenses for enacting such laws, which was part of the Violent Crime and Law Enforcement Act of 1994.¹⁸⁷ This act, also known as the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act, (herein the Wetterling Act),¹⁸⁸ compels "states to register sex offenders convicted of a wide range of sexual offenses, regardless of the age of the victims, as well as those convicted of certain nonsexual offenses against children."¹⁸⁹ The Wetterling Act, passed in September of 1994,¹⁹⁰ gave wide latitude to the states to fashion reporting methods, and great desecration in notification to the public.¹⁹¹ "[T]he compelling necessity for a quick and effective remedy against the extreme threat of sex offenders in society has prompted the federal government to act and the state legislatures to follow."¹⁹²

In 1996, Congress enacted two additional sex offender laws. The first was coined the federal version of "Megan's Law,"¹⁹³ and required all 50 states to adopt some form of uniform community notification of an offender's presence in the community.¹⁹⁴ The second permitted states to distribute the registration information as each states' dissemination laws permitted.¹⁹⁵ These registration statutes varied greatly among jurisdictions in their key elements, such as what triggers a requirement to register, who gets what information and how, how the information is accessed, and how notification will occur.¹⁹⁶ These "Megan's Laws" expressed as their goal community notification, and "were [enacted] to prevent crime" by "letting community residents know that sex offenders lived in

187. Garfinkle, *supra* note 141, at 166; *See also* PUB. L. No. 103-222, 108 Stat. 2038 (1994).

188. Filler, *supra* note 31, at 330 n.95; Jacob Wetterling was a ten-year-old, living in the small town of St. Josephs, Minnesota, when he was abducted at gunpoint by a masked man in October, 1989. *Id.* The offender fled on foot with Jacob, who has never been found. *Id.*

189. *Id.* at 327; *See also* PUB. L. NO. 103-322, 108 Stat. 2038 (1994) (codified as amended at 42 U.S.C. § 14071 (1994 & Supp. IV 1998)).

190. Kabat, *supra* note 169, at 359, App. 1.

191. Garfinkle, *supra* note 141, at 166; Lee, *supra* note 23, at 505. If states refuse to pass legislation for sex offender registration states faced the loss of federal funding. *Id.*

192. *Id.* at 492. *See e.g.* Doe v. Poritz, 662 A.2d 367, 372-73 (N.J. 1995).

193. Garfinkle, *supra* note 141, at 167. *See also* Pub. L. No. 104-145, 110 Stat. 1345 (1996) (amended at 42 U.S.C. § 14072 (Supp. IV 1998)). Act received the name "Megan's Law" under the authorship of N.J. Rep. Zimmer.

194. Filler, *supra* note 31, at 327.

195. Garfinkle, *supra* note 141, at 167.

196. Telpner, *supra* note 28, at 2048-49.

their neighborhoods, and to improve law enforcement, [by] providing police with additional information to investigate sex offense cases.”¹⁹⁷ The final federal act was embodied in the Pam Lyncher¹⁹⁸ Sexual Offender Tracking and Identification Act, passed in October, 1996.¹⁹⁹ This Act was designed to create a national database with the FBI, with contributions from all states, in order to track the whereabouts of sexual offenders in communities nationally.²⁰⁰

The “essence” of Megan’s Law is the notification component, which is designed to “facilitate public access” to the offender information that the police have in their registry, thereby allowing persons interested in knowing about an offender to have free access to the information.²⁰¹ This access or notification, can occur in two forms: (1) “active,” which requires police to notify the community or residents involved directly, or (2) “passive,” where the public is allowed to inspect the information on demand as needed.²⁰²

3. *The States’ Response*

“There is no greater crime, I do not believe, than a child that has been molested, perhaps killed, or not killed but sexually molested by somebody else.”²⁰³

Megan’s parents and a wide assortment of victim’s advocates and political leaders had campaigned state legislatures and Congress to enact community notification laws to warn community residents of the presence of sex offenders in their neighborhoods after Megan’s death.²⁰⁴ By 1999, all 50 states had some form of Megan’s Law on the books.²⁰⁵ As previously mentioned, the states are allowed to provide notification to the community as they see fit and as their respective state laws permit. These disclosure methods vary between states in terms of who can view the offender information and how they can do it.²⁰⁶ The federal Wetterling Act guidelines do not require states to register juveniles who are adjudicated or who otherwise meet the threshold

197. APPROACHES, CSOM, *supra* note 130, at 2.

198. Filler, *supra* note 31, at 330 n.95. Pam Lyncher was a Texas anticrime advocate who died in a plane crash. *Id.*

199. *Id.* at 327; *see also* Pub. L. No. 104-236, 110 Stat. 3093 (codified as amended at 42 U.S.C. § 14072 (Supp. IV 1998)).

200. Telpner, *supra* note 28, at 2049 n.103.

201. *Id.* at 2050.

202. *Id.*

203. Garfinkle, *supra* note 141, at 171 n.53 (*quoting* U.S. Rep. Upton).

204. APPROACHES, CSOM, *supra* note 130, at 2.

205. *See* note 137 *supra*.

206. Telpner, *supra* note 28, at 2051.

to be considered sex offenders.²⁰⁷ States were allowed to address the juvenile sex offender registration issue as they thought necessary.²⁰⁸

The approaches vary. In Ohio, for instance, the local county sheriff where the offender is residing is responsible for notification upon receipt of an offender's "intent to reside" form, which is to be provided by the offender either from his or her correctional facility or his or her past residential law enforcement agency.²⁰⁹ The sheriff must also notify occupants of adjacent homes to the offender's and all occupants of homes within 1000 feet of the offender's place of residence.²¹⁰ The offender's records in possession of the sheriff are public records, and may be viewed on demand from citizens.²¹¹

Indiana made its own efforts towards registration of sex offenders, enacting their version—Zachary's Law.²¹² Initially, Indiana's sex offender law struck a middle ground, allowing public access and direct notification, requiring release of the sex offender registry to all schools and state agencies. Private agencies that provide services to children or who license persons who will work with children may also request the registry.²¹³

Both Ohio²¹⁴ and Indiana²¹⁵ require registration of juvenile sex offenders if the child is adjudicated delinquent for committing an act that would be a sexual offense if committed by an adult. The child must be at least 14 years of age, and classified by a juvenile or adult court as a sex offender, or is adjudicated as likely to repeat the offense.²¹⁶ Indiana goes a step further by requiring a

207. Center for Sex Offender Management, Office of Justice Programs-Natl. Inst. of Corrections, UNDERSTANDING JUVENILE SEXUAL OFFENDING BEHAVIOR: EMERGING RESEARCH, TREATMENT APPROACHES AND MANAGEMENT PRACTICES, Dec. 1999, available at <http://www.csom.org> (last visited Mar. 6, 2003) [hereinafter UNDERSTANDING, CSOM].

208. *Id.*

209. OHIO REV. CODE ANN. § 2950.11 (2002).

210. *Id.*

211. *Id.* § 2950.11(e).

212. *Id.*; See also Kabat, *supra* note 169, APP. 1; see, e.g., P.L. 11-1994 § 7, IND. CODE § 5-2-12-1 through 13 (2002).

213. Telpner, *supra* note 28, at 2050; see also IND. CODE § 5-2-12-11 (Burns 2002).

214. OHIO REV. CODE § 2950.03 (2002); See, e.g., State v. Grimes, 757 N.E.2d 413, 415-16 (Ohio Ct. App. 2001) (noting that sexual classification must be supported by clear and convincing evidence, which must be supported by particular facts and evidence).

215. IND. CODE 5-2-12-4 (2002).

216. See, e.g., In re G.B., 709 N.E.2d 352, 354 (Ind. Ct. App. 1999) (holding that sex offender registration act applies to juvenile sex offenders, the trial court has discretion only in deciding whether a juvenile is likely to be a repeat offender, and such a finding will result in the juvenile being placed on the registry); accord K.J.P. v. State, 724 N.E.2d 612, 615 (Ind. Ct. App. 2000) holding that there is no error, where juvenile court ordered juvenile offender

finding by a court, based on clear and convincing evidence that the juvenile is likely to re-offend.²¹⁷ Ohio has recently adopted a three tier rating system for juvenile offenders fourteen to eighteen years of age, with a different registration scheme for each of the three different categorizes.²¹⁸

Kentucky classifies juvenile sex offenders as anyone “under the age of eighteen years old [at the time of the offense], who is not actively psychotic or mentally retarded and who has been adjudicated guilty . . . of a sexual offense.”²¹⁹ Kentucky makes the label of juvenile sex offender mandatory if the juvenile is convicted of an act or an attempted act that is either a felony or a misdemeanor sex offense under the Kentucky criminal code, or uses a minor in a “sexual performance.”²²⁰ For any juvenile “adjudicated or who may be declared a sex offender,” there is a mandatory sex offender assessment by the court to ensure state and federal constitutional safeguards are followed.²²¹ Juvenile sex offenders under Kentucky law must register subject to Kentucky’s Megan’s Law.²²²

The various Megan’s Laws enacted throughout the country differ in their juvenile registration schemes. Some states with Megan’s Laws that include juveniles, such as Delaware and Rhode Island, register juvenile sex offenders and maintain those records as public until the offender turns 25 years old.²²³ Thereafter, the records are destroyed.²²⁴ Texas requires juvenile sex offenders to register, but only through the offender’s parole period, and not at all past age twenty-one when those records are destroyed.²²⁵ Michigan, South Carolina, and California, at the discretion of the

to register as sex offender before finishing court-ordered counseling, where there was clear and convincing evidence the juvenile was likely to repeat sex offense).

217. IND. CODE § 5-2-12-4(6) (2003).

218. Amanda Iacone, *Juvenile Sex Law Top Priority for Senate*, THE POST (Athens, Ohio & Ohio Univ.), Apr. 25, 2001, Online Edition available at <http://thepost.ohiou.edu/archives3/apr01/042501/news8.html> (last visited Sept. 26, 2003). See also OHIO REV. CODE ANN. § 2950.09 (2002) (stating that a juvenile offender registrant must register annually for ten years, a habitual offenders must register annually for twenty years, and a sexual predator must register every three months for life) (emphasis added).

219. KY. REV. STAT. § 635.505 (2) (2000). See also Dept. of the Public Advocate, *Juvenile Sex Offenders*, THE ADVOCATE, Nov. 2002, available at <http://dpa.state.ky.us/library/advocate/nov02/juvsex.html> (last visited Sept. 26, 2003).

220. KY. REV. STAT. § 531.320 (1998), § 635.505, § 635.510 (2000).

221. *Id.* § 635.505

222. *Id.*

223. Scott Matson & Roxanne Lieb, *Sex Offender Registration: A Review of State Laws*, Washington State Institute for Public Policy-Executive Summary (Rev. July 1996), available at <http://www.wsipp.wa.gov/reports/regsrtn.html>.

224. *Id.*

225. *Id.*

court, may apply lifetime registration requirements to juvenile offenders.²²⁶ California however does not release juvenile offenders' names and only releases other information upon request.²²⁷ Alabama's level of notification depends on the size of the community in which the offender intends to live.²²⁸ Georgia requires all sex offenders, juvenile or adult, to "notify both the sheriff and the superintendent of the public school district where the offender intends to [live]."²²⁹ Kansas is perhaps the most protective of the juvenile sex offender. In Kansas, juvenile adjudications are not considered criminal convictions for purposes of the Kansas sex offender law.²³⁰

New Jersey was quick to follow the federal Wetterling Act with passage of its sex offender registration law in October of 1994.²³¹ The New Jersey's notification scheme is based on the courts assessment of the likelihood of recidivism of the offender, linking the risk of re-offense to the scope of disclosure.²³² If the offender has a "moderate" risk, notification of the offender's presence in the community is made "to community organizations such as schools and churches."²³³ If the risk of recidivism is "high," then "notification is also provided to 'members of the public, likely to encounter [the offender].'"²³⁴ New Jersey's Megan's Law clearly extends to juvenile offenders by its use of the words "[a] person...who has been adjudicated delinquent... for the commission of a sex offense" in the first sentence of the statute.²³⁵

In summary, "Megan's Laws require convicted sex offenders to register certain personal information with local law enforcement officials upon release from [custody]" or upon their arrival in the community or jurisdiction.²³⁶ There are two basic parts to Megan's Laws. One is a registration component, and the other is a notification component for personal information about the offender.²³⁷ States differ as to what information each offender is required to submit. Most typically demand things such as the offender's name, address, date of birth, description, alias,

226. *Id.*

227. Swearingen, *supra* note 96, at 573.

228. Telpner, *supra* note 28, at 2051.

229. *Id.*

230. Lee, *supra* note 23, at 509; *see, e.g.*, State of Kansas v. Ward, 886 P.2d 890, 894-95 (Kan. 1994); State of Kansas v. Clint L., 936 P.2d 235, 237 (Kan. 1997).

231. Telpner, *supra* note 28, at 2039.

232. *Id.* at 2051.

233. *Id.*

234. *Id.*

235. N.J. STAT. § 2C:7-2 (2003). *See, e.g.*, In re B.G., 674 A.2d 178, 184 (N.J. Super. 1996).

236. Epstein, *supra* note 155, at 248.

237. *Id.*

identifying marks, vehicle information, and place of employment.²³⁸ States are allowed to determine how much information must be included in their registration schemes, how much information they will disclose to the public, and how it will be disclosed, so long as “the minimum baseline for registration” and notification is met under the Witterling Act.²³⁹ Local law enforcement “shall release relevant information that is necessary to protect the public from a specific person required to register.”²⁴⁰ Another component of Megan’s Laws is immunity from liability for law enforcement officials who are complying with the disclosure laws in good faith.²⁴¹

C. Motivation For Megan’s Laws

1. The Recidivism Argument

“Long prison terms do not deter them. Too often, special rehabilitation programs do not cure them. No matter what we do, the minute they get back on the street, many of them resume their hunt for victims, beginning a restless and unrelenting prowling for children, innocent children to molest, abuse, and in the worst cases to kill.”²⁴²

The community notification schemes enacted in response to public demand have enjoyed only mixed results, with little empirical evidence documenting the results.²⁴³ If one looks strictly at the individual criminal acts of these sex offenders, it is easy to see how and why legislatures and Congress passed the variety of Megan’s Laws we see today in all 50 states.²⁴⁴ There is little argument that sex crimes are the vilest acts imaginable,²⁴⁵ when perpetrated against children, who are the most innocent and helpless of our society, that feeling is amplified, and preventing just one of these incidents, against one child, anywhere, can arguably make the passage of a Megan’s Law worthwhile. But, one still needs to consider the costs of such laws. Another important question is what else is behind these laws; what other influences are at work here?

Several factors have influenced the Megan’s Law debate over the years and spawned passage of these special laws. Taken as a

238. *Id.*

239. *Id.*

240. Hiller, *supra* note 49, at 276; 42 U.S.C. § 14071(e) (*amended by* Pub. L. No. 104-145, § 2, 110 Stat. 1345 (1996)).

241. 42 U.S.C. § 14071(f) (2000).

242. Garfinkle, *supra* note 141, at 175. See 142 CONG. REC. H4451, H4453 (daily ed., May 7, 1996) (statement of Rep. Schumer).

243. APPROACHES, CSOM, *supra* note 130, at 2.

244. Hiller, *supra* note 49, at 276.

245. Durant, *supra* note 25, at 294.

whole, the cumulative effect of all of these factors creates powerful motivations for such unusual and draconian laws. These influential factors are:

1) the local activism resulting from community outrage over the brutal rapes and murders of children, 2) the high rate of recidivism by child sex offenders, and the need to protect children, 3) the increase in the incidence of child abuse and child molestation nationally, 4) the belief that registration deters released child sex offenders from future offenses, 5) the fact that registration furnishes a list of potential suspects that would allow law enforcement to quickly track down the abductor and the child.²⁴⁶

These factors, not necessarily in this order, seem to be the seminal reasons noted for passage of Megan's Laws in the majority of states.

Each of these motivations seems a justifiable and sound rationale for controlling these offenders, but it is the second justification—recidivism, which resounds among legal scholars, politicians, academicians, psychologists, and criminologists as one of the most powerful reason for Megan's Laws, second only to the distasteful and heinous nature of the acts themselves. Recidivism also seems to hold the distinction as being one of the most contentious of all the points and factors relating to child sex offenders—adult or juvenile—driving the passage of Megan's Laws today.²⁴⁷

2. *Recidivism and Adult Offenders*

*"Sexual offenders are different. . . Even after long, long years in prison. . . the odds are extremely high that they will commit the same or a similar crime again."*²⁴⁸

"Recidivism" has been defined "as the likelihood of reoffense after capture and punishment."²⁴⁹ A "recidivist" is defined as a one who has been convicted of numerous criminal offenses, a "habitual criminal" and a "criminal repeater."²⁵⁰ Modern political and legislative rhetoric is saturated with statistical claims that are designed to support the topics or positions which these governmental bodies debate; the Megan's Laws are no different.²⁵¹

246. Hiller, *supra* note 49, at 273.

247. Kabat, *supra* note 169, at 335. The preferred rationale for Megan's Laws nationwide is to combat the perceived problem with recidivism among sex offenders; and almost all scholarly research mentions "recidivism" or "re-offending" as a motivation, whether factually presented or exaggerated. *Id.* See also Bedarf, *infra* note 255, at 893.

248. Garfinkle, *supra* note 141, at 171 (quoting N.Y. Rep. Schumer).

249. Ball, *supra* note 27, at 406 n.35.

250. BLACK'S LAW DICTIONARY 1269 (6th ed., 1990).

251. Garfinkle, *supra* note 141, at 168-171.

Legislators frequently claim that sex offenders are more likely to re-offend than other kinds of offenders.²⁵² Even though it would seem from hearing the quotes and the misquotes of legislators that there is a large assortment of studies and statistics forming the basis for these claims, that simply is not the case.²⁵³ Many of the legislative findings of various state's Megan's Laws cite that sex offenders pose a greater threat because of their higher risk of re-offending.²⁵⁴ Yet it seems, nothing could be further from the truth.

In a thorough analysis of the recidivism myth and the studies and statistical assertions associated with its claims, Abril Bedarf, in his examination of sex offender notification laws, makes several compelling arguments with respect to the studies that have been previously conducted.²⁵⁵ Bedarf begins his assessment by citing the early studies on recidivism, the first done by the New Jersey Commission on the Habitual Sex Offenders, which found that even as early as 1950, before the awareness of sexual offenders had become so prevalent, the recidivism rate for sex offenders was only seven percent.²⁵⁶ This rate was the lowest of all categories except murder.²⁵⁷ This surprising conclusion was affirmed in subsequent years in other studies.²⁵⁸ In 1965, researchers found that only ten percent of the three thousand sex offenders observed for twelve to twenty-four years were subsequently convicted of a sex crime.²⁵⁹

The late 1970s, however, found criminologists reexamining their conclusions about sex offenders, which were not in line with those of the psychiatric community, who claimed that "sex offenders commit an alarming number of sexual offenses for which they are never arrested or convicted."²⁶⁰ The psychiatric community cited in support of its position a study of 137 anonymous male offenders who were found to have committed two to five times more sex offenses than their convictions revealed.²⁶¹ These varying conclusions lend some merit to the argument that low recidivism rates of sex offenders on paper, based on arrest and conviction data, are higher overall since many of the offenses go

252. *Id.* at 171.

253. RECIDIVISM, CSOM, *infra* note 261, at 14.

254. Garfinkle, *supra* note 141, at 171; Epstein, *supra* note 155, at 249-50.

255. Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 893-99 (1995). The author looked at available studies of recidivism both for sex offenders and for non-sex related crimes, beginning in the 1950s through the article's publication date, 1995. *Id.*

256. *Id.* at 893-94.

257. *Id.* at 894.

258. *Id.* at 894 n.48.

259. *Id.* at 894.

260. *Id.*

261. CENTER FOR SEX OFFENDER MANAGEMENT, OFFICE OF JUSTICE PROGRAMS-NATL. INST. OF CORRECTIONS, RECIDIVISM OF SEX OFFENDERS, May 2001, at 3 available at <http://www.csom.org> (last visited Mar. 6, 2003) [hereinafter RECIDIVISM CSOM].

unreported. This view is espoused by experts who believe that sex offenses are "highly repetitive [in] nature," and thus such offenders may commit hundreds of acts that go unreported.²⁶²

Some experts also suggest that at least some sex offenders are "serial offenders, to the point of compulsion."²⁶³ The Center for Sex Offender Management reports that National Crime Victimization Surveys conducted in the mid nineties found that only thirty-two percent, or one out of three, sexual assault victims ages twelve or older reported the attack to police.²⁶⁴ This alarming revelation, coupled with the fear and embarrassment that accompanies these victims, their feelings of guilt, and the desire to "put [the] tragic experience behind them,"²⁶⁵ as well as the fact that many of the victims are young children themselves, not necessarily aware or astute enough to know they have been victimized or how to report it, all lead to a strong presumption that it is likely under reporting of sexual offenses occurs in society.²⁶⁶

Low recidivism rates for sex offenders, Bedarf points out, were also found in a ten-year study in 1985 that sought to correlate recidivism with the type of crime committed.²⁶⁷ The findings of the study reveal that the average rate of re-arrest for a sex crime was only 11.3%.²⁶⁸ This rate varied with the category of offender, pedophiles were 6.2%, assaulters were 10.4%, and flashers were 20.5% more likely to be re-arrested for a sexual related crime.²⁶⁹ Another study analyzing sex offender recidivism, conducted by the California Department of Justice in 1988, revealed that over a fifteen-year period, 19.7% of offenders were re-arrested for a sex offense, and those arrested for serious sex offenses initially, were 25% more likely to be rearrested for rape than those charged with lesser sex crime charges.²⁷⁰ These results suggest that twenty-five percent of the serious sex offenders are serial, compulsive offenders, and should bear the burden of registration and notification under Megan's Laws.²⁷¹

The final work cited by Bedarf was a 1989 report by the

262. Elizabeth P. Bruns, *Cruel and Unusual?: Virginia's New Sex Offender Registration Statute*, 2 WM. & MARY J. OF WOMEN & L. 171, 172 (1995).

263. *Id.*

264. *Id.*

265. *Id.* See also TOM TALBOT et al., AN OVERVIEW OF SEX OFFENDER MANAGEMENT, Center for Sex Offender Management, Office of Justice Programs-Nat'l Inst. of Corrections, July 2002, available at <http://www.csom.org> (last visited Mar. 6, 2003) [hereinafter OVERVIEW CSOM],

266. See generally RECIDIVISM CSOM, *supra* note 261, at 3.

267. Bedarf, *supra* note 255, at 894.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

United States Department of Justice, which found only 7.7% of rapists were rearrested for rape within three years after leaving custody, and they were 10.5 times more likely to have a subsequent arrest for rape than non-rapists, while those committing sex offenses other than rape were 7.5 times more likely to be rearrested for a nonrape sex offense.²⁷²

When consideration of recidivism data for non-sexual offenses is added for comparison, the data on sex offenders takes on a new perspective and becomes quite startling. The aforementioned 1989 U.S. Justice Department report showed a lower recidivism rate, 7.7%, for serious sex offenders than for any other class of offender except murderers.²⁷³ The data showed that the recidivism rate for convicted robbers in 1983 was 19.6%, 21.9% for those convicted of assault, 31.9% for those convicted of burglary, 24.8% for drug offenders, and 33.5% for those convicted of theft.²⁷⁴ There is strong evidence to support the argument, therefore, that "sex offenders are not more likely than other criminals to be recidivists."²⁷⁵ Furthermore, there is no empirical data that demonstrates that sex offenders have consistently higher or lower rates of recidivism than do other criminal offenders; "[a]t the very least, the data is unclear."²⁷⁶ Yet another statistic from the California Department of Corrections inmate population study showed that within a group of high-risk sex offenders studied, 62% did return to prison within two-years, but only 15% returned for committing a sex related offense,²⁷⁷ and many of those who returned were ironically due to failing to register as sex offenders under California law.²⁷⁸

In the majority of these studies, the adult sex offenders demonstrate a significantly low recidivism rate²⁷⁹ compared to almost the entire inmate or offender population, and certainly, lower than legislators espouse when passing these bodies of law. The data is not clear-cut,²⁸⁰ and accurate measurements of the rate at which sex offender's recidivate are difficult to collect,²⁸¹ but the numbers do suggest that sex offenders are no more likely to relapse than any other criminal offenders. Even though assertions have been made to the contrary that sex offenders will strike again, the proof is not in the numbers. Where recidivism does exist, researchers have found that it can be effectively reduced by providing the offender with specialized and intensive sex offender

272. *Id.* at 895-96.

273. Bedarf, *supra* note 255, at 896.

274. *Id.* See also Bruns, *supra* note 262, at 173.

275. Bedarf, *supra* note 255, at 896.

276. Bruns, *supra* note 262, at 173-74.

277. Garfinkle, *supra* note 141, at 172.

278. *Id.*

279. *Id.*

280. Kabat, *supra* note 169, at 335.

281. OVERVIEW CSOM, *supra* note 265, at 2.

treatment, which has been shown to significantly reduce re-arrest rates in sex offenders compared to those who were not treated.²⁸²

3. *Rhetoric's Impact*

Even those who should accurately proclaim numbers relating to justice in America have fallen victim to the misquoting and rhetoric about sex offenders. Then Attorney General Janet Reno weighed in on the sex offender debate, and was quoted as saying that "convicted child molesters have a recidivism rate as high as 40% to 70%," numbers not at all close to those in the scholarly research relating to repeat sex offenses.²⁸³ The need to avoid these emotional leaps and misuse of statistical data concerning recidivism of sex offenders should be of importance to legislators and policy makers who the public looks to and relies on for governance, leadership, and justice. Despite the studies demonstrating sex offenders have some of the lowest recidivism rates, the public continues to believe that they have the highest rates,²⁸⁴ and these false notions are postulated by the comments and records of legislators in passing Megan's Laws.²⁸⁵ Legislative debates have offered many examples of the vivid passion, anger, and a seething desire to punish sex offenders, calling them "animals" and claiming they have "no rights."²⁸⁶ The complacency at speaking these salacious claims cannot be clearer than with the statement on the house floor by Congressman Randall Cunningham, "[p]erhaps a sexual predator's life should be just a little more toxic than someone else in the American citizenry, that an individual that preys on children, that maybe their rights should be secondary to children's and families."²⁸⁷ The reliance on the recidivism myth becomes even more problematic when applied to juvenile sex offenders.²⁸⁸

4. *Recidivism and Juvenile Offenders*

"First we never thought children got sexually assaulted. . . then we thought it [was] adults doing it. . . now we know that a great many perpetrators of crime against our children are other children."²⁸⁹

282. *Id.*

283. Kirsten Bredlie, *Keeping Children Out of Double Jeopardy: An Assessment of Punishment and Megan's Law in Doe v. Portiz*, 81 MINN. L. REV. 501, 510 n.71 (2001).

284. Bedarf, *supra* note 255, at 897-98.

285. Telpner *supra* note 28, at 2054 nn.148-51; Filler *supra* note 31, at 338-40; Garfinkle *supra* note 141, at 170.

286. Telpner, *supra* note 28, at 2054.

287. Garfinkle, *supra* note 141, at 174.

288. *Id.* at 173.

289. Anand, *supra* note 46, at A19.

These are only estimates from the available data, but the numbers are shocking, forty-one percent of sexual assaults against children ages ten to sixteen were committed by other children, a large portion of which were offenders between the ages of eleven and fourteen,²⁹⁰ or thirteen and seventeen,²⁹¹ depending on which estimate you consider. Either way the numbers are, to say the least, shocking. What is also shocking is the absence of discourse concerning juvenile sex offenders in the legislative debates. In light of the relative ease in which the politicians and policy makers speak of the dangers of sex offenders in general, exaggerating the statistics and narratives on the subject,²⁹² and the relative high numbers of acts that involve juveniles, the record is stark of any mention of juveniles in floor debates or in the legislative acts themselves. The most often used word in the congressional Megan's Law debate was "children," and yet the use of the word was limited exclusively to the child victims, not the child sex offenders.²⁹³

When discussing the differences between various legislative findings of different states relating to juvenile sex offender registration, Elizabeth Garfinkle noted in particular the difference between the findings of Idaho and Alabama.²⁹⁴ Idaho's Megan's Law specifically mentions juvenile sex offenders and their risk of re-offending and its language mimics the adult statute exactly, except for the addition of the words "juvenile."²⁹⁵ Alabama's legislative findings are a refreshing departure, imparting a different concept that juveniles are more likely to respond to treatment, have shorter histories as sex offenders, and be less prone to exhibit deviant patterns than adult offenders.²⁹⁶ It is not clear whether the engine of rhetoric in shaping Megan's Law was deliberate in avoiding the issue of juveniles or whether it was done with the purpose of lumping them into the mix of sex offenders generally.

Juvenile sex offenders pose a difficult problem for Megan's Laws. As previously mentioned, juveniles own a unique niche in modern American criminal law, which has developed into two distinct systems, one for adult offenders, and one for juvenile offenders. Since its inception in 1899 in Illinois, this bifurcated system is based on the idea that juveniles and adults are different, that they commit crimes for different reasons, and that they

290. *Id.*

291. UNDERSTANDING CSOM, *supra* note 207.

292. Filler, *supra* note 31, at 338-40.

293. Garfinkle, *supra* note 141, at 183.

294. *Id.* at 182-83.

295. *Id.* (citing IDAHO CODE § 18-8302 (2002)).

296. *Id.* (citing ALA. CODE § 15-20-21 (2001)).

should be treated differently in the eyes of the law.²⁹⁷ The research shows juvenile sex crime is often committed for reasons apart from those of adults; yet, their inclusion in most Megan's Laws, and the tendency to treat them like adult offenders, suggest juveniles are losing their unique status within the criminal justice system.²⁹⁸

Research on juvenile sex offender recidivism is somewhat lacking, with most studies examining the effectiveness of the treatment protocols to reduce future offending.²⁹⁹ As previously mentioned, there exists a common belief about juvenile sex offenders, that they will re-offend, even after treatment, yet there is no compelling evidence to suggest that the majority of offenders will likely become adult offenders.³⁰⁰ Child sex offenders who participate in treatment programs achieve success, and have shown lower recidivism rates than adult offenders or untreated juvenile sex offenders. Several studies in the early to mid 1990s have shown that juvenile offenders who participate in treatment have recidivism rates of between 7% and 13% over a five-year period, while other earlier studies in the 1980s and 1990s have given that number to be between 5% and 15%, compared with recidivism rates of between 15% and 50% for non-sexual offenses.³⁰¹ One study found very little sex offense recidivism among 256 juvenile sex offenders over a six-year period; only seven percent committed another sexual offense and forty percent committed other, non-sex related offenses.³⁰² At worst, where the juvenile is classified a severe sex offender, it has been found that the recidivism rate is higher, thirty-seven percent for repeated sex related acts, while eighty-nine percent repeated non-sexual related acts.³⁰³ There is some concern like those expressed with recidivism studies of adult offenders, that methodological flaws may have altered these findings somewhat, however there is considerable evidence to support the opinion that the proper specialized treatment will greatly impact juvenile recidivism rates.³⁰⁴

It is believed that juvenile sex offenders do respond better to

297. Lee, *supra* note 23, at 497-98.

298. Garfinkle, *supra* note 141, at 184.

299. RECIDIVISM CSOM, *supra* note 261, at 14.

300. OFFENDER NOTES, *supra* note 183.

301. *Id.* See also Lippincott, Williams & Wilkins, *Practice Parameters for the Assessment and Treatment of Children and Adolescents Who Are Sexually Abusive of Others; Statistical Data Included*, JOURNAL OF THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY (1999) (showing that a significant number of juvenile sex offenders will respond to therapeutic intervention, which is cost-effective to communities not only in terms of money, but also in terms of recidivism).

302. Lippincott, *supra* note 301, at 685.

303. *Id.*

304. *Id.* All studies have some form of flaw or questionable rigor, but each has discovered sufficient evidence to support the treatment reduces recidivism argument. *Id.*

treatment concepts over adult offenders for several reasons.³⁰⁵ Juvenile offenders possess a less deeply ingrained deviant sexual pattern than do adult offenders; they are still exploring alternative ways to receive sexual gratification, and their sexual fantasy is still evolving and not fully joined with their permanent behavior.³⁰⁶ Additionally, the youth offender is more available for learning effective interpersonal and social skills than are adult offenders.³⁰⁷ Some offenders are not amendable to treatment in this regard, stressing the importance in understanding the treatability of juvenile sex offenders, which involve a number of patient characteristics and situational factors.³⁰⁸ Such characteristics as empathy and frequency of sexual offending behavior will dictate the proper treatment protocols to consider.³⁰⁹ As the studies demonstrate, treatment is quite effective in reducing recidivism, but Lippincott stresses that the offenders are not “cured,” that they must develop and maintain “coping and adaptive strategies to prevent further sexual offenses.”³¹⁰

Megan’s Laws perform a protective function and are predicated upon the notion that sex offenders, be they adult or adolescent, will likely offend, abuse, or molest again. The myth, however, is not supported by the numbers. There is some discord about the accuracy, but there is sufficient support for the claims that sex offenders have a lower rate of recidivism than most other criminal offenders. Juveniles have even less if they receive early, proper rehabilitative treatment with follow-up monitoring. The application of the blanket Megan’s Law justification of risk of recidivism to juvenile sex offenders, for that reason alone, is insufficient to warrant registration of child sex offenders.

IV. THE JUVENILE SEX OFFENDER AND THEIR VICTIMS

“The tendency, historically, to dismiss or minimize the nature of sexually abusive behavior among juveniles has failed to interrupt the development of abusive patterns, and as a result has failed to protect the community.”³¹¹

A. Commonalities and the Players

1. The Common Juvenile Sex Offender . . . if there is one

“A new research study from a Salt Lake City therapist says adolescent

305. *Id.*

306. *Id.*

307. *Id.*

308. Lippincott, *supra* note 301, at 685.

309. *Id.*

310. *Id.*

311. Morain, *supra* note 120, at F7.

*sexual perpetrators 'look more like the rest of us' than other adolescent offenders, and their seeming silence can be deadly. . . . [They] display their anger covertly. . . . Teen-age sex offenders are much more passive than other delinquent kids.*³¹²

The issue of adolescent sex offenders “remains the least understood, least discussed, and perhaps most distressing area of child sex abuse.”³¹³ Martin & Pruett write that juvenile sex offenders are described as “being different from other problem youth, in that sex offenders tend to be less outwardly rebellious and disruptive.”³¹⁴ For the past several decades, society paid little, if any, attention to children who sexually abuse other children; these children were just “misguided youth.”³¹⁵ Society applied a “boys-will-be-boys” mentality to a serious problem.³¹⁶ The child sex offender’s behavior results from a range of influences, vary across individuals, environments, and situations, with no quick reliable answers to address this problem appropriately.³¹⁷ Their behavior in past decades was not thought of as alarming, and thus many adolescent offenders went unrecognized by social workers, mental health workers, and criminal justice officials.³¹⁸ This allowed the problem to escalate into the serious risk now seen as “worthy of serious concern” to society.³¹⁹

The profile of a typical juvenile sex offender, if one exists, generally falls into stereotypical sexual deviant categories.³²⁰ These offenders come from all socioeconomic backgrounds and are 90% male, with a median age of fourteen; they usually commit their first offense before age fifteen, and sometimes as early as twelve years old.³²¹ These offenders are far more likely to have been sexually or physically abused. Numbers indicate that between 40% and 80% of the offenders have suffered prior sexual abuse, and 20% to 50% have suffered physical abuse.³²² These offenders display another disturbing attribute; approximately 80% have a diagnosable psychiatric disorder, which leads many of them

312. Child Abuse; *Teen-Age Sex Offenders Appear 'More Normal' Than Other Adolescent Offenders, Therapist's Research Shows*, Sept. 14, 1989, BUSINESS WIRE. [hereinafter *Adolescent Offenders*]

313. Lee, *supra* note 23, at 480.

314. Martin & Pruett, *supra* note 33, at 289.

315. Rothchild, *supra* note 46, at 720.

316. *Id.*; Martin & Pruett, *supra* note 33, at 284; OFFENDER NOTES, *supra* note 183.

317. Lee, *supra* note 23, at 481.

318. Martin & Pruett, *supra* note 33, at 283.

319. *Id.*

320. *Id.*

321. Rothchild, *supra* note 46, at 724; Martin & Pruett, *supra* note 33, at 287; OFFENDER NOTES, *supra* note 183.

322. OFFENDER NOTES, *supra* note 183.

to have trouble with impulse control and aggressive behavior.³²³ Between 30% and 60% have a learning disability or other academic dysfunction.³²⁴

Martin & Pruett, in their work on juvenile sex offenders, correlated a number of works in social and psychology research on juvenile criminal and sex offenders and established approximately five baseline background characteristics found in juvenile sex offenders that shape their future actions and offender profiles.³²⁵ Adolescent sex offenders are often isolated from their peer groups. This social isolation is found to be a hallmark descriptor of the juvenile sex offender.³²⁶ They are described as "loaners," more shy, timid, and withdrawn than those who commit nonsexual youth crime, and "who lack the social skills necessary to develop close meaningful relationships."³²⁷ These young offenders, isolated from their peer group, thus turn to younger children for the interactions they perceive as easier to manage.³²⁸

It is not uncommon, when looking at juvenile offenders of any type, to find they come from backgrounds and living environments with a high degree of family dysfunction.³²⁹ Juvenile sex offenders tend to have home environments where the parents have higher degrees of psychiatric disturbances, alcoholism, and marital tension than any other group.³³⁰ These adolescent offenders may also find themselves exposed to family dysfunction in the form of violence between family members and themselves, which impacts their developmental faculties.³³¹ These offenders also experience higher degrees of physical abuse from a variety of sources, parents, stepparents, and stepsiblings and other unrelated males than do other juvenile offenders.³³² The final characteristic of adolescent sex offenders, and the most prevalent of the aforementioned characteristics, is widely known as a "cycle-of-abuse" where the offender recreates and perpetrates the abuse that the offender received in childhood onto the new victims.³³³ This factor is very prevalent in the backgrounds of juvenile sex offenders, and is generally supported by clinical practitioners and independent studies as well.³³⁴

Other lesser-known factors are present in some adolescent

323. *Id.*

324. *Id.*; UNDERSTANDING, CSOM, *supra* note 207, at 3.

325. Martin & Pruett, *supra* note 33, at 294-302.

326. *Id.* at 295.

327. *Id.* See also *Adolescent Offenders*, *supra* note 312.

328. Martin & Pruett, *supra* note 33, at 296.

329. *Id.*

330. *Id.* at 297-98.

331. *Id.*

332. *Id.*

333. *Id.* at 298-99. See also Lippincott, *supra* note 301, at 60S.

334. Martin & Pruett, *supra* note 33, at 298-99 nn.105-09.

offenders, such as frequent exposure to pornography, a marked lack of empathy and a low self-esteem that can lead to a “distorted cognition” about the negative effects of their actions.³³⁵ These factors are not exhaustive, and do not guarantee that an early victim of sexual violence or abuse will grow up to be an abuser themselves. As the evidence suggests, these children have monumental problems and attempt to work them out as best they can, but often in less desirable ways. These are some of the important factors that present themselves and create the risk a child may become an adolescent sex offender in the future.³³⁶ The current climate of punishment over rehabilitation and treatment in Megan's Laws operates to leave children with a “self-help” remedy, while being shuffled like adult sex offenders into the pit of registration and labeling, akin to abuse at the hands of Megan's Laws. Professor Filler refers to this as “legally permissive retribution against sex offenders,”—a lifetime branded as a sex offender.³³⁷

2. *The Common Victim of the Juvenile Sex Offender*

“There are too many innocent young kids getting hurt.”³³⁸

Juvenile offenders, usually fall into one of two categories: those who sexually abuse children, and those who victimize their peers and adults.³³⁹ The majority of the offender's victims are female, but some studies have found that boys are the targets of male adolescent sex offenders as well.³⁴⁰ The victims are typically between the ages of three and sixteen with many younger than nine years old.³⁴¹ Most of the victims are “not related to the offender by blood or marriage,”³⁴² although there is evidence in the research that 40% of the victims are siblings or other relatives of the offenders.³⁴³ Often, even if not related, the victims know the offender.³⁴⁴ This discovery contributes to the implication that the reported juvenile sex offenses and those relating to recidivism are

335. *Id.* at 300-01 nn.119, 122, 123 & 126.

336. Lippincott, *supra* note 301, at 62S.

337. Filler, *supra* note 31, at 348.

338. Morgan, *supra* note 26. Rhonda Blevins spoke these words in response to the murder of her seven-year old daughter, Kristi, who was killed by a juvenile sex offender in Oilton Oklahoma. *Id.*

339. OFFENDER NOTES, *supra* note 183.

340. Lippincott, *supra* note 301, at 60S.

341. *Id.*

342. Rothchild, *supra* note 46, at 726. Here, “blood or marriage” refers to parental marriage. *Id.*

343. Lippincott, *supra* note 301.

344. Martin & Pruett, *supra* note 33, at 302-03.

not accurate.³⁴⁵ If some of the victims are within the offender's family there is a likelihood that the event would not be discovered by adults or reported outside the family if it were known, thus impacting the reliability of the data available.³⁴⁶

These factors are disturbing and in most cases are not addressed by the Megan's Laws in the country. Only Alabama's Megan's Law takes a wider note of any factors affecting juvenile sex offenders outside of their perceived tendency to re-offend.³⁴⁷ Alabama attempts to bring about awareness and a policy of help and treatment for the juvenile sex offenders under their jurisdiction.³⁴⁸

Megan's Laws should enumerate a distinction between adults and children and should seek to remedy the previously mentioned factors that impact children and their tendency to offend. Rather than just throwing them to the wolves out of the gate, denying them a fighting chance to be better citizens, this would greatly enhance the odds that these children will not re-offend or offend in the first place, ending the "cycle-of-abuse." An approach like this for juveniles in the Megan's Laws would give them what they need: understanding of the helplessness of their situation and another chance at rehabilitation.³⁴⁹

V. THE QUANDARY OF MEGAN'S LAW

"[There] is concern[] that a high school student who fondles another student in the hallway of a school could be convicted on a sexual imposition charge and then be ordered to register as a sex offender for 10 years to life. I think it is a bit reckless . . . once you label someone for a lifetime, you are clearly diminishing that person's ability to provide employment for themselves and be a productive member of society."³⁵⁰

A. Offender or Adolescent-Where Nature Ends and Megan's Law Begins

1. Considerations

"Lawmakers opposed to the bill painted a picture of a high school senior sentenced to life for touching his freshman girlfriend. . . because one of the sex crimes covered is engaging in a sexual act with a minor between 12 and 15, if the two are at least

345. Garfinkle, *supra* note 141, at 173-74.

346. *Id.*

347. Garfinkle, *supra* note 141, at 183 n.268.

348. *Id.*

349. Lee, *supra* note 23, at 491.

350. Mark Reiter, *Sexual Predator Label Could be Placed on Ohio 14-Year-Olds*, TOLEDO BLADE, Nov. 19, 2001.

*four-years apart in age.*³⁵¹

To say that “boys-will-be-boys” suggests that the acts of juvenile sex offenders are routine, ordinary conduct by mischievous ornery adolescent boys, that society simply overlooks. Its use in this context implies just that, the natural actions of typical American adolescents, engaging in normal sexual development. The danger here is that the ornery adolescent, guided only by his or her hormones, walks into the minefield of Megan’s Law where the adolescent offender may be in trouble for nothing more than being young, and following a biological footprint like any maturing adolescent.

The behavioral and social sciences classify juvenile sex offending differently than does the juvenile justice system. The behavioral science profession considers three general defining categories when examining juvenile sexual behavior: the use of coercion, the sexual interaction and whether it is age appropriate in nature.³⁵² These areas are similar to the generally accepted parameters defining juvenile sex offenses by social workers in the field.³⁵³ Analysis of the three categories used in the behavioral sciences approach is helpful in understanding how the behaviors are construed and classified and how a different approach may be useful.

The first category, coercion, is simple. It is similar to that connotation found in the social work profession; it is force, a position of unequal power between two parties, which the more powerful one abuses.³⁵⁴ The second defining element is the “age” or “peer appropriateness” of the sexual behavior.³⁵⁵ While looking at the coercion element appears to be simple, it becomes more difficult when balanced with an eye for what is normal and what is not. Said another way: is the target behavior deviant behavior or not.³⁵⁶ The age difference between the two participants, the mental capacity of the participants, the willingness to engage in the behavior being addressed, and its circumstances enter the mix in weighing the appropriateness of the behavior.³⁵⁷ Sexual behavior between two thirteen-year-olds that is mutual, not a product of coercion, and not a product of deviant intentions is less problematic than a situation where one of the thirteen-year-olds suffers from a diminished capacity, possessing mental faculties

351. *Measure Passed, supra* note 186, at A17.

352. *Martin & Pruett, supra* note 33, at 291.

353. *Id.*

354. *Martin & Pruett, supra* note 33, at 291.

355. *Id.* at 291-92.

356. *Id.* at 293. Defining deviance is difficult because not even professionals agree on the definition.

357. *Id.* at 292-93.

less than the other. There seems little doubt what the outcome will be, an inappropriate case is easy to make. But what if the mentally impaired participant is seemingly capable of deciding, and cognizant of the circumstances? Will the outcome be the same?³⁵⁸ Some researchers propose that an age difference of five years or more should be present before an accusation of sexual abuse is made against a participant.³⁵⁹

Simply counting years seems too simplistic, and is inconsistent with the tenet of the current behavioral sciences guidebook, the DSM-IV. This guidebook suggests that clinical judgment should be used to consider the maturity of the victim and the age difference between the parties in assessing whether sexualized contact is appropriate between at least one adolescent and another.³⁶⁰ Therefore, it seems in viewing the behavior of juveniles, the age difference, *and* the consideration of the circumstances involved is important and generally should come together in the mental health profession before a determination can be made.

The last category to consider is a separate, and different view altogether, which is sometimes overlooked. In this category, all of the offender's behavior, activities, and lifestyle are considered to see if there exists deviant sexualized behavior that does not involve physical contact or any kind of force.³⁶¹ The importance of this category cannot be minimized, as these behavior patterns are signs, albeit not certainties, of a possible problem with a potential youthful sex offender.³⁶² Some studies of serious adult sex offenders have shown that many of these adult offenders began their sex offending careers with nonviolent sexual offenses in their adolescence.³⁶³ This category of offending is more tolerated as harmful pranks and ornery playfulness, which may consist of being a Peeping Tom or streaking; however, if allowed to escalate, it may potentially lead to more serious offending.³⁶⁴ This progression is important to spot and treat early in youthful offenders.³⁶⁵ But what about Megan's Laws?

Legislators, public policy decision makers, courts, and social service providers must be attuned to these issues, and strive to protect youthful offenders from harm at the hands of Megan's Laws. Some of these acts may indeed be playful pranks done in

358. *Id.* at 291-92; DSM, *supra* note 56.

359. *Id.* at 292.

360. Martin & Pruett, *supra* note 33, at 291-92; DSM, *supra* note 56.

361. Martin & Pruett, *supra* note 33, at 292-93. Deviant sexualized conduct is behavior such as "exhibitionism, voyeurism, fetishism, frottage, obscene phone calls." *Id.* at 292.

362. *Id.* at 287-88.

363. *Id.*

364. *Id.* at 287.

365. *Id.* at 288.

bad taste by adolescents. Any general classification by age or behavior as enumerated in adult criminal statutes is not enough to do the job. Using these characteristic factors when evaluating juvenile sex offenders, rather than just applying ridged rules to make the registration decision, allows the weight to be properly placed on the true deviant nature of the acts undertaken, before a youth is placed on the registry.³⁶⁶ This may help avoid the inherent "gray areas" that may exist in dealing with juvenile behavior.³⁶⁷ Decision makers should also take into consideration the natural maturing processes, which may be different from their own experiences in drafting legislation and protocols for applying Megan's Laws to juvenile sex offenders and take into account the entire picture of a child offender.

2. Normal Sexual Development-Sex Play-Age Appropriate Behavior

"Congress shouldn't expose countless teenagers to life sentences for being involved in consensual relationships."³⁶⁸

Notwithstanding the differences between the general categories listed above, there are times when the adolescent activities are normal and a natural part of the maturing process. By age three or four, many children begin various forms of sex play with peers.³⁶⁹ These children may develop erections, engage in sexual exploration games, peek in at the other child's parts, use nasty language, and flirt.³⁷⁰

"Sex Play" between children in this period is normal, and is loosely described as contact that is often exploratory in nature, and is accompanied by joy, laughter, embarrassment, inhibition, lightheartedness, spontaneity, and balanced with curiosity about other things.³⁷¹ Sex play consists of activities such as playing doctor or engaging in exploratory touching and tickling.³⁷² Children in their middle ages will have various rises and falls in sexual interest depending on exposures and influences in their living environs; children in middle ages will hold hands, or even

366. *Id.* at 294.

367. *Id.*

368. *Measure Passed*, *supra* note 186, at A17 (quoting Rep. John Conyers (MI) comments on the House floor).

369. Lippincott, *supra* note 301, at 59S.

370. *Id.*

371. N.C. Div. of Social Services, Jordan Inst for Families, CHILDREN'S SEXUAL BEHAVIOR FROM NORMAL TO DISTURBED-NORMAL SEXUAL,, Vol. 7, No. 2, May 2002 available at http://www.ssw.unc.edu/fcrp/Cspn/vol7_no2/understand_jso.htm (last visited May 25, 2003) [hereinafter NORMAL BEHAVIOR NOTES]. See also Lippincott, *supra* note 301, at 59S.

372. *Id.*

playfully kiss.³⁷³ Sex play becomes a concern only when done routinely or when it is accompanied by coercion or an absence of mutual consent.³⁷⁴ Normative sex play and normal sexual development is the way maturing children develop sexually, seeking information and a better understanding about the nature of sexual life through play and exploration with others.³⁷⁵ Preadolescence is a time when sexual development increases, and children become aware of their bodies.³⁷⁶ Children may begin exploring their bodies and genitals, and seek to view pictures and images of other people's bodies in an effort to understand themselves.³⁷⁷ Sex play at this level is usually for non-sexual goals or purposes.³⁷⁸ Masturbatory activities become more common in preadolescence but are only considered a problem when the practice leads to physical harm or is conducted in public or at inappropriate times.³⁷⁹ By later adolescence, the child will be creating his or her own sexual identity and will work toward resolving questions and misconceptions they may have about sex in general, and their own sexuality.³⁸⁰

Sex play and normative sexual development includes acts that are age-appropriate or acts that are expected to occur with children at certain maturity stages in life, and which are not deviant or coercive.³⁸¹ Where age-of-consent laws exist, they present a unique problem for adolescent offenders who are caught in their nets. For example, where two fifteen-year-olds engage in consensual sex in a state with an age-of-consent law, the youth can be required to register for engaging in consensual sexual activity with another juvenile.³⁸² These laws assume a child is incapable of giving consent, thus implying coercion or exploitation was used. In some situations this is true, but logic is lost by holding one minor legally responsible for exploiting another minor's legally prescribed inability to make the mature decision concerning the act, even when the perpetrator is just as incapable of making the decision himself.³⁸³ This is yet another example of a firm bright-line rule that may be misapplied with respect to age resulting in a

373. *Id.*

374. *Id.*

375. *Id.*

376. *See* NORMAL BEHAVIOR NOTES, *supra* note 371.

377. Lippincott, *supra* note 301, at 59S.

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

382. Garfinkle, *supra* note 141, at 181 & 187. These laws are based on the presumption that minors are incapable of giving consent, therefore sexual acts under the statutory age, are illegal. *Id.* In about half the states the age is eighteen. *Id.* at 186.

383. *Id.* at 187.

triggering of Megan's Law.

There are however, many examples of questionable applications of Megan's Laws to adolescent offenders that are prevalent and jolting. "[R]elatively innocuous activities of juveniles . . . are being adjudicated as sexual offenses" if the act falls into the category of a sex offense of even a minor type.³⁸⁴ In a Michigan case, an eleven year old was listed on the state's sex offender registry Internet site improperly, thus exposing him to the shame and ridicule of his peers and exposing his name and address to other adult offenders who may have potentially preyed on him.³⁸⁵ In another Michigan case, a high school senior engaged in a "senior prank" by "mooning" the high school principal and was arrested and convicted of indecent exposure, necessitating registration as a sex offender for the next twenty-five years.³⁸⁶ In Oklahoma, a two and a half year old was actually placed on the state's Megan's Law unpublished registry in a category for youths with sexual behavior problems without notice or due process, after he was seen touching and kissing a female child and then reported to authorities.³⁸⁷ On the other hand, some real child sex offenses have not been taken seriously because there existed an element of "childish" behavior or "horseplay" that investigators focused on to the exclusion of all else, overlooking the obscure underlying problem.³⁸⁸

Despite all the rhetoric and debate, childhood sexual play is not harmful under ordinary circumstances and is a normal and valuable developmental experience as long as there is no deviant behavior.³⁸⁹ Some commentators and academics claim there exists some fuzzy gray areas because the line between normative and criminal sexual behavior in adolescents is blurry.³⁹⁰ At the least, it is unresolved.³⁹¹ This can present a problem for child sex offenders when accused of normal behavior of a sexual nature and raises the ire of a misapplication of Megan's Law.

Another problem exists where there are differing opinions or interpretations of what constitutes deviant or nonconsensual behavior; the definitions are vague and vary between persons and courts, subjecting children to different standards, facilitating arbitrary standards in the courts and the juvenile systems.³⁹² Yet another peril appears in the Megan's Law mine field when you

384. Garfinkle, *supra* note 141, at 189.

385. FREEMAN-LONGO, *supra* note 61, at 13.

386. *Id.*

387. *Id.*

388. Vieth, *supra* note 106, at 54.

389. Garfinkle, *supra* note 141, at 186.

390. *Id.* at 185.

391. *Id.*

392. Garfinkle, *supra* note 141, at 187.

consider a youth offender convicted or adjudicated in one state for a borderline offense that is not necessarily reportable under Megan's Law in that jurisdiction, for example "moonning." If that child moves with his parents to another state whereupon it is discovered that under the new state's Megan's Law phrasing, the minor's borderline act of "moonning" is a reportable event, necessitating the youth to register as a sex offender in his new home and then for life wherever he or she goes. There must be reasonable standards applied to all Megan's Laws nationwide to prevent these mishaps and allow even application of the law nationwide.

3. *Treating Child Sex Offenders as Adult Sex Offenders-A Dangerous Mix*

"I think this law is outrageous. . . putting kids in a position that is the same as adults. The whole purpose of the juvenile court system . . . is suppose[] to be rehabilitation."³⁹³

Megan's Laws have brought sex offender registration and notification to communities in an attempt to increase public awareness, safety, and facilitate tracking of dangerous sex offenders released into these communities.³⁹⁴ Applying the requirements of Megan's Laws to adolescent sex offenders may have a negative impact on the normal development of the youthful offender.³⁹⁵ This is contrary to the fundamental underpinnings of the juvenile justice system and "*parens patriae*," which seeks to correct the course of juvenile offenders by rehabilitation and oversight.³⁹⁶ Maintaining this childhood innocence is important in American values.³⁹⁷ Megan's Laws damage that innocence and pose a legal hurdle to juveniles who are developing physically and emotionally, and who are developing, new friends, personalities, and self-esteem, thus altering their ability to experience normal child-adolescent development.³⁹⁸ The public notification and Megan's Law in general also cause unnecessary stress to the juvenile offenders by exposing them to scrutiny and ridicule in the community, further harming their efforts at rehabilitation and increasing the likelihood of recidivism.³⁹⁹ The failure to separate youthful offenders from adult offenders in the Megan's Law systems and provide for rehabilitation and repair has a potential

393. Reiter, *supra* note 350.

394. Rothchild, *supra* note 46, at 743.

395. *Id.* at 744.

396. *Id.*

397. Garfinkle, *supra* note 141, at 177.

398. Rothchild, *supra* note 46, at 744-45.

399. *Id.* at 745.

for harmful long-term consequences for these juveniles.⁴⁰⁰

Juveniles are generally treated differently than their adult counterparts, but this difference often evaporates when juvenile sex offenders are involved in petition or waiver proceedings.⁴⁰¹ In most states, the petition process, sometimes called waiver,⁴⁰² allows courts to classify a juvenile offender as an adult; however, there are usually no provisions to separate juvenile sex offenders from adult offenders in terms of their rights and consequences.⁴⁰³ Waiver establishes that the juvenile is a danger to society and not amenable to treatment.⁴⁰⁴ The long-standing benefit of a dual criminal justice system, one for juveniles and the other for adult offenders, is altered when the juvenile is a sex offender even if waived into court. There seems to be only a single alternative for these type offenders, yet the evidence supports that they are not hopeless, that they do have lower recidivism rates, and that they can be rehabilitated successfully.

The central idea behind the juvenile justice model is the rehabilitation of the juvenile offender.⁴⁰⁵ The application of the Megan's Law requirements of registration and notification to juvenile sex offenders thwarts the rehabilitation idea by isolating, degrading, and reminding the offenders of the situation.⁴⁰⁶ Megan's Laws obviate two fundamental cores of the rehabilitation model: confidentiality and stigmatization.⁴⁰⁷ Confidentiality has been a hallmark of the juvenile justice system since it began, and is blatantly violated by the notification element of Megan's Laws in most states, when a juvenile's records become open to the public-exposed for the world to see.⁴⁰⁸ The motivation for the confidentiality element is derived from the idea that a juvenile offender will not be able to forget the mistakes of his youth if the history was publicly disclosed.⁴⁰⁹ The other element is stigma or the effect of the disclosure on the offender. The effect of the disclosure puts the juvenile offender on the spot, creating a sense of discomfort and penalizing the offender for the past juvenile act that was to be forgotten.⁴¹⁰

"[E]ffective rehabilitation of youths will be nearly impossible if they are not able to let their delinquent history 'fade into

400. FREEMAN-LONGO, *supra* note 61, at 12.

401. Turoff, *supra* note 62, at 1149-50.

402. Rothchild, *supra* note 46, at 736-40.

403. *Id.* at 736-41.

404. *Id.* at 737-40.

405. Swearingen, *supra* note 96, at 553.

406. *Id.* at 555.

407. *Id.*

408. *Id.* at 555-56.

409. *Id.* at 556.

410. *Id.* at 560.

obscurity and become wholly forgotten.”⁴¹¹ Megan’s Laws subverts that idea by notifying the community that a juvenile sex offender lives nearby and shines a bright light on them.⁴¹² The stigma created by Megan’s Law harms them in many ways, such as, finding suitable living arrangements,⁴¹³ securing meaningful employment,⁴¹⁴ and making lasting friends.⁴¹⁵ Megan’s Laws do not further the goals of the historical juvenile justice system or any offender rehabilitation tenant in America criminal law. There are indeed hopeless cases, however certainly not all are so situated and deserving of such a harsh remedy—a form of “legally permissive retribution.”⁴¹⁶ These laws conflict with the ideals of the founding principle of the juvenile legal system, “*parens patriae*,” and the effective rehabilitation of juvenile offenders.⁴¹⁷

4. Other Consequences of Megan’s Laws on Child Sex Offenders

*“The theoretical and feel-good benefits of Megan’s Law may, in the long run, be overwhelmed by the law’s negative consequences. Statutes enabling, even perhaps encouraging, vigilantism and similar harms seem utterly at odds with constitutional values.”*⁴¹⁸

Evidence suggests, in some cases, that Megan’s Laws may actually impede an offender’s path to rehabilitation, dampening his feeling of hope for being normal again and returning to society.⁴¹⁹ This impediment in turn “put[s] a lot of stress on the offender, which puts them at greater risk to re-offend.”⁴²⁰ Shaming of offenders at the hands of Megan’s Laws is another common theme of late.⁴²¹ This shaming has led to mental as well as physical pain and anguish for offenders and their families, well after the punishment has been served.⁴²² In fact, all of the community notification models are based upon the idea of

411. Swearingen, *supra* note 96, at 561.

412. Telpner, *supra* note 28, at 2059-60.

413. FREEMAN-LONGO, *supra* note 61, at 11-12.

414. Telpner, *supra* note 28, at 2060.

415. *Id.*

416. Filler, *supra* note 31, at 348.

417. Rothchild, *supra* note 46, at 730-31.

418. Garfinkle, *supra* note 141, at 201.

419. Telpner, *supra* note 28, at 2060.

420. *Id.*

421. Bredlie, *supra* note 283, at 512-13.

422. *Id.* See generally Aaron S. Book, *Shame On You: An Analysis of Modern Shame Punishment as an Alternative to Incarceration*, 40 WM. & MARY L. REV. 653 (1999) (noting that sex offenders have had signs placed in their front yards warning of their crimes). In early European history, brutish branding and mutilations occurred, leaving an indelible “mark of infamy” on the offenders notifying the community of their crimes. *Id.* at 659.

identifying the sex offender to the rest of the community.⁴²³ Shaming, however, has become an “outlet for the community’s rage” against sex offenders.⁴²⁴ Megan’s Laws continue to perpetrate the tradition of shaming and publicly humiliating sex offenders with the application of a “scarlet letter” effect.⁴²⁵ Indicating that arguably “America’s criminal justice system has not completely eliminated ‘Scarlet Letter’ style punishments.”⁴²⁶ These antiquated and obscure themes of punishment also vastly and detrimentally affect the fragile child sex offender and their families.

a. Vigilantism-Ostracism:

Megan’s Laws also spawn vigilantism and ostracism of offenders, which harms them and their family members in communities where they live, which is not something any child sex offender needs, much less, any child in general should have to endure.⁴²⁷ When discussing Megan’s Law in Congress, Congressmen even made passing reference to the risk of causing “vigilante” retaliation to offenders.⁴²⁸ Offenders of all types serve their time and thus pay their debt to society for their crimes.⁴²⁹ However, Megan’s Laws attach a proverbial lifelong “ball and chain” to the offender. The community rage can be unbridled. For instance, a female sex offender used her sister-in-law’s address on her prison forms, with no intent to move or live there upon release from confinement.⁴³⁰ Three months prior to her release, the sister-in-law’s neighborhood was informed that a sex offender was moving into the home.⁴³¹ The sister-in-law received death threats and threatening phone calls, her children were attacked by other children, and the home and children were shot at.⁴³² Homes of offenders have been attacked and burned down.⁴³³ One had warning signs posted in his yard by neighborhood residents and

423. Bedarf, *supra* note 255, at 911.

424. *Id.* at 913.

425. Bredlie, *supra* note 283, at 513, n.81; Lee, *supra* note 23, at 513; Kabat, *supra* note 169 *passim*.

426. Bredlie, *supra* note 283, at 513.

427. FREEMAN LONGO, *supra* note 61, at 13. A juvenile probation officer faced a dilemma when a landlord discovered from the Internet that a child sex offender was living with his family in an apartment. *Id.* The parents of the eleven-year-old boy were evicted two days later. The juvenile probation officer then had to deal with a family and offender with nowhere to live and no permanent location to be found. *Id.*

428. Filler, *supra* note 31, at 344.

429. Durant, *supra* note 25, at 301 & nn.104-05.

430. *Id.* at 297 n.60.

431. *Id.*

432. *Id.*

433. *Id.* at 297 n.64.

his vehicles vandalized.⁴³⁴ The stories are endless and painful to someone who is trying to find a new beginning and a fresh start.

This behavior in the world of a juvenile sex offender (or an adult) sets up a “contact bomb” or time bomb effect, “we know they’re going to go off, we just don’t know when.”⁴³⁵ Sex offenders, like no other category of criminal offender, face unrelenting abuse and detrimental treatment at the hands of the Megan’s Law scheme.⁴³⁶ They are exposed to the wrath of the communities they live in by what is described as a “vigilante mentality,”⁴³⁷ forcing some offenders to leave their communities.⁴³⁸ These offenders, either forced away or who left on their own, go on the lamb, creating instead a band of roving offenders, afraid to put down stakes or to register; thus they are unknown to the communities where they may end up or where they may offend again, if they do at all.⁴³⁹ Recently, a survey of sex offender registries nationally discovered that states had lost track of “tens of thousands of . . . sex offenders” who were supposed to be registered under Megan’s Law.⁴⁴⁰ California alone lost track of at least 33,000 offenders, and the average accountability of the databases was only twenty-four percent of the offenders.⁴⁴¹ As a remedy to this vigilantism and growing reactionary response to offenders imposed by the notification requirements of Megan’s Laws, California’s Megan’s Law attempts to curb vigilantism by including a section making it a felony to access the sex offender registry and use the information therein to retaliate against an offender.⁴⁴²

Juvenile sex offenders are not immune from this public discord and chaos when they attend school or youth programs,⁴⁴³ where it can fester among adolescents who are normally incorrigible. An adolescent going through a normal maturity period may lash out at the child sex offender, hindering the little bit of rehabilitation Megan’s Law affords them. Given the lack of stability, and the constant fear and apprehension that is inherent in the daily life of these child sex offenders, there is little hope that they will reap the “wholesome mental and physical development”

434. *Id.* at 297 nn.65-66.

435. Telpner, *supra* note 28, at 2059.

436. *Id.* at 2060. *See also* Durant, *supra* note 25, at 297.

437. Lee, *supra* note 23, at 513.

438. Ball, *supra* note 27, at 442.

439. Bedarf, *supra* note 255, at 909.

440. Lara Walker & Chris Courtney, eds., *Survey: States Have Lost Track of Sex Offenders*, CHI. TRIB. REDEYE EDITION, Feb. 7, 2003 at 6.

441. *Id.*

442. Lee, *supra* note 23, at 513 n.311. *See, e.g.*, CAL. PENAL CODE § 290(q) (2003) (asserting that misuse of sex offender information “to commit a felony shall be punished, in addition to and consecutive to any other punishment, by a five year” prison term).

443. Swearingen, *supra* note 96, at 561.

or rehabilitation they need and deserve to help them mature into "productive and law abiding adults."⁴⁴⁴

b. NIMBYism:

The NIMBYism syndrome is derived from the term "NIMBY," which stands for "Not In My Back Yard."⁴⁴⁵ NIMBYism is a common community activism tenet that in the past has been used to organize the masses in communities to rally against changes in zoning, environmental concerns or to oppose highways being built nearby.⁴⁴⁶ This tenet has been extended to many things unfavorable to American communities and sex offenders under Megan's Laws are no exception.⁴⁴⁷ Realtors avoid selling property in areas where sex offenders are listed, and if the disclosure is not mandatory, there essentially is no disclosure of the information to a new buyer who may have children.⁴⁴⁸

Juvenile offender's families find it difficult to find a place where they are welcome, considering that their child, as a minor, will be branded as a registrant. In Texas, juvenile probation authorities have had to deal with an unexpected registry issue when a landlord discovered an apartment tenant's eleven-year-old son was a registered juvenile sex offender.⁴⁴⁹ The landlord demanded the family move out within two days, putting the entire family out on the streets with nowhere to go while the probation office had the double obligation of dealing with managing a sex offender and effectively supervising a juvenile offender's family stability lost by the sudden forced move.⁴⁵⁰ There is no end in sight for this disturbing trend. This "stress" pressure increases the probability that the juvenile and adult sex offenders will "do something dumb," and reoffend.⁴⁵¹

444. *Id.*

445. Telpner, *supra* note 28, at 2064.

446. FREEMAN-LONGO, *supra* note 61, at 8, 11, 12 & 15; Telpner, *supra* note 28, at 2064.

447. FREEMAN-LONGO, *supra* note 61, at 8, 12 & 15. To get a teen sex offender out of its community, one Oregon community pooled money to send him away to an out of state college. *Id.* at 12. Another community forced a juvenile sex abuse residential program which operated for ten-years largely unknown to the community to move after neighbors protested and demanded the home leave the area. *Id.* at 8. In Des Moines, a landlord was criticized by tenants for renting an apartment to a sex offender even though in reality, the tenant never actually rented the apartment. *Id.* In New Jersey and Ohio, real estate sales have been impacted by sex offender disclosures in neighborhoods where property is for sale and a registrant is listed. *Id.* at 15.

448. *Id.*

449. *Id.* at 13.

450. FREEMAN-LONGO, *supra* note 61, at 13.

451. Morgan, *supra* note 26.

VI. CONCLUSION

"I think it makes us feel better. . . . It gives us the notion that we've done something to protect our children. In that sense, to some degree, it might be good. But for it to protect children, you have to have some assurance that the info on the registry is correct."⁴⁵²

There is a certain motivation to feel good and to in turn make others feel better about passing any laws that protect children like Megan's Laws. That activity is prevalent among politicians, activists, child advocates, victims rights groups, families and victims of sexual abuse, and was no less prevalent in the passage of the many Megan's Laws throughout the country. The central idea behind Megan's Laws was to protect children from "unknown" strangers next to them, who may be a violent sexual offender, who, as a group, only commit nine percent of all sex abuse of children.⁴⁵³ Yet, there was no mention of the most likely source of danger to a child: a friend or relative.⁴⁵⁴

Megan's Laws generally leave a lot to be desired especially when it comes to child sex offenders. Within Megan's Laws are marked departures from the ideology of our juvenile justice systems rehabilitation and a second chance at life for the juvenile offered by a protective state. Instead, the states' Megan's Laws community notification and registration requirements for juveniles add a painful, and ineffective means of preventing children from falling victim to child sex abuse at the hands of other children. For sex offenders and youthful offenders especially, Megan's Laws deliver a "scarlet letter"⁴⁵⁵ to child sex offenders, marking them for life with the indelible scar of registration and notification as a sex offender in their communities for what may be natural adolescent curiosity or sexual development.

These unusual laws, born out of political oratory and misinformation, are not thoroughly grounded in sound public policy and pose a troublesome burden on child sex offenders especially, at a time when the child offender is most vulnerable to outside influences and needs our understanding, attention, and help. It leaves child sex offenders shipwrecked within the adult legal system and without a viable way to rescue themselves from the doldrums. In this way, Megan's Law goes against the juvenile courts rehabilitative philosophy, which harms the child sex offender in the end.⁴⁵⁶ These laws subject child offenders to the same outcome as adult offenders would receive, without regard to the intent of the child offender, the understanding of their actions,

452. *Id.*

453. Garfinkle, *supra* note 141, at 173-74.

454. *Id.*

455. Bredlie, *supra* note 283, at 513.

456. Swearingen, *supra* note 96, at 555.

or the need for intervention. Instead, they apply an all or nothing approach in most cases and leave little in the way of alternatives. Child sex offenders within Megan's Laws are exposed to the same dangers of vigilantism and ostracism that adults face, even though adults may be better equipped to respond to it, rather than react to it. Child sex offenders are especially vulnerable because they are sometimes helpless to escape the ridicule. In this way, there is new meaning given to the words of Justice Brennan from an early Supreme Court case relating to juvenile procedure where he stated, "[T]hat intervention cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him were he an adult."⁴⁵⁷

Megan's Laws serve a noble purpose and make good public policy sense with some simple refinements. First, Megan's Law should be applied to serious or violent juvenile sex offenders, not to those who have committed lesser offenses. Such a change would parallel the legislative intent of state and federal lawmakers, while allowing the lesser juvenile offenders to enjoy the rehabilitation benefits of the old juvenile justice system where there would be a potentially better outcome for the youthful offender.

Megan's Laws should eliminate the use of any age requirements to determine who should register, and apply, instead, a standard with exception for specific consideration of the age-appropriateness of the behavior and the lack of coercion. Megan's Laws must include and follow an enumerated rehabilitation plan with benchmarks for performance and warning flags for failure to meet any rehabilitative goals before any child sex offender should be written off and compelled to list himself or herself in a Megan's Law registry. This sentiment is mirrored by Martin and Pruett, who assert "A core principle of [their work] is that timely therapeutic intervention, either on its own or in concert with some form of restraint, is an absolute necessity if society is to adequately respond to the problems created by juvenile sex offenders."⁴⁵⁸ Rehabilitation is an important part of the juvenile justice system and a necessary aid for child offenders who have shown by their acts that they need the guidance. "It is not only in society's best interests to attempt to treat these offenders, it is society's obligation to make this investment in time, patience, and money."⁴⁵⁹

Megan's Laws' pose an onerous burden and a shameful effect on child sex offenders, which is worn for a lifetime like Hester

457. *In re Winship*, 397 U.S. 358, 367 (1970).

458. Martin & Pruett, *supra* note 33, at 313-14.

459. *Id.* at 314.

Prynne's Scarlet Letter.⁴⁶⁰ The burden imposed by the application of Megan's Laws to children should, at the very least, include rehabilitation treatment and monitoring, allowing children to enjoy the benefits envisioned by the juvenile justice system, and permit some avenue for child sex offenders to eventually put the event behind them and live a better life. If not, then the weighted burden of Megan's Laws should be lifted from the chests of the child sex offenders, removing from the bosom of children its—*Scarlet Letter*.

*But the point which drew all eyes, and as it were, transfigured the wearer,—so that both men and women, who had been familiarly acquainted with Hester Prynne, were now impressed as if they beheld her for the first time,—was that Scarlet Letter, so fantastically embroidered and illuminated upon her bosom. It had the effect of a spell, taking her out of the ordinary relations with humanity, and inclosing her in a sphere by herself.*⁴⁶¹

460. Bredlie, *supra* note 283, at 512.

461. *Id.* at 512 n.79.