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# “The Strings in the Books Ain’t Pulled and Persuaded”: How the Use of Improper Statistics and Unverified Data Corrupts the Judicial Process in Sex Offender Cases

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“THE STRINGS IN THE BOOKS AIN’T  
PULLED AND PERSUADED”: HOW THE  
USE OF IMPROPER STATISTICS AND  
UNVERIFIED DATA CORRUPTS THE  
JUDICIAL PROCESS IN SEX OFFENDER  
CASES

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INTRODUCTION

We begin this Article by sharing something about our past legal practice careers, as we believe that is so relevant to the topic that we focus on in this Article. When Michael L. Perlin was a rookie Public Defender in Trenton, New Jersey, in the early 1970s, he regularly visited the Menlo Park Diagnostic Center where some of his clients—those who had been found, in the phrase used then, to be “repetitive and compulsive” sex offenders—were housed.<sup>1</sup> When Heather Ellis Cucolo

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1. See, e.g., N.J. STAT. ANN. § 2A:164-3 (West 2018), *repealed by* N.J. STAT. ANN. § 2C:98-2 (West 1979). See generally Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 NW. U. L. REV. 1317 (1998) (discussing how psychiatry was used to explain criminal behavior, including the criminal behavior of repeat or capital offenders).

was a rookie Public Defender in Newark, New Jersey, in the late 2000s, she regularly visited the Special Treatment Unit (“STU”), attached to the state prison in Avenel, New Jersey, where some of her clients—now classified as sexually violent predators—were housed.<sup>2</sup> When the two of us talked about our experiences during the latter years, we were stunned at the similarities that we found: almost no meaningful treatment of any sort, prison-like conditions, and a population comprised of a minority of people whom we agreed posed a significant danger to the community but a majority of whom had committed crimes involving no personal contact.<sup>3</sup>

As we discussed our experiences further, we both inevitably focused on the topic at the heart of this Article: the way that improper statistics and unverified data has contaminated the “debate” surrounding the post-conviction treatment of sex offenders—whether in Facebook discussions or in U.S. Supreme Court cases. We believe we have an absolute obligation to call out those who distort the evidence and create a false consciousness in this area, be they TV news pundits or Supreme Court justices.<sup>4</sup> We use the word “corrupts” in our title consciously because we believe that what has resulted is the corruption of the judicial process.<sup>5</sup> Our thesis is simple—an examination of a range of

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2. See generally Melissa Wangenheim, ‘*To Catch a Predator, Are We Casting Our Nets Too Far?: Constitutional Concerns Regarding the Civil Commitment of Sex Offenders*, 62 RUTGERS L. REV. 559, 559–83 (2010) (examining the characteristics of individuals labeled sexually violent predators and describing admissions at New Jersey’s Special Treatment Units).
  3. In the 1970s, the vast majority of residents of the sex offender facility in New Jersey were charged with such crimes as peeking in windows and the theft of underwear from laundromats.
  4. For an example of news articles that create a sense of panic without verifiable sources see, e.g., *37 Scary Repeat Sex Offenders Statistics*, HEALTH RES. FUNDING, <https://healthresearchfunding.org/37-scary-repeat-sex-offenders-statistics/> [<https://perma.cc/ACB7-3DYH>] (last visited Jan. 23, 2019). For articles discussing problems with the sex registration system and the portrayal of sex offenders to the general public see Jessica M. Pollak & Charis E. Kubrin, *Crime in the News: How Crimes, Offenders and Victims Are Portrayed in the Media*, 14 J. CRIM. JUST. & POPULAR CULTURE 59, 60–64 (2007); Tom Condon, *Sex Offender Registry: More Harm than Good?*, CONN. MIRROR (May 21, 2018), <https://ctmirror.org/2018/05/21/sex-offender-registry-harm-good/> [<https://perma.cc/SN6Z-P3DX>] (describing the argument that sex offender registries are based on myths and do not solve any problems). We are not so naïve to think this Article will make much of a difference on Facebook debates, but we do hope that it may eventually have an impact on the way that both trial and appellate courts approach these issues.
  5. We are aware that the phrase “judicial corruption” usually includes the receipt of something of value. See, e.g., Cynthia A. Koller & Elizabeth B. Koller, *Splintered Justice: Is Judicial Corruption Breaking the Bench?*, 47 CRIM. L. BULL. 948, 952 (2011) (“[W]e define judicial corruption as: a breach of the public’s delegated and implied trust in which judges

judicial decisions involving sexual offender determinations reveals that, frequently, courts rely improperly on inaccurate and underdeveloped statistics as well as unverified and outdated information. This reliance, too often, underlies rulings that subject the sex offender to significant sanctions and loss of liberty. Additionally, the continuation of the testimonial script that all sex offenders are high recidivists, dangerous, compulsive, and untreatable contributes to the anti-therapeutic effect of shaming and humiliation.<sup>6</sup> This narrative results in isolation, seclusion, and lack of dignity; also, it further trivializes the judicial process and violates the tenets of therapeutic jurisprudence. We will consider each of these, and we will look at all of this through the filter of the Supreme Court’s decision in *McKune v. Lile*,<sup>7</sup> a case decided sixteen years ago that is now beginning to resurface in new, critical literature that has deconstructed the case’s basic fallacy in ways that we hope will stay at the forefront of this debate for the coming years.<sup>8</sup>

We argue here that, in fact, the “strings in the book” *are* “pulled and persuaded”<sup>9</sup> so that judges do not have to deal with the reality to

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*manipulate the power of their official positions by receiving or agreeing to receive something of value in return for influence in the performance of their official duties.”* (emphasis in original). However, the meaning of “corruption” in this context goes far beyond the simple exchange of money-for-favors. See Kellam Conover, *Rethinking Anti-Corruption Reforms: The View from Ancient Athens*, 62 BUFF. L. REV. 69, 69 (2014) (quoting ARISTOTLE, ARISTOTLE: POLITICS bk. III, § 1279a29–33 (H. Rackham trans., Harvard Univ. Press rev. & report ed. 1990)) (“Over two millennia ago, Aristotle posited that ruling in one’s own interest, not in the people’s interest, causes politics to deviate from their intended purpose—what he terms ‘corruption.’”); see also Zephyr Teachout, *Love, Equality, and Corruption*, 84 FORDHAM L. REV. 453, 454 (2015) (arguing that Aristotle understood corruption in the context of “questions of motive, intent, feeling, and passion”).

6. We discuss how “the focus of sexual offender laws is to shame and humiliate those persons subject to regulation” extensively in MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, SHAMING THE CONSTITUTION: THE DETRIMENTAL RESULTS OF SEXUAL VIOLENT PREDATOR LEGISLATION 3 (2017).
7. 536 U.S. 24 (2002).
8. For the most recent critique, see David T. Goldberg & Emily R. Zhang, *Our Fellow American, the Registered Sex Offender*, 2016 CATO SUP. CT. REV. 59, 76 (2016–17) (“Justice Kennedy’s plurality opinion in *McKune v. Lile* . . . offered a litany of deeply problematic factual assertions about ‘sex offenders’ that continue to shape legal decisions to this day.”).
9. Our title comes from one of Bob Dylan’s greatest songs, *The Lonesome Death of Hattie Carroll*, about the death of a country club waitress at the hands of an inebriated tobacco empire scion. It comes from a verse that—importantly for our purposes—talks about the sort of judicial corruption that Dylan saw in that case (in which the defendant was given a six-month sentence):

which they willfully blind themselves.<sup>10</sup> The premises of judges' decisions related to the assessment of who is a sexually violent predator are built on houses of cards that could and should crumble quickly if we dispassionately examine the underlying statistics and data. A recent article critiqued the teleological way that courts interpret biologically-based evidence in a range of criminal procedure cases so that they can end up with the result that, a priori, they want to reach. Indeed, “judges . . . , like the rest of us, are subject to an incessant media barrage of media hysteria on questions of whether sex offenders are likely to recidivate.”<sup>11</sup> We believe that it is *impossible* to make sense of the law or the science in this volatile area of law and policy until we come to grips with this reality.

Part I of this Article considers how courts rely on inaccurate statistics when deciding whether a sex offender is likely to recidivate.<sup>12</sup> Part I also contrasts these inaccurate statistics with the *accurate* statistics and looks carefully at this misuse of statistics in the context of the *McKune* case and the *denouement* of that decision. Part II

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In the courtroom of honor, the judge pounded his gavel  
To show that all's equal and that the courts are on the level  
And that the strings in the books ain't pulled and persuaded  
And that even the nobles get properly handled.

BOB DYLAN, *THE LONESOME DEATH OF HATTIE CARROLL* (Columbia Records 1964) (emphasis added).

10. *See, e.g.*, *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011) (“Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances.”).
11. Michael L. Perlin, ‘*I’ve Got My Mind Made Up’: How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence*’, 24 *CARDOZO J. EQUAL RTS. & SOC. JUST.* 81, 89 (2017) (citing, inter alia, Heather Ellis Cucolo & Michael L. Perlin, ‘*They’re Planting Stories in the Press’: The Impact of Media Distortions on Sex Offender Law and Policy*’, 3 *U. DENV. CRIM. L. REV.* 185, 215 (2013)); *see, e.g.*, Catherine Donaldson-Evans, *Molesters Often Strike Again*, FOX NEWS, <http://www.foxnews.com/story/2005/04/16/molesters-often-strike-again.html> [<https://perma.cc/4KWS-YSGT>] (last updated May 19, 2015) (quoting forensic psychologist Louis Schlesinger’s statement that “[recidivism of sexual predators] happens all the time”).
12. It has now become clear that this may *not* be the only area of the law in which this sort of misplaced reliance has occurred. *See, e.g.*, John Lightbourne, *Damned Lies & Criminal Sentencing Using Evidence-Based Tools*, 15 *DUKE L. & TECH. REV.* 327 (2017) (discussing the courts’ misplaced reliance on statistics regarding sentencing decision-making); Ryan Gabrielson, *Suspect Evidence Informed a Momentous Supreme Court Decision on Criminal Sentencing*, PROPUBLICA (Dec. 11, 2017, 11:40 A.M.), <https://www.propublica.org/article/suspect-evidence-momentous-supreme-court-decision-criminal-sentencing> [<https://perma.cc/5JPP-7SMN>].

discusses how these errors have led to the inappropriate shaming and humiliation of persons enmeshed in the Sexually Violent Predator Act (“SVPA”) commitment process.<sup>13</sup> Part II also explains how these errors have consequently trivialized the judicial process, noting, however, that there have been *some* recent cases that consider the underlying issues more seriously. Part III explores the meaning and significance of therapeutic jurisprudence in this context and seeks to expose how the errors in question violate all the precepts of therapeutic jurisprudence. We conclude with some modest suggestions for the courts and for litigators in this complex and difficult area of the law.

## I. HOW COURTS RELY ON INACCURATE STATISTICS

Sex offender statutes and implementing court decisions are designed to isolate, restrict, and/or remove sexual offenders from society.<sup>14</sup> Strict monitoring and post-criminal sentence sanctions have been deemed necessary for two central reasons: (1) such individuals commit crimes that society has deemed to be the most heinous,<sup>15</sup> and (2) sex offenders have a high rate of recidivism and are highly likely to repeat offending behaviors.<sup>16</sup>

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13. *See generally* Michael L. Perlin & Naomi M. Weinstein, “*Friend to the Martyr, a Friend to the Woman of Shame*”: *Thinking About the Law, Shame and Humiliation*, 24 S. CAL. REV. L. & SOC. JUST. 1, 41–47 (2014) (discussing how sex offender registration acts (“SORAs”) are “based on flawed reasoning” that “shame and stigmatize sex offenders and deny them meaningful opportunities for rehabilitation”).
  14. *See, e.g.*, Pamela Foohey, *Applying the Lessons of GPS Monitoring of Batters to Sex Offenders*, 43 HARV. C.R.-C.L. L. REV. 281, 283 (2008) (“Residency restrictions push sex offenders to more rural areas at the outskirts of cities and towns. Not only does this remove sex offenders from the areas where they are likely to find work and treatment, but it also isolates them from society, aggravates their housing problems, and forces them to live near each other.”); *Grady v. North Carolina*, 135 S. Ct. 1368, 1370–71 (2015) (holding that attaching a GPS monitoring device to a person was a Fourth Amendment search); Ben A. McJunkin & J.J. Prescott, *Fourth Amendment Constraints on the Technological Monitoring of Convicted Sex Offenders*, 21 NEW CRIM. L. REV. 379 (2018).
  15. When members of the public are asked to imagine a typical sex offender or offense, “most people naturally envision sex offenders who commit the most heinous sex offenses such as rape and child sexual abuse.” Margaret C. Stevenson et al., *The Influence of a Juvenile’s Abuse History on Support for Sex Offender Registration*, 21 PSYCHOL. PUB. POL’Y & L. 35, 40–41 (2015).
  16. There is some important empirical evidence that such laws actually *increase* the rate of recidivism. *See, e.g.*, J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161, 161 (2011); Stephanie N.K. Robbins, *Homelessness Among Sex Offenders: A Case for Restricted Sex Offender*

There are two major sorts of legislative enactments designed to confine and restrict offenders—civil commitment laws and registration and notification laws. Both of these legal sanctions necessitate the use of expert testimony during court proceedings.<sup>17</sup> Expert predictions of future violence is “central to the ultimate question: . . . whether petitioners suffer from a mental abnormality or personality disorder”<sup>18</sup> that causes them to be predisposed to commit future crimes.<sup>19</sup> Importantly, the bases for these predictions have not gone unchallenged. In 2004, a Florida appellate judge wrote that “[w]e have embarked on the first steps into a new world, arguably a science fiction world, in which judges and juries are asked to prevent crimes years before they occur.”<sup>20</sup> Judicial opinions are constrained by the statutory language that requires expert testimony on the issue of dangerousness.<sup>21</sup>

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*Registration and Notification*, 20 TEMP. POL. & CIV. RTS. L. REV. 205, 208 (2010).

17. In the few cases that have considered the question, such testimony has regularly passed the standard for the admission of expert testimony established by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587–92 (1993), which determined that scientific evidence is admissible if it is valid and reliable. See Melissa Hamilton, *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws*, 83 TEMP. L. REV. 697, 735–40 (2011) (summarizing *Daubert* and *Frye* challenges to future dangerousness evidence).
18. *In re Young*, 857 P.2d 989, 1017 (Wash. 1993).
19. *In re Detention of Thorell*, 72 P.3d 708, 714 (Wash. 2003); *In re Detention of Holtz*, 653 N.W.2d 613, 615 (Iowa Ct. App. 2002). See generally FED. R. EVID. 702 (“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if . . . scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue . . .”).
20. *In re Commitment of Burton*, 884 So. 2d 1112, 1120 (Fla. Dist. Ct. App. 2004); see also *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (“[T]he thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.”). On the admissibility of scientific evidence testimony based on the sorts of risk assessment instruments typically used in sex offender cases, see Douglas Mossman et al., *Risky Business Versus Overt Acts: What Relevance Do “Actuarial,” Probabilistic Risk Assessments Have for Judicial Decisions on Involuntary Psychiatric Hospitalization?*, 11 HOUS. J. HEALTH L. & POL’Y 365, 399–400 n.158 (2011); see also Hamilton, *supra* note 17, at 735–37.
21. For decades, a debate has raged on the parallel question of the extent to which an expert mental health professional can predict dangerousness on the part of someone subject to involuntary civil commitment. See generally MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* §§ 3-4 to 3-4.2.4 (3d ed. 2017). By way of example, John Monahan and Henry Steadman have questioned the factors used by mental health professionals to make clinical

Thus, in responding to a challenge to admitted future dangerousness testimony, a Massachusetts trial judge has stated that courts must “respect [the] policy of [the] legislature with respect to the trustworthiness of psychiatric opinion evidence in cases involving sexually dangerous persons.”<sup>22</sup> For a judge to make a ruling on the potential future risk of an individual, his or her ultimate decision is inevitably purely based on the subjective opinion of an expert witness, devoid of concrete answers and verifiable scientific conclusions.<sup>23</sup> And courts have erred on the side of caution, willing to easily accept an expert’s determination of high risk.<sup>24</sup>

This notion of a purported reality of high recidivism has been perpetuated by experts working in the field of sex offender assessment, court decisions supporting civil commitment of offenders after they have served a criminal sentence, and, most notably, the media. All three of these contributing factors are interconnected and have continuously built upon each other’s misinformation and inaccurately perceived truths.<sup>25</sup>

The media has focused significantly on the heinous and highly emotionally charged crimes of individuals such as Earl Shriver, whose

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assessments of dangerousness. “[U]nless actuarial research can independently verify the predictive value of these and other, more theoretically derived factors, their actual as opposed to perceived usefulness in risk assessment will remain unknown.” John Monahan & Henry J. Steadman, *Toward a Rejuvenation of Risk Assessment Research*, in *VIOLENCE AND MENTAL DISORDER* 7 (John Monahan & Henry J. Steadman eds., 1994), discussed in Grant H. Morris, *Defining Dangerousness: Risking a Dangerous Definition*, 10 *J. CONTEMP. LEGAL ISSUES* 61, 86 n.145 (1999). At the best, mental health professionals cannot predict long-term dangerousness accurately “at much better than a modest level of accuracy.” PERLIN & CUCOLO, *supra*, at § 3-4.2.3 (citing John Monahan, *Clinical and Actuarial Predictions of Violence*, in 1 *MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY* § 7.2.2-1[2], at 317 (David Faigman et al. eds., 1997)).

22. Commonwealth v. Parks, No. 04709, 2005 WL 1367112, at \*4 (Mass. Mar. 9, 2005) (citing Commonwealth v. McGruder, 205 N.E.2d 726, 728 (Mass. 1965)).
23. On the dangers of admitting unverified expert testimony in other forensic settings, see Valena E. Beety, *Cops in Lab Coats and Forensics in the Courtroom*, 13 *OHIO ST. J. CRIM. L.* 543, 545 (2016), which characterizes sole reliance on “an individual forensic analyst” as a “dangerous path.”
24. On how fear of voter retaliation supports this approach, at least in part, see generally Heather Ellis Cucolo & Michael L. Perlin, “*They’re Planting Stories in the Press: The Impact of Media Distortions on Sex Offender Law and Policy*,” 3 *U. DENV. CRIM. L. REV.* 185 (2013) [hereinafter Cucolo & Perlin, *Impact of Media Distortions*].
25. And this observation is not new. See Hal Arkowitz & Scott O. Lilienfeld, *Once a Sex Offender, Always a Sex Offender? Maybe Not.*, *SCI. AM.* (Apr. 1, 2008), <https://www.scientificamerican.com/article/misunderstood-crimes/> [<https://perma.cc/2WCW-648P>].

crime precipitated the first new generation sex offender law, and Jesse Timmendequas, whose victim is the namesake of Megan’s Law.<sup>26</sup> A writer of a *New York Times* op-ed column in 1993 concluded that “[t]here can be no dispute that monsters live among us. The only question is what to do with them once they become known to us.”<sup>27</sup> As a result of the media’s depiction of a one-dimensional “sex offender” in broadcast news and newspaper articles,<sup>28</sup> the general public has conceptualized what it believes to be the prototype of this “monstrous imminent evil”—a male who violently attacks young children who are strangers.<sup>29</sup> The common wisdom is that—per the television series, *Law*

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26. Earl Shriner’s crime provoked Washington State to enact the first of the new generation sex offender laws, and the murder and sexual assault of Megan Kanka by Jesse Timmendequas produced New Jersey’s Megan’s Law, which served as the “model community notification law” for other states to follow. See Cucolo & Perlin, *Impact of Media Distortions*, *supra* note 24, at 188 n.26. For a recent article offering an array of legal theories under which such laws might be challenged, including substantive due process, see Wayne A. Logan, *Challenging the Punitiveness of “New-Generation” SORN Laws*, 21 NEW CRIM. L. REV. 426 (2018).
27. Andrew Vachss, *Sex Predators Can’t Be Saved*, ZERO (Jan. 5, 1993), [http://www.vachss.com/av\\_dispatches/disp\\_9301\\_a.html](http://www.vachss.com/av_dispatches/disp_9301_a.html) [<https://perma.cc/3J46-7V6G>]. Vachss is a popular novelist and an attorney who represents children and youth in abuse/neglect, delinquency, custody/visitation proceedings, and related tort litigation. See *Andrew Vachss—Credentials*, ZERO, <http://www.vachss.com/vachss/credentials.html> [<https://perma.cc/DTU7-C3UF>] (last visited Jan. 24, 2019). He writes frequently about what he perceives as the nature of evil as reflected in the actions of sex offenders. See *Sick vs. Evil*, ZERO, [http://www.vachss.com/mission/sick\\_vs\\_evil.html](http://www.vachss.com/mission/sick_vs_evil.html) [<https://perma.cc/8JT8-69MH>] (last visited Jan. 24, 2019).
28. Pollak & Kubrin, *supra* note 4, at 60 (“Reality is socially constructed, in large part, through the media, which provides a way for dominant values in society to be articulated to the public.”); *id.* at 64 (“With regards to emotion, newspapers focus on ideas whereas television emphasizes ‘feeling, appearance, mood . . . there is a retreat from distant analysis and a dive into emotional and sensory involvement.’”).
29. Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMPLE POL. & C.R. L. REV. 1, 16 (2012) [hereinafter Cucolo & Perlin, *Preventing Sex-Offender Recidivism*]; Helen Gavin, *The Social Construction of the Child Sex Offender Explored by Narrative*, 10 QUALITATIVE REP. 395, 395 (2005) (“The Dominant narrative construction, in Western societies, concerning child sex offenders identifies such individuals as purely male, inherently evil, inhuman, beyond redemption or cure, lower class, and unknown to the victim . . .”). On the “monster” metaphor in general, see JOHN DOUARD & PAMELA D. SCHULTZ, *MONSTROUS CRIMES AND THE FAILURE OF FORENSIC PSYCHIATRY* (David C. Thomas et al. eds., 2013).

and Order: SVU—recidivism rates are near 100 percent for sex offenders.<sup>30</sup>

The role of the media in the development of sex offender law is a base reflection of the power of fear in the creation of law and policy. By extrapolating from the scenario of the worst case,<sup>31</sup> we have created policies that reject valid and reliable statistics, reject science, and, instead, generate a body of statutes and court decisions based on inaccurate presumptions. For example, prior to the enactment of national sex crime registries and notification laws, there were no verifiable reports of any increase in sex crimes.<sup>32</sup> In fact, a federally funded study showed that a decline in sexual assault cases began *before* the enactment of sex offender reforms. This finding would seem to indicate that, since the pattern of decline began *prior* to the enactment of sex crime reforms, the laws themselves could not have affected the start of this downward pattern.<sup>33</sup>

The judiciary is susceptible to the same moral panic as the press and the general public. The media-driven panic over sex offenders has directly influenced judicial decisions—at the trial, intermediate appellate, and Supreme Court levels—in this area of the law, especially in jurisdictions with elected judges.<sup>34</sup> The demonization of this population has helped create a “moral panic”<sup>35</sup> that has driven the

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30. See Cucolo & Perlin, *Impact of Media Distortions*, *supra* note 24, at 217.

31. This is a perfect reflection of the vividness heuristic. See *infra* note 156 and accompanying text.

32. Christina Mancini, J. C. Barnes & Daniel P. Mears, *It Varies from State to State: An Examination of Sex Crime Laws Nationally*, 24 CRIM. JUST. POL’Y REV. 166, 171 (2011).

33. See KRISTEN ZGOBA ET AL., MEGAN’S LAW: ASSESSING THE PRACTICAL AND MONETARY EFFICACY 37 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf> [<https://perma.cc/R4P4-9HNL>]. A more recent study by Professor Zgoba and two colleagues tracked 547 convicted sex offenders over a fifteen-year period and concluded that SORN laws “do[] not have a demonstrable effect on future offending.” Kristen M. Zgoba, Wesley G. Jennings & Lara M. Salerno, *Megan’s Law 20 Years Later: An Empirical Analysis and Policy Review*, 45 CRIM. JUST. & BEHAV. 1028, 1044 (2018); see also Susan K. Livio, *Maureen Kanka Defends Megan’s Law Despite Report Saying It Fails to Deter Pedophiles*, N.J. REAL-TIME NEWS (Feb. 6, 2009, 7:55 PM), [http://www.nj.com/news/index.ssf/2009/02/despite\\_new\\_report\\_on\\_megans\\_l.html](http://www.nj.com/news/index.ssf/2009/02/despite_new_report_on_megans_l.html) [<https://perma.cc/S7QJ-JW2R>] (reporting Megan Kanka’s mother’s (Maureen Kanka) statement to the Newark Star-Ledger (New Jersey’s largest circulation newspaper) that the “purpose of [Megan’s Law] was to provide an awareness to parents . . . . Five million people have gone to the state web site. It’s doing what it was supposed to do . . . . We never said it was going to stop them from reoffending or wandering to another town.”).

34. Cucolo & Perlin, *Impact of Media Distortions*, *supra* note 24, at 218–19.

35. See, e.g., Daniel M. Filler, *Making the Case for Megan’s Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 346–66 (2001); Eric Fink, *Liars*

passage of legislation. Yet, valid and reliable research has found this legislation to be counterproductive and engendering a *more* dangerous set of conditions<sup>36</sup> and judicial decisions—all reflecting the “anger and hostility the public feels” about this population.<sup>37</sup>

In the case of *United States v. Comstock*,<sup>38</sup> the Supreme Court’s opinion reinforced the power of Congress to prevent this “dangerous” cohort of individuals from entering society.<sup>39</sup> Although it is impossible to know with any level of confidence whether the Justices writing for the majority were moved or influenced in any way by public sentiment,<sup>40</sup> there is no doubt that the majority blindly accepted the

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*and Terrorists and Judges, Oh My: Moral Panic and the Symbolic Politics of Appellate Review in Asylum Cases*, 83 NOTRE DAME L. REV. 2019, 2038–39 (2008).

36. Tusty ten Bensel & Lisa L. Sample, *Social Inclusion Despite Exclusionary Sex Offense Laws: How Registered Citizens Cope with Loneliness*, CRIM. JUST. POL’Y REV. 1, 1–2 (2016); see also HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 43 (2007), <https://www.hrw.org/report/2007/09/11/no-easy-answers/sex-offender-laws-us> [<https://perma.cc/89WH-VKXA>]. We have known this for at least two decades. See Eric Janus & Robert Prentky, *Sexual Predator Law: A Two-Decade Retrospective*, 21 FED. SENT’G REP. 91 n.24 (2008) (citing state reports as sources); Joanna S. Markman, *Community Notification and the Perils of Mandatory Juvenile Sex Offender Registration: The Dangers Faced by Children and Their Families*, 32 SETON HALL LEGIS. J. 261, 282–83 (2008).
37. Meghan Gilligan, *It’s Not Popular but It Sure Is Right: The (In)Admissibility of Statements Made Pursuant to Sexual Offender Treatment Programs*, 62 SYRACUSE L. REV. 255, 271 (2012).
38. 560 U.S. 126 (2010).
39. The *Comstock* Court expressly declined to address whether 18 U.S.C. § 4248 or its application denied equal protection, procedural or substantive due process, or any other constitutional rights. *Id.* at 149–50. Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventative Detention*, 101 J. CRIM. L. & CRIMINOLOGY 969, 996 (2011) (“[T]he majority opinion essentially rewrote law surrounding the Necessary and Proper Clause to allow for virtually unfettered federal power in the area of sex offender civil commitment.”).
40. For sixty years, it has been a “given” that the Supreme Court is responsive. See Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) (“The fact is, then, that the policy views dominant on the Court are never for long out of line with the policy views dominant among lawmaking majorities of the United States.”). More recent studies, interestingly, suggest there is a four-year to seven-year time lag between the expression of public opinion and its articulation in Supreme Court opinions. See, e.g., William Mishler & Reginald Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169, 195–98 (1996); William Mishler & Reginald Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 92 (1993). The most recent study is clear: “[T]he empirical

opinion that sexual predators will pose a high risk of dangerousness and that future risk can be determined.<sup>41</sup> Notably, three of the five persons designated as “sexually dangerous” whose appeals were heard in the *Comstock* case were on charges of possession of child pornography.<sup>42</sup> Although child pornography is a crime that continuously harms the victim through dissemination, recent studies show an overall lower risk for reoffense.<sup>43</sup> Additionally, researchers disagree on the risk between viewing child pornography and committing a contact offense, with the general consensus that exclusive internet offenders have a low risk of recidivism.<sup>44</sup>

In a 5-year fixed follow-up sample of 266 child pornography offenders who had some opportunity to reoffend in the community, the mean CPORT score was 1.94 (SD = 1.57, 95% CI = 1.74 - 2.12, range 0–7). Eleven percent committed a new sexual offense, with 3 percent committing a new contact sexual offense against a child (17 years of age or younger) and 9 percent committing a new child pornography offense.

The valid and reliable research paints an entirely different picture from the one accepted by the general public and the media and unthinkingly endorsed by the Supreme Court.<sup>45</sup> Contemporaneous Department of Justice statistics demonstrate that “[n]ot only do few sex offenders get rearrested for committing a new sex crime, but sex offenders are less likely than non-sex offenders to be rearrested for any crime at all.”<sup>46</sup> This is certainly an extremely complicated area and

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results suggest justices write opinions with an eye toward anticipated public opinion.” Ryan C. Black et al., *The Influence of Public Sentiment on Supreme Court Opinion Clarity*, 50 LAW & SOC’Y REV. 703, 727 (2016).

41. *Comstock*, 560 U.S. at 131. Justice Alito’s concurring opinion focuses upon the fears of “dangerousness” and “risk” in allowing this population to return to the community and, therefore, must support federal intervention. Citing evidence of the States’ unwillingness to assume the financial burden of containing these individuals, Justice Alito deemed that the burden thus fell upon Congress to prevent these prisoners to enter the community and “present a danger [wherever] they chose to live or visit.” *Id.* at 158 (Alito, J., concurring).
42. *Id.* at 131. Graydon Earl Comstock, Jr. had served a 37-month sentence in federal prison for *receiving* child pornography.
43. M.C. Seto & A.W. Eke, *Predicting Recidivism Among Adult Male Child Pornography Offenders: Development of the Child Pornography Offender Risk Tool (CPORT)*, 39 L. & HUM. BEHAV. 416, 426 (2015).
44. Babchishin et al., *Online Child Pornography Offenders Are Different: A Meta-analysis of the Characteristics of Online and Offline Sex Offenders Against Children*, 44 ARCHIVES SEXUAL BEHAV. 45 (2015).
45. See *infra* notes 59–65 and accompanying text.
46. See Tamara Rice Lave, *Throwing Away the Key: Has the Adam Walsh Act Lowered the Threshold for Sexually Violent Predator Commitments*

outcomes can vary based on the definitions of “re-offense,” the cohort studied, and the methods used in carrying out the study. Thus, the conclusions of numerous reports and studies on re-offense and dangerousness are hotly contested,<sup>47</sup> but recent studies undeniably show misguidedness in our general understanding of recidivism.

1. Since 1992, sex offenses in the U.S. have declined by 60 percent; rape rates, too, have followed a similar trajectory.<sup>48</sup> Recidivism rates for *all* released prisoners, not just those who committed a sexual crime, tend to range between 56.7 percent (within one year after release) and 76.6 percent (within five years after release).<sup>49</sup>

2. For non-incarcerated sex offenders, five-year recidivism rates were less than 5 percent for federal probationers.<sup>50</sup> Additionally, previous research consistently found that recidivism rates for sex offenders are generally lower than 20 percent after a five-year follow-up.<sup>51</sup>

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*Too Far?*, 14 U. PA. J. CONST. L. 391, 396–97 (2012) (citing U.S. DEP’T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 2 (2003)).

47. See generally Grant Duwe & Valerie Clark, *The Effects of Prison-Based Educational Programming on Recidivism and Employment*, 4 PRISON J. 454 (2014).
48. David Finkelhor & Lisa Jones, *Have Sexual Abuse and Physical Abuse Declined Since the 1990s?*, CRIMES AGAINST CHILD. RES. CTR., Nov. 2012, at 1; see also Erica Goode, *Researchers See Decline in Child Sexual Abuse Rate*, N.Y. TIMES (June 28, 2012), <https://www.nytimes.com/2012/06/29/us/rate-of-child-sexual-abuse-on-the-decline.html> [<https://perma.cc/86QU-6YZX>] (“Overall cases of child sexual abuse fell more than 60 percent from 1992 to 2010, according to David Finkelhor, a leading expert on sexual abuse who, with a colleague, Lisa Jones, has tracked the trend. The evidence for this decline comes from a variety of indicators, including national surveys of child abuse and crime victimization, crime statistics compiled by the F.B.I., analyses of data from the National Data Archive on Child Abuse and Neglect and annual surveys of grade school students in Minnesota, all pointing in the same direction.”). *But see* Corey Rayburn Yung, *How to Lie with Rape Statistics: America’s Hidden Rape Crisis*, 99 IOWA L. REV. 1197 (2014) (discussing a study that addresses how widespread the practice of undercounting rape is in police departments across the country).
49. Matthew R. Durose et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, BUREAU OF JUST. STAT. (Apr. 22, 2014), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986> [<https://perma.cc/6ZBH-73L2>].
50. WILLIAM RHODES ET AL., RECIDIVISM OF OFFENDERS ON FEDERAL COMMUNITY SUPERVISION 5 (2013), <https://www.ncjrs.gov/pdffiles1/bjs/grants/241018.pdf> [<https://perma.cc/M4AA-92C8>].
51. Lawrence L. Bench & Terry D. Allen, *Assessing Sex Offender Recidivism Using Multiple Measures: A Longitudinal Analysis*, 4 PRISON J. 411, 413 (2013).

3. An early study that looked at released offenders found that the rates of recidivism are similar to those of other incarcerated offenders, with rates of reoffending for sex crimes falling around 28 percent.<sup>52</sup>

4. Older age is generally tied to lower risk of recidivism amongst sex offenders. A 2003 report found that: “(1) age was a ‘powerful determinant’ of sexual arousal assessed by volumetric phallometry,<sup>53</sup> and (2) sexual recidivism decreased as a linear function of age at time of release from prison (based on an analysis of 468 sex offenders released from a federal penitentiary in Ontario).”<sup>54</sup> The authors posited that “these findings are less than surprising, given the well documented decline of bioavailable testosterone over the course of the lifespan, and the equally well documented decrease in libido in males as age increases.”<sup>55</sup>

Disturbingly, there appears to be very little research into the efficacy of civil commitment. Other than incapacitation, there is scarce empirical evidence of its long-term benefits, and little research has explored its effectiveness on sexually violent predators.<sup>56</sup>

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52. *See, e.g.,* DONNA SCHRAM & CHERYL MILLOY, SEXUALLY VIOLENT PREDATORS AND CIVIL COMMITMENT: A STUDY OF THE CHARACTERISTICS AND RECIDIVISM OF SEX OFFENDERS CONSIDERED FOR CIVIL COMMITMENT BUT FOR WHOM PROCEEDINGS WERE DECLINED i, 9 (1998), [https://www.wsipp.wa.gov/ReportFile/1278/Wsipp\\_Sexually-Violent-Predators-and-Civil-Commitment\\_Full-Report.pdf](https://www.wsipp.wa.gov/ReportFile/1278/Wsipp_Sexually-Violent-Predators-and-Civil-Commitment_Full-Report.pdf) [<https://perma.cc/ZR2Y-ML93>] (explaining that when tracking the official records of sixty-one sex offenders who had been released during the first six years of the Washington Community Protection Act of 1990, 41 percent of the group were not rearrested at a mean follow-up of almost four years, and, of the 59 percent who were rearrested, only 28 percent had committed further sex offenses; the non-offenders could have been subjected to life sentences without parole).
53. This is a measurement of penile blood volume change, rather than penile circumference change. *See* Ray Blanchard et al., *Phallometric Comparison of Pedophilic Interest in Nonadmitting Sexual Offenders Against Stepdaughters, Biological Daughters, Other Biologically Related Girls, and Unrelated Girls*, 18 SEXUAL ABUSE 1, 6 (2006).
54. Robert Alan Prentky & Austin F. S. Lee, *Effect of Age-at-Release on Long Term Sexual Re-offense Rates in Civilly Committed Sexual Offenders*, 19 SEX ABUSE 43, 45 (2007) (citing Howard E. Barbaree et al., *The Development of Sexual Aggression Through the Life Span: The Effect of Age on Sexual Arousal and Recidivism Among Sex Offenders*, 989 ANNS. N.Y. ACAD. SCI. 59 (2003)).
55. *Id.* But *see* Marnie E. Rice & Grant T. Harris, *What Does It Mean When Age Is Related to Recidivism Among Sex Offenders?*, 38 LAW & HUM. BEHAV. 151 (2014) (“No adjustment to a sex offender’s score on a comprehensive actuarial tool that includes age at first or index offense should be made simply because the offender is older.”).
56. THE CTR. FOR SEX OFFENDER MGMT., THE COMPREHENSIVE APPROACH TO SEX OFFENDER MANAGEMENT 1–2 (2008); *see* Astrid

Regulating, criminalizing, and sanctioning actions involving sexual activity—void of sexual offending—has had a complicated and rocky history within the law and courts.<sup>57</sup> Cases involving sex crimes can further complicate a judge’s established “moral” position on sensitive issues, and court decisions are unlike any other area in our jurisprudence.<sup>58</sup> The judgment that precedes the adjudication of these crimes is overwhelming and steeped in fear, disgust, and a belief that the charged individual is automatically guilty and deviant. There is rampant ignorance as to the legal, societal, and psychological underpinnings of the circumstances surrounding these cases by not only the “court of public opinion” but of the highest court itself.<sup>59</sup>

And now, for the first time, we are beginning to see some of the legal roots of these attitudes. In a recent article, Professor Ira Ellman and a colleague discussed the Supreme Court’s continued reference to the “frightening and high” statistics of recidivism by sexual offenders.<sup>60</sup> They referenced two fundamental decisions by the Court that set the

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Birgden & Heather Cucolo, *The Treatment of Sex Offenders: Evidence, Ethics, and Human Rights*, 23 *SEXUAL ABUSE* 295, 300–301 (2011).

57. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (holding that there was no constitutional protection for acts of sodomy, and that states could outlaw those practices) *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (holding that a Texas statute forbidding two persons of the same sex to engage in certain intimate sexual conduct violates due process clause); Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 *AM. U. L. REV.* 313, 317 (2003) (discussing “the ‘public welfare offense’ model where the majority of jurisdictions, either by legislative enactment or court decision, have determined that the protection of the community demands strict regulation of sexual activity”). On how the public responds in related ways to questions of both sexual autonomy and sexual offenses in matters involving persons with mental disabilities, see Michael L. Perlin, Heather Ellis Cucolo & Alison J. Lynch, *Sex, Sexuality, Sexual Offending and the Rights of Persons with Mental Disabilities*, 6 *LAWS* 20 (2017); Michael L. Perlin, Alison J. Lynch, & Valerie R. McClain, “Some Things are Too Hot to Touch”: *Competency, the Right to Sexual Autonomy, and the Roles of Lawyers and Expert Witnesses*, 34 *TOURO L. REV.* (forthcoming 2019). On how the public demands strict regulation of consensual sexual activity on the part of persons with mental disabilities, see MICHAEL L. PERLIN & ALISON J. LYNCH, *SEXUALITY, DISABILITY AND THE LAW: BEYOND THE LAST FRONTIER?* (2016).
58. See PERLIN & CUCOLO, *supra* note 21, § 5-6.4.1 (characterizing the Court’s decisions in sex offender area as “void of concrete and credible supporting evidence”).
59. See Dara L. Schottenfeld, *Witches and Communists and Internet Sex Offenders, Oh My: Why It Is Time to Call Off the Hunt*, 20 *ST. THOMAS L. REV.* 359, 361 (2008).
60. Ira Mark Ellman & Tara Ellman, “Frightening and High”: *The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 *CONST. COMMENT.* 495, 496 (2015).

stage for inaccurate statistical reference to the re-offense rate of offenders.<sup>61</sup>

In one of those cases, *McKune v. Lile*,<sup>62</sup> the Court, relying on one prior source, cited an 80 percent rate of re-offense for untreated offenders as a basis underlying the justification to restrict the rights and liberties of individuals convicted of sexual offenses.<sup>63</sup> The Court noted that convicted sex offenders who reenter society are much more likely than any other type of offender to be rearrested for a new rape or sexual assault and “[s]tates thus have a vital interest in rehabilitating convicted sex offenders.”<sup>64</sup> The Court’s acceptance of the re-offense rate as “frightening and high” and much greater than the rate for other offenders has been echoed by federal and state courts ever since.<sup>65</sup> According to the article by Professor Ellman and his colleague:

*McKune* provides a single citation to support its statement “that the recidivism rate of untreated offenders has been estimated to be as high as 80%:” the U.S. Dept. of Justice, Nat. Institute of Corrections, *A Practitioner’s Guide to Treating the Incarcerated Male Sex Offender xiii* (1988). Justice Kennedy likely found that reference in the amicus brief supporting Kansas filed by the Solicitor General . . . as the SG’s brief also cites it for the claim that sex offenders have this astonishingly high recidivism rate. This Practitioner’s Guide itself provides but one source for the claim, an article published in 1986 in *Psychology Today*, a mass market magazine aimed at a lay audience. That article has this

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61. *McKune v. Lile*, 536 U.S. 24 (2002); *Smith v. Doe*, 538 U.S. 84 (2003). *See generally* PERLIN & CUCOLO, *supra* note 21, §§ 5-4.10.1.1, 5-6.5.1.
62. 536 U.S. 24 (2002).
63. *Id.* at 33 (citing U.S. DEPT. OF JUST., A PRACTITIONER’S GUIDE TO TREATING THE INCARCERATED MALE SEX OFFENDER xiii (1988)); *see infra* notes 64–67 and accompanying text.
64. *McKune*, 536 U.S. at 34.
65. A LexisNexis search yielded over 100 cases that use the “frightening and high” language when determining the outcome of sex offender cases. *See, e.g.*, *Does #1–5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016) (“As in *Smith*, the legislative reasoning behind SORA is readily discernible: recidivism rates of sex offenders, according to both the Michigan legislature and *Smith*, are ‘frightening and high.’”); *Belleau v. Wall*, 811 F.3d 929, 934 (7th Cir. 2016) (“The Supreme Court in *Smith v. Doe*, 538 U.S. 84, 103 (2003) . . . , remarked on ‘the high rate of recidivism among convicted sex offenders and their dangerousness as a class.’ The risk of recidivism posed by sex offenders is “frightening and high.” . . . “When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.”); *see, e.g.*, *United States v. Cotton*, 760 F. Supp. 2d 116, 128–29 (D.D.C. 2011); *United States v. Garner*, 490 F.3d 739, 743 (9th Cir. 2007); *State v. Peterson-Beard*, 377 P.3d 1127, 1146 (Kan. 2016); *Doss v. State*, No. 08-1512, 2009 WL 2184835, at \*5–6 (Iowa Ct. App. July 22, 2009).

sentence: “Most untreated sex offenders released from prison go on to commit more offenses—indeed, as many as 80% do.” But the sentence is a bare assertion: the article contains no supporting reference for it. Nor does its author appear to have the scientific credentials that would qualify him to testify at trial as an expert on recidivism. He is a counselor, not a scholar of sex crimes or re-offense rates, and the cited article is not about recidivism statistics. It’s about a counseling program for sex offenders he then ran in an Oregon prison. His unsupported assertion about the recidivism rate for untreated sex offenders was offered to contrast with his equally unsupported assertion about the lower recidivism rate for those who complete his program.<sup>66</sup>

Thus, the authors conclude that “the evidence for *McKune*’s claim that offenders have high re-offense rates (and the effectiveness of counseling programs in reducing it) was just the unsupported assertion of someone without research expertise who made his living selling such counseling programs to prisons.”<sup>67</sup>

Others have used Ellman’s reasoning to sway courts in their view of the case. In one case, the Illinois Supreme Court rejected the defendant’s arguments with these words:

The problem for the defendant is that, regardless of how convincing that social science may be, “the legislature is in a better position than the judiciary to gather and evaluate data bearing on complex problems.” Simply put, we are not a superlegislature.<sup>68</sup>

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66. Ellman & Ellman, *supra* note 60, at 497–98 (internal citations omitted); see also Steven Yoder, *What’s the Real Rate of Sex-Crime Recidivism?*, PAC. STANDARD (May 27, 2016) (citations omitted), <https://psmag.com/news/whats-the-real-rate-of-sex-crime-recidivism> [<https://perma.cc/JBW4-LFBS>] (critiquing the Robert Freeman-Longo’s article *Changing a Life-time of Sexual Crime*, PSYCHOL. TODAY (1986)).

67. Ellman & Ellman, *supra* note 60, at 499. Ellman and Ellman asserted that “the Solicitor General was complicit in urging the Court toward this conclusion with the argument that ‘[t]he absence of ready and reasonable alternatives for reducing recidivism among convicted sexual offenders bolsters the constitutionality of [Kansas’s Sexual Abuse Treatment Program].’” *Id.* at n.15 (quoting Brief for the United States as Amici Curiae at 24, *McKune v. Lile*, 536 N.W.2d 24 (2002) (No. 00-1187)).

68. *People v. Pepitone*, 106 N.E. 3d 984, 992–93 (Ill. 2018) (citations omitted). Tellingly, footnote 3 in the *Pepitone* opinion says this:

One of the *amicus* briefs reminds us that it is ‘perhaps subjective’ whether recidivism rates are low or high. Further, as the State observes, ‘[n]obody knows the true re-offense rate for child sex offenders’ because only a small percentage of sex offenses are reported and only a small percentage of reported offenses result in arrests. However, ‘researchers widely agree that observed

In the other opinion, in his dissent in *State v. Peterson-Beard*,<sup>69</sup> writing for himself and two colleagues, Judge Johnson drew extensively on the Ellmans’ research, concluding that “a recent investigation into the source of *Smith*’s seemingly compelling statistics calls into question their bona fides.”<sup>70</sup> Following this lengthy review, he concluded:

The article recognized that human nature is such that, when faced with an immeasurable fear and strongly held belief, a person will tend to ignore or discount quantifiable facts. “The label ‘sex offender’ triggers fear, and disgust as well. Both responses breed beliefs that do not yield easily to facts.” [Ellman & Ellman], 30 Const. Comment. at 508. Yet, I must cling to the belief that the persons who have been privileged to serve on our nation’s highest Court will yield to the facts and give a closer look at whether our statutory scheme is rationally connected to the nonpunitive purpose of public safety and whether its terms and conditions are excessive in relation to that public safety purpose. If they do, I submit that an objective analysis will disclose that, in the current version of [the Kansas sex offender law], public safety has crossed over the line and is now a “sham or mere pretext” for imposing additional punishment on the offender.<sup>71</sup>

In spite of the existence of extensive scientific literature on sexual and violent recidivism research, myths and misconceptions continue to exist. Stunningly, a recent investigative article underscores that at least one state—California—sought to suppress research studies that showed that *untreated* sex offenders with *all* of the risk factors of committed SVPs contributed to only 6.5 percent of contact sex crimes during an almost five-year exposure in the community.<sup>72</sup> The article also explained

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recidivism rates are underestimates of the true reoffense rates of sex offenders.’

*Id.* at 992 n.3 (citing OFF. OF SEX OFFENDER SENT’G, MONITORING, APPREHENDING, REGISTERING, & TRACKING, SEX OFFENDER MANAGEMENT ASSESSMENT AND PLANNING INITIATIVE 91 (Chris Lobanov-Rostovsky & Roger Przybylski eds., 2014), [https://www.smart.gov/SOMAPI/pdfs/SOMAPI\\_Full%20Report.pdf](https://www.smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf) [<https://perma.cc/59TK-TNLN>]).

69. 377 P.3d 1127 (Kan. 2016).

70. *Id.* at 1146.

71. *Id.* at 1147.

72. Tamara Rice Lave & Franklin E. Zimring, *Assessing the Real Risk of Sexually Violent Predators: Doctor Padilla’s Dangerous Data*, 55 AM. CRIM. L. REV. 705, 709–10, 724–28 (2018) (detailing the efforts made to suppress this study).

that California “shut down” the study when these statistics became known.<sup>73</sup>

The irrational fear over these types of crimes permeates all facets of the law—this fear affects lawyers (both prosecutors and defense counsel), legislators, and judges alike.<sup>74</sup> Throughout the case law, from the inception of the new generation laws until the present, myths and misconceptions continue to be voiced by the courts in making their decisions.<sup>75</sup> Yet, the inadequate and inaccurate response to sexual offending can be mainly attributed to the failure of public policy to create a working relationship between effective law making and sexual-violence prevention and intervention.<sup>76</sup>

This is not the end of the story. In recent years, some state and federal courts have begun to scale back restrictions on sex offenders and scrutinize the constitutionality of enacted laws. The decade or so of poking holes in the solid foundation of incorrect and unfounded beliefs surrounding sexual offending appears to have finally made an impact in the judiciary.<sup>77</sup> Several recent decisions, in certain jurisdictions, have thus abruptly halted the “runaway train” of sex offender legislation.

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73. *Id.* at 740 (positing that these findings “undermine any theory of fixed levels of sexual violence risk”).

74. Edward I. Koch, *The Independence of the Judiciary?*, 1 N.Y. CITY L. REV. 457, 477–78 (1996) (asserting that “[i]t is not just public officials who are guilty of exerting pressure against judges” by recounting the press attacks against Judge Denny Chin for ruling that New York’s Megan’s Law could not be applied retroactively in *Doe v. Pataki*, 940 F. Supp. 603, 604 (S.D.N.Y. 1996)). See generally Jill Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES SOC. ISSUES & PUB. POL’Y 1, 2 (2007) (“Sex offenders and sex crimes incite a great deal of fear among the general public, and as a result, lawmakers have passed a variety of social policies designed to protect community members from sexual victimization.”).

75. See LA. REV. STAT. ANN. § 15:561.2 (2012) (showing that the Louisiana legislature relied upon purported high recidivism rates among sex offenders as its justification for the non-punitive objective of protecting the public from sexual re-offenders, without any proof or certainty of this statement); see *United States v. Comstock*, 560 U.S. 126, 127 (2010) (accepting, in the majority’s opinion, the fact that sexual predators pose a high risk of dangerousness and that future risk can be determined).

76. JOAN TABACHNICK & ALISA KLEIN, ASS’N FOR THE TREATMENT OF SEXUAL ABUSERS, A REASONED APPROACH: RESHAPING SEX OFFENDER POLICY TO PREVENT CHILD SEXUAL ABUSE 3 (2011), <http://www.atsa.com/pdfs/ppReasonedApproach.pdf> [<https://perma.cc/SQ7Z-KMEL>] (“Experts agree that a criminal justice response alone cannot prevent sexual abuse or keep communities safe. Yet, tougher sentencing and increased monitoring of sex offenders are fully funded in many states, while victim services and prevention programs are woefully underfunded.”).

77. Although much groundwork has been laid in questioning misconceptions, the research of Ira Ellman and Tara Ellman that has been scarcely noted

In late 2016, the Sixth Circuit concluded in *Does #1–5 v. Snyder* that Michigan’s sex offender registry and residency restriction law constituted ex post facto punishment.<sup>78</sup> Significantly, this decision stood in stark contrast with the judgments of other courts that have largely rejected various constitutional challenges to specialized sex offender laws and policies.<sup>79</sup> In *Does #1–5*, the plaintiffs, who filed anonymously, argued that various provisions of Michigan’s Sex Offenders Registration Act (“SORA”) were “unconstitutionally vague, should not be enforced under strict liability standards, infringed upon freedom of speech, and hobbled their rights to parent, work, and travel.”<sup>80</sup>

The Sixth Circuit found the retroactive application of SORA to be punitive and therefore unconstitutional.<sup>81</sup> In conducting the rationality-excessiveness test, the court considered the legislature’s stated goals of promoting public safety and reducing recidivism.<sup>82</sup> The court found little to no evidence on the record to support the claim that SORA served either of these goals.<sup>83</sup> Considering the stated goal of reducing recidivism, the court found the evidence in the record demonstrated SORA had, at best, no impact on recidivism.<sup>84</sup> In fact, the court found evidence in the record that the law may actually *increase* the risk of recidivism.<sup>85</sup> Compounding the court’s unwillingness to uphold SORA was the State of Michigan’s failure to so much as analyze recidivism rates in the state, despite having the necessary data to do so.<sup>86</sup> As for public safety, the court found that the record disclosed no relationship between SORA’s registration requirements and public safety whatsoever. Upholding SORA, the court found, would amount to writing a blank check to the legislature to pass whatever laws it wished.<sup>87</sup>

Of note in the *Does #1–5* case was the unique approach that the Sixth Circuit took by discussing “scientific evidence that refutes

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and discussed in the recent case law must be acknowledged. See Ellman & Ellman, *supra* note 60.

78. 834 F.3d 696, 705–06 (6th Cir. 2016).

79. Melissa Hamilton, *Constitutional Law and the Role of Scientific Evidence: The Transformative Potential of Doe v. Snyder*, 58 B.C. L. REV. E-SUPPLEMENT 34 (2017).

80. *Id.* at 37 (first citing MICH. COMP. LAWS § 28.729 (2011), and then citing *Does #1–5*, 834 F.3d at 698).

81. *Does #1–5*, 834 F.3d at 705–06.

82. *Id.* at 704.

83. *Id.* at 704–05.

84. *Id.* at 704.

85. *Id.* at 704–05 (citing Prescott & Rockoff, *supra* note 16, at 168–69).

86. *Id.* at 705.

87. *Id.*

moralized judgments about sex offenders, specifically that they pose a unique and substantial risk of recidivism.”<sup>88</sup> Melissa Hamilton, in her important article highlighting these points, identified the significance of the Sixth Circuit’s reasoning and analysis. Hamilton focused on the implication of the court’s suspicion of the long-held belief that sex offender recidivism was “frightening and high” and that it was not clearly supported by the scientific evidence.<sup>89</sup>

Other courts have followed the Sixth Circuit’s lead in rejecting “frightening and high statistics” as the bases for decisions in sex offender cases. By way of example, the Pennsylvania Supreme Court, in *Commonwealth v. Muniz*,<sup>90</sup> held that the Sexual Offender Registration and Notification Act (“SORNA”), or Megan’s Law IV, registration requirements were “punishment,” thus violating the ex post facto clauses of both the State and Federal Constitutions.<sup>91</sup> Such requirements could not be applied retroactively, the court found, as the individual had already been sentenced for the predicate crime.

Elsewhere, in *Millard v. Rankin*,<sup>92</sup> Judge Matsch distinguished the Supreme Court’s holding in *Smith v. Doe*<sup>93</sup> by employing the same factors that had been used in the *Kennedy v. Mendoza-Martinez* case.<sup>94</sup> In reaching an alternative conclusion, the *Millard* court distinguished Colorado’s SORNA from the Alaska statute that had been at issue in *Smith*.<sup>95</sup> Judge Matsch stressed that Colorado’s SORNA imposed affirmative disabilities or restraints that were greater than those deemed “minor and indirect” by the Supreme Court in *Smith*.<sup>96</sup> Thus,

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88. Hamilton, *supra* note 79, at 34.

89. *Id.*

90. 164 A.3d 1189 (Pa. 2017).

91. *Id.* at 1218.

92. 265 F. Supp. 3d 1211, 1226 (D. Colo. 2017).

93. 538 U.S. 84, 105–06 (2003).

94. *Millard*, 265 F. Supp. 3d at 1223–24 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)). The factors in *Kennedy* were: whether, in its necessary operation, the regulatory scheme: (1) has been regarded in our history and traditions as a punishment; (2) imposes an “affirmative disability or restraint;” (3) “promote[s] the traditional aims of punishment;” (4) has a rational connection to a nonpunitive purpose; (5) is excessive with respect to this purpose; (6) “comes into play only on a finding of *scienter*;” and (7) “whether the behavior to which it applies is already a crime.” 372 U.S. at 168–69.

95. *Millard*, 265 F. Supp. 3d at 1228.

96. *Id.* at 1229 (noting that in *Smith*, “the Court expressly noted that the law under consideration did not have an in-person reporting requirement, and further stated that the record contained ‘no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred’” (quoting *Smith*, 538 U.S. at 100)).

Judge Matsch held that six of the seven factors weighed in favor of finding the state’s SORNA requirements punitive in their effects and, therefore, in violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.<sup>97</sup>

In *Millard*, persons who were registered under the Colorado Sex Offender Registration Act<sup>98</sup> brought a § 1983 civil action and claimed that the Colorado SORA violated their rights under the Eighth and Fourteenth Amendments to the United States Constitution. In finding that the plaintiffs’ Eighth and Fourteenth Amendment rights were violated,<sup>99</sup> the court looked at the criminal history of registrants David Millard, Eugene Knight, and Arturo Vega, detailing the crimes that placed them on the registry and focusing on the resulting hardships of being classified as a “sex offender” in the community.

David Millard was forced to change residences and, as a result of highly detailed information published on the internet, constantly feared that his sex offender status would be discovered and result in his loss of employment.<sup>100</sup> Eugene Knight was a full-time father who received a letter from his child’s school that identified him as a sex offender and barred him from entering school grounds. The court noted that “[t]his exclusion from his children’s school is solely because he is a registered sex offender. Neither DPS nor anyone else had ever accused Mr. Knight of any conduct allegedly disrupting school operations or creating an unsafe or threatening school environment.”<sup>101</sup> Arturo Vega, who was adjudicated as a juvenile offender at age fifteen for conduct occurring when he was thirteen years old, detailed the difficulty experienced in his employment as a direct consequence of his presence on the sex offender registry.<sup>102</sup> Because Mr. Vega was a juvenile offender, he made prior attempts to be removed from the registry. During the prior proceedings for removal, the magistrates improperly placed the burden on Mr. Vega to prove that another offense was not likely.<sup>103</sup> This

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97. *Id.* at 1231, 1235.

98. *Id.* at 1214. SORA requires a person convicted of unlawful sexual behavior or another offense, the underlying factual basis of which involves unlawful sexual behavior, to register with the state as a sex offender. COLO. REV. STAT. § 16-22-103 (2018). SORA defines unlawful sexual behavior to include a wide range of offenses, and its registration requirements apply to both adult and juvenile offenders. *City of Northglenn v. Ibarra*, 62 P.3d 151, 156–57 (Colo. 2003); *see also* COLO. REV. STAT. § 16-22-102(3) (2018) (defining “conviction”); *id.* § 16-22-102(9) (defining “unlawful sexual behavior”).

99. *Millard*, 265 F. Supp. 3d. at 1235.

100. *Id.* at 1218.

101. *Id.* at 1220.

102. *Id.* at 1220–21.

103. *Id.* at 1221–22.

testimony by Mr. Vega, prompted the *Millard* court to aptly describe the prior proceedings as a “Kafka-esque procedure, which was played out not once but twice, [and] deprived Mr. Vega of his liberty without providing procedural due process.”<sup>104</sup>

In addition to reviewing the personal hardships faced by the plaintiffs, the *Millard* court took note of a recent shift in the Supreme Court’s conceptualization of privacy and access to the internet by citing the 2017 case of *Packingham v. North Carolina*.<sup>105</sup> Although *Packingham* had dealt with First Amendment violations of registered sex offenders, it contained a foreshadowing statement that applied directly to the issue in *Millard*.<sup>106</sup> In his majority opinion in *Packingham*, Justice Kennedy highlighted “the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system,” but noted that this was not an issue currently before the Court.<sup>107</sup> Two months after the decision in *Packingham*, the *Millard* court seized upon the significance of Justice Kennedy’s observation and took advantage of the ripeness of that issue in the case at bar.<sup>108</sup> The *Millard* court fittingly took the language contained in *Packingham* and applied it to the relevant facts and circumstances of the *Millard* plaintiffs.

This ongoing imposition of a known and uncontrollable risk of public abuse of information from the sex offender registry, in the absence of any link to an objective risk to the public posed by each individual sex offender, has resulted in and continues to threaten Plaintiffs with punishment disproportionate to the offenses they committed. Where the nature of such punishment is by its nature uncertain and unpredictable, the state cannot assure that it will ever be proportionate to the offense. SORA as applied to these Plaintiffs therefore violates the Eighth Amendment.<sup>109</sup>

The decisions in *Does #1–5*, *Muniz*, and *Millard* represent significant evidence of a judicial shift—in those three jurisdictions—in evaluating the constitutionality of SORA as applied. Noteworthy as well is the case of *Karsjens v. Jesson*,<sup>110</sup> that dealt with the “as applied”

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104. *Id.* at 1233.

105. *Id.* at 1228 (citing *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017)).

106. *Packingham*, 137 S. Ct. at 1733.

107. *Id.* at 1737.

108. *See Millard*, 265 F. Supp. 3d at 1228.

109. *Id.* at 1232.

110. 6 F. Supp. 3d 916 (D. Minn. 2014).

constitutionality of the Minnesota Sex Offender Program (MSOP). In *Karsjens*, multiple claims were brought under a § 1983 class action asserting that the MSOP was punitive in effect.<sup>111</sup> The class action alleged, among other things, that the MSOP failed to provide treatment and denied the right to be free of inhumane treatment.<sup>112</sup> The court displayed its assurance that plaintiffs would likely succeed if, through discovery, they can demonstrate that the commitment scheme is systematically applied in a way that indefinitely commits individuals who are no longer dangerous.<sup>113</sup> Judge Frank took seriously the plaintiffs’ claims, stating that the program in Minnesota is “clearly broken,” and might be “one of the most draconian sex offender programs in existence.”<sup>114</sup> The court observed as follows:

At the center of Plaintiffs’ challenge to the Minnesota sex offender commitment scheme is the allegation that a commitment to MSOP essentially amounts to life-long confinement, equivalent to a lifetime of criminal incarceration in a facility resembling, and run like, a medium to high security prison. Under such conditions, and assuming the allegations in the Complaint to be true, it appears that MSOP may very well be serving the constitutionally impermissible purposes of retribution and deterrence.<sup>115</sup>

A year later, on February 2, 2015, the same court denied a motion to dismiss and a motion for summary judgment by defendants and reiterated that, “[n]ot only does this case address the rights of those populations in our society that are most disliked and feared (and a number of individuals who are vulnerable), but it also heightens the concerns and fears of the public at large.”<sup>116</sup> In a noteworthy footnote, the court acknowledged and refused to dismiss the Plaintiffs’ assertion that:

Defendants were “aware of the failure to progress Plaintiffs and [c]lass members through the different treatment phases to the point that they could be conditionally or unconditionally released” and that “the MSOP treatment program as implemented had only conditionally released a single person and

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111. *Id.* at 926–27.

112. *Id.* at 926.

113. *Id.* at 931.

114. *Id.* at 956.

115. *Id.* at 931.

116. *Karsjens v. Jesson*, No. CV 11-3659 (DWF/JJK), 2015 WL 420013, at \*18 (D. Minn. Feb. 2, 2015).

had never unconditionally released anyone committed to MSOP.”<sup>117</sup>

Even within this small segment of the opinion, the court created history by recognizing and proclaiming the above long-held suspicion and concern by individuals who question the basis for sex offender civil commitment. In further momentous recognition, the court stressed the underlying politics of this area of the law:

Moreover, the record before the Court highlights both the best and the worst of the three branches of our government. At a minimum, the evidence has shown that, to date, the executive and legislative branches in Minnesota have let politics, rather than the rule of law and the rights of “all” of their citizens guide their decisions. In a situation such as this, the federal court may have to step in to protect the rights of Plaintiffs.<sup>118</sup>

Any optimism inspired by Judge Frank’s decision ended with the decision of the Eighth Circuit, which, in *Karsjens v. Piper*,<sup>119</sup> reversed Judge Frank’s opinion and found no substantive due process violation.<sup>120</sup> The Eighth Circuit explained that although civil commitment is a significant deprivation of liberty, the Supreme Court has never held that individuals “who pose a significant danger to themselves or others possess a fundamental liberty interest in freedom from physical restraint.”<sup>121</sup>

In reviewing the recent cases that impact sex offender laws, it is noteworthy to consider how the denial of the petitions for certiorari by the Supreme Court in both the *Karsjens* case and the *Does #1–5* case affect the dialogue about a potential shift of opinion in the highest court

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117. *Id.* at \*17 n.29 (citing Third Amended Complaint at 34, 81, 83–84, *Karsjens*, 2015 WL 420013).

118. *Id.* at \*18 (citing *United States v. Will*, 449 U.S. 200, 218 (1980) (“[T]he role of an Article III judge is to safeguard a litigant’s ‘right to have claims decided by judges who are free from potential domination by other branches of government.’”)).

119. *Karsjens v. Piper*, 845 F.3d 394 (8th Cir. 2017).

120. *Id.* at 410–11.

121. *Id.* at 407. In particular, the Eighth Circuit held that “[a]lthough the Supreme Court has characterized civil commitment as a ‘significant deprivation of liberty,’ it has never declared that persons who pose a significant danger to themselves or others possess a fundamental liberty interest in freedom from physical restraint.” *Id.* (citations omitted) (citing *Foucha v. Louisiana*, 504 U.S. 71, 116 (1992) (Thomas, J., dissenting), which “criticiz[ed] the majority’s analysis of a due process challenge to a civil commitment statute because, ‘[f]irst, the Court never explains whether we are dealing here with a fundamental right, and . . . [s]econd, the Court never discloses what standard of review applies”).

in the land. By denying the petition for certiorari in *Does #1–5*,<sup>122</sup> the Supreme Court left in place a decision from the Sixth Circuit Court of Appeals that had declared portions of the law unconstitutional and effectively required the Michigan legislature to replace the existing law.<sup>123</sup> In denying the petition for certiorari in *Karsjens*,<sup>124</sup> the Supreme Court left the Eighth Circuit ruling to stand as precedent in the sex offender civil commitment system within Minnesota and other states in that Circuit.

Theoretically, the Court’s refusal to review the *Karsjens* case could be viewed as an abdication of constitutional oversight of sex offender commitment laws. One can question whether the Court was merely scaling back its federal oversight in these state issues or whether the Court is not quite ready to fully confront the “frightening and high” mythology that was exposed in Professor Ellman’s article.<sup>125</sup> But, either way, in both circumstances, had the Court granted certiorari, it would have been forced to confront recent developments within the scientific community, in some manner or fashion, in order to effectively evaluate the constitutional issues raised. This entry into the “scientific world” is a “can of worms” that the Supreme Court has been hesitant to open fully; yet in this especially unique area of the law, it is impossible to divorce the science from the legislation in the determination of constitutionality.<sup>126</sup>

## II. ON SHAME AND HUMILIATION

Shame and humiliation are often felt in combination with one another; it is necessary to consider both in detail in order to seek to understand how these emotions are generated as a direct result of our treatment of individuals that have been labeled as sexual offenders.

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122. *Snyder v. John Does #1–5*, 138 S. Ct. 55 (2017) (mem.).

123. *Snyder v. John Does #1–5*, 834 F.3d 696, 706 (6th Cir. 2016).

124. *Karsjens v. Piper*, 138 S. Ct. 106, 107 (2017) (mem.).

125. See Ellman & Ellman, *supra* note 60, at 496.

126. See Cucolo & Perlin, *Preventing Sex-Offender Recidivism*, *supra* note 29, at 10.

But we must honestly and thoroughly investigate the reasons supporting the enactment of such legislation while scrutinizing legislative usage of medical and scientific testimony to support sex-offender commitments. Before we could even begin to address the problems surrounding the science, however, we would need to re-consider the laws and foundations on which they were based.

*Id.* (citations omitted).

A. *Shame*

There is no question in our mind that our society has become one in which shame is used as a modality to control defendants’ behavior.<sup>127</sup> “Shame is bordered by embarrassment, humiliation, and mortification, in porous ways that are difficult to predict or contain,” and it is “one of the most important, painful and intensive of all emotions.”<sup>128</sup> “Shame is considered to be more painful than guilt because one’s core self—not simply one’s behavior—is at stake.”<sup>129</sup>

“[S]hame [is] the emotion we experience when we realize that we are not living up to our standards or ideals.”<sup>130</sup> Shame can occur alone or with another who causes or heightens the experience. “The shamed person feels exposed and wants to hide.”<sup>131</sup>

B. *Humiliation*

The authors noted in an earlier article: “[h]umiliation is the emotional experience of being lowered in status, usually by another person. There is the associated sense of powerlessness.”<sup>132</sup> Humiliation has been defined as “the rejection of human beings as human, that is, treating people as if they were not human beings but merely things, tools, animals, subhumans, or inferior humans.”<sup>133</sup> It is thus no surprise

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127. Perlin & Weinstein, *supra* note 13, at 4.

128. *Id.* at 7 (first quoting, Toni M. Massaro, *The Meaning of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL’Y & L. 645, 655 (1997); and then quoting Robert Svensson et al., *Moral Emotions and Offending: Do Feelings of Anticipated Shame and Guilt Mediate the Effect of Socializing on Offending?*, 10 EUR. J. CRIMINOLOGY 2, 3 (2013)).

129. *Id.* (quoting June Price Tangney et al., *Moral Emotions and Moral Behavior*, 58 Ann. Rev. Psychol. 345, 349 (2007)).

130. Heather Ellis Cucolo & Michael L. Perlin, *Promoting Dignity and Preventing Shame and Humiliation by Improving the Quality and Education of Attorneys in Sexually Violent Predator (SVP) Civil Commitment Cases*, 28 U. FLA. J.L. & PUB. POL’Y 291, 292 (2017) [hereinafter Cucolo & Perlin, *Promoting Dignity*].

131. Aaron Lazare & Wilton S. Sogg, *Shame, Humiliation and Stigma in the Attorney-Client Relationship*, 47 Prac. Law. 11, 12 (2001). On potential strategies to ameliorate the extent to which persons with mental illness are stigmatized, see Sareen K. Armani, *Coexisting Definitions of Mental Illness: Legal, Medical, and Layperson Understandings Paving a Path for Jury Bias*, 26 S. CAL. REV. L. & SOC. JUST. 213 (2017).

132. Cucolo & Perlin, *Promoting Dignity*, *supra* note 130, at 292 (emphasis added).

133. Perlin & Weinstein, *supra* note 13, at 8 (quoting Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 487 n.266 (1997)).

that the vast majority of sex offenders self-report being humiliated on a daily basis.<sup>134</sup> Elsewhere, with a colleague, Michael L. Perlin wrote:

The use of humiliation techniques, whether done in overt or passive ways, violates rights to due process, privacy, and freedom from cruel and unusual punishment. By marginalizing the rights of those who are shamed and humiliated, such individuals are treated as less than human.<sup>135</sup>

Think about this in the context of criminal punishments—though we adhere to the fantasy that SVPA commitments are *not* criminal, per the pretextual decision of *Kansas v. Hendricks*,<sup>136</sup> there is no question that they are.<sup>137</sup> “Punishment was originally needed to ‘remove the evil spirit thought to cause an individual to transgress against society.’ It is a ritualistic device conveying ‘moral condemnation,’ ‘inflicting humiliation,’ and dramatizing evil through a public ‘degradation ceremony.’”<sup>138</sup> In a parallel context, consider Justice Ginsburg’s dissent in *Sandin v. Conner*, in which she argued that the stigma of punitive segregation “should suffice to qualify such confinement as liberty depriving for purposes of Due Process Clause protection.”<sup>139</sup> There is no

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134. Cucolo & Perlin, *Preventing Sex-Offender Recidivism*, *supra* note 29, at 31 n.177 (citing U.S. DEP’T OF JUSTICE, SEX OFFENDER COMMUNITY NOTIFICATION: ASSESSING THE IMPACT IN WISCONSIN 9 (2000), [www.ncjrs.gov/pdffiles1/nij/179992.pdf](http://www.ncjrs.gov/pdffiles1/nij/179992.pdf) [<https://perma.cc/7KP8-YTTD>], which found “that seventy-seven percent of interviewed sex offenders told of being humiliated in their daily lives . . . due to expanded notification actions.”).
135. Perlin & Weinstein, *supra* note 13, at 8 (citing Bernstein, *supra* note 133, at 489–90).
136. 521 U.S. 346 (1997); see Michael L. Perlin, “*There’s No Success like Failure/and Failure’s No Success at All*”: *Exposing the Pretextuality of Kansas v. Hendricks*, 92 NW. U. L. REV. 1247, 1248–49 (1998) (discussing the *Hendricks* decision).
137. We define “pretextuality” as courts’ acceptance, either implicitly or explicitly, of “testimonial dishonesty” and their “engage[ment] similarly in dishonest decisionmaking.” See Perlin, *supra* note 136, at 1252. See generally Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of “Ordinary Common Sense,” Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY L. 131, 133 (1991).
138. Michael L. Perlin, “*The Borderline Which Separated You from Me*”: *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1385 (1997) (quoting CHRISTOPHER HIBBERT, *THE ROOTS OF EVIL: A SOCIAL HISTORY OF CRIME AND PUNISHMENT* 32 (1963), which “discuss[es] the use of sticks, pillory, branding iron, ducking stool, and scarlet letters”).
139. *Sandin v. Conner*, 515 U.S. 472, 489 (1995) (Ginsburg, J., dissenting).

question that “SVPA proceedings . . . are invariably and inevitably inundated with stigma, shame, and humiliation.”<sup>140</sup>

It is also disconcerting to note that matters have gotten *worse* in recent years. Studies have found that “[p]erceptions of individuals with mental illness as dangerous have increased over time . . . . [T]he odds of describing a person with mental illness as violent in 1996 were 2.3 times the odds of describing a person with mental illness as violent in 1950.”<sup>141</sup> In short, the statistical errors on which courts rely—abetted by misleading media depictions<sup>142</sup>—create an environment in which shame and humiliation fester and through which the judicial process is trivialized, just as we regularly trivialize both valid and reliable behavior research when it is dissonant with our false “ordinary common sense”<sup>143</sup> and the experiences of persons with mental illness.<sup>144</sup> There is no question left “on the table” about the law’s power to shame and humiliate.<sup>145</sup>

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140. Cucolo & Perlin, *Promoting Dignity*, *supra* note 130, at 295.

141. Angela M. Parcesepe & Leopoldo J. Cabassa, *Public Stigma of Mental Illness in the United States: A Systematic Literature Review*, 40 ADMIN. & POL’Y MENTAL HEALTH & MENTAL HEALTH SERVS. RES. 384, 388 (2013), as quoted in Aurélie Tabuteau Mangels, *Should Individuals with Severe Mental Illness Continue to Be Eligible for the Death Penalty?*, 32 CRIM. JUST. 9, 11 (2017).

142. See generally Cucolo & Perlin, *Impact of Media Distortions*, *supra* note 24.

143. False “ordinary common sense” is a “self-referential and non-reflective” way of constructing the world (“I see it that way, therefore everyone sees it that way; I see it that way, therefore that’s the way it is”). It is supported by our reliance on a series of heuristics-cognitive-simplifying devices that distort our abilities to rationally consider information.” Michael L. Perlin & Heather Ellis Cucolo, “*Tolling for the Aching Ones Whose Wounds Cannot Be Nursed*”: *The Marginalization of Racial Minorities and Women in Institutional Mental Disability Law*, 20 J. GENDER, RACE & JUST. 431, 453 (2017) (first quoting Cucolo & Perlin, *Preventing Sex-Offender Recidivism*, *supra* note 29, at 38; and then quoting Michael L. Perlin, “*Simplify You, Classify You*”: *Stigma, Stereotypes and Civil Rights in Disability Classification Systems*, 25 GA. ST. U. L. REV. 607, 622 (2009)).

144. See Michael L. Perlin & Alison J. Lynch, *How Teaching About Therapeutic Jurisprudence Can Be a Tool of Social Justice, and Lead Law Students to Personally and Socially Rewarding Careers: Sexuality and Disability as a Case Example*, 16 NEV. L.J. 209, 216 n.41 (2015) (citing MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* (2000)).

145. *Id.* at 224 n.85.

### III. HOW THIS VIOLATES THERAPEUTIC JURISPRUDENCE<sup>146</sup>

Therapeutic jurisprudence looks at the impact of law on people’s lives,<sup>147</sup> focusing upon the law’s influence on “emotional life and psychological well-being.”<sup>148</sup> It seeks “to determine whether legal rules and procedures or lawyer roles can or should be reshaped to enhance their therapeutic potential *while not subordinating due process principles*.”<sup>149</sup> Per Professor David Wexler, the tension in this inquiry must be resolved in this manner: “The law’s use of ‘mental health information to improve therapeutic functioning [cannot] impinge[] upon justice concerns.’”<sup>150</sup>

In a series of articles and a book, we have assessed various aspects of sex offender policies through the prism of therapeutic jurisprudence.<sup>151</sup> In one of those articles, we concluded that we believe

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146. Part III is generally adapted from Michael L. Perlin & Alison J. Lynch, “*All His Sexless Patients*”: *Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257, 277–79 (2014) and Michael L. Perlin & Alison J. Lynch, “*In the Wasteland of Your Mind*”: *Criminology, Scientific Discoveries and the Criminal Process*, 4 VA. J. CRIM. L. 304 (2016). Further, it distills the work of Michael L. Perlin over the past twenty-five years, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993); see also Michael L. Perlin, “*Have You Seen Dignity?*”: *The Story of the Development of Therapeutic Jurisprudence*, 27 U.N.Z. LAW REV. 1135 (2017) [hereinafter Perlin, *Seen Dignity*]; Michael L. Perlin, “*Changing of the Guards*”: *David Wexler, Therapeutic Jurisprudence, and the Transformation of Legal Scholarship*, 63 INT’L J.L. & PSYCHIATRY 3 (2019).
147. Perlin & Lynch, *supra* note 146, at 277 (quoting Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009)).
148. *Id.* (citing David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, 67 REV. JUR. U.P.R. 317 (1998)).
149. Perlin & Lynch, *supra* note 146, at 277 (emphasis added); see, e.g., Michael L. Perlin, “*And My Best Friend, My Doctor, Won’t Even Say What It Is I’ve Got*”: *The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 751 (2005).
150. Perlin & Lynch, *supra* note 146, at 277–78 (quoting David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993)).
151. See, e.g., Cucolo & Perlin, *Impact of Media Distortions*, *supra* note 24; Cucolo & Perlin, *Preventing Sex-Offender Recidivism*, *supra* note 29; Cucolo & Perlin, *Promoting Dignity*, *supra* note 130; Heather Ellis Cucolo & Michael L. Perlin, “*Far from the Turbulent Space*”: *Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators*, 18 U. PA. J.L. & SOC. CHANGE 125 (2015) [hereinafter Cucolo & Perlin, “*Far from the Turbulent Space*”]; Perlin, Cucolo & Lynch, *supra* note 57; Perlin, Lynch & McClain, *supra* note 57; PERLIN & CUCOLO, *supra* note 6. The interests of one of the authors, Perlin, predated the actual articulation of the phrase

that it is only through the use of therapeutic jurisprudence that we can best diminish the shaming and humiliating aspects of these processes.<sup>152</sup> We know that nothing so clearly violates “the dignity of persons as treatment that demeans or humiliates them” as shaming.<sup>153</sup> To be consistent with therapeutic jurisprudence principles we must, rather, focus on reintegrating sex offenders into society and promoting sex offenders’ self-respect and dignity while fostering family and community relationships.<sup>154</sup> In an earlier article focusing on the right to and quality of counsel at SVPA hearings, we made this point:

Those very variables that make SVPA litigation *different*—the need for lawyers to be able to understand, contextualize and effectively cross-examine experts on specific actuarial tests; the need for lawyers to recognize when an expert witness is needed to rebut the state’s position, and the need for lawyers to understand the potential extent of jury bias (making the ideal of a fair trial even more difficult to accomplish)—all demand a [therapeutic jurisprudence] approach to representation and to litigation.<sup>155</sup>

Certainly, the issues we raise here—the ways that courts use improper statistics and unverified data, misunderstand or ignore the significance of valid and reliable research, and fall prey to the perniciousness of the vividness heuristic, a cognitive-simplifying device through which a “single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be

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“therapeutic jurisprudence.” In 1975, in one of Michael L. Perlin’s first articles, about the use of psychiatric testimony in criminal cases, he said this in discussing what he characterized as “quirky” cases:

[Imagine] a defendant is charged with a minor offense (such as petty larceny) which nevertheless raises a question as to the possible existence of a psychiatric problem (*e.g.*, where the defendant steals only pantyhose), a psychiatric examination may serve to indicate the real problem (if, in fact, one is present) and to *direct the defendant towards a suitable therapeutic treatment program.*

Perlin, *Seen Dignity*, *supra* note 146, at 1141 (quoting Michael L. Perlin, *Psychiatric Testimony in a Criminal Law Setting*, 3 BULL. AM. ACAD. PSYCHIATRY & L. 143, 146 (1975) (emphasis added)).

152. This sentence and the two subsequent sentences were originally published in Cucolo & Perlin, *Promoting Dignity*, *supra* note 130, at 322–23.

153. R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 549 (2006) (quoting Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT’L L. 848, 850 (1983)).

154. Cucolo & Perlin, *Promoting Dignity*, *supra* note 130, at 322–23 (citing, *inter alia*, Cucolo & Perlin, *Preventing Sex-Offender Recidivism*, *supra* note 29, at 40).

155. Cucolo & Perlin, “*Far from the Turbulent Space*,” *supra* note 151, at 166–67.

made<sup>156</sup>—like, the easily accessible *Psychology Today* article relied upon by the *McKune* court—all ignore the precepts of therapeutic jurisprudence and must be rejected as a modality of decisional analysis.<sup>157</sup> Perhaps cases such as *Muniz* and *Millard* will give other judges some traction if they choose to reject the hysterical thinking that has been the hallmark of sex offender decision-making for the past two decades.

### CONCLUSION

Although we have seen some significant steps forward in the courts’ recognition of rights violations and the mandate of necessary constitutional protections, overturning draconian laws and legislation continues to be an uphill battle. Clearly evidenced in numerous decisions, courts around the country continue to remain stagnant, clinging to misinformation and refusing to depart from prejudicial viewpoints that are pretextual and based on irrational fears. What continues to be the main culprit is the courts’ use of inaccurate statistics and unverified data. The shameful efforts of states to suppress the true data has totally dominated this area of law and policy.<sup>158</sup>

We remain hopeful that some of the significant observations, such as those by Judge Frank in the *Jesson* case, as well as other recent caselaw on the rights of offenders in the community, will have a further impact on judges across the nation deciding similar issues in future lawsuits. To return to our title, the “strings in the books” are “being pulled and persuaded.” We—and others—have offered insight into these “strings,” yet key questions remain to be answered: in which direction are these “strings” being pulled, and is it factual or inaccurate information that underlies the “persua[sion]”? We believe it is imperative that scholars and researchers turn next to these questions to bring some measure of coherence—and *honesty*—to this complicated and emotionally-fraught area of law and policy.

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156. See Perlin, *supra* note 138, at 1417; see Perlin, *supra* note 143, at 637 (“One vivid, negative anecdote—perhaps even an apocryphal one with no basis in fact—overwhelms an extensive contrary statistical database.”). On the vividness heuristic in SVPA cases, see Cucolo & Perlin, *Promoting Dignity*, *supra* note 130, at 325.

157. See generally Perlin & Lynch, *supra* note 144, at 216–17 (discussing New York Law School’s efforts to educate students about sanism, pretextuality, heuristics, false “ordinary common sense,” and therapeutic jurisprudence).

158. See Lave & Zimring, *supra* note 72, at 724–27.