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# Grown-Up Justice Isn't Child's Play: The Case For a Data Driven Reassessment of Civil Commitment for Juvenile Sex Offenders

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*Comments on Criminal Law*

**Grown-Up Justice Isn't Child's Play: The Case For a Data Driven Reassessment of Civil Commitment for Juvenile Sex Offenders**

*Rosemary Deck\**

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\* J.D., University of Pacific, McGeorge School of Law, to be conferred May 2017; B.A., Political Science, Humboldt State University, 2014. I would like to thank Distinguished Professor of Law Michael Vitiello for his mentorship, guidance, and constant encouragement. Thank you to *The University of the Pacific Law Review*, in particular Alisa Pinarbasi, for helping to edit this piece. Thank you to my parents, Jane and Michael, for their unwavering support and love. Finally, to Casey Russo and the everyday heroes at the Humboldt County Public Defender's Office for always having my back and encouraging me to go to law school.

“A fundamental tenant of American juvenile courts is that growing up is a proven cure for crime.”

—Franklin E. Zimring<sup>1</sup>

## I. INTRODUCTION

Nine years after completing his court-mandated sentence, Craig Bolte remains in confinement.<sup>2</sup> Craig has been detained, either in juvenile hall or in Minnesota’s civil commitment facility (MSOP), for the last eighteen years.<sup>3</sup> Eighteen years without any meaningful hope of release have understandably taken a toll on Craig’s mental health.<sup>4</sup> At one point, the situation seemed so dire that he wrote to his state representative asking to be euthanized; an option he viewed as more humane than dying in indefinite civil commitment.<sup>5</sup>

Craig is a sex offender who was civilly committed as a sexually violent predator based on an offense he committed when he was a juvenile.<sup>6</sup> Craig’s uncle sexually abused him; as a result, Craig attempted suicide several times by the age of four.<sup>7</sup> When Craig turned ten, he began to inflict the same sexual abuse on young children that his uncle inflicted on him.<sup>8</sup> Four years later, Craig’s parents called a local crisis center for help for Craig and the crisis center called the police.<sup>9</sup> Craig has been in custody ever since.<sup>10</sup> The juvenile court sentenced Craig to a juvenile corrections facility, where he remained until he was nineteen.<sup>11</sup> Twenty-eight years old now, Craig has spent the last nine years in Minnesota’s civil commitment facility based on the sexual crimes he committed when he was ten.<sup>12</sup>

Craig was one of fourteen plaintiffs in the case that successfully challenged the constitutionality of Minnesota’s civil commitment statute.<sup>13</sup> A court-appointed panel of experts was asked to examine the case and they determined

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1. FRANKLIN E. ZIMRING, *AN AMERICAN TRAVESTY*, at xv (University of Chicago Press, 2004).

2. Beth Schwartzapfel, *A System That is Clearly Broken*, MARSHALL PROJECT (June 17, 2015), available at <https://www.themarshallproject.org/2015/02/09/a-system-that-is-clearly-broken> (on file with *The University of the Pacific Law Review*).

3. Schwartzapfel, *supra* note 2.

4. *Id.*

5. *Id.* (“He even once wrote to his state legislator, he said, asking to be euthanized, since ‘it’s more humane than dying in here.’”).

6. Schwartzapfel, *supra* note 2.

7. *Id.*

8. *Id.*

9. *Id.* (The crisis center called the police.).

10. Schwartzapfel, *supra* note 2.

11. *Id.*

12. *Id.*

13. *Id.*

that of the sixty-two people committed for offenses that occurred while they were juveniles, “most, if not all, of them should have never been committed.”<sup>14</sup>

The panel reported that “sexual conduct was used to substantiate a need for civil commitment in a situation in which officials seemingly did not know what else to do with them.”<sup>15</sup> Craig Bolte explained that “his progress towards release was dealt setbacks for petty rule violations: things like sharing food with other patients . . . or attending a religious service that [he] didn’t sign up for.”<sup>16</sup> Throughout the Minnesota program’s twenty-one year existence, the state rehabilitated and released only three out of 700 offenders.<sup>17</sup>

Empirical data do not support the civil commitment of juvenile sex offenders.<sup>18</sup> Instead, legislatures should adopt a more data-driven, individualized approach that acknowledges the inherent differences between those who commit violent sexual offenses as adults and those who commit violent sexual offenses as juveniles.<sup>19</sup>

Part II reviews the current state of civil commitment in the United States.<sup>20</sup> It outlines the Supreme Court’s civil commitment jurisprudence as well as cases in which the Court has relied on empirical data that distinguish adult offenders from juvenile offenders.<sup>21</sup> Part II.A. explores the policies used to justify the civil commitment of sex offenders generally and analyzes whether empirical data supports those policies.<sup>22</sup> Part II.B. looks specifically at juvenile sex offenders and evaluates the inherent differences between adult and juvenile offenders that support a change in civil commitment practice and policy.<sup>23</sup> Part II.C. outlines the Supreme Court’s civil commitment jurisprudence.<sup>24</sup> Next, Part II.D. examines the Court’s differentiation between juvenile and adult offenders.<sup>25</sup>

Part III.A. applies the policies used to justify civil commitment of adult sex offenders to juveniles to illuminate that those same policies are not successful based on the empirical data.<sup>26</sup> Part III.B. explores the recidivism rates of juvenile sex offenders to further demonstrate that a recidivism rationale is unfounded.<sup>27</sup>

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14. *Id.*

15. *Id.*

16. Bill Hudson, *Locked Up at 15, Sex Offender Calls His Treatment ‘A Sham’*, CBS MINNESOTA (Feb. 19, 2015), available at <http://minnesota.cbslocal.com/2015/02/19/locked-up-at-15-sex-offender-calls-his-treatment-a-sham/> (on file with *The University of the Pacific Law Review*).

17. Schwartzapfel, *supra* note 2.

18. *Id.*

19. *See Infra* Part V.

20. *See Infra* Part II.

21. *See Infra* Part II.

22. *See Infra* Part II.A.

23. *See Infra* Part II.B.

24. *See Infra* Part II.C.

25. *See Infra* Part II.D.

26. *See Infra* Part III.A.

27. *See Infra* Part III.B.

In Part IV, this Comment analyzes the effects of civil commitment on juveniles.<sup>28</sup> Part IV.A. demonstrates that juvenile sex offenders are more receptive to treatment than adults, which undercuts legislatures' purported purpose of civil commitment.<sup>29</sup> Part IV.B. explores the harms of using adult methods on juvenile offenders.<sup>30</sup> In light of the aforementioned discussion, Part IV.C. addresses the damage juveniles experience when misclassified as sexually violent predators based on an adult schema.<sup>31</sup> Part IV.D. presents an alternative, more holistic approach to dealing with juvenile sex offenders in lieu of civil commitment.<sup>32</sup> Part IV.E. looks forward and examines how the issue of civil commitment for juvenile sex offenders is ripe for consideration by the Supreme Court.<sup>33</sup>

Finally, Part V argues for the implementation of a data-driven approach to dealing with juvenile sex offenders, as opposed to the current framework and in light of the empirical data discussed above.<sup>34</sup>

## II. CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS AND THE DIFFERENCES BETWEEN ADULT AND JUVENILE SEX OFFENDERS

This part addresses adult and juvenile sex offenders separately, providing background and history of the treatment of both types of offenders.<sup>35</sup> Next, it outlines the relevant jurisprudence pertaining to sex offenders, including a number of prominent Supreme Court cases.<sup>36</sup> Finally, this section discusses the case law that developed the jurisprudence that treats juveniles differently from adults, with particular attention to the rationales that justify different treatment.<sup>37</sup>

### A *Civil Commitment of Sex Offenders Generally*

Legislatures in the United States often craft sex offender laws around policies that fail to reflect empirical data.<sup>38</sup> Unlike other criminal defendants, the state can hold sex offenders indefinitely after they complete their sentences on the

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28. *See Infra* Part IV.

29. *See Infra* Part IV.A.

30. *See Infra* Part IV.B.

31. *See Infra* Part IV.C.

32. *See Infra* Part IV.D.

33. *See Infra* Part IV.E.

34. *See Infra* Part V.

35. *See Infra* II.A–B.

36. *See Infra* II.C.

37. *See Infra* II.D.

38. *See ZIMRING, supra* note 1 (discussing how “In the modern politics of criminal justice, policy toward sex offenders is often based on monolithic images of alien pathologies; it is rarely based on facts.”).

unsupported notion that the offenders pose an increased risk of recidivism.<sup>39</sup> This determination is based on the subjective recommendations of a sex expert or a psychiatrist that an offender qualifies as a sexually violent predator (SVP).<sup>40</sup> Some states allow juries in civil commitment hearings, but in states like New Jersey, the presiding judge has “sole discretion and decides whether clear and convincing evidence has been presented, rather than whether the state has made its case beyond a reasonable doubt.”<sup>41</sup>

In addition to the burden of proof being different in civil commitment hearings, courts do not strictly apply the rules of evidence.<sup>42</sup> Prosecutors can introduce hearsay and conversations between offenders and therapists as support for continued commitment.<sup>43</sup> These types of evidence are usually prohibited in criminal courts, except in military commissions such as the ones at Guantanamo Bay.<sup>44</sup>

Once the court classifies someone as a SVP, the state locks him or her away under the state’s civil laws.<sup>45</sup> SVPs are housed in secure facilities with armed guards and are subject to many of the same restrictions that they were subject to in prison or juvenile detention.<sup>46</sup> The commitment facilities severely limit visitors, activities, and personal liberties.<sup>47</sup> Because SVP laws are civil laws and not criminal laws, this confinement does not qualify as additional punishment for the same crime and therefore does not implicate double jeopardy issues.<sup>48</sup>

Many of these sexually violent predator laws are the result of legislators viscerally reacting to specific victims in a symbolic attempt to honor the

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39. James Ridgeway, *How ‘Civil Commitment’ Enables Indefinite Detention of Sex Offenders*, THE GUARDIAN (Sept. 26, 2013), available at <http://www.theguardian.com/commentisfree/2013/sep/26/civil-commitment-sex-offenders> (on file with *The University of the Pacific Law Review*).

40. *Id.*

41. George Steptoe & Antoine Goldet, *Why Some Young Sex Offenders Are Held Indefinitely*, THE MARSHALL PROJECT (Jan. 27, 2016), available at <https://www.themarshallproject.org/2016/01/27/why-some-young-sex-offenders-are-held-indefinitely#.zT8roRidz> (on file with *The University of the Pacific Law Review*).

42. *Id.*

43. *Id.*

44. Brian J. Farrar, *Say What? The Case for Hearsay at the Guantanamo Bay Military Commissions*, 23 MICHIGAN STATE INT’L L. REV. 177, 178; Kenneth Roth, *Justice Cheated*, N.Y. TIMES (May 6, 2012), [http://www.nytimes.com/2012/05/07/opinion/justice-cheated.html?\\_r=0](http://www.nytimes.com/2012/05/07/opinion/justice-cheated.html?_r=0) (on file with *The University of the Pacific Law Review*) (“Because the rules of evidence for military commissions have been written to allow for the introduction of certain hearsay evidence, critics argue that this makes the commissions inherently biased and illegitimate.”).

45. Tamara Rice Lave and Justin McCrary, *Do Sexually Violent Predator Laws Violate Double Jeopardy or Substantive Due Process? An Empirical Inquiry*, 78 BROOKLYN L. REV. 4 1391, 1393 (2013), available at [http://eml.berkeley.edu/~jmccrary/lave\\_and\\_mccrary2013FINAL.pdf](http://eml.berkeley.edu/~jmccrary/lave_and_mccrary2013FINAL.pdf) (on file with *The University of the Pacific Law Review*).

46. *Id.*

47. *Id.*

48. *Id.*

victims.<sup>49</sup> Such high-profile sex crimes precipitated the creation of new sex offender laws geared towards keeping violent sex offenders off the streets, even beyond the determinate length of their sentences.<sup>50</sup> The federal government and twenty states currently have statutes that allow the detainment of sex offenders beyond the end of their prison sentences.<sup>51</sup> The research does not support the effectiveness of a tough-on-crime approach.<sup>52</sup>

Washington was the first state in the nation to enact a civil commitment law for sex offenders.<sup>53</sup> Then-governor Booth Gardner encouraged the legislature to pass comprehensive sex offender legislation after Earl Shriner, a sex offender, was released following a ten-year sentence only to rape a seven-year-old boy two years later.<sup>54</sup>

The policy of civilly committing SVPs does not have widespread support from other Western countries. The United Kingdom, for example, is currently refusing to extradite California sex offender Roger Alan Giese “fearing that he will be denied human rights by being indeterminately civilly committed to a mental facility once he is released from prison.”<sup>55</sup> The Giese case is the third of its kind where the United Kingdom has denied an extradition request based on the practice of civil commitment in the United States.<sup>56</sup>

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49. ZIMRING, *supra* note 1, at xiii; *see e.g.*, MEGAN'S LAW, <http://www.meganslaw.ca.gov/> (last visited Aug. 17, 2016) (on file with *The University of the Pacific Law Review*) (“Megan’s Law is named after seven-year-old Megan Kanka, a New Jersey girl who was raped and killed by a known registered sex offender who had moved across the street from the family without their knowledge. In the wake of the tragedy, the Kankas sought to have local communities warned about sex offenders in the area. All states now have a form of Megan’s Law.”).

50. Jeslyn A. Miller, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CAL. L. REV. 2097, 2098 (2010).

51. Melodie Pellot-Hernandez, *U.S. Civil Commitment Clashes with U.K. and E.U. Human-rights Laws*, NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW (December 15, 2015), *available at* <http://blogs.law.unc.edu/ncilj/2015/12/15/us-civil-commitment-clashes-with-uk-and-eu-humanrights-laws/#10> (on file with *The University of the Pacific Law Review*); Monica Davey, *States Struggle With What to Do With Sex Offenders After Prison*, N.Y. TIMES (Oct. 29, 2015), *available at* [http://www.nytimes.com/2015/10/30/us/states-struggle-with-what-to-do-with-sex-offenders-after-prison.html?\\_r=0](http://www.nytimes.com/2015/10/30/us/states-struggle-with-what-to-do-with-sex-offenders-after-prison.html?_r=0) (on file with *The University of the Pacific Law Review*).

52. Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, AM. J. PUB. HEALTH. 412–419 (March 2010), *available at* <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2820068/> (on file with *The University of the Pacific Law Review*).

53. REBECCA JACKSON & RONALD ROESCH, *LEARNING FORENSIC ASSESSMENT: RESEARCH AND PRACTICE* 162 (Routledge 2015).

54. *Id.*

55. Pellot-Hernandez, *supra* note 51.

56. Leon Neyfakh, *England Refuses to Extradite an Alleged Sex Offender Due to Human Rights Concerns*, SLATE (Oct. 21, 2015), *available at* [http://www.slate.com/articles/news\\_and\\_politics/crime/2015/10/roger\\_alan\\_giese\\_england\\_refuses\\_to\\_extradite\\_accused\\_sex\\_offender.html](http://www.slate.com/articles/news_and_politics/crime/2015/10/roger_alan_giese_england_refuses_to_extradite_accused_sex_offender.html) (on file with *The University of the Pacific Law Review*).

*B. Juvenile Sex Offenders Generally*

There are currently juvenile offenders civilly committed as sexually violent predators based on what could be considered as truly juvenile behavior.<sup>57</sup> Christopher Lee was sent to the Minnesota Sex Offender Program (MSOP) when he was seventeen years old despite having never been convicted of a sex crime.<sup>58</sup> The juvenile court sent him to juvenile detention after he was found guilty of theft and arson.<sup>59</sup>

Christopher would spend the next several years transferring between juvenile treatment centers.<sup>60</sup> During the course of treatment for his non-sexual delinquency, Christopher admitted some acts of juvenile sexual misconduct from his past to counselors.<sup>61</sup> “He was caught attempting to copy his penis on a copying machine while at a therapy session and sent sexually harassing letters to girls at his school.”<sup>62</sup> Christopher also admitted to some instances of sexual impropriety with a younger sibling and several instances of exposing himself in public.<sup>63</sup>

While he was never charged with any offenses for these behaviors, his admissions resulted in his civil commitment as a sexually violent predator.<sup>64</sup> The evidence the court relied on to place Christopher in civil commitment “consisted almost entirely of misconduct that he confessed to during various treatment programs.”<sup>65</sup> While behaviors such as the photocopying of genitals or public exposure could easily be written off as youthful indiscretions, the fact that Christopher committed these acts as a juvenile delinquent in custody produced a different outcome, which his differently-situated peers would not have experienced.<sup>66</sup>

Of the twenty states that have SVP civil commitment laws, thirteen allow civil commitment for those who committed the qualifying offense as juveniles.<sup>67</sup> The result is indeterminate incarceration of individuals for sex crimes they

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57. Cf. Paul Demko, ‘He Was a Kid’: Former Juvenile Sex Offenders Languish in MSOP, CAPITOL REPORT (Oct. 5, 2012), available at <http://politicsinminnesota.com/2012/10/he-was-a-kid-former-juvenile-sex-offenders-languish-in-msop/> (on file with *The University of Pacific Law Review*) (describing behaviors such as photocopying of genitals and watching children urinate in public restrooms).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* (“So the only distinguishing factor between these guys and a lot of their peers is the fact that at some point they were put in a residential facility that documented what they did.”).

67. Steptoe & Goldet, *supra* note 41.

committed when they were children.<sup>68</sup> Unlike adult offenders, the data on juvenile sex offenders does not indicate the type of paraphilia commonly associated with sexual offenders.<sup>69</sup> Juvenile sex offenders do not specialize in sex crimes.<sup>70</sup> Instead, “young victims of young sexual offenders seem most often to be targets of opportunity rather than sexual preference.”<sup>71</sup> What this means is that juvenile offenders do not choose victims because of their pre-pubescent characteristics, but instead because they are vulnerable and available.<sup>72</sup> Additionally, research indicates that a majority of juvenile sex offenders outgrow sexual deviance as they become young adults.<sup>73</sup> Of those juveniles who will reoffend with a sexual crime, most of them will do so while they are still juveniles and not when they are adults.<sup>74</sup> This data does not support the continued confinement of juvenile sex offenders into adulthood.<sup>75</sup>

There are three categories of juvenile sex offenders<sup>76</sup>: (1) the “sexual status offender,” whose sexual acts are unlawful merely because their partner is under the legal age of consent<sup>77</sup>; (2) the second type of offender, and the most serious, is the “repeat offender in abusive sexual conduct”<sup>78</sup>—this small population of juvenile sex offenders makes up between 4–8% of juvenile sex crime arrests<sup>79</sup>; (3) the third and final category, which includes a majority of juvenile sex offenders, are first-time offenders who are unlikely to reoffend.<sup>80</sup>

The evolution of smartphone and Internet culture has created a new type of sex offense that has the potential to expose large numbers of juveniles to criminal liability.<sup>81</sup> A recent study from 2014 found that half of those surveyed admitted

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68. Scott Michels, *Juvenile Sex Offenders: Locked Up for Life?*, JUVENILE JUSTICE INFORMATION EXCHANGE (Oct. 1, 2012), available at <http://jjie.org/juvenile-sex-offenders-locked-up-for-life/> (on file with *The University of the Pacific Law Review*).

69. ZIMRING, *supra* note 1, at 65–66 (paraphilia are abnormal sexual desires).

70. *Id.*

71. *Id.*

72. *Cf.* ZIMRING, *supra* note 1, at 65 (“Young victims of young sexual offenders seem most often to be targets of opportunity rather than sexual preference.”).

73. Naomi J. Freeman et al., *Rule 706 Expert Report and Recommendations Civil No. 11-3659 (DWF/JJK)* (Nov. 17, 2014), available at <http://stmedia.startribune.com/documents/Expert+panel+report+on+sex+offender+program.pdf> (on file with *The University of the Pacific Law Review*).

74. ZIMRING, *supra* note 1, at 65.

75. *Cf. id.* (explaining that juvenile sex offenders reoffend most often when they are still juveniles).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Cf.* Tamar Lewin, *Rethinking Sex Offender Laws for Youth Texting*, N.Y. TIMES (Mar. 20, 2010), available at <http://mobile.nytimes.com/2010/03/21/us/21sexting.html?pagewanted=all&referrer=&r=0> (on file with *The University of the Pacific Law Review*) (“In most states, teenagers who send or receive sexually explicit photographs by cellphone or computer — known as “sexting” — have risked felony child pornography charges and being listed on a sex offender registry for decades to come.”).

to ‘sexting’ (sending sexual explicit images over text message) as minors.<sup>82</sup> Of the twenty states that have ‘sexting’ laws on the books, eleven charge the crime as a misdemeanor and four charge it as a felony, but they are all charged as sex offenses.<sup>83</sup>

In 2009, a fourteen-year-old girl was arrested in New Jersey for posting explicit pictures of herself on her MySpace page.<sup>84</sup> She was charged with possessing and distributing child pornography.<sup>85</sup> The increasing prevalence of ‘sexting’ among teenagers raises concerns about labeling juveniles as sex offenders because of the consequences that accompany the label, such as sex offender registries and civil commitment.<sup>86</sup>

These statistics reveal an over-inclusion problem when developing public policy. The policies touted by legislators as appropriate for the most egregious offenders are applied to all offenders across the board.<sup>87</sup> As criminologist and law professor Franklin E. Zimring explained, “the choice is between overtreatment of large numbers of youth and failure to intervene with the dangerous few.”<sup>88</sup> This demonstrates that normal juvenile behaviors and sexual curiosity have the potential to be treated as criminal activity.<sup>89</sup>

### C. Supreme Court Jurisprudence Regarding Civil Commitment of Sex Offenders

The U.S. Supreme Court upheld the constitutionality of civil commitment statutes for sex offenders on three occasions. The first was in the case of *Kansas v. Hendricks* in 1997.<sup>90</sup> Next, in 2002, the Court heard *Kansas v. Crane*, which served to refine the *Hendricks* decision.<sup>91</sup> The third, and most recent, civil commitment case to reach the Supreme Court was *United States v. Comstock*.<sup>92</sup>

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82. Heidi Strohmaier et al., *Youth Sexting: Prevalence Rates, Driving Motivations, and the Deterrent Effect of Legal Consequences*, 11(3) SEXUALITY RESEARCH AND SOCIAL POLICY 245 (2014) (“Consistent with hypotheses, more than half of respondents reported sexting as minors, although only 28 percent sent photographic sexts.”).

83. Sameer Hinduja and Justin W. Patchin, *State Sexting Laws, A Brief Review of State Sexting and Revenge Porn Laws and Policies*, CYBERBULLYING RESEARCH CENTER 1 (July 2015).

84. Lewin, *supra* note 81.

85. *Id.*

86. *Cf. Id.* (“In most states, teenagers who send or receive sexually explicit photographs by cellphone or computer—known as “sexting”—have risked felony child pornography charges and being listed on a sex offender registry for decades to come.”).

87. ZIMRING, *supra* note 1, at 68.

88. *Id.*

89. *Cf. Demko, supra* note 57 (“Warren Maas, executive director of Project Pathfinder, one of the largest sex offender treatment programs in the state, points out that it’s not uncommon for teenagers to act out sexually in ways that could be construed as criminal behavior. ‘If we committed every kid that was fairly randy, we would have a pretty full program,’ Maas said.”).

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

91. *Kansas v. Crane*, 534 U.S. 407 (2002).

92. *United States v. Comstock*, 560 U.S. 126 (2010).

In *Hendricks*, the Court held that civil commitment did not violate the Double Jeopardy Clause of the Fifth Amendment or the Ex Post Facto Clause because the confinement was not punitive.<sup>93</sup> The Court found the Kansas statute did not implicate retribution or deterrence, the two main penological objectives of punishment.<sup>94</sup>

In his concurring opinion, Justice Anthony Kennedy made clear that if civil commitment evolved into an apparatus for deterrence or retribution, or “if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified,” the Court’s precedent would not support it.<sup>95</sup>

In the *Crane* case, the Court reviewed the Kansas Supreme Court’s restrictive application of the *Hendricks* decision.<sup>96</sup> Kansas applied the *Hendricks* rule to a defendant who suffered a personality disorder without any assessment of his volitional impairment or ability to control himself.<sup>97</sup> The Court held that there must be a showing of a sex offender’s inability to control his or her behavior that would “distinguish the dangerous sexual offender whose serious . . . disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.”<sup>98</sup>

Most recently in *Comstock*, the Court held the federal civil commitment statute at issue to be narrowly tailored and sufficiently accommodating of the state’s interests.<sup>99</sup> The Court did not address any claims of equal protection, substantive due process, or procedural due process, leaving those claims available on remand.<sup>100</sup> While these cases did not specifically address the constitutionality of civilly committing juveniles,<sup>101</sup> other cases have highlighted the inherent differences between adult and juvenile offenders that merit differential treatment.<sup>102</sup>

#### D. Supreme Court Jurisprudence Differentiating Adult and Juvenile Offenders

Elsewhere, beyond the realm of civil commitment, the Court treats juvenile offenders differently from adult offenders based on the inherent differences that

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93. *Hendricks*, 521 U.S. at 369.

94. *Id.* at 361–62.

95. *Id.* at 373.

96. *Crane*, 534 U.S. at 410.

97. *Id.*

98. *Id.* at 413.

99. *United States v. Comstock*, 560 U.S. 126, 149 (2010).

100. *Id.* at 149–50.

101. *Id.* at 126.

102. *See e.g.*, *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (discussing the stark differences in maturity and culpability between adult and juvenile offenders).

come with age.<sup>103</sup> The law does not afford juvenile sex offenders the same developmental considerations as other juvenile offenders.<sup>104</sup>

In *Roper v. Simmons*, the Court rejected the death penalty of juveniles as cruel and unusual.<sup>105</sup> Five years after *Roper*, the Court held in *Graham v. Florida* that life sentences for juveniles without the opportunity of parole are unconstitutional for non-homicide offenses.<sup>106</sup> Two years after *Graham v. Florida*, the Supreme Court decided *Miller v. Alabama*.<sup>107</sup> In *Miller*, the Court held mandatory life without opportunity of parole (LWOP) sentences for juveniles unconstitutional under the Eighth Amendment.<sup>108</sup> In its most recent term, four years after deciding *Miller*, the Court heard *Montgomery v. Louisiana* to determine whether or not *Miller* applied retroactively.<sup>109</sup>

In *Roper*, Justice Kennedy underscored the importance of empirical data in the analysis.<sup>110</sup> He explained how “juvenile offenders cannot with reliability be classified among the worst offenders.”<sup>111</sup> Juvenile offenders lack the maturity and sense of responsibility that is expected from adults.<sup>112</sup> As Justice Kennedy put it, “juveniles have less control, or less experience with control, over their own environment.”<sup>113</sup>

The next important difference the Court identified is that juveniles are still in a fluid state of development.<sup>114</sup> As such, they are more deserving of forgiveness because of the increased possibility that they will be reformed as they mature.<sup>115</sup> “It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”<sup>116</sup>

In *Graham*, Justice Kennedy reiterated the lessened culpability and lack of maturity of juveniles, and the importance of those qualities when devising

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103. See e.g., *Graham v. Florida*, 560 U.S. 48 (2010) (showing that juveniles have lessened culpability and are therefore less deserving of the most severe punishments); *Roper*, 543 U.S. at 551.

104. Cf. *Demko*, *supra* note 57 (demonstrating that juvenile sex offenders are subject to civil commitment where are non-sexual juvenile delinquents are not).

105. *Roper*, 543 U.S. at 608.

106. *Graham*, 560 U.S. at 94.

107. *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

108. *Id.* at 2460.

109. *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

110. See *Roper*, 543 U.S. at 569 (citing scientific and sociological studies detailing the differences between juvenile and adult offenders).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 570.

116. *Id.* at 573.

sentencing.<sup>117</sup> Using the same data cited in *Roper*, Kennedy concluded that juveniles possessed a greater ability for change and reform.<sup>118</sup>

The Court based its decision in *Miller* that mandatory LWOP sentence for juveniles were unconstitutional on the fundamental differences between juvenile and adult offenders.<sup>119</sup> It found that “states could not sentence juvenile defendants to die in prison without considering their maturity, upbringing, or potential to reoffend, citing their lessened culpability as minors at the time of the crime.”<sup>120</sup>

In holding that the *Miller* rule applied retroactively, the Court in *Montgomery* reiterated the inherent differences between juveniles and adults, which justify different standards.<sup>121</sup> This decision made over 2,000 inmates that were sentenced as juveniles to mandatory LWOP eligible for resentencing.<sup>122</sup>

This signals that the Court may be ready to hear a challenge to the civil commitment of juvenile sex offenders, which effectively acts as a life sentence in an overwhelming majority of cases. With such paltry success statistics, such as the release of only 3 out of 700 people committed in Minnesota’s MSOP, it is fair to say that civil commitment is a de facto life sentence.<sup>123</sup> People sentenced to LWOP have the benefit of knowing that they have no chance at release, they can make their peace with that, and they can move forward with their lives in prison.<sup>124</sup> Those people who are civilly committed are not afforded the same sense of finality. They will be forever haunted by the false glimmer of hope that comes with the possibility of release.<sup>125</sup>

Mental health experts who specialize in treating juvenile sex offenders are concerned with the process of civil commitment.<sup>126</sup> Their concerns arise mainly from the difficulty in predicting with any reliability whether a juvenile sex offender will mature into an adult sex offender.<sup>127</sup> Mark Chaffin at the University of Oklahoma Health Sciences Center explained, “if you want to protect the public, the price you pay is that you will harm probably a larger number of children who are not going to commit crimes.”<sup>128</sup>

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117. *Graham v. Florida*, 560 U.S. 48, 68 (2010).

118. *Id.*

119. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012).

120. Matt Ford, *A Retroactive Break for Juvenile Offenders*, THE ATLANTIC (Jan. 26, 2016), available at <http://www.theatlantic.com/politics/archive/2016/01/montgomery-alabama-supreme-court/426897/> (on file with *The University of the Pacific Law Review*).

121. *See generally*, *Montgomery v. Louisiana*, 136 S.Ct. 718, 736 (2016).

122. Ford, *supra* note 120.

123. Schwartzapfel, *supra* note 2.

124. *See e.g.*, Davey, *supra* note 51 (“Craig Bolte, a sex offender who has been held here nine years and who says he would rather be sent to prison, where ‘there is still hope.’”).

125. *Id.*

126. Michels, *supra* note 68.

127. *Id.*

128. *Id.*

The developmental rationale the Court used to support the decision that the death penalty and mandatory LWOP are unconstitutional for juvenile offenders applies to indefinite commitment as well.<sup>129</sup> Juvenile offenders are still juvenile offenders. The nature of the crime committed does not make that any less true. The Court's recent decisions in the *Roper-Graham-Miller-Montgomery* line of cases may show its willingness to reassess the treatment of juvenile offenders in light of developmental differences between juveniles and adults. Although Justice Kennedy used these empirical findings in support of abolishing the juvenile death penalty and mandatory LWOP, the data are no less true when applied to the indeterminate civil commitment of juvenile sex offenders.<sup>130</sup>

### III. IS THE PRACTICE OF CIVILLY COMMITTING JUVENILE SEX OFFENDERS SUPPORTED BY THE DATA?

This Part addresses the public policy rationales that drive our current civil commitment laws for sex offenders and how these rationales are unsubstantiated when applied to juveniles.<sup>131</sup> Additionally, this Part evaluates the relevant empirical data to show that the laws are empirically unsupported.<sup>132</sup> Next, this Part examines the recidivism rates of juvenile sex offenders to further show civil commitment laws predicated on an increased risk of recidivism are uncorroborated by empirical data.<sup>133</sup>

#### A. *Policies Driving Civil Commitment and the Lack of Empirical Data to Support It*

The most commonly cited policy for civil commitment for sex offenders is the recidivism rationale. As a group, sex offenders have one of the lowest recidivism rates when compared to other categories of crimes.<sup>134</sup> Regardless, a recent study from the University of Florida found that "the general public believes that 75 percent of sex offenders will reoffend."<sup>135</sup> This widely held belief that sex offenders will reoffend at such a high rate is largely

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129. Tiffany M. Shute, *Cruel and Unusual: The Effect of Miller v. Alabama on the Indefinite Civil Confinement of Juvenile Sex Offenders*, 41 CRIM. AND CIV. CONFINEMENT 225 (2015).

130. Michels, *supra* note 68.

131. *See infra* Part III.A.

132. *Id.*

133. *Infra* Part III.B.

134. Paul Heroux, *Sex Offenders: Recidivism, Re-Entry Policy and Facts*, HUFFINGTON POST (Nov. 8, 2011), available at [http://www.huffingtonpost.com/paul-heroux/sex-offenders-recidivism\\_b\\_976765.html](http://www.huffingtonpost.com/paul-heroux/sex-offenders-recidivism_b_976765.html) (on file with *The University of the Pacific Law Review*).

135. *See* Hal Arkowitz & Scott O. Lilienfeld, *Once a Sex Offender, Always a Sex Offender? Maybe Not*, SCIENTIFIC AMERICAN (Apr. 1, 2008), available at <http://www.scientificamerican.com/article/misunderstood-crimes/> (on file with *The University of the Pacific Law Review*) (discussing the misconceptions about repeat sex offenders).

unsupported.<sup>136</sup> In fact, Public Safety Canada found the opposite to be true.<sup>137</sup> It conducted a data review study that found only 14 percent of sex offenders would reoffend within five years of release, escalating to just 24 percent after 15 years of release.<sup>138</sup> The Bureau of Justice reports the recidivism numbers to be even lower.<sup>139</sup> According to their statistics, the recidivism rate for sex offenders is approximately five percent, which is significantly lower than the 60 percent recidivism statistic for all other criminal activity.<sup>140</sup>

Experts identified a number of false assumptions that both policymakers and the public rely on when adopting and supporting punitive policies. According to Franklin Zimring, many of our laws and policies that address sexual offenders are premised on what he refers to as “four critical assumptions.”<sup>141</sup> These incorrect assumptions are that sex offenders are pathological, specialized, fixed in his or her proclivities, and at a high risk of offending again in the future.<sup>142</sup> Although these are the characteristics we have assumed when developing policy and laws, Zimring explains that the empirical evidence to support these assumptions is “uneven.”<sup>143</sup>

Along the lines of Zimring’s “four critical assumptions,”<sup>144</sup> Elizabeth J. Letourneau and Michael H. Miner developed three assumptions upon which our laws dealing with juvenile sex offenders are premised.<sup>145</sup> First, juvenile sex offenses are part of a larger epidemic of juvenile offending.<sup>146</sup> Second, juvenile sex offenders share more commonalities with their adult counterparts than with other juvenile offenders generally.<sup>147</sup> Third, juvenile sex offenders, without intervention, pose an extremely high recidivism risk.<sup>148</sup>

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136. *Id.*

137. *Id.*

138. *Id.* (“Sex crimes researchers R. Karl Hanson and Kelly E. Morton-Bourgon of Public Safety Canada conducted a large-scale meta-analysis (quantitative review) of recidivism rates among adult sex offenders. They found a rate of 14 percent over a period averaging five to six years. Recidivism rates increased over time, reaching 24 percent by 15 years. The figures are clearly out of alignment with the public’s more dire expectations.”).

139. Ridgeway, *supra* note 39 (reporting that the recidivism rate for sex offenders is around 5 percent making it significantly lower than the average recidivism rate for all criminal activity which is 60 percent).

140. *Id.*

141. ZIMRING, *supra* note 1, at 27 (explaining that sex offenses, unlike other criminal conduct, are still tethered to psychological pathologies).

142. *Id.* (“These assumptions project the image of a sex offender in terms of (1) pathological sexual orientation, (2) sexual specialization, (3) fixed sexual proclivities, and (4) a high level of future sexual dangerousness.”).

143. *Id.* at 29.

144. *Id.* at 27 (explaining that sex offenses, unlike other criminal conduct, are still tethered to psychological pathologies).

145. Elizabeth J. Letourneau & Michael H. Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo*, 17 *SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT* 293, 294 (July 2005).

146. *Id.*

147. *Id.*

148. *Id.*

Juvenile sex offenses are not part of a larger epidemic of juvenile offending. Over the last 25 years, “rates of juvenile sexual offending were characterized more by stability than by change.”<sup>149</sup> Juvenile sex offenders do not have more in common with adult sex offenders than other juvenile offenders. The evidence contradicts this assumption, showing that the opposite is true.<sup>150</sup> There is not an extremely high risk of recidivism. The data show that recidivism rates for juvenile sex offenders are low when compared with recidivism rates for nonsexual crimes.<sup>151</sup> Letourneau and Miner explain that these empirically unsupported assumptions have improperly influenced the manner in which we deal with juvenile sex offenders.<sup>152</sup> The time has come to rectify the harm done by these improper influences.

The empirical evidence used to justify the disparate treatment of sex offenders by civilly committing them is lacking.<sup>153</sup> For example, sex offenders in California return to prison after their release at a rate much lower than other offenders.<sup>154</sup> Yet, unlike other individuals that commit nonsexual crimes, juvenile sex offenders are held indeterminately after the completion of their sentences.<sup>155</sup> Society prefers civil commitment because of the mistaken belief that it will prevent recidivism.<sup>156</sup> Reconciling public policy with the empirical data to develop a more effective approach necessitates a shift in way the public views sex offenders.<sup>157</sup>

#### *B. Recidivism of Juvenile Sex Offenders Specifically*

The use of civil commitment to deal with juvenile sex offenders troubles some mental health experts.<sup>158</sup> These experts found that it is difficult to accurately predict whether a juvenile sex offender will mature into a dangerous

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149. *Id.* at 296.

150. *Id.*

151. *Id.* at 300 (“For example, of 25 studies that reported sexual recidivism rates for juvenile sex offenders (wherein recidivism was defined as either new arrests or new convictions), the mean rate of recidivism was 9 percent.”).

152. *Id.* at 301.

153. *Cf. ZIMRING, supra* note 1, at 30 (explaining that re-arrest statistics do not support the notion that child molesters are at an increased risk of re-offending when compared to nonsexual offenders).

154. *Id.* at 31.

155. Ridgeway, *supra* note 39 (“When it comes to sex offenders, a number of states and the federal government have laws that allow them to keep you in jail, simply because they consider you a potential recidivist.”).

156. Heather R. Willis, *Creeping by Moonlight: A Look at Civil Commitment Laws for Sexually Violent Predators Through the Lens of The Yellow Wallpaper*, 15 WM. & MARY J. WOMEN & L. 161, 190 (2008), available at <http://scholarship.law.wm.edu/wmjowl/vol15/iss1/6> (on file with *The University of the Pacific Law Review*) (“Society prefers these laws because they believe, mistakenly, that commitment prevents recidivism.”).

157. *See id.* (“This is a very controversial area of public policy where alternatives to the current system are available, but these alternatives require fundamental shifts in thinking that are not easy, and because they are not easy, they will not be popular.”).

158. Michels, *supra* note 68.

sex offender.<sup>159</sup> Essentially, a juvenile can outgrow deviant sexual behaviors if allowed to return to society as opposed to being indefinitely detained.<sup>160</sup> As William Blackstone famously wrote, “it is better that ten guilty persons escape, than that one innocent suffer.”<sup>161</sup> That sentiment is applicable here. With such difficulty predicting recidivism, coupled with the low frequency of repeat sex offenses, the concerns of mental health experts working within the juvenile system are well founded.<sup>162</sup>

Empirical studies have looked at the recidivism rates of juvenile sex offenders.<sup>163</sup> A study conducted in Texas in 2006 used the sex offender registry to track the recidivism of 300 offenders who committed their qualifying offense before they turned 18.<sup>164</sup> Only 4.3 percent of the offenders in the study were arrested for another sex offense as adults.<sup>165</sup> A different study focusing on juvenile sex offenders in Wisconsin found that 8.5 percent of the offenders “had contact with police for a sex offense as adults.”<sup>166</sup> Of that 8.5 percent, it is unclear what percentage of those contacts resulted in arrest.<sup>167</sup>

In evaluating juvenile sex offenders for civil commitment, psychiatrists often use a risk assessment test called the Juvenile Sex Offender Assessment Protocol II (JSOAP-II).<sup>168</sup> JSOAP-II is a 30-part checklist to help determine a juvenile sex offender’s risk of reoffending. Offenders score points based on whether there is a history of sexual abuse or aggression, but also based on largely innocuous nonsexual acts like vandalism or reckless driving.<sup>169</sup> Experts say that JSOAP-II and tests like it have “no proven ability to accurately predict a juvenile’s

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159. *Id.*

160. *Cf. id.* (“ . . . home-based treatment is effective in treating most juvenile offenders.”).

161. *See generally* R. M. N. KERR, THE STUDENT’S BLACKSTONE: BEING THE COMMENTARIES ON THE LAWS OF ENGLAND OF SIR WILLIAM BLACKSTONE, KNT. ABRIDGED AND ADAPTED TO THE PRESENT STATE OF THE LAW 518 (W. Clowes and Sons 1885) (establishing the background principles of the quote that Blackstone is often attributed).

162. *But cf. Michels, supra* note 68 (“If someone says I want to protect the public from the very small number of individuals who are highly dangerous, but I don’t want to put children in institutions for things they might have done, the reality is you cannot have it both ways.”).

163. JUSTICE POLICY INSTITUTE, *Youth Who Commit Sex Offenses, Facts and Fiction*, available at [http://www.justicepolicy.org/images/upload/08-08\\_FAC\\_SORNAFactFiction\\_JJ.pdf](http://www.justicepolicy.org/images/upload/08-08_FAC_SORNAFactFiction_JJ.pdf) (on file with *The University of the Pacific Law Review*).

164. *Id.*

165. *Id.* (“A 2006 retrospective study of 300 males on a sex offense registry in Texas who were under age 18 at the time of their first sex offense charge found that 4.3 percent of the sample was rearrested as an adult for another sex offense.”).

166. *Id.* (“A 2007 study funded by the MacArthur Foundation reviewed a longitudinal data set of three cohorts of youth in Racine, Wisconsin and found that of men who had contact with police for a sex offense as youth, 8.5 percent had contact with police for a sex offense as adults.”).

167. *Id.*

168. Steptoe & Goldet, *supra* note 41. (JSOAP-II was developed in Philadelphia, PA in 1994).

169. *Id.*

likelihood to sexually reoffend.”<sup>170</sup> Even acknowledging this, psychiatrists continue to use JSOAP-II to support civilly committing juvenile sex offenders.<sup>171</sup>

As demonstrated above, the U.S. Supreme Court recognizes the need to treat juvenile and adult offenders differently.<sup>172</sup> In particular, juveniles lack maturity and are vulnerable to outside influences.<sup>173</sup> The legislature should take these developmental differences and susceptibilities into consideration before relegating juveniles to confinement alongside adult offenders. Because of their youth, juvenile offenders have not developed a stagnant or fixed pattern of deviant sexual behavior.<sup>174</sup> In light of the fact that even the psychiatrists applying the risk assessment tools do not believe in their efficacy,<sup>175</sup> the recidivism rationale for civilly committing juvenile sex offenders, without more, is unsupported.

#### IV. THE PROBLEM WITH USING ADULT METHODS ON JUVENILES

This Part addresses the differences that exist between juvenile and adult sex offenders.<sup>176</sup> First, it examines how receptive juvenile sex offenders are to treatment in comparison to their adult counterparts.<sup>177</sup> Next, it addresses the issues that arise when adult methods of treatment are used on juvenile sex offenders.<sup>178</sup> This Part then discusses the consequences that result when juvenile sex offenders are labeled as Sexually Violent Predators.<sup>179</sup> Next, this Part examines how a different approach can benefit juvenile sex offenders.<sup>180</sup> Finally, this Part suggests that the issue of civil commitment for juvenile sex offenders is ripe to be heard by the United States Supreme Court.<sup>181</sup>

##### A. Receptiveness to Treatment

Juvenile sex offenders are more receptive to treatment than adults.<sup>182</sup> A study using Multisystemic Therapy (MST) found that treatment of juvenile offenders

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170. *Id.*

171. *E.g., id.* (Paolillo acknowledged JSOAP-II's "experimental nature," but ran the test anyway).

172. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

173. *Id.* (“[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”).

174. Michels, *supra* note 68.

175. Steptoe & Goldet, *supra* note 41.

176. *Infra* Part IV.

177. *Infra* Part IV.A.

178. *Infra* Part IV.B.

179. *Infra* Part IV.C.

180. *Infra* Part IV.D.

181. *Infra* Part IV.E.

182. *Cf.* Karen Franklin, Ph.D, Efficacy of Sex Offender Treatment Still Up in the Air, *Psychology Today* (Sept. 25, 2013), available at <https://www.psychologytoday.com/blog/witness/201309/efficacy-sex-offender>

reduced recidivism rates.<sup>183</sup> MST deviates from the more common one-on-one therapy, and instead incorporates the offender's community and family.<sup>184</sup> This is the opposite of the methodology of civil commitment in that the offender is immersed in their community as opposed to being isolated from them.<sup>185</sup> Furthermore, the juvenile offender is surrounded by family and community support, as opposed to being surrounded by adult sex offenders.<sup>186</sup>

Civil commitment treatment programs and requirements vary from state to state.<sup>187</sup> In New Jersey, for example, a civil commitment facility known as Avenel facilitates group therapy sessions for its residents.<sup>188</sup> Not all facilities require therapy.<sup>189</sup> In fact, some offenders refuse treatment because their communications with therapists and staff can be used against them in subsequent commitment assessments and hearings.<sup>190</sup> This creates an environment of wariness and distrust, which undercuts the purpose of open and candid therapy sessions.<sup>191</sup>

Unlike adults, all juveniles, regardless of whether they are sex offenders or offenders in some other criminal category, are "particularly amenable to treatment designed to help end delinquency."<sup>192</sup> Some methods of treatment that are effective for juvenile sex offenders are ineffective for adult sex offenders.<sup>193</sup> A number of studies focused on the effectiveness of treatment on juvenile sex offenders "consistently found at least modest treatment effects on both sexual and nonsexual recidivism."<sup>194</sup>

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treatment-still-in-the-air (on file with *The University of the Pacific Law Review*) (discussing the result of studies performed with adults and juveniles where the juveniles were more successful).

183. *Id.*

184. Brad Fischer, *Treatment for Juvenile Offenders Shows Positive Effects 22 Years Later, Including Reduced Recidivism Rates*, UNIVERSITY OF MISSOURI NEWS BUREAU (Nov. 17, 2011), available at <http://munews.missouri.edu/news-releases/2011/1117-treatment-for-juvenile-offenders-shows-positive-effects-22-years-later-including-reduced-recidivism-rates/> (on file with *The University of the Pacific Law Review*).

185. *Cf. id.* ("MST interventions involve the offender's entire family and community, as opposed to the more common individual therapy, where the offender visits a therapist.")

186. *Id.*

187. *Cf. Steptoe & Goldet, supra* note 41 (describing the facilities in New Jersey known as Avenel).

188. *Id.*

189. *Cf. Miller, supra* note 50, at 2118 (detailing that offenders can refuse treatment).

190. *Id.*

191. *Cf. id.* (knowing that any information can be used to further commit them, patients are less forthcoming).

192. JUSTICE POLICY INSTITUTE, *supra* note 163.

193. *Id.*

194. Roger Przybylski, *The Effectiveness of Treatment for Juveniles Who Sexually Offend*, SOMAPI Research Brief p.2 (July 2005), U.S. Department of Justice Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, available at <http://www.smart.gov/pdfs/JuvenileTreatment.pdf> (on file with *The University of the Pacific Law Review*).

B. *Issues With Using Adult Methods on Juveniles*

Psychiatrists use predication models on adult sex offenders to help assess the likeliness of reoffending.<sup>195</sup> When they use these same methods on juvenile sex offenders, the methods do not yield an accurate prognosis.<sup>196</sup> As a result, the policies driving the treatment for adult sex offenders are improper for juvenile sex offenders.<sup>197</sup>

A one-size-fits-all approach to treatment does more harm than good.<sup>198</sup> Given that juvenile sex offenders are at a low risk of recidivism, certain interventions and treatments increase the risk of anti-social behavior.<sup>199</sup> Additionally, grouping low-risk offenders with high-risk offenders yields the same result.<sup>200</sup> Placing a dysfunctional child with dysfunctional adults exposes the child to more of the same dysfunction.<sup>201</sup> Occurrences of older offenders preying on younger offenders are not uncommon.<sup>202</sup> As previously discussed, juveniles are more susceptible to the influence of those around them.<sup>203</sup> In most cases, the state laws that apply to juvenile sex offenders replicate the laws crafted for adult offenders.<sup>204</sup> These laws do not take into account the significant differences between adult and juvenile offenders and therefore do more harm than good.<sup>205</sup>

C. *Consequences of Misclassifying Juveniles as SVPs*

When psychologists and judges designate juvenile sex offenders as Sexually Violent Predators (SVPs), juvenile sex offenders may be eligible for civil commitment due to the perceived risk they pose to society.<sup>206</sup> This classification

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195. Cf. Michels, *supra* note 68 (explaining that the methods used to predict whether adult sex offenders will reoffend do not work effectively on juveniles).

196. *Id.* (explaining that the methods used to predict whether adult sex offenders will reoffend do not work effectively on juveniles).

197. *Id.* (citing the conclusions drawn by Maia Christopher, the director of the Association for the Treatment of Sexual Abusers).

198. Cf. Franklin, *supra* note 182 (discussing the potential negative effects of certain treatment options).

199. *Id.* (“If these children are subjected to excessively intense or inappropriate therapy, this could increase the risk for future antisocial behavior.”).

200. *Id.* (“Grouping low risk offenders with those at high risk for reoffending, could result in adverse outcomes.”).

201. Steptoe and Goldet, *supra* note 41 (“If you put a child who is on the borderline of being anti-social or dysfunctional, and you put them with a whole bunch of anti-social and dysfunctional people, all you get is a rotten child,” said Carl Bell, the director of the Institute for Juvenile Research at the University of Illinois.”).

202. *Id.*

203. Cf. *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (“juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”).

204. FRANK. C. DICATALDO, *THE PERVERSION OF YOUTH: CONTROVERSIES IN THE ASSESSMENT AND TREATMENT OF JUVENILE SEX OFFENDERS*, 213 (NYU Press, 2009).

205. *Id.*

206. Cf. ZIMRING, *supra* note 1, at 33 (explaining the range of methods used to manage sexual offenders, including civil commitment after a prison term has been served).

carries its own consequences. Juveniles are less likely to be rehabilitated when they view themselves as abnormal.<sup>207</sup> For juveniles who are labeled as sex offenders, or SVPs, managing the stigma that comes along with these labels can frustrate the effectiveness of rehabilitation.<sup>208</sup>

Labels such as “SVP” can be hard to renounce.<sup>209</sup> Sex offenders are commonly thought of as being incurable.<sup>210</sup> Experts now favor reframing notions of incurability due to the negative effects they can have on juvenile sex offenders.<sup>211</sup> Juveniles who think of themselves as being “incurable” internalize the label, which can have negative impacts on “self-esteem, motivation, and confidence to make positive changes in treatment.”<sup>212</sup>

The expert panel appointed by the court to review the MSOP program in Minnesota observed “high levels of learned helplessness and hopelessness, both on the part of the clients and the staff.”<sup>213</sup> This type of internalized oppression impedes any meaningful chance at rehabilitation.<sup>214</sup> It is important to the rehabilitation of juvenile offenders that they are not defined by their sex offenses.<sup>215</sup>

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207. Letourneau & Miner, *supra* note 145, at 306.

208. *Cf.* JUSTICE POLICY INSTITUTE, *supra* note 163 (“For youth, registries and notification systems cut youth off from beneficial social networks, creating social stigma and isolation, increasing the risk of suicide, alienating a youth from school and community, and raising barriers to successful participation in society.”).

209. HUMAN RIGHTS WATCH, *Raised on the Registry, The Irreparable Harm of Placing Children on Sex Offender Registries in the US*, HUMAN RIGHTS WATCH (May 1, 2013), available at <https://www.hrw.org/report/2013/05/01/raised-registry/irreparable-harm-placing-children-sex-offender-registries-us> (on file with *The University of the Pacific Law Review*) (“Labels stick and can last a lifetime. The label of “sex offender,” “child molester,” or “sexually violent predator” can cause profound damage to a child’s development and self-esteem.”).

210. See Timothy Egan, *Therapy for Child Molesters: Many Doubt That it Works*, NY TIMES (Jan. 1, 1990), available at <http://www.nytimes.com/1990/01/01/us/therapy-for-child-molesters-many-doubt-that-it-works.html?pagewanted=all> (on file with *The University of the Pacific Law Review*) (“It’s only in the last few years that people have started to say that certain sex offenders are incurable,” said Dr. Janis F. Bremer, a therapist at the Hennepin County Home School in Minnetonka, Minn., who is a member of a recent national group set up to study treatment methods for sexual offenders.”).

211. Dr. Kurt Bumby, *Understanding Treatment for Adults and Juveniles Who Have Committed Sex Offenses*, CENTER FOR SEX OFFENDER MANAGEMENT (Nov. 2006), available at [http://www.csom.org/pubs/treatment\\_brief.pdf](http://www.csom.org/pubs/treatment_brief.pdf) (on file with *The University of the Pacific Law Review*).

212. *Id.* (“[E]xperts suggest reframing the “incurability” emphasis within relapse prevention with juveniles, because of the potential negative impact it may have on self-esteem, motivation, and confidence to make positive life changes in treatment.”); Amy L. Drapalski et al., *A Model of Internalized Stigma and Its Effects on People With Mental Illness*, 64(3) PSYCHIATRIC SERVICES 264 (Mar. 2013) (Internalizing the stigma associated with the label SVP can result in increased depression, decreased self-esteem, social avoidance, and decreased persistence in seeking support and services).

213. Schwartzapfel, *supra* note 2.

214. *Cf. id.* (explaining that the lack of any determinate end date effects both staff and clients).

215. Beth Schwartzapfel, *An Oklahoma Program Treats Juvenile Sex Offenders as Kids, Not Criminals*, ALJAZEERA AMERICA (Aug. 21, 2014), available at <http://america.aljazeera.com/articles/2014/8/21/an-oklahoma-programtreatsjuvenilesexoffendersaskidsnotcriminals.html> (on file with *The University of the Pacific Law Review*).

D. The Difference an Alternative Approach Can Make

Tyler, a sixteen-year-old from Oklahoma, is a sex offender.<sup>216</sup> Tyler's older sister sexually abused him when he was seven, and when he turned 14, he began to do the same to his younger siblings.<sup>217</sup> The law in many other states would require Tyler to register as a sex offender for life, be sent to prison, and face the potential of indefinite civil commitment.<sup>218</sup> Instead, the court ordered that Tyler and his parents participate in a program at the University of Oklahoma's Center on Child Abuse and Neglect as a condition of his probation.<sup>219</sup> Tyler now lives at home with his family while they collectively participate in the program.<sup>220</sup>

In 1986, Barbara Bonner founded the Oklahoma program, which employs a family oriented approach and uses positive socialization methods.<sup>221</sup> The program has seen great success with the recidivism rate of program graduates at about three to five percent.<sup>222</sup> Describing the program, Bonner says, "it's not the highly specialized, extremely difficult intervention that is often necessary for adult sex offenders—and that most state systems assume is necessary for kids."<sup>223</sup> Tyler just celebrated his sixteenth birthday at Chuck E. Cheese with his family.<sup>224</sup>

This positive approach is part of a larger trend recently favored by experts.<sup>225</sup> These methods are geared toward providing offenders with positive goals, such as autonomy, intimacy, and emotional balance.<sup>226</sup> Another example of a more positive treatment methodology akin to the one in Oklahoma is Multisystemic Therapy (MST). MST also employs a holistic family and community-focused approach that is "designed to address individual, family, peer, school, and community influences."<sup>227</sup> Results from those offenders who participate in MST show "lower rates of sexual and nonsexual recidivism."<sup>228</sup>

Tyler's story is a stark contrast from that of Craig Bolte.<sup>229</sup> Bolte, now 28, was civilly committed for sex crimes he perpetrated when he was ten.<sup>230</sup> Craig did not get the benefit of participating in MST, or a program like the one Tyler is

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216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. Bumby, *supra* note 211.

226. *Id.*

227. *Id.*

228. Letourneau & Miner, *supra* note 145, at 305.

229. *Supra* Part I.

230. Schwartzapfel, *supra* note 2.

in at the University of Oklahoma.<sup>231</sup> Craig says that he wants to do “what everyone else does.”<sup>232</sup> For him, this includes going to college, finding a spouse, and having a family.<sup>233</sup> The things that Craig wants the most are the same things that Tyler’s treatment is focused on fostering.<sup>234</sup>

If Craig were afforded the holistic treatment approach that Tyler was, he may never have written to his state representative asking to be euthanized.<sup>235</sup> If he had entered the Oklahoma program after his juvenile sentence was complete, or participated in MST, the last nine years of his life may have looked very different. If he had spent those years building ties within his community and with his family, as opposed to being confined alongside adult sex offenders, Craig could have achieved at least some of the goals he dreams of.<sup>236</sup> As Elizabeth Letourneau, professor at the School of Public Health at Johns Hopkins University explained, “there are interventions that should never be used on juveniles and civil commitment is one of them.”<sup>237</sup>

### E. Looking Forward

Considering the Supreme Court’s evolving jurisprudence regarding the appropriate punitive measures for juveniles stemming from the *Roper-Graham-Miller-Montgomery* line of cases, the issue of civil commitment for juvenile sex offenders is ripe for review by the Court.<sup>238</sup> Additionally, a growing number of states have overturned their own civil commitment statutes on findings of unconstitutionality.<sup>239</sup> Even though civil commitment of adult sex offenders is largely settled law, the constitutionality of civilly committing juvenile sex offenders is a question that has yet to be presented to the Supreme Court.

The Court is not alone in recognizing the trend of empirically supported justice for juveniles.<sup>240</sup> With the increased popularity of “sexting,” teenagers

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231. *Cf. id.* (explaining that Craig Bolte was committed under Minnesota’s Sexual Offender Program).

232. *Id.*

233. Schwartzapfel, *supra* note 2.

234. *Id.*

235. *Supra* Part I.

236. *Supra* Part I.

237. Michels, *supra* note 68.

238. *Roper v. Simmons*, 543 U.S. 551, 551 (2005); *Graham v. Florida*, 560 U.S. 48, 94 (2010); *Miller v. Alabama*, 132 S.Ct. 718, 718 (2016); *Montgomery v. Louisiana*, 136 S.Ct. 718, 718 (2016).

239. Schwartzapfel, *supra* note 2.

240. *Cf. Lewin, supra* note 81 (“Last year, Nebraska, Utah and Vermont changed their laws to reduce penalties for teenagers who engage in such activities, and this year, according to the National Council on State Legislatures, 14 more states are considering legislation that would treat young people who engage in sexting differently from adult pornographers and sexual predators.”).

across the nation risk being charged with sex offenses, having to list themselves on sex offender registries, and potentially face civil commitment as a result.<sup>241</sup>

Legislators, attorneys, and lower courts have begun to acknowledge the need to change certain sex offender laws, which are viewed as too severe to address adolescent sexual curiosity.<sup>242</sup> For example, the opinion in a “sexting” case that made it before a federal court of appeals “recognized that a prosecutor had gone too far in trying to enforce adult moral standards” on the teenage girls involved.<sup>243</sup> Over 14 states in the last several years have considered legislation that distinguishes sexual predators from juveniles who engage in “sexting,” recognizing the potential debilitation that accompanies being labeled a sex offender.<sup>244</sup>

With the recent passing of Justice Antonin Scalia, the composition of the Court may change dramatically. Justice Scalia dissented in both *Miller* and *Montgomery*.<sup>245</sup> Justice Anthony Kennedy was clear when he noted “if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified,” that the Court’s precedent would not support it.<sup>246</sup> The Court has already shown a willingness to move away from a tough-on-crime approach to juvenile justice and with hardliner Scalia gone, this trend could continue.

## V. CONCLUSION

Empirical data does not support the civil commitment of juvenile sex offenders. Justice instead requires a data-driven approach that acknowledges the inherent difference between adults and juveniles.

The first step is allowing juvenile offenders the opportunity to grow out of their deviant behaviors.<sup>247</sup> The most effective way for juvenile offenders to outgrow these behaviors is to reintegrate them back into their communities.<sup>248</sup> These young offenders are more receptive to treatment than adults, which is all

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241. *Cf. id.* (“In most states, teenagers who send or receive sexually explicit photographs by cellphone or computer—known as “sexting”—have risked felony child pornography charges and being listed on a sex offender registry for decades to come.”).

242. *Cf. id.* (“But there is growing consensus among lawyers and legislators that the child pornography laws are too blunt an instrument to deal with an adolescent cyberculture in which all kinds of sexual pictures circulate on sites like MySpace and Facebook.”).

243. *Id.*

244. *Id.* (Misdemeanor: Alaska, Arizona, Connecticut, Florida, Georgia, Hawaii, Nevada, North Dakota, Pennsylvania, South Dakota, Texas, Utah; Felony: Alabama, Florida, Georgia, Nebraska, Utah. There is currently no federal sexting law in force).

245. *See generally*, *Miller v. Alabama*, 132 S.Ct. 2455 (2012); *Montgomery v. Louisiana*, 136 S.Ct. 718, 718 (2016).

246. *Kansas*, 521 U.S. at 373.

247. ZIMRING, *supra* note 1, at 106.

248. Letourneau & Miner, *supra* note 145, at 305.

the more reason for them to receive the most effective treatment possible.<sup>249</sup> Furthermore, using adult methods on juveniles does more harm than good.<sup>250</sup> When juvenile offenders internalize the stigma that comes along with the sexually violent predator label, they lose hope in their own ability to be rehabilitated.<sup>251</sup> This leads to the type of helplessness and hopelessness that was described by the panel of experts appointed by the court in the Minnesota MSOP case.<sup>252</sup>

In light of the successes of MST, similar programs like the one in Oklahoma, and the absence of empirical data supporting the effectiveness of civil commitment for juvenile offenders, this unjust form of quasi-punishment in the guise of rehabilitation must stop. The time has come to act in the best interest of juvenile offenders instead of acting on the unsupported fears and misconceptions of the public.

As Franklin Zimring said, “a fundamental tenant of American juvenile courts is that growing up is a proven cure for crime.”<sup>253</sup> In the case of juvenile sex offenders, it is evident that the cure for crime is growing up outside the restrictive confines of civil commitment, holistically reintegrated into a community that is invested in his or her success.

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249. *Cf.* Franklin, *supra* note 182 (discussing the result of studies performed with adults and juveniles where the juveniles were more successful).

250. *Cf. id.* (discussing the potential negative effects of certain treatment options).

251. *Id.*; Drapalski et al., *supra* note 212 (explaining that internalized stigma, or internalized oppression, “occurs when a person cognitively or emotionally absorbs stigmatizing assumptions and stereotypes about mental illness and comes to believe and apply them to him or herself.”).

252. Schwartzapfel, *supra* note 2 (“The judge-appointed expert panel noted ‘high levels of learned helplessness and hopelessness, both on the part of the clients and the staff.’ Their report detailed a culture in which there is no meaningful discharge planning, and ‘a ubiquitous belief that clients cannot achieve release, which likely affects both staff and client behavior.’”).

253. ZIMRING, *supra* note 1, at xv.