

**NET-WIDENING IN DELAWARE:
THE OVERUSE OF REGISTRATION AND RESIDENTIAL
TREATMENT FOR YOUTH WHO COMMIT SEX OFFENSES**

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ABSTRACT

This article examines recent legislative and judicial changes to Delaware's approach to youth who have sexually offended and contrasts these changes with findings from empirical research. Since the early 1990s, laws related to sex offender registration, penalties for sex offenses, and waiver of adolescents to adult court have all become more stringent; yet, recent research into the youth targeted by these laws demonstrates that they are not comparable to youth who have sexually offended in other states. Delaware's aggressive legislative approach, although softened by judges in practice, has apparently led to net-widening. Placing youth who are at low risk for re-offense in detention and residential treatment, and in public registries, costs the state millions of dollars and undermines public safety. The legislature should revise existing statutes so that many of these youth can be properly treated and supervised in the community.

INTRODUCTION: THE CONTEXT OF SEX OFFENDER LEGISLATION
SINCE THE 1990S

Since the 1990s, popular tough-on-crime legislation has capitalized on the public's fears of the violent recidivist. The spirit of California's "three strikes and you're out" approach has influenced sentencing reform in states across the country, with most states shifting from indeterminate to determinate sentencing structures for certain offenses.¹ Interestingly, violent crime rates have consistently fallen during the period of panic over recidivists,² but the

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1. FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 159 (2001). *See also* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 62-65 (2006).

2. David Finkelhor & Lisa Jones, *Why Have Child Maltreatment and Child Victimization Declined?*, 62 J. SOC. ISSUES 685, 685-86 (2006) (showing the decline of violent child victimization during this time). *See also* Fed. Bureau of Investigation, *Crime in the United States 2006*, (Sept. 2007), <http://www2.fbi.gov/ucr/cius2006/documents/violentcrimemain.pdf>.

efficacy of “governing through crime” outweighs the facts.³ Today, policymakers seek better ways of signaling their concern with crime and their solidarity with victims and their families. Cracking down on the particular category of sex offenders⁴ is politically costless, as nearly no one would risk being portrayed as “pro-sex offender” by challenging the latest legislation. In the current climate, many believe it is too politically dangerous to question a sex offender policy, even one that will cost hundreds of millions of dollars, such as California Proposition 83.⁵ As Republican consultant Ray McNally said about proposed residency restrictions in California, “[I] [p]ity the poor politician who decides to stand up against this initiative. They’ll be roadkill by morning.”⁶ Similar sentiments are expressed in national debates and in discussions of state policies in places like Delaware,⁷ which is the state this article uses as a case study of the translation of punitive political rhetoric to practice at the level of juvenile justice systems.

Nationally, these largely unopposed general sentencing policies, as well as those focused on sex offenders, have led to spectacular growth in the imprisonment of adult sex offenders since the 1980s, even though crime rates have generally declined.⁸ A basic premise underlying these policies is that the

3. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 4, 6 (2007).

4. “Sex offenders” is used in this instance in the same way it is used in media and public policy—as a catchall term for a wide variety of criminal conduct, from urination in public to violent sexual assault, including homicide. For an elaboration and the historical context of the non-differentiated approach to punishing sex offenders, see CHRYSANTHI S. LEON, SEX FIENDS, PERVERTS, AND PEDOPHILES: UNDERSTANDING SEX CRIME POLICY IN AMERICA (forthcoming August 2011) (on file with authors). Elsewhere in this article, we often use “youth who have sexually offended” or a variation thereof in order to emphasize that a youth’s conduct should not be used to define him or her. However, for brevity and to avoid tedious repetition, we will use the shorthand “juvenile sex offenders” at times as well. This usage does in fact reflect the current status and experience of such youth—undermining the creation of this permanent identity is the purpose of this article.

5. California Proposition 83 is also known as Jessica’s Law, CAL. PENAL CODE §§ 209, 220, 269, 288.3, 290.3, 311.11, 667.5, 667.51, 667.6, 667.61, 667.71, 1203.06, 1203.065, 1203.075, 3000, 3000.07, 3001, 3003, 3003.5, 3004, 12022.75 and CAL. WELF. & INST. CODE §§ 6600, 6600.1, 6601, 6604, 6604.1, 6605, 6608 (West 2006). See, e.g., Andy Furillo, *Crackdown Urged on Sex Offenders; Critics See Flaws*, THE SACRAMENTO BEE, Oct. 24, 2006, at A1.

6. George Skelton, *Republicans’ Anti-Molester Measure Puts Democrats in a Tough Spot*, L.A. TIMES, Feb. 6, 2006, at B3.

7. One author has spent over 400 hours observing Delaware courts and attending other meetings with various state bureaucrats for another project, an ongoing ethnography of the criminal justice system’s approach to mental illness. See generally Chrysanthi Leon, *As Well as Expected: Women’s Performance in Mental Health Court* (May 2010) (paper presented at the Annual Meeting of the Law and Society Association in Chicago) (on file with *Widener Law Review*).

8. Jonathan Simon & Chrysanthi Leon, *The Third Wave: American Sex Offender Policies Since the 1990s*, in INTERNATIONAL HANDBOOK OF PENOLOGY AND CRIMINAL JUSTICE 733, 736 (Shlomo Giora Shoham et al. eds., 2008). See LEON, *supra* note 4 (illustrating the long-term historical picture of the role stories about sex offenders has played in shaping criminal justice

crime problem can be solved by increasing criminal justice oversight of known offenders through lengthy incarceration, enhanced supervision upon release, or both.

Critics have pointed out the practical and normative problems with this political motivation and with some of these new policies, especially when applied to offenders under eighteen.⁹ In addition to fears of repeat criminals, recent decades have been marked by periods of media hype surrounding the special threat posed by juvenile delinquents. For example, presidential candidate Bob Dole famously pontificated during his 1996 campaign, “[u]nless something is done soon, some of today’s newborns will become tomorrow’s superpredators—merciless criminals capable of committing the most vicious of acts for the most trivial of reasons.”¹⁰ Supported by scholars like John DiIulio, who coined the term “superpredator,”¹¹ youth involved in criminal activity have become symbols of danger, and are responsible for compelling government intervention in the name of public safety.¹² However, since the passage of the Adam Walsh Act in 2006, which applies to both juveniles and adults, and thus effectively nationalizes juvenile sex offender registration, numerous critics have described the unintended and punitive consequences that result when juveniles are enveloped in a law enforcement program designed for adults. This article moves beyond the available critiques by demonstrating not only the logical fallacies of the laws that treat youth

policy more broadly). On the general incarceration increase, one source stated that “[a]n examination of the rise of imprisonment from 1992 to 2001 concluded that the *entire* increase was a result of changes in sentencing policy and practice.” THE SENTENCING PROJECT, NEW INCARCERATION FIGURES: THIRTY-THREE CONSECUTIVE YEARS OF GROWTH, (2006), *available at* http://www.sentencingproject.org/doc/publications/inc_newfigures.pdf.

9. See FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING 143-59 (2004); Phoebe Geer, *Justice Served? The High Cost of Juvenile Sex Offender Registration*, DEV. MENTAL HEALTH L., July 2008, at 33, 44-52; Britney M. Bowater, Comment, *Adam Walsh Child Protection and Safety Act of 2006: Is There a Better Way to Tailor the Sentences of Juvenile Sex Offenders?*, 57 CATH. U. L. REV. 817, 835-46 (2008); Adam Doeringer, Comment, *Rehabilitating Juvenile Sex Offenders with a Life Sentence*, 42 J. MARSHALL L. REV. 187 (2009).

10. Kelly Luker, *Kids These Days*, METRO SANTA CRUZ, Sept. 18, 1997, *available at* <http://www.metroactive.com/papers/cruz/09.18.97/kids-9738.html>.

11. *Id.* Zimring responded to DiIulio’s work:

Zimring has researched DiIulio’s work, and finds that blanket prediction of superpredators is full of holes. DiIulio’s oft-quoted number of 270,000 superpredators, he says, did not accurately figure ages. So the year 2010, he says, will find us terrorized by “desperadoes in diapers,” 4-, 5- and 6-year-olds which were inadvertently included with the teens.

Id. Zimring also explained that little evidence would support an interpretation of increased misconduct by children, but instead, police practices have shifted. *Id.*

12. See generally SIMON, *supra* note 3, at 207-31 (addressing the importation of crime control into school administration); AARON KUPCHIK, JUDGING JUVENILES: PROSECUTING ADOLESCENTS IN ADULT AND JUVENILE COURTS (2006) (contending that a “sequential model of justice,” or a system that borrows both a criminal justice model and a juvenile justice model, is necessary when prosecuting adolescents in criminal court).

adjudicated on sex charges like future superpredators, but reports on clear empirical proof of the misguided net-widening.

PART I: STATUTORY CHANGE IN DELAWARE

As noted in a 2008 report on sexual offenders in Delaware, public opinion and policy changes nationwide have shifted to take sexual offending more seriously; “[c]riminal sexual behavior that in the past might have been handled as a misdemeanor, addressed privately, or even considered a mental health issue, is now more likely to be prosecuted as a felony.”¹³ In the past, U.S. law and policy tended to dismiss juvenile sexual offending as harmless, reflecting the cultural assumption that sexual aggression signifies no more than “boys being boys.”¹⁴ Few sex offenses were set forth in the Delaware Code until 1953. In line with increasing awareness and the pressure of feminist and child protection movements, the state legislature made significant legislative revisions in the early 1970s to protect adult victims against offensive and non-consensual contact by juveniles and to penalize adults who victimized the young.¹⁵ However, those legislative revisions did not criminalize sexual contact between juveniles. As commentary to the 1971-1972 Legislative revisions stated:

The rationale of excusing from criminal sanctions sexual contact between relatively young people is that such contact presents no important social harm and is widely engaged in and tolerated. This is one of the fields in which private morals must be relied upon to regulate personal behavior, and in which criminal sanctions are inappropriate to punish breach of the moral law.¹⁶

Further, the commentary specifically emphasized a deferral of such matters to “the realm of private moral authorities such as the church and the family.”¹⁷ Thus, the first wave of legislative reforms to take sex crime more seriously in Delaware deliberately excluded sexual contact between youth and emphasized that such matters were better regulated without government intrusion.

13. PHILISA J. WEIDLEIN-CRIST & JOHN P. O’CONNELL, JR., DEL. OFFICE OF MGMT. AND BUDGET, STATISTICAL ANALYSIS CTR., DELAWARE SEX OFFENDERS: PROFILES & CRIMINAL JUSTICE SYSTEM OUTCOMES 1 (2008).

14. Gail Ryan, *Treatment of Sexually Abusive Youth: The Evolving Consensus*, 14 J. INTERPERSONAL VIOLENCE 422, 422 (1999).

15. See WEIDLEIN-CRIST & O’CONNELL, *supra* note 13, at 1. As to the adult who had contact with a consensual youth, the 1971-1972 Code commentary stated that “although the contact is consensual, it is with a person whom the law seeks to protect because of his or her immaturity.” DEL. CRIM. CODE § 761 cmt. (1973).

16. DEL. CRIM. CODE § 761 cmt. (1973). See also *Fletcher v. State*, No. 0404010688, 2008 WL 2912048, at *4 (Del. Fam. Ct. June 16, 2008).

17. DEL. CRIM. CODE § 762 cmt. (1973).

Sex offenders have featured prominently in United States penal legislation since the 1990s,¹⁸ and Delaware followed the national lead, including the adoption of community notification laws that do not differentiate children from adults.¹⁹ In 1995, Delaware passed the Dangerous Crimes Against a Child Act, which provided that “a person who is at least 18 years of age, or who has been tried as an adult and who is convicted of a dangerous crime against a child [under the age of fourteen] shall be guilty of a class B felony,” and that any subsequent convictions will result in a mandatory life sentence.²⁰ For repeat sexual predators, Delaware’s 2006 Jessica’s Law specified additional felony charges and double sentencing terms which could result in a life sentence.²¹

In 1994, Delaware adopted sex offender registration, commonly referred to as Megan’s Law, requiring sex offenders to register with the state.²² At that time, twenty-two other states had enacted similar legislation.²³ As of March 1, 1999, Delaware’s Community Notification Law clarified the boundaries of public access to “searchable records” of convicted Delaware sex offenders.²⁴ This law explicitly includes photographs and other information that can be found on the internet.²⁵ In 2001, the Delaware Supreme Court in *Helman v. State*²⁶ held that Delaware’s Megan’s Law applied to juveniles as well as adults, thus requiring juveniles adjudicated for certain sex offenses to register on the sex offender registry, and be subject to community notification within their communities and on the Internet.²⁷ This conviction-based approach makes no distinction based on age or any other factors related to risk to the community, nevertheless, the court held that such registration requirements were a proper exercise of legislative policy.²⁸ As the Delaware Family Court noted, “Delaware has thus been treating juvenile sex offenders just like adult sex offenders since 2001.”²⁹

Delaware assigns people convicted of sex offenses to one of three tiers. Under Delaware law, sex offenders who are assigned to Tiers II and III are included in the community notification Internet database.³⁰ The tier level is

18. Franklin E. Zimring et al., *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort*, 26 JUST. Q. 58, 59 (2009).

19. See DEL. CODE ANN. tit. 11, §§ 4120-4121 (2010).

20. *Id.* at § 779.

21. *Id.* at § 4205A.

22. *Id.* at §§ 4120-4121 (2010). See also *Fletcher v. State*, No. 040401688, 2008 WL 2912048, at *3 (Del. Fam. Ct. June 16, 2008).

23. *Fletcher*, 2008 WL 2912048, at *3.

24. *Id.*

25. *Id.*

26. 784 A.2d 1058 (Del. 2001).

27. *Id.* at 1079.

28. *Id.* at 1064.

29. *Fletcher*, 2008 WL 2912048, at *3. From 1915 to 2001, Delaware’s juvenile sex offender laws evolved from leaving offenses completely to the family, church, and community, to treating juvenile sex offenders as harshly as adult sex offenders, and in some cases more so. See *id.*

30. DEL. CODE ANN. tit. 11, § 4121(e)(1)(a) (2007). Amendments adopted in April 2002 expanded notification requirements and the definition of “searchable records” from which

established by the offense and without consideration of the particular individual's risk of re-offense, meaning that if an individual with a long history of violent offenses is able to plead down to a minor sex offense in a particular case, he or she will automatically be deemed low to moderate risk.³¹ In contrast, an individual with no previous criminal justice contacts and no other warning signs in his or her background, who accepts a plea to a charge of unlawful sexual contact, will automatically be in the higher risk tier.³² Delaware's tier system is therefore purely conviction-based, tying the hands of criminal justice officials and forcing them to make placements based on known risk. This creates nonsensical outcomes, which threaten public safety.

Delaware's approach to sex offender risk determination and registry placement, although statutorily labeled "risk-based," is actually conviction-based. This ignores a considerable amount of research that provides the basis for individualized risk prediction, and puts Delaware out of step with the evidence-based practice used in many states across the United States. Risk assessment tools used to classify sex offenders have been implemented in other states, including New Jersey and Washington.³³ In these states, actuarial tools are used by experts to use factors associated with future sexual offending in order to place individuals along a continuum of low to high risk with respect to future dangerousness.³⁴ These assessments inform placement into the sex offender registry, as well as treatment and supervision decisions for the offender upon release into the community.³⁵ For example, Washington uses an End of Sentence Review Committee (ESRC), established by the state legislature in 1997 to review the risk level of sex offenders prior to an offender's release from prison.³⁶ The ESRC's classification decision is based on the Minnesota Sex Offender Screening Tool (MnSOST) and the STATIC-99, two actuarial instruments that have been validated as good predictors by several empirical evaluations.³⁷ Local law enforcement receives the ESRC recommendation and then ultimately determines the level of risk

the public could gain information about sex offenders in Delaware. The 2002 additions required schools to notify students' families of local sex offenders, while also requiring the offender to list his or her places of study in addition to listing places of employment. *Id.* at §§ 4121(a)(3), 4121(f) (2010); *Fletcher*, 2008 WL 2912048, at *4.

31. *See* DEL. CODE ANN. tit. 11, § 4121(d).

32. *Id.*

33. *See* Elizabeth K. Drake & Steve Aos, *Does Sex Offender Registration and Notification Reduce Crime? A Systematic Review of the Research Literature*, WASH. ST. INST. FOR PUB. POL., June 2009, at 2, available at <http://www.wsipp.wa.gov/rptfiles/09-06-1101.pdf>; Phillip H. Witt & Lori H. Lessin, *Overview of Sex Offender Risk Assessments (2005)* (unpublished manuscript) (on file with authors).

34. *See generally* Witt & Lessin, *supra* note 33.

35. *Id.*

36. Drake & Aos, *supra* note 33, at 2.

37. *Id.*

communicated to the public.³⁸ Those factual determinations are absent in Delaware's statutory scheme.³⁹

Interestingly, youth adjudicated on sex charges in Delaware who appear in Family Court are typically evaluated by psychologists, who include such a risk assessment in their evaluations⁴⁰ But, due to the current state of the law, these evaluations can only be used for treatment recommendations, and not to inform registration tier placement. Thus, revising the law to allow for the full use of the risk assessments would not entail new costs to the system, but would likely provide a cost-savings by focusing resources on high risk youth, rather than treating all youth as high risk, or by unintentionally forcing youth out of the state by making community placement impossible.

Altogether, the statutory changes described thus far demonstrate that Delaware has followed a trend towards removing discretion from criminal justice actors by making sentencing decisions conviction-based. This issue continues to be debated nationally,⁴¹ as well as in Delaware, which has its own particular history regarding the increasing reliance on minimum mandatory statutes in place of individualized decision-making.⁴² But the offense-based statutory revisions have been particularly challenging for Delaware's Family Court, which must reconcile this new approach with the traditional individualized approach for youth who appear before it.

Some of Delaware's recent legislative changes have created especially puzzling sentencing outcomes for youth. For example, a juvenile defendant was sentenced for a felony conviction of unlawful sexual contact in the second degree in *State v. Sapps*.⁴³ Counsel for the teenage defendant cited violation of his rights of equal protection, on the basis that defendants in his position are treated more harshly than an adult found guilty of the same unlawful conduct:

Thus, here lies the concern of the Court. Whether the victim is thirty (30) years of age or under sixteen (16) years of age, the elements of the crime, with the exception of the age of the victim, are identical for the adult offender as well as the juvenile offender who is within four (4) years of age of the under sixteen (16) year old victim. Given the identical nature of unlawful sexual contact, such as the intentional touching of the buttocks, the adult defendant who touches the buttocks of the unwilling adult victim is guilty of a Class A Misdemeanor. The

38. *Id.*

39. *See Helman v. State*, 784 A.2d 1058, 1074 (Del. 2001).

40. *See Meeting Minutes, State of Delaware House of Representatives Judiciary Committee, Juvenile vs. Adult Sex Offenders* (Mar. 31, 2010) [hereinafter Meeting Minutes], http://www.dehousedems.com/pdfs/Judiciary_Committee_Meeting_Minutes_-_3-31-10.pdf.

41. *See generally* Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reform*, 58 STAN. L. REV. 277 (2005) (describing twenty-five years of modern sentencing reforms and the balancing of consideration of offense conduct and offender characteristics at sentencing).

42. *See generally* Devera B. Scott et al., *The Assault on Judicial Independence and the Uniquely Delaware Response*, 114 PENN ST. L. REV. 217 (2009).

43. *State v. Sapps*, 820 A.2d 477, 480, 506 (Del. Fam. Ct. 2002).

teenage defendant, however, who intentionally touches the buttocks of the unwilling teenage victim is guilty of a Class G Felony.⁴⁴

The court contrasted this disparate treatment with other penalties for sex crimes. Specifically, the court pointed out that the Delaware rape statutes

place emphasis on protecting the young victim . . . [and] on analyzing the nature of the injuries suffered by the victim or whether the defendant displayed a deadly weapon during the crime, and these statutes also place special significance on making more accountable the adult defendant or the defendant who holds a position of trust. In none of these rape statute scenarios, regardless of the age of the victim, does the present statutory scheme hold the juvenile defendant more accountable than the adult defendant.⁴⁵

But under the present unlawful sexual contact statutes, a juvenile defendant will be held more accountable than an adult defendant and will be assigned to a more restrictive registration and notification tier. Although the *Sapps* court expressed major concerns about the effects of Megan's Law on successful juvenile rehabilitation, and its concern that the juvenile sex offender was suddenly being viewed as identical to the adult sex offender, it deferred such matters to the attention of the Delaware Legislature.⁴⁶

Since Delaware's 2001 decision regarding the inclusion of juveniles in the adult sex offender registry, juvenile sex offenders in Delaware seem to face more severe consequences than those in any other state. Although in some ways a follower, Delaware has become the most punitive state in the nation with regard to its approach to juveniles who have committed sex offenses due to this conviction-based approach, which does not make exceptions for youth under age fourteen.⁴⁷ Delaware's unique approach is even more restrictive than what is required under the Adam Walsh Child Protection and Safety Act, passed by the U.S. Congress in 2006 but not yet in full effect.⁴⁸ The Act, named after the son of the renowned host of "America's Most Wanted," requires state compliance with a publicly accessible registration and notification plan.⁴⁹ States that are determined to be non-compliant with the Act face severe consequences such as a ten percent reduction in criminal

44. *Id.* at 479 (citation omitted).

45. *Id.* at 490.

46. *Id.* at 505. *See also* Fletcher v. State, No. 040401688, 2008 WL 2912048, at *4 (Del. Fam. Ct. June 16, 2008).

47. *See generally* Sharon Denniston, Summary Comparison of U.S. State Juvenile Sex Offender Registry Laws (Mar. 28, 2010) (unpublished survey, on file with authors).

48. *See* Meeting Minutes, *supra* note 40. As of this writing, the U.S. Department of Justice has deferred state compliance until July 2011. U.S. Dep't of Justice, SORNA Extensions Granted (Aug. 2, 2010), http://www.ojp.usdoj.gov/smart/pdfs/SORNA_Extensions_Granted.pdf.

49. *Fletcher*, 2008 WL 2912048, at *16.

justice funding from the federal government's Byrne grant system.⁵⁰ Without this grant money, it may be difficult for states to pay for various pertinent law enforcement activities.⁵¹ Delaware ratified its version of the bill in 2007, which made previously registered juveniles, including children under the age of fourteen, now publically known.⁵² As of early 2010, this resulted in the inclusion of a nine-year-old in Delaware's internet-based public sex offender registry which includes photographs.⁵³

The consequences of this registration and notification for youth have quickly become apparent. Since 2007, some Delaware Family Court judges have carved out room for de-registering or postponing the registration of certain juveniles on a case-by-case basis.⁵⁴ A number of decision-makers in the state's juvenile justice system have also agreed not to adjudicate youth on sex-related charges if alternative charges can be used that would not trigger registration requirements,⁵⁵ but these stop-gap measures are being applied unevenly across the state, and without the explicit guidance of the legislature.⁵⁶

For example, in *Fletcher v. State*, a case resplendent with references to the sociological and psychological knowledge base regarding sexual offending, Judge John E. Henriksen granted a petition expunging the record of a juvenile who pled guilty to a misdemeanor offense of unlawful sexual contact.⁵⁷ The Delaware Supreme Court subsequently upheld the expungement—along with another in a consolidated appeal—and further upheld the Family Court's ruling that this expungement included removal from the sex offender registry.⁵⁸ The Family Court's opinion in *Fletcher* rested on the determination that Fletcher posed little risk of future sexual offending and parsed the complicated legislative enactments since the Walsh Act as intending to leave room for individual judgment regarding juveniles.⁵⁹ The judge also opined that "it would be helpful if the Legislature made that statement clearer."⁶⁰

50. *Id.*

51. *See id.*

52. *See id.*

53. Meeting Minutes, *supra* note 40.

54. *See, e.g.,* State v. Becker, 979 A.2d 1149, 1153 (Del. Fam. Ct. 2009).

55. The author recorded statements from three independent sources during ethnographic research conducted in 2010.

56. The author recorded statements from independent sources during ethnographic research conducted in 2010. As of March 2010, conflicting opinions had been issued by Family Court judges. In contrast to the stop-gaps described above and below, one Family Court judge recently denied reopening and deferring a registration and indicated disagreement with the deferral approach. Although adding his voice to the call for clarification of the legislation that is now difficult to interpret as a result of revisions added quickly to accommodate the Adam Walsh Act, the judge did not believe that deferring whether or not to register, and at what level registration should occur, could be done without specific legislative authority. That decision is now on appeal to the Delaware Supreme Court, adding more urgency to the need for legislative clarification.

57. *Fletcher*, 2008 WL 2912048, at *1.

58. State v. Fletcher, 974 A.2d 188, 190 (Del. 2009).

59. *Fletcher*, 2008 WL 2912048, at *16-23.

60. *Id.* at *30.

Other recent holdings have shown that the Family Court can postpone determinations about a youth's inclusion in the registry until treatment progress has been made⁶¹ and that a governor's pardon also removes an offender's information from the registry.⁶² Altogether, these cases show that the state judiciary recognizes the burden the registry places on individuals through stigmatization and the other detrimental effects on employment and housing that directly conflict with the goals of rehabilitation and community re-integration. Each of the cited cases included detailed accounts of the humiliations and other obstacles the petitioners suffered as a result of their status as registered sex offenders. In the *Heath* case, the Delaware Attorney General's Office itself acknowledged the registry as a "civil disability tantamount to the restriction of a civil right."⁶³

Although it has been possible to transfer certain juveniles to adult criminal court since the inception of the juvenile justice model more than a hundred years ago, the scope and the methods of transfer have both expanded dramatically since the early 1990s.⁶⁴

Delaware law provides that a child shall be adjudicated as an adult if certain criteria are met regarding the offender and/or his or her alleged offense. The court distinguishes by type and level of alleged act, the child's age and previous delinquent adjudications.⁶⁵ Altogether, there are numerous opportunities for youth facing sex charges to be transferred to adult court.⁶⁶ Interestingly, available data from the State Public Defender's Office shows that very few youth represented by the Public Defender's Office have been waived to adult court on sex charges in the last three years,⁶⁷ suggesting that this is not an area in which attitudes have necessarily hardened, and that, instead, the parties

61. *State v. Becker*, 979 A.2d 1149, 1159 (Del. Fam. Ct. 2009); *State v. Horton*, 980 A.2d 1039, 1044 (Del. Fam. Ct. 2008).

62. *Heath v. State*, 983 A.2d 77, 82 (Del. 2009).

63. *Id.* at 80.

64. KUPCHIK, *supra* note 12, at 15-17. *See also* HOWARD N. SNYDER ET AL., NAT'L CENTER FOR JUV. JUST., JUVENILE TRANSFERS TO CRIMINAL COURTS IN THE 1990'S: LESSONS LEARNED FROM FOUR STUDIES (2000) (detailing four studies conducted in three states all undertaken to study legislative transfer mechanisms, their methodology, and impact).

65. DEL. CODE ANN. tit. 10, § 1010 (2008).

66. The Delaware Code provides that a child shall be treated as an adult where:

- (1) The acts alleged to have been committed constitute first or second degree murder, rape in the first degree or rape in the second degree or kidnapping in the first degree, or any attempt to commit said crimes;
- (2) The child is not amenable to the rehabilitative processes available to the Court;
- (3) The child has previously been adjudicated delinquent of 1 or more offenses which would constitute a felony were he or she charged as an adult under the laws of this State, and has reached his or her 16th birthday and the acts . . .

constitute one of the articulated offenses, including rape in the third degree. *Id.*

67. Interview with Lisa Minutola, Chief of Legal Services, Delaware State Public Defender's Office (Mar. 9, 2010).

agree that Family Court may be the best place to attend to the needs and challenges of most youth. From 2005 to 2009, a total of only thirteen youth represented by the public defender were waived to adult court (for any charges, not just sex related charges), without significant variation across the three counties.⁶⁸ This very selective use of waiver to adult court demonstrates that it remains an available option for the rare case in which a youth presents the kinds of risks that require Superior Court oversight. In fact, this may provide a model for how the justice system should more selectively handle youth adjudicated on sex charges in the future.

PART II: DELAWARE YOUTH

A. Delaware Youth Adjudicated on Sex Charges

From 2008 through 2010, sixty-two youth were admitted to Out-of-State Division of Youth Rehabilitative Services (DYRS) residential programs as juvenile sex offenders who have Inappropriate Sexual Behaviors (ISB).⁶⁹ For a combination of reasons, including the sentencing judge's orders as well as lack of community placement alternatives, many of these youth are in residential placement—which means institutional confinement.⁷⁰ Of these, the majority are out-of-state because of Delaware's lack of treatment services within the state.⁷¹ Additionally, most of these youth spend far more time in detention

68. *Id.* This data is similar across the state, further demonstrating this consensus. Note, however, that youth with private counsel and other exceptions would not be part of the available count.

69. Telephone Interview with Shirley Lerner, Resources Unit Manager, Community Services, Division of Youth Rehabilitation Services (Mar. 23, 2010).

70. *Id.*

71. For a discussion of placement of youth adjudicated on sex charges in Delaware in 2001, see JORGE RODRÍGUEZ-LABARCA & JOHN P. O'CONNELL, STATE OF DEL. OFFICE OF MGMT. AND BUDGET, STAT. ANALYSIS CTR., RECIDIVISM OF DELAWARE JUVENILE SEX OFFENDERS RELEASED IN 2001, at 6-7 (2007), available at http://sac.omb.delaware.gov/publications/documents/recidivism_juvenile_2007.pdf.

The 22 juvenile sex offenders were sentenced by Family Court to indefinite sentences which were served in out-of-state sex offender residential treatment programs. In addition to time spent in detained and sentenced status in Delaware, the juvenile sex offenders served time in programs that were located in Minnesota, Pennsylvania, South Carolina and Virginia. The majority of the placement episodes comprised two placements: a stay in secure detention while the case was being adjudicated, and then time in a treatment program like Minnesota's Hennepin County Home School. These out-of-home placements reflect the rehabilitative mission of DYRS and the Family Court and are based on placement decision taken by a team of professionals from Family Court, the Division of Child Mental Health, the Office of the Public Defender, and DYRS.

Id. DYRS has received grants in the past to develop and/or enhance sex offender management practices for those under community supervision in state. See Meeting Minutes, Delaware Division of Youth Rehabilitative Services, Community Advisory Board (Sept. 24, 2007), available at http://kids.delaware.gov/pdfs_archive/meet/yrs_cab_min_ncc_200709_Sep.pdf. For more

than their peers who are sentenced to detention in the state's secure facility (the Ferris School).⁷² For example, a 2001 cohort study found that the juveniles in out-of-state sex offender treatment averaged about two years in detention, compared to just seven months for the non-sex offense detentioners.⁷³ Between fiscal years 2004 (FY04) through 2009 (FY09), out-of-state residential expenditures continued to rise from approximately \$2.9 million in FY04 to over \$5.1 million in FY09.⁷⁴ In FY09, the State therefore spent more than five million dollars to send sixty-two youth (approximately \$74, 000 per annum for each youth) out of state for sex-offense specific residential treatment.⁷⁵ These high costs in terms of time spent in detention and away from families, as well as the financial costs to the state, can only be justified if the youth are serious offenders who cannot be treated in the community and pose high risk of re-offense.

Numerous individuals within the various state agencies that deal with delinquent youth have complained about their inability to place youth in the community after names are publicized through the sex offender registry, for both technical reasons and those of stigma and reluctance. Foster families who are willing to take such youth often cannot because of the residency restrictions that are tied to the registry and prohibit "sex offenders" from living within 1300 feet of schools, parks, and other designated areas.⁷⁶ At the March 2010 meeting of Delaware's Sex Offender Management Board, representatives from Delaware's Division of Child Mental Health similarly raised concerns about the registry's effect on youth under their care.⁷⁷ In a recent instance, a teenage girl was refused a place in a treatment program within Delaware because it was too close to a school.⁷⁸ Another board member noted that the law, as written, would actually allow such a youth to *attend the school* that triggered the residency restriction, but not to *live in a treatment facility* near the school.⁷⁹ This is despite the fact that in the facility, the girl would be under much stricter supervision than she would be if actually attending the school. The exchange over this conundrum ended with the question: "so you have to send them out of state?" Unfortunately, the respondent offered "that's Delaware's dilemma."⁸⁰

detailed information on the Comprehensive Approaches to Sex Offender Management Discretionary Grant Program, see generally OFFICE OF JUSTICE PROGRAMS, *Bureau of Justice Assistance Programs: Comprehensive Approaches to Sex Offender Management*, <http://www.ojp.usdoj.gov/BJA/grant/casom.html>.

72. RODRIGUEZ-LABARCA & O'CONNELL, *supra* note 71, at 7.

73. *Id.*

74. Telephone Interview with Shirley Lerner, Resources Unit Manager, Community Services, Division of Youth Rehabilitation Services (Mar. 23, 2010).

75. *Id.*

76. Meeting Notes, Delaware Sex Offender Management Board (Mar. 29, 2010).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

Even when foster families or treatment programs are either not excluded by the registry-defined residency restrictions or choose not to bring them into play, they may decline to subject themselves to the stigmas that accompany notoriety through the public registry.⁸¹ Dr. Betty Kilpatrick testified to the consequences of that notoriety in the *Horton* case: “Packs of children yell at [the defendant] and have spit on him. [He] had his pants pulled down and had garbage thrown on him.”⁸² Similarly, in *Becker*, a Division of Family Services caseworker testified that children who remain in the community are subjected to merciless provocation that evokes counter-productive hostility in the youth.⁸³ Even placements in educational programs are jeopardized.⁸⁴ In *Fletcher*, the youth’s out-of-state residential program indicated that it might pull him from his vocational training in nursing since state laws prevent the licensure of registered sex offenders.⁸⁵

B. Findings from the Delaware Youth Needs Evaluation

Given the recent Delaware decisions surrounding juveniles adjudicated on sex charges, as well as longstanding interest from Family Court regarding the welfare of children under its care, the Chief Judge of the Family Court commissioned Professor David L. Burton to collect data in the summer of 2009. Burton reported his findings to the Court in October 2009.⁸⁶ This section draws upon Burton’s findings from Delaware, as well as his comparisons to youth in the eleven other states where Burton has performed similar evaluations. The Delaware data collection evaluated all of the sexual offenders under the care of the State’s Division of Youth Rehabilitative Services (DYRS) and youth at the state’s secure detention facility, the Ferris School, for a non-sexual offender comparison sample.⁸⁷ Approximately fifty percent of both the DYRS sex offenders and Ferris School detentioners participated,⁸⁸ resulting in samples of forty-seven juvenile sex offenders and fifty-four juvenile non-sex offenders.⁸⁹ The survey included questions from a variety of inventories that measure factors that are clinically and empirically

81. *Id.* Further discussion at the same meeting made it clear that the burden now rests on the families or the programs to deny a placement because they are aware of the residency restrictions; law enforcement may also pursue charges against a youth for violating the restrictions, but it appears that this is infrequent, and families and programs are more likely to police themselves. *Id.*

82. *State v. Horton*, 980 A.2d 1039, 1041 (Del. Fam. Ct. 2008) (alteration in original).

83. *State v. Becker*, 979 A.2d 1149, 1151 (Del. Fam. Ct. 2009).

84. *See id.*

85. *Fletcher v. State*, No. 040401688, 2008 WL 2912048, at *3 (Del. Fam. Ct. June 16, 2008).

86. DAVID L. BURTON, DELAWARE YOUTH NEEDS EVALUATION, FIRST REPORT: PRELIMINARY DATA AND IMPLICATIONS (2009).

87. *Id.* at 2.

88. *Id.*

89. *Id.* at 5. There is no way to compare those who responded and those who did not. Although, based on experience, youth who are more behaviorally and psychologically challenged tend to refuse to respond. Therefore, these results may be conservative. *Id.* at 2.

correlated with delinquency as well as risks of future offending.⁹⁰ As a measure of accuracy, the survey also included invalidity scales, which are questions designed to catch deceit. Answers to these questions showed no correlation with answers to questions on other scales, which is a strong indication of the reliability of data. In addition, the surveys were given anonymously which often also increases veracity of responses.

The Delaware Youth Needs Evaluation contains striking findings about the uniqueness of youth in Delaware who are adjudicated on sex charges. Youth in Delaware are unusually young compared to the similar samples Burton reviewed in other states⁹¹ and to the findings in published scholarship.⁹² Burton maintains one of the largest databases of juvenile sex offenders in the United States. This database includes states he has personally evaluated and the cases collected by a prominent American researcher in the field, Gail Ryan. The combined average age for sexual delinquent youth in this large dataset is approximately 16.5.⁹³ In contrast, the average age of Delaware youth is a full year younger, about 15.5.⁹⁴ Other researchers have reported that older juveniles are more likely to commit adult sex offenses than their younger counterparts.⁹⁵ Given that the youth captured in Burton's Delaware survey are

90. Information regarding adolescents' perceptions of the positive and negative aspects of their relationships with their parents and their close friends was gathered utilizing a self-report instrument developed by Gay C. Armsden & Mark T. Greenberg, *The Inventory of Parent and Peer Attachment: Individual Differences and Their Relationship to Psychological Well-Being in Adolescence*, 16 J. YOUTH & ADOLESCENCE 427 (1987). BURTON, *supra* note 86, at 6.

91. David L. Burton & William Meezan, *A Preliminary Examination of Racial Differences in Trauma and Sexual Aggression Among Adolescent Sexual Abusers*, SMITH C. STUD. SOCIAL WORK, Mar. 2007, at 101, 106 [hereinafter Burton & Meezan 2007]; David L. Burton & William Meezan, *Revisiting Recent Research on Social Learning Theory as an Etiological Proposition for Sexually Abusive Male Adolescents*, J. EVIDENCE-BASED SOC. WORK, May 2004, at 41, 42 [hereinafter Burton & Meezan 2004]; David L. Burton, *Male Adolescents: Sexual Victimization and Subsequent Sexual Abuse*, 20 CHILD & ADOLESCENT SOC. WORK J. 277, 280 (2003) [hereinafter Burton, *Male Adolescents*]; David L. Burton et al., *A Social Learning Theory Comparison of the Sexual Victimization of Adolescent Sexual Offenders and Nonsexual Offending Male Delinquents*, 26 CHILD ABUSE & NEGLECT 893, 898 (2002).

92. The distinction between research published in report form versus that which appears in scholarly articles that have undergone peer review is a very important one. Peer review establishes methodological soundness, and is also reserved for work which furthers theoretical debates within the journal's discipline. Burton's research on youth in Delaware is presently in the former category, although the author has a long record of peer-reviewed publication and has included these data in two publications under review. See Burton & Meezan 2007, *supra* note 91; Burton & Meezan 2004, *supra* note 91; Burton, *Male Adolescents*, *supra* note 91; Burton et al., *supra* note 91.

93. Burton, *Male Adolescents*, *supra* note 91, at 280.

94. BURTON, *supra* note 86, at 5.

95. Ian A. Nisbet et al., *A Prospective Longitudinal Study of Sexual Recidivism Among Adolescent Sex Offenders*, 16 SEXUAL ABUSE: J. RES. & TREATMENT 223, 230 (2004). "[A]ge at assessment was found to predict sexual recidivism but, perhaps counterintuitively, it was an older age at assessment that predicted adult sexual offense charges. The likelihood of being

at the back end of their criminal justice contact, it is likely that the average Delaware youth offender was age fourteen or younger when he or she was arrested.⁹⁶

Many of Delaware's youth have seen a great deal of difficulties in their homes. Sex offenders more often reported witnessing sexual abuse and domestic violence at home, whereas the nonsexual offending youth more often reported witnessing neglect at home.⁹⁷ Nevertheless, sexually offending youth in Delaware give less indication of traumatic histories than typical youth adjudicated on sex charges: fifteen percent reported no adverse experiences and an additional twenty percent reported only one.⁹⁸ One of the nation's leading experts on child abuse, David Finkelhor, has established that a simple count of the number of "traumatic events" in a child's history is a more powerful predictor of future problematic behavior than other types of scales.⁹⁹ Delaware youth lack this key indicator of risk to the community. Additionally, research connects personal history of sexual abuse to a juvenile's own abusive conduct, but Delaware youth contradict this expectation as well.¹⁰⁰ Using a simple dichotomous response (yes/no), fifty-one percent of the sex offender group reporting being sexually abused as a child.¹⁰¹ This is thirty percent less than Burton's last anonymous study with sex offender youth.¹⁰²

charged with sexual offenses as an adult increased by 60% with each year increase in age at assessment." *Id.*

96. Lawyers with the Delaware Public Defender's Office confirm this anecdotally, concurring with the sense that many juveniles come to them with sex charges between the ages of twelve and fourteen. Interview with Attorney, Delaware Public Defender's Office (Feb. 4, 2010).

97. BURTON, *supra* note 86, at 7. These questions were on a scale as follows: 0=no, 1=yes, and 3= I don't know. For the sake of clarity and ease, Burton only reported the negative and positive responses. For significance values, see *id.* at 8.

98. *Id.* at 9.

99. See generally Finkelhor & Jones, *supra* note 2.

100. See BURTON, *supra* note 86, at 10-11. The Childhood Trauma Questionnaire (CTQ) measures traumatic experiences throughout childhood and is widely considered to have good internal consistency and test-retest reliability:

The CTQ is a retrospective self-report questionnaire that consists of items used to assess the extent to which respondents experienced five types of negative childhood experiences: physical, sexual, and emotional abuse, physical neglect, and emotional neglect. The questionnaire consists of 34 items which asked subjects to rate the frequency with which various events which took place when they "were growing up" on a 1-5 scale in which 1 = "never true" and 5 = "very often true." Therefore the highest total a youth could score on this measure is 170. Questions include: "Someone tried to touch me in a sexual way or make me touch them," "There was someone in my family who wanted me to be a success," and "I was punished with a belt, board, cord, or some other hard object."

Id. at 9-10.

101. *Id.* at 11.

102. *Id.* at 10-11. Burton also included the Trauma Symptom Checklist for Children (TSCC):

Sexually-adjudicated youth in Delaware reported very little sexually deviant interest compared to similar youth in other states.¹⁰³ This is a crucial consideration, as the knowledge base for risk prediction has consistently connected deviant sexual interest to re-offense.¹⁰⁴ Worling and colleagues have found that self-reported sexual interest in children is a significant predictor of

The TSCC is a self-report measure of posttraumatic stress and related psychological symptoms, in the past two months, in children and youth who have experienced traumatic events. The TSCC is a 54-item measure that yields six Clinical Scales (Anxiety, Depression, PTS, Dissociation, Sexual Concerns, and Anger). For all clinical scales, except sexual concerns (SC), T scores at or above 65 are clinically significant. T scores ranging from 60-65 raise concerns about the kids' level of difficulty, and may be viewed as subclinical symptomatology. For SC, and the subscales SC-P and SC-D, T scores at 70 or above are clinically significant. SC scales (with two factors, increased sexual thoughts, feelings, behaviors, and another factor assessing conflict, fears, and unwanted sexual responses; subscales involve sexual preoccupation or SC-P, and Sexual Distress or SCD), have been normed on children with slightly lower T scores, hence the 70 cutoff. It is important to note that unlike many other tests the TSCC is normed on youth from 8-16 so the scores for this sample, which is slightly older than I [sic] some cases are not necessarily the best reflection of the symptoms . . . although they give a solid ballpark figured [sic] and a good group comparison value.

Overall the youth report a lot of traumatic symptoms, however the number of youth who are in the 'clinically concerning' ranges in either group is not very large. The sex offenders report significantly more trauma related anxiety, depression and post traumatic stress. There are no other significant differences between groups. This is unusual for this measure, sex offenders are usually significantly higher on several scales than delinquent youth.

Id. at 11.

The two groups both committed a great deal of non-sexual crime and are statistically about equal in what they do and how often they commit crimes. This is very unusual—usually delinquent youth are higher on one or two scales and sex offenders on five or so of the scales:

Naturally, both groups have committed sexual crimes, but both groups were also hesitant to respond to many of these questions. Of the Ferris youth, two admitted to sexual crimes in this particular set of questions, scoring a 7 and a 14, on the scale of severity and complexity. . . . Sixty eight percent of the sexual offender youth admitted to penetration or more as their most severe level of act. The average score was 8.39 (SD = 4.90) or 'penetration with penis, digits or objects'. Similarly, 38% of the sexual offenders admitted to using force. The mean score was 2.97 (SD = 2.2) or 'games and threats.' These are both lower than previous anonymous studies that have used the same scales.

Id. at 19.

103. *Id.*

104. See Chrysanthi Leon, *We Know Them When We See Them: Constituting Criminal Sexual Deviance* 12-21 (2009) (unpublished manuscript) (on file with author) (exploring the objectivity of deviant interest measurements that rely on biological measures such as visual reaction time and polygraphs). However, note that one of the authors maintains deep skepticism about both the lack of robust theorizing regarding the role of deviant interest in sexual offending and about the lack of empirically-validated, peer-reviewed scholarship in the adult assessment field.

sexual recidivism in both adults and adolescents.¹⁰⁵ Burton therefore included a set of questions about how sexually aroused the youth found a number of stimuli on a five point scale with zero, being not at all, to four, being a great deal.¹⁰⁶ As might be predicted for normal teens, the greatest endorsement is for arousal to females aged thirteen to eighteen.¹⁰⁷ “Oddly and uncommonly, there are very few significant group differences . . .”¹⁰⁸ Burton has often used these questions in studies and typically finds “more differences and higher means for the sex offenders.”¹⁰⁹ “In order to assess this further, [Burton] determined the number of youth who reported any sexual arousal to children under [twelve], or [to] rape.”¹¹⁰ Over half of those that responded indicated no deviant interests at all.¹¹¹

Deviance and age also appear to be related. In fact, whether we interpret sexual interest and conduct as *deviant* must be considered in light of adolescent development.¹¹² Younger juveniles who sexually offend are more likely situational offenders, acting out on impulses with inappropriate subjects.¹¹³ Although the age of the offender is irrelevant in the sense that it cannot undo the seriousness of the consequences for the victim, age is linked to the offender’s motivation and likelihood to continue such behavior.¹¹⁴ This comports with recent debates in the media surrounding statutory rape cases that have been lumped into the same category as violent sexual assaults. One such case is that of Genarlow Wilson, a twenty-one-year old man from Georgia who served two years of a ten year prison sentence for aggravated child molestation stemming from a consensual encounter with a fifteen-year-old when he was seventeen.¹¹⁵ His case highlights an increasing awareness of

105. See James R. Worling, *The Estimate of Risk of Adolescent Sexual Offense Recidivism (ERASOR): Preliminary Psychometric Data*, 16 *SEXUAL ABUSE: J. RES. & TREATMENT* 235, 241-42 (2004); James R. Worling & Tracey Curwen, *Adolescent Sexual Offender Recidivism: Success of Specialized Treatment and Implications for Risk Prediction*, 24 *CHILD ABUSE & NEGLECT* 965, 978 (2000).

106. BURTON, *supra* note 86, at 25-26.

107. *Id.* at 26.

108. *Id.* Sex offender youth did report “more sexual interest in girls under twelve and in underwear,” while the Ferris youth reported more interest in females aged thirteen to eighteen. Note that the sexually-offending youth were also themselves younger than the Ferris youth. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* Eight (seventeen percent of those that responded) “indicated that they were aroused by one of the possible four questions, another 8 indicated that they were aroused by two of the four questions, and 3 (6.4% of those that responded) indicated that they were aroused by three of the four questions.” *Id.*

112. See Nisbet et al., *supra* note 95, at 230; Zimring et al., *supra* note 18.

113. Nisbet et al., *supra* note 95, at 230.

114. See *id.* at 230-31.

115. *Genarlow Wilson: Plea Deal Would Have Left Me Without a Home*, CNN U.S. (Oct. 29, 2007), http://articles.cnn.com/2007-10-29/us/wilson.released_1_plea-deal-molestation-offender?_s=PM:US.

the need to distinguish among offenders by context, which includes the age of the involved parties.¹¹⁶

In the clearly non-consensual context, the sexual assault can signal different levels of potential for continuing abusive tendencies. As Nisbet and his colleagues suggest:

[I]t may be that sexual offending in early adolescence is more influenced by access and opportunity (i.e., situational influences), while the same behavior in late adolescence is more indicative of a developing preference for sexually deviant behavior. This being the case, a 14-year-old offender sexually assaulting a 6-year-old child might be considered less “deviant” (although no less serious) than a 17-year-old assaulting the same victim.¹¹⁷

Thus, the measures of deviant sexual interest, young age, and relative lack of adverse events reveal a picture of Delaware youth who are far removed from the superpredator.¹¹⁸

These three measures reflect a juvenile sex offender population that is similar to such juveniles in community settings in other states; they do not appear to warrant residential placements in terms of treatment need or risk to the community. Burton’s findings show other differences as well, but the three highlighted above are the most relevant for the purposes of examining juvenile inclusion in sex offender registries and in residential treatment.

Before leaving Burton’s Delaware research, another facet of his inquiries is relevant here. Though, as this article argues, many sexually offending youth in Delaware should probably not be in secure confinement, many are. Burton asked his respondents a set of questions using a scale running from never (0), to always (5), designed to assess safety in placements.¹¹⁹ The good news is that compared to Ferris youth (non-sexual offenders in detention), Delaware’s sex offender youth feel significantly safer in their facilities, which are predominantly contracted placements in out-of-state institutions; these offenders “less often report illegal drugs in the facility and much less often

116. Georgia amended its “Romeo and Juliet” exception after the incident, providing that “[i]f the victim is at least 14 but less than 16 years of age and the person convicted of child molestation is 18 years of age or younger and is no more than four years old than the victim” the person is guilty of a misdemeanor and not subject to stricter sentencing provisions. GA. CODE ANN. § 16-6-4.

117. See Nisbet et al., *supra* note 95, at 230.

118. See James R. Worling, *Assessing Sexual Arousal with Adolescent Males Who Have Offended Sexually: Self-Report and Unobtrusively Measured Viewing Time*, 18 SEXUAL ABUSE: J. RES. & TREATMENT 383, 384 (2006). “Although deviant sexual interests likely play a role in the etiology and/or maintenance of adolescent sexual offending for *some* adolescents, there are likely other factors to consider such as intimacy deficits, antisociality, attitudes supportive of sexual offending, and opportunity, for example.” *Id.* (emphasis in original).

119. BURTON, *supra* note 86, at 21-23.

report being beaten by staff in the facility.”¹²⁰ Other good news includes the sexually offending youth’s reporting on their therapeutic experience.¹²¹ The sex offenders reported that group treatment was significantly harder, more useful, more important, designed to help, and that it was more fun and more interesting than did the Ferris youth.¹²² Altogether, these are indicators clinicians working with sex offenders would be glad to hear.

The premise of the registration and notification scheme is that knowledge will provide protection. Specifically, these policies assume that past offenders will be future offenders. But when it comes to sexual offending, several decades of recidivism research prove otherwise. There are two kinds of methodologically rigorous research that allow strong conclusions about recidivism: prospective follow-up studies of large samples of released offenders and meta-analyses that combine multiple studies to allow for large sample analysis. In the first category, we have both a national study and Delaware-specific research. The most comprehensive study to date is the Bureau of Justice Statistics recidivism data on two-thirds of all the inmates released from state prison systems in 1994.¹²³ Based on a three-year follow-up, state prisoners in general had almost a one in two chance of a new conviction as 46.9% were reconvicted in state or federal court for a new crime, felony or misdemeanor.¹²⁴ Drug offenders had the highest recidivism rates (60.5%); and, of violent offenders, robbers had a 46.5% recidivism rate.¹²⁵ Compare this with the 22.3% reconviction rate for “other sex offenses”—the category used for child molestation and other non-rape offenses.¹²⁶ Note as well that this rate of one in five is for all the state prisoners in the study, not just those released from prison on a sex charge. In fact, of the released sex offenders, the sex offense recidivism rate was only 5.3% over the three-year follow-up period. In Delaware, a study of all sex offenders released from prison in 2001 found only 3.8% were arrested for a new sex crime within a three-year follow-up period.¹²⁷ A similar study of the sex offenders with a disposition in 2004

120. *Id.* at 21. Two of the forty-five responding Ferris youth did report being beaten by staff, and one reported being sexually touched without consent all the time. *Id.* In statistical analyses like this one, however, one must temper such results with possibilities of youth being deceitful.

121. *Id.* at 24-25.

122. *Id.*

123. PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUST. STAT., RECIDIVISM OF PRISONERS RELEASED IN 1994 (2002), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf>.

124. *Id.* at 8.

125. *Id.*

126. *Id.* “Other sexual assault” is defined as:

- (1) forcible or violent sexual acts not involving intercourse with an adult or minor, (2) nonforcible sexual acts with a minor (such as statutory rape or incest with a minor), and (3) nonforcible sexual acts with someone unable to give legal or factual consent because of mental or physical defect or intoxication.

Id. at 15.

127. WEIDLEIN-CRIST & O’CONNELL, *supra* note 13, at 5.

found that of the 195 offenders, only three percent were arrested for a new sex charge within a two-year follow-up.¹²⁸

Although this low sexual recidivism rate of adult sex offenders challenges our conventional wisdom, it is extremely well-established.¹²⁹ Two large meta-analyses, which control for variation among the studies and allow for the strengths of large sample comparison, also demonstrate low sex offender base rates. Hanson and Bussiere's 1998 meta-analysis of numerous recidivism studies with an average follow-up of four to five years found, "[o]n average, the sex offense recidivism rate was 13.4% ($n = 23,393$; 18.9% for 1,839 rapists and 12.7% for 9,603 child molesters)."¹³⁰ In 2004, an updated meta-analysis that included studies published after 1998 confirmed the low rate: fourteen percent after five years.¹³¹

For juveniles, the data is even stronger. The next two sections present data on Delaware youth and their known recidivism rates, followed by research from a study that followed a birth cohort of youth in Philadelphia through adulthood. After a discussion of this empirical data, which falsifies the assumption that juveniles with sex charges become adult sex offenders, the article returns to the implications of Burton's finding as to the uniqueness of Delaware's youth sex offenders.

C. *Recidivism of Delaware Youth: General and Sex Offender Felony Re-arrests*

Diulio and others who warned of juvenile superpredators gave credence to a popular fear of dangerous youth. This particular cycle of the moral panic also focused on sexual abuse, a topic that rose to public prominence due to feminist and child protection advocacy efforts that paid off beginning in the 1970s.¹³² A generation of sexual abuse researchers, who also began their data collection in the 1970s, relied on the retrospective measures of their clinical samples, and are largely responsible for perpetuating this popular belief.¹³³ That is, by asking known adult offenders in treatment about sexual abuse in

128. *Id.* at 47.

129. See Franklin E. Zimring & Chrysanthi S. Leon, *A Cite-Checker's Guide to Sexual Dangerousness*, 13 BERKELEY J. CRIM. L. 65, 69-73 (2008).

130. R. Karl Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 351 (1998).

131. ANDREW J. R. HARRIS & R. KARL HANSON, PUB. SAFETY & EMERGENCY PREPAREDNESS CANADA, SEX OFFENDER RECIDIVISM: A SIMPLE QUESTION 2004-03, at 7-8 (2004).

132. See generally Leon, *supra* note 4.

133. See Zimring et al., *supra* note 18, at 62-65; Judith V. Becker et al., *Characteristics of Adolescent Incest Sexual Perpetrators: Preliminary Findings*, J. FAM. VIOLENCE, March 1986; A. Nicholas Groth et al., *Undetected Recidivism Among Rapists and Child Molesters*, 28 CRIME & DELINQUENCY 450 (1982). As Zimring notes, "[a]lthough Doren's (1998) early review of the sex offender recidivism literature suggested that sex offenders remained at continued risk for sex recidivism for decades, the studies conducted in the 1980s were usually cross-sectional and retrospective studies of adult sex offenders." Zimring et al., *supra* note 18, at 60.

their pasts, they made a common-sense extrapolation that turns out to be false. Of their small slice of the adult sex offender population, these researchers found evidence that their small cross-section tended to have juvenile offense histories.¹³⁴ On the contrary, it turns out that when viewed prospectively, it is a small subset of the juvenile offenders who grow up and become the offenders who Dr. Gene G. Abel and others see in their practices.¹³⁵ Looking backward without a comparison group skews the significance.

Dr. Franklin E. Zimring explored sex offender continuity and improved upon prior research by utilizing a large community-based sample of males and females from Racine, Wisconsin.¹³⁶ Cohort studies are large samples of city residents born in the same year through adolescence and into young adulthood.¹³⁷ This kind of sampling corrects for many of the limitations that had plagued sex offender research. Instead of taking a known group of offenders and working backward to see what features the group has in common, and then using that to make predictions in the other direction, cohort studies start with a large group and follow them over time. To identify predictors, the large samples can be subjected to statistical analyses. Using bivariate and multivariate analyses on the Racine cohort, Zimring disproved the assumed correlation between a sex offense prior to age eighteen and subsequent adult sexual offending.¹³⁸ In fact, Zimring found a robust significant effect for the length of a juvenile's general delinquency record for predicting adult sex offender status. This study has been widely recognized for its methodological sophistication and vastly improved generalizability over past research.¹³⁹ But limitations do include the racially homogenous (mainly Caucasian) sample from a small Midwestern city, with low evidence of serious criminality generally, and non-minor sex offending in particular.¹⁴⁰

Most recently, Zimring and his colleagues examined the second Philadelphia birth cohort, with similar methodological rigor, but this time using a sample that can be more closely compared to the youth adjudicated in Delaware.¹⁴¹ This dataset included 13,160 boys and 14,000 girls born in 1958,

134. Zimring et al., *supra* note 18, at 66.

135. G. G. Abel & C. A. Osborn, *Sexual Assault Through the Life Span: Adult Offenders with Juvenile Histories*, in THE JUVENILE SEX OFFENDER 104 (H. E. Barbaree et al. eds., 1993).

136. Zimring et al., *supra* note 18, at 61.

137. See MARVIN E. WOLFGANG ET AL., FROM BOY TO MAN, FROM DELINQUENCY TO CRIME 7 (1987); MARVIN E. WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT 7 (1972).

138. Zimring et al., *supra* note 18, at 61.

139. Michael H. Miner, *The Fallacy of Juvenile Sex Offender Risk*, 6 CRIMINOLOGY PUB. POL'Y 565, 566-67 (2007).

140. *Id.* at 567.

141. Zimring et al., *supra* note 18, at 62-63. As the authors note:

A direct replication and extension of the Zimring et al. study with the Philadelphia data is especially important because the Philadelphia data comprise a large sample of individuals who "grew up" during a period of increasing crime rates in a rather high crime social context, are much more racially heterogeneous (including both Whites and Blacks), are from a major urban city, and have extensive evidence of serious criminal activity, all features that depart significantly from much of the prior sex offender research generally, and the Racine data used by Zimring et al. in particular.

and followed through age twenty-six.¹⁴² Of the more than 27,000 youth, only 204 boys and seventeen girls had subsequent contacts with police related to sex charges.¹⁴³ The measure of recidivism used is police contact, a more inclusive measure than the typically used standards of arrest, adjudication, or conviction.¹⁴⁴ Examination of simple patterns of police contact indicated that “juvenile sex offender” was misleading, as the youth did not specialize:

Nevertheless, the primary characteristic of the male juvenile sex contact group in Philadelphia was the extraordinary frequency of both total and non-sexual police contacts but single sex contact histories. What set these boys apart from other juvenile males with police records was a differential probability to be contacted several times for non-sex offenses prior to reaching age 18 and being non-White and from a low SES background. The juvenile sex offenders appeared to be the very opposite of specialists—typically one-time sex offenders but many time offenders for everything else.¹⁴⁵

The authors painstakingly describe each stage of the data, in detail, that is worth reading firsthand.¹⁴⁶ But for the purposes of this article, their description of what the lack of specialization means in terms of the usefulness of juvenile registration is crucial:

The most striking feature of the Philadelphia data was the lack of overlap between juvenile sex offending and adult sex offending. For the girls, none of the juvenile sex offender contact group (n=17) could be found among the group who had a sexually based offense past the age of 18. If one were estimating the impact of a registration system from these data, the false positive rate among the juvenile females for adult sex offending would be 100 percent and similarly, 100 percent of the adult female sex offenders would not have been part of the registry in the first place. Therefore, it is arithmetically impossible for a prediction system to have had a poorer performance than the outcome for Philadelphia females.

Id. at 62.

142. *Id.*

143. *Id.* One limitation of this dataset may be that the law enforcement activity took place during the 1970s, at the very early end of increased prosecution of sexual offenses. However, the effect of this limitation is modulated by the fact that increased prosecution tends to bring in more offenders that would have been treated as nuisances in the past. Thus, the more serious sex charges that would have attracted police attention in the 1970s are likely the ones law enforcement would be especially concerned about tracking today, including assaults with some level of harm or violence. This interpretation is supported by the domination of rape and indecent sexual assault as the most prevalent offenses among the cohort both before and after age eighteen. *Id.* at 66.

144. *Id.* at 63. This data included police rap sheets, investigative reports, and municipal court files. *Id.*

145. *Id.* at 65.

146. *Id.* at 62-63.

For the males, the predictions of adult sexual offending were also quite poor if not in the zero range. One in ten of the males with juvenile sex offense contacts had an adult sex offense record in Philadelphia in the follow-up period after age 18. Furthermore, the 53 sex offenses attributed to this group were 7.8 percent of the total adult sex offenses attributable to the cohort males. So, using the juvenile sex records to predict who would become an adult sex offender in this scenario produced a false positive rate of 90 percent for the young men targeted while it also missed 92.2 percent of all the adult male sex offenders. Both the false positive and false negative rates were 90 percent or greater, a discouraging record for predictions of dangerousness over an eight-year period in young adulthood.¹⁴⁷

The Philadelphia study is the most recent and convincing of a long series of studies from around the world that undermines the prevailing beliefs about sexual offending by youth. Abel et al. contend that adolescent sex offenders are assumed to be at high risk to continue sexual offending into adulthood,¹⁴⁸ however, prospective recidivism studies of adolescent sex offenders do not support this assumption as they consistently indicate that relatively few adolescents are known to commit further sexual offenses within the first ten years of their adult lives.¹⁴⁹

A corollary to the recidivism assumption is an assumption of deviance. In part, this is due to confusion over how to interpret the American

147. Zimring et al., *supra* note 18, at 65-66.

148. See Gene G. Abel et al., *Sexual Assault through the Life Span: Adult Offenders with Juvenile Histories*, in THE JUVENILE SEX OFFENDER 104, 110-11 (Howard E. Barbaree et al. eds., 1993).

149. *Id.* See also James M. Brannon & Rik Troyer, *Adolescent Sex Offenders: Investigating Adult Commitment-Rates Four Years Later*, 39 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 317, 321 (1995); Heather M. Gretton et al., *Psychopathy and Recidivism in Adolescent Sex Offenders*, 28 CRIM. JUST. & BEHAV. 427, 443 (2001); Michael P. Hagan & Meg E. Cho, *A Comparison of Treatment Outcomes Between Adolescent Rapists and Child Sexual Offenders*, 40 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 113, 120 (1996); Michael P. Hagan & Karyn L. Gust-Brey, *A Ten-Year Longitudinal Study of Adolescent Rapists Upon Return to the Community*, 43 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 448, 453 (1999); Michael P. Hagan et al., *The Efficacy of a Serious Sex Offenders Treatment Program for Adolescent Rapists*, 38 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 141, 146-47 (1994); Timothy J. Kahn & Heather J. Chambers, *Assessing Reoffense Risk with Juvenile Sexual Offenders*, 70 CHILD WELFARE 333, 344 (1991); Niklas Langstrom, *Long-term Follow-up of Criminal Recidivism in Young Sex Offenders: Temporal Patterns and Risk Factors*, PSYCHOL., CRIME & L., Mar. 2002, at 41, 42; Niklas Langstrom & Martin Grann, *Risk for Criminal Recidivism Among Young Sex Offenders*, 15 J. INTERPERSONAL VIOLENCE 855, 856 (2000); Michael H. Miner, *Factors Associated with Recidivism in Juveniles: An Analysis of Serious Juvenile Sex Offenders*, 39 J. RES. CRIME & DELINQ. 421, 432-33 (2002); Lucinda A. Rasmussen, *Factors Related to Recidivism Among Juvenile Sexual Offenders*, 11 SEXUAL ABUSE: J. RES. & TREATMENT 69, 70, 76 (1999); Mark Rubinstein et al., *Sexually Assaultive Male Juveniles: A Follow-Up*, 150 AM. J. PSYCHIATRY 262, 262-63 (1993); Ron Sipe et al., *Adolescent Sexual Offenders Grown Up: Recidivism in Young Adulthood*, 25 CRIM. JUST. & BEHAV. 109, 120 (1998); Wayne R. Smith & Caren Monastersky, *Assessing Juvenile Sexual Offenders' Risk for Reoffending*, 13 CRIM. JUST. & BEHAV. 115, 135 (1986); James R. Worling, *Personality-Based Typology of Adolescent Male Sexual Offenders: Differences in Recidivism Rates, Victim-Selection Characteristics, and Personal Victimization Histories*, 13 SEXUAL ABUSE: J. RES. & TREATMENT 149, 158-59 (2001); Worling & Curwen, *supra* note 105, at 977.

Psychological Association's criteria for diagnosing pedophilia. Since they call for a pattern of sexual interest in children, with onset often in adolescence, this has been viewed in the same backwards way as history of sex charges. As Worling has explained:

Much of the treatment that was provided in the 1980's and 1990's to adolescents who offended sexually was predicated on the notion that deviant sexual interests played a critical role in the sexual assaults. For example, adolescents were often asked to track their sexual interests in violence and/or prepubescent children for lengthy time periods by completing deviant fantasy logs and charts and to participate in punishment-based procedures, such as covert sensitization, to reduce the strength and frequency of their presumed deviant sexual interests. In the last several years, however, this heightened focus on the role of deviant sexual arousal has shifted considerably; in part because it is now recognized that most adolescents who commit a sexual offense do not display primarily deviant sexual interests.¹⁵⁰

Juveniles with police contact for sex charges are not only unlikely to continue such activity into adulthood, but there is little reason to treat these youth as specially deviant with regard to sexual interest or with sexual charges; rather, sex charges are more likely to be part of a general pattern of delinquent behavior.¹⁵¹ The premise of juvenile sex offender registration is to improve public safety, but few commit additional offenses, and so the premise is empirically false.

Youth adjudicated delinquents (on any charges, not just sex-related) in Delaware have a felony re-arrest rate of about sixty to sixty-eight percent for secure detention (Level 5) at twenty-four months; fifty-six to sixty-nine percent for moderate secure detention (Level 4).¹⁵² The comparable rates for youth adjudicated delinquent of sex offenses in Delaware are exceptionally low, and when combined with Professor Burton's work, which provides an in-depth examination of Delaware youth across a variety of measures that are correlated to future dangerousness, this shows that the vast majority of

150. Worling, *supra* note 118, at 384.

151. See Michelle Meloy, *The Sex Offender Next Door: An Analysis of Recidivism: Risk Factors, and Deterrence of Sex Offenders on Probation*, 16 CRIM. JUST. POL'Y REV. 211 (2005). See generally Terance D. Miethe et al., *Specialization and Persistence in the Arrest Histories of Sex Offenders: A Comparative Analysis of Alternative Measures and Offense Types*, 43 J. RES. CRIME & DELINQ. 204 (2006). But see David L. Burton, *Were Adolescent Sexual Offenders Children with Sexual Behavior Problems?*, 12 SEXUAL ABUSE: J. RES. & TREATMENT 37, 46-47 (2000) (cautioning restraint in drawing firm positive conclusions).

152. JORGE RODRÍGUEZ-LABARCA & JOHN P. O'CONNELL, STATE OF DEL. OFFICE OF MGMT. AND BUDGET, STAT. ANALYSIS CTR., 1994-2006 JUVENILE LEVEL III, IV AND V RECIDIVISM STUDY 13-23 (2007), available at <http://sac.omb.delaware.gov/publications/documents/recidivism07.pdf>.

Delaware juvenile sex offenders are not dangerous and do not merit registration.¹⁵³ At a minimum, removal from the registry is called for.

Recidivism research conducted by Delaware's Statistical Analysis Center (SAC) shows the felony re-arrest rate ranging from about a fifty-six to seventy-two percent for all delinquent youth in Delaware two years after release.¹⁵⁴ For youth adjudicated on sex charges, a similar follow-up shows that the felony sex re-arrest rate is only thirteen percent.¹⁵⁵ They represent a fraction of the risk to public safety related to sexual violence.

Emerging research further undermines another assumption of the registration and notification laws: the efficacy of the laws themselves as a prevention device. Even if sexual recidivism rates are low overall, we might expect that there could still be a small but measurable effect of these laws and that offenders who are included under them will either be "on notice" of heightened surveillance or for other reasons will be less likely to commit new sex offenses. Delaware's registration and community notification laws were included in a multi-state study of whether these laws correlated with a specific deterrent effect in that offenders in the registry were less likely to commit new

153. Burton's evaluation did find a small number of youth who will need intensive interventions to address their needs. *See* BURTON, *supra* note 86, at 4.

154. RODRÍGUEZ-LABARCA & O'CONNELL, *supra* note 152, at 17-18, 23. *See also id.* at 13 tbl. 5 (presenting 2002 cohort data on youth released from the most restrictive detention environment).

155. Data as reported by the State of Delaware Office Management and Budget Statistical Analysis Center at the Association for Criminal Justice Researchers annual meeting and provided to the Delaware Public Defender's Office (on file with authors). This data point refers to the high end of a range of recidivism for sex offense re-arrests for youth released from detention in FY03-FY08. The follow-up periods range from six months to five years, and the various re-arrest rates range from zero to thirteen percent for felony sex re-arrests. Misdemeanor sex re-arrests range from zero to four percent, while technical violations range from zero to twenty percent. Note that this is disaggregated re-arrest data, which has not been included in the formal publication of Delaware sex offender recidivism research. *See* RODRÍGUEZ-LABARCA & O'CONNELL, *supra* note 71, at 2. For example, twenty-seven percent of the juvenile sex offenders released in 2001 were rearrested for a new sex offense or failure to register as a sex offender offense within three years of release. *Id.* at 5. After five years at risk, forty-one percent of the juvenile sex offenders were rearrested for a new sex crime or failure to register as a sex offender offense. *Id.* Reference to an aggregate rate, or "new sex crime or failure to register," is profoundly misleading, as technical violations are not sex offenses, but rather refer to a bureaucratic failure to register on par with curfew violations, and other behaviors. These are wrongful behaviors on the part of youth, and should be taken seriously, but should not be presented as actual sex offenses for the purpose of presenting sexual recidivism rates. Further, this inclusion of failure to register in sex offense recidivism counts is not peculiar to Delaware; other states and the Uniform Crime Report similarly lump these offenses together in their aggregate reporting, likely because of how the offense is placed in statutory schemes. Failure to register as a sex offender became an illegal act with the state's passing of SB 355 in 1996. Act of June 27, 1996, 70 Del. Laws 882 (1995). Sex offender registration requirements became more intensive with Senate Bill 60, Delaware's Adam Walsh Act, signed in June 2007, which requires high risk sex offenders to appear in person to the Delaware State Police every ninety days for life, moderate risk offenders every six months, and low risk sex offenders annually. S.B. 60, 144th Gen. Assemb., Reg. Sess. (Del. 2007).

sex crimes.¹⁵⁶ But neither the study, which included Delaware, nor a separate systematic review of all of the empirical literature that included juveniles, found such an effect. No decrease in subsequent sex convictions for people on the registry could be shown.¹⁵⁷

PART III: CONCLUSIONS AND RECOMMENDATIONS

Feeley and Simon have argued that across the criminal process a broad shift has taken place toward a “new penology” aimed at managing the risk of dangerous classes in society.¹⁵⁸ Simon and others have argued that new sex-crime and punishment laws can be seen as part of this new penology.¹⁵⁹ “In this account, community notification and civil commitment laws exemplify a trend toward approaching crime as a problem of managing high-risk categories and subpopulations, rather than punishing or normalizing individuals.”¹⁶⁰ The new penology exhibits lowered expectations for what our punishment can achieve, “emphasiz[ing] technocratic performance measures over the delivery of community safety.”¹⁶¹ In this cynical view, a registered sex offender database “works,” for example, if it includes a large number of offenders and conveys accurate information, not if it can be shown to improve probationer compliance or other measures of public safety.

The new penology is in direct conflict with the historical justification for juvenile and family courts, which justify broad interventions into families in order to rehabilitate and disrupt potential patterns of abuse, neglect, and delinquency that could continue into adulthood.¹⁶² The authority of the Family Court relies on *parens patriae* and must uphold the best interests of the child, with room to balance those interests with the social welfare. Only when the harms to society justify it, can we intrude on the normal development of youth in the community. For the juvenile sex offender in particular, the Delaware case study developed here demonstrates that we have widened the net of social control to include younger and less deviant youth under the guise of rehabilitation, in reaction to politically-raised and inaccurate fears.

156. Amanda Y. Agan, Sex Offender Registries: Fear without Function? 19, 25 (Dec. 2008) (unpublished manuscript), available at <http://www.solresearch.org/~SOLR/cache/date/20081201-AAgan-Regry.pdf>.

157. *Id.* at 3-6. See also Drake & Aos, *supra* note 33, at 4.

158. See generally Malcom M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 CRIMINOLOGY 449 (1992); Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCHOL. PUB. POL’Y & L. 452, 452-53 (1998).

159. See Simon & Leon, *supra* note 8, at 749; ERIC S. JANUS, FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 14 (2006).

160. Simon & Leon, *supra* note 8, at 749.

161. *Id.*

162. See generally Fletcher v. State, No. 0404010688, 2008 WL 2912048 (Del. Fam. Ct. June 16, 2008) (discussing state intervention techniques for adolescent sex offenders).

Evidence-based risk predictions show that age, past traumatic history, and deviant sexual interest are correlated with future offending, and all three measures show Delaware youth are at lower risk than many others.¹⁶³ Beyond the data presented thus far, other reasons exist to question the continued inclusion of adolescents in public databases as well as Delaware's reliance on out-of-state residential sex offender treatment for many youth:

We may not know enough about how sex offender therapies work, and for whom, to justify the costs. Robust research is needed to establish causalities and identify the most appropriate subjects for treatment. Standardization through licensing or a nationally approved credentialing process is not comparable to that required of other specialties. As a result, the practice of sex offender treatment is largely unregulated. Until research and professionalization increase, the generally low rate of recidivism for untreated sex offenders may not justify additional treatment interventions.¹⁶⁴

Children and adolescents who have sexually offended may also be too young to benefit from specialized sex offender treatment. Particularly with young people, who are less likely to have fixed sexual preferences than adults, intervening in their development without rigorously tested treatment modes may cause more harm than benefit. The stigmas and other problems associated with being singled out as sexually deviant may outweigh the largely unproven benefits.

Many clinicians and researchers have also speculated on the iatrogenic effects of grouping together youth adjudicated on sex charges.¹⁶⁵ In the broader criminological literature, social learning theory has been well-proven with youth: exposure to other criminally-involved youth, especially in detention, creates more criminal knowledge and increases the likelihood of future offending.¹⁶⁶ Compounded by the stigmas that face youth whose status as sex offenders is made public through Internet registries, we may be making it impossible for youth who return from sex offender residential treatment to successfully re-integrate.

Nationally, there may be a trend towards modulating the effect of fear on our correctional policies. The Secretary of Corrections for California, a state

163. See Douglas L. Epperson et al., *Actuarial Risk Assessment with Juveniles Who Offend Sexually: Development of the Juvenile Sexual Offense Recidivism Risk Assessment Tool-II (JSORR-AT-II)*, in RISK ASSESSMENT OF YOUTH WHO HAVE SEXUALLY ABUSED: THEORY, CONTROVERSY, AND EMERGING STRATEGIES 157-65 (David Prescott ed., 2006); Douglas L. Epperson et al., *Juvenile Sexual Offense Recidivism Rate Assessment Tool-II (JSORR-AT-II)*, in RISK ASSESSMENT OF YOUTH WHO HAVE SEXUALLY ABUSED: THEORY, CONTROVERSY, AND EMERGING STRATEGIES 222-36 (David Prescott ed., 2006).

164. Chrysanthi Leon, *Sex Offender Treatment*, in CORRECTIONS (Vol. 4) (forthcoming chapter, on file with author).

165. Elizabeth J. Letourneau & Michael H. Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo*, 17 SEXUAL ABUSE: J. RES. & TREATMENT 293, 304 (2005).

166. See, e.g., DEVIANT PEER INFLUENCES IN PROGRAMS FOR YOUTH: PROBLEMS AND SOLUTIONS 4 (Kenneth A. Dodge et al. eds., 2006).

that boasts one of the world's biggest correctional systems, recently added his voice to the call for evidence-based corrections:

[Partnering with academics] has been just absolutely vital. Otherwise you are just making policy decisions based on either politics or based on your gut sense of what works and I think that is how California got in this spot. . . . The simple fact is that our population has mushroomed and in large part that is because we have lacked research as to who we should be afraid of versus who we really are just mad at.¹⁶⁷

Youth who sexually offend certainly stir our passions, but it is up to policymakers to ensure our emotions are channeled into productive outlets.

Although this article focuses on youth, it should be clear that Delaware youth have been swept into statutory approaches designed for adults. This inclusion is in part related to the social and political context, which often fails to differentiate adults from youth when referring to "sex offenders." There is also a misplaced belief about the need to comply with the federal Adam Walsh Act.

States have faced incredible pressure to acquiesce in the tightening of the net around juvenile sex offenders, externally through the Walsh Act and internally from constituents who respond well to punitive policies as symbolic "action" against sexual abuse. But momentum is building to resist the trend for more and better surveillance and restriction, and to use evidence-based practices to save resources for the subset of offenders who truly require extended state control and therapeutic intervention. In late 2009, Vermont's state legislature crafted a joint resolution asking the United States Congress for an additional extension for states to come into full compliance with the Adam Walsh Act. In the resolution, the Vermont State Senate requested time for states to work with Congress "toward a solution that will honor the intent of the Act by creating a more consistent system of sex offender registries throughout the country while preserving the authority of individual states to develop the approaches that are most effective for them."¹⁶⁸ If adopted and sent to United States Attorney General Eric Holder, Vermont will be the first jurisdiction to officially reject the Adam Walsh Act.

In contrast, Delaware's government expresses great satisfaction in leading the nation in compliance with the Adam Walsh Act.¹⁶⁹ Given the financial incentives, as well as a sincere desire to protect the public, this enthusiasm is

167. Interview by David Onek with Matthew Cate, Sec'y of the Cal. Dep't of Corr. and Rehab. (Feb. 23, 2010) (alterations in original), *available at* <http://www.law.berkeley.edu/7800.htm>.

168. S.J. Res. 24, 2009-2010 Sess. (Vt. 2009), *available at* <http://www.leg.state.vt.us/docs/2010/journal/SJ090317.pdf#page=1>.

169. Media Release, Del. Dep't of Justice, Law Enforcement Agencies Collaborate to Better Protect Delaware Residents (August 11, 2009), *available at* <http://attorneygeneral.delaware.gov/media/releases/2009/protect%20Delaware%20residents.pdf>.

understandable. But while law enforcement may be implementing changes in the state's registry, institutions that work with youth are moving in a different direction. As discussed above, the Delaware Supreme Court has affirmed judicial discretion to expunge juvenile records and exclude children from the registry on a case-by-case basis.¹⁷⁰ But this option will only be available to youth with the savvy and the resources to seek it. Many will not. The legislature should step in and ensure equal protection for all youth by utilizing an evidence-based approach rather than a piecemeal one.

Increasing awareness of the high stakes for youth included in that registry has affected charging and adjudication decisions as well. As in other states, there seems to be a trend towards avoiding sex-related charges when judges and others involved believe the consequences of the label outweigh the accuracy of the description of events. In fact, a 2008 report found that in Delaware, fifteen percent "of offenders [including both adults and juveniles] are not required to register because" the sex offender "pled to an offense not requiring registration."¹⁷¹ This kind of end-run around legislative intent is unwise as a long-term solution and is another unintended consequence of the expansion of registration and notification laws. A far better solution would be to explicitly clarify the statutory approach to including juveniles in publically available information, and to make sure that inclusions are based on individualized risk assessments. It is also worth clarifying that while the Adam Walsh Act, as currently written, specifically calls for a conviction-based approach similar to what Delaware has now, Senator Patrick Leahy is leading efforts to pass a reform law that would provide more room for states' discretion.¹⁷² Regardless of how that reform legislation proceeds through the United States Congress, the Adam Walsh Act as enacted already provides room for states to defer to existing case law and legislative authority in the specifics of how they make registry determinations. Finally, "compliance" with the Adam Walsh Act has already been awarded to the State of Ohio, which has maintained an individualized approach to juvenile inclusion in the public registry.¹⁷³ That is, Ohio has not jeopardized its Byrne grant funding while simultaneously enacting sensible policies for youth based on empirical evidence. But even if Delaware insists on maintaining its conviction-based approach, the Adam Walsh Act does not require youth under fourteen to be included in the public registry,¹⁷⁴ so the legislature could make that change with no foreseeable conflicts with federal rules of any kind.

Delaware cannot wait to see what happens in the next several years in terms of federal tinkering. General youth detention rates in Delaware are some of the worst in the country. According to 2008 data, Delaware is among only two other states with more than 400 youths in detention per 100,000 youths in the

170. *State v. Fletcher*, 974 A.2d 188, 192 (Del. 2009).

171. WEIDLEIN-CRIST & O'CONNELL, *supra* note 13, at 43.

172. Meeting Minutes, *supra* note 40.

173. See National Juvenile Justice Network, *Ohio Archives Compliance with Adam Walsh Act Despite Decision to Shield Juveniles From Registration Requirements*, (Feb 26, 2010), http://njjn.org/media/resources/public/resource_1490.pdf.

174. 42 U.S.C. § 16911(8) (2006).

population; this is in contrast with the national average of 208 per 100,000.¹⁷⁵ Delaware is also unusual nationally in showing a three percent increase in juvenile detention since 1997, while thirty-five states saw declines during the same time period.¹⁷⁶

Nonetheless, the very recent trend in Delaware juvenile detention is promising. According to data reported by the Division of Youth Rehabilitation Services, more Delaware youth are exiting residential treatment than are entering it.¹⁷⁷ This trend seems to match the recent expansion in training opportunities on inappropriate sexual behaviors that federal grant money has made available to treatment providers and Family Court judges. Another possibility is that it is attributable to the lag experienced in Delaware regarding catching up to national trends.¹⁷⁸ However, DYRS also reports that it is

[w]orking with select out-of-state providers . . . to review their program lengths of stay and develop shorter term, more intensive program offerings . . . to ensure that youth remain in the most appropriate, least restrictive environment based on their assessed risk level via standardized sexual and non-sexual risk assessments tools such as the ERASOR and J-SOAP.¹⁷⁹

Regardless of cause, it is a positive trend. But the fiscal outlay for out-of-state sex offender juvenile placements by Delaware remains very high with a budget estimate for fiscal year 2010 of about \$3.5 million to be spent on approximately forty youth.¹⁸⁰

Burton finds that many of the Delaware sex offender youth are quite mild compared to those in other states he has evaluated. About thirty percent of the Delaware juvenile sex offenders reported no childhood family adversities, about forty percent of the sex offender group indicated only one or two victims, about fifty-five percent indicated no deviant arousal, and several did not commit nonsexual crimes and several had no indication of severe personality issues on the MACI. This makes up a group of forty-five percent

175. Melissa Sickmund, U.S. Dep't of Justice, Office of Justice Programs, *Juveniles in Residential Placement, 1997–2008*, (Feb. 2010), <http://www.ncjrs.gov/pdffiles1/ojdp/229379.pdf>.

176. *Id.*

177. Telephone Interview with Shirley Lerner, Resources Unit Manager, Community Services, Division of Youth Rehabilitation Services (Mar. 23, 2010). On July 1, 2007, DYRS had thirty-three youth active in out-of-state ISB contracted residential services. *Id.* In FY08, DYRS continued sending these out-of-state placements faster than they were being discharged, as evidenced by the thirty admissions and twenty-two discharges for that fiscal year. *Id.* In FY09, DYRS noticed a reversal in the trend as there were twenty-one admissions and twenty-eight discharges during the fiscal year. *Id.* In FY10, this downward trend in referrals to out-of-state ISB contracted residential programs has continued with seven admissions between July 1, 2009 and February 28, 2010, and twenty-two discharges during that same time period. *Id.*

178. *See* Sickmund, *supra* note 175.

179. Telephone Interview with Shirley Lerner, Resources Unit Manager, Community Services, Division of Youth Rehabilitation Services (Mar. 23, 2010).

180. *Id.*

of the youth who would be classified correctly as low-to-moderate risk because they would probably not reoffend and would be better served in the community rather than residential placement.

Unfortunately, the people who must find community placements for youth who have sexually offended report that inclusion in the public registry often make this impossible. While increased law enforcement, tougher charging decisions, and other legislative actions may each account for a portion of the net-widening in Delaware, information from researchers indicates that once kids are labeled juvenile sex offenders, alternatives to incarceration may be out of reach. Thus, regardless of whether or not the majority of juveniles adjudicated on sex charges in Delaware enter the judicial system through the front door, the majority of those brought in are placed in the most restrictive setting, even when they pose little threat to the community and would do well in outpatient treatment.

This article advises against the community notification aspect of juvenile registration, as well as severely restricting uses of residential placements for youth who have sexually offended. Registration laws have been part of the law enforcement toolkit for sex offenders in the United States since the 1940s, and research indicates that they existed as far back as the 1700s for “rogues” and other criminals surveilled by police in Europe.¹⁸¹ So they are likely here to stay. But the question of whether youth belong in the registry is clear when viewed from the vantage point of research. Not only does the notoriety prevent community placement, it cannot actually assist law enforcement as we expect it to. Dr. Zimring proved the lack of predictive power juvenile sex charges have.¹⁸² He also interpreted data in light of registration requirements:

Might this registry be effective nonetheless by providing the police with a reliable group of potential suspects? The problem here would be that 92 percent of all the adult male sex offenders were never juvenile sex offenders so the registry would be a very poor predictive tool. If this juvenile registry was used to “round up the usual suspects,” 49 persons would have been needlessly predicted as sexually dangerous for every truly dangerous person so concerned, and more than 92 percent of true offenders would not have been on the registry. That appears to be a poor prediction tool for police and prosecutors and a prediction made about adult sex recidivism risk that would be wrong about 98 percent of the time.¹⁸³

Given the high stakes for youth and the costs to the state, we cannot justify the continued reliance on a prediction that is wrong ninety-eight percent of the time! The juvenile sex offender registry is the exact opposite of evidence-based corrections.

Finally, policymakers who seek to bring more good sense into the Delaware “dilemma” for juvenile sex offenders need to distinguish the recommended

181. WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA xi, 1-2, 30-31 (2009).

182. *See* Zimring et al., *supra* note 18, at 71.

183. *Id.*

changes from a call to go “soft” on sex offenders. As the United States Supreme Court has made clear, registration is not punishment, and nothing suggested in this article would change the available sentence structure for sex offenses.¹⁸⁴ Judges in the Family Court and Superior Court will still be able to punish according to statutory guidelines, even as trends observed by Delaware’s Statistical Analysis Center show that criminal justice actors, including judges, are increasingly using more severe charges and lengthier sentences.¹⁸⁵ This article addresses the separate issue of what to do with these juvenile offenders after they have been punished in order to ensure that how we act is based on what we know, thus preventing future offending. The registry is designed to prevent such future offending and residential treatment similarly should be focused on youth in need of rehabilitation. Delaware youth, by and large, merit neither.

Nationally, there have been several critiques of juvenile sex offender registration, but what makes this article unique is the examination of youth in Delaware that shows how much younger and less deviant they are than youth adjudicated on sex charges in other states. Burton’s study, combined with Zimring’s analysis of the Philadelphia and Racine birth cohorts showing that juvenile sex charges do not predict adult sex charges, clearly shows that the registry cannot work the way we intend. Given the chilling effect registration in Delaware has had on placement for juveniles in community settings, and the resulting high costs during a time of budget crisis, this is altogether powerful evidence against both the registry and the widespread use of residential treatment.

184. *See* *Smith v. Doe*, 538 U.S. 84, 89-90, 105-06 (2003).

185. WEIDLEIN-CRIST & O’CONNELL, *supra* note 13, at 26 (stating that “the severity of conviction is much higher than a decade ago”).