ARTICLES

PANICKED LEGISLATION

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INTRODUCTION

We are in the throes of a moral panic.[1] It is not the first time,[2] nor will it likely be the last,[3] but it is among the most enduring.[4] Dubbed the sex panic,[5] it has bred widespread and ever-escalating legislation,[6] impacted the lives of more than a million people and their families,[7] and caused public hysteria and violence.[8] Unlike other

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1. *See infra* Part I (recounting the scholarship surrounding moral panics in general and the sex panic specifically).

2. *See infra* Part I (describing a litany of moral panics that emerged over the decades).

3. *See* STANLEY COHEN, FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS 1 (Routledge, 3d ed. 2002) ("Societies appear to be subject, every now and then, to periods of moral panic."); *see also* Corey Jessup & Monica K. Miller, *Fear, Hype, and Stereotypes: Dangers of Overselling the Amber Alert Program*, 8 ALB. GOV'T L. REV. 467, 475 (2015) (observing that "[m]oral panics come and go").

4. *See, e.g.*, Bela August Walker, *Essay: Deciphering Risk: Sex Offender Statutes and Moral Panic in a Risk Society*, 40 U. BALT. L. REV. 183, 188–93 (2010) (reviewing the history of the sex panic, which began in the 1930s and has existed for ninety years); *see also* Wayne A. Logan, *Sex Offender Registration in a Pandemic*, 18 OHIO ST. J. CRIM. L. 515 (2021) (elaborating on forces at work that maintained registration requirements in the face of a raging pandemic).

5. *E.g.*, ROGER N. LANCASTER, SEX PANIC AND THE PUNITIVE STATE 1 (2011); *see also* Gillian Harkins, Review Essay, *Sex Offenses and the Imaginaries of Punitive Reason*, 36 POL. & LEGAL ANTHROPOLOGY REV. 379, 379–80 (2013) (emphasizing that Roger Lancaster used the term "sex panic" to decry the "punitive turn" that governmental action took to imaginary threats). For an interesting take on the combination of sex panic and sex denial, see Corey Rayburn Yung, *Sex Panic and Denial*, 21 NEW CRIM. L. REV. 458 (2018).

6. *See, e.g.*, Does #1–5 v. Snyder, 834 F.3d 696, 697–98 (6th Cir. 2016) (describing how Michigan's registry has "grown into a byzantine code governing in minute detail the lives of the state's sex offenders"); Wallace v. State, 905 N.E.2d 371, 374–77 (Ind. 2009) (recounting the numerous changes to the federal and Indiana sex offender registration schemes); State v. Henry, 228 P.3d 900, 903–05 (Ariz. Ct. App. 2010) (providing a detailed history of the escalating amendments to Arizona's offender schemes); State v. Letalien, 985 A.2d 4, 8–11 (Me. 2009) (detailing the extensive amendments to Maine's registration scheme); State v. Bodyke, 933 N.E.2d 753, 757–60 (Ohio 2010) (reviewing the substantial evolution of Ohio's sex offender registration scheme since 1963).

7. An excellent examination of the reverberating impact of registration and notification burdens can be found in *Millard v. Rankin*, 265 F. Supp. 3d 1211, 1214–17 (D. Colo. 2017), *rev'd in part, vacated in part sub nom.* Millard v. Camper, 971 F.3d 1174 (10th Cir. 2020) (explaining in detail the burdens facing a registrant in Colorado attempting to meet the registry requirements). *See also In re* Taylor, 343 P.3d 867, 869 (Cal. 2015) ("Blanket enforcement of the residency restrictions against these parolees has severely restricted their ability to find housing . . . , greatly increased the incidence of homelessness among them, and hindered their access to medical . . . and other rehabilitative social services available to all parolees . . . ."); HUM. RTS. WATCH, RAISED ON THE REGISTRY: THE IRREPARABLE HARM OF PLACING CHILDREN ON SEX OFFENDER REGISTRIES IN THE US 17 (2013), https://www.hrw.org/sites/default/files/reports/us0513_ForUpload_1.pdf [https://perma.cc/Q689-B78D] (showcasing the trauma that children on the registry face). For a look at what families face, see Jill Levenson & Richard Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 34 AM. J. CRIM. JUST. 54, 62–64 (2009), which recognized that family members of registrants suffer from a host of life-changing issues including loss of employment and housing limitations, threats, harassment, and financial repercussions.

8. *See, e.g.*, *Millard*, 265 F. Supp. 3d at 1217–21 (articulating the vigilantism facing registrants); Matt Clarke, *Vigilantes Assault, Rob and Murder Registered Sex Offenders*, PRISON LEGAL NEWS (May 5, 2017), https://www.prisonlegalnews.org/news/2017/may/5/vigilantes-assault-rob-and-murder-registered-sex-offenders/ [https://perma.cc/WLG2-DGQ5] (cataloging examples of violence against registrants); *California Man Beaten to Death After Being Mistaken for Sex Offender*, MERCURY NEWS, Sept. 3, 2019, https://www.mercuryn

moral panics in our history that dissipated over time,[9] there are no signs that the sex panic is diminishing. Indeed, this panic grows more virulent with each passing year.[10]

Undoubtedly, fear is the motivating force.[11] But it is fear based on what could be described as a "mythical narrative"—a story based on false assumptions that generates a disproportionate response and fuels the panic.[12] Like moral panics before it,[13] the sex panic is based on its own two-fold mythical narrative: our communities are filled with strangers who are poised to kidnap and assault our children—what has been called "stranger danger"[14] —and those who commit sex offenses recidivate at alarmingly high rates, which portends unceasing future dangerousness.[15] Not only are these assumptions false based on decades of extensive empirical study,[16] but the

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ews.com/2019/09/03/california-man-beaten-to-death-after-being-mistaken-for-sex-offender [https://perma.cc/K9V6-2Z8T]; *Man Claims Child Rapist Murders*, CBS NEWS, Sept. 6, 2008, https://www.cbsnews.com/news/man-claims-child-rapist-murders [https://perma.cc/Y6SY-2QBE] (reporting the killing of two registrants by Michael Anthony Mullen); Associated Press, *Mother Gets 3 Months for Hitting Sex Offender with Baseball Bat*, FOX NEWS, Jan. 14, 2015, https://www.foxnews.com/story/mother-gets-3-months-for-hitting-sex-offender-with-baseball-bat [https://perma.cc/987B-4DAJ] (noting that the assault against the registrant occurred after defendant saw fliers announcing his move into her neighborhood).

9. *See infra* Part I (analyzing the structure of moral panics).

10. *See* Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1076–100 (2012) (tracing the escalating burdens of registration and notification schemes since they were first enacted in 1994); *see also* Catherine L. Carpenter, *All Except For: Animus that Drives Exclusions in Criminal Justice Reform*, 50 SW. L. REV. 1, 9–17 (2020) (showcasing a myriad of criminal justice reform efforts to which those convicted of sex offenses were not entitled).

11. *See, e.g.*, 152 CONG. REC. 14986 (2006) (statement of Sen. Hatch) ("If we convict these monsters, we can't lose track of them. These are all common -sense solutions to a dark and horrible problem in our society.").

12. *See* Daniel A. Krauss et al., *The Public's Perception of Crime Control Theater Laws: It's Complicated*, 27 PSYCH. PUB. POL'Y & L. 316, 325 (2021) (describing the mythical narrative as an important feature of Crime Control Theater). Such mythical narratives are not unique to moral panics. *See, e.g.*, Jen Camden & Kathryn E. Fort, *"Channeling Thought": The Legacy of Legal Fictions from 1823*, 33 AM. INDIAN L. REV. 77, 89 (2008) (describing the mythical narrative that may have permeated the ruling on indigenous land rights); Jamie R. Abrams, *Debunking the Myth of Universal Male Privilege*, 49 U. MICH. J.L. REFORM 303, 315 (2016) (arguing that the mythical narrative that glorifies combat military service harms the push to equalize opportunities for women in the military).

13. *See infra* Section I.B (addressing the mythical narrative).

14. *See infra* Part III (examining the false assumption of stranger danger); Michael Hobbes, Sex Offender Registries Don't Keep Kids Safe, But Politicians Keep Expanding Them Anyway, HuffPost (July 16, 2019, 5:45 AM), https://www.huffpost.com/entry/sex-offender-laws-dont-make-children-safer-politicians-keep-passing-them-anyway_n_5d2c8571e4b02a5a5d5e96d1 [https://perma.cc/JP3V-RATV] (offering the false assumptions that stoke the sex panic).

15. *See* Tamara Rice Lave et al., *The Problem with Assumptions: Revisiting "The Dark Figure of Sexual Recidivism,"* 39 BEHAV. SCI. & L. 279 (2021) (rejecting faulty data to suggest high recidivism rates); Kristin M. Budd & Christina Mancini, *Crime Control Theater: Public (Mis)Perceptions of the Effectiveness of Sex Offender Residence Restrictions*, 22 PSYCH. PUB. POL'Y & L. 362, 365 (2016) (describing the bases for the mythical narrative in a sex panic).

16. *See* Declaration of R. Karl Hanson at 7, Doe v. Harris, No. 3:12-cv-05713-TEH, 2013 WL 144048 (N.D. Cal. Nov. 7, 2012); *see also* Does # 1–5 v. Snyder, 834 F.3d 696, 704–05 (6th Cir. 2016) (highlighting several studies that reject the prevailing view that those convicted of sex offenses recidivate at a much higher rate than the rest of the prison population).

legislative regime upon which they are built demands universal application and fidelity to this false narrative.

Although fear animates the legislation, it is not couched as nakedly. Instead, the government frames the need for a registration and notification regime as the result of a logical assessment of the risks that communities face from "those who commit sex offenses."[17]

No matter the messaging, however, unbridled fear propels the response. Eula Biss summed it up well: "[R]isk perception may not be about quantifiable risk so much as it is about immeasurable fear. Our fears are informed by history and economics, by social power and stigma, by myth and nightmares. And as with other strongly held beliefs, our fears are dear to us."[18]

Biss is correct. Our fears are dear to us. Our perception of a situation—not the truth of it—determines our actions.[19] The public's fear that "sex offenders" live among us in plain sight, prowl our streets, and assault our children has hardened into a perceived reality.[20] In his theory on probability neglect, Professor Cass Sunstein asserts that "when intense emotions are engaged, people tend to focus on the adverse outcome, not on its likelihood."[21] That is certainly true of registration schemes, which have been created to deter the improbable. Indeed, registration and notification schemes depart from traditional governmental risk management, which underemphasizes in its calculus the public's anxiety over unlikely harms.[22] Instead,

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17. *See* Doe v. Moore, 410 F.3d 1337, 1347 (11th Cir. 2005) (acknowledging that the State's purpose in enacting Florida's Sex Offender Act was to protect "the public from sexual abuse[]"); Lee v. State, 895 So. 2d 1038, 1042 (Ala. Crim. App. 2004) ("[T]he Legislature found that the public was in danger from sex offenders because of the high recidivism rate among such offenders.").

I use the phrase *those who commit sex offenses* intentionally throughout this Article rather than the ubiquitously used, but extremely misleading and damaging term, *sex offender*. It is cumbersome, yes, but it is important person-first language that rejects the use of labels to reduce a person to a single act or condition. Other authors have grappled with this issue. *See, e.g.*, Alexa Sardina & Alissa R. Ackerman, *Restorative Justice in Cases of Sexual Harm*, 25 CUNY L. REV. 1, 2 n.2 (2022) (describing the authors' use of person-first language in their article on sexual harm). For another way to address these actors, see Kelly M. Socia et al., *Punitive Attitudes Toward Individuals Convicted of Sex Offenses: A Vignette Study*, 38 JUST. Q. 1262 (2021), which uses the anacronym "ICSO" throughout the article to describe "individuals convicted of sex offenses."

18. EULA BISS, ON IMMUNITY: AN INOCULATION 37 (2014).

19. Coined the "Thomas Theorem," and named for the renowned sociologist, the theorem states that "if men define situations as real, they are real in their consequence." JOHN SCOTT, *Thomas Theorem*, *in* A DICTIONARY OF SOCIOLOGY (4th ed. 2015).

20. *See, e.g.*, 162 CONG. REC. 921 (2016) (statement of Rep. Wagner) ("I cannot fathom the anger and anguish felt by Megan's parents and all parents whose children fall prey to such sick predators. I would do anything to protect my children and all children from sexual predators, and I feel blessed that I and my colleagues are in a position where we can make a difference."); *see also* 152 CONG. REC. 15334 (2006) (statement of Sen. Grassley) ("Each of these murders was committed by a repeat sex offender. These cases should open our eyes to the necessity of passing a bill that will protect children from monsters who commit these crimes . . . .").

21. Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 62 (2002).

22. *See* Molly J. Walker Wilson, *Adaptive Responses to Risk and the Irrationally Emotional Public*, 54 ST. LOUIS U. L.J. 1297, 1300 (2010) (describing the role of lawmaker in managing risk).

registration schemes have been enacted specifically to quell the public's fear over the unlikely harm of sexual assault by a stranger.[23]

This is the intersection at which we find ourselves: intense fear that motivates punitive legislation against those who commit sex offenses despite low recidivism rates and the unlikelihood that a stranger will assault our children.[24] Facts, however, provide little comfort once fear grips a community. And where there is fear, punitive action soon follows.[25] As Philip Jenkins wrote, "Talking about a 'problem' or 'crisis' ipso facto implies that there is a solution, that change of some kind is necessary or desirable."[26]

No better support for Jenkins's position exists than laws that symbolically, but unnecessarily or ineffectively, attempt to alleviate public concern over a perceived social problem. To that end, States have passed a cascade of largely symbolic laws targeting those who have committed sex crimes, but which only *seem* to address public safety.[27] Laws—which this Article describes as *panicked legislation*—hastily crafted and without empirically sound data or reason.[28] Despite their appeal, registration and notification laws have been thoroughly criticized on all fronts as a failed

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23. *See infra* Section I.B (recognizing that most assault is carried out by those the victim knows).

24. *See infra* Section I.B (detailing both empirical evidence of low rates of recidivism and of the improbable event of a stranger assaulting our children).

25. There is considerable debate over the role that emotion should play in legal decision making. *See, e.g.*, Dan M. Kahan, *Two Concepts of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741 (2008) (offering different theories for the role that emotion plays in risk assessment); Susan A. Bandes, *Emotions, Value, and the Construction of Risk*, 156 U. PA. L. REV.: PENNUMBRA 421 (2008) (inquiring whether emotion is a departure from reason or an essential component of it); Cass R. Sunstein, *Misfearing: A Reply*, 119 HARV. L. REV. 1110 (2006) (replying to a criticism that heuristic thinking diminishes the rational-weigher); Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions*?, 94 MINN. L. REV. 1997 (2010) (offering a retrospective on law and emotions scholarship in various arenas).

26. PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 4 (1998).

27. Krauss et al., *supra* note 12, at 317 ("[S]cholars specializing in psychology and law have identified a particular group of emotionally enacted crime related laws that are intended to address important criminal justice problems but actually have inconsequential or deleterious effects on what they were specifically designed to target."); *see also* J. Kelly Strader, *Criminalization as a Policy Response to a Public Health Crisis*, 27 J. MARSHALL L. REV. 435, 435–40 (1994) ("When faced with the politically risky and intellectually challenging tasks of developing responses to our nation's crises, our policy-makers often opt for politically safe and intellectually easy approaches.").

28. *See infra* Section I.B (analyzing the data that has been collected to demonstrate the low recidivism rates of those who commit sex offenses).

experiment,[29] extremely ineffective,[30] and damaging.[31]

When the symbolism of a law or regulation outweighs its pragmatic value, it has been cynically dubbed *Crime Control Theater*.[32] The ceremonial removal of shoes at the airport —an act whose ability to protect the travelling public is minimal at best[33]—is but a small example of Crime Control Theater at play.[34] But that is not really its goal. Requiring travelers to remove their shoes is "symbolic communication" that signifies the existence of a government at work protecting travelers from would-be terrorists.[35]

And herein lies the question: how to challenge a registration and notification scheme that the public has embraced overwhelmingly,[36] but which has been heralded as Crime Control Theater? Nearly thirty years after the enactment of the first

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29. *See, e.g.*, JUDITH LEVINE & ERICA R. MEINERS, THE FEMINIST AND THE SEX OFFENDER: CONFRONTING SEXUAL HARM, ENDING STATE VIOLENCE 152 (2020) ("The sex offense legal regime does no good and much harm."); Eric S. Janus, *Preventing Sexual Violence: Alternatives to Worrying About Recidivism*, 103 MARQ. L. REV. 819, 821 (2020) (urging the dismantling of the "regulatory regime").

30. *See, e.g.*, Amanda Y. Agan, *Sex Offender Registries*: *Fear Without Function?*, 54 J.L. & ECON. 207, 207 (2011) ("The results from all three data sets do not support the hypothesis that sex offender registries are effective tools for increasing public safety."); Molly J. Walker Wilson, *The Expansion of Criminal Registries and the Illusion of Control*, 73 LA. L. REV. 509, 522–23 (2013) (citing studies that have shown that registration and notification laws have had "no significant difference" of reoffense between those required to register and those who were not); Does #1–5 v. Snyder, 834 F.3d 696, 704–05 (6th Cir. 2016) ("Tellingly, nothing the parties have pointed to in the record suggests that the residential restrictions have any beneficial effect on recidivism rates.").

31. *See* J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161, 165, 181 (2011) (arguing that the registration regime lessens public safety, rather than enhances it as the public believes); *see also* Janus, *supra* note 29, at 838 ("Presence and residence restrictions have repeatedly been shown to be ineffective or, worse, counterproductive in that they actually increase sexual reoffending.").

32. *See, e.g.*, Kelly M. Socia & Andrew J. Harris, *Evaluating Public Perceptions of the Risk Presented by Registered Sex Offenders: Evidence of Crime Control Theater*?, 22 PSYCH. PUB. POL'Y & L. 375 (2016) (arguing that sex offense registration schemes are Crime Control Theater). For a fuller discussion of Crime Control Theater, see *infra* Part II.

33. *See* Dylan Matthews, *The TSA is a Waste of Money That Doesn't Save Lives and Might Actually Cost Them*, VOX (Sept. 11, 2016, 11:26 AM), https://www.vox.com/2016/5/17/11687014/tsa-against-airport-security [https://perma.cc/HW2G-ESLE] (noting that the TSA "has never presented any evidence that the shoe ban is preventing attacks").

34. Crime Control Theater is the outgrowth of "Security Theater," which gained prominence as a psychological theory following the 9/11 attacks. *See, e.g.*, Krauss et al., *supra* note 12, at 317 (citing the work of scholars who examined the laws and regulations enacted to make the public feel safety in flying again). For another example of Crime Control Theater at the airport, see Tom Meehan, *Security Theater: Feeling Safe at the Airport Does Not Make You Safe*, LOSS PREVENTION MEDIA (Jan. 1, 2019), https://losspreventionmedia.com/security-theater-feeling-safe-at-the-airport-does-not-make-you-safe/ [https://perma.cc/CLP9-Q7G4] (reporting that the National Guard stationed at airports held in their hands guns without bullets).

35. *See also* Meehan, *supra* note 34 (distinguishing between making people safe and making people feel safe); *cf.* Jessup & Miller, *supra* note 3, at 469, 478 (critiquing the ineffectiveness of the AMBER Alert Program).

36. *See* Krauss et al., *supra* note 12, at 317 (acknowledging widespread support for sex-offender registration and notification laws); *see also infra* Part II (examining public support of these measures).

national registration regime,[37] we find ourselves at a crossroads. Despite decades of compiled statistics that refute the mythical narrative of high recidivism rates among those who commit sex offenses, we are still deeply entrenched in the sex panic.

The counterevidence to this false narrative is compelling,[38] *but what of a public that cannot hear the counterevidence*? With substantial empirical evidence for support, we know that adults and children convicted of sex offenses recidivate at much lower rates than the public imagines.[39] Thus, the idea that the public would hold onto disputed and false assumptions about purportedly high recidivism rates has been a sobering realization for scholars like me who have long advocated for change.[40] We believed that if we could disabuse the public of the mythical narrative that recidivism rates are "frightening and high,"[41] the sex panic would subside and the regulatory regime would collapse.

Surely, activism should be poised to succeed. Counter-messaging to neutralize a moral panic enjoys at least theoretical traction.[42] Scholars, advocacy groups, and

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37. The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act enacted the first national sex-offender registration regime. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 2038, 2038–42 (repealed 2006) (establishing federal guidelines for state registration laws).

38. *See infra* Section Part I.B (reviewing the empirical evidence demonstrating low recidivism rates). For an interesting flip of the discussion, see JUST. POL'Y INST., REGISTERING HARM: HOW SEX OFFENSE REGISTRIES FAIL YOUTH AND COMMUNITIES 12 (2008), https://justicepolicy.org/wp-content/uploads/2022/02/walsh_act.pdf [https://perma.cc/NU7R-D3HF], which reports sixty-one studies that found that recidivism rates of *non-sexual* offenders were much higher than sexual offenders.

39. *See infra* Section I.B (reporting on the myriad of studies to support the proposition of low recidivism rates).

40. For a range of articles that questioned the assumptions attributed to those who committed sex offenses, see, for example, Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495 (2015), which criticizes the Supreme Court's determination that sex offender's recidivate at high rates; Carpenter, *supra* note 10, at 27–34, which provides the "real data" on recidivism rates and the reason for the false allegations that they are high; Wayne A. Logan, *Megan's Laws as a Case Study in Political Stasis*, 61 SYRACUSE L. REV. 371, 393–94 (2011), which explains the various factors that may account for the claim of recidivism; and Heather Ellis Cucolo & Michael L. Perlin, *"The Strings in the Books Ain't Pulled and Persuaded": How the Use of Improper Statistics and Unverified Data Corrupts the Judicial Process in Sex Offender Cases*, 69 CASE W. RSRV. L. REV. 637, 640 (2019), which concluded that "[t]he premises of judges' decisions related to the assessment of who is a sexually violent predator are built on houses of cards that could and should crumble quickly if we dispassionately examine the underlying statistics and data."

41. The phrase "frightening and high" gained prominence after the U.S. Supreme Court used it in two cases, *Smith v. Doe*, 538 U.S. 84 (2003), and *McKune v. Lile*, 536 U.S. 24 (2002). *See Smith*, 536 U.S. at 103 ("The risk of recidivism posed by sex offenders is 'frightening and high.'" (quoting *McKune*, 536 U.S. at 23)). The phrase was later debunked thoroughly by Ira and Tara Ellman. *See* Ellman & Ellman, *supra* note 40, at 497–99 (tracing the Court's use to a pop psychology article without empirical veracity); *see also* State v. Chapman, 944 N.W.2d 864, 879 (Iowa 2020) (Appel, J., concurring) ("Embarrassingly, the 'frightening and high' risk of recidivism has been totally eviscerated subsequent to *McKune* and *Smith*. The source of the statement was run into the ground by scholars Tara and Ira Mark Ellman").

42. *See, e.g.*, Brian V. Klocke & Glenn W. Muschert, *A Hybrid Model of Moral Panics: Synthesizing the Theory and Practice of Moral Panic Research*, 4 SOCIO. COMPASS 295, 299 (2010) (quoting theorists who

the targeted groups themselves, all with agency, have the power to rewrite the message of vilification. With rare exception,[43] however, this strategy has not worked.

In retrospect, this was naïve thinking; as I have come to think of it, it was the decade of "magical thinking."[44] The public's thinking never wavered even though article after article described in extensive detail the false assumptions upon which the sex panic was built and the accurate data that rebuffed them.[45] But we have come to learn that falsely embedded assumptions are not easily recast, even when people are presented with contrary accurate data.[46] And it is not only the public who has difficulty absorbing contrary evidence—those in the academic world sometimes reject empirical analysis when it does not contribute to the false narrative they have embraced.[47] Psychologists call this "confirmation bias," which is "the tendency to acquire or process new information in a way that confirms one's preconceptions and avoids contradiction with prior beliefs."[48]

No matter the empirical evidence or how it is presented, deniers stand firm. They even proliferate.[49]

In fact, the phenomenon of firmly-held false views has led scholars to question

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believed that the "process of demonization could be stopped").

43. *See, e.g.*, Does #1–5 v. Snyder, 834 F.3d 696, 704 (6th Cir. 2016) ("The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in *Smith* that '[t]he risk of recidivism posed by sex offenders is "frightening and high."'" (quoting *Smith*, 538 U.S. at 103)).

44. For an examination of human nature's desire to engage in "magical thinking" and its protective value, see MATTHEW HUTSON, THE 7 LAWS OF MAGICAL THINKING: HOW IRRATIONAL BELIEFS KEEP US HAPPY, HEALTHY, AND SANE (2012).

45. *See supra* note 41.

46. Jason Rydberg, Christopher P. Dum & Kelly M. Socia, *Nobody Gives a #%&!: A Factorial Survey Examining the Effect of Criminological Evidence on Opposition to Sex Offender Residence Restrictions*, 14 J. EXPERIMENTAL CRIMINOLOGY 541, 548 (2018) ("Substantively, messages regarding impact of [sex offense registration laws] on public safety or collateral consequences may be met with skepticism or indifference because they do not align with what the public believes the purpose of such policies should be.").

47. *See, e.g.*, Franklin E. Zimring & Sam Kamin, *Facts, Fallacies, and California's Three Strikes*, 40 DUQ. L. REV. 605, 614 (2002) (criticizing those who rejected the empirical evidence behind the failure of three strikes as "a poor substitute for intuition," and rebutting charges that "only a cynic or someone with an axe to grind could think otherwise").

48. Armen E. Allahverdyan & Aram Galstyan, *Opinion Dynamics with Confirmation Bias*, PLOS ONE, July 2014, at 1, 1; *see also* Shahram Heshmat, *What is Confirmation Bias?*, PSYCH. TODAY (Apr. 23, 2015), https://www.psychologytoday.com/us/blog/science-choice/201504/what-is-confirmation-bias [https://perma.cc/BNV2-F9WB] ("In sum, people are prone to believe what they want to believe.").

49. In the case of the sex panic, see Nicholas Scurich & Richard S. John, *The Dark Figure of Sexual Recidivism*, 37 BEHAV. SCI. & L. 158, 160 (2019), which captured national attention by criticizing twenty years' worth of studies that show low recidivism rates. Where the "Big Lie" concerning the outcome of the 2020 presidential election is concerned, see, for example, U.S. District Court Judge Amy Berman Jackson's recent comments in *United States v. Meredith*, 1:21-00159-ABJ, slip op. at 24 (D.D.C. May 26, 2021): "The steady drumbeat that inspired defendant to take up arms has not faded away; six months later, the canard that the election was stolen is being repeated daily on major news outlets and from the corridors of power in state and federal government . . . ." *See also infra* note 57 and accompanying text.

whether strong counterevidence can ever successfully refute entrenched positions.[50] Drs. Dylan Campbell and Anna-Kaisa Newheiser think it cannot. Campbell and Newheiser reported that "misinformation and false beliefs often persist even after being debunked with counterevidence in part because people spontaneously generate explanations that support their false beliefs."[51]

The uphill climb to change falsely held views is not consigned to the sex panic. Sadly the list is long of deeply entrenched but false beliefs that have permeated the public discourse.[52] The 2020 presidential election is an excellent example for its inclusion of what many argue is the "Big Lie" that swirled around it.[53] The commentary offers analysis on how a false assumption can take hold[54] and continue to ferment

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50. *See, e.g.*, Dylan S. Campbell & Anna-Kaisa Newheiser, *Must the Show Go On? The (In)Ability of Counterevidence to Change Attitudes Toward Crime Control Theater Policies*, 43 LAW & HUM. BEHAV. 568, 569 (2019) (recognizing the difficulty in changing people's entrenched views); Socia & Harris, *supra* note 32, at 376 ("[C]ommunity surveys suggest that citizens adhere to strongly held beliefs and perceptions about sex offenders and the risk that they present to society—beliefs that are often contrary to research evidence.").

51. Campbell & Newheiser, *supra* note 50, at 569. Falsely held beliefs are also present in the public's embrace of three strikes laws, which were intended to reduce crime. *See* Michael Vitiello, *California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?*, 37 U.C. DAVIS L. REV. 1025, 1099 (2004) (recognizing that despite empirical studies "showing that [California's] Three Strikes [Law] had not delivered on its overblown promises, [the data] are unlikely to influence the public debate about the law").

52. *See, e.g.,* Amanda Robb, *Anatomy of a Fake News Scandal*, ROLLING STONE (Nov. 16, 2017, 3:07 PM), https://www.rollingstone.com/feature/anatomy-of-a-fake-news-scandal-125877/ [https://web.archive.org/web/20221230104548/https://www.rollingstone.com/feature/anatomy-of-a-fake-news-scandal-125877/] (debunking the absurd claim that Hillary Clinton operated a child sex ring out of a pizza parlor); Jeff Berardelli, *10 Common Myths About Climate Change — and What Science Really Says*, CBS NEWS (Feb. 27, 2020, 7:00 AM), https://www.cbsnews.com/news/climate-change-myths-what-science-really-says/ [https://perma.cc/M9WM-FC29] (criticizing the logical-sounding but misleading or inaccurate claims against climate change); Gabor David Kelen & Lisa Maragakis, *COVID-19 Vaccines: Myth Versus Fact*, JOHNS HOPKINS MED. (Mar. 10, 2022), https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/covid-19-vaccines-myth-versus-fact [https://perma.cc/9PRW-KZ5J] (refuting common myths circulating about the COVID-19 vaccination).

53. *See* Melissa Block, *The Clear and Present Danger of Trump's Enduring "Big Lie,"* NPR (Dec. 23, 2021, 5:00 AM), https://www.npr.org/2021/12/23/1065277246/trump-big-lie-jan-6-election [https://perma.cc/VE8B-E7WN] (defining the Big Lie as the "verifiably false assertion that Trump won"). The term "The Big Lie" traces back to Nazi Germany. *See* Zachary Jonathan Jacobson, *Many Are Worried About the Return of the 'Big Lie.' They Are Worried About the Wrong Thing*, WASH. POST (May 21, 2018, 6:00 AM), https://www.washingtonpost.com/news/made-by-history/wp/2018/05/21/many-are-worried-about-the-return-of-the-big-lie-theyre-worried-about-the-wrong-thing/ [https://web.archive.org/web/20220928204807/https://www.washingtonpost.com/news/made-by-history/wp/2018/05/21/many-are-worried-about-the-return-of-the-big-lie-theyre-worried-about-the-wrong-thing/] (describing The Big Lie in Nazi Germany as a "strategy of propaganda that focused on the mass dissemination of a single or a few chief falsehoods to a target population").

54. *See, e.g.*, Sarah D. Wire, *Inside the MAGA World Scramble to Produce Findings Suggesting the 2020 Election Was Stolen*, L.A. TIMES (June 19, 2022, 4:12 PM), https://www.latimes.com/politics/story/2022-06-17/jan-6-behind-scenes-trump-election-maga-world-search-fraud [https://web.archive.org/web/20221229135317/https://www.latimes.com/politics/story/2022-06-17/jan-6-behind-scenes-trump-election-maga-world-search-fraud] (detailing the widespread efforts of Trump's advisors to engage in a multifaceted campaign "driven by a frantic mission whose goal was to keep then-President Trump in office after an election he lost," and observing that "crafting [of] the 'Big Lie' came from a motley crew of both big players and people unfamiliar to the public").

despite proven facts to the contrary.[55] This false narrative continued long after the election had been settled, as politicians across the country in 2022 ran for election with the Big Lie as their rallying cry[56] and an exposé concluded that attempts to counter the Big Lie with facts and reason only served to backfire and cement the falsity for those who chose to believe it.[57] Exacerbating the framing of these issues is the great divide in this country regarding how consumers receive and integrate the news into their understanding of the issues.[58]

Armed with this realization, this article urges a new tactic to combat panicked legislation. It argues for judicial intervention in the form of the Irrebuttable Presumption Doctrine. Employed primarily in the 1970s by the United States Supreme Court, the doctrine stands for the proposition that a statute cannot confer or deny a right based on presumption that is not universally accepted as true.[59]

Where a false assumption is impervious to change based on empiricism and logic, the Irrebuttable Presumption Doctrine offers an opportunity to directly counter the falsity of that assumption. If an underlying presumption is intended to support

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55. *See, e.g.*, Olivier Knox & Caroline Anders, *On Anniversary of Jan. 6, Trump's 'Big Lie' Has Only Gained Traction*, WASH. POST (Jan. 3, 2022, 11:41 AM), https://www.washingtonpost.com/politics/2022/01/03/biden-trump-face-off-this-week-jan-6/ [https://web.archive.org/web/20221214173013/https://www.washingtonpost.com/politics/2022/01/03/biden-trump-face-off-this-week-jan-6/] (analyzing the continued belief by some Republicans in the Big Lie one year after the January 6 insurrection); Thomas L. Friedman, Opinion, *Trump's Big Lie Devoured the G.O.P. and Now Eyes Our Democracy*, N.Y. TIMES (May 4, 2021), https://www.nytimes.com/2021/05/04/opinion/gop-trump-2020-election.html [https://web.archive.org/web/20221226234114/https://www.nytimes.com/2021/05/04/opinion/gop-trump-2020-election.html] (writing that the Big Lie continues to be embraced by Republican lawmakers); Miles Parks et al., *Election Deniers Have Taken Their Fraud Theories on Tour—to Nearly Every State*, NPR (June 30, 2022 3:52 PM), https://www.npr.org/2022/06/30/1107868327/trump-election-fraud-jan-6 [https://perma.cc/N3NL-D4TY] (reporting that the "election denial movement . . . has evolved into a nationwide force . . . despite the Jan. 6 Committee's investigation and efforts by voting officials at every level to combat disinformation").

56. *See* Charles Homans, *How 'Stop the Steal' Captured the American Right*, N.Y. TIMES MAG. (July 28, 2022), https://www.nytimes.com/2022/07/19/magazine/stop-the-steal.html [https://web.archive.org/web/20221229203429/https://www.nytimes.com/2022/07/19/magazine/stop-the-steal.html] (finding that the Big Lie has "fed a new wave of post-Trump activism on the right").

57. Sarah Longwell, *Trump Supporters Explain Why They Believe the Big Lie*, ATLANTIC (Apr. 18, 2022), https://www.theatlantic.com/ideas/archive/2022/04/trump-voters-big-lie-stolen-election/629572 [https://web.archive.org/web/20221205175518/https://www.theatlantic.com/ideas/archive/2022/04/trump-voters-big-lie-stolen-election/629572/]; *accord* Tovia Smith, *They Believe in Trump's 'Big Lie.' Here's Why It's Been So Hard To Dispel,* NPR (Jan. 5, 2022, 4:13 PM), https://www.npr.org/2022/01/05/1070362852/trump-big-lie-election-jan-6-families [https://perma.cc/96AX-9R44] (reporting on the struggle that family members have to dissuade their loved ones of the Big Lie). It is not yet clear to what effect the January 6, 2022, hearings will have on the force of the Big Lie. *See* Melissa De Witte, *Will the Jan 6 Hearings Make a Difference? Stanford Scholar Discusses How They Might Shift Public Perception*, STAN. NEWS (June 22, 2022), https://news.stanford.edu/2022/06/22/will-jan-6-hearings-make-difference/ [https://perma.cc/4HDL-WP4R].

58. *See* Mark Jurkowitz et al., *U.S. Media Polarization and the 2020 Election: A Nation Divided*, PEW RSCH. CTR. (Jan. 24, 2020), https://www.pewresearch.org/journalism/2020/01/24/u-s-media-polarization-and-the-2020-election-a-nation-divided [https://perma.cc/CE4S-P5T7] (noting the difference in how Democrats and Republicans view the credibility of the news).

59. *See infra* Part III (examining the line of cases from the 1970s that brought prominence to the doctrine).

registration and notification schemes for individuals who have committed sex offenses, the factual basis for such schemes must be accepted as universally true to survive constitutional challenge.[60] But if a State is unable to defend the claim, then the classification schemes cannot survive constitutional challenge because of the inadequate fit between the assumptions made and the policy the laws are designed to serve.[61]

This Article takes its cue from two important lines of cases in different arenas that struck down legislation: exclusion of bail rights for undocumented immigrants[62] and aspects of both adult and juvenile registration schemes in Pennsylvania that relied on a false presumption of high recidivism rates.[63] Both lines of cases offer the same message. False factual predicates purported to be universally true cannot support the constitutionality of either classification scheme.[64]

On the micro level, these cases offer the legal framework to demand individualized assessment, but their analysis should not be cabined. On the macro level, their pronouncements serve a more profound and far -reaching role. Their opinions help to diffuse the mythical narratives that plague their targeted groups by rejecting the underlying false premises instrumental to the passage of registration and notification laws.

To set the stage for analysis of the Irrebuttable Presumption Doctrine, Part I explores the sociology and essential components of moral panics. Part II continues this examination with a study of Crime Control Theater, an outgrowth of panicked legislation where laws and regulations have been designed more for show than solution. And with this as backdrop, Part III urges the application of the Irrebuttable Presumption Doctrine for the purpose it was initially intended: to combat false presumptions in legislation that masquerade as universal truths. The Irrebuttable Presumption Doctrine offers the opportunity to challenge panicked legislation that is based on firmly held but wildly incorrect assumptions that target those who have committed sex offenses.

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60. *See, e.g.*, Commonwealth v. Torsilieri (*Torsilieri II*), No. 15-CR-0001570-2016, slip op. at 2 (Pa. Ct. Com. Pl. Aug. 22, 2022) (reciting the factors needed to satisfy the Irrebuttable Presumption Doctrine).

61. For an example of a court that did not accept the state's claim, see *Does #1–5 v. Snyder*, where the Sixth Circuit observed that "[i]ntuitive as some may find [the policy for these laws], the record before us provides *scant* support for the proposition that SORA in fact accomplishes its professed goals." 834 F.3d 696, 704 (6th Cir. 2016) (emphasis added); *see also* Melissa Hamilton, *Constitutional Law and the Role of Scientific Evidence: The Transformative Potential of* Doe v. Snyder, 58 B.C. L. REV. 34, 40 (2017) (recognizing the importance of Sixth Circuit Judge Batchelder's engagement with statistical evidence).

62. *See, e.g.*, Lopez-Valenzuela v. Arpaio, 770 F.3d 772 (9th Cir. 2014) (en banc) (employing the Irrebuttable Presumption Doctrine to overturn Proposition 100, which denied bail to undocumented immigrants).

63. *In re* J.B., 107 A.3d 1 (Pa. 2014) (overturning lifetime registration for certain juveniles because the statutory scheme assumed high recidivism rates that was not universally true); *Torsilieri II*, slip op. at 2 (declaring unconstitutional Pennsylvania's registration scheme, which relies on a faulty presumption regarding adult recidivism rates).

64. *See infra* Part III.

I. THE MAKING OF PANICKED LEGISLATION: A PRIMER ON MORAL PANICS

Panicked legislation is both the symbol and the result of a moral panic fueled by the public's distorted perception of a societal threat from a targeted group of people.[65] The study of moral panics teaches us, sadly often in hindsight, that legislation enacted in response to these outsized fears are most often misguided attempts to salve a fearful public.[66]

At the heart of any panicked legislation is the fear that birthed it. Vilification of a targeted group—what sociology professor Stanley Cohen described as "the folk devil"[67]—is central to the panic that stirs in communities. In Cohen's view, folk devils are individuals deemed responsible for creating a threat to society; they are the negative characters—the manifestation of evil —in the moral panic drama.[68]

Sadly, our legal landscape is littered with panicked legislation passed through the years that has used the might of the criminal law to target specific groups. Consider the panicked legislation that was hastily drafted during the midst of the HIV/AIDS crisis and the illogical increase in penalties sought for narcotics offenses involving crack cocaine. Laws passed during the HIV/AIDS epidemic were designed to target gay men,[69] and crack-cocaine-specific sentencing guidelines disproportionately affected Black and Brown individuals.[70] In quoting Professor Sanford Kadish, Professor J. Strader makes a compelling argument that criminalization to stigmatize "corrupts both citizenry and police and reduces the moral authority of the criminal law, especially among those portions of the citizenry—the poor and subcultural—who are particularly likely to be treated in an arbitrary fashion."[71]

In the case of those who commit sex offenses, their vilification is equally obvious but more persistent.[72] U.S. District Court Judge Richard Matsch understood this

65. *See* LANCASTER, *supra* note 5, at 23.

66. *See infra* Section I.B (recounting the moral panic and ensuing legislative changes surrounding teens who commit violence).

67. COHEN, *supra* note 3, at vi; *see also* KENNETH THOMPSON, MORAL PANICS 8 (1998) ("The threat and its perpetrators are regarded as evil 'folk devils' . . . .").

68. COHEN, *supra* note 3, at viii–-xix (describing several groups of folk devils to include, among others, young working-class males, school bullies, evil drug pusher, and social workers as "middle-class folk devils"); *see also* Timothy Recuber, *The Terrorist as Folk Devil and Mass Commodity: Moral Panics, Risk, and Consumer Culture*, 9 J. INST. JUST. & INT'L STUD. 158, 160 (2009) (explaining that "'the terrorist' serves as a menacing folk devil justifying an unprecedented number of new efforts at social control").

69. For an excellent discussion of the laws injudiciously passed in response to the HIV/AIDS crisis, see Strader, *supra* note 27.

70. *See* Kyle Graham, *Sorry Seems to be the Hardest Word: The Fair Sentencing Act of 2010, Crack, and Methamphetamine*, 45 U. RICH. L. REV. 765, 769 (2011) (reporting on the extremely harsh penalties affecting drugs that were based on false assumptions).

71. Strader, *supra* note 27, at 446.

72. *See* John Douard, *Sex Offender as Scapegoat: The Monstrous Other Within*, 53 N.Y.L. SCH. L. REV. 31, 41 (2008) ("[S]ex offenders are the targets of 'moral panic.'").

central point when he wrote in Millard v. Rankin, "The fear that pervades the public reaction to sex offenses—particularly as to children—generates reactions that are cruel and in disregard of any objective assessment of the individual's actual proclivity to commit new sex offenses."[73]

A. The Makeup of a Panic

The term "moral panic" was first coined in 1971 by Jock Young,[74] but made famous in 1972 by Professor Cohen in his groundbreaking work Folk Devils and Moral Panic: The Creation of Mods and Rockers.[75] In this work, Cohen set up the panic as "[a] condition, episode, person or group of persons [that] emerges to become defined as a threat to societal values and interests."[76] The threat, the folk devil, comes in many shapes and sizes, all of which represent the manifestation of evil poised to destabilize the wellbeing of a society.[77] To the subjectivist, the threat is but a realization of the degree of concern the public feels over an issue, irrespective of the truth of that threat.[78]

But what if an objectivist view premised on science and other evidence diverges dramatically from the subjectivist position held by the public? Ohio Court of Common Pleas Judge Mary Katherine Huffman describes all too well this divergence in her analysis of the sex panic: "[W]hat began as mere concern surrounding an identifiable group grows in such intensity that boundless fear directed at the scourged no longer bears any relation to an actual threat."[79]

No matter the targeted group, scholars agree that all moral panics are include similar hallmarks: an irrational and outsized fear that seizes the community,[80] key

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73. 265 F. Supp. 3d 1211, 1226 (D. Colo. 2017), *rev'd in part, vacated in part sub nom.* Millard v. Camper, 971 F.3d 1174, 1177 (10th Cir. 2020); *cf.* Commonwealth v. Torsilieri (*Torsilieri II*), No. 15-CR-0001570-2016, slip op. at 4 (Pa. Ct. Com. Pl. Aug. 22, 2022) ("It is this designation, this 'scarlet letter' of 'high risk,' that distinguishes the heightened stigma sexual offenders experience, and hence their greater marginalization, from that stigma merely associated with the fact of conviction . . . .").

74. THOMPSON, *supra* note 67, at 7 ("The first published reference to a 'moral panic' was by the British sociologist Jock Young, in 1971, when discussing public concern about statistics showing an apparently alarming increase in drug abuse.").

75. COHEN, *supra* note 3.

76. *Id.* at 1.

77. *See* THOMPSON, *supra* note 67, at 120 (ascribing and detailing the reaction of a societal moral panic to a variety of situations). One of the early and leading scholars on panics is journalist Debbie Nathan. *See* DEBBIE NATHAN & MICHAEL SNEDEKER, SATAN'S SILENCE: RITUAL ABUSE AND THE MAKING OF A MODERN AMERICAN WITCH HUNT (1995).

78. For an explanation of the objectivist and subjectivist viewpoints, see Erich Goode & Nachman Ben-Yehuda, *Moral Panics: Culture, Politics, and Social Construction*, 20 ANN. REV. SOCIO. 149, 151 (1994).

79. Mary Katherine Huffman, *Moral Panic and the Politics of Fear: The Dubious Logic Underlying Sex Offender Registration Statutes and Proposals for Restoring Measures of Judicial Discretion to Sex Offender Management*, 4 VA. J. CRIM. L. 241, 247 (2016).

80. *See, e.g.*, COHEN, *supra* note 3, at xxvii (commenting that moral panics include "an exaggeration of the

messengers to spread the narrative of fear,[81] an identified group that must be vilified and feared,[82] and measures designed to punish and ostracize the targeted group.[83] To this set of indices, Professors Erich Goode and Nachman Ben-Yehuda add an important factor: volatility.[84] Moral panics generally burst suddenly and vanish, but not before leaving in their wake fear and hostility, which Goode and Ben-Yehuda call "cultural and institutional legacy."[85]

The societal threat in a moral panic varies across the spectrum and eras.[86] Indeed, examination reveals that the sex panic is only one in a long line of moral panics. Since Cohen's study of the moral panic arising from the 1964 clash between two British youth gangs—the Mods and Rockers[87] —the term has been used to include a wide range of fear-based legislation targeting drug use, childcare centers, teens—especially Black and Brown youth—HIV, and cult worship.[88] Most recently, Professor Aya Gruber has used the term to reject the narrative that campus rape is rampant.[89]

The catalog of past moral panics calls to mind Professor Bela August Walker's depiction of our modern world as a "risk society . . . where anxiety over manufactured risks overwhelms other worries, creating a world fraught with insecurity and unpredictability."[90] In this way, the study of past panics helps inform us. This body of scholarship not only provides us with an understanding of the making of panics,

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number or strength of the cases, in terms of the damage caused, moral offensiveness, potential risk if ignored"); THOMPSON, *supra* note 67, at 10 (emphasizing the disproportionality that occurs when there is an "exaggeration of statistics, [a] fabrication of statistics," or an inappropriate focus on a particular social problem as "exceptionally threatening").

81. Described as *moral entrepreneurs*, specific actors with agency spread the narrative to ensure the passage of strict laws. *See* THOMPSON, *supra* note 70, at 12–13 (asserting their importance by noting, "[t]he public is often stirred up through the mass media by the efforts of 'moral entrepreneurs' . . . who attempt to rouse public opinion . . . to bring pressure on the authorities to exercise social control and moral regulation"); Daniel M. Filler, *Terrorism, Panic, and Pedophilia*, 10 VA. J. SOC. POL'Y & L. 345, 349 (2003) (defining moral entrepreneurs as those who use "strategic rhetoric" to target a particular group).

82. *See, e.g.*, THOMPSON, *supra* note 67, at 9 (noting agreement among theorists that a panic includes a "high level of concern" and "increased level of hostility" toward a particular group); Goode & Ben-Yehuda, *supra* note 78, at 156 (defining the vilified group as "selfish, evil wrongdoers who are responsible for the trouble").

83. *See, e.g.*, Klocke & Muschert, *supra* note 42, at 302 tbl.3 (outlining the "regulation" facet of a moral panic, which is "the advocation of strong measures . . . to deter, manage, or eradicate the threat").

84. Goode & Ben-Yehuda, *supra* note 78, at 158.

85. *Id.* at 155–59 (establishing the hallmarks of all moral panics).

86. *See* Klocke & Muschert, *supra* note 42, at 298 (cataloging a number of moral panics over the last forty years).

87. *See* LANCASTER, *supra* note 5, at 24 (describing Cohen's study).

88. *See id.* at 24–25; *see also* THOMPSON, *supra* note 67, at 55, 69, 105, 115 (showcasing additional panics about mugging, sex and AIDS, girl gangs, and sex on the screen). For an examination of the present day witch hunt, see NATHAN & SNEDEKER, *supra* note 80, at 53–103 (tracing the roots of the satanic scare).

89. *See* Aya Gruber, *Anti-rape Culture*, 64 KAN. L. REV. 1027 (2016) (painting a picture of widespread, but unnecessary, anxiety of rapes on campuses); *accord* AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION 151–57 (2020).

90. Walker, *supra* note 4, at 186.

but it also enables us to identify the arc of the panic so that we may diffuse it and disengage from it if we can recognize its occurrence in real time.

1. From Cultivation through Dissipation

Sadly, moral panics share a predictable path. In addition to the hallmarks of a panic, sociologist professors Brian Klocke and Glenn Muschert propose that all moral panics sport the same cyclical arc: cultivation, operation, and dissipation.[91]

i. Cultivation

A firmly entrenched false narrative does not take hold overnight.[92] Cultivation is key. This phase of a panic describes the conditions that set the stage for the potential of a moral panic. The conflict between "competing moral universes" is often set against the backdrop of overarching social problems.[93]

An onslaught of messaging over time has catalyzed the mythical narrative. As I wrote in an earlier article, "Saying something is true does not make it so. And saying it louder does not make it truer."[94] But cultivating a false message requires exactly that kind of drumbeat: persistent and repetitive messaging that the public comes to believe as true.

For a message to induce a moral panic, it must be "sticky." In *Made to Stick*, authors Professor Chip Heath and Dan Heath articulated principles that make a message endure.[95] To have lasting impact, messages must be easily understood, be able to be repeated, have emotional appeal, and come from credible messengers.[96] "Stop the Steal" & "The Big Lie" (2020 election),[97] "Stranger Danger" (fear of unknown people), and "Frightening and High" (the sex panic)[98] are examples of sticky messaging. These are snappy phrases that have emotional appeal and are amplified through various mediums by key messengers whose purpose is to cement the message.[99]

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91. Klocke & Muschert, *supra* note 42, at 302 tbl.3.

92. *See infra* Part I.A (describing the importance of cultivation in the development of a moral panic).

93. *See infra* Part I.A.

94. Carpenter, *supra* note 10, at 1.

95. CHIP HEATH & DAN HEATH, MADE TO STICK: WHY SOME IDEAS SURVIVE AND OTHERS DIE 25–201 (hardcover ed. 2008); *cf.* Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 BUFF. L. REV. 1, 22 n.111 (2010) (reporting on commercial and entertainment messages that had the power to stick).

96. HEATH & HEATH, *supra* note 95 (offering six principles to explain why some ideas "stick"); *cf.* Carpenter, *supra* note 95, at 21–34 (examining trends in criminal law that using the six principles from Heath & Heath's *Made to Stick*).

97. *See supra* notes 52–57 and accompanying text.

98. *See supra* note 40 (outlining the genesis of the term).

99. *See* HEATH & HEATH, *supra* note 95, at 14–24 (providing an innovative way to look at successful

ii. Operation

Operation aptly depicts the realization of the alleged conflict, which is generally a triggering episode magnified across mediums and followed in its wake by new laws designed to address the societal threat.[100] Professors Klocke and Muschert elaborate on the operation of a panic: "Agents of social control and action groups mobilize financial and human resources to take corrective legislative, civic, and law enforcement measures against the new threat."[101] This phase of operation is aptly termed *regulation*, which is defined as governmental action that manages the threat by surveillance, mobilization of resources & agencies, and institutionalization.[102] Institutionalization is the formalization of the operation through the passage of new laws and sanctions.[103]

We have witnessed social movements that sprung from the tragic and unspeakable deaths of children, deaths which galvanized the nation to act.[104] Consider the passage of Three Strikes Laws arising from the horrific kidnapping and murder of Polly Klass by Richard Allen Davis, a man with numerous prior arrests and convictions.[105] Stricter drunk driving laws also were enacted in part because of the death of Candy Lightner's thirteen-year-old daughter, which was caused by a drunk driver.[106] Finally, registration and notification schemes were passed because of the murders of Jacob Wetterling and Megan Kanka (and in Megan's case, at the hand of a prior offender).[107]

To be sure, not all social movements are instrumental cogs in a panic. Stricter drunk driving laws, for example, positively influenced social practices, including the

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messaging); *see also* Zachary B. Wolf, *The 5 Key Elements of Trump's Big Lie and How It Came To Be*, CNN POL. (May 19, 2021, 7:17 PM) https://www.cnn.com/2021/05/19/politics/donald-trump-big-lie-explainer/index.html [https://perma.cc/Q3H4-U8FN].

100. Klocke & Muschert, *supra* note 42, at 302 tbl.3.

101. *Id.* at 304.

102. *Id.* at 302 tbl.3.

103. *Id.*

104. *See* Carpenter, *supra* note 95, at 13–22 (showcasing the social movements that arose as a result of the deaths of children that captured national attention and their effect on the passage of legislation).

105. *Richard Allen Davis' Life of Crime*, SFGATE (Aug. 6, 1996), https://www.sfgate.com/crime/article/RICHARD-ALLEN-DAVIS-LIFE-OF-CRIME-2971897.php [https://perma.cc/HQF8-8EW6] (detailing numerous arrests and convictions from the 1960s, when he was just twelve years old through the 1990s right before his kidnap and murder of Polly Klaas).

106. For an examination of the impact of Candy Lightner and the organization she founded, Mothers Against Drunk Driving (MADD), see Tracey B. Carter, *Drunk Drivers are a Moving Time Bomb: Should States Impose Liability on Both Social Hosts and Commercial Establishments Whose Intoxicated Guests and Patrons Subsequently Cause Injuries or Death to Innocent Third Parties?*, 49 CAP. U. L. REV. 385, 387 (2021) ("1980 was the year 'where one mom started a movement that would significantly change the course of history in the United States.'").

107. Carpenter & Beverlin, *supra* note 10, at 1076–77 (2012) (describing the creation of registration and notification schemes triggered by the deaths of Jacob Wetterling and Megan Kanka).

rise of ridesharing[108] and changes to the business practice of the "three martini lunch."[109] In fact, our emerging social awareness of the tragedy of drunk driving deaths may have impacted the California Supreme Court's decision in *People v. Watson*, which allowed for the first time a murder charge to proceed in a drunk driving death.[110] That shift in attitude was seismic. Previously, lower courts in California had dismissed drunk-driving murder indictment in favor of the well-established charge of manslaughter.[111]

But did a similar positive outcome result from the passage of California's Three-Strikes law,[112] which was heralded as the toughest in the nation?[113] The effort to enact harsher laws for repeat offenders was not surprising given the extensive criminal profile of the man who had committed the kidnapping and brutal murder of Polly Klaas.

Yet, despite widespread appeal at enactment, its aftermath reveals a different story: California's Three Strikes Law has never been accepted by either scholars or law enforcement. Although the U.S. Supreme Court upheld its passage in two 5-4, opinions,[114] scholars have railed against the extremely harsh and reactionary law[115] and sociologists protest that, based on empirical evidence, the law does not reduce crime.[116] So disliked is the policy that those responsible for its enforcement have

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108. Michelle Cheng, *Ride Sharing Reduced US Drunk Driving Deaths by 6%*, QUARTZ (July 27, 2021), https://qz.com/2038153/drunk-driving-deaths-dropped-as-more-americans-used-uber/#:~:text=Is%20Ubering%20the%20best%20way%20to%20end%20drunk%20driving%3F&text=%EF%BB%BFAbout%20one%2Dthird%20of,according%20to%20a%20new%20study [https://perma.cc/WA6V-FSYB] (last updated July 20, 2022) (citing the work of researchers who found that the practice of ride-sharing has a positive impact on the reduction in drunk driving deaths).

109. Mike Drummond, *What Ever Happened to the 3 Martini Lunch?*, HOTEL ONLINE (Mar. 14, 2005), https://www.hotel-online.com/News/PR2005_1st/Mar05_MartiniLunch.html [https://perma.cc/7TKQ-84ZY] (reporting a diner's comment, "I can't remember the last time I saw business people having martinis at lunch").

110. 637 P.2d 279 (Cal. 1981), *superseded by statute*, Act of Sept. 30, 1990, § 1(d), 1990 Cal. Stat. 8120, 8122 (codified as amended at CAL. PENAL CODE § 191.5(e) (West 2014)).

111. *Id.* at 281–82.

112. *See* CAL. PENAL CODE § 1210.1 (West 2022).

113. *E.g.*, Riggs v. California, 525 U.S. 1114, 1115 (1999) ("California appears to be the only State in which a misdemeanor could receive . . . a [Three Strikes] sentence."); Ramirez v. Castro, 365 F.3d 755, 772 (9th Cir. 2004) ("At the outset, we note that the State concedes 'the statute . . . is the most stringent in the nation.'"). Petty crimes are at the center of the controversial statute. *See, e.g.*, Ewing v. California, 538 U.S. 11 (2003) (approving life sentence for the theft of golf clubs); Lockyer v. Andrade, 538 U.S. 63 (2003) (affirming life sentences for stealing videotapes); People v. Barrera, 82 Cal. Rptr. 2d 755 (Cal. Ct. App. 1999) (triggering life sentence for forging a check).

114. *Ewing*, 538 U.S. 11; *Lockyer*, 538 U.S. 63.

115. *E.g.*, Erwin Chemerinsky, *Cruel and Unusual: The Story of Leandro Andrade*, 52 DRAKE L. REV. 1, 4 (2003) ("My thesis is a simple one: It is cruel and unusual punishment . . . to sentence a person to life in prison for committing a minor offense.").

116. *E.g.*, Zimring & Kamin, *supra* note 47, at 605–06 (offering strong rebuttal to a published article on why their landmark monograph, *Crime & Punishment*, correctly analyzed the lack of contribution three strikes laws made to crime in California); Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 103 (1998) ("[I]t would be unrealistic

attempted to engage in workarounds to ameliorate its harshness.[117]

Think panicked legislation that is never overturned.

During the operation of a moral panic, it is not only the legislature that feels compelled to act. The public also assumes a personal sense of responsibility to remain vigilant against the imposing threat. Through acts of condemnation,[118] the public partners with the government to protect the community.[119] Efforts to shame the offender is what Lancaster decries as "poisoned solidarity" or "mutual suspicion."[120] Not surprising, incidents of violence and vigilantism against the targeted group rise during the period of operation.[121]

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to expect Three Strikes laws to reduce the crime rate significantly.").

117. *See* Greg Krikorian, *Three–Strikes Law Has Little Effect, Study Says*, L.A. TIMES (Mar. 5, 2004, 12:00 AM), https://www.latimes.com/archives/la-xpm-2004-mar-05-me-strikes5-story.html [http://web.archive.org/web/20210227070019/https://www.latimes.com/archives/la-xpm-2004-mar-05-me-strikes5-story.html] (observing that then-District Attorney Steve Cooley "declined to prosecute most nonviolent offenses and lesser drug charges as third strikes," even though "Los Angeles County generates approximately 40% of the three-strikes cases in the state"); *Prosecutors Craft Juvenile Three-Strikes Legislation*, L.A. CTY. DIST. ATT'Y'S OFF. (May 5, 2021), https://da.lacounty.gov/about/inside-lada/3strikes-bill [https://perma.cc/4DGV-9GN6] (describing efforts to pass Assembly Bill 1127, which "would allow people to petition the court for resentencing if their prior juvenile adjudication was used to enhance an adult felony conviction"); *see also LA DA Ending Three Strikes Allegations Illegal? Prosecutors Sue Over Easing of Sentencing by Gascon*, MYNEWSLA, (Dec. 30, 2020), https://mynewsla.com/crime/2020/12/30/la-da-ending-three-strikes-allegations-illegal-prosecutors-sue-over-easing-of-sentencing-by-gascon/ [https://perma.cc/8QV6-K62M]. *But see* Eric Leonard, *Appeals Court Orders LA County DA Gascon to Enforce Three Strikes, Special Circumstances*, MSN (June 2, 2022), https://www.msn.com/en-us/news/crime/appeals-court-orders-la-county-da-gasc%C3%B3n-to-enforce-three-strikes-special-circumstances/ar-AAY19oG#:~:text=A%20three%20justice%20panel%20of%20the%20California%20Appeals,sentences%20of%20life%20without%20the%20possibility% [https://perma.cc/9EVK-YS2G].

118. *See, e.g.*, Smith v. Doe, 538 U.S. 84, 99 (2003) ("It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times."); *see also* Young v. State, 806 A.2d 233, 249 (Md. 2002) ("Being labeled as a sexual offender within the community can be highly stigmatizing and can carry the potential for social ostracism."). The *Young* test was partially superseded by amendments to Maryland's sex offender legislation. *See In re* Nick H., 123 A.3d 229, 239–40 (Md. Ct. Spec. App. 2015).

119. For an interesting look at shaming, see Michael Lavi, *The Good, The Bad, and The Ugly Behavior*, 40 CARDOZO L. REV. 2597 (2019).

120. LANCASTER, *supra* note 5, at 21. *See generally* Toni M. Massaro, *The Meanings of Shame Implications for Legal Reform*, 3 PSYCH. PUB. POL'Y & L. 645, 673–682 (1997) (offering an excellent review of the rise of public shaming).

121. *See* Mitchell Carter et al., *Man Shows No Remorse for Fatally Shooting Registered Sex Offender, Deputies Say*, 11NEWS (July 29, 2022, 5:38 PM), https://www.kktv.com/2022/07/29/man-shows-no-remorse-fatally-shooting-registered-sex-offender-deputies-say [https://perma.cc/4VSU-F6GF]; *see also* Carpenter, *supra* note 10, at 23–24 (recounting other incidents of violence against registrants or those believed to have committed sex offenses).

iii. Dissipation

After cultivation and operation, the last phase in the arc, dissipation, refers to the "receding of a [moral panic] from the public limelight."[122] Dissipation occurs either because a new normal has developed or else systemic changes have taken place to support or to counter the societal threat.[123] True, dissipation could result from successful challenges by experts, investigative journalists, or a successful counter-social movement,[124] but in the case of the sex panic, this has not occurred. Neither has the public's vitriol dissipated despite Goode's and Ben-Yehuda's claim that "the fever pitch" of a panic is not sustainable.[125]

Although the term "dissipation" implies that a moral panic ultimately vanishes, a lingering and negative impact is left in its wake, nonetheless. Here, Klocke's and Muschert's admonition of a panic's "cultural and institutional legacy" is most profound. Moral panics often create a permanent change in the public discourse concerning the societal threat. In colloquial terms, it is difficult for the public to put the genie back in the bottle.[126]

2. Key Actors

Essential to a moral panic are the messengers who shape the story and who have access to the public with a platform to spread the word.[127] It takes more than the moral entrepreneurs like Professor John DiLulio to promote a panic.[128] In the sex panic, key actors including the media, politicians, and judiciary have all been instrumental in propagating the panic. With nearly identical messaging, they reinforce one another in an escalating and disproportionate concern over a perceived social threat.[129]

The sex panic, like the panic involving teen violence, has had its share of

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122. Klocke & Muschert, *supra* note 42, at 302 tbl.3.

123. *Id.*

124. *Id.* at 305.

125. Goode & Ben-Yehuda, *supra* note 78, at 158.

126. Whether one can put the genie back in the bottle is evident in the debate on whether to abolish registration and notification. *See, e.g.*, ReasonTV, *Should We Abolish the Sex Offender Registry? A Debate*, YOUTUBE (Feb. 26, 2018), https://www.youtube.com/watch?v=SIt7-GcvLGk [https://web.archive.org/web/20221208054243/https://www.youtube.com/watch?v=SIt7-GcvLGk].

127. *See* MALCOLM GLADWELL, THE TIPPING POINT 33 (2000) (emphasizing the importance of those influential in spreading the message); *see also* Carpenter, *supra* note 95, at 10–21 (analyzing key messengers who promoted specific criminal legislation). In the case of the "Big Lie," see Wire, *supra* note 54 (describing key players who worked for weeks before and after the election to craft the message that the election had been stolen).

128. *See generally infra* Section I.B.1.

129. *See* JENKINS, *supra* note 26, at 6–7 (1998) (observing that the media and politicians frame the perceived danger with identical language and messages).

messengers to spread false assumptions of stranger danger[130] and high recidivism rates.[131] Those intent on provocation draw upon what Klocke and Muschert call "atrocity tales" to portray the behavior of the perpetrators as something that is innately evil and immutable.[132] Consider the Nebraska state legislator who said that "he did not 'buy' the idea of 'rehabilitation' or that 'people could change . . . [i]n [this] area.'"[133] Consider also the comments of U.S. Representative Ric Keller, a Republican congressman from Florida: "The best way to protect children is to keep child predators locked up in the first place, because someone who has molested a child will do it again and again and again."[134]

Political actors also understand that fear sells.[135] California State Assemblyman Bill Hoge's message of fear devoid of facts is a prime example: "What we're up against is the kind of criminal who, just as soon as he gets out of jail, will immediately commit this crime again at least 90 percent of the time . . . ."[136] Critical of the fear messaging, one journalist wrote, "Despite child sexual abuse declining by 60% between 1992 and 2010, states continue[d] to legislate as if lenient sex offender laws

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130. *See infra* Section I.B (debunking the "stranger danger" myth).

131. *See* JUST. POL'Y INST., *supra* note 38, at 12 (quoting then-Attorney General of Florida, Charlie Crist, who stated, "The experts tell us that someone who has molested a child will do it again and again"); STAFF OF S. COMM. ON PUB. SAFETY, REP. ON AB 1844, S. 2009-2010, Reg. Sess., at 22 (Cal. Comm. Print 2010) (quoting then-District Attorney of San Diego County, Bonnie Dumanis, who claimed that "[u]nlike other criminals, in many cases, sex offenders cannot be rehabilitated," so Chelsea's Law was necessary to "make sure these are the offenders that will be housed in prison until they die"); Emma Coleman, *Another State to Consider Chemical Castration for Sex Offenders*, ROUTEFIFTY (Jan. 6, 2020), https://www.route-fifty.com/public-safety/2020/01/chemical-castration-tennessee/162241/ [https://perma.cc/T58C-2FFL] (referencing Tennessee House of Representatives Rep. Bruce Griffey's statement that "[i]t seems like there's something wrong with their wiring and those urges to have sex with children never go away").

132. Klocke & Muschert, *supra* note 42, at 303.

133. *See* Doe v. Nebraska, 734 F. Supp. 2d 882, 898 (D. Neb. 2010) (alteration in original) (quoting Exhibit 2 to Affidavit in Support of Defendant's Motion for Summary Judgment at 15 [hereinafter Exhibit 2], *Doe*, 734 F. Supp. 2d 882 (Nos. 8:09-cv-00456, 4:09-cv-03266, 4:10-cv-03004, 4:10-cv-03005)); *see also id.* (recounting that the sponsoring legislator to Nebraska's expanded sex offender laws "expressed 'rage' and 'revulsion' regarding persons who have 'these convictions'" (quoting Exhibit 2, *supra*, at 4, 15)).

134. JUST. POL'Y INST., *supra* note 38, at 12 (detailing comments of then-U.S. Representative Ric Keller, who represented Florida as a Republican).

135. *See, e.g.*, 154 CONG. REC. S10300 (daily ed. Oct. 1, 2008) (statement of Sen. Chuck Schumer) ("[S]ocial networking web sites . . . [are] potential hotbeds for sexual predators, who can easily camouflage themselves amidst the throng of users on these sites, while furtively pursuing their own despicable designs."); Candace Carpenter, *Halloween Sex Offender Bill Approved by Senate; Protects Children From Higher Levels of Sex Offenders*, ACTIONNEWS5 (Jan. 24, 2019, 6:35 PM), https://www.actionnews5.com/2019/01/25/halloween-sex-offender-bill-approved-by-senate-protects-children-higher-levels-sex-offenders/ [https://perma.cc/SDF7-GWPT] ("'You know Halloween is such a fun night, kids going house to house,' [Arkansas state Senator Trent] Garner said. 'It's a specially susceptible time for them to be harmed, let's make sure we protect them from the real monsters.'").

136. B. Drummond Ayres, Jr., *California Child Molesters Face 'Chemical Castration,'* N.Y. TIMES (Aug. 27, 1996), https://www.nytimes.com/1996/08/27/us/california-child-molesters-face-chemical-castration.html [https://web.archive.org/web/20221016220908/https://www.nytimes.com/1996/08/27/us/california-child-molesters-face-chemical-castration.html].

are a national emergency."[137] Of course, dramatic oversell by politicians is not a new strategy. In 1922, H.L. Mencken mused, "The whole aim of practical politics is to keep the populace alarmed (and hence clamorous to be led to safety) by an endless series of hobgoblins, most of them imaginary."[138]

Supporting populist legislation through an inflated sense of risk is beneficial to the political actor. Professor Jonathan Simon highlighted this truth when he wrote, "The politicians, bolstered by what is taken to be nearly universal public support [for registration laws], compete to propose ever more severe responses to criminal behavior."[139] And compete they do, as communities are pitted against each other to create increasingly harsh registration and residency laws to chill registrants from moving to their jurisdictions.[140]

Even the confirmation hearings for U.S. Supreme Court nominees are not immune from senators peddling sex panic rhetoric. As recently as 2022, the Supreme Court confirmation hearings for Justice Ketanji Brown Jackson provided a backdrop to inflammatory and false messaging designed to fuel fear and promote the sex panic.[141]

Although politicians play a significant role, it is the media that dominates since Stanley Cohen first began to study panics.[142] Its presence, made pervasive by

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137. Hobbes, *supra* note 14 (extorting the fact that lawmakers are using the myth of stranger danger to maintain a panic over those who commit sex offenses); *see also* Michael O'Hear, *Managing the Risk of Violent Recidivism: Lessons from Legal Responses to Sexual Offenses*, 100 B.U. L. REV. 133, 144–45 (2020) (acknowledging several myths associated with the perception of a sex offender).

138. *H.L. Mencken: Quotes: Quotable Quotes*, GOODREADS, https://www.goodreads.com/quotes/34764-the-whole-aim-of-practical-politics-is-to-keep-the [https://perma.cc/EN3N-FNL6].

139. Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCH. PUB. POL'Y & L. 452, 455 (1998); *see also* LANCASTER, *supra* note 5, at 3 (quoting an interviewee to *The New York Times*, who said, "No one gets elected in Sacramento without a platform that says, 'Let's get rid of rapist, pedophiles and murderers'").

140. For the impact of the competition model, see Yung, *supra* note 5, at 149, which contends that "the amount of real estate available to sex offenders will continue to decrease and more sex offender communities will emerge." As an example, see *In re Taylor*, where the California Supreme Court concluded that the map of San Diego "graphically show[s] huge swaths of urban and suburban San Diego, including virtually all of the downtown area, completely consumed by the [residency] restrictions." 343 P.3d 867, 873 (Cal. 2015) (alteration in original).

141. Zachary B. Wolf, *The Focus on Child Pornography in Confirmation Hearings Is Not What Republicans Promised*, CNN POL. (Mar. 23, 2022, 5:32 PM), https://www.cnn.com/2022/03/23/politics/ketanji-brown-jackson-hearing-gop-what-matters/index.html [https://perma.cc/P7SH-DNUU] (reporting that "[w]hat [Republican senators] ended up focusing on, more than anything else, was child pornography and pushing the false notion that Jackson is sympathetic to people who consume it"). For reporting on the false assertions leveled against those who commit sex offenses, see Devin Dwyer, *Fact Check: Judge Ketanji Brown Jackson Child Porn Sentences 'Pretty Mainstream,'* ABCNEWS (Mar. 21, 2022, 9:02 PM), https://abcnews.go.com/Politics/fact-check-judge-ketanji-brown-jackson-child-porn/story?id=83565833 [https://perma.cc/M9J5-C2Y3], where the author writes that Justice Jackson's confirmation hearings started "amid a flurry of misleading allegations by Republican Sen. Josh Hawley."

142. *See* Klocke & Muschert, *supra* note 42, at 300 (considering the expanded role of the media since panics were first studied).

instantaneous messaging and the twenty-four-hour news cycle, lends special weight to the public's receipt of its message and messaging.[143] In this way, Klocke and Muschert recognized that the "complexity and intensity of the interaction of news media production and audience reception dynamics have increased."[144] Lawmakers, as well, have acknowledged that their actions have been greatly informed by media reports.[145]

We know that the media's messaging matters. "Stop the Steal" is an excellent example. Not only were allegations leveled at government officials who perpetrated the lie of a stolen election, some complained that Fox News played an influential role in promulgating the falsehood, both by their on -air rhetoric and by their refusal to air most of the January 6th hearings.[146]

The media's role in stoking the sex panic can be traced back to its showcase of high-profile sexual assault cases by strangers.[147] Professors Heather Cucolo and Michael Perlin recognized the power of the media to frame the conversation when they argued that "we cannot discuss our national obsession with sexual offenses or offenders without considering how the role of the media has framed our conceptualizations of offenders and influenced resulting legal decisions and legislation."[148]

Although sensational and harrowing, concentration on stranger sexual assault distorts the true data because most sexual harm is committed by someone known to the victim.[149] But, as we have come to appreciate, images of stranger assaults have been burned into our memories, and the role these memories play cannot be underestimated. Under a theory of "availability heuristics," which causes people to overestimate the frequency of an event,[150] media saturation of these events leads the public

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143. *Id.*

144. *Id.* at 301.

145. *See* Lisa L. Sample & Colleen Kadleck, *Sex Offender Laws: Legislators' Accounts of the Need for Policy*, 19 CRIM. JUST. POL'Y REV. 40, 57 (2008).

146. *See, e.g.*, Eugene Robinson, *Trump and Fox News Told the 'Big Lie' for Profit*, WASH. POST (June 13, 2022, 4:43 PM), https://www.washingtonpost.com/opinions/2022/06/13/trump-and-fox-news-told-the-big-lie-for-profit/ [https://web.archive.org/web/20221028000123/https://www.washingtonpost.com/opinions/2022/06/13/trump-and-fox-news-told-the-big-lie-for-profit/] (charging that Fox News "repeatedly welcomed Giuliani and other Trump-cult liars to its airwaves"); Chris Cillizza, *Liz Cheney Blasted Fox News for the Big Lie . . . on Fox News*, CNN POL. (May 14, 2021, 5:30 PM), https://www.cnn.com/2021/05/14/politics/liz-cheney-fox-news-big-lie/index.html [https://perma.cc/9HJ3-33NS] (reporting that Liz Cheney told Fox News anchor Baier, "You are a big part of the problem. No, I'm not talking about former President Donald Trump. I am talking about Fox News"); Jeremy W. Peters, *Fox News Will Not Carry Thursday's Jan. 6 Hearing Live*, N.Y. TIMES (July 21, 2022), https://www.nytimes.com/2022/07/21/technology/fox-jan-6-hearing.html [https://web.archive.org/web/20221013190951/https://www.nytimes.com/2022/07/21/technology/fox-jan-6-hearing.html].

147. *See* Klocke & Muschert, *supra* note 42, at 300; *see also infra* Section I.B (illuminating the stranger danger myth).

148. Heather E. Cucolo & Michael L. Perlin, *"They're Planting Stories in the Press:" The Impact of Medial Distortions on Sex Offender Law and Policy*, 3 U. DENV. CRIM. L. REV. 185, 186 (2013).

149. *See infra* Section I.B.

150. *See* David Pimentel, *Fearing the Bogeyman: How the Legal System's Overreaction to Perceived Danger*

to believe erroneously that stranger sexual harm is pervasive and inescapable.[151] Good lawmaking suffers as risks are inflated by false notions of recurrence.[152]

Television plays an important role as well in fixing these images. As Professors Daniel LaChance and Paul Kaplan reported, reality shows have played an instrumental role in cementing the image of the irredeemable offender.[153] Shows like *To Catch a Predator*, the authors argued, confirms the shift to the dominance of self-control where "those who fail to govern themselves are demonized, punished, and socially excluded."[154]

3. Language and Labels

If messaging matters, then inflammatory language plays a starring role in the operation of a panic. Indeed, "framing of a [moral panic] will usually involve provocative language to describe the deviance or its impacts."[155] In particular, the sex panic has given license to politicians to employ language rarely seen or reserved for others who have committed crime. Language like "pond scum predators,"[156] "monsters,"[157] "animals,"[158] and "sick predators"[159] fill congressional and state records.

Where provocatory language is used to vilify a targeted group, labels do the heavy lifting. Generally, labels serve a valuable purpose in how we navigate our daily lives and how we converse with others. A label is, after all, effective and efficient; a label is a quick soundbite to distill a more complex set of heterogenous elements. It is also, as one scholar notes, "the 'primary and perhaps indispensable'

Threatens Families and Children, 42 PEPP. L. REV. 235, 252–53 (2015).

151. For an excellent discussion of the media's role in creating an alarming picture, see Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006).

152. *See* Elena Kantorowicz-Reznichenko, Any-where, Any-time*: Ambiguity and the Perceived Probability of Apprehension*, 84 UMKC L. REV. 27, 44–47 (2015) (examining "availability heuristics" from an economic perspective).

153. Daniel LaChance & Paul Kaplan, *The Seductions of Crimesploitation: The Apprehension of Sex Offenders on Primetime Television*, 15 LAW CULTURE & HUMANS. 127, 128 n.1 (2019) (describing "crimesploitation" as a "genre of reality television that exploits folk knowledge about crime to make profits for media corporations").

154. *Id.* at 128.

155. Klocke & Muschert, *supra* note 42, at 300; *see also* Giulia Lowe & Gwenda Willis, *"Sex Offender" Versus "Person": The Influence of Labels on Willingness to Volunteer with People Who Have Sexually Abused*, 32 SEXUAL ABUSE 591, 592, 594 (2020) (noting that in some regions those who commit sex offenses are called "beasts" or "predators," and suggesting that even those in academia supportive of registrants misuse the label of "sex offender" with unintended and negative consequences).

156. 152 CONG. REC. 2978 (2006) (statement of Rep. Virginia Brown-Waite).

157. *Id.* at 15717 (statement of Rep. John Phillip Gingrey).

158. House Bills on Sexual Crimes Against Children: Hearing on H.R. 764, H.R. 95, H.R. 1355, H.R. 1505, H.R. 2423, H.R. 244, H.R. 2796, and H.R. 2797 Before the H. Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary, 109th Cong. 6 (2005) (statement of Rep. Mark Foley).

159. 162 CONG. REC. 921 (2016) (statement of Rep. Ann Wagner).

means by which people create, comprehend, and express social boundaries."[160]

In the sex panic, however, labels take on added significance. It has become so commonplace to use identifying and generalized labels for those who have committed sex crimes that such labels have seeped into the lexicon without sufficient attention. Only in sex crimes is there a "shift from being persons convicted of certain acts to becoming permanent carriers of an inherently degraded status."[161]

The shift in labeling is not accidental. People may drive drunk or steal, but those who commit sex offenses are permanently marked by the label "sex-offender." The Pennsylvania Court of Common Pleas in *Commonwealth v. Torsilieri* crystalized the distinction we have wrought on those who have committed sex offenses:

> We do not place murderers on a registry, nor do we place offenders such as those convicted of Aggravated Assault or other violent crimes on a registry, regardless of how many times or how egregiously they offend. No matter what their propensity for violence may be, we do not label them or publish to the world that they are at "high risk" of committing additional violent offenses.[162]

Harmful labels like "sex offender,"[163] "sexual predator,"[164] and "sexually violent predator"[165] stick like crazy glue. Their adherence is permanent, *no matter the illegitimacy of the label.*[166] Implicit in the label is the judgment of deviancy of the person and not a comment on the offender's act.[167]

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160. Bernardo M. Velasco, Note, *Who are the Real Refugees? Labels as Evidence of a "Particular Social Group,"* 59 ARIZ. L. REV. 235, 253 (2019) (recognizing the value of labels to define a social group).

161. Walker, *supra* note 4, at 185. Aware of the damaging nature of labels, the Sexual Abuse Board has recommended person-first language. *See* Gwenda M. Willis & Elizabeth J. Letourneau, *Promoting Accurate and Respectful Language to Describe Individuals and Groups*, 30 SEXUAL ABUSE 480 (2018).

162. Commonwealth v. Torsilieri (*Torsilieri II*), No. 15-CR-0001570-2016, slip. op. at 4 (Pa. Ct. Com. Pl. Aug. 22, 2022).

163. Sex Offender Registration and Notification Act, Pub. L. No. 109–248, 120 Stat. 590 (codified as amended at 34 U.S.C. §§ 20901–20962 (2018)).

164. The Sexual Predator Punishment and Control Act: Jessica's Law, 2006 Cal. Stat. A–299 (codified as amended in scattered sections of CAL. PENAL CODE and CAL. WELF. & INST. CODE).

165. CAL. WELF. & INST. CODE § 6600(a)(1) (West 2022) (defining "sexually violent predator" for the purposes of Jessica's Law).

166. *See generally* Andrew J. Harris & Kelly M. Socia, *What's in a Name? Evaluating the Effects of the "Sex Offender" Label on Public Opinion and Beliefs*, 28 SEX ABUSE: J. RSCH. & TREATMENT 660, 661 (2016) (rejecting the view that offenders are a "homogeneous population"). Courts have long recognized the permanent damage these labels have. *See, e.g.*, Ray v. State, 982 P.2d 931, 936 (Idaho 1999) ("[R]egistration brings notoriety to a person convicted of a sexual offense [and] does prolong the stigma attached to such convictions."), *abrogated by* Padilla v. Kentucky, 559 U.S. 356 (2010); Doe v. Pryor, 61 F. Supp. 2d 1224, 1231 (M.D. Ala. 1999) ("[C]ommunity notification under the Act will seriously damage [the plaintiff-registrant's] reputation and standing in the community.").

167. Chiricos et. al., *The Labeling of Convicted Felons & Its Consequences for Recidivism*, 45 CRIMINOLOGY 547 (2007) (demonstrating that a person being labeled a "convicted felon" dramatically increases recidivism

Pause for a moment on the inappropriateness of the term "sex offender" and its application to the following cases. Consider the label affixed to the following persons: a fourteen-year-old boy who had voluntary sexual intercourse with his soon to be thirteen-year-old girlfriend,[168] two fourteen-year-old boys who engaged in a sexual battery (or prank depending on one's viewpoint) of two twelve-year-old boys and who now must register for life,[169] those who committed non -sexual offenses,[170] and those who committed a single sex offense decades ago never to sexually reoffend.[171]

Indeed, a label has the effect of reducing all who commit a sex offense to a singular description. And no doubt, this was its intent. *Ideal Victims and Monstrous Offenders*, for example, which traced the public conversation around sex offenses in the *L.A. Times* from 1990 through 2015, found that that the term "sexual predator" was used to describe all those who commit sexual offenses, regardless of whether their offenses were violent, or their behavior was predatory.[172] The roughly drawn grouping of all who commit sex offenses into one category invites criticism that the registration regime is overinclusive, or that a one-size-fits-all approach that is not rationally connected to its legislative goals.[173]

This is the central concern of Professors Andrew Harris and Kelly Socia: the term "sex offender," or in this case "sexual predator," implies a homogeneity of factors that is neither appropriate nor applicable.[174] In their article on the adverse effect of the term "sex offender," Harris and Socia wrote that although it is intended to be "a value-neutral descriptor, the term [sex offender] is laden with connotations and beliefs promulgated and reinforced through media and public policy narratives."[175]

The inability to engage in nuanced language and reasoning runs counter to our recognition of their importance in analyzing and implementing the rule of law. Even the U.S. Supreme Court in its landmark decision in *Smith v. Doe* made a sweeping generalization when it stated, "The [Alaska] legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and

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across disparate population groups).

168. *See, e.g.*, People *ex. rel.* J.L., 800 N.W.2d 720, 721 (S.D. 2011).

169. *See, e.g.*, State *ex rel.* B.P.C., 23 A.3d 937 (N.J. Super. Ct. App. Div. 2011).

170. *See, e.g.*, Dewalt v. State, 426 S.W.3d 100, 100–01 (Tex. Crim. App. 2014) (requiring registration as a sex offender for a mother who fled to Mexico with her child following her loss in a custody battle); *cf.* Commonwealth v. Torsilieri (*Torsilieri II*), No. 15-CR-0001570-2016, slip op. at 5 (Pa. Ct. Com. Pl. Aug. 22, 2022) (denouncing the inclusion of non-sexual offenses in Pennsylvania's registration scheme).

171. *See, e.g.*, Weisart v. Stewart, 665 S.E.2d 187 (S.C. Ct. App. 2008) (requiring registration for an offense of skinny dipping committed years earlier).

172. Rebecca A. DiBennardo, Ideal Victims and Monstrous Offenders: How the News Media Represent Sexual Predators, 4 SOCIUS: SOCIO. RSCH. FOR DYNAMIC WORLD 1 (2008).

173. *Id.* at 16.

174. Harris & Socia, *supra* note 166, at 664.

175. *Id.* at 661. For a comment on the use of identity-based labels in academic literature, see Lowe & Willis, *supra* note 155, at 594, which notes that even those in academia supportive of registrants misuse the label "sex offender" with unintended and negative consequences.

their dangerousness *as a class*. The risk of recidivism posed by sex offenders is 'frightening and high.'"[176]

Inherent in the Court's use of the words "as a class" is what has been characterized as the "myth of homogeneity." Its inaccuracy leads to damage consequential and far-reaching.[177] Painting all who commit sex offenses as dangerous, no matter their crime, circumstances, or age leads to policies that bar registrants from the opportunity to reintegrate successfully or be afforded the same opportunities as other felons. In an earlier piece, *All Except For*, I examined the blanket exclusions from all criminal justice reform efforts registrants suffer—the benefits and opportunities they have been denied because of their presumed status.[178] The impact is real and deleterious.

Given a moral panic's provocative language and its stickiness of the messaging, it is no wonder that panics stimulate reactionary and irrational responses.[179] The landscape is replete with oversized and absurd responses by an over-hyped public to children engaged in play[180] and to unknown adults in one's community who are involved in law-abiding activities.[181]

State courts are not exempt. In a shift of focus, the reason of which is not readily clear, courts have deferred to legislative decisions to broaden registration where the

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176. 538 U.S. 84, 103 (2003) (emphasis added) (quoting McKune v. Lile, 536 U.S. 24, 34 (2002)).

177. See Brief of 17 Scholars Who Study Sex Offenses as Amici Curiae in Support of Appellees and Supporting Affirmance at 4, Millard v. Camper, 971 F.3d 1174 (10th Cir. 2020) (No. 17-1333), 2018 WL 3693887, at *4 (raising important distinctions for purposes of assessing dangerousness among those who have committed sex offenses).

178. Carpenter, *supra* note 10. For a deep dive into the criminal justice reform initiatives to which registrants are not entitled, see *id.* at 9–17.

179. *See* Mary de Young, *The Devil Goes to Day Care: McMartin and the Making of a Moral Panic*, 20 J. AM CULTURE, Spring 1997, at 19, 22–23 (reporting on the frenzied reaction to claims that a prestigious daycare center was a center for predators); Noah Caldwell et al., *America's Satanic Panic Returns—This Time Through QAnon*, NPR (May 18, 2021, 5:00 PM), https://www.npr.org/2021/05/18/997559036/americas-satanic-panic-returns-this-time-through-qanon [https://perma.cc/9MKX-XQ7V] (describing the fear that Democratic politicians lead a "shadowy cabal" who use satanic rituals).

180. *See* Jonathan Turley, *Family Sues Wisconsin Prosecutor After She Charges 6-Year-Old Boy with First-Degree Sexual Assault After "Playing Doctor*,*"* JONATHAN TURLEY (Nov. 25, 2011), https://jonathanturley.org/2011/11/25/family-sues-wisconsin-prosecutor-after-she-charges-6-year-old-boy-with-first-degree-sexual-assault-after-playing-doctor/ [https://perma.cc/9MHY-46YF] (criticizing a prosecutor for charging a six-year-old for "fail[ing] to apply not just discretion but reason").

181. See LANCASTER, *supra* note 5, at 19–21 (detailing the story of Eric Haskett who was mistaken for someone out to harm the community for simply falling asleep in a parked car waiting to pick up his date); *see also* Fredrick Kunkle, *Caught in a Neighborhood Web Innocent Man Mistaken for Registered Offender*, WASH. POST (May 13, 2006), https://www.washingtonpost.com/archive/politics/2006/05/13/caught-in-a-neighborhood-web-span-classbankheadinnocent-man-mistaken-for-registered-offender-span/19cbb41c-ba88-417d-b077-b77b6e653066/ [https://web.archive.org/web/20220130152728/https://www.washingtonpost.com/archive/politics/2006/05/13/caught-in-a-neighborhood-web-span-classbankheadinnocent-man-mistaken-for-registered-offender-span/19cbb41c-ba88-417d-b077-b77b6e653066/] ("'Don't [mess] with suburbia, because we will chew you up and spit you out," said [one community] resident . . . ." (first alteration in original)).

underlying criminal act is not sexual.[182] The inclusion of non-sexual offenders in a registration regime is one of the hardest concepts for any lay audience to grasp when I make presentations around the country. Their addition symbolizes the overbreadth of panicked legislation that continues to grow unchecked. The trial court on remand in *Torsilieri* vividly called this practice an "overbroad suffocating net."[183]

Rainer v. State provides an excellent example of the legislature's overreach where no sexual motivation existed.[184] There, the Supreme Court of Georgia affirmed defendant's requirement to register for robbing and falsely imprisoning an underage female who sold him drugs.[185] The court rejected the argument that registration in non-sexual cases was over-inclusive, relying on the generalized trope that registration "advances the State's legitimate goal of informing the public for purposes of protecting children from those who would harm them."[186] The majority was in error, however, to offer this assertion. Registration schemes, initially, were never designed to protect children from *all* harm, only from harm "by those who have committed certain designated [sexual] offenses."[187]

Unfortunately, *Rainer* is not a one-off. Other courts have similarly supported legislative sweeps of non-sexual crimes into the growing body of registerable offenses.[188]

Think panicked legislation that is over-inclusive.

B. The Mythical Narrative

Moral panics need oxygen to thrive. Mythical narratives supply that much needed oxygen. A narrative may be compelling but that does not make it accurate. Endemic to all mythical narratives is the painting of stereotypic, but inaccurate attributes, of the perpetrator. Designed with one purpose, the mythical narrative pushes lawmakers and policymakers to advance heightened and reactionary responses to the

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182. See, e.g., Rainer v. State, 690 S.E.2d 827 (Ga. 2010) (affirming registration for robbery of underage female drug dealer); People v. Johnson, 870 N.E.2d 415 (Ill. 2007) (supporting legislation's automatic registration where victim is a minor despite lack of sexual motivation), superseded by statute, Child Murderer and Violent Offender Against Youth Registration Act, 2006 Ill. Laws 3273 (codified as amended at ch. 730 ILL. COMP. STAT. ANN. §§ 154/1–154/105 (West 2022)); Dewalt v. State, 426 S.W.3d 100 (Tex. Crim. App. 2014) (rejecting challenge where mother was convicted of kidnapping her own child following a custody battle that she lost).

183. Commonwealth v. Torsilieri (*Torsilieri II*), No. 15-CR-0001570-2016, slip op. at 5 (Pa. Ct. Com. Pl. Aug. 22, 2022), *on remand from Torsilieri I*, 232 A.3d 567 (Pa. 2020).

184. 690 S.E.2d at 827.

185. *Id.*

186. *Id.* at 829.

187. *Id.* at 831 (Hunstein, C.J., dissenting). Not all courts agree with the Supreme Court of Georgia. *See, e.g.*, State v. Robinson, 873 So. 2d 1205 (Fla. 2004) (overturning automatic sex offender registration where defendant stole a vehicle unaware it contained a child).

188. Millard, *supra* note 171.

alleged threat.[189] It paves the way for the panicked legislation that ensues.

1. Lessons from the 1990s: The Superpredator Juvenile

The 1990s's preoccupation with teens who committed crime offers valuable lessons in the aftermath of panicked legislation. Watching this moral panic unfold is to recognize the significance of a mythical narrative and the importance of its hold on legislators and policymakers. Although simplistic to report, it began with one man, who Professor Roger Lancaster called "a moral entrepreneur."[190] To a public disenchanted with what it perceived to be the weakness of the juvenile justice system, then-Princeton Professor John. J. DiLulio's message of teens out of control resonated with the community. Employing inflammatory language, Professor DiLulio coined a new term, *superpredators*, to describe juveniles as violent and law-breaking.[191] Professor DiLulio argued that "America is now home to thickening ranks of juvenile 'super-predators'—radically impulsive, brutally remorseless youngsters."[192]

Professor DiLulio's call to action initially appeared as a first-person account in *The Weekly Standard*.[193] In retrospect, it was not surprising that the term "super-predator" struck a nerve. Professor DiLulio's article included all the tropes of a mythical narrative: highly provocative and inflammatory language directed at a targeted group, specifically the teens of Philadelphia,[194] a call to government action,[195] false data to bolster the view that juvenile crime was rampant,[196] and individual stories that were intended to stoke the panic.[197]

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189. *See* Krauss et al., *supra* note 12, at 317 (identifying the mythical narrative as the factor that breathes life into the public support for the legislative reaction).

190. LANCASTER, *supra* note 5, at 14 (calling moral entrepreneurs "self-styled leaders of the movement"); *see also* Goode & Ben-Yehuda, *supra* note 78, at 154 (describing these key actors as "moral crusaders").

191. John DiLulio, *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995, 12:00 AM), https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators [https://perma.cc/KF2E-ATPH] (describing juveniles as "super crime-prone males").

192. *See* Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), http://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html [https://web.archive.org/web/20221208124536/http://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html].

193. DiLulio, *supra* note 191.

194. *Id.* ("They kill or maim on impulse without any intelligible motive . . . .").

195. *Id.* ("Americans are sitting atop a demographic crime bomb. And all of those who are closest to the problem hear the bomb ticking.").

196. *Id.* ("At a time when overall crime rates have been dropping, youth crime rates, especially for crimes of violence, have been soaring."). *But see* HOWARD N. SNYDER, U.S. DEP'T OF JUST., OFF. OF JUV. JUST. & DELINQUENCY PREVENTION, JUVENILE ARRESTS 2000, at 1 (2002), https://www.ojp.gov/pdffiles1/ojjdp/191729.pdf [https://perma.cc/Z3BZ-PDXP] ("Juvenile violent crime arrests, which increased through the mid-1980s and early 1990s, have maintained their steady decline for the sixth consecutive year.").

197. DiLulio, *supra* note 191 ("[A] veteran beat policeman confided [to me]: 'I never used to be scared. Now I say a quick Hail Mary every time I get a call at night involving juveniles. I pray I go home in one piece to my own kids.'").

Like other successful moral entrepreneurs, Professor DiLulio was seen as a "clever popularizer who quickly became the darling of the think-tank circuit."[198] Equally unsurprising, "superpredator" became a household term.[199] It is a term that dogs us to this day.[200]

Professor DiLulio's message was ultimately debunked,[201] but not before the mythical narrative of the marauding teen left its mark.[202] All too quickly, the public was gripped in fear that its community was overrun by teens intent on violence.[203] And as is true of all mythical narratives, the fact that juvenile crime was on a steady decline did not diminish the persistence of his false story.[204] Nor did it diminish the public's belief that the juvenile justice system was not equipped to control these teenagers.[205]

Government response was quick and widespread.[206] Across the country, states lowered what was the presumptive age of eighteen to try someone as an adult.[207] California, for example, lowered the age to fourteen to transfer children to adult court.[208] Not only were they tried in adult court, but juveniles also suffered the same

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198. Carroll Bogert & Lynnell Hancock, *Superpredator*, THE MARSHALL PROJECT, https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth [https://perma.cc/ZBW9-57KJ].

199. *See id.* (indicating that the term superpredator appeared at least 300 times in print).

200. *See id.*; *cf.* Fox 29 Philadelphia, *Summer Curfew for Children, Teens Under 18 Takes Effect in Philadelphia*, YOUTUBE (July 8, 2022), https://www.youtube.com/watch?v=tHGGHygi50g (describing summer curfew for teens as "saving our streets").

201. *See, e.g.*, Becker, *supra* note 192 (reporting Professor Franklin Zimring's comment that Dilulio's "theories on superpredators were utter madness"); Bogert & Hancock, *supra* note 198 (reporting that "juvenile murder arrests had fallen by two-thirds" when thousands of juveniles were supposed to have taken over the streets with violence).

202. *See* Becker, *supra* note 192 (arguing that the theory about superpredator juveniles led to many changes in the laws).

203. *See, e.g.*, Rosie DiManno, Opinion, *Where Are the Parents of Juvenile Thugs?*, TORONTO STAR (Jan. 11, 2008), http://www.thestar.com/opinion/columnists/2008/01/11/where_are_parents_of_juvenile_thugs.html [https://perma.cc/8N5Y-3CQN] (depicting juvenile offenders as "mini-me malefactors, armed and dangerous, who have taken their schools hostage, slick to the ways of a docile system"); *see also* Clyde Haberman, *When Youth Violence Spurred 'Superpredator' Fear*, N.Y. TIMES (Apr. 6, 2014), http://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html [https://web.archive.org/web/20221227162156/http://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html] (tracing the origins of the public's fear of juvenile offenders).

204. *See* SNYDER, *supra* note 197, at 1 (reporting a decline in juvenile arrests for six years in a row).

205. *See* Barry C. Feld, *The Honest Politician's Guide to Juvenile Justice in the Twenty-First Century*, 564 ANNALS 10, 11 (1991) ("Concerns about the inability of juvenile courts to rehabilitate chronic and violent young offenders . . . accompany the growing fear of youth crime.").

206. *See generally* Samuel Marion Davis, *The Criminalization of Juvenile Justice: Legislative Responses to "The Phantom Menace*,*"* 70 MISS. L.J. 1 (2000).

207. *See* Patrick Griffin et al., U.S. Dep't of Just., Off. of Juv. Just. & Delinquency Prevention, NCJ 232434, Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting (2011), https://www.ojp.gov/pdffiles1/ojjdp/232434.pdf [https://perma.cc/CR2J-2L6J].

208. *See* People v. Super. Ct. of Riverside Cnty. (Lara), 410 P.3d 22, 24–25 (Cal. 2018) (offering the historical

penalties as their adult counterparts. Believed to be irredeemable, they were sentenced to life imprisonment without the possibility of parole,[209] and based on that same rationale, children as young as nine were required to register as "sex offenders" once they reached adulthood.[210]

Most damaging is that panicked legislation derived from a mythical message takes time to undo. This has certainly been true of the moral panic surrounding juvenile crime. Only recently—more than twenty -five years after Professor DiLulio appeared on the scene—have we begun to dismantle the reactionary laws passed because of the mythical narrative of the superpredator juvenile.[211]

Think panicked legislation that is hard to overturn.

2. The Mythical Narrative of the Sex Panic

This section dives deeper into the world of the sex panic to analyze its heart—the mythical narrative, or story that fuels the public to target those who have committed sex offenses. In that way, the panic surrounding teen violence with its attendant mythical narrative shares a common attribute with the sex panic. Similar to the teen violence panic, the sex panic is fueled by inflammatory language embedded in false assumptions that paint a vivid, but erroneous picture of a group of people set on destabilizing the safety and security of the community. A report from Fox News illustrates the essence of the sex panic's mythical narrative:

> "Many [sex offenders], if not all, will molest children until the day they die. They're dangerous and they're going to reoffend."
>
> . . . .
>
> Not only are they almost certain to continue sexually abusing

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background of changes to laws that allowed prosecutors to file charges against children in adult court); *accord* ALA. CODE § 12-15-203 (West 2021) (enabling transfer to adult court of juveniles fourteen years or older).

209. *See, e.g.*, Montgomery v. Louisiana, 577 U.S. 190 (2016) (hearing challenge to a state law that had sentenced juvenile offenders to life imprisonment without the possibility of parole); Miller v. Alabama, 567 U.S. 460 (2012) (same); Graham v. Florida, 560 U.S. 48 (2010) (same).

210. *See* Catherine L. Carpenter, *Against Juvenile Sex Offender Registration*, 82 U. CIN. L. REV. 746, 768–72 (2013) (cataloging the ages and burdens of children required to register).

211. In the context of trying juveniles as adults, California voters approved the Public Safety and Rehabilitation Act of 2016 by initiative, which limited prosecutors' discretion to transfer juveniles to adult court. Proposition 57, 2016 Cal. Stat. A-39 (codified as amended at CAL. CONST., art. III, § 32; CAL. WELF. & INST. CODE §§ 602, 707 (West 2016)). For an example of this Act in action, see *Super. Ct. of Riverside Cnty. (Lara)*, 410 P.3d at 25–26, which required a juvenile court judge to conduct a transfer history to consider various factors in accordance with the new regime.

Where children have been sentenced to life imprisonment without the possibility of parole, it took two separate cases heard by the U.S. Supreme Court to end that practice: *Graham v. Florida*, 560 U.S. 48 (2010), which held that sentencing juveniles to life imprisonment without the possibility of parole in non-capital cases was unconstitutional, and *Alabama v. Miller*, 567 U.S. at 460, where the Court determined that the same sentences imposed on juveniles was unconstitutional in capital cases as well.

children, but some eventually kill their young victims—more often than not for the purpose of keeping them quiet.[212]

Not all narratives that attach to legislation are mythical. What makes a narrative "mythical," and therefore a flash point for a moral panic, is best characterized by the falsity and exaggeration of its claims against a subset of the community.[213] This subsection examines two anchoring false assumptions that are entrenched in the mythical narrative of the sex panic: purportedly high recidivism rates, and the "sticky," but inaccurate, message of "stranger danger" as an omnipresent threat.

i. The Real Data on Recidivism Rates

Registration schemes are premised on the government's need to predict future dangerousness. Mandatory registration schemes are designed to divide those who commit sex offenses into groupings based on a legislature's conjecture of their potential to reoffend. When combined with the public's preoccupation with managing risks, one can understand the public's obsession with recidivism rates for those who have committed sex offenses.

Given the onslaught of messaging it has received, the public's fear is understandable but unfounded. Data gathered over twenty years finds that recidivism rates for both adults and children who have committed sex offenses is much lower than the public believes. As researchers have concluded, registration schemes "assume that past offenders will be future offenders. But when it comes to sexual offending, several decades of recidivism research prove otherwise."[214]

Contrary to myth, those who commit sex offenses consistently have lower recidivism rates when compared with the re-offense rates of their non-sex offending counterparts.[215] According to recognized scholars in the field, "methodologically rigorous research studies" have shown that between eighty and ninety-five percent of sexual offenders do not reoffend sexually.[216] Other reports confirm this assessment.

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212. Catherine Donaldson-Evans, *Molesters Often Strike Again*, FOX NEWS (May 19, 2015, 4:45 PM), https://www.foxnews.com/story/molesters-often-strike-again [https://perma.cc/W898-SKBY]; *see* Yung, *supra* note 5, at 466.

213. *See* LANCASTER, *supra* note 5, at 23 ("[A] false, exaggerated, or ill-defined moral threat to society" underlie moral panics.).

214. Chrysanthi Leon et al., *Net-Widening in Delaware: The Overuse of Registration and Residential Treatment for Youth Who Commit Sex Offenses*, 17 WIDENER L. REV. 127, 141 (2011).

215. *See* Ryan W. Porte, Note, *Sex Offender Regulations and the Rule of Law: When Civil Regulatory Schemes Circumvent the Constitution*, 45 HASTINGS CONST. L.Q. 715, 727 (2018); *see also* Janus, *supra* note 29, at 835–36 (listing numerous studies in support of the premise of low recidivism rates); *infra* notes 217–27 and accompanying text.

216. Commonwealth v. Torsilieri (*Torsilieri II*), No. 15-CR-0001570-2016, slip op. at 6 (Pa. Super. Ct. Aug. 22, 2022) (quoting Affidavit of Professor Elizabeth J. Letourneau, Ph.D, *Torsilieri II*, No. 15-CR-0001570-2016 (June 29, 2021)) (adopting the testimony of well-recognized experts in the field).

For example, in 1995, the U.S. Department of Justice Bureau of Justice Statistics reported that of the 9,691 male sex offenders released from prisons in fifteen States in 1994, 5.3 percent were rearrested for a new sex crime within three years of release.[217] A companion study arrived at the same conclusion: of 272,111 former inmates discharged in 1994, the study found that the lowest rearrest rates were for those previously convicted of murder and rape, while those who had committed property crimes had the highest re-offense rates.[218] New York, Arizona, and Ohio all reported similar findings, with rates between 2.1 and eight percent.[219] A study in 2005 analyzed 746 men convicted of sexual offenses, finding that in a five-year period, only 3.6 percent were arrested and charged with a new crime and 2.7 percent were convicted.[220]

Other modern studies confirm these numbers, as the Michigan Supreme Court recognized in *People v. Betts* when it detailed the "growing body of research" to support low recidivism rates.[221] Even where higher recidivism rates are reported for those who have committed sex offenses, their re-offense rates are still significantly lower than their counterparts who have committed property or drug crimes.[222]

It is not only the adults. Data reveal that children who have committed sex offenses have similarly low recidivism rates.[223] Dr. Michael Caldwell's compilation of forty studies found that re-offense rates for children is under five percent.[224] He

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217. PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 193427, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 8 tbls. 9 & 10 (2002), https://bjs.ojp.gov/redirect-legacy/content/pub/pdf/rpr94.pdf [https://perma.cc/KWK7-X4MA].

218. State v. O'Hagen, 881 A.2d 733, 744 (N.J. Super. Ct. App. Div. 2005).

219. Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 AM. J. PUB. HEALTH 412, 413–14 (2010).

220. Ira Mark Ellman, *When Animus Matters and Sex Crime Underreporting Does Not: The Problematic Sex Offender Registry*, 7 U. PA. J.L. & PUB. AFF. 1, 19 (2021) (citing the Connecticut study); *accord* Tamara Rice Lave & Franklin E. Zimring, *Assessing the Real Risk of Sexually Violent Predators: Doctor Padilla's Dangerous Data*, 55 AM. CRIM. L. REV. 705, 717–19 (2018) (including numerous studies that report low recidivism rates).

221. 968 N.W.2d 497, 513 (Mich. 2021); *accord Torsilieri II*, No. 15-CR-0001570-2016, slip op. at 5–6.

222. RHIANA KOHL ET AL., URBAN INST., MASS. RECIDIVISM STUDY: A CLOSER LOOK AT RELEASES AND RETURNS TO PRISON 14 (2008), https://www.urban.org/sites/default/files/publication/31671/411657-Massachusetts-Recidivism-Study.PDF [https://perma.cc/6RAN-NASN].

223. *See* Michael F. Caldwell, *Juvenile Sex Offenders*, *in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 55 (Franklin E. Zimring & David S. Tanenhaus eds., 2014) (providing empirical data on child sex offenders that refute the presumption of high recidivism rates in this group); NICOLE PITTMAN & QUYEN NGUYEN, A SNAPSHOT OF JUVENILE SEX OFFENDER REGISTRATION & NOTIFICATION LAWS: A SURVEY OF THE UNITED STATES 6 (2011), https://www.njjn.org/uploads/digital-library/SNAPSHOT_web10-28.pdf [https://perma.cc/Y3KC-5B9W] (citing a study by Dr. Elizabeth Letourneau that found a reconviction rate of less than one percent and reporting on studies compiled by Professor Zimring which showed that over ninety-two percent of all individuals who committed a sex offense as a juvenile did not commit another sex offense); *cf. In re* J.B., 107 A.3d 1, 13 (Pa. 2014) (endorsing a report that "the recidivism rate for juvenile sexual offenders to commit another sexual offense is less than two percent").

224. Caldwell, *supra* note 223, at 63–64 (providing empirical data on child sex offenders that refute the

concluded, "In brief, juvenile sex offenders as a group appear to be no more likely to engage in sexual violence than similar non-sex offending delinquents."[225] Other researchers have confirmed that children who commit sex offenses do not re-offend at rates imagined by the public.[226]

Yet, despite the widespread comparable scientific analysis, the public has not embraced the data. On the contrary, the false message of high recidivism rates remains deeply embedded in the public discourse.[227] To be sure, this is characteristic of entrenched, but false, messaging in a moral panic. But there is another reason, one that is equally disturbing with far-reaching consequences. At a minimum, accepting the empirical research requires a trust in those who have compiled the data. It demands a belief in the credibility of the "scientist as messenger."

And here lies the difficulty. The "scientist as messenger" is not credible to a large swath of the public.[228] Indeed, a strong anti-science sentiment has permeated the public discourse. Not only does the public mistrust empirical evidence regarding recidivism rates, but suspicion of research extends to a host of other topics, from climate change to vaccination benefits.[229] As one political scientist noted, "One of the things we know from studies about how people respond to news is that nobody likes science or empiricism when it conflicts with their deeply held views."[230]

So vulnerable is the message of low recidivism rates that any opposing opinion can upset it. One article in particular, *The Dark Figure of Sexual Recidivism,* did just that when it claimed that empirical studies collected and analyzed by numerous scholars were incorrect because the studies did not consider the rate of underreporting in crime.[231] The article's authors, Professors Nicholas Scurich and Richard John,

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presumption of high recidivism rates in this group).

225. *Id.* at 61.

226. *See, e.g.*, PITTMAN & NGUYEN, *supra* note 223, at 6 (relying on Dr. Elizabeth Letourneau who found extremely low reconviction rates in juveniles); *id.* (including studies by Professor Zimring that the overwhelming number of persons who were convicted of a sex offense as a child never reoffended); *accord In re* J.B., 107 A.3d at 13 (relying on a study that "the recidivism rate for juvenile sexual offenders to commit another sexual offense is less than two percent.").

227. *See* Scurich & John, *supra* note 49, at 159 (citing a study from Florida where "residents believe (on average) that 76% of child molesters and 74% of rapists will commit an additional sexual offense.").

228. *See* Aviva Philipp-Muller et al., *Understanding Why People Reject Science Could Lead to Solutions for Rebuilding Trust*, THE CONVERSATION (July 14, 2022, 11:25 AM), https://theconversation.com/understanding-why-people-reject-science-could-lead-to-solutions-for-rebuilding-trust-183875 [https://perma.cc/SF2R-C2JU] (asserting four factors that lead to a rejection of scientific facts).

229. *Id.*; *cf.* Peter J. Hotez, Opinion, *The Antiscience Movement Is Escalating, Going Global and Killing Thousands*, SCI. AM. (Mar. 29, 2021), https://www.scientificamerican.com/article/the-antiscience-movement-is-escalating-going-global-and-killing-thousands/ [https://perma.cc/Z6ME-EYAU] (arguing that the anti-science movement has facilitated the spread of COVID).

230. Christina Pazzanese, *Why Isn't the Right More Afraid of COVID-19?*, HARV. GAZETTE (Oct. 30, 2020), https://news.harvard.edu/gazette/story/2020/10/what-caused-the-u-s-anti-science-trend/ [https://perma.cc/B2HK-HYBH] (quoting Tom Nichols, a political scientist).

231. Scurich & John, *supra* note 49, at 160; *see also* Nicholas Scurich, *Introduction to the Special Issue:*

argued that the generally accepted data "mask[] a lurking complexity in that [they] deal[] only in officially recorded crime statistics"[232]—what social scientists call *observed* recidivism.[233] Using a probabilistic simulation model, Scurich and John further claimed that *actual* recidivism rates (underreported sexual crimes) cause recidivism rates to be much higher than social scientists have acknowledged using observed recidivism rates.[234]

Probably most troubling was the tone of the article, which directed suspicion at the broad array of social scientists who published findings of low recidivism rates. Scurich and John summarized the decades-rich empirical studies by dismissing them as merely "orthodoxy in academic circles," arguing instead that the observed recidivism rates are "specious and seriously betray the reality of sexual recidivism."[235] This trope recalls the words of scholars who questioned Professor Franklin Zimring's empirical analysis of Three Strikes Laws, to which he responded, "[T]he most troubling aspect of their critique is its clear distaste for empirical analysis of the criminal justice system."[236] Similarly, *Torsilieri* rebuked the "blanket denunciation" by the Commonwealth's expert of all empirical research contrary to its position, stating that the expert's testimony "materially detract[ed] from his credibility."[237]

Scholars responded to Scurich's and John's report in short order.[238] Professors Tamara Rice Lave and J.J. Prescott and researcher Grady Bridges wrote a thorough critique of the *Dark Figure's* probabilistic simulation approach where they criticized the report for its lack of specific methodology and characterized it as "interesting solely as an academic exercise."[239] Surely, Rice, Lave, and Bridges argued, "[A]ny attempt to undermine the consensus of an entire field should be supported . . . by careful analysis and sound reasoning."[240] Similarly, Dr. Brian Abbott wrote that the *Dark Figure* model "suffer[s] from significant deficiencies that likely produce

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Underreporting of Sexual Abuse, 38 BEHAV. SCI. & L. 537, 537 (2020) (defining "dark figure" of crime to mean "occurrences that by some criteria are called crime yet that are not registered in the statistics").

232. Scurich & John, *supra* note 49.

233. *See, e.g.*, Lave et al., *supra* note 15, at 280.

234. Scurich & John, *supra* note 49, at 538–39; *see also id.* at 163 (claiming that actual recidivism is represented in statutes such as the one in California, which refers to whether someone will *engage* in illegal behavior, not whether they were convicted of it).

235. *Id.* at 173.

236. Zimring & Kamin, *supra* note 47, at 613.

237. Commonwealth v. Torsilieri (*Torsilieri II*), No. 15-CR-0001570-2016, slip op. at 7 (Pa. Ct. Com. Pl. Aug. 22, 2022).

238. *See* Lave et al., *supra* note 15, at 281 (rejecting Scurich and John's methodology as flawed because "their conclusions are essentially driven by assumptions that are not themselves rooted in data or empirical research"); *accord* Brian Abbott, *Illuminating the Dark Figure of Sexual Recidivism*, 38 BEHAV. SCI. & L. 543 (2020); Ellman, *supra* note 220, at 27.

239. Lave et al., *supra* note 15, at 280–81 (denouncing the model as following "ineluctably from their empirical assumptions and the unrepresentative empirical research they cite to benchmark their calculations").

240. *Id.* at 280.

inaccurate predicted actual sexual recidivism rates."[241] In expert testimonies at trial in *Torsilieri*, Professors R. Karl Hanson and Prescott rebuffed the assumptions made in the report and the scant underlying data used.[242]

So concerned were Lave, Prescott, and Bridges that *Dark Figure* would feed into the mythical narrative, they responded with a cautionary note: "Our goal is to ensure that nontechnical consumers of Scurich and John understand exactly what their research does and what it does not do . . . ."[243] Lave, Prescott, and Bridges were right to be worried. The *Dark Figure* claim threw long-established recidivism rates into dispute in both court and academic settings.[244]

Notwithstanding the pushback from the *Dark Figure* report, there is one positive development that is noteworthy. There has been a noticeable shift in a court's willingness to entertain the empirical research on the subject.[245] Until recently, courts generally rebuffed studies claiming low recidivism rates, signaling instead clear support for the legislative position that recidivism rates were high.[246] Indeed, the courts' deference to the legislative rationale has been so pervasive that on appeal, states have not felt compelled to develop sufficient trial records to prove their position.[247] It was, therefore, significant that in *Does #1–5 v. Snyder* in 2016,[248] the Sixth Circuit rejected the State's position and endorsed the validity of these studies because no federal court to that point had signaled receptivity to these findings.[249] As the Sixth Circuit wrote,

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241. Abbott, *supra* note 238, at 543.

242. Commonwealth v. Torsilieri (*Torsilieri II*), No. 15-CR-0001570-2016, slip op. at 8–10 (Pa. Ct. Com. Pl. Aug. 22, 2022) *on remand from* Commonwealth v. Torsilieri (*Torsilieri I*), 232 A.3d 567 (Pa. 2020).

243. Lave et al., *supra* note 15, at 280–81 (citation omitted); *accord* Ellman, *supra* note 220, at 27–34 (criticizing *Dark Figure's* attempt to cull recidivism rates from estimates of unknown facts).

244. *See Torsilieri I*, 232 A.3d at 582–83 (recognizing a potential underlying dispute regarding recidivism rates); Ashlynd Huffman, *Can Child Sexual Abusers Be Rehabilitated? Experts Weigh in on Treatment and Likelihood of Reoffending*, STILLWATER NEWS PRESS (Oct. 14, 2021) https://www.stwnewspress.com/can-child-sexual-abusers-be-rehabilitated-experts-weigh-in-on-treatment-and-likelihood-of-reoffending/article_b24e0cae-2d24-11ec-9c5f-dfbff078df36.html [https://perma.cc/L242-D8V2] (quoting a professor who tells her students because "[t]he vast majority of sex offenses are not reported," her "recidivism rate is really low, but actually [her] report rate may be really low").

245. *See, e.g.*, Does #1–5 v. Snyder, 834 F.3d 696, 704 (6th Cir. 2016); *Torsilieri I*, 232 A.3d at 582–83; *In re* J.B., 107 A.3d 1, 17–18 (Pa. 2014); *Torsilieri II*, slip op. at 6–10.

246. *See, e.g.*, *Torsilieri I*, 232 A.3d at 577 (recounting historical review of the court's use of recidivism studies, calling them only "counter-narrative").

247. *See, e.g.*, *Snyder*, 834 F.3d at 704 (chastising the state for not offering evidence to support its position).

248. *Id.*

249. *See, e.g.*, *In re* Alva, 92 P.3d 311, 332 (Cal. 2004) ("Given the 'frightening and high' danger of long-term recidivism by this class of offenders, the permanent nature of the registration obligation also is designed to serve legitimate regulatory aims." (citation omitted) (quoting Smith v. Doe, 538 U.S. 84, 103 (2003))); State v. Seering, 701 N.W.2d 655, 665 (Iowa 2005) ("As numerous authorities have acknowledged, '[t]he risk of recidivism posed by sex offenders is "frightening and high."'" (alteration in original) (quoting *Smith*, 538 U.S. at 103)), *superseded by statute*, Act of May 21, 2009, ch. 119, § 3, 2009 Iowa Acts 411, 417–418 (codified at IOWA CODE ANN. § 692A.103 (West 2022)), *as recognized in* Planned Parenthood of the Heartland, Inc. v. Reynolds, 962 N.W.2d 37, 46 (Iowa 2021); State v. Blankenship, 48 N.E.3d 516, 531 (Ohio 2015) (endorsing

"The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement . . . that '[t]he risk of recidivism posed by sex offenders is "frightening and high."'"[250]

ii. The Myths of "Stranger Danger"

Stranger danger is a sticky message[251] that has been popularized to explain safety rules to children to protect themselves from strangers.[252] It is a byproduct of the sex panic's description of the world as fraught with danger from those we do not know.

The term stranger danger gained traction in the 1980s because of high profile abduction cases that captured national attention at that time.[253] Such high-profile cases generated an intense focus on child safety apparatus and protection, and from a merging of politics, private partnerships and the public, there developed an "elaborate child safety network."[254] But as one author wrote, the "visibility and salience" of these cases were supported by "[s]kewed statistics, sensationalized reporting, and a tense political climate."[255]

As noted earlier in this article, "availability heuristics" is a motivating force behind stranger danger. The searing images of random kidnappings and sexual assaults animate parents and lawmakers alike, the improbability of such events

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the "frightening and high" language to affirm automatic registration).

250. *Snyder*, 834 F.3d at 704 (second alteration in original) (quoting *Smith*, 538 U.S. at 103) (referencing Lawrence A. Greenfield's study that those who commit sex offenses "are actually *less* likely to recidivate than other sorts of criminals"); *accord* Doe 1 v. Marshall, 367 F.Supp.3d 1310, 1330 (M.D. Ala. 2019) ("At a certain point, 'most individuals convicted of a sexual offense will be no more likely to commit another sexual offense than the rate of spontaneous 'out-of-the-blue' sexual offenses in the general population.'" (quoting Exhibit 1 to Plaintiffs' Consolidated Response and Reply to Defendants Briefing on Summary Judgment at 5, *Doe 1*, 376 F. Supp. 3d (No. 2:15-cv-606-WKW))).

251. *See Experts Warn Against Teaching the Phrase 'Stranger Danger,'* ABC NEWS (Mar. 31, 2017, 8:11 AM), https://abcnews.go.com/Lifestyle/experts-warn-teaching-phrase-stranger-danger/story?id=46427626 [https://perma.cc/QW95-S8AT] (highlighting a salient feature of the phrase "It's so easy, it rhymes").

252. A host of websites are devoted to the term. *See, e.g.*, *Stranger Danger: Role Playing Scenarios*, MY CHILD SAFETY, http://www.mychildsafety.net/stranger-danger.html [https://perma.cc/EE9L-K5ET] (instructing parents on explaining to children how to react when approached by strangers); *Teach 'Stranger Danger' in 4 Easy Steps*, CLEV. CLINIC (Dec. 16, 2020), https://health.clevelandclinic.org/teach-stranger-danger-in-4-easy-steps/ [https://perma.cc/W5BQ-ABHX] ("Discussing Stranger Danger is a must whether your child is entering kindergarten or high school . . . .").

253. *See* Michael Wilson, *The Legacy of Etan Patz: Wary Children Who Became Watchful Parents*, N.Y. TIMES (May 8, 2015), https://www.nytimes.com/2015/05/10/nyregion/etan-patzs-disappearance-has-a-lasting-impact-on-parenting.html [https://web.archive.org/web/20221230142817/https://www.nytimes.com/2015/05/10/nyregion/etan-patzs-disappearance-has-a-lasting-impact-on-parenting.html] (highlighting the kidnapping of Etan Patz as "haunting in its randomness").

254. Paul Mokrzycki Renfro, *Keeping Children Safe is Good Business: The Enterprise of Child Safety in the Age of Reagan*, 17 ENTER. & SOC'Y 151, 152 (2016).

255. *Id.* at 181.

notwithstanding. In analyzing the impact on the nation of the brutal murder of seven-year-old Megan Kanka by her neighbor, Professor Wayne Logan recalled Professor Sunstein's admonition: "When people use the availability heuristic, they assess the magnitude of the risks by asking whether examples can readily come to mind."[256] It is very likely that these examples will "often lead people to treat risks as much greater than they are in fact."[257]

A story from Toledo, Ohio, highlights the exaggerated perceived risk that parents felt when they became overwrought to learn that a regular customer at a bakery was offering free donuts to their children who had come into the bakery on their way to school.[258] The innocence of the gesture by that customer was not lost on contributing reporter Lenore Skenazy, but it was lost on the school that defended its act of calling the police and notifying the parents by saying that the alarm was a "teachable moment."[259]

An interesting backlash has developed in recent years called "Let Go and Let Grow," a movement designed to foster independence, not fear, in children.[260] The concept of stranger danger and its corollary of intense parental supervision has led to what critics call "helicopter parenting," inappropriate criminal charges against parents who give their children some independence, and a generation of fragile children without the confidence to make their way in the world.[261]

"Stranger danger" is not a phrase without other consequences. Unfortunately, it inaccurately masks true dangers and obfuscates facts. In reality, most abductions occur by family members, not strangers, and most unwanted online solicitations do not come from trolling internet predators but from their peers.[262] Worried by the

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256. Logan, *supra* note 40, at 395.

257. *Id.*

258. *See* Lenore Skenazy, *Stranger Danger and Donuts*: *One School's (Over)Reaction*, CHRISTIAN SCI. MONITOR (Apr. 24, 2012), https://www.csmonitor.com/The-Culture/Family/Modern-Parenthood/2012/0424/Stranger-danger-and-donuts-one-school-s-over-reaction [https://perma.cc/2XKF-ACLU].

259. *Id.*

260. *See Let Grow Mission: We Are Leading the Movement for Childhood Independence*, LET GROW, https://letgrow.org/our-mission/ [https://perma.cc/RF32-8DX2] (citing its mission to "give kids the independence they need to grow into capable, confident, and happy adults").

261. Lenore Skenazy, founder of *Free Range Kids* and President of *Let Grow*, writes on the detrimental impact of stranger danger and of the importance of teaching children independence. *See, e.g.*, Lenore Skenazy, *Want Resilient Kids? Start a "Let Grow" Play Club at Their School*, FEE (Feb. 6, 2018), https://fee.org/articles/want-resilient-kids-start-a-let-grow-play-club-at-their-school [https://perma.cc/4XT2-K73A] ("Parents have been told that they must watch their kids 24/7 and smooth their path all the way.").

262. Jennifer Wooden Mitchell & Rosemary Wooden Webb, *4 FACTS to Dispel Common Myths About Stranger-Danger*, CHILD LURES PREVENTION, https://childluresprevention.com/resources/stranger-danger-myths/ [https://perma.cc/G2JH-CGSU] (last visited Feb. 27, 2023); *see also* CTR. FOR SEX OFFENDER MGMT., MYTHS AND FACTS ABOUT SEX OFFENDERS (2000), https://cepp.com/wp-content/uploads/2021/04/Myths-and-Facts-About-Sex-Offenders-2000.pdf [https://perma.cc/5EWY-KE6C]; HOWARD N. SNYDER, U.S. DEP'T OF JUST., BUREAU OF JUST. Stat., NCJ 182990, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000), https://bjs.ojp.gov/redirect-l

dilution of the message, Callahan Walsh, a child advocate with the National Center of Missing and Exploited Children, cautioned, "We want parents to rethink 'stranger danger' because we've been able to do the analysis of these attempted abductions . . . . '[S]tranger danger' just doesn't fit that model . . . ."[263]

Political journalist Walter Lippmann may not have had the benefit of the term "availability heuristics" in the early twentieth century, but he argued as much when he cautioned that we rely on "'pictures in our heads,' many of them delivered by the news media, to tell us about the world."[264] It is not surprising, then, that the pictures in our head related to the sex panic are not of family members who commit sexual crimes, but of the predatory stranger who roams the streets on the prowl for children and lives undetected in our neighborhoods.

This is the problem. At the heart of registration and notification regimes is the lawmaking assumption that strangers commit sexual offenses.[265] As the story continues, if only we could track and monitor these strangers, we would prevent sexual crimes from occurring. Knowing that children and adults alike are most likely to be victimized by a family member, intimate partner, or acquaintance,[266] we must ask whether registration and notification schemes are worth the financial and human cost if they merely placate a fearful public.[267]

II. CRIME CONTROL THEATER: THE OUTGROWTH OF PANICKED LEGISLATION

Professor Lancaster was correct when he said that the public is "obsessed with risk and addicted to panic."[268] Enter Crime Control Theater, which is a manifestation of moral panics.[269] Crime control theater is simply a sign—often in the form of a law

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egacy/content/pub/pdf/saycrle.pdf [https://perma.cc/P7FL-ZWM5] (reporting that only about 7% were strangers to their juvenile victims).

263. *Experts Warn Against Teaching the Phrase 'Stranger Danger,' supra* note 252 (advising parents of the reasons not to use the phrase); *see also Rethinking "Stranger Danger,"* NAT'L CTR. FOR MISSING & EXPLOITED CHILD., https://www.missingkids.org/education/kidsmartz [https://perma.cc/SL6B-A8RB]. Callahan Walsh is the brother of Adam Walsh, for whom the original SORNA regime was named, and the son of John Walsh.

264. Bldg. Blocks for Youth, Off Balance: Youth, Race, & Crime in the News 1 (2001) (available at https://perma.cc/AK39-XTA8).

265. For an excellent discussion of the impact of these assumptions on the laws produced, see Alexandra Hunstein Roffman, Note, *The Evolution and Unintended Consequences of Legal Responses to Childhood Sexual Abuse: Seeking Justice and Prevention*, 34 CHILD. LEGAL RTS. J. 301, 314–16 (2014).

266. *See* Jeffrey C. Sandler et al., *Does a Watched Pot Boil? A Time-Series of New York State's Sex Offender Registration and Notification Law*, 14 PSYCH. PUB. POL'Y & L. 284, 297–98 (2008) (citing statistics that "93% of child sexual abuse victims knew their abuser").

267. *See infra* notes 276–278 (reporting on the plea by social scientists to reallocate the costs to other initiatives).

268. LANCASTER, *supra* note 5, at 15.

269. *See* Budd & Mancini, *supra* note 15, at 362 (describing Crime Control Theater laws as "hastily conceived and theoretically questionable crime control strategies"); Jessup & Miller, *supra* note 3, at 478 (arguing that "swift action often replaces effective action").

or regulation—that an anxious public is facing undefined risks that are not easily solved.[270]

The ground is fertile for a moral panic because, as scholars argue, the public's concerns over risks both large and small are growing.[271] This is best explained by "risk society theory,"[272] where socially constructed problems abound with intense occupation over the "elaborated levels of risk management plus disputes how this management is managed."[273]

The gap between the risk and its successful management can promote a panic when the public perceives an inadequacy in its established safety systems.[274] In *Megan's Law: Crime and Democracy in Late Modern America*, for example, Professor Jonathan Simon wrote that the emergence of notification schemes was because of the perceived "betrayal of parents by a state unable to control predators and unwilling to empower citizens to protect themselves."[275] LaChance and Kaplan would agree. They proffered the theory that reality shows like *To Catch a Predator* were successful because they highlighted the public's thirst for a private response in the face of perceived governmental inaction.[276]

The cycle may be predictable, but the results are often ineffective. Scholars cite four criteria for Crime Control Theater: a reactionary response to moral panic,[277]

270. *See, e.g.*, Jessup & Miller, *supra* note 3, at 473–486 (characterizing the emergence of Crime Control Theater where societal concerns are not easily fixed by legislation).

271. Risks that produce symbolic legislation are widespread and varied. *See, e.g.*, Alicia DeVault, Monica K. Miller, Timothy Griffin, *Crime Control Theater: Past, Present, and Future,* 22 PSYCH. PUB. POL'Y & L. 341, 342–44 (2016) (referencing legal actions that are seen as Crime Control Theater, including Amber Alerts, Safe Haven Laws, and Sex Offense Registration and Notification Laws); *see also* Budd & Mancini, *supra* note 15, at 362 (citing to panics involving sexual child abuse in daycare centers and serial pedophiles). *See generally* Jessup & Miller, *supra* note 3 (arguing that the AMBER Alert is a feel-good measure that is not effective).

272. Walker, *supra* note 4, at 202. For a critique of the politically expedient solution, see Strader, *supra* note 27, at 435–40, which chastised the government for choosing easy solutions in times of crisis.

273. COHEN, *supra* note 3, at xxx. The public's obsession with risk management is evident in the rise of other criminal registries. *See also* Wilson, *supra* note 30, at 528–38 (cataloging violent offender, methamphetamine, and domestic violence registries).

274. *See* Walker, *supra* note 4, at 202; Socia et al., *supra* note 17, at 1263 (citing instances of public backlash against the court system and prosecutors).

275. Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 L. & SOC. INQUIRY 1111, 1136 (2000) (characterizing Megan's law as "a story about the power of a social movement . . . to command remarkable attention from state legislatures and Congress").

276. LaChance & Kaplan, *supra* note 153, at 130 (arguing that "everyday citizens have been imagined as possessing the capacity and the responsibility for preventing criminal harms that may befall themselves and their families").

277. *See, e.g.*, Campbell & Newheiser, *supra* note 50, at 569 (A Crime Control Theater law "should have its roots in a moral panic, or a widespread fear over a particular crime and how it will be dealt with that exceeds what is appropriate in light of actual crime statistics."); *see also* DeVault et al., *supra* note 271, at 343.

unquestioned acceptance and promotion,[278] appeal to mythic narratives,[279] and, finally, abject empirical failure.[280] The government recognizes that it must respond, but all too often, laws created in response to public pressure are seen as "overselling a solution to a socially created problem."[281] And oversell they have. Registration and notification schemes come with hefty price tags that are hard to sustain.[282] Lave, Prescott, and Bridges urged reallocation of resources when they wrote, "The vast majority of sexual offenses are committed by individuals who are not potential recidivists, and . . . recidivism numbers are sufficiently low that it makes little public-safety sense to focus so much effort and so many resources on what is a relatively small population."[283] In New Jersey, where Megan's Law was first enacted,[284] results similarly describe that because Megan's Law has had no effect on time to first re-arrest or on the reduction in sexual re-offense or number of victims, "the growing costs may not be justifiable."[285]

Panicked legislation invites skepticism. Scholars bemoan a range of laws that have been enacted whose symbolic communication far outweighs their usefulness, including AMBER Alerts and Safe Haven Laws.[286] Notwithstanding their ineffectiveness, they are overwhelmingly embraced by the public,[287] perhaps, as mused by scholars Campbell and Newheiser, because the public does not appreciate just how ineffective they are.[288]

It is not only AMBER Alert or Safe Haven Laws; scholars also decry registration schemes as Crime Control Theater.[289] They are viewed as reactionary laws to a

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278. *See, e.g.*, Campbell & Newheiser, *supra* note 50, at 569; Budd & Mancini, *supra* note 15, at 363 ("Perhaps because these laws are aimed at protecting children and promoted as a way to increase public safety, they have received broad public support." (citation omitted)).

279. *See, e.g.*, Budd & Mancini, *supra* note 15, at 365; DeVault et al., *supra* note 271.

280. DeVault et al., *supra* note 271, at 341 (describing Crime Control Theater Laws as "legal actions that *appear* to address crime, but are ineffective").

281. Jessup & Miller, *supra* note 3, at 469 (critiquing the ineffectiveness of the AMBER Alert Program).

282. *See* Alan Greenblatt, *States Struggle to Control Sex Offender Costs*, NPR (May 28, 2010, 12:01 AM), https://www.npr.org/templates/story/story.php?storyId=127220896 [https://perma.cc/V6W8-LZR9] ("Sometimes federal mandates and state laws get passed without a real sense of what the lingering costs are . . . .").

283. Lave et al., *supra* note 15, at 298.

284. Doe v. Poritz, 662 A.2d 367 (N.J. 1995) (upholding the state's passage of the first community notification scheme).

285. N.J. DEP'T OF CORR., NCJ225370, MEGAN'S LAW: ASSESSING THE PRACTICAL AND MONETARY EFFICACY 2 (2008), https://www.ojp.gov/pdffiles1/nij/grants/225370.pdf [https://perma.cc/N45P-4YME].

286. For examination of laws that have been dubbed Crime Control Theater across a wide range of issues, see Krauss et al., *supra* note 12, at 317, which lists AMBER Alerts, three strikes laws, registration and notification schemes, and safe haven regulations as examples of Crime Control Theater.

287. *See* Socia & Harris, *supra* note 32, at 376 (citing numerous scholars in support of the position that "citizens strongly support such policies and believe in their effectiveness in making the community safer").

288. Campbell & Newheiser, *supra* note 50, at 569; *see also* Krauss et al., *supra* note 12, at 317 (acknowledging widespread support for these laws).

289. *See, e.g.*, Socia & Harris, *supra* note 32, at 375 (claiming that the public's mythical beliefs "may

moral panic, which are accepted by the public and promoted by government officials, but which are "well-documented empirical failures in their effectiveness."[290]

In an interesting analysis of residency restrictions, authors Kristen Budd and Christina Mancini concluded that the drive to prevent registrants from living near where children congregate is Crime Control Theater on display.[291] Residency restrictions may appeal to the public, Budd and Mancini argued, but they have no impact on the reduction of sexual assault.[292]

Megan's Law websites are also criticized for offering the public a false sense of security despite there being no empirical evidence that notification reduces sexual assault.[293] My law students concur. They offer that the Megan's Law websites for their neighborhoods are not helpful, either because the red dots are too numerous to consider or because the information is too vague to provide meaningful information upon which to act.

III. Employing The Irrebuttable Presumption Doctrine To Combat False Assumptions

It is human nature to generalize. It is also a necessary and fundamental precept of legislative drafting that lawmakers must make assumptions, categorize, and line - draw. Consequently, in constructing statutory schemes, legislators often favor bright line rules over individualized assessments to confer or deny a benefit.[294] Recognizing the imprecision that comes with such an exercise, lawmakers have enjoyed the courts' protection under the principle of legislative deference to create and define regulations.[295] As one court noted, "We cannot require the legislature to establish a perfect

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contribute to adoption of public policies that carry significant symbolic value, yet may fall short of their ostensible goals of protecting children and preventing sexual victimization"); Krauss et al., *supra* note 12, at 316 ("Sex offender registration and community notification (SORN) laws are prototypical examples of [Crime Control Theater] laws." (citation omitted)); DeVault et al., *supra* note 271, at 342 ("Sex offender registration laws are another well-known [Crime Control Theater] legal action.").

290. Krauss et al., *supra* note 12, at 316.

291. Budd & Mancini, *supra* note 15 (criticizing residence restrictions as Crime Control Theater).

292. *Id.*

293. Logan A. Yelderman et al., *Understanding Crime Control Theater: Do Sample Type, Gender, and Emotions Relate to Support for Crime Control Theater Policies?*, 43 CRIM. JUST. REV. 147, 148–49 (2018) (recounting a National Institute of Justice study that "determined that Megan's Law . . . failed to reduce sex offender recidivism rates").

294. *See generally* Edward L. *Rubin, Due Process and the Administrative State*, 72 CAL. L. REV. 1044 (1984) (criticizing the diminished role of individualized assessment).

295. *See* Lambert v. California, 355 U.S. 225, 228 (1957) (recognizing that courts give considerable weight to legislative authority to define an offense). For the role that rational basis plays, see Doe v. Moore, where the Eleventh Circuit observed that "[t]he rational basis standard is 'highly deferential,'" and that it would only "hold legislative acts unconstitutional under a rational basis standard in only the most exceptional circumstances." 410 F.3d 1337, 1345 (11th Cir. 2005) (quoting Williams v. Pryor, 240 F.3d 944, 948 (11th Cir. 2001)).

classification system."[296] So entrenched is legislative deference that the U.S. Supreme Court expanded this position and held that a state government "has no obligation to produce evidence to sustain the rationality of a statutory classification."[297]

Generalizations in lawmaking come at a cost, however. Professor Sunstein wrote, "The problem arises when the generalizations are wrenched out of context and treated as freestanding or universal principles, applicable to situations in which their justifications no longer operate."[298]

Professor Sunstein's warning brings into sharp focus mandatory registration and notification schemes, which are elaborately drawn but essentially coded generalizations. Registration schemes, formerly built on individualized risk determinations,[299] have been replaced by the requirement of offense-based assessments, a cornerstone of the Adam Walsh Child Protection and Safety Act passed by Congress in 2006.[300] Under this model, individuals are automatically assigned to different tiers with corresponding escalating burdens based on the crimes they committed, not according to their actual likelihood of re-offense.[301]

To be sure, offense-based registration schemes are attractive. One can appreciate the efficiency of such a model where registrants are grouped in tiers automatically without the requirement for individualized assessment. The Supreme Court acknowledged this obvious point when it cautioned in *Stanley v. Illinois* that "[p]rocedure by presumption is always cheaper and easier than individualized determination."[302]

Although it is within the purview of the legislature to create a registration regime with generalizations built into the classification system, the concept of legislative deference has limits. Courts recognize that "deference to legislative determination is not boundless."[303] The Sixth Circuit so plainly reiterated this in *Does #1–5 v.*

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296. Rainer v. State, 690 S.E.2d 827, 830 (Ga. 2010).

297. Heller v. Doe *ex rel.* Doe, 509 U.S. 312, 320 (1993).

298. Cass R. Sunstein, Lecture, *Moral Heuristics and Moral Framing*, 88 MINN. L. REV. 1556, 1558 (2004).

299. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 6, § 178E(f) (West 2022) (permitting the court to relieve a sex offender of his duty to register if "the circumstances of the offense in conjunction with the offender's criminal history indicate that [she] does not pose a risk of reoffense or a danger to the public"); *see also* State v. Ellison, No. 78256, 2002 WL 1821927 (Ohio Ct. App. Aug. 8, 2002) (explaining that prevailing law at the time of the decision permitted a trial or sentencing court to employ factors in order to determine whether to classify an offender as a sexual predator).

300. Pub. L. No. 109-248, § 621, 120 Stat. 587, 633–34 (codified as amended at 34 U.S.C. § 20981 (2018)) (defining tiers of registration according to the offense committed).

301. *See* State v. Williams, 952 N.E.2d 1108, 1113 (Ohio 2011) (noting that offenders were no longer entitled to a hearing to determine whether they would be classified as a sexually oriented offender, habitual sex offender, or sexual predator under Ohio's amended sex offender statute); *see also* Commonwealth v. Baker, 295 S.W.3d 437, 446 (Ky. 2009) (acknowledging that Kentucky's residency restrictions apply to certain offenders without any consideration as to whether they might be a threat to children or to public safety); *In re* W.M., 851 A.2d 431, 436 (D.C. 2004) (reporting that registration requirements are "based on the nature of the offenses . . . committed rather than on an individualized assessment of . . . risk of recidivism").

302. 405 U.S. 645, 656–57 (1972).

303. Commonwealth v. Torsilieri (*Torsilieri I*), 232 A.3d 567, 583 (Pa. 2020) (admonishing that a legislature's

Snyder when it demanded from the state empirical evidence to support wholesale presence restrictions against registrants.[304] The Sixth Circuit said that prior case law should not "be understood as writing a blank check to states to do whatever they please in this arena."[305]

Here, specifically, is the significance of the Irrebuttable Presumption Doctrine. Legislative deference cannot serve as a shield to promote false generalizations that produces overinclusive legislation. An outgrowth of early pronouncements on conclusive presumptions,[306] the Irrebuttable Presumption Doctrine serves as the guardrails to two diametrically opposed points: deference to a legislative body's classifications and the use of contrary empirical evidence to demonstrate that the determination is unreasonable. The doctrine asks an important question: Does the law constitute "an attempt, by legislative fiat, to enact into existence a fact which . . . cannot be made to[] exist in actuality"?[307] Sitting at the juncture between substantive and procedural due process, the doctrine demands that legislative line drawing be based on factual bases that are universally true.

A. The History of the Irrebuttable Presumption Doctrine

The Irrebuttable Presumption Doctrine came to prominence in a line of cases heard by the Supreme Court during the 1970s. As an attempt by the Court to fashion a more flexible rational basis test,[308] the Court invalidated statutes that relied on false irrebuttable presumptions to confer or deny a right to a specific group of people.[309] The cases came to stand for the proposition that the factual predicate underlying the

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policy determinations are "nonetheless 'subject to the limits of the Constitution'" (quoting Commonwealth v. Hale, 128 A.3d 781, 785–86 (Pa. 2015))).

304. 834 F.3d 696, 704 (6th Cir. 2016).

305. *Id.* at 705.

306. *See* Heiner v. Donnan, 285 U.S. 312, 329 (1932) (characterizing a particular tax code section as a "conclusive presumption"); *see also* Schlesinger v. Wisconsin, 270 U.S. 230 (1926) (rejecting a death tax that included a conclusive presumption that gifts made within six years of death were intended as a transfer in contemplation of death); United States v. Bowen, 414 F.2d 1268, 1272–73 (3d Cir. 1969) (finding invalid conclusive presumption that the mailing of communication by Selective Service Board "shall constitute notice" to the intended recipient "whether he actually receives it or not").

307. *Heiner*, 285 U.S. at 329.

308. Justice Marshall summed up well the value of the doctrine. U.S. Dep't of Agric. v. Murry, 413 U.S. 508, 519 (1973) (Marshall, J., concurring) ("There is no reason, I believe, to categorize inflexibly the rudiments of fairness.").

309. *See* Bell v. Burson, 402 U.S. 535 (1971) (concerning the conclusive presumption of an uninsured motorist's fault in a car accident); *see also* Stanley v. Illinois, 405 U.S. 645 (1972) (regarding the irrebuttable presumption that an unwed father is an unfit parent); Vlandis v. Kline, 412 U.S. 441 (1973) (involving the irrebuttable presumption that an applicant's out-of-state residency status at the time of admission is deemed unchanged throughout tenure at school); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (focusing on the conclusive presumption that a pregnant teacher was unfit to teach after the fifth or sixth month of pregnancy); Turner v. Dep't of Emp. Sec. & Bd. Rev. Indus. Comm'n of Utah, 423 U.S. 44 (1975) (concerning a conclusive presumption that women were incapable of working for a period preceding and following pregnancy).

classification must be accepted as universally true.[310] The doctrine importantly shifted the question from whether an individual was a member of the classification to whether the classification itself was properly drawn.[311] For example, *Stanley v. Illinois* held unconstitutional a statutory classification that was premised on the position that unwed biological fathers were unfit parents.[312] So too, *Cleveland Board of Education v. LaFleur* overturned a state statute because of the inadequacy of the fit between the classification affecting school teachers and the policy the law was designed to serve.[313] There, the statute impermissibly presumed that women in their fifth or sixth month of pregnancy were unfit to serve as teachers.[314] In reaching this result, the Court noted that "neither the necessity for continuity of instruction nor the state interest in keeping physically unfit teachers out of the classroom can justify the sweeping mandatory leave regulations."[315]

The doctrine was not without detractors, however.[316] Both Chief Justice Burger and then-Associate Justice Rehnquist expressed grave concerns that the potential overreach of the doctrine would undermine previously well-established analysis regarding substantive and procedural due process violations.[317] In a later opinion limiting the doctrine's applicability, then-Associate Justice Rehnquist described the Irrebuttable Presumption Doctrine as "a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with . . . the Constitution."[318]

That thread of opposition took hold.[319] Critics chastised the Court's imprecision in stating whether the doctrine was intended as a burden-shifting evidentiary rule, a

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310. For a critique of the doctrine, see Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534, 1539–45 (1974).

311. *See, e.g.*, U.S. Dep't of Agric. v. Murray, 413 U.S. 508, 514 (1973) ("We conclude that the deduction taken for the benefit of the parent in the prior year is not a rational measure of the need of a different household with which the child of the tax-deducting parent lives and rests on an irrebuttable presumption often contrary to fact.").

312. *See* 405 U.S. 645, 658–59 (1972).

313. 414 U.S. at 650.

314. *Id.* at 644.

315. *Id.* at 647–48; *see also id.* at 641 n.9 (suggesting that the law was to "insulate schoolchildren from the sight of conspicuously pregnant women").

316. *See, e.g.*, Jonathon B. Chase, *The Premature Demise of Irrebuttable Presumptions*, 47 U. COLO. L. REV. 653, 653 (1976) ("[I]t is difficult to recall any doctrine utilized by the Court in recent years which has met with such a degree of antipathy as has the irrebuttable presumption/procedural due process analysis.").

317. Vlandis v. Kline, 412 U.S. 441, 459–69 (1973) (Burger, C.J., dissenting).

318. Weinberger v. Salfi, 422 U.S. 749, 772 (1975).

319. *See, e.g.*, Catlin v. Sobel, 93 F.3d 1112, 1118 (2d Cir. 1996) ("The use of irrebuttable presumption language was a conceptually confused, if not dishonest, method of justifying independent judicial review of legislative classifications." (quoting 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 17.6, at 42 (2d ed. 1992))); Kirk v. Sec'y of Health & Hum. Servs., 667 F.2d 525, 535 (6th Cir. 1981) ("Since we find the guidelines to be merely a substitute for legislative line-drawing, we reject appellants' challenge on irrebuttable presumption grounds.").

theory for determining substantive or procedural due process violations, or perhaps the Court's misapplication of an equal protection challenge.[320] Ultimately, and under the weight of the criticism, the doctrine was curbed as the Court replaced it with other analyses.[321] Casting about for alternatives, the six-Justice majority in *Weinberger v. Salfi* limited the doctrine's application to cases involving "affirmative Government action which seriously curtails important liberties cognizable under the Constitution,"[322] while the four-Justice plurality in *Michael H. v. Gerald D.* focused its reasoning on "the adequacy of the 'fit' between the classification and the policy that the classification serves."[323]

Also instructive in *Michael H.* was the analytical tug-of-war between the plurality and dissent over whether to frame the doctrine as a substantive or procedure rule.[324] It is a question of importance and not merely of semantics. By casting the doctrine as a substantive rule, the plurality limited its applicability to cases where a liberty interest attached to the governmental action.[325] Rejecting such a restriction, the dissent reframed the doctrine in terms of procedural fairness and whether the statute had impermissibly denied the meaningful opportunity to contest the classification.[326]

For some courts, the plurality opinion of *Michael H.* signaled the de facto end to the Irrebuttable Presumption Doctrine.[327] Indeed, in argument before the court, the Commonwealth in *In re J.B.* went further, characterizing the doctrine as possibly

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320. *See* Bruce Ackerman, *The Conclusive Presumption Shuffle*, 125 U. PA. L. REV. 761, 762 (1977) (recounting several criticisms of the doctrine); *see also The Irrebuttable Presumption Doctrine in the Supreme Court*, *supra* note 310, at 87.

321. *See Weinberger*, 422 U.S. at 749 (modifying the doctrine's applicability); Michael H. v. Gerald D., 491 U.S. 110, 121 (1989).

322. 422 U.S. at 749 (regarding a provision of the Social Security Act prohibiting wage earner's widow or stepchild from receiving insurance benefits unless the relationship was in existence nine months prior to death).

323. 491 U.S. at 121 (plurality) (rejecting the application of the Irrebuttable Presumption Doctrine and using the rational basis test in a paternity contest between natural father and husband of mother); *accord* Caitlin v. Sobol, 93 F.3d 1112, 1119 (2d Cir. 1996).

324. *Compare* 491 U.S. at 118–26 (plurality) (refuting the applicability of the doctrine because it was not attached to a protected liberty interest), *with id.* at 148–53 (Brennan, J., dissenting) (demonstrating the doctrine's applicability under procedural due process).

325. *See id.* at 120–21 (plurality).

326. *See id.* at 153 (Brennan, J., dissenting) ("Even more disturbing than the plurality's reliance on these infirm foundations is its failure to recognize that the defect from which conclusive presumptions suffer is a *procedural* one: the State has declared a certain fact relevant, indeed controlling, yet has denied a particular class of litigants a hearing to establish that fact. This is precisely the kind of flaw that procedural due process is designed to correct.").

327. *See, e.g.*, *Catlin*, 93 F.3d at 1118–19 (criticizing the workability of the Irrebuttable Presumption Doctrine). One district court opined that "the doctrine has now been 'abandoned as a generally accepted approach,'" and "[i]n this sense, the irrebuttable presumption analysis has simply collapsed into the ordinary equal protection/due process analysis" except in cases involving fundamental interests. Black v. Snow, 272 F. Supp. 2d 21, 30–31 (D.D.C. 2003) (quoting GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 915 & n.4 (13th ed. 1997)).

"obsolete."[328] The suggestion that the doctrine had met its demise was erroneous,[329] but it is fair to say that even where the doctrine has retained its vitality, courts have adhered to the plurality's view in *Michael H.* that the doctrine may only be used where the presumption implicates a protected liberty interest.[330]

B. The Modern Application of the Doctrine

The Irrebuttable Presumption Doctrine occupies a unique place in constitutional analysis. Unable to be classified easily, the doctrine straddles procedural and substantive due process[331] and it defies definition as to whether it is an evidentiary or substantive rule.[332] But its value continues to warrant attention. It can be a viable tool, where used properly, to challenge the false assumptions underlying statutory classifications.[333]

C. The Bail Cases Affecting Undocumented Immigrants

Even as bail reform measures stirred the country,[334] Arizona citizens voted to exclude eligibility to all persons who had likely entered the country illegally—no matter the seriousness of the offense or the individual circumstances of the arrestee.[335] When challenged, the state argued in *Lopez-Valenzuela v. Arpaio* that pretrial

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328. 107 A.3d 1, 12 n.22 (Pa. 2014) (citing the state's brief which noted that "some federal courts have questioned whether the irrebuttable presumption doctrine is obsolete").

329. *See infra* Section III. B (examining recent cases that used the doctrine).

330. *See In re* J.B., 107 A.3d at 14–16, n.24; Dean v. McWherter, 70 F.3d 43, 46 (6th Cir.1995).

331. *See supra* notes 320–24 and accompanying text (reporting on the differing views of the doctrine noted in *Michael H.*); *see also* Ackerman, *supra* note 320, at 773–79 (arguing that the doctrine may be a merger of procedural and substantive rules).

332. *See* John M. Phillips, Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449, 462 n.69 (1975) (agreeing with Wigmore's contention that "conclusive evidence is not a rule of evidence at all, but rather a rule of substantive law"); *see also* Ackerman, *supra* note 320, at 781–92 (differentiating among classifications that serve a procedural purpose and those that attempt to avoid procedural purpose without justification).

333. For examples of the doctrine's modern applications, see *Commonwealth v. Clayton*, 684 A.2d 1060, 1063–65 (Pa. 1996), which struck down a regulation under Irrebuttable Presumption Doctrine that had automatically suspended the drivers' licenses of individuals who had one epileptic seizure, *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 792–98 (9th Cir. 2014) (en banc) (Nguyen, J., concurring), which found unconstitutional a bail provision that was not extended to undocumented immigrants, and *In re J.B.*, 107 A.3d at 1, which rejected lifetime registration for juveniles who committed sex offenses under the Irrebuttable Presumption Doctrine.

334. *See, e.g.*, Act of July 2, 2019, No. 179, § 14(2), 2019 Haw. Sess. Laws 575, 582 (uncodified) (stating that the act "[r]equire[s] the release of a defendant under the least restrictive conditions required"); Act of Jul. 11, 2016, 2016 Alaska Sess. Laws ch. 36, § 57 (codified as amended at ALASKA STAT. § 12.30.006(d) (2021)); *see also In re* Humphrey, 228 Cal. Rptr. 3d 513, 523–25 (Cal. Ct. App. 2018) (reviewing California's new bail procedures).

335. *See Lopez-Valenzuela*, 770 F.3d at 792–98 (Nguyen, J., concurring) (examining Proposition 100, which was approved by California voters in 2006).

detention was an acceptable means to "ensur[e] that persons accused of crimes are available for trial."[336] However, the Ninth Circuit rejected the conclusive presumption underlying the Proposition that those who are illegally in the country will flee rather than face a pending criminal accusation.[337] The court stated, "[E]ven if *some* undocumented immigrants pose an unmanageable flight risk or undocumented immigrants on average pose a greater flight risk than other arrestees, Proposition 100 . . . employs an overbroad, irrebuttable presumption rather than an individualized hearing to determine whether a particular arrestee poses an unmanageable flight risk."[338]

This is the value of the Irrebuttable Presumption Doctrine: to call out classifications that are based on false generalizations and flawed assumptions. On the surface, the reasoning offered for Proposition 100 may seem to be rationally connected to its purpose—undocumented immigrants are "unmanageable flight risks" because of their status and therefore they cannot be ensured to appear court.[339] But that is a false assumption, and it drove the Proposition. Rather than being unmanageable flight risks, records reveal that many undocumented immigrants have long-standing roots in the community and data also show that, contrary to conjecture, they appear at their court appointed times.[340]

More dangerous than the flawed official reasoning of the sponsors was their true intention. Although the majority did not delve into the hostility behind this blanket exclusion, the concurring opinion felt compelled to elaborate on the pretext of the supposed rationale.[341] Judge Nguyen stated, "I write separately to address the extraordinary record of legislative intent, which I believe demonstrates that Proposition 100 was intentionally drafted to punish undocumented immigrants for their 'illegal' status."[342]

What emerges from the concurring opinion's detailed account is a picture of vocalized animus towards undocumented immigrants. The drafters' refusal to afford this group of arrestees individualized hearings is an excellent example of what one scholar has termed "procedural due process avoidance," which can be seen as the refusal to afford procedural due process in the passage of a law because of the drafters' ill-intentioned reasons.[343]

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336. *Id.* at 782 (majority).

337. *Id.* at 784.

338. *Id.*; *see also* Michael Neal, *Zero Tolerance for Pretrial Release of Undocumented Immigrants*, 30 B.U. PUB. INT. L.J. 1, 37–39 (2021) (arguing the unfairness of a system that demonstrates "calculated disregard" for the individual circumstances of the undocumented immigrant).

339. Neal, *supra* note 338, at 37–38.

340. *Id.*

341. *See Lopez-Valenzuela*, 770 F.3d at 792–98 (Nguyen, J., concurring).

342. *Id.* at 792.

343. Ackerman, *supra* note 320, at 782 (explaining that courts are more likely to look behind statutory classifications if there is a nefarious purpose for the failure to include procedural due process).

Comments by sponsors of the Proposition revealed their true motivation. Sponsors viewed undocumented immigrants as more dangerous than their documented counterparts and considered undocumented immigrants' pretrial detentions as deserved because of their prior illegal entry into the country.[344] Consider, for example, one political message, which is eerily similar to the messaging in sex offense politics.[345] Without any empirical evidence to support the assertion, one lawmaker who supported Proposition 100 claimed numerous examples of violent criminals who fled, but who, as the concurring opinion noted, "also could not cite a single case to support his position."[346]

The application of the doctrine in *Lopez-Valenzuela* reinforces its value, not only for the specific constitutional tool that it offered challengers, but for the overarching importance of its message. In this polarized climate of conversation, the court's rejection of false assumptions concerning undocumented immigrants is a welcome antidote to the mythical narrative about them.

D. Sex Offense Regimes

Unlike bail cases where freedom from pretrial detention is a protected liberty interest, no liberty interest has been recognized to be free from registration.[347] The question, therefore, remains whether there are viable liberty interests that might attach considering that registrants suffer loss of reputation, loss of employment, and are denied free movement and housing opportunities.[348]

Indeed, reputation is a valued and protected liberty interest that warrants a due process challenge under many state constitutions,[349] and one might imagine that there is a significant loss of reputation that registrants experience on the registry.[350] The Pennsylvania Court of Common Pleas in *Commonwealth v. Torsilieri* so affirmed

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344. *Lopez-Valenzuela*, 770 F.3d at 792 (Nguyen, J., concurring).

345. For an interesting fusion of mythical narratives concerning those who commit sex offenses and their exclusion from bail, see *State v. Wein*, which affirmed the mythical narrative that those who commit sex offenses present future risks to their communities. 417 P.3d 787 (Ariz. 2018).

346. Lopez-Valenzuela, 770 F.3d at 794; see also id. at 795 ("Illegal aliens shouldn't be able to get bond for anything let alone a Class 1, 2, or 3 felony . . . ." (alteration in original) (quoting S. Judiciary Comm. Meeting on H.B. 2389 and H.C.R. 2028, 47th Leg., 1st Reg. Sess. (Ariz. 2005))).

347. *See, e.g.*, Doe v. Moore, 410 F.3d 1337, 1345 (11th Cir. 2005) (rejecting appellant's argument that a fundamental right was implicated); Doe v. Mich. Dep't of State Police, 490 F.3d 491, 499–502 (6th Cir. 2007) (dismissing plaintiffs' substantive due process claim because it did not allege a sufficient privacy interest); *In re* W.M., 851 A.2d 431, 451 (D.C. 2004) ("Since SORA does not threaten rights and liberty interests of a 'fundamental' order, appellants cannot succeed on their substantive due process challenge.").

348. For a review of the burdens facing registrants, see *supra* note 7.

349. *See, e.g.*, Taylor v. Penn. State Police, 132 A.3d 590, 605 (2016) ("[R]eputation is among the fundamental rights that cannot be abridged without compliance with state constitutional standards of due process); *see also infra* note 355 and accompanying text regarding states with reputation as a protected interest.

350. *See* Carpenter, *supra* note 10, at 1090–94.

when it wrote, "It is this designation, this 'scarlet letter' of 'high risk,' that distinguishes the heightened stigma sexual offenders experience, and hence their greater marginalization, from that stigma merely associated with the fact of conviction."[351]

In a line of federal civil cases in a defamation context, the U.S. Supreme Court wrote that reputation alone will not suffice for a due process challenge because reputation is not a federally protected interest.[352] Under what has been colloquially called the *stigma plus test*, challengers in federal court must prove that in addition to their loss of reputation, they have also suffered loss of a tangible interest.[353] Although registrants can easily meet the first part of the test—the loss of reputation as the 'stigma'—courts have been unwilling to assign an additional liberty interest—the *plus*—to their claim to be free from loss of housing or education options.[354]

Although narrowed by the "stigma *plus* test," a path remains for challengers to employ the Irrebuttable Presumption Doctrine under state law. Until such time as courts acknowledges the cognizable loss of liberty facing those who must register, reputation alone can serve as the liberty interest in a state court challenge *providing that reputation is a protected interest in the state constitution*.[355]

So focused are we on the jurisprudence of the federal constitution that we sometimes forget to consider the independent and robust jurisprudence of state constitutions. We overlook the important liberty interests that are protected separately within them. As one article rightly noted, "powerful liberty protections sit latent [in state constitutions] from disregard."[356]

That was the setting for *In re J.B.*, which examined whether in Pennsylvania, a statutory scheme violated the state's due process because it required lifetime

351. Commonwealth v. Torsilieri (*Torsilieri II*), No. 15-CR-0001570-2016, slip op. at 4 (Pa. Ct. Com. Pl. Aug. 22, 2022); *accord* Commonwealth v. Perez, 97 A.3d 747, 766 (Pa. Super. 2014) (Donohue, J., concurring) (concluding that Pennsylvania's public internet website "exposes registrants to ostracism and harassment").

352. *See* Paul v. Davis, 424 U.S. 693 (1976) (requiring more than loss of reputation for a successful due process challenge).

353. *See generally id.*; *see also* Vega v. Lantz, 596 F.3d 77, 81 (2d Cir. 2010) (providing the elements to prove a 'stigma plus' claim).

354. *See, e.g.*, Welvaert v. Neb. State Patrol, 683 N.W.2d 357, 366 (Neb. 2004) (rejecting claim of loss of reputation because "consequences flow not from . . . registration and dissemination provisions, but from the fact of conviction, already a matter of public record" (quoting Smith v, Doe, 538 U.S. 84, 103 (2003))); State v. White, 590 S.E.2d 448, 456 (N.C. Ct. App. 2004) ("[A]ny stigma flowing from registration requirements is not due to public shaming, but arises from accurate information which is already public . . . ."). The Fifth Circuit was extremely dismissive in entertaining such a potential claim. *See* Does 1–7 v. Abbott, 945 F.3d 307 (5th Cir. 2019) ("Even assuming for the sake of argument that a convicted sex offender has a liberty interest in being free from registration . . . .").

355. For a sample of state constitutions that include reputation as a protected interest, see ME. CONST. art. 1, § 19, DEL. CONST. pmbl., S.D. CONST. art. 6, § 20, WYO. CONST. art. 1, § 8, TENN. CONST. art. 1, § 17, OKLA. CONST. art. 2, § 6, and N.C. CONST. art. 1, § 18.

356. Loretta H. Rush & Marie Forney Miller, *A Constellation of Constitutions: Discovering and Embracing State Constitutions as Guardians of Civil Liberties*, 82 ALB. L. REV. 1353, 1354 (2018).

registration for certain juveniles.[357] Since Pennsylvania citizens enjoy the freedom from loss of reputation under their state constitution, the juvenile challengers were able to rely on reputation as a protected interest to attach to the Irrebuttable Presumption Doctrine.[358]

Proving that a liberty interest attaches to the challenge, however, is only the threshold question. The more difficult step was contesting the factual predicate upon which rested automatic lifetime registration for juveniles: that children who commit certain sex offenses reoffend at such high rates that they are irredeemable and therefore in need of lifetime monitoring.[359]

Like other sex offense statutory schemes, tucked into this one is its mythical narrative: that juvenile offenders recidivate at alarmingly high rates. That statement is not universally true; it is not even partly accurate. Empirical research overwhelmingly supports the view that juveniles who commit sex offenses recidivate at the same, or lower, rates as their non-sex -offending counterparts.[360] In fully researched studies, Dr. Michael Caldwell reports that the recidivism rate for children who offend is under five percent.[361] Based on the empirical evidence, the court correctly affirmed the trial court's use of the Irrebuttable Presumption Doctrine to find that the statutory scheme affecting lifetime registration for juveniles was unconstitutional because its factual predicate was not universally true.[362]

Animated by empirical studies supporting low recidivism rates, a similar result was obtained in *Torsilieri*.[363] Employing the Irrebuttable Presumption Doctrine, the Pennsylvania Court of Common Pleas wrote on remand that Pennsylvania's SORNA laws were based on a "faulty premise that all sexual offenders are dangerous high-risk recidivists."[364]

In re J.B. and *Torsilieri* offer a singularly important takeaway. State

357. 107 A.3d 1 (Pa. 2014).

358. *Id.* at 16. Six years later, the court was faced with a similar issue but affecting adults in *Commonwealth v. Torsilieri* (*Torsilieri I*), 232 A.3d 567 (Pa. 2020), which remanded the case to the trial court with instructions to consider the empirical studies offered by the challengers. On remand, the Pennsylvania Court of Common Pleas embraced empirical studies to find the statute unconstitutional under the Irrebuttable Presumption Doctrine. *See* Commonwealth v. Torsilieri (*Torsilieri II*), No. 15-CR-0001570-2016 (Pa. Ct. Com. Pl. Aug. 22, 2022).

359. *See In re* J.B., 107 A.3d at 1–2 ("After review, we affirm the determination that SORNA violates juvenile offenders' due process rights through the use of an irrebuttable presumption.").

360. *Id.* at 13; *see also* Catherine L. Carpenter, *Throwaway Children: The Tragic Consequences of a False Narrative*, 45 SW. L. REV. 461, 489–91 (2015) (detailing the studies and experts who report low recidivism rates among children who commit sex offenses).

361. Caldwell, *supra* note 223, at 41 (providing empirical data on child sex offenders that refute the presumption of high recidivism rates in this group from a study conducted with this author).

362. *See id.*

363. *Torsilieri II*, No. 15-CR-0001570-2016 (Pa. Ct. Com. Pl. Aug. 22, 2022).

364. *Id.* at 5.

constitutionalism has lived in the shadows of federal jurisprudence,[365] but state constitutions offer rights and protections not available in the federal constitution, including the right to be free from loss of reputation.[366] Since these decisions are based on the courts' review of the Pennsylvania's constitution,[367] they are unreachable by the U.S. Supreme Court,[368] a strategy that is not foreign to state supreme courts that have overturned aspects of sex offense registration laws under a theory of adequate and independent state grounds.[369]

It must be acknowledged that successful application of the Irrebuttable Presumption Doctrine in a state with reputation as a protected liberty interest is at best a partial victory. Singularly, a state lawsuit does not advance the use of the Irrebuttable Presumption Doctrine on a national scale. Nor does it push other courts to recognize the mythical narrative that propels the sex panic. But each state victory builds connective messaging to diffuse the mythical narrative. With a robust record of empiricism on low recidivism rates and a state constitution that protects reputation as a fundamental right, the Irrebuttable Presumption Doctrine may be a successful option to assert a due process violation; and, with that, a viable opportunity to challenge panicked legislation.

CONCLUSION

Yes, we are in the throes of a moral panic. Ultimately, *Panicked Legislation* is a cautionary tale about hastily crafted lawmaking intended for only one purpose: to appease a fearful public. With no abatement in sight and even more panicked legislation on the horizon, this article urges judicial intervention in the form of the Irrebuttable Presumption Doctrine to reject classification schemes built on false assumptions that masquerade as universal truths.

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365. *See* Robert F. Williams, Forward, *Robert F. Williams State Constitutional Law Lecture: The State of State Constitutional Law, The New Judicial Federalism and Beyond*, 72 RUTGERS L. REV. 949, 975 (2020) (noting a 1988 Gallup Poll where more than half of those surveyed did not know they had a state constitution).

366. *See generally id.*

367. *In re* J.B., 107 A.3d 1, 14–19 (Pa. 2014).

368. It is always possible that an appellate court within Pennsylvania might overturn the order of the Court of Common Pleas in *Commonwealth v. Torsilieri* (*Torsilieri II*), No. 15-CR-0001570-2016 (Pa. Ct. Com. Pl. Aug. 22, 2022), that it issued on remand from *Commonwealth v. Torsilieri* (*Torsilieri I*), 232 A.3d 567 (Pa. 2020).

369. Several other courts have overturned their sex offense registration laws by relying on state constitutional grounds, even where the state constitution is identical to the federal constitution. *See, e.g.*, Wallace v. State, 905 N.E.2d 371 (Ind. 2009) (concluding that Indiana's amended scheme violates constitutional principles under state grounds); Doe v. State, 189 P.3d 999 (Alaska 2008); State v. Williams, 952 N.E.2d 1108 (Ohio 2011); Doe v. Dep't of Pub. Safety & Corr. Servs., 62 A.3d 123 (Md. 2013).