

#MeToo and the Myth of the Juvenile Sex Offender

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[P]rison abolition [i]s the most direct path toward justice[.] Our work [to end gender violence] needs to be reframed as a movement against the patriarchal carceral state that is so dangerous to so many people . . . includ[ing] tearing down the architecture of racism and the related forms of oppression upon which that carceral state is built. . . . That will protect survivors and . . . make us strong, whole and ready.¹

[T]he usual response to sexual violence is “get the perpetrators and lock them up” . . . What does accountability look like, particularly in the age of Black Lives Matter? How do we talk about sexual violence while we’re really also so aware of virulent state-sanctioned violence and white supremacy against Black communities?²

The #MeToo movement has brought much needed attention to women’s and girls’ victimization and the systemic nature of sexual harm. It can also be credited with concrete benefits such as increased reporting of sexual assault and harassment. What has been overlooked, however, is that it also has real downsides, as does, more broadly, the criminal legal system’s (CLS) treatment of sexual harm. Specifically, our approach to sexual harm reveals the pathologies and ineffectiveness of the CLS and risks re-inscribing the very gendered and racialized hierarchies the movement seeks to eradicate. Yet sexual harm continues to be left out of most conversations on decarceration and criminal legal reform. #MeToo amplifies this missed opportunity in focusing almost exclusively on individual blame and punishment, and ignoring the structural causes of gender violence, as well as meaningful survivor healing and offender accountability. This is true both as to the scope of criminalization, which is ever-expanding particularly as to sexual harms,³ and to the

* Professor of Law, Brooklyn Law School. For helpful comments on this piece, I owe thanks to Jenny Carroll, Angel Maldonado, and other participants in the 2019 FLST conference and the Criminal Justice Ethics Schmooze. For valuable research assistance, I am grateful to Caitlyn Garcia, Hector Melendez, and Meg Ryan.

¹ Beth E. Richie, *Reimagining the Movement to End Gender Violence: Anti-Racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice (Transcript)*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 257, 262, 272 (2015).

² Victoria Law, *How Can We End Child Sexual Abuse Without Prisons?*, TRUTHOUT (Oct. 2, 2019), <https://truthout.org/articles/how-can-we-end-child-sexual-abuse-without-prisons/>.

³ See Sameer Hinduja & Justin W. Patchin, *State Sexting Laws*, CYBERBULLYING RES. CTR., <https://cyberbullying.org/state-sexting-laws.pdf> (last updated Nov. 2018) (discussing the thirty-three states that enacted revenge porn or non-consensual monogamy laws); Ellen Wulforst, *New York City Cracks Down on ‘Upskirting’ Crimes Against Women*, REUTERS (Apr. 18, 2016),

response once harm occurs, which is almost always to advocate for longer prison sentences and more restrictions post-release, such as sex offender registration.⁴

Despite the fact that much of the #MeToo reckoning has focused on high-profile men who repeatedly exploit minors—e.g., Jeffrey Epstein, R. Kelly, Kevin Spacey—minors themselves, some as young as eight, constitute one third of those adjudicated sex offenders and one quarter of those required to register, sometimes for life. The image that continues to drive policy, and continues to be false, is that of a “pack” of “savage,” “wilding” predators, as exemplified in the portrayal of the five teenagers wrongly convicted and punished (since exonerated) for the rape of the Central Park jogger.⁵ At the same time, harm to juveniles who do not fit a mainstream mold are ignored. Thus, although girls of color are sexually assaulted at much higher rates than white girls (as are women of color), their victimhood continues to be overlooked and their responses to it even criminalized.⁶ This is why an important part of the Movement for Black Lives’ platform is to address gender-based violence, but not via the CLS, because “the punitive nature of this system is ill-equipped to support young girls through the violence and trauma they’ve

<https://www.reuters.com/article/us-usa-new-york-upskirting/new-york-city-cracks-down-on-upskirting-crimes-against-women-idUSKCN0XF240> (discussing the numerous states that have made “upskirting” a crime); see also S.B. 104, 154th Gen. Assemb., Reg. Sess. (Ga. 2017), <http://www.legis.ga.gov/Legislation/20172018/170710.pdf> (discussing the new Georgia legislation that penalizes upskirting as a felony carrying a one to five-year prison sentence).

⁴ The debate over Brock Turner’s sentencing, including a very rare and, in my view, erroneous judicial recall, vividly illustrated this dynamic. See, *Brock Turner Sentenced to Six Months Amid Calls for Tougher Penalty*, ESPN (June 3, 2016), https://www.espn.com/college-sports/story/_/id/15938889/brock-turner-former-stanford-cardinal-swimmer-sentenced-six-months-jail; Sarah Moon & Amanda Watts, *The Judge Who Was Recalled After the Brock Turner Case is Fired From His New Job As a High School Tennis Coach*, CNN (Sept. 12, 2019), <https://www.cnn.com/2019/09/12/us/brock-turner-case-judge-fired-coaching-job/index.html> (noting that the judge who presided over the Turner case has since been fired from another job).

⁵ See *WHEN THEY SEE US* (Netflix 2019). Prosecutor Linda Fairstein has drawn particular criticism for describing the juveniles as animals and savages, rightly so, but the police, media and politicians also contributed.

⁶ See, e.g., Tarana Burke, *#MeToo was Started for Black and Brown Women and Girls. They’re Still Being Ignored*, WASH. POST (Nov. 9, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/11/09/the-waitress-who-works-in-the-diner-needs-to-know-that-the-issue-of-sexual-harassment-is-about-her-too/> (quoting CDC statistics) (discussing that girls of color are disproportionately sexually assaulted, with Native American girls at a rate of 12.5%, multi-race 13.5%, 8.6% black, 8.2% Hispanic and 7.4% white); Cynthia Godsoe, Letter to the Editor, *Helping Women and Girls in Prison*, N.Y. TIMES (Dec. 10 2015), <https://www.nytimes.com/2015/12/10/opinion/helping-women-and-girls-in-prison.html> (“Most girls enter the criminal justice system for nonviolent offenses. They are often punished for attempting to escape family abuse and trauma, arrested for running away or for prostitution, even when they are too young to legally consent to sex. This sexual abuse to prison pipeline lets the real offenders—those who exploit and abuse children and teenagers—off the hook, while failing to treat girls’ mental health and other trauma needs. Indeed, girls often receive more severe sentences for less serious offenses than boys.”); see also, Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1261–65 (2011) (indicating that male victims are also discounted).

experienced, which further subjects them to sexual victimization and a lifelong path of criminalization and abuse.”⁷

In this Symposium essay, I similarly urge caution about the direction the #MeToo movement is taking. Instead of doubling down on a criminal approach to sexual harms, I argue that we should expand the conversation and look beyond the CLS to more effective and less costly (in every way—fiscal and human) approaches. The ineffectiveness and overly punitive nature of our current approach result in a system that does not work for survivors, offenders, and society more broadly. Indeed, punishing juveniles for sex offenses puts them at much greater risk for being sexually abused themselves by adults—undermining the primary stated goal of the sex offense criminal framework. I conclude with the counterintuitive suggestion that decriminalization and decarceration efforts should not only include sex offenses, but likely should *begin* with them. Sex offenses are one key piece of an abolitionist vision that seeks to transform society and achieve racial and gender justice, and I join a small but growing group of reformers and (even fewer) scholars in calling for this as both pragmatic and essential.⁸

I focus here on juveniles as the most problematic and the most promising category of so-called sex offenders. Problematic because they are a significant percentage of those adjudicated sex offenders, as noted above, despite the fact that most sex offender laws were designed to protect minors, and that their conduct deemed criminal is often developmentally normal, or at least not aberrant. Applying laws (themselves flawed and overly harsh) intended for adults is wrong—their “offending” is very different—and out-of-step with all prevailing medical and psychiatric literature. Indeed, the research makes clear that there is no medical or criminological category of a “juvenile sex offender”; rather, it is a legal construct based on fear that brings more harm than good.

Yet juveniles are also the group of sex offenders most likely to inspire reform. Research demonstrates that minors are very unlikely to re-offend and more amenable to rehabilitation. Building on U.S. Supreme Court jurisprudence demonstrating that juvenile culpability and punishment should be assessed differently, a small but growing number of courts and legislatures are questioning both the scope of criminalization and the harshness of punishment such as registration, when applied to those who offended as minors.⁹

Nonetheless, the predominant approach to juveniles’ sexual behavior, whether harmless and widespread or bringing some harm, continues to be to pathologize and criminalize. Take just a few typical cases—a 17-year-old boy has naked pictures of his 15-year-old girlfriend, which she took and sent to him. He is convicted of child pornography. (More rarely, she may also be prosecuted). Two thirteen-year-old girls consensually engage in oral sex. One girl’s parents push for prosecution, and the

⁷ *End the War on Black People*, THE MOVEMENT FOR BLACK LIVES, [https:// policy.m4bl.org/end-war-on-black-people/](https://policy.m4bl.org/end-war-on-black-people/) (last visited January 28, 2020).

⁸ See Cynthia Godsoe, *Alternatives to Criminal Law* (forthcoming).

⁹ See *infra* notes 75–78.

other girl is convicted of statutory rape.¹⁰ An eleven-year-old boy (himself abused by an adult family member several years earlier) touches his eight-year-old cousin's genitals over her objections. He is adjudicated delinquent for forcible child sex abuse. Two of the minors are incarcerated; all three are placed on the sex offender registry. Punishing harmless and/or widespread behavior, and failing to address the root causes of problematic conduct reflects our distorted view of risk and harm in this realm.

Particularly through the lens of juveniles, our punishment of sexual offenses also reveals three significant pathologies of the broader criminal legal system. First, we rely almost exclusively on criminalization and punishment to address societal problems that have multiple causes beyond individual culpability. Sexual assault and other sex offenses are about a lot more than individual bad actors. Instead, they stem from structural gender, racial, and economic inequality, substance abuse, and familial trauma that are often multi-generational. Since it does not address these root causes, the criminal legal system has proven particularly ineffective at addressing sex offenses.

Second, the system is immensely costly, in fiscal and, most importantly, human terms, with very low effectiveness. Punishment is racially disproportionate and overly harsh. This is true of all offenses, but particularly true of sex offenses. I will not belabor the point here, but the U.S. is the largest incarcerator in the world and this punishment disproportionately falls on people of color and other marginalized groups.¹¹ Accordingly, when we expand the criminal law to cover ever more nuanced sex offenses or to apply to younger and less culpable actors, the burden falls disproportionately on people of color.¹² Those designated as sex offenders are also accorded post-sentencing consequences, such as residency restrictions, civil commitment, and placement on a sex offender registry that make it particularly difficult for them to reintegrate into the community and gain employment—the two things most indicative of rehabilitation. Accordingly, it should not be surprising that the research shows these measures to be ineffective or likely criminogenic. Every state requires some juveniles to register, even those as young as ten, and sometimes for life with no appeal.¹³ Indeed, over 200,000 people or about 1/4 of those on the

¹⁰ Karyl Troup-Leasure & Howard N. Snyder, *Statutory Rape Known to Law Enforcement*, OJJDP JUVENILE JUSTICE BULLETIN, at 2 (Aug. 2005), <https://www.ncjrs.gov/pdffiles1/ojjdp/208803.pdf> (defining statutory rape as “consensual sexual relations with an individual not old enough to legally consent to the behavior.”). State statutes vary widely, but the vast majority criminalize consensual sex between some parties below the age of consent. I use minors, children, and adolescents interchangeably to indicate someone below the age of consent and peer statutory rape to indicate when two minors have sex.

¹¹ THE NATIONAL ACADEMIES, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 125 (2014).

¹² See, e.g., Lara Bazelon, *California's Sexual Assault Law Will Hurt Black Kids*, N.Y. TIMES (Sept. 22, 2017) (arguing against steeper punishment for “sexual violence” in schools beginning in kindergarten).

¹³ See LANCASTER, *infra* note 36. See, *Juvenile Sex Offender Registry (SORNA)*, *infra* note 39. Thirty-eight states subject children under age 18 to sex offender registration for offenses adjudicated

registry, are there for convictions or delinquency adjudications as juveniles. Nationally, the juvenile registry alone has an estimated social cost of \$3 billion.¹⁴ In a world of limited resources, this massive amount of money could be more productively spent on, for instance, prevention by adults committing sexual harms and services for those harmed to heal. Additionally, the costs of punishing minors is borne not only by the juvenile offender but by their families, including on other children. Finally, children and youth on the registry are at significantly greater risk of mental health trauma, including suicide, and of sexual victimization by adults—the very harm the sex offense system purportedly seeks to address.¹⁵

Compounding this failure is that a criminal law approach to sexual harm, particularly by minors, simply does not work. This is true both in terms of preventing and redressing harm. The vast majority of offenders are never prosecuted or convicted, so whatever harms the criminal law seeks to address remain unanswered. The few who are convicted then are subjected to extremely harsh punishments but not rehabilitative services. In this, the harm that led to the conviction remains unredressed. The lack of accountability in the CLS worsens this failure to redress harm. Survivors want an acknowledgement of their harm—something that the adversarial criminal legal system does not allow for.¹⁶ Moreover, the CLS fails to provide services that might produce real healing or at least mitigation of the injuries suffered, offering instead only long periods of offender incarceration. This punitive approach not only ignores the real needs (and desires) of those harmed by sex crimes, but it perpetuates a cycle of harm by failing to restore either victim or offender.

Third, the criminal treatment of sex crimes reinforces the very gendered and racialized hierarchies that animate them. Girls and women of color continue to be undervalued and unprotected,¹⁷ while male survivors continue to be stigmatized and disbelieved.¹⁸ Indeed, the founder of the #MeToo movement, Tarana Burke, recently lamented this turn in the movement: “We have to shift the narrative that it’s a gender war, that it’s anti-male, that it’s men against women, that it’s only for a certain type of person—that it’s for white, cisgender, heterosexual, famous

in juvenile court while all states subject children to sex offender registration for offenses adjudicated in adult court.

¹⁴ Richard B. Belzer, *The Costs and Benefits of Subjecting Juveniles to Sex-Offender Registration and Notification*, R STREET, at 5 (Sept. 2015), <https://www.rstreet.org/wp-content/uploads/2015/09/RSTREET41.pdf>.

¹⁵ Elizabeth J. Letourneau et al., *Effects of Juvenile Sex Offender Registration on Adolescent Well-Being: An Empirical Examination*, 24 PSYCHOL. PUB. POL’Y & L. 105, 115 (2018).

¹⁶ AISHAH SHAHIDAH SIMMONS, LOVE WITH ACCOUNTABILITY: DIGGING UP THE ROOTS OF CHILD SEXUAL ABUSE 21 (2019).

¹⁷ See, e.g., Bobby Allyn, *Cyntoia Brown Released After 15 Years in Prison for Murder*, NPR (Aug. 7, 2019), <https://www.npr.org/2019/08/07/749025458/cyntoia-brown-released-after-15-years-in-prison-for-murder>.

¹⁸ See Capers, *supra* note 6.

women.”¹⁹ Burke founded the movement in 2006 while working with girls of color with a primary aim of recognizing previously unseen victims.²⁰ Since #MeToo went viral in 2017 after actress Alyssa Milano tweeted it out, however, the movement has been largely associated with famous white women while non-mainstream survivors continue to be marginalized.²¹

This essay has four parts. I begin in Part I by outlining the definitional problems in juvenile sex offenses—what behavior is actually harmful or wrongful; who is the victim and who the offender—as well as other reasons why punishing minors for sexual acts is often over-inclusive and illegitimate.²² Part II fleshes out the high costs and ineffectiveness of our current carceral approach to sexual harms and wrongs, particularly the exposure to mental health trauma, suicide and, perversely, sexual abuse by adults, facing the many juveniles required to register as sex offenders. In Part III, I map the potential for movements such as #MeToo to reinforce gendered, racialized and heteronormative paradigms when they focus on a criminal approach to sexual harm. The Conclusion flags two promising approaches to sex offenses outside the criminal legal system, public health bystander interventions and restorative justice, and argues for a more nuanced and intersectional approach to sex offending, an approach in accord with core feminist values.²³ To this end, we can learn from the women of color who are founders and leaders in the penal abolition movement, many of whom are also survivors of sexual harm.²⁴

I. DEFINITIONAL PROBLEMS

Juveniles deemed sex offenders differ considerably from adult offenders, particularly in the lack of harm and risk they bring. Nonetheless, their conduct is lumped into one category and equated with that of adults, or sometimes even further pathologized. Juveniles’ cases range from petting over clothes, sharing pornography with other minors, and sexting, to forcible rape, with the majority falling into the first categories.²⁵ Tellingly, half of juveniles are adjudicated sex offenders for

¹⁹ Liz Rowley, *The Architect of #MeToo Says the Movement Has Lost Its Way*, THE CUT (Oct. 23, 2018), <https://www.thecut.com/2018/10/tarana-burke-me-too-founder-movement-has-lost-its-way.html>.

²⁰ Burke, *supra* note 6.

²¹ See discussion *infra* notes 120–21. There are more non-iconic victims, including boys and girls of color, than among adult victims.

²² See Jennifer M. Reingle, *Victim-Offender Overlap*, THE ENCYCLOPEDIA OF THEORETICAL CRIMINOLOGY 911 (2014) (eschewing the frequently used dichotomy of victim or offender in a theoretical and empirical discussion of why these categories are not mutually exclusive).

²³ See Kimberle W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

²⁴ See *infra* notes 130–32.

²⁵ See Christopher D. Houck et al., *Sexting and Sexual Behavior in At-Risk Adolescents*, 133 PEDIATRICS e276, e277 (2014) (defining “[s]exting” as the transmission of nude (or seminude) images

fondling, and their most serious offense is less likely than adults to be rape.²⁶ As one expert concludes, “the image of the adult sexual predator is a poor fit for the vast majority of adolescent sex offenders [who are] . . . neither sexually abnormal nor sexually dangerous”²⁷

The definitional problems pervading the juvenile sex offender context further warp this already flawed framework: Who is a victim and who is an offender in behavior between two minors? What conduct is typical adolescent conduct and what is criminal or merits other interventions? What is the nature for the sexual interaction, its impact on the “victim,” and relatedly the culpability and potential for rehabilitation of the “offender?” With so many lines being drawn arbitrarily, in illegitimate gendered and racialized ways, and contravening medical and psychiatric research, it is no wonder that jurisdictions vary enormously in the number and type of juvenile sex offenses compared to those assigned to adults. Quite simply, there is no clear agreement on what a juvenile sex offense is, and I argue here that there should likewise be no category of “juvenile sex offender.”²⁸

A. *The Victim-Offender Overlap*

The victim-offender binary is particularly polarized in sex offenses; chaste victim is contrasted with monstrous offender. These images are also highly racialized and gendered; boys and men are devalued as victims, along with “unchaste” girls.²⁹ The recent derision of Jeffrey Epstein’s victims is a clear demonstration of this dynamic. These girls, who were almost all low-income and some homeless, were deemed less worthy victims because Epstein paid them.³⁰ The victim and offender categories, often characterized as “natural or innate,” are in fact highly socially constructed. Harm is only recognized for some victims—white, middle-class, female—and culpability is only recognized for some offenders. The

via an electronic device).

²⁶ David Finkelhor et al., *Juveniles Who Commit Sex Offenses Against Minors*, OJJDP JUVENILE JUSTICE BULLETIN, at 4 (Dec. 2009) <https://www.ncjrs.gov/pdffiles1/ojjdp/227763.pdf>.

²⁷ Franklin E. Zimring, *An American Tragedy: Legal Responses to Adolescent Sexual Offending*, ADOLESCENT DEV. & LEGAL POL’Y MONOGRAPH SERIES, <https://www.prearesourcecenter.org/sites/default/files/library/legalresponsestojuvenilesexoffending.pdf> (last visited March 20, 2020).

²⁸ This is, of course, not to say that adults should be termed “sex offenders.” See, e.g., Alice Ristroph, *Farewell to the Felonry*, 53 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 563 (2018). But the label is even more illegitimate when applied to juveniles.

²⁹ I have previously described this dynamic. See Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313 (2015); see also Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH & LEE L. REV. 173 (2017).

³⁰ Epstein’s lawyer questioned whether statutory rape is actually a crime, at least against these types of girls. Similarly, Alan Dershowitz, another of Epstein’s attorneys and himself accused of statutory rape with two of the victims, derided the teenagers as “prostitutes.” See, e.g., Tracy Clark-Flory, *Jeffrey Epstein and the Oxymoron of the Underage Women*, JEZEBEL (July 10, 2019), <https://jezebel.com/jeffrey-epstein-and-the-oxymoron-of-underage-women-1836247451>.

narrative of #MeToo further entrenches this framework.

This skewed framework is especially problematic when looking at juveniles for several reasons. Although protecting minors from sexual abuse and exploitation by adults is the purported justification for the extremely harsh and stigmatized punishment of sex offenders, children and teenagers comprise a significant portion of those branded as sex offenders.³¹ In many of these cases, it is unclear whether the conduct is or should be criminal when engaged in by a juvenile, because it is developmentally typical, or at least not clearly aberrant.³² Nor is it clear from a culpability and harm perspective who is the victim and who is the offender.

Protecting children from adult “predators” underlies the increase in sex offense laws and the uniquely harsh treatment of those accused of sex offenses.³³ For instance, SORNA, the federal statute imposing sex offender registration, aims “to protect the public from sex offenders and offenders against children, and [was adopted] in response to the vicious attacks by violent predators”³⁴ High profile crimes such as the kidnappings and murders of Polly Klaas and Jacob Wetterling, as well as irrational panic driven by factors including the entry of white, middle-class mothers into the work force, drove this trend.³⁵ As Roger Lancaster describes it, this panic in the 1980s and early 1990s was in reality “[l]ess about the protection of children than about the preservation of adult fantasies of childhood as a time of sexual innocence . . . giv[ing] rise to bloated imaginings of risk, inflated conceptions of harm, and loose definitions of sex.”³⁶

Despite being the most sympathetic victims,³⁷ however, hundreds of thousands of children and teenagers are deemed sex offenders. David Finkelhor, a leading researcher on child sexual abuse, points out that almost one third of convicted sex offenders were minors when they offended, with 35.6 percent being between ages 12 and 14, and 16 percent under 12-years-old.³⁸ Tellingly, about one quarter of those required to register as sex offenders committed their offenses as juveniles, some as young as eight-years-old.³⁹ The justification for criminalizing and punishing them

³¹ See Finkelhor et al., *supra* note 26.

³² See discussion *infra* notes 51–74.

³³ This harshness leads me to categorize the post-sentence consequences such as sex offender registration to be punishment, as some courts and other legal authorities have recently recognized. See *infra* note 130 (quoting from a brief by the Michigan Attorney General).

³⁴ Sex Offender Registration and Notification Act, 34 U.S.C. § 20901 (2018).

³⁵ Thanks to Jenny Carroll for pointing out that poor, rural, and many women of color had always worked outside the home.

³⁶ ROGER N. LANCASTER, *SEX PANIC AND THE PUNITIVE STATE* 2 (2011).

³⁷ This applies to at least some children, since concepts of victimhood are highly racialized and gendered.

³⁸ Finkelhor et al., *supra* note 26, at 4–5.

³⁹ *Juvenile Sex Offender Registry (SORNA)*, JUV. L. CTR, <https://jlc.org/issues/juvenile-sex-offender-registry-sorna> (last visited January 9, 2020) (“Over 200,000 people in 39 states are currently on sex offender registries for crimes they committed as children.”) (citation omitted).

is, often explicitly, the protection of children, despite the offender being a child themselves. For instance, one state high court affirmed lifetime sex offender registration and electronic monitoring, with no possibility of review, for a twelve-year-old, reasoning that the laws were enacted to protect children and that sexual assaults “disproportionately affect juveniles,” including many 12 years old and younger.⁴⁰ Similarly, another state supreme court recently affirmed the sex offender adjudication of a 15-year-old boy for consensual sexting with two girls, one his age and one two years older than him, because the statute at issue is “fundamentally concerned with the ‘privacy, health, and emotional welfare of [the state’s] children’ . . . [whose] sexual exploitation . . . ‘results in social, developmental, and emotional injury’”⁴¹

Minors almost always offend against other minors, with most victims being the same age or slightly younger than the offenders.⁴² In addition, the assignment of “offender” and “victim” roles are typically determined by the prosecutor, judge, or even parents, usually along gendered and racialized lines. This is true in peer statutory rape and sexting cases, where both parties are below the age of consent. In 2012, 40 children under the age of ten and 461 between the ages of 11 and 16 were adjudicated guilty of statutory rape of other minors.⁴³ When children are the same or close in age, gender often becomes the factor that determines culpability. Boys, or more “masculine-behaving” children, are deemed as initiators and offenders.⁴⁴ For instance, D.B., a twelve-year old, was convicted of the statutory rape of two other boys, aged eleven and twelve.⁴⁵ The trial court found him to be the offender in these consensual encounters because the sexual activity “was [D.B.]’s idea . . . [and that] every single time it was about [D.B.] being sexually gratified. It wasn’t about [the boy deemed to be a victim].”⁴⁶ The judge made this subjective determination, which does not comport with harm, culpability, or even the statutory language, and sentenced the twelve-year-old D.B. to five years suspended incarceration, indefinite probation, and sex offender treatment. Similarly, based on gendered and heteronormative stereotypes, in the J.G. case, only one, African-American, boy was charged with felony sex abuse after four boys and three girls of

⁴⁰ See, *In re Justin B.*, 405 S.C. 391, 408 (2013). No irony in this decision!

⁴¹ *In re T.B.*, 445 P.3d 1049, 1058 (2019).

⁴² Finkelhor et al., *supra* note 26, at 9.

⁴³ See FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: SEX OFFENSE OFFENDERS, STATUTORY RAPE, SEX AND RACE BY AGE, 2012, <https://ucr.fbi.gov/nibrs/2012/table-pdfs/sex-offense-offenders-statutory-rape-sex-and-race-by-age-2012> (last visited Apr. 22, 2020).

⁴⁴ See, e.g. *In re T.B.*, 445 P.3d 1049, 1052, 1058 (2019) (affirming the adjudication of a 15-year-old boy as a sex offender for sexting with a 17-year-old girl where she also sexted and was not charged).

⁴⁵ *In re D.B.*, 950 N.E.2d 528, 529–30 (Ohio 2011).

⁴⁶ See Merit Brief of Appellant D.B. at *4, *In re D.B.*, 950 N.E.2d 528 (Ohio 2011) (No. 2010-0240), 2010 WL 3498429 (noting that M.G. would often receive video games or the use of D.B.’s pool in exchange for sex). *Id.* at *5 (quoting Transcript of Record at 202–03); *In re D.B.*, No. 2009 CA 00024, 2009 WL 5062017 (Ohio Ct. App. 2009)).

about the same age played a “game”; touching each other at school.⁴⁷ This was despite the fact that the boys only touched the girls’ breasts over their clothes, while the girls touched the boys’ genitals, both clothed and unclothed.⁴⁸ In both cases, parents (who initiated the D.B. case), police, and prosecutors essentially defined the crime themselves, along illegitimate criteria such as racialized gender norms and parental pressure.

More broadly than statutory rape, the division between victim and offender is particularly tenuous among juveniles given that many of the offenders were previously victimized, often by adults.⁴⁹ While, this is also true of adult offenders it is even more extreme and troubling as to juveniles. Very often, they do not receive proper treatment and sometimes offend against others in a somewhat responsive manner. In this way, their victimhood is erased and they are seen only as offenders.⁵⁰

Three additional factors aggravate the problematic breadth of criminalization and punishment of juvenile sex offenders: the developmental appropriateness or widespread nature of much of their sexual conduct; their low risk of recidivism compared to adults; and their diminished culpability and greater potential for rehabilitation.

B. Criminalization of Normal Behavior & Skewed Perception of Risk

Much of the conduct juveniles are punished for is, in fact, developmentally appropriate and/or not harmful in the fashion the law—written with an adult offender in mind—intended.⁵¹ For instance, the medical literature confirms that it is developmentally normal for minors to experiment with sexual touching, oral sex, and even sexual intercourse at a wide range of ages.⁵² Many children masturbate, and kiss and touch the genitals of other children.⁵³ This consensual sexual play is

⁴⁷ See generally, *In re Jordan F.*, No. 1 CA-JV 08-0191, 2009 WL 2525311, at *1–3 (Ariz. Ct. App. Aug. 18, 2009), *petition for reh’g denied*. Another boy was charged with various sex offenses and a third boy was investigated but not charged. *Id.* at *1 n.1. None of the girls were charged or even fully investigated.

⁴⁸ *Id.* at *1–3.

⁴⁹ Finkelhor et al., *supra* note 26, at 3.

⁵⁰ This is something I have previously described in the context of commercially, sexually-exploited girls. See Godsoe, *Punishment as Protection*, *supra* note 29.

⁵¹ I have previously described this dynamic as peer statutory rape. See Godsoe, *Recasting Vagueness*, *supra* note 29.

⁵² Experts confirm that “[s]exual development begins well before adolescence,” but note that most children under fourteen may not be physically or emotionally ready for oral sex or intercourse, yet it is still quite widespread. Clea McNeely & Jayne Blanchard, *The Teen Years Explained*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, at 62 (2009), http://www.jhsph.edu/research/centers-and-institutes/center-for-adolescent-health/_includes/_pre-redesign/Interactive%20Guide.pdf (describing different age groups and each group’s inclinations towards sexual activities).

⁵³ See *id.* (describing the ages of 11–13 as the usual start of such sexual activity).

“not uncommon” and should not usually be a cause for concern.⁵⁴ One report from the Johns Hopkins School of Public Health notes the increasingly large number of minors engaging in sexual activity with another adolescent from age 10 and up: “Sexual fantasy and masturbation episodes *increase* between the ages of 10 and 13 . . . [and] by the age of 12 or 13, some young people may pair off and begin dating and experimenting with kissing, touching, and other physical contact, such as oral sex.”⁵⁵ By ages 14 to 16, “both genders experience a high level of sexual energy,” and by 16 many have “willingly experienced” intercourse.⁵⁶ In short, researchers emphasize that “[s]exuality is a vital part of growing up,” and that the scope of “normal” is flexible and broad.⁵⁷

Reflecting this, juvenile sexual conduct deemed criminal is often more about “immaturity, impulsivity, and sexual curiosity rather than hardened criminality, [as it might be for adults].”⁵⁸ Researchers note that most cases reflect “curiosity,” “impulsive” behavior, or “poor judgment” rather than pathology or danger.⁵⁹ It is likely no coincidence that juvenile offenders peak in early adolescence, ages 12 to 14, when most go through puberty.⁶⁰ When a significant portion of those in the age group are engaging in this activity, as with consensual sex between two teens and “playing doctor” among younger children, it should not be criminalized. A small number of legal authorities have recognized this. For instance, one court reversed a peer statutory rape adjudication specifically noting the widespread incidence of childhood experimentation and adolescent sex, remarking that such laws “seem deliberately to over-criminalize” and cast doubt on the legitimacy of the criminal law by punishing “moral[ly] neutral[], if not innocen[t]” behavior.⁶¹ Similarly, the Model Penal Code drafters cite the widespread nature of child and adolescent sexual exploration as a basis for a significant reduction of peer statutory rape liability:

Many of the behaviors covered by the contact provision are considered rites of passage during youth and puberty, and reflect ordinary acts of sexual exploration as one matures. Indeed, very young children may

⁵⁴ See NAT’L CHILD TRAUMATIC STRESS NETWORK, SEXUAL DEVELOPMENT AND BEHAVIOR IN CHILDREN: INFORMATION FOR PARENTS AND CAREGIVERS 1–3 (2009), <http://www.nctsn.org/sites/default/files/assets/pdfs/sexualdevelopmentandbehavior.pdf> (reporting that most sexual play is an expression of children’s natural curiosity).

⁵⁵ McNeely & Blanchard, *supra* note 52, at 62 (emphasis added). The increase at age 10 and up indicates the medical reality that children have sexual thoughts and contact exploration in early childhood.

⁵⁶ *Id.* at 63.

⁵⁷ This includes same-sex exploration for children who do not identify as gay. *Id.* at 62, 68.

⁵⁸ *In re J.B.*, 107 A.3d 1, 19 (Pa. 2014) (citing a trial court that was, unusually, looking at developmental research).

⁵⁹ Finkelhor et al., *supra* note 26, at 3.

⁶⁰ *Id.* at 2.

⁶¹ *In re G.T.*, 758 A.2d 301, 306–07 (Vt. 2000).

voluntarily undertake behavior that would technically meet the definition of sexual contact out of pure, even if ill-advised, sexual curiosity. . . . In sum, together these provisions reflect the judgment that while certain kinds of sexual exploration are appropriate for even young children, that exploration should generally be restricted to others within the peer-group range.⁶²

They conclude that, while “[i]t may not be ideal that a very young child engages in kissing, stripping, or ‘petting’ before the age of twelve, but so long as such activity is nominally consensual and engaged in with age-appropriate partners, it should not [be] a proper subject for penal law.”⁶³

Similarly, psychiatric definitions of sexual disorders preclude any diagnosis until at least age 16, including pedophilia, no matter the age of the other party.⁶⁴ This “iron rule” from *The Diagnostic and Statistical Manual of Mental Disorders* (DSM) reinforces the normalcy of sexuality and sexual conduct among a wide age range of minors.⁶⁵ Even with minors sixteen or older, a diagnosis is only appropriate if the victim is at least five years younger, and the DSM still urges caution in diagnosing individuals “in late adolescence involved in an ongoing sexual relationship with a twelve- or thirteen-year-old.”⁶⁶ Indeed, most juveniles offend “against their age mates or somewhat younger children,” with offenses against younger children declining as offenders move into middle adolescence, aged 14 and up.⁶⁷

Rather than follow medical expertise or empirics, however, panic about childhood and adolescent sexuality continues to drive policy. As the cases discussed here demonstrate, most prosecutors, legislators, and courts continue to severely punish this widespread behavior—even when neither of the participants feel victimized and there is no non-consensual or forcible conduct.⁶⁸ For instance, the Colorado Supreme Court recently upheld the adjudication of a fifteen-year-old boy

⁶² MODEL PENAL CODE § 213.5 commentary at 26–28 (AM. LAW INST., Discussion Draft No. 2, 2015).

⁶³ *Id.* at 27. I am not agreeing or disagreeing with the assessment that this conduct is “not ideal” or “ill-advised.”

⁶⁴ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 571 (4th ed. 2000).

⁶⁵ See HOWARD E. BARBAREE ET AL., THE JUVENILE SEX OFFENDER (1993).

⁶⁶ AM. PSYCHIATRIC ASS’N, *supra* note 64, at 72.

⁶⁷ Finkelhor et al., *supra* note 26, at 9.

⁶⁸ See Brittany L. Smith & Glen A. Kercher, *Adolescent Sexual Behavior and the Law*, CRIME VICTIMS’ INST., at 3, 18–32 (Mar. 2011), http://www.crimevictimsinstitute.org/documents/Adolescent_Behavior_3.1.11.pdf (describing cases from a variety of states and finding that “more and more young people are finding themselves facing sexual assault charges, whether or not either partner feels victimized.”). See also Zimring, *supra* note 27 (describing the continuing approach to “call[] for prosecution in all cases . . . defin[ing] all illegal sexual behaviors as abusive, regardless of the age of the child or the circumstances of the behavior.”).

as a sex offender for sexting with two girls, one fifteen and one seventeen, who were not charged.⁶⁹ The two girls consensually sent to and received from T.B. explicit nude photos. Both girls had met the boy at a “Future Farmers” conference and both had a romantic relationship with him.⁷⁰ The Court acknowledged that sexting “has become common in our society, especially among teenagers,” with 1-in-4 teens receiving and 1-in-7 sending such a text.⁷¹ This widespread adolescent behavior led the state legislature to enact another statute reducing adolescent sexting to a civil infraction.⁷² Nonetheless, the Court upheld T.B.’s conviction for “sexual exploitation of a child.”⁷³ In a similar instance of punishing conduct that is both fairly widespread and acknowledged to be consensual, both a thirteen-year-old girl and a twelve-year-old boy were prosecuted for “consensual intercourse.”⁷⁴

The over-inclusiveness of those punished for sex offenses committed as juveniles is aggravated by the fact that juveniles are also significantly less likely to re-offend than adults, who themselves re-offend at low rates. Frank Zimring and other researchers have demonstrated that 3 percent or fewer of those adjudicated a sex offender as a juvenile commit another sex offense. Indeed, the research shows they “are almost certain to desist” offending.⁷⁵ Put another way, only a “vanishingly small” portion of juveniles currently classified as sex offenders are likely to re-offend, and even a smaller percentage of those have the potential to be dangerous as adults.⁷⁶ The research is supported by a “consensus among experienced practitioners” working with juvenile victims and offenders that juveniles have a low

⁶⁹ *In re T.B.*, 445 P.3d 1049, 1052, 1058 (2019).

⁷⁰ *Id.* at 1051.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *State ex rel. Z.C.*, 165 P.3d 1206, 1207 n.1 (Utah 2007). Peer statutory rape is disproportionately enforced when a teenaged girl becomes pregnant. *Id.* at 1207 n.1. and discussion *infra* notes 113–14.

⁷⁵ Zimring, *supra* note 27 (examining longitudinal studies). A handful of courts have also recognized these lower recidivism rates. *See e.g., In re J.B.*, 107 A.3d 1, 10 (Pa. 2014) (“The research studies relied upon by the trial court indicated that recidivism rates for juvenile sex offenders are far lower than the recidivism rates of adult sexual offenders and, instead, are comparable to non-sexually offending juveniles.”).

⁷⁶ Letourneau et al., *supra* note 15, at 115; Press Release, Johns Hopkins Bloomberg School of Public Health, Children on Sex Offender Registries at Greater Risk for Suicide Attempts, Study Suggests (Dec. 6, 2017) (on file with author) (summarizing Letourneau’s research). Finkelhor et al., *supra* note 26, at 3 (noting the “favorable prognosis” for rehabilitation and lack of risk for most juveniles deemed sex offenders). Reflecting our distorted view of risk and harm in the sex offense context, adult recidivism rates are often inflated and not based on empirical research. *See* David Feige, Opinion, *When Junk Science About Sex Offenders Infects the Supreme Court*, N.Y. TIMES (Sep. 12, 2017), <https://www.nytimes.com/2017/09/12/opinion/when-junk-science-about-sex-offenders-infects-the-supreme-court.html>.

recidivism rate.⁷⁷ The profile of juvenile offending⁷⁸ and very low recidivism rates (re-arrest rates of 4–8 percent) for any other crime further demonstrate that juveniles deemed sex offenders are very rarely a future risk.⁷⁹ Finally, those juveniles who might need it respond “well to treatment.”⁸⁰ Nonetheless, legislatures and courts continue to rely on false “myths” about “juvenile sex offenders” and/or research on adults (which is itself often erroneous).⁸¹ For instance, the South Carolina Supreme Court recently upheld lifetime registration and electronic monitoring for a boy convicted at age twelve, citing the (false, even for adults) maxim that “convicted sex offenders . . . are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.”⁸²

C. Juveniles’ Lower Culpability and Greater Capacity for Rehabilitation

In line with this research and, more broadly, with theories of punishment, the Supreme Court has recently and repeatedly recognized that juveniles are both less culpable and more capable of rehabilitation and has transformed Eighth Amendment jurisprudence in recent years.⁸³ Recognition of this difference is also starting to impact police procedure,⁸⁴ and the conditions of confinement of minors.⁸⁵ Scholars and reformers continue to argue for different treatment of juvenile and adult offenders.⁸⁶ There has been some promising movement to differentiate juveniles from adults in the sex offense realm, but most states still treat them predominantly the same as adults, despite these many differences.

⁷⁷ See ELIZABETH J. LETOURNEAU ET AL., JUVENILE REGISTRATION AND NOTIFICATION POLICY EFFECTS: A MULTISTATE EVALUATION PROJECT 36 (2018).

⁷⁸ Most of these juveniles do not specialize in sex offenses, but rather engage in either experimentation or delinquency, offending in a variety of areas—“acting out”—on a developmentally appropriate continuum.

⁷⁹ Zimring, *supra* note 27.

⁸⁰ Zimring, *supra* note 27, at 62.

⁸¹ *Id.* at 63.

⁸² *In re Justin B.*, 405 S.C. 391 (2013) (internal quotation omitted).

⁸³ The Supreme Court has recognized these differences in a recent line of cases. See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012) (holding that mandatory life imprisonment without parole for those who are minors at the time of their crime violates the Eighth Amendment’s prohibition on cruel and unusual punishment); *Graham v. Florida*, 560 U.S. 48, 74 (2010) (prohibiting life imprisonment for minors who have not committed homicide and requiring the state to give minors a “meaningful opportunity” to obtain release); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (finding that the execution of individuals who committed their crime when they were minors violated the Eighth and Fourteenth Amendments).

⁸⁴ See, e.g., *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

⁸⁵ See, e.g., ban on solitary confinement for juveniles in federal and numerous state, (e.g., New York) prisons.

⁸⁶ See, e.g., Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. REV. 539 (2016) (citing neuroscience about brain development to call for a more nuanced mens rea analysis tailored to juveniles).

II. HIGH COSTS & INEFFECTIVENESS OF THE CRIMINAL LEGAL SYSTEM

The next two sections outline existing pathologies of the criminal legal system, which are heightened in the context of sex offenses: its high costs and ineffectiveness along every metric, as well as the reinscription of racialized, gendered, and heteronormative sexual paradigms. Again, the focus on punishment and false narratives about predators that underlie much of the #MeToo discussion risks further entrenching these flaws.

The criminal legal system is both very costly and largely ineffective at preventing or redressing harm. The juvenile legal system is less known but arguably even more unfair—because it lacks juries and is often closed, and thus particularly nontransparent.⁸⁷ In both systems, punishment is very harsh and racism is baked-in so that both whom is prosecuted and the extent of punishments are very disproportionate. Particularly problematic in the sex offense context are the post-punishment consequences, specifically sex offender registration and residency restrictions. Research has demonstrated that, like incarceration, these are not rehabilitative—no published study indicates they increase public safety and some research suggests they may be criminogenic.⁸⁸ The system appears to be particularly ineffective at preventing and redressing sexual harm. Rape and child sex abuse rates have not fallen despite years of criminal focus. Numerous scholars have persuasively argued that evidentiary problems, and, especially, deeply embedded cultural norms around gender and consent, make rape prosecutions difficult.⁸⁹

If we listen to survivors, the system's ineffectiveness becomes even more apparent. Very low reporting rates for sexual offenses frequently reflect survivors' dissatisfaction with the criminal legal system, including its excessively punitive nature, lack of services, lack of accountability, and re-traumatization of victims. As one survivor of sexual assault put it: “[In the criminal system], victims do not control their story [They may have] flashbacks to the initial trauma . . . [while the] retribution-centered response disincentivizes the accused from admitting or acknowledging the harm they have caused.”⁹⁰ Indeed, prison abolitionism was born, in many ways, out of the CLS' utter failure to address the needs of female survivors;

⁸⁷ Many children charged with sex offenses end up being tried as adults, as the cases outlined below illustrate.

⁸⁸ See J.J. Prescott, *Portmanteau Ascendant: Post-Release Regulations and Sex Offender Recidivism*, 48 Conn. L. Rev. 1035 (2016); Letourneau, *supra* note 77.

⁸⁹ See, e.g., Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY 467 (2002–03) (discussing research including Dan Kahan's, demonstrating that “gentle nudges” to change norms have not been as successful in rape as in other areas).

⁹⁰ Stefanie Mundhenk Harrelson, *I Was Sexually Assaulted, And I Believe Incarcerating Rapists Doesn't Help Victims Like Me*, THE APPEAL (July 18, 2019), <https://theappeal.org/i-was-sexually-assaulted-and-i-believe-incarcerating-rapists-doesnt-help-victims-like-me/> (arguing for a restorative justice approach).

to bring “nothing restorative in place for anyone. The system punished and left more disaster in its wake.”⁹¹

This should not be surprising given that sex offenses are highly correlated with complex societal factors including gender and racial inequality and familial trauma. Criminalization and punishment frequently resulting in multi-generational cycles of harm do not address the root causes of crime. Measures such as the offender registry and residency restrictions do not protect children, because victimized children are targeted by people known to them, most frequently a family member.⁹² They thus give a false sense of security and even deter reporting out of fear of the consequences to offenders. Moreover, the immense financial costs of the current carceral approach to sex offenders, including an estimated \$200 million to \$1 billion spent on the juvenile sex offender registry alone, prevent resources from being applied to better address both those who are actually committing sexual harms, and services for those harmed to heal.⁹³

Again, these structural flaws are heightened in the juvenile context. A large part of the ineffectiveness as to juveniles is that much of their conduct should not even be criminalized, as I argued above. Even where the conduct is harmful, such as with non-consensual (other than because of age) or forcible conduct, applying the harsh punishment, incarceration, and questionable “treatment” to juveniles that we do to adults causes more harm than good.⁹⁴ Few juveniles are offered appropriate treatment, despite evidence that they respond particularly well to it.⁹⁵ All available research indicates no link between registries and either general or specific deterrence for juveniles.⁹⁶ Indeed, registries, along with other harsh approaches to juvenile sex offenses may even be criminogenic and harm-increasing by blocking employment and family/community ties, which are key to rehabilitation; stigmatizing and isolating offenders; and disincentivizing juveniles and their friends and families from seeking help or even reporting offenses.⁹⁷

⁹¹ Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1688 (2019). See discussion *infra* note 116.

⁹² See LETOURNEAU ET AL., *supra* note 77.

⁹³ Belzer, *supra* note 14, at 5.

⁹⁴ Elizabeth J. Letourneau & Kevin S. Armstrong, *Recidivism Rates for Registered and Nonregistered Juvenile Sexual Offenders*, 20 SEXUAL ABUSE: J. OF RES. & TREATMENT 393, 403–06 (2008) (indicating that research demonstrates sex offender registration does not decrease recidivism). Indeed, recidivism rates are lower in states that do not register juveniles. Riya Saha Shah, *Five Facts About Juvenile Sex Offender Registration*, ABA (Dec. 5, 2018), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/practice/2018/five-facts-about-juvenile-sex-offender-registration/>.

⁹⁵ See LETOURNEAU ET AL., *supra* note 77.

⁹⁶ See NAT'L JUVENILE JUSTICE NETWORK, *SEX OFFENSE REGISTRATION AND RELATED LAWS: TREATING YOUTH FAIRLY* 4 (2018), <http://www.njjn.org/our-work/juvenile-justice-policy-sex-offense-registration-and-notification-laws> (summarizing research of a 5% sex offense recidivism rate from 1943–2015 and 2.75% from 2000–2015); LETOURNEAU ET AL., *supra* note 77, at 29 (reporting no deterrence effect for juveniles on the registry and those not).

⁹⁷ This latter concern has been cited by therapeutic professionals and law enforcement in

Sex offender registration and residency restrictions are particularly harmful to juveniles and, very often, their families, including siblings. A 2018 national study by leading sex abuse researchers concluded that children on the registry are at significantly greater risk for numerous harms, including being four times as likely to attempt suicide and twice as likely to be sexually assaulted, and five times as likely to be approached for sex by an adult.⁹⁸ This confirms prior research finding that registration as a “juvenile sex offender” “significantly predicts” increased likelihood of severe depression and suicidal ideation as an adult.⁹⁹ The 2018 study also found that juveniles required to register experience other negative outcomes including increased mental health problems, more peer relationship problems, greater rates of peer violence, and a lower sense of safety. Essentially, registries set children up for victimization by peers and adults; as one of the researchers summarized:

[Putting children on the registry] not only conveys to the child that he or she is worthless, it also essentially alerts the rest of the world that a child has engaged in an illegal sexual behavior [likely making] children vulnerable to unscrupulous or predatory adults who use the information to target registered children for sexual assault . . . [Our] study suggests that these requirements may place children at risk of the very type of abuse the policy seeks to prevent, among other serious negative consequences.¹⁰⁰

The study’s authors joined almost every expert in a near unanimous call by experts calling for the abolition of juvenile registries.

Largely overlooked in policy debates about imposing these punishments on juveniles is their great impact on other family members, including siblings. Since the majority of juveniles offend against or with family members, many of those impacted are the designated victims. Typical is the experience of one woman, “inappropriately touched” by her brother as a child, who said this in speaking against registering juveniles: “What people don’t realize is that a child on the registry is a

opposition to juvenile registries. *See id.* at 3–4.

⁹⁸ Letourneau et al., *supra* note 15, at 112–15 (reporting the results and policy implications of a national study comparing outcomes for those who commit sex offenses as juveniles who were required to register versus those who were not).

⁹⁹ Sharon E. Denniston, THE RELATIONSHIP BETWEEN JUVENILE SEX OFFENDER REGISTRATION AND DEPRESSION IN ADULTHOOD, <https://womenagainstregistry.org/resources/pdf/SharonDennistonPhDSummary.pdf> (Summary of Dissertation Research Findings and Selected Excerpts from Dissertation) (noting that in addition to the stigma of registration, many experience lifelong “roadblocks” in education, employment, and independent housing, possibly contributing to the depression).

¹⁰⁰ Press Release, Johns Hopkins Bloomberg School of Public Health, Children on Sex Offender Registries at Greater Risk for Suicide Attempts, Study Suggests (Dec. 6, 2017) (on file with author) (quoting Elizabeth Letourneau, Director of the Moore Center for the Prevention of Child Sexual Abuse & Professor of Mental Health).

family on the registry and a victim on the registry.”¹⁰¹ Sadly this story is not uncommon. Another girl who was abused by her ten- and twelve-year-old brothers when she was seven underwent further harm when her brothers were placed on the registry after two years of incarceration. When a local newspaper published her brothers’ names and address under the headline, “Know Where the Monsters Are,” local vigilantes shot the family dog and threw a Molotov cocktail onto their driveway, failing to acknowledge that the victim also lived in the house and suffered the consequences of these actions.¹⁰²

The harms of over-criminalizing juveniles’ sexual activity, and of the registry and other punishment, are clear in virtually every case. Take Jacob C., adjudicated delinquent at age eleven for touching his sister’s genitals. First, as discussed above, it is not clear that this conduct was harmful or wrongful or merely exploration among young children. Even to treat this behavior as harmful, Jacob’s young age, the victim being a family member,¹⁰³ and the fact that it was a non-penetration offense, all militate towards treating it therapeutically, outside of the juvenile or criminal legal systems. This rarely happens. Instead criminalization and punishment are our primary responses even to young children. The consequences for Jacob and his family were extremely harmful. Jacob was placed on the Michigan sex offender registry and prevented by residency restriction laws from living near other children.¹⁰⁴ The law prevented Jacob from living with his sister in his mother’s home, and, since his parents were separated and his father lived in Florida, Jacob was placed in a juvenile home, and then foster care. When he turned 18, his status on the registry became public. He was bullied at high school. He eventually dropped out of college after campus police followed him everywhere. He moved to Florida, but had trouble following the complex and burdensome registration requirements there. His status on the registry prevented him from gaining employment and, despite no contrary evidence to his status as a doting father, he lost custody of his daughter once the judge found out about the offense he committed at age eleven.

Consider next Maya who was arrested at ten-years-old for experimentation—she “flashed” and play-acted sexually while fully clothed with her two younger step-brothers. She was adjudicated delinquent of criminal sexual conduct, was sent to juvenile prison for 18 months and then required to register for 25 years. At age 18,

¹⁰¹ Nicole I. Pittman & Riya Saha Shah, *Cruel and Unusual: The Case Against Registering Kids as Sex Offenders*, CRIM. JUST. at 32, 33 (Summer 2017).

¹⁰² Sarah Stillman, *The List*, THE NEW YORKER (Mar. 14, 2016), <https://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes>.

¹⁰³ I and other scholars have argued that family victims can bring different considerations. See LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* (2018); Cynthia Godsoe, *Redrawing the Boundaries of Relational Crime*, 69 ALA. L. REV. 169 (2017).

¹⁰⁴ HUMAN RIGHTS WATCH, *RAISED ON THE REGISTRY: THE IRREPARABLE HARM OF PLACING CHILDREN ON SEX OFFENDER REGISTRIES IN THE US 1* (2013), https://www.hrw.org/sites/default/files/reports/us0513_ForUpload_1.pdf.

when her registration became public, she was fired from her job, dropped out of college due to harassment and a lack of money, and ended up homeless.

Or consider Carson E., who was adjudicated delinquent for rape at age thirteen. He successfully completed sex offender treatment but was still required to register. He was repeatedly denied housing and employment due to his status and eventually committed suicide at age twenty-five.¹⁰⁵

Finally, in Texas, David, an immature nineteen-year-old, fondled a girl who was almost sixteen years old, as they started a relationship. Her parents didn't like it. They reported the couple to the police and David pleaded guilty to the strict liability offense of statutory rape and agreed to a five-year prison sentence. When he is released from prison, residency restrictions will prevent him from living anywhere except with his parents. He will have to register as a sex offender. His parents fear that the publication of his registration will cause harm to their small local business.¹⁰⁶

There are too many cases to detail but most of them follow the same harsh trajectory. This response to children offending (if we agree, *arguendo*, that this is truly an offense) carries consequences for both the accused children and their families. Most are prevented from gaining employment or stable housing. They may be unable to maintain or create familial relationships. The overly punitive nature of the CLS treatment of those convicted of a sex offense not only carries great harm but is also, itself, criminogenic. In short, the system is broken beyond repair.

III. RACIALIZED AND GENDERED SOCIAL CONTROL

The punishment of juvenile sex offenses re-entrenches gendered and racialized norms, which undercut the equality aspirations of the #MeToo movement. Scholars have developed a robust literature in recent years describing the use of criminal sanctions, or the threat thereof, to control low-income and marginalized communities.¹⁰⁷ I have previously argued, along with others, that this social control function is particularly robust in the context of sex offenses and as to juveniles.¹⁰⁸ In the many cases of peer statutory rape, sexting, and developmentally normal exploration, prosecutors, courts, teachers, and particularly parents police children's

¹⁰⁵ *Id.* at 53.

¹⁰⁶ EMILY HOROWITZ, PROTECTING OUR KIDS?: HOW SEX OFFENDER LAWS ARE FAILING US 62–64 (2015).

¹⁰⁷ *See generally* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2002); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009).

¹⁰⁸ JOEY L. MOGUL ET AL., QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES (2012); Godsoe, *Recasting Vagueness*, *supra* note 29; Godsoe, *Redrawing the Boundaries of Relational Crime*, *supra* note 103. As to juveniles, see Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 408 (2013).

and young people's sexuality, based more on panic and control than a coherent notion of harm or social wrong. Accordingly, to paraphrase Paul Butler, the system is working exactly as it is supposed to.¹⁰⁹

Statutory rape prosecutions continue to harshly enforce masculine and feminine roles, as well as impose heteronormative and racialized norms. Although exact data is not available, experts agree that same-sex and interracial sexual contact between minors is disproportionately prosecuted.¹¹⁰ In one highly publicized case, a Black seventeen-year-old was convicted of aggravated child molestation and sentenced to ten years in prison without parole for consensual oral sex with his fifteen-year-old white girlfriend.¹¹¹ Minor males are prosecuted significantly more often than females.¹¹² Boys are sometimes prosecuted and the girls not, even when the boys in question are the younger or less mature party, or commit less serious offenses.¹¹³ When girls are prosecuted, it is often because they have violated feminine norms—e.g., by becoming pregnant as teens or taking on overly masculine roles—and they are frequently punished less severely.¹¹⁴ In one typical case, both the boy and girl were prosecuted for statutory rape, but the boy, who was one year younger, was put on probation while the girl was not. In lieu of probation, she was only required to obey her parents, write an essay about her teen motherhood, and have no unsupervised contact with her “co-defendant,” the boy.¹¹⁵

Gendered norms also dictate victim and offender designations in same-sex cases. For instance, in *D.B.*, the trial court contrasted the “offender” boy, who initiated the sexual contact purportedly for his sole gratification, with the passive, feminized boy as the “victim,” despite the boys' close age proximity and evidence that the sex was consensual.¹¹⁶ Another court described consensual anal sex between two similarly aged boys as “reflect[ing] an almost archetypal perpetrator and victim of criminal sexual conduct.”¹¹⁷ The court designated as the offender the boy who

¹⁰⁹ Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L. J. 1419 (2016) (persuasively arguing that police violence against Black men is a systemic, structural problem and calling for radical, abolitionist change).

¹¹⁰ See Godsoe, *Recasting Vagueness*, *supra* note 29, at 218–28 (discussing experts and cases).

¹¹¹ *Id.* at 226–27.

¹¹² See Smith & Kercher, *supra* note 68, at 13 (describing cases from around the country). See generally Troup-Leasure & Snyder, *supra* note 10, at 4.

¹¹³ To take just one example, a twelve-year-old boy was prosecuted for “sexually fondling a 14-year-old girl who was a willing participant.” *In re* E.R., 197 P.3d 870, 871 (Kan. Ct. App. 2008). A Kansas appellate court reversed the delinquency adjudication, interpreting that state's statute to require “the offender to be older than the victim.” *Id.* at 870–72.

¹¹⁴ See Godsoe, *Recasting Vagueness*, *supra* note 29, at 225–26 nn. 328–30 (discussing experts and cases).

¹¹⁵ State *ex rel.* Z.C., 165 P.3d 1206, 1207 (Utah 2007). She was also required to pay for a paternity test.

¹¹⁶ *In re* D.B., 950 N.E.2d 528, 533 (Ohio 2011).

¹¹⁷ *In re* B.A.H., 845 N.W.2d 158, 166 (Minn. 2014).

initiated conduct, even noting critically that this boy provided lubricant.¹¹⁸ The more passive boy, who resisted the purported offender's suggestions until ultimately acquiescing, was designated the victim.¹¹⁹ This paradigm reflects both the increased blame placed on boys for consensual sexual behavior, and the heightened protection granted to at least some girl victims.

What renders this dynamic particularly troubling is that effectively preventing and addressing sexual harm has long been a core feminist issue, with the #MeToo movement being a recent iteration. For good reason. The majority of victims of sexual harm are girls and women, and a significant majority of women have been impacted by it.¹²⁰ Imposing punishment for non-harmful behavior along gendered and racialized lines, however, under-recognizes male victims and non-conforming female survivors, as well as female offenders.¹²¹ For instance, the Movement for Black Lives recognizes that Black girls experience gender-based violence at extremely high rates, making it more than just a gender problem.¹²² Among juveniles, the numbers of both male victims and female offenders are significantly higher than among adults; accordingly, the distortions are even greater.¹²³

Compounding these problems is that feminist efforts to address the systemic problem of sexual harm have almost exclusively focused on a criminal and punitive approach, a myopia that much of the #MeToo conversation seems to emulate.¹²⁴ Such a carceral approach is not only harmful and costly to society, as I have argued here, but is at odds with fundamental feminist goals and principles—preventing harm, achieving offender accountability and victim healing, and, most of all, realizing justice and equality for all marginalized groups, including women of color, transgender women, etc. An abolitionist framework, seeking to transform and build our communities, is a much better fit; a vision I expand on below.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Michele C. Black et al., *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report*, CTDS FOR DISEASE CONTROL (Nov. 2011), http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf (reporting that 1-in-5 women will be raped at some point in their lives compared to 1-in-71 men); *see also* CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992–2000 (2002) (reporting that in that time period, 91% of victims of rape and sexual assault were female, and 9% were male).

¹²¹ *See, e.g.*, Capers, *supra* note 6; Brenda Cossman, #MeToo, *Sex Wars 2.0 and the Power of Law*, 3 ASIAN Y.B. OF HUM. RTS. & HUMAN. L. 18 (2019); Godsoe, *Punishment as Protection*, *supra* note 29.

¹²² THE MOVEMENT FOR BLACK LIVES, *supra* note 7.

¹²³ Perhaps recognizing less rigid gender roles and the fluidity of “normal” sexual conduct among young people.

¹²⁴ *See, e.g.*, Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581 (2009). Remember also the outrage over Brock Turner's sentencing. *See* Moon & Watts, *supra* note 4. *See also* Hayes & Kaba, *infra* note 131 (quoting Judge Rosemarie Aquilina telling Larry Nasser “I just signed your death warrant[,]” and the praise she received in return).

IV. CONCLUSION: A BETTER PATH FORWARD

Reducing our carceral state requires alternatives to incarceration for violent and sex offenses, something legislators have been unwilling to even consider to date.¹²⁵ In contrast, almost all the rhetoric around the #MeToo movement has doubled down on a punishment approach to sex offenses; indeed, legislators, scholars, and advocates continue to call for expanding the criminal law to cover ever more nuanced sexual interactions. This needs to change, particularly as to juveniles, but not limited to them. I have argued here that there are numerous moral, developmental, and pragmatic reasons to treat sex offenses committed by juveniles differently.¹²⁶

Recent years have brought some positive change in this regard. For instance, several courts have reversed and precluded statutory rape prosecutions where both parties are below the age of consent.¹²⁷ Numerous state legislatures have enacted more minor criminal, or even civil, penalties for teen sexting so that young people are not prosecuted under child pornography laws, as well as building age gap provisions into statutory rape laws. Experts, including the American Bar Association in a 2009 Resolution,¹²⁸ have called for reform or abolition of juvenile

¹²⁵ The decarceration challenge is both conceptual and literal. As political scientist Marie Gottschalk summarizes: “Drawing a firm line between the [nonviolent, nonserious, and nonsexual offenders] and other offenders has contributed to the further demonization of people convicted of sex offenses or violent crimes in the public imagination and in policy debates. It has impeded the enactment of more comprehensive changes in sentencing policies and parole practices. . . . [I]f the ultimate aim is to slash the prison and jail population, render the criminal justice system more just, and dismantle the carceral state without jeopardizing public safety, this political strategy [of drawing a firm distinction between the nonviolent, nonserious, nonsexual offenders on the one hand, and violent offenders, sex offenders, and criminal aliens on the other] may be ultimately be self-defeating.” MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 165 (2015). To cite an even more recent example, Senator Tom Cotton, one of the only Republican opponents of President Trump’s recent criminal reform legislation, almost derailed the legislation’s passage because it might have allowed a small number of those convicted of sex-related crimes to petition for early release from prison, as those convicted of homicide were—something the Senator did not complain about: “There are 1,446 sex offenders in federal prison convicted under this statute, and not one of them deserves to be released a day early.” Senator Tom Cotton, *Fix the First Step Act and Keep Violent Criminals Behind Bars*, NAT’L REV. (Dec. 17, 2018), https://www.cotton.senate.gov/?p=op_ed&id=1036.

¹²⁶ But, again, I want to be clear that adult sex offenses should also be addressed in a more effective and humane manner.

¹²⁷ See, *In re D.B.*, 950 N.E.2d 528, 533 (Ohio 2011) (“As applied to children under the age of 13 who engage in sexual conduct with other children under the age of 13 . . . [the law] is unconstitutionally vague”); *State ex rel. Z.C.*, 165 P.3d 1206, 1207–08 (Utah 2007) (determining that a plain language reading of a Utah statute that led to the prosecution of a thirteen-year-old girl for sex with a twelve-year-old boy, and vice versa, led to absurd results); *In re G.T.*, 758 A.2d 301, 308 (Vt. 2000) (arguing that a plain language reading of a Vermont statute that led to the prosecution of a fourteen-year-old boy for sex with twelve-year-old girl led to absurd results). The court in *D.B.* voided the statute as vague. The other two courts based their holdings on the statute’s “absurdity” to avoid reaching the constitutional issues, but their main concern was an overly broad statute and selective enforcement.

¹²⁸ “RESOLVED, That the American Bar Association urges Congress and the state legislatures

registries and a handful of state and federal courts in recent years have struck parts of these measures.¹²⁹ In a highly unusual and promising move, the Michigan Attorney General this year submitted an amicus brief describing registration and residency restrictions as “punishment” and arguing for their down-sizing, citing the “particularly detrimental” impact they have on juveniles by punishing often non-dangerous but “ill-considered” behavior such as sexting; stigmatizing them; and impeding their rehabilitation.¹³⁰

It is not enough, however, to narrow prosecutions or roll back the harshest punishments for juveniles. Sexual harm does exist, and children and teenagers are victimized at particularly high levels. Truly addressing sexual harm requires recognizing the wide array of vulnerability to this harm, as well as interventions that are effective and humane. Divesting from the punitive approach also requires investing in safe and healthy sexual development and prevention and healing programs. Abolitionists, many of them women of color, call for responses to sexual harm that do not rely on incarceration, that prioritize accountability, and services for both those who harm and those who are harmed. This approach focuses on root causes and structural inequality, “do[ing] what criminal punishment systems fail to do: build support and more safety for the person harmed, figure out how the broader context was set up for this harm to happen, and how that context can be changed so that this harm is less likely to happen again.”¹³¹

Given the victim-offender overlap, and wide range of “normal” juvenile conduct, this approach must be both nuanced and flexible. The multiple axes of vulnerability—age, gender, race, sexual orientation—require an intersectional approach to the categories of victim and offender. This is also in line with the spirit of the #MeToo founding—Tarana Burke’s vision was to recognize previously unseen victims, as well as increase the accountability of offenders.¹³² Yet scholars and reformers, including me, join Burke in their concern that #MeToo has become increasingly one-dimensional—focusing only on gender, and particularly the victimhood of white girls and women.¹³³ The movement also posits wrongful or

to re-examine and revise laws, policies, and practices that require youth to register as sex offenders or be subject to community notification provisions otherwise imposed upon adult sex offenders, based upon a juvenile court adjudication.” *Juvenile Sex Offender Policy*, ABA (Feb. 2009), https://www.americanbar.org/groups/public_interest/child_law/resources/attorneys/juvenile_sex_offenderpolicy/.

¹²⁹ *In re J.B.*, 107 A.3d 1 (Pa. 2014) (holding that SORNA violates the due process rights of juvenile offenders due to an irrebuttable presumption about certain offenses); *In re C.P.*, 967 N.E.2d 729 (Ohio 2012) (holding that automatic lifelong registration for certain offenses violates the 8th Amendment for juvenile offenders).

¹³⁰ Brief of Amicus Curiae at 23–26, *People v. Snyder*, 501 Mich. 1078 (2018) (No. 153696).

¹³¹ Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not ‘Transformative Justice.’ Here’s Why.*, THE APPEAL (Feb. 5, 2018), <https://theappeal.org/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why-a2ea323a6645/>.

¹³² See Burke, *supra* note 6.

¹³³ See, e.g., Keisha Lindsay, participating in *Talking About Black Lives Matter and #MeToo*, at 38 (WISC. J. L., GENDER & SOC’Y, Working Paper) (describing the movement’s “single-axis

harmful sex and legally permissible sex as easily identifiable—a clear binary—while oftentimes these exist on a spectrum.¹³⁴ Finally, prevention and redress require looking to alternatives beyond punishment, beyond the criminal law. Options that are less costly in every way and which bring a greater chance for success. Here I flag two promising options, including public health approaches: bystander interventions and restorative justice.

Public health approaches usually follow a socio-ecological model, which looks at “individual, relationship, community, and societal level factors and the interactions between factors at all these levels to identify risk and protective factors and develop appropriate responses.”¹³⁵ Most are still used to address drug and other victimless crimes, but there is increasingly support for using them for violent crime.¹³⁶ One promising intervention to address the widespread problem of sexual assault, particularly on college campuses, is bystander intervention. These programs aim to prevent the harm of sexual assault and, even more significantly, change social norms so that bystanders will intervene to reduce risky situations.¹³⁷ These programs are relatively new and so research is limited to small sample sizes. Nonetheless, initial results are promising: both at encouraging bystander intervention and, more importantly, in my view, at changing deeply embedded social mores about consent and sexual interactions. For instance, one study found that fraternity men who were trained in bystander intervention were 40 percent less likely to commit sexual violence.¹³⁸ A larger study of the popular Green Dot bystander intervention program from 2010–2013 found that Intimate Partner Violence (IPV) rates were 17 percent lower amount students that participated in the program.¹³⁹ Even more promising is the finding by a five-year CDC-funded study of a 50 percent reduction in sexual violence in Kentucky high schools that had implemented the Green Dot program.¹⁴⁰ These programs should start even earlier, in elementary school, to teach healthy behaviors, consent, and community engagement.

orientation . . . on sexism” and the fact that “Black women’s voices are increasingly absent”); Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L. J. FORUM 105 (2018).

¹³⁴ See, e.g., Cossman, *supra* note 121.

¹³⁵ Thanks to Jonathan Todres for this helpful definition.

¹³⁶ CDC, *Violence Prevention: A Public Health Issue*, <https://www.cdc.gov/violenceprevention/publichealthissue/index.html> (last visited Apr. 23, 2020) (as early as 1979, violent behavior was deemed “a key public health priority.”). See also GOODMARK, *supra* note 103, at 56–73 (2019).

¹³⁷ Sarah Swan, *Bystander Interventions*, 6 Wisc. L. Rev. 976 (2015).

¹³⁸ Tyler Kingkade, *This is Why Every College Is Talking About Bystander Intervention*, HUFFINGTON POST (Feb. 8, 2016), https://www.huffingtonpost.com/entry/colleges-bystander-intervention_us_56abc134e4b0010e80ea021d.

¹³⁹ *Green Dot for Colleges*, ALTERISTIC (last visited Feb. 27, 2020), <https://alteristic.org/services/green-dot/green-dot-colleges/>.

¹⁴⁰ Ryan Grim & Jason Cherkis, *Here’s How You Can Help Stop A Sexual Assault Before It Happens*, HUFFINGTON POST (July 8, 2015), https://www.huffingtonpost.com/2015/07/08/bystander-intervention_n_7758118.html.

Restorative justice, on the other hand, is a promising but underutilized option for redressing, rather than preventing, harm. There is no uniform definition of restorative justice, but as a process it envisions crime as harm to interpersonal relationships—certainly true of most sexual assaults where victims and offenders know each other. It focuses on accountability of the offender and repairing harm through communication and attention to the root causes (recall the multi-generational nature of much sexual harm) for the victim, offender, and society. The process itself can take numerous forms, including Family Group Conferencing, healing circles, and victim-offender mediation, but it always requires victims' consent. As some of its earliest supporters describe it, restorative justice is "a philosophy that places emphasis on repairing harm, empowering a victim-driven process, and transforming the community's role in addressing crime. It approaches offender accountability through making reparations and undergoing rehabilitation rather than punishment."¹⁴¹ Restorative justice is forward-looking to solutions and healing, rather than backward-looking and punitive.¹⁴² It also recognizes harms to a broader community outside of the victim-offender dyad, a dynamic particularly relevant to the juvenile context, where most harms are among family and friend groups.¹⁴³

Although the few programs that exist have demonstrated good results in terms of prevention and victim satisfaction through restorative justice for violent and sex-based crimes as compared to the criminal legal system, the focus on punishment as the only way for victims to heal or offenders be held accountable has led to very limited use of restorative justice in the CLS.¹⁴⁴ Victim consent is required but, as Danielle Sered reveals, most victims are never asked and, if asked, will very often choose restorative justice compared to the alienation and failure to bring closure and accountability of the CLS.¹⁴⁵ As Sered says:

¹⁴¹ C. Quince Hopkins, Mary P. Koss, & Karen J. Bachar, *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS PUB. U. L. REV. 289 (2004).

¹⁴² This can include healing for the offender for their own past victimization which, as noted earlier, is often correlated with sexual offending. Katherine van Wormer, *Restorative Justice as Social Justice for Victims of Gendered Violence: A Standpoint Feminist Perspective*, 54 SOC. WORK 107, 110 (2009).

¹⁴³ See Lara Korte, *UT students are unhappy with sexual misconduct policies. Could A New Approach Help?*, STATESMAN (Jan. 17, 2020), <https://www.statesman.com/news/20200117/ut-students-are-unhappy-with-sexual-misconduct-policies-could-new-approach-help> (A restorative process asks "'Who else was harmed in this process? . . . When you keep harm to [the offender and victim] behind closed doors, the process is often very unsatisfying[.]").

¹⁴⁴ Compared to, for instance, in Europe, where it has been much more widely used for IPV, sexual assaults and other violent crimes. See DEBARATI HALDER & K. JAISHANKAR, THERAPEUTIC JURISPRUDENCE AND OVERCOMING VIOLENCE AGAINST WOMEN 12–13 (2017). See also van Wormer, *supra* note 142, at 110 (describing gendered crimes including IPV and sexual violence as the "most controversial and undeveloped area" of restorative initiatives and related scholarship).

¹⁴⁵ DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR (2019) (describing success of one of the few restorative justice programs to address violence).

What's powerful about [restorative justice] is it forces somebody who has committed harm to come face-to-face with the human impact of what they've done. . . . One of the problems with prison is that there is never a time in the prisoner's incarceration where they are required to actually grapple with the impact their choices had on other people's lives.¹⁴⁶

Some campuses are implementing restorative justice options for sexual assault, again with some promising results. Campus assault survivors echo Sered in contrasting the accountability and closure they received through restorative justice with the traditional criminal, or punitive Title IX, processes: “[these traditional systems] wouldn't really have fixed anything . . . It wouldn't have healed any hurt. . . . What I really, really wanted was for him to step up to the plate and take responsibility”¹⁴⁷

These approaches are not a panacea, but are particularly promising and appropriate for juveniles, given the ambiguous nature of much of their “offending” in terms of harms and parties, and their greater capacity for rehabilitation and change. Prevention and restorative justice frames also bring to the surface invisible harms, address their structural and root causes, and build towards a world of reduced harm and, most importantly, meaningful equality across race, class, and gender lines. This more inclusive and intersectional approach to sexual harms embodies the true spirit of #MeToo.

¹⁴⁶ Bill Keller, *Is Prison the Answer to Violence?*, THE MARSHALL PROJECT (Feb. 16, 2017), <https://www.themarshallproject.org/2017/02/16/is-prison-the-answer-to-violence#> (interview with Common Justice founder Danielle Sered).

¹⁴⁷ See Tovia Smith, *After Assault, Some Campuses Focus on Healing Over Punishment*, NPR (July 25, 2017) <https://www.npr.org/2017/07/25/539334346/restorative-justice-an-alternative-to-the-process-campuses-use-for-sexual-assault> (quoting one survivor as choosing restorative justice because the traditional punitive system “wouldn't really have fixed anything It wouldn't have healed any hurt. . . . What I really, really wanted was for him to step up to the plate and take responsibility”).