PEDOPHILIA: LAWS FIGHTING NATURE INSTEAD OF COPING WITH IT

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Left-handed people or “lefties” have been discriminated against throughout history. They have been ostracized by society, had their dominant hand tied behind their back, and even burned as witches. In fact, the words for left or left-handed in many languages have negative connotations. For example, the word for left in Latin is *sinistre*, from which the word sinister is derived. Yet being a lefty is not a choice, people are born left-handed. In fact, handedness is directly linked to dominant hemispheres in the brain. Historically, efforts have been made to convert lefties into righties, such as forcing them to learn to write with their right hand. However, despite these efforts, natural lefties continue to prefer the left hand.

So what does left-handedness have in common with pedophilia? Well, the answer is actually that the two have a lot in common with each other. It all comes down to science. Recent research indicates that pedophilia, a sexual attraction to pre-pubescent children, is actually a biological condition in the brain that individuals are born with, similar to handedness. In

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2. Id.
3. Id.
4. Id. at 9; see also discussion infra Part I.
6. Id.

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addition, there is a scientific connection between being left-handed and suffering from pedophilia. Also, as with left-handedness, there does not appear to be a cure for pedophilia.

Nevertheless, while comparisons between pedophilia and left-handedness exist, there is a glaringly obvious distinction. Left-handedness is a victimless condition, pedophilia is not. This distinction, in light of recent research linking pedophilia to the brain and natural biology, raises an interesting question as to how these individuals should be treated in society, particularly in the law. Should pedophiles be subjected to increasingly harsh criminal penalties and civil restrictions when they are born with the condition and cannot cure it? The stated goal of sex offender laws targeting pedophiles is public safety, the need to protect children from sexual abuse. However, if pedophilia is a biological condition developed in the brain before birth, then the question arises whether laws targeting pedophiles also need to adapt and address this condition. This article argues that the best way to achieve this goal is for the law to move away from the excessively stigmatizing system that only reaches pedophiles after they offend, with questionable effect, to a system that encourages both treatment and prevention.

Before outlining the discussion to follow, it is important to articulate that this article in no way intends to negate or lessen the suffering of children subjected to sexual abuse. However, this article does offer a frank analysis of pedophilia and sex offender legislation, raising serious concerns

8. See infra Part I.
10. E.g., Adam Walsh Child Protection & Safety Act, 42 U.S.C. § 16901 (2006 & Supp. 2012) (“In order to protect the public from sex offenders and offenders against children . . . Congress in this chapter establishes a national system for the registration of those offenders . . . .”); Ark. Code Ann. §12-12-902 (2013) (“The General Assembly finds that sex offenders pose a high risk of reoffending after release from custody, that protecting the public from sex offenders is a primary governmental interest, that the privacy interest of persons adjudicated guilty of sex offenses is less important than the government’s interest in public safety, and that the release of certain information about sex offenders to criminal justice agencies and the general public will assist in protecting the public safety.”); Idaho Code Ann. §18-8302 (2011) (“[T]his state’s policy is to assist efforts of local law enforcement agencies to protect communities by requiring sexual offenders to register . . . .”); La. Rev. Stat. Ann. §15:540 (2011) (“The legislature finds that sex offenders, sexually violent predators, and child predators often pose a high risk of engaging in sex offenses, and crimes against victims who are minors even after being released from incarceration or commitment and that protection of the public from sex offenders, sexually violent predators, and child predators is of paramount governmental interest.”); see also ABowitz Megan’s Law, CALIFORNIA DEPT OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, http://www.meganslaw.ca.gov/homepage.aspx?lang=ENGLISH (last visited Dec. 21, 2013) (“California’s Megan’s Law provides the public with certain information on the whereabouts of sex offenders so that members of our local communities may protect themselves and their children.”).
about the excessive, and in some cases unwarranted, stigma placed on pedophiles in the law. Part I will summarize the recent science indicating that pedophilia is a brain condition developed in utero. After addressing the science, this article will then accept the premise that pedophilia is a biological condition, in order to address its legal implications. Part II will consider the current legal system as it relates to pedophiles. The focus of this section will be on how current laws serve to stigmatize and isolate pedophiles, deterring them from seeking help and creating a sense of desperation that may actually encourage pedophiles to act on their sexual attraction to children. Finally, in Part III, this article will make several suggestions on how sex offender laws should be reformed and refocused in order to create an environment conducive for pedophiles to seek help and treatment before they offend.

I. PEDOPHILIA AS A BIOLOGICAL CONDITION IN THE BRAIN

The idea that pedophilia may be a biological condition—originating in the brain—is not new. Early studies of the concept of sexuality, such as Richard von Krafft-Ebing’s *Psychopathia Sexualis* in 1886, hypothesized that various sexual deviances, including pedophilia, were in fact brain conditions. Unfortunately, the technology simply did not exist at the time to test these hypotheses, eventually being overshadowed by Sigmund Freud’s theories of psychoanalysis. Freud’s “nurture” theories essentially overtook the earlier “nature” theory of Krafft-Ebing and others. However, new technology is now changing our understanding of how the brain works, and over the last ten years or so the nature theory is gaining traction once again. The idea that pedophilia is a condition in the brain has reemerged.

Three groups of researchers and scientists are currently studying the brain and its relationship to pedophilia. All three groups, two in Germany and one in Canada, have been conducting MRIs on pedophiles, looking for signs in the brain that pedophilia is a biological condition. All three groups have found evidence that the source of pedophilia is in the brain structure and composition. However, this article will focus mainly on the research coming out of Canada at the Centre for Addiction and Mental

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12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *See id.* The focus of the research from the three groups does differ. See *id.* The research out of Canada looks at the entire brain, while the two German groups are each focusing on specific regions, the temporal and frontal lobes, of the brain. *Id.*
Health (CAMH) in Toronto. The CAMH research is led by Dr. James Cantor, who has been studying pedophilia and its association with the brain for more than ten years.\textsuperscript{17} Dr. Cantor’s conclusion is that pedophilia is a biological condition in the brain that is developed before birth.\textsuperscript{18} Unlike the more commonly recognized nurture theory, that pedophilia develops from life experiences and vulnerabilities from childhood,\textsuperscript{19} this new research indicates that pedophiles are biologically wired to be sexually attracted to children.\textsuperscript{20}

Before getting into the details of the research, it is first necessary to pause and explain the definition of pedophilia and how it is currently diagnosed. The \textit{Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR} serves as a guide for clinicians and researchers across various fields.\textsuperscript{21} It is also utilized by lawyers and courts on a regular basis, including in the civil commitment context.\textsuperscript{22} The goal of the \textit{DSM-IV-TR} is to create consistency in terminology and diagnoses of mental disorders.\textsuperscript{23} The manual defines a mental disorder as a “manifestation of a behavioral, psychological, or \textit{biological} dysfunction in the individual.”\textsuperscript{24} Pedophilia is classified within the category of mental disorders known as paraphilias, which are “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors” that fall outside what one might consider societal norms, lasting

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\textsuperscript{18} \textit{Cantor Lecture}, supra note 7.


\textsuperscript{20} \textit{See Cantor Lecture}, supra note 7.


\textsuperscript{22} \textit{See John Fabian, The Adam Walsh Child Protection and Safety Act: Legal and Psychological Aspects of the New Civil Commitment Law for Sex Offenders}, 60 \textsc{Clev. St. L. Rev.}, 307, 316 (2012).

\textsuperscript{23} \textit{See DSM-IV-TR}, supra note 21, at xxiii–xxiv.

\textsuperscript{24} \textit{Id.} at xxxi (emphasis added). Since biology is included in the manual’s definition of mental disorder, there does not appear to be a conflict between the research on pedophilia as a biological condition and the term pedophilia as it is used in the manual. Also, while still subject to much criticism, the \textit{DSM-5} specifically references evidence that pedophilia can develop in utero. \textsc{AM. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders: DSM-5}, at 699 (5th ed., 2013) (“There is some evidence that neurodevelopmental perturbation in utero increases the probability of development of a pedophilic orientation.”).
at least six months.\textsuperscript{25} The focus of pedophilia is sexual activity with a prepubescent child, generally aged thirteen or younger.\textsuperscript{26} Note that a distinction should be made between a pedophile and an individual who is attracted to, or engages in, sexual activity with a minor who has undergone puberty, generally aged fourteen to eighteen.\textsuperscript{27} Moreover, pedophilia is almost never diagnosed in females.\textsuperscript{28} Also, under this definition, not all child molesters are pedophiles and not all pedophiles are child molesters. A person who engages in sexual activity with a child may be acting out of violence or suffering from some other mental disorder.\textsuperscript{29} But, a pedophile may be diagnosed without ever acting on their sexual attraction to children.\textsuperscript{30} The DSM-IV-TR is relatively silent as to the source or cause of pedophilia.

With the above definition of pedophilia in mind, it is now possible to return to the recent biological research on pedophilia. Before MRIs were conducted, there were several indicators that led Dr. Cantor and his team to zero in on the brain as a source of pedophilia.\textsuperscript{31} One of the first indicators was IQ. Dr. Cantor’s team first analyzed IQ samples from tens of thousands of prisoners who were tested when they entered prison between the years 1900 and 2000.\textsuperscript{32} The so-called “offenders against children” had significantly lower IQs.\textsuperscript{33} While Dr. Cantor acknowledges that the definition of “child” varied by year and jurisdiction, the IQ samples were even lower when the age definition of “child” was lower.\textsuperscript{34} So the more pedophilic the IQ sample was, the lower the IQ. Next, IQ testing was

\begin{itemize}
  \item \textsuperscript{25} DSM-IV-TR, supra note 21, at 566.
  \item \textsuperscript{26} Id. at 571.
  \item \textsuperscript{27} See id. Recognizing this distinction is important because society as a whole does not necessarily draw the same line, grouping both pedophiles and individuals who engage in sex acts with post-pubescent minors together. For example, derogatory labels such as “child molester” are often used interchangeably. In addition, the science to be discussed linking pedophilia to biology utilizes the DSM-IV-TR definition.
  \item \textsuperscript{28} Id. at 568.
  \item \textsuperscript{29} See id. at 571-72; see also Alan Zarembo, Many Researchers Taking a Different View of Pedophilia, L.A. TIMES (Jan. 14, 2013), http://articles.latimes.com/2013/jan/14/local/la-me-pedophiles-20130115.
  \item \textsuperscript{30} DSM-IV-TR, supra note 21, at 571-72. However, it is extremely rare to diagnose pedophilia in this fashion since most pedophiles do not seek treatment voluntarily. Id. For further discussion, see infra Part II.
  \item \textsuperscript{31} Cantor Lecture, supra note 7.
  \item \textsuperscript{32} Id.
  \item \textsuperscript{33} Id.
  \item \textsuperscript{34} Id. In addition, the lower IQs in pedophilic prisoners cannot be explained away by simply arguing that dumber people are caught for their crimes because the IQs of pedophilic prisoners were also lower than the IQs of other criminals whose offenses were against adults. Id.
conducted on sex offenders at CAMH. The average IQ of the pedophiles in the group was 90, which Dr. Cantor describes as not noticeable on the street but enough that one might think the person was not very bright.

Along with IQ, pedophiles tested at CAMH scored the lowest in both visual-spatial and verbal memory testing. The results of this memory testing provided two more indicators that something about the brain of pedophiles was unique or different. In addition, sixty to seventy percent of pedophiles studied at CAMH were either failing or failed school, or were placed in special education classrooms. That percentage is dramatically different than the baseline of two percent. This is significant because it suggests a developmental difference exists in pedophiles before offenses are committed.

Two other indicators—height and handedness—also signaled that the source of pedophilia was biological, and that pedophilia is a condition developed before birth, in utero. On average, pedophiles are approximately 2.5 centimeters shorter than the rest of the population. To put that height difference in perspective, that is about double the effect one would get if a woman smokes during pregnancy. As for handedness, about ten percent of the regular population is left-handed, while in contrast about thirty percent of pedophiles are left-handed. The only other groups with such a large percentage of lefties are schizophrenics and people with severe brain injuries. The evidence of a high percentage of left-handed individuals among the pedophilic population was one of the most significant factors because brain structure is the only thing that causes a person to be left-handed or right-handed. The dominant hemisphere of the brain determines handedness.

35. It is necessary to distinguish the term “sex offender” in this article from other terminology such as “pedophile.” The term “sex offender,” for the purposes of this article, will refer to an individual who has been convicted of any sex offense relating to children or adults.
36. Cantor Lecture, supra note 7.
37. Id.
38. Id.
39. Id.
40. Id.
41. Id.
42. Id.
43. Id.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id.
correlation, and conclude that, like both height and handedness, pedophilia originates in the brain and develops before birth.49

Armed with this information, Dr. Cantor and his team began conducting MRIs to try to identify where or what in the brain causes pedophilia.50 The MRI research compared brain scans of pedophiles with scans of non-sexual offenders.51 The pedophiles were identified through self-reporting or based on their prior offenses.52 The rationale behind a comparison of pedophiles to other criminal offenders was to exclude any results that could simply be attributed to a propensity to break the law.53 The results of the MRIs indicated that pedophiles have less developed white matter in the brain.54 White matter is the connective tissue that connects different parts of the brain.55 The results were also symmetrical, meaning the underdeveloped white matter was evident on both sides of the brain.56 The significance of this underdeveloped white matter only becomes clear when one looks at the several parts of the brain that respond when a person is sexually aroused.57 The white matter connects all of these parts of the brain.58 In pedophiles, the white matter tissue is underdeveloped and connects the wrong stimulus to the wrong response.59 Accordingly, there is a “literal cross-wiring” of the brain.60

Interestingly, however, this research does not demonstrate that pedophiles lack the ability to control their impulses.61 There is a need to distinguish between sexual interests and behavior. A pedophile may have a sexual interest in children, but he still theoretically has the ability to control that sexual interest. Thus, while science has not yet reached a point where the white matter deficiency in the brain can be corrected,62 there are ways to treat pedophiles to prevent them from acting on their desires. Sex-drive reducing medications may be an option to help “take the edge off” and aid a

49. Id.
50. Dr. Cantor’s MRI research was launched with a $1 million grant from the Canadian Institutes for Health Research. JAMESCANTOR.COM, http://jamescantor.com (last visited May 5, 2013).
51. Cantor Lecture, supra note 7.
52. Id.
53. Id.
54. Id.
55. Id.
56. Id.
57. Id.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id.
pedophile in exercising abstinence to control his sexual interest in children. But reaching out to pedophiles to start treatment is a problem. Right now, pedophiles rarely seek help voluntarily, normally only coming in contact with mental health or medical professionals after they have committed an offense and enter the criminal justice system.

While this research is relatively new, Dr. Cantor and his team’s conclusions have been attracting attention not only in medical fields, but also in the general public. Now, the focus of the research is shifting, to pinpoint the prenatal influences that cause pedophilia to develop. Is it in the genes? Or could the cause be something as simple as a vitamin deficiency? In addition, the science has not yet reached the point where individuals can be scanned for pedophilia. However, there are clear conclusions that can be drawn right now, which can and should have legal implications. First, accepting the science as it stands, people are born with the condition of pedophilia. Furthermore, there is no cure. As of now, the condition in the brain cannot be changed. Nonetheless, pedophiles can learn to live with the condition. Therefore, while this biological condition does not entirely eliminate culpability for child sex crimes, it does pose interesting questions about how the law should treat pedophiles and what should be done with those who offend. Accordingly, the remainder of this article will accept the current research on pedophilia as a biological condition in order to analyze these questions and suggest answers.

II. THE STIGMATIZING EFFECTS OF SEX OFFENDER LAWS ON PEDOPHILES

Accepting the science that pedophilia is a biological condition, the stigma of the current criminal justice system may actually deter and prevent treatment of pedophiles. “Having encountered thousands of cases, it is my experience that the pedophiles who do go on to become actual child molesters do so when they feel the most desperate. Yet, much of what

63. Id.
64. DSM-IV-TR, supra note 21, at 566; Cantor Lecture, supra note 7.
65. Dr. Cantor’s findings have been written about in the Los Angeles Times and other major newspapers, as well as broadcast on stations such as CNN. See Zarembo, supra note 29; James Cantor, Do Pedophiles Deserve Sympathy?, CNN (June 21, 2012, 10:32 PM), http://www.cnn.com/2012/06/21/opinion/cantor-pedophila-sandusky [hereinafter Cantor CNN].
66. Cantor Lecture, supra note 7.
67. Id. White matter has only been detectable with MRI technology for the last few years. Id. Moreover, the deficiency in white matter seen in pedophiles is slight enough that it can only be detected at this point when analyzing large group samples. Id.
68. Id.
society does has been to increase rather than decrease their desperation.69 From criminal sentencing to civil commitment to sex offender registration and notification, the pedophile must deal with a potential lifetime of public shame, humiliation, and ostracism.

A. Criminal Sentencing

The stigma starts with sentencing. While a pedophile who engages in a sexual act or sexual contact with a child commits a serious crime, that pedophile is often treated more harshly than others who have committed similar crimes with adults. Many would argue that the injury is more egregious when the victim is a child and harsher treatment is warranted, but the science suggesting pedophilia is a biological cross-wiring should force a reexamination. For example, a federal conviction for aggravated sexual abuse involving a child requires a minimum thirty year prison sentence,70 but there is no sentencing minimum for aggravated sexual abuse of an adult.71 Furthermore, the federal sentence for sexual contact with a child under the age of twelve72 is double that for the same crime with an adult victim.73 Yet the biologically-wired pedophile’s intent in the act is likely no more malicious, and may actually be less malicious, than the intent of an offender against an adult. Moreover, even lesser crimes pose tough sentences on the pedophile. Under federal law, receipt of child pornography carries a minimum five year prison sentence.74 The pedophile faces more time in prison than other sex offenders, and other criminals in general, because of a condition that science now indicates he was born with.

B. Post-Sentence Restrictions and Requirements

Of course, the story does not end when the pedophile has served his criminal sentence. Upon release from prison, sex offenders may be forced to return to lock up under civil commitment statutes and must also comply

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71. 18 U.S.C. §§ 22441(a)-(b) (2006 & Supp. 2012). The term sexual act is also defined differently, based on whether the victim is a child or an adult. Behavior constitutes a sexual act against an adult when there is penetration. However, behavior amounting to a sexual act against a child does not require penetration, but can occur when there is intentional touching underneath a child’s clothing. 18 U.S.C. § 2246(2) (2006 & Supp. 2012).
72. Sexual contact is defined as the touching of a child’s private parts through their clothing. 18 U.S.C. § 2246(3) (2006 & Supp. 2012).
with registration and notification statutes.\(^{75}\) Pedophiles are the most vulnerable of sex offenders under these civil commitment and registration and notification statutes. Not only is pedophilia one of the top diagnoses for civil commitment,\(^{76}\) but nearly every conviction for a child sex offense subjects the pedophile to the most stringent of registration and notification requirements.\(^{77}\)

The federal Adam Walsh Child Protection Safety Act (AWA), which attempts to create a national standard for sex offender laws, serves as a good example of the stigmatizing effects that post-conviction, post-sentence sex offender statutes have on pedophiles in particular. Congress enacted the AWA in 2006 with the purpose of “protect[ing] the public from sex offenders and offenders against children.”\(^{78}\) Notably, the AWA was enacted in the name of seventeen crime victims, thirteen of whom were aged fourteen or younger when the crimes occurred.\(^{79}\) So while the AWA targets all sex offenders, it singles out pedophiles in the stated purpose and places them at the statute’s forefront. As for the AWA’s substance, it strengthened the federal sex offender laws of the previous decade including the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Act and Megan’s Law, both of which involved sex offender registration and notification.\(^{80}\) The AWA also created a federal sex offender registry as well as a federal civil commitment scheme for so-called “sexually dangerous person[s].”\(^{81}\) The statute targets states as well, encouraging them to comply with national standards for state sex offender registration, notification, and civil commitment.\(^{82}\)


\(^{76}\) Fabian, supra note 22, at 337.

\(^{77}\) See infra Part II.B.1.


\(^{79}\) Id.

\(^{80}\) For a discussion of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act as well as Megan’s Law, see Catherine L. Carpenter & Amy E. Beverlin, The Evolution of Constitutionality in Sex Offender Registration Laws, 63 HASTINGS L.J. 1071, 1077-78 (2012).


C. Civil Commitment

The first obstacle a pedophile faces after serving a criminal sentence is civil commitment, which essentially keeps the pedophile locked up and isolated from society. Twenty states as well as the federal government have sexually violent predator (SVP) civil commitment statutes. The threat of civil commitment exists for many sex offenders, but pedophiles are more likely to find themselves civilly committed after serving out their sentences. One of the most common diagnoses for civil commitment is pedophilia. Under the AWA, a sex offender is subject to civil commitment if the government can establish by clear and convincing evidence that he is a “sexually dangerous person.” A sexually dangerous person is defined as a “a person suffering from a serious mental illness, abnormality, or disorder, as a result of which the individual would have serious difficulty in refraining from sexually violent conduct or child molestation.” The AWA generally mirrors the language of Supreme Court precedent. In *Kansas v. Crane*, the Court held that civil commitment of a sex offender does not require a complete inability to control one’s behavior, only “serious difficulty.” Under this language, every biologically-wired pedophile, regardless of his offense, would seem to fall into this definition. Pedophiles may have control over their impulses, but this control requires a pedophile to abstain from the type of sexual activity he finds arousing. That is not easily achieved behavior. Moreover, the availability of treatment in civil commitment facilities has been the subject of much criticism. Once civilly committed, it is extremely rare for a sex offender to be released. Thus, the prospect of civil commitment provides little hope for the pedophile trying to cope with a condition he is born with.

84. *Id.* at 337.
89. *See supra* Part I.
91. *See e.g.*, Davey & Goodnough, *supra* note 90; Mears, *supra* note 90.
D. Sex Offender Registration

If a pedophile can escape civil commitment, he still must cope with sex offender registration and public notification. Unlike other sex offenders, for the pedophile this equates to a public airing of his biological condition—a sexual interest in children—which he cannot cure. The Supreme Court has acknowledged registration and notification “subjects the offender to public shame, the humiliation increasing in proportion to the extent of publicity.”92 However, while acknowledging the stigma, the Court upheld Alaska’s sex offender registration and notification statute at the time, finding that the stigma associated with registration did not amount to punishment.93 Legislation has continued to test the boundaries of that holding ever since.94 The Sex Offender Registration and Notification Act (SORNA) of the AWA is perhaps the best example of testing those boundaries. SORNA lays out the registration and notification standards that states are incentivized to comply with.95 These notification standards are a “set of minimum national standards and sets a floor, not a ceiling, for jurisdictions’ programs.”96

Under SORNA, sex offenders are classified into one of three tiers, which determines the length of time the sex offender is required to register.97 Durational requirements for tier I offenders are the lowest at 15 years.98 Unfortunately, the only pedophiles who may fall into tier I are those convicted of receiving child pornography.99 The remaining two tiers are where most offenses likely to be committed by pedophiles are classified. Tier II offenders must register for 25 years and tier III offenders face lifetime registration.100 SORNA provides for a laundry list of information that sex offenders are required to provide, with nearly all of it

93. See id.
94. See e.g., Starkey v. Okla. Dep’t of Corr., 305 P.3d 1004, 1030-31 (Okla. 2013) (holding that post-Smith amendments to Oklahoma’s sex offender registration laws violated the ex post facto clause of the state constitution); People v. Mosley, 116 Cal. Rptr. 3d 321, 332 (Ct. App. 2010) (discussing the amendments to California’s sex offender registration scheme after the passage of Jessica’s Law in 2006).
95. See NAT’L GUIDELINES, supra note 82.
96. Id. at 6 (emphasis in original).
99. NAT’L GUIDELINES, supra note 82, at 22. However, unlike other tier I offenders who may be exempted from the public notification arm of SORNA, tier I offenders with “specified offenses against a minor,” which includes child pornography offenses, are not exempt. Id. at 18-22.
being available for public access on state and federal databases. Just a few examples of the information required of sex offenders are their name, address, place of employment, Social Security number, license plate numbers, and even a DNA sample. Sex offenders must also provide information regarding names and web addresses they use online. Of the information just listed, only a sex offender’s Social Security number is exempt from public notification. Outside of SORNA, the AWA also provides grants to states for electronic monitoring and GPS tracking of registered sex offenders twenty-four hours a day.

The effects of registration, notification, and tracking of sex offenders are clear. Not only is there a severe, if not complete, loss of privacy, but courts have readily acknowledged the “profound humiliation and community-wide ostracism” offenders face. The consequences of this stigma range from threats of violence and “vigilante justice” to loss of employment and housing. In addition, these statutes often force sex offenders to distance themselves from family members and friends because of the onerous burden placed on them as well. However, despite recognition of the stigma and consequences, constitutional challenges to these laws have had varying results in the courts. While, a handful of state high courts have recognized that these statutes are too harsh and violate ex post facto principles, this opinion has not yet taken hold generally. In fact, it appears to be the opposite.

103. 42 U.S.C. §§ 16914, 16915(a) (2006); see also NAT’L GUIDELINES, supra note 82, at 27.
104. 42 U.S.C. § 16918 (2006). States also have the option to exempt an employer’s name from their publicly accessible databases. Id.
106. Wallace v. State, 905 N.E.2d 371, 380 (Ind. 2009); see also Starkey v. Okla. Dep’t of Corr., 305 P.3d 1004, 1022-25 (Okla. 2013) (finding that Oklahoma’s sex offender registration and notification provisions “impose substantial disabilities” on registrants); Doe v. State, 189 P.3d 999, 1010-11 (Alaska 2008) (finding that the duties imposed by Alaska’s sex offender registration and notifications provisions are “significant and intrusive,” and similar to the duties of probationers and parolees subject to continued state supervision).
108. Prescott & Rockoff, supra note 107, at 190.
109. See, e.g., Smith v. Doe, 538 U.S. 84, 105-106 (2003) (holding that Alaska sex offender registration and notification statute was not punitive despite the attendant stigma and public shame that registrants face); Wallace, 905 N.E.2d at 384 (holding that Indiana’s Sex Offender Registration Act violates ex post facto principles on state constitutional grounds).
Efforts continue across the country to expand restrictions on registered sex offenders, particularly those who might be diagnosed as pedophiles. Several states restrict the employment opportunities of registered sex offenders. For example, Georgia prohibits registered offenders from not only working in childcare fields but also prohibits employment at businesses within 1,000 feet of where children congregate. Louisiana restricts registered offenders from working in public transportation or in service fields that require visits to homes. Moreover, residency restrictions are perhaps the most onerous, preventing registered sex offenders from living within a certain distance from public and private schools and parks. In one highly publicized example, these residency restrictions in Miami left hundreds of registered offenders homeless and living under a bridge. A fairly recent trend that goes hand in hand with residency restrictions, are efforts to turn small plots of vacant land into “pocket parks” to force sex offenders in the neighborhood to relocate elsewhere. All of these efforts serve to separate pedophiles from general society, essentially forcing them to live in isolation, while also making integral parts of life—a job and a home—difficult and in some cases impossible to sustain.

Adding to the excessively stigmatizing effect of the statutes, are the language and labels placed on pedophiles by society as well as assumptions that are made, but not necessarily based in fact. While research on the brain and pedophilia is new, pedophilia itself has been classified as a mental disorder for a very long time. Nonetheless, pedophiles have garnered no empathy for their condition. For example, lawmakers label pedophiles as “monster[s]” and the “human equivalent of toxic waste” in order to rally support for new sex offender legislation. Additionally, this legislation

114. CAL. PENAL CODE § 3003.5(b) (West 2006) (prohibiting sex offenders from living within 2,000 feet of any public or private school, or park where children regularly reside).
117. See DSM-IV-TR, supra note 21, at 571-72.
is touted as necessary to stop recidivism among child predators. However, empirical studies have suggested that registration and notification statutes have no significant effect on recidivism and may actually encourage recidivism among registered offenders. One study found a 1.57 percent increase in sex offenses when a notification regime becomes part of an average-sized sex offender registry. The authors of the study hypothesize that the social and financial costs of complying with registration and notification laws are simply too high or not worth it. Moreover, residency restrictions have been called into serious doubt, even within government agencies. The California Sex Offender Management Board has publicly acknowledged that onerous residency restrictions encourage recidivism and that the only intervention proven effective against recidivism is sex offender-specific treatment.

So far this article has only discussed the stigmatic effects of sex offender laws on pedophiles who have acted on their attraction and entered the criminal justice system. However, this stigma also has an effect on a pedophile who has not offended, or has not yet offended. The high cost of being labeled a pedophile by society and the fear of being forced into the sex offender system deters pedophiles from seeking help, even though treatment options may be available to help them live with their condition. This is evidenced by the fact that the medical profession rarely diagnoses pedophilia in individuals who voluntarily seek treatment. Almost all pedophiles are diagnosed after being referred for treatment through the criminal justice system. Therefore, perhaps the best way to protect public safety and children, and to achieve the stated purpose of many sex offender laws, is to focus attention on treating pedophiles before they offend rather than only dealing with them after an offense occurs.

122. Prescott & Rockoff, supra note 107, at 192.
123. Id.
124. Id.
126. See supra Part I.
127. DSM-IV-TR, supra note 21, at 566.
128. Id.
III. LEGAL REFORM SHOULD ENCOURAGE TREATMENT NOT OSTRACISM

The need for comprehensive legal reform is clear when taking into consideration both the science that pedophilia is a biological condition developed before birth, and the harsh and debilitating stigma of sex offender laws. This article suggests a two-pronged approach to reform that targets pedophiles before first offenses occur and after.

According to the Bureau of Justice Statistics, more than eighty-one percent of “child molesters” are first time child-sex offenders. This suggests that recidivism is not the crux of the problem. Thus, truly deterring child sex offenses should include identifying potential offenders before they offend and getting them treatment. The problem is how to get pedophiles to present themselves to medical professionals capable of providing pre-offense treatment. While MRIs cannot yet detect the biological condition of pedophilia on an individualized basis, the science is close and doctors will need patients to conduct the MRIs. Moreover, even right now under the DSM-IV-TR, pedophiles can be diagnosed without ever having committed an offense. Yet pedophiles do not seek treatment voluntarily, as discussed above, due in large part to the excessively stigmatizing sex offender laws on the books. Reform of these existing post-offense laws will be discussed later. But legal reform must also take place before a pedophile’s first offense by altering mandatory child abuse reporting statutes and directing resources to research, treatment, and early identification of pedophilia.

While the laws already discussed in Part II may deter pedophiles from seeking treatment, current mandatory child abuse reporting statutes also chill the pedophile’s desire to seek to medical help. Pedophiles may rationally fear that seeking help for pedophilia from a medical professional, regardless of whether or not they have offended, will land them in legal trouble. Forty-eight states and the District of Columbia have mandatory reporter statutes. While the standard for when a report must be made

130. See supra Part I.
131. DSM-IV-TR, supra note 21, at 571-72.
132. See supra Part II.
133. Cantor Lecture, supra note 7.
varies from state to state, typically a report is required when a reporter “suspects or has reason to believe that a child has been abused or neglected” or a reporter “has knowledge of . . . conditions that would reasonably result in harm to the child.”\footnote{135} Nearly all of these statutes name medical and health professionals as mandated reporters, requiring a report to be made regardless of whether the patient is the child or the adult suspected of committing the abuse.\footnote{136} Significantly, the doctor-patient privilege is one of the most commonly denied privileges in these statutes.\footnote{137} Thus, a pedophile seeking help from a doctor may share information about urges or fantasies he has about a child around him, and the doctor, fearing liability, may be forced to report the pedophile under a statute’s “conditions that would reasonably result in harm to the child” prong.\footnote{138} It is a situation both the pedophile and the doctor want to avoid.

The goal of mandated reporter statutes is obvious, to prevent and protect children from abuse and neglect. However, this goal can and should be achieved in the context of child sex offenses by accommodating a doctor-patient privilege. The privilege should not exist when the patient is a child reporting or displaying symptoms of sexual abuse. However, the privilege should be available when the pedophile is the patient, so that he can openly discuss his condition and seek appropriate treatment. Pedophiles are more likely to come forward voluntarily, if they do not have to fear that their thoughts—really a product of biology—could subject them to investigation and potential criminal liability.

Additionally, legislation has not shied away from allocating resources targeting sex offenders for what has been labeled public safety. However, instead of allocating resources to questionable efforts such as electronic monitoring and the building of “pocket parks” to drive pedophiles out of neighborhoods, a better use of those resources would be for medical treatment of pedophilia and first offense prevention. As Dr. Cantor’s research has indicated, pedophiles may be able to cope with their condition.\footnote{139} In Germany, sex researchers with the Prevention Project Dunkelfeld are currently working with pedophiles to help them learn to live with their condition, offering a combination of therapy and medication.\footnote{140} Pedophiles in the program are convicted offenders, offenders who have not

\begin{footnotes}
\item[135] Id. at 3.
\item[136] Id. at 2.
\item[137] Id. at 2-4.
\item[138] See id.
\item[139] See supra Part I.
\end{footnotes}
been caught, and non-offenders. Notably, in perusing Prevention Project Dunkelfeld’s website, nearly every page contains an asterisk emphasizing that “there is no mandatory report law in Germany.” The project just recently opened its seventh clinic in Germany, and is partially funded by the government. Allocating resources for a similar project here in the United States, or at least making such an effort legally possible, would be a step in the right direction, focusing attention on the pedophile and treatment.

When it comes to reform, it is also important to maintain the right focus, and pay attention to the purpose of sex offender statutes that target pedophiles after they offend. The current laws are victim-centralized, named after children who have been victims of murder and sex crimes. In passing current legislation, lawmakers offer detailed accounts of the crimes. However, this is the wrong approach. Legislation needs to be more balanced. While this article in no way suggests that child victims of sex crimes and pedophiles should be viewed in the same light, the plight of a pedophile suffering from a biological condition must be taken into account. Pedophilia should be thought of as a disability, which necessitates removing some of the stigma associated with the condition. However, this does not require a total repeal of sex offender laws on the books. In fact, many of the laws can be revised to actually serve the stated purpose of public safety while also benefitting the pedophile in the form of treatment.

First, civil commitment may remain a viable option, however its current operation needs to be reevaluated. Right now, the effect of civil commitment is to merely keep pedophiles away from society at large. Most pedophiles can expect to be civilly committed indefinitely and treatment is rare and underfunded. In fact, many sex offenders choose not to seek treatment at all—fearing that if they admit the need for treatment it will be used as grounds for remaining in civil commitment. Ironically, not seeking treatment is also a consideration in civil commitment

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141. See id.
142. See id.
143. See id.
144. Logan, supra note 120, at 390-93. The AWA’s stated purpose also includes a list of seventeen victims, thirteen of whom were aged fourteen or younger when the crimes against them occurred. 42 U.S.C.A. § 16901 (2006).
145. When Megan’s Law was being passed by the House of Representatives, Representative Dick Zimmer (R-NJ) invoked the details of the rape and murder of young Megan Kanka by a neighbor who told the girl he had a puppy to show her. 42 Cong. Rec. H4452 (daily ed. May 7, 1996) (statement of Rep. Zimmer). See also Logan, supra note 120, at 390-91.
146. See supra Part II.
147. See Davey & Goodnough, supra note 90.
However, for the purposes of civil commitment, a line needs to be drawn between medicine and the law. The law needs to provide more explicit guidelines for courts in determining who should qualify for civil commitment, and those guidelines should be based on medical diagnoses, not legal definitions. Moreover, civil commitment should only be permissible if it operates as a properly funded treatment program. In addition, pedophiles who are civilly committed need a viable way of obtaining release that is not based on legal technicalities.

Coupled with civil commitment reform, sentence mitigation law should be reevaluated in its application to the biologically-wired pedophile. For example, the federal sentencing guidelines currently leave no room for a pedophilia diagnosis to be a mitigating factor at sentencing. The mitigating factor under which pedophilia would most likely fall is diminished capacity, however the guidelines explicitly exclude consideration of diminished capacity in child sex offense cases. In light of the science linking pedophilia to biology, this exclusion should not stand. Instead pedophilia should be a mitigating factor because culpability, while not eliminated, is lessened by the fact that the pedophile is unable to cure his condition. If civil commitment reform is implemented, then sentence mitigation would not necessarily put untreated pedophiles back into the community because they would be prime candidates for revamped treatment-centered civil commitment.

An overhaul of sex offender registration and notification statutes is also necessary. While these statutes require sex offenders to provide an increasing amount of personal information, registration schemes do provide some worthwhile benefit. There is evidence that registering with law enforcement, and allowing law enforcement to keep reasonable tabs on sex offenders, does help prevent recidivism. However, that benefit does not extend to public notification statutes, which some studies have indicated pose such a high cost to sex offenders that they actually encourage criminal activity including recidivism. As the laws apply to diagnosed pedophiles,

150. § 5K2.13 (2013).
151. Since the science behind pedophilia being a biological condition does not indicate that pedophiles lack impulse control or an understanding of right and wrong, a pedophile who acts on his sexual interest toward children is culpable. This is why an insanity defense would be difficult, since it generally requires a showing that the defendant either did not understand his actions were wrong or lacked the ability to control his actions. 2 CRIM. L. DEF. § 173 (2013).
153. Prescott & Rockoff, supra note 107, at 192.
154. Id.
with a biological brain condition, sex offender registration with law enforcement should be permissible but public notification needs to be eliminated.\textsuperscript{155} This strikes the proper balance in protecting children from recidivists while also allowing pedophiles a degree of medical and sexual privacy. Note also that this would apply to pedophiles who are not civilly committed, so a determination has already been made that these pedophiles are not sexually dangerous persons who are volitionally impaired.\textsuperscript{156}

Finally residency and employment restrictions may be appropriate for pedophiles, however the key to these laws will be reasonableness. Residency restrictions that make it impossible for pedophiles to maintain a home go too far.\textsuperscript{157} Targeted efforts to drive pedophiles out of communities, like the construction of “pocket parks,” should be prohibited.\textsuperscript{158} Employment restrictions in fields that do not primarily serve or work with children are also unreasonable.\textsuperscript{159} Nevertheless, reasonable residency and employment restrictions could operate like other rules and regulations that affect people with disabilities and other conditions. For example, no one would think it is unreasonable to prohibit a blind person from driving a bus or a drug addict from working at a pharmacy. Preventing a pedophile from living \textit{within sight} of a school may be similarly reasonable, especially considering the benefit it might have on treatment by keeping the pedophile at a distance from the triggers of his sexual interests. The focus should be on reasonableness, whether the restrictions truly serve the purpose of keeping pedophiles at a safe distance from children or if they really operate only to isolate and segregate pedophiles from the entire community.

Overall, legal reform with respect to pedophiles needs to happen in two stages. First, the law needs to take a close look at how to address the biological condition of pedophilia before a pedophile acts on his attraction to children. Two suggestions in this realm are to provide for a doctor-patient privilege in mandatory child abuse reporting statutes and to allocate resources to the creation and administration of pedophile treatment programs. Next, the law must reform current sex offender legislation to strike a balance between the victim-centered approach in place now and recognition of pedophilia as a biological condition that individuals are born with. This requires an emphasis on treatment in the civil commitment

\textsuperscript{155} This paper does not address potential reforms of sex offender registration and notification as it pertains to offenders who are not diagnosed pedophiles.

\textsuperscript{156} \textit{See} discussion on civil commitment standards \textit{supra} Part II.

\textsuperscript{157} \textit{See} Skipp, \textit{supra} note 115 (regarding sex offenders living under a bridge in Miami).

\textsuperscript{158} \textit{See} Lovett, \textit{supra} note 116.

context, more privacy when it comes to sex offender registration, and reasonableness when implementing residency and employment restrictions.

IV. CONCLUSION

What to do with pedophiles if they are biologically wired to be attracted to children is not an easy question to answer. However, it is important to draw a distinction between sexual attraction and behavior when answering this question. It seems fundamentally unfair to essentially subject pedophiles to a lifetime of punishment and ostracism for a condition they were born with. Nevertheless, the sex offender laws on the books today do exactly that. They also inhibit pedophiles from voluntarily seeking treatment to cope with their condition. As science linking pedophilia to biology and the brain gains more traction, a reexamination of sex offender laws and their effects will be necessary. There is no question that laws need to be in place to protect children from sexual abuse, however shifting away from the victim-centered approach in place now may be the best way to prevent child sexual abuse. Law and society should focus on treatment of pedophiles, creating an atmosphere in which pedophiles will voluntarily seek help to cope with their condition. At the same time, the law can balance this emphasis on treatment with reasonable restrictions in order to protect children. Moreover, pedophiles who do offend, should be subject to appropriate punishment for the crime.