

Taking Pedophilia Seriously

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Abstract

This Article pushes lawmakers, courts, and scholars to reexamine the concept of pedophilia in favor of a more thoughtful and coherent approach. Legal scholarship lacks a thorough and reasoned analysis of pedophilia. Its failure to carefully consider how the law should conceptualize sexual attraction to children undermines efforts to address the myriad of criminal, public health, and other legal concerns pedophilia raises. The result is an inconsistent mix of laws and policies based on dubious presumptions. These laws also increase risk of sexual abuse by isolating people living with pedophilia from treatment.

The Article makes two central arguments: (1) although pedophilia does not fit neatly into any existing legal rubric, the concept of mental disorder best addresses the issues pedophilia raises; and (2) if the law conceptualizes pedophilia as a mental disorder, we must carefully reconsider how several areas of law address it. Specifically, it argues that sexually violent predator statutes expand state power to civilly commit individuals by distorting the concept of pedophilia as a mental disorder. At the same time, anti-discrimination law is dismissive of pedophilia as a mental disorder, excluding it from civil rights protections ordinarily associated with mental illness. Closer examination of

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these distinctions reveals them to be based on questionable premises.

The law should take pedophilia seriously as a mental disorder. Many individuals living with pedophilia pose a danger to others. Yet we should not categorically deny pedophilia the civil rights protections afforded to other mental disorders without a convincing normative justification supported by cogent scientific evidence. Strengthening civil rights protections for those with pedophilia also increases access to treatment and support that helps prevent child abuse.

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I. Introduction

Ethan Edwards is a pedophile.¹ He has also never touched a child in a sexual manner and vows he never will.² Edwards is one of the two founders of “Virtuous Pedophiles,” a website dedicated to supporting individuals with pedophilia who are morally opposed to sexual contact with children.³ The site attempts to reduce the stigma of pedophilia by demonstrating that it is an unchosen sexual attraction and that many individuals with pedophilia live law-abiding lives.⁴ A section called “Who We Are” is full of testimonials from individuals living with pedophilia⁵

1. See *Who We Are*, VIRTUOUS PEDOPHILES (2012), <http://www.virped.org/index.php/who-we-are> (last visited Jan. 27, 2015) (introducing Ethan Edwards pseudonym for a man struggling with pedophilia) (on file with the Washington and Lee Law Review). The name “Ethan Edwards” is a pseudonym.

2. *Id.*

3. *Id.*; Tracy Clark-Flory, *Meet Pedophiles Who Mean Well*, SALON, (June 30, 2012, 9:00 PM), http://www.salon.com/2012/07/01/meet_pedophiles_who_mean_well/ (last visited Jan. 27, 2015) (reporting on Virtuous Pedophiles) (on file with the Washington and Lee Law Review).

4. See *Who We Are*, *supra* note 1 (presenting testimonials from Virtuous Pedophiles members); Clark-Flory, *supra* note 3 (reporting on Virtuous Pedophiles); Jennifer Bleyer, *How Can We Stop Pedophiles*, SLATE (Sept. 23, 2012, 2:32 PM), http://www.slate.com/articles/health_and_science/medical_examiner/2012/09/stop_childhood_sexual_abuse_how_to_treat_pedophilia.html (last visited Jan. 27, 2015) (relating the stories of several pedophiles and examining the debate surrounding the treatment of pedophiles) (on file with the Washington and Lee Law Review).

5. Where possible, this Article uses the “people first” language preferred

who oppose any sexual contact with children but have nowhere else to turn for support.⁶ They live in fear of discovery, which would result in loss of their jobs, friends, and community.⁷ Many contemplate suicide.⁸

Pedophilia presents something of a paradox for the law. Those who are sexually attracted to children are perhaps the most reviled group in our society, regardless of whether they have acted on their desires.⁹ Yet it is commonly presumed that such

in mental illness and disability law. See H.R. REP. NO. 101-485, pt. 2, at 74 (1990) (endorsing individualized determinations of what handicapped individuals are capable of doing rather than broad generalizations and fears); S. REP. NO. 101-116, at 51 (1989) (stating preference for term “individual with handicaps”); JOHN PARRY, REGULATION, LITIGATION AND DISPUTE RESOLUTION UNDER THE AMERICANS WITH DISABILITIES ACT: A PRACTITIONER'S GUIDE TO IMPLEMENTATION, app. A (2d ed. 1996) (outlining key definitions and terms in the field). This language refers to individuals first rather than their mental illness or disability; for example, as “people living with schizophrenia” as opposed to “schizophrenics.” See H.R. REP. NO. 101-485, pt. 2, at 74 (1990); S. REP. NO. 101-116, at 51 (1989); JOHN PARRY, MENTAL DISABILITY LAW: A PRIMER 1 (5th ed. 1995) (stressing the importance of language in disability law). Because this Article discusses pedophilia as a mental disorder, it therefore uses the term “people with pedophilia” or “people living with pedophilia” as opposed to “pedophiles,” unless, as with Ethan Edwards, an individual chooses to identify himself as “a pedophile.” *Who We Are*, *supra* note 1.

6. See *Who We Are*, *supra* note 1 (including introductory statements from over seventy individuals and in-depth testimonials by others).

7. See Alice Dreger, *What Can Be Done About Pedophilia?*, THE ATLANTIC (Aug. 26, 2013, 9:42 AM), <http://www.theatlantic.com/health/archive/2013/08/what-can-be-done-about-pedophilia/279024/> (last visited Jan. 27, 2015) (answering frequently asked questions about pedophilia treatment) (on file with the Washington and Lee Law Review); Clark-Flory, *supra* note 3 (describing the struggles of an anonymous Virtuous Pedophiles member).

8. See *Who We Are*, *supra* note 1, (demonstrating that suicidal thoughts are prevalent among pedophiles); Clark-Flory, *supra* note 3 (same); Fred S. Berlin & Edgar Krout, *Pedophilia: Diagnostic Concepts Treatment, and Ethical Considerations*, in OUT OF HARM'S WAY: READINGS ON CHILD SEX ABUSE, ITS PREVENTION AND TREATMENT 155, 157 (Dawn C. Haden ed., 1986) (quoting a man with pedophilia who admits thoughts about suicide).

9. See JESSE BERING, PERV: THE SEXUAL DEVIANT IN ALL OF US 156 (2013) (explaining that men with pedophilia must live in a society that does not understand or want to understand their condition); Jay R. Feierman, *Human Erotic Age Orientation: A Conclusion*, in PEDOPHILIA: BIOSOCIAL DIMENSIONS 552, 553 (Jay R. Feierman ed., 1990) (noting that in Western society men with pedophilia face “social ostracism, humiliation, and banishment”); Agustín Malón, *Pedophilia: A Diagnosis in Search of a Disorder*, 41 ARCHIVES SEXUAL BEHAV. 1083, 1094 (2012) (contending that pedophiles are the most feared embodiment of perversion in modern society); Bleyer, *supra* note 4 (explaining

individuals have a mental illness and cannot control their urges or even their actions.¹⁰ The result is an often contradictory mix of laws founded on questionable presumptions. These laws and policies reflect little consideration of what pedophilia itself is and how the law should treat it.

This Article pushes lawmakers, courts, and scholars to reexamine how they understand and treat pedophilia in favor of a more thoughtful and coherent approach. It places the law's treatment of pedophilia in the context of the debate over whether pedophilia should be considered a mental disorder or whether it is better conceptualized as a type of sexual orientation.¹¹ This Article argues that, although pedophilia does not fit neatly into any existing legal rubric, the concept of mental disorder best addresses the issues pedophilia raises.

The Article further argues that, if we are to conceptualize pedophilia as a mental illness or disorder,¹² we must rethink how the law approaches it. Several areas of the law recognize pedophilia as a mental disorder for the purposes of curtailing civil rights but exclude it from civil rights protections associated with mental disorders. Prosecutors and courts distort the concept of pedophilia to justify civilly committing individuals as “sexually violent predators” using far lower standards than ordinary civil commitment proceedings.¹³ At the same time, anti-discrimination

that pedophiles are often viewed as “monsters” or “predators”); Clark-Flory, *supra* note 3 (citing pedophilia expert James Cantor as estimating that individuals with pedophilia may be the most isolated individuals in society).

10. See Malón, *supra* note 9, at 1092 (positing that pedophilia's classification as a mental illness seems to exacerbate ill will toward pedophiles by increasing the perception that they are slaves to their urges and incapable of controlling their behavior).

11. See *infra* Part II.A–B.

12. This Article often uses the terms “mental disorder” and “mental illness” interchangeably. The American Psychiatric Association's Diagnostic and Statistical Manual began using the term “disorder” in lieu of illness in its third edition. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 5 (3d ed. 1980) (defining mental disorder as a basic concept); Massimiliano Aragona, *The Concept of Mental Disorder and the DSM-V*, 2 DIALOGUES PHIL. MENTAL NEURO SCI. 1, 3 (2009) (outlining the history of the Diagnostic and Statistical Manual and the decision to adopt “disorder”). The two terms have no specific set of criteria that distinguish them. Some associate “illness” more with a biological basis than “disorder.” See *id.* (exploring the nuances of the terms).

13. See *infra* Part III.B (examining pedophilia as a legal concept).

law is dismissive of pedophilia as a mental disorder, excluding it from civil rights protections ordinarily associated with mental illness.¹⁴ Closer examination of these laws reveals them to be based on questionable premises.

The law needs to take pedophilia seriously as a mental disorder. While not every person living with pedophilia is “virtuous,” the law should not categorically deny individuals with pedophilia the civil rights protections afforded to those suffering from other mental disorders without a strong normative justification supported by cogent scientific evidence. Our current treatment of pedophilia is inconsistent with important legal principles underlying laws that protect the civil rights of those with mental disorders. Moreover, the law takes an awkward and incoherent approach because it confronts the issues pedophilia raises only *after* it manifests in criminal behavior. This squanders opportunities to treat pedophilia early, which experts argue would improve treatment outcomes and prevent child sexual abuse.¹⁵

This Article fills a gap in legal scholarship, which too often elides the distinction between sexual attraction and the act of child molestation, ignoring the many issues that pedophilia in itself raises.¹⁶ Outside the context of sex offenders, pedophilia is relegated to a counterexample or comparison for other topics, demonstrating what something else is *not*.¹⁷ Yet legal scholarship

14. See *infra* Part IV.A (exploring the pedophilia exception to anti-discrimination laws).

15. See Gerard A. Schaefer et al., *Potential and Dunkelfeld Offenders: Two Neglected Target Groups for Prevention of Child Sexual Abuse*, 33 INT'L J.L. & PSYCHIATRY 154, 154 (2010) (explaining that many potential child sex abusers remain unknown until they offend and that this represents an undertreated body of pedophiles).

16. See, e.g., Bhagwan A. Bahroo, *Pedophilia: Psychiatric Insights*, 41 FAM. CT. REV. 497, 500 (2003) (discussing “[p]edophilia as a human behavior” and focusing primarily on sex offenses).

17. See, e.g., Ann. E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1476–78 (2011) (distinguishing between polyamory and pedophilia); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 846 (2002) (positing that gays can distinguish themselves from those living with pedophilia); William N. Eskridge Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 477 n.205 (2001) (distinguishing pedophilia from homosexuality and disability); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 19–20 (1998) (distinguishing homosexuality from “an uncontroversially reprobated horror, like pedophilia”).

has failed to examine what pedophilia itself *is* and its legal implications.¹⁸ It remains largely silent even as recent breakthroughs in the neurology of pedophilia have brought mass media attention to the social and policy issues pedophilia raises.¹⁹ This Article examines the difficulties in conceptualizing

18. There is significant scholarship on sex offenses and the punishment or civil commitment of sex offenders, a subject different from an analysis of pedophilia itself. *See generally* Stephen J. Morse, *Preventive Confinement of Dangerous Offenders*, 32 J.L. MED. & ETHICS 56 (2004) (discussing the criminal law theory implications of detaining dangerous offenders); David J. Gottlieb, *Preventive Detention of Sex Offenders*, 50 U. KAN. L. REV. 1031 (2002) (arguing that statutes that allow for civil commitment of sex offenders raise significant constitutional problems); Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69 (1996) (analyzing propriety of civil commitment for sex offenders); John A. Fennel, *Punishment By Another Name: The Inherent Overreaching in Sexually Dangerous Person Commitments*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 37 (2009) (examining the efficacy and basis for a Massachusetts civil commitment statute); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1 (2003) (analyzing preventive detention of dangerous sex offenders).

The limited legal scholarship on pedophilia focuses primarily on sex offenses and civil commitment statutes but does not address the foundational issue of how the law should conceptualize pedophilia in the first place. *See generally* Bahroo, *supra* note 16; Andrea Friedman, *Pedophilia: Laws Fighting Nature Instead of Coping With It*, 43 SW. L. REV. 253 (2013) (arguing for more treatment of pedophiles and less stigmatization under the law); Melissa Hamilton, *Adjudicating Sex Crimes as Mental Disease*, 33 PACE L. REV. 536 (2013) (discussing the consequences of paraphilia diagnoses for punishment and civil commitment of sex offenders); Thomas K. Zander, *Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Link in Psychodiagnosis*, 1 J. SEXUAL OFFENDER CIV. COMMITMENT: SCI. & L. 17 (2005) (considering psychiatric arguments that criticize civil commitment of sex offenders); Jennifer Jason, Note, *Beyond No Man's Land: Psychiatry's Imprecision Revealed By Its Critique of SVP Statutes as Applied to Pedophilia*, 83 S. CAL. L. REV. 1319 (2010) (considering psychiatric arguments that critique Supreme Court decisions allowing for civil commitment of pedophiles).

19. *See Tarred and Feathered*, THIS AMERICAN LIFE (Apr. 11, 2014), <http://www.thisamericanlife.org/radio-archives/episode/522/tarred-and-feathered> (last visited Jan. 27, 2015) (examining the treatment of pedophiles by the public and by medical professionals) (on file with the Washington and Lee Law Review); Clark-Flory, *supra* note 3 (same); Casey Schwartz, *What Science Reveals About Pedophilia*, THE DAILY BEAST (Dec. 7, 2011), <http://www.thedailybeast.com/articles/2011/12/06/what-science-reveals-about-pedophilia.html> (last visited Jan. 27, 2015) (reporting on recent coverage and research of pedophilia as a mental disorder) (on file with the Washington and Lee Law Review); Bleyer, *supra* note 4 (same); Dreger, *supra* note 7 (same).

pedophilia and proposes that current lawmakers, scholars, and courts adopt a more reasoned approach to it.

Changing the law's understanding of pedophilia has substantial practical implications. Re-examining pedophilia is necessary to create criminal and public health laws that effectively prevent child sexual abuse. The current approach to pedophilia denies individuals living with pedophilia critical civil rights protections that would allow them to seek treatment, maintain employment, and openly take part in society—all of which would assist them in avoiding criminal behavior. These laws may therefore have the inimical consequence of increasing the risk of child sexual assault.²⁰

But, while preventing child abuse is a substantial concern, it is not the law's only concern. Taking pedophilia seriously requires us to take seriously the rights of people living with it. How the law conceptualizes and treats pedophilia influences the ability of those living with pedophilia to seek treatment, maintain employment, and use public accommodations.²¹ For those who are convicted or suspected of engaging in criminal activity, a pedophilia diagnosis influences their sentence and whether they will be deemed a “sexually violent predator” and detained indefinitely.²² Failure to accurately conceptualize pedophilia severely undermines the legitimacy of these laws and practices. Diagnosing and treating pedophilia is also a significant public health and legal concern. Researchers estimate that approximately one percent of the male population—and an unknown but presumably smaller percentage of the female population—lives with pedophilia, putting its prevalence on par with schizophrenia, autism spectrum disorder, and anorexia nervosa.²³

20. See *infra* Part III.A (examining the law's treatment of pedophilia in comparison with anti-discrimination statutes).

21. See *infra* Part III.A

22. See *infra* Part III.B (examining laws that provide for the civil commitment of pedophiles).

23. See Wesley Stephenson, *How Many Men Are Paedophiles?*, BBC NEWS (July 29, 2014), <http://www.bbc.com/news/magazine-28526106> (last visited Jan. 27, 2015) (discussing research by Seto and Contor on the prevalence of pedophilia) (on file with the Washington and Lee Law Review); Michael C. Seto, *Is Pedophilia a Sexual Orientation?*, 41 ARCHIVES SEXUAL BEHAV. 231, 232 (2012) (examining the prevalence of pedophilia in men); NAT'L INST. OF MENTAL

The lack of legal scholarship examining the concept of pedophilia reflects the discomfort that the topic instills.²⁴ Sexual attraction to children is, to most people, abhorrent and disgusting.²⁵ Individuals who sexually abuse children are society's most loathed criminals; those who feel sexual desire for children therefore provoke disgust and suspicion.²⁶ Any analysis of expanding the rights of these individuals may seem like sympathy for the devil, but the unease this topic provokes only underscores the need for more thorough and dispassionate analysis.²⁷ Legal scholarship should not avoid thoughtful analysis simply because it might lead to uncomfortable conclusions.

This Article does not dispute the very real harm of sexual abuse or argue that pedophilic disorder should excuse criminal behavior. Sex with children inflicts significant physical and psychological harm.²⁸ This Article does not seek to excuse this

HEALTH, THE NUMBERS COUNT: MENTAL DISORDERS IN AMERICA (2012) (reporting estimated percentages of Americans with various mental disorders).

24. See Lea H. Studer & A. Scott Aylwin, *Pedophilia: The Problem with Diagnosis and Limitation of CBT in Treatment*, 67 MED. HYPOTHESES 774, 774 (2006) (asserting that it is difficult to discuss pedophilia dispassionately because of biological imperatives to protect children and the outrage that child sexual exploitation generates).

25. See BERING, *supra* note 9, at 156 (contrasting pedophilia and other types of paraphilia); Clark-Flory, *supra* note 3 (describing how people with pedophilia feel treated by society); Malón, *supra* note 9, at 1094 (explaining that people with pedophilia are often viewed as “monsters” or “predators”); Bleyer, *supra* note 4 (same).

26. Malón, *supra* note 9, at 1094 (explaining that people with pedophilia are often viewed as “monsters” or “predators”); Bleyer, *supra* note 4 (same); Clark-Flory, *supra* note 3 (same).

27. See Studer & Aylwin, *supra* note 24, at 774 (stressing the need for dispassionate discourse to resolve the problems pedophilia poses).

28. See Ryan C.W. Hall & Richard C.W. Hall, *A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, 82 MAYO CLINIC PROC. 457, 465 (2007) (outlining the effects of sexual abuse on children); Peter J. Fagan et al., *Pedophilia*, 288 J. AM. MED. ASS'N 2458, 2460 (2002) (explaining that sexually abused children are at higher risk for mood and anxiety disorders, substance abuse, and suicide); Lillian Southwick Bensley et al., *Self-Reported Abuse History and Adolescent Problem Behaviors*, 24 J. ADOLESCENT HEALTH 163, 165–66 (1999) (examining associations between child sexual abuse and antisocial and suicidal behaviors); Heather Y. Swanston et al., *Nine Years After Child Sexual Abuse*, 27 J. CHILD ABUSE & NEGLECT 967, 968, 977–81 (2003) (reviewing previous studies and presenting new statistical evidence of negative effects on child sex abuse victims). Some researchers argue that child–adult sexual experience does not

behavior; on the contrary, it holds those with pedophilia responsible for their actions rather than dismissing them as incorrigible monsters that lack the agency to control their behavior. People with pedophilia remain responsible for their acts; what they cannot control—and deserve no blame for—is their desires.

Part II outlines pedophilia's general definition, characteristics, causes, and treatments. It distinguishes common myths from the realities of living with pedophilia. While the term pedophilia is often used to refer to child sexual abuse, pedophilia is in fact a status of being sexually attracted to prepubescent children and not a behavior.²⁹ This sexual attraction likely has a biological cause beyond the control of the individual living with it. Contrary to popular belief, many individuals living with pedophilia believe that sex with children is wrong.³⁰ The enormous stigma of pedophilia, however, often isolates them from support and treatment.³¹

Part III confronts the question of how the law should conceptualize pedophilia. Sexologists, psychiatrists, and legal scholars usually associate pedophilia with one of two categories: (1) a mental disorder or (2) a form of sexual orientation called

inevitably result in psychological harm. See Zander, *supra* note 18, at 39 (outlining this research). However, even if this is true, the experience still violates the child by overriding his or her ability to make reasoned choices about sexual activity. Because children lack the capacity to make these choices, sexual activity with them is a de facto violation and therefore a harm. See PETER WESTON, *THE LOGIC OF CONSENT* 116–17 (2004) (discussing the harm of statutory rape); ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* 217 (2003) (explaining that age is a proxy for psychological capacities that are relevant to the validity of consent). Although the age at which an individual has the capacity to give consent is subject to debate, see WERTHEIMER, *supra*, at 116–226 (engaging in the debate), this Article presumes that prepubescent children lack sufficient capacity.

29. See STEPHEN T. HOLMES & RONALD M. HOLMES, *SEX CRIMES: PATTERNS AND BEHAVIORS* 110 (3d ed. 2009); Hamilton, *supra* note 18, at 577–78 (discussing misuse of the term); Dreger, *supra* note 7 (same); David Goldberg, *I, Pedophile*, *THE ATLANTIC* (Aug. 26, 2013, 9:05 AM), <http://www.theatlantic.com/health/archive/2013/08/i-pedophile/278921/> (last visited Jan. 27, 2015) (relating that many men with pedophilia do not act on their attractions beyond viewing child pornography) (on file with the Washington and Lee Law Review).

30. See Clark-Flory, *supra* note 3 (reporting on Virtuous Pedophiles).

31. *Id.*

“erotic age orientation.” Part III.A describes the two views and the conceptual problems pedophilia poses for each. Part III.B argues that, for the purposes of legal analysis, pedophilia should be considered a mental disorder and not a sexual orientation. Laws that concern sexual orientation increasingly and justifiably recognize the legitimacy and value of different types of relationships and sexualities. Pedophilic desires are not in themselves blameworthy, but they nonetheless involve sexual interests that would harm others if acted upon. The legal rubric of mental illness provides a more coherent fit for pedophilia and is far better suited to address the legal concerns pedophilia raises.

Part IV challenges the law’s current approach to pedophilia in the context of civil rights protections and civil commitment. If we are to take pedophilia seriously as a mental disorder, lawmakers, courts, and scholars must reconsider how the law addresses pedophilia in these contexts. Anti-discrimination laws such as the Americans with Disabilities Act³² (ADA) define disability to include mental disorders that impair major life activities.³³ Pedophilic disorder, however, is explicitly and categorically excluded from ADA protection.³⁴ Part IV.A argues that there are good reasons to question the validity of this exclusion, and that including pedophilic disorder from disability protections afforded to other mental illnesses may be inconsistent with the tenets of these laws and counterproductive to the goal of preventing child abuse. It examines how existing ADA exceptions such as the direct threat analysis can provide a robust response to the potential public health and safety concerns that ADA protection for pedophilia may raise. Part IV.B argues that Sexually Violent Predator (SVP) statutes expand state power to civilly commit individuals with pedophilia based on a questionable understanding of pedophilia as a mental disorder. While there are valid concerns about many of these individuals’ propensity for criminal behavior, expanding state power to preventively detain in this way is inconsistent with important constitutional and criminal law principles.

32. 42 U.S.C. §§ 12101–12213 (2012).

33. *Id.* § 12102.

34. *Id.* § 12211.

The Article concludes by considering the implications of the Article's analysis in other areas of law. Deeper analysis of pedophilia also helps inform lawmaking concerning other sexual interests, sexual orientations, and sexual disorders.

II. What Is Pedophilia?

A. Behavior vs. Status

Pedophilia is not the same as sexual abuse.³⁵ Sexual abuse³⁶ of a child is a criminal and morally reprehensible behavior.³⁷ An individual who sexually abuses a child makes a decision to act, and that action harms a child.³⁸ Pedophilia, in contrast, refers to a type of sexual interest—specifically an intense and persistent sexual interest in prepubescent children.³⁹ Pedophilia need not

35. See MICHAEL C. SETO, PEDOPHILIA AND SEXUAL OFFENDING AGAINST CHILDREN 4 (2008) (introducing the distinction as a foundational concept); Donald S. Strassberg et al., *Psychopathy Among Pedophilic and Non-Pedophilic Child Molesters*, 36 CHILD ABUSE & NEGLECT 379, 379 (2001) (examining differences between sex offenders who are pedophilic and non-pedophilic); Studer & Aylwin, *supra* note 24, at 776 (explaining that common parlance and many clinicians use the terms pedophile and child molester interchangeably); Lisa J. Cohen & Igor I. Galynker, *Clinical Features of Pedophilia and Implications for Treatment*, 8 J. PSYCHIATRIC PRAC. 276, 277 (2002) (same); Hamilton, *supra* note 18, at 577–78 (same).

36. Though the legal definitions of the terms “sexual abuse” and “sexual assault” vary by jurisdiction, this Article uses both phrases to refer to any unlawful sexual interaction with a child. See Bahroo, *supra* note 16, at 499 (describing the different definitions).

37. See J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2364–65 (1997) (distinguishing homosexuality from pedophilia on grounds that sexual relationships with children are inherently exploitive).

38. See Hall & Hall, *supra* note 28, at 465 (outlining effects of sexual abuse on children); Fagan et al., *supra* note 28, at 2460 (same); Swanston et al., *supra* note 28, at 968, 977–81 (same).

39. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 697 (5th ed. 2013) [hereinafter DSM-V] (outlining diagnostic criteria for pedophilia); Anthony R. Beech & Leigh Harkins, *DSM-IV Paraphilia: Descriptions, Demographics, and Treatment Interventions*, 17 AGGRESSION & VIOLENT BEHAV. 527, 529 (2012) (describing various definitions of pedophilia); Berlin & Krout, *supra* note 8, at 157 (describing sexual desires of people with pedophilia); Cohen & Galynker, *supra* note 35, at 277 (same); SETO, *supra* note 35, at 3 (same). Many variations exist within the broad category of pedophilia. Some individuals are attracted exclusively to prepubescents while others are also attracted to pubescent adolescents or adults. See SETO, *supra*

entail any behavior; one may be a celibate pedophile, similar to how one may have sexual desires for adults while remaining celibate.

Just as not all pedophiles sexually abuse children, not all sexual abuse of children is committed by pedophiles. Indeed, the majority of child sex offenders do not have a strong or dominant sexual interest in children.⁴⁰ Child sexual abuse is commonly motivated by other factors, such as power, control, or sense of entitlement, and often occurs within the family.⁴¹

B. Characteristics, Causes, and Treatment

It is not unusual for children to experience “crushes”—affection and attraction to other children. As most people age out of childhood, so do the people to whom they are attracted. This does not happen to people with pedophilia; they grow older but remain attracted to children.⁴² Individuals often first notice their pedophilic interest in adolescence.⁴³

note 35, at 4 (differentiating between attraction to pre- and post-pubescent children); Beech & Harkins *supra*, at 529 (same); Cohen & Galynker, *supra* note 35, at 280 (same); Hall & Hall, *supra* note 28, at 459 (same). The age and the sex of prepubescent children to which the individual is attracted may also vary. There is some speculation that those attracted to infants is a variation of pedophilia or should be categorized as its own unusual sexual interest. SETO, *supra* note 35, at 4.

40. See Beech & Harkins, *supra* note 39, at 529 (estimating that 25% to 40% of child sex offenders qualify for pedophilic disorder diagnosis).

41. See *id.* (noting that not all sexual abusers are people with pedophilia); Studer & Aylwin, *supra* note 24, at 777 (same); 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> (last visited Jan. 27, 2015) (tracing developments on the purported psychological causes of pedophilia) (on file with the Washington and Lee Law Review).

42. See Ariadne Ellsworth, *Pulling Pedophilia Out of the Dark*, BROWN POL. REV. (Apr. 26, 2014, 11:00 AM), <http://www.brownpoliticalreview.org/2014/04/pulling-pedophilia-out-of-the-dark/> (last visited Jan. 27, 2015) (relating the story of “Adam,” who realized as an adolescent that he was attracted to children) (on file with the Washington and Lee Law Review); Bleyer, *supra* note 4 (describing the experience of “Spencer,” who noticed that, as he aged, the type of boy he was attracted to did not age).

43. See Cohen & Galynker, *supra* note 35, at 278 (noting that, while some realize it earlier, many people with pedophilia become aware of their attraction during adolescence); Beech & Harkins, *supra* note 39, at 529 (providing that 50% of people with pedophilia develop interest by age fifteen); Studer & Aylwin,

Though the exact prevalence of pedophilia in the population is unknown, researchers estimate it at approximately one percent of the male population,⁴⁴ with a far smaller but unknown prevalence among women.⁴⁵ Interestingly, *some* attraction to prepubescents seems even more common. Studies of sexual arousal indicate that a surprising proportion of the population, particularly among men, has fantasized about prepubescent children during intercourse or masturbation or may become aroused upon viewing images of prepubescents.⁴⁶

The last few decades have seen increasing evidence that pedophilia is biological and more specifically that it might be neurological in origin.⁴⁷ In studies with large sample sizes, sex offenders diagnosed with pedophilia scored lower on intelligence tests than non-pedophilic patients, with number of child victims negatively correlating with intelligence while the number of adult partners positively correlated with intelligence.⁴⁸ Men with pedophilia on average have poorer visuospatial and verbal memory scores.⁴⁹ Individuals with pedophilia have lower scores

supra note 24, at 775 (explaining that paraphilia often develops in adolescence); Hall & Hall, *supra* note 28, at 457 (same).

44. See Stephenson, *supra* note 23 (discussing research by Seto and Cantor); SETO, *supra* note 35 (examining prevalence of pedophilia in men).

45. Studies of women have been largely limited to sex offenders, which severely curtails the ability to make a calculation. See SETO, *supra* note 35, at 6–8 (examining several studies and their statistical limitations); Cohen & Galynker, *supra* note 35, at 277–78 (same); Hall & Hall, *supra* note 28, at 524 (same); Schwartz, *supra* note 19 (reporting that women commit 6% of child sex offenses).

46. See Studer & Aylwin, *supra* note 24, at 775 (examining the prevalence of pedophilia in men); SETO, *supra* note 35, at 7 (citing several studies). One study found 62% of men had fantasized about young girls and 3% about young boys, while another found that 9% had fantasized about sex with young children, with 7% indicating some likelihood that they would have sex with a child if they were guaranteed that they would not be identified or punished. SETO, *supra* note 35, at 7.

47. See SETO, *supra* note 35, at 108–11 (discussing neuroscientific study in this area).

48. *Id.* at 109.

49. See James M. Cantor et al., *Cerebral White Matter Deficiencies in Pedophilic Men*, 42 J. PSYCHIATRIC RES. 167, 167–68, 177 (2008) (discussing the phenomena and showing visual examples); James M. Cantor et al., *Intelligence, Memory, and Handedness in Pedophilia*, 18 NEUROPSYCHOLOGY 3, 11 (2004) (examining these conclusions).

for semantic knowledge and lower executive functioning levels.⁵⁰ They are also three times more likely to be left-handed or ambidextrous, strongly suggesting a neurological cause.⁵¹ Some findings suggest that disturbances to neurodevelopment in utero or in early childhood increase risk of pedophilia.⁵² Sex offenders with pedophilia are also more likely to report experiencing head injuries, a possible source of brain damage, before age thirteen.⁵³

Brain imaging also evidences a neurological cause. MRIs reveal that sex offenders with pedophilia have less white matter in their brains than individuals who have committed no offenses against children.⁵⁴ White matter serves as a pathway in the brain's network, connecting various grey matter areas to each other and carrying nerve impulse between neurons.⁵⁵ Researchers speculate that pedophilia could result from improper connections in the brain, most notably in a network that identifies whether environmental stimuli are sexual.⁵⁶ The brain of an individual

50. See Yana Suchy et al., *Neurocognitive Differences Between Pedophilic and Nonpedophilic Child Molesters*, 15 J. INT'L NEUROPSYCHOLOGICAL SOC'Y 248, 252–55 (2007) (reaching these conclusions with statistical analyses).

51. See Cantor et al., *Cerebral White Matter Deficiencies in Pedophilic Men*, *supra* note 49 (discussing the phenomena); Cantor et al., *Intelligence, Memory, and Handedness in Pedophilia*, *supra* note 49 (examining these conclusions); James M. Cantor et al., *Quantitative Reanalysis of Aggregate Data on IQ in Sexual Offenders*, 131 PSYCHOL. BULLETIN 555, 559–62 (2005) (demonstrating these statistical relationships); see also Jadranka Bacic, *MRIs Link Pedophilia to Early Brain Development*, 5 CANADIAN PSYCHIATRY AUJOURD'HUI 6 (June 2009) (reporting on a study involving brains of one thousand people with pedophilia).

52. See Cantor, et al., *Quantitative Reanalysis of Aggregate Data on IQ in Sexual Offenses*, *supra* note 51, at 565 (suggesting this conclusion as the cause of both low IQ and pedophilic interests).

53. See Ray Blanchard et al., *Retrospective Self-Reports of Childhood Accidents Causing Unconsciousness in Phallometrically Diagnosed Pedophiles*, 31 ARCHIVES SEXUAL BEHAV. 511, 523 (2003) (reaching this conclusion based on statistical analysis); SETO, *supra* note 35, at 109 (same).

54. Cantor et al., *Cerebral White Matter Deficiencies in Pedophilic Men*, *supra* note 49, at 180.

55. See Schwartz, *supra* note 19 (explaining that white matter is the substance that connects brain regions to each other); see also Cantor et al., *Cerebral White Matter Deficiencies in Pedophilic Men*, *supra* note 49, at 180 (describing the results of a neuroscience study and postulating that low white matter volumes increase the risk of developing pedophilia); Dreger, *supra* note 7 (“In studies, pedophiles show signs that their sexual interests are related to brain structure and that at least some differences existed in their brains before birth.”).

56. See Bacic, *supra* note 51 (discussing neuroscience research that

with pedophilia may interpret stimuli that usually elicit a nurturing and protective response as sexual instead.⁵⁷

Psychiatric research calls into question many assumptions about the minds of individuals with pedophilia. Contrary to common beliefs, individuals living with pedophilic disorder are unlikely to have antisocial personality disorder; recent studies have demonstrated that sex offenders diagnosed with pedophilic disorder score significantly lower on indicators of antisocial personality disorder than either non-pedophilic child molesters or control groups of non-sex offending criminals.⁵⁸ Though studies are often limited to convicted sex offenders with pedophilia and exclude those who do not offend,⁵⁹ this limitation seems more likely to inflate rather than reduce findings of antisocial personality disorder. Individuals with pedophilia do experience higher rates of mental disorders, most commonly mood and anxiety disorders and, in particular, major depression and social phobia.⁶⁰

suggests the brains of people with pedophilia have problems with the circuitry that connects sexually responsive parts of the brain); Cantor et al., *Cerebral White Matter Deficiencies in Pedophilic Men*, *supra* note 49, at 180 (providing an explanation for why low white matter volumes may increase the risk of pedophilia); Dreger, *supra* note 7 (“The best current evidence suggests that pedophilia results from atypical wiring in the brain.”).

57. See Dreger, *supra* note 7 (noting that brains of those living with pedophilia may have “what could be considered a ‘cross-wiring’ in the brain anatomy that is responsible for controlling natural social instincts or behavior”); Schwartz, *supra* note 19 (discussing the brain’s network for detecting sexual objects in the environment and theorizing that abnormal functioning in the brains of people with pedophilia causes children to provoke an erotic response rather than the urge to nurture or protect).

58. See Strassberg et al., *supra* note 35, at 380–81 (explaining the results of a study that showed that pedophilic child molesters are significantly less likely to have a psychopathic personality than non-pedophilic child molesters).

59. See, e.g., Studer & Aylwin, *supra* note 24, at 775 (“As pedophiles typically do not identify themselves as such, studies on virtually every aspect of pedophilia use convicted sex offenders as the sample pool, and crime statistics as a data source.”); Nancy C. Raymond et al., *Psychiatric Comorbidity Among Pedophilic Sex Offenders*, 156 AM. J. PSYCHIATRY 786, 786 (1999) (noting every participant in the study except one was a sex offender that was court ordered to participate in treatment programs); Strassberg et al., *supra* note 35 (noting that the sample included men who were convicted of a sexual offense against a child less than fourteen years old).

60. See Raymond et al., *supra* note 59, at 786–87 (discussing the prevalence of various mood disorders among individuals with pedophilia).

The role of impulsivity in pedophilia and pedophilic behavior is also subject to debate. It is commonly assumed that individuals living with pedophilia simply “can’t help themselves” and are unable to control their impulses to molest children.⁶¹ Yet individuals with pedophilia rarely spontaneously molest children, and the vast majority of sexual abuse of children is premeditated.⁶² A recent study found no connection between pedophilia and impulse-aggressive traits and in fact found more evidence of inhibition, passive-aggression, and harm avoidance.⁶³ Similarly, MRI studies have found no evidence to suggest any differences in the parts of the brain that relate to self-control or impulsivity.⁶⁴

Attitudes toward sexual abuse of children vary among individuals living with pedophilia. Among those who offend, some individuals attempt to justify child sexual abuse, absolving themselves of guilt and responsibility by minimizing the harm to the child.⁶⁵ In contrast, some offenders are relieved to be

61. See Hall & Hall, *supra* note 28, at 462 (noting that, although people with pedophilia often report difficulty controlling their behavior, it is rare for them to spontaneously molest a child); *Six Misconceptions About Pedophiles*, DISCOVERY NEWS (Nov. 18, 2011, 3:00 AM), <http://news.discovery.com/human/psychology/misconceptions-pedophilia-111118.htm> (last visited Jan. 27, 2015) (dispelling the misconception that people with pedophilia cannot help attempting to molest a child whenever the opportunity arises) (on file with the Washington and Lee Law Review).

62. See Hall & Hall, *supra* note 28, at 462 (arguing that, because 70% to 80% of sex offenses against children are premeditated, the notion that people with pedophilia lack self-control is untenable).

63. Lisa J. Cohen et al., *Impulsive Personality Traits in Male Pedophiles Versus Healthy Controls: Is Pedophilia an Impulsive-Aggressive Disorder?*, 43 *COMPREHENSIVE PSYCHIATRY* 127, 132–33 (2002). These researchers proposed that pedophilia may be compulsive rather than impulsive—that is, driven by the desire to avoid harm and relieve negative feelings rather than to gain pleasure and positive feelings. *Id.* at 127, 132–33. The research on this is limited, however, by the fact that it targets sex offenders with pedophilia, excluding non-offenders. *Id.* at 129.

64. James M. Cantor, *Understanding MRI Research on Pedophilia*, http://individual.Utoronto.ca/james_cantor/blog2.html (last visited Jan. 27, 2015) (on file with the Washington and Lee Law Review).

65. See Fagan et al., *supra* note 28, at 2460 (noting that many people with pedophilia exhibit cognitive distortions, such as a belief that the child was not harmed by abuse); Berlin & Krout, *supra* note 8, at 156–57 (contrasting people with pedophilia who feel ashamed of their attraction to children with people with pedophilia who are not bothered by their sexual interest in children); Cohen & Galynker, *supra* note 35, at 279, 282 (stating that people with

apprehended and hope that treatment will help them correct their behavior.⁶⁶ Others, like those on the site Virtuous Pedophiles, have never offended.⁶⁷ Virtuous Pedophiles adamantly opposes any sexual contact with children.⁶⁸ While there is no research on the prevalence of attitudes among people living with pedophilia, some experts who work with people with pedophilia insist that those who embrace their desires are in the minority.⁶⁹ Among those who wish to avoid sexual contact with children, some have no trouble resisting while others require professional help.⁷⁰

Current psychological consensus is that pedophilia is amenable to appropriate treatment in many circumstances.⁷¹ Treatment cannot convert sexual interests; therapy to redirect sexual attraction away from children toward adults has fared no

pedophilia “routinely deny and minimize the deviant nature of their behavior and its destructive impact on children involved”); Schwartz, *supra* note 19 (discussing the feelings of denial people with pedophilia may experience).

66. Fagan et al., *supra* note 28, at 2460.

67. See Berlin & Krout, *supra* note 8, 156–57 (noting that some people with pedophilia find it easy to resist sexually abusing children); VIRTUOUS PEDOPHILES, <http://www.virped.org/> (last visited Jan. 27, 2015) (listing goals of the organization, which include informing the public that a substantial number of people living with pedophilia do not molest children) (on file with the Washington and Lee Law Review); Dreger, *supra* note 7 (“Not every person who experiences sexual attractions to children acts on those attractions.”); Clark-Flory, *supra* note 3 (discussing people with pedophilia that have never abused children).

68. *F.A.Q.*, VIRTUOUS PEDOPHILES, <http://www.virped.org/index.php/f-a-q> (last visited Jan. 27, 2015) (on file with the Washington and Lee Law Review).

69. See Schwartz, *supra* note 19 (noting that some people with pedophilia believe society should not insist that they refrain from acting on their attractions, but that this view is expressed by a minority of people with pedophilia).

70. See Berlin & Krout, *supra* note 8, at 3 (comparing people with pedophilia that have difficulty resisting temptation and need professional help with people with pedophilia that find it easy to resist acting on their attraction to children).

71. See Beech & Harkins, *supra* note 39, at 534 (discussing various psychological studies that show people with pedophilia are less likely to abuse children when treated); Cohen & Galynker, *supra* note 35, at 286 (listing predictors of treatment outcomes, which include whether the individual knew his victims, the number of victims, and whether the abuse occurred inside the home); Bleyer, *supra* note 4 (describing successful treatment using therapies similar to those for addiction).

better with pedophilia than it has with same-sex attraction.⁷² Instead, successful treatment has focused on cognitive-behavioral therapy, often in combination with medication that reduces overall sexual desire.⁷³ Some treatments have integrated models used for addiction therapy.⁷⁴

One shortcoming in the research on treatment is that it usually focuses on individuals who have committed sexual offenses, with little attention given to the treatment of non-offending individuals living with pedophilic disorder.⁷⁵ The lack of research and large-scale treatment programs for those outside the criminal justice system is a source of frustration among non-offenders, with some forming their own support groups to fill the gap.⁷⁶

A relatively new German project seeks to address these problems by providing confidential and free treatment for both offending and non-offending individuals. Prevention Project Dunkelfeld (PPD) offers treatment and support to individuals

72. See SETO, *supra* note 35, at 175–76 (discussing the efficacy of therapy aimed at changing a pedophile’s interest in children and noting that it is unclear whether the therapy results in actual changes in interest or greater control over pedophilic sexual arousal); Berlin & Krout, *supra* note 8, at 164 (explaining that, although therapy attempting to replace the erotic feelings of people living with pedophilia about children with age-appropriate stimuli achieved some success, “it has not been well established that such changes carry over into the non-laboratory situation”); Dreger, *supra* note 7 (“We have not yet found a way to convert pedophiles into non-pedophiles that is any more effective than the many failed attempts to convert gay men and lesbians into heterosexuals.”).

73. See Beech & Harkins, *supra* note 39, at 534 (discussing various psychological studies that show that therapy and medication has reduced recidivism by sexual offenders); SETO, *supra* note 35, at 171–76 (providing an overview of various types of treatments for pedophilia and noting a study showing that cognitive-behavioral therapy resulted in a significant decrease in recidivism among sex offenders); Schwartz, *supra* note 19 (discussing the use of medication that lowers testosterone levels and psychotherapy that involves cognitive behavioral methods).

74. See Beech & Harkins, *supra* note 39, at 533 (discussing Relapse Prevention).

75. See *id.* at 534 (explaining that many more studies have examined treatment for sex offenders rather than pedophilia); Cohen & Galynker, *supra* note 35, at 286 (discussing treatment outcomes only among sex offenders).

76. See Clark-Flory, *supra* note 3 (describing support groups formed by people with pedophilia who have never offended); Bleyer, *supra* note 4 (discussing the difficulty in finding appropriate therapy).

sexually attracted to children to prevent sexual offenses.⁷⁷ It employs a public outreach campaign—using billboards, print, television, and online advertising—to send three messages to individuals living with pedophilic disorder: (1) you are not to blame for your sexual attraction; (2) you are responsible for your actions; and (3) help is available.⁷⁸

PPD's treatment focuses on preventing individuals from both physically abusing children and using child pornography.⁷⁹ It uses both behavioral therapy and, in some circumstances, pharmaceutical interventions.⁸⁰ The therapy focuses on helping patients learn “an appropriate perception and appraisal of their sexual wishes and needs,” “the identification of and coping with dangerous developments,” and “strategies for the prevention of

77. See M. Beier et al., *Encouraging Self-Identified Pedophiles and Hebephiles to Seek Professional Help: First Results of the Prevention Project Dunkelfeld (PPD)*, 33 CHILD ABUSE & NEGLECT 545, 545 (2009) (introducing the project and describing the international concern about child sexual exploitation); *Project*, PREVENTION PROJECT DUNKELFELD, <https://www.dont-offend.org/story/78/3878.html> (last visited Jan. 27, 2015) (describing the project as a way for people with pedophilia to obtain confidential treatment) (on file with the Washington and Lee Law Review); D. RICHARD LAWS & TONY WARD, *DESISTANCE FROM SEX OFFENDING: ALTERNATIVES TO THROWING AWAY THE KEYS* 159–60 (2011) (discussing the project and its approaches to prevent child abuse by people with pedophilia).

78. See LAWS & WARD, *supra* note 77 (stating the slogan of the media campaign: “You are not guilty because of your desire, but you are responsible for your sexual behavior. There is help! Don’t become an offender!”); Beier et al., *supra* note 77, at 546 (describing the media campaign and the research that supported choosing these three messages); *Media Work*, PREVENTION PROJECT DUNKELFELD, <https://www.dont-offend.org/story/84/3884.html> (last visited Jan. 27, 2015) (explaining the goals of the media campaign) (on file with the Washington and Lee Law Review); GEROLD SCHERNER & LAURA KUHLE, *INSIGHTS OF THE PREVENTION PROJECT DUNKELFELD* (Apr. 3, 2013), *available at* <http://www.slideshare.net/Sexpo/gerold-scherner-insights-of-the-preventive-project-dunkelfeld> (discussing the need to dispel stigma about pedophilia and using the media campaign to further this goal).

79. See Beier et al., *supra* note 77, at 548 (noting that a substantial portion of the sample committed child sexual exploitation through child pornography and discussing the approach for prevention analyzed by the study).

80. See *Therapy*, PREVENTION PROJECT DUNKELFELD, <http://www.dont-offend.org/story/85/3885.html> (last visited Jan. 27, 2015) (“The therapeutic procedure integrates behavioural therapy and sexological approaches and also includes the option for pharmaceutical support.”) (on file with the Washington and Lee Law Review).

sexual assault.”⁸¹ It is provided in both group and individual settings and may include family members.⁸²

PPD has not yet published treatment results indicating whether it has been successful in reducing or preventing offenses. However, preliminary results indicate that individuals who undergo treatment emerge with a balance of characteristics that makes them less likely to offend, particularly among those who have a history of offending.⁸³ For example, treatment resulted in more negative attitudes toward offending, greater victim empathy, less emotional loneliness and hostility, and better sexual coping skills.⁸⁴

C. Living with Pedophilia

Individuals who have sexual interest in children usually live closeted lives.⁸⁵ It is commonly assumed that such people do not self-identify to more successfully victimize children.⁸⁶ For some, this is the case.⁸⁷ But for those who do not abuse children, the closet is both a refuge from societal condemnation and a source of profound isolation. Experts and individuals living with pedophilia agree that isolation and lack of support is a serious obstacle for the prevention of sexual abuse.⁸⁸ Dr. James Cantor, one of the

81. *Id.*

82. *Id.*

83. See SCHERNER & KUHLE, *supra* note 78 (discussing results that show both child sex abusers and users of child pornography had less offense-supportive attitudes after treatment). See generally Zarembo, *supra* note 41.

84. See SCHERNER & KUHLE, *supra* note 78 (explaining the results of treatment for offenders that both sexually abused children and viewed child pornography and noting improvement in these four areas).

85. See BERING, *supra* note 9, at 156–57 (discussing the extreme personal distress experienced by people with pedophilia because of the need to hide a fundamental aspect of their identity).

86. See, e.g., Malcolm Gladwell, *In Plain View*, THE NEW YORKER (Sept. 24, 2012), <http://www.newyorker.com/magazine/2012/09/24/in-plain-view> (last visited Jan. 27, 2015) (“A pedophile . . . is someone adept not just at preying on children but at confusing, deceiving, and charming the adults responsible for those children.”) (on file with the Washington and Lee Law Review).

87. See *id.* (describing some pedophilic child molesters’ process of becoming integrated in a community to earn trust).

88. See Dreger, *supra* note 7 (noting that many people with pedophilia stopped attending therapy because mandatory reporting laws may require their

foremost researchers on pedophilia, has argued that individuals living with pedophilia are more likely to offend when they have no support, noting “[p]eople are most likely to do the most desperate things when they feel the most desperate.”⁸⁹

Pedophilia is the most shameful and feared of all unusual sexual interests.⁹⁰ Individuals living with pedophilia exist in a society that not only does not understand their sexual interests but does not want to.⁹¹ Psychologist Jesse Bering analogizes an individual with pedophilia to a straight person in a witness protection program that assigns him a gay identity:

[Y]ou must convince everyone you meet, for your own safety and for the safety of those you care about, that you’re 100 percent homosexual. Now don’t try too hard to appear gay, because you’ll give yourself away, so be stereotypical but not *too* stereotypical, yet don’t ever let your guard down either Watch what you say, where your eyes go, what you do in your spare time, whom you’re seen with, and careful now, no matter how close you get to someone in this new life of yours, no one must ever discover that you’re really a heterosexual. All that you hold dear—and I can’t emphasize this part enough—hangs in the balance.⁹²

Comments on the Virtuous Pedophiles website describe similar feelings of fear and isolation:

therapist to report them to authorities, which leaves people with pedophilia with no support from mental health professionals); Clark-Flory, *supra* note 3 (providing an example of a pedophile who has never abused children and started an anonymous support group to help people with pedophilia resist abusing children).

89. Dreger, *supra* note 7.

90. See BERING, *supra* note 9, at 156–57 (explaining that people with pedophilia face a lifetime of defending, rationalizing, or hiding their sexual interests because of society’s shame and fear of their sexual interest in children); Malón, *supra* note 9 (stating that people with pedophilia are the most feared embodiment of perversion in modern society); Bleyer, *supra* note 4 (illustrating a pedophile’s struggle for acceptance and noting the moment he realized that what felt entirely natural to him was despised by society); Clark-Flory, *supra* note 3 (citing pedophilia expert James Cantor as estimating that individuals with pedophilia may be the most isolated individuals in society).

91. See BERING, *supra* note 9 (explaining the personal distress people with pedophilia experience because of society’s refusal to try to understand pedophilia).

92. *Id.* at 156–57.

The only thing keeping me from suicide is knowing my family and friends would be devastated. . . . I also wonder how many would still care if they knew how I felt about boys.

* * *

I have a paralyzing fear of being outed as a pedophile (even though I haven't done anything illegal, the social stigma would destroy what little social and family life I have.)

* * *

I don't think I can ever tell anybody in my family, as I'm too worried that if people know it will prevent me from growing up to have a successful job or do well in my final years of high school. It's such a sensitive topic, and so many people think that pedophilia is one of the worst crimes in the world, even above murder. But I have not offended, and I wish not to.

* * *

I felt like I could never talk about it to anyone and I could talk about other things but never really the true problem. I've had suicidal thoughts for a long time. I just want to talk to someone who understands without fear, I don't know what else to do.⁹³

The artifice is exhausting and yet the repercussions of being outed may be worse. When a U.K. news source began a project of naming suspected pedophiles, residents throughout the country reacted violently to the idea of such individuals living in their communities.⁹⁴ Riots erupted in which police came under fire;

93. *Who We Are*, *supra* note 1.

94. See Rebecca Allison, *Doctor Driven Out of Home By Vigilantes*, THE GUARDIAN (Aug. 29, 2000, 19:42 EDT), <http://www.theguardian.com/uk/2000/aug/30/childprotection.society> (last visited Jan. 27, 2015) ("Dr. Cloete is the latest victim to have been wrongly identified by anti-paedophile campaigners in the wave of protests which have swept the country following the News of the World's campaign to 'name and shame' alleged sex offenders.") (on file with the Washington and Lee Law Review); Nicole Martin, *Innocent Families Driven Out as Paedophile Protest Continues*, THE TELEGRAPH, (Aug. 10, 2000), <http://www.telegraph.co.uk/news/uknews/1352121/Innocent-families-driven-out-as-paedophile-protest-continues.html> (last visited Jan. 27, 2015) (describing a mob of 300 people that gathered outside a suspected pedophile's home and screamed "hang him") (on file with the Washington and Lee Law Review); *Families Flee Paedophile Protests*, BBC NEWS (Aug. 9, 2000, 11:14 GMT), http://news.bbc.co.uk/2/hi/uk_news/872436.stm (last visited Jan. 27, 2015) (discussing the need to rehouse some residents because of the violence) (on file with the Washington and Lee Law Review). It is unclear whether the news

cars were burned, and windows smashed.⁹⁵ Mobs targeted and attacked those suspected of pedophilia.⁹⁶ The government was forced to relocate several families, and one man killed himself after a vigilante attack on his home left him in fear for his life.⁹⁷ Even a pediatrician was forced to flee her home after vandals mistook her title for the word “pedophile.”⁹⁸ As Bering notes, people living with pedophilia, “aren’t living their lives in the closet; they’re eternally hunkered down in a panic room and chewing away nervously at their nails.”⁹⁹

III. Reconceptualizing Pedophilia in the Law

This Part analyzes the different ways of conceptualizing pedophilia in the law. Part III.A explores pedophilia as a mental disorder and as a sexual orientation, and discusses the problems each concept raises. Part III.B posits that the legal concept of sexual orientation is a poor fit for pedophilia because pedophilic sexual interests are defined by intense and recurrent desires to engage in conduct that significantly harms others. It argues that the legal concept of mental illness far better addresses the issues pedophilia raises.

reports are using “pedophile” mistakenly to refer to child molesters rather than people living with pedophilia. However, the conflation of these categories in the public mind makes the distinction largely irrelevant in this context—either is likely to produce significant hostile reactions.

95. *Families Flee Paedophile Protests*, *supra* note 94 (“Protests have escalated from peaceful demonstrations into riots with police coming under fire, cars being burned and windows smashed.”).

96. *See id.* (describing the mob violence against people suspected to have pedophilia).

97. *Id.*

98. *See* Allison, *supra* note 94 (“Self-styled vigilantes attacked the home of a hospital pediatrician after apparently confusing her professional title with the word ‘paedophile.’”).

99. BERING, *supra* note 9.

*A. Pedophilia as Mental Disorder or Sexual Orientation**1. Pedophilic Disorder*

The American Psychiatric Association (APA) recognizes a mental disorder characterized by sexual attraction to children, which it terms “pedophilic disorder.”¹⁰⁰ Pedophilic disorder is part of a subset of mental disorders known as “paraphilic disorders,” named so because each involves an unusual sexual interest called a “paraphilia.”¹⁰¹

The APA’s Diagnostic and Statistical Manual of Mental Disorders (DSM), the “bible” of modern psychiatry,¹⁰² outlines three diagnostic criteria for pedophilic disorder.¹⁰³ Criterion A requires recurrent, intense sexual interest in a prepubescent child or children that lasts for at least six months.¹⁰⁴ The DSM defines prepubescence as “generally age thirteen years or younger,”¹⁰⁵ however it is more reliable to use indicators of

100. The APA only recently changed the name of this disorder from pedophilia to pedophilic disorder. AM. PSYCHIATRIC ASS’N, PEDOPHILIC DISORDERS (2013). Much of the research on pedophilic disorder therefore refers to it as pedophilia. This change reflects the APA’s distinction between a paraphilic disorder and its underlying paraphilia.

101. Paraphilias can vary significantly in the type of interest at issue. Some concern erotic activities (masochistic disorder involves sexual interest in being made to suffer), whereas others concern the individual’s erotic targets (pedophilic disorder involves sexual interest in prepubescent individuals). See DSM-V, *supra* note 39, at 685, 694, 697 (describing different types of paraphilic disorders).

102. See Malón, *supra* note 9, at 1094 (noting that the description of the DSM as a psychiatric bible is not a mere play on words given the normative status it has acquired in our society); Gary Greenberg, *The Cult of DSM*, PSYCHOTHERAPY NETWORKER, Mar.–Apr. 2014, at 21 (criticizing the power the DSM has over the psychiatric community).

103. The DSM did not make this formal distinction between “paraphilia” and “paraphilic disorder” until the recent DSM-V. The disorder itself was once called a paraphilia; now paraphilias are not disorders, but rather Criterion A of paraphilic disorders. See DSM-V, *supra* note 39, at 685–86, 816 (explaining the change in terminology from DSM-IV to DSM-V). This distinction did not change how paraphilic disorders are diagnosed; it simply changed how we referred to them. *Id.*

104. See *id.* at 697–98 (providing the definition of Criterion A and describing the diagnostic features of pedophilic disorder).

105. See *id.* (defining prepubescence).

puberty rather than age.¹⁰⁶ Criterion B is fulfilled if the individual acts on the urges or if the individual's urges or fantasies cause "marked distress or interpersonal difficulty."¹⁰⁷ Sexual interest is therefore necessary but not sufficient for a diagnosis; it must be accompanied by some behavior, distress, or interpersonal impairment. Criterion C specifies that clinicians should exclude from a pedophilic disorder diagnosis an individual under age sixteen as well as an individual in late adolescence involved in an ongoing sexual relationship with a twelve- or thirteen-year-old.¹⁰⁸

Classifying pedophilia as a mental disorder raises the thorny question of how to distinguish which sexual desires indicate mental illness rather than typical variations in sexuality.¹⁰⁹ One reason this is so difficult is that it relies on a coherent concept of mental illness.¹¹⁰ While there is no universally accepted definition

106. See Hamilton, *supra* note 18, at 560 (explaining that secondary sex characteristics associated with puberty may be present before age thirteen and noting criticism of the DSM's definition of pedophilic disorder for this reason). Thomas K. Zander argues that this method raises problems because the onset of puberty is not a clear line, allowing determinations to "literally devolve into a splitting of pubic hairs." Thomas K. Zander, *Adult Sexual Attraction to Early-Stage Adolescents: Phallometry Doesn't Equal Pathology*, 38 ARCHIVES SEXUAL BEHAV. 329, 329 (2009).

107. DSM-V, *supra* note 39, at 697. All other paraphilic disorders listed in the DSM-V require "clinically significant distress" or "impairment" in "social, occupational or other important areas of functioning." See *id.* at 686, 689, 691, 694, 695, 700, 702 (providing the definitions of the other paraphilic disorders: voyeuristic disorder, exhibitionistic disorder, frotteuristic disorder, sexual masochism disorder, sexual sadism disorder, fetishistic disorder, and transvestic disorder).

108. See *id.* at 697 (providing the definition of Criterion C).

109. See, e.g., Fred S. Berlin, *Pedophilia: When Is a Difference a Disorder?*, 31 ARCHIVES SEXUAL BEHAV. 479, 479 (2002) (discussing the inevitable value judgments required to label a condition as a mental disorder) [hereinafter Berlin, *Pedophilia: When Is a Difference a Disorder?*]; Hamilton, *supra* note 18, at 556–59 (explaining that because pedophilia is a type of mental disorder characterized by psychosexual interest in unusual objects, its characterization as a mental disorder inherently involves a normative inquiry).

110. See Charles Moser, *Paraphilia: A Critique of a Confused Concept*, in NEW DIRECTIONS IN SEX THERAPY: INNOVATIONS AND ALTERNATIVES 91, 93–96 (Peggy J. Kleinplatz ed., 2001) (noting the influence of medicine, religion, law, science, society, and culture on the definition of mental disorders and discussing the difficulty of defining mental disorders); Hamilton, *supra* note 18, at 556–59 (explaining that even within the same timeframe and cultural base there is no

of or test for mental illness,¹¹¹ working definitions possess common traits. Most notable among these is the idea of the mental dysfunction,¹¹² specifically a disturbance in an individual's ability to think, feel, or relate to others.¹¹³ Mental

consensus about what is normal and abnormal, which renders classification of behavior as a mental disorder controversial).

111. See MICHAEL S. MOORE, *LAW AND PSYCHIATRY* 182–98 (1984) (describing various ways to define mental illness); Allen Frances et al., *Defining Mental Disorder When It Really Counts: DSM-IV-TR and SVP/SDP Statutes*, 36 J. AM. ACAD. PSYCHIATRY & LAW 375, 378 (2008) (noting that even the DSM-IV-TR states that it cannot provide a precise definition of a mental disorder); Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J.L. REFORM 585, 593–97 (2002) (describing the difficulty of defining a mental disorder); Aragona, *supra* note 12, at 1–2 (stating that whether disorder is a scientific biomedical term or a sociopolitical term that necessarily involves a value judgment is a “fundamental philosophical problem underlying discussions on diagnostic systems”); Jerome C. Wakefield, *The Concept of Mental Disorder: Diagnostic Implications of the Harmful Dysfunction Analysis*, 6 WORLD PSYCHIATRY 149, 150 (2007) (noting tests that distinguish disorders from nondisorders rely on implicit assumptions about the concept of disorder).

112. See MOORE, *supra* note 111, at 193 (analyzing whether the outcome of a particular condition or process defines its function, which allows assessment of dysfunction based on deviation from a condition's function); Korn *supra* note 111, at 593–95 (discussing the role of mental dysfunction in defining a mental disorder); Wakefield, *supra* note 111, at 151–52 (distinguishing mental disorders from other negative mental conditions by arguing that mental disorders entail dysfunction); Aragona, *supra* note 12, at 5–13 (critiquing the argument that dysfunctions are purely factual, rather than containing a normative element); Fred S. Berlin, *Commentary on Pedophilia Diagnostic Criteria in DSM-5*, 39 J. AM. ACAD. PSYCHIATRY & LAW 242, 242 (2011) [hereinafter Berlin, *Commentary on Pedophilia Diagnostic Criteria in DSM-5*] (describing the criteria of a pedophilia diagnosis and arguing that individuals who have sexual urges in response to children, regardless of the intensity of the urges, should qualify for a pedophilia diagnosis). The DSM-V describes mental illness as a syndrome characterized by (1) clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that (2) reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. DSM-V, *supra* note 39, at 20.

113. See DSM-V, *supra* note 39, at 20 (using the concept of dysfunction to define mental disorder); Aragona, *supra* note 12, at 5–13 (critiquing the argument that dysfunctions are purely factual, rather than containing a normative element); Berlin, *Commentary on Pedophilia Diagnostic Criteria in DSM-5*, *supra* note 112, at 242 (describing the criteria of a pedophilia diagnosis and arguing that individuals who have sexual urges in response to children, regardless of the intensity of the urges, should qualify for a pedophilia diagnosis); Korn, *supra* note 111, at 594 (explaining that disturbances in thinking, feeling, and relating to others that characterizes a mental disorder results in a substantially diminished capacity for coping with the ordinary demands of life); Wakefield, *supra* note 111, at 150 (discussing use of

disorders are also commonly defined as causing distress, impairment, or an increased risk of suffering or death.¹¹⁴

The distinction between a healthy and unhealthy mind is neither objective nor universally accepted.¹¹⁵ In general, physicians and psychiatrists define health and illness with regard to certain goals—ideas about how bodies and minds should operate—with illness being a type or degree of deviance from those goals.¹¹⁶ As Michael Moore notes, we deem a heart that

impairment).

114. See MOORE, *supra* note 111, at 193 (disputing this definition); Berlin, *Commentary on Pedophilia Diagnostic Criteria in DSM-5*, *supra* note 112, at 242 (describing the diagnostic criteria of pedophilia and using the concepts of distress, suffering, and impairment).

115. As a result, the psychiatric community and its critics have spent the last century debating what constitutes a mental illness. See MOORE, *supra* note 111, at 155–216 (providing an extensive discussion about the definition of mental illness); Zander, *supra* note 18, at 28 (“Debates about the validity of the construct of ‘mental illness’ and ‘mental disorder’ have raged for the past half-century.”); Aragona, *supra* note 12, at 1–13 (providing an example of scholarship that rejects a definition of mental disorder and argues mental disorder is best understood as a construct, which cannot provide a clear-cut demarcation between what is and is not a disorder). Some theorists argue that mental illness rarely reflects illness at all, but instead reflects subjective lay concepts and value judgments, and that the process of being labeled abnormal and ill causes psychological and social harms rather than identifying them. Such skeptics warn that psychiatry justifies coercive interventions to impose social norms rather than treat legitimate illness. See MOORE, *supra* note 111, at 155–81 (challenging these views); Zander, *supra* note 18, at 28–29 (describing the debate about the validity of the construct of mental disorder); THOMAS S. SZASZ, *THE MYTH OF MENTAL ILLNESS: FOUNDATIONS OF A THEORY OF PERSONAL CONDUCT* (1961) (arguing against classifying psychological problems as diseases or illnesses); Eric J. Dammann, “*The Myth of Mental Illness: Continuing Controversies and Their Implications for Mental Health Professionals*,” 17 *CLINICAL PSYCHOL. REV.* 733 (1997) (summarizing Szasz’s views and the views of Szasz’s critics).

This Article does not challenge the concept of mental illness. We need not have an objective or unanimously accepted measurement of dysfunction in order to recognize that it exists. Just because mental illness diagnoses have been used for illegitimate purposes in the past does not mean that there is no such thing as mental illness. On the contrary, there is significant evidence that many individuals do suffer from mental dysfunctions. Few would argue that a severely delusional paranoid schizophrenic is perfectly healthy simply because we have no objective or universally accepted measurement of health. This Article accepts the concept of mental illness and examines the difficulties of using it to pathologize sexual interests.

116. See MOORE, *supra* note 111, at 28–29, 189–90 (describing functional explanations for mental illness, which evaluate the end state or goal of a system

cannot properly pump blood unhealthy because we believe that the function of the heart is to pump blood through our circulatory system and not, for example, to make noise.¹¹⁷

There is no established baseline conception of how a sexual desire *should* function to determine when it is not functioning properly. Sexual interest spans an enormous range.¹¹⁸ If reproduction is its goal,¹¹⁹ then any desire for nonreproductive sex might indicate illness; this justification would pathologize a

to determine illness); Berlin, *Pedophilia: When Is a Difference a Disorder?*, *supra* note 109, at 480 (arguing it is reasonable to describe pedophilia as a disorder because of the psychological burdens and impairments individuals sexually attracted to children experience); Aragona, *supra* note 12, at 6 (discussing the normative aspect of defining a mental disorder); Wakefield, *supra* note 111, at 151 (discussing the definition of mental disorder and arguing it has both a normative and factual component). Physical medicine, for example, is concerned with a system that maintains certain balances that contribute toward what we consider health and survival. See MOORE, *supra* note 111, at 189–90 (describing the functional analysis entailed in determining whether a person is physically ill).

117. See MOORE, *supra* note 111, at 189–90 (describing the function of the heart as pumping blood, rather than making noise in the chest cavity, because pumping blood contributes to the proper functioning of the entire body); Wakefield, *supra* note 111, at 151–52 (noting that because the function of the heart is to pump blood, a heart that cannot pump blood is dysfunctional).

118. See BERING, *supra* note 9, at 99–166 (describing different types of sexual attractions); Berlin, *Pedophilia: When Is a Difference a Disorder?*, *supra* note 109 (discussing the diverse spectrum of human sexuality); Lisa Miller, *The Turn-On Switch*, N.Y. MAGAZINE (July 21, 2013), <http://nymag.com/nymag/features/fetishes-2013-7/> (last visited Jan. 27, 2015) (discussing myriad sexual interests) (on file with the Washington and Lee Law Review); Moser, *supra* note 110, at 92 (“[Researchers] have yet to find an attribute that has not been eroticized. Someone, somewhere will find the most seemingly unlikely stimulus erotic.”).

119. See Berlin, *Pedophilia: When Is a Difference a Disorder?*, *supra* note 109 (“God or nature has put sexual drive into each and every one of us for a very important reason—the preservation of the human race.”); Jerome C. Wakefield, *Disorder as Harmful Dysfunction: A Conceptual Critique of DSM-III-R’s Definition of a Mental Disorder*, 99 PSYCHOL. REV. 232, 243 (1992) (arguing that the diagnostic criteria of a mental disorder should direct clinicians to evaluate whether a particular system or mechanism is failing to function as it naturally would); see also Malón, *supra* note 9, at 1090 (describing this view); Vernon L. Quinsey, *Coercive Paraphilic Disorder*, 39 ARCHIVES SEXUAL BEHAV. 405, 405–07 (2009) (analyzing coercive paraphilic disorder from an evolutionary perspective). But see Jay R. Feierman, *A Biosocial Overview of Adult Human Sexual Behavior with Children and Adolescents*, in PEDOPHILIA: BIOSOCIAL DIMENSIONS, *supra* note 9, at 8, 26–27 (describing the evolutionary role in nonprocreative sexual behavior).

host of sexual interests, including same-sex attraction.¹²⁰ If human pleasure and happiness is a goal, then psychology should pathologize a far narrower range.¹²¹ Changing social mores, including prejudices, often inform judgments of what desires are pathological.¹²² The DSM's current definition of a paraphilia is oddly broad and archaic, entailing "[a]ny intense and persistent sexual interest other than sexual interest in genital stimulation or preparatory fondling with phenotypically normal, physically mature, consenting human partners."¹²³

The DSM attempts to narrow this category by using Criterion B—behavior, distress, or interpersonal difficulty—to distinguish when sexual interest in children constitutes a mental disorder.¹²⁴ But these requirements create more problems than they resolve. The behavior requirement raises the possibility that clinicians will diagnose an individual based on harmful or criminal behavior alone.¹²⁵ Mental health professionals and

120. See Richard Green, *Rejoinder*, 31 ARCHIVES SEXUAL BEHAV. 505, 505 (2002) (explaining that if mental disorder is characterized by a failure to function in a natural or biologically designated way, then homosexuality is a mental disorder).

121. See PAUL R. ABRAMSON & STEVEN D. PINKERTON, WITH PLEASURE 3–50 (2002) (arguing that sex serves the goal of pleasure in itself).

122. For example, same-sex attraction was once considered pathological. Andreas De Block & Pieter R. Adriaens, *Pathologizing Sexual Deviance: A History*, 50 J. SEX RES. 276, 287–89 (2013); Moser, *supra* note 110, at 96. Psychiatrists also diagnosed slaves that attempted to escape with a psychological disorder called drapetomania. Patrick Singy, Letter to the Editor, *What's Wrong With Sex?*, 39 ARCHIVES OF SEXUAL BEHAV. 1231 (2010).

123. See DSM-V, *supra* note 39, at 685.

124. See *id.* at 685–86, 697–98 (defining Criterion B and explaining its application to a diagnosis of paraphilic disorder); Berlin, *Pedophilia: When Is a Difference a Disorder?*, *supra* note 109, at 479–80 (explaining that pedophilia is a disorder because it creates psychological burdens and impairments for an individual living in a society that has wisely decided to prohibit adult–child sexual interaction).

125. See DSM-V, *supra* note 39, at 697–98 (defining Criterion A, which includes sexual desires aroused by children, and Criterion B, which includes acting on these desires); see also Ray Blanchard, *The DSM Diagnostic Criteria for Pedophilia*, 39 ARCHIVES SEXUAL BEHAV. 304, 305 (2009) (discussing DSM-IV, but the criteria were not altered in the fifth edition); Zander, *supra* note 18, at 37 (stating that just because behavior is criminal does not justify labeling it as a mental disorder); Charles Moser, Letter to the Editor, *When Is an Unusual Sexual Interest a Mental Disorder?*, 38 ARCHIVES SEXUAL BEHAV. 323, 324 (2009) (“[J]ust committing a crime does not indicate psychopathy and most criminals do not have diagnoses based upon their specific crime.”); Studer & Aylwin, *supra*

governments may therefore use psychiatric diagnoses to inappropriately pathologize what is better understood as criminal behavior.¹²⁶ The distress criterion seems counterintuitive; it seems reasonable to be more concerned about the mental health of an individual who is *not* distressed by his attraction to children.¹²⁷ Distress and interpersonal difficulty are also questionable criteria because they may be caused by the individual's shame and fear of societal response rather than the sexual desire itself.¹²⁸ Given society's view of those who have

note 24, at 777 (distinguishing child molesters and people with pedophilia by noting that a child molester's primary sexual attraction may not be to children); Aragona, *supra* note 12, at 4 (describing concerns about the medicalization of all bad behavior); Hamilton, *supra* note 18, at 574–77 (supporting the argument that sex crimes and psychiatric illness are conflated by noting that forensic scientists rely on criminally offensive sexual behavior to fulfill both Criterion A and B).

126. See Moser, *supra* note 125 (describing the confusing nature of deciding which sex crimes are diagnoses); De Block & Adrians, *supra* note 122, at 278 (discussing the medicalization of aberrant sexual behavior steered by the use of physicians and psychiatrists as forensic experts to help ensure the state's control over private morality).

127. See Blanchard, *supra* note 125, at 306–07 (referencing other psychiatrists who posit that the DSM's definition of pedophilic disorder excludes an individual who masturbates to fantasies of children but is not distressed by these thoughts and behaviors); Richard Green, *Is Pedophilia a Mental Disorder*, 31 ARCHIVES SEXUAL BEHAV. 467, 470 (2002) (critiquing the DSM's definition of pedophilic disorder for excluding an individual that has never acted on his sexual attraction to children and is not distressed by his urges). Ray Blanchard, the chair of the paraphilia sub-working group for the DSM-V, has argued that practitioners need not worry about a pedophile who feels no distress because distress must always follow from Criterion A. Blanchard argues that a patient who feels sexual desire toward children but does not act on it *must* feel some sort of distress because of his inability to act on it. See Blanchard, *supra* note 125, at 307 (“How could one experience a lifetime of sexual ‘urges,’ which are never satisfied, with no sense of frustration?”). According to Blanchard, the presence of a paraphilia necessitates distress if it cannot be fulfilled; otherwise, “can one really say there was an ‘urge’ in the first place?” *Id.* at 307; see also Malón, *supra* note 9, at 1088 (summarizing Blanchard's argument that a contented pedophile—an individual that never acts on his urges and experiences no distress—does not actually exist or is extremely rare). If this is true, however, then Criterion B serves no purpose. All individuals with Criterion A either act on their desires or do not, and thus Criterion B encompasses all individuals who fulfill Criterion A.

128. See Malón, *supra* note 9, at 1084 (discussing the criteria of distress in a pedophilic disorder diagnosis); Alan W. Shindel & Charles A. Moser, *Why Are the Paraphilias Mental Disorders?*, 8 J. SEXUAL MED. 927, 928 (2010) (explaining that an individual with a paraphilia may experience distress because of societal

pedophilic desires, these criteria could potentially encompass anyone who is attracted to children. As one critic notes, “[i]t does not seem possible for a person sexually interested in children not to be socially impaired in some way because societal norms dictate that it is abnormal for a person to be sexually interested in children.”¹²⁹

Perhaps most importantly, the behavior, distress, and interpersonal difficulty criteria cannot resolve the underlying question as to why some sexual desires raise the possibility of pathology while others do not. Intense, recurrent desire for vaginal intercourse with an adult is generally considered normal, thus we do not pathologize the desire itself when an individual acts on it, even with a non-consenting person.¹³⁰ Nor is there a paraphilic disorder diagnosis for an individual whose intense and recurrent desire for vaginal intercourse with an adult causes him distress because he simply does not want to have sex until marriage. Even if these individuals were diagnosed with mental disorders, their interest in vaginal intercourse with an adult would be irrelevant to the diagnosis.

While arguments demonstrate the difficulty in neatly categorizing pedophilia as a mental disorder, they do not foreclose

discrimination). The DSM attempts to avoid this problem by requiring that the distress and impairment be *caused by* the paraphilia as opposed to societal response. But it is impossible to tease out causation in this way. All distress likely has some internal and external cause. An individual may be repulsed by his sexual interest for children in part because he finds it morally repugnant and in part because he knows society condemns it as morally repugnant.

129. William T. O’Donohue et al., *Problems with the DSM-IV Diagnosis of Pedophilia*, 12 *SEXUAL ABUSE: J. RES. & TREATMENT* 95, 102 (2000).

130. Some psychiatrists have proposed paraphilic coercive disorder be added to the DSM’s paraphilic disorder. This proposed disorder requires “recurrent, intense sexually arousing fantasies or sexual urges focused on sexual coercion” and that either the individual be distressed or impaired by the attractions or the individual has sought sexual stimulation by forcing sex on three or more non-consenting persons on separate occasions. See Paul Stern, *Paraphilic Coercive Disorder in the DSM: The Right Diagnosis for the Right Reasons*, 39 *ARCHIVES SEXUAL BEHAV.* 1443, 1444 (2010) (arguing that paraphilic coercive disorder “gives the judicial system the best opportunity to most accurately identify the small group of men who have previously committed, and are likely in the future to commit, this type of predatory sexual violence”). But this proposed disorder again requires an intense and recurrent desire for coerced sex, as opposed to my hypothetical, in which a man does not specifically desire coerced sex but decides nonetheless to override his wife’s consent.

this categorization. Part III.B, *infra*, will argue that, for the purposes of the law, the concept of a mental disorder provides perhaps the most adequate means of conceptualizing pedophilia. These issues, however, provide room for ongoing debate about the nature and dimensions of pedophilia as a mental disorder both in psychiatry and the law.

2. Erotic Age Orientation: Pedophilia as a Sexual Orientation

The fifth edition of the DSM, as originally published in October 2013, referred to pedophilia as a sexual orientation.¹³¹ It specifically stated that an intense and persistent sexual interest in prepubescent children that is not acted on or accompanied by distress or impairment is better characterized as a sexual orientation than a mental disorder.¹³² The text provoked an immediate and vitriolic response, particularly from conservative news sites and bloggers.¹³³ These news sources interpreted it as an attempt to normalize pedophilia and promote the sexual abuse of children.¹³⁴ In response, the APA issued a press release

131. See DSM-V, *supra* note 39, at 698 (comparing pedophilic sexual orientation and pedophilic disorders).

132. See *id.* (stating that if individuals “have never acted on their impulses, then these individuals have a pedophilic sexual orientation but not a pedophilic disorder”).

133. See Cheryl Wetzstein, *APA to Correct Manual: Pedophilia Is Not a “Sexual Orientation”*, THE WASHINGTON TIMES, <http://www.washingtontimes.com/news/2013/oct/31/apa-correct-manual-clarification-pedophilia-not-se/> (last updated Oct. 31, 2013) (last visited Jan. 27, 2015) (noting “an uproar on the internet that the APA had designated pedophilia as a sexual orientation in its new [DSM]”) (on file with the Washington and Lee Law Review); Dr. Susan Berry, *American Psychiatric Association Reclassifies Pedophilia, Backtracks*, BREITBART, <http://www.breitbart.com/big-government/2013/11/02/american-psychiatric-association-reclassifies-pedophilia/> (last updated Nov. 2, 2013) (last visited Jan. 27, 2015) (discussing the “public outcry” in response to the DSM-V’s classification of pedophilia as a sexual orientation) (on file with the Washington and Lee Law Review); Hunter Stuart, *Whopping Pedophilia “Sexual Orientation” Error Sparks Right-Wing Freakout*, THE HUFFINGTON POST, http://www.huffingtonpost.com/2013/10/31/pedophilia-sexual-orientation_n_4183482.html (last updated Nov. 1, 2013) (last visited Jan. 27, 2015) (observing that “[c]onservative media outlets and pundits pounced on the [DSM-V] statement”) (on file with the Washington and Lee Law Review).

134. See Wetzstein, *supra* note 133 (discussing how bloggers bashed “the APA for ‘mainstreaming’ deviance and capitulating to pro-pedophile groups”); Berry, *supra* note 133 (citing conservative nonprofit organization’s statement

explaining that the term “sexual orientation” was used in error.¹³⁵ The press release noted that pedophilic desires that do not fulfill Criterion B should be characterized as a sexual interest or a paraphilia rather than a sexual orientation.¹³⁶

The outcry over the DSM’s textual error demonstrates the controversy surrounding the concept of sexual orientation and its power. The DSM text did not normalize sexual abuse—on the contrary, it specifically designated those who act on pedophilic desires as having a mental disorder. But the mere possibility that sexual interest in children could be considered a sexual orientation sparked outrage.

While sexual orientation is commonly used to describe the gender to which one is attracted, several scholars and advocates argue for a more expansive definition.¹³⁷ Some have proposed, for example, that sexual orientation should include an axis of sexuality versus asexuality—the extent to which one experiences sexual urges or interests at all.¹³⁸ Sexual orientation might also consider the extent to which one focuses sexual interest on others as opposed to autoeroticism.¹³⁹ Other scholars have proposed

that children will ultimately suffer from “any effort to legitimize pedophilia”) (internal quotation marks omitted); Stuart, *supra* note 133 (noting conservative bloggers’ and commenters’ “shared sentiment . . . that this was a logical progression from the normalization of homosexuality that began in the 1960’s”).

135. See Press Release, Am. Psychiatric Ass’n, APA Statement on DSM-5 Text Error (Oct. 31, 2013) (stating that the term sexual orientation was used in error “and should read ‘sexual interest’”).

136. See *id.* (“APA considers pedophilic disorders a ‘paraphilia,’ not a ‘sexual orientation.’”).

137. See, e.g., Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L.J. 997, 1057–58 (2012) (arguing for a broader definition of sexual orientation); Tweedy, *supra* note 17, at 1479–1509 (discussing expanding sexual orientation to include the preference of polyamorous relationships); Michael D. Storms, *Theories of Sexual Orientation*, 38 J. PERSONALITY & SOC. PSYCHOL. 783, 783–91 (1980) (discussing the limits of common theories regarding the nature of sexual orientation); see also Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 338–344 (2014) (proposing additional axes by which to measure asexuality).

138. See Emens, *supra* note 137, at 338–40 (discussing asexuality using existing models of sexual orientation); Storms, *supra* note 137, at 783–91 (positing asexuality as a distinct sexual orientation).

139. See Emens, *supra* note 137, at 341–42 (discussing asexuality along an autoerotic axis); Glazer, *supra* note 137, at 1054–55 (arguing for separation of sexual orientation into general orientation and specific orientation).

expanding it to include the extent to which individuals are polyamorous as opposed to monogamous.¹⁴⁰ More controversial definitions of the term might also include whether one is attracted to humans, non-human animals, or inanimate objects.¹⁴¹

Those who argue that pedophilia is a type of sexual orientation distinguish between different types of sexual orientations; sexual gender orientation, the focus of most research on sexual orientation, is but one.¹⁴² This view places pedophilia on a larger spectrum of erotic age orientation, which describes how individuals experience sexual attraction to age groups ranging from infants to the elderly.¹⁴³ Erotic age orientation contains at least five categories of sexual interest: (1) pedophilia (attraction to prepubescents); (2) hebephilia (attraction to minors in early puberty); (3) ephebophilia (attraction to older adolescents); (4) teliophilia (attraction to sexually mature persons); and (5) gerontophilia (attraction to the elderly).¹⁴⁴ Some also categorize nepiophilia (attraction to infants) as a separate type of erotic age orientation rather than a subset of pedophilia.¹⁴⁵

One difficulty in determining whether pedophilia should be considered a type of sexual orientation is that, despite over a century of social science research and legal analysis, there is no one accepted definition of sexual orientation.¹⁴⁶ Several means of

140. See Tweedy, *supra* note 17, at 1482–1509 (discussing polyamory as a sexual orientation).

141. See BERING, *supra* note 9, at 25, 117–18 (discussing sexual attraction to non-human animals and inanimate objects).

142. See SETO, *supra* note 35, at 231 (defining sexual gender orientation).

143. See *id.* at 3–4 & n.1, 231 (explaining sexual age orientation); BERING, *supra* note 9, at 169 (discussing erotic age orientation); Hall & Hall, *supra* note 28, at 458 (same).

144. See BERING, *supra* note 9, at 169 (noting the different categories of sexual interest); SETO, *supra* note 35, at 3–4 & n.1 (defining the types of sexual interest); Hall & Hall, *supra* note 28, at 458 (discussing categories of sexual interest within erotic age orientation).

145. See SETO, *supra* note 35, at 4 (“It is not clear if sexual preference for infants . . . represent variants of pedophilia or instead represent different paraphilias.”).

146. See Emens, *supra* note 137, at 339–44 (discussing various models of sexual orientation); Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. 525, 541 (2013) (noting that “there is no unitary definition”); Randall L. Sell, *Defining*

organizing individuals into categories of sexual orientation based on sexual interests or behaviors have been proposed, accepted, and subsequently rejected and replaced throughout history.¹⁴⁷ The concept of homosexuality¹⁴⁸ has transformed over the past century from a tendency to engage in same-sex sexual behavior, to a type of gender deviance, to an abnormal personality and mental disorder, and finally to an affirmative social identity.¹⁴⁹ Still, terms such as “homosexual” and “bisexual” do not have universally accepted characteristics.¹⁵⁰ Nor are these terms even widely accepted by the very communities they identify; those who prefer to identify as gay, lesbian, or queer, for example, reject the word “homosexual.”¹⁵¹

Modern conceptions of sexual orientation generally share certain characteristics. Perhaps most prominently, sexual

and Measuring Sexual Orientation: A Review, 26 ARCHIVES SEXUAL BEHAV. 643, 644–49 (1997) (describing confusion surrounding the conceptual definition of sexual orientation).

147. See Clarke, *supra* note 146, at 541–42 (noting that the understanding of sexual orientation has fluctuated over time).

148. I use the term “homosexuality” and “homosexual” throughout this Article with reservations. The term itself is not accepted by the lesbian, gay, or bisexual community and is, in fact, offensive to many given its clinical history and history of disparaging use. See Jeremy W. Peters, *The Decline and Fall of the “H” Word*, N.Y. TIMES, Mar. 23, 2014, at ST10 (“[T]hat five syllable word has never been more loaded, more deliberately used and, to the ears of many gays and lesbians, more pejorative.”); GLAAD Media Reference Guide: Terms to Avoid, GLAAD, <http://www.glaad.org/reference/offensive> (last visited Jan. 27, 2015) (explaining why the term “homosexual” is offensive within the gay community) (on file with the Washington and Lee Law Review). However, at times it is necessary to use the term in order to reference the actual clinical concept rather than the fuller modern concepts of sexual orientation or lesbian, gay, or bisexual.

149. See STEVEN SEIDMAN, THE SOCIAL CONSTRUCTION OF SEXUALITY 28 (2d ed. 2010) (noting the changing meaning of homosexuality); see also MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 43 (Robert Hurley trans., Vintage Books 1990) (1976) (describing the changing view from sodomy as an aberration in behavior to the homosexual as “a species”); Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 346–47 (2004) (discussing a historical-constructivist view of homosexuality).

150. See Sell, *supra* note 146, at 644–49 (outlining the differing understandings of terms commonly used to describe sexual orientations).

151. See sources cited *supra* note 148 (discussing the offensive connotation of the term “homosexual”).

orientation generally involves a type of sexual interest.¹⁵² It also requires sexual interests have a certain breadth and depth.¹⁵³ It implies something stronger than, say, an individual's interest for individuals with green eyes or dimples.¹⁵⁴ Comparing a sexual orientation to this type of preference trivializes sexual orientation's depth and its role in the individual's psyche.¹⁵⁵ Erotic age orientation is similarly defined by sexual interest. Such sexual interests must be intense and persistent in order to fall into a category; a fleeting attraction to a child is insufficient to qualify as pedophilia.¹⁵⁶

Sexual orientation is also widely accepted as immutable, unchosen, and likely biological in origin.¹⁵⁷ Sexual gender orientation is something that one discovers rather than acquires and which cannot be reoriented.¹⁵⁸ Several theories point to

152. Some researchers also distinguish different types of psychological components, such as sexual interest versus affection and love. *See* Sell, *supra* note 146, at 648–49 (discussing various psychological components).

153. *See* Emens, *supra* note 149, at 341–43 (explaining that “polyamorists are rarely seen as having a distinct identity”); Tweedy, *supra* note 17, at 1466–68 (discussing the concept of sexual orientation as an identity).

154. *See* Tweedy, *supra* note 17, at 1482–83 (discussing importance of “embeddedness”). *But see* Ruth Hubbard & Elijah Wald, *Gay Genes?, in* PROFITABLE PROMISES: ESSAYS ON WOMEN, SCIENCE, AND HEALTH 81, 83 (1995) (describing orientations toward “hair colors, body shapes, [and] racial types”).

155. *See* Sell, *supra* note 146, at 648 n.10 (explaining that the term “sexual preference” “trivializes the depth of the psychological processes involved” and “sexual orientation” is more appropriate because “sexual feelings are a basic part of an individual's psyche”); Tweedy, *supra* note 17, at 1482–83 (noting that sexual orientation is integral to an individual's identity and would manifest itself as “strong and consistent”).

156. *See* SETO, *supra* note 35, at 231–32 (defining pedophilia as “persistent and recurrent” sexual attraction to prepubescent children).

157. *See* JOHN MONEY, GAY, STRAIGHT, AND IN-BETWEEN 11 (1988) (stating sexual orientation is not a choice or preference); SETO, *supra* note 35, at 231 (citing research revealing that “prenatal factors . . . influence sexual gender orientation”); Dreger, *supra* note 7 (describing sexual orientation as “a sexual interest that is inborn and unchangeable”).

158. *See* SETO, *supra* note 35, at 231 (describing sexual gender orientation as “innate” and noting that “reorientation therapies have not worked for homosexual men”). Indeed, reorientation therapy has been so discredited and its attendant risks so high that some states have banned such therapy for minors. *See, e.g.*, N.J. STAT. ANN. § 45:1-55 (West 2013) (forbidding “sexual orientation change efforts with a person under 18 years of age”).

biological origins for sexual gender orientation, including hormone exposure in the womb or genetic predisposition.¹⁵⁹

There is also evidence that erotic age orientation is biological in origin and immutable.¹⁶⁰ Pedophilia, in particular, likely has biological causes, and in particular neurological roots.¹⁶¹ Researchers are finding similar evidence of neurological differences in men with hebephilia—intense attraction toward early adolescents.¹⁶² There is little research on sexual interest in late adolescents and adults—most likely because such sexual interest is viewed as normal and unproblematic. However, the biological distinctions between individuals living with pedophilia, those living with hebephilia, and the remainder of the population, indicate that all such sexual interest is likely biological in nature.¹⁶³

Like mental illness, sexual orientation raises several conceptual dilemmas. It is not clear, for example, that sexuality can be categorized and measured. Defining and operationalizing sexual orientation is complicated by the recognition that sexual

159. See J. Michael Bailey, *Biological Perspectives on Sexual Orientation*, in *PSYCHOLOGICAL PERSPECTIVES ON LESBIAN, GAY, AND BISEXUAL EXPERIENCES* 50, 55–74 (Linda D. Garnets & Douglas C. Kimmel eds., 2003) (explaining the neuroendocrine theory, under which sexual orientation depends on patterns of hormone exposure); CHERYL L. WEILL, *NATURE'S CHOICE: WHAT SCIENCE REVEALS ABOUT THE BIOLOGICAL ORIGINS OF SEXUAL ORIENTATION* 49–54, 63–78 (2009) (describing the gestational neurohormonal theory and the genetics of sexual orientation); William R. Rice et al., *Homosexuality as a Consequence of Epigenetically Canalized Sexual Development*, 87 *Q. REV. BIOLOGY* 343, 344 (2012) (theorizing that fetal development affects an individual's sexual gender orientation).

160. See Studer & Aylwin, *supra* note 24, at 776 (describing arguments that “pedophilia, like heterosexuality or homosexuality, represents sexual arousal to a particular identifiable group, and is not voluntarily decided, but biologically determined”); Dreger, *supra* note 7 (describing sexual orientation as “inborn and unchangeable”).

161. See *supra* Part II.B (discussing the causes of pedophilia in depth).

162. See Ray Blanchard et al., *Pedophilia, Hebephilia, and the DSM-V*, 38 *ARCHIVES SEXUAL BEHAV.* 335, 336 (2009) (discussing research results indicating that “hebephiles” were intermediate between people with pedophilia and teleiophiles with respect to IQ and handedness); James M. Cantor et al., *Handedness in Pedophilia and Hebephilia*, 34 *ARCHIVES SEXUAL BEHAV.* 447, 447 (2005) (“Men with primary erotic interests for . . . pubescent children show poorer performance on intelligence and other neuropsychological tests.”).

163. See Cantor et al., *supra* note 162, at 457 (presenting evidence of an “association between handedness and erotic age preference”).

orientation may vary over time and by the fact that many individuals resist categorization altogether.¹⁶⁴ There is evidence that sexuality is fluid and dynamic and defies distinct and fixed categories.¹⁶⁵ Such definitional problems have prompted some theorists and advocates to argue that social science should abandon the concept of sexual orientation altogether.¹⁶⁶

Part III.B, *infra*, will analyze an additional wrinkle in conceptualizing pedophilia as a sexual orientation—the normative element of sexual orientation. At least with regard to the law, sexual orientation has a normative element that is inconsistent with the potential harmfulness inherent in pedophilia. In the law, sexual orientation has evolved to demarcate benign variations in sexuality. Pedophilia, in contrast, involves the potential for harm not found in heterosexuality or gay or lesbian sexual relationships. For this reason, for the purposes of the law, sexual orientation is a poor fit for the concept of pedophilia.

B. Pedophilia as a Legal Concept

This subpart analyzes the concept of pedophilia as a mental disorder or sexual orientation in the law. The difficulties raised above have different implications when we consider how each concept serves distinct legal purposes and how pedophilia fits into these purposes. The concepts of mental disorder and sexual orientation serve specific purposes in the law.¹⁶⁷ In contrast to science, which uses terms and categories to describe or make sense of some presumptive objective reality,¹⁶⁸ the law is more

164. See Clarke, *supra* note 146, at 542–43 (noting that individuals are “increasingly redefining, reinterpreting, and renegotiating their sexuality”).

165. See Eve Kosofsky Sedgwick, *Epistemology of the Closet*, in THE LESBIAN AND GAY STUDIES READER 45, 56 (Henry Abelove et al. eds., 1993) (noting the “mobility of sexual desire”); Emens, *supra* note 149, at 339–40 (discussing how sexual desire can vary throughout an individual’s life).

166. See Clarke, *supra* note 146, at 542–43 (advocating for “abandon[ing] the search for a unitary theory of sexual orientation”); Tweedy, *supra* note 17, at 1471–73 (discussing arguments against sexuality-based categories).

167. See Balkin, *supra* note 37, at 2325–26 (distinguishing legal and sociological uses); Dreger, *supra* note 7 (different meaning of sexual orientation for the purposes of the law).

168. See Robert A. Prentky et al., *Sexually Violent Predators in the*

normative in nature. It reflects moral or value judgments about the types of circumstances that merit, for example, legal protections or the deprivation of liberty.¹⁶⁹ These concerns will ultimately define the parameters of the legal concepts of mental disorder and sexual orientation.

This subpart argues that, to the extent that the law must consider pedophilia within its current means of categorizing sexual interests and identities, pedophilia is better suited to the mental disorder category than the sexual orientation category. Laws that concern sexual orientation increasingly and justifiably recognize the legitimacy and value of different types of relationships and sexualities. Pedophilia, while not inherently blameworthy, involves a desire that would be harmful to others if pursued. Laws concerning mental illness address many of the legal concerns pedophilia raises and provides the most coherent fit for it.

The term “sexual orientation” is fairly new to the law.¹⁷⁰ Until the last few decades, the law only marginalized and punished the gay, lesbian, and bisexual community. The status of being gay, lesbian, or bisexual could not be criminalized,¹⁷¹ but the criminalization of same-sex sexual acts provided a rationale for lesbians, gays, and bisexuals to be arrested, harassed by police, and denied equal rights in areas such as employment, housing, and medical care.¹⁷²

Courtroom, 12 PSYCHOL. PUB. POL’Y & L. 357, 360 (2006) (noting that scientific use of the terms is “largely descriptive”).

169. See *id.* (describing the normative significance).

170. The first case I could find using the term is a 1968 Civil Rights Act case challenging the arrests of “hippies” who were questioned by the police about their political affiliation and sexual orientation. *Hughes v. Rizzo*, 282 F. Supp. 881, 882–83 (E.D. Pa. 1968). The court noted that the police could arrest an individual for sodomy and investigate a “known homosexual” speaking to a juvenile, but they could not arrest an individual “on the basis of suspicion, or even probable cause to believe, that the arrestee occupied the status of being a homosexual.” *Id.* at 884.

171. See *Robinson v. California*, 370 U.S. 660, 666–68 (1962) (holding that criminalizing status is unconstitutional).

172. See *Lawrence v. Texas*, 539 U.S. 558, 581–82 (2003) (describing effects of the criminalization of sodomy on gay individuals); MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 54–89 (2010) (describing how sodomy laws undermined the dignity and equality of LGB individuals); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 127–52

The concept of sexual orientation has played an important role in changing the law's treatment of the lesbian, gay, or bisexual (LGB) community. It helped shift the legal discourse from one of marginalization and judgment to one of legitimacy and respect.¹⁷³ Sexual orientation distinguishes LGB individuals as a distinct category with immutable—or at the very least unchosen—characteristics.¹⁷⁴ In doing so, it moves away from the rhetoric of defining LGB people simply in terms of behavior and their legal rights simply in terms of sexual practices.¹⁷⁵ It recognizes the legitimacy of different sexual gender orientations and the need to protect those who face discrimination based on their sexual orientation. Sexual orientation looks at different types of gender attractions and recognizes that they are natural and legitimate variations in human sexuality.¹⁷⁶ It also reinforces its profundity and its importance to individual identity, as

(2000) (describing how sodomy laws encourage discrimination and police harassment of LGB individuals).

173. This importance is evidenced by the Court's shift in approach from *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld a sodomy law, to *Lawrence v. Texas*, 539 U.S. 558 (2003), which overturned *Bowers*. In *Bowers*, the Court addressed the issue as whether the constitution protected an isolated sexual act. See *Bowers v. Hardwick*, 478 U.S. 186, 190–95 (1986) (“The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . .”). The *Lawrence* Court, in contrast, focused on the importance of the act in the greater context of the gay identity. See *Lawrence*, 539 U.S. at 566–78 (noting that the *Bowers* Court's narrow framing of the issue “discloses the Court's own failure to appreciate the extent of the liberty at stake”).

174. See Tweedy, *supra* note 17, at 1468–69 (discussing the minoritizing view of gay identity, “which incorporates the idea of LGB people as inherently different”). This is the “minoritizing discourse” of sexual orientation, which views LGB people as inherently different (in contrast to the universalizing discourse, which views “homoerotic potential to be characteristically human”). Janet E. Halley, “*Like Race*” Arguments, in *WHAT'S LEFT OF THEORY? NEW WORK ON THE POLITICS OF LITERARY THEORY* 40, 48 (Judith Butler et al. eds., 2000); see also Sedgwick, *supra* note 165, at 58 (discussing the minoritizing view of sexual identity); Tweedy, *supra* note 17, at 1468–73 (analyzing sexuality-based identity categories); Emens, *supra* note 149, at 338–39 (outlining the minoritizing model).

175. See *supra* note 173 and accompanying text (discussing the shift in the Court's treatment of the LGB community).

176. See *supra* note 173 and accompanying text (discussing shift in the Court's treatment of the LGB community); see also Zander, *supra* note 18, at 29 (stating that homosexuality was removed from DSM based on judgment that it is a natural variation in human sexuality).

opposed to terms such as “sexual preference” or “homosexual lifestyle.”¹⁷⁷

This shift has been marked by an increase in civil rights protections for LGB individuals. Many states repealed sodomy laws even before the Supreme Court’s landmark *Lawrence v. Texas*¹⁷⁸ decision held them unconstitutional.¹⁷⁹ Twenty-one states prohibit discrimination based on sexual orientation in a variety of contexts, and the Equal Employment Opportunity Commission (EEOC) has argued that employment discrimination based on the sex stereotyping of lesbian, gay, or bisexual individuals violates Title VII of the Civil Rights Act.¹⁸⁰ Federal law also punishes hate crimes targeting victims’ sexual orientation.¹⁸¹ Nineteen states and the federal government recognize marriage equality, a number that is growing since the Supreme Court held unconstitutional much of the Defense of Marriage Act.¹⁸² These legal protections almost universally apply

177. See Tweedy, *supra* note 17, at 1466–68 (discussing historical roots of narrow understanding of sexual identity); *GLAAD Media Reference Guide: Terms to Avoid*, *supra* note 148 (classifying “sexual preference” and “homosexual lifestyle” as offensive).

178. 539 U.S. 558 (2003).

179. See *id.* at 570–71 (“Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them.”).

180. *Facts about Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, or Transgender (Gender Identity) Status*, EEOC, <http://www.eeoc.gov/federal/otherprotections.cfm> (last visited Jan. 27, 2015) (stating that gay, lesbian, or bisexual individuals may bring a sex discrimination claim under Title VII) (on file with the Washington and Lee Law Review).

181. See Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 (2012) (criminalizing offenses based on an individual’s sexual orientation and gender identity).

182. See *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (finding that DOMA unconstitutionally deprived same-sex couples from equal protection). Thirty-two states and Washington, D.C. give LGB individuals the freedom to marry, and an additional eight states have judicial rulings in favor of marriage equality. See *Overview: Pending Marriage Equality Cases*, LAMBDA LEGAL <http://www.lambdalegal.org/pending-marriage-equality-cases> (last updated Nov. 7, 2014) (last visited Jan. 27, 2015) (presenting marriage equality statistics) (on file with the Washington and Lee Law Review); *States, FREEDOM TO MARRY* <http://www.freedomtomarry.org/states/> (last updated Oct. 17, 2014) (last visited Jan. 27, 2015) (summarizing status of marriage equality in each state) (on file with the Washington and Lee Law Review).

only to sexual gender orientation, with one state including asexuality.¹⁸³

The law's approach to sexual orientation, however, is not suitable for pedophilia because of the way pedophilia differs from sexual gender orientation. Lesbian, gay, and bisexual individuals have historically faced discrimination based on unwarranted moral judgments about their sexuality. Same-sex sexual behavior is, in reality, no more harmful than sexual behavior between individuals of the opposite sex. On the contrary, such sexual behaviors and relationships can be beneficial, just as heterosexual sexual behaviors and relationships can be beneficial. Sexual gender orientation therefore involves desire and affection that is not simply tolerated; it is a valuable and important part of an individual's life and identity.

Pedophilia, in contrast, involves desire to perform sexual acts that are harmful to others. Sexual activity between an adult and a prepubescent child can cause the child physical and psychological harm.¹⁸⁴ It is a violation of an individual who is not yet capable of giving consent to sex.¹⁸⁵ Legal scholarship has implicitly relied on this justification to distinguish pedophilia while expanding the definition of sexual orientation. For example, Ann E. Tweedy argues that pedophilia should not be considered a sexual orientation because it would cause harm to others if acted upon:

[A] more difficult problem is posed by sexual orientations, such as pedophilia, that are societally disfavored because they cause harm to others and to society at large [We would not want] to prohibit employers from making negative employment decisions based on such preferences or practices. Thus, a holistic definition of "sexual orientation" in an anti-

183. See, e.g., N.Y. EXEC. LAW § 292(27) (McKinney 2014) (defining sexual orientation to include asexuality); Emens, *supra* note 149, at 362 (indicating that New York is the only state to protect asexuality so far); Tweedy, *supra* note 17, at 1463–65 (discussing state protection of sexual gender orientation); see also Dreger, *supra* note 7 (noting that the term sexual orientation, when used in the legal context, does not include pedophilia).

184. See *supra* note 28 and accompanying text (describing significant harm suffered by children); Balkin, *supra* note 37, at 2364–65 (discussing inherently exploitative nature of sexual relationships with children).

185. See *supra* note 28 and accompanying text (describing a child's inability to consent).

discrimination statute would, in some principled way, have to exclude harmful sexual preferences while protecting those that are societally disfavored simply because of prejudice.¹⁸⁶

Tweedy is correct that, unlike sexual gender orientation, pedophilia involves a sexual desire that should not be acted on because it is harmful to others. While LGB communities face prejudice based on unwarranted concerns about their sexuality, there are good reasons to be concerned about the sexual practices that pedophilic desires entail. In contrast to sexual gender orientation, the nature of pedophilic sexual desire is not something of value. Pedophilia, therefore, lacks the legitimacy associated with the concept of sexual orientation.

Pedophilia may nonetheless raise civil rights issues where individuals face discrimination based on their sexual interests as opposed to their behavior. As discussed more fully below, discrimination based on sexual attraction to children alone may be unwarranted and the law may have good reason to prohibit it.¹⁸⁷ It is not that sexual attraction to children fails to raise civil rights issues that merit protection, but rather these issues are complicated by the fact that such preferences, if acted upon, would be harmful to others.

For these reasons, the rubric of mental disorder is a better fit for the issues pedophilia raises. Like sexual orientation, mental illness is a status, not a behavior; it is not chosen; there is strong evidence of biological causes for many mental illnesses; and individuals living with mental illness have been the targets of unwarranted discrimination throughout history.¹⁸⁸ Unlike sexual orientation, however, mental illness involves a dysfunction.

The legal concept of mental illness incorporates the idea of dysfunction or impairment. Civil rights protections for the mentally ill under disability law are premised on the idea that the mental illness constitutes a “substantial impairment” on the individual’s functioning. Mental health parity laws protect treatment for mental illness, by their very nature implying that mental illness merits remedy.¹⁸⁹ Criminal laws hold that

186. Tweedy, *supra* note 17, at 1478 (footnotes omitted).

187. *Infra* Part IV.A.

188. *Infra* Part IV.A.

189. See Stacy A. Tovino, *Reforming State Mental Health Parity Law*, 11

individuals are not criminally responsible where mental illness impairs their ability to understand or control their behavior.¹⁹⁰

Mental illness laws also acknowledge that these impairments can raise significant public health and safety concerns.¹⁹¹ For these reasons, mental health laws balance civil rights protections with concerns about public health and safety. For example, anti-discrimination laws do not protect individuals with mental illness from discrimination where doing so would pose a direct threat to the health and safety of others.¹⁹² Mental illness can also justify limiting an individual's civil rights, as where courts use a determination of mental illness to civilly commit a person.¹⁹³

This approach relies on the assumption that it is appropriate to consider intense and recurrent desires to harm others as the basis for a mental disorder, at least for the purposes of the law.¹⁹⁴ While, as discussed above, there is certainly no objective means of designating which desires should form the basis of a mental disorder, intense and persistent desires to harm innocent individuals may be one of the less controversial bases. This approach also echoes the work of psychologists Jerome C.

HOUS. J. HEALTH L. & POL'Y 455, 467–69 (2012) (summarizing state law prohibiting discrimination against an individual with mental illness by failing to provide treatment).

190. See *infra* notes 346–348 and accompanying text (discussing criminal responsibility of an individual with mental illness); MOORE, *supra* note 111, at 243–45 (analyzing theories behind precluding criminal responsibility).

191. See *infra* Part V.A.1 (addressing mental illness laws and public health concerns).

192. See *infra* notes 249–254 and accompanying text (discussing the direct threat exception).

193. See *infra* Part IV.B (describing civil commitment law).

194. By “desire to harm others,” I mean a desire that inherently involves harm to others and not necessary the desire specifically to inflict harm on others. The individual who has the desire may not view it as harmful. See Fagan et al., *supra* note 28, at 2460 (characterizing pedophilia as “a chronic psychiatric disorder”); Berlin & Krout, *supra* note 8, at 156–57 (stating that pedophilia is when an individual's erotic desire manifests itself as erotic attractions towards children); Schwartz, *supra* note 19 (describing pedophilia as a mental illness); Cohen & Galynker, *supra* note 35, at 279, 282 (defining pedophilia as a psychiatric disorder characterized by recurrent sexual desire towards prepubescent children). Many individuals who molest children do not believe it harms them. There is sufficient evidence to the contrary that the presence of harm should be beyond dispute, even if the individual is unaware of or refuses to acknowledge it. See *supra* note 28 and accompanying text (discussing significant harm suffered by children).

Wakefield and Agustin Malón. Wakefield argues that mental disorders are best defined using a “harmful dysfunction” analysis, where the term “harmful” refers to conditions judged negative by sociocultural standards.¹⁹⁵ Malón argues that disorders such as pedophilic disorders are better understood as relying on a “dangerous dysfunction” rationale, where the concern is not the harm to the individual with the disorder, but the threat that individual poses to others.¹⁹⁶

Reliance on harm and danger underlies many rationales for pathologizing pedophilia in psychiatry.¹⁹⁷ The APA’s fact sheet on paraphilic disorders states that a diagnosis requires either: (1) a sexual interest that causes distress (which, as discussed above, lacks utility) or (2) “a sexual desire or behavior that involves *another person’s psychological distress, injury, or death*, or a desire for sexual behaviors involving *unwilling persons or persons unable to give legal consent*.”¹⁹⁸ Psychiatric scholarship also cites the harm that sexual contact with minors would inflict when discussing why pedophilia should be considered pathological.¹⁹⁹

Distinguishing pedophilia as a mental disorder based on the dangerousness of the desires is not without problems. Relying on

195. See Wakefield, *supra* note 111, at 149 (defining “harmful dysfunction”).

196. See Malón, *supra* note 9, at 1088–93 (explaining “dangerous dysfunction” rationale).

197. See Berlin & Krout, *supra* note 8, at 155–57 (stating that “psychiatric help may be needed” if an individual “experiences strong erotic attractions towards unacceptable sexual partners, such as children”); Fagan et al., *supra* note 28, at 2460 (indicating that pedophilic behaviors are “the primary concern of mental health and criminal justice systems,” not fantasies or impulses); Berlin, *Commentary on Pedophilia Diagnostic Criteria in DSM-5*, *supra* note 112, at 242–43 (noting society’s responsibility to protect children from harm).

198. AM. PSYCHIATRIC ASS’N, PARAPHILIC DISORDERS 1 (2013) (emphasis added), <http://www.dsm5.org/Documents/Paraphilic%20Disorders%20Fact%20Sheet.pdf>.

199. See, e.g., Berlin & Krout, *supra* note 8, at 155–57 (stating that erotic desire to engage in behavior that harms others or with inappropriate partners may merit psychiatric treatment); Malón, *supra* note 9, at 1088–93 (arguing that the pedophilic disorder diagnosis reflects concerns that the sexual interest poses harm to others rather than harm to the diagnosed person); Robert L. Spitzer, *Harmful Dysfunction and the DSM Definition of Mental Disorder*, 108 J. ABNORMAL PSYCHOL. 430, 431 (1999) (“Because pedophilic behavior results in the victimization of children, the dysfunction also represents a harmful condition by social standards. Thus pedophilia . . . is correctly classified as a disorder, not a normal variant.”).

dangerousness to others to distinguish a mental disorder may medicalize all desire to engage in undesirable behavior. But this potential problem should be distinguished from the more troubling problem of pathologizing behavior. This Article suggests that pedophilia should be pathologized because of the intense and recurrent *interest*—a mental component—in harming others, not because of any particular behavior.²⁰⁰ It therefore does not raise the problem of pathologizing all criminal behavior. The potential for overbreadth can also be mitigated by drawing a principled boundary based on the intensity and recurrence of the interest.

The proposed approach does fail, however, to resolve significant debate about whether sexual interests are appropriate bases for psychological diagnoses²⁰¹ and, if so, what the precise parameters of a pedophilia diagnoses should be.²⁰² The law's normative distinctions should not rely on questionable science. Yet the law can appropriately consider pedophilia a mental disorder without perfect understanding of its parameters. It currently does precisely this for several mental disorders, from depression to obsessive-compulsive disorder.²⁰³ Courts, lawmakers, and legal scholars should continue to engage with the

200. See Malón, *supra* note 9, at 1093 (urging caution that the dangerous dysfunction analysis might pathologize bad behavior).

201. See Zander, *supra* note 18, at 37–40 (summarizing “debate about the conceptual validity of the diagnosis of pedophilia”); Studer & Aylwin, *supra* note 24, at 776–78 (advocating that future DSM editions should drop pedophilia as a category); Malón, *supra* note 9, at 1086 (discussing controversy surrounding the appropriateness of considering paraphilias as mental disorders); Shindel & Moser, *supra* note 128, at 928 (arguing that all paraphilias should be removed from the DSM); Moser, *supra* note 110, at 92–93 (stating paraphilias are “a pseudoscientific attempt to regulate sexuality”); Prentky et al., *supra* note 168, at 366 (citing controversy regarding diagnostic validity); Green, *supra* note 127, at 469–70 (questioning validity of diagnosis of pedophilia).

202. See Malón, *supra* note 9, at 1088–90 (describing disagreement over how pedophilia should be operationalized); Zander, *supra* note 18, at 37–40 (describing concerns about pedophilia's validity and reliability).

203. See, e.g., Marsha Garrison, *The Empire of Illness: Competence and Coercion in Health-Care Decision Making*, 49 WM. & MARY L. REV. 781, 824–34 (2007) (characterizing depression as a mental illness and noting the medical field's evolving understanding of depression); Jerry Von Talge, *Major Depressive Disorder*, 26 AM. JUR. PROOF OF FACTS 3D 1 (2014) (noting that “the precise etiology of depression is still not clearly understood”).

conceptual and practical issues surrounding pedophilia as our understanding of it—and mental illness in general—evolves.

IV. Rethinking the Law's Approach to Pedophilic Disorder

This Part argues that, if the law conceptualizes pedophilia as a mental disorder, we should carefully reconsider areas of law that implicate it. While several areas of law recognize pedophilia as a mental illness, they often distinguish it as part of a special category with more limited civil rights protections. Part IV argues that distinguishing pedophilia is problematic, specifically in the context of disability law and civil commitment. There are legitimate reasons for denying some individuals living with pedophilic disorder employment based on their mental illness, and there are legitimate reasons for subjecting them to civil commitment. Current statutes, however, do not adequately distinguish the legitimate reasons from those based on disgust and unfounded fears.

A. Pedophilia and Anti-Discrimination Law

1. Disability Discrimination and the Pedophilia Exception

Several federal and state statutes prohibit discrimination based on mental illness.²⁰⁴ Among these statutes are the ADA and section 504 of the Rehabilitation Act (Rehabilitation Act).²⁰⁵

204. See, e.g., 42 U.S.C. §§ 12101–12213 (2012) (prohibiting discrimination based on mental disabilities); 29 U.S.C. §§ 791, 793–94 (prohibiting employment discrimination based on mental disabilities).

205. 29 U.S.C. §§ 791, 794. The Fair Housing Act (FHA) also prohibits housing discrimination on the basis of disability. 42 U.S.C. § 3604(f)(1)(B). Like the ADA and Rehabilitation Act, the FHA prohibits discrimination based on mental disorders that substantially impair major life activities. *Id.* § 3602(h); see *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (noting that the ADA uses the same definition for “disability” that the FHA does for “handicap”). Unlike the ADA and Rehabilitation Act, however, pedophilia is not explicitly excluded from coverage. Courts often interpret the FHA, the ADA, and the Rehabilitation Act definition of disability similarly, which would support excluding pedophilic disorder from coverage. See *id.* at 631 (noting similar interpretations of “disability”). Unfortunately, there is no case law resolving this issue. If the FHA covered pedophilic disorder, then the FHA’s direct threat analysis would apply.

Together, these laws prohibit both public and private actors from discriminating against otherwise qualified individuals with disabilities in areas such as employment, education, and medical care.²⁰⁶ These acts use similar terminology, and courts interpreting one statute will look to case law involving the others.²⁰⁷ States and municipalities also have statutes that mirror these acts and look to these federal laws for interpretation and implementation.²⁰⁸

These federal laws define disability to include “a mental impairment that substantially limits one or more major life activities.”²⁰⁹ A mental impairment includes “[a]ny mental or psychological disorder, such as . . . emotional or mental illness.”²¹⁰ Major life activities include the functions of major bodily systems; thus, an impairment that interferes with brain function or reproductive function will qualify as a disability.²¹¹ It also includes mental impairments that interfere with mental processes such as the ability to concentrate, think, or learn, as well as the ability to engage in sexual relations and interact with others.²¹²

The arguments set forth below about pedophilic disorder and the direct threat analysis would apply to the FHA.

206. 42 U.S.C. §§ 12101–12213; 29 U.S.C. §§ 791, 793–94.

207. See 42 U.S.C. § 12201(a) (interpreting the ADA through Rehabilitation Act regulations and case law); 29 U.S.C. § 705(9) (mirroring the ADA’s terminology); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598–600 (1999) (discussing the history of the ADA); *id.* at 618–19 (Kennedy, J., dissenting) (interpreting the ADA and the Rehabilitation Act).

208. See, e.g., Claudia Center & Andrew J. Imparato, *Redefining “Disability” Discrimination: A Proposal to Restore Civil Rights Protections for All Workers*, 14 STAN. L. & POL’Y REV. 321, 334 (2003) (describing the development of state anti-discrimination laws and their relationship to the ADA); *Levy v. Comm’n on Human Rights & Opportunities*, 671 A.2d 349, 355 (Conn. 1996) (reviewing federal precedent concerning employment discrimination for guidance in enforcing state anti-discrimination statutes).

209. 42 U.S.C. § 12102(1) (2012); 29 U.S.C. § 705(9).

210. 29 C.F.R. § 1630.2(h)(2) (2011).

211. See 42 U.S.C. § 12102(2) (“[A] major life activity also includes the operation of a major bodily function, including . . . brain . . . and reproductive functions.”); 29 U.S.C. § 705(9) (referencing the definitions in 42 U.S.C. § 12102).

212. See 42 U.S.C. § 12102(2)(A) (“[M]ajor life activities include . . . learning, reading, concentrating, thinking, communicating, and working.”); 29 U.S.C. § 705(9) (referencing the definitions in 42 U.S.C. § 12102).

This definition would seem to include several instances of individuals living with pedophilic disorder. Pedophilic disorder is a mental illness that can impair major life activities such as reproduction, the ability to engage in sexual relations, and the ability to interact with others.²¹³ Indeed, one of the diagnostic criteria for pedophilic disorder is interpersonal difficulty.²¹⁴

The ADA's definition of disability, however, explicitly excludes "sexual behavior disorders" such as pedophilia.²¹⁵ Congress included this exception to ease Senator Jesse Helms's concerns that the ADA's coverage of mental disorders might protect transvestites.²¹⁶ The Rehabilitation Act similarly excludes pedophilic disorder from its exception of disability.²¹⁷ As a result, individuals living with pedophilic disorder have no legal protection against discrimination based on their mental disorder in employment or in medical treatment, education, and other public accommodations.²¹⁸

This has significant consequences for an individual living with pedophilic disorder. Most notably, he may lose his job and become unemployable if he openly identifies as living with pedophilia or if he fails to hide his disorder adequately, even if he

213. See Schwartz, *supra* note 19 (discussing the lives of those with pedophilic disorder).

214. DSM-V, *supra* note 39, at 697.

215. See 42 U.S.C. § 12211(b) (2012) (listing exclusions from the ADA's disability definition, including sexual behavior disorders, gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs).

216. See Adrienne L. Hiegel, *Sexual Exclusions: The Americans with Disabilities Act as Moral Code*, 94 COLUM. L. REV. 1451, 1473–77 (1994) (discussing the considerations which led to the exclusion of sexual and gender identity disorders from the ADA); *Equality of Opportunity: The Making of the Americans with Disabilities Act*, NATIONAL COUNCIL ON DISABILITY, http://www.ncd.gov/publications/1997/equality_of_Opportunity_The_Making_of_the_Americans_with_Disabilities_Act (last updated July 26, 2010) (last visited Jan. 27, 2015) (summarizing the legislative and political history of the ADA) (on file with the Washington and Lee Law Review); see also 135 CONG. REC. 10,765 (daily ed. Sept. 7, 1989) (summarizing the debate over the ADA and sexual disorders).

217. 29 U.S.C. § 705(20)(F).

218. See Hiegel, *supra* note 216, at 1467–75 (discussing the ADA's standard for disability and its treatment of sexual behavior and gender identity disorders).

has engaged in no criminal conduct.²¹⁹ He may therefore lose his job, and all future job prospects, if he is seen at a group therapy session or participates in an organization that counsels individuals on avoiding offending.²²⁰ He may even face these consequences if he is merely suspected of having pedophilic disorder.²²¹ These consequences underscore the difficulty and importance of remaining closeted, as discussed *supra* in Part III.C.

An individual living with pedophilic disorder also has no right to accommodations that might aid in his treatment or reduce the risk of engaging in sexual abuse. For example, he would be unable to obtain a reasonable accommodation that would allow him to attend therapy on a regular basis.²²² This may seem like a slight inconvenience, but supportive treatment for individuals living with pedophilic disorder is actually quite rare.²²³ In the first thirty-eight months of Prevention Project Dunkelfeld, discussed above, patients traveled an average of two hundred and five kilometers to the outpatient clinic, with some traveling internationally.²²⁴

Some individuals living with pedophilic disorder may also require an employer to accommodate difficulty working with

219. *See id.* at 1480 (“The ADA allows an employer to make distinctions among its workers based not on a general moral code, but according to a specific scheme of sexual ethics.”).

220. *See id.* at 1481 (“Hearing or knowing that an employee is a member of an unprotected group—the statement of an identity—may constitute ‘conduct’ sufficient to make the employee vulnerable to discharge.”).

221. *See id.* at 1481 (“It is the imaginative workings, through fear and stereotype, of employers and fellow employees which make these external activities a sign of ‘unqualified’ employment status.”).

222. *Compare* *Hibbler v. Reg’l Med. Ctr.* at Memphis, 12 F. App’x 336, 339 (6th Cir. 2001) (noting that employer reduced hours so that employee could attend swimming therapy), *and* *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 526 (7th Cir. 1996) (discussing an employer accommodation granting an employee time off to attend TMJ therapy), *with* *Johnson v. City of Blaine*, 970 F. Supp. 2d 893, 912 (D. Minn. 2013) (noting that an employer was not obligated to excuse employee from mandatory overtime in order to attend group therapy for depression because mandatory overtime was an essential function of the job and employee was free to request leave for appointments).

223. *See supra* note 76 and accompanying text.

224. *See* *Beier et al.*, *supra* note 77, at 547 (describing the results of Project Dunkelfeld).

children. As a woman writing on the Virtuous Pedophiles website describes:

I'm very good with children and love being with them. Everyone says so, I wanted to be a teacher growing up. But underneath it all there's always been that attraction that pops up unexpectedly. I try and bury it and that works for a few weeks but then it comes back with force and I feel worse than ever. So I quit [a childcare course] and I couldn't even tell anyone why. They still encourage me to get back into childcare and that is so hard²²⁵

2. Rethinking the Pedophilia Exception

Recognizing pedophilic disorder as a disability is consistent with the goals of the ADA and Rehabilitation Act.²²⁶ The ADA and the Rehabilitation Act were passed to respond to the challenges individuals living with disabilities face in a community that often views them as inferior, isolates them, and denies them social and economic opportunities.²²⁷ While this may be true of several groups of individuals, lawmakers and courts are particularly concerned with the unwarranted and pervasive discrimination individuals with disabilities face.²²⁸

The ADA recognizes that those with mental disorders often face unwarranted fear, stigma, and discrimination.²²⁹ They are isolated from social and economic opportunities based on stereotypes that they are morally weak, violent, erratic, deviant,

225. *Who We Are*, *supra* note 1.

226. *See* 42 U.S.C. § 12101 (2012) (listing the historical context of and purpose for the ADA).

227. *See id.* (including in a statement of findings that “many people with physical or mental disabilities have been precluded from [fully participating in all aspects of society] because of discrimination”); MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY* 305 (2004) (discussing the social stigma surrounding people with disabilities); Korn, *supra* note 111, at 586–87, 605–07 (describing stereotypes and other negative views of the mentally ill).

228. *See* 42 U.S.C. § 12101 (noting the priorities of addressing discrimination against those with disabilities); NUSSBAUM, *supra* note 227, at 305–07 (describing the discrimination that disabled individuals experience); Korn, *supra* note 111, at 605–12 (describing the negative stereotypes of the mentally ill).

229. *See* Korn, *supra* note 111, at 605–15 (cataloging the negative stereotypes of the mentally ill).

sexually unrestrained, and untreatable.²³⁰ They also face unfounded views that their disabilities are less legitimate and that they stem from moral failing.²³¹ Individuals living with mental disorders are isolated and denied employment out of fear that they are prone to violence or crime, even though the correlation between violence and mental illness is weak.²³² They face high unemployment rates despite the fact that most individuals with mental illness can work and, in fact, work may aid their symptoms.²³³ Individuals with mental disorders even face discrimination within the disabled community.²³⁴ As a result, individuals are more likely to remain silent about their disability and forego treatment rather than endure isolation and stigma of mental illness.²³⁵

Pedophilic disorder is no less a mental disorder plagued by stigma and discrimination.²³⁶ It is unchosen, biological in nature, and not within the individual's control.²³⁷ While an individual living with pedophilic disorder remains responsible for his actions, there is nothing blameworthy about having the mental illness of pedophilic disorder.²³⁸ Indeed, many individuals living

230. See *id.* at 605–07 (describing the social stigma of the mentally ill).

231. See *id.* at 605 (“Many believe that if mentally ill people would only try harder, they would get well. In this view, mental illness is due to internal weakness or other personal shortcomings.”).

232. See *id.* at 609–12 (describing the stereotype of violence that mentally ill people face).

233. See *id.* at 587 (“In the United States, 70-90% of persons classified as mentally disabled were unemployed and not seeking work. . . . Moreover, recent studies indicate that people with mental disabilities can work, and that working may decrease symptoms.”).

234. See *id.* at 601–02 (“[S]ome people with mental disorders . . . perceive that the disability rights movement has traditionally excluded people with mental illness. Accordingly, some people with a mental illness feel that they are discriminated against even within the disability community.”).

235. See *id.* at 606 (“The stigma of being diagnosed with a mental illness may cause some to forgo treatment, rather than incur the many disadvantages of being labeled ‘mentally ill.’”).

236. See *supra* note 9 and accompanying text (examining the stigma and isolation surrounding pedophilic disorder).

237. See Berlin & Krout, *supra* note 8, at 155 (describing human sexuality generally); Schwartz, *supra* note 19 (discussing differing views of pedophilia as a mental illness).

238. See Berlin & Krout, *supra* note 8, at 155 (describing human sexuality generally); Schwartz, *supra* note 19 (discussing pedophilia as a mental illness).

with the disorder are often distressed and disgusted by their own desires and have never acted on them.²³⁹

The stigma of living with this mental disorder is perhaps unsurpassed. Individuals living with pedophilic disorder are the most universally despised group in modern society.²⁴⁰ Even among other marginalized groups, those living with pedophilic disorder are outcasts. The LGB community has worked, understandably, to distance themselves from unwarranted comparisons to pedophiles.²⁴¹ The disability rights movement has made no effort to include it among its mental disorder protections.²⁴² The contempt for pedophilia even limits funding for research on the causes and treatment of pedophilic disorder.²⁴³ Those living with pedophilic disorder have no allies and are the allies no one wants.

239. See Schwartz, *supra* note 19 (noting that many people with pedophilia want help and try to control their behavior).

240. See BERING, *supra* note 9, at 156 (describing the stigma associated with people with pedophilia in society); Malón, *supra* note 9, at 1094 (noting that the diagnosis of pedophilia is closely associated with a moral judgment); Bleyer, *supra* note 4 (describing social attitudes towards people with pedophilia and the impact on treatment options); Clark-Flory, *supra* note 3 (noting the social isolation people with pedophilia experience).

241. See Yoshino, *supra* note 17, at 846 (arguing that gays can “cover” by distancing themselves from people with pedophilia); Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 427 (2000) (noting that the gay movement rejects pedophilia because it undermines their legitimacy); Balkin, *supra* note 37, at 2363–64 (noting that a standard attack on homosexuals is to degrade them by associating them with sexual deviants such as pedophiles); Bleyer, *supra* note 4 (describing accusations that pedophilia is driven by a “homosexual agenda” for gay men to have sex with boys); Charles Silverstein, *The Implications of Removing Homosexuality from the DSM as a Mental Disorder*, 38 ARCHIVES SEXUAL BEHAV. 161, 161–62 (2009) (describing that, when fighting for the removal of homosexuality from the DSM, the gay community did not want to discuss implications for other paraphilias, particularly pedophilia); Duncan Osborne, *The Trouble with NAMBLA*, ADVOCATE, Dec. 14, 1993, at 40 (describing the schism between gay rights activists and pedophile activists); Joyce Price, *Pedophiles Resisting Expulsion from Gay Umbrella Organization*, WASH. TIMES, Nov. 27, 1993, at A4 (noting the gay community’s resistance to including people with pedophilia).

242. See Hiegel, *supra* note 216, at 1474–76 (describing the moral qualifications behind the ADA’s definition of disability).

243. See *Tarred and Feathered*, *supra* note 19 (“Fundors don’t want to be associated with pedophilia research. The stigma is too great.”); Ellsworth, *supra* note 42 (“But because of the societal disdain for the disorder, institutions are unwilling to fund pedophilia studies.”).

There are several arguments in favor of excluding pedophilic disorder from anti-discrimination statutes. Most notably, some individuals living with pedophilic disorder may pose an increased danger to others by nature of their mental illness.²⁴⁴ Those living with pedophilic disorder experience urges to commit abuses against children, a particularly vulnerable population.²⁴⁵ Anti-discrimination law should not put children in increased danger of sexual abuse.²⁴⁶

The ADA and the Rehabilitation Act, however, anticipate this issue and incorporate measures to protect public health and safety. Both acts, for example, require that the disabled individual is “otherwise qualified” for the position and does not pose a “direct threat” to the health or safety of others.²⁴⁷ An employer may therefore lawfully discriminate against an individual with a disability if that individual would pose a significant risk to the health or safety of others that could not be eliminated by a reasonable accommodation.²⁴⁸

Courts have, for decades, used the direct threat analysis to balance the need to prevent unwarranted discrimination with concerns about the safety and health of employers. These cases often entail risks of serious injury or death. Courts have considered, for example, potential risk of HIV transmission by

244. See Courtney Flack, *Chemical Castration: An Effective Treatment for the Sexually Motivated Pedophile or an Impotent Alternative to Traditional Incarceration?*, 7 J.L. SOC'Y 173, 174 (2005) (“Sex offenders who commit their crimes against children often struggle with an inappropriate and uncontrollable sexual desire for their child victims. Pedophiles may act on their sexual feelings despite . . . confinement or lengthy incarceration.”).

245. See *id.* at 177 (“The sexual appetite of the pedophile can be dangerously insatiable.”).

246. Similar arguments about individuals who are attracted to adults are less convincing. One might argue, for example, that the logic that prohibits those with pedophilic disorder from caring for children should similarly prohibit heterosexual man from caring for women who lack capacity, such as severely mentally ill or unconscious women. But a defining characteristic of pedophilic disorder is an intense attraction to those who cannot consent. A heterosexual man does not have an attraction that is specific to those who cannot consent. A better analogy would be a man who has an intense attraction to unconscious women; such an attraction would raise valid concerns about his ability to appropriately care for unconscious women.

247. 42 U.S.C. §§ 12112–113 (2012).

248. See 42 U.S.C. § 12111(3) (defining a “direct threat”).

health care workers,²⁴⁹ risk of tuberculosis transmission to school children,²⁵⁰ and the risk posed by a lifeguard's hearing impairment²⁵¹ or a truck driver's visual impairment.²⁵² In the context of mental disorders, courts have considered potential direct threats such as those posed by a surgeon whose manic nature causes him to be unable to successfully complete surgery, or a bus driver who is unable to safely operate a bus due to problems forming judgments, controlling his mood, and responding to stress.²⁵³ Courts have also considered the threat posed by an individual living with a mental disorder that is correlated with violent behavior.²⁵⁴

While the direct threat analysis prioritizes health and safety, it rejects the use of sweeping generalizations about people with mental illness toward this end. The direct threat analysis requires employers to consider the specifics of the individual's mental illness, including the diagnosis, its degree, its

249. See *Estate of Mauro v. Borgess Med. Ctr.*, 137 F.3d 398, 407 (6th Cir. 1998) ("All the evidence, together with the uncontradicted fact that a wound causing an HIV-infected surgical technician to bleed while in the body cavity could have catastrophic results and near certainty of death, indicates that [the worker] was a direct threat.").

250. See *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 285 (1987) (discussing the circumstances under which persons with contagious diseases are included under the ADA).

251. See *Schultz v. Young Men's Christian Ass'n*, 139 F.3d 286, 288–89 (1st Cir. 1998) (considering whether the ability to hear is an essential function of lifeguarding).

252. See *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 569 (1999) (considering whether a truck driver's visual impairment posed a direct threat under the ADA).

253. See *Haas v. Wyo. Valley Health Care Sys.*, 465 F. Supp. 2d 429, 435–36 (M.D. Pa. 2006) (discussing the standards for the direct threat exception and determining it to be a triable issue of fact in this case); *F.F. v. City of Laredo*, 912 F. Supp. 248, 254 (S.D. Tex. 1995) ("In light of the direct threat against public safety posed by his condition, Plaintiff could not perform the 'essential functions' of his job as a passenger bus driver.").

254. See, e.g., Ann Hubbard, *The ADA, the Workplace, and the Myth of the "Dangerous Mentally Ill"*, 34 U.C. DAVIS L. REV. 849, 867 (2001) (summarizing research correlating mental disorders with violent behavior); *McKenzie v. Benton*, 388 F.3d 1342, 1354–55 (10th Cir. 2004) (noting that an individual living with post-traumatic stress disorder posed a threat to health and safety of others, as evidenced by her dangerous behavior, including shooting her off-duty revolver at her father's grave).

manageability, and its behavioral consequences.²⁵⁵ In the context of mental health, for example, fears of violent behavior may not be based on generalizations about the individual's mental disorder. An individualized inquiry must demonstrate that the person at issue poses a serious risk of violence, looking to evidence such as the individual's threatening behavior or previous assaults.²⁵⁶

This individualized inquiry requirement is critical because a general diagnosis of mental illness tells us little about the risk particular individuals pose. Although there is a correlation between certain mental disorders and violence, a diagnosis in itself provides insufficient information to determine whether an individual poses a risk of violence.²⁵⁷ For example, if multiple diagnoses are considered, the rate of violence among those diagnosed with schizophrenia-related disorders, obsessive-compulsive disorder, panic disorder, major depression, or bipolar disorder is five to six times the rate of violence among those with no disorder.²⁵⁸ But the majority of individuals with these diagnoses are still non-violent, and a diagnosis alone provides little predictive value of future violence.²⁵⁹ Individual factors such

255. See Korn, *supra* note 111, at 600 (discussing the stereotypes and generalizations of the mentally ill and how such generalizations can be more personalized).

256. See *McKenzie*, 388 F.3d at 1347–48 (summarizing expert testimony on the direct threat issue as applied to the specific facts of the case).

257. There is a weak correlation between mental disorders and violence. See Hubbard, *supra* note 254, at 870–73 (summarizing epidemiological evidence analyzing the correlation between violence and various mental disorders). This correlation increases depending on the diagnosis, with higher rates of violence among those diagnosed with bipolar disorder and schizophrenia. See Hubbard, *supra* note 254, at 870–71 (noting that schizophrenia and related disorders had the highest rates of violence in the study, with 8% committing a violent act in the preceding year); Seena Fazel et al., *Bipolar Disorder and Violent Crime: New Evidence from Population-Based Longitudinal Studies and Systematic Review*, 67 ARCHIVES GEN. PSYCHIATRY 931, 934 (2010) (“[T]here was an increased risk of violent crime among the individuals with bipolar disorder . . .”).

258. See Hubbard, *supra* note 254, at 871 (“Taking multiple diagnoses into account, the prevalence of violence among all persons with schizophrenia-related disorders, obsessive-compulsive disorder, panic disorder, major depression or bipolar disorder ranged from 10.66% to 12.69%.”).

259. See *id.* (“Although these rates are five to six times the rates of violence by persons with no disorder, they also indicate that seven out of eight persons with schizophrenia and nine of ten persons with major depression did not report

as recent past violence, personal traits such as anger, aggressiveness, and impulsivity, alcohol and drug dependence, personal conflicts and perceived threats and hostility, and active psychotic symptoms are important in predicting violent behavior.²⁶⁰

The direct threat analysis allows the ADA and the Rehabilitation Act to protect public health and safety while rejecting the assumption that individuals with pedophilic disorder are categorically too dangerous to employ. The risk of any individual living with pedophilic disorder committing sexual abuse cannot be discerned from generalizations about the disorder.²⁶¹ While pedophilic disorder is likely a risk factor for offending, macro-level statistics are unable to determine the risk that any one individual living with pedophilic disorder poses. An individualized inquiry is necessary to consider the risks that a specific person with pedophilia poses. Several variables will affect this risk, including: the individual's attitude toward offending and treatment, whether he has previously offended, and whether his mental disorder is co-morbid with other mental disorders, such as ones indicating impulse control or antisocial personality disorder.²⁶² An individual who has never offended and believes child sex abuse is morally wrong will pose far less of a threat than an individual who has offended or believes that children enjoy sexual abuse.

In this way, pedophilic disorder is similar to other mental illnesses that are associated with criminal behavior, and in particular with violence. It is no more a choice than bipolar disorder, can significantly impair an individual's ability to engage in major life activities, and is subject to substantial stigma and discrimination. While pedophilic disorder likely correlates with an increased risk of sexual abuse, having pedophilic disorder does not make one a sexual predator; just as with other mental illnesses, different individuals living with pedophilic disorder will

a single incident of violence.”).

260. See *id.* at 873–85 (reviewing literature on the individual factors likely to contribute to violent behavior).

261. See Schwartz, *supra* note 19 (noting that many people with pedophilia want help and try to control their behavior).

262. See SETO, *supra* note 35, at 150–55 (discussing risks for previous offenders).

pose vastly different types of risks in different contexts.²⁶³ The direct threat analysis protects public health and safety while ensuring that decisions are based on valid risk assessments rather than mere disgust with the mental disorder.

In reality, it is likely that judges and juries will err on the side of finding a direct threat. Unless and until juries and judges see individuals living with pedophilic disorder more openly and safely acting as law-abiding members of society, cases are likely to face reflexive dismissal based on questionable evidence of direct threat. HIV provides a useful case study. Case law for HIV disability claims is replete with decisions in which a court, contrary to medical consensus, found that an individual living with HIV posed a direct threat or was not otherwise qualified for the position because of transmission threat.²⁶⁴ Several circuits accepted even a theoretical chance of transmission as sufficient to demonstrate a direct threat.²⁶⁵ It is likely that individuals living with pedophilic disorder will similarly face a presumption against

263. See Hubbard, *supra* note 254, at 885–86 (describing the wide variety of individual circumstances that can affect the threat presented by a single individual with a mental illness).

264. See, e.g., Waddell v. Valley Forge Dental Assocs., Inc., 276 F.3d 1275, 1281 (11th Cir. 2001) (“[W]e conclude that the record establishes that the district court properly granted summary judgment to Valley Forge because an HIV-infected dental hygienist like Waddell poses a significant risk of HIV transmission to his patients.”); Montalvo v. Radcliffe, 167 F.3d 873, 878 (4th Cir. 1999) (“[A] significant risk to the health and safety of others would exist if [the individual with HIV] were allowed to participate in the group karate classes.”); EEOC v. Prevo’s Family Mkt., Inc., 135 F.3d 1089, 1095 (6th Cir. 1998) (considering whether an employee who may have HIV constitutes a direct threat); Leckelt v. Bd. of Comm’rs of Hosp. Dist. No. 1, 909 F.2d 820, 829 (5th Cir. 1990) (“Although none of Leckelt’s duties apparently fell within the technical definition of an invasive procedure, at least some of these duties provided potential opportunities for HIV transmission to patients.”); see also Katrina Atkins & Richard Bales, *HIV and the Direct Threat Defense*, 91 KY. L.J. 859, 879–90 (2003) (summarizing the different approaches of courts to determining whether HIV constitutes a direct threat); Dawn-Marie Harmon, Comment, *HIV and the ADA: What Is a Direct Threat?*, 55 ME. L. REV. 391, 407–25 (2003) (analyzing the direct threat exception to the ADA across different circuits).

265. See Atkins & Bales, *supra* note 264, at 879–90 (discussing circuits’ differing views of HIV as a direct threat); Harmon, *supra* note 264, at 393 (“[A] showing of a theoretical possibility of transmission is enough to invoke the direct threat exception, even if the odds of transmission are extremely small.”).

their claims. Insofar as this presumption contravenes the requirements of the ADA, it certainly merits concern.²⁶⁶

Another reason to exclude pedophilic disorder from the disability definition is that inclusion would likely increase burdens on employers. At the moment, employers need not justify the decision to fire an individual because he has pedophilic disorder—the pedophilic disorder itself is sufficient justification. ADA protection would require that an employer perform a direct threat analysis before firing the employee, just as he must for individuals living with mental illnesses such as schizophrenia or bipolar disorder. Many courts also place the burden on the employer to prove a direct threat if litigation arises.²⁶⁷

This burden may not be as heavy as many fear. In many circumstances, this would pose little challenge to an employer. A defendant would have a strong argument that an individual living with pedophilic disorder who has a history of child sex abuse poses a direct threat in a position that involved contact with children, particularly if the position creates any possibility that the individual would care for a child. Other circumstances might be more challenging, such as where a plaintiff with no history of offending seeks a position that involves responsibility over children and provides evidence that he poses no threat in the form of testimony from psychiatrists. In other positions, individuals with pedophilic disorder will clearly pose no threat to others, such as a lab technician who works only with blood samples, a computer programmer in an office environment, or a neurosurgeon. In all situations, however, juries and judges are likely to err strongly on the side of finding a direct threat.²⁶⁸

266. I cite it not in approval but to demonstrate that the direct threat is likely to provide robust protection for defendants in this context.

267. See, e.g., *EEOC v. Chrysler Corp.*, 917 F. Supp. 1164, 1171 (E.D. Mich. 1996), *rev'd on other grounds*, 172 F.3d 48 (6th Cir. 1998) (noting that the employer carries the burden of proving a direct threat); *Rizzo v. Children's World Learning Ctrs., Inc.*, 84 F.3d 758, 764 (5th Cir. 1996) (“As with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat.”); see also Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 NW. U. L. REV. 1279, 1283 (2001) (“[T]he employer has the burden of persuading the fact finder that the employee or applicant poses a direct threat in the workplace.”). *But see* *EEOC v. Amego, Inc.*, 110 F.3d 135, 142–44 (1st Cir. 1997) (putting the burden on the plaintiff to prove that he does not pose a direct threat).

268. See *supra* notes 264–265 and accompanying text (predicting how the

Regardless, it is not clear that pedophilic disorder should be categorically denied disability protection provided to other mental disorders simply because litigating such cases burdens employers. It is true that litigating will still pose a burden to employers even if the odds are stacked in their favor. But this is the case for all disabilities. This is true even when the stakes are high, such as when an employer must consider whether an employee's mental disorder makes him violent, whether a physical or mental disability compromises his ability to drive a bus safely, fly a plane, or supervise children or the elderly, or whether the employee poses a risk of transmitting HIV, hepatitis, or other serious illness.²⁶⁹

Another argument against recognizing pedophilic disorder as a disability is it will dilute the rights provided to other individuals living with mental disorders. As discussed above, courts are likely to interpret the direct threat analysis liberally and find direct threats even when they are unsupported by scientific evidence. The resulting case law may be used against other individuals living with mental disorders to diminish their ability to bring anti-discrimination claims. This may be the reason that the disability community has not sought to include those with pedophilic disorder.

While this is a valid claim, it nonetheless seems questionable to deny a group civil rights protections for this reason. If pedophilic disorder is a mental illness that can substantially impair a major life activity, it is dubious to allow these individuals protection against unwarranted discrimination only if it does not adversely affect other disabled individuals. The ADA has thus far stood by controversial decisions to include unpopular groups that raise direct threat issues—most notably individuals with mental illness and HIV.²⁷⁰ It is not clear that pedophilic disorder merits an exceptional response.

courts will handle a direct threat analysis for those with pedophilic disorder).

269. See *supra* notes 249–254 and accompanying text (discussing sample litigation under the ADA).

270. See NATIONAL COUNCIL ON DISABILITY, *supra* note 216 (discussing objections to the inclusion of individuals living with mental illness and HIV). See generally Hubbard, *supra* note 267 (discussing Congress's decision to include in the ADA individuals living with mental illness and use of a narrow direct threat analysis to contend with those who pose threats).

Lawmakers may also exclude pedophilic disorder from disability protections because such protections have an important legitimizing role. Statutes such as the ADA send a message that disability is not a moral failing or adequate reason to exclude individuals from economic, social, and other opportunities.²⁷¹ They serve as a symbolic welcoming of individuals living with disabilities into the mainstream society—indeed, they redefine what mainstream society is and should be.²⁷²

Lawmakers may hesitate to send this message about those living with pedophilic disorder. This may be due, in part, to the conflation of pedophilic disorder and sexual assault and other criminal behavior.²⁷³ It may also be a reaction to those with pedophilic disorder who seek to justify the sexual assault of children.²⁷⁴ Even the mental disorder itself—isolated from the despicable behavior or attitudes of some individuals who live with it—prompts widespread disgust and derision.²⁷⁵

These concerns do not justify distinguishing this mental illness for the purpose of anti-discrimination law. Revulsion for sexual assault and those who attempt to justify it is well founded. But including pedophilic disorder among ADA and Rehabilitation Act protections would not provide civil rights protections for sexual assault or those who promote it. These behaviors are not equivalent to pedophilic disorder, and would be indicators that an individual living with pedophilic disorder poses a direct threat. Pedophilic disorder is not a choice for which an individual is responsible and therefore it is not a moral failing.

271. See Hiegel, *supra* note 216, at 1452 (“The ADA reconfigures our norms of physical capability at the same time that it revises our vision of America, guaranteeing equal political and economic rights to a population traditionally excluded from full participation in American public life.”).

272. See *id.* (“Intended to prohibit the use of myths and stereotypes associated with a disability as a basis for private decisions, the Act is an important symbolic gesture of ‘welcome’ into ‘the mainstream of American society,’ a statement about the respect and dignity of those considered physically or mentally limited.”).

273. See Studer & Aylwin, *supra* note 24, at 776 (describing confusion of pedophilia as a status and describing child sexual abuse).

274. See *supra* note 65 and accompanying text (discussing the attitudes of people with pedophilia toward sexual abuse of children).

275. See *supra* note 9 and accompanying text (summarizing the stereotypes and stigmas surrounding those with pedophilic disorder).

In sum, the challenges involved in granting pedophilic disorder disability protections are not unique to it as a mental illness, and it is questionable that they warrant a categorical exemption from disability protection. The protections of the ADA and the Rehabilitation Act prohibit employers and other parties from excluding individuals with mental disorders based on stereotypes or disgust. It requires them instead to base decisions on evidence and to ensure their concerns are legitimate. If the law accepts that individuals living with pedophilic disorder do, indeed, have a mental disorder, then we should carefully consider our reasons for excluding them from these protections.

The more practical arguments against including pedophilic disorder as a disability should also be weighed against the potential benefits. Recognizing pedophilic disorder as a mental illness under the ADA would improve the ability of individuals living with pedophilic disorder to seek help without fear of negative consequences. At present, an individual who discovers his attraction to children must keep the attraction secret; disclosure could result in the loss of his job, educational opportunities, housing, medical care, and other social and economic opportunities protected by the ADA and Rehabilitation Act. These consequences disincentivize individuals living with pedophilic disorder from seeking treatment that could assist them in refraining from illegal activities such as sexual assault or the consumption of child pornography. Distinguishing pedophilic disorder as undeserving of legal protections granted to other mental illnesses also legitimizes the stigma of this mental illness that keeps those suffering from it from seeking help.²⁷⁶

The nature of the ADA and the Rehabilitation Act protections may also help prevent individuals from committing criminal acts. In order to benefit from these civil rights protections, an individual must identify as or be regarded as having a disability. Such identification is inconsistent with the tactics of a sexual predator, who relies on his sexual attraction to children remaining secret.²⁷⁷ Individuals living with pedophilic

276. See Feerman, *supra* note 9, at 564 (describing stigma as discouraging individuals from seeking help for pedophilia).

277. See Gladwell, *supra* note 86 (describing the strategies of sexual predators).

disorder will also be more likely to pass the direct threat test if they provide evidence of treatment. Accommodations such as the ability to attend therapy sessions or avoid contact with children are similarly uncondusive to sexual predation tactics. ADA and Rehabilitation Act protection therefore alerts employers to an individual's disorder and encourages the individual to seek accommodations to minimize any potential threat he or she poses to others.

B. Civil Commitment Law

While anti-discrimination laws provide increased civil rights protections for those living with mental disorders, civil commitment laws allow the state to limit individual freedom based in part on mental illness. Ordinarily, states can civilly commit an individual under very limited circumstances. Part IV.B argues that Sexually Violent Predator (SVP) statutes lower the standard for civil commitment of people living with pedophilic disorder and, in doing so, raise several potential conflicts with important constitutional and criminal law principles. While it often is valid to compromise the liberties of some in order to protect the safety of others,²⁷⁸ a system that relies on unwarranted assumptions and questionable science is a poor means to accomplish this goal.

1. Civil Commitment: Justifications and Limitations

Until recently, civil commitment for mental health disorders was quite limited. The Due Process Clause requires states seeking to civilly commit an individual to demonstrate clear and convincing evidence that the person is (1) mentally ill and (2) dangerous to himself or others.²⁷⁹ While some individuals do need long-term care, civil commitment generally focuses on

278. See Schulhofer, *supra* note 18, at 84 (noting that public interest can outweigh an individual's liberty interests).

279. See generally *Foucha v. Louisiana*, 504 U.S. 71, 77–84 (1992); *Addington v. Texas*, 441 U.S. 418, 426–32 (1979); *O'Connor v. Donaldson*, 422 U.S. 563, 574–76 (1975); Zander, *supra* note 18, at 18–19; Schulhofer, *supra* note 18, at 70.

providing care only as long as an individual poses a threat to himself or others.²⁸⁰

The strict requirements of these laws reflect their basis in a state's police and *parens patriae* powers.²⁸¹ A state's *parens patriae* powers allow it to stand in as guardian or protector for those who are unable to protect themselves because they lack capacity or competence.²⁸² Involuntary civil commitment generally applies to those who are not competent to make their own decisions—*unable* to understand the consequences of their actions as opposed to merely unwilling to abide by the law. By standing in *parens patriae* to them, a state protects not only society, but also the committed individual who cannot appreciate or control his actions.²⁸³

These justifications are vital to the constitutionality of civil commitment. The Supreme Court has held that civil commitment is unconstitutional unless the individual has a valid mental disorder; otherwise, it might be construed as punishment for future crimes.²⁸⁴ The American Psychiatric

280. For example, many states' SVP commitment laws contrast their long-term commitment with the short-term commitment goals of pre-existing civil commitment statutes. *See, e.g.*, FLA. STAT. § 394.910 (2014); IOWA CODE § 229A.1 (2014); WASH. REV. CODE § 71.09.010 (2014).

281. *See Addington*, 441 U.S. at 426

The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.

See generally John Kip Cornwall, *Understanding the Role of the Police and Parens Patriae Powers in Involuntary Civil Commitment Before and After Hendricks*, 4 PSYCHOL. PUB. POL'Y & L. 377, 377 (1998); Gottlieb, *supra* note 18, at 1035; Zander, *supra* note 18, at 17.

282. *See Addington*, 441 U.S. at 426 (discussing states' *parens patriae* powers); Cornwall, *supra* note 281, at 379–90 (discussing the history of *parens patriae* authority over the mentally ill).

283. *See* Dora W. Klein, *When Coercion Lacks Care: Competency to Make Medical Treatment Decisions and Parens Patriae Civil Commitments*, 45 U. MICH. J.L. REFORM 561, 561–62 (2012) (describing *parens patriae* power in the context of civil commitment); Elizabeth A. Weeks, *The Newly Found "Compassion" For Sexually Violent Predators: Civil Commitment and the Right to Treatment in the Wake of Kansas v. Hendricks*, 32 GA. L. REV. 1261, 1274 (1998) (same).

284. *See Foucha*, 504 U.S. at 77–83 (requiring both mental illness and dangerousness for commitment); Frances et al., *supra* note 111, at 377–78

Association supports this limitation and recommends that civil commitment be limited to persons who have a “severe mental disorder” and “lack capacity to make a reasoned treatment decision.”²⁸⁵ Many state civil commitment statutes imply that psychosis, which entails some sort of loss of contact with reality, is required for such commitment.²⁸⁶ Prior to the 1990s, civil commitment proceedings were almost exclusive to persons with psychosis.²⁸⁷

Criminal law theory also limits the extent to which individuals can be detained for offenses they could commit. Retributivism, the dominant theory in criminal law, entails a presumption of individual freedom and allows detention only insofar that it is morally justified.²⁸⁸ It allows criminal punishment of individuals only in accordance with their moral desert.²⁸⁹ Retributivism does not condone the punishment of

(discussing the requirement of a mental abnormality coupled with dangerousness as a predicate for civil commitment); Gottlieb, *supra* note 18, at 1037–38 (describing *Foucha* and the invalidity of preventive detention); Prentky et al., *supra* note 168, at 359, 362 (“[I]t is the presence of a mental abnormality that saves SVP laws from being unconstitutional preventive detention.”). Justice White’s plurality opinion in *Foucha* required states to justify commitment with clear and convincing evidence that a person is mentally ill and dangerous. See *Foucha*, 504 U.S. at 76 n.3 (“[Psychiatric] opinion is reliable enough to permit the courts to base civil commitments on clear and convincing medical evidence”); see also Zander, *supra* note 18, at 30–32 (discussing Justice White’s plurality opinion in *Foucha*). Justice O’Connor’s concurring opinion in *Foucha* stated civil commitment requires “some medical justification,” or else the connection between the nature and purposes of confinement would be absent. *Foucha*, 504 U.S. at 88 (O’Connor, J., concurring).

285. Zander, *supra* note 18, at 19; see also Gottlieb, *supra* note 18, at 1039 (describing how a Kansas statute limited civil commitment to individuals detached from reality or unable to care for themselves).

286. See Zander, *supra* note 18, at 18–19 (detailing the major court decisions that addressed the scope of a state’s power to civilly commit individuals).

287. *Id.* at 32.

288. See Kimberly Kessler Ferzan, *Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible*, 96 MINN. L. REV. 141, 149–51 (2011) (describing justifications for punishment under theories of retributivism); Morse, *supra* note 18, at 58 (“For people who are dangerous because they are disordered, the usual presumption in favor of maximum liberty yields”).

289. See Henry M. Hart, *The Aims of Criminal Law*, 23 L. & CONTEMP. PROB. 401, 412 (1958) (“[I]t is necessary . . . that the violation was blameworthy and, hence, deserving of the moral condemnation of the community.”); Ferzan, *supra* note 288, at 149; Gottlieb, *supra* note 18, at 1033–34 (describing how criminal

individuals who cannot understand or control their actions because such individuals are not morally blameworthy. Retributivism also rejects punishment based on purely preventive grounds because it punishes those who have yet to act in a morally blameworthy way.²⁹⁰ Such punishment does not accord with retributivism's respect for individual autonomy because it fails to provide individuals the opportunity to choose to comply with the law.²⁹¹

Most criminal law scholarship distinguishes and justifies civil commitment on the grounds that it is non-punitive.²⁹² Civil

law gives the state the right to assign moral blame); Schulhofer, *supra* note 18, at 80–83 (arguing criminal punishment can be only for voluntary acts and in proportion to blameworthiness of those acts, and this cannot be trumped by concerns about future dangerousness).

290. See Ferzan, *supra* note 288, at 178, 183–84 (discussing preventive interference under retributivism); Morse, *supra* note 18, at 58 (“There is no ‘pure’ prevention—the confinement of dangerous people without desert or disease.”); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1439–41 (2001) (“[N]o person deserves punishment before committing an offense.”); Schulhofer, *supra* note 18, at 91 (arguing that to quarantine a diseased person in advance would violate her autonomy if she could avoid transmitting the disease to others through her conduct); see also R.A. DUFF, CRIMINAL ATTEMPTS 389 (1997) (making similar arguments against criminalizing preparatory steps).

291. See Ferzan, *supra* note 288, at 177–78 (discussing retributivism's objection that pure prevention fails to take people's autonomy seriously); Morse, *supra* note 18, at 57–58 (arguing that respect for autonomy constrains state intervention to instances of desert or disease); Robinson, *supra* note 290, at 1434–41 (describing the conflict between punishment based on dangerousness and punishment based on desert); Schulhofer, *supra* note 18, at 91 (arguing that individuals are not responsible for harms that are not the result of chosen actions).

292. See Morse, *supra* note 18, at 57–58 (“Such deprivations are forms of greater or lesser quarantine and may include ‘treatment,’ but in theory they are not punishment.”). There is debate among retributivist scholars about whether detention based on predictions of dangerousness constitutes punishment. See, e.g., *id.* at 58 (discussing the justification of non-punitive intervention for non-responsible people); Robinson, *supra* note 290, at 1444–46 (discussing the controversy surrounding the preventive detention legislation of the 1960s); Ferzan, *supra* note 288, at 180–84 (examining the bases for interference in civil and criminal contexts); Douglas Husak, *Lifting the Cloak: Preventive Detention as Punishment*, 48 SAN DIEGO L. REV. 1173, 1180–91 (2011) (arguing that preventive detention constitutes punishment in some circumstances). Doug Husak, for example, argues that civil commitment is punishment if it involves a deprivation of freedom that the state intentionally uses to stigmatize an individual. Husak, *supra*, at 1188–91. Husak would therefore classify SVP commitment as punishment if the state has a punitive intention. See *id.* at

commitment is limited to those who are unable to exercise their autonomy.²⁹³ Retributivism, therefore, generally requires that the state limit civil commitment to those who have mental illnesses that significantly compromise their ability to choose to act in accordance with the law.²⁹⁴ Failure to make this distinction could result in the detention of individuals out of fear of the choices they will make. As preventive detention, this would fail to respect the individual's autonomy to decide whether to commit an

1189–90 (noting that involuntary confinement of the dangerous mentally ill differs from punishment because it lacks punitive intention). Husak argues, however, that retributivism allows preventive punishment only when the state demonstrates the individual has certain characteristics that make him pose substantial danger of future harm. *Id.* at 1191–1202. SVP statutes do not meet these criteria because they fail to require sufficient evidence that an individual has a mental illness that creates a substantial risk they will commit a sex offense, as discussed above. Husak also requires that the individual has control over the relevant characteristics, which would preclude consideration of pedophilic disorder. *Id.* at 1198–99 (“As long as we ensure that defendants have control over these characteristics, they need not worry that they could not possibly lose the status that rendered them eligible for liability in the first place.”).

293. See Gottlieb, *supra* note 18, at 1045 (discussing constitutionally required justifications for civil commitment); Stephen J. Morse, *Neither Desert Nor Disease*, 5 LEGAL THEORY 265, 269–70 (1999) (“[A]gents incapable of rationality do not actually have to cause harm to justify nonpunitive intervention.”).

294. See Ferzan, *supra* note 288, at 162 (arguing that preventive interference is comparable to the elimination of an “Innocent Threat” in the self-defense context); Morse, *supra* note 293, at 269–70 (comparing irrational agents to other dangerous but irresponsible instrumentalities, including hurricanes, microbes, and wild beasts). Civil commitment may be used in other circumstances, such as quarantine. Such commitment is likewise considered nonpunitive and limited to those unable to control whether they harm others. As both Schulhofer and Gottlieb have noted, we ought not to civilly commit an infectious individual who is able to control disease transmission purely on the grounds that we fear he will not act responsibly. See Schulhofer, *supra* note 18, at 91 (arguing that quarantining an infectious individual who can control transmission of the disease would violate her autonomy as a responsible person); Gottlieb, *supra* note 18, at 1045–46 (arguing that the state may quarantine infectious individuals because they may have no way of preventing themselves from infecting others). We ought not to quarantine individuals with HIV, for example, because they are able to control disease transmission. Such quarantine would amount to preventive detention based on our fear about their future choices and would not adequately respect their autonomy. See Schulhofer, *supra* note 18, at 91 (“[I]f we simply fear that she may choose to ignore the sanctions deployed to prevent such misconduct, then a decision to quarantine her in advance is a decision to . . . violate her autonomy . . .”).

offense; as punishment, it would improperly punish an individual who has not yet committed a culpable act.²⁹⁵

2. The Content of Sexually Violent Predator Civil Commitment Laws

SVP laws use civil commitment to detain sex offenders from society when they cannot be held by the criminal justice system.²⁹⁶ For one who is convicted of an offense, civil commitment occurs after the individual has served his prison sentence.²⁹⁷ SVP law requirements vary by jurisdiction but share common traits: (1) a connection with a sexual offense;²⁹⁸ (2) a mental abnormality of some sort;²⁹⁹ (3) the mental abnormality somehow predisposes the actor to commit sexual offenses;³⁰⁰ and (4) the actor must have some threshold likelihood to offend if released.³⁰¹

The first requirement is that the individual usually must have some connection with a sexual offense. Two things are

295. See Schulhofer, *supra* note 18, at 92–93 (“[A] free society should never resort to regulatory confinement measures that bypass the individual’s capacity for autonomous choice.”); Ferzan, *supra* note 288, at 177–78 (“[P]ure prevention . . . fails to take people’s autonomy seriously, to announce rules, to give individuals opportunities to comply, and to treat individuals as responsible agents when we punish them.”).

296. See Jill S. Levenson, *Policy Interventions Designed to Combat Sexual Violence: Community Notification and Civil Commitment*, in IDENTIFYING AND TREATING SEX OFFENDERS: CURRENT APPROACHES, RESEARCH, AND TECHNIQUES, 17, 19 (Robert Geffner et al. eds., 2003) (describing that civil commitment statutes are used to detain dangerous sex offenders who can no longer be held by the criminal justice system); Frances et al., *supra* note 111, at 375, 376 (discussing the emergence of SVP civil commitment statutes in order to detain dangerous offenders who would otherwise be released).

297. See Frances et al., *supra* note 111, at 375 (“Individuals identified as an SVP/SDP are civilly committed for treatment in designated mental health facilities after serving their prison terms.”).

298. See *infra* notes 302–307 and accompanying text (comparing how different states define and treat the predicate sexual offense).

299. See *infra* notes 308–312 and accompanying text (comparing how different states define the underlying mental disorder).

300. See *infra* notes 313–319 and accompanying text (comparing different states’ requirements of predisposition to commit sexual offenses).

301. See *infra* notes 320–325 and accompanying text (comparing different states’ requirements of likelihood to re-offend).

notable about this requirement. First, the type of offense and its connection to sexual violence can vary significantly. Some states define a category of “sexually violent” offenses,³⁰² while others include any offense that a judge determines was sexually violent.³⁰³ Second, conviction is not necessary in many jurisdictions. Some states require that the individual was convicted, found not guilty by reason of insanity, or deemed incompetent to stand trial;³⁰⁴ others require only that the individual was charged;³⁰⁵ and neither federal law nor Minnesota require a formal charge.³⁰⁶ Some states also include minors adjudicated delinquent.³⁰⁷

Several jurisdictions do not require a formal mental disorder diagnosis. In *Kansas v. Hendricks*,³⁰⁸ the Supreme Court upheld legislatures’ ability to define the parameters of a mental disorder

302. See, e.g., ARIZ. REV. STAT. ANN. § 36-3701 (2014) (enumerating the offenses included under the term “sexually violent offense”); 725 ILL. COMP. STAT. 207 / 5 (2014) (same).

303. See, e.g., N.J. STAT. ANN. § 30:4-27.26 (West 2014) (providing that “sexually violent offense” means any offense which the court finds should be considered a sexually violent offense); S.C. CODE ANN. § 44-48-30 (2014) (providing that, in addition to certain enumerated offenses, “sexually violent offense” means any offense which the court finds should be considered a sexually violent offense).

304. See, e.g., ARIZ. REV. STAT. ANN. § 36-3701(7) (defining “sexually violent person”); WIS. STAT. § 980.01(7) (2014) (providing the definition of “sexually violent person,” which requires that one have been convicted, adjudicated delinquent, or found not guilty by reason of insanity of a sexually violent offense).

305. See, e.g., IOWA CODE § 229A.2(11) (2014) (providing the definition of “sexually violent predator,” which requires that one has been convicted or charged with a sexually violent offense); KAN. STAT. ANN. § 59-29a02(a) (2014) (providing that “sexually violent predator” means “any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence”).

306. See, e.g., 18 U.S.C. § 4247(a)(5) (2012) (requiring only that the person has “engaged or attempted to engage” in sexually violent conduct or child molestation); MINN. STAT. § 253D.02 (2014) (requiring only that the individual has engaged in “harmful sexual conduct”).

307. See, e.g., MASS. GEN. LAWS ch. 123A, § 1 (2014) (providing the definition of “sexually dangerous person,” which includes one who has been adjudicated as a delinquent juvenile or youthful offender by reason of a sexual offense); 42 PA. CONS. STAT. § 6402 (2014) (providing a separate definition of “sexually violent delinquent child”).

308. 521 U.S. 346 (1997).

sufficient for SVP commitment without relying on psychiatric terminology.³⁰⁹ Legislatures therefore drafted into SVP statutes terms such as mental “abnormality,”³¹⁰ mental “dysfunction,”³¹¹ and “behavioral abnormality.”³¹² The few that require a “mental disorder,” usually define the term broadly to include “a congenital or acquired condition affecting the emotional or volitional capacity.”³¹³

This mental disorder or abnormality must also undermine the actor’s ability to control his sexually violent impulses.³¹⁴ Unlike ordinary civil commitment laws, SVP laws do not require mental incapacity; they include individuals who are able to understand their actions and their consequences.³¹⁵ Instead, SVP statutes rely on the concept that these individuals are more predisposed to commit offenses because they have more difficulty controlling their behavior.³¹⁶

309. *Id.* at 358–60.

310. *See, e.g.*, 18 U.S.C. § 4247(a)(6) (including “abnormality” in the definition of “sexually dangerous to others”); FLA. STAT. § 394.912(5) (2014) (defining “mental abnormality”); IOWA CODE § 229A.2 (2014) (same); KAN. STAT. ANN. § 59-29a02 (2014) (same); MO. REV. STAT. § 632.480 (2014) (same); N.H. REV. STAT. ANN. § 135-E:2 (2014) (same); N.J. STAT. ANN. § 30:4-27.26 (West 2014) (same); N.Y. MENTAL HYG. § 10.03 (McKinney 2014) (same); 42 PA. CONS. STAT. ANN. § 6402 (2014) (same); S.C. CODE ANN. § 44-48-30 (2014) (same); VA. CODE ANN. § 37.2-900 (2014) (same); WASH. REV. CODE § 71.09.020(18) (2014) (same).

311. *See* MINN. STAT. § 253D.02 (2014) (including “dysfunction” in the definition of “sexually dangerous person”); N.D. CENT. CODE § 25-03.3-01 (2014) (including “dysfunction” in the definition of “sexually dangerous individual”).

312. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.003(a) (West 2013) (including “behavioral abnormality” in the definition of “sexually violent predator”).

313. *See, e.g.*, 725 ILL. COMP. STAT. 207 / 5 (2014) (defining “mental disorder”); WIS. STAT. § 980.01 (2014) (same). Some states also use this or a similar definition for mental abnormality. *See, e.g.*, IOWA CODE § 229A.2 (2014) (defining “mental abnormality”); KAN. STAT. ANN. § 59-29a02 (2014) (same); MO. REV. STAT. § 632.480 (2014) (same); N.J. STAT. ANN. § 30:4-27.26 (2014) (same).

314. *See* Frances et al., *supra* note 111, at 375 (detailing the criteria necessary for categorizing an individual as an SVP).

315. *See* Hamilton, *supra* note 18, at 541–43 (“[T]he SVP law model represents gap-filling between desert and disease in which normal responsibility rules for criminal versus civil control are blurred.”).

316. *See id.* (“[C]ognitive plus volitional impairments substantiate a presumption of risk of future dangerousness and, in turn, are used by officials to justify segregation and containment of sex offenders.”).

In practice, states have often made this requirement quite vague.³¹⁷ Federal law requires that the mental disorder cause “serious difficulty refraining from sexually violent conduct or child molestation.”³¹⁸ Several jurisdictions require the mental disorder “predispose the person to commit” acts of sexual violence,³¹⁹ with some specifying the predisposition must make them a danger or menace “to the health and safety of others.”³²⁰

Many jurisdictions also specifically require some likelihood to engage in sexually violent acts in the future. This likelihood need

317. See Frances et al., *supra* note 111, at 376–77 (arguing that most states’ definitions of the qualifying mental disorders for SVP laws are vague and difficult to apply).

318. 18 U.S.C. § 4247(a)(6) (2012); see also VA. CODE ANN. § 37.2-900 (2014) (requiring that the individual “find[] it difficult to control his predatory behavior”).

319. See, e.g., ARIZ. REV. STAT. ANN. § 36-3701(7) (2014) (requiring a mental disorder that makes the person likely to engage in acts of sexual violence); FLA. STAT. § 394.912(5) (2014) (requiring a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence); 725 ILL. COMP. STAT. 207 / 5 (2014) (requiring a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence); IOWA CODE § 229A.2 (2014) (requiring a mental abnormality that makes the person likely to engage in predatory acts constituting sexually violent offenses); KAN. STAT. ANN. § 59-29a02 (2014) (requiring a mental abnormality or personality disorder that makes the person likely to engage in repeat acts of sexual violence); MO. REV. STAT. § 632.480 (2014) (requiring a mental abnormality that makes the person more likely than not to engage in predatory acts of sexual violence); N.J. STAT. ANN. § 30:4-27.26 (West 2014) (requiring a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence); WASH. REV. CODE § 71.09.020(18) (2014) (requiring a mental abnormality or personality disorder that makes the person likely to engage in predatory acts of sexual violence); WIS. STAT. § 980.01 (2014) (requiring a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence).

320. See, e.g., ARIZ. REV. STAT. ANN. § 36-3701(5) (2014) (requiring predisposition to such a degree as to render the person a danger to the health and safety of others); IOWA CODE § 229A.2 (2014) (requiring predisposition to a degree that would constitute a menace to the health and safety of others); KAN. STAT. ANN. § 59-29a02 (2014) (same); MO. REV. STAT. § 632.480 (2014) (same); N.H. REV. STAT. ANN. § 135-E:2 (2014) (requiring propensity to such a degree that the person has serious difficulty in controlling his behavior as to pose a potentially serious likelihood of danger to others); WASH. REV. CODE § 71.09.020(8) (2014) (requiring predisposition to commit criminal sexual acts in a degree constituting such a person as a menace to the health and safety of others).

not be particularly strong. Most states require only that the individual is “likely” to engage in acts of sexual violence.³²¹ Some jurisdictions require that the state show it is “more likely than not” that the individual will commit a future act of sexual violence.³²² Other states define it as “such a degree as to pose a menace to the health and safety of others.”³²³ New Hampshire requires that “the person has serious difficulty in controlling his or her behavior as to pose a potentially serious likelihood of danger to others.”³²⁴ Others do not define “likely” at all.³²⁵ California, which does not define “likely” in the statute, instructs

321. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-3701(7) (2014) (requiring that the person is likely to engage in acts of sexual violence); FLA. STAT. § 394.912(5) (2014) (same); IOWA CODE § 229A.2 (2014) (requiring that the person will, more likely than not, engage in acts of a sexually violent nature); KAN. STAT. ANN. § 59-29a02 (2014) (requiring that the person is likely to engage in repeat acts of sexual violence); MASS. GEN. LAWS ch. 123A, § 1 (2014) (requiring the person be likely to engage in sexual offenses); MINN. STAT. § 253D.02 (2014) (requiring that the person is likely to engage in acts of harmful sexual conduct); N.H. REV. STAT. ANN. § 135-E:2 (2014) (requiring that the person pose a potentially serious likelihood of danger to others); MO. REV. STAT. § 632.480 (2014) (requiring that the person will, more likely than not, engage in predatory acts of sexual violence); N.J. STAT. ANN. § 30:4-27.26 (West 2014) (requiring that the person is likely to engage in acts of sexual violence); N.Y. MENTAL HYG. § 10.03 (McKinney 2014) (requiring that the person is likely to be a danger to others and to commit sex offenses); S.C. CODE ANN. § 44-48-30 (2014) (requiring that the person is likely to engage in acts of sexual violence); TEX. HEALTH & SAFETY CODE ANN. § 841.003(a) (2013) (requiring that the person is likely to engage in a predatory act of sexual violence); VA. CODE ANN. § 37.2-900 (2014) (requiring that the person is so likely to commit sexually violent offenses that he constitutes a menace to the health and safety of others).

322. *See, e.g.*, IOWA CODE § 229A.2 (2014) (requiring that the person will, more likely than not, engage in acts of a sexually violent nature); MO. REV. STAT. § 632.480 (2014) (requiring that the person will, more likely than not, engage in predatory acts of sexual violence); WIS. STAT. § 980.01 (2014) (requiring that the person will, more likely than not, engage in one or more acts of sexual violence).

323. *See, e.g.*, FLA. STAT. § 394.912(4) (2014) (requiring propensity of such a degree as to pose a menace to the health and safety of others); KAN. STAT. ANN. § 59-29a02 (2014) (requiring propensity of such a degree as to pose a menace to the health and safety of others); NEB. REV. STAT. § 83-174.01 (2014) (same); N.J. STAT. ANN. § 30:4-27.26 (2014) (requiring that the person pose a threat to the health and safety of others); S.C. CODE ANN. § 44-48-30 (2014) (requiring that the person pose a menace to the health and safety of others).

324. N.H. REV. STAT. ANN. § 135-E:2 (2014).

325. *See, e.g.*, MASS. GEN. LAWS ch. 123A, § 1 (2014) (omitting “likely” as a statutorily defined term); MINN. STAT. § 253D.02 (2014) (same); N.Y. MENTAL HYG. § 10.03 (2014) (same); TEX. HEALTH & SAFETY CODE ANN. § 841.003(a) (2013) (same); VA. CODE ANN. § 37.2-900 (2014) (same).

jurors that the term “does not mean that it must be more probable than not that there will be an instance of re-offending.”³²⁶

3. Implications for Pedophilic Disorder

SVP statutes do not apply to every individual living with pedophilic disorder, nor do they apply exclusively to those with pedophilic disorder. An individual living with pedophilic disorder usually does not fall within the purview of the SVP statute unless he is suspected of committing an offense, generally either a sexually violent or sexually motivated offense.³²⁷ These individuals also need not be diagnosed with pedophilic disorder to be subject to civil commitment under SVP statutes. Other diagnoses, such as antisocial personality disorder, may support SVP civil commitment.

Despite these caveats, this Article addresses SVP civil commitment because pedophilic disorder is a major predictor of SVP commitment.³²⁸ Pedophilic disorder is one of the—if not the—most common diagnosis in support of SVP commitment.³²⁹ A

326. See CAL. WELF. & INST. CODE §§ 6600–6609.3 (West 2014) (omitting “likely” as a statutorily defined term); CAL. JURY INSTR. CRIM. 4.19 (defining “likely” for juries in the context of deciding commitment of an alleged sexually violent predator).

327. See Beech & Harkins, *supra* note 39, at 529 (noting that those who sexually abuse children are not exclusively those who are classified as pedophilic, but are a wide-ranging group); Zander, *supra* note 18, at 36 (discussing the prevalence of paraphilia diagnoses among those committed under SVP statutes); Hamilton, *supra* note 18, at 553–54 (discussing the statistical correlation between paraphilia diagnosis and civil commitment).

328. See Beech & Harkins, *supra* note 39, at 529 (describing the correlation between pedophilic disorder and civil commitment); Zander, *supra* note 18, at 36 (describing the statistical connection between pedophilia diagnosis and civil commitment); Hamilton, *supra* note 18, at 553–54 (examining statistically the role diagnoses of sexual deviance play in imposing preventive detention).

329. See Beech & Harkins, *supra* note 39, at 529 (“[Pedophilia] is the most common diagnosis in civil commitment procedures”); Zander, *supra* note 18, at 36 (“Pedophilia . . . is one of the most frequently made diagnoses in SVP cases.”); Hamilton, *supra* note 18, at 553–54 (“The strong influence of the paraphilias in committal proceedings is consistently shown by statistical analyses.”). The vast majority of civil commitments rely on a diagnosis of pedophilic disorder or hebephilic disorder. Hebephilia is an intense sexual interest in young adolescents, and is often confused with pedophilia. At present,

diagnosis of pedophilic disorder raises the odds of civil commitment by approximately 4,500%; it has an even higher correlation with a recommendation for civil commitment than an individual's statement that he intends to commit a new sex crime.³³⁰ Courts often rely on pedophilic disorder as de facto evidence that the individual's volitional control is compromised or that he is likely to re-offend.³³¹

Taken as a whole, SVP statutes expand the state's power to civilly commit, and do so in a way that has especially severe repercussions for individuals living with pedophilic disorder. The consequences of SVP statutes for individuals living with pedophilic disorder are even more severe given the statutes' scopes. Most statutes do not require a criminal conviction, and the federal statute does not require an arrest. Moreover, unlike ordinary civil commitment, SVP statutes are specifically drafted to ensure long-term detention.³³² Some states explicitly cite the

the American Psychiatric Association does not recognize hebephilia disorder in the DSM-V. *See* DSM-V, *supra* note 39 (omitting hebephilia from the recognized mental disorders). However, SVP civil commitment proceedings often cite the general category of unspecified paraphilias, arguing that hebephilia is an unspecified paraphilia. *See* Zander, *supra* note 18, at 36 (“[T]he paraphilias are commonly the diagnostic basis for the mental abnormality or mental disorder that is alleged as part of SVP commitment proceedings.”).

330. *See* Jill S. Levenson & John W. Morin, *Factors Predicting Selection of Sexually Violent Predators for Civil Commitment*, 50 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 609, 622 tbl.3 (2006) (providing data on the effect of pedophilia diagnosis on the odds of civil commitment); *see also* Hamilton, *supra* note 18, at 554 (“Pedophilia was also highly correlated and had a statistical effect greater even than the number of previous victims or the individual's statement of intent to commit a new sex crime.”).

331. *See, e.g.,* Shindel & Moser, *supra* note 128, at 927 (stating that paraphilia diagnoses have been misused in criminal and civil commitment proceedings as indication that individuals cannot control their behavior); Hamilton, *supra* note 18, at 554–55 (describing cases in which pedophilia was analogized to lifelong addiction); *Commonwealth v. Stephens*, 74 A.3d 1034, 1040–42 (Pa. Super. Ct. 2013) (referring to expert testimony that defendant was likely to re-offend because pedophilia was incurable, lifelong disorder); *United States v. Wetmore*, 766 F. Supp. 2d 319, 336–37 (D. Mass. 2011) (citing expert testimony that the defendant was likely to re-offend because of pedophilia diagnosis); *In re Kennedy*, 578 S.E.2d 27, 29 (S.C. Ct. App. 2003) (finding pedophilia diagnosis alone sufficient to demonstrate sufficient likelihood of re-offending).

332. *See* CAL. WELF. & INST. CODE § 6600–6609.3 (West 2014) (providing that a determination of danger to the health and safety of others does not require proof of a recent overt act while the offender is in custody); FLA. STAT. § 394.910

need to avoid using ordinary civil commitment proceedings, which are “primarily designed to provide short-term treatment to individuals with serious mental disorders and then return them to the community.”³³³ Permanent detention might in fact be the goal of such statutes.³³⁴ Several states’ legislative findings state that the prognosis for curing sexually violent offenders is poor, suggesting doubt about rehabilitating those offenders.³³⁵

4. *Rethinking Sexually Violent Predator Statutes*

SVP statutes contain an interesting mix of requirements. They provide for civil commitment of individuals who understand their actions but nonetheless have a mental disorder that affects their ability to control their behavior. The rationale of the statute therefore relies heavily on the state’s ability to distinguish individuals who have some sort of volitional impairment that makes them so dangerous that detention is warranted.

The concept of volitional impairment is central to the constitutionality of SVP laws. In *Kansas v. Crane*,³³⁶ the Court held that the statutory requirements for SVP commitment must be able to distinguish those who have a mental abnormality that makes them dangerous from the ordinary criminal.³³⁷ To this end, it required that statutes show a degree of volitional impairment.³³⁸ The *Crane* Court held that states need not show that individuals it seeks to commit have complete inability to

(2014) (“It is . . . the intent of the Legislature to create a civil commitment procedure for the long-term care and treatment of sexually violent predators.”); WASH. REV. CODE § 71.09.010 (2014) (“The legislature further finds that the . . . treatment needs of this population are very long term . . .”).

333. WASH. REV. CODE § 71.09.010 (2014).

334. Frances et al., *supra* note 111, at 375 (noting that civil commitment occurs after serving one’s prison term and lasts for an indefinite period).

335. See Schulhofer, *supra* note 18, at 75 (discussing legislative findings in the Washington statute).

336. 534 U.S. 407 (2002).

337. See *id.* at 412–13 (recognizing that lack of control must be sufficiently proven to distinguish the dangerous sexual offender from the dangerous, but typical, recidivist); Zander, *supra* note 18, at 30–31 (discussing the holding in *Crane*).

338. *Crane*, 534 U.S. at 412 (rejecting commitment without any lack-of-control determination).

control their actions; indeed, the Court questioned whether this was even possible.³³⁹ But the Court required that states demonstrate that individuals show “serious difficulty” in refraining from sexually violent behavior.³⁴⁰

Yet SVP statutes, and the *Crane* decision that upheld them, rely on questionable assumptions about the psychology of those living with pedophilic disorder and other mental disorders. At present, the concept of volitional impairment is highly questionable in both law and psychiatry.³⁴¹ Psychiatric literature is rife with ambiguity and uncertainty about the concept of volitional impairment and self-control in general, and with concerns about its use in SVP proceedings.³⁴²

For these reasons, the APA cautions against assuming impaired impulse control from a psychiatric diagnosis for the sake of legal proceedings.³⁴³ We should question whether the concept is sufficiently able to distinguish individuals with behaviors, preferences, or sexual orientations from those who are truly mentally ill. This is particularly true given that SVP commitment proceedings often rely on conclusions about volitional impairment that lack a proper evidentiary basis or that misconstrue the psychiatric literature.³⁴⁴ Members of the psychiatric community have cited these concerns to argue that

339. See *id.* at 411–12 (finding no requirement of total or complete lack of control); Frances et al., *supra* note 111, at 377–78 (discussing the Court’s decisions in *Crane* and *Hendricks*).

340. See *Crane*, 534 U.S. at 412–13 (“It is enough to say that there must be proof of serious difficulty in controlling behavior.”); Prentky et al., *supra* note 168, at 362–63 (discussing the holding in *Crane*).

341. See Prentky et al., *supra* note 168, at 363 (“[I]t is problematic, and perhaps impossible, to distinguish between impulses that are irresistible and impulses that simply are not resisted.”); Zander, *supra* note 18, at 65–66 (examining the issues in determining volitional impairment in paraphilia cases).

342. See Zander, *supra* note 18, at 65–66 (“[N]one of the paraphilias require any type of volitional impairment or inability to control impulses to make a diagnosis.”); Prentky et al., *supra* note 168, at 363–64 (“The volitional dysfunction standard as applied in insanity defenses is rarely appropriate in the SVP context.”).

343. See DSM-V, *supra* note 39, at 25 (cautioning the use of DSM-V diagnostic criteria when making legal decisions); Morse, *supra* note 18, at 64–65 (discussing the problems inherent in measuring lack of control); Frances et al., *supra* note 111, at 379 (discussing use of the DSM in forensic settings).

344. See Morse, *supra* note 18, at 64–65 (discussing the problems inherent in measuring lack of control).

SVP laws inappropriately use psychiatry to promote preventive detention of those deemed deviant.³⁴⁵

Pedophilic disorder in particular is often used to determine volitional impairment. SVP commitment proceedings often use pedophilia and other paraphilia diagnoses as de facto evidence that the individual lacks volitional control.³⁴⁶ Yet psychiatric research has not demonstrated that paraphilic disorders are associated with volitional impairment or impulse control.³⁴⁷ For this reason, the DSM does not list impulse control as a symptom of pedophilic disorder or other paraphilic disorders.³⁴⁸ Research has also questioned the relationship between pedophilic disorder and long-term recidivism.³⁴⁹

These problems are exacerbated by the fact that courts routinely fail to require appropriate evidence of volitional impairment. Most states allow courts to assume the actor has difficulty controlling his actions from the defendant's mental disorder and his past acts.³⁵⁰ This practice essentially allows courts to conflate pedophilic disorder and other paraphilic disorders with volitional control, a presumption that is not supported by scientific evidence.³⁵¹

345. See Frances et al., *supra* note 111, at 375–76 (describing the shortcomings of SVP definitions applied broadly by state statutes).

346. See *supra* note 331 and accompanying text (discussing courts' reliance on pedophilia diagnoses as evidence of likelihood to re-offend).

347. See *supra* Part II.B (discussing the characteristics of paraphilic disorders).

348. See DSM-V, *supra* note 39, at 697–99 (providing a description of pedophilic disorder and omitting impulse control as a symptom).

349. See Beech & Harkins, *supra* note 39, at 529 (citing research that found a pedophilic diagnosis was unrelated to long-term recidivism).

350. See Kenneth W. Gaines, *Instruct the Jury: Crane's "Serious Difficulty" Requirement and Due Process*, 56 S.C. L. REV. 291, 300–01 (2004) (arguing that Arizona, California, Illinois, Massachusetts, Minnesota, South Carolina, Texas, Washington, and Wisconsin fail to require a separate finding of lack of control); Janine Pierson, Comment, *Construing Crane: Examining How State Courts Have Applied Its Lack-of-Control Standard*, 160 U. PA. L. REV. 1527, 1537–46 (2012) (arguing that ten states do not require a separate showing of lack of control, and either ignore the requirement or inappropriately conflate it with the mental abnormality requirement).

351. See Michael B. First & Robert L. Halon, *Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases*, 36 J. AM. ACAD. PSYCHIATRY & L. 443, 450 (2008) (describing the distinction between diagnosis of paraphilia and volitional impairment). Courts' willingness to assume volitional

SVP statutes therefore create a system in which individuals living with pedophilic disorder may be detained indefinitely based on questionable constitutional grounds. The problems inherent in the concept of volitional impairment undermine the requirement's ability to accurately distinguish a group of individuals who merit civil commitment. Moreover, state courts have weakened the requirement, further undermining its validity in civil commitment proceedings. SVP statutes allow civil commitment of individuals who are able to understand and control their actions based on fear of the decisions they will make.³⁵² This undermines the justifications central to the constitutionality of civil commitment.³⁵³

SVP statutes also conflict with criminal law theory. As discussed above, the dominant theory of retributivism requires that the state limit civil commitment to individuals who are unable to act in accordance with the law.³⁵⁴ SVP statutes use mental illness to civilly commit individuals who can rationally choose their behavior. An individual in the throes of sexual interest does not act on reflex. He feels an interest, forms an intent, and acts on it.³⁵⁵ Refusing to engage in the sexual activity

impairment, despite lack of evidence, may in fact be tied to the disgust pedophilic disorder instills. Historically, the determination that a sexual urge creates an impulse control problem has been linked to whether the underlying interest is considered acceptable. It was at one time commonly accepted that individuals could suffer from "compulsive homosexuality" and "compulsive masturbation" because same-sex attraction and masturbation were in themselves viewed as problematic. *See Moser, supra* note 125, at 323 ("[C]ompulsive masturbators and compulsive homosexuals began to disappear once those behaviors were no longer seen as signs or symptoms of psychopathology."); *Moser, supra* note 110, at 92 (detailing the history of and problems with paraphilia as a concept). Similarly, courts may be presuming that individuals with sexual interest in children must lack control over their actions.

352. *See* Gottlieb, *supra* note 18, at 1037, 1045 (arguing that preventive detention of sane individuals is not constitutional); Schulhofer, *supra* note 18, 94–95 (arguing that SVP commitments should be impermissible without proof of mental illness).

353. *See* Gottlieb, *supra* note 18, at 1037–38, 1045 (arguing that there are constitutional limits to how far criminal and civil sanctions may overlap).

354. *See supra* notes 292–295 and accompanying text (detailing how retributivism applies to civil commitment).

355. *See* Morse, *supra* note 18, at 63 (examining how desire and control influence action and responsibility).

might be more difficult for an individual who desires it than for an individual who does not in that the former will suffer from frustration, tension, or loneliness. But these negative consequences do not prevent the individual from controlling his actions.³⁵⁶ Indeed, it is for this very reason that we hold such individuals responsible for their actions and deny them an insanity defense; criminal law expects the individual to suffer the negative effects and holds him responsible if he does not.³⁵⁷

The above difficulties with SVP statutes may seem small in the larger context of preventing sex offenses. But a deprivation of liberty—particularly one so complete and indefinite as civil commitment—should not be undertaken lightly.³⁵⁸ It should not allow for the detention of those whose mental disorders might simply predispose them to choose to commit offenses.³⁵⁹ Otherwise, states may use civil law to circumvent constitutional limits on criminal law.³⁶⁰ We must also take care not to detain people based on assumptions with questionable scientific merit, even with the best of intentions.

If we take pedophilic disorder seriously as a mental disorder, then we must think critically about what it is and what it is *not*. As reviled as individuals with pedophilic disorder may be, and as horrific as the offenses of many individuals chosen for SVP civil commitment are, SVP laws still merit scrutiny. Disgust does not justify the state's ability to indefinitely detain based on

356. *See id.* (“[A] desire is simply a desire . . . there is no literal physical compulsion, as there is in cases of reflex, spasm and the like.”).

357. *See id.* (“Even if the yielding conduct is the symptom of a recognized disorder, agents who yield in such circumstances appear quintessentially responsible for their conduct . . .”). We might, potentially, excuse the action based on the idea that the discomfort in not acting is too much for an individual to bear. But such an excuse would be, as Morse notes, a “non-culpable hard choice” similar to duress rather than a lack of control or volition. *See id.* at 64 (discussing potential loss of control as a result of compulsion or duress).

358. *See* Hamilton, *supra* note 18, at 541 (arguing SVP statutes are a human rights issue because civil commitment infringes on liberty and privacy).

359. *See* Gottlieb, *supra* note 18, at 1045 (arguing that the state must show why civilly committed individuals differ from other criminals who commit sex crimes); Schulhofer, *supra* note 18, at 94–95.

360. *See* Gottlieb, *supra* note 18, at 1035 (“If the government may simply recast its criminal proceedings as civil, it may be able to accomplish the goals it might otherwise achieve only through punishment by a simple change in nomenclature.”).

questionable assumptions and scant evidence. Undoubtedly, SVP statutes civilly commit many terrible people who have done and will do abhorrent things. But the SVP system inappropriately uses mental illness—and in particular pedophilic disorder—to justify preventive detention in a way that is inconsistent with constitutional and retributivist principles.

This is not to say that constitutional and criminal law principles foreclose any civil commitment to prevent violent sexual offenses. There are two potential alternatives to achieve these goals. The first is to limit SVP civil commitment to individuals who are truly not competent to choose whether to abide by the law, as the law ordinarily does for the civil commitment of those who are mentally ill and dangerous.³⁶¹ If such individuals have the capacity to choose whether to violate the law, the state may not detain them indefinitely. For those convicted of an offense, the state may impose probation and other limitations on their freedom after release, but the state may not use civil commitment to keep them in custody where criminal law cannot.

A second alternative would be to consider models of preventive detention that rely on dangerousness and *not* mental disorder. Criminal law theorists have proposed several potential justifications for very limited detention of individuals who intend to commit offenses, analogizing it to self-defense.³⁶² Current SVP

361. See Schulhofer, *supra* note 18, at 94–96 (“Preventive incapacitation of [individuals who are capable of choosing to act and responding to sanctions], as a substitute for reliance on the criminal process, is inconsistent with the core commitments of a free society . . .”).

362. Kimberly Kessler Ferzan, for example, uses a self-defense analogy to argue that states have a limited right to detain individuals who intend to commit an offense. Ferzan, *supra* note 288, at 162–63. Stephen Morse similarly uses a self-defense analogy to argue that preventive detention might be justifiable if predictive technology could accurately determine whether an individual will offend. Morse, *supra* note 18, at 69; Morse, *supra* note 293, at 295. Michael Louis Corrado argues that the state can restrain individuals to prevent the crimes of those who *intend* to commit them and have begun to make an effort to commit the offense. See Michael Louis Corrado, *Punishment and the Wild Beast of Prey: The Problem of Preventive Detention*, 86 J. CRIM. L. & CRIMINOLOGY 778, 790 (1996) (“Setting aside the question of preventive detention for the moment, punitive restraint in the case of ongoing efforts to break the law would seem to be as well justified as punishment for past crimes.”). Scholars differ on whether these detentions are punitive, preventive, or some combination of the two. See Husak, *supra* note 292, at 1180–91 (arguing

statutes rely on mental illness while undermining the *parens patriae* justification that makes mental illness relevant to civil commitment. These proposed systems of preventive detention rely instead on predicting when an individual intends to commit an offense and intervening beforehand.³⁶³ Because of its lack of mental disorder requirement, it is not clear where such a system would fit in with Supreme Court precedent requiring a disease justification for civil commitments based on dangerousness.³⁶⁴ These proposed means of detention also require a strong showing that the individual will commit an offense.³⁶⁵

punitive under some circumstances); Corrado, *supra*, at 790 (arguing punitive); Morse, *supra* note 18, at 58 (arguing preventive); Ferzan, *supra* note 288, at 180–84 (arguing somewhat punitive and somewhat preventive).

363. See Ferzan, *supra* note 288, at 162 (“This structure has a natural application to preventive interference by the State. The aggressor is a responsible agent. He performs an act in furtherance of a culpable intention. And, based on that act, it becomes permissible to stop him.”); Corrado, *supra* note 362, at 790 (“If the state could never detain except for a crime committed, then the state could not intervene to prevent an ongoing attempt to harm. It seems clear that in some circumstances the state has the moral authority to do just that.”). This is not to say mental disorders would be irrelevant. An individual’s pedophilic disorder could be evidence of an individual’s intent to commit an offense.

364. See *Foucha v. Louisiana*, 504 U.S. 71, 77–84 (1992) (concluding that a person may be held without violating their due process rights so long as they are both mentally ill and dangerous); *Addington v. Texas*, 441 U.S. 418, 426–32 (1979) (“[T]he State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others.”); *O’Connor v. Donaldson*, 422 U.S. 563, 574–76 (1975) (considering and rejecting reasons for detention in the absence of dangerousness and mental illness).

365. One reason for this is the view that a self-defense-like theory is needed to justify detention based on prediction of future crimes; it is a narrow exception for the state to intervene to prevent a crime. Thus, the showing should not rely on the general characteristics of the individual. See Ferzan, *supra* note 288, at 173, 179 (“Importantly, what justifies the State’s interference is not a general prediction based on facts about the actor, but what the actor has done.”). Rather, the state should be able to demonstrate at the very least that the individual has the intent to commit an offense. See *id.* at 167–69 (explaining intent as an element in justifying state interference). Other potential requirements include an act in furtherance of the offense. See *id.* (describing the benefits of the evidentiary requirement of an act for the state to intervene). But see Husak, *supra* note 292, at 1194–97 (arguing against an act requirement). These proposals stand in stark contrast to current SVP statutes, which generally require only a likelihood of offending and rely on general characteristics such as the individual’s mental disorder.

V. Conclusion

A. Implications for Other Areas of Law and Policy

1. Public Health

As with any mental disorder, the public needs public health interventions that identify and treat pedophilia early. Currently, states offer treatment programs for people with pedophilia that are sex offenders, but there are no outreach efforts and no large-scale treatment or research programs that focus on early identification and the prevention of sexual abuse before an individual commits an offense.³⁶⁶ State intervention is almost exclusively limited to those in its custody or those who are on restricted conditions of release.³⁶⁷

From a public health perspective, this approach is absurd. It would be likewise irrational for public health policy to ignore depression until it manifests in suicidal behavior or drug abuse, or to ignore schizophrenia until it manifests in a violent episode. Public health authorities recognize that early identification and intervention provide better prognoses for mental disorders, which is in part why public health authorities, such as the National Institute for Mental Health (NIMH), spend hundreds of millions of dollars studying and treating these disorders, and in particular on programs with preventive focuses.³⁶⁸ In contrast, NIMH funds no programs addressing the treatment of pedophilia, much less the early identification and treatment of individuals before they offend.³⁶⁹ Our lack of focus on early identification and intervention squanders important opportunities to prevent child sexual abuse. Experts argue that the best means of preventing

366. Interview with Michael Seto (Sept. 25, 2014).

367. *Id.*

368. See *FY 2014 Budget Congressional Justification*, NAT'L INST. MENTAL HEALTH, <http://www.nimh.nih.gov/about/budget/fy-2014-budget-congressional-justification.shtml> (last visited Jan. 27, 2015) (identifying hundreds of millions of dollars allocated in NIMH's budget to treat and prevent mental health disorders through programs, research grants and other uses) (on file with the Washington and Lee Law Review).

369. Interview with Erin Patricia Shannon, Acting Budget Officer, NIMH (Sept. 29, 2014).

child abuse is to focus on treatment before an individual commits the offense and enters the criminal justice system.³⁷⁰

Limiting treatment and research to pedophiles that are sex offenders severely restricts our ability to study the effects of treatment. Studies of sex-offender treatment are commonly focused on the issue of recidivism and whether treatment successfully prevents re-offenses.³⁷¹ This creates several problems. Recidivism is a common problem in U.S. prisons among all types of offenders, with sex offenses proving to be no exception. Several variables determine an individual's likelihood of re-offending for any offense, including employment stability, housing, and community support.³⁷² All offenders face obstacles in these areas, but such problems are particularly stark for sex offenders due to registration requirements and housing limitations.³⁷³ Focusing on recidivism among sex offenders therefore restricts research to a group of pedophiles with myriad intervening variables and for which treatment faces the most obstacles.

Limiting research to sex offenders and recidivism also prevents us from studying the myriad other important effects treatment may have. For example, it forecloses the study of

370. Interview with Michael Seto (Sept. 25, 2014).

371. See sources cited *supra* note 73.

372. *Recidivism of Sex Offenders*, CTR. FOR SEX OFFENDER MGMT. (May 2001), <http://www.csom.org/pubs/recidsexof.html> (last visited Jan. 26, 2015) (reviewing studies on sex offender recidivism) (on file with the Washington and Lee Law Review); INDIANAPOLIS-MARION COUNTY CITY-COUNTY COUNCIL RE-ENTRY POLICY STUDY COMMISSION, RE-ENTRY POLICY STUDY COMMISSION REPORT (2013), available at http://www.prisonpolicy.org/research/recidivism_and_reentry/; JOCELYN FONTAINE ET AL., SUPPORTIVE HOUSING FOR RETURNING PRISONERS: OUTCOMES AND IMPACTS OF THE RETURNING HOME—OHIO PILOT PROJECT, URBAN INSTITUTE JUSTICE POLICY CTR. (2012); Paul Heroux, *Sex Offenders: Recidivism, Re-Entry Policy and Facts*, HUFFINGTON POST (Nov. 8, 2011 3:41 PM), http://www.huffingtonpost.com/paul-heroux/sex-offenders-recidivism_b_976765.html (last updated Jan. 8, 2012 5:12 AM) (last visited Mar. 18, 2015) (on file with the Washington and Lee Law Review).

373. See Joseph Goldstein, *Housing Restrictions Keep Sex Offenders in Prison Beyond Release Dates*, N.Y. TIMES (Aug. 21, 2014), <http://www.nytimes.com/2014/08/22/nyregion/with-new-limits-on-where-they-can-go-sex-offenders-are-held-after-serving-sentences.html> (last visited Jan. 27, 2015) (describing the challenges sex offenders within New York face in finding housing that conforms to the requirements of sex offender registration) (on file with the Washington and Lee Law Review).

treatment's effects on those who have never offended or have never been in the criminal justice system. It also limits our ability to study how variables common to offending affect the success of treatment. This deprives us of information key to preventing child sexual abuse and to helping individuals living with pedophilia live law-abiding and productive lives.

2. Criminal Law

Careful consideration of pedophilia as a mental disorder has implications for criminal law, but would be unlikely to result in significant change. This is in large part because pedophilic disorder does not implicate culpability in a way that concerns criminal law. Individuals living with pedophilic disorder would be unlikely to argue successfully that they are not guilty by reason of mental defect or insanity. Nor does pedophilic disorder raise concerns about criminalization of the sexual abuse of children. Careful consideration of pedophilic disorder may, however, be cause to reexamine its use in sentencing.

Insanity defenses have undergone substantial changes over the past century.³⁷⁴ Until a few decades ago, several insanity defenses incorporated a notion of both cognitive impairment and volitional impairment.³⁷⁵ Mental disorders provided a defense to a crime based on either a lack of rational capacity—for example, an inability to understand the wrongfulness of his actions—or a volitional impairment such that the accused was unable to control his actions.³⁷⁶ In the mid-1980s, Congress and several states, with the support of the American Psychiatric Association,

374. See MOORE, *supra* note 111, at 218–32 (describing the rise and fall of the volitional test in the 1980s following a number of political episodes involving mental illness, like the shooting of President Reagan); Michael Louis Corrado, *Responsibility and Control*, 34 HOFSTRA L. REV. 59, 60–62 (2005) (explaining the development and popularity of various tests, namely volitional and cognitive, for determining insanity for the purpose of criminal defenses since the 1950s).

375. See *supra* note 374 and accompanying text.

376. See Prentky et al., *supra* note 168, at 363–64 (“In some states, criminal acts may be excused on proof of irresistible impulses or an impairment in ability to conform one’s behavior to the law when caused by mental illness (psychosis).”).

abolished the volitional impairment criteria.³⁷⁷ The majority of states now rely purely on cognitive impairment.³⁷⁸

Pedophilic disorder is rarely used as an insanity defense, and rethinking its place in the law should not affect this. Pedophilic disorder is, in itself, unlikely to provide an insanity defense under either the cognitive or volitional impairment criteria. A pedophilic disorder diagnosis is based on sexual attraction and either behavior, distress, or impairment.³⁷⁹ It requires no cognitive impairment, nor do any of these criteria imply an inability to understand the nature or wrongfulness of one's actions. Nor does a pedophilic disorder diagnosis either require or imply an inability to control one's actions.

Careful consideration of pedophilic disorder also provides little reason to question the criminalization of sex with children or the production, dissemination, and possession of child pornography. It is true that individuals living with pedophilic disorder have urges to engage in these illegal activities. But the fact that some individuals, by nature of their biology, may desire to engage in unlawful activity is not in itself reason to make the activity lawful. On the contrary, there are ample reasons to criminalize child sexual abuse and child pornography offenses. Such offenses harm other individuals and deserve punishment when done with a culpable mental state.

One concern of criminal law that may merit reconsideration is pedophilic disorder's role in sentencing. Mental disorders are often mitigating factors in sentencing.³⁸⁰ Judges consider an

377. See Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 85 (2006) ("The popularity of control tests began to wane by the 1970s, and grew even more unpopular in the wake of John Hinckley's acquittal, under the Model Penal Code standard, for the shooting of President Reagan in 1981. . . . Most states, as well as the federal courts, use only a cognitive test for insanity.").

378. See Corrado, *supra* note 374, at 61 & nn.16–17 ("By my survey, thirty states, in 1980, had two-prong insanity rules, with both cognitive and volitional prongs: only eighteen still had the older one-prong test. By 2004, only fifteen states still had the two-prong test, and thirty had the one-prong, purely cognitive test.").

379. See *supra* notes 102–108 and accompanying text (describing the APA's three criteria for pedophilic disorder).

380. See Stephen J. Morse, *Mental Disorder and Criminal Law*, 101 J. CRIM. L. & CRIMINOLOGY 885, 907, 945 (2011) (describing mental illness as a mitigating factor); Ellen Fels Berkman, Note, *Mental Illness as an Aggravating*

individual's mental disorder as reducing his moral culpability on the basis that it impaired his ability to act in accordance with the law. These individuals are sufficiently sane to be responsible for their actions and therefore do not merit an insanity defense. Nonetheless, judges often consider mental illness when determining how much punishment the individual deserves.³⁸¹

On the contrary, courts use pedophilic disorder to justify lengthier sentences or to justify the decision to incarcerate over less restrictive options.³⁸² In contrast to other mental disorders, pathologizing pedophilic disorder seems to have exacerbated perceptions that such individuals are monsters incapable of empathy or self-control.³⁸³ Pedophilic disorder may even provoke more sentencing than other types of sexual disorders; in *State v. Lottie*,³⁸⁴ for example, a judge justified his imposition of a harsher

Circumstance in Capital Sentencing, 89 COLUM. L. REV. 291, 296–98 & nn.44–46 (1989) (same).

381. See Morse, *supra* note 380, at 945 (“It is universally accepted that mental disorder is a mitigating factor, and many jurisdictions specifically list mental abnormality as a mitigating factor, using language similar to the Model Penal Code’s ‘extreme mental or emotional disturbance’ criterion or a similar partial responsibility standard.”); Berkman, *supra* note 380, at 296–98 & nn.44–46 (“Numerous state legislatures and courts have concluded that certain mental and emotional states may constitute mitigating factors.”).

382. See, e.g., *United States v. Mantanes*, 632 F.3d 372, 375–76 (7th Cir. 2011) (basing sentencing in part on conclusion that defendant was a “pedophile with continuing urges”); *State v. Lottie*, No. 93050, 2010 WL 2333052, at *1–3 (Ohio Ct. App. June 10, 2010) (“The judge then found that Lottie was not amenable to community control sanctions and that ‘[t]his type of crime calls for a prison sentence.’”); see also Hamilton, *supra* note 18, at 537–38 & nn.10–12 (outlining cases). In *Lottie*, there does not appear to be a formal diagnosis of pedophilic disorder. The sentencing judge seems to have concluded that the defendant had pedophilia based on the defendant’s solicitation of young girls and the fact that, in the judge’s words, “Your girlfriend looks pretty young in the back sitting next to your mom, as well.” *Lottie*, 2010 WL 2333052, at *1–2.

383. See Malón, *supra* note 9, at 1092

On the contrary, this diagnosis and especially its management by professionals or lay persons could be having in general the effect of reinforcing the image of these men as dangerous slaves of their own libido, without the capacity for love, lacking any empathic feeling for children, and incapable of managing their condition in a socially acceptable way.

384. No. 93050, 2010 WL 2333052 (Ohio Ct. App. June 10, 2010).

sentence by distinguishing the defendant's pedophilic disorder from mere sex addiction.³⁸⁵

Courts use pedophilic disorder to extend sentencing based on concerns about protection and deterrence, not based on blameworthiness.³⁸⁶ An individual living with pedophilic disorder arguably has an inherent motive to re-offend against children that might make him more difficult to deter from offending.³⁸⁷ Thus, courts may extend the sentence of individuals living with pedophilic disorder in order to protect the public from a recidivist.

Reconceptualizing pedophilia in the law requires us to reexamine the extent to which extended sentencing is justified. It is not clear that pedophilic disorder merits different treatment than other mental disorders in the context of sentencing. Recidivism for sex offenses is, contrary to popular belief, lower than for other offenses.³⁸⁸ Some studies report that offenders living with pedophilic disorder are more likely to re-offend than those who do not live with pedophilic disorder;³⁸⁹ others have demonstrated no relationship between pedophilic disorder and long-term recidivism.³⁹⁰ It is also difficult to accurately measure

385. See *id.* at *1–2 (quoting the trial court judge as stating, “I think what you are missing the point with, though, is that it’s not just sex addiction, it’s pedophilia. That it’s clear from your actions that you targeted young girls.”).

386. There is nothing more inherently blameworthy about an individual with pedophilic disorder who sexually abuses a child out of sexual desire than an individual without pedophilic disorder who sexually abuses a child out of a desire to humiliate or dominate a child. It is even possible that the former is less blameworthy than the latter, just as crimes of passion may be considered less blameworthy than cold-blooded ones.

387. See, e.g., *United States v. Boroczko*, 705 F.3d 616, 620–21 (7th Cir. 2013) (citing concerns about greater recidivism due to pedophilia).

388. See *Levenson*, *supra* note 296, at 22 (explaining that a study that is often believed to show high recidivism rates “did not in fact conclude that sex offender treatment is futile, but that due to the methodological inadequacies of the studies they examined, they were unable to find a statistically significant treatment effect on recidivism”).

389. See *Strassberg et al.*, *supra* note 35, at 379 (“Increasingly, there is empirical evidence that these two groups of sexual offenders against children differ in a number of important ways. For example, compared to non-pedophiles, pedophiles tend to have more victims, respond more poorly to treatment, and are more likely to reoffend.” (citations omitted)); *Levenson*, *supra* note 296, at 21 (discussing a variety of studies which have been interpreted to show high recidivism rates for pedophilic sex offenders).

390. See *Beech & Harkins*, *supra* note 39, at 529 (citing studies concluding that a pedophilic diagnosis is unrelated to long-term recidivism); Robin J.

recidivism given that it often relies on either self-report or criminal conviction.³⁹¹ One thing that is clear is that pedophilic disorder does not necessarily indicate recidivist tendencies; several variables specific to the individual are important in calculating an individual's likelihood to reoffend.³⁹² It is worthwhile to balance these considerations—as well as the need for additional research—when considering whether pedophilic disorder is an appropriate consideration for extending sentencing. The use of pedophilic disorder to extend sentencing is also relevant to more general debates about using recidivism (or predictions of recidivism) to extend sentencing, a controversy that is beyond the scope of this Article.³⁹³

It is also worth reflecting on the role that disgust plays in extending the sentences of sex offenders because of a pedophilic disorder diagnosis. In Martha Nussbaum's work on disgust and the law, she distinguishes indignation, defined as imputing blame on a person because of their wrongful behavior, from disgust, defined as distancing an object as less human.³⁹⁴ Sex offenses against children elicit legitimate indignation, which recognizes individuals as responsible moral agents. But extended sentences

Wilson et al., *Pedophilia: An Evaluation of Diagnostic and Risk Prediction Methods*, 23 *SEXUAL ABUSE* 260, 268–70 (2011) (“However, individuals who met *DSM-IV-TR*-based diagnoses of pedophilia were no more likely to be convicted of a new sexual offence than those who failed to meet the *DSM-IV-TR* diagnostic criteria for pedophilia . . .”); Heather M. Moulden et al., *Recidivism in Pedophiles: An Investigation Using Different Diagnostic Methods*, 20 *J. FORENSIC PSYCHIATRY & PSYCHOL.* 680, 693 (2009) (“The results suggest that those individuals diagnosed as pedophiles do not recidivate more often or more quickly than non-pedophiles.”); see also Hamilton, *supra* note 18, at 579–80 (“Nor is a DSM diagnosis of pedophilia correlated with sexual recidivism. Actually, a study using a regression analysis method indicates that a DSM diagnosis of pedophilia is not even a significant predictor for sexual recidivism.”).

391. See Hall & Hall, *supra* note 28, at 533 (“Recidivism is a term with many definitions, which affect reported rates of repeated offenses. For example, some studies look at additional arrests for any offense, others only look at arrests for sexual crimes, and some only look at convictions, whereas others analyze self-reported reoffenses.”).

392. See *id.* (explaining the impact of variables like sexuality and antisocial personality traits on recidivism rates).

393. See JULIAN V. ROBERTS, *PUNISHING PERSISTENT OFFENDERS: EXPLORING COMMUNITY AND OFFENDER PERSPECTIVES* 3 (2008) (describing the “normative dilemmas” that accompany recidivist sentencing premiums).

394. NUSSBAUM, *supra* note 227.

for offenders diagnosed with pedophilic disorder may instead reflect disgust, a judgment that such individuals are inhuman monsters. Nussbaum has noted a similar effect where prosecutors seeking the death penalty in murder cases appeal “to a type of disgust that places the murderer in a class of heinous monsters more or less outside the boundaries of the jury’s moral universe.”³⁹⁵

Courts should exercise caution when tapping the emotion of disgust for the purposes of punishment. Disgust is, in some ways, more comforting than indignation. It creates a boundary between us and the objects of our disgust.³⁹⁶ But using disgust to distinguish those living with pedophilic disorder may be in tension with the decision to hold the defendant responsible as a moral agent.³⁹⁷ Even the most horrific abusers of children are not, in fact, monsters—they are human beings who have done terrible things with no justification or excuse. Disgust only clouds our ability to punish the individual as a moral agent.³⁹⁸

3. *Constitutional Law and Sexual Freedom*

Reconsidering pedophilic disorder in the law should not raise concerns about constitutional protections for child abuse. In the last two decades, the Supreme Court has issued landmark decisions protecting the rights of sexual minorities to engage in relationships. These decisions, however, rely on foundations that are inapplicable to pedophilic disorder and child sexual abuse.

In 2003, the Supreme Court’s landmark *Lawrence v. Texas* decision struck down a state sodomy law.³⁹⁹ Its decision argued that criminalizing sexual conduct that is intrinsic to the identity of a marginalized group—in particular, gay men—affects the

395. *Id.* at 65–66.

396. *See id.* (“Disgust is all about putting the object at a distance and drawing boundaries.”).

397. *See id.* (“Indignation works in the opposite direction: by imputing blame to its object, and by focusing on the wrongful nature of the person’s act, it presupposes the ascription of humanity and responsibility.”).

398. *See id.* at 165–68 (arguing that using disgust as a tool to distance oneself from others limits jurors’ ability to critically evaluate the moral culpability of defendants).

399. 539 U.S. 558 (2003).

group's full participation in society.⁴⁰⁰ *Lawrence* did not entirely prohibit states from criminalizing such sexual conduct; it required states to demonstrate a rational basis for such laws beyond "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral"⁴⁰¹

Laws prohibiting the sexual abuse of children clearly have such a basis. Sexual abuse significantly harms children.⁴⁰² It poses both physical and psychological harms, and is de facto harmful because such children lack capacity to give consent.⁴⁰³ Thus, even if criminalizing sex with children could be viewed as denying those with pedophilic disorder relationships intrinsic to their identity, such concerns are far outweighed by the need to protect children from harm. For these reasons, *Lawrence* implicitly rejected any attempt to apply its reasoning to the sexual abuse of children by distinguishing gay sexual relationships from those involving minors or "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused."⁴⁰⁴

4. Mandatory Reporting Laws

All fifty states have laws requiring health care practitioners to report suspected child abuse to authorities.⁴⁰⁵ Such statutes require psychologists to report suspicions of past, present, or future sexual abuse of a child based on disclosures by the

400. *See id.* at 575–79 ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in [homosexual sex]").

401. *Id.* at 577–78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting), *overruled by Lawrence*, 539 U.S. at 578).

402. *See supra* note 28 (discussing the long-term psychological harms to children as a result of child-sexual relations, including trauma, neurosis, and depression).

403. *See id.* (discussing the incapability of a child to give reasoned consent).

404. *Lawrence*, 539 U.S. at 578.

405. CHILD WELFARE INFO. GATEWAY, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2014), http://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf; Hall & Hall, *supra* note 28, at 467, 468.

potential victim, perpetrator, or any party.⁴⁰⁶ An individual living with pedophilic disorder who consults a psychiatrist out of fear that he might offend may therefore trigger disclosure requirements.⁴⁰⁷

These statutes must balance the critical need to prevent child abuse and to treat individuals who have been abused with the need to ensure confidentiality in health care.⁴⁰⁸ Non-offending individuals with pedophilic disorder avoid seeking treatment out of fear that psychiatrists will report them to authorities, resulting in the loss of their jobs and families.⁴⁰⁹ There is also evidence that these statutes deter sex offenders from seeking psychiatric help

406. See, e.g., CONN. GEN. STAT. §17a–101a (2014) (explaining that “mandated reporters” who in the ordinary course of their employment have reasonable cause to suspect or believe that any child under the age of eighteen has been abused or neglected has a duty to report or cause a report to be made to the authorities); *Gross v. Myers*, 748 P.2d 459 (Mont. 1987) (applying a similar mandate in Montana); see also Schwartz, *supra* note 19 (“Studying the disorder is complicated by the fact that, in the U.S., laws that went into effect in the 1990s require therapists and physicians to report to child protective services (and other authorities that vary by state) anyone they believe poses a threat to a child.”).

407. See Dreger, *supra* note 7 (“Many jurisdictions have passed mandatory reporting regulations for psychologists and other health care providers. Consequently, when someone who thinks he might be a pedophile comes in for counseling or therapy, the psychologist may be compelled by law to report the person to the authorities.”); Schwartz, *supra* note 19 (“Since reporting a potential pedophile results in legal action, the law has deterred many pedophiles from voluntarily seeking psychiatric help—which troubles some researchers, since the disorder can be easier to prevent than treat.”).

408. See Schwartz, *supra* note 19 (“[I]t can be easy to forget that pedophilia is a mental illness, and that legally, it only becomes a crime when acted upon. Yet the key to preventing and treating the disorder may lie in its clinical details.”).

409. See Hall & Hall, *supra* note 28, at 468–69 (“The opponents of [Megan’s Law and related laws] argue that, because of the laws, pedophiles will intentionally avoid treatment and not register because of fear (1) for their physical safety, (2) for their family’s safety, and (3) of not being able to obtain housing and employment.”); Dreger, *supra* note 7 (“[P]sychologist[s] may be compelled by law to report [people with pedophilia] to the authorities. . . . [T]hese people have simply stopped coming in at all, and instead of getting help to them, we now have pedophiles circulating in society receiving no support at all.”); Clark-Flory, *supra* note 3 (“[V]ery few pedophiles will voluntarily out themselves, given the stigma; and due to mandatory reporting rules, which are open to interpretation, non-offending pedophiles can reasonably fear being reported to the police.”); Bleyer, *supra* note 4 (same).

to avoid re-offending.⁴¹⁰ When Maryland passed a strict mandatory reporting law, the Johns Hopkins Sexual Offenders Clinic saw the identification of new offenses committed by the treated population decrease from 21% to 0%, with no increase in the number of abused children identified.⁴¹¹

Germany's Prevention Project Dunkelfeld, discussed above, provides an example of treatment and outreach that mandatory reporting laws prevent. The project's success is dependent on Germany's lack of mandatory reporting law, a fact featured on the front page of its website.⁴¹² The lack of mandatory reporting has allowed the project to reach individuals who have either not offended but fear they may, or who have offended but have never been caught.⁴¹³ Not only does this expand access to treatment, but it has also allowed the project to gain additional insight on groups that usually elude researchers. The Project has since produced research on pedophilia itself and on creating public outreach campaigns to encourage individuals living with pedophilic disorder to seek treatment.⁴¹⁴

410. See Fred S. Berlin et al., *Effects of Statutes Requiring Psychiatrists to Report Suspected Sexual Abuse of Children*, 148 AM. J. PSYCHIATRY 449, 451 (1991) (showing that the number of self-reporting pedophiles in Maryland plummeted to and remained at zero after disclosure laws were passed); Hall & Hall, *supra* note 28, at 468–69 (“In 1988, Maryland required that all abuse that occurred during treatment be reported. This law caused the identification of new offenses committed by the population being treated at the Johns Hopkins Sexual Offenders Clinic to decrease from 21% to 0%.”). These studies were not limited to sex offenders living with pedophilic disorder, but there is no reason to believe that the laws would have a less significant chilling effect for those living with pedophilia.

411. See *supra* note 410 and accompanying text.

412. PREVENTION PROJECT DUNKELFELD, <https://www.dont-offend.org/> (last visited Jan. 27, 2015) (on file with the Washington and Lee Law Review).

413. See Beier et al., *supra* note 77, at 4 (“[U]p to 45% of the present sample of self-identified pedophiles and hebephiles could be encouraged to participate in clinical diagnostics, even though they were not mandated to seek treatment. The majority of these men (66%) indeed met the diagnostic criteria of pedophilia and/or hebephilia.”).

414. See Janina Neutze et al., *Predictors of Child Pornography Offenses and Child Sexual Abuse in a Community Sample of Pedophiles and Hebephiles*, 23 SEXUAL ABUSE: J. RES. & TREATMENT 212, 230–34 (2011) (describing the benefits of research afforded by increased self-reporting, including the proposition “that factors identified in research with detected child sexual abuse and child pornography offenders may not generalize to undetected offenders”); Beier et al., *supra* note 77, at 1–4 (describing the benefits to research caused by increased

Additional reflection on pedophilic disorder could contribute to the discussion of how legal standards can best balance concerns about encouraging preventive therapy with concerns about ensuring abused children are helped and sex offenders identified. It could also help develop legal standards that better enable health care providers to determine when they should report an individual living with pedophilic disorder who has not disclosed any offense. The identification and prevention of abuse are important public policy goals. Lawmakers must balance the efficacy of mandatory reporting statutes in achieving these goals with the potential obstacles they pose to treating pedophilia and preventing additional abuse.

B. Implications for Other Paraphilias

Further reflection on the legal meaning and consequences of pedophilic disorder has consequences for other paraphilias. First, this reflection helps us determine how to best conceptualize other paraphilias in the law. Second, the above discussion of pedophilic disorder raises relevant concerns for other paraphilias that are best conceptualized as mental disorders under the law.

Although this Article argues that mental disorders provide a better rubric for the legal issues pedophilia raises, this conclusion is not warranted for every paraphilia. For example, fetishism (sexual interest in objects) may be better conceptualized as a sexual orientation than a mental disorder.⁴¹⁵ The argument that fetishism, which does not involve harm to another human being, constitutes a dysfunction is far weaker than for pedophilia.⁴¹⁶

participation in studies and the efficacy of various types of media campaigns); Klaus M. Beier et al., *Can Pedophiles Be Reached for Primary Prevention of Child Sexual Abuse? First Results of the Berlin Prevention Project Dunkelfeld*, 20 J. FORENSIC PSYCHIATRY & PSYCHOL. 851, 865 (2009) (explaining the potential of media campaigns as preventive measures vis-à-vis child sexual abuse).

415. See Beech & Harkins, *supra* note 39, at 531 (defining fetishism).

416. See Odd Reiersol & Sven Skeid, *The ICD Diagnoses of Fetishism and Sadomasochism*, 50 J. HOMOSEXUALITY 243, 248 (2006) (“If a person has an uncontrollable urge to do something that violates a partner’s personal boundaries, or has an uncontrollable urge to do something that causes harm to himself or herself, these are issues that must be addressed.”); Susan Wright, *Depathologizing Consensual Sexual Sadism, Sexual Masochism, Transvestic Fetishism, and Fetishism*, 39 ARCHIVES SEXUAL BEHAV. 1229 (2010) (discussing

Similar arguments could be made for transvestitism, which the DSM continues to categorize as a paraphilia.⁴¹⁷

Other paraphilias are better conceptualized as mental disorders for the purposes of legal analysis. For these sexual disorders, the disability discrimination analysis above may provide a strong argument for their inclusion in the ADA and other anti-discrimination laws. Indeed, among paraphilias, pedophilia likely inspires the most concerns about inclusion in anti-discrimination law because of the nature of the threats such sexual desires pose. Other paraphilias will likely be far easier to justify as disabilities entitled to civil rights protections.

C. Final Thoughts

This Article begins, but does not resolve, a much larger discussion of how the law should conceptualize and approach pedophilia. It argues for a more reasoned and coherent concept of pedophilia. It further argues that the law should incorporate this concept in a way that is more consistent with important legal principles.

Advances in this topic have significant implications for several areas of law. It is vital to understand sexual attraction to children in order to prevent child sexual abuse. At present, our laws and policies often isolate individuals with pedophilia from resources that prevent abuse, exacerbating public health and criminal law problems. The rights of individuals with pedophilia, however, are in themselves an appropriate concern for the law. We should not ignore inconsistent or unjust laws simply because they only affect those who provoke revulsion.

Lawmakers, courts, and scholars must continue to re-examine this topic as our understanding of pedophilia evolves. Further reflection is vital to improve both the laws that address

the policy problems with conflating sexual behaviors with mental disorders and the questions which much be answered to distinguish the two, like determining the meaning and boundaries of “significant distress”).

417. See DSM-V, *supra* note 39, at 700–04 (listing the wearing of clothing usually worn by another gender as evidence of “fetishistic disorder”); Beech & Harkins, *supra* note 39, at 530–31 (“The most common fetishistic targets of this paraphilia are female underwear, feet, and shoes.”).

pedophilia and the lives of the individuals and communities these laws affect.