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Sexual Predators and the Politics of Sexual Violence*

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Closing Pandora's Box: Sexual Predators and the Politics of Sexual Violence

Eric S. Janus*

Sexually violent predator (“SVP”) commitment laws offer a dangerous but seductive promise. In exchange for perfect protection against a few of the most reviled and dangerous criminals—those who prey sexually on women and children—we need only remove from those individuals the protection of our most fundamental constitutional limitations on government power. We reassure ourselves that our molestation of these constitutional protections is safely limited. Unfortunately, we are finding that the seduction of public protection is too strong a force. SVP laws entail a logic that pushes our thinking and approach to sexual violence ever further off balance and demands increasing investment in their strategies. Like Pandora’s box, these new laws, which seemed attractive at first, now seem excessive, but cannot, given the political context in which they exist, be abandoned or limited.

SVP laws make an extraordinary moral and constitutional claim: We permit our government—despite its democratic values—to pick out a small group of people and treat them in a way that we would never allow ourselves to be treated. We allow this group—and only this group—to be locked up to prevent unspecified crimes that they might (or might not) commit at some unspecified time in the future. These laws violate a fundamental premise of our constitutional system: As a general matter, the State can take

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away a person's physical liberty only if he or she is charged with a specific crime, and convicted of that crime according to a set of strict procedural protections. As Justice Jackson stated in *Williamson v. United States*:¹ "Imprisonment to protect society from predicted but un consummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it."

How did it come to pass that sixteen states in adopting SVP laws, have been willing to compromise the "great safeguards which the law adopts [to protect individuals] in the punishment of crime and the upholding of justice"?² The story begins in the late 1980s. Heinous crimes, committed by sex offenders just released from prison, created a political environment that demanded action. Despite their toxicity to the protection of liberty, SVP laws proved too hard to resist. Policymakers chose these laws precisely because they allowed a fundamental bypass of constitutional protections. A Minnesota task force, for example, recommended the use of SVP laws to circumvent three procedural safeguards inherent in the criminal justice system.³ First, the criminal justice system requires in-court testimony to prove a crime, whereas SVP commitments make liberal use of hearsay evidence embedded in the expert testimony. Thus, the task force surmised, SVP laws can protect society against "individuals . . . who may not have been convicted of a sex offense, because of the reluctance of young and/or scared victims to testify against perpetrators of sexual abuse."⁴ Second, SVP laws circumvent the limits

¹ 184 F.2d 280, 282 (2d Cir. 1950).

² *Cooper v. Oklahoma*, 517 U.S. 348, 366 (1996) (quoting *United States v. Chisolm*, 149 F. 284, 288 (S.D. Ala. 1906)).

³ Psychopathic Personalities Subcommittee, *Report, in MINNESOTA DEPT. OF HUMAN SERVICES, REPORT TO THE COMMISSIONER: COMMITMENT ACT TASK FORCE*, at 45, 48-50 (1988).

⁴ *Id.* at 45.

imposed by strict burdens of proof by allowing the confinement of individuals who “may be dangerous but evade conviction due to the high burden of proof required in criminal cases.”⁵ Third, because SVP laws are not limited by double jeopardy and ex post facto protections, they can compensate for the “comparatively short correctional sentences” for sex offenders by confining individuals after they have completed their criminal sentences.⁶

The original SVP laws, passed in the early 1990s, were immediately challenged in court. Although the attacks took several legal forms, at bottom they all argued that SVP laws violated the fundamental compact limiting the state’s power to deprive us of our liberty.⁷ The constitutional issues badly divided the courts that considered them. In the end, by a 5-4 vote, the United States Supreme Court upheld the use of SVP laws.⁸ But the courts’ imprimatur has been conditional. Recognizing that SVP laws create an escape from the strict limits of the criminal law, the courts have held that SVP laws must be reserved for the “extraordinary”; they must be severely limited.⁹ The central imperative for civil commitment is that it must remain secondary to the criminal justice system as a tool for social control. As the Minnesota Supreme Court stated, “[S]ubstantive due process forecloses the substitution of preventive detention schemes for the criminal

⁵ *Id.* at 48.

⁶ *Id.* at 49.

⁷ See, e.g., *In re Blodgett*, 510 N.W.2d 910 (Minn. 1994), cert. denied, U.S. , 115 S. Ct. 146 (1994) (considering assertions that laws violate due process and equal protection); *In re Young*, 122 Wash. 2d 1, 857 P.2d 989 (Wash. 1993) (rejecting challenge based on ex post facto and double jeopardy violations).

⁸ *Kansas v. Hendricks*, 521 U.S. 346 (1997).

⁹ See, *In re Linehan*, 518 N.W.2d 609, 616; (Minn. 1996) (Gardebring, J. dissenting) (describing SVP commitment as “the extraordinary sanction of indefinite commitment without periodic judicial review.”)

justice system, and the judiciary has a constitutional duty to intervene before civil commitment becomes the norm and criminal prosecution the exception.”¹⁰

Thus, the effort to justify SVP commitment laws centered on courts giving assurances that the “reduced-protection” zone was exceptional because it applied only to a small group of people. More importantly, through these assurances, proponents of SVP commitment laws sought to show that the unfortunate group whose rights were to be curtailed was not just small numerically, but also somehow different in kind from the rest of us. In this way, we could all rest assured that what we are doing to “them” could not, in the future, be done to “us.”

States and courts made three promises in an effort to reassure themselves and the rest of us that SVP laws would be extremely limited in their application. First, they promised that confinement would be numerically small because the laws would be directed only at the “most dangerous.”¹¹ Second, they promised that the targets would

¹⁰ *In re Linehan*, 557 N.W.2d 171, 183 (Minn. 1996). The *Hendricks* Court acknowledges this principle as well, suggesting that at least part of the role of mental disorder is to provide a constitutionally adequate boundary around the use of civil confinement to accomplish social control goals:

This admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings. Hendricks’ diagnosis as a pedophile, which qualifies as a “mental abnormality” under the Act, thus plainly suffices for due process purposes.

Kansas v. Hendricks, 521 U.S. 346, 360 (1997).

¹¹ *Kansas v. Hendricks*, 521 U.S. 346, ___ (1997) (reasoning that SVP laws “tak[e] great care to confine only a narrow class of particularly dangerous individuals.”)

different in kind from the rest of us because only the “mentally disordered” would be locked up.¹²

Third, they promised that confinement would be limited because treatment would be provided and that “patients” would be released from confinement as soon as they were no longer dangerous or mentally disordered.¹³

Although these assurances were motivated in the first instance by constitutional concerns, there is a second, more utilitarian reason for the promise of limitations: SVP programs are very expensive, so policy-makers promised that the programs would not continue to grow in size and expense, and that the extraordinary cost of an SVP commitment would be reserved for cases in which the danger to the community was extraordinarily high. A basic principle of criminology—the principle of “selective incapacitation”¹⁴—as well as common sense, support this utilitarian principle by which the intensity of intervention is proportional to the risk posed by the individual.¹⁵

Over the years I have argued, in law review articles and court briefs, that these promises were empty window dressing. First, the “most dangerous” claim is dubious because of the limitations in our ability to predict dangerousness. The claim has been further undercut by court decisions that systematically fail to set high, consistent, and

¹² Id., at ___ (stating “We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a “mental illness” or “mental abnormality.””)

¹³ See, e.g., *In re Call*, 535 N.W.2d 312, (Minn. 1995) (noting requirement for provision of treatment and for release when “if no reasonable relation exists between the original reason for commitment and the continued confinement.”)

¹⁴ FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 34-36, 143-44, 169-71 (1995).

¹⁵ Eric S. Janus, *Minnesota’s Sex Offender Commitment Program: Would an Empirically-Based Prevention Policy be More Effective?*, 29 WM. MITCHELL L. REV. 1083, 1116 (2003).

accountable standards for risk assessment.¹⁶ Second, the “mental disorder” limitation is untenable because it is so vague and broad that it excludes almost no one.¹⁷ Finally, the promise of treatment and time-limited confinement is belied by the almost non-existent treatment graduation rates in SVP programs across the country.¹⁸

The Politics of Sexual Violence

My purpose in this Article is not to rehearse the systematic betrayal of these constitutional promises. Rather, I report on an equally serious problem. Even when state officials have taken the limitations on SVP commitments seriously, their efforts, when “exposed” by the media, have been truncated by a firestorm of popular and political obstruction.

I summarize here the recent events in Minnesota and Wisconsin, two of the original SVP states. Their programs are now a decade or more old. The central lesson of these stories is that the politics of sexual violence, as framed by SVP laws and popular passion, will not let us close this Pandora’s box. Ultimately, it will be both society at large and future victims of sexual violence who suffer, because the expense of SVP programs is wildly out of proportion to their benefit. As more and more resources pour

¹⁶ See Janus, *supra* note 15, at 1110-11; Eric S. Janus & Paul E. Meehl, *Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings*, 3 PSYCHOL., PUB. POL’Y & L. 33 (1997); Eric S. Janus & Robert A. Prentky, *The Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 39 AM. CRIM. L. REV. (2003).

¹⁷ See Eric S. Janus, *Foreshadowing the Future of Kansas v. Hendricks*, 92 NW. U. L. REV. 1279 (1998); Eric S. Janus, *Sex Offender Commitments: Debunking the Official Narrative and Revealing the Rules in Use*, 8 STAN. L. & POL’Y REV. 71 (1997).

¹⁸ See W. Lawrence Fitch, *Sexual Offender Commitment in the United States; Legislative and Policy Concerns*, in SEXUALLY COERCIVE BEHAVIOR; UNDERSTANDING AND MANAGEMENT 489, 492-93 (Annals of the New York Academy of Sciences 2003); Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 323 (2003).

into SVP Programs, the distortion in policy and resource allocation will become more and more severe.¹⁹ Society will suffer because of the resource drain, and victims will suffer because these SVP programs will draw more and more resources away from programs that address the great bulk of sexual violence in the community.

I draw these conclusions by examining recent events in Minnesota and Wisconsin. As noted, these are two of the original SVP states, and their programs are among the most mature in the nation. The events are echoed, however, in other mature programs, such as Washington's, and are beginning to beset California's newer program. We can safely assume that the same experience will befall other SVP programs as they mature, as well.

Minnesota

The Minnesota Sex Offender Program ("MSOP") was designed by Dr. Michael Farnsworth, the director of forensic psychiatry for the state. The program's design was based on Farnsworth's research into the state of the art of sex offender treatment nationwide. It was designed as a step-level program, and, in my opinion, Dr. Farnsworth truly believed that many of the men committed could work their ways through the program and "graduate" in a matter of two to four years.²⁰

There were indications that Minnesota took its constitutional and programmatic mandates seriously. For example, the per diem expense for the Minnesota program has

¹⁹ See Janus, *supra* note 15, at 1101-09.

²⁰ See *Call v. Gomez*, 535 N.W.2d 312 (Minn. 1995). In *Call*, a 1995 Minnesota Supreme Court case, the court relied on representations of state officials stating that an "average patient" was expected to complete the "intensive" treatment program in a "minimum of 24 months." *Id.* at 319 n.5. Later, treatment officials described the length of treatment as at least four years. E-mail from Anita Schlank, Ph.D., then-Clinical Director of Minnesota Sex Offender Program, to Eric S. Janus (Aug. 19, 2002) (noting that most patients are unable to complete the program in the minimum period) (on file with author).

been among the highest in the nation,²¹ and the Minnesota treatment program is cited as the national model.²² While other states housed their SVP programs in correctional settings,²³ or used old jail buildings (New Jersey, for example), Minnesota built a new facility, disconnected from any prison, to house its SVP program.²⁴ Finally, the State funded the development of an actuarial tool to assess the risk of recidivism.²⁵

Of course, there were many ways in which the assurances about the law were belied. The most significant of these, the promise of progress through the treatment program, simply did not materialize. Thus, the population of the MSOP kept growing as new commitments continued apace, no patients were released, and only a small handful of detainees managed to achieve, and maintain, the highest levels of treatment at which some form of release might be contemplated.²⁶

By 1998, the failed promise of the treatment program began to be noticed. In a report to the Legislature in 1998, the Minnesota Department of Corrections projected a

²¹ Fitch, *supra* note 9, at 493.

²² See Anita Schlank et al., *The Minnesota Sex Offender Program*, in *THE SEXUAL PREDATOR: LAW, POLICY, EVALUATION AND TREATMENT* 10-14 (Anita Schlank & Fred Cohen eds., 1999) (describing the Minnesota program and noting its national prominence).

²³ Roxanne Lieb, *State Policy Perspective on Sexual Predator Laws*, in *PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY* 46-51 (Table 2.2) (Bruce J. Winick & John Q. LaFond eds., 2003).

²⁴ Conrad deFiebre, *Psychopathic Sex Offenders Get New Home*, *MINNEAPOLIS STAR TRIB.*, Nov. 5, 1995, at 1B.

²⁵ MINN. STAT. § 244.052(2) (1996); Douglas L. Epperson et al., *Minnesota Sex Offender Screening Tool—Revised (MnSOST-R): Development, Validation, and Recommended Risk Level Cut Scores* (Dec. 2003), at <http://www.psychology.iastate.edu/faculty/epperson/TechUpdatePaper12-03.pdf>.

²⁶ Janus, *supra* note 15, at 1090.

rapid growth in the population under commitment, and a concomitant growth in the costs of the SVP program.²⁷

Concern about the growing costs led to several changes in the MSOP. For example, the State developed a satellite replica of the program in a prison. This program was aimed at imprisoned sex offenders in an effort to reduce the number of released sex offenders who required civil commitment.²⁸ Officials also began to examine why the treatment program had almost non-existent treatment completion and discharge rates. Officials focused on the fact that committed individuals were not equally competent in navigating the rather complex “cognitive behavioral” treatment program and that committed individuals varied widely in the level and nature of the risk that they posed.²⁹ For example, then-clinical director, Dr. Anita Schlank, reported at a symposium held in November 2002 that about twenty-five percent of the committed men could be managed, with proper supervision, in the community.³⁰ The Fiscal Year 2003 Operational Plan for

27. See MINN. DEP’T OF CORR., CIVIL COMMITMENT STUDY GROUP, REPORT TO LEGISLATURE 21 (1998), available at <http://www.doc.state.mn.us/publications/socpublications.htm>.

28. Cf. *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Breyer, J., dissenting). Justice Breyer stated that the Kansas SVP Act:

did not provide Hendricks (or others like him) with any treatment until after his release date from prison and only inadequate treatment thereafter. These, and certain other, special features of the Act convince me that it was not simply an effort to commit Hendricks civilly, but rather an effort to inflict further punishment upon him.

Id.; cf. MINN. DEP’T OF CORR., PROGRAMS FOR SEX OFFENDERS, available at <http://www.doc.state.mn.us/publications/pdf/Sex%20Offender%20Programs.pdf> (last visited _).

29. See Eric S. Janus & Nancy Walbek, *Sex Offender Commitments in Minnesota: A Descriptive Study of Second Generation Commitments*, 18 BEHAV. SCI. & L. 343 (2000).

30. E-mail from Schlank, *supra* note 11:

[W]e estimated that there were approximately 48 individuals who were likely not an escape risk and if, at the time of their commitment, there had been a residential treatment program that accepted Level Three sex

the Minnesota Department of Human Services (“DHS”) proposed an “alternate treatment track for individuals who chronically refuse to participate in sex offender programs.”³¹ Officials also proposed the development of “appropriate clinical pathways based on client characteristics, rather than commitment status,” a project that will involve identifying “patients whose treatment needs are not currently being adequately met (as indicated via lack of progress toward less restrictive settings).”³²

All of this planning came to an apparent halt in June 2003, however, with the publication of an article in the Twin Cities’ *Star Tribune* newspaper entitled, *State Looks to Release Sexual Psychopaths; Is Concern for Offenders, or the Lock-Up Program’s High Cost, Driving Change?*³³ Referring to the aforementioned planning, the article characterized officials as “looking for ways to release into the community some of the 190 sexual psychopaths These repeat rapists and pedophiles . . . have been declared sexually dangerous by judges”³⁴ According to the article, the officials who run the program felt that they had fulfilled only part of their legal obligation—to protect the public—and had neglected the other part—“giving sexual psychopaths in their care

offenders and could ensure that they were observed around-the-clock and prevented from any access to potential victims, it seemed possible that they could have been placed there with a “stayed commitment” hanging over their head in case they did not succeed.

However, Dr. Schlank qualified her statement by acknowledging that “in no way do I consider myself an expert on assessing escape risk.” *Id.*

³¹ STATE OPERATED FORENSIC SERVICES, OPERATIONAL PLAN B—FISCAL YEAR 2003, Product and Related Tasks 1 (2003).

³² *Id.*

³³ Josephine Marcotty, *State Looks to Release Sexual Psychopaths; Is Concern for Offenders, or the Lock-Up Program’s High Cost, Driving Change?*, MINNEAPOLIS STAR TRIB., June 22, 2003, at 1A.

³⁴ *Id.*

individualized treatment in the least prison-like settings possible.”³⁵ The article stated that “sex psychopaths” would be released under strict supervision and that officials can “manage—but not eliminate – risk to the community.”³⁶ The article also suggested that intense supervision could achieve a recidivism rate of ten percent. It painted the officials as discounting this risk to the community in order to satisfy the rights of the sex offenders: “More important [than the risk to the community], they say, the state has a legal obligation to provide effective treatment.”³⁷

The article quoted the Democratic Attorney General, who characterized the plan as being a consequence of the Republican Governor’s “no new taxes pledge”: “‘This whole no-new-tax pledge is having an unyielding consequence to the public,’ said Attorney General Mike Hatch, whose office petitions to have sexually dangerous offenders committed for many counties. ‘To keep a few bucks in people’s pockets, we are going to let sexual predators out to harm people.’”³⁸ A prominent prosecutor was quoted as mocking the claim that offenders released to the community would be adequately supervised. Referring to the projected ten percent recidivism rate for released offenders, the article stated, “Some prosecutors don’t see one-in-10 recidivism rate as a success story, especially since no one can predict which sex offender will rape again.”³⁹

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Marcotty, *supra* note 33.

The story remained in the headlines for several weeks, while the Attorney General and the Governor attacked each other and traded ascriptions of blame.⁴⁰ Finally, the Governor issued an Executive Order that directed the DHS officials not to release anyone unless “required by law or ordered by a court.”⁴¹ The media reported that the Governor’s Chief of Staff explained the meaning and intent of the Executive Order in this way: “The governor doesn’t want these guys to get out, and he’s made that clear ever since he was running for office.”⁴²

The Minnesota SVP crisis entered a second stage in November 2003 with the tragic disappearance of college student Drew Sjodin in East Grand Forks, North Dakota, just west of the border with Minnesota. Soon after her disappearance, Alfonso Rodriguez was arrested and charged with her kidnapping. Rodriguez had been released from a Minnesota prison some seven months before and was classified as a “level 3” sex offender,⁴³ a label reserved for offenders with a “high risk” to reoffend.⁴⁴

In many ways, the incident was an archetypal case and immediately entered the national spotlight. Sjodin was a young, blond college student, abducted and (many assumed) raped and possibly murdered by a stranger—an older male, repeat sex offender

⁴⁰ See, e.g., Mark Brunswick, *Pawlenty Criticizes Hatch, Article; Governor Says Debate over Star Tribune’s Sex-Offender Story Is Being Pushed by Politics*, MINNEAPOLIS STAR TRIB., June 24, 2003, at 1B; Lori Sturdevant, Editorial, *Versus Hatch, Pawlenty Prevailed*, MINNEAPOLIS STAR TRIB., June 29, 2003, at 9AA.

⁴¹ Exec. Order No. 03-10, 28 Minn. Reg. 57 (July 21, 2003).

⁴² Warren Wolfe, *Sex Offender Release Rules Are Changed; Pawlenty’s Executive Order, in Effect, Will Keep Psychopaths Locked Up, Chief of Staff Says*, MINNEAPOLIS STAR TRIB., July 11, 2003, at 1B (quoting Chief of Staff Charlie Weaver).

⁴³ Chuck Haga, *Suspect Held in Abduction; Sex Offender Charged in Dru Sjodin Case*, MINNEAPOLIS STAR TRIB., Dec. 2, 2003, at A1.

⁴⁴ MINN. STAT. § 244.052 3(e) (1996) (defining a level III sex offender as “an offender whose risk assessment score indicates a high risk of reoffense”).

(who is a Mexican-American, perhaps making the archetypal salience of the alleged crime even stronger). One newspaper article, assessing why the Sjodin case caught the nation's attention, surmised, "part of the answer may be in Dru Sjodin's smile: Beauty to the Beast some people see in Rodriguez, released from captivity in May after serving 23 years for vicious attacks on women."⁴⁵

The case reignited the political finger pointing between the Governor and the Attorney General. The debate was now transformed, moving as if scripted, to the next dramatic level. In place of the hypothetical future release from commitment of moderate-risk offenders, the new story focused on a real victim and a real offender and a real crime.

The story line immediately focused on why and how this "level 3 sex offender" was not civilly committed. The Attorney General accused the Governor of allowing this individual to be released; the Governor and his Commissioner of Corrections blamed their subordinates for "bad judgment" and promised to seek disciplinary action and "removal" of the state workers responsible for recommending against commitment.⁴⁶ The Governor proposed reinstating the death penalty in Minnesota, a state which had abolished the ultimate penalty some one hundred years earlier.⁴⁷

The crisis focused attention on the process by which offenders are selected for commitment. As if it were reporting a scoop, a *Star Tribune* headline disclosed, *Hurdles*

⁴⁵ Chuck Haga, *High Publicity of Sjodin Case Puzzles Some; Why Has This Abduction Had Such Lasting Attention?*, MINNEAPOLIS STAR TRIB., Dec. 7, 2003, at 1A.

⁴⁶ Patricia Lopez, *Governor Cites Bad Judgment on Rodriguez; Pawlenty Faulted Corrections Staffers in Release of Convict.*, MINNEAPOLIS STAR TRIB., Dec. 19, 2003, at 1A.

⁴⁷ Conrad deFiebre, *Death penalty vote is urged ; Gov. Pawlenty called for a constitutional referendum on the issue.* MINNEAPOLIS STAR TRIB., Jan. 28, 2004, at B!

*High for Offender Commitment; Many Most Likely to Commit Sex Crimes Again are Released After Prison Rather Than Institutionalized.*⁴⁸ The body of the article gave the details: “Since 1999, three-fourths of the rapists and pedophiles most likely to reoffend were released in Minnesota instead of being committed for indefinite treatment at a secure psychiatric facility.”⁴⁹ The article continued:

The data show that commitment of offenders like Rodriguez is not driven only by how dangerous they are. It is also governed by the very high standards set by state law and the courts. And all along the way, the individual judgments of psychologists, prosecutors and judges can influence the outcome, making it appear almost arbitrary.⁵⁰

The article reported that “controversy is becoming focused on the validity of how corrections and justice officials choose who should be committed and why.”⁵¹ The newspaper noted that some offenders who had been assessed in the actuarial risk assessment as in the highest risk group had not been committed, while others assessed as a more moderate risk were committed.⁵²

An editorial in the *Star Tribune* shaped and reflected the nature of the debate.⁵³

The questions, according to the editorial, were whether the system is “too lax,” and how could an offender “officially classified by the state as a sexual predator” not be referred

⁴⁸ Josephine Marcotty & John Stefany, *Hurdles High for Offender Commitment; Many Most Likely to Commit Sex Crimes Again are Released After Prison Rather Than Institutionalized*, MINNEAPOLIS STAR TRIB., Jan. 11, 2004, at A1.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Rodriguez; What to Do with Sex Predators?*, MINNEAPOLIS STAR TRIB., Dec. 4, 2003, at 26A

for civil commitment?⁵⁴ Claiming that releasing a person like Rodriguez seems “wildly risky,” the editorial then posed a question to which Minnesotans deserve “a better explanation”: “Did they make a serious error, or did they take a gamble—hoping to save the cash a commitment would consume?”⁵⁵

Eventually, the Governor and Commissioner of Corrections settled on a strategy of referring all “Level 3” sex offenders to county prosecutors for consideration of civil commitment. The Corrections Commissioner explained, “she ordered the change to ensure that prosecutors familiar with the laws review all Level 3 offenders for possible civil commitments. Now only corrections officials do the initial reviews and referrals.”⁵⁶ This plan amounted to a shifting of the responsibility (and, hence, blame) for making judgments about sex offender commitments from a centralized process of the Department of Corrections to eighty-seven county attorneys.⁵⁷ The Commissioner of Corrections “defended that response as necessary to ensure ‘that we don’t miss somebody who should be committed.’”⁵⁸

The deliberations then shifted to the legislature with over fifty bills introduced to address the problem.⁵⁹ In the midst of this legislative frenzy, the Democrat-Farmer-

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Paul Gustafson, *Level 3 Offender Reviewal Changed*, MINNEAPOLIS STAR TRIB., Dec. 5, 2003, at 1B.

⁵⁷ *See id.*

⁵⁸ Conrad deFiebre, *Sex Offender Review Criticized; Pawlenty’s Action Threatens a State Commitment Law That Protects the Public, DFLers Say*, MINNEAPOLIS STAR TRIB., Jan. 13, 2004, at 2B.

⁵⁹ A Westlaw search of the Minnesota Bill Tracking database using the search terms “sex offender,” “criminal sexual conduct,” “psychopathic” and “predator” yielded over 50 bills using one or more of these terms introduced in the 2004 legislative session. (House Files 1681, 1793, 2028, 2104,

Labor Party began running “a caustic television commercial” accusing the Republican Governor of “bungling the release of sexual predators.”⁶⁰ The *Star Tribune* described the ad in a front page story: “Over foreboding music, the camera narrows in on [Governor] Pawlenty’s eyes and a narrator says: ‘These eyes just watched as administrative bungling and the wrong budget priorities let rapists and sexual predators back on our streets.’”⁶¹

Wisconsin

The developments in Wisconsin, a Midwestern state similar in many ways to Minnesota, offer an instructive comparative case study. Wisconsin’s SVP program was, like Minnesota’s, one of the original three modern SVP laws. Both programs grew consistently but moderately over the initial years of their operation, with Wisconsin reaching a population of 260 in the fall of 2003,⁶² compared with two hundred in Minnesota.⁶³ Wisconsin’s program differed from Minnesota’s in two notable respects. First, the Wisconsin and Minnesota courts diverged in their interpretations their respective discharge standards. In Wisconsin, the courts had held that an individual must be released if his risk of reoffense fell below the threshold for commitment, substantial

2127, 2175, 2277, 2308, 2568, 2569, 2574, 2577, 2657, 2665, 2724, 2744, 2752, 2856, 2876, 2919, 2933, 2943, 2980, 2981, 2991, 3077; Senate Files 1745, 1774, 1848, 1863, 2080, 2131, 2179, 2352, 2464, 2486, 2508, 2543, 2544, 2548, 2817, 2822, 2855, 2882, 2901, 2925, 2929, 2938, 2951, 3030, 3057). The identical search targeting legislation introduced in 2003 yielded only 9 bills.

⁶⁰ Conrad deFiebre & Dane Smith, *DFL Fires an Early Salvo at Pawlenty; A TV Ad Blames the Governor for the Release of Hundreds of Sexual Predators*, MINNEAPOLIS STAR TRIB., Mar. 17, 2004, at A1.

⁶¹ *Id.*

⁶² Jessica McBride & Reid J. Epstein, *State Tops in Release of Sexual Predators*, MILWAUKEE J. SENTINEL, Sept. 22, 2003, at 1A.

⁶³ Ben Steverman, *Prosecutors Promise Aggressive Stance on Sex Offenders*, MINNEAPOLIS STAR TRIB., Jan. 21, 2004, at 1S.

probability of reoffense.⁶⁴ The Minnesota courts, in contrast, had held that discharge would be permitted only if the individual could make an acceptable adjustment to society, a standard that suggests a lower level of risk than the “highly likely” standard required for commitment in Minnesota.⁶⁵

The second difference is likely more significant. Prior to 2000, Wisconsin, like Minnesota, had a policy limiting supervised releases to individuals who had completed the prescribed treatment program. In 2000, Wisconsin treatment officials liberalized the criteria employed by state evaluators to include individuals whose risk could be “managed safely” in the community. According to news accounts, this change caused the rate of recommendations for supervised release to double.⁶⁶ By the fall of 2003, the number of persons who had been released, either conditionally or absolutely, from Wisconsin’s program reached about thirty-nine.⁶⁷ Of that number, a fair proportion had been returned to the institution because of “rule violations,” but the news media reported no instances of sexual reoffenses by released individuals.⁶⁸

As described above, Minnesota officials were working on a similar change in policy in the summer of 2003 when the press reported the plans, triggering the first chapter of the political firestorm and effectively putting stop to those plans. In September of the same year, some three months later, the press in Wisconsin discovered

⁶⁴ McBride & Epstein, *supra* note 62.

⁶⁵ Call v. Gomez, 535 N.W.2d 312 (Minn. 1995).

⁶⁶ McBride & Epstein, *supra* note 62.

⁶⁷ *Id.*

⁶⁸ *Id.*

and exposed Wisconsin's liberal standards for release. A front-page headline in Milwaukee's *Journal Sentinel* blared, *State Tops in Release of Sexual Predators*.⁶⁹

The news report triggered immediate legislative proposals to tighten release standards. Within two days, the sponsors of the original SVP law proposed lowering the standard for commitment from "substantially probable" to "probable" to reoffend, thereby changing the standard for discharge as well.⁷⁰ The proposal also required "progress in treatment" as a condition for supervised release.⁷¹ A follow-up *Journal Sentinel* article quoted the director of the secure facility as pointing out that the existing discharge standards would allow community placements of individuals whose risk of reoffense was below seventy-five percent but that "[i]t's not a determination that the person is safe."⁷² Thus, one of the sponsors of the legislation stated, "The standard needs to fall to the side of protecting of public safety."⁷³

In a subsequent article, the *Journal Sentinel* described the state's policy as "a practice quietly implemented within the state [Department of Health and Family Services]" and characterized it as having "turned the law upside down."⁷⁴ This sentiment was echoed in an editorial in the *Appleton Post-Crescent*, which weighed in to support

⁶⁹ *Id.*

⁷⁰ Jessica McBride & Reid J. Epstein, *Tougher Sexual Predator Law Sought*, MILWAUKEE J. SENTINEL, Sept. 25, 2003, at 1A.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Jessica McBride, *Predator Law Has Officials in a Bind*, MILWAUKEE J. SENTINEL, Oct. 26, 2003, at 1B.

the tightening of standards. The paper opined that the “idea” of the SVP law was to “minimize” the risk to the community, and criticized the legal standard for release:

An offender has to be deemed “substantially probable” to re-offend to be denied release. That means an offender who is only “probable” or, say, “slightly probable” would have to be released. Someone who is “probable” to commit another sexual offense can rejoin the community, with supervision? No way. No wonder communities are rejecting these guys.⁷⁵

Meanwhile, the state’s efforts to find community placements for committed offenders were meeting another obstacle, as citizens voiced “virulent opposition” to proposals to house offenders in their neighborhoods.⁷⁶ In September 2003, the press reported that the third proposed location for convicted child molester Billy Lee Morford—a home on a dead-end street in a mostly industrial area—was scuttled when “a homeowner bowed to public pressure and withdrew an offer to rent.”⁷⁷ The president of the local Apartment Association was quoted as saying that he “would advise against anyone renting to Morford. . . . ‘Nobody wants to touch this,’ [he] said. ‘You don’t want to have your neighbors protesting and marching in front of your house. You can’t blame people for not renting to him.’”⁷⁸

The case of pedophile Shawn Schulpus was even more extreme. A judge had ordered him released to a community placement facility in 1997, but the state claimed to

⁷⁵ Editorial, *Sexual-Predator Law Needs Another Look*, POST-CRESCENT (Appleton, Wis.), Oct. 1, 2003, at 6 [hereinafter *Another Look*].

⁷⁶ Reid J. Epstein, *House-Hunting for Sexual Predator Seems Futile*, MILWAUKEE J. SENTINEL, Sept. 9, 2003, at 1B.

⁷⁷ *Id.*

⁷⁸ *Id.*

be unable to locate a placement that would accept him. In 2004, Schulpus sought a remedy from the state court of appeals, but the court rejected his claim, holding, in a split decision, that “the state acted in good faith in attempting to find placement for Schulpus and that its failure to do so did not rise to the level of a violation of his due process rights.”⁷⁹

Lessons about the Politics of Sexual Violence

The lessons from Minnesota and Wisconsin are straightforward. Efforts to hew to the limiting-assurances for SVP laws will be politically unacceptable, even when they are abstract and hypothetical and have not had any demonstrable negative effect on public safety. When a real tragedy occurs, the media and politicians will interpret the tragedy as a failure to use the SVP tool broadly enough. Moves will be made to broaden the SVP net. Rare but archetypal crimes—the “Beauty and the Beast” paradigm – will form the template against which solutions to the problem of sexual violence are measured. Lost in the fog will be the great bulk of sexual abuse that does not fit this mold.

The stories illustrate the immense political energy inherent in these archetypal stories of sexual violence. In Wisconsin, “virulent opposition” has thwarted the law’s command that graduates from the SVP program be placed in the community. The courts of Wisconsin have apparently bowed to the public will on this issue.⁸⁰ A similar story is being spun out in California, where the first several graduates of that state’s SVP program are seeking community housing. Reported one paper, “Brian DeVries, the first

⁷⁹ *In re* Commitment of Schulpus, No. 02-1056, 2004 WL 193089 (Wis. Ct. App. Feb. 3, 2004); Tom Held, *Prosecutors Lose Some Input on Sex Predators*, MILWAUKEE J. SENTINEL, Feb. 4, 2004, at 1B.

⁸⁰ *See supra* note 79 and accompanying text.

graduate of a special state treatment program for violent sexual predators, ended up in a trailer at the Correctional Training Facility on a judge's order after more than 100 Santa Clara County landlords refused to rent to him."⁸¹

As California's story unfolds, state officials are expressing concern about this public reaction:

The uproar that has accompanied the release of [the first graduates for the program] has prompted the administration of Gov. Arnold Schwarzenegger and legislators to reexamine the eight-year old [SVP] program. "We are concerned about the difficulties and the growing attention to the placement of these individuals," said . . . [the], spokeswoman for the Health and Human Services Agency.⁸²

A newspaper headline highlighted the official concern: *State Law Threatened by Public's Revulsion to Sex Offenders/Legal Challenge Could Result if Predators Are Given Nowhere to Live*.⁸³

But the experiences of Minnesota and Wisconsin suggest that the intensity of the public opposition to the release of committed sex offenders will be too intense for politicians to handle in a deliberate way. No politician can afford to have any weakness on the issue exposed. The politicization of the issue severely narrows the permissible areas of discourse. The developments in Minnesota suggest that budget concerns are

⁸¹ Jake Henshaw, *Bills Introduced in Response to Release of Sex Offenders: Battle over Placement of Program Graduates Prompts Look at Policies*, THE DESERT SUN (Palm Springs, Cal.), Mar. 20, 2004, at 1A, available at <http://www.thedesertsun.com/news/stories2004/state/20040320021903.shtml> (last visited _.

⁸² *Id.* (paragraph structure omitted).

⁸³ Peter Fimrite, *State Law Threatened by Public's Revulsion to Sex Offenders; Legal Challenge Could Result if Predators are Given Nowhere to Live*, SAN FRANCISCO CHRON., Mar. 8, 2004, at A1.

toxic, effectively making any kind of cost-benefit analysis untouchable. Similarly, the consistent framing of the issue as reflecting a tension between patient rights and public safety leaves out any consideration of the principles of selective incapacitation and the notions of proportionality that it entails.

The political vocabulary introduces the rhetoric of zero-tolerance. Thus, a newspaper editorial in Wisconsin ridicules a legal standard permitting supervised discharges of individuals who fall below the “substantially probable” standard for original commitment,⁸⁴ and a Minnesota prosecutor calls a ten percent recidivism rate “unacceptable.”⁸⁵ This is a significant transformation from the starting position in which the central justification for sex offender commitments was the legislature’s focus on the few “most dangerous” offenders.

The political rhetoric tends to shape the problem of sexual violence in the form of the archetypal “Beauty and the Beast” story, focusing intense attention on rare but vivid crimes. Such a narrow framing of the problem renders the huge proportion of sexual violence relatively invisible. A media commentator in California highlighted the irony in the enormous public outcry over the supervised release for three SVP graduates:

It’s worth asking whether such strident resistance is proportional to the potential threat these ex-convicts pose. Not that the public shouldn’t be concerned about the ex-offenders’ potential to strike again. But citizens are overlooking thousands of other released sex offenders, many of whom are back on the street without any legal strings. Care to guess how many convicted sex offenders are believed living freely in California, either paroled or

⁸⁴ See *Another Look*, supra note 75.

⁸⁵ See Marcotty, supra note 33.

simply released without significant treatment? It's about 67,000⁸⁶

If “Beauty and the Beast” is the template for the problem, then SVP commitments become the die for the solution. In Minnesota, the release of Rodriguez was consistently described as a “mistake” that needed fixing. We must, the papers said, “devise better ways to actually protect the community from sexual predators.”⁸⁷ Discussion focused on SVP commitments as the (only) potential solution. The direct question posed by the media was why civil commitment was not pursued for Rodriguez. Civil commitment was identified as the “program designed to secure public safety,”⁸⁸ as if this were the only means of protecting public safety. Thus, civil commitment becomes the ordinary, rather than the extraordinary, solution.

Unsurprisingly, the key fix for the “mistake” in Minnesota is to expand the reach of the SVP program. The process by which this expansion was accomplished is instructive. Prior to the crises, Minnesota essentially had four categories of risk for released sex offenders. Three categories related to community notification, ranging from Level 1 (least risky) to Level 3 (most risky). Superimposed on that classification scheme was the somewhat separate civil commitment referral process. In general, only a fraction of the Level 3 offenders were referred for commitment. The media response put immense pressure on this system. The theme in the press after Rodriguez’s arrest was “why was this Level 3 offender not referred for commitment?” The question has powerful resonance because the state defined Level 3 as the “highest” risk. It was

⁸⁶ Vicki Haddock, *Molester Multitudes; Police Can't Locate Thousands of Sex Offenders*, S. F. CHRON., Mar. 21, 2004, at E3.

⁸⁷ *Rodriguez; What to Do with Sex Predators?*, *supra* note 53.

⁸⁸ *Id.*

impossible for officials to justify why anyone with this designation would not be committed. The natural response was to expand commitment referrals to the entire group of Level 3 offenders. But there is no reason to think that the arbitrary boundary defining the bottom of Level 3 will be the last resting point for civil commitment.

When it comes to the politics of sexual violence, shifting blame is not only acceptable, but necessary. No one wants to be the last one to have touched the “mistake.” This blame shifting is not only unseemly, but it also will seriously undercut good public policy. In the Minnesota story, shifting the blame has meant that the referral decisions about SVP commitments will be made by eighty-seven county prosecutors, rather than by a centralized and specialized team.⁸⁹ This decentralization will decrease the chances that a consistent and evidence-based judgment about who is the “most dangerous” will be made.

Conclusion

The experiences in Minnesota and Wisconsin—echoed in California and Washington—send an unmistakable message. Once a state has opened Pandora’s box by adopting an SVP Program, efforts to limit the growth of such programs will be met with fierce public opposition.

We might ask why it matters. After all, every predator confined is a predator from whom we are protected. But it is much more complicated than that. Every dollar spent on SVP programs is a dollar that could be spent on the much more ubiquitous, but relatively invisible, forms of violence against women and children. As Minnesota politicians exchanged blame and legislators fell over each other to draft tougher laws for

⁸⁹ See *supra* note 57 and accompanying text.

sex offenders, a small group of women and men protested state funding cuts of \$5 million in domestic violence funding.⁹⁰ The story, buried in the B-section of the newspaper, was a whisper compared to the cacophony generated by the crises of the previous summer. Yet last year in the Hennepin County (Minneapolis) Minnesota, there were “over 30,000 calls to 911 regarding domestic violence. . . . In the last five years 132 women and 68 children under the age of 13 died because of domestic violence.”⁹¹

The funding and focus on SVP commitments misdirect our focus and resources away from the “most danger.” By using the Beauty and the Beast template as our guide in fixing the system, will we have accomplished a real increase in safety or simply achieved some reassurance, unsupported by any systemic change, that we have exiled from our midst the symbolic “beast”?

There is no shortage of responsible officials and commentators who understand that the Constitution and sound public policy demand that SVP programs be limited. For example, Dean Steven McAllister, who spoke at the symposium at which this paper was presented, is no foe of SVP laws: he helped write the briefs defending the Kansas SVP law in the United States Supreme Court. Yet Dean McAllister expressed his disappointment and concern at the failure to limit the actual implementation of these laws.⁹² Similarly, officials in Maryland, Washington, and California appeared to concur with the judgments of their counterparts in Minnesota and Wisconsin. Larry Fitch, head

⁹⁰ *Rallying Against Domestic Violence*, MINNEAPOLIS STAR TRIB., Feb. 12, 2004, at 5B.

⁹¹ E-mail from Chief Judge Kevin Burke, Hennepin County (Minnesota) District Court, to a large group of people and forwarded to Eric S. Janus (Feb. 6, 2004, 3:41 PM CST) (on file with author).

⁹² Videotape: Symposium, *Managing Sex Offender Risk, Conditional Release and Community Treatment* (Feb. 20, 2004) (on file with the *Seton Hall Law Review*).

of Forensic Services for the Maryland Department of Health and Mental Hygiene, opined that the Wisconsin SVP program “is doing the best job of moving people through.” He continued: “That is what this is supposed to be about—people are supposed to be treated and integrated back into the community. In some states, people have bought into the idea that this is simply extended confinement.”⁹³

George Bukowski, who runs California’s program, similarly commented positively about the Wisconsin program: “Maybe we need to talk to people in Wisconsin,” he said.⁹⁴ And Mark Selig, head of the Washington State SVP program, stated: “I think the problem with the laws has been that the view at the time they were conceived didn’t account for the whole picture, the mission of treatment and the process of release. . . . That’s really where the problems lie. We are all trying to learn.”⁹⁵

The lesson to be learned is an expensive one. When Wisconsin’s SVP law was passed, “officials estimated that 10 people per year would be committed and that annual operating costs would be around \$3.6 million.”⁹⁶ Some ten years later, in 2003, operating costs for the Wisconsin program are \$26 million a year, and the physical facility itself cost about \$40 million.⁹⁷ California is slated to spend \$350 million for a facility to house

⁹³ McBride & Epstein, *supra* note 62.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

its SVP population.⁹⁸ Costs for the Minnesota program were projected to rise from \$17 million to \$76.9 million in the twelve years from 1998 to 2010.⁹⁹

The Wisconsin and Minnesota experiences show that even good intentions on the part of state officials will be insufficient to hold these programs to the strict limits they require. Once the politics of sexual violence attaches, its logic will prevail with no obvious or logical benchmarks to provide limits.

How can we close Pandora's box? I propose here a few ideas that will lead us in that direction:

- Shift the underlying framework from addressing the “most dangerous” to preventing the “most violence.” The aim of public policy ought to be to have a mix of tools that are optimized to effect the largest, most effective reduction in sexual offending.
- Base public policy and program design on the growing body of knowledge about sexual offending. Decisions about resource allocation and program design ought to be grounded on empirical knowledge about the diversity, patterns, causes, prediction, and treatment of sexual offending.
- Prevention programs must be systematically, not incrementally, built and evaluated. Addressing the “most violence” requires having a range of interventions and the ability to allocate resources and risks among those interventions. Expansion of expensive intensive interventions is hard to resist unless the next most intensive tool is available and adequately funded.
- The politics of sexual violence must be addressed. The news media must be part of the solution, helping to reframe public discourse. Basing systems on evidence and cost-benefit allocations provides public officials firmer ground than arbitrary, ad hoc design decisions. Innovations like problem-solving courts should be used to coordinate and rationalize individual plans for offender supervision and treatment in the community.
- Governments should fund research, development, and evaluation. Key areas where more knowledge is needed include: efficacy of treatment and supervision of sex offenders in the community; identification of “dynamic” predictors of sexual recidivism; development and evaluation of broad-based primary (public-

⁹⁸ *Id.*

⁹⁹ MINN. DEP'T OF CORR., CIVIL COMMITMENT STUDY GROUP, REPORT TO LEGISLATURE 21 (1998). This figure does not include costs associated with legal proceedings, estimated by the Minnesota Department of Human Services in a 1997 survey at \$100,000 per commitment for attorneys and experts. Fitch, *supra* note 18, at 493.

health style) interventions that attempt to change attitudes and behaviors before sexual abuse occurs; and whether legal tools such as mandatory reporting and community notification are, on balance, effective in reducing violence.