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Preventing Sexual Violence: Alternatives To Worrying About Recidivism

Abstract

How can it be that in the era in which almost one million Americans are on sex offender registries—most of whom are publicly stigmatized on websites, banished from their homes, shunned from their jobs, prevented from uniting with their families and traveling internationally, forced into homelessness, all of which increases their risk for suicide, and shames their spouses and children, even if their offenses occurred long in the past—that the #MeToo movement would explode, revealing widespread sexual misconduct against women, by powerful men, protected by iconic institutions? How can we have had three decades of the most aggressive, “spare-no-expense” laws ostensibly designed to prevent sexual violence and, at the same time, observe the widespread failure of law enforcement agencies to take the simple step of analyzing sexual assault kits, as a first step in the investigation of allegations of sexual abuse? How can these phenomena co-exist?

This Article argues that this incongruity is not an ironic coincidence, but rather a flaw that goes to the heart of our contemporary approach to sexual violence prevention. This flaw has, at its core, an almost obsessive focus on recidivistic sexual violence. Understanding this central characteristic will illuminate a framework for an alternative approach to our public policy on sexual violence, one in which the prevention of recidivism plays but a small role in a more comprehensive approach to sexual violence and its place in our culture

The flaws in the regulatory intervention policies are not an accidental characteristic, but arise from, and in turn support and protect, the very phenomena underlying #MeToo and the SAK revelations: the cultural attitudes, values and practices that allow sexual violence against women to flourish.

Indeed, the thesis is that our aggressive policies are, in a perverse way, designed precisely to protect this aspect of our society—what feminists might call “the patriarchy”—from taking full accountability and responsibility for its role in sexual violence. In this sense, we can say that #MeToo and SAK backlogs persist not in spite of, but in significant measure because of the nature of the aggressive regulatory policies addressed to sexual recidivism.

Keywords

#MeToo Movement, Sexual Assault Kits, Sexual violence prevention, Sex offenders, Recidivism

Disciplines

Criminal Law

PREVENTING SEXUAL VIOLENCE: ALTERNATIVES TO WORRYING ABOUT RECIDIVISM

ERIC S. JANUS*

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I. INTRODUCTION

How can it be that in the era in which almost one million Americans are on sex offender registries—most of whom are publicly stigmatized on websites,

* Professor of Law, Mitchell Hamline School of Law; Director, Sex Offense Litigation and Policy Resource Center. Many thanks are due to my research assistants, Samantha Zuehling and Bethany Maski, for their help in preparing this Article.

banished from their homes, shunned from their jobs, prevented from uniting with their families and traveling internationally, forced into homelessness,¹ all of which increases their risk for suicide,² and shames their spouses and children, even if their offenses occurred long in the past—that the #MeToo movement would explode, revealing widespread sexual misconduct against women, by powerful men, protected by iconic institutions?³ How can we have had three decades of the most aggressive, “spare-no-expense” laws ostensibly designed to prevent sexual violence and, at the same time, observe the widespread failure of law enforcement agencies to take the simple step of analyzing sexual assault kits,⁴ as a first step in the investigation of allegations of sexual abuse? How can these phenomena co-exist?

This Article argues that this incongruity is not an ironic coincidence, but rather a flaw that goes to the heart of our contemporary approach to sexual violence prevention. This flaw has, at its core, an almost obsessive focus on *recidivistic* sexual violence. Understanding this central characteristic will illuminate a framework for an alternative approach to our public policy on sexual violence, one in which the prevention of recidivism plays but a small role in a more comprehensive approach to sexual violence and its place in our culture.

The question posed by this symposium is whether there are alternatives to long-term incarceration to address violent recidivism. My answer is a definitive “yes,” along with a suggestion that the alternative entails reframing the question. Our current system of long-term incarceration for sex offenders is the

1. Beth Schwartzapfel & Emily Kassie, *Banished*, MARSHALL PROJECT (Oct. 3, 2018), <https://www.themarshallproject.org/2018/10/03/banished> [https://perma.cc/6W3S-VDDA] (documenting connection between residency restrictions and homelessness among sex offenders).

2. Moore Ctr. for the Prevention of Child Sexual Abuse, *News Release: Children on Sex Offender Registries at Greater Risk for Suicide Attempts, Study Suggests*, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH (Dec. 6, 2017), <https://www.jhsph.edu/research/centers-and-institutes/moore-center-for-the-prevention-of-child-sexual-abuse/moore-prevention-news/children-on-sex-offender-registries-at-greater-risk-for-suicide-attempts> [https://perma.cc/BBC4-TGJ3].

3. Sophie Gilbert, *The Movement of #MeToo*, ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/> [https://perma.cc/R9PJ-4W8U]. In addition to exposing misconduct and cover-ups, the movement has also spawned some disturbing incidents of “mob rule.” See Times Editorial Board, *Editorial: Firing the Judge in Brock Turner Sex Assault Case Was a Step Toward Mob Rule*, L.A. TIMES (Sept. 12, 2019), https://www.latimes.com/opinion/story/2019-09-12/judge-brock-turner-sex-assault-case-tennis?fbclid=IwAR2KwXtuIA_5g20xHtlkdhuBGAMQ-p3MhVkpqNUFMjfrRad-0UaZ-FfyfPqQ [https://perma.cc/T9ZW-P3MJ].

4. Jennifer C. Braceras, *The Rape Kit ‘Backlog’ Narrative Lets Police Off the Hook*, BOS. GLOBE (Sept. 16, 2019), <https://www.bostonglobe.com/opinion/2019/09/16/the-rape-kit-backlog-narrative-lets-police-off-hook/WF4UkrHa58xVDbIn1FFyQI/story.html> [https://perma.cc/ZCT6-MXXH].

answer to a question that mistakenly focuses on recidivistic violence, causing a larger problem. The solution is to broaden our focus to all sexual violence.

This Article examines a suite of laws that have come to characterize our contemporary approach to sexual violence. These laws share several core characteristics. As observed above, their key focus and justification is recidivism prevention, specifically, reducing the rate at which individuals who have been previously convicted of a sex offense commit another sex offense upon release from punishment. The laws also share the claim that they are “regulatory” and not “punitive,” and therefore not subject to the normal constitutional constraints on punishment.⁵ This Article will refer to these laws as “regulatory” laws or regime, or, for reasons that will become apparent, “predator laws.”

Framing the central question about sexual violence in terms of managing the risk of recidivistic violence presupposes that recidivism is one of the central problems to be managed. It isn’t. The alternative is to put recidivistic violence in its proper place, as a small part of the problem, and dismantle the regulatory regime that has been built on the wildly exaggerated myths about recidivism. To do this requires understanding that we have developed such a singular focus on recidivism because it serves to protect traditional gender hierarchies.

The past three decades have produced a massive and wide-reaching movement to incarcerate people convicted of sex offenses. In addition to classic criminal justice responses—steadily increasing sentences⁶ and lengthy periods of post-confinement supervision⁷—this space has seen an unprecedented and unique reliance on regulatory means to achieve confinement and incarceration. Such regulatory means include civil predictive confinement (more commonly referred to as Sexually Violent Predator laws or Sex Offender Civil Commitment),⁸ broad registration and public notification schemes,⁹ and a variety of behavioral restrictions limiting where persons convicted of a sex

5. *Smith v. Doe*, 538 U.S. 84, 89, 92–93, 96 (2003); *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997); *Doe v. Miller*, 405 F.3d 700, 719 (8th Cir. 2005).

6. MINN. SENTENCING GUIDELINES COMM’N, CRIMINAL SEXUAL CONDUCT SENTENCING PRACTICES: CRIMINAL SEXUAL CONDUCT OFFENSES SENTENCED IN 2017, at 12 (2019) (noting that in Minnesota, average pronounced prison sentence for First Degree Criminal Sexual Conduct increased from 75 months in 1988 to 190 months in 2017); Kristen Budd & Scott A. Desmond, *Sex Offenders and Sex Crime Recidivism: Investigating the Role of Sentence Length and Time Served*, 58 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 1481, 1482 (2014).

7. Budd & Desmond, *supra* note 6, at 1494.

8. ERIC S. JANUS, FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 3 (2006) [hereinafter JANUS, FAILURE TO PROTECT]/

9. Wayne A. Logan, *Sex Offender Registration and Notification*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 397, 397, 400 (Erik Luna ed., 2017).

offense may reside and what online facilities they may use.¹⁰ The proliferation of these aggressive forms of non-penal, non-bricks, and mortar incapacitation has shown remarkable resistance to a robust, empirical critique¹¹ and to a growing wave of penal reforms that have addressed other aspects of mass incarceration.¹²

There are sound reasons to conclude that these regulatory interventions fail to achieve the goal ostensibly set for them: a reduction in sexual violence.¹³ In fact, there is good evidence that these policies have perverse and counterproductive effects that impede and impair efforts to prevent sexual violence, such as distortion and misallocation of prevention resources, impairment of reintegration efforts,¹⁴ leading to increased recidivism and impaired law enforcement,¹⁵ harm to families and victims, and deterrence of reporting and prosecuting sex crimes.¹⁶ These policies are reactionary, interstitial, atheoretical, and anti-empirical, and many critics identify these characteristics as reasons for the lack of efficacy and counter-productivity of the policies.¹⁷

But we will not be able to understand either the shortcomings of these policies or the reason they are so persistent unless we explore their relationship to the #MeToo movement, with its exposure of the powerful coverups and sanctioning of sexual misconduct and the revelations of thousands of Sexual

10. Jacob Hutt, *Offline: Challenging Internet and Social Media Bans for Individuals on Supervision for Sex Offenses*, 43 N.Y.U REV. L. & SOC. CHANGE 663, 665 (2019); Schwartzapfel & Kassie, *supra* note 1.

11. Eric S. Janus, *Holding our Sexual Violence Policy Accountable*, in SEXUAL VIOLENCE: EVIDENCE BASED POLICY AND PREVENTION 285, 295–96 (Elizabeth L. Jeglic & Cynthia Calkins eds., 2016).

12. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (federal incarceration reform excluding sex offenders); S. B. 7066, 2019 Leg., Reg. Sess. (Fla. 2019) (amending FLA. CONST. art VI, § 4 by restoring voting rights to felons, but excluding sex offenders).

13. Sexual violence, like all violent crime, has seen a decline. But, as is argued below, the evidence that the aggressive regulatory laws have contributed to that decline is weak. And, there is good evidence that other approaches would be more effective and more cost-effective. See Grant Duwe, *What Has Worked and What Has Not with Minnesota Sex Offenders: A Review of the Evidence*, 21 J. SEXUAL AGGRESSION 71, 82–84 (2015).

14. Beth M. Huebner, Kimberly R. Kras, & Breanne Pleggenkuhle, *Structural Discrimination and Social Stigma Among Individuals Incarcerated for Sexual Offenses: Reentry Across the Rural-Urban Continuum*, 57 CRIMINOLOGY 715, 718–19 (2019).

15. Janus, *supra* note 11, at 288–89, 299–30.

16. See Duwe, *supra* note 13, at 75.

17. Janus, *supra* note 11, at 290–300; Duwe, *supra* note 13, at 83.

Assault Kits (SAK) sitting untested in police warehouses.¹⁸ Both of these phenomena reveal deep veins of persistent cultural myths, attitudes, and practices that allow sexual violence to flourish: “a criminal-justice system in which police officers continue to reflexively disbelieve women who say they’ve been raped;”¹⁹ a system in which the classic rape myths prevail,²⁰ and in which rape is only “real” if the woman who is raped fits some notion of the “perfect” or “righteous” victim.²¹ These myths, and their pernicious undermining of the prevention effort, continue to flourish despite the aggressive campaigns underlying contemporary regulatory laws, campaigns that tout our societal commitment to “spare no expense” in our unflagging effort to “save [the] next innocent victim.”²²

This Article argues that the flaws in the policies are not an accidental characteristic, but arise from, and in turn support and protect, the very phenomena underlying #MeToo and the SAK revelations: the cultural attitudes, values and practices that allow sexual violence against women to flourish.

18. *Ending the Rape Kit Backlog*, RAPE, ABUSE, & INCEST NAT’L NETWORK, <https://www.rainn.org/content/take-action-end-dna-backlog> [<https://perma.cc/DWV5-T3EQ>] (stating at least 100,000 SAK’s have gone untested in warehouses); *see also* Corey Rayburn Yung, *How to Lie with Rape Statistics: America’s Hidden Rape Crisis*, 99 IOWA L. REV. 1197, 1204 (2014); Soraya Chemaly, *How Did the FBI Miss Over 1 Million Rapes?*, NATION (June 27, 2014), <https://www.thenation.com/article/how-did-fbi-miss-over-1-million-rapes/> [<https://perma.cc/A9UX-P7PU>].

19. Barbara Bradley Hagerty, *An Epidemic of Disbelief*, ATLANTIC, Aug. 2019, at 74; *see also* Rachel Lovell, Misty Luminais, Daniel J. Flannery, Laura Overman, Duoduo Huang, Tiffany Walker, & Dan R. Clark, *Offending Patterns for Serial Sex Offenders Identified via the DNA Testing of Previously Unsubmitted Sexual Assault Kits*, 52 J. CRIM. JUST. 68, 69 (2017) (identifying as causes of the backlog, *inter alia*, “victim-blaming behaviors and beliefs” and “budget cuts that reduced the number of sexual assault investigators and crime lab personnel”).

20. *See* JANUS, FAILURE TO PROTECT, *supra* note 8, at 79 (discussing of the classic rape myths); 3A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 736 (James H. Chadborn rev. ed., 1970) (“The real victim, however, too often in such cases is the innocent man.”); *id.* at 737 (“No judge should ever let a sex offense charge go to the jury unless the female complainant’s social history and mental makeup have been examined and testified to by a qualified physician.”).

21. *See* Hagerty, *supra* note 19. Historically, the victim must also have been Caucasian; in the eyes of the law, “only white women could be raped.” Sarah Deer, *Decolonizing Rape Law: A Native Feminist Synthesis of Safety and Sovereignty*, 24 WICAZO SA REV. 149, 151 (2009). Women minorities remain the most likely group to be affected by the crime of rape and the most likely to experience systemic barriers to reporting. *See* ELYSE SHAW, ARIANE HEGEWISCH, & CYNTHIA HESS, INST. FOR WOMEN’S POL’Y RES., SEXUAL HARASSMENT AND ASSAULT AT WORK: UNDERSTANDING THE COSTS 2 (2018), https://iwpr.org/wp-content/uploads/2018/10/IWPR-sexual-harassment-brief_FINAL.pdf [<https://perma.cc/F25F-A37Q>]; *Victims of Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT’L NETWORK, <https://www.rainn.org/statistics/victims-sexual-violence> [<https://perma.cc/3BJD-WDYK>].

22. JANUS, FAILURE TO PROTECT, *supra* note 8, at 8.

Indeed, the thesis is that our aggressive policies are, in a perverse way, designed precisely to protect this aspect of our society—what feminists might call “the patriarchy”—from taking full accountability and responsibility for its role in sexual violence. In this sense, we can say that #MeToo and SAK backlogs persist not in spite of, but in significant measure because of the nature of the aggressive regulatory policies addressed to sexual recidivism.

At the center of our policies is the notion of the “sex offender” as serial recidivist predator, a distinct type of person lacking key capacities that mark full civic personhood. This Article explores the origins of this idea, and its implications, in particular its relationship to the deep flaws in current policies. It demonstrates the falsity of the idea and explains how this particular figure of the sex offender as serial predator gets its power and stickiness from the cultural impetus to support and defend patriarchal power. I end by showing that effective alternatives exist and argue that only the abolition of the regulatory measures will open the way for policies that are uninfected by their anti-feminist core.

A final introductory note concerns the nature of sexual violence, its prevention, and the criminal justice system. Imagine a series of events, beginning with a sexual assault, progressing through a report to authorities, the law enforcement investigation, prosecutorial charging decision, the judicial process, the correctional process, and finally the release back into the community. Recidivism, by definition, occurs at the very last stage. And the “attrition” along the way is staggering. By a large margin, most victims of sexual assault do not report the assault to authorities.²³ And in those cases that are reported, the attrition is even steeper. According to a recent article in the Atlantic: “[R]oughly 125,000 rapes are reported across the United States . . . [b]ut in 49 out of every 50 rape cases, the alleged assailant goes free”²⁴ A focus on recidivism means attention to the very smallest end of the funnel; it excludes nearly all sexual violence. This Article attempts to shed some light on the reasons for this otherwise puzzling misdirection of our attention.

The precise opposite of the current approach to sexual violence prevention is the public health approach, which has at its center a search for and attention

23. NAT'L SEXUAL VIOLENCE RESOURCE CTR., STATISTICS ABOUT SEXUAL VIOLENCE 2 (2015), https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media_packet_statistics-about-sexual-violence_0.pdf [https://perma.cc/NA4X-QKR2].

24. Hagerty, *supra* note 19, at 74.

to the root causes of sexual violence.²⁵ #MeToo and the SAK crisis vividly expose key root causes: prevailing attitudes and institutional practices that facilitate, encourage, and valorize sexual harm, and protect sexual abusers. The current regulatory approach directs our attention away from these factors, because these factors constitute exactly the set of values that give men power, the “patriarchy.” Yet it is the public health approach that most thoughtful commentators, scientists, practitioners, and anti-violence advocates alike unambiguously support.²⁶

This Article is about alternatives. It suggests that our current recidivism-based approach focuses attention too far “downstream.” A broader field of vision will direct our inquiry at a better question: can we make positive changes further upstream? As one commentator observed about the SAK crisis:

This is the question that haunts every advocate, researcher, and enlightened detective or prosecutor I spoke with: How many rapes could have been prevented if the police had believed the first victim, launched a thorough investigation, and caught the rapist? How many women would have been spared a brutal assault?²⁷

II. HOW WE GOT HERE: A SHORT HISTORY

The historical development of the regulatory policies and laws has been described in various sources.²⁸ Sexual violence became a subject of intense interest among feminist thinkers and reformers in the mid-1970s.²⁹ These reformers saw multiple problems with our societal responses to sexual violence. Many of the problems were seen as tied to a series of “rape myths,” deeply ingrained ideas about gender relations and gender roles that described the archetypal rape.³⁰ These broadly-held traditional societal attitudes portrayed

25. Pamela M. McMahon, *The Public Health Approach to the Prevention of Sexual Violence*, 12 *SEXUAL ABUSE: J. RES. & TREATMENT* 27, 28 (2000).

26. See Janus, *supra* note 11, at 289–90; Kathleen C. Basile, *Implications of Public Health for Policy on Sexual Violence*, 989 *ANNALS N.Y. ACAD. OF SCI.* 446, 448–49 (2003); Sarah DeGue, Linda Anne Valle, Melissa K. Holt, Greta M. Massetti, Jennifer L. Matjasko & Andra Teten Tharp, *A Systematic Review of Primary Prevention Strategies for Sexual Violence Perpetration*, 19 *AGGRESSION & VIOLENT BEHAV.* 346, 346–62 (2014).

27. Hagerty, *supra* note 19, at 79.

28. See, e.g., JANUS, FAILURE TO PROTECT, *supra* note 8, at 20–21; see also Eric S. Janus, *Sexual Violence, Gender Politics, and Outsider Jurisprudence: Lessons from the American Experience in Prevention*, in *DANGEROUS PEOPLE: POLICY, PREDICTION, AND PRACTICE* 73, 73–75 (Bernadette McSherry & Patrick Keyzer eds., 2011).

29. JANUS, FAILURE TO PROTECT, *supra* note 8, at 81.

30. *Id.*

sexual violence as the product of an aberrational psychology among rapists; doubted women's claims of rape, placing on them the burden to disprove acquiescence and provocation; and generally asserted that women were safest at home and in marriage, and most in danger in public.³¹ These myths shaped law, policy, and practice.

Feminist thinkers and researchers challenged these myths. They asserted—and provided empirical evidence—that rape was deeply rooted in the “patriarchal” values and structures of the society, and therefore the product of societal, rather than solely individual psychological (or biological) causes.³² Research showed that sexual violence was much more ubiquitous, and more a characteristic of intimate relationships, than portrayed in the traditional view.³³ In short, feminist theorists claimed, and researchers proved, that “collectively women are more at risk of violence in intimate relations than in public spaces.”³⁴ Feminists, and other reformers, advocated for a series of reforms in law and policy, broadening and modifying the definition of criminal sexual conduct, and attempting to modify some of the law enforcement practices that subjected rape victims to additional trauma.³⁵

In challenging these myths and advocating for changes in law and practice to reflect the non-mythical reality of sexual violence as feminists saw it, some feminist ideas and reforms were deeply threatening to social conservatives.³⁶ The fight about the nature of sexual violence grew to a stature and importance similar to the parallel fights about gay rights,³⁷ women's roles in work and at home,³⁸ and abortion.³⁹

31. *Id.* at 84.

32. Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM L. & CRIMINOLOGY 554, 554–55 (1993); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1091, 1093 (1986).

33. Bachman & Paternoster, *supra* note 32 at 570.

34. Elizabeth Stanko, *Naturalising Danger: Women, Fear, and Personal Safety*, in DANGEROUS OFFENDERS: PUNISHMENT AND SOCIAL ORDER 147, 150 (Mark Brown & John Pratt eds., 2000). This portion of the text is based on Janus, *supra* note 28.

35. Eric Janus, *Civil Commitment as Social Control: Managing the Risk of Sexual Violence*, in DANGEROUS OFFENDERS: PUNISHMENT AND SOCIAL ORDER 71, 84 (Mark Brown & John Pratt eds., 2000).

36. Janus, *supra* note 28, at 76–78; JANUS, FAILURE TO PROTECT, *supra* note 8, at 84.

37. See ROGER N. LANCASTER, SEX PANIC AND THE PUNITIVE STATE 231 (2011). Lancaster argues persuasively that the “sex panic” that has led to our current suite of regulatory laws that “took shape during a period of cultural and political retrenchment in the wake of feminism and gay liberation.” *Id.*

38. See SARA M. EVANS, TIDAL WAVE: HOW WOMEN CHANGED AMERICA AT CENTURY'S END 308 (2003).

39. *Id.* at 46–47, 112, 182, 214.

The challenge to the institutions of the patriarchy evoked fierce reactions, symbolized in the 1991 Clarence Thomas confirmation hearings and the forceful and ruthless squashing of Anita Hill's testimony about Justice Thomas's alleged sexually harassing behavior.⁴⁰ It was at that very same period that the modern regulatory regimes got their start. I have argued elsewhere that these new laws provided a politically safe and powerful way for social conservatives to manage the trajectory of feminist-inspired anti-violence policy in a direction much more compatible with the traditional patriarchal views of gender relations and sexual violence.⁴¹ I argue here that this new direction was powered by a laser focus on recidivism and the creation of a new myth of "frightening and high" recidivism among individuals released after a sex offense conviction.

The origin stories of these laws are often told. They all follow the same template: They involve young children or young women who were brutally attacked, raped and killed. But the key similarity is that they all reflect *recidivist* violence, attacks by individuals convicted of sex offenses who had recently been released from their prison sentences. This focus on recidivist violence is of central importance to understanding the development of law and policy. As we shall see, in the culture war then raging, a focus on recidivist violence allowed social conservatives, as well as the society as a whole, to signal its proper concern about sexual violence, while protecting some of the central values of the patriarchy against the perceived attacks inherent in the feminist reforms.

III. "FRIGHTENING AND HIGH"

Very early in the development of these regulatory schemes, lawmakers and courts focused on a particular justification for the new laws: sexual recidivism rates that were purportedly extremely high. Particularly at the beginning of this reform, the claim was tautologically true: that *some* sex offenders reoffended at extremely high rates.⁴² A Fox News posting, for example, headlined *Molesters Often Strike Again*, quoted a "forensic psychologist specializing in criminal behavior and sex crimes": "It happens all the time . . . The dangerous ones have a high recidivism rate."⁴³ But the trope soon transformed into a non-

40. JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 99, 291–300, 343 (1994).

41. JANUS, *FAILURE TO PROTECT*, *supra* note 8, at 84; Janus, *supra* note 28, at 76–78.

42. JANUS, *FAILURE TO PROTECT*, *supra* note 8, at 48–49.

43. Catherine Donaldson-Evans, *Molesters Often Strike Again*, FOX NEWS (May 19, 2015), <https://www.foxnews.com/story/molesters-often-strike-again> [<https://perma.cc/6D3Y-CAT3>].

tautological statement about “sex offenders” as a group.⁴⁴ Most famously, the U.S. Supreme Court authoritatively characterized “sex offenders” as having a “frightening and high”⁴⁵ rate of sexual recidivism, identifying that rate as having been “estimated to be as high as 80%.”⁴⁶ Ira Ellman and Tara Ellman have traced the provenance—and baselessness—of this claim, which spread rapidly, being cited nearly one hundred times by courts.⁴⁷ Thoroughly discredited, the meme nonetheless persists.⁴⁸

The significance of this meme in shaping and justifying the new regime of laws cannot be overstated. It is central to the development and strengthening of the “sex offender” as the outsider, the other. It is central to the focus downstream, rather than on root causes. It is, thus, central to the strength of the predator laws as a bulwark against a feminist approach to sexual violence.

Begin by noting that the Supreme Court’s discussion in *Smith v. Doe*⁴⁹—occurring in connection with its vetting of registration laws—applied across the board to “sex offenders.”⁵⁰ The Court explicitly treated “sex offenders” as a “class,” referring to “the high rate of recidivism among convicted sex offenders and their *dangerousness as a class*.”⁵¹ The Court thus framed and created a “type” or taxon, a natural grouping of human beings, all of whom shared the key characteristic of “dangerousness.”⁵²

The Court’s language suggests that “sex offenders” are almost certain to rape again. This meme underlies two critical characteristics of our modern predator laws and the “sex offenders” they target. The first is the sex offender as “other.” The second is the sex offender as serial predator.

A. *The Sex Offender as “Other”*

The ostensive almost certain return to sexual crime upon release from incarceration strongly implies that “sex offenders” do not learn from the

44. See JANUS, FAILURE TO PROTECT, *supra* note 8, at 48 (detailing examples of legislative findings asserting that “[s]ex offenders” are “extremely likely” or “particularly likely” or “high[ly] likely]” to “repeat their offenses” after release from imprisonment).

45. *Smith v. Doe*, 538 U.S. 84, 103 (2003); *McKune v. Lile*, 536 U.S. 24, 34 (2002).

46. *McKune*, 536 U.S. at 33.

47. Ira Mark Ellman & Tara Ellman, “*Frightening and High*”: *The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 497 (2015).

48. *Jones v. Cty. of Suffolk*, 936 F.3d 108, 118 (2d Cir. 2019); *People ex rel. T.B.*, 2019 COA 89, ¶117, *cert. granted*, No.19SC690, 2020 WL 529206 (Colo. Feb. 3, 2020).

49. 538 U.S. 84 (2003).

50. *Id.* at 89.

51. *Id.* at 103 (emphasis added).

52. *Id.*

experience of harsh punishment. It suggests an impairment in the ability to control or choose one's behavior, an absence of the "free will" that normal humans have. As "free will" is a fundamental prerequisite for full civic personhood, its absence entails a psychological defect in "sex offenders" that differentiates them from "normals" on a critical aspect of humanhood.

This construction of the sex offender as the "other" is most explicit in connection with the courts' justification of the use of civil commitment schemes to lock up people after they have served their sentences. In order to find constitutional justification for these predictive confinement schemes, the courts explicitly characterize the individuals the laws target as exhibiting a "mental abnormality" sufficient to "distinguish" them from "dangerous but typical recidivist[s]." ⁵³ But the widespread citation of the "frightening and high" meme as justification for registration, notification and presence restrictions demonstrates that the abnormal psychological model pervades the popular and judicial understanding of all of the regulatory laws. ⁵⁴ As Beth Heubner, Kimberly Kras, and Breanne Pleggenkuhle write:

shaped by several stereotypes including the homogeneity of offending, unresponsiveness to treatment, and high rates of reoffending. [s]ociety applies a "moral-deviate script" to individuals convicted of sexual offenses, which describes the perceived immorality underlying their behavior and serving as a label that cannot be shed. The "sex offender" status is seen as a feature within the person rather than as a label affixed to him or her or as a characteristic. ⁵⁵

The role that "recidivism" plays in the origins and legitimization of the contemporary regulatory regime is highlighted by contrasting the mechanisms of past sex panics. These movements, and the laws they spawned, have always constructed their targets as the "other," but their focus was not so much on recidivism—the commission of another sex crime by a previously convicted individual—but rather the prediction and prevention of criminal activity by mentally defective individuals. The recidivism meme leads to the same kind of explanation for sexual violence, but without "the racist and homophobic dispositions of the earlier panics." ⁵⁶

53. *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

54. See Heubner, Kras & Pleggenkuhle, *supra* note 14, at 717 (arguing that the regulatory laws simultaneously "fuel[]" and "construct[]" the stigma of being a "sex offender").

55. *Id.* (citations omitted).

56. Roger Lancaster argues that "the racist and homophobic dispositions of the earlier panics became more subtle and less visible, while progressive rhetoric became more pronounced." LANCASTER, *supra* note 37, at 220.

For example, the sex crime panic that took place in Iowa in the 1960s was directed at closeted homosexual men who were plucked from their everyday lives and shuttled off to “treatment” centers.⁵⁷ It was not recidivism that was targeted, but rather the mentally defective “psychopath,” a term that was used as a “code word for homosexual.”⁵⁸ Similarly, Molly Ladd-Taylor traces the origins of Minnesota Sex Psychopath law in 1939 to the goal of Progressive reformers to “identify[] and contain[] would-be criminals before they committed a crime.”⁵⁹ The brutal murder that was the immediate catalyst for the passage of the Minnesota law led to a focus not on recidivists, but on “morons, defectives, and the insane. . . . [P]ederasts, exhibitionists, masochists, auto-eroticists were gathered up and questioned.”⁶⁰ The popular press claimed “that psychiatrists were nearly unanimous that almost all potential sex murderers could be identified and taken into custody for minor offenses before they launched their sex crimes careers.”⁶¹

B..*The Sex Offender as “Serial Predator”*

The “frightening and high” meme also entails that most sexual violence is the work of a discrete group of recidivist “serial predators.” After all, if those presently identified as sex offenders are “almost certain” to reoffend upon release from prison, then most future sex offenses will be committed by those recidivists, and most future “sex offenders” will be people who have been previously convicted of a sexual offense. Unless the number of reported sex offenses is (contra-factually) constantly growing, we would expect the 80% of offenders who recidivate to constitute about 80% of the offenders arrested and convicted of new offenses (also, contra-factually).⁶²

57. See NEIL MILLER, *SEX-CRIME PANIC: A JOURNEY TO THE PARANOID HEART OF THE 1950S* xvi–xvii, 148, 150 (2002).

58. Molly Ladd-Taylor, “*Ravished by Some Moron*”: *The Eugenic Origins of the Minnesota Psychopathic Personality Act of 1939*, 31 J. POL’Y HIST. 192, 194 (2019).

59. *Id.* at 195–96.

60. *Id.* at 200.

61. *Id.* at 202.

62. I use the term “serial predator” to refer to a specific pattern of behavior: sexual reoffending after having been convicted of a previous sex offense. As the text below demonstrates, the percent of such recidivists is much lower than commonly believed. There are, to be sure, individuals who are serial rapists, in the sense that they commit two or more sexual assaults. There is research suggesting that “serial sex offending is quite common,” in the sense that some offenders who are not apprehended commit an additional offense. See Hagerty, *supra* note 19, at 78 (reporting on the “sheer number of repeat offenders” revealed in the program to test warehoused Sexual Assault Kits). But other researchers warn against putting emphasis on serial rapists as perpetrators of campus sexual assault, stating that:

Put these two ideas together, and you have the foundations for modern sex-offender regulation: Policies designed to separate a discrete group of individuals who are inherently (psychologically, biologically) different-in-kind from the norm, and who are responsible for most of the sexual violence in our society. Therein lies both the moral and utilitarian justifications for placing “sex offenders” in a reduced rights zone and relying principally on a policy of separation and exclusion to effectuate a prevention agenda.

These policy foundations reinforce an anti-feminist agenda with a dual pronged approach. The regulatory laws are emblazoned with the traditional notion that sexual violence is aberrant rather than systemic, perpetrated by abnormal men rather than men acting out, and protected by, the norms of the society. Simultaneously, these laws are branded as aggressive and innovative,⁶³ thus inoculating the broader society from the argument that its own norms allow sexual violence to flourish.

I develop these ideas in my 2006 book titled *Failure to Protect*,⁶⁴ where I argue that these laws also serve the deep and historical need for western liberal democracies to define full civic personhood (“we the people”) by contrasting it with an outsider group whose rights need not be respected by the majority.⁶⁵ Rose Corrigan’s 2006 article makes a similar point about the relationship between the regulatory approach and the protection of traditional norms for gender relations:

Existing research fails to grasp that Megan’s Law is not solely an illustration of “governing through crime” interchangeable with other new punitive measures. Crucial to the success of Megan’s Law is its rejection of feminist challenges to social, cultural, economic, and legal institutions that structure gender, sexuality, violence, and the family. Megan’s Law is a viable project precisely because it so successfully distorts progressive, feminist rhetoric and tactics for ends that further the coercive and discriminatory uses of state

Although a small group of men perpetrated rape across multiple college years, they constituted a significant minority of those who committed college rape and did not compose the group at highest risk of perpetrating rape when entering college. Exclusive emphasis on serial predation to guide risk identification, judicial response, and rape-prevention programs is misguided.

Kevin M. Swartout, Mary P. Koss, Jacquelyn W. White, Martie P. Thompson, Antonia Abbey & Alexandra L. Bellis, *Trajectory Analysis of the Campus Serial Rapist Assumption*, 169 JAMA PEDIATRICS 1148, 1148 (2015).

63. JANUS, FAILURE TO PROTECT, *supra* note 8, at 3.

64. *Id.*

65. For further discussion, see *id.* at 5–6.

power. . . . Antirape activists argued that rape was the product of social conditions that normalized sexual violence; Megan's Law depicts sexually violent behavior as the product of individual mental defects and pathology.⁶⁶

Understanding the regulatory legal regime in this way helps explain its stickiness, its staying power over the years. It is not simply the vividness of crimes against children; it is that highlighting these particular crimes, in this particular pattern, keeps our focus away from the patterns by which the "patriarchy" allows sexual violence to flourish. By focusing on a particular image of "the recidivist," the "serial predator," as a psychologically different "other," we direct attention away from the social norms that protect and encourage sexual misconduct and we lessen the pressure for more fundamental change to those central pillars of male power in our society.⁶⁷

IV. THE MYTH OF THE SERIAL PREDATOR

The "frightening and high" myth is a faulty foundation for our sexual violence prevention policy. In constructing the figure of the serial predator, it mischaracterizes the nature of sexual violence and misdirects our prevention efforts.

A. *The "Frightening and High" Myth Grossly Exaggerates Sexual Recidivism*

The foundational myth of modern regulatory prevention policy holds that almost all people convicted of a sex offense will, when allowed back in society, commit another sex offense. In reality, the opposite appears to be true: almost all people convicted of a sex offense refrain from reoffending sexually. In a recent Bureau of Justice Statistics (BJS) study of sex offenders released from prison, 92.3% of the individuals were not rearrested for a new sex offense in the nine-year follow up period.⁶⁸ Even that statistic is likely to overstate the

66. Rose Corrigan, *Making Meaning of Megan's Law*, 31 L. & SOC. INQUIRY 267, 275 (2006) (internal citations omitted).

67. See LANCASTER, *supra* note 37, at 210 (describing how legislation "individualized the experience of violence and was in conflict with feminism's broader approach to systematic inequalities").

68. MARIEL ALPER & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, U.S. DEPT' OF JUSTICE, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM STATE PRISON: A 9-YEAR FOLLOW-UP (2005-14)* 4 (2019),

<https://www.bjs.gov/content/pub/pdf/rsorsp9yfu0514.pdf> [https://perma.cc/8FQU-7UC4].

rearrest rate for the entire class of sex offenders.⁶⁹ The BJS study was confined to individuals released from prison.⁷⁰ Thus, it does not include individuals who were convicted of a sex offense but not sent to prison.⁷¹ This non-prison group would include people sent to a local jail or placed on probation and is almost certainly less risky than the group sent to prison.⁷² So, the recidivism rate for the entire group of sex offenders is likely less than the 7.7% detected in the BJS study.⁷³

Of course, the fact that recidivism rates are much lower than asserted in the “frightening and high” meme is not support for the assertion that sexual violence is not an important problem in the country. In fact, sexual victimization is relatively widespread.⁷⁴ The rate of rape and sexual assault annually for persons over twelve for example, is 1.4/1000 people,⁷⁵ and the lifetime prevalence of sexual victimization among women is 18.2%.⁷⁶ But the focus on recidivism suggests that recidivistic offending is the core of the problem. In fact, as demonstrated below, it is not.

B. “Sex Offenders” are Heterogeneous with Respect to the Risk of Recidivism

Part of the creation of the “frightening and high” myth is the notion that sex offenders as a “class” are dangerous. But this assertion ignores the fact that individuals previously convicted of sexual offenses present a wide variance in the risk of re-offense.⁷⁷ To be more precise, the level of risk posed by each

69. Thanks to Professor Ira Ellman for developing this important point. *See* Brief of Eighteen Scholars as *Amici Curiae* in Support of Petitioners at 8, *Vasquez v. Foxx*, 895 F.3d 515 (7th Cir. 2018) (No. 18-386), *cert. denied*, 139 S. Ct. 797 (2019).

70. ALPER & DUROSE, *supra* note 68, at 1.

71. *Id.*

72. Brief of Eighteen Scholars as *Amici Curiae* in Support of Petitioners, *supra* note 69, at 16.

73. *Id.* at 8.

74. *Scope of the Problem: Statistics*, RAPE, ABUSE & INCEST NATIONAL NETWORK, <https://www.rainn.org/statistics/scope-problem> [<https://perma.cc/G2WL-RQ2Q>] (“Every 73 seconds another American is sexually assaulted.”).

75. RACHEL E. MORGAN & JENNIFER L. TRUMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CRIMINAL VICTIMIZATION, 2017, at 3 (2018), <https://www.bjs.gov/content/pub/pdf/cv17.pdf> [<https://perma.cc/ACZ8-8CZH>].

76. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 22 (2000), <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf> [<https://perma.cc/GE5V-CJA8>].

77. LIN SONG & ROXANNE LIEB, WASH. STATE INST. FOR PUB. POLICY, ADULT SEX OFFENDER RECIDIVISM: A REVIEW OF STUDIES I (1994),

individual can be assessed, and subgroups that are meaningful in terms of risk can be identified. To illustrate this point, consider the following examples:

- The State of Minnesota assigns a risk level to all sex offenders who are about to be released from custody.⁷⁸ In a recent report, the State identified 15% as level 3 (the highest risk), 29% as level 2, and 56% as level 1 (the lowest risk).⁷⁹
- In a study of California offenders, 8.9% were identified as “well above average” risk; 20% as “above average risk,” and 71% as “average or below average” risk.⁸⁰

This heterogeneity is exhibited along other axes. Two of the most significant are age and years of offense-free living in the community. Robert Prentky, Howard Barbaree, and Eric Janus found that age-related “reductions in recidivism among sex offenders are consistent across studies” and that the “aging effect” is “one of the most robust findings in the field of criminology.”⁸¹ Philip Witt, John Furlong, Sean Hiscox, and James Maynard report that “The odds of being sexually reconvicted declined by about 0.02 each year of increasing age.”⁸²

Karl Hanson, Andrew Harris, Elizabeth Letourneau, Maaike Helmus, and David Thornton have reported on an even stronger relationship showing that the risk of sexual re-offense declines with time offense-free in the community: “risk predictably declines over time[.]” and “risk can be very low—so low, in fact, that it becomes indistinguishable from the rate of spontaneous sexual offenses for individuals with no history of sexual crime but who have a history

http://www.wsipp.wa.gov/ReportFile/1161/Wsipp_Adult-Sex-Offender-Recidivism-A-Review-of-Studies_Full-Report.pdf [<https://perma.cc/WT5T-TTH4>].

78. MINN. STAT. § 244.052 subdivs.2, 3(a)–(k) (2019).

79. Brian Collins, Minn. Dep’t of Corr., Presentation at the 2017 MnTASA Conference: Residency Restrictions: Sound Public Policy or Tinfoil Hats? (Apr. 21, 2017) (on file with author).

80. SEUNG C. LEE, R. KARL HANSON, NYSSA FULLMER, JANET NEELEY, & KERRY RAMOS, CAL. DEP’T OF JUSTICE, THE PREDICTIVE VALIDITY OF STATIC-99R OVER 10 YEARS FOR SEXUAL OFFENDERS IN CALIFORNIA:2018 UPDATE, 11, 19 (2018),

http://saraso.org/pdf/Lee_Hanson_Fullmer_Neeley_Ramos_2018_The_Predictive_VValidity_of_S_pdf [<https://perma.cc/7TEN-TTQF>].

81. ROBERT A. PRENTKY, HOWARD E. BARBAREE, & ERIC S. JANUS, SEXUAL PREDATORS: SOCIETY, RISK, AND THE LAW 112 (2015); *see also* Tamara Rice Lave, *Throwing Away the Key: Has the Adam Walsh Act Lowered the Threshold for Sexually Violent Predator Commitments Too Far?*, 14 U. PA. J. CONST. L. 391, 397 (2011).

82. Philip H. Witt, John S. Furlong, Sean P. Hiscox, & James H. Maynard, *Age and Sex Offense Recidivism*, SEX OFFENDER LAW REP., Feb./Mar. 2015, at 1, 28.

of nonsexual crime.”⁸³ Each year in the community offense-free indicates a 12% decrease in the odds of reoffending, and this is true for offenders in all risk categories.⁸⁴ The clear implication from these findings is that sex offenders do not pose a special risk of sexual recidivism forever, and that there is a point in time when expending societal resources on special supervision of sex offenders is wasteful.

C. Recidivist Sexual Offending is a Small Sliver of All Sexual Offending

Multiple studies establish that recidivist violence is a tiny fraction of all sexual violence. Kelly Bonnar-Kidd reports that 96% of all arrests for sexual crimes in New York involved individuals without previous sex crime convictions.⁸⁵ A government study of sex offenders released from prison in 1994 found that 86% had had no prior conviction for a sexual offense.⁸⁶ The number was similar (84%) in a study following prisoners released from prison in 2005.⁸⁷ The 1994 study also found that released offenders not convicted of sex crimes accounted for 87% of the sex crimes committed by all prisoners released from custody.⁸⁸ In Pennsylvania, “more than 96 percent of defendants charged with a sexual offense in 2016 had no criminal history of sexual violence.”⁸⁹ And a Minnesota study found that 93% of all sex offense convictions were of first-time sex-offenders.⁹⁰

83. R. Karl Hanson, Andrew J. R. Harris, Elizabeth Letourneau, L. Maaik Helmus, & David Thornton, *Reductions in Risk Based on Time Offense-Free in the Community: Once A Sexual Offender, Not Always A Sexual Offender*, 24 PSYCHOL., PUB. POL’Y & L. 48, 58 (2018).

84. *Id.* at 54.

85. Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 AM J. PUB. HEALTH 412, 414 (2010); *see also* Jeffrey C. Sandler, Naomi J. Freeman, & Kelly M. Socia, *Does a Watched Pot Boil? A Time-Series Analysis of New York State’s Sex Offender Registration and Notification Law*, 14 PSYCHOL., PUB. POL’Y, & L. 284, 295 (2008) (showing that, in N.Y., 95% of sex-offense arrestees between 1986 and 2006 were first-time sex offenders).

86. *See* PATRICK A. LANGAN, ERICA L. SCHMITT, & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 11 (2003), <https://www.bjs.gov/content/pub/pdf/rsorp94.pdf> [<https://perma.cc/R4VG-FR6B>].

87. *See* MATTHEW R. DUROSE, ALEXIA D. COOPER, & HOWARD N. SNYDER, U.S. DEP’T JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, at 10 (2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf> [<https://perma.cc/R7G9-JQZG>].

88. LANGAN, SCHMITT & DUROSE, *supra* note 86, at 24.

89. Joshua Vaughn, *Failure-to-Comply Arrests Reveal Flaws in Sex Offender Registries*, APPEAL (Aug. 1, 2018), <https://theappeal.org/skyrocketing-charges-for-failing-to-comply-with-sex-offender-registries-reveal-their-flaws/> [<https://perma.cc/7Z2C-JALZ>].

90. Collins, *supra* note 79.

There are several consequences of this insight. First, it reinforces the point made above, that the serial predator model is false. If that model were true, we would see a high percentage of repeated sexual offender arrests and convictions. However, what we observe is that most convicted sex offenders are first-time sex offenders, dispelling this myth. Secondly, it suggests that policies that focus primarily on recidivist violence as a prevention strategy are destined to have, at best, a small impact on sexual offending. After all, if recidivist sexual violence constitutes only 4–7% of those arrested or convicted for sexual violence, and, as Rachel Lovell, Misty Luminais, Daniel Flannery, Laura Overman, Duoduo Huang, Tiffany Walker, and Dan Clark state, “approximately 80% of rapes are unreported and of those that are reported, only 10% lead to a conviction[,]”⁹¹ even a large impact on recidivism will have only a small impact on sexual violence overall. We get the same result if we come at it slightly differently: The Rape, Abuse & Incest National Network reports that only 500 perpetrators out of every 100,000 sexual assaults will receive a felony conviction.⁹² According to the BJS recidivism statistics, forty (7.7% of 500) of those convicted will be rearrested for a new sex crime.⁹³ Even if the regulatory laws were to cut that recidivism in half, the change in sexual assaults would be an imperceptible .02%. But, as the next section argues, there is little evidence that the regulatory laws have any significant impact on recidivism.

V. THE WEIGHT OF THE EVIDENCE ESTABLISHES THAT CURRENT POLICIES ARE GENERALLY INEFFECTIVE AND PROBABLY HAVE PERVERSE CONSEQUENCES

The likely consequences of current policies have been thoroughly described in other sources.⁹⁴ We can summarize as follows: civil commitment programs

91. Lovell, Luminais, Flannery, Overman, Huang, Walker & Clark, *supra* note 19, at 69 (citing NATIONAL RESEARCH COUNCIL, ESTIMATING THE INCIDENCE OF RAPE AND SEXUAL ASSAULT (2014)). Note that other sources provide different reporting rates for sexual assault, but there is widespread agreement that the reporting rates are well below half. *See, e.g.*, NAT’L SEXUAL VIOLENCE RESOURCE CTR, *supra* note 23, at 2 (stating that 37% of sexual assaults are reported, but only 12% of child sexual abuse, is reported to authorities.); *The Criminal Justice System: Statistics, RAPE, ABUSE & INCEST NAT’L NETWORK*, <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/RCR7-FNED>] (stating that 23% of sexual assaults are reported to police).

92. *See Criminal Justice System: Statistics, supra* note 91.

93. ALPER & DUROSE, *supra* note 68, at 5.

94. *See, e.g.*, Deanna Cann & Deena A. Isom Scott, *Sex Offender Residence Restrictions and Homelessness: A Critical Look at South Carolina*, CRIM. J. POL’Y REV. 1, 10 (2019) (“[S]uch policies are repeatedly found to have extensive negative collateral consequences.”); Jill S. Levenson & David

A. D’Amora, *Social Policies Designed to Prevent Sexual Violence: The Emperor’s New Clothes?*, 18 CRIM. JUST. POL’Y REV. 168, 180 (2007).

are exceedingly expensive, have no demonstrable effect on the incidence of sexual violence, and a very small effect on recidivistic sexual violence.⁹⁵ The latter effect arises from the brute fact of incapacitation; the former most likely because the effect on recidivism is very small, and recidivism itself is a small fraction of sexual offending.⁹⁶ Largely unexplored is the resource-allocation consequences of civil commitment programs. Their cost nationwide is estimated to be in excess of half a billion dollars annually,⁹⁷ exceeding the amount budgeted (or requested) for all programs under the Violence Against Women Act nationally in fiscal year 2020.⁹⁸ There is strong evidence that these programs do not achieve their articulated goal of confining only the “most dangerous.”⁹⁹ They over-commit initially and extend confinements unnecessarily.¹⁰⁰ These factors add to the likelihood that alternative uses for the billions spent over the years would have more effective prevention effects.¹⁰¹

95. See Duwe, *supra* note 13, at 83; Jeffrey C. Sandler & Naomi J. Freeman., *Evaluation of New York State’s Sex Offender Civil Management Assessment Process Recidivism Outcomes*, 16 CRIMINOLOGY & PUB. POL’Y 913, 913 (2017) (finding a reduction in sexual rearrest rate of 2.6 percentage points).

96. Kelly M. Socia, *Sex Offender Civil Commitment Policies in Context*, 16 CRIMINOLOGY & PUB. POL’Y 909, 910 (2017) (“Therefore, in terms of reducing sexual assault victimization rates for citizens, these programs will play only minor roles compared with broader, more comprehensive reentry programs.”).

97. Andrew J. Harris, *Policy Implications of New York’s Sex Offender Civil Management Assessment Process*, 16 CRIMINOLOGY & PUB. POL’Y 949, 950 (2017); Adam Deming, *Sex Offender Civil Commitment Programs: Current Practices, Characteristics, and Resident Demographics*, 36 J. PSYCHIATRY & L. 439, 442 (2008) (reporting that the total budgeted for SOCC programs in 2007 was \$446 million). The budget for the California program in 2019 was \$333 million. Barbara Koepfel, *Modern-Day Gulag in the Golden State*, PRISON LEGAL NEWS (June 4, 2019), <https://www.prisonlegalnews.org/news/2019/jun/6/modern-day-gulag-golden-state/> [<https://perma.cc/35GF-V5R2>].

98. NAT’L NETWORK TO END DOMESTIC VIOLENCE, VIOLENCE AGAINST WOMEN ACT (VAWA) AND RELATED PROGRAM APPROPRIATIONS FOR FISCAL YEARS 17, 18, 19, AND 20, at 1 (2020), https://nnedv.org/wp-content/uploads/2020/01/Library_Policy_FY21_Approps_Chart_20Feb2020.pdf [<https://perma.cc/8A9C-MJEW>] (stating that the President’s FY21 proposed budget for all VAWA programs was \$498.50 million).

99. Janus, *supra* note 11, at 295.

100. *Id.*

101. See Andrew J. Ahrendt & William T. O’Donohue, *Sexually Violent Predator Evaluations: Problems and Proposals*, in SEXUALLY VIOLENT PREDATORS: A CLINICAL SCIENCE HANDBOOK 199, 210 (William T. O’Donohue & Daniel S. Bromberg eds., 2019) (“Research examining the effectiveness of SVP civil commitment on recidivism has resulted in findings supporting that the high cost of civil commitment and liberty deprivation is not worth the small benefit.”); BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN THE ACTUARIAL AGE* 32 (2007);

Presence and residence restrictions have repeatedly been shown to be ineffective or, worse, counterproductive in that they actually increase sexual reoffending.¹⁰² The fault likely lies in the false premise represented by the serial predator model. Offending against children is a function of social, not spatial, proximity.¹⁰³

Registries and notification schemes are a bit more complicated. While some studies have shown modest effects on recidivism, most likely due to the improved information available to law enforcement, most studies have shown no beneficial impact on recidivism or sex-crime arrest rates.¹⁰⁴ One of the most sophisticated studies, by J.J. Prescott and Jonah Rochoff, separated out the effect of registration from notification.¹⁰⁵ The authors concluded that public notification likely increases recidivism, whereas registration may have a deterrent effect on first time offending.¹⁰⁶ But the authors state that the negative effect on recidivism likely wipes out the beneficial effect of registration.¹⁰⁷

Other perverse effects have been observed including:

- Changes in prosecutorial practices that reflect prosecutors' reluctance to impose the harshness of registration, especially on juveniles.¹⁰⁸
- Possible creation of disincentives to reporting of sexual assault.¹⁰⁹
- Potential detrimental effects of false paradigms of sexual assault. The predator model may impair prevention by misdirecting self-protection actions on the part of potential victims¹¹⁰, and in impairing the ability to recognize the

Eric S. Janus, *Minnesota's Sex Offender Commitment Program: Would an Empirically-Based Prevention Policy Be More Effective?*, 29 WM. MITCHELL L. REV. 1083, 1101-02 (2003).

102. Cann & Scott, *supra* note 94, at 10-11 (citing studies that find "no impact" on recidivism or "increase the rates of sexual offending").

103. *Id.*; Brief of Eighteen Scholars as Amici Curiae in Support of Petitioners, *supra* note 69 at 8.

104. Janus, *supra* note 11, at 291-93; Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J. L. & ECON. 207, 235 (2011).

105. J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J. L. & ECON. 161, 180-81 (2011).

106. *Id.* at 181.

107. *Id.*

108. Janus, *supra* note 11, at 296-98.

109. *Id.*

110. Katherine Mangan, *Sex-Assault Prevention Program Sees Results, and Raises Questions*, CHRON. HIGHER EDUC. (June 12, 2015), https://www.chronicle.com/article/Sex-Assault-Prevention-Program/230861/?cid=at&utm_medium=en&utm_source=at [<https://perma.cc/6RGH-ND38>] ("Most women are oriented and trained and socialized to fear the stereotypical stranger rape and to avoid the

“warning signs of sexual behavior problems in siblings, parents, children, cousins, or others to whom they are close because they do not see them as ‘monsters.’”¹¹¹

VI. THE REGULATORY REGIME IS BROADLY HARMFUL

By casting sex offenders as degraded others, the regulatory laws create a dangerous revitalization of a jurisprudence of difference, continuing a disgraceful thread of American jurisprudence in which one after another outgroups are excluded from full civic personhood.¹¹² Underlying these laws is the stereotype that membership in a particular “class” of people signifies an inherent danger and degraded civic membership, justifying the creation of a zone of diminished rights. The sex offender laws, in short, provide legitimacy to this dangerous historical template.

These laws—both the past and the present—cause extreme pain among their targets, their families, and friends.¹¹³ “[T]he individual’s life chances are diminished, having ‘a cascade of negative effects on all manner of opportunities.’ . . . [T]he social and structural stigmas . . . interact and symbolically reproduce the very prison from which one is released.”¹¹⁴

The “othering” of sex offenders and the creation of the “serial predator” model, entail a steep discount on the harm to persons with convictions, and by extension, their families. In fact, it is a fair assessment that the pain caused by these laws is invisible and does not count at all in the prevailing public discourse.¹¹⁵ This is, of course, the obverse of the pain calculus giving rise to

underground parking garage or walking home alone at night across campus. That doesn’t protect them from far-more-common threats.”).

111. JOAN TABACHNICK & ALISA KLEIN, A REASONED APPROACH: RESHAPING SEX OFFENDER POLICY TO PREVENT CHILD SEXUAL ABUSE 2 (2011),

<https://www.atsa.com/pdfs/ppReasonedApproach.pdf> [<https://perma.cc/D5EW-CPWS>].

112. JANUS, FAILURE TO PROTECT, *supra* note 8, at 100.

113. Cann & Scott, *supra* note 94, at 13 (finding a strong association between the implementation of residence restriction policies and rates of homelessness for registered sex offenders in South Carolina); Huebner, Kras, & Pleggenkuhle, *supra* note 14, at 717; Mary Katherine Huffman, *Moral Panic and the Politics of Fear: The Dubious Logic Underlying Sex Offender Registration Statutes and Proposals for Restoring Measures of Judicial Discretion to Sex Offender Management*, 4 VA. J. CRIM. L. 241, 265 (2016).

114. Huebner, Kras, & Pleggenkuhle, *supra* note 14, at 717 (quoting Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. SOC. 363, 373 (2001)).

115. Janus, *supra* note 11, at 295–96.

the #MeToo movement, wherein it is only the pain of the perpetrator that counts.¹¹⁶

To say that the pain to former offenders and their families is not the only thing, is different from saying that it is nothing. In fact, rendering the pain of registrants invisible, making them the “other,” has the perverse effect of rendering the pain of most victims of sexual violence invisible as well. As we have seen, the regulatory regime is premised on the serial predator model, and this empirically inaccurate portrayal of sexual violence makes invisible the pain of the victims who have been harmed by people who do not fit the serial predator paradigm, and the victims whose harm could have been prevented by policies framed to address the real problem, rather than the mythical serial predator.

VII. ALTERNATIVES

The path to sexual violence prevention lies not in de-humanizing the perpetrators, but in humanizing them. True prevention requires acknowledging sexual assault not as an aberration, but as a ubiquitous part of our culture interwoven and supported by some of our fundamental hierarchies and values. If we seek efficacious prevention, we must abandon the serial predator model, and adopt, in its place, a more complex and factually based understanding of sexual violence that moves beyond the individual to the societal.

I offer that the first and key step to effective prevention is to understand the engine driving the predator model. If I am correct, that power is the protection of male privilege. The challenge is to transform the framing and the language from dehumanizing and othering, to changing cultural norms; from the futile and discredited attempt at ritual exile of evil, to a recognition that true prevention requires comprehensive, empirically informed changes to social norms, as well sensible and proportionate measures of accountability and incapacitation.

A. *Some Specific Alternatives*

In that spirit, I present a non-exhaustive set of examples of changes and approaches that would make a concrete, empirically supported difference in the level of sexual violence. The three examples I present illustrate the principle of comprehensiveness—they exhibit primary prevention as well as interventions after harm has been done—and they are all examples of rigorous

116. X. Birk, *Come Clean, Carleton*, MEDIUM (May 25, 2018), <https://medium.com/@xbirk15/come-clean-carleton-7a9c1d9311a6> [https://perma.cc/BB4B-HUQA] (“I vividly remember him scolding us for heedlessly ‘ruining the futures’ of the accused students . . .”).

evaluation to determine efficacy. In short, they are a model for an alternative approach to prevention.

1. Assault Prevention Training

Primary prevention arguably has the best opportunity to effectuate the biggest change because it has the potential to be widely implemented at the upstream end of the funnel. As Sarah DeGue, Linda Anne Valle, Melissa Holt, Greta Massetti, Jennifer Matjasko, and Andra Teten Tharp and others point out: “If a strategy is widely implemented, even a small effect on perpetration behavior may have a large impact.”¹¹⁷ A strong example of this is the work of Canadian researcher Charlene Senn, a social psychologist at the University of Windsor, and her colleagues, Misha Eliasziw, Paula C. Barata, Wilfreda E. Thurston, Ian R. Newby-Clark, H. Lorraine Radtke, and Karen L. Hobden, who have conducted research on programs to reduce sexual assault on college campuses.¹¹⁸ They reported in the *New England Journal of Medicine* that they developed a program for college women and subjected it to rigorous study.¹¹⁹ They reported that, in the study’s sample, the incidence of rape was reduced by 50% during the year following the program.¹²⁰ Rates of attempted rape and nonconsensual sexual contact were also reported to be “significantly lower.”¹²¹ According to the authors: “[O]nly eight women would need to have participated in the program in order to stop a nonconsensual, nonpenetrative act, and only 22 women to avert one completed rape.”¹²² The authors report: “most campuses use programs that have never been formally evaluated or have not proved to be effective in reducing the incidence of sexual assault.”¹²³

2. Testing Sexual Assault Kits; Training Law Enforcement

The careful study of untested Sexual Assault Kits (SAKs) yields several insights. Nationwide, thousands of such kits languish untested.¹²⁴ Their neglect has multiple causes, among them the persistence of classic rape myths which

117. DeGue, Valle, Holt, Massetti, Matjasko, & Tharp, *supra* note 26, at 359.

118. See Charlene Y. Senn, Misha Eliasziw, Paula C. Barata, Wilfreda E. Thurston, Ian R. Newby-Clark, H. Lorraine Radtke, & Karen L. Hobden, *Efficacy of a Sexual Assault Resistance Program for University Women*, 372 *NEW ENG. J. MED.* 2326, 2326–35 (2015).

119. *Id.* at 2326.

120. *Id.* at 2332.

121. *Id.* at 2326.

122. Mangan, *supra* note 110.

123. Senn, Eliasziw, Barata, Thurston, Newby-Clark, Radtke, & Hobden, *supra* note 118, at 2327.

124. Lovell, Luminais, Flannery, Overman, Huang, Walker, & Clark, *supra* note 19, at 68.

create skepticism and disbelief among law enforcement personnel.¹²⁵ The research shows that testing the kits leads to the identification, arrest, and conviction of significant numbers of perpetrators, and that these apprehensions, had they been timely, would have prevented additional sexual assaults.¹²⁶ “When this occurs,” as Lovell, Luminais, Flannery, Overman, Huang, Walker, and Clark report, “the potential exists to greatly reduce the number of future offenses across the country.”¹²⁷ What is required is “better training and additional resources” for the officers who investigate sexual assault.¹²⁸

Putting resources into the investigation of sexual assault and addressing the rape-myth attitudes underlying the neglect of SAKs would have a number of clear benefits. It is empirically based. It addresses key attitudinal impediments underlying the justice system’s “inadequate response to sexual assault.”¹²⁹ It addresses disincentives for reporting sexual assault, and “sends a supportive message to victims.”¹³⁰ It is directly related to holding perpetrators accountable. It has demonstrated benefits in terms of prevention of future offending, largely because it addresses a much broader aspect of the problem of sexual violence than registration and notification, which, as we have seen, addresses only the small end of the funnel.

3. Circles of Support and Accountability

Circles of Support and Accountability (CoSA) is a program that assists offenders to reintegrate into society after release from prison.¹³¹

CoSA is predicated on the idea that no one, not even a sex offender, is “disposable” in society. The program attempts to help core members successfully reenter society by providing them with social support as they try to meet their employment, housing, treatment, and other social needs. Through the regular meetings that occur among circle members, CoSA is designed to help core members forge friendships with the volunteers in their circles. . . . But given its goal of “no more victims,” CoSA also emphasizes accountability by insisting

125. *Id.* at 69; Hagerty, *supra* note 19.

126. Lovell, Luminais, Flannery, Overman, Huang, Walker & Clark, *supra* note 19, at 69.

127. *Id.* at 76.

128. *Id.*

129. *Id.* at 68.

130. *Id.*

131. GRANT DUWE, THE PROMISE AND POTENTIAL OF CIRCLES OF SUPPORT AND ACCOUNTABILITY: A SEX OFFENDER REENTRY PROGRAM 3–4 (2018), <https://www.aei.org/wp-content/uploads/2018/02/The-Promise-and-Potential-of-Circles-of-Support-and-Accountability.pdf> [<https://perma.cc/FL35-CFAE>].

that offenders accept responsibility for their actions.¹³²

Grant Duwe reports on a “gold standard” random-assignment study of Circles of Support and Accountability (CoSA) in Minnesota.¹³³ The study found that participation in the program lowered the risk of sexual recidivism by 88% (from 8% rearrested to 2%) and lowered the risk of recidivism for any type of offense by 57%.¹³⁴ Duwe estimates that the program results in a benefit to the state of \$40,000 per participant, returning \$3.73 for every dollar spent,¹³⁵ which he estimates to be 65% higher than the return from other correctional interventions.¹³⁶ Other studies have been consistent.¹³⁷ Similarly, he reports that “treatment is a cost-effective therapeutic approach” that is associated with a “3.6 percentage point difference . . . between treated and untreated sex offenders, resulting in a 26% reduction in sexual reoffending.”¹³⁸ Like CoSA, prison-based sex-offender treatment has an return on investment estimated between \$2.05 and \$3.11.¹³⁹ He contrasts these findings to more punitive and intrusive measures (longer sentences, civil commitment, and the regulatory measures this paper address), and concludes, “While studies have shown some of these interventions can reduce sex offense recidivism, they may also yield a negligible return on investment (ROI) due to high operational costs.”¹⁴⁰

VIII. CONCLUSION: DISMANTLING THE RECIDIVISM-FOCUSED SERIAL PREDATOR APPROACH

The question posed in this symposium is whether there are alternatives to long-term incarceration to address the threat of violent recidivism. My answer is a bit impertinent: the best way to reduce sexual violence is to stop the focus on sexual recidivism.

I have argued in this paper that the aggressive laws that characterize our approach to sexual violence prevention are a direct response to a focus on a mistaken but widespread meme that sexual recidivism is “frightening and high.” By their very structure, these laws are about separating a group from the populace. Their structure, their framing, and their language all point downstream, at a discrete group. They construct the problem as individual and

132. *Id.* at 4.

133. *Id.* at 5.

134. *Id.* at 6.

135. *Id.*

136. *Id.* at 8.

137. Giulia Lowe & Gwenda Willis, “Sex Offender” Versus “Person”: *The Influence of Labels on Willingness to Volunteer With People Who Have Sexually Abused*, SEXUAL ABUSE 1, 3 (2019).

138. DUWE, *supra* note 131, at 3.

139. *Id.*

140. *Id.* (footnote omitted).

aberrational, a cancer than can be excised. Their structure negates the idea that societal practices and values condone and foster sexual violence, cover it up and protect perpetrators. They make the pain of registrants and perpetrators invisible, but at the same time they cast the pain of most victims of sexual assault into the shadows: those whose victimization does not fit the paradigm, whose crimes are not reported, whose reports are not taken seriously, or whose victimizations could have been prevented by non-mythical, empirically based policies.

The main thesis is that our prevention would be more effective if it abandoned, or at least deemphasized the recidivism-based focus. More precisely, we should put recidivism in its proper place, which is a small part of the problem of sexual violence.

But what does that mean for the suite of policies that are so squarely based on the recidivism myth? What are the implications of the evidence that they represent poor resource allocation choices, with return on investments that are inferior to other options? That they most likely have perverse consequences that actually increase the incidence of sexual assault? That they cause pain to hundreds of thousands of people, some of whom are former-offenders, and many of whom are their families? That they may impair the reporting of sexual assault?

I propose that the proper answer to this question is abolition of these so-called regulatory laws, not their reform. The very core of these laws is harmful to the prevention effort, and to people. At their core, these laws are based on a model that is empirically false, and ethically corrupt: the idea that “sex offenders” are different in kind, aberrational, and are thus in a “reduced-rights” zone. They stand for an individualistic rather than societal solution. This core idea facilitates the harms that the #MeToo movement is exposing; it represents the myths that underlie the failures of the criminal justice system exhibited in the SAK crisis. In short, these laws give support to the anti-feminist gender hierarchy that protects abusers and demeans victims.

In contrast to abolition, mere reform would leave the core idea of these laws intact. And experience has shown that it is probably not possible to have a well-contained, limited version of these laws.¹⁴¹ Further, to the extent that individual assessment suggests that community supervision and behavioral restrictions are advisable for particular individuals as they are released from prison, the criminal justice system provides tools to impose those limits.¹⁴² The criminal system can certainly be excessive; but it is based on treating offenders as human

141. Eric S. Janus, *Closing Pandora's Box: Sexual Predators and the Politics of Sexual Violence*, 34 SETON HALL L. REV. 1233, 1233 (2004).

142. *Id.* at 1253.

beings who are accountable for their actions, rather than as “others” who may be regulated like nuclear waste.

In the end, the predator laws are just morally wrong. As a justice of the Minnesota Supreme Court opined: “Today the target is people who are sexually dangerous. Which class of people, who are different from us and who we do not like, will it be tomorrow?”¹⁴³

In re Matter of Linehan, 557 N.W.2d 171, 202 (Minn. 1996) (Page, J., dissenting). 143.

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