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Evidence Based Policy and Prevention

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Chapter 16
Holding Our Sexual Violence Policy Accountable

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Introduction

Public policy and law addressing sexual violence in the United States reflect fateful choices. Created reflexively—with little thought about the complexity of sexual violence, the interrelatedness of policies, and the risk of unintended consequences—the choices we have made fall short of our potential for preventing sexual violence. But it is not simply that our policies are not the best they could be; there is good evidence that many of our programs may actually worsen the problem. Our policies are characterized by a willful and intentional turning away from empiricism. The politics producing sexual violence policy is maladaptive, perversely and persistently keeping us from doing the right thing.

The choices we make in designing sexual violence policy are consequential. These choices are rooted deeply in the way we structure our thinking about the problem, what I refer to as our "frames" (Janus 2007). Our frames shape the questions we ask about how to prevent sexual violence and the assumptions we make about the nature of sexual violence and sex offenders. If we get the frames wrong, we will ask the wrong questions and get the wrong answers. Once we begin asking the right questions, we have a much better chance of designing the most effective prevention policies.

We need to change our frames for thinking about sexual violence policy. We need to demote the search for the "most dangerous" offenders, and promote the drive to eliminate the most harm. We need to broaden our focus beyond incapacitating the individual offender to a more comprehensive search to address the root causes of sexual violence, identifying not only the psychological or biological predispositions, but also the societal values and practices that allow and even encourage sexual violence to flourish.

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There is perhaps one frame that is most harmful: it is the notion that there can be no excess in this area of policy; that over-breadth and overzealousness are not harmful, because, at the very least, our laws are preventing at least some future victimization, and that is self-evidently good. We need to understand the two flaws with this approach: first, there is a very real possibility that some of our policies actually worsen the problem, increasing rather than decreasing sexual violence. Second, and perhaps more important, there is a strong possibility that our current allocation of scarce prevention resources means that we are failing to prevent as much harm as we could with other choices.

In this chapter, I argue that we need to change our frames, to ask different and better questions about sexual violence prevention, to base our policies more on science than on intuitions and fear-based stereotypes. There is solid evidence that some of the current approaches cause adverse changes in the efficacy of the criminal justice system and an increase in sexual violence recidivism. There is also strong evidence that other approaches—tried and true supervision and treatment, primary prevention strategies—can have a much greater impact on decreasing sexual violence (Janus 2006; Lobanov-Rostovsky 2015). In contrast, our current approaches have limited success in their stated purpose of protecting against recidivistic sexual violence.

Our prevailing frames are depressing our ability to address sexual violence in the most optimal way.

An Overview of the Major Characteristics of US Policy on Sexual Violence

Our subject is a series of approaches to sexual violence, all of which had their genesis in the 1990s (Janus 2006). These initiatives include sexually violent predator (SVP) laws, registration and community notification laws (SORN or RCNL), and a variety of residential and spatial restrictions. SVP programs, which are adopted in twenty US jurisdictions, use "civil commitment" to continue to confine (or, in a couple of instances, supervise) sex offenders who are being released from prison. These laws require proof of a likelihood of future sexual dangerousness as well as some vaguely defined form of "mental abnormality" that impairs the individual's ability to control his sexual misconduct. Theoretically, states are required to release individuals from SVP confinement as soon as they can be appropriately managed in less secure community settings (Indiana 1972; Hendricks 1997). Currently, approximately 5200 individuals are confined in SVP programs (Igneri and Wozniak 2011). Since SVP programs' inception, very few have been released (Lohn 2010).

Registration and community notification laws (RCNL) are mandated by federal law, and therefore have been adopted in all states. Though details differ, these laws require convicted sex offenders to register with law enforcement, often for many

decades or for life (Ellman and Ellman 2015). They also provide public access to information about offenders. Some states provide open access to information about all offenders (Prescott and Rockoff 2011). Other states tailor the degree of access by the risk level of the offender. Residential restrictions, which can be state-wide or local, impose spatial restrictions on where offenders can live or go.

What these all have in common is that they are addressed at recidivistic sexual offenders, meaning offenders whose identity is already known to law enforcement. These policies have been overlaid on changes to the criminal law that have broadened the definitions of criminal sexual conduct, attempted to make the criminal justice system more responsive to victims of sexual violence, increased average sentences for sexual offenses, and imposed automatic, long sentences on repeat sexual violence, particularly child sexual abuse (Janus 2006).

These laws all rest on the underlying assumption that sexual violence is stranger violence. The policies all seek prevention through separation. Directly through geographic separation, or indirectly through the identification of known offenders, these laws seek to keep "them" away from "us." They are all based on the archetype of the "sexual predator," the stranger rapist who, undeterred by punishment, is almost certain to reoffend. Ellman and Ellman (2015) trace the legislative and judicial genealogy of these laws, crystalized in a phrase adopted by the Supreme Court, parroted by numerous other courts, but without any empirical support: the recidivism of sex offenders is "frightening and high."

The legislative adoption of these laws was rushed, unencumbered by the complexities of scientific evidence. Registration and public notification laws arose and spread rapidly throughout the United States in the 1990s, culminating in the passage of the Adam Walsh Act at the federal level that mandated broad registration and community notification laws (RCNL) as a condition of receiving federal funds. SVP laws spread more slowly, often in response to horrific crimes. Residential restrictions have spread widely, but their reach has not matched the universality of RCNL laws.

Framing Our Approaches to Sexual Violence

Frames reflect our understanding of sexual violence, and define the problems we seek to address in designing public policy. At our core, our current way of framing and designing policy to address sexual violence is based on a view of sexual violence that focuses on the individual, rather than on societal level issues. Whether biological or psychological, the policy-makers' view assumes that there is something about the individual sex offender that has "caused" him or "predisposed" him to sexual misconduct. Cast into the shadows in this framework are societal factors: values, ideas, or institutional structures that are conducive to, or inhibitive of, sexual violence:

> While experts look to larger social and cultural patterns to explain why sexual violence is pervasive, the public sees the problem as resting within the minds, hearts, and actions of individuals. That is, how the occurrence of sexual violence is shaped by larger social and cultural systems is largely out of the purview of the average American (O'Neil and Morgan 2010).

Of course, any sensible theory of sexual violence would inclusively examine the interaction between social determinants and bio-psychological determinants. But our public policy has taken a decidedly different pathway. It has rejected, for the most part, inquiry into the societal causes of sexual violence. It has focused on identifying dangerous individuals, rather than dangerous values, myths, attitudes, or practices.

In several writings, I have advanced the theory that the strength of this frame ties directly into the "culture wars" that have raged since the 1980s. A persistent fault line has been the contest between social conservatives and feminists. Feminists claim that the "patriarchy," the embodiment of male power, is what allows rape and sexual assault to flourish, whereas social conservatives see traditional social structures (the family) as the best bulwark against rape (Janus 2006). The individualistic frame mandates that our focus be turned away from social structures like patriarchy, instead highlighting the abnormal constitution (psychological or biological) of the individual. The individualistic frame absolves us (as a society) from responsibility for sexual violence, giving us a relatively easy and pain-free way to address our obligations to prevent sexual violence. We need not reform our core values. All we have to do is identify the individuals who possess the aberrational sexually violent predisposition and separate them from us. This frame is fundamentally limiting. As Donna Dunn says "The absence of critical thinking about the larger social context … short circuits strategies that could address this problem at its roots" (Dunn 2015, p. 876).

This frame also gathers strength from its role in justifying a set of laws that treat sex offenders as the "degraded other" (Janus 2006). Inherent in the individualistic frame is the notion that offenders are abnormal and aberrational. This allows society to design policies that are based on differences in kind—with the underlying assumption that those individual characteristics never change, and justify categorical differences in the law, such as the creation of "reduced-rights" zones in which normal protections of the law are foregone. It allows us to disregard or devalue the rights—and pain—of the "other" (Janus 2006).

There are several other highly consequential choices that have framed the questions we ask, and therefore the solutions we find. One is an almost exclusive focus on recidivist violence, a small sliver of all sexual violence. The other is a set of memes that focus our attention on zero tolerance, and sparing no expense in preventing the "next" horrific sex crime.

Perhaps the most influential, yet most invisible, choice we have made is to frame our sexual violence policy almost exclusively in terms of recidivistic sexual violence. Policy-makers and courts consistently justified these laws based on the unquestioned (but mistaken) assertion that all sex offenders have extremely high rates of recidivism, and that the central aim of prevention could be accomplished by addressing only recidivistic violence (Ellman and Ellman 2015).

The exclusivity of this frame dangerously misdirects our attention. The relatively low rate of sexual recidivism—especially as compared to public perceptions—is one reason the focus on recidivism is harmful. Intrusive policies, justified by generalizations about high rates of recidivism, cause needless harm to individuals; they are of flawed design and therefore of doubtful efficacy (Ellman and Ellman 2015).

But there is a greater distortion that is harder to see. Recidivist violence is a small sliver of all sexual violence. Most sexual assaults are committed by non-recidivists—that is, by individuals who have not been previously convicted of a sex crime. Of those sex crimes that are in the criminal justice system, somewhere between one in seven and one in twenty is committed by an individual previously convicted of a sex crime—i.e., by a recidivist (Janus 2006; Zgoba et al. 2012). The recidivism frame obscures the great majority of sexual violence.

An additional important frame posits the benefit from these laws in terms of preventing the "next" horrific sexualized murder or rape. Minnesota Governor Mark Dayton, responding to a federal court decision holding the Minnesota SVP program unconstitutional, "has repeatedly cited a hypothetical worst-case scenario, saying he doesn't want to have to face the family of a person who has been killed or brutalized by a sex offender after they were released into a less restrictive setting" (Condon 2015). This frame leads immediately to the mantra that "we will spare no expense," (Lohn 2010) and that, as stated by Governor Dayton, we will not "compromise to the slightest degree" the safety of the population (Raguse and Associated Press 2015).

Bierie (2015) characterizes this framework as asking whether these laws "can ever help—whether there is any tangible examples in which a case was assisted or a victimization prevented" (p. 6). This approach—which I will refer to as the "at least some benefit" frame—truncates our ability to evaluate the success of our public policy. Since spatial separation seems intuitively to produce "at least some" benefit, we feel no need to look at unintended adverse effects, lost opportunities for prevention due to resource allocation choices, or the enormous harm caused to offenders and their families. It is in this way that these frames entail that sex offenders are viewed as the "other," a degraded class whose rights need not be respected, who have forfeited the right to a full place in society. There is no other way to understand the utility calculus underlying the "at least some" benefit frame. It must mean that any benefit, no matter how isolated, outweighs the harm to offenders and their families, a priori. This frame corresponds to research findings that the underlying motivations for these laws are retributive (Carlsmith et al. 2007 as cited in Calkins et al. 2014).

There is an alternative way of approaching sexual violence prevention. Instead of narrowly focusing on recidivistic offending, identifying the "most dangerous" and separating them from us and justifying policies if there is a chance that they will have "at least some" benefit, we should change our focus. We should reframe our policy analysis to understanding and preventing the "most danger."

Many of the most thoughtful commentators on the prevention of sexual violence urge a public health approach to the problem of sexual violence (Basile 2003;

DeGue et al. 2014; Palmer and Prowant 2013). Sexual violence, like the classic infectious diseases (small pox, measles, polio), has widespread negative effects on our society. The public health approach—a systematic application of scientific learning aimed at understanding and addressing root causes—could help effectively reduce sexual violence in the same way that it has controlled many infectious diseases.

The public health approach entails a systematic method of analysis, a way of seeing the problem in a larger, more contextualized framework. It uses systematic and empirically based information for deciding how best to attack a public health problem like sexual violence. It consciously looks beyond individual characteristics of offenders to identify causes that exist at a societal or community level. These classic steps that enabled public health to conquer infectious disease aim to address sexual violence comprehensively. The first step is "ongoing systematic collection, analysis, and interpretation of data on the incidence, prevalence, and risk factors." The second step is "identifying causes" through research. The third step is the "development and evaluation of programs." Finally, the public health model engages in "dissemination and implementation ... communicating which preventive programs work based on evaluation of data and putting these programs into practice" (Basile 2003) (Janus 2006, pp. 116–117).

The public health approach helps us understand the difference between thinking about a problem like sexual violence at the scale of individuals, and thinking about it from the perspective of the population as a whole. The public health approach allows us to see that there is "collective" risk as well as individual risk, and that recidivistic violence accounts for only a fraction of the collective risk posed by sexual violence (Janus 2006, p. 117). Unlike the conventional narrow and politicized approach informing our current laws, public health advocates understand the need for a "comprehensive approach addressing all levels of prevention" (Kaufman et al. 2002 as cited in Janus 2006, p. 117).

A report from the Minnesota Department of Health summarizes this approach: "Most often, perpetrators are known by the victims. A sustained effort must occur to change the social norms and conditions that support male violence" (Minnesota Department of Health 2009, p. 8). The National Alliance to End Sexual Violence urges policies that are designed to hold offenders accountable, yet are "grounded in research and assessed critically and routinely to ensure their effectiveness" and "[s]upport primary prevention policies and practices" (Tabachnick and Klein 2011, p. 10).

Evaluating Our Legislative Approaches to Sexual Violence

As suggested above, the conventional framing of sexual violence policy eschews the notion that we ought to evaluate the efficacy of our prevention policy. This view is aptly summed up by Minnesota State Representative Tony Cornish: "We didn't make these guys commit these crimes, so I have a hard time having any tears for

someone we can't find a place [to live] for.... You gotta think about the mother who is walking her kid to the playground. They don't really pay much attention to your statistics of recidivism" (Bierschbach 2016).

A key question that should be addressed is where the "burden of proof" lies in the context of evaluating these policies. The prevailing frame—which asks only if "at least some" crime is prevented—clearly places the burden on the critics. The burden has been hard to overcome, given the paucity of systematic evaluation of these laws, and the fact that much of the critique of the policies has necessarily been tentative—based on theory, but untested by rigorous empirical study. I argue, however, that the burden has shifted to the proponents of these laws, for four reasons: first, the evidence is strong that the direct benefit from these laws is quite small; second, there is now convincing evidence that these laws, or at least some of them, actually increase sexual offending. There is also some evidence, less conclusive, that these laws may impair the reporting and prosecution of sexual abuse. Third, there is strong evidence that other approaches to prevention are highly effective and underfunded. Finally, the persistent popularity of laws that are clearly counterproductive ought to dilute the deference customarily given to legislative action.

Registration and Community Notification Laws

Using a variety of techniques, researchers have attempted to ascertain whether registration and community notification laws have had an impact on sexual offending. The studies have grown in sophistication, evolving from a priori critiques based on the perceived incongruence of these laws with the actual characteristics of sexual offending, to much more sophisticated attempts to judge whether changes in offending rates can be connected statistically with the implementation of these laws. There is strong evidence that the efficacy of RCNL laws depends on their scope and severity. Poorly designed laws can increase recidivism and adversely affect the criminal justice system's handling of sex crimes.

Early critiques of registration and notification laws were based on the fact that intimates and acquaintances commit most sexual offenses, whereas the laws were designed around a stranger offender paradigm. Other critics pointed to the lack of use of public registries (Ackerman et al. 2012) as well as surveys showing that a majority of law enforcement officers "disagreed with the premise that 'sex offender registration and notification is effective in preventing sexual victimization'" (Tewksbury and Mustaine 2013, p. 102, as cited in Najdowski et al. 2016, p. 115).

Calkins et al. (2014) collected the results of empirical studies examining the efficacy of registration and community notification laws on sexual offender recidivism: "In summary, research on the effectiveness of RCNLs in addressing sex offending has produced mixed results across studies" (p. 453). Calkins et al. (2014) observed that "the neglect of risk-relevant information... may help to explain why this legislation has had little impact on recidivism" (p. 452).

Three studies, however, have convincingly demonstrated that RCNLs can have perverse and unintended effects that are adverse to the prevention effort. Najdowski et al. report that "registration may have iatrogenic effects on adolescent sex offenders and their social ties that, ironically, increase sexual recidivism" (Najdowski et al. 2016, p. 116), citing a study that followed a group of adolescent boys who had been adjudicated for felony sexual offenses and found that "registration was associated with a higher rate of sexual and other offense charge" (Letourneau et al. 2010 as cited in Najdowski et al. 2016, p. 116). The authors note that this result is "consistent with myriad evidence suggesting that registration harms adolescent and adult offenders in ways that might actually increase the likelihood that they will commit future crimes" (Najdowski et al. 2016, p. 116 (citations omitted)).

Prescott and Rockoff (2011) performed a sophisticated study comparing rates of sexual offending before and after enactment of registration and community notification laws across the country. They separately analyzed the effects of registration and of public notification. Their study found that registration did not deter non-registered offenders, but that it was associated with a reduction in reported recidivist offenses by registered offenders "presumably by increasing police monitoring and therefore increasing the likelihood of punishment that potential recidivists face" (Prescott 2012, p. 53). They estimated that the amount of sexual crime avoided through the reduction in recidivism is 1.07 % of the total annual amount of sexual crime reported (Prescott and Rockoff 2011). This result is consistent with other research that has shown that community supervision (in conjunction with treatment) is effective in reducing recidivism (Janus 2006).

These authors analyzed the effects of public notification separately. They found that notification laws appear to have a deterrent effect on non-registrants: "One potential explanation for this effect, also consistent with our model, is that notification deters potential (nonregistered) offenders by increasing the punishment for committing a sex crime" (Prescott and Rockoff 2011, p. 164). But, as they continue, notification regimes may actually increase recidivism among those subject to their requirements—i.e., among registrants (Prescott and Rockoff 2011). Further, they suggest that the size and scope of the public notification regime make a difference (Prescott and Rockoff 2011).

> We estimate that notification laws reduce the number of sex offenses when the size of the registry is small but that these benefits dissipate as more offenders become subject to notification requirements (Prescott and Rockoff 2011, p. 192).

They found that broadly applicable public notification is associated with an increase in recidivism: "Convicted sex offenders become more likely to commit crimes when their information is made public because the associated psychological, social, or financial costs make crime-free life relatively less attractive" (Prescott and Rockoff 2011, p. 165). They estimate that "[w]hen a registry is of average size, adding a notification regime effectively increases the number of sex offenses by more than 1.57 %" (Prescott and Rockoff 2011, p. 192).

Prescott summarizes:

> All else equal, publicly revealing the identity and criminal history of a released offender seems to increase the likelihood of his returning to crime. These results are highly statistically significant: it is unlikely that existing notification laws are reducing recidivism among registered offenders, and it is distinctly possible that these laws are making things worse (Prescott 2012, p. 54).

In the third study, Letourneau et al. (2010) examined South Carolina's adoption of registration and notification. They describe the South Carolina law as casting a "wide net: most sex crimes were designated register offenses, registration duration was set to life, and all registrants were subjected to community notification without regard for individual risk" (Letourneau et al. 2010, p. 48). Online public notification did not occur until 6 years after the initial implementation of the policy (Letourneau et al. 2010). They found that the initial policy did not have any "detectible effect on recidivism rates," but did have a deterrent effect, being "associated with reductions in first-time offending, suggesting that the policy caused would-be offenders to reevaluate the benefits-to-risks associated with sexual offending" (Letourneau et al. 2010, p. 48). They found that "failure to register as a sex offender does not appear to increase the likelihood of sexual recidivism" (Letourneau et al. 2010, p. 48). The study found "online notification was associated neither with general deterrence of sex crimes nor with reduced sexual recidivism rates" (Letourneau et al. 2010, p. 53).

Significantly, they also found that the enactment of South Carolina's sex offender policy was "associated with serious effects on judicial decision making" (Letourneau et al. 2010, p. 48). They found that prosecutors were more likely to "plead down," reducing charges from sex to non-sex crimes after the enactment of the policy, and this phenomenon increased in frequency after the advent of online notification (Letourneau et al. 2010).

These three studies confirm that RCNL laws are very likely to have negative consequences that actually undermine their public safety and recidivism reduction purposes. Two of the studies found an association between RCNL laws and an increase in recidivism. One found an association with increased prosecutorial decisions to "plead down" to non-sex crimes. Further, two of the studies found that the magnitude of adverse consequences was directly tied to the breadth and severity of the laws. Taken together, these three studies provide a convincing refutation of the "at least some" benefit approach to policy-making. The common-sense intuition that these laws are good policy because they prevent "at least some" crime constrains our inquiry too narrowly. As Prescott observes,

> It is easy to see, therefore, that the effect on recidivism of notification laws (and of most sex offender post-release laws generally) is an empirical question: the effectiveness of these laws will depend on how they are structured and applied (Prescott 2012, p. 55).

Residential Restrictions

Bierie, in one of the few cogent defenses of registration laws, makes a rather modest plea: "[T]his commentary is a call for understanding; it is an attempt to show that policy-makers, law enforcement, and the public are more rational than assumed and that they likely have reasonable and important ideas to consider" (Biere 2015, p. 8). But the persistence of residential and other spatial restrictions offers a cogent rebuttal to this modest claim: residential restrictions garner authoritative and nearly uniform condemnation. Prosecutors, correctional experts, treatment experts, state task forces, the U.S. Department of Justice, among others, all conclude that imposing residential restrictions generally on sex offenders is a bad idea. It is not bad simply because it is not effective. It is bad because it probably degrades supervision and accountability, inhibits re-entry and community connections, and therefore increases the likelihood of recidivism.

Calkins et al. (2014) explain "In summary, the data suggest that offenders are most likely to offend against individuals known to them, and, moreover, that they are likely to find their victims and carry out their offenses in private, as opposed to public, locations" (p. 455). They conclude that residency restrictions are "logically inconsistent with what we know about sex-offending patterns" (Calkins et al. 2014, p. 455). The Minnesota Department of Corrections concluded that "not a single re-offense would have been prevented by an ordinance restricting where sex offenders could live" (Duwe et al. 2008 as cited in Tabachnick and Klein 2011, p. 24). Similar unequivocal condemnations come from ATSA (2014), the California Sex Offender Management Board (CASOMB 2016), and the US DOJ SMART Office (U.S. Department of Justice 2015), and authoritative reports from Iowa (Iowa Department of Human Rights 2000), Kansas (Kansas Sex Offender Policy Board 2007), Colorado (Colorado Department of Public Safety 2004), and Florida (Levenson and Cotter 2005) have shown that there is no empirical reason to think that such geographical restrictions will be effective—and lots of reasons to think that such poorly thought-out broad brush restrictions may be counterproductive. National, well-respected anti-violence organizations, such as the Jacob Wetterling Foundation, warn against residency restriction laws, pointing out that they are "ineffective at preventing harm to children, and may indeed actually increase the risks to kids" (Jacob Wetterling Resource Center 2010; Duwe et al. 2008; Janus 2011).

But states and local jurisdictions continue to enact residency restrictions (Sex Offender Management Policy in the States 2010). This pattern provides reason to assert that the burden of proof on these laws should be on proponents. There is no reason to think that the adoption of these policies is anything other than parochial and heedless of adverse consequences. Policy-makers who act in the face of such uniform and compelling evidence ought to be put to the proof. Perhaps recognizing this, courts in a half-dozen states have struck these laws down.

SVP Laws

Unlike the other policies, the SVP programs very visibly incapacitate those who are confined, and thus have the direct benefit of preventing any crimes those individuals would have committed had they not been incapacitated. The benefits from SVP laws seem more concrete and obvious than the hoped-for, but difficult to observe decreases in recidivism due to other types of prevention efforts. But SVP programs are hugely expensive and highly intrusive on civil liberties (Janus 2006), so their claimed legitimacy depends on their promise to confine only a small group of the most dangerous offenders. The research shows that individuals selected for commitment are likely somewhat more dangerous than sex offenders who are not selected. But several factors undercut the mandate to confine only the "most dangerous." As a result, the justification for the extraordinary expense and intrusion is questionable.

Mercado et al. (2010) (as cited in Calkins et al. 2014, p. 449) found that the offenders who were "almost committed," individuals referred for commitment but released instead of committed, "have double (10.5 %) the rate of sexual recidivism as that observed in their general offender sample (5 %) in New Jersey." Still, Calkins et al. conclude "Even among this highest risk group (those highly considered for SVP commitment), detected rates of sexual recidivism were still quite low" (Mercado et al. 2011).

The selection procedures for SVP programs have been broadly shown to be suboptimal for choosing only the most dangerous for commitment. For example, several studies have shown that offenders who are actually committed are older than those who are not committed, despite the fact that research shows that aging diminishes risk (Ackerman et al. 2012; Lu et al. 2015; Lucken and Bales 2008). Further, in some states, these programs lack ongoing procedures to monitor the risk of committed individuals, in order to identify individuals whose risk could be reasonably managed in the community (Karsjens v. Jesson 2015; Van Orden v. Schafer 2015). Thus, factors like risk reduction through aging and treatment-induced change are not recognized, and there may be no system for identifying non-high-risk individuals who have been misidentified in the commitment process (Duwe 2013). This is significant given the research that shows juries have little regard for actuarial risk assessments (Krauss and Sales 2001 as cited in Lu et al. 2015), and have very low risk thresholds for judging dangerousness (Boccaccini et al. 2013).

A recently published study by Minnesota Department of Corrections researcher Grant Duwe concluded that the recidivism rates of civilly committed individuals were only slightly higher than the likely recidivism rate for offenders who were not civilly committed (Duwe 2013). Similarly, McLawsen et al. (2012) report that average actuarial risk assessment levels for Nebraska's committed population "are best described as moderate to medium" (p. 461).

Studies of two of the biggest SVP programs concluded that "individuals are being over-selected for commitment (Florida Department of Children and Families

2013, p. 24)," and "There is broad consensus that the current system of civil commitment of sex offenders in Minnesota captures too many people and keeps many of them too long" (Minnesota Sex Offender Civil Commitment Advisory Task Force 2013 p. 1).

Research from several perspectives shows that SVP programs have a very small impact on sexual offending. Duwe, for example, estimates that Minnesota's SVP program accomplishes a reduction of the state's overall four-year sexual recidivism rate of less than half of one percent (reduction from 3.2 % to 2.8 %) (Duwe 2013). Lave and McCrary (2013) used historical forcible rape, sex-related homicides, and non-fatal child sexual abuse rates to determine whether a state's passage of an SVP law had an effect on the rates of these crimes; their results "are consistent with SVP laws having no discernible deterrent or incapacitation effects" (p. 1402). Ackerman et al. (2012) reached a similar conclusion: "Even if those committed under SVP legislation have higher rates of recidivism than other violent criminals, the small number of rapes prevented by civil commitment is likely to be a very small fraction of the total" (p. 865).

The empirical data challenge the rationale for the high cost and drastic liberty deprivation of SVP programs. SVP programs consume a huge share of the prevention resources (Lohn 2010): SVP laws consume about a half-billion dollars to confine about 5000 individuals in two-fifths of the states. The estimated expenditure in the US from registration and notification regimes in all 50 states is less: $400 million (Biere 2015, p. 7). The per capita cost for confining a person in an SVP program, about $97,000 per year, is "nearly four times that of the $26,000 per offender annual rate of general correctional costs (Gookin 2007)" (Mercado et al. 2011, p. 12). The budget for the nationwide "Sexual Assault Services Program" under the federal Violence against Women Act (VAWA 2014) was $27 million for FY2015.

If, as these data suggest, the impact of SVP programs on sexual offending is small, it is likely that other allocations of those resources would provide greater protection against violence. I return to this question below.

Indirect Effects

Reduced reporting. The discussion above recites the growing body of evidence that these laws can have direct adverse consequences, such as an increase in recidivism and "pleading down" in criminal sexual conduct cases (Letourneau et al. 2010). An additional area of concern is whether the excessive severity of these laws might depress the reporting of sexual assault (Hamilton 2011). A number of respected researchers have raised this possibility, suggesting that victims in non-stranger assaults might hesitate to report because of the severity of the consequences for the perpetrator, who may be a family member or an acquaintance, and because of the feared notoriety and stigma that might fall on the victims and other family members of the perpetrator.

Finkelhor and Jones (as cited in Tabachnick and Klein 2011) surmise that an observed decrease in reported child sexual abuse might be due to increasing reluctance to report, a concern echoed by an ATSA Report: "It is important to consider whether or not the legislative policies currently enforced to manage known sex offenders might play a role in reducing the reporting of sexual abuse as opposed to there being an actual decline in the incidence of child sexual abuse" (Tabachnick and Klein 2011, p. 14). Surveying empirical, though anecdotal research on the effect that current laws might have on reporting, McLeod (2014) reports

> The extraordinarily punitive character of post-conviction sex offense regulations also makes survivors who have close personal or familial ties to their assailants reluctant to report not only out of fear or shame but because criminal conviction consequences that amount to permanent banishment are often undesirable between intimates (as opposed, perhaps, as applied to strangers). Registration and notification measures create particularly strong disincentives to report among family members (p. 1559).

The Handbook of Community Sentiment (Armstrong et al. 2015, p. 244) echoes these themes:

> In addition, fear of having one's family member exposed as an offender might make victims hesitate to report their victimization… To avoid that shame, the victim might remain silent. Incest and interfamily sex crimes are underreported, and notification laws might lessen reporting even more.

From a slightly different perspective, an ATSA report opines that the portrayal of sex offenders as "monsters" might depress recognition and reporting because "people may be less likely to recognize 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'" (Tabachnick and Klein 2011, p. 7). This concern is echoed by Senn et al. (2015), whose work with college women suggests that the incorrect portrayal of college sexual assault as being perpetrated mainly by "serial" rapists has impaired the ability of college women to recognize and take appropriate action to reduce the risk of sexual assault.

Despite these theoretical and anecdotal concerns, there has been little methodical research about the potential connection between harsh policies and the reporting of sexual assault (Lave 2011). I did a simple linear trend line plotting reporting for rape and sexual assault from 1994 to 2008. I observed that reporting for rape is generally higher than reporting for sexual assault, that the reporting rate for both types of crimes has increased during the 24-year period, but that rape reporting has increased at a faster rate than reporting of sexual assault. I also analyzed reporting rates for the combination of rape and sexual assault, using the NCVS Victimization Analysis Tool. I analyzed data from 2001 to 2014, separating out reporting rates for stranger-perpetrated crimes from non-stranger-perpetrated crimes. While reporting for stranger assaults remains steady, the rate of reports for non-stranger assaults declines. Note that the NCVS warns that some of these estimates may be unreliable since they are based on small numbers.

These results are very preliminary to be sure. The improved reporting rates during the period from 1994 to 2008 correspond to growing public awareness about

sexual assault, and this may explain in part the improved reporting rates. But the improvement is not shared for reporting of non-stranger assaults, an observation consistent with the theoretical concerns expressed by many commentators. Certainly, more work could be done to tease out these patterns and correlations.

Impact on offenders and their families: Juveniles, stigma, and vigilantism. These laws have powerful effects on offenders that are well described by Ellman and Ellman (2015):

> Residency restrictions … are severe enough to exclude registrants from most available housing in their community, preventing them from living with their families. Separate "presence restrictions" in many communities bar registrants from using public libraries or enjoying public parks with their families in some cities. Their registration formally excludes them from many jobs, and as a practical matter keeps them from many more. The registration requirement typically extends for decades, and in some states, such as California, for life, with no path off the registry for most registrants (pp. 496–497).

We can identify three additional types of consequences that were unintended, or at least, unanticipated. First, there is widespread evidence that notification regimes create stigma and hardship for families of offenders (Armstrong et al. 2015). Second, vigilantism facilitated by publicly available registry information continues, targeting not only offenders, but their families as well (Stillman 2016). Finally, a consequence that falls somewhere between intended and unintended is the effect these laws have on people whose sexual offending occurred when they were juveniles, and, indeed, on victims of childhood sexual assault (Stillman 2016). Though the public passion behind much of this legislation is grounded in the desire to protect children, it turns out that children are often perpetrators, and that many sex offenders are themselves victims of childhood sexual abuse (Stillman 2016). A Department of Justice study reports "Juvenile sex offenders comprise more than one-quarter (25.8 %) of all sex offenders and more than one-third (35.6 %) of sex offenders against juvenile victims" (Finkelhor et al. 2009, p. 3). Though most sexual abuse victims do not become sexual abusers, the authors report that "Among preteen children with sexual behavior problems, a history of sexual abuse is particularly prevalent" (Finkelhor et al. 2009, p. 3). "[C]hildren younger than age 12 have about an equal likelihood of being victimized by juvenile and adult sex offenders" (Finkelhor et al. 2009, p. 5). Yet the Adam Walsh Act requires states to include individuals who were 14 or older at the time of their offense in their registration and public notification schemes (McPherson 2007). It is not surprising that, several years into this regime, reports are surfacing of individuals whose lives have been devastated because of actions they took as children (Stillman 2016).

Opportunities Lost

Our framework needs to acknowledge that public policy involves choices with consequences. Chanting that we "spare no expense" to prevent the next tragedy is a harmful lie. Public funding for prevention is limited, and our policy choices

inevitably entail foregoing some prevention opportunities in favor of others. Minnesota Governor Mark Dayton made these tradeoffs explicit, warning the state's spending on its SVP program "will have to compete with the many pressing needs that fall under the Department of Human Services budget." He continued "We aren't able to do the innovative kinds of things we want to do for people who are more deserving of the limited dollars we have for public help" (Condon 2015).

The consequences of these choices can be quite stark: in recent years, "Minnesota [has] had the lowest number of psychiatric beds per capita in the nation (3.9 per 100,000, compared with an average of 14.1 per 100,000 and a recommended level of 50 per 100,000)" (Stanek 2013) and the highest per capita SVP population in the nation (Minnesota Office of the Legislative Auditor 2011).

In my book, Failure to Protect (Janus 2006), I suggested a number of thought experiments evaluating whether transferring money from SVP programs to broader interventions, such as intensive probation and parole supervision and primary prevention programs, might produce more effective prevention. I concluded these alternative approaches probably provide greater protection by preventing more sexually violent assaults. DeGue et al. (2014) confirm that this is a general principle of the public health approach: "If a strategy is widely implemented, even a small effect on perpetration behavior may have a large impact" (p. 359). But, of course, we cannot know what these interventions are without well-funded studies to develop, implement, and evaluate them, and we have not put sufficient resources into that effort (Senn et al. 2015; DeGue et al. 2014).

A powerful example is the work of Canadian researcher Charlene Senn, a social psychologist at the University of Windsor, and her colleagues, who have conducted research on programs to reduce sexual assault on college campuses (Senn et al. 2015). She and her colleagues reported in the *New England Journal of Medicine* that they developed a program for college women and subjected it to rigorous study. Senn et al. (2015) found that, in the study's sample, the incidence of rape was reduced by 50 % during the year following the program. Rates of attempted rape and nonconsensual sexual contact were also reported to be "much lower" (Senn et al. 2015). According to the authors, "Only 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" (Mangan 2015). Yet 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" (Senn et al. 2015, p. 2327). Recall that researchers find that other forms of intervention, such as harsh public notification laws and long-term SVP programs, probably reduce sexual violence by 1 or 2 %. Yet research on programs that could multiply that by orders of magnitude is underfunded (DeGue et al. 2014).

While SVP programs consume increasing budgets, other forms of prevention, such as domestic violence services, child protection services, sexual violence education, police services, parole and probation, and victim services, are starved for funding (Potter 2010; Schoenmann 2009; Washington State Strategic Plan for Victim Services 2005: 5). In Virginia, legislative leaders indicated that funding that state's SVP program will "force[them] to take money from other programs, many of

which received dramatic cuts last winter when legislators trimmed billions in core services such as education and health care to balance the state's budget" (Potter 2010). California spent $55 million a year on GPS tracking of sex offenders released from prison, but "largely ignored treatment" (Simerman 2010), despite broadly accepted evidence that treatment, coupled with supervision, reduces recidivism (Janus 2006: 126). In Minnesota, "77 % of sex offenders are released from prison without treatment," due to a shortage of treatment beds (Palmer 2010). Yet spending on Minnesota's SVP program is rarely reined in "We have to cut something else to pay for it," said a prominent state legislator (Lohn 2010). Domestic violence is a problem that is as serious as sexual violence (Black et al. 2011). Yet, domestic violence prevention is persistently underfunded (National Network to End Sexual Violence [NNESV] 2016). The National Network to End Domestic Violence reports (2016) "Almost 80 % of states reported that their programs were experiencing cuts or reduction in funding from local county and city sources." At the same time, demand on services is increasing, thus creating "an unconscionable gap in services" (NNESV 2016).

This critique is not only the work of civil liberties critics. ATSA says "Victim advocacy organizations have questioned the large expenditure of funds on sex offender management tools that may not really protect communities, while resources and services for victims are being cut" (Tabachnick and Klein 2011, p. 9). Commenting on a federal court decision holding that Minnesota's SVP program is unconstitutional, the Minnesota Coalition Against Sexual Assault (2015, p. 30) said "Minnesota's leading network of advocates for victims of sexual assault agrees with Federal Court Judge Donovan Frank's Order declaring the Minnesota Sex Offender Program unconstitutional. ... Public safety is served by prevention and true rehabilitation. A dysfunctional system does not help victims, and it does not help public safety."

Conclusion

We must change our framework so that it is focused on addressing the most danger, not simply the most dangerous. Such an approach demands systematic and comprehensive interventions that are based on evidence of effectiveness. Resources need to be devoted to evaluating approaches, and implementing the effective approaches. Defiant rejection of empiricism sounds tough on sexual violence, but it willfully ignores approaches that could prevent more crimes.

We have the resources for prevention. We are spending them on programs that at best have modest returns, and at their worst, increase the problem. Yet we know there are programs that could increase prevention by orders of magnitude. Researcher Charlene Senn puts it like this: "If we know we can actually reduce the number of rapes women are experiencing, it would be unethical not to do it" (Mangan 2015).

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