

# **Preventing Sex-Offender Recidivism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration**

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## **Abstract**

The public's panic about the fear of recidivism if adjudicated sex offenders are ever to be released to the community has not subsided, despite the growing amount of information and statistically-reliable data signifying a generally low risk of re-offense. The established case law upholding sex offender civil commitment and containment statutes has rejected challenges of unconstitutionality, and continues to be dominated by punitive undertones. We have come to learn that the tools used to assess offenders for risk and civil commitment still have indeterminate accuracy, and that the availability of meaningful treatment for this population remains uncertain in its availability and debatable as to its effectiveness. Yet, society continues to clamor for legislation confining this cohort of offenders for "treatment," and, ostensibly, protection of the community, and legislatures respond quickly to these calls. This "reform legislation" often includes strict and demeaning post-release restrictions that track offenders and curb their integration into society. These "reforms" continue to show no benefit either to the public or to the individual offender. The absence of meaningful and effective treatment during confinement, combined with inhumane conditions upon release, make it far less likely that this cohort of individuals will ever become productive members of society. Only through therapeutic jurisprudence, a focus on rehabilitation, and a dedication to authentically treating individuals who have committed sexual offenses with humanity, will it be possible to reduce recidivism and foster successful community reintegration.

This article takes a new approach to these issues. It examines sex offender laws, past and present, looks at this area of sex offender commitment and containment through a therapeutic jurisprudence lens, and suggests basic policy changes that would optimally and constitutionally minimize re-offense rates, while upholding and protecting human rights of all citizens. It highlights the failure of community containment laws and ordinances by focusing on (1) the myths/perceptions that have arisen about sex offenders, and how society incorporates those myths into legislation, (2) the lack of rehabilitation offered to incarcerated or civilly-committed offenders, resulting in inadequate re-entry preparation, (3) the anti-therapeutic and inhumane effect of the laws and ordinances created to restrict sex offenders in the community, and (4) the reluctance and resistance of courts to incorporate therapeutic jurisprudence in seeking to remediate this set of circumstances. It concludes by offering some modest suggestions, based on the adoption of a therapeutic jurisprudence model of analysis.

## Introduction:

Individuals who have committed sex offenses have taken center stage in both the criminal and civil legal systems.<sup>1</sup> Currently, no other population is more despised, more vilified, more subject to media misrepresentation and more likely to be denied basic human rights.<sup>2</sup> Endless emotionally charged debates have ensued, focusing on how to ostensibly maintain safety in local communities while containing the “sexual predator.” Unfortunately, most of these debates are premised upon incorrect “facts” and spurious data that have been distorted and skewed to support political agendas that respond to -- or, perhaps, in some cases, incite -- community outcries of retribution.<sup>3</sup>

State and federal legislators have addressed society’s fear and outrage by enacting statutes and laws to keep such offenders locked up indefinitely and, then, if

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<sup>1</sup> Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435 (2010) . See *infra* notes 8-9 for prototypical definitions of “sex offenders.”

<sup>2</sup> Adam Deming, *Sex Offender Civil Commitment Programs: Current Practices, Characteristics, and Resident Demographics*, 36 J. PSYCHIATRY & L. 439, 443 (2008) (noting that the term “sexually violent predator” is an emotionally charged one that conjures up many misleading or inaccurate images ).

<sup>3</sup> Michelle Meloy et al, *Sex Offender Laws in America: Can Panic-Driven Legislation Ever Create Safer Societies?* , 20 CRIM. JUST. STUD. 423 (2007).

there is to be eventual release,<sup>4</sup> for such offenders to be strictly monitored upon return to the community.<sup>5</sup> Sex offender civil commitment and community containment laws were developed as reactionary responses to the statistically-rare, but widely feared, violent and child-directed, sexually motivated crime.<sup>6</sup>

Under the prevailing statutory schemes – many of which have been patterned after the law upheld by the United States Supreme Court in *Kansas v. Hendricks*<sup>7</sup> ---

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<sup>4</sup> Call v. Gomez, 535 N.W.2d 312 (Minn. 1995) (without more, proof that a committed person no longer meets the commitment standard was not sufficient to justify discharge).

<sup>5</sup> Kevin M. Carlsmith et al., *The Function of Punishment in the "Civil" Commitment of Sexually Violent Predators*, 25 BEHAV. SCI. & L. 437 (2007) (considering the retributive motivations for sexually violent predator [SVP] commitment) ).

<sup>6</sup> Leonore M.J. Simon, *Matching Legal Policies with Known Offenders*, in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY 149 (Bruce J. Winick and John Q La Fond, eds., 2003) (PROTECTING SOCIETY)

Legal policies targeting sex offenders are appearing in an increasing number of states and on the federal level. These policies often result from widely publicized heinous sex crimes committed by stranger offenders. Washington state, for example, enacted its community notification legislation after a 7-year-old boy was raped and mutilated by a convicted sex offender...the resulting legislation was designed to protect children from strangers. Such legislation, however, promotes a 'false sense of security, lulling parents and children into the big-bad-man mindset when many molesters are in fact trusted authority figures or family members.

<sup>7</sup> *Kansas v. Hendricks*, 521 U.S. 346 (1997).

individuals who have committed sexual offenses -- or certain qualifying offenses deemed to have a sexual component<sup>8</sup> -- may be civilly committed for care and “treatment” after the conclusion of their prison sentence.<sup>9</sup> Such a civil commitment,

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<sup>8</sup> WASH. REV. CODE ANN. § 71.09.020 (17):

"Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

<sup>9</sup> WASH. REV. CODE § 71.09.020 (18):

"Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental

although originally intended to apply to the most heinous and dangerous offenders, has become a widely-used tool, designed to contain large numbers of offenders whether or not their sexually- motivated crimes were severe or frequent.<sup>10</sup> If and when their risk to offend is perceived to be sufficiently reduced,<sup>11</sup> they may then be released back into the

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abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

For a discussion on effective (and ineffective) methods of treatment for sex offenders and sexual predators, see Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y. & L. 505 (1998).

<sup>10</sup> This broad application flies in the face of the Supreme Court's mandate in upholding these statutes, noting that they only apply to a narrow class of individuals. See *Hendricks*, 521 U.S. at 364; see also Office of the Legislator State of Minnesota, *Civil Commitment of Sex Offenders* (March 2011), accessible at <http://www.auditor.leg.state.mn.us/ped/2011/ccsosum.htm> ( "number of civilly committed sex offenders in the Minnesota Sex Offender Program (MSOP) nearly quadrupled during the last decade and is expected to nearly double over the next ten years."); Jim Rubenstein et al., *West Virginia Sexually Violent Predator Management Task Force: Final Report*,(2007) accessible at [www.wvpds.org/SVP%20report-%20Final%20-6-30-2007.pdf](http://www.wvpds.org/SVP%20report-%20Final%20-6-30-2007.pdf) (*West Virginia Report*) ("The qualifying offense feature of the definition is narrow in scope, creating gaps for high risk offenders to slip past. On the other hand, the mental abnormality component of the definition is too broad in scope, allowing inappropriate offenders to be channeled through the screening process").

<sup>11</sup> WASH. REV. CODE ANN. §71.09.092:

Conditional release to less restrictive alternative — Findings.

community.<sup>12</sup> Upon release, individuals are subjected to community containment laws that impose strict conditions on place of residence, employment, freedom of movement, often including intensive and intrusive monitoring.<sup>13</sup> The state and federal

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Before the court may enter an order directing conditional release to a less restrictive alternative, it must find the following: (1) The person will be treated by a treatment provider who is qualified to provide such treatment in the state of Washington under chapter 18.155 RCW; (2) the treatment provider has presented a specific course of treatment and has agreed to assume responsibility for such treatment and will report progress to the court on a regular basis, and will report violations immediately to the court, the prosecutor, the supervising community corrections officer, and the superintendent of the special commitment center; (3) housing exists in Washington that is sufficiently secure to protect the community, and the person or agency providing housing to the conditionally released person has agreed in writing to accept the person, to provide the level of security required by the court, and immediately to report to the court, the prosecutor, the supervising community corrections officer, and the superintendent of the special commitment center if the person leaves the housing to which he or she has been assigned without authorization; (4) the person is willing to comply with the treatment provider and all requirements imposed by the treatment provider and by the court; and (5) the person will be under the supervision of the department of corrections and is willing to comply with supervision requirements imposed by the department of corrections.

<sup>12</sup>Steven I. Friedland, *On Treatment, Punishment, and the Civil Commitment of Sex Offenders*, 70 U. COLO. L. REV. 73 (1999).

<sup>13</sup> Beth Keiko, *Sexual Violence, Sanity, and Safety: Constitutional Parameters for Involuntary Civil Commitment of Sex Offenders*, 15 U. PUGET SOUND L. REV. 879 (1992) .

governments' enactment of registration and notification statutes have "widened the net" over vast numbers of individuals who have committed a wide range of offenses, sexually-based and otherwise.<sup>14</sup> Ironically, sadly, and empirically, it has been shown that these laws do little to protect the public; instead, they serve to ostracize, isolate and destroy any hope of integration; contrarily, responding to community pressures, they potentially increase the likelihood of recidivism and achieve the exact opposite effect intended by the legislatures.<sup>15</sup>

This paper intends to highlight the failure of community containment laws and ordinances by focusing on (1) the myths/perceptions of sex offenders and how society incorporates those myths into legislation, (2) the lack of rehabilitation offered to incarcerated or civilly-committed offenders resulting in inadequate re-entry preparation, (3) the anti-therapeutic and inhumane effect of the laws and ordinances

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<sup>14</sup> Melissa Wangenheim, "To Catch a Predator," *Are We Casting Our Nets Too Far?: Constitutional Concerns Regarding the Civil Commitment of Sex Offenders*, 62 RUTGERS L. REV. 559 (2010); see e.g., *State v. Smith*, 780 N.W.2d 90 (Wis. 2010) (17-yr-old male convicted as a sex offender based off of the crime of false imprisonment during a drug exchange; sanctioned for failing to update the State with personal information).

<sup>15</sup> Kristen M. Zgoba et al, *Megan's Law: Assessing the Practical and Monetary Efficacy* (December 2008), <http://www.state.nj.us/corrections/SubSites/REU/research.html>. (authors thoroughly examined efficacy and cost of Megan's Law by tracking 550 randomly selected sex offenders released between 1990 and 2000 and comparing 10 years before and 10 years after the law was enacted; no reduction in reoffending and no reduction in the number of victims found; costs increased exponentially by \$3.9 million per year by 2007).

created to restrict sex offenders in the community, and (4) the reluctance and resistance of courts to incorporate therapeutic jurisprudence in seeking to remediate this set of circumstances. We will conclude by offering some modest suggestions, based on the adoption of a therapeutic jurisprudence model of analysis.

The absence of meaningful and effective treatment during confinement, combined with inhumane conditions upon release, make it far less likely that this cohort of individuals will ever become productive members of society. Only through therapeutic jurisprudence, a focus on rehabilitation, and a dedication to treating individuals who have committed sexual offenses with humanity, will it be possible to reduce recidivism and foster successful community reintegration.

I. Perceptions of a sex offender epidemic

Nothing is more threatening to our families and communities and more destructive of our basic values than sex offenders who victimize children and families. Study after study tells us that they often repeat the same crimes. That's why we have to stop sex offenders before they commit their next crime, to make our children safe and give their parents piece of mind.

--President Bill Clinton (1996)<sup>16</sup>

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<sup>16</sup> President William J. Clinton, The President's Radio Address (Aug. 24, 2006) (transcript available at <http://www.presidency.ucsb.edu/ws/index.php?pid=53230>) (referring to community notification laws as a way to "give . . . parents peace of mind").

Political pressure is only one of the many reasons why focus on this area of the law has exploded into an outright epidemic.<sup>17</sup> Some of the other most salient reasons include:

- Media-driven frenzy over rare yet horrific acts of sexual violence against children<sup>18</sup>;

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<sup>17</sup> Roxanne Lieb et al., *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43 (1998); Eric S. Janus, *Closing Pandora's Box: Sexual Predators and the Politics of Sexual Violence*, 34 SETON HALL L. REV. 1233, 1233–50 (2004) (discussing how the effect of politics and public outcry fuels the expansion of sexually violent predator programs) .

<sup>18</sup>Michael H. Miner, Editorial, *Is This Any Way to Develop Policy?*, (2007), <http://www.sexual-offender-treatment.org/54.html>; DENNIS J. STEVENS, MEDIA AND CRIMINAL JUSTICE: THE CSI EFFECT, (2009).

It must be noted that -- within the last few years -- there has been a shift in the media's presentation of sexual crimes and legislative responses. The state of the economy (raising concerns about the exorbitant cost of sex offender facilities) coupled with high profile cases involving otherwise- respected members of the community seem to have opened a wider dialogue in analyzing these issues with focus on the legality of these laws and the reality of sex offender re-offense and risk. See e.g., Erica Goode, *Researchers See Decline in Child Sexual Abuse Rate*, The New York Times (June 29, 2012) A13, accessible at [http://www.nytimes.com/2012/06/29/us/rate-of-child-sexual-abuse-on-the-decline.html?\\_r=2&emc=tnt&tntemail1=y](http://www.nytimes.com/2012/06/29/us/rate-of-child-sexual-abuse-on-the-decline.html?_r=2&emc=tnt&tntemail1=y); Monica Davey and Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison* (March 4, 2007) accessible at <http://www.nytimes.com/2007/03/04/us/04civil.html?pagewanted=all>

- Belief that future recidivism is high and most sex offenders will reoffend,<sup>19</sup> a belief reinforced by all popular media depictions (such as those on the popular TV show, *Law and Order: Special Victims Unit*);
- The public's frustration over the overwhelming amount of plea bargains carrying light sentences for these specific types of offenses;<sup>20</sup>
- The drastic increase in psychiatric and psychological expert testimony on the part of witnesses supporting prosecutorial applications for extended incarceration post-sentence;<sup>21</sup>

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<sup>19</sup> Charles H. Rose III, *Caging the Beast: Formulating Effective, Evidentiary Rules to Deal with Sexual Offenders*, 34 AM. J. CRIM. L. 1 (2006); Amy Adler, *To Catch a Predator*, 21 COLUM. J. GENDER & L. 532 (2011).

<sup>20</sup> Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670 (2008); see also, Kevin M. Carlsmith et al., *The Function of Punishment in the "Civil" Commitment of Sexually Violent Predators*, 25 BEHAV. SCI. & L. 437, 445-46 (2007) (controlled study finding that when the criminal sentence was lenient, respondents strongly supported civil commitment without regard to future risk); Eric Hartley, *Molesters Getting a Slap on the Wrist? Lack of Jail Time in Cases Sparks Sentencing Debate*; THE CAPITAL, April 22, 2007 accessible at <http://www.mdgazette.com/content/molesters-getting-slap-wrist> .

<sup>21</sup> Christine Willmsen, *State Wastes Millions Helping Sex Predators Avoid Lockup*, Seattle Times, January 21, 2012; Gary Craig, *Expert Opinion Among Civil Commitment's High Costs*, Democrat and Chronicle.com (December 12, 2010), accessible at <http://www.democratandchronicle.com/article/20101229/NEWS01/12290345> (Over a three-year period, a psychologist, earned approximately \$677,000 from giving expert

- The creation of numerous jobs for psychologists and social workers within the civil commitment institutions for persons committed under “Sexually Violent Predator” (SVP) laws,<sup>22</sup> and
- The loosely defined statutory requirements of SVP laws that result in misapplication of the intent of the law and arbitrary decisions as to who and as to what behavior satisfies the statutes.<sup>23</sup>

The programmatic goal of SVP laws was to focus society’s attention on those offenders who pose the greatest risk and likelihood of recidivism but, at the time the laws were initially enacted, the knowledge and information answering “who” fit the

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testimony in sex offender civil commitment cases for the state of Massachusetts.

Additional expert testimony, in the State of New York, increased that amount to almost one million dollars over a three-year period.

<sup>22</sup> Gary Craig, *Civil\_Confinement of Sex Offenders Costs State \$175,000 a Piece*, Democrat and Chronicle.com (December 26,2010), accessible at [http://www.democratandchronicle.com/article/20101226/NEWS01/12260311/Civil-confinement- of sex- offenders- costs- state- \\$175-,000- apiece](http://www.democratandchronicle.com/article/20101226/NEWS01/12260311/Civil-confinement- of sex- offenders- costs- state- $175-,000- apiece) (discussing NY civil commitment costs: “At the current rate of growth — about 70 newly confined offenders annually — treatment costs alone will grow by about \$12 million a year”).

<sup>23</sup> John Q. LaFond & Bruce J. Winick , *Doing More Than Their Time*, (Op- ed), N.Y. Times, May 21, 2006, at sec. 14, pg. 13

profile of the goal-directed group was uncertain and inconclusive.<sup>24</sup> In fact, valid and reliable evidence tells us that incest and familial offenses have been found to be the most common occurrences of sexual violence, not the “stranger rapist/ murderer” profile that fueled enactment of most sex offender laws.<sup>25</sup> The laws were passed nonetheless, and empirical support to detain offenders relied heavily on the expert opinions supported by then current “risk determinative” instruments and controversial science.<sup>26</sup> The studies and statistics regarding risk yielded inaccurate results when applied to individual offenders being evaluated for the likelihood of future re-offenses.<sup>27</sup>

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<sup>24</sup> Karol Lucken & William Bales, *Florida's Sexually Violent Predator Program: An Examination of Risk and Civil Commitment Eligibility*, 54 CRIME & DELINQ. 95, 119-22 (2008).

<sup>25</sup> Lori Presser & Elaine Gunnison, *Strange Bedfellows: Is Sex Offender Notification a Form of Community Justice?*, in CURRENT PERSPECTIVES ON SEX CRIMES 320, 324 (Ronald M. Holmes and Stephen T. Homes, eds., 2002) (“[I]n nearly 75 percent of sexual assault and rape cases and in 90 percent of those involving children, the victim knew the offender. Forty-three percent of victims under age 12 were assaulted by family members.”); See also Bruce J. Winick, *A Therapeutic Jurisprudence Analysis of Sex Offender Registration and Community Notification Laws*, in PROTECTING SOCIETY, *supra* note 6, at 213, 218 (more than seventy-five percent of reported cases of sexual abuse are perpetrated by someone that the child knows)

<sup>26</sup> For an overview of the discrepancies in risk assessment, see R. Karl Hanson, *Who is Dangerous and When are They Safe? Risk Assessment with Sexual Offenders*, in PROTECTING SOCIETY, *supra* note 6, at 63-72; See also, Matter of Registrant G.B., 685 A.2d 1252 (N.J. 1996); Matter of Registrant C.A., 679 A.2d 1153(N.J. 1996); and In re

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Commitment of R.S., 773 A.2d 72 (N.J. Super. App. Div, 2001), *aff'd*, 801 A.2d 219, 220 (N.J. 2002), where the court stated:

Although there are critics who challenge the validity and predictability of actuarial instruments in sex offender assessments, the record expert testimony and scientific literature demonstrates that clinicians specializing in sex offender assessments generally support the use of actuarial instruments in the overall assessment process even though they do not support reliance on the actuarial instruments alone....As the Appellate Division summarized:

The extensive expert testimony in this matter concerning validation studies, cross-validation studies, reliability studies, correlation coefficients, and clinically-derived factors attests to reliability in this context, where the actuarials are not used as the sole or free-standing determinants for civil commitment. They are not litmus tests. There is no requirement that the actuarial instruments be the best methods which could ever be devised to determine risk of recidivism. What is required is that they produce results which are reasonably reliable for their intended purpose.

IMO Commitment of R.S., 773 A.2d at 91(citation omitted).

See also, e.g., *State ex rel. Romley v. Fields*, 35 P.3d 82, 89 (Ariz. 2001); *People v. Therrian*, 6 Cal.Rptr.3d 415, 419-20 (App. 2003); *Roeling v. State*, 880 So.2d 1234, 1238-40 (Fla.App.2004); *In re Detention of Holtz*, 653 N.W.2d 613, 619 (Iowa App.2002); *In re Care & Treatment of Teer*, No. 89,652, 90 P.3d 379, slip op. at 3-4 (Kan.App.2004) (unpublished order); *Commonwealth v. Wright*, No. 032449A, 2004 WL 1690388, slip op. at 1 (Mass.Super.2004); *In re Risk Level Determination of R.B.P.*, 640 N.W.2d 351, 353-56 (Minn.App.2002); *Goddard v. State*, No. 25779, 144 S.W.3d 848, 850-51 (Mo.App.2004); *State v. Legg*, 84 P.3d 648, 651 (Mont. 2004); *Slansky v. Nebraska State Patrol*, 685 N.W.2d 335, 345-49 (Neb. 2004); *In re Commitment of R.S.*, 801 A.2d 219,

These underlying tools that support confinement and containment continue to be flawed,<sup>28</sup> and experts drastically disagree on offender statistics and the reliability of actuarial instruments designed to show recidivism.<sup>29</sup> Yet, there has been absolutely no

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220-21 (N.J. 2002); *People v. Girup*, 780 N.Y.S.2d 698 (A.D. 2004) (mem. op.); *In re D.V.A.*, 676 N.W.2d 776, 778-80 (N.D.2004); *State v. McKinniss*, 795 N.E.2d 160, 165-66 (Ohio App. 2003); *State v. Gibson*, 66 P.3d 560, 564-65 (Or. App. 2003); *In re Care & Treatment of Tucker*, 578 S.E.2d 719, 721 (S.C. 2003); *In re Commitment of Morales*, 98 S.W.3d 288, 291 (Tex.Ct.App.2003); *In re Detention of Thorell*, 72 P.3d 708, 724-25 (Wash. 2003); *In re Commitment of Tainter*, 655 N.W.2d 538, 544 (Wis. 2002).

<sup>27</sup> Robin J. Wilson et al., *Comparing Sexual Offenders at the Regional Treatment Centre (Ontario) and the Florida Civil Commitment Center* [INT'L J. OFFENDER THER. & COMPAR. CRIMINOL.] (2012) (in press), accessible at <http://ijo.sagepub.com/content/early/2012/01/17/0306624X11434918> (discussed in Karen Franklin's online blog, *In the News: Treatment and Risk Among the Most Dangerous Sexual Offenders* (February, 21, 2012), retrieved from <http://forensicpsychologist.blogspot.com/2012/02/treatment-and-risk-among-most-dangerous.html>.)

<sup>28</sup> John Matthew Fabian, *The Risky Business of Conducting Risk Assessments for Those Already Civilly Committed as Sexually Violent Predators*, 32 WM. MITCHELL L. REV. 81 (2005).

<sup>29</sup> Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 BUFF. CRIM. L. REV. 593, 606-19 (2000); Larry Oakes, *They're All Close Calls Now*, *Star. Trib. (Minn.)*, June 9, 2008, at A1 (quoting psychiatrist John Austin, "In general the (risk assessment tests) are about 70 percent accurate; thus they are wrong 30 percent of the time."); Eric S. Janus & Robert A. Prentky, *The Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and*

movement towards serious modification of or repeal of any of these laws, even as studies are reworked and results of earlier studies are re-evaluated, leading to the concomitant rejection by scholars and researchers of those earlier studies and statistical instruments.<sup>30</sup>

Contemporaneous sex offender civil commitment legislation could not have been developed as it had were it not linked securely to the scientific community's findings, especially since such laws were constitutionally upheld as civil acts premised on general civil commitment laws that had already found to be constitutional.<sup>31</sup> But we

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*Accountability*, 40 AM. CRIM. L. REV. 1443, 1486 (2003); PAUL MEEHL, CLINICAL VERSUS STATISTICAL PREDICTION: A THEORETICAL ANALYSIS AND A REVIEW OF THE EVIDENCE (1954); Robert Prentky et al., *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 PSYCHOL. PUB. POL'Y & L. 357, 361 (2006)) (citing twin concerns that "good science" will be unrecognized or misunderstood by the law, and that the pressures of the law will not only use but encourage "bad science"); Cailey Miller et al., *Reliability of Risk Assessment Measures Used in Sexually Violent Predator Proceedings*, PSYCHOLOGICAL ASSESSMENT, published online May 7, 2012. Advance online publication accessible at <http://www.ncbi.nlm.nih.gov/pubmed/22563984>.

<sup>30</sup> Shoba Sreenivasan et al., *Alice In Actuarial-Land: Through the Looking Glass of Changing Static-99 Norms*, 38 J. AM. ACAD. PSYCHIATRY. & L. 400, 402 (2010) ( shift in reliance on the original Static-99 norms occurred when the crafters of the tool, in their own analysis of newer Static-99 studies, found that the recidivism rates reported in the original Static-99 norms were not holding firm; that is, they were not being replicated).

<sup>31</sup> In *Hendricks*, 521 U.S. at 357 (citing to *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) and *Addington v. Texas*, 441 U. S. 418, 426–427 (1979), the Supreme Court majority

must honestly and thoroughly investigate the reasons supporting the enactment of such legislation while scrutinizing legislative usage of medical and scientific testimony to support sex offender commitments.<sup>32</sup> Before we could even begin to address the problems surrounding the science, however, we would need to re-consider the laws and foundations on which they were based.

## II. Rehabilitation

### A. *The myth of rehabilitation*

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reiterated that “we have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards”).

<sup>32</sup> *Id.* at 359 (“States have, over the years, developed numerous specialized terms to define mental health concepts. Often, those definitions do not fit precisely with the definitions employed by the medical community. The legal definitions of ‘insanity’ and ‘competency,’ for example, vary substantially from their psychiatric counterparts.”), and *id.* at 360 (“Hendricks’ diagnosis as a pedophile, which qualifies as a “mental abnormality” under the Act, thus plainly suffices for due process purposes”). See also, Heather Ellis Cucolo, *Hebephilia and Pedohebephilia: Implications for Law and Policy*, 12 SEX OFFENDER LAW REPORT 55 (2011), accessible at [http://www.civresearchinstitute.com/online/article\\_abstract.php?pid=7&iid=380&aid=2537](http://www.civresearchinstitute.com/online/article_abstract.php?pid=7&iid=380&aid=2537)

In order to examine rehabilitation, we must begin by looking at the focus of civil commitment and incarceration.<sup>33</sup> Prison's main purpose is punishment, and any specific treatment for sex offenders is an "added bonus" specifically outside of the reason for incarceration.<sup>34</sup> Prisons generally, are not designed to foster, nor are they seriously

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<sup>33</sup> Kurt Bumby et al, *Understanding Treatment for Adults and Juveniles Who Have Committed Sex Offenses*, Center for Sex Offender Management 9 (November 2006) (CSOM) , accessible at [http://www.csom.org/pubs/treatment\\_brief.pdf](http://www.csom.org/pubs/treatment_brief.pdf)

For professionals in the sex offender management field, it is virtually impossible to avoid the inevitable question about whether sex offenders can be treated or rehabilitated. A definitive response – either in the negative or affirmative – would imply that a simple answer exists, when in reality, the answer is not a clear-cut one. Yet as is often the case in the social and behavioral sciences, there tends to be evidence on either side of the issue of interest. The same holds true with research on sex offender treatment, whereby both skeptics and advocates can produce some level of empirical evidence to support their respective positions.

Donna Schram & Cheryl Milloy, *Sexually Violent Predators and Civil Commitment* (February 1998), accessible at <http://www.wsipp.wa.gov/pub.asp?docid=98-02-1101> (authors tracked the official records of 61 sex offenders who had been released during the first 6 years of the Washington Community Protection Act of 1990, finding that 41% of the group were not rearrested at a mean follow-up of almost 4 years, and, of the 59% who were rearrested, only 28% had committed further sex offenses; the non-offenders could have been subjected to life sentences without parole).

<sup>34</sup> Often sex offender specific treatment is denied or not offered while an individual is serving a criminal sentence leading to a "punish first, treat later" strategy. CSOM, *supra* note 33, at 3.

invested in rehabilitation.<sup>35</sup> Once an individual enters sex offender civil commitment,<sup>36</sup> the focus is ostensibly no longer punishment but is instead containment with an emphasis on treatment. In order to comport with constitutional mandates, the treatment must be offered such that the conditions of confinement do not become punitive.<sup>37</sup> In upholding a state sex offender civil commitment statute in *Kansas v. Hendricks*, the Supreme Court offered little insight into the standards for treatment.<sup>38</sup>

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<sup>35</sup> Michelle Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC'Y REV. 33 (2011).

<sup>36</sup> Compare *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), aff'd in part, rev'd in part, 344 F. Supp. 387 (M.D. Ala. 1972), aff'd in part, rev'd in part *sub nom.*) *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) "If a person is to be deprived of liberty, not as punishment for a criminal offense, but because of the need for therapy, then government should have a duty to provide minimally adequate treatment." The "quid pro quo" theory of *Wyatt* is discussed in the civil commitment context most recently in Michael L. Perlin, "Abandoned Love": *The Impact Of Wyatt v. Stickney On The Intersection Between International Human Rights And Domestic Mental Disability Law*, 35 LAW & PSYCHOL. REV. 121, 129-30 (2011).

<sup>37</sup> *Hendricks*, 521 U.S. at 367-69. Providing treatment also assures that the conditions and duration of confinement bear a reasonable relation to the purpose for which persons are confined, another requirement of due process. See *Seling v. Young*, 531 U.S. 250, 265 (2001) citing *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992), *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982), and *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

<sup>38</sup> The *Hendricks* Court used the language "vague and overly broad" in discussing the standards without much further insight; Justice Breyer's dissent suggests that a civil scheme that requires treatment yet systematically denies access to treatment violates

Subsequent case law has discussed treatment for sex offenders, but focused mainly on whether certain aspects of confinement invalidated the civil nature of the statute.<sup>39</sup> Treatment has never been deemed to be a constitutional right by the US Supreme Court,<sup>40</sup> but most states -- in an effort to quash challenges alleging punitive detainment -- consider it a duty to provide treatment and a “right” of the offender to participate.<sup>41</sup>

*B. What treatment is offered during confinement and how does it prevent future recidivism?*

Our ability to keep sex offenders locked away relies heavily on the notion that we can constitutionally detain individuals for care and treatment through sex offender

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both substantive due process and ex post facto clause, *Hendricks*, 521 U.S. at 378. The Court in *Hendricks* conceded that the specific treatment program offered Hendricks “may have seemed somewhat meager,” *id.* at 367. See Michael L. Perlin, *There's No Success like Failure/and Failure's No Success at All : Exposing the Pretextuality of Kansas v. Hendricks*, 92 Nw. U. L. REV. 1247, 1264 (1998).

<sup>39</sup> *Turay v. Seling*, 108 F.Supp.2d 1148 (W.D. Wash. 2000); *In re Detention of Betsworth*, 711 N.W.2d 280 (Iowa 2006) (statutory right to treatment was satisfied as long as an individualized treatment program designed to assist in controlling deviant behaviors was offered)

<sup>40</sup> On how the Supreme Court failed to constitutionalize this right in *Youngberg v. Romeo*, 457 U.S. 307 (1982), see Perlin, *supra* note 36 at 125.

<sup>41</sup> Jeslyn A. Miller, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CALIF. L. REV. 2093 (2010) (fantasy diaries and notes taken throughout treatment are entered into court evidence leading some lawyers to advise nonattendance in California’s Atascadero State Hospital; 70% of patients at that facility refuse treatment).

civil commitment.<sup>42</sup> However, there is no consensus as to the effectiveness of treatment or whether the treatment that is made available to this population has had any real effect on risk reduction.<sup>43</sup> Relatively little is known about which sex offenders will benefit from treatment, what treatment is most effective, and how treatment affects

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<sup>42</sup> John Petrila, *Because They Do Horrible Things: Fear, Science, and the Erosion of Civil Liberties in Sexually Violent Predator Proceedings*, 36 J. PSYCHIATRY & L. 359, 380 (2008) (“the courts have rarely insisted that treatment be provided, based in part on assumptions that this is a group of individuals for which little exists in the way of treatment.”); James F. Quinn, Craig J. Forsyth, & Carla Mullen-Quinn, C. *Societal Reaction to Sex Offenders: A Review of The Myths Surrounding their Crimes and Treatment Amenability*, 25 DEVIANT BEHAVIOR 215 (2004).

<sup>43</sup> *In re Young*, 857 P.2d 989, 1003-04 (1993) (treatment does not prevent recidivism but may in fact lead to more offenses); Danielle Polizzi et al., *What Works in Adult Sex-Offender Treatment? A Review of Prison and Non-Prison Based Treatment Programs*, 43 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 357 (1999); Michael C. Seto & Howard Barbaree, *Psychopathy, Treatment Behavior and Sex offender Recidivism*, 14 J. INTERPERSONAL VIOLENCE 1235, 1244 (1999) (uncertainty continues to exist as to whether treatment is detrimental for psychopaths who are considered to be the highest risk of offenders); Jan Looman, Nicola A. C. Morphett & Jeff Abracen, *Does Consideration of Psychopathy and Sexual Deviance Add to the Predictive Validity of the Static-99R?*. INT’L J. OFFENDER THER. & COMPAR. CRIMINOL., online pre-publication accessible at <http://ijo.sagepub.com/content/early/2012/05/24/0306624X12444839.abstract>; John Edens et al. *Inter-Rater Reliability of the PCL-R Total and Factor Scores among Psychopathic Sex Offenders: Are Personality Features More Prone to Disagreement Than Behavioral Features?* 28 BEHAV. SCI. & L., 106 (2010).

recidivism.<sup>44</sup> In a 2006 article, Drs. Robert Prentky and Barbara Schwartz suggest that, “Perhaps the more pressing question, certainly from a public policy standpoint, is ‘who’ is most likely to be impacted by treatment and how best should they be treated.”<sup>45</sup> There is no known cure for inappropriate sexual thoughts or behavior and it is believed that biological (surgical castration and pharmacological interventions)<sup>46</sup> and non-biological (cognitive-behavioral therapy)<sup>47</sup> options are the only confirmed methods for reducing

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<sup>44</sup> Marnie Rice & Grant T. Harris, *What We Know and Don’t Know About Treating Adult Sex Offenders*, in PROTECTING SOCIETY, *supra* note 6, at 101 (too few well-controlled studies to accurately determine the benefits of treatment).

<sup>45</sup> Robert Prentky & Barbara K., Schwartz,, *Treatment of Adult Sex Offenders*. (December, 2006) accessible at [http://www.vawnet.org/search-results.php?filterby=Treatment+of+Adult+Sex+Offenders.&search.x=0&search.y=0\\_](http://www.vawnet.org/search-results.php?filterby=Treatment+of+Adult+Sex+Offenders.&search.x=0&search.y=0_)

<sup>46</sup> Chemical castration is considered to be potentially effective in its role of reducing obsessive thoughts and/or fantasies in addition to suppressing violent tendencies. It does not have much success in changing the object of one’s attraction but can have a marked effect on reducing the desire to act on sexual impulses. See Robert D. Miller, *Forced Administration of Sex-Drive Medications to Sex Offenders: Treatment or Punishment*, 4 PSYCHOL. PUB. POL’Y & L. 175 (1998) (model for effective pharmacological treatment for sex offenders is based on the notion that medication must suppress the psychological component of sexual deviation, which causes the deviant sexual fantasies, and thereby inhibit the physical sexual arousal).

<sup>47</sup> Studies supporting the use of cognitive behavioral therapy for sex offenders include James R. Worling & Tracey Curwen, *Adolescent Sexual Offender Recidivism: Success of Specialized Treatment and Implications for Risk Prediction*. 24 CHILD ABUSE & NEGLECT 965 (2000) ; D. RICHARD LAWS ET AL., REMAKING RELAPSE PREVENTION WITH SEX OFFENDERS: A

risk.<sup>48</sup> Cognitive-behavioral treatment may include social skills training, sex education, cognitive restructuring, aversive conditioning and victim empathy therapy.<sup>49</sup>

The treatment model thus far has been a treatment-as-management<sup>50</sup> approach, “including cognitive behavioral treatment to recondition thoughts, feelings, and behaviors, relapse prevention to support and monitor self-management skills in

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SOURCEBOOK, Part 2 § 3 (2000); D. Richard Laws & Marshall, W. L. *A Brief History of Behavioral and Cognitive Behavioral Approaches To Sexual Offender Treatment: Part 1. Early Developments*, 15 *SEXUAL ABUSE: J. RES & TREATMENT* 75 (2003); ROBERT J. McGRATH ET AL., CURRENT PRACTICES AND TRENDS IN SEXUAL ABUSER MANAGEMENT: THE SAFER SOCIETY 2009 NORTH AMERICAN SURVEY §9,, at 71-74 (2010); Steve Aos et al., *Evidence-Based Adult Corrections Programs: What Works and What Does Not* (January 2006), accessible at <http://www.wsipp.wa.gov/rptfiles/06-01-1201.pdf> .

<sup>48</sup> Lauren Cox, *Treating Pedophiles: Therapy Can Work, But it's a Challenge* (Dec. 15, 2011) , accessible at <http://www.myhealthnewsdaily.com/2015-treating-pedophiles-therapy-challenge.html> (quoting Dr. Fred Berlin and David Prescott : “Two decades of published work with sex offenders haven't produced a cure...Instead, therapists aim to help pedophiles resist their urges.” “We don't know how to change the fact that a person is sexually attracted to children”); KAREN J. TERRY, *SEXUAL OFFENSES AND OFFENDERS: THEORY, PRACTICE, AND POLICY*92, 139, 154 (2005); Reinhard Wille & Klaus M. Beier, *Castration in Germany*, 2 *ANNALS SEX RESEARCH* 103 (1989); Ariel Rosler & Eliezer Witztum, *Pharmacotherapy of Paraphilias in the Next Millennium*, 18 *BEHAV. SCI. & L.* 43 (2000).

<sup>49</sup> Richard B. Krueger & Meg S. Kaplan, *Behavioral and Psychological Treatment of the Paraphilic and Hypersexual Disorders*, 8 *J. PSYCHIATRIC PRAC.* 24, 25 (2002).

<sup>50</sup> Kelly K. Bonnar-Kidd , *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 *HEALTH POL'Y & ETH.* 412 (2010).

avoiding high risk situations and places...”<sup>51</sup> Sex offender civil commitment, in particular, has been described by civil libertarians as preventive detention masquerading as coerced treatment that threatens rehabilitation, justice, and constitutional values, and legitimizes warehousing.<sup>52</sup> Questions additionally arise surrounding the lack of qualifications and competency of treatment providers in these institutions supporting the notion that treatment is in place to support continued confinement after prison.<sup>53</sup>

A 2011 study by the Program Evaluation Division of the State of Minnesota’s Office of Legislative Auditor ([OLA]),<sup>54</sup> looking at Minnesota’s sex offender civil commitment scheme found:

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<sup>51</sup> Astrid Birgden & Heather Ellis Cucolo, *The Treatment of Sex Offenders: Evidence, Ethics and Human Rights*, 23 *SEXUAL ABUSE: J. RES. & TREATMENT* 295, 300 (2011).

<sup>52</sup> *Id.* at 304.

<sup>53</sup> *West Virginia Report*, *supra* note 10, at 11:

Sex offender assessment and treatment requires an approach unfamiliar to most mental health professionals. At this time, West Virginia does not require any formal process of certification or licensure of those providing treatment or diagnostic services to sex offenders, creating inconsistencies in the methods and underlying philosophical framework of treatment programs and services.

See also, McGRATH et. al., *supra* note 47, at 33 (fewer than 15% of United States providers hold doctoral degrees.)

<sup>54</sup> James Nobles, *Civil Commitment of Sex Offenders*, Minnesota Office of Legislative Auditor (2011), accessible at <http://www.auditor.leg.state.mn.us/ped/2011/ccsosum.htm>

- The number of civilly committed sex offenders in the Minnesota Sex Offender Program (MSOP) nearly quadrupled during the last decade and is expected to nearly double over the next ten years.
- The number of court commitments as a percentage of referrals from the Department of Corrections varies significantly across the state.
- [OLA's] statistical analysis suggests that some sex offenders being committed may have a lower risk of recidivism than others who are being released from prison.
- Minnesota lacks reasonable alternatives to commitment at a high security facility. Lower-cost alternatives may be appropriate for some sex offenders being considered for commitment or already residing at MSOP facilities.
- No sex offender has been discharged from MSOP since it was created in 1994.<sup>55</sup> Without releases, Minnesota is susceptible to lawsuits challenging the adequacy of the treatment program.

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<sup>55</sup> But see, *Judicial Panel Gives Final OK On Discharge Of Sex Offender From Minnesota Program*, accessible at [http://www.twincities.com/localnews/ci\\_19940882?IADID=Search-www.twincities.com-www.twincities.com](http://www.twincities.com/localnews/ci_19940882?IADID=Search-www.twincities.com-www.twincities.com) (Feb. 10, 2012) (state released offender in 2000, but he violated the terms of his release and was returned to the program in 2003). A second offender was approved for release in February, 2012. See Warren Wolfe, *A Turning Point for State's Sex Offender Program*, accessible at <http://www.startribune.com/local/stpaul/139595093.html>.

The Minnesota program made international news recently when a London (UK) High Court refused to return an alleged sex offender to Minnesota to face criminal charges

- MSOP's treatment program has experienced frequent leadership changes and significant staff vacancies, and it has struggled to maintain the type of therapeutic environment necessary for treating high-risk sex offenders.
- Current MSOP management has worked to address security problems and clinical deficiencies, but it still needs to increase the number of treatment hours provided, improve the therapeutic environment, and establish clearer guidelines for judging treatment progress.

C. *Why is so little attention paid to rehabilitation?*

This all raises the rarely-asked question: why is so little attention paid to rehabilitation? A review of the treatment offered and the facilities designed to contain individuals who have committed sexual offenses seems to confirm the answer that

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after officials in Hennepin and Dakota counties refused to guarantee he would not be committed to the state's controversial sex offender program, because such institutionalization "would be a "flagrant denial" of Sullivan's human rights under Article 5 of the European Convention on Human Rights." See Ian Evans, *Britain Denies Extradition of Minnesota Sex Suspect* (June 28, 2012), accessible at <http://www.startribune.com/local/160704485.html>.

The authors wish to thank Anita Schlank, Jack B. Schaffer, and John Austin for their assistance in bringing this information to their attention.

society has no intention or desire to return these individuals to the community.<sup>56</sup> The phrase “sex offender” automatically implies “monstrous imminent evil.”<sup>57</sup> Political pressure calls for sex offenders to be effectively managed through deterrence-based

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<sup>56</sup> Sarah E. Spierling, *Lock Them Up and Throw Away the Key: How Washington's Violent Sexual Predator Law Will Shape the Future Balance Between Punishment and Prevention*, 9 J.L. & Pol'y 879 (2001).

See e.g., MINN. STAT. ANN. §253B.185 (2011):

A civilly committed sex offender may be fully discharged only after a determination is made that the person “is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of inpatient treatment and supervision.” and “specific conditions [must] exist to provide a reasonable degree of protection to the public and to assist the patient in adjusting to the community.”

<sup>57</sup> Christina Hebel, *EU Politicians Angered By Polish Chemical Castration Plan*, Spiegel Online (2008), accessible at

<http://www.spiegel.de/international/europe/0,1518,580284,00.html>

(Polish Prime Minister, Donald Tusk, called for the introduction of forced chemical castration for sex offenders saying, "I don't believe that such individuals, such creatures, can be called human," he said. "In this case one can't even argue on behalf of human rights"). See e.g., Jonathan Simon, *Sanctioning Government: Explaining America's Severity Revolution*, 56 U.MIAMI L. REV. 217, 229 (2001), characterizing the public view of sex offenders as “those who are perceived as in the grip of evil or monstrous desires.”

methods.<sup>58</sup> Treatment for sex offenders has been defined as “the delivery of prescribed interventions as a means of managing crime-producing factors and promoting positive and meaningful goal attainment for participants, all in the interest of enhancing public safety.”<sup>59</sup> Our goals, when designing containment laws, have always been directed towards making the public feel safer, not towards helping the offender to live successfully and thrive as a member of the community *upon his release*.<sup>60</sup> Any focus on human rights and rehabilitation for sex offenders has been put forth on a limited basis by the academic community, but has been severely neglected in the legislatures and courts.<sup>61</sup>

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<sup>58</sup>Laurie O. Robinson, *Sex Offender Management: The Public Policy Challenges*, 989 ANNALS N.Y. ACAD. SCI. 1 (2003); Kenneth Crimaldi, “Megan’s Law”: *Election-Year Politics and Constitutional Rights*, 27 RUTGERS L.J. 169 (1995)

<sup>59</sup> Bumby, *supra* note 33, at 2

<sup>60</sup> Charles Scott & Trent Holmberg, *Prisoners’ Rights Versus Public Safety*, 31 J. AM. ACAD. PSYCHIATRY L. 502 (2003)

<sup>61</sup> Beyond the scope of this paper is an analysis of the application of the United Nations’ Convention on the Rights of Persons with Disabilities to this population. On that document in general, see e.g., Michael L. Perlin, “A Change Is Gonna Come”: *The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law*, 29 NO. ILL. U. L. REV. 483 (2009); on its implications for forensic populations, see MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD 100-01 (2011); on the implications of international human rights instruments for forensic patients and correctional inmates in general, see Astrid Birgden & Michael L. Perlin, “Where The Home In The Valley Meets The Damp Dirty Prison”: *A Human Rights*

III. Anti-therapeutic and Inhumane solutions upon release

A. *Are individuals who have committed sex offenses unworthy of constitutional and legal protections?*

States (and the federal government) have enacted laws to attempt to reduce recidivism and re-offense and to ensure that certain offenders are monitored in the community, once either civil or criminal confinement ends,

In 1996, Megan's Law was enacted in New Jersey in response to community outrage from the brutal rape and murder of seven-year-old Megan Kanka by a convicted sex

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*Perspective On Therapeutic Jurisprudence And The Role Of Forensic Psychologists In Correctional Settings*, 14 *AGGRESSION & VIOLENT BEHAVIOR* 256 (2009); Astrid Birgden & Michael L. Perlin, *"Tolling for the Luckless, the Abandoned and Forsaken": Community Safety, Therapeutic Jurisprudence and International Human Rights Law As Applied to Prisoners and Detainees*, 13 *LEG. & CRIMINOL. PSYCHOLOGY* 231 (2008); Michael L. Perlin & Henry A. Dlugacz, *"It's Doom Alone That Counts": Can International Human Rights Law Be An Effective Source of Rights in Correctional Conditions Litigation?*, 27 *BEHAV. SCI. & L.* 675 (2009).

offender, a “horrific” offense<sup>62</sup> that was the catalyst to enact a law that would track all convicted sex offenders and publically display where they resided in the community.<sup>63</sup> Parallel legislation to Megan’s Law was subsequently enacted on a federal level to further compel conformity between the states.<sup>64</sup> Within this legislation was the authorization to create a national registry of offenders who are considered recidivists, deemed sexual violent predators, convicted of coercive, penetrative sex with anyone and/or offenders who have had sex with children under the age of 12.<sup>65</sup> By 2005, this national registry was available on the Internet and was linked to all other state online

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<sup>62</sup> See e.g., Karne Newburn, *The Prospect of an International Sex Offender Registry: Why an International System Modeled after United States Sex Offender Laws Is Not an Effective Solution to Stop Child Sexual Abuse*, 28 WIS. INT’L L.J. 547, 549 (2010).

<sup>63</sup> Offenders must register their address with local authorities and are placed into one of three tiers based upon their level of perceived risk. *Artway v. Attorney General of New Jersey*, 81 F.3d 1235 (3d Cir. 1996), *reh’g denied*, 83 F.3d 594 (3d Cir. 1996) (upholding registration aspects of New Jersey’s “Megan’s Law,” and finding that challenge to notification aspects of law was not ripe) .

<sup>64</sup> Megan’s Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (codified at 42 U.S.C. § 14071 (2000) (allowing public disclosure of information and whereabouts).

<sup>65</sup> Department of Justice Office of the Attorney General, *Megan’s Law; Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended*, (December 17, 1998), accessible at <http://pub.bna.com/cl/19990120/2196.htm> (accessed August 24, 2007), which defines an aggravated sexual act as: “(1) engaging in sexual acts involving penetration with victims of any age through the use of force or the threat of serious violence; and (2) engaging in sexual acts involving penetration with victims below the age of 12.”

registries. Subsequently, in 2006, Congress enacted the Adam Walsh Child Protection and Safety Act. This legislation contains the Sex Offender Notification and Registration Act (SORNA). By enacting this Act, Congress increased the pool of individuals required to register as well as the length of time of registration. In order to expand the group of individuals subject to registration, Congress defined a sex offense as a “criminal offense that has an element involving a sexual act or sexual contact with another”<sup>66</sup> Through the expansion of qualifying crimes and offenses, this Act was the first to encompass juvenile offenders.<sup>67</sup> By 2006, all 50 states and the District of Columbia had enacted some form

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<sup>66</sup> Adam Walsh Child Protection and Child Safety Act of 2006, 42 U.S.C. §16911 et seq., Title I: Sex Offender Registration and Notification Act (SORNA) §111(5)(A)(i) (sometimes AWA). According to the HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S. 103-04 (2007), at least 5 states require registration for adult prostitution-related offenses; 13 states require registration for public urination; 29 states require registration for consensual sex between teenagers; and 32 states require registration for exposing genitals in public; see also *Rainer v. State*, 690 S.E. 2d 827 Ga. 2010) (upholding provision of the state's sex offender registry law that requires the registration of certain persons *not* convicted of sex crimes) .

<sup>67</sup> Michael F. Caldwell et al., *An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles Evaluating the Ability to Predict Sexual Recidivism*, 14 PSYCHOL. PUB. POL'Y & L. 89 (2008); *Doe v. Weld*, 954 F. Supp. 425 (D. Mass. 1997) (Massachusetts juvenile statute held constitutional).

of community notification and registration requirements.<sup>68</sup> As of 2008, 30 states had enacted residency restrictions for offenders in the community.<sup>69</sup>

In order to effectively comply with SORNA, state public websites must include:

- The name of the sex offender, including any aliases.
- The address of each residence at which the sex offender resides or will reside and, if the sex offender does not have any (present or expected) residence address, other information about where the sex offender has his or her home or habitually lives. If current information of this type is not available because the sex offender is in violation of the requirement to register or un-locatable, the website must so note.
- The address of any place where the sex offender is an employee or will be an employee and, if the sex offender is employed but does not have a definite employment address, other information about where the sex offender works.
- The address of any place where the sex offender is a student or will be a student.
- The license plate number and a description of any vehicle owned or operated by the sex offender.

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<sup>68</sup> Richard Gary Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Assessing the Impact in Wisconsin*, (National Institute of Justice 2000), accessible at [www.ncjrs.gov/pdffiles1/nij/179992.pdf](http://www.ncjrs.gov/pdffiles1/nij/179992.pdf).

<sup>69</sup> Michelle L. Meloy, Susan L. Miller & Kristin M. Curtis, *Making Sense out of Nonsense: The Deconstruction of State-Level Sex Offender Residence Restrictions*, 33 AM. J. CRIM. JUST. 209 (2008).

- A physical description of the sex offender.
- The sex offense for which the sex offender is registered and any other sex offense for which the sex offender has been convicted.
- A current photograph of the sex offender.<sup>70</sup>

Failure to comply is a violation of federal law, and the offender is either fined or imprisoned.<sup>71</sup> Ignoring Supreme Court precedent<sup>72</sup> and acting without any express legislative findings on an impact on interstate commerce<sup>73</sup>, Congress invoked the Commerce Clause to authorize the federalization of registration violations.<sup>74</sup>

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<sup>70</sup> SORNA, §118 (c)(1) (States have discretion to decide to exempt public information about tier I sex offenders who have been convicted of offenses other than specified offenses against a minor).

<sup>71</sup> 18 U.S.C. §2250(a)(3)(2006) (sex offender shall be fined or imprisoned not more than ten years, or both); Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J. CONTEMP. CRIM. JUST. 67 (2005).

<sup>72</sup> Traditionally, the Supreme Court has found that this sort of Congressional action is an intrusion on the police power authority of the states and lacking any express congressional findings necessary to uphold such mandates. *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating federal law that made it a crime to possess a gun near a school); *United States v. Morrison*, 529 U.S. 598 (2000) (striking down federal law that allowed victims of gender-motivated crimes to sue in federal court).

<sup>73</sup> Congress' authority to act has generally been preconditioned on legislative findings. The Supreme Court echoed this notion in the prominent area of affirmative action where specific legislative findings were required. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (requiring Congress to justify affirmative action legislation with specific findings; because "classifications based on race are

In 2007, retroactive application of the Adam Walsh Act was administratively authorized in order to successfully develop a “comprehensive” system that would be effective in protecting the public with a wider scope and inclusion of all offenders, - regardless of when they were convicted.<sup>75</sup> Therefore, a defendant is *de facto* a criminal the moment the law goes into effect, and can therefore be prosecuted under “failure to register” without an allegation of any subsequent offense. This is directly in violation of prior Supreme Court mandates that an element of a crime should not be viewed as continuing “unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.”<sup>76</sup> Although Congress has echoed the unverified conclusion that individuals who commit sexual offenses are

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potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified"); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500-04 (1989) (legislatures "must identify that discrimination, public or private, with some specificity before they may use race-conscious relief")

<sup>74</sup> What had otherwise been a state crime, registration violations are now punished by federal sanctions citing the possible “state loop-holes” See *United States v. Madera*, 474 F.Supp.2d 1257 (M.D. Fla. 2007) (unsuccessful challenge to the AWA registration provision on several basis including the Commerce Clause).

<sup>75</sup> Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8,894, 8,895 (Feb. 28, 2007) (codified at 28 C.F.R. pt. 72).

<sup>76</sup> Corey Rayburn Yung, *The Disappearing Ex Post Facto Clause: From Substantive Bulwark to Procedural Nuisance*, 61 SYR. L. REV. 647 (2011), quoting *United States v. Toussie*, 397 U.S. 112, 121 (1970).

likely to reoffend, it has done so without specific legislative support.<sup>77</sup> By continuing to criminalize an element of the crime through retroactive application of the law and by further criminalizing failure to register, Congress has overstepped its Constitutional authority.

Community notification and residency restriction laws have been criticized as being immoral, cruel and inhumane, and detrimental to the goal of reducing sexual offending.<sup>78</sup> The efficacy of these laws has been sharply debated, with many questions surrounding the legality and morality of ostracizing offenders after release,<sup>79</sup> as well as weighing the expense generated by these laws<sup>80</sup> with the degree to which they protect the community.<sup>81</sup> If a criminal has paid his debt to society by concluding his sentence,<sup>82</sup>

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<sup>77</sup> See *United States v. Buxton*, No. CR-07-082, 2007 U.S. Dist. LEXIS 76142 (W.D. Okla.) (“Congress expressly stated that the purpose of SORNA was ‘to protect the public from sex offenders and offenders against children’”).

<sup>78</sup> Jill S. Levenson & Leo P. Cotter, *The Effect of Megan's Law on Sex Offender Reintegration*, 21 J. CONTEMP. JUST. 49 (2005).

<sup>79</sup> See generally, Birgden & Cucolo, *supra* note 51.

<sup>80</sup> Fred Cohen, *From the Editor: Sex Offender Registration Laws; Constitutional and Policy Issues*, 31 CRIM. L. BULL. 151 (1995).

<sup>81</sup> *State v. Kedging*, 571 N.W.2d 450 (Wis. App. 1997) (commitment order was abuse of discretion where placement options outside of offender's county of residence were not considered); *McCreary v. State*, 582 So.2d 425 (Miss. 1991)(banishment from a large geographical area struggles to serve any rehabilitative purpose); Minn. Dep't of Corrections, *Level Three Sex Offenders: Residential Placement Issues, 2003 Report to the Legislature*, 9 (2003) (ex offender proximity to schools or parks not associated with recidivism).

how can society limit where he chooses to live upon release?<sup>83</sup> How have these laws passed constitutional muster and overcome challenges of ex post facto and double jeopardy?<sup>84</sup> The present system of registering offenders does not distinguish between the future dangerous from the formerly dangerous. It bundles statutory rape cases that deal with sexual interactions between teenagers -- interactions that would otherwise be consensual but for the age of one of the partners -- with cases of individuals who have committed violent pedophilic offenses. It seems obvious that such a system is unreliable and unfair.<sup>85</sup>

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<sup>82</sup> Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 3 HOWARD L.J. 54 (2011).

<sup>83</sup> *United States v. Pitts*, No. 07-157-A, 2007 U.S. Dist. LEXIS 82632 (M.D. La. Nov. 7, 2007) (statutorily authorized prison sentence of up to ten years for failing to register did not provide reason to find that a prosecution under SORNA was punitive in nature).

<sup>84</sup> *W.P. v. Poritz*, 931 F. Supp. 1199 (D.N.J. 1996) (notification requirements did not impose "punishment" on sex offenders; law constitutional); *United States v. Husted*, No. CR-07-105-T, 2007 LEXIS 56662 (W.D. Okla. 2007), *rev'd on other grounds*, 545 F.3d 1240 (10<sup>th</sup> Cir. 2008) (reversing on statutory grounds but not on Ex Post Facto Clause grounds).

<sup>85</sup> In no way are we suggesting that criminal behavior should be excused; it absolutely should be criminally prosecuted in accordance with our laws and determinations as to what constitutes a sexual crime. But in the context of monitoring *after an individual has been adjudicated for that crime or served his or her criminal sentence*, a consideration of

Additionally, this population is forever branded with a “scarlet letter,”<sup>86</sup> notwithstanding the fact that these defendants have already been criminally punished for their offenses. Every aspect of their life has the potential to be intruded upon, scrutinized and judged (residency, employment, personal life, community activities, internet use,<sup>87</sup> daily whereabouts).<sup>88</sup> Under the law, general criminals (non-sex offense convictions) are often branded with the after-effects of a criminal conviction when seeking employment or dealing with federal and state agencies,<sup>89</sup> but nothing else approximates the public display of distrust and alienation directed towards individuals who have committed sexual offenses.

*B., How far will we infringe on human rights?*

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the various degrees of dangerousness, risk and heinousness of the prior crime should be taken into account.

<sup>86</sup> Lara Geer Farley, *Adam Walsh Act: The Scarlet Letter of the Twenty-First Century*, 47 WASHBURN L.J. 471 (2007-2008).

<sup>87</sup> Associated Press, *Sex Offenders Are Barred from Internet by New Jersey*. New York Times, Dec 28, 2007, p B5; Zevitz & Farkas, *supra* note 68, at 393 (study of 30 sex offenders in the state of Wisconsin revealed that 23 of 30 described being humiliated regularly, being ostracized by neighbors and lifetime acquaintances, and being harassed or threatened by nearby residents or strangers)

<sup>88</sup> See Shelley Albright & Furjen Denq, *Employer Attitudes Toward Hiring Ex-Offenders*, 76 PRISON J. 118 (1996).

<sup>89</sup> See generally, Love, *supra* note 82 (discussing the stigmas and difficulties of maintaining/seeking employment post-release from prison)

The phrase “sex offender” automatically infers “monstrous imminent evil”<sup>90</sup> but does that label give us justification to deny human rights mandated under international law? Article 17 of the International Covenant on Civil and Political Rights states that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.”<sup>91</sup> Everyone has the right to the protection of the law against such interference or attacks. Residency restrictions prevent individuals who have committed sexual offenses, from living within specific proximities to schools, parks and other areas where children congregate.<sup>92</sup> These ordinances are aimed at prohibiting offenders from residing within particular areas and inevitably within particular cities.<sup>93</sup> A number of scholarly articles have found that the strict ordinances banning offenders from living in numerous areas within the state result in a state of affairs that is the modern equivalent of the medieval

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<sup>90</sup> See *supra* note 56.

<sup>91</sup> International Covenant on Civil and Political Rights, 1966, Art. 17 . U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (1992).

<sup>92</sup> *Cobb v. State*, 437 So.2d 1218, 1220 (Miss. 1983) (upholding a probation condition requiring the defendant to “stay out of Stone County”).

<sup>93</sup> Steven Brown et al., *What People Think About the Management of Sex Offenders in the Community*, 47 HOWARD J., #3 (July 2008 ), accessible at <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2311.2008.00519.x/abstract> ( study finding that the public does not necessarily agree with punitive conditions but is insecure in the effectiveness of community containment and concerned about the reality of reintegration)

sanction of banishment.<sup>94</sup>

Residency restrictions range anywhere from 100 feet to 2,500 feet from any designated area in which minors congregate and apply to the individual regardless of the prior crime or offending history. Therefore, someone whose crime did not include children-as-victims and who has no history of interest in or attraction to children is still subjected to ordinances preventing him from living within a specified distance from where children may be.<sup>95</sup> The case of *Doe v. Miller*<sup>96</sup> exemplifies the courts' failure in acknowledging the vast differences within the sex offender population and the resulting offenses, and their refusal to acknowledge and consider scientific data about sex-offending behaviors.

*Doe* challenged an Iowa law<sup>97</sup> prohibiting any person convicted of certain sex offenses involving minors from residing within 2000 feet of a school or registered child

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<sup>94</sup> Corey Rayburn Yung, *Banishment By a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101 (2007); Associated Press, *Sex Offenders Living Under Miami Bridge*, N.Y. TIMES, Apr. 8, 2007, at A22; Shelley Ross Saxer, *Banishment of Sex Offenders: Liberty, Protectionism, Justice, & Alternatives*, 86 WASH. U. L. REV. 1397 (2009); Zevitz & Farkas, *supra* note 68.

<sup>95</sup> Jim Nichols, *Tossing the Book at Sex Offenders; Officials Target Hundreds Living Too Close to Schools*, The Plain Dealer (Cleveland, Ohio), July 31, 2005, at B1.

<sup>96</sup> *Doe v. Miller*, 298 F. Supp. 2d 844, 870 (S.D. Iowa 2004), rev 'd, 405 F.3d 700 (8th Cir. 2005), cert denied, 546 U.S. 1034 (2005).

<sup>97</sup> IOWA CODE ANN. §692A.2A (West 2004):

care facility. At trial, no scientific data were entered regarding how the treatment of certain clinical disorders might affect the risks for sexual recidivism. The district court found that the statute was unconstitutional and amounted to *ex post facto* punishment, violated the plaintiffs' rights to avoid self-incrimination, and violated substantive due process, because it infringed on rights to travel and rights to choose how to conduct "family affairs"<sup>98</sup>

On appeal, the Eighth Circuit reversed the trial court decision, finding the statute to be constitutional, concluding that the Constitution did not prevent Iowa from regulating the residency of sex offenders in order to protect the health and safety of its citizens.<sup>99</sup> Significant in the majority opinion is the failure to consider any information regarding how the treatment of certain clinical disorders might affect the risks for sexual recidivism. Furthermore, the court did not comment upon or consider in its ruling, any

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1. For purposes of this section, "person" means a person who has committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor. 2. A person shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility. 3. A person who resides within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school, or a child care facility, commits an aggravated misdemeanor.

<sup>98</sup> *Doe*, 298 F.Supp.2d at 880.

<sup>99</sup> *Doe*, 405 F.3d at 705

of the *amicus* briefs that were designed to educate the court about the relevant science and data.<sup>100</sup> Only the dissent speaks to the potential problems in applying the Iowa law

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<sup>100</sup> *Id.* at 709:

We likewise conclude that the Iowa residency restriction does not contravene principles of procedural due process under the Constitution. The restriction applies to all offenders who have been convicted of certain crimes against minors, regardless of what estimates of future dangerousness might be proved in individualized hearings. Once such a legislative classification has been drawn, additional procedures are unnecessary, because the statute does not provide a potential exemption for individuals who seek to prove that they are not individually dangerous or likely to offend against neighboring schoolchildren. Unless the Does can establish that the substantive rule established by the legislative classification conflicts with some provision of the Constitution, there is no requirement that the State provide a process to establish an exemption from the legislative classification

And see *id.* at 714:

The Does contend, however, that the statute is irrational because there is no scientific study that supports the legislature's conclusion that excluding sex offenders from residing within 2000 feet of a school or child care facility is likely to enhance the safety of children. We reject this contention because we think it understates the authority of a state legislature to make judgments about the best means to protect the health and welfare of its citizens in an area where precise statistical data is unavailable and human behavior is necessarily unpredictable. Although the Does introduced one report from the Minnesota Department of Corrections finding "no evidence in Minnesota that residential proximity of sex offenders to schools or parks affects reoffense," this solitary

to all convicted offenders, regardless of their history and risk of re-offending.<sup>101</sup>

Further, it faults the Iowa law for viewing all sex offenders as at equal risk for recidivism.<sup>102</sup>

Due to the restrictions upheld by the *Doe* court, individuals may be uprooted and forced to move from established residences, be unable to return home after prison, and may be prevented from residing with their own children, thus further disabling the

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case study-which involved only thirteen reoffenders released from prison between 1997 and 1999-does not make irrational the decision of the Iowa General Assembly and the Governor of Iowa to reach a different predictive judgment for Iowa. As the district court observed, twelve other States have enacted some form of residency restriction applicable to sex offenders [footnote omitted].

<sup>101</sup> *Doe* 405 F. 3d at 726. The dissent makes note of the varying degrees of sexual offenses:

“However, the restriction also applies to John Doe II, who pleaded guilty to third degree sexual abuse for having consensual sex with a fifteen-year-old girl when he was twenty years old. The restriction applies to John Doe VII, who was convicted of statutory rape under Kansas law. His actions which gave rise to this conviction would not have been criminal in Iowa. The restriction applies also to John Doe XIV, who pleaded guilty to a serious misdemeanor charge in 1995 after he exposed himself at a party at which a thirteen-year-old girl was present. John Doe XIV was nineteen at the time of his offense.”

<sup>102</sup> *Id*

family unit and removing the needed support of family members.<sup>103</sup> One such example involves the case of Wendy Whitaker, who engaged in a single act of consensual oral sex with a 16 year old when she was 17 years old. She was arrested and charged with the crime of sodomy. Over 10 years later, she was forced from her home because of its proximity to a child care center. After the Georgia Supreme Court's decision *in Mann v. Ga. Dep't of Corr.*<sup>104</sup> – holding that the Georgia statute, prohibiting registered sex offender from residing within 1,000 feet of any child care facility, school or church where minors congregate, was an impermissible taking without adequate compensation,<sup>105</sup>-- Ms. Whitaker returned to her home, believing that since she owned her home she had a right to reside there; once again, however, the Columbia County

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<sup>103</sup> Jill Levenson & Richard Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 34 AM. J. CRIM. JUST. 54 (2009). The *Doe* court specifically addressed and dismissed the argument of banishment: "While banishment of course involves an extreme form of residency restriction, we ultimately do not accept the analogy between the traditional means of punishment and the Iowa statute. Unlike banishment, § 692A.2A restricts only where offenders may reside. It does not "expel" the offenders from their communities or prohibit them from accessing areas near schools or child care facilities for employment, to conduct commercial transactions, or for any purpose other than establishing a residence." *Doe*, 405 F.3d 700 at 719

<sup>104</sup> *Mann v. Georgia Dept. of Corrections*, 653 S.E.2d 740 (Ga. 2007)

<sup>105</sup> As applied to a registered sex offender who purchased home in accordance with the statute but was later forced to move when a child care center opened within 1,000 feet of the residence, *Mann*, 653 S.E. 2d at 760.

Sheriff's Office ordered Ms. Whitaker to vacate her residence within 72 hours because it was within 1,000 feet of a church.<sup>106</sup>

Residency restrictions banish undesirable individuals from our community is supported in fear and belief that they would, without a doubt, reoffend.<sup>107</sup> Sex offenders are 'banished' to neighboring counties or states and often corralled into poor, minority-dense neighborhoods and placed in boarding houses to reside solely with other sex offenders.<sup>108</sup> Dr. Paul Appelbaum, clearly describes the fallout and potential harms

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<sup>106</sup> Whitaker was subsequently removed from the sex offender registry after spending twelve years on it. See Bill Rankin, *Lead Plaintiff Removed From Sex Offender Registry*, ATLANTA JOURNAL-CONSTITUTION, (Sept. 17, 2010), at B1, discussed in Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 487 n. 190 (2011). See also, Southern Center for Human Rights, *Woman Who Had Consensual Sex as a Teenager No Longer Required to Register as a Sex Offender* (Sept. 17, 2010), accessible at [http://www.schr.org/action/resources/woman\\_who\\_had\\_consensual\\_sex\\_as\\_a\\_teenager\\_no\\_longer\\_required\\_to\\_register\\_as\\_a\\_sex](http://www.schr.org/action/resources/woman_who_had_consensual_sex_as_a_teenager_no_longer_required_to_register_as_a_sex).

<sup>107</sup> Karen Sloan, *Towns Fear an Influx of Offenders*, Omaha World-Herald, Oct. 4, 2005, at 1A; see also *Des Moines Zones out Molesters*, Omaha World-Herald, Oct. 13, 2005, at 2B.

<sup>108</sup> Saxer, *supra* note 94; Michael J. Duster, *Criminal Justice System Symposium: Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE L. REV. 711 (2005).

in a 2008 column discussing community notification:

Given the consternation aroused by sex offenders, it can hardly be unexpected that the typical consequences of such disclosure are loss of housing, jobs, and friends. Yet these are just the kind of supports that can anchor a released offender in a community and reduce recidivism. Numerous reports have surfaced of offenders being threatened, harassed, and in rare cases killed after community notification. Suicide also has been reported. Perhaps most disturbing is the large number of states that fail to limit disclosures to predatory offenders, instead extending the process to everyone convicted of a sexually related offense. Swept up in this net are people who have committed noncontact crimes, such as exhibitionism or peeping, those whose only offense occurred as children, and persons who engaged in consensual sex with a somewhat younger girlfriend or boyfriend and were convicted of statutory rape.<sup>109</sup>

### *C. Who's afraid of the big, bad wolf?*

We designed our community containment laws based on certain perceived truths: (1) that convicted sex offenders pose a greater danger to the public when they

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<sup>109</sup> Paul Appelbaum, *Law & Psychiatry: Sex Offenders in the Community: Are Current Approaches Counterproductive?* PSYCHIATRIC SERVICES (2008), accessible at doi: 10.1176/appi.ps.59.4.352

reside near places where children frequent;<sup>110</sup> (2) that we can dispose of the problem by limiting their housing options in our municipalities,<sup>111</sup> and (3) that sex offenders coming out of prison or sex offender civil commitment have a high re-offense rate for contact sexual crimes.<sup>112</sup> Yet studies conducted in a number of states do not confirm the above

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<sup>110</sup> HUMAN RIGHTS WATCH, *supra* note 66, at 103-04 (citing the lack of evidence supporting assertion that prohibiting offenders from living near children actually protects children from sexual violence); According to The Association for the Treatment of Sexual Abuse, “*Facts About Adult Sex Offenders*” (2007) (accessible at <http://www.atsa.com/ppOffenderFacts.html>), currently no studies show a relationship between residence, distance from a school or child-care facility, and an increased likelihood of recidivism.)

<sup>111</sup> Peter A. Zamoyski, *Will California's "One Strike" Law Stop Sexual Predators, or Is a Civil Commitment System Needed?*, 32 SAN DIEGO L. REV. 1249 (1995); Christine Kong, *The Neighbors Are Watching: Targeting Sexual Predators with Community Notification Laws*, 40 VILL. L. REV. 1257 (1995).

<sup>112</sup> Hanson, *supra* note 26, in PROTECTING SOCIETY, *supra* note 6, at 63; R. Karl Hanson, *Who is Dangerous and When Are They Safe? Risk Assessment with Sexual Offenders*. According to a major study done by the Bureau of Justice Statistics, when measured by rearrest for the same type of crime, rapists had a relatively low rate of arrest for another rape (7.7%) compared to larcenists (33.5%), burglars (31.9%), and drug offenders rearrested for drug offenses (24.8%). *Id.* Only murderers had a lower recidivism rate for the same crime than rapists. *Id.* (citing Bureau of Justice Statistics, Special Report, Recidivism of Prisoners Released in 1983, at 5 (1989), available at [www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf);

See *Doe*, 405 F. 3d at 715

There can be no doubt of a legislature's rationality in believing that “[s]ex offenders are a serious threat in this Nation,” and that “[w]hen convicted sex

listed beliefs:

- A New Jersey study sampling 268 sexual offenders found that (1) the strict residency restrictions caused a housing shortage for tracked offenders, and (2) offenders who targeted adults were more likely to live closer to children than those who offended against children.<sup>113</sup>
- In 2006, New York released a study analyzing 19, 827 sex offenders and found: (1) the rate for new sex offenses after one year in the community was 2 percent; and (2) the cumulative rate increased to 3 percent after two years, 6 percent after five years, and 8 percent after 8 years.<sup>114</sup>
- A study in California followed 93 high-risk predators and in 2006 issued results showing that after six years on the street, 4.3 % of these worst-of-the-worst

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offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault.” *Conn. Dep’t of Pub. Safety*, 538 U.S. at 4 (alterations in original) (quoting *McKune v. Lile*, 536 U.S. 24, 32-33, (2002) (plurality opinion)). The only question remaining is whether, in view of a rationally perceived risk, the chosen residency restriction rationally advances the State's interest in protecting children.”

<sup>113</sup> Michael Chakewski & Cynthia Calkins Mercado, *An Evaluation of Sex Offender Residency Restriction Functioning, in Town, County, and City-Wide Jurisdictions*, 20 CRIM. JUST. POL’Y REV. 44 (2009); Michele L. Meloy, Susan L. Miller & Kristen M. Curtis, *Making Sense Out of Nonsense: The Deconstruction of State-Level Sex Offender Residence Restrictions* 33 AM. J. CRIM. JUST. 209 (2008).

<sup>114</sup> Chris Dornin, *Facts and Fiction About Sex Offenders*, 2 SENTENCING AND JUSTICE REFORM ADVOCACY 6 (2010), accessible at [www.SJRA1.com](http://www.SJRA1.com).

- offenders had committed new sex offenses.<sup>115</sup>
- Alaska reported in 2007 that 3 % of sex offenders had committed a new sex crime in their first three years after release from prison.<sup>116</sup>
  - Tennessee found that 4.7% of 504 sex offenders released from prison in 2001 were arrested for a new sex offense after three years. The sex crime recidivism rate was zero for offenders whose original crime was incest.<sup>117</sup>
  - Missouri tracked 3,166 offenders between 1990 and 2002 – covering a period before the enactment of residency restrictions and SORNA—and found that 12% had been re-arrested for a new sex crime and of that 12%, 10% had been reconvicted.<sup>118</sup>
  - A 2007 Minnesota Department of Corrections study tracked 3,166 sex offenders released from Minnesota prisons between 1990 and 2002 and found that after an average of 8.4 years in the community, 10 percent had been convicted of a new sex offense. Those released in the beginning of the study period were much more likely to reoffend within three years than those released later -- 17 percent in 1990 as opposed to 3 percent in 2002.<sup>119</sup>
  - West Virginia tracked 325 sex offenders from 2001-2003 and found that: (1) the

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

recidivism rate for any return to prison, not just for sex crimes, was 9.5 percent; (2) 6 individuals returned for new sex related crimes which included 3 crimes of failing to register; (3) the sex crime recidivism rate was slightly less than 2 percent; and (4) only 1 percent had an actual sex crime victim.<sup>120</sup>

Given the data that demonstrates the low recidivism rates for sex offenders (as compared with other criminals), it appears that bias and stigma surrounding the type of crime committed- sexual offenses- is what fuels our legislation. Thus we ignore and disregard current studies<sup>121</sup> and instead act based on unfounded myths.<sup>122</sup>

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<sup>120</sup> *Id.*

<sup>121</sup> Washington and New York have relatively narrow laws that may prove more effective; In Washington, “high-risk offenders” cannot live within 880 feet of schools or daycare centers, WASH. REV.CODE § 9.94A.030 (West 2005), and in New York, serious offenders cannot enter school grounds or facilities caring for children, N.Y. PENAL LAW § 65.10(4-a) (McKinney Supp. 2007)

<sup>122</sup> Rob Freeman-Longo, *Myths and Facts About Sex Offenders*, Center for Sex Offender Management (CSOM) (2000), accessible at <http://www.csom.org/pubs/mythsfacts.html>:

There are many misconceptions about sexual offenses, sexual offense victims, and sex offenders in our society. Much has been learned about these behaviors and populations in the past decade and this information is being used to develop more effective criminal justice interventions throughout the country. This document serves to inform citizens, policy makers, and practitioners about

D. *Do community notification and registration laws contribute to low reconviction and re-offense rates?*

Despite the substantial costs, little research has been conducted to examine whether such laws enhance community protection.<sup>123</sup> In terms of community notification, it would appear that Megan's Law has failed to significantly reduce re-offending. The legislative assumption was that community notification would deter new offenses and citizens would take protective measures against sex offenders; "exactly what action is expected is not clear."<sup>124</sup> Unfortunately, these strategies are based on evidence that is "...anecdotal or plain conjecture."<sup>125</sup> As noted above,<sup>126</sup> the efficacy and

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sex offenders and their victims, addressing the facts that underlie common assumptions both true and false in this rapidly evolving field.

<sup>123</sup> See generally, Sarah E. Agudo, *Irregular Passion: The Unconstitutionality and Inefficacy of Sex Offender Residency Laws* 102 NW. U. L. REV. 307 (2008); CSOM, *supra* note 33; See Winick, *supra* note 11, at 569 ("Thus, the negative effects of these laws far exceed their positive value inasmuch as community protection can be accomplished through reliance on a criminal punishment model with enhanced penalties for repeat offenders."); Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet From Danger or One Step From Absurd?*, 49 INT. J. OFFENDER THER. & COMP. CRIMINOLOGY 168 (2005).

<sup>124</sup> Victoria Simpson Beck et al., *Community Response to Sex Offenders*, 32 J. PSYCHIATRY & L. 141, 142 (2004).

<sup>125</sup> Rice & Harris, *supra* note 44, IN PROTECTING SOCIETY, *supra* note 6 at 108.

<sup>126</sup> See *supra* note 16.

cost of Megan's Law was thoroughly examined by tracking 550 randomly selected sex offenders released between 1990 and 2000 and comparing 10 years before and 10 years after the law was enacted.<sup>127</sup> The authors found no verifiable link in a reduction of re-offending and no reduction in the number of victims, but did note an exponentially increasing cost of \$3.9 million per year by 2007.<sup>128</sup> In response to this study, Megan's mother (Maureen Kanka) informed the *Newark Star-Ledger* -- the newspaper that commissioned the study -- that the "purpose of the law was to provide an awareness to parents...Five million people have gone to the state website. It's doing what it was supposed to do...we never said it would stop them from re-offending or wandering to another town."<sup>129</sup>

It is shocking that society has been so callous in disregarding human dignity and rights without the appropriate factual knowledge of empirical support to even confirm that these laws are actually achieving the goal intended.<sup>130</sup> As of yet, there is not one

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<sup>127</sup> See Zgoba et al, *supra* note 15, at 37.

<sup>128</sup> *Id.*

<sup>129</sup> Susan K. Livio, *Maureen Kanka Defends Megan's Law Despite Report Saying It Fails to Deter Pedophiles*, (2009) <http://www.nj.com/news/index.ssf/2009/02/>

<sup>130</sup> Michelle P. Jerusalem, *A Framework for Post-Sentence Sex Offender Legislation: Perspectives on Prevention, Registration, and the Public's "Right" to Know*, 48 VAND. L. REV. 219, 246 (1995) ("People want to know if a released sex offender is moving into their community; they have let legislators know that this is what they want with loud voices. Legislators, in

peer-reviewed study that shows that residency restrictions prevent re-offense.<sup>131</sup>

Although residency restrictions have withstood a vast amount of constitutional challenges,<sup>132</sup> some courts have begun to question the intent of the legislation and

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turn, give them what they want. However, in doing so, an analysis of appropriate policy goals seems to have been forgotten.”).

<sup>131</sup> Some courts have begun to question strict residency restrictions, and whether such restrictions are unconstitutional in their application. See e.g., *U.S. v. Rudd*, 662 F.3d 1257 (9th Cir. 2011); see also the dissent in *Doe v. Gregoire*, 960 F. Supp. 1478, 1486–87 (W.D. Wash. 1997) (holding that public notification provisions are punitive and violate the Ex Post Facto Clause when applied to offenders convicted of crimes which predate the Washington Act); and similarly, the dissent in *State v. Myers*, 923 P.2d 1024, 1043 (Kan. 1996), *cert. denied*, 521 U.S. 1118 (1997) (holding that a law permitting unrestricted public access to a sex offender registry violated the constitutional prohibition against ex post facto laws). Consider also the majority opinion of *Doe v. Baker*, No. 1:05-CV-2265-TWT, 2006 U.S. Dist. LEXIS 67925, at 11 (N.D. Ga. Apr. 5, 2006), holding that “a more restrictive act that would in effect make it impossible for a registered sex offender to live in the community would in all likelihood constitute banishment which would result in an ex post facto problem . . . .”)

<sup>132</sup> See generally, *Mann v. State*, 603 S.E.2d 283 (Ga. 2004); *Thompson v. State*, 603 S.E.2d 233 (Ga. 2004); *Denson v. State*, 600 S.E.2d 645 (Ga. Ct. App. 2004); *People v. Leroy*, 828 N.E.2d 769; *State v. Seering*, 701 N.W.2d 655 (Iowa 2005); *Weems v. Little Rock Police Dep't*, 453 F.3d 1010 (8th Cir. 2006) *cert. den. sub. nom. Weems v. Johnson*, 550 U.S. 917 (2007)(residency restriction did not violate constitutional right to travel, ex post facto law, or substantive due process); *State ex rel. White v. Billings*, 860 N.E.2d 831(Ohio Com. Pl. 2006) (statute prohibiting a sex offender from residing within 1000 feet of school premises was a civil regulatory measure and thus did not violate Ex Post Facto clause).

render opinions finding certain regulations unconstitutional.<sup>133</sup> The United States Supreme Court has been reluctant to review many of the decisions regarding community notification and registration, but, in 2003, the Supreme Court issued three separate decisions on the retroactive application of SVP laws. Of the three cases, *Smith v. Doe*<sup>134</sup> and *Connecticut Department of Public Safety v. Doe*<sup>135</sup> upheld the retroactive

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<sup>133</sup> The appeals court in *Mann v. Georgia Dept. of Corrections*, 282 Ga. 754, 653 S.E.2d 740, 760 (Ga.,2007) reconsideration denied (Dec 13, 2007) determined that an unconstitutional taking had occurred where an offender was forced to move from his home after a child-care facility opened within 1000 feet of his property. In rendering its decision, the Court considered the economic hardship that occurred as a result of the taking as well as the interference with an individual's reasonable investment-backed expectation when purchasing property for a private residence. The Court additionally assessed the statute and found that it effectively empowered private third parties with the state's police power, *Id* at 745.

In 2009, Indiana's Supreme Court, in *State v. Pollard*, 908 N.E.2d 1145 (Ind. 2009), held that the residency restriction "violates the prohibition on Ex Post Facto laws...because it imposes burdens that have the effect of adding punishment beyond that which could have been imposed (at the time the) crime was committed." *Id.* at 1154.

<sup>134</sup> *Smith v. Doe*, 538 U.S. 84, 105-06 (2003) (holding that the retroactive application of the registration and notification requirements of the Alaska SVP statute did not violate the ex post facto clause).

<sup>135</sup> *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003) (finding that even if the public notification procedures implicated a liberty interest, sex offenders were not

application and rejected arguments of ex post facto violations. The Court found both statutes to be non-punitive, and gave little weight to the consequential stigma and potential negative impact of these laws.<sup>136</sup> Only *Stogner v. California*<sup>137</sup> held that

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entitled to a hearing to determine whether they were currently dangerous before their inclusion in the registry).

<sup>136</sup> *Smith*, 538 U.S. at 86:

Respondents' argument that the Act, particularly its notification provisions, resembles shaming punishments of the colonial period is unpersuasive. In contrast to those punishments, the Act's stigma results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. The fact that Alaska posts offender information on the Internet does not alter this conclusion. Second, the Act does not subject respondents to an affirmative disability or restraint. It imposes no physical restraint, and so does not resemble imprisonment, the paradigmatic affirmative disability or restraint.

The Court in *Connecticut Department of Public Safety*, 538 U.S. at 6, relied on *Paul v. Davis*, 424 U.S. 693 (1976), which had held that mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest. The Court concluded that: "In short, even if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of all sex offenders-currently dangerous or not-must be publicly disclosed. Unless respondent can show that that substantive rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise" *Connecticut Department of Public Safety*,, 538 U.S at 7.

<sup>137</sup> *Stogner v. California*, 539 U.S. 607(2003) (holding that the retroactive application of the 1993 statute to previously time-barred prosecutions violated the Ex Post Facto clause)

application of the California law, which extended the time to prosecute sexual crimes, was unconstitutionally Ex Post Facto as applied to Stogner.

Scholars have proposed that residency restriction laws are, in fact, counterproductive in their strict application, and can result in homelessness and isolation; that have the opposite effect of promoting safe communities by actually heightening the risk of re-offense.<sup>138</sup> The strict application of these laws combined with their effect of isolation and humiliation can cause lack of dignity, hopelessness, feeling unworthy and “less than human.”<sup>139</sup> Hardships placed on individuals in the community serve to break down protective measures and increase stressors, two of the major catalysts claimed by experts to fuel relapse.<sup>140</sup> The psychological stress from “isolation, disempowerment, shame, depression, anxiety (and) lack of social supports...can trigger”

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<sup>138</sup> See generally, HUMAN RIGHTS WATCH, *supra* note 66 (transiency and lack of habilitation has caused Iowa officials to lose track of offenders); Tewksbury, *supra* note 71 (use of sex offender registries may lead to social withdrawal and greater anxiety and stress for sex offenders; this process, for some sex offenders, can be a precursor to reoffending); Meloy et al., *supra* note 3; Stephanie Chen, *After Prison, Few Places for Sex Offenders to Live*, WALL.ST.J., FEB 19, 2009 at A16; Yung *supra* note 94; Jeffery Koffman, *Sex Offenders Live in Village Under Miami Bridge*, ABC Nightline, September 3, 2009; Saxer, *supra* note 94.

<sup>139</sup> Cohen, *supra* note 50; Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 CALIF. L. REV. 885 (1995); Zevitz & Farkas, *supra* note 68. On the constitutional significance of dignity in the criminal trial process, see e.g., Michael L. Perlin, “Dignity Was the First to Leave” *Godinez v. Moran, Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants*, 14 BEHAV. SCI. & L. 61 (1996).

<sup>140</sup> Levenson & Cotter, *supra* note 123.

deviant behavior.”<sup>141</sup> Clearly the end result of our efforts serves no benefit to the offender or the community.

There needs to be a shift in our conceptualization and inevitable interaction with this population in order to be successful in combating the inherent problems. Specifically, we need to confront and analyze our fears and construct solutions that account for the human rights of *all* persons. Our approach to change must begin by examining these issues through the lens and application of therapeutic jurisprudence.

#### IV. Through the Lens of Therapeutic Jurisprudence

##### *a. Therapeutic jurisprudence: An overview*

One of the most important legal theoretical developments of the past two decades has been the creation and dynamic growth of therapeutic jurisprudence (TJ).<sup>142</sup>

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<sup>141</sup> *Id.* at 170-71.

<sup>142</sup> See *e.g.*, DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990) ; DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (1996); BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL (2005); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17 (2008); 1 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, § 2D-3, at 534-41 (2d ed. 1998). Wexler first used the term in a paper he presented to the National Institute of Mental Health in 1987. See David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 L. & HUM. BEHAV. 27, 32-33 (1992).

Therapeutic jurisprudence presents a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law that can have therapeutic or anti-therapeutic consequences.<sup>143</sup> The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.<sup>144</sup> There is an inherent tension in this inquiry, but David Wexler clearly identifies how it must be resolved: “the law's use of “mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns.”<sup>145</sup> As one

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<sup>143</sup>See Michael L. Perlin, “*His Brain Has Been Mismanaged with Great Skill*”: How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?, 42 AKRON L. REV. 885, 912 (2009); see Kate Diesfeld & Ian Freckelton, *Mental Health Law and Therapeutic Jurisprudence*, in DISPUTES AND DILEMMAS IN HEALTH LAW 91 (I. Freckelton & K. Peterson eds., 2006) (for a transnational perspective).

<sup>144</sup> Michael L. Perlin, “*You Have Discussed Lepers and Crooks*”: Sanism in Clinical Teaching, 9 CLINICAL L. REV., 683-729 (2003) (Perlin, “*Lepers and Crooks*”); Michael L. Perlin, “*And My Best Friend, My Doctor/ Won't Even Say What It Is I've Got : The Role and Significance of Counsel in Right to Refuse Treatment Cases*”, 42 SAN DIEGO L. REV. 735 (2005); Michael L. Perlin, “*Everybody Is Making Love/Or Else Expecting Rain*”: Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia, 83 U. WASH. L. REV. 481 (2008).

<sup>145</sup> David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993).

of us (MLP) has written elsewhere, “An inquiry into therapeutic outcomes does not mean that therapeutic concerns ‘trump’ civil rights and civil liberties.”<sup>146</sup>

Therapeutic jurisprudence “asks us to look at law as it actually impacts people’s lives”<sup>147</sup> and focuses on the law’s influence on emotional life and psychological well-being.<sup>148</sup> It suggests that “law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law should attempt to bring about healing and wellness.”<sup>149</sup> By way of example, therapeutic jurisprudence “aims to offer social science evidence that

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<sup>146</sup> Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000); Michael L. Perlin, “*Where the Winds Hit Heavy on the Borderline*”: *Mental Disability Law, Theory and Practice, Us and Them*, 31 LOYOLA L.A. L. REV. 775, 782 (1998).

<sup>147</sup> Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing With Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

<sup>148</sup> David B. Wexler, *Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies*, in DANIEL P. STOLLE, DAVID B. WEXLER & BRUCE J. WINICK, PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45 (2000) (Stolle et al).

<sup>149</sup> Bruce Winick, *A Therapeutic Jurisprudence Model for Civil Commitment*, in INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVE ON CIVIL COMMITMENT, 23, 26 (Kate Diesfeld & Ian Freckelton, eds. 2003).

limits the use of the incompetency label by narrowly defining its use and minimizing its psychological and social disadvantage.”<sup>150</sup>

In recent years, scholars have considered a vast range of topics through a therapeutic jurisprudence lens, including, but not limited to, all aspects of mental disability law, domestic relations law, criminal law and procedure, employment law, gay rights law, and tort law.<sup>151</sup> As Ian Freckelton has noted, “it is a tool for gaining a new and distinctive perspective utilizing socio-psychological insights into the law and its applications”.<sup>152</sup> It is also part of a growing comprehensive movement in the law towards establishing more humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully.<sup>153</sup> These alternative approaches optimize the psychological well being of individuals, relationships, and communities

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<sup>150</sup> Claire B. Steinberger, *Persistence and Change In The Life Of The Law: Can Therapeutic Jurisprudence Make A Difference?* 27 LAW & PSYCHOL. REV. 55, 65 (2003). The most thoughtful sympathetic critique of TJ remains Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL'Y & L. 193 (1995).

<sup>151</sup> Michael L. Perlin, *“Things Have Changed”: Looking at Non-institutional Mental Disability Law Through the Sanism Filter*, 46 N.Y.L. SCH. L. REV. 535 (2002-03).

<sup>152</sup> Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 582 (2008).

<sup>153</sup> Susan Daicoff, *The Role of Therapeutic Jurisprudence Within The Comprehensive Law Movement*, in STOLLE et al. *supra* note 148, at 365.

dealing with a legal matter, and acknowledge concerns beyond strict legal rights, duties, and obligations. In its aim to use the law to empower individuals, enhance rights, and promote well being, therapeutic jurisprudence has been described as "...a sea-change in ethical thinking about the role of law...a movement towards a more distinctly relational approach to the practice of law...which emphasises psychological wellness over adversarial triumphalism".<sup>154</sup> That is, therapeutic jurisprudence supports an ethic of care.<sup>155</sup>

One of the central principles of therapeutic jurisprudence is a commitment to dignity. Professor Amy Ronner describes the "three Vs": voice, validation and voluntariness,<sup>156</sup> arguing:

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<sup>154</sup> Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329-30 (2001).

<sup>155</sup> See e.g., Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605-07 (2006); David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn's Concerns about Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597, 599 (2007); Brookbanks, *supra* note 154; Gregory Baker, *Do You Hear the Knocking at the Door? A "Therapeutic" Approach to Enriching Clinical Legal Education Comes Calling*, 28 WHITTIER L. REV. 379, 385 (2006).

<sup>156</sup> Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008).

What “the three Vs” commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant’s story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronouncement that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.<sup>157</sup>

B. *Do sex offender laws and judicial proceedings promote a vision that is consonant with the principles that Professor Ronner sketches out for us in this paragraph?*

The origins and development of sex offender law has had a profoundly anti-therapeutic effect. This is so for multiple reasons.

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<sup>157</sup> Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94-95 (2002); *See generally*, AMY D. RONNER, LAW, LITERATURE AND THERAPEUTIC JURISPRUDENCE (2010).

- The current universe of sex offender laws presumes a uniform type of offender with uniform reasons for offending with relatively static strengths and weaknesses. Nothing in the literature supports this assumption.<sup>158</sup>
- The current universe of sex offender laws presumes that “everyone is a recidivist.”<sup>159</sup> According to a U.S. Bureau of Justice Statistics study (“Recidivism of Sex Offenders Released from Prison in 1994”),<sup>160</sup> just five percent of sex offenders followed for three years after their release from prison in 1994 were arrested for another sex crime.<sup>161</sup> A study released in 2003 by the Bureau found that within three years, 3.3% (141 percent of 4,295) of the released child molesters were arrested again for committing another sex crime against a child. Three to five percent is hardly a high repeat offender rate. In the largest and most comprehensive study ever done of prison recidivism, the Justice

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<sup>158</sup>Chrysanthi S. Leon, *SEX FIENDS, PERVERTS, AND PEDOPHILES: UNDERSTANDING SEX CRIME POLICY IN AMERICA*, 181 (2011); Paul Noroian & Fabian M. Salah, *Residency Restrictions for Convicted Offenders*, 34 J. AM. ACAD. PSYCHIATRY & L. 422 (2006)

<sup>159</sup> *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident and Offender Characteristics* (2000), accessible at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1147>

<sup>160</sup> Matthew R. Durose, Patrick A. Langan, & Erica L. Schmitt, *Recidivism of Sex Offenders Released from Prison in 1994* (2003), accessible at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1136>

<sup>161</sup> *Id.*

Department found that sex offenders were in fact less likely to reoffend than other criminals".<sup>162</sup> " ". The 2003 study of nearly 10,000 men convicted of rape, sexual assault, and child molestation found that sex offenders had a re-arrest rate 25 percent lower than for all other criminals. Part of the reason is that serial sex offenders—those who pose the greatest threat—rarely get released from prison, and the ones who do are unlikely to re-offend".<sup>163</sup>

- The current universe of sex offender laws presumes that the most likely sex offense scenario is what is awkwardly often called "stranger rape." Statistics, though, indicate that the majority of women who have been raped know their assailant. A 1998 National Violence Against Women Survey revealed that among those women who reported being raped, 76% were victimized by a current or former husband, live-in partner, or date.<sup>164</sup> Also, a Bureau of Justice Statistics study found that nearly 9 out of 10 rape or sexual assault victimizations involved

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<sup>162</sup> Carl Bialik, *How Likely Are Sex Offenders to Repeat Their Crimes?* The Wall Street Journal, (January 24, 2008).

<sup>163</sup> Benjamin Radford, *Predator Panic: Reality Check on Sex Offenders*, Live Science (2006), accessible at <http://www.livescience.com/776-predator-panic-reality-check-sex-offenders.html>

<sup>164</sup> Patricia Tjaden & Nancy Thoennes, *Stalking in America: Findings From the National Violence Against Women Survey*. Washington, DC: U.S. Department of Justice, National Institute of Justice ( 1998), accessible at <https://www.ncjrs.gov/pdffiles/169592.pdf>.

a single offender with whom the victim had a prior relationship as a family member, intimate, or acquaintance.<sup>165</sup> In the cases of child victims, there is no question that relatives, friends, baby-sitters, persons in positions of authority over the child, or persons who supervise children are more likely than strangers to commit a sexual assault.<sup>166</sup>

- The current universe of sex offender laws presumes that registration law and community “banishment” law minimizes reoffending. There is no evidence that such laws are effective in reducing re-offending,<sup>167</sup> or that they provide

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<sup>165</sup> Lawrence Greenfield,,*Sex Offenses and Offenders*, Bureau of Justice Statistics, (1997), accessible at <http://bjs.ojp.usdoj.gov/content/pub/pdf/SOO.PDF>; Michael R. Rand & Lawrence A. Greenfield ,*VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS* (1998).

<sup>166</sup> Howard N. Snyder, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* (July 2000), accessible at <http://www.eric.ed.gov/PDFS/ED446834.pdf>

<sup>167</sup> Rice & Harris, *supra* note 44, in PROTECTING SOCIETY, *supra* note 6, at 101; Doe v. Baker, No. 1:05-CV-2265-TWT, 2006 U.S. Dist. LEXIS 67925, at \*11 (N.D. Ga. Apr. 5, 2006). The *Baker* court acknowledged that residency restrictions may be analogous to banishment, noting that “a more restrictive act that would in effect make it impossible for a registered sex offender to live in the community would in all likelihood constitute banishment which would result in an ex post facto problem . . . .”

incentives for sex offenders to engage treatment in the community or demonstrate a pro-social lifestyle.<sup>168</sup>

- The current universe of sex offender laws ignores the multiple ways that the court process and the roles played by defense counsel and the prosecution -- as is done currently -- support cognitive distortions that can be used by sex offenders as ways of justifying sexual offending<sup>169</sup> and, by emphasizing punishment, retribution and incapacitation, often provide disincentives for sex offenders to undergo treatment.<sup>170</sup> Similarly, the confrontational adjudicative process of traditional courts encourage advocacy of innocence, discourage acceptance of responsibility, and influence subsequent acceptance of treatment once sentenced.<sup>171</sup>

On the other hand, scholars have crafted potential ameliorative suggestions using TJ tools and methods. In another paper, one of the co-authors (HEC) has conceived of a TJ approach to sentencing of sex offenders, via Sex Offender Courts employing a non-confrontational system to encourage acceptance of responsibility,

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<sup>168</sup> Astrid Birgden, *Therapeutic Jurisprudence and Sex Offenders: A Psycho-legal Approach to*

*Protection*, 16 *SEXUAL ABUSE: J. RES. & TREATMENT* 351 (2004).

<sup>169</sup> *Id.*

<sup>170</sup> William Edwards & Christopher Hensley, *Contextualizing Sex Offender Management Legislation and Policy: Evaluating the Problem of Latent Consequences in Community Notification Laws*. 45 *INT'L J. OFFENDER THER. & COMPAR. CRIMINOL.*, 83 (2001).

<sup>171</sup> See Birgden & Cucolo, *supra* note 51; Birgden, *supra* note 168.

to allow high risk offenders to be re-evaluated throughout the term of their sentence, to provide for positive reinforcements for changes in behavior and attitude through treatment, to allow for early release with intensive parole supervision, and to sanction the placement of low risk offenders in the community for monitoring and treatment.<sup>172</sup> In addition, reforms need to extend to the correctional system and to the monitoring of the offender in the community.<sup>173</sup>

C. *Why has the legal system been reluctant to adopt TJ principles in sex offender case law and legislation?*

We can think of several overlapping reasons.

First is the fear of being seen as ‘soft on crime,’ imperiling the judge’s re-election chances. The literature is replete with studies of political campaigns – many of which were successful – that turned on this precise issue.<sup>174</sup>

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<sup>172</sup> Cucolo, *supra* note 32; see also, John Q. La Fond & Bruce Winick, *Sex Offender Reentry Courts: A Proposal for Managing the Risk of Returning Sex Offenders to the Community*, 34 SETON HALL L. REV. 1173, 1196 (2004).

<sup>173</sup> *Id.*

<sup>174</sup> See Paul Carrington, *Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court*, 89 N.C. L. REV. 1965, 1989-90 (2011) (discussing the California Supreme Court election of 1986 that led to the defeat of Chief Justice Rose Bird and two other associate justices perceived in this way); John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 470-742 (1999) (discussing political campaigns aimed at ousting individual judges for being “soft on crime”).

Next, judges are traditionally adverse to endorsing or utilizing any intervention that might be perceived as being “touchy-feely.” In this context, New York Chief Judge Jonathan Lippman has stated, “Some see the specter of well-meaning but misguided “touchy-feely” judges intent on pursuing rehabilitation and their own personal conceptions of social justice at the expense of punishment and accountability.”<sup>175</sup>

Third, like the general public, judges have, by and large, bought into myths about sex offending and sex offenders discussed earlier, and the impact of sex offender laws on the general public.<sup>176</sup> Thus, even though procedural fairness should be the touchstone of the judicial process,<sup>177</sup> it is very difficult to achieve this in sex offender cases where the public –and many judges – rejects the notion that this cohort of offenders even *deserves* “procedural fairness,” *in spite of the fact* that such fairness inevitably increases compliance with court orders.<sup>178</sup>

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<sup>175</sup> Jonathan Lippman, *Achieving Better Outcomes for Litigants in the New York State Courts*, 34 *FORDHAM URB. L.J.* 813, 830 (2007).

<sup>176</sup> See e.g., Winick, *supra* note 9, at 552, discussing the “small” likelihood of a judge ever overruling a prosecutor's discretionary determination in such cases.

<sup>177</sup> See e.g., Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 *COURT REVIEW* 4 (2007-08).

<sup>178</sup> See e.g., Raymond Paternoster et al, *Do Fair Procedures Matter?: The Effect of Procedural Justice on Spouse Assault*, 31 *LAW & SOC'Y REV.* 163, 160 (1997)

Fourth, judges have a deep need to convince themselves that the “system works.” Judges typically express great faith in the adversary system,<sup>179</sup> and their statements typically a deep-seated “attachment to commonly held beliefs,”<sup>180</sup> notwithstanding the reality that “subconscious influences can cloud their decisions and impede their legal reasoning.” even when “they desire to render a ‘fair’ decision.”<sup>181</sup>

To a great extent, this all flows from the pernicious impact of heuristic thinking and the meretricious impact of a false “ordinary common sense” (OCS) on judicial decision-making.<sup>182</sup> OCS is self-referential and non-reflective (“I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is”).

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<sup>179</sup> Daniel W. Shuman, Elizabeth Whitaker & Anthony Champagne, *An Empirical Examination of the Use of Expert Witnesses in the Courts—Part II: A Three City Study*, 34 JURIMETRICS J. 193, 207 (1994) (reporting on survey results).

<sup>180</sup> Lode Walgrave, *Restoration in Youth Justice*, 31 CRIME & JUST. 543, 547(2004).

<sup>181</sup> Evan R. Seamone, *Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Harmful Judicial Biases*, 42 WILLAMETTE L. REV. 1, 3 (2006). See also *id.*: “Consequently, in many circumstances, for judges to be fair, they must be capable of identifying subconscious influences on their behavior and they must neutralize the effects of such impulses.”

<sup>182</sup> See generally, MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* 16-20 (2000).

In criminal procedure, by way of example, “OCS presupposes two self-evident truths: 1) everyone knows how to assess an individual's behavior, and 2) everyone knows when to blame someone for doing wrong.”<sup>183</sup> Heuristics are “simplifying cognitive devices that frequently lead to . . . systematically erroneous decisions through ignoring or misusing rationally useful information.”<sup>184</sup> Professor Terry Maroney explains:

Judges are prone to the same heuristics and biases as are other human beings, but also that these factors influence their judging--and not always for the better. For example, judges overweight small risks and underweight large ones, just as most people do. They also are prone to anchoring, hindsight, and egocentric biases, and they rely on ostensibly irrational decisional tools such as intuition.<sup>185</sup>

And Professor Eden King notes that “attitudinal forces may be coupled with cognitive biases that lead judges to focus on information that confirms their preconceptions (i.e., confirmation bias; to recall vivid and emotionally charged

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<sup>183</sup> Michael L. Perlin, *She Breaks Just Like a Little Girl : Neonaticide, The Insanity Defense, and the Irrelevance of Ordinary Common Sense*, 10 WM. & MARY J. WOMEN & L. 1, 8 (2003):

<sup>184</sup> Michael L. Perlin. *They Keep It All Hid ”: The Ghettoization of Mental Disability Law and Its Implications for Legal Education*, 54 ST. LOUIS U. L. J. 857, 876 (2010).

<sup>185</sup> Terry Maroney, *Emotional Regulation and Judicial Behavior*, 99 CAL. L. REV. 1485, 1492 (2011).

aspects of cases (i.e., the availability heuristic), and to interpret information that reinforces the status quo as legitimate (i.e., system justification biases).”<sup>186</sup>

How does this play out in the context of sex offenders? Writing about how mental disability is perceived in the legal profession, one of the authors (MLP) has said this:

Judges and jurors, both consciously and unconsciously, often rely on reductionist, prejudice-driven stereotypes in their decision-making, thus subordinating statutory and case law standards as well as the legitimate interests of the mentally disabled persons who are the subject of the litigation. Judges' predispositions to employ the same sorts of heuristics, as do expert witnesses further contaminate the process.<sup>187</sup>

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<sup>186</sup> Eden B. King, *Discrimination in the 21st Century: Are Science and the Law Aligned?* 17 PSYCHOL. PUB. POL'Y & L. 54, 57 (2011), relying upon Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979), Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973), and John T. Jost & Mahzarin R. Banaji, *The Role of Stereotyping in System-Justification and the Production of False Consciousness*, 33 BRIT. J. SOC'L PSYCHOL. 1 (1994).

<sup>187</sup> Michael L Perlin, *“Baby, Look Inside Your Mirror”: The Legal Profession's Willful and Sanist Blindness to Lawyers with Mental Disabilities*, 69 U. PITT. L. REV. 589, 602-03 (2008).

We believe that the same sort of “contaminat[ion]” takes place in the sex offender arena as well.

V. *A future designed through knowledge, therapeutic jurisprudence and the universal application of human dignity and rights*

Eight years ago, Dr. Astrid Birgden, suggested that TJ, with its emphasis on increasing therapeutic effects and decreasing anti-therapeutic consequences of the law, might provide the necessary framework to ensure community and offender protection.<sup>188</sup> Her suggestions to create an effective system focused on the collaboration of efforts between legal practitioners, correctional practitioners and the court system. A psycho-legal approach can be successful in addressing sex offender assessment (risk and need principles), treatment (need and internal responsivity principles), and management (external responsivity principles) so long as the focus rests on both community and offender protection. In the courtroom setting, correctional practitioners can advise the court on offender rehabilitation techniques (offender protection) while legal practitioners maintain an environment that assists offenders in engaging in treatment (community protection). In the corrections setting, legal practitioners can provide advice on ethical treatment (offender protection) while

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<sup>188</sup> Birgden, *supra* note 168.

correctional practitioners can increase the courts' confidence in rehabilitation (community protection).<sup>189</sup>

Clearly, we must focus our efforts and resources on reintegration into society rather than removal and alienation. Sex offender civil commitment is not going by the wayside, and, following the recent Supreme Court decision upholding federal civil commitment in *United States v. Comstock*,<sup>190</sup> it is potentially gaining more support. Given the limited effectiveness and knowledge of treatment combined with the lengthy and indefinite time spent in sex offender civil commitment,<sup>191</sup> states should reallocate their resources and focus on fostering rehabilitation and reintegration into the community. If we continue to support civil commitment under the guise of treatment and the hope that individuals can be treated, then ethically, we must tailor treatment to assist in re-

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<sup>189</sup> Bill Glaser, *Treaters or Punishers? The Ethical Role of Mental Health Clinicians in Sex Offender Programs*, 14 AGGRESSION & VIOLENT BEHAVIOR 248 (2009).

<sup>190</sup> 130 S. Ct. 1949 (2010) *Comstock* was the first federal appellate decision, addressing the constitutionality of the federal civil commitment legislation. In 2009, federal prisoners, facing civil commitment, were successful below in their constitutionally-based challenge. See 551 F. 3d 274 (4<sup>th</sup> Cir. 2009).

The Supreme Court reversed. Justice Breyer, writing for a 7-2 majority, found that Congress had the authority to create legislation under the Necessary and Proper Clause. Citing *Youngberg*, 457 U. S. at 320, the majority recognized Congress as a “federal custodian” with “the constitutional power to act in order to protect nearby (and other) communities from the danger federal prisoners may pose.”

<sup>191</sup> Eric S. Janus, *The Preventative State, Terrorists, and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence*, 40 CRIM. L. BULL. 576 (2004).

entering society.<sup>192</sup> Focus should follow TJ ideals and aim to promote self-respect and dignity while learning to engage in emotionally intimate relationships with others.<sup>193</sup> Preparation for release should include job training, education and life skills. We must support the transition back into the community by fostering family and community relationships.

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<sup>192</sup> John Q. LaFond, *The Future of Involuntary Civil Commitment in the U.S.A. after Kansas v. Hendricks*, 18 BEHAV. SCI. & L. 153 (2000); Hollida Wakefield, *The Vilification of Sex Offenders: Do Laws Targeting Sex Offenders Increase Recidivism and Sexual Violence?*, 1 J. SEXUAL OFFENDER CIV. COMMITMENT: SCI. & L. 141, 146 (2006):

The SVP laws were passed with the promise of rehabilitation as a major goal. Confinement would be limited because treatment would be provided and the “patients” would be released as soon as they were no longer dangerous or mentally disordered .. But in reality, committed sex offenders are rarely discharged. The primary purpose of these laws is incapacitation - - to prevent future sexual violence by direct physical constraint. Treatment is only an additional purpose...). In reality, punishment, isolation, and incapacitation are the dominant purposes ... LaFond ...observes that in some states, there was no bona fide treatment program in place when the individuals were committed. (references omitted).

<sup>193</sup> Prentky & Schwartz, *supra* note 45, at 10, stating: “The most important point, however, is that the overarching goal of reducing sexual violence in society *must* rest squarely with the forces within society that promote and foster sexual violence. By merely reducing the risk of those who have already turned to sexual violence, we will never achieve the ultimate aim of making society a safer place by restoring the rights to sexual autonomy for women and children.”

Certainly, the authors are not so naïve to believe that this will benefit every type of person who commits sexual offenses, yet conclude that the suggestions offered here for reintegration must be the main focus and starting point of any coherent policy in order to maximize success.

Residency restrictions should be completely dismantled due to their anti-therapeutic effect and unfounded ability to have any impact on diminishing re-offense and making communities safer. If we choose to still have some form of community monitoring, it must be done through an individualized assessment of risk, likelihood and danger based off of credible, peer-reviewed studies and ethical evaluations. We should encourage and reward efforts to engage in community service and acknowledge genuine attempts to live offense-free and contribute to society. To quote the late Professor Bruce Winick, “Modern-day sex offenders should also be offered the possibility of redemption.”<sup>194</sup> “Feel-good” legislative designs and agendas should be abolished in that they serve no other purpose but to humiliate, label and dehumanize the individual.

In the courtroom context, we need to think more seriously about the role of problem solving courts in dealing with this phenomenon and how, if properly conceived of and conducted, such courts can be the best assurance that therapeutic jurisprudence will be an important and integral part of the decision-making process.<sup>195</sup> Therapeutic

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<sup>194</sup> Winick, *supra* note 9, at 567.

<sup>195</sup> See e.g., Emily Horowitz, *Growing Media and Legal Attention to Sex Offenders: More Safety or More Injustice?* 2007 J. INST. JUST. INT’L STUD. 145, 154:

jurisprudence potentially can re-educate judges--in the principles of therapeutic jurisprudence to aid them in “identify[ing] alternatives to harsh punishments..., particularly since the punitive response often leads to recidivism in most cases.”<sup>196</sup>

Therapeutic jurisprudence instructs us to step back from myths and prevailing attitudes and to carefully consider the prescriptions of TJ principles.<sup>197</sup> Recall the “three

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Mental-health treatment can prevent recidivism, and advocates for therapeutic jurisprudence argue that treating sex offenders in specialized courts or outpatient programs can be immensely effective and Constitutionally sound. Other alternative policy options include specialized sex offender re-entry courts, which can evaluate risk, manage treatment, and closely monitor sex offenders upon release. These courts are significantly cheaper than inpatient psychiatric facilities ... Other studies have found that cognitive-behavioral treatment reduces sex offender recidivism ...Delivering longer minimum sentences, or lifetime probation or parole, are obvious ways to avoid the dilemmas created by civil-commitment laws.  
(citations omitted).

See also, La Fond & Winick, *supra* note 172, at 1174: “Sex offender courts, which are based on principles of Therapeutic Jurisprudence, can provide more intensive community supervision for a much larger group of sex offenders, while at the same time motivating them to change their attitudes and behavior.”

<sup>196</sup> Brian G. Sellers & Bruce Arrigo, *Adolescent Transfer, Developmental Maturity, and Adjudicative Competence: An Ethical and Justice Policy Inquiry*, 99 J. CRIM. L. & CRIMINOLOGY 435, 480 (2009).

<sup>197</sup> Birgden, *supra* note 169; Birgden & Cucolo, *supra* note 51; Winick, *supra* note 9.

Vs” -- voice, validation and voluntariness-- that Professor Amy Ronner has discussed.<sup>198</sup>

The current sex offender laws honor none of these prescriptions. It is time we seriously re-evaluated them all. We must educate ourselves, confront our fears and resist the urge to succumb to reactionary responses. These emotionally charged issues must be dealt with through rational solutions directed towards protecting potential victims while preserving the human rights of all.<sup>199</sup>

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<sup>198</sup> Ronner, *supra* note 157, at 94-95.

<sup>199</sup> HUMAN RIGHTS WATCH, *supra* note 66, at 103-04:

“Reforming sex offender laws will not be easy. At a time when national polls indicate that Americans fear sex offenders more than terrorists, legislators will have to show they have the intelligence and courage to create a society that is safe yet still protects the human rights of everyone.”