

**MINNESOTA’S SEX OFFENDER COMMITMENT
PROGRAM: WOULD AN EMPIRICALLY-BASED
PREVENTION POLICY BE MORE EFFECTIVE?**

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I. INTRODUCTION

Minnesota’s sex offender commitment laws arise from a compelling purpose: the prevention of sexual violence. Yet, I will argue in this short essay that there is strong evidence that these laws are poor public policy. When confronted with the problem of sexual violence, the Minnesota Legislature asked the wrong question, and sex offender commitment laws are an expensive, and

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ultimately wrong answer. The Minnesota Courts and Legislature have made the problem worse by consistently failing to establish meaningful and transparent standards for invoking and continuing sex offender commitments. As a result, the flaws in the system are exacerbated and multiplied as time goes on.

One might well ask: why should we care? After all, sex offender commitments undeniably incapacitate a group of dangerous sex offenders, and in that direct and obvious way, prevent further sexual violence. The commitments may be expensive, but saving a future victim from sexual violence is arguably worth the price.

But it is not that simple. Public resources are limited, even for the prevention of sexual violence. Prestigious national professional organizations have roundly criticized sex offender commitments on resource allocation grounds. For example, the 1996 Interim Report of an American Psychiatric Association Task Force concluded that Sexual Violent Predator (“SVP”) laws “misallocate psychiatric facilities and resources, and constitute an abuse of psychiatry,”¹ and the National Association of State Mental Health Program Directors warned that these laws “undermine the mission and integrity of the public mental health system, . . . divert[ing] scarce resources away from people who both need and desire treatment.”² In 1992, the Minnesota Psychiatric Society called for the repeal of Minnesota Psychopathic Personality law, warning that for the great majority of those committed, “there is no form of treatment that has a reasonable expectation of success.”³ Yet despite the drumbeat of concern, the consequences of the choice in the State of Minnesota have remained essentially unexamined. In this essay, I suggest that an evidence-based evaluation of sex offender commitments would likely show that a different allocation of those resources – abandoning the expensive commitment program – could prevent even more sexual violence. If I am right,

1. AM. PSYCHIATRIC ASS’N., TASK FORCE REPORT ON SEXUALLY DANGEROUS OFFENDERS (1996), *quoted in* W. Lawrence Fitch, *Sex Offender Commitment in the United States: Legislative and Policy Concerns*, in *SEXUAL COERCION: UNDERSTANDING AND MGMT.* (R. Prentky, E. Janus & M. Seto eds., forthcoming 2003).

2. NATIONAL ASS’N OF STATE MENTAL HEALTH PROGRAM DIRECTORS (NASMHPD) (1997), NASMHPD Policy Statement on Laws Providing for the Civil Commitment of Sexually Violent Criminal Offenders, p. ii., *quoted in* Fitch, *supra* note 1.

3. The Minnesota Psychiatric Society, *Problems with the Current Psychopathic Personality Statute 3* (1992) (on file with author).

the state's choice is actually subjecting victims to crimes that could have been prevented.

A key problem with Minnesota's policy is that we have not asked the right questions. We've asked "How can we lock up the most dangerous?" We should be asking, "How can we prevent the most violence?" We should be intensely studying the issue, and allocating scarce resources to a mix of programs and approaches whose prevention efficacy has empirical support. Instead, one choice – to pursue sex offender commitments – made a decade ago without empirical support, now dictates a resource allocation scheme that is arguably radically out of proportion to its benefit. At the very least, Minnesota needs to take a hard look at whether there are victims whose crimes could be prevented with a more deliberate and fact-driven prevention strategy.

I have argued, both in court and in law journals, that the Minnesota sex offender commitment scheme is unconstitutional,⁴ and that its underlying premises are harmful to the advances made in recent years in the fight against sexual violence.⁵ To some extent, the arguments I (and my co-counsel) have advanced have found resonance in the rhetoric of the courts. The unfettered sweep for sex offender commitments, consistently sought by Minnesota and other states, is unconstitutional.⁶ Courts have an obligation to insure that civil commitment is a narrow, rather than a loose, exception to the strict constraints that govern the criminal

4. See *Linehan III*, 557 N.W.2d 171, cert. granted, judgment vacated by *Linehan v. Minnesota*, 522 U.S. 1011 (1997), on remand to *Linehan IV*, 594 N.W.2d 867 (Minn. 1999), cert. denied by 528 U.S. 1049 (1999), habeas denied sub nom. *Linehan v. Milczark*, 315 F.3d 920 (8th Cir. 2003); *Linehan I*, 518 N.W.2d 609 (Minn. 1994); *In re Linehan*, 544 N.W.2d 308 (Minn. Ct. App. 1996) (*Linehan II*); Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries for Sex Offender Commitments*, 72 IND. L. J. 157 (1996).

5. Eric S. Janus, *Sex Offender Commitments: Debunking the Official Narrative and Revealing the Rules in Use*, 8 STAN. L. & POL'Y REV. 71 (1997); Eric S. Janus, *Legislative Responses to Sexual Violence: An Overview*, in *SEXUAL COERCION: UNDERSTANDING AND MGMT.* (R. Prentky, E. Janus & M. Seto eds., forthcoming 2003).

6. *Kansas v. Crane*, 534 U.S. 407, 407 (2002) (holding that commitment must be limited to individuals who have "serious difficulty" controlling their impulses). *But see, Milczark*, 315 F.3d at 927 (upholding Minnesota's "inadequate control" standard). For a broader discussion of the control standard, see Janus, *Sex Offender Commitments*, supra note 5 and Eric S. Janus, *Sex Offender Commitments and the 'Inability to Control': Developing Legal Standards and a Behavioral Vocabulary for an Elusive Concept*, in *THE SEXUAL PREDATOR: LEGAL ISSUES, CLINICAL ISSUES, SPECIAL SITUATIONS* (Anita Schlank ed.) (2001).

law.⁷

Nonetheless, as I will argue below, the courts have essentially given the state a green light to pursue sex offender commitments without meaningful accountability. Yet in this arena, Minnesota needs judicial oversight to save it from its own mistakes and weaknesses. Over the past sixty years, the State Legislature has enacted two sex offender commitment laws, both of which were unconstitutional as written, and both of which required substantial reconstructive surgery by the courts to withstand constitutional attack.⁸ What's worse, the second law (the Sexually Dangerous Persons Act) was unconstitutionally overbroad in the very same way that the first law failed.

At a more practical level, the courts have failed to save the state from its own misapprehension of how best to protect the public interest. If sex offender commitments are justified at all, this expensive intervention should be limited to the sickest and most dangerous. Despite this, the state has consistently urged the courts to avoid meaningful limits on eligibility for commitment – and the Minnesota courts, invoking public safety, have largely obliged. The irony – and essential point of this essay – is that this broad flexibility in the use of preventive detention tramples on more than individual liberty. It also undercuts the only principle upon which sex offender commitment laws might make some sense, the principle of selective incapacitation – the claim that a net decrease in violence can be achieved by devoting extraordinary resources to incapacitating the extraordinarily dangerous.⁹ In multiple ways the laws and policies of the state fail to insure fidelity to the underlying premise that only the “most dangerous” are confined in the most expensive and intrusive manner.

Further, public policy is largely driven by white-hot media coverage of horrendous crimes. These are the visible crimes, and they naturally pose the question of how we could have locked up this highly dangerous sex offender. But these notorious crimes are,

7. See generally *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Linehan III*, 557 N.W.2d 171.

8. State *ex rel* *Pearson v. Probate Court of Ramsey*, 287 N.W. 297, 300 (Minn. 1939) (holding the original Psychopathic Personality Act constitutional only as limited to those subject to guardianship); *Linehan IV*, 594 N.W.2d at 873 (holding modern sexually dangerous persons law unconstitutional unless construed to require proof of a volitional dysfunction element).

9. F. E. ZIMRING & G. HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 10-16 (Oxford Univ. Press) (1995).

in many ways, not representative of the overwhelming majority of sexual crimes, those committed by acquaintances and intimates of the victims.¹⁰ The great bulk of sexual abuse is relatively invisible, so policy makers are not required to ask how we could prevent the *most* sexual violence. We have developed an expensive intervention aimed at separating from the community the few “most dangerous,” while underfunding efforts to address the much larger group of sex offenders (and potential sex offenders) who are among us in the community.

Despite its huge cost and its potential for unintended and undesirable consequences, the sex offender commitment scheme has largely escaped critical evaluation. In a legislatively mandated study released in 2000, the Minnesota Department of Corrections noted the “concentration of resources” entailed by sex offender commitments, and observed that the cost of the program would “quadruple in ten years.”¹¹ The report recommended a bi-annual evaluation of “all aspects of the sex offender management system.” It should be “data-based” and “report on benchmarks that measure the performance of the system.”¹² The recommendation was conveyed to the Legislature, which never acted on it.¹³

The prevention of sexual violence is too important a purpose: we need to struggle to get it right. To this end, this is an essay that advances an evidence-based argument about how we, as a state, have largely gotten it wrong by putting most of our prevention resources into sex offender commitments. Of necessity, my argument here is preliminary, based on incomplete information about the consequences of the state’s resource allocation choices. It is meant as a prod for further careful study, and for policy-making that is based on evidence. Despite the tentative nature of my argument, several concrete policy suggestions are clear, and I

10. National Center for Injury Prevention and Control, *Rape Fact Sheet*, available at <http://www.cdc.gov/ncipc/factsheets/rape.htm> (last visited Dec. 19, 2002) (reporting that 92% of rapes are committed by “known assailants,” and that “[a]bout half of all rapes and sexual assaults against women are committed by friends and acquaintances, and 26% are by intimate partners”).

11. MINN. DEP’T. OF CORR., SEX OFFENDER POLICY AND MANAGEMENT BOARD STUDY 4 (2000) [hereinafter MINN. DEP’T. OF CORR., BOARD STUDY], available at www.doc.state.mn.us/publications/legislativereports/pdf/sexoffenderboard.pdf.

12. *Id.* at 10.

13. E-mail from Stephen Huot, Director, Sex Offender/Chemical Dependency Services Unit, Minnesota Department of Corrections, to Eric Janus, Professor of Law, William Mitchell College of Law (November 7, 2002) (on file with author).

end by delineating those suggestions about how to re-direct our efforts in a more effective manner.

II. THE MINNESOTA SEX OFFENDER COMMITMENT SCHEME: INTRODUCTION

Minnesota is one of approximately sixteen states to use a civil commitment model to incarcerate sex offenders in highly secure “treatment centers.” Minnesota has two sex offender commitment laws, the Sexual Psychopathic Personality Act,¹⁴ and the Sexually Dangerous Persons Act.¹⁵ Though they differ in some significant details, their essential features are the same. They are “civil” laws in the sense that they lock people up in order to prevent future dangerous behavior, rather than as punishment following a conviction for criminal conduct. They claim their constitutional legitimacy by their kinship to traditional (and unquestionably constitutional) “civil commitment” laws. While the traditional use of civil commitment addresses individuals whose severe mental illness, mental retardation or chemical dependency renders them dangerous to self or others, sex offender commitment laws seek to prevent predicted future sexual crime that is coupled with a much broader notion of “mental disorder.” The sex offender laws guarantee treatment,¹⁶ and thus claim that their purposes – incapacitation and treatment – are commensurate with traditional civil commitment laws.¹⁷

The earlier law, passed in the late 1930s, was initially used extensively for relatively brief institutionalization of low-level sexual offenders.¹⁸ As with most traditional civil commitments, the early law was seen as an alternative to the criminal justice system for those who were “too sick” to be punished.¹⁹ Eventually, about half the states passed similar “sex psychopath” laws. But the laws were thoroughly discredited as failed policy in a number of influential

14. MINN. STAT. § 253B.02, subd. 18b (2002).

15. MINN. STAT. § 253B.02, subd. 18c (2002).

16. MINN. STAT. § 253B.03, subd. 7 (2002).

17. *Kansas v. Hendricks*, 521 U.S. 346, 365-66 (1997).

18. W. D. Erickson, *Critical Analysis of the Psychopathic Personality Statute* (1992) (unpublished manuscript, on file with the author) (characterizing the initial implementation of Minnesota’s 1939 Psychopathic Personality Commitment Act as the “commitment of relatively harmless individuals for relatively trivial crimes”).

19. *Millard v. Harris*, 406 F.2d 964, 969 (D.C. Cir. 1968) (holding D.C. Sex Psychopath Act limited to those “too sick to deserve criminal punishment”).

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reports, including those of the Group for the Advancement of Psychiatry and the American Bar Association's Criminal Justice Mental Health Standards,²⁰ and many were repealed or simply fell into disuse.

In 1989, a Task Force convened by the Minnesota Attorney General, ignoring the previous failure of the law, recommended the resuscitation of sex offender commitments in Minnesota.²¹ Responding to public outrage at horrendous crimes committed by recently paroled sex offenders, the Task Force recommended a new use of the law, not as a substitute, but rather as a supplement, for the criminal justice system, tacking civil confinement onto the criminal sentence for those sex offenders who were "too dangerous" to be released from prison. It was recognized that civil commitment was an extraordinary remedy, but its use was justified on the grounds that it would be directed only at the "most dangerous."²²

Commitments under the laws began in earnest in the early 1990s.²³ Over the years, a small but steady stream of sex offenders has been committed as they are released from prison or juvenile custody. Commitments have averaged about 5% of prison releases per year, in recent years amounting to about eighteen new commitments annually.²⁴ An expensive new facility was built to house the detainees, and an extensive and costly treatment program was developed.²⁵ Currently, there are about 190 individuals under commitment,²⁶ and the annual budget for the

20. AM. BAR ASS'N, ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 460 (1989); GROUP FOR THE ADVANCEMENT OF PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE 30S TO THE 80S (1977).

21. FINAL REPORT OF THE MINNESOTA ATTORNEY GENERAL'S TASK FORCE ON THE PREVENTION OF SEXUAL VIOLENCE AGAINST WOMEN (Feb. 1989).

22. John L. Kirwin, *Civil Commitment of Sexual Predators: Statutory and Case Law Developments*, THE HENNEPIN LAWYER, Sept.-Oct. 1995, at 25. See also MINN. DEP'T OF CORR., BOARD STUDY, *supra* note 11, at 4.

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

24. MINN. DEP'T OF CORR., BOARD STUDY, *supra* note 11, at 4.

25. See Anita Schlank, *The Minnesota Sex Offender Program*, in THE SEXUAL PREDATOR: LAW, POLICY, EVALUATION AND TREATMENT (Anita Schlank & Fred Cohen eds., Civil Research Institute 1999).

26. Huot, *supra* note 13. Most of the committed individuals are confined in the Minnesota Sex Offender Program, with an additional number in a special program for low functioning individuals and others serving out their criminal sentences in prison. *Id.*

program is \$20 million.²⁷

An individual can be released upon proof that the individual no longer “needs” inpatient confinement and can be safely released.²⁸ Although release from commitment is theoretically possible at any time, in reality release is possible only for those who have successfully navigated the treatment program. The program is described as requiring a minimum of four years to complete.²⁹ To date, only one person has been released (on a provisional discharge).³⁰ Only a handful has attained the highest levels in the treatment program.³¹ Thus, for the foreseeable future, the committed population will continue to grow as more are committed and few or none are discharged. As Figure 1 shows, the committed population will gradually constitute a larger and larger proportion of the sex offenders under confinement. As a consequence, its share of the resource pie will inevitably grow.

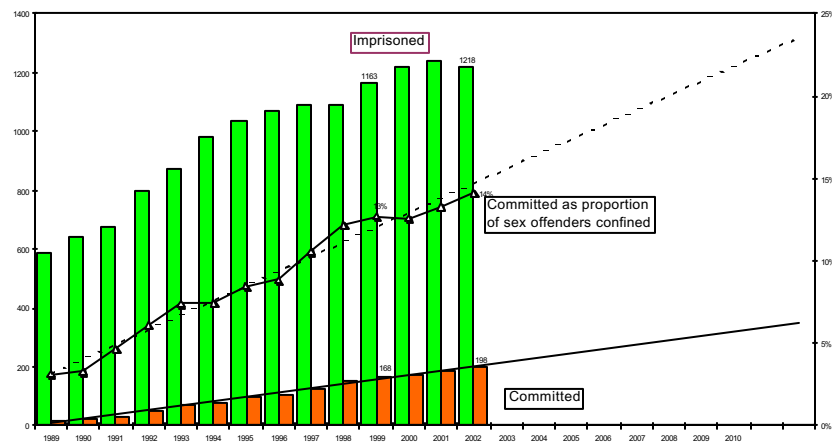


Figure 1. Minnesota sex offenders subject to penal or civil confinement.³²

27. MINN. DEP'T OF CORR., BOARD STUDY, *supra* note 11, at 1.

28. MINN. STAT. § 253B.18, subd. 7 (1998).

29. E-mail from Anita Schlank, Ph.D., Clinical Director of Minnesota Sex Offender Program, to Eric Janus, Professor of Law, William Mitchell College of Law (Aug. 19, 2002) (on file with author) (noting that most patients are unable to complete the program in the minimum period).

30. E-mail from Anita Schlank, Ph.D., Clinical Director of Minnesota Sex Offender Program, to Eric Janus, Professor of Law, William Mitchell College of Law (Nov. 24, 2002) (on file with author).

31. *Id.*

32. See Janus & Walbek, *supra* note 23, at 356. Sources: For sex offenders in

While sex offender commitments consume a bigger and bigger share of the pie, other approaches to the prevention of sexual violence go wanting.³³ This allocation of resources has not been a thoughtful one; rather, it has followed inexorably from the choice to use sex offender commitments as the centerpiece of the state's approach to sexual violence. I turn now to an exploration of whether the allocation consequences of the state's choice are faithful to the goal shared by all, the reduction of sexual violence.

III. ASKING THE WRONG QUESTION, LEGISLATING THE WRONG ANSWER, AND DOING IT POORLY

A. *Some Preliminary Observations About Question-Framing*

In this section of the paper, I argue that sex offender commitment laws are an answer to the wrong question. Instead of asking how public policy can be designed to prevent *the most sexual violence*, the state asked how the *most dangerous individuals* could be securely incapacitated. This choice of question, no doubt the result of forceful framing of the issue in the popular media, has guided us down a particular and perhaps misdirected pathway. For ease of reference, I will refer to the two approaches as the “most violence” and the “most dangerous” approaches. I begin by making several observations.

To begin, the two questions are potentially related to each other, but they are not equivalent to each other. Thus, it is possible that a strategy aiming to prevent the most sexual violence would, as a part of its strategy, incapacitate the few “most dangerous.” But it is equally likely that the few “most dangerous” individuals do not commit, in the aggregate, the most violence. If so, then the “most violence” strategy would address its resources to low and moderate risk offenders who make up the great bulk of offenders in the community, and who, in the aggregate, commit most of the sexual crimes. Or, most plausibly, a “most violence” approach might entail a continuum of interventions, tailored to various levels of

prisons, Minnesota Department of Corrections. For sex offenders under civil commitment, Minnesota Department of Human Services. Note that the latter figure includes committed individuals who were confined in correctional facilities, and individuals committed to inpatient institutions other than the Minnesota Sex Offender Program.

33. See *infra* Part III.-C.

risk, in a mix that is optimized to the prevention of the “most violence.”³⁴

The “most dangerous” strategy is only one of many, and its relation to the prevention of the “most violence” is an empirical question. It is a question that was not asked or answered at the inception of the sex offender commitment strategy. As a result, the state chose an approach to sexual violence that is, at the least, unmindful of the alternate approaches that might have been adopted had the underlying question been framed in terms of preventing the “most violence.”

Second, having asked the wrong question, the state has exacerbated its error by failing even to be faithful to the central justification of the strategy it has adopted. In a variety of ways, the state legislature and courts have missed critical opportunities to ensure that sex offender commitments really do address only the “most dangerous.” As a result, I will argue, it is likely that the civil commitment group is not, in fact, the “most dangerous.” This undercuts the primary justification for sex offender commitments—that the “most dangerous” require the most resources.

Why does it make a difference how the question is framed? Because even if the “most dangerous” are civilly committed, most of the sexual violence remains unaddressed in the community.

Examine the twelve-year period from 1987 through 1998. Averaging over that period, about 725 persons were convicted each year of a sex offense, of whom 325 were sent to prison and 400 were released into the community on probation.³⁵ Two hundred fifty additional sex offenders were released from prison into the community.³⁶ Eleven sex offenders were committed, comprising only about 1.7% of the sex offenders released from the criminal justice system into the community.³⁷ Examine, as well, the year 1997, when 6,373 rapes and other sexual assaults were reported to authorities in Minnesota.³⁸ A conservative estimate is that there are

34. See, e.g., LaFond & Winick, *A Therapeutic Jurisprudence Approach to Managing Sex Offender Risk: A Proposal for Sex Offender Reentry Courts*, in *SEXUAL COERCION: UNDERSTANDING AND MGMT.* (R. Prentky, E. Janus & M. Seto, eds. forthcoming 2003).

35. MINN. DEP'T OF CORR., BOARD STUDY, *supra* note 11, at 1.

36. *Id.*

37. *Id.*

38. MINNESOTA PLANNING: REPORTED CRIMES, *available at* <http://www.mnplan.state.mn.us/cj/offense.html> (last visited Jan. 10, 2003).

twice as many actual sexual assaults committed,³⁹ so we can estimate (conservatively) that there were about 12,600 actual sexual assaults in the state during that year. Compared to this, the number of persons civilly committed in 1997, twenty-one,⁴⁰ amounts to two-tenths of one percent.

Thus, the “most violence” takes place in the community. A “most violence” approach would have developed strategies for addressing the 12,600 annual instances of sexual assault. The “most dangerous” approach addresses the handful of individuals who pose the highest risk.

B. The Direct Benefit of Minnesota's Sex Offender Commitment Laws

The direct and obvious benefit of Minnesota's sex offender commitment laws is that a subset of dangerous sex offenders is incapacitated and therefore prevented from committing new crimes of sexual violence. Of course, even the prevention of one such crime is beneficial. But, we ought to know how the benefit of sex offender commitments compares to the overall level of sexual violence in the state. In this section, I propose a model to estimate the sexual violence that is prevented by sex offender commitment laws, and place it in the context of sexual violence more generally in the community.

I begin by developing an estimate for the recidivism prevented by civil commitment. I then make two comparisons. First, I estimate the total sexual recidivism by sex offenders in the criminal justice system (probationers in the community, and sex offenders released into the community from prison). This is a significant comparison, because the criminal justice system is recognized as a point of high opportunity for intervention in the cycle of sexual violence.⁴¹ Thus, with this comparison, we can ask whether the resource allocation between community correctional interventions and civil commitment is proportionate to their relative benefits. Second, I compare the benefits of sex offender commitments to the levels of sexual offending in the community as a whole.

To estimate the amount of sexual violence prevented by sex

39. Callie Marie Rennison, Ph.D., *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, 2002, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsarp00.pdf>.

40. Janus & Walbek, *supra* note 23.

41. P. M. Harris, *Prison-based Sex Offender Treatment Programs in the Post-Sexual Psychopath Era*, 23 J. PSYCHOL. & L. 555, 569 (1995).

offender commitment laws in Minnesota, we must develop an estimate of the recidivism rate that the committed group would have exhibited had it not been committed. Since, by definition, this committed group has been confined and has had no opportunity to re-offend, I use two indirect approaches to make this estimate. First, I suggest that the observed recidivism rate for a highly comparable but non-committed group is a rough estimate of the recidivism rate for the committed group. Second, I examine the method by which committed individuals are selected, and use information about the recidivism rates associated with those selection methods.

A preliminary word about recidivism rates will be helpful. My estimates will focus on rates of sexual offending recidivism. These rates report the proportion of a group of sex offenders (usually those released from a prison) who are observed to commit another sexual offense during a specified observation period. Research shows that the observed rate of recidivism is directly correlated to the length of the follow-up observation period.⁴² Thus, recidivism rates are meaningful – and can be meaningfully compared – only with knowledge of the follow-up period. In the discussion below, I take this characteristic into account by discussing and comparing, where appropriate, average *annual* recidivism rates.

My first attempt at estimation is quite simple. I examine the recidivism rate for a group whose risk should be similar to the commitment group, individuals who were referred for commitment but were not committed. The Minnesota Department of Corrections studied this group, and has made preliminary findings that the rate is about 18% over a follow-up period of 6.5 years.⁴³ Thus, as a rough estimate, we can assume that the rate for the committed group would be roughly the same, since all members of the referred group (committed and non-committed) had been assessed by the Department of Corrections as exhibiting the highest risk.⁴⁴

The second method is more complex. It examines the method

42. Robert A. Prentky et al., *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 LAW & HUM. BEHAV. 635, 650 (1997).

43. MINN. DEP'T OF CORR., BOARD STUDY, *supra* note 11, at 19. However, these results are preliminary and should be interpreted with caution. See e-mail from Stephen Huot, Director of Sex Offender/Chemical Dependency Services Unit, Minnesota Department of Corrections, to Eric Janus, Professor of Law, William Mitchell College of Law (Nov. 7, 2002) (on file with author).

44. *Id.*

by which the committed cohort is selected, and attempts to construct an estimate from our knowledge of these methods. The selection process makes use of both human judgments (mental health professionals and trial court judges) and “actuarial” risk assessment instruments. An actuarial approach isolates the most important factors that indicate risk of reoffense, combines them through empirical research into a formula that weights each factor optimally, and produces a score for each individual based on the combination of risk factors.⁴⁵ The formula is applied to a large sample of sex offenders whose post-release history is then followed and whose reoffenses are observed. Researchers then measure, for offenders in the sample, the frequency of sexual reoffense for each score-level. This frequency is then taken to be the probability of recidivism associated with the given score.⁴⁶

As a brief example, the STATIC-99 is a risk assessment instrument that combines ten factors.⁴⁷ An individual's scores on these factors are summed, and the total score is compared to a table that shows the reoffense frequencies associated with each score.⁴⁸ The table indicates, for example, that a score of 5 is associated with a frequency of sexual recidivism (over a five year follow-up period) of 33%.⁴⁹ The highest risk category shown on the table – scores of 6 or above – is associated with a measured frequency of sexual recidivism (over a five year period) of 39%.⁵⁰

Contrary to our general intuitions, there is substantial evidence that the actuarial methods of risk assessment are the most

45. See generally R. M. Dawes et al., *Clinical Versus Actuarial Judgment*, 243 SCI. 1668, 1668 (1989). The actuarial method is often compared to clinical judgment: “In the clinical method the decision-maker combines or processes information in his or her head. In the actuarial or statistical method the human judge is eliminated and conclusions rest solely on empirically established relations between data and the condition or event of interest.” *Id.*

46. See, e.g., D.L. Epperson et al., *Minnesota Sex Offender Screening Tool – Revised: Development, Effectiveness, and Recommended Risk Level Cut Level Scores*, available at <http://www.corr.state.mn.us/publications/socdpublications.htm> (last visited Jan. 12, 2003).

47. The factors include: number of prior sex offenses (charges or convictions), prior non-sexual violence, whether victims have been unrelated, strangers or males, age, and marital status. R. KARL HANSON & DAVID THORNTON, *STATIC 99: IMPROVING ACTUARIAL RISK ASSESSMENTS FOR SEX OFFENDERS 1999-02* at 5, available at www.sgc.gc.ca/publications/corrections/199902_e.pdf.

48. *Id.* at 18.

49. *Id.*

50. *Id.*

accurate methods of assessing the risk (likelihood) of reoffense.⁵¹ Thus, even though the actual selection process for civil commitment is somewhat complex, and makes use of human judgment as well as actuarial risk scores, we can make a plausible argument that the results attainable by use of actuarial instruments represents a ceiling, or top estimate, of the recidivism rates for the commitment group.

The principal actuarial tool developed and used in Minnesota to select candidates for commitment is the MnSOST-R.⁵² The developers of this instrument claim that the highest risk group identified by the tool – those with MnSOST-R scores of 13 and above – has a recidivism rate of either 70% or 88%,⁵³ depending on the follow-up period. Though not entirely clear in the documentation, a reasonable inference is that the 70% figure is associated with a six-year follow-up period, while the 88% is associated with a twenty-year follow-up.⁵⁴

If these claims are correct and if commitment is limited to individuals in this highest risk category, we can estimate that the committed group's *annual* recidivism rate would be somewhere between 4% (88% divided by twenty years) and 12% (70% divided by six years).⁵⁵

51. See, e.g., SOLICITOR GENERAL OF CANADA, RESEARCH SUMMARY: GUIDELINES FOR OFFENDER RISK ASSESSMENT (2002) [hereinafter RESEARCH SUMMARY] (“One of the most consistent findings is that evidence based, actuarial measures are more accurate in the prediction of offender re-offending or recidivism than professional, clinical judgment.”), available at www.sgc.gc.ca/publications/corrections/200211_e.asp.

52. Epperson, et al., *supra* note 46.

53. *Id.*

54. The MnSOST-R was developed using a six-year follow-up period. However, it is well-known that the rate of recidivism in the tested population affects the instrument's ability to identify recidivists accurately. The MnSOST-R was developed using a specially constructed sample with a 35% sexual recidivism rate. Epperson et al., *supra* note 46. There is good evidence that such a high rate of recidivism is not present unless the population is followed for at least twenty years. See Dennis M. Doren & Douglas L. Epperson, *Great Analysis, But Problematic Assumptions: A Critique of Janus and Meehl (1997)*, 13 *SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT* 45, 47 (2001) (base rate for sexual recidivism is between 39% and 52% for a twenty-year follow up period); Hanson & Thornton, *supra* note 47, at 19 (reporting a 25% sexual reconviction rate with a sixteen-year follow-up period). The 70% figure is the MnSOST-R authors' estimate of the frequency of recidivism in the highest risk group (those with scores of 13 and above) in a six-year follow-up of a normal sample of released sex offenders.

55. There is good evidence that the recidivism rate is higher earlier in the period after release. Prentky, *supra* note 42, at 645. However, because the group of interest (all committed individuals) has been detained for a period of years, it

There are several reasons, however, to consider these numbers to be an overestimate of the actual recidivism rates for committed individuals. First, the most impressive MnSOST-R results are out of line with the results obtained by other, well-accepted and well-validated risk-assessment instruments. For example, the highest risk group identified by the RRASOR is claimed to have a 73% sexual recidivism rate, but only with a follow-up period of ten years.⁵⁶ The STATIC-99, intended to be an improvement on the RRASOR, claims its riskiest group shows 52% sexual recidivism over a fifteen-year follow-up period.⁵⁷ Wollert argues that the MnSOST-R results are inflated because the test was not properly cross-validated.⁵⁸ Barbaree's independent research on the MnSOST-R showed six-year recidivism rates substantially lower than those found by the developers, with the highest risk group in Barbaree's report evidencing a six-year rate of 30%.⁵⁹

Further, it is doubtful that Minnesota commitments are limited to the highest of the MnSOST-R's risk groups. The instrument is mentioned in only two appellate sex offender commitment cases. In both, the courts committed individuals with scores below the top group. In *Hince v. O'Keefe*,⁶⁰ the individual was committed despite a MnSOST-R score that indicated a "low" risk of reoffense. In *In re Givens*,⁶¹ the commitment was upheld despite a MnSOST-R score of 12, which would have placed Givens in the second to the highest risk group, for which the developers report recidivism rates of 44% (six-year follow-up) and 70% (twenty-year follow-up). Barbaree's independent check on the MNSOST-R found that membership in this second-tier risk group corresponded to a recidivism risk of 20% over a six-year period.⁶² Similarly, the Minnesota Court of Appeals upheld a commitment of an individual who scored in the "medium-high" range of the

seems a permissible technique to simply average the recidivism rate over the entire follow-up period.

56. See Doren & Epperson, *supra* note 54, at 51.

57. Hanson & Thornton, *supra* note 47.

58. Richard Wollert, *The Importance of Cross-Validation in Actuarial Test Construction: Shrinkage in the Risk Estimates for the Minnesota Sex Offender Screening Tool-Revised*, 2 J. THREAT ASSESSMENT 87 (2002).

59. Howard Barbaree, Presentation at William Mitchell College of Law (November 15, 2002).

60. 613 N.W.2d 784 (Minn. Ct. App. 2000).

61. *In re Givens*, No. C4-02-995, 2002 WL 31554041, at *2 (Minn. Ct. App. Nov. 19, 2002).

62. Barbaree, *supra* note 59.

STATIC-99, indicating a fifteen-year sexual recidivism rate of 40%.⁶³

In addition, Minnesota courts refuse to rely solely on actuarial risk assessment scores, routinely referring as well to clinical predictions. Most commentators agree that such “mixed” prediction methods have a lower level of accuracy than pure actuarial selection processes.⁶⁴

A further factor suggesting that the commitment group may have a recidivism rate below the maximum possible using actuarial instruments comes from the work of Howard Barbaree and Karl Hanson, whose separate research shows a rather dramatic inverse correlation between age and recidivism.⁶⁵ This finding suggests two reasons why the actuarial probabilities are overestimates. First, the average age at commitment is older than the average age of the prison populations on which many risk assessment instruments were normed.⁶⁶ Second, this age differential only increases as commitments stretch over years. It follows that the risk of the committed group may be somewhat less than indicated by the actuarial scores, and that the difference may increase with time as the commitment group ages.⁶⁷

Based on this discussion, we can establish with some confidence the estimated upper bounds on the recidivism rate for the committed group. Table 1 summarizes the information developed above. Column 1 refers to the various groups of interest, beginning with sex offenders released to the community from prison, individuals sentenced to probation in the community,

63. Civil Commitment of Bartholomay, No. C6-01-1104, 2001 WL 1645818, at *2 (Minn. Ct. App. Dec. 26, 2001).

64. See e.g., W. Grove & P. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, 2 PSYCHOL., PUB. POL'Y & L. 293 (1996); RESEARCH SUMMARY, *supra* note 51.

65. Barbaree, *supra* note 59; See also R. Karl Hanson, *Age and Sexual Recidivism: A Comparison of Rapists and Child Molesters*, available at www.sgc.gc.ca/publications/corrections/age200101_e.asp (last visited Sept. 23, 2002).

66. Barbaree, *supra* note 59. For example, the average age of the samples used to produce the RRASOR and STATIC-99 ranged from 30.4 to 36.2, while the average age of individuals committed in Minnesota between 1991 and 1996 (inclusive) was 40.3. See HANSON & THORNTON, *supra* note 47, at 8; see also Janus & Walbek, *supra* note 23, at 357.

67. See, e.g., Linda S. Beres & Thomas D. Griffith, *Habitual Offender Statutes and Criminal Deterrence*, 34 CONN. L. REV. 55, 69 (2001) (discussing the decreasing effectiveness of incapacitation “because the aging convict would no longer be an active offender if he were released”).

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and finally those who are civilly committed. Listed under the civil commitment heading are the various methods for estimating recidivism rates for the committed group.

Column 2 lists the corresponding maximum recidivism rates for each group (and estimation method) in column 1. Column 3 lists the corresponding follow-up period. Column 4 shows the average annual recidivism rate (column 2 divided by column 3).

For purposes of our comparison, the table also lists the recidivism rates for sex offenders in the community. The sexual recidivism rate of all Minnesota sex offenders being released from prison has been measured at 18% with an average follow-up period of 6.5 years.⁶⁸ The sexual recidivism rate for probationers was measured at 9% with a follow-up period of seven-eight years.⁶⁹

We can develop an estimate of the number of sexual crimes prevented annually by the sex offender commitment laws, and compare this number to the sex crimes committed by offenders after their release into the community from prison or conviction. Statistics for the period 1987-1998 provide an estimate of the relative sizes of each of the groups of interest. During the twelve year period 1987 through 1998, 4,800 convicted adult sex offenders were placed in the community on probation.⁷⁰ During the same period, 3000 sex offenders were released from prison. Of this number, 287 were referred for civil commitment and 135 were civilly committed.⁷¹ In this period, civil commitments represented 4.5% of sex offenders released from prison, a number that approximates the rate of commitments during the period of active use of commitments.⁷²

Referring again to Table 1, we now estimate the number of sex offenses committed (or prevented) annually by each of these

68. MINN. DEP'T. OF CORR., BOARD STUDY, *supra* note 11, at 21. Sex offenders released during a later period have shown a somewhat lower recidivism rate. Stephen Huot, *Sex Offender Treatment and Recidivism: 2002 Update and Preliminary Analysis* (on file with author).

69. MINN. DEPT. OF CORR., COMMUNITY-BASED SEX OFFENDER PROGRAM EVALUATION PROJECT, REPORT TO THE LEGISLATURE 4 (1997) [hereinafter MINN. DEP'T. OF CORR., PROGRAM EVALUATION REPORT]. This is consistent with later findings which reported that the six-year recidivism rate for probationers who completed treatment was 5%, compared to 11% for those who did not. MINN. DEP'T. OF CORR., SEX OFFENDER SUPERVISION 2000 REPORT TO THE LEGISLATURE 15-16 [hereinafter SEX OFFENDER REPORT].

70. MINN. DEP'T. OF CORR., BOARD STUDY, *supra* note 11, at 4.

71. *Id.*

72. See, e.g., Janus & Walbek, *supra* note 23, at 354.

groups. Shown in column 5, this number is obtained by multiplying the size of the group by its annual recidivism rate. Column 6 expresses the estimated sex crimes committed (or prevented) as a percentage of all sex crimes committed by released prisoners and probationers. Finally, column 7 shows the estimated crimes for each row expressed as a percentage of the total sex crimes cleared by police in a typical year.⁷³

1	2	3	4	5	6	7
Population and source of recidivism estimate	Predicted recidivism	Follow-up Period	Average annual rate	Predicted crimes prevented (committed) annually	As percent of all predicted sex crimes by released prisoners and probationers	As percent of sexual offenses cleared by police (est. 2000/year)
Sex offenders released from prison	18%	6.5	3%	83.1	59%	4.15%
Probationers	9%	7.5	1%	57.6	41%	2.88%
<i>Civilly committed</i>						
DOC study	18%	6.5	3%	3.7	3%	0.19%
STATIC-99	52%	15	3%	4.7	3%	0.23%
RRASOR	73%	10	7%	9.9	7%	0.49%
MN-SOST-R Moderate	44%	6	7%	9.9	7%	0.50%
MN-SOST-R Moderate	70%	20	4%	4.7	3%	0.24%
MN-SOST-R high	88%	20	4%	5.9	4%	0.30%
MN-SOST-R high	70%	6	12%	15.8	11%	0.79%
Barbaree Mn-SOST-R High	30%	6	5%	6.8	5%	0.34%
Barbaree Mn-SOST-R Moderate	20%	6	3%	4.5	3%	0.23%
Average for civilly committed			5%	7.3	5%	0.37%

Table 1. Estimated rates of sexual recidivism and sexual crimes prevented or committed by various groups of sex offenders released or committed 1987-1998.

As shown in column 6 of Table 1, sex offender commitment laws prevent between 3% and 11% of the recidivist sexual crimes associated with sex offenders released to the community in the criminal justice system. The average of all of the estimates is 5%. Put another way, between 89% to 97% of sex offender recidivists are returned to the community. As a percentage of all cleared sex

73. I have used the figure 2000, which is the approximate number of arrests and apprehensions for sex crimes reported by the Minnesota Planning Department website for the year 1997. See MINNESOTA PLANNING DEPARTMENT, *Arrests and Apprehensions in Minnesota in 1997*, at <http://www.mnplan.state.mn.us/cgi-bin/datanetweb/justice?protype=1&year=97&bracket=T&topic=P&area=S>. I have used the estimate for "cleared" sex crimes since that figure is comparable to the recidivism rates, which measure only those crimes that have been discovered and cleared by authorities.

crimes in a given year, sex offender commitments prevent somewhere between two-tenths of 1% and half of 1% of the total cleared sexual violence in the state.

C. Misallocation of Resources?

Compared to the total expenditure for sexual violence treatment and prevention, sex offender commitments consume a large share of the resources, well out of proportion to the share of crimes that they prevent. The cost of commitments is currently \$20 million per year,⁷⁴ but this cost is expected to grow to \$76 million by 2010.⁷⁵ In contrast, according to the last figures I have had access to, the total state expenditure⁷⁶ for community sex offender treatment was \$1.1 million per year,⁷⁷ and the expenditure for sex offender treatment in prisons was approximately \$2.1 million⁷⁸ for a much larger population (about 1200 in prison,⁷⁹ 900 probation,⁸⁰ and 450 post-release offenders⁸¹ in the community). Thus, simply comparing these figures, the commitment program consumes 86% of the state's treatment resources directed at sex offenders under correctional control, yet addresses only 8% of this population, and, as shown above, at most 11% of the sexual crime committed by sex offenders under correctional control. There are, of course, other state expenditures aimed at the prevention of sexual violence (e.g., supervision of released offenders in the community), but the point remains: sex offender commitments consume a large, disproportionate, and growing share of the resources available for

74. Minnesota Department of Human Services, Bulletin #02-77-01 (June 24, 2002).

75. MINN. DEP'T. OF CORR., CIVIL COMMITMENT STUDY GROUP, REPORT TO LEGISLATURE 23 (1998). This figure does not include costs associated with legal proceedings, estimated by the Minnesota Department of Human Services in a 1997 survey at \$100,000 per commitment for attorneys and experts. Fitch, *supra* note 1.

76. Counties provide some additional support for sex offender treatment in the community. In recent years, Ramsey and Hennepin Counties budgeted or expended about \$750,000 per year on community sex offender treatment. Offenders are required to contribute to the cost of treatment, as well. SEX OFFENDER REPORT, *supra* note 69, at 15.

77. *Id.* at 18.

78. Huot, *supra* note 43.

79. MINN. DEP'T. OF CORR., THE STATE OF THE PRISON POPULATION, *available at* www.corr.state.mn.us/pdf/state_of_the_prison.pdf (2001) (indicating 1181 sex offenders in Minnesota prisons as of January 1, 2001).

80. Huot, *supra* note 43.

81. SEX OFFENDER REPORT, *supra* note 69, at 18.

the prevention and treatment of sexual violence.

Does this lopsided allocation of resources make sense? This is a question that is both empirical and normative. It is certainly arguable that the expenditure of \$20 million per year is justified in order to prevent between six and twenty-three of the “cleared” crimes of sexual violence.⁸² Further, it might be argued that the disproportionate allocation of resources is justified by the “risk principle,” which asserts that higher levels of service are best reserved for higher risk cases and that low-risk cases are best assigned to minimal service.⁸³

But these arguments are incomplete, because they do not address whether some other allocation of the resources could produce an even greater reduction in sexual violence. By way of a very rough comparison, consider the following. The cost per life saved by flu vaccinations is \$500, by breast cancer screening is \$17,000, and by highway improvements is \$60,000.⁸⁴ In contrast, using the figures stated in the prior paragraph, the cost of a cleared sex-crime saved by civil commitment is somewhere between \$869,000 and \$3.3 million.

Interventions aimed at the vastly greater numbers of sex offenders in the community are under-funded and under-developed. At a recent symposium on sex offender treatment, the consensus of participants, across a range of backgrounds, was that Minnesota lacked an adequate “continuum of care” for sex offenders.⁸⁵ Currently, the state has only one community-based

82. The figures in the text are the estimated number of sex crimes prevented by civil commitment currently (about 190), given the recidivism rates in Table 1 and the current population of sex offenders committed. It is calculated by multiplying the estimates of annual recidivism rates in column 4 by 190. This yields an estimate of between six and twenty-three “cleared” sex crimes per year. Of course, it is possible that some committees, if they had been released into the community, would have committed more than one crime before apprehension. But it must be recalled that most, if not all, civilly committed individuals would be classified as “level III” offenders, and thus subjected to the most intensive form of release supervision. This intensive supervision might, itself, prevent some of the predicted recidivism, and would likely increase the probability of rapid apprehension if a supervisee did commit a recidivist sex offense.

83. D.A. Andrews et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 CRIMINOLOGY 369, 374 (1990); James McGuire & Philip Priestley, *Reviewing ‘What Works’: Past, Present and Future*, in WHAT WORKS: REDUCING REOFFENDING – GUIDELINES FROM RESEARCH AND PRACTICE 3, 14 (J. McGuire, ed. 1995).

84. Paul Slovic, *Trust, Emotion, Sex, Politics, and Science: Surveying the Risk Assessment Battlefield*, 1997 U. CHI. LEGAL F. 59, at Table 1.

85. Panel discussion at William Mitchell College of Law (November 15,

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residential sex offender treatment program, a program with only twenty-three beds.⁸⁶ A Minnesota Department of Corrections study in 2000 noted that only about 75% of the highest risk, "Level 3", sex offenders released from prison are housed in half-way houses, and that "[i]t is reasonable to expect that, if more halfway house beds were available on a statewide basis, all Level 3 offenders would first be released to halfway houses."⁸⁷ There is also a need for "other sorts of transitional housing for sex offenders."⁸⁸ The availability of transitional living "has not kept pace at all with the number of sex offenders (and other high-risk person offenders) released from correctional facilities."⁸⁹ In fact, by the year 2003, the proportion of Level 3 sex offenders who are released to a half-way house had fallen to 60%, and a DOC study found that "transition services for offenders leaving prison at expiration of sentence are even more limited. These offenders leave . . . without supervision."⁹⁰

A 2000 Report to the Legislature by the Department of Corrections noted that the highly effective "Intensive Supervised Release" program for sex offenders is not available in about half of the state's counties, and is significantly underfunded in the large metropolitan counties.⁹¹ Correcting the problem would require \$3 million,⁹² according to the DOC, yet the legislature only appropriated increased funding of \$1 million.⁹³ The report also notes that "[r]outinely, [parole] agents report that caseload sizes are too large to allow them to utilize all of the tools available to best

2002).

86. Telephone Interview with Doug Williams, Alpha Human Services (Nov. 11, 2002).

87. MINN. DEP'T OF CORR. BOARD STUDY, *supra* note 11, at 21.

88. SEX OFFENDER REPORT, *supra* note 69, at 11.

89. *Id.*

90. MINN. DEP'T OF CORR., LEVEL THREE SEX OFFENDERS: RESIDENTIAL PLACEMENT ISSUES, 2003 REPORT TO THE LEGISLATURE, at 2, *available at* <http://www.corr.state.mn.us/publications/legislativereports/pdf/Lvl%203%20SEX%20OFFENDERS%20report%202003-web.pdf> (last visited Mar. 18, 2003) [hereinafter MINN. DEP'T OF CORR., LEVEL THREE SEX OFFENDERS].

91. *Id.* at 3. Only about 20% of "high risk" offenders identified in the Public Risk Monitoring program could receive Intensive Supervised Release in Hennepin County. *Id.*

92. *Id.*

93. E-mail from Stephen Huot, Director, Sex Offender/Chemical Dependency Services Unit, to Eric Janus (Nov. 25, 2002, 04:28p.m. CST) (on file with author).

supervise sex offenders in the community,”⁹⁴ and that “in many jurisdictions, caseload sizes continue to remain at levels that allow only minimum supervision techniques.”⁹⁵

As reported in 2000, state funding for the treatment of sex offenders on probation has remained constant since 1990, despite a 40% increase in the number of sex offenders on probation, leading a DOC study to conclude that funding for such treatment “needs to be increased dramatically,”⁹⁶ and that “[i]n many cases, the length and intensity of post-release programming are less than what is needed by the offender.”⁹⁷ The DOC recommended in 2000 an increase in state expenditures for sex offender treatment in the community for probationers and post-release offenders from \$2.1 million per biennium to \$6.4 million per biennium, but the number may increase as the number of offenders in the community increases.⁹⁸ No additional funding has been provided. Yet, there is good evidence that the type and amount of treatment make a difference.⁹⁹

The DOC continued, in 2003, to recommend increases in “the number and capacity of half-way houses” for sex offenders and funding for “three-quarter-way houses” that would provide “increased levels of community supervision” of sex offenders.¹⁰⁰ But budget cuts responsive to massive budget shortfalls will only exacerbate the problem. In his 2004-05 Biennial Budget Recommendation, the Governor proposes “significant budget reductions” in such core community services as sex offender evaluation and sex offender notification.¹⁰¹ The proposed budget

94. SEX OFFENDER REPORT, *supra* note 69, at 7.

95. *Id.* at 9. The Legislature allocated \$4 million for enhanced supervision of adult felony sex offenders in 2000. E-mail from Stephen Huot, *supra* note 93.

96. SEX OFFENDER REPORT, *supra* note 69, at 16.

97. *Id.* at 19.

98. *Id.* at 18.

99. See R. Karl Hanson et al., *First Report of the Collaborative Outcome Data Project on the Effectiveness of Psychological Treatment for Sexual Offenders*, 14 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 169 (2002). Jennifer L. Skeem, John Monahan, and Edward P. Mulvey, *Psychopathy, Treatment Involvement, and Subsequent Violence Among Civil Psychiatric Patients*, 26 LAW & HUM. BEHAV. 577, 598-99 (2002) (describing relationship between amount of treatment and reduction of violence among patients with “psychopathy”).

100. MINN. DEP’T OF CORR., LEVEL THREE SEX OFFENDERS, *supra* note 90, at 12.

101. 2004-05 Governor’s Budget Recommendations, Corrections Department, Agency Operation Reduction, at 28, *available at* http://www.budget.state.mn.us/budget/operating/200405/rec_rev1/corrections.pdf.

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reduces grants to counties for probation and supervised release supervision of offenders in the community, including sex offender supervision and treatment.¹⁰² The recommendations would eliminate county grants aimed at sex offender assessment entirely.¹⁰³

In a recent survey, Minnesota district court judges concluded that the state needed:

- Longer and more intensive community supervision, both for probationers and offenders on supervised or conditional release,
- More probation officers to accomplish the above,
- Increased funding for treatment of offenders (although a few judges reported that they didn't believe that treatment was effective in reducing recidivism),
- More treatment options, and
- Better evaluation (both statewide and national) of treatment programs and more training for judges on the results of these evaluations.¹⁰⁴

Having shown that the treatment and supervision of the majority of sex offenders—those in the community—are inadequately funded, we can ask whether transferring resources from sex offender commitments to community-based treatment and supervision would possibly result in a net decrease in recidivism. As a means of making this question more concrete, I propose four thought experiments. In considering these four exercises, imagine that the 400 sex offenders being released from prison in a given year are ranked in descending order of their assessed risk.

Experiment One: Imagine that we are faced with two policy options: Under Option A, the riskiest twenty offenders are civilly committed, and the remaining 380 offenders are allowed to live on their own in the community. Under Option B, the riskiest nineteen offenders are civilly committed, and the funds freed up from not committing the twentieth offender could then be used to purchase intensive, residential treatment in the community. Since the per diem for the commitment is \$310 and the per diem for a residential treatment program is about \$103,¹⁰⁵ the state can place

102. *Id.* at 32.

103. *Id.*

104. MINN. DEP'T. OF CORR., BOARD STUDY, *supra* note 11, at 4.

105. Telephone Interview with Doug Williams, Alpha Human Services (Nov.

three offenders (numbers 20, 21 and 22) in the residential program. Suppose that the risk posed by each of these three offenders (whose risk ranks are contiguous) is similar. Which option would prevent more violence? While Option A prevents 100% of the violence from one individual (number 20), Option B provides less certain, though still substantial, protection for three. If this intensive treatment and supervision reduced the risk of recidivism by 34%, simple mathematics shows that Option B would provide more protection than Option A.¹⁰⁶

In Experiment Two, we introduce a third option, Option C. Under Option C, the riskiest nineteen offenders would be civilly committed, but the state would use the funds freed by not committing the twentieth offender (\$310 per diem) to provide increased supervision for offenders who will be released into the community. "Intensive" supervision costs \$17 per day per offender, "enhanced" supervision is \$4 per day, while regular supervision is \$2 per day.¹⁰⁷ The state could then increase supervision from enhanced to intensive for the next twenty-four individuals on the risk ranking, offenders 20-43. Which option will prevent more crime? If the intensive supervision reduced the relative recidivism rate for supervisees by as little as 5%, Option C would prevent more recidivism than Option A (civil commitment).¹⁰⁸

Experiment Three: Instead of funding a civil commitment program, we use the \$20 million per year to provide adequate community-based supervision and treatment for the larger group of sex offenders in the community. If these improved systems reduced the recidivism rates among released sex offenders by as little as one percentage point, more sex crimes would be prevented

22, 2002).

106. Hanson et al., *supra* note 99. The authors conducted a meta-analysis which found that the "relative" reduction in recidivism associated with treatment completion was 40%. They define the "relative reduction" rate as the difference between the treatment and non-treatment rates expressed as a percentage of the non-treatment rate. In contrast, the "absolute" reduction rate refers to the numerical difference between the treatment rate and the non-treatment rate. *Id.* at 189.

107. E-mail from Stephen Huot, *supra* note 93.

108. See ROBERT A. PRENTKY & ANN W. BURGESS, FORENSIC MANAGEMENT OF SEXUAL OFFENDERS 236 (2000) (reporting that "the most effective known technique for reducing risk of relapse is intensive supervision" in the community); Kim English, *The Containment Approach: An Aggressive Strategy for the Community Management of Adult Sex Offenders*, 4 PSYCHOL. PUBL. POL'Y & LAW 218, 219 (reporting on supervision methods that "can exert significant control over offenders' opportunities to commit new crimes").

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than all but the most sanguine estimates of sex offender commitment efficacy.¹⁰⁹

Experiment Four: Many policy-makers are now advocating for the development of a primary sexual violence prevention strategy, exemplified by a campaign called "Stop It Now!," and other public health style approaches.¹¹⁰ These are primary approaches in the sense that they attempt to change conditions in society to reduce the incidence of sexual violence.¹¹¹ These programs are premised, in part, on the fact that risk factors for sexual assault include "adherence by men to sex role stereotyping, negative attitudes of men towards women, alcohol consumption, [and] acceptance of rape myths by men," all factors that might be addressed by public health approaches.¹¹² Each year in Minnesota, authorities apprehend individuals involved in about 2000 crimes of sexual violence (rape).¹¹³ If an intense campaign of primary prevention could prevent only 0.5% of these crimes,¹¹⁴ the savings in violence

109. Using the model set forth in Table 1, such a reduction would prevent about eleven sex crimes per year ($17\%/6.5*3000 = 78$ (compared to eighty-three if rate is 18%); $8\%/7.5*4800=51$ (compared to fifty-seven if rate is 9%), for a net savings of eleven). For comparison purposes, the model predicts that sex offender commitments prevent between 3.7 and 15.8 sex crimes per year, with the "average" estimate being 7.3, or about 34% fewer crimes than could be achieved by addressing sex offenders in the community.

110. ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS, SEXUAL ABUSE AS A PUBLIC HEALTH PROBLEM (Sept. 2000), at <http://www.atsa.com/pppublichealth.html>; STOP IT NOW!, WORKING UPSTREAM: A PUBLIC HEALTH APPROACH TO PREVENTING THE SEXUAL ABUSE OF CHILDREN, at www.stopitnow.com/Working_Upstream.pdf; see also, NATIONAL CENTER FOR INJURY PREVENTION & CONTROL, RAPE FACT SHEET, at <http://www.cdc.gov/ncipc/factsheets/rape.htm> (last visited Dec. 19, 2002) (describing "promising primary prevention programs").

111. See STOP IT NOW!, *supra* note 110, at 3 ("child sexual abuse is not just the result of individual pathologies and aberrant families; it is a widespread social illness, requiring social action and change, and primary, 'front end' prevention strategies").

112. NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, *supra* note 110.

113. See MINNESOTA PLANNING, REPORTED CRIMES, available at <http://www.mnplan.state.mn.us/cj/offense.html> (last visited Mar. 13, 2003).

114. See, e.g., Heather Meyer & Nan Stein, *Review of Teen Dating Violence Prevention*, at <http://www.vawprevention.org/research/teendating.shtml> (2000) (last visited 12/19/2002) (reporting that several programs addressing teen dating violence had reported "significant" results in decreasing attitudes that are supportive of dating violence); Vangie A. Foshee et al., *An Evaluation of Safe Dates, an Adolescent Data Violence Prevention Program*, 88 AMJ. PUB. HEALTH 45, 49 (1998) (reporting 69% less sexual violence perpetration in the treatment sample compared to the control). Prevention strategies have been successful in reducing other forms of public health threats. L. Denny et al., *Perceptions of child sexual*

(100 crimes) would swamp even the most optimistic estimates of the benefit of sex offender commitment laws. Yet, due to budget restraints, the Governor is recommending the elimination of existing funding for programs such as Violence Prevention programs in public schools.¹¹⁵

These thought experiments demonstrate that reallocating resources from civil commitment to a range of community-based interventions might enhance the prevention of crime. The experiments are, of course, based on a set of assumptions about the efficacy of community interventions. But, the assumptions are not random. Respected researchers report that “the most effective known technique for reducing risk of relapse is intensive supervision” in the community,¹¹⁶ and that community “aftercare can be made sufficiently ‘tight’ to reduce risk to a minimum for many offenders.”¹¹⁷ Treatment is generally thought to reduce recidivism by about 40% of the non-treatment rates.¹¹⁸ Advocates for a public health approach cite the need for funding for further research on risk and protective factors, prevention programs that work, treatment, education and organizing, and science-based public health approaches.¹¹⁹

In this section, I have suggested an examination of the benefits of a reallocation of the sex offender commitment money to address the prevention, treatment, and supervision needs among the much larger group of sex offenders in the community and in the correctional system. In times of shrinking state resources, allocation choices take on heightened importance. While it is attractive to wish these allocation choices were not real constraints, the legislature failed to provide adequate resources for community supervision and treatment even before the current massive budget cuts, despite forceful advocacy by various task forces and governmental reports. There is simply not enough money to do it all. The adoption of commitment as a strategy to fight sexual

abuse as a public health problem-Vermont, Sept. 1995. MORTALITY & MORBIDITY WEEKLY REP., 46, 801-803.

115. 2004-05 Governor’s Budget Recommendations, Department of Education, Prevention, at 265-67, *available at* http://www.budget.state.mn.us/budget/operating/200405/rec_rev1/e12_education.pdf.

116. Prentky & Burgess, *supra* note 108.

117. *Id.* at 243.

118. Hanson et al., *supra* note 99, at 188-89.

119. STOP IT NOW!, *supra* note 110, at 7.

violence has had huge allocation consequences. My aim in this paper is not to answer the question about resource allocation, but to urge that it be studied fairly and dispassionately.

D. Doing it Poorly

If my argument is correct, then Minnesota's sex offender commitment program is built upon a flawed premise: that an extraordinarily expensive security program is warranted because of the extraordinary risk posed by a limited number of identifiable individuals. Worse, as I show in this section, Minnesota's commitment program is not even faithful to this foundational principle. Though frequently espoused, the principle that only the "most dangerous" individuals are incarcerated (sometimes referred to as "selective incapacitation") has been systematically undermined and thwarted by the legislature and courts.

This infidelity to the principle of selective incapacitation matters for two reasons. First, the massive deprivation of liberty entailed by civil commitment is justified (if at all) only on the theory that the danger posed is extraordinary.¹²⁰ To the extent that constitutional boundaries are pushed to address the ordinarily dangerous, the legitimacy of the anti-violence effort is compromised.¹²¹

But my argument here is not about justice. It is about efficacy. As important as arguments about justice are, here I argue that the unfaithfulness to basic principle undercuts the effectiveness of the state's efforts to combat sexual violence. The argument is straightforward: to the extent that the state spends *extraordinary* resources on the *ordinarily* risky, the resource misallocation postulated above is exacerbated. Simply stated, the state misallocates resources, and hence undercuts its violence-prevention effectiveness, when it uses the most expensive, most intrusive resource on anything but the top risk.

There is good reason to conclude that Minnesota's sex offender commitment program does not, in actual fact, lock up only a narrowly defined group of the "most dangerous," but instead a rather eclectic group of individuals representing a wide band of

120. See Eric S. Janus & Paul E. Meehl, *Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings*, 3 PSYCHOL. PUB. POL'Y & L. 33, 34 (1997).

121. See Janus, *Sex Offender Commitments: Debunking the Official Narrative and Revealing the Rules in Use*, *supra* note 5.

risk. We can begin by noting that the state has done little or no evaluation of its success in selecting only the “most dangerous” for commitment. What little direct evidence there is suggests that the committed group represents a wide range of risk. Dr. Nancy Walbek and I conducted research on commitments through 1996.¹²² We found that the evidence suggested a wide variation in the “dangerousness” of the 100 men we studied.¹²³ The men varied widely on several measures that are closely associated with probability of future offending, such as number of prior sex offenses, number of prior criminal offenses, age, and concurrent presence of paraphilias (deviant sexuality) and antisocial personality disorder.¹²⁴ We also found substantial variation in the severity of the past offenses exhibited by these individuals.¹²⁵

In addition to this direct evidence, there are many ways in which Minnesota’s sex offender commitment scheme has been structured inconsistently with the “most dangerous” assumptions. Many of these structural choices are the combined result of legislative language and judicial construction of that language. We can analyze these choices into two categories: those that impair the ability of the intake selection system to identify only the “most dangerous” on the initial commitment decision (“intake”); and those that impair the ability of the system to retain in the most expensive setting only the “most dangerous” (“discharge”).

1. *Intake*

There are two key structural defects that undercut the “most dangerous” assumption in the civil-commitment selection process. First, the system has failed to articulate meaningful standards for most aspects of the process, resulting in selection decisions that are largely unreviewable for consistency with the core policy of selective incapacitation. Second, where the system *has* articulated standards, those standards are inconsistent with the key concept of selecting only the “most dangerous.”

The selection process begins with a centralized and systematized review of all sex offenders who are about to be

122. Janus & Walbek, *supra* note 23.

123. *Id.*

124. *Id.*; see also R.K. Hanson & M.T. Bussiere, OFFICE OF THE SOLICITOR GENERAL OF CANADA, MINISTRY SECRETARIAT, PREDICTORS OF SEXUAL OFFENDER RECIDIVISM: A META-ANALYSIS (1996).

125. Janus & Walbek, *supra* note 23, at 359.

released from custody.¹²⁶ After the initial screening, the selection process becomes highly decentralized. Individual prosecuting attorneys are free to bring commitment petitions and may accept or reject the central screening decisions;¹²⁷ further, they may pick and choose from among the referrals, and there is no guarantee that prosecutors will choose the most dangerous offender for commitment prosecution.¹²⁸ When petitions are filed, cases proceed to trial. However, as I now argue, trial judges' decisions about dangerousness are largely unguided and unreviewable, because neither the legislature nor the appellate courts have articulated meaningful standards for this risk assessment.

Standards for risk assessment can be of two types: substantive and methodological. Substantively, the Minnesota Supreme Court has held that the risk of future sexual violence must be "highly likely,"¹²⁹ but it has never reversed a case on the grounds that this standard was not met. Not surprisingly, no court of appeals has ever reversed on this ground, and I am aware of only one Minnesota trial court decision that is even arguably based on failure of proof of likelihood of future sexual dangerousness. Further, the appellate courts routinely treat risk-assessment decisions as matters involving credibility judgments, which are thus effectively insulated from appellate review.¹³⁰

Methodologically, the courts have failed to take steps that would facilitate the development of transparent standards for risk assessment. The courts have rejected arguments that risk assessment must be based on state-of-the-art risk assessment methods,¹³¹ have never subjected risk assessment testimony to any form of searching reliability review normally applied to expert or

126. MINN. STAT. § 244.052, subd. 3 (2002).

127. See e-mail from Adam Bailey, Minnesota Department of Corrections, to Wayne Logan, Professor of Law, William Mitchell College of Law (Nov. 21, 2002, 12:42p.m. CST) (stating that fifteen of 190 selected for commitment were not referred by DOC but were selected by county attorneys or other authorities during period 1997-present).

128. At a recent symposium, two county prosecutors acknowledged that their discretionary decisions to petition for commitment at times contravened screening decisions not to refer for commitment. This exercise of "clinical" judgment may dilute the accuracy of the actuarially based referral decisions. Barbaree, *supra* note 59.

129. *Linehan III*, 557 N.W.2d at 180.

130. See Janus, Preventing Sexual Violence, *supra* note 4, at 178; Eric S. Janus, *The Use of Social Science and Medicine in Sex Offender Commitment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 347, 369 (1997).

131. *Linehan III*, 557 N.W.2d at 189.

scientific testimony,¹³² and have never insisted that risk assessment testimony be presented in quantified form, with information about error rates and confidence intervals.¹³³ Thus, risk assessment decisions are highly subjective, relying on idiosyncratic definitions of “highly likely” by judges and experts.¹³⁴ As a result, there is no structural assurance that persons who are committed are, in any measurable way, really the “most dangerous.”¹³⁵

Further, when the legislature and courts have set enforceable standards, these standards for risk assessment have always emphasized broad rather than narrow ranges for risk. I have already suggested that the system sets no real standards for assessing the “likelihood” of dangerousness. In addition to the likelihood of future violence, Brooks suggests that dangerousness assessments should also examine imminence and severity of dangerous behavior.¹³⁶ On both of these issues, statutory language

132. See, e.g., *In re Schultz*, No. CX-99-1296, 1999 WL 1100941, at *5 (Minn. Ct. App. Nov. 30, 1999) (characterizing questions about expert’s testimony as going not to admissibility but to “weight and credibility.”); see also *In re Martinelli*, No. C6-98-569, 1998 WL 613845, at *6 (Minn. Ct. App. Sept. 15, 1998) (characterizing objection about the expertise of an expert witness as going to “weight” rather than admissibility); *In re Clements*, 440 N.W.2d 133, 137 (Minn. Ct. App. 1989) (characterizing objections relating to the experience of an expert witness as pertinent to weight, not admissibility).

133. Cf. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594 (1993) (requiring examination of error rates when considering admissibility of scientific testimony).

134. See, e.g., Frederick Mosteller & Cleo Youtz, *Quantifying Probabilistic Expressions*, 5 STAT. SCI. 2 (1990); Fenna H. Poletiek, *How Psychiatrists and Judges Assess the Dangerousness of Persons with Mental Illness: An ‘Expertise Bias’*, 20 BEHAV. SCI. & THE L. 19 (2002) (reporting that Dutch judges and doctors ascribe different meanings to the term “dangerous” in a civil commitment context).

135. The Minnesota Supreme Court has further weakened the possibility of meaningful oversight of sex offenders in holding that sex offender commitment courts need not make “specific” factual findings in support of commitment. Factual specificity allows appellate courts to look behind the legal boilerplate recited in trial court decisions, to make legal judgments about the sufficiency of trial courts’ application of conclusory legal categories such as “highly likely.” Ironically, the commitment act (See MINN. STAT. § 253B.09, subd. 2 (2002)) provides for, and the appellate courts have emphasized, the necessity of factual specificity in standard civil commitment cases, where the stakes, both for the individual and the community, are arguably much lower. Compare, *Linehan II*, 557 N.W.2d at 190 (“the factual specificity requirements for other civil commitment findings were not adopted in the SDP Act”), with *In re Danielson*, 398 N.W.2d 32, 37 (Minn. Ct. App. 1986) (“the drafters of the Commitment Act clearly intended to require specificity in the findings of the trial courts”).

136. Brooks has analyzed “dangerousness” into four elements: likelihood, severity, imminence, and frequency. Much discussion of dangerousness focuses only on the first factor, with the classification turning on whether the probability

and judicial gloss set wide, rather than narrow standards.

Early on, a Minnesota intermediate appellate court decision suggested that the *severity* of the harm, as well as its likelihood, would be legally relevant.¹³⁷ But since then, only one appellate case has turned on that distinction,¹³⁸ and another panel of the court of appeals has disavowed that decision.¹³⁹ Further, the restrictions on severity apply only to SPP commitments, having been rejected in the SDP law.¹⁴⁰

The Minnesota Supreme Court has specifically held that there is no "imminency" requirement for commitment.¹⁴¹ Thus, those confined may include individuals who would not commit a dangerous offense for decades if released into the community.

Finally, in perhaps the most serious blow to the underlying principle of "selective incapacitation," the Minnesota Supreme Court held that the sex offender commitment laws impose no "least restrictive alternative" requirement on sex offender commitments. To reach this holding, the Court had to ignore its previous jurisprudence.¹⁴² Though the legislature subsequently inserted a less restrictive alternative provision of sorts, it is weaker than the equivalent provision applicable to normal civil commitments, placing the burden on the respondent to prove that "a less restrictive treatment program is available that is consistent with the patient's treatment needs and the requirements of public safety."¹⁴³ To my knowledge, this provision has never been raised successfully by a respondent.

The perverse effects of this weakening of the least restrictive

of future dangerous behavior is judged high enough to warrant state intervention. But the other three elements ought to figure, as well, into the judgment about who poses the "most danger." Marie A. Bochnewich, Comment, *Prediction of Dangerousness and Washington's Sexually Violent Predator Statute*, 29 CAL. W. L. REV. 277, 298 (1992), (citing Alexander D. Brooks, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM (1974)).

137. *In re Rickmyer*, 519 N.W.2d 188 (Minn.1994).

138. *In re Robb*, 622 N.W.2d 564, 572 (Minn. Ct. App. 2001).

139. *In re Preston*, 629 N.W.2d 104, 112 (Minn. Ct. App. 2001).

140. *See In re Robb*, 622 N.W.2d at 573.

141. *Linehan III*, 557 N.W.2d at 190 ("[T]he Act does not limit the prediction by time period.")

142. *Compare Hennepin County v. Levine*, 345 N.W.2d 217, 219-20 (Minn. 1984), *with In re Senty-Haugen*, 583 N.W.2d 266, 268 (Minn. 1998) (stating "[o]ur reading of the relevant statutes suggests that . . . Minn. Stat. § 253B.185, governing SPP/SDP commitments, simply does not require that such commitments be made to the least restrictive treatment program").

143. MINN. STAT. § 253B.18, subd. 1 (2002).

alternative principle are well-illustrated in the *Senty-Haugen* case.¹⁴⁴ All parties agreed that Senty-Haugen could be safely and appropriately treated in a community facility, but the county refused to pay and sought his commitment to a secure (and considerably more expensive) institutional facility.¹⁴⁵ The trial court ordered him committed and the court of appeals affirmed, holding that the government had no obligation to fund the less restrictive (and less expensive), though suitable, alternative.¹⁴⁶ On review, the supreme court took an even broader approach, holding that the sex offender commitment laws placed on the state no obligation to seek or utilize appropriate alternatives to full-blown institutionalization, even when those alternatives actually exist and are funded.¹⁴⁷

The result of the case, of course, is the commitment of an individual who was not among the “most dangerous,” at least in the sense that the risk he posed could have been adequately managed in the community. By broadening the net for civil commitment, this decision contributes to the radical misallocation of prevention resources, and thus arguably weakens rather than strengthens the state’s prevention efforts.

The legislative response to the case inserted a least restrictive alternative requirement, but diluted it by putting the burden on the respondent and limiting its application to alternatives that are “available.” But this approach is mere window dressing and demonstrates a failure to understand that the appropriate use of the sex offender commitment resources is key to the efficacy of the state’s policy. To date, this provision has never been applied by an appellate court to insure that only the “most dangerous” individuals are committed.

2. *Discharge*

The fidelity of the sex offender commitment scheme to the principle of selective incapacitation turns as much on the discharge of detainees as it does on their admission. A system that retains individuals who do not constitute the “most dangerous” contributes to the misallocation of scarce treatment and prevention resources.

144. 583 N.W.2d 266.

145. *In re Senty-Haugen*, 583 N.W.2d at 267.

146. *Id.*

147. *Id.*

There are two defects with the Minnesota retention and discharge process. First, the legal standards insure that the most intense and expensive services will continue to be used even after an individual's risk drops below the "most dangerous." Second, the practical method used by the state to judge readiness for release appears to be seriously uncorrelated with risk.

First, in *In re Call*, the Minnesota Supreme Court rejected the principle that a committee should be moved out of the most restrictive (and expensive) commitment placement as soon as his risk dropped below the "most dangerous."¹⁴⁸ The court held that detainees could be retained under commitment so long as they continued to "need" inpatient commitment and to pose "a danger" to the community, even if they fall below the threshold for initial commitment.¹⁴⁹ In a sense, this standard permits sex offenders to be held in expensive, intense placement until they are among the least dangerous (no longer pose "a danger" to the community), thus violating the basic premise of sex offender commitments—selective incapacitation.¹⁵⁰

Second, the system adopted by the state for determining readiness for community placement is likely not optimally designed for assessing when the risk of such placement is at an acceptable level. The state has adopted a single measure¹⁵¹ of determining when committed individuals should be discharged to the community—completion of the prescribed sex offender treatment program.¹⁵² There are good reasons to doubt that this measure is optimally related to assessing the risk of community placement. To begin, though the program has been in effect for nearly ten years, only one person (out of nearly 200 eligible) has "graduated" from the program and been placed on provisional discharge. At the

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

149. *Id.* at 319.

150. *See, e.g., Crocker v. O'Keefe*, No. CX-02-712, 2002 WL 31248485, at *2-3 (Minn. Ct. App. Oct. 8, 2002) (describing the Minnesota Court of Appeals' observation that "[t]he supreme court has rejected reliance on 'good behavior in the artificial environment of a hospital,'" and the court's finding that Crocker had not even established a *prima facie* case for discharge despite expert evidence that "if this determination is approached from a more dynamic perspective (provided he refrains from drinking), the conclusion is that he is unlikely to be dangerous").

151. The Minnesota Department of Human Services only recently established a separate program for sex offenders with cognitive impairments. *See* MINNESOTA DEPARTMENT OF HUMAN SERVICES, SPECIAL NEEDS SERVICES MANUAL (unpublished material on file with author).

152. *See* Schlank, *supra* note 25.

present time, only about 3% of the residents have reached the final, or “transition” stage of treatment.¹⁵³ During the period 1999 to mid-2002, the number in the top three stages (out of five stages) of treatment remained nearly unchanged,¹⁵⁴ decreasing from 15% to 13% as the total population has grown.¹⁵⁵ Just recently, the program reported an increase of the top three levels by six residents to 18% of the total group as of the fall of 2002.¹⁵⁶ According to information from the Minnesota Department of Corrections, approximately 20% of the residents are not participating in treatment, and an additional 40% are making no progress in treatment.¹⁵⁷

Of course, these rather dismal progression and graduation rates have meant that almost no one has been discharged even provisionally, a result that, in itself, is neither good nor bad. In fact, some prosecutors argue that the low “success” rate is actually a sign of a successful program, indicating that the program is continuing to detain offenders who remain dangerous.

However, despite some research evidence to the contrary,¹⁵⁸ there is no specific evidence that failure to progress in the Minnesota treatment program is a valid measure of risk of reoffense in the community. In fact, the available evidence suggests that, at least for some substantial subgroup of detainees, failure in treatment is unrelated to level of risk in a properly supervised community setting. In a November 2002 symposium, the director of the Minnesota Sex Offender Program acknowledged that the program staff had estimated that about 25% of the current residents could be placed in the community, given appropriate supervision.¹⁵⁹ Since this proportion is about eight

153. Schlank, *supra* note 30 (stating that there are five in transition stage out of 182 total eligible for participation).

154. In 1999, twenty-six individuals were in phases III, IV and Transition. The number as of February 2002 was twenty-four, but Dr. Schlank reports that it has grown to thirty-three as of September 2002. The 1999 figures are derived from an oral presentation by Anita Schlank. Those for February 2002 are from a fax from the Department of Human Services to Paul Demko. The September 2002 figures are from an email from Anita Schlank dated Nov. 24, 2002.

155. During the indicated time, the total population grew from 141 to 179.

156. Schlank, *supra* note 29.

157. MINN. DEP'T OF CORR. BOARD STUDY, *supra* note 11, at 13.

158. Hanson et al., *supra* note 99.

159. Schlank, *supra* note 29 (“[W]e estimated that there were approximately 48 individuals who were likely not an escape risk and if, at the time of their commitment, there had been a residential treatment program that accepted Level Three sex offenders and could ensure that they were observed around-the-clock

times the proportion of residents who have attained the transition level, and since almost all of the community-ready committees are either non-participants in the treatment or at the lowest level of treatment,¹⁶⁰ it follows that treatment program success is, at least in some important ways, inversely related to community risk. The MSOP has apparently never been formally evaluated to determine what accounts for the miniscule rate of progress,¹⁶¹ and its FY 2003 Operational Plan is only at the stage of proposing an “alternate treatment track for individuals who chronically refuse to participate in sex offender programs.” At a broader level, the State Operated Forensic Services of the Department of Human Services has only recently proposed the development of “appropriate clinical pathways based on client characteristics, rather than commitment status,” a project that will involve identifying “patients whose treatment needs are not currently being adequately met (as indicated via lack of progress toward less restrictive settings).”¹⁶²

There is growing evidence that the aging process by itself reduces risk.¹⁶³ Based on a study by Hanson,¹⁶⁴ Barbaree concludes that recidivism rates decrease by 0.5% per year as a function of age-at-release from custody.¹⁶⁵ A substantial cohort (about one-third) of the commitment group has been committed for eight years or longer.¹⁶⁶ It is reported that younger detainees (age 35 and

and prevented from any access to potential victims, it seemed possible that they could have been placed there with a ‘stayed commitment’ hanging over their head in case they did not succeed.”). However, Dr. Schlank qualified her statement by acknowledging that “in no way do I consider myself an expert on assessing escape risk.” *Id.*

160. *Id.* (indicating that “half are treatment refusers, four are Phase III, five are Phase II and the rest are Phase I”).

161. Recently, I have made several requests to the Minnesota Department of Human Services for any available evaluations. None have been furnished. However, a 1996 Report concluded that the MSOP program was a “state-of-the-art program,” but emphasized the need for a “process which allows a patient to gradually leave the building at some point with whatever security measures are deemed necessary . . . as the only way that the treatment program can evaluate an individual’s progress. Without this form of assessment, sex offender treatment is a theoretical process which focuses on the remote future and has to deal with ‘what if’s’.” *Executive Summary*, unpublished manuscript on file with author.

162. State Operated Forensic Services, Operational Plan – Fiscal Year 2003, Project/Goal 4.

163. Hanson, *supra* note 65.

164. *Id.*

165. Barbaree, *supra* note 59.

166. See Janus & Walbek, *supra* note 23 (Table 1, reporting that, as of December 1999, ten residents had been committed more than ten years and fifty-seven more than five years).

younger) are demonstrating the “most optimistic” response to the treatment program, participating at a higher rate and more consistently than the rest of the program.¹⁶⁷ This suggests that age—which is inversely related to risk—is directly related in some way to treatment failure, again corroborating the possibility that failure to succeed in treatment is not related in any kind of direct or simple way to lowered risk of recidivism.¹⁶⁸

Finally, I am familiar with several cases in which competent mental health experts have evaluated residents who have stagnated at the earliest stages of treatment for a decade or more. The evaluations have suggested two things. First, one could make a reasonable case that the failure in treatment has resulted from a mismatch between the individual’s capabilities and the demands of the treatment program.¹⁶⁹ Second, despite the total failure of treatment, these individuals present risks that are manageable in the community.

Failure in the treatment program, in other words, may turn on a number of factors, some of which may be entirely unrelated to risk. Thus, while treatment completion may be a positive sign for lower risk,¹⁷⁰ treatment failure (or lack of treatment progress) may reflect other sets of disabilities rather than high risk, and may fail to assess whether risk can be appropriately managed with proper supervision in the community. As a result, using the treatment program as the sole screening device for discharges fails to take into account the range of risks posed by committed individuals. Continued commitment then reflects lack of ability (or motivation) to negotiate the treatment program, rather than a measure of the

167. MINN. DEP’T OF CORR. BOARD STUDY, *supra* note 11.

168. The Department of Human Services’ Proposed Operation Plan for Fiscal Year 2003 tacitly acknowledges the issue of age and risk: “Identify elder MSOP patients with no or low rate of treatment participation and with low security and low to moderate medical care needs.”

169. An additional explanation for the lack of treatment progress by some residents, suggested by Dr. Schlank at the WMCL Symposium, is “institutionalization,” a phenomenon in which the detainee becomes comfortable with and dependent upon the care provided by a total institution like MSOP. *See, e.g.*, Jenny Kretev, Pathena Prokipidis & Evan Sycammias, *The Psychological Effects of Imprisonment*, available at <http://www.uplink.com.au/lawlibrary/> (last visited January 10, 2003) (“Some inmates may totally adjust to prison life. This notion is referred to as ‘institutionalization.’ This is where the ‘inmate loses interest in the outside world, views the prison as home, loses the ability to make independent decisions, and in general, defines him or herself totally within the institutional context.”).

170. Hanson et al., *supra* note 99.

magnitude of risk posed by the individual.

In short, the system for discharge insures that the commitment system will retain even those individuals who fall below the “most dangerous” level of risk,¹⁷¹ further exacerbating the departure from the principle of selective incapacitation.

3. *A Green Light*

Taken together, the Court's jurisprudence gives a green light to sex offender commitments in Minnesota. Though the Court says that the Constitution allows only very narrow latitude for commitment,¹⁷² and the Court recognizes that its role is to intervene to insure this limited application, its actions speak otherwise. The message from the Court's decisions is that there are no enforceable standards for judging dangerousness. The Court's decisions send the signal that alternatives less restrictive—and less expensive—than total high security incarceration are not seriously to be considered, either at the beginning of commitment or at the end.

The Court's permissive stance toward sex offender commitments has substantial irony. Its minimalist approach to supervising this extraordinary form of governmental intervention appears to be motivated by its view of the compelling weight of the state's interest in preventing sexual violence. At a superficial level, it might appear that broadening state power to use civil commitment is consonant with that goal. But the broad prosecutorial and lower court discretion, together with appellate abdication of supervision, probably has the reverse effect. By failing to set standards or to provide meaningful review, the Court's jurisprudence fails to provide assurances that civil commitment is used sparingly, and only as absolutely necessary. The Court sends

171. The constitutional problem posed by the failure of the treatment program is complex. It is a subject addressed at length in a recent article by Prof. Wayne Logan and myself. In the article, we argue that states have only a reasonable period of time to accomplish the treatment goals of commitment. When that time expires, commitment must end. The essential theory is that the duration of commitment matters. Commitments that extend too long become punitive. Further, the duration of commitment must be related to its purpose, in this case, treatment. Finally, in several key cases, the Supreme Court has indicated that this durational relationship requires that the state make some progress in its non-punitive purpose. Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Dangerous Predators*, 31 CONN. L. REV. (forthcoming 2003).

172. See *Linehan III*, 557 N.W.2d 171.

the signal that civil commitment can be used expansively, rather than sparingly. The sex offender commitment population continues to grow without near term limit, because of steady new commitments and no discharges. This steady growth will require ever growing resources for ever-diminishing returns.

E. Do Sex Offender Commitments Actually Increase Recidivism?

In the discussion above, I have asked whether sex offender commitment laws embody a misallocation of scarce treatment and prevention resources, spending extraordinary sums on a miniscule percentage of the problem. If I am correct in my analysis, this resource allocation choice results in a less effective social response to sexual violence and a missed opportunity to prevent sexual violence. In this section, I address a slightly different question: do sex offender commitment laws actually (though unintentionally) *increase* sexual violence by creating powerful net disincentives for imprisoned sex offenders to engage in treatment?

Common sense might suggest that the answer to this question is surely “no.” As a matter of conventional wisdom, behavioral science, and bureaucratic practice, imprisoned sex offenders who are potential candidates for commitment might believe that successful completion of treatment will serve to inoculate them from selection for commitment. Since, this reasoning continues, sex offenders will view commitments as tantamount to life imprisonment, they will have a strong incentive to take the step that is most readily available to them—completion of treatment—as a means of reducing their risk of commitment.

Though this narrative has a certain definitiveness, it tells at best half the story. I suggest that sex offender commitments might also function as a treatment disincentive. If so, then sex offender commitment will pull offenders in opposite directions, and the net effect will be difficult to judge without the kind of empirical study that has not been done.

We can identify three ways in which sex offender commitments might have an effect on upstream treatment participation. First, the “coercion” effect acknowledges that coercion is critical in inducing many sex offenders to undertake treatment, but suggests that excessive coercion may backfire and produce treatment failures. Second, the “treatment-status” effect is based on the fact that an individual’s status with respect to treatment is a factor that is taken into account in determining whether or not to commit

him, and that failure at treatment places an inmate at greater risk of commitment than treatment refusal. Third, the "treatment-admissions" effect recognizes that treatment requires full disclosure of prior sex crimes, and that these disclosures can be used to bolster commitment cases. Each of these effects is a hypothesis without full empirical support, and each could clearly be the subject for a study in itself. Here, I will simply outline the salient known facts that suggest that the effect might exist.

1. *The "Coercion" Effect*

Whether intentional or not, the possibility of sex offender commitment may serve as a form of coercion, creating an incentive to induce imprisoned sex offenders to participate in sex offender treatment. Indeed, some form of coercion is an integral part of sex offender treatment. Many sex offenders will not attend or cooperate with treatment without substantial coercive pressure. Sexual misbehavior is, for some, highly pleasurable and highly ingrained. These individuals will change only if there is substantial pressure to learn the lessons of sex offender treatment.¹⁷³ This pressure most often comes from the legal system. Thus, the interconnection between treatment and coercive sanctions is not a small or inconsequential aspect of treatment, but rather a central feature.

However, this "incentive" feature of sex offender commitment may be moderated because treatment is already mandatory for many convicted sex offenders, either as a condition of parole or probation,¹⁷⁴ or by reason of Minnesota law that lengthens the time in custody for inmates who fail to participate in prison-based treatment.¹⁷⁵ In addition, while it is clear that some form of coercion is necessary to induce participation in treatment, at least for many sex offenders, there is also evidence that too much coercion can be counter-productive, increasing treatment failure, thus suggesting that the incentive effect of civil commitment may

173. Judith Lewis Herman, *Sex Offenders: A Feminist Perspective*, in HANDBOOK OF SEXUAL ASSAULT 177, 185 (W. L. Marshall, D. R. Laws, & H. E. Barbaree eds., 1990).

174. ANNA C. SALTER, TREATING CHILD SEX OFFENDERS AND VICTIMS: A PRACTICAL GUIDE 42, 171 (1988); SEX OFFENDER REPORT, *supra* note 69, at 10 (stating 71% of the offenders were ordered by the sentencing court into sex offender treatment).

175. MINN. STAT. § 244.05, subd. 1b(b), (1993). This law penalized inmates who refused directives to participate in treatment. *Id.*

be uncertain. Marshall and Barbaree report that while “one might expect [high external pressures] to account for the low rate of dropouts,” “oddly enough” some researchers “report that the highest rates of withdrawal from their program occurred in those patients who felt the greatest pressure to participate in therapy.”¹⁷⁶ Also, the fact that the incentive is driven by such a powerful negative contingency may serve to transform the nature of the correctional treatment itself. Correctional treatment programs that are “punitive” have been shown “to worsen rates of recidivism.”¹⁷⁷ As Rice puts it: “Programs based on fear or punishment . . . have been considerably less effective than other programs, and some of these programs may even be harmful for certain offenders.”¹⁷⁸

Thus, the net effect of sex offender commitments as a treatment-incentive is uncertain. Any increase in prisoner treatment participation may be offset by the souring effects of the highly coercive and punitive nature of the incentive.¹⁷⁹

2. The “Treatment Status” Effect

One factor taken into account in determining whether an individual will be referred for commitment, and ultimately committed, is his status with respect to treatment. Treatment success or failure is an item in the Minnesota Sex Offender Screening Tool.¹⁸⁰ The Civil Commitment Review Coordinator also takes this into account.¹⁸¹ In these processes, treatment failure is

176. W. L. Marshall & H. E. Barbaree, *Outcome of Comprehensive Cognitive-Behavioral Treatment Programs*, in HANDBOOK OF SEXUAL ASSAULT, 363, 375 (1990) (citing G.G. Abel et al. *Predicting Child Molesters' Response to Treatment*, ANNALS OF THE NEW YORK ACADEMY OF SCIENCES 528, 223-34 (1988)).

177. McGuire & Priestley, *supra* note 83, at 10.

178. Marnie E. Rice & Grant T. Harris, *The Treatment of Mentally Disordered Offenders*, 3 PSYCHOL. PUB. POL'Y & L. 126, 145 (1997).

179. Andrews, *supra* note 83, at 38 (stating “the average effect of an increase in the severity of the penalty was a very small increase in recidivism, plus a detectable (but not strong) tendency for custody to attenuate the positive effects of appropriate human service programs”).

180. Douglas L. Epperson et al., *Predicting Risk of Recidivism for Incarcerated Sex Offenders: Updated Development on the Sex Offender Screening Tool (SOST)*, Presentation at the annual conference of the Association for the Treatment of Sexual Abusers (Oct. 1995). See also, Glenn E. Ferguson, et al., *New Jersey's Sex Offender Risk Assessment Scale: Preliminary Validity Data*, 26 J. OF PSYCHIATRY & L. 327, 350-51 (1998) (sex offender treatment history and current involvement constitute two items in thirteen-item screening tool).

181. Stephen J. Huot, *Demographics and Recidivism*, in SEXUAL PREDATORS: EVALUATING, TREATING & RELEASING VIII (Minn. Inst. Legal Educ. 1997).

viewed as increasing the risk of sexual recidivism and suitability for commitment, while treatment success decreases these concerns. Non-entry into treatment, on the other hand, is seen as neutral, neither increasing nor decreasing risk.¹⁸²

The potential treatment disincentive arises from the fact that treatment-failure increases the risk of commitment above even treatment-non-participation. Sex offender treatment programs have significant failure rates.¹⁸³ It follows that an offender does not know, in advance of treatment, whether he will be successful in treatment or fail treatment. As I explore below, the rational mental calculations of an offender might conclude that the safest bet is to avoid treatment altogether.

Most likely, this line of thinking would characterize high-risk individuals who are most in need of intensive treatment.¹⁸⁴ These are the individuals who are most at risk for commitment, and for whom treatment-status is most likely to tip the balance with respect to commitment.

Imagine how the world might look to an incarcerated sex offender trying to decide whether to participate in treatment. Sex offenders in prison may well be aware that participation in treatment does not immunize them from civil commitment. My research with Dr. Nancy Walbek shows that 64% of persons committed after 1990 had participated previously in treatment.¹⁸⁵ Information provided by the Minnesota Department of Corrections indicates that 57% of a slightly different group of sex offender committees had participated in sex offender treatment prior to commitment.¹⁸⁶ This report states that 48.6% had participated but

182. Epperson et. al., *supra* note 179; Hanson & Bussiere, *supra* note 124, at 14 (“Contrary to what is commonly assumed, those sexual offenders who denied their offenses were no higher risk than other offenders (average r of .02, with no significant variability).”). However, among those offenders who began treatment, those “who were unmotivated to attend treatment, or who failed to complete treatment, were at greater risk for general recidivism than those who completed treatment ($r=.14$).” Hanson & Bussiere, *supra* note 124, at 16.

183. See Janus & Walbek, *supra* note 23, at 356.

184. See, e.g., J. Stephen Wormith & Mark E. Olver, *Offender Treatment Attrition and its Relationship with Risk, Responsibility, and Recidivism*, 29 CRIM. JUST. & BEH. 447, 448-49 (2002) (defining the “risk principle” holding that “public safety will increase when higher risk offenders . . . are referred to and complete appropriately devised treatment;” and further noting that “client characteristics that put the offender at risk for not completing treatment are also likely to put him or her at risk for recidivism”); Andrews, *supra* note 83 at 374.

185. Janus & Walbek, *supra* note 23, at 366.

186. Stephen J. Huot, *Presentation: Development and Use of the Minnesota Sex*

not completed treatment, 8.6% had participated and completed treatment, and 43% had never participated in treatment.¹⁸⁷

Consider further that entry into treatment is not a guarantee of successful completion. In fact, a large percentage of those who participate fail treatment. Treatment participation and completion rates are variable.¹⁸⁸ The Minnesota Legislative Auditor, citing the literature, has stated that “in many programs large numbers of offenders are terminated or withdraw from treatment (up to 30 to 50 percent).”¹⁸⁹ Stephen Huot reported in 1998 that about 50% of prisoners enter sex offender treatment, but that only 50% to 60% of those sex offenders complete treatment.¹⁹⁰

If we consider this information with the data about treatment-status for committed individuals, we can estimate the odds of being committed as they might appear to a numerate and rational sex offender trying to decide whether or not to enter treatment. The odds of being committed for persons who *enter* treatment are approximately 5.7/100, whereas the odds for individuals who *do not enter* treatment are 4.3/100.¹⁹¹ Of course, the odds for treatment *completers* are lower than for treatment *failures*, but *ex ante*, sex offenders do not know whether they will be successful or not. To the extent that these odds also represent commonsense assumptions, fear of lifetime commitment may induce some high risk sex offenders to stay out of treatment altogether, rather than

Offender Screening Tool, Civil Commitment Study Group (May 11, 1998) (on file with author) (reporting on ninety-three residents of the Minnesota Sexual Psychopathic Personality Treatment Center in January 1998).

187. *Id.*

188. J.K. Marques et al., *Effects of Cognitive-Behavioral Treatment on Sex Offender Recidivism*, 21 CRIM. JUST. & BEH. 28, 33 (1994) (reporting that the authors note that “[r]ates of treatment withdrawal and termination vary widely depending on a number of factors (e.g., offender motivation, program requirements, consequences of leaving treatment)”, and citing an example of a treatment program in which nearly 35% of those entering failed to complete the program).

189. PROGRAM EVALUATION DIV., OFFICE OF THE LEGIS. AUDITOR, STATE OF MINN., *SEX OFFENDER TREATMENT PROGRAMS* 41 (July 1994) (citing Marques et al., 1991 *Report to the Legislature on the Sex Offender Treatment and Evaluation Project*, 9-10).

190. Huot, *supra* note 185.

191. The calculations assume the following: 50% of imprisoned sex offenders enter treatment; 25% complete; 25% fail. Among committed sex offenders: 9% had succeeded at treatment, 48% had failed, and 43% had no treatment. Finally, I assume that 5% of released sex offenders are committed. The “odds” of being committed for a given group (e.g., treatment completers) equals the number of group members who are committed divided by the total number of group members.

risk treatment failure.

3. *The Treatment Disclosure Effect*

A third way in which the existence of sex offender commitment laws may create a treatment disincentive is by breaching the normal rules of confidentiality that protect disclosures in therapy.¹⁹² Sex offender commitment laws destroy confidentiality in multiple ways. Government officials are allowed access to complete treatment records even prior to the commencement of a civil commitment petition.¹⁹³ Further, once a commitment petition has been filed, the traditional rules of treatment privilege are waived and provide no protection.¹⁹⁴ Case law in Minnesota explicitly identifies treatment information as discoverable,¹⁹⁵ admissible,¹⁹⁶ and relevant to determining both the mental disorder and the prediction elements of the sex offender commitment law.¹⁹⁷ Prosecutors teach each other to obtain otherwise private treatment data as part of the pre-petition review to determine whether to proceed with a commitment,¹⁹⁸ and that

192. MINN. STAT. § 595.02, subd. 1(d) (2002) (establishing a patient-physician privilege); MINN. STAT. § 144.651, subd. 16 (2002) (providing for the confidentiality of medical records).

193. Minnesota law provides for access to data by the county attorney: Notwithstanding [other statutory sections], prior to filing a petition for commitment as a sexual psychopathic personality or as a sexually dangerous person, and upon notice to the proposed patient, the county attorney or the county attorney's designee may move the court for an order granting access to any records or data, to the extent it relates to the proposed patient, for the purpose of determining whether good cause exists to file a petition and, if a petition is filed, to support the allegations set forth in the petition.

MINN. STAT. § 253B.185, subd. 1b (2002). See *In re Bartholomay*, 2001 WL 1645818 (Minn. Ct. App. Dec. 26, 2001).

194. *Bartholomay*, 2001 WL 1645818. See, also, MINN. STAT. § 253B.23, subd. 4 (2002).

195. *In re D.M.C.*, 331 N.W.2d 236, 238-39 (Minn. 1983).

196. *In re Martin*, 458 N.W.2d 700, 703 (Minn. Ct. App. 1990).

197. *Linehan I*, 518 N.W.2d at 614 (holding that courts should take "the person's record with respect to sex therapy" into account in determining likelihood of future harmful sexual conduct); *In re Mayfield*, No. C2-95-103, 1995 WL 254407, at *3 (Minn. Ct. App. May 2, 1995) (pointing to unsuccessful treatment and subsequent refusal of treatment in support of commitment); *In re Pirkel*, 531 N.W.2d 902, 907 (Minn. Ct. App. 1995) (holding that "refusal of treatment and lack of relapse prevention plan can show an utter lack of control"); *In re Young*, No. C1-94-1779, 1994 WL 654508, at *1 (Minn. Ct. App. Nov. 22, 1994) (treatment refused).

198. Patricia M. Buss & Pauline M. Halpeny, *Prosecuting the Petition*, in

treatment records provide “excellent sources of information about prior acts”¹⁹⁹

Although confidentiality is generally assumed to be critical to the establishment of an effective therapeutic relationship,²⁰⁰ its role in sex offender treatment may be even more critical, because of the material and dire consequences that may flow from the disclosures that are essential to effective treatment. Freeman-Longo and Blanchard observe that treatment effectiveness depends on a relationship of trust:

If treatment is to be effective, relationships must be built between therapists and abusers that foster openness, disclosure, honesty, and change. As with all human beings, sex abusers need to believe they will be treated with dignity and professionalism before they will let their guard down and risk being vulnerable.²⁰¹

Similarly, researchers Abel and Rouleau²⁰² focus on the need for valid information from the offender so that the therapist can “identify the precise treatment needs of the patient.” They report that the “most important” factor in increasing the validity and reliability of the offender’s self-reports is the “protection of confidentiality.” These scholars report on the unpublished research of Dr. Meg S. Kaplan, who compared the disclosures of offenders under two conditions, one in a criminal justice setting in which the offenders were promised “anonymity,” and the other in a mental health setting in which “elaborate steps” were taken to “explain and insure how the confidentiality” would be

PSYCHOPATHIC PERSONALITIES AND SEXUALLY DANGEROUS PERSONS, 1, 2 (Minn. Inst. Legal Educ. 1995) (stating “it is important to look at all records from the day the Respondent walked into the prison/jail until the day he/she left, giving specific consideration to their behavior, level of participation in groups, and their view of themselves while they were at the facility”).

199. Jancie M. Allen, *Meeting Standards for Commitment under the Psychopathic Personalities Statute: Petitioner’s Perspective*, in PSYCHOPATHIC PERSONALITIES AND SEXUALLY DANGEROUS PERSONS, 2 (Minn. Inst. Legal Educ. 1995).

200. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (“Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust, in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.”).

201. ROBERT E. FREEMAN-LONGO & GERAL BLANCHARD, *SEXUAL ABUSE IN AMERICA: THE EPIDEMIC OF THE 21ST CENTURY* 169 (Euan Bear, ed., Safer Society Press 1998).

202. Gene G. Abel & Joanne L. Rouleau, *The Nature and Extent of Sexual Assault*, in *HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES & TREATMENT OF THE OFFENDER* 9, 10 (William L. Marshall et al. eds., 1990).

maintained.²⁰³ Kaplan found that offenders in the first condition revealed only 5% of the sex crimes that they admitted to in the second, and that they admitted a greater number of paraphilias in the second compared to the first.²⁰⁴ Abel and Rouleau conclude:

These results confirm the powerful effect that confidentiality of information can have on the number of sex crimes reported. Since confidentiality is so powerful in influencing such reports, one should use caution when interpreting assessment or treatment studies that omit or leave vague the exact nature of how confidentiality was obtained.²⁰⁵

In yet another study, Kurt Freund assessed the role of confidentiality in obtaining disclosures from exhibitionists. In the first group, assurances of anonymity were given to subjects (“totally confidential, which was thoroughly explained to these patients”); in the other, disclosures were to be shared with evaluating or treating physicians. In the first condition, 25% admitted to having raped or attempted rape, whereas in the second, only 14.9% made the admission. Freund attributes the difference in disclosure rates to the difference in confidentiality.²⁰⁶

Successful participation in sex offender treatment requires full and candid disclosure of past sexual history and admission of responsibility.²⁰⁷ Studies uniformly show that most convicted sex offenders have committed a number of undetected sexual offenses in addition to the offense for which they are convicted.²⁰⁸ Further, a significant proportion of sex offenders exhibit high levels of denial as they enter treatment.²⁰⁹ In the average case, full

203. Abel & Rouleau, *supra* note 201, at 10-11. See Meg S. Kaplan, *The Impact of Parolees' Perceptions of Confidentiality on the Reporting of Their Urges to Interact Sexually with Children* (1985) (unpublished doctoral dissertation, New York University, on file with author and University of Minnesota Library); see also Meg S. Kaplan et al., *The Impact of Parolees' Perception of Confidentiality of Their Self Reported Sex Crimes*, 3 ANNALS SEX RES. 293, 301-302 (1990) (comparing psychological interviews with interviews conducted by parole officer).

204. Kaplan, *supra* note 202, at 299-300.

205. Abel & Rouleau, *supra* note 201, at 11.

206. Kurt Freund, *Courtship Disorder*, in HANDBOOK OF SEXUAL ASSAULT 195, 202 (1990).

207. Stefan J. Padfield, *Self-Incrimination and Acceptance of Responsibility in Prison Sex Offender Treatment Programs*, 49 KAN. L. REV. 487, 498 (2001).

208. Harris, *supra* note 41, at 559.

209. Stephen C. Brake & Diann Shannon, *Using Pretreatment to Increase Admission in Sex Offenders*, in THE SEX OFFENDER: NEW INSIGHTS, TREATMENT INNOVATIONS AND LEGAL DEVELOPMENTS (Barbara K. Schwartz & Henry R. Cellini,

disclosure by the client is likely to reveal legally valuable, and previously unknown, information about crimes.

Despite the importance of confidentiality, the conventional wisdom is that some limitations on confidentiality are necessary, especially for sex offenders. Coercion is critical in obtaining entry into and completion of treatment,²¹⁰ and disclosures of some sort may be necessary in effectuating the coercion. Further, the role of treatment as an adjunct to correctional intervention, assessment and supervision clearly requires sharing of information.²¹¹ In a report issued by the Minnesota Department of Corrections, treatment for sex offenders was viewed as “a critical part of the supervision of sex offenders placed on probation.”²¹² Prison-based treatment is seen as helpful in the “assessment of the most dangerous sex offenders.”²¹³

Thus, policy-makers must strike a balance between the confidentiality that encourages full disclosure in treatment, and the coercion that provides the motivation necessary to encourage full disclosures. Minnesota has struck a rather lopsided balance, stripping all protections from treatment disclosures so as to implement the most intrusive form of coercion: sex offender commitments. What remains uncertain is whether the highest-risk sex offenders will, on the whole, believe that full treatment disclosure is a route to avoiding commitment, or a method to provide the state with the evidence it needs to seal a commitment.

4. *The Consequences of Treatment Disincentives*

Do these disincentives make a difference? Let us perform one more brief thought experiment. Compare Option A, in which sex offender commitment laws operate normally, with Option D, in which sex offender commitments are eliminated. Under Option A, we assume that commitment produces a net disincentive to

eds., 1995), at 5-1, 5-13 (stating that 44% of sex offenders in treatment program initially presented with high levels of denial); Anita M. Schlank & Ted Shaw, *Treating Sexual Offenders Who Deny – A Review*, in *THE SEX OFFENDER: NEW INSIGHTS, TREATMENT INNOVATIONS AND LEGAL DEVELOPMENTS* (Barbara K. Schwartz & Henry R. Cellini, eds. 1995) 6-1 (citing studies showing that between 54% and 87% of sex offenders referred for treatment deny all or part of their crime).

210. See *supra* text accompanying note 173.

211. SALTER, *supra* note 173, at 172-73, 263.

212. MINN. DEP'T OF CORR. BOARD STUDY, *supra* note 11, at 10.

213. Stephen Huot, PowerPoint Presentation (June 8, 1999) (on file with author).

upstream treatment. Under Option D, this disincentive is absent. Suppose that as a result, the treatment refusal rate for sex offender prisoners drops from 50% in Option A to 40% in Option D. Assume, as well, that the treatment-failure rate experiences a similar drop, so that the success rate for those who enter treatment increases from 50% in Option A to 60% in Option D. Assume that the recidivism rates for each of these groups is as measured by the Department of Corrections in a six-year follow-up study: 14% for treatment completers (2.3% per year), 19% for those who never entered treatment (3.16% per year), and 22% for those who entered but quit or were terminated (3.67% per year).²¹⁴

Table 2 summarizes the application of these assumptions to a typical annual cohort of 400 sex offenders released from prison. The table calculates the possible effect of switching from Option A to Option D: Under Option D, an additional forty sex offenders would enter sex offender treatment, raising the total treatment participants to 240 from 200. The number of treatment completers would rise from 100 (50% of 200) to 144, while the number of treatment failures would drop from 100 to 96. The table then computes estimates, under both of the options, for the sex crimes prevented or committed during a six-year follow-up period. The table shows that 2.32 additional sex crimes would be prevented by the increased treatment participation under Option D.

For comparison, the table also estimates the number of crimes prevented during the same period by sex offender commitments (under Option A). This estimate uses two assumptions: the "high" assumption assumes that civil commitment locks up a large group with high recidivism; the "low" assumption posits a smaller

214. *Id.* The Minnesota figures are not out of line with results reported in a recent meta-analysis by Hanson et al. who found that treatment was associated with reductions in sexual recidivism from 17.3% to 9.9%. *Supra* note 99 at 187. Hanson et al. define the "relative reduction" rate as the difference between the treatment and non-treatment rates expressed as a percentage of the non-treatment rate. *See id.* at 189. In contrast, the "absolute" reduction rate refers to the numerical difference between the treatment rate and the non-treatment rate. *See id.* Using this terminology, Hanson et al. found a relative reduction rate of 40%, whereas the relative reduction found in Minnesota (between treatment completers and treatment failures) was 36%. Hanson et al. acknowledge that it is somewhat uncertain whether the reduction in recidivism is a true "treatment effect," rather than "unintended consequences of the research designs." *Id.* at 186. They conclude, however, that "the balance of available evidence suggest that current treatments reduce recidivism, but that firm conclusions await more and better research." *Id.*

commitment group and a more moderate recidivism rate. This portion of the table shows that eliminating civil commitment would allow an additional 2.16 (low assumption) to 13.3 (high assumption) sex crimes in the six-year period.

In sum, the table suggests that the disincentive effects of sex offender commitment laws may, under some assumptions, be about equal and opposite to the crime prevention effects of commitments, while under other assumptions, the disincentive effect would reduce, but not swamp, the prevention effect of commitments.

	Six- year Recidivism rate	Option A		Option D		Crimes prevented (allowed)
		Number	Sex crimes	Number	Sex Crimes	
Refusers	0.19	200	38	160	30.4	7.6
Failures	0.22	100	22	96	21.12	0.88
Completers	0.14	100	14	144	20.16	(6.16)
Total			74		71.68	2.32
Commitments						
high	0.7	19	13.3	0	0	(13.30)
low	0.18	12	2.16	0	0	(2.16)

Table 2. Possible Effects of Removing the Treatment Disincentive Effects of Sex Offender Commitments²¹⁵

IV. RECOMMENDATIONS AND CONCLUSION

As I have argued at length, sex offender commitment laws marginalize important constitutional prohibitions on preventive detention, and advance a paradigm of sexual violence that contradicts important advances in our social understanding of that scourge.²¹⁶ These laws place the important fight against sexual violence on an infirm foundation. They should be repealed for those reasons alone.

But even if one rejects these concerns for justice and social meaning, a central practical problem with Minnesota’s sex offender

215. See *supra* note 213 and accompanying text. For commitment recidivism numbers, see *supra* Table 1.

216. See, e.g., Eric S. Janus, *Civil Commitment as Social Control: Managing the Risk of Sexual Violence*, in DANGEROUS OFFENDERS 85 (Mark Brown & John Pratt eds., 2000) (observing that SVP laws undercut important advances in understanding sexual violence achieved through the feminist revolution).

commitment scheme remains: its excessive and disproportionate allocation of resources. The fateful choice to use the civil commitment format to address sexual violence now demands an ever-growing allocation of scarce protection and prevention dollars. Unsurprisingly, the growth in funding for civil commitment is associated with the failure to fund adequately a continuum of services and supervision for sex offenders in the community. While the choice facing prosecutors and courts in determining the placement for sex offenders is not precisely "all or nothing," the scarcity of community supervision and treatment means that they must choose between "excessive" and "inadequate" interventions for risky sex offenders.

How did we get to this unbalanced approach, and how can we get out of it? The decision to use civil commitment is, in my judgment, largely to blame. Civil commitment is "preventive detention," a concept that is foreign to our jurisprudence. It is, constitutionally, an extraordinary remedy that requires correspondingly extraordinary justification. Underlying the choice is the notion – expressed more or less explicitly – that there is a group of sex offenders who are "different" in kind, not just degree, from the "ordinary" sex offender. In reality, sex offenders, like all humans, are characterized by a continuum of variation on many axes, including risk. While the "difference in kind" notion supports a qualitatively separate response, the continuum in reality demands a proportionate, graduated response. Minnesota's choices so far have favored the former rather than the latter approach.

The choice of civil commitment follows from, and reinforces, the wrong question. We ask only "Who are the most dangerous?" rather than "How can we prevent the most danger?" The thought experiments set out in this article are designed to show that the choice of question matters – and that in answering the proper question, our choices and allocations of resources ought, as much as possible, to be based on evidence.

It is very possible that Minnesota's choice to use civil commitment has diverted us from approaches that would have prevented more crimes and saved more victims. It is time to begin seriously asking and answering these questions.

It is also time to take concrete steps to minimize any actual or potential resource misallocation. The evidence seems fairly clear that a net prevention of sexual violence might well result from the

total elimination of sex offender commitments and the transfer of resources to strong, well-funded interventions in the community and the criminal justice system. But, given the reality that sex offender commitments will not be eliminated in the near future, reform ought to be directed at insuring true fidelity to the central justification for sex offender commitments – that they confine only the “most dangerous.” Resources will be saved by insuring that extraordinarily expensive and intensive interventions are not used for ordinarily risky offenders. These saved resources ought to be put into adequately addressing the full range of risk among sex offenders in corrections and in the community.

I suggest the following steps to hew the system closer to balance. First, the courts should insist on the highest accuracy and accountability in the initial risk assessment that underlies selection for civil commitment. Actuarial risk assessment tools have weaknesses, but they are more accurate than clinical judgments. In order to insure accountability and uniform adherence to the “most dangerous” principle, courts should set quantified thresholds for risk. Actuarial assessments should provide the “fail safe” ceiling for risk assessment judgments – courts should allow no commitments for individuals whose risk, as estimated by actuarial tools, falls below the numerical threshold.

Second, the legislature should enact a strong “least restrictive alternative” provision. Courts should have the authority to direct the creation of suitable, community-based alternatives to institutionalization for the many cases in which such alternatives would provide suitable, and much less expensive, security.

Third, resources saved by containing commitment to only the truly “most dangerous” should be reallocated to other prevention and protection purposes. Especially needed are supervision and treatment resources in the community for those whose risk falls immediately below the “most dangerous” level, and resources for the extremely promising developments in primary prevention. Primary prevention has the potential to do the most good, not only because it addresses a huge number of crimes, but also because it has hope of intervening earlier in the careers of sexual abusers.

Fourth, committed offenders should be moved to community supervision as rapidly as possible. It is a mistake to insist that committed offenders be released only when their risk is at the lowest levels, while allowing the release from prison of a larger number of offenders whose risk levels range up to the thresholds

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for commitment. The better policy would be to reallocate the resources currently devoted to maintaining large committed populations to intensive supervision in the community, and move committed individuals to that community supervision as soon as it can be determined that their risk is no higher than the highest risk offenders who are released directly to those settings. Committed individuals should be moved into the community whether or not they have completed the treatment program. The relevant standard ought to be whether supervision conditions can be designed that will adequately protect the public.

For the sake of potential victims, we need to change course in this state. Minnesota's sex offender commitment scheme is not just a bad idea; it likely has bad consequences. It is a huge and disproportionate sink for resources that might be put to more effective use in the fight against sexual violence. Worse, its demand for resources will continue to grow, thus predetermining to a large extent how prevention and treatment dollars are spent. It is very possible that a more rational allocation of these resources would actually prevent more violence than the allocation that is automatically produced by the sex offender commitment scheme. At the very least, the fight against sexual violence demands a full, careful, and empirically-based study of the optimal approach to sexual violence.