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SEXUAL PREDATOR LAWS: A TWO-DECADE RETROSPECTIVE

Eric S. Janus

and

Robert A. Prentky

William Mitchell College of Law
875 Summit Avenue
St. Paul, Minnesota 55105-3076

www.wmitchell.edu
Direct: (651) 290-6310
E-mail: eric.janus@wmitchell.edu

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Sexual Predator Laws: A Two-Decade Retrospective

ERIC S. JANUS

President and Dean, William Mitchell College of Law

ROBERT A. PRENTKY

Associate Professor, School of Psychology, Fairleigh Dickinson University

The year 2009 approaches the twentieth anniversary of the birth of sexual predator legislation, a family of laws aimed at controlling sexual violence through "regulatory" schemes of prevention—schemes that claim exemption from the constraints surrounding the normal "charge and conviction" paradigm of the criminal justice system. This same two-decade time span has witnessed the most energetic, sweeping legislative agenda on sexual offenders in memory. This brief Article identifies the broad arc of these developments, tracing key legal issues, as well as the ways in which the existence of this new legal approach has shaped both other areas of the law and the behavioral sciences.

The underlying tenet of sexual predator legislation is the notion of *exceptionalism*: the assertion that sexual violence—at least in some forms—is different *in kind* from the common expressions of antisocial behavior that are the everyday object of the criminal justice system. Whether this notion of exceptionalism spawned the regulatory initiatives, or vice versa, is not entirely clear. What seems clear, however, is that the idea itself has been highly influential in driving multiple regulatory approaches to controlling sexual violence.[1] Moreover, it has put pressure on (or created incentives for) developments in the behavioral sciences,[2] and it may provide a model for preventive detention in other areas of the law, such as antiterrorism legislation. The real danger is that the notion of exceptionalism is a pretext that will eventually be forgotten or discarded, and we will be left with a new and unbridled regulatory approach to criminal behavior ungoverned by any principled limitations.

The principal articulated impetus for sexual predator legislation was the belief that sexual violence was rampant, posed a more insidious threat to the welfare of society than other criminal behaviors, and, as such, needed to be addressed not simply in the criminal law but by using a variety of interventions that were civil or "regulatory" in nature.[3] The central ideas are that the state commonly restricts liberty in the name of regulation, the key prerequisites derive from a nonpunitive purpose (perhaps benevolently *parens patriae* in spirit), and the risk of harm or danger is sufficient to balance the liberty-deprivation.

These initial insights have spawned several species of law. Sexually violent predator (SVP) commitment laws use a mental health model to physically confine offenders, generally after the expiration of their sentence.[4] Megan's Law[5] is a generic term denoting laws requiring registration and community notification of released sexual offenders.[6] Residential restriction laws generally prohibit sex offenders from living within a specified radius (often 1,000 feet) of places where children are known to gather.[7]

These are merely the most common forms of regulatory control of sex offenders. In practice, there are few limits on the regulatory lengths to which lawmakers may resort. A number of states have considered laws requiring sex offenders to use distinctively colored license plates.[8] And several have enacted laws requiring sex offenders to stay in their homes on Halloween evening and to avoid any contact with children related to the holiday.[9]

Early litigation challenged the constitutionality of the major forms of regulatory laws. A common theme in these challenges was the argument that the laws were in reality punitive, and therefore they violated a variety of constitutional limitations on punishment. Uniformly, however, the courts have held that the states acted with a proper, nonpunitive motive, and rejected these challenges.[10] Another challenge to the commitment laws argued that they violated substantive due process rights.[11] Essentially, this is an argument, rejected by the Supreme Court, that SVP laws fail to satisfy a key constitutional prerequisite of civil commitment, proof of "mental disorder." A related due process right, the provision of treatment for the presumptive mental disorder, was given short shrift by the Supreme Court in *Hendricks*.[12]

This Article traces some of the more significant developments arising from the introduction of this regulatory approach. First, we comment about the spread of civil commitment laws. Second, we describe some of the mutations that this legal approach has spawned. Third, we examine several ways in which SVP laws have had an impact on behavioral sciences (and vice versa), offering some observations about the potential import of this interdependence. Fourth, we provide some brief and speculative comments about the future of the regulatory approach in dealing with sex offenders. Finally, we offer an observation, and a warning, about the potential spread of the approach beyond sexual violence and into other traditional areas of the criminal law.

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I. The Spread of Civil Commitment Laws

The use of civil approaches to dealing with sexual violence has had an up and down history. In its first incarnation, from the late 1930s through the 1970s, "sexual psychopath" laws were adopted by over half the states.[13] In a brief period of time, between 1975 and 1981, half of those statutes were repealed.[14] By 1985, these statutes existed in only thirteen states, and were regularly enforced in only six states. The repeal of these statutes has been attributed to four factors: (1) the growing influence of the feminist movement, which opposed the "medicalization" of rape; (2) dissatisfaction among mental health professionals, primarily psychiatrists, as reflected in the 1977 report from the Committee on Forensic Psychiatry of the Group for the Advancement of Psychiatry (GAP), which dealt a mortal blow to the scientific legitimacy of these statutes, referring to them as "social experiments that have failed and that lack redeeming social value"[15]; (3) the prevailing "due process revolution" raised procedural and substantive due process issues and recognized rights that eventuated in suits filed on behalf of mental patients; and (4) a wave of societal disapprobation with treatment of sexual offenders led to treatment-oriented interventions falling increasingly out of favor.[16]

The second generation of these statutes, beginning in 1990, has, thus far, been unaffected by these four factors. By the eighteenth year of the new era, twenty states had adopted SVP laws, and the United States Congress had passed a civil commitment provision as part of the Adam Walsh Act.[17] In their earlier incarnation, the laws had a legitimate (if somewhat weak) theoretical grounding (coming from the progressive notion of the power of psychiatry and the redeemability of human beings), whereas the second manifestation was much more opportunistic, grabbing a handy tool to address a pressing political and social problem. No doubt, the biggest impediment to the spread of the laws in their second coming has been their cost. The average annual program cost has been estimated at $97,000 per person.[18]

It is difficult, and likely premature, to predict whether the SVP meme has run its course. As Dawkins[19] and other meme theorists contend, some memes propagate poorly and become extinct, while other memes are heartier, spread, and mutate, much like the SVP meme. Curiously, some meme theorists have argued that memes most detrimental to their hosts are the ones most likely to thrive and spread.[20]

Between 1990 and 1999, seventeen states passed SVP statutes. After a spate of adoptions, the spread slowed considerably, with no new SVP statute enacted for the next seven years. In 2006, Nebraska passed an SVP bill, followed by New York and New Hampshire in 2007. The federal version was added quietly to a bill whose main thrust was regularizing and nationalizing sex offender registration and notification laws and infrastructure.[21] Given the considerable struggle to pass the New York law, and the low visibility of the federal civil commitment law, it is likely that further spread of the civil commitment model will be sporadic.[22]

II. The Spawn of Other Mutations

That said, it is clear that the key conceptual frameworks that the SVP laws embody retain great power to shape a popular legislative agenda. Two of these key frameworks are built around the primacy of "risk" as a way of managing antisocial behavior, and the logic of the "degraded other." Together, these two frames advance the idea that sex offenders—alone among human beings—can be sorted according to their risk,[23] and that the proper way to address the risk is through identification and physical separation. Many of the newer legislative approaches are variations on this theme.

The power of these frames is evidenced by their ability to generate new laws that contradict clear empirical findings about best practices. A key example is residential restrictions, which continue to be enacted, despite a lineup of studies, many conducted by law enforcement agencies, concluding that these restrictions are counterproductive.[24] Similarly anti-empirical are the provisions specifically directed at juveniles in the Sex Offender Registration and Notification Act (SORNA), part of the Adam Walsh legislation passed in 2006.[25] Federal guidelines for the Adam Walsh Act prescribe an offense-based (no risk assessment) system of registration that will require everyone over the age of fourteen years who commits a sex offense to register.[26] The Act will categorize all offenders into three "Tiers." Tier I requires registration and notification for fifteen years, Tier II for twenty-five years, and Tier III for life.[27]

In practice, this requirement will fall especially heavily on juvenile sex offenders. The Act's requirements are especially onerous for offenders whose victims are under thirteen years old.[28] Because juveniles are the largest group of offenders against other juveniles,[29] experts argue, the provisions of the Adam Walsh Act will likely have a disproportionate impact on juveniles.[30] The underlying premise of SORNA, like all registration and notification laws, is that the constraint on liberty entailed by registration and notification is offset and justified by the avoidance of future risk—indeed, the special and unique risk of sexual recidivism. But much evidence suggests that juveniles who offend sexually are not at high risk of sexual recidivism,[31] and, perhaps as importantly, not at higher risk than other juveniles who are delinquents.[32]

Stepping back, we can make this comment on the spread of the regulatory paradigm beyond civil commitment. The regulatory paradigm correctly recognizes that all regulatory laws impose restrictions on liberty, and that such regulation must ordinarily be supported by some legislative assessment of harm or danger. The fundamental turn that the predator laws take is in asserting that the harm is manifested in *risky persons* (or the status of "dangerousness"), rather than *risky behavior* or *risky things*. Most regulation prohibits risky *behaviors* (e.g., drunk

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driving, speeding, dumping pollutants), or controls risky or dangerous *things* (e.g., radioactive waste). The radical shift in the predator laws is that the risk of harm is conceived as being a condition of the person, rather than simply a quality of the person's behavior. It is this radical shift that generates the need to establish the idea of exceptionality, that there are clear and principled limits on the legitimacy of regulating risky persons.

In the SVP commitment laws, the idea of exceptionality is made explicit, embodied in the mental disorder requirement. But (as we argue briefly below), in the implementation of SVP laws, the mental disorder element loses its pivotal role, and the notion of risk (harm) becomes ascendant as the real justification for the deprivation of liberty. This move from mental disorder to risk allows the regulatory paradigm to expand from civil commitment to public notification (akin to label warnings on dangerous products) and geographical separation (analogous to zoning restrictions on hazardous product disposal). The loss of the principled factor that makes predator laws exceptional (mental disorder) ominously opens the possibility of broad expansion of the paradigm.

III. Interactions with the Behavioral Sciences

A key claim in the argument for the legitimacy of the sexual predator paradigm is its reliance on the putative expertise of the behavioral sciences.[33] But the way in which science is presumed to legitimate predator laws has never been entirely clear, and this lack of clarity has led to confusion and ambivalence as courts seek to navigate the terrain of these laws.[34]

At the core of all of the sexual predator laws is the notion of risk—dangerousness—with a fundamental variation among the laws being whether risk is considered to be an adjudicated (individual) fact, or a legislative (group) fact. Many of the civil commitment laws, for example, contain legislative findings about the risk posed by sex offenders as a group, but all require adjudication of individual risk. In contrast, many of the notification and residential restriction laws impose restrictions on liberty based on legislative categories, with no requirement (or opportunity) for individualized risk assessments.[35]

The precise constitutional line between the two approaches has not been articulated, but it has been assumed that the deprivation of physical liberty (as in civil commitment) requires individual adjudication of risk, whereas registration, public notification, and (perhaps) residential restrictions do not. Although the Supreme Court has never explicitly made this distinction, its treatment of the registration/notification cases suggests this outcome.[36]

Perhaps by serendipity, the rise of civil commitment laws corresponded with a growth in research aimed at developing and improving empirically based risk assessment methods. This circumstance has confronted courts with an interesting set of predicaments. Had these risk assessment methods, including actuarial methods, *not* been developed (as was the case in the adjudication of "sexual psychopathy" under the old statutes), reliance on traditional clinical assessments of dangerousness would have been the only option. Despite the well-known weakness of clinical judgment in the prediction of dangerousness,[37] SVP courts (following the lead of the Supreme Court in its death penalty jurisprudence[38]) refused to hold that prediction-based deprivation of liberty was unconstitutional. Of course, the courts always left open the possibility that the actual assessment in a particular case would not be sound enough to meet (constitutionally imposed) standards of proof, but these are weight-of-the-evidence assessments, and have been viewed uniformly as comprising only questions of fact. As such, they generally escape appellate review, thus impeding the development of articulated legal standards of risk.[39]

The introduction of empirically developed and validated risk assessment scales cast the process in a new light. The long trail of empirical evidence finding that mechanistic methods are as good as (often better than) clinical predications[40] pushed courts in the direction of allowing the use of these scales (an issue often framed as a question of admissibility under *Daubert* or *Frye*).[41] The use of these mechanistic scales, however, has brought an unprecedented transparency to the risk assessment process, exposing clearly the nature and limitations of risk assessment.[42] Suddenly, courts were confronted with a number of potentially embarrassing facts: the group-based nature of risk assessment, the tension of applying probabilistic estimates from life tables to defendants who departed significantly from the membership of the reference groups used to derive the estimates, the difficulty of evaluating and incorporating dynamic risk factors, and the problem of translating statutory language into scientifically meaningful terms all became quite clear. By quantifying key elements of the risk assessment process, actuarial risk assessment (ARA) has given courts the tools to answer some difficult questions: How much risk is required? What is the time horizon for risk assessment? How is error to be assessed? Should it be expressed using group-based confidence intervals? What level of error is permissible? How is maturation (aging) to be adjusted for? How does treatment impact risk status? The science of empirical risk assessment, in short, gives courts a realistic opportunity to make clear decisions, set clear legal thresholds, and thus translate risk assessment into questions of law—legal standards—rather than unreviewable decisions of credibility or weight. To date, however, it is not at all apparent that this salutary effect of empirical risk assessment is materializing.[43]

Equally as central as "risk" to the legitimacy of civil commitment laws is the notion of "mental disorder." Key decisions of the Supreme Court have given some content and potential distinguishing clarity to this legal concept.[44] Nonetheless, strong forces prevail to insure that the mental disorder element does not limit the reach of regulatory control.

In the political and legal fights involving SVP laws, two important arguments have pointed to the central role for "mental disorder." Both of these arguments are designed to address the concern that surrounds the deprivation of liberty outside of the criminal "charge and conviction" paradigm. The first is a simple argument by analogy. Beginning with the established legitimacy of "standard" civil commitment, courts have asserted that SVP laws are "just like" traditional uses of civil commitment, because both require proof of some form of "mental disorder" proximately connected to risk.[45]

This simple argument proved inadequate, because critics argued (in a manner not seriously advanced in prior constitutional litigation) that the kind of mental disorder underlying SVP laws was different from the psychiatric illnesses traditionally underlying civil commitment, thus depriving the analogy of its power. This forced the courts to articulate two additional characteristics of constitutionally sufficient mental disorder. First, putting the legal aspect of constitutionality in the foreground, the Supreme Court held that it is the mental disorder element that underlies the exceptionality of SVP commitments.[46] To be constitutionally sufficient, a mental disorder must be distinct from the ordinary kinds of mental disorder frequently associated with the behaviors addressed by the criminal justice system.[47] Without much explanation beyond historical precedent, the court settled on the notion of control dysfunction to play this role.

The second puts science in the foreground. The Supreme Court has pointed to medical legitimacy (relying on the imprimatur of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM)) on several occasions as a factor supporting the legitimacy of SVP commitments.[48] Although the high court has never really explained in what sense medical legitimacy operates to make these schemes constitutional, the notion seems, at least implicitly, to underlie a good deal of the jurisprudence in state courts.[49]

The implications of these two aspects of constitutional mental disorder have been instructive. Given the key constitutional role played by the notion of control dysfunction, it is shocking to see the consistently subversive way in which the courts have deprived the control-dysfunction standard of any clear meaning. One of us (Janus) wrote about this phenomenon in the mid-1990s,[50] well before the Supreme Court in *Crane* confirmed the continuing constitutional centrality of the concept.[51] His conclusion then was that in fifty-five years of implementing the first generation of sex psychopath laws in Minnesota, over 300 people had been civilly committed, and in none of the cases was the control-dysfunction element mentioned in appellate review.[52] The vigorous litigation about the second-generation SVP laws focused intensely on the constitutional status, and meaning, of "inability to control." Janus reviewed the first twenty-five appellate cases that discussed control dysfunction in the 1990s. His conclusion: "nowhere in the corpus of [these] cases can one find a straightforward declarative sentence explaining how one distinguishes incapacity to control (a mental disorder) from a failure to control (criminal behavior)."[53] In a forthcoming publication, Prentky, Coward, and Gabriel call the control-dysfunction element "an 800 pound diagnostic gorilla, an essential defining characteristic of an indispensable statutory element that the weight of scholarly opinion regards in the same vein as divination."[54] The essential problem is that courts have eschewed almost any effort to define what control dysfunction might mean.[55] Most courts simply hide the determination inside nested findings of fact. In several states, juries are not even given a specific jury instruction that uses the "difficulty controlling" terminology.[56] A review of the appellate cases does not reveal any serious effort by courts to articulate standards governing the control-dysfunction criterion. The closest any courts have come to attempting a definition of the term is a series of California cases, holding that the only evidence that could demonstrate difficulty controlling behavior was evidence that the individual had tried, but failed, to cease engaging in illegal behavior.[57] This definition has clear failings.[58]

On the scientific side, there has been vigorous activity aimed at influencing the contours of the mental-disorder element. As mentioned, the courts seem to assume that, though the mental disorder criterion is a legal creation, it must be grounded on a mental disorder that has some medical legitimacy. The clearest and most obvious source for "medical legitimacy," the DSM, was never intended as a system for classifying criminal behavior, and consequently does not provide meaningful diagnoses for most of the individuals who are candidates for SVP commitments. The task of providing a legitimate diagnosis for SVP proceedings is further complicated by the fact that Antisocial Personality Disorder, a DSM disorder that legitimately applies to many sex offenders, is often assumed to be a constitutionally inadequate predicate for commitment.[59]

This confluence of factors has led to three scientifically unfortunate consequences, all of which are aimed at providing taxonomic coverage for sex offenders who are subject to SVP petitions. The first is a vigorous effort on the part of a few psychologists to develop and promote a new diagnosis, specifically for rapists, who otherwise would have no taxonomic home in the DSM. Second is the overuse of the DSM diagnosis *pedophilia*, applying it indiscriminately to individuals who offend against children (anyone under the age of consent), whether or not they meet the rather specific diagnostic criteria.[60] Third is a use of the term *hebephilia* to provide coverage for offenders whose victims are pubescent, but not yet adults (i.e., adolescents).[61]

Pedophilia, a medical diagnosis defined by the DSM, is a distinct subgroup of individuals who sexually molest children. Indiscriminately diagnosing petitioned child molesters into this diagnostic category[62] renders the diagnosis meaningless, undercutting the essential scientific purpose of classification—reduction of taxonomic

heterogeneity by assigning cases to maximally homogeneous groups. Lost is the diagnostic clarity that flows from assigning the offender to a differentiated *subgroup* of child molesters that might inform our judgment about that particular individual based on known subgroup characteristics.

Recognizing that *pedophilia* applies only to those whose victims are prepubescent, some examiners apply the label *hebephilia* to individuals who offend against adolescents.[63] Specifically rejected by the American Psychiatric Association for inclusion in the DSM, the diagnosis refers to an arousal that, according to the testimony cited by one court, characterizes "a significant portion of adult men."[64]

The diagnostic conundrum is perhaps even more serious for rapists, for whom the DSM provides no ready category. The result is a newly created "diagnosis of convenience": Paraphilia: NOS-Nonconsent. This diagnosis is not in the DSM. It is the creation of a psychologist who recognized the need to provide all rapists with a "home" in the DSM, just as child molesters have.[65] As explained by one examiner in a New Jersey SVP case, "Rape or coercive sex is not listed as a paraphilia. So we generally use this diagnosis, paraphilia, NOS in order to code for rape or coercive or nonconsent sex."[66]

Although this new diagnosis, which requires evidence of preferential arousal to nonconsenting partners, is plausible,[67] it would be very rare. It must be determined that the mere "nonconsent" of the victim is the preferred source of sexual arousal. Discerning who, among all rapists, are consistently and intensely aroused by the knowledge that the victim does not consent, is extraordinarily difficult. After several thousand evaluations, one of us (Prentky) has identified one rapist who would qualify for this diagnosis. In our experience, however, this new diagnosis has become the ubiquitous classification in some jurisdictions for rapists, especially when Antisocial Personality Disorder does not apply. In our judgment, this diagnosis most often reflects bad science and faulty clinical judgment.[68] It has no empirical support, no established criteria for classification, and highly questionable reliability. In contrast, there is a considerable body of science[69] that has identified factors associated with sexual aggression against women, including misogynistic anger, negative or hostile masculinity, rape-related cognitive distortions (rape myths) and entitlement, and impersonal sex.[70] But the imperatives of the SVP cases have pushed to the forefront a diagnosis that ignores these factors in favor of a weak new diagnosis that formalistically satisfies the SVP case law.

IV. Future of the Regulatory Approach to Sexual Violence: Invalidity as Applied

What can we say about the future of the regulatory approach to the prevention of sexual violence? Is there any stopping point in politics or law? Or, will legislatures, unconstrained by political opposition, continue their imaginative quest for safety, enacting Halloween quarantines and chartreuse license plate laws of increasing absurdity? Will SVP commitment laws continue to grow without short-term limit?

We see a future limited by four possible constraints.

A. Fiscal Constraint

States may simply run out of money to continue, or begin, expensive sex offender commitment regimes.[71] Given the massive strains on the economy at the present time, this may be the most realistic outcome. However, most of the noncommitment regulatory approaches have the benefit of little or no upfront costs. Registration, notification, and residential restrictions appear, in legislative analysis, to be low-cost, and are often enacted without forethought as to the real costs of enforcement.

B. Remedial Litigation

Most of the litigation about regulatory predator laws has focused on the facial validity of the laws, rather than on their implementation. In theory, an aggrieved individual could challenge improper implementation, forcing states to conform to the law (and the Constitution). But this kind of remedial litigation is problematic. The commitment and discharge of individuals are matters of case-by-case litigation in state trial courts. Those individual litigations uniformly frame important boundary issues as questions of fact, thus giving appellate courts a ready excuse not to elaborate, and hence control, questions of legal compliance. For this reason, such enforcement lawsuits have been few and laborious.[72] Nonetheless, it is probably the case, based on anecdotal comments, that the possibility of constitutional litigation is in the minds of many state program administrators, and that this possibility serves as a modest curb on flagrantly unconstitutional implementation.

C. Invalidity as Applied

An alternative litigation approach would assert that SVP laws are "invalid as applied." The aim would be to invalidate a particular state SVP law, putting an end to the programs operated under that law. The legal claim seeks to show that the law has an improper (punitive) purpose based on systemic and persistent patterns of improper implementation. The early challenges to SVP laws were facial challenges, asserting that their legislative histories and statutory provisions made plain a punitive purpose. Though these initial facial challenges were uniformly unsuccessful, the initial facial evaluations of statutory purpose might have been mistaken, for two reasons. First, the explicit provisions of the SVP law might have masked a hidden legislative purpose that was improper. Second, despite a proper legislative purpose, the executive implementation of the statutory scheme might reveal an improper state purpose. This litigation approach is explored in more detail elsewhere.[73]

D. Political Leadership to Change Frames

We have suggested that the regulatory approaches to sexual violence appear to be useful and attractive because

they are viewed through a set of conceptual frames, in particular, the exceptionality of the "sexual predator," the concept of risk, and the idea of the degraded other. As we have written elsewhere, a key to changing the public policy and associated legal structures is the development and adoption of a new set of frames.[74] Among other things, the new frames ought to insist on seeing sex offender policy comprehensively, through a public health approach, and on developing a greater sense of community ownership of the problem of sexual violence.

V. Spread beyond Sexual Violence

As we have suggested, the fundamental problem underlying the use of a regulatory approach to sexual violence is in establishing boundaries or limits. Advocates for SVP laws have consistently argued for the notion of exceptionality—that the expansion of civil commitment to sex offenders is *sui generis*, not the first step on a slippery slope to the preventive state.[75] Yet now, the existence and validity of SVP laws is being cited as justification for extending preventive detention into another area: preventive detention of suspected terrorists.

Wittes and Gitenstein, for example, argue that preventive detention runs counter to core values, but that nonetheless it can be expanded to suspected terrorists because it has been used for a number of purposes such as the dangerously mentally ill or sexually deviant.[76] In arguing for the extension, they do *not* focus on the grounds used to justify SVP laws—the supposed distinguishing characteristics of the mental status. Rather, they rely on the argument from necessity, the fact that we have no alternative, because evidence is inadmissible or no crimes have been committed, thereby undermining the utility of the criminal justice system.[77] Goldsmith and Katyal also argue from this analogy.[78]

But the analogy can operate in two directions. There are lessons learned from the SVP context that may help inform the debate about national security courts and the use of preventive detention in that context. Goldsmith and Katyal, for example, argue that a national security court should have a mechanism for insuring that "there is a continuing rationale to detain people years after their initial cases are heard."[79] But we know from the SVP context that risk assessment is extremely problematic, especially after years of confinement in a controlled environment, rendering assessment of *change* in risk status even more problematic. The *Washington Post* supports preventive detention for a "limited few."[80] Yet we know from the SVP context that intentions to limit the use of these laws are problematic. At least the SVP context is one arena in which science can be of some assistance. If legislatures define the boundaries of "limited few," actuarial science can identify, with some accuracy, a delimited subgroup of "most dangerous" sex offenders. This would, at least, be a defensible, standardized selection process and, arguably, yield a much-reduced false-positive error rate.

But at present, even that much reliability would be absent in the anti-terrorism context, where (at least to our knowledge) no peer-reviewed, empirically developed actuarial risk assessment tools exist. But if the SVP context is predictive, a new market for detention based on prediction of danger will lead to the creation of new empirical tools for assessment of risk. We know, for example, that the government already uses a secret algorithm to assess risk for all passengers arriving in the United States on international flights.[81] And the Los Angeles Police have undertaken a project to "map" "Muslim enclaves." The purpose is to "identify communities within the large Muslim community, which may be susceptible to violent, ideologically based extremism."[82]

Profiling designed to identify "dangerous people" has a dishonorable legacy in this country, emerging, in only one example, in the days of the Cold War, and ultimately destroying the lives of many innocent Americans before Senator Joseph McCarthy was silenced. We have visited this shame on our citizens many times in history. Do we wish to go there again?

Notes

Eric S. Janus was counsel in litigation challenging the constitutionality of Minnesota's SVP laws from 1994 through 2003. He thanks his research assistant, Joe Phelps, for his diligent and skillful work in preparing this manuscript.

1 *See generally* Eric S. Janus, Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State (2006).

2 *See generally* Robert A. Prentky et al., *Sexually Violent Predators in the Courtroom*, 12 Psychol. Pub. Pol'y & L. 357 (2006) (discussing the developments in risk assessment).

3 *See* Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 Conn. L. Rev. 319, 320 (2003).

4 *See* Prentky et al., *supra* note 2, at 359.

5 Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996).

6 *See* Timothy E. Wind, *The Quandary of Megan's Law: When the Child Sex Offender Is a Child*, 37 J. Marshall L. Rev. 73, 93-95 (2003).

7 *See* Janus, *supra* note 1, at 156-57.

8 PolState.com, *Three States Consider Sex Offender License Plates*, *at* http://polstate.com/?p=5128 (last visited June 14, 2007).

9 Catrin Einhorn, *Judge Blocks Rules Limiting Sex Offenders on Halloween*, N.Y. Times, Oct. 28, 2008, at A12.

10 *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346 (1997).

11 *See* Janus & Logan, *supra* note 3, at 338-39.

12 *See Hendricks*, 521 U.S. 346 (1997).

13 Samuel J. Brakel et al., The Mentally Disabled and the Law 739-40 (3rd ed. 1985).

14 *Id*.

15 Committee on Psychiatry & Law of the Group for the Advancement of Psychiatry, Psychiatry and Sex Psychopath Legislation: The 30's to the 80's, at 839-40 (1977).

16 *See* Robert A. Prentky & Ann W. Burgess, Forensic Management of Sexual Offenders (2000).

17 Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, §§ 301, 302, 120 Stat. 587 (2006).

18 *See generally* Kathy Gookin, Wash. State Inst. for Pub. Pol'y, Comparison of State Laws Authorizing Involuntary Commitment of Sexually Violent Predators: 2006 Update (2007) (Doc. No. 07-08-1101).

19 *See generally* Richard Dawkins, The Selfish Gene (1976).

[20] *See generally* Kevin Kelly, Out of Control: The New Biology of Machines (1994).

[21] Adam Walsh Act §§ 301, 302.

[22] Many of the cases under the federal law are on hold as of this writing, awaiting a ruling by the Fourth Circuit Court of Appeals on the constitutionality of the federal law.

[23] *See* Prentky et al., *supra* note 2, at 370-71.

[24] *See, e.g.*, Minn. Dep't of Corrections, Level Three Sex Offenders: Residential Placement Issues, 2003 Report to the Legislature 9 (2003) (finding that sex offender proximity to schools or parks is not associated with recidivism); Iowa Dep't of Human Rights, The Iowa Sex Offender and Recidivism 19 (2000), *available at* http://www.state.ia.us/dhr/cjjp/images/pdf/01_pub/SexOffenderReport.pdf (finding no statistical significance in differences in recidivism of sexual offenders after implementation of sex offender registry); Kan. Sex Offender Pol'y Board, 2007 Report (2007) (indicating that electronic monitoring, when used alone, will not change sex offender behavior and provide security for the community); Colo. Dep't of Pub. Safety, Report on Safety Issues Raised by Living Arrangements for and Location of Sex Offenders of the Community 17 (2004), *available at* http://dcj.state.co.us/odvsom/Sex_Offender/SO_Pdfs/FullSLAFinal01.pdf (noting inability to document relationship between reoffending of sexual offenders and proximity to schools and day-care centers); Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1000 Feet From Danger or One Step From the Absurd?*, 49 Int'l J. Offender Therapy & Comp. Criminology 168 (2005) (discussing Florida study finding residency restrictions linked to increased isolation, financial and emotional stress, and decreased stability in sex offenders, which may inadvertently increase triggers for reoffense).

[25] *See* Nicole Pittman, Sexually Violent Predator Civil Commitment by State, Presentation at the National Juvenile Defender Leadership Summit (2006).

[26] Adam Walsh Act § 111(8).

[27] *Id.* § 111(2)-(4).

[28] *Id.* § 111(4)(A)(ii).

[29] *See* Howard Snyder, U.S. Dep't of Justice, Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics (2000) (NCJ 182990).

[30] *Id.*

[31] *See generally* Donna D. Schram et al., Wash. State Inst. for Pub. Pol'y, Juvenile Sex Offenders: A Follow Up Study of Reoffense Behavior (1991) (Doc. No. 91-09-1101); Timothy J. Kahn & Heather J. Chambers, *Assessing Reoffense Risk with Juvenile Sexual Offenders*, 70 Child Welfare 333 n.3 (1991); Steven P. Lab et al., *Research Note: An Evaluation of Juvenile Sexual Offender Treatment*, 39 Crime & Delinq. 543 n.4 (1993); Robert A. Prentky et al., *An Actuarial Procedure for Assessing Risk in Juvenile Sex Offenders*, 12 Sexual Abuse: J. Research & Treatment 71 n.2 (2000); Lucinda A. Rasmussen, *Factors Related to Recidivism among Juvenile Sexual Offenders*, 11 Sexual Abuse: J. Research & Treatment 69 n.1 (1999); Ron Sipe et al., *Adolescent Sexual Offenders Grow Up*, 25 Crim. Just. & Behavior 109 n.1 (1998); Wayne R. Smith & Caren Monastersky, *Assessing Juvenile Sexual Offenders' Risk for Reoffending*, 13 Crim. Just. & Behavior 115 n.1 (1986).

[32] *See* Michael F. Caldwell, *Sexual Offense Adjudication and Sexual Recidivism Among Juvenile Offenders*, 19 Sex Abuse 107, 110 (2007); Mark Chaffin, *Our Minds Are Made Up–Don't Confuse Us with the Facts: Commentary on Policies Concerning Children with Sexual Behavior Problems and Juvenile Sex Offenders*, 13 Child Maltreatment 110, 114 (2008); Franklin E. Zimring et al., The Predictive Power of Juvenile Sex Offending: Evidence from the Second Philadelphia Birth Cohort Study (2007), *available at* http://ssrn.com/abstract=995918.

[33] *See* Eric S. Janus, *The Use of Social Science and Medicine in Sex Offender Commitments,* 23 New Eng. J. on Crim. & Civ. Confinement 347, pt. II.A (1997).

[34] *See generally* Prentky et al., *supra* note 2.

[35] *See* Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 Harv. C.R.-C.L. L. Rev. 531 (2007) (discussing impacts of regulatory regime's focus on persons instead of their behaviors).

[36] *See Smith v. Doe*, 538 U.S. 84 (2003) (discussing the Alaska Megan's Law); *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003) (discussing the Connecticut Megan's Law).

[37] *See* Prentky et al., *supra* note 2 (discussing and criticizing the use of risk assessment tools in determining offender dangerousness).

[38] *See Barefoot v. Estelle*, 463 U.S. 880 (1983).

[39] *See United States v. Shields*, No. 07-12056-PBS, 2008 WL 544940, at *1 (D. Mass. Feb. 26, 2008).

[40] *See* Prentky et al., *supra* note 2, at 371-72.

[41] *See Roeling v. State*, 880 So.2d 1234, 1239-40 (Fla. Dist. Ct. App. 2004).

[42] *See* Prentky et al., *supra* note 2, at 370-71.

[43] *See Commonwealth v. Meals*, 912 A.2d 213 (Pa. 2006) (rejecting effort by intermediate appellate court to impose de novo review over assessment process).

[44] *See Kansas v. Crane*, 534 U.S. 407 (2002).

[45] *See Young v. Weston*, 898 F. Supp. 744, 749-50 (W.D. Wash. 1995).

[46] *See Crane*, 534 U.S. at 413.

[47] *See Kansas v. Hendricks*, 521 U.S. 346, 347 (1997).

[48] *See Hendricks*, 521 U.S. at 360; Prentky et al., *supra* note 2, at 364.

[49] *See generally Brown v. Watters*, No. 06C0753, 2007 WL 4418193 (E.D. Wis. Dec. 17, 2007) (upholding a Wisconsin SVP commitment). *Brown* involved a diagnosis of "paraphilia-NOS non-consent," a diagnosis admittedly "coined" by the State's retained expert. The trial court had instructed the jury that "you are not bound by medical opinions, labels, or definitions." On habeas review, the federal court noted (uncontroversially) that the definition of mental disorder in SVP cases is a "legal" one and then drew the additional conclusion that "a diagnosis that is not generally recognized in the medical community may be sufficient to satisfy due process concerns." But the court quickly added, "This is not to say that anything goes," and that a psychological opinion could be so "irrational or unpersuasive that it would not support indefinite commitment consistent with the Due Process Clause." Explaining that the diagnosis sub judice did not fall into that unconstitutional category, the court argued that it was "consistent" with the DSM-IV-TR.

[50] *See* Eric S. Janus, *Sex Offender Commitments: Debunking the Official Narrative and Revealing the Rules-In-Use*, 8 Stan. L. & Pol'y Rev. 71 (1997).

[51] 534 U.S. 407 (2002).

[52] *See* Janus, *supra* note 50.

[53] *Id.* at 81.

[54] Robert A. Prentky et al., *Sex Offender Research: Navigating Methodological Quicksand.*, in Research Methods in Forensic Psychology (S. Penrod & B. Rosenfeld eds.).

[55] The recently passed Adam Walsh Act, for example, contains no definition of the key operative element for commitment, "serious difficulty in refraining from sexually violent conduct." Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 301(e)(2), 120 Stat 587 (2006).

[56] *See People v. Williams*, 74 P.3d 779 (Cal. 2003); Kenneth W. Gaines, *The Jury:* Crane*'s "Serious Difficulty" Requirement and Due Process*, 56 S.C. L. Rev. 291 (2004).

[57] *Williams*, 74 P.3d at 793.

[58] One federal court, citing a Bureau of Prisons definition, stated that "serious difficulty" could be ascertained from

considering a person's "inability to appreciate the wrongfulness, harmfulness or likely consequences" of his behavior, his "inability to control conduct," as well as scores on risk assessment tools. *United States v. Abregana*, 574 F. Supp. 2d 1145, 1157 (D. Haw. 2008).

[59] *See generally Brown v. Watters*, No. 06C0753, 2007 WL 4418193, at *3 (E.D. Wis. Dec. 17, 2007). The Supreme Court has suggested caution in connection with antisocial personality disorder, but the court also cited contrary authority, *Adams v. Bartow*, 330 F.3d 957 (7th Cir. 2003), and *Linehan v. Milczark*, 315 F.3d 920, 926-27 (8th Cir. 2003).

[60] A prime example is *Commonwealth v. Meals*, 912 A.2d 213 (Pa. 2006), in which the Pennsylvania Supreme Court overturned the intermediate appellate court's reversal of a *pedophilia* diagnosis; "in requiring that an expert's diagnosis of pedophilia required more than proof of sexual assaults upon children to support defendant's classification, improperly imposed a greater standard of proof than required by statute." *See also People v. Olvera*, No. H031022, 2008 WL 3906682 (Cal. Ct. App. Aug. 26, 2008) (noting dispute among experts about whether respondent suffered from pedophilia, or was an "opportunistic" child molester); *People v. Thammavong*, No. MH99406, 2008 WL 3893773 (Cal. Ct. App. Aug. 25, 2008) (noting diagnosis of pedophilia for respondent whose victims ranged in age from eight to sixteen).

[61] *See Abregana*, 574 F. Supp. 2d at 1151-52.

[62] *See, e.g., In re Commitment of W.A.L.*,SVP-333-03, 2008 WL 4647715 (N.J. Super. Ct. App. Div. Oct. 1, 2008) (discussing diagnosis of *pedophilia* for respondent whose victims included both "adolescent females and adult women.").

[63] *See Abregana*, 574 F. Supp. 2d at 1151-52; *United States v. Shields*, No. 07-12056-PBS, 2008 WL 544940 (D. Mass Feb. 26, 2008).

[64] *Id*.

[65] *See Brown v. Watters*, No. 06C0753, 2007 WL 4418193, at *1 (E.D. Wis. Dec. 17, 2007) (citing expert testimony of psychologist Dennis Doren); Dennis M. Doren, Evaluating Sex Offenders: A Manual for Civil Commitments and Beyond (2002).

[66] *In re Civil Commitment of D.X.B.*, No. 61-00, 2006 WL 488641, at *4 (N.J. Super. Ct. App. Div. Mar. 2, 2006).

[67] *See* Michael B. First & Robert L. Halon, *Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases*, 36 J. Am. Acad. Psychiatry & L. 443, n.4 (2008); Robert A. Prentky et al., *Commentary: Muddy Diagnostic Waters in the SVP Courtroom*, 36 J. Am. Acad. Psychiatry & L. 455, n.4 (2008).

[68] Prentky et al., *supra* note 54.

[69] *See* Neil M. Malamuth, *Risk Assessment of Sexual Aggression: Commentary, in* Understanding and Managing Sexually Coercive Behavior, Annals of the New York Academy of Sciences (Robert A. Prentky et al. eds., 2003); Neil M. Malamuth, *The Confluence Model as an Organizing Framework for Research on Sexually Aggressive Men: Risk Moderators, Imagined Aggression and Pornography Consumption, in* Aggression: Theoretical and Empirical Reviews (Russell G. Geen & Edward I. Donnerstein eds., 1998).

[70] Prentky et al., *supra* note 54.

[71] *See generally* Janus, *supra* note 1, ch. 4 (discussing the benefits and costs of sexually violent predator commitment laws).

[72] *See Turay v. Seling*, 108 F. Supp. 2d 1148 (W.D. Wash. 2000).

[73] *See generally* Eric S. Janus & Brad Bolin, *An End-Game for Sexually Violent Predator Laws: As-Applied Invalidation*, 6 Ohio St. J. Crim. L. 25 (2008).

[74] *See generally* Eric S. Janus, *"Don't Think of a Predator": Changing Frames for Better Sexual Violence Prevention*, 8 Sex Offender L. Rep. 81 (2007).

[75] *See generally* Janus, *supra* note 1, ch. 6.

[76] Benjamin Wittes & Mark Gitenstein, *A Legal Framework for Detaining Terrorists*, Brookings Institution (2008), *available at* http://www.brookings.edu/papers/2007/~/media/Files/Projects/Opportunity08/PB_Terrorism_Wittes.pdf.

[77] *See id*.

[78] Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists' Court*, N.Y. Times, July 11, 2007, at A19.

[79] *Id*.

[80] Editorial, *Justice at Guantanamo; Congress Has Another Chance to Repair the Rules for Handling Detainees in the War on Terrorism*, Wash. Post, July 18, 2007, at A18.

[81] U.S. Dep't of Homeland Security, Privacy Impact Assessment for the Automated Targeting System 2 (2006) ("ATS standardizes names, addresses, conveyance names, and similar data so these data elements can be more easily associated with other business data and personal information to form a more complete picture of a traveler, import, or export in context with previous behavior of the parties involved. Every traveler and all shipments are processed through ATS, and are subject to a real-time rule based evaluation.").

[82] Michele Norris, *All Things Considered: Plan to Map L.A.'s Muslims Sparks Outrage* (National Public Radio broadcast, Nov. 10, 2007).