

Sex Offender Reentry Courts: A Proposal for Managing the Risk of Returning Sex Offenders to the Community*

John Q. La Fond** & Bruce J. Winick***

I. INTRODUCTION

Enraged by sex crimes against young children committed by convicted sex offenders,¹ the public has demanded that government do whatever is necessary to prevent sexual recidivism. Victims' groups mobilized public opinion and politicians rapidly responded.² Since about 1990, policymakers in the United States have adopted two distinct strategies to prevent convicted sex offenders from committing more sex crimes. One strategy emphasizes long-term confinement either in the prison system or in the mental health system. The other strategy relies on information compilation and dissemination.

Both strategies assume that sex offenders are more dangerous

* We first proposed this concept in John Q. La Fond & Bruce J. Winick, *Sex Offender Reentry Courts: A Cost Effective Proposal for Managing Sex Offender Risk in the Community*, 989 ANNALS N.Y. ACAD. SCI. 300 (2003). This Article is a revised and expanded version of that earlier article.

** Edward A. Smith/Missouri Chair in Law, the Constitution, and Society, University of Missouri-Kansas City School of Law, 5100 Rockhill Road, Kansas City, MO 64110-2499. E-mail: lafondj@umkc.edu.

*** Professor of Law, University of Miami School of Law, 1311 Miller Drive, Room 476, Coral Gables, FL 33146. E-mail: bwinick@law.miami.edu.

¹ A vicious sexual attack on a young boy generated the first sexually violent predator statute implemented in Washington State in 1990. See David Boerner, *Confronting Violence: In the Act and the Word*, 15 U. PUGET SOUND L. REV. 525 (1992) (citing sources). A brutal sexual killing of a young girl in New Jersey by convicted sex offenders living across the street from the victim prompted New Jersey to enact a mandatory community notification law. See *Man Charged in 7-Year-Old Neighbor's Killing*, N.Y. TIMES, Aug. 1, 1994, at B5. The murder of Polly Klaus in California by a convicted sex offender generated intense public pressure for law reform. Vlae Kershner & Carolyn Lockhead, *Politicians React with Calls for Stiffer Sentences*, S.F. CHRON., Dec. 7, 1993, at A4.

² Stuart Scheingold & Toska Olson, *The Politics of Sexual Psychopathy: Washington State's Sexual Predator Legislation*, 15 U. PUGET SOUND L. REV. 809 (1992).

than other criminals and are likely to reoffend during their entire lives. They also require public officials to predict whether a convicted sex offender will commit another sex crime if released into the community. These strategies present public officials with rather stark choices: confining sex offenders for a very long time or simply releasing them with minimal supervision into the community.

This Article explores why it is so difficult to predict when sexual offenders will commit another sex crime. It then proposes the use of sex offender reentry courts to control sex offenders in the community, using a risk-management approach that will protect the community effectively at reasonable cost and also create incentives for sex offenders to seek rehabilitation.

Sex offender courts, which are based on principles of Therapeutic Jurisprudence, can provide more intensive community supervision for a much larger group of sex offenders, while at the same time motivating them to change their attitudes and behavior.

II. THE DEFICIENCIES OF EXISTING LEGAL APPROACHES FOR DEALING WITH SEX OFFENDERS

A. *Limited Choices: Long-Term Confinement or Information Control*

1. Longer Criminal Sentences

Most states have aggressively used the criminal justice system to prevent sex offenders from committing more sex crimes. They have dramatically increased sentences for sex crimes, passed mandatory minimum sentences for repeat offenders, including sex offenders, and enacted life-time sentences under "one, two, or three strike(s)" laws. Between 1993 and 1995, twenty-four states and the federal government passed "three-strike" statutes. They increased sentences for repeat offenders, including serious sex crimes. Some of these laws required mandatory life sentences for specified repeat offenders.³

While the prison population in the United States increased by 206 percent from 1980 to 1994, the number of imprisoned sex offenders increased even more—by 330 percent. Between 1985 and 1993, the average time served by convicted rapists in state prisons increased from about three years to five years, an increase in

³ John Clark et al., U.S. Dep't of Justice, *Three Strikes and You're Out: A Review of State Legislation* (1997), available at <http://ncjrs.org/pdffiles/165369.pdf> (last visited June 15, 2004).

percentage of sentence served from thirty-eight percent to fifty percent. Put differently, for sex offenders released from prison from 1985 to 1993, there has been a significant increase in the average length of stay in prison and in the percentage of sentence served before release. Since 1980 the number of prisoners sentenced for violent sexual assault other than rape increased by nearly fifteen percent—faster than any other category of crime except drug trafficking.⁴

2. Critiques of Criminal Sentencing

Mandatory minimum and lifetime sentences confine many sex offenders who, in fact, do not pose a high risk of committing another sex crime. Thus, they are overinclusive. Because these sentencing laws use only an offender's criminal history and use it inaccurately to determine the risk of sexual recidivism,⁵ many sex offenders who do not pose a serious risk of reoffending will be confined.

These sentencing schemes are also underinclusive. Many sex offenders who pose a serious risk of committing more sex crimes will not be confined because these schemes do not use the best risk assessment techniques to identify dangerous sex offenders. Mandatory minimum sentences are also excessive because many sex offenders will be incarcerated much longer than is necessary to prevent them from committing another sex crime. As a result of these sentencing initiatives, sex offenders are an incredible "growth industry" for our prisons and jails.

3. Indeterminate Civil Commitment

Sixteen states have passed sexually violent predator ("SVP") laws that use the state's civil commitment authority to hospitalize mentally ill sex offenders who are likely to commit another sex crime if not confined. SVP laws authorize the indefinite commitment of sex offenders about to be released from prison, who suffer from a "mental abnormality" or a "personality disorder" that makes them likely to reoffend. These laws are designed to confine disordered and dangerous sex offenders who can no longer be held in the criminal justice system. Most states commit sexually violent predators for an indeterminate period; they cannot be released until they are "safe" to

⁴ Lawrence A. Greenfield, U.S. Dep't of Justice, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault* (1997), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/soo.pdf> (last visited June 15, 2004).

⁵ See generally R. Karl Hanson, *What Do We Know About Sex Offender Risk Assessment?*, 4 PSYCHOL. PUB. POL'Y & L. 50 (1998).

live in the community. California commits SVPs for two years initially, but this commitment can be renewed.⁶

4. Critiques of SVP Commitment

Because SVP laws confine some of the more dangerous sex offenders, they will prevent these individuals from committing new sex crimes while they are in secure facilities. But, these laws are also overinclusive. They can be used against any offender convicted of a *single* qualifying sex crime. Prosecutors win most of the cases they file, ranging from about seventy-five percent to just under one hundred percent. The inability to initially commit sex offenders to an outpatient program subject to intensive control and the understandable desire of juries to err on the side of safety rather than risk explain much of this amazing success rate.⁷ SVP laws thus commit some sex offenders who would not reoffend if released or placed in an outpatient program under aggressive supervision.

SVP commitment can only be used for a small number of sex offenders because these cases require the government to prove the statutory and constitutional elements and because commitment is extraordinarily expensive. Consequently, SVP laws are underinclusive. Many dangerous sex offenders must be released into the community following the expiration of their prison sentences.

These laws also create disincentives for charged sex offenders to accept criminal responsibility for their behavior by pleading guilty and for convicted offenders to participate in prison treatment programs.⁸ Treatment in prison is more likely to succeed because it is offered closer in time to the commission of the crime, thus discouraging denial and minimization.⁹

5. Offender Information Collection and Dissemination

The second strategy, information control, relies primarily on sex offender registration and community notification laws. These laws require offenders to provide information about themselves to law

⁶ W. Lawrence Fitch & Debra A. Hammen, *The New Generation of Sex Offender Commitment Laws: Which States Have Them and How Do They Work?*, in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY 27, 30 (Bruce J. Winick & John Q. La Fond eds., 2003) [hereinafter PROTECTING SOCIETY].

⁷ John Q. La Fond, *The Costs of Enacting a Sexual Predator Law*, 4 PSYCHOL. PUB. POL'Y & L. 468, 486, 502 (1998).

⁸ Bruce J. Winick, *A Therapeutic Jurisprudence Assessment of Sexually Violent Predator Laws*, in PROTECTING SOCIETY, *supra* note 6, at 317, 322.

⁹ See Robert M. Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predator Law*, 15 U. PUGET SOUND L. REV. 597, 617 (1992).

enforcement agencies. This information, in turn, may be provided to the community.¹⁰

6. Registration Laws

All fifty states have enacted a sex offender registration law. Most convicted sex offenders must register with the police where they live and furnish law enforcement agencies with detailed information about their residence, employment, and criminal history. Offenders may also have to provide pictures, fingerprints, and DNA samples. Policymakers assume that registration laws will deter registered offenders from committing another sex crime and, if they do, will aid police investigation.

7. Notification Laws

All fifty states have also passed community notification laws since 1990.¹¹ These laws authorize or direct law enforcement to disclose information about dangerous sex offenders to the community. Organizations, like schools and day care centers, and individual citizens can use this information to protect themselves from dangerous offenders living in the neighborhood. Though some of these laws limit where sex offenders may live,¹² they do not otherwise directly control how sex offenders live in the community.

8. Critiques of Registration and Notification Laws

Most registration laws require most sex offenders to register for at least ten years and often longer. Most also provide no incentive for sex offenders to participate in community treatment or to demonstrate that they pose little risk of reoffending and should no longer have to register. Policymakers assumed that providing this information would make people more confident of their ability to respond to any danger posed by sex offenders living nearby. However, some research indicates that notification laws actually

¹⁰ Bruce J. Winick, *A Therapeutic Jurisprudence Analysis of Sex Offender Registration and Community Notification Laws*, in PROTECTING SOCIETY, *supra* note 6, at 213, 213.

¹¹ Wayne A. Logan, *Sex Offender Registration and Community Notification: Emerging Legal and Research Issues*, 989 ANNALS N.Y. ACAD. SCI. 337, 337-38 (2003).

¹² One example is an Iowa law that prohibits anyone convicted of a sex offense against a minor from living within 2000 feet of an elementary or secondary school or a day care center. A federal judge struck down the law as unconstitutional because its practical effect was to banish sex offenders from living in many smaller towns and cities and severely limiting housing in big cities to expensive developments, industrial areas, or the outskirts. In addition, there was no evidence that the law actually protected children. *See Doe v. Miller*, 298 F. Supp. 2d 844 (S.D. Iowa 2004).