

FAILURE
to
PROTECT

*America's Sexual Predator
Laws and the Rise of the
Preventive State*

ERIC S. JANUS

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ROPER: You would give the devil the benefit of law.

SIR THOMAS MORE: Yes, what would you do? Cut a great road through the law to get at the devil?

ROPER: I would cut down every law in England to do that.

SIR THOMAS MORE: And when the law was down and the devil turned around on you, where would you hide; the laws being all flat? This country's planted thick with laws from coast to coast, and if you cut them down, do you think you could stand in the winds that would blow through them?

ROBERT BOLT, *A Man for All Seasons*

CONTENTS

<i>Acknowledgments</i>	ix
Introduction: The Worst of the Worst?	1
<i>Part I</i> Fateful Choices	
1. New Legislative Approaches	13
2. Judicial Promises and Betrayals	25
3. A Factual Primer on Sexual Violence	42
4. Benefits and Costs	60
<i>Part II</i> Consequences	
5. Feminism, the Culture Wars, and Sexual Violence	75
6. Harbinger of the Preventive State?	93
<i>Part III</i> Course Corrections	
7. There Are Alternatives	113
8. The Politics of Sexual Violence	130
9. Righting Public Policy against Sexual Violence	145
<i>Notes</i>	161
<i>Index</i>	181

Introduction: The Worst of the Worst?

We keep getting sidetracked with issues like castration and pink license plates for sex offenders, as if they can't borrow or drive another car. . . . Don't get me wrong, we need extreme vigilance for some. But these people are coming from us—society—and we have to stop the hemorrhage. We have to stop pretending that these people are coming from other planets.

—NANCY SABIN, executive director
of the Jacob Wetterling Foundation

Dru Sjodin was last seen on November 22, 2003. Age twenty-two and a senior at the University of North Dakota, she was apparently abducted from the parking lot of a shopping center in Grand Forks on a busy Saturday afternoon. Ten days later, Alfonso Rodriguez Jr. was arrested and charged with her kidnapping. Rodriguez had been released from prison seven months earlier at the age of fifty. He had just served a twenty-three-year sentence as a repeat sex offender, a sexual predator who attacked strangers. Though he was classified as a level 3 offender, the highest risk category for released sex offenders, officials decided not to take the extraordinary step of seeking his civil commitment to a secure treatment facility as a “sexually dangerous person.” Dru Sjodin’s body was not found until the snow melted in April 2004. Rodriguez has pleaded not guilty, and his trial for capital murder was still pending as of March 2006.

Sjodin’s death reminds us of the list of young women and children who have been sexually assaulted and murdered by repeat sex offenders following their

release from prison. In Minnesota alone, at least ten women have died over the past two decades, victims of released sex offenders. And throughout the nation, the headlines tell the same tragic story: nineteen-year-old Katie Poirier of Moose Lake, Minnesota, nine-year-old Dylan Groene of Coeur d'Alene, Idaho, thirteen-year-old Sarah Lunde of Hillsborough County, Florida, nine-year-old Jessica Lunsford of Homosassa, Florida, and eleven-year-old Carlie Brucia of Sarasota. With almost clockwork regularity yet another young innocent is found dead.

Who are the accused? They are men with long criminal records of violence and sexual assault, released from prison only to prey again. Poirier's confessed killer is Donald Blom, who had six felony convictions including sexual assault and kidnapping. Dylan Groene's accused killer is Joseph Edward Duncan III. He was released from prison in 2000, after serving a twenty-year sentence for raping and torturing a fourteen-year-old Tacoma, Washington, boy. Jessica Lunsford's accused killer, John Evander Couey, had a long criminal record of violence and sexual assault. So did Joseph P. Smith, the accused killer of Carlie Brucia. David Onstott, who has been charged with Sarah Lunde's murder, is a convicted rapist.

The recidivist crimes the men are accused of mark them as the "worst of the worst." These are the criminals we have come to call "sexual predators"—the most dangerous sex offenders, those who seem to be pathologically different from the rest of us. Punished severely for prior sexual assaults, sexual predators seem undeterred by the prospect of returning to prison. It seems that no sooner are they released from prison than they revert to their sick predilections, satisfying their deviant urges on the most vulnerable and innocent. These are the men who lurk in the bushes and parking lots, attacking strangers without provocation or warning. They often seem to lack the essential empathy and conscience that mark human beings. They are "monsters" and "beasts."

But sexual predators—and our powerful reaction to them—are doing another form of damage as well. We have come to think of these men as archetypical sex offenders and have shaped our public policy responses as if all sex offenders fit this mold. We are blind to the true nature of sexual violence in our society, which is far different from what we think it is. Rape-murders are exceedingly rare, and sexual predators represent but a small fraction—a thin sliver—of the sexual criminals in our country. In the 1980s and 1990s feminist scholars such as Florence Rush, Mary Koss, and Diana Russell have shown us that most sexual violence is perpetrated by acquaintances and intimates and family, not by strangers lurking in the dark.¹ But this clear view is being obscured by new legal initiatives and media spotlights on "the sexual predator."

Sexual predators—and our response to them—are in many ways the subject of this book. Decent people naturally feel outrage when horrible crimes are committed by recently released sexual predators. The outrage is directed not simply at the criminals but also at a system that seems incapable of protecting the most vulnerable among us. These rapists, after all, were safely locked up before being released. In hindsight, the warning signs of future tragedy seemed plain—if only state officials would have looked.

This outrage has been translated into a set of aggressive new laws aimed at disabling sexual predators before they strike. The touchstone of the new predator laws is regulatory prevention. Two legislative innovations of the early 1990s provide the focus for this book's inquiry. The first is the use of "civil commitment" to lock up "mentally disordered" dangerous sex offenders after they have finished serving their criminal sentences but before they have committed a new crime. The second is "Megan's law," named after seven-year-old Megan Kanka, a New Jersey girl who was raped and killed by a convicted pedophile who had moved into the neighborhood without her parents' knowledge. In the aftermath of the tragedy, the Kankas led a campaign to require authorities to warn communities about sex offenders in the area. All states now have a form of Megan's law.

Both of these laws impose a restraint on sex offenders before a new crime is committed. These new laws are based on the same power states use to warn consumers of the dangers of tobacco or alcohol and to manage the risk of nuclear waste by storing it in remote deserts. This regulatory power is now directed at protecting us from high-risk criminals. Yet these new tools were inadequate to save the lives of Dru Sjodin, Dylan Groene, Jessica Lunsford, Sarah Lunde, and Carlie Brucia.

A major thesis of this book is that these new laws—although well intentioned—are ill-conceived, bad policy. They were sold as innovative approaches to finding and incapacitating the worst of the worst, but there is little evidence they have succeeded in that important task. It is not simply that these new laws haven't been able to solve the problem of sexual violence. It is that our way of thinking about sexual violence is increasingly distorted. The distortion has led us to the predator laws, and the predator laws strengthen the distortion. We are in a vicious cycle of bad policy, and we need to find a way out if we want to fight sexual violence more effectively.

The distortion is straightforward. We have substituted a part of the problem for the whole. Sexual predators are rare, atypical sex offenders. But because of the intense focus of the media and these new laws, predators have become archetypical. In the headlines, and in these laws, sexual predators have come to symbolize the essence of the problem of sexual violence. In the

process, the thousands of women and children whose victimization does not fit this paradigm—only recently made visible through the work of feminist scholars—are at risk of becoming invisible once again.

The origins of the predator archetype are not hard to discern. The stories of Sjodin and Rodriguez, Lunsford and Couey, although awaiting proof in courts of law, sear our consciousness. We are horrified at the cruelty, randomness, and unpredictability of these cases. They symbolize a danger that we all dread. We must not minimize the reality that a small percentage of sex offenders are psychopaths with deviant sexual urges and that they do pose a high risk of repeat violence. But we distort this reality if we magnify this small part of the problem of sexual violence and come to think of it as the whole of the problem.

By distorting the real nature of sexual violence we will hurt our efforts to fight sexual violence in four important ways. First, our focus on the sexual predator will lead us to put more and more resources into trying to do the impossible—prevent the rare but horrible crimes committed by the worst of the worst. And every time our efforts fail—as inevitably they will—we will redouble the effort we put into our faulty strategy.

Second, the spotlight on sexual predators will push the great bulk of sexual aggression—crimes that do not fit the sexual predator paradigm—into relative obscurity, ignored in the allocation of societal resources for fighting sexual violence.

Third, we will begin to think that we can fulfill our societal responsibility by excising a discrete “cancer”—the sexual predator. But, through the work of feminist reformers, we now are aware that sexual violence not only is more common than we once thought but that it is part of the fabric of our society, which includes the tacit approval of sexism and violence in everyday life. While we all are repulsed by the rapist-murderer, tolerant attitudes toward acquaintance rape are common. The sexual predator template encourages us to think that by exiling this monster we have acquitted our responsibility, yet as a larger society we will not have changed the circumstances that allow sexual violence to flourish.

Fourth, we should fear the sexual predator archetype as much as, if not more than, the sexual predator himself because this template has led to extraordinary legal measures that have embraced legal principles that are harbingers of a “preventive state.”² The preventive state claims the right to deprive people of liberty before criminal action is afoot. Under this approach, it is enough that there is a potential for harm, that the individual’s psychological makeup—or political inclinations—poses a grave risk. This attitude rips a large hole in the fabric of our American concept of justice.

With the advent of the “war on terror,” there is increasing pressure to expand the preventive actions of the government. Claiming the right of preemptive attack, the Bush administration launched a preventive war in Iraq. The administration detains “enemy combatants” indefinitely, without charge. Threats of bioterrorism have triggered a reinvigoration of the assertion of state power to quarantine and forcibly treat citizens. The USA Patriot Act as renewed in 2006 expands the government’s right to conduct surveillance, collecting information even when no specific crime is suspected. The government claims the right to wiretap international messages without even the modest protections of a warrant from the secret Foreign Intelligence Surveillance Act court. The horrors of September 11 are putting pressure on the delicate balance between security and liberty.

It is a truism that liberty is at the heart of our national self-identity. But many of the freedoms we take for granted today have been won through two centuries of hard-fought legal battles. The state can deprive a person of liberty only under the strictest of circumstances. In general, this means only when he or she has been charged and then convicted (beyond a reasonable doubt) of having actually committed (at a specified time and place in the past) a specified crime. We do not allow incarceration for the propensity to commit a crime. In our system, the punishment should never precede the crime.

Yet this is precisely what the predator laws seem to do—except that they do not call the deprivation of liberty “punishment.” The predator laws pick out a group of people and place them in a specially degraded legal status that allows the state to treat them in ways that no other person can be treated. Sexual predators are relegated, as it were, to a “reduced-rights zone.”

How can the law justify treating one particular group in a legally degraded way? If the government can lock up sexual predators in advance of their (predicted) crimes, why not other criminals? Why not terrorists? Why not political subversives? What is to stop the state from assessing all of us for “risk” and locking up prophylactically those whose RQ—risk quotient—is assessed above an arbitrary threshold?

We are confident that our fundamental principles of justice, enshrined in the Constitution, do not allow this kind of preventive detention. But the legal protections against the preventive state are fragile. The predator laws provide a template for a radical assault on those protections in a two-step process. First, the predator laws resurrect a concept that has properly fallen out of favor in U.S. law: the notion of the “degraded other.” In the past, we have used categories such as race, gender, national origin, sexual orientation, and disability to put people into reduced-rights zones. But the courts have, for the most part, put a stop to that. Now, the predator laws have reversed that trend, reintro-

ducing into our legal vocabulary the notion that we can designate a group to be put into this alternate legal universe where fundamental rights are diminished. The second step is the introduction of “risk” as a basis for putting people into the degraded status. Sexual predators are placed in the reduced-rights zone not because they have been convicted of a heinous crime but because we think they are at risk of committing one. Taken together, these two aspects of the predator template provide a formula for radically altering the balance between security and liberty.

How we conceptualize the scourge of sexual violence matters. The conceptual architecture we embrace will shape the legal and public policy choices we make. These, in turn, will determine whether we are spending our resources effectively or wastefully. And, because sexual violence carries such a powerful social meaning, the choices we make in this arena will have broad reverberations that shape our reactions to other threats to our security.

At the risk of oversimplification, we can identify two distinct and influential approaches to sexual violence that have emerged in the past several decades. One approach examines sexual violence at a societal level, asking which aspects of our society facilitate or inhibit the sexual victimization of women and children. The second approach looks at the individual sex offender and asks what biological or psychological factors are associated with sexual violence. The first approach will help us understand what societal changes we might take to prevent sexual violence. The second will prompt us to examine interventions at an individual level.

Prominent in the first approach have been feminist theorists and reformers. Law professor Catharine MacKinnon, for example, argues that sexual violence is “socially not biologically impelled.” It is “an act not of [biological] difference but of dominance . . . of gender hierarchy.” Sexual violence “flourishes with social support, enforcing and expressing” the socially imposed inferiority of women.³ This theoretical orientation leads MacKinnon, like other feminist reformers, to understand sexual violence as a widespread feature of our society, thriving in intimate relationships and families, on dates, and between acquaintances. If sexual aggression is nourished by a widespread socially sanctioned hierarchy of gender, then solutions must also be widespread, and they must seek to dismantle the hierarchy.

Feminist ideas have had a powerful—but limited—influence in reshaping our approaches to sexual violence. That sexual aggression is relatively widespread has received broad acceptance, but the underlying implication—that sexual violence flourishes because of a sexist society—remains the subject of intense controversy.

The second approach to sexual violence is exemplified by the work of R.

Karl Hanson, a social science researcher with the Canadian government. Hanson is among the leading experts worldwide in the empirical analysis of sexual offending. He has put together massive databases about sexual offending and sex offenders, crossing continents and spanning decades. Using sophisticated statistical analysis, he mines these data. He is looking for “predictors” of sexual recidivism, measurable facts about individuals that correlate with recidivism. From this research, Hanson constructs and validates “actuarial risk assessment” tools, psychological protocols that combine and weight the facts about a person and produce a numerical score associated with his risk of reoffending sexually.

MacKinnon’s theories tell us that if we want to do something about sexual violence, we should look around at social structures and attitudes to understand the extent and social characteristics of sexual violence. In contrast, psychological and biological theorists like Hanson prompt us to seek understanding of sexual violence by looking at—and within—the individual.

There is nothing inherently incompatible between broader societal and narrower individual approaches to explaining and understanding sexual violence. They can coexist. Occupying parallel conceptual worlds, they provide different lenses for understanding and trying to prevent the same social evil. We ought to embrace the truths of both if we want an effective program for addressing sexual abuse.

But if we are not careful, we can allow one approach or the other to occupy our field of vision, obscuring the truths of the other framework. Hanson’s work, for example, has certain features that seem to pull us in a direction at odds with the socially conscious view of feminists like MacKinnon. Hanson’s scientific techniques allow us—with reasonable accuracy and at reasonable expense—to classify people according to their risk. But these tools are likely to draw our attention disproportionately to identifying and neutralizing the “most dangerous.” When we look too much at individual risk, societal patterns and root causes of sexual violence are obscured.

A major thesis of this book is that such a shift is occurring, and that the predator laws result from, and in turn strengthen, an important imbalance in the approach to sexual violence. We give inordinate attention to the question made possible by Hanson’s work—who are the most dangerous and how can we protect ourselves from them—and give much less to the questions posed by MacKinnon—what are the patterns of sexual violence, and how do our social structures allow them to flourish.

How is this shift occurring? Consider the following story. In 1995, responding to the imminent release, after decades in prison, of an infamous rapist who had killed a fourteen year old, the governor of Minnesota called a

special session of the legislature to pass a new predator commitment law. The media attention on the matter was persistent and intense. At a legislative hearing to consider the bill, critics pointed to the serious questions of constitutionality that such preventive detention raises. In response, one of the most thoughtful (and politically liberal) members of the state senate posed the question: "How could any politician vote against this law? If we defeat this law what could I say to the family of the next victim, killed or raped by a person who would have been committed under this law?"

This powerful question has captured the American public's imagination. It seems so intuitively obvious that we ought to do all in our power to save the "next victim" from harm. Our failure to take available precautions seems clearly to implicate us in the tragedies that (looking backward) seem so preventable. We ought to spare no expense to stop the next murderer and save his next innocent victim.

But what underlies this question? We picture in our heads the deranged rapist-murderer who will surely strike again if released from prison. We conceptualize the predator laws as zeroing in on this man, picking him out of the thousands of "ordinary" criminals who pass every year through the criminal justice system and back into society. Just as the benefits of locking this "monster" away seem clear and indisputable, the alternative seems patently unacceptable. As the late U.S. Supreme Court chief justice William H. Rehnquist put it during the oral argument on the Kansas predator law: "So what's the State supposed to do, just wait till he goes out and does it again?"

The attraction of this paradigm is magnetic, but ultimately it is illusory. It is not just that the prospects of picking out the next rapist-murderer are vanishingly small. It is not simply that, once begun, this quest for safety from the "worst of the worst" will demand ever increasing resources in a spiral fueled by the politics of sexual violence. The real problem is that the vividness of this goal will blanch the larger threat from sexual violence. The real tragedy of deaths like Dru Sjodin's will be amplified because our moral fervor to prevent the next rape-murder will blind us to the concrete steps we can take to increase safety for the tens of thousands of children and women whose sexual victimization falls outside that narrow spotlight.

In this book I seek to help us find our way out of the magnetic attraction of this predator template. We need to turn from asking, how can we identify and lock up the most dangerous? to the more comprehensive, how can we design a system that will prevent the most sexual violence? We need to transfer our willingness to spare no expense from the highly visible but ultimately fruitless quest for perfect safety to the less flashy but broader efforts to get at the root causes of sexual violence and to take sensible safety precautions in regard to

the vast majority of sex offenders who are released into the community. And, finally, we need to make sure that we do not sacrifice our basic democratic principles in our quest for security.