

2013

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Caroline Palmer

*Minnesota Coalition Against Sexual Assault*

Bradley Prowant

*Law Student, University of Minnesota Law School*

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## Recommended Citation

Palmer, Caroline and Prowant, Bradley, "Re-Thinking Minnesota's Criminal Justice Response to Sexual Violence Using a Prevention Lens" (2013). *Symposium: 50th Anniversary of the Minnesota Criminal Code-Looking Back and Looking Forward*. Paper 2.  
<http://open.mitchellhamline.edu/symposium-minnesota-criminal-code/2>

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## RE-THINKING MINNESOTA'S CRIMINAL JUSTICE RESPONSE TO SEXUAL VIOLENCE USING A PREVENTION LENS

Caroline Palmer and Bradley Prowant\*

*“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.”<sup>1</sup>*

### I. Introduction

Sexual violence is one of the most difficult issues we face in the human condition. Anyone can be a victim – the harm knows no demographic boundaries. In Minnesota it was estimated that in one year 61,000 residents were subjected to a sexual assault.<sup>2</sup> This number could nearly fill the Metrodome in downtown Minneapolis. And survivors face many personal challenges. Rape is among “the most severe of all traumas, causing multiple, long-term negative outcomes.”<sup>3</sup> Even with the many strides that have occurred in recent years to support a victim-centered response, survivors who seek help from the legal, medical and mental health systems, among others still “may face disbelief, blame, and refusals of help instead of assistance.”<sup>4</sup> It is a problem that demands a response from all levels of society. And yet this response is lacking.

But the inadequacy of the sexual violence response does not lie solely within our systems or the victim-blaming myths perpetuated by society and reflected in jury pools. Public policy, the driving force behind the system response, has failed to see the big picture when it comes to the

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\* Caroline Palmer, J.D. is Staff Attorney at the Minnesota Coalition Against Sexual Assault (MNCASA). She is a graduate of Hamline University School of Law and Barnard College. She was a Policy Fellow at the Hubert H. Humphrey Institute of Public Affairs at the University of Minnesota. Bradley Prowant is a third-year student at the University of Minnesota Law School. He received his B.A. in history and philosophy from the University of Iowa.

<sup>1</sup> Eric Janus, *Examining Our Approaches to Sex Offenders & The Law: Minnesota’s Sex Offender Commitment Program: Would an Empirically-Based Prevention Policy Be More Effective?*, 29 WM. MITCHELL L. REV. 1083, 1085 (2003) (hereinafter referred to as *Examining Our Approaches*).

<sup>2</sup> Minn. Dep’t of Health, *Costs of Sexual Violence in Minnesota* 4 (July 2007), [http://www.pire.org/documents/mn\\_brochure.pdf](http://www.pire.org/documents/mn_brochure.pdf) (last visited Oct. 7, 2012) (hereinafter *Costs Report*). The study contains statistics for the year 2005.

<sup>3</sup> Rebecca Campbell, Emily Dworkin and Giannina Cabral, *An Ecological Model of the Impact of Sexual Assault on Women’s Mental Health*, 10 TRAUMA VIOLENCE ABUSE 225 (2009).

<sup>4</sup> *Id.* at 226.

relationship between effective law making and sexual violence prevention and intervention. According to Joan Tabachnick and Alisa Klein, authors of *A Reasoned Approach: Reshaping Sex Offender Policy to Prevent Child Sexual Abuse*, “Experts agree that a criminal justice response alone cannot prevent sexual abuse or keep communities safe. Yet tougher sentencing and increased monitoring of sex offenders are fully funded in many states, while victim services and prevention programs are woefully underfunded.”<sup>5</sup> An effective policy geared towards ending sexual violence and holding offenders accountable must be comprehensive in its approach, constructed with the view of preventing sexual violence from occurring in the first place, aggressively intervening when it does and looking to the future to stop further harm.

But current public policy is decidedly lopsided in its response, so focused on punishment, particularly for the worst-of-the-worst offenders, that there is little opportunity for ideas about prevention, let alone meaningful support for victims or far-reaching rehabilitation programs for offenders, to gain the serious traction in the discussion. This state of affairs is driven, in part, by the complexity of the issues, and no one would argue that they are not among the most difficult and politically unpopular any lawmaker has to face. Considerable public safety and public health concerns are at stake.

Still, horrific headlines about sex crimes often translate into near instant legislative solutions, without regard to the fact that there may not be a one-size-fits-all answer or that there may be a negative unintended consequence in some other part of the legal response or that sexual violence requires a comprehensive and well-considered strategic approach.<sup>6</sup> According to the

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<sup>5</sup> Joan Tabachnick and Alisa Klein, Association for the Treatment of Sexual Abusers, *A Reasoned Approach: Reshaping Sex Offender Policy to Prevent Child Sexual Abuse* 2 (2011), <http://www.atsa.com/pdfs/ppReasonedApproach.pdf> (last visited Oct. 7, 2012) (hereinafter referred to as *A Reasoned Approach*).

<sup>6</sup> *Id.* at 21-24. According to Tabachnick and Klein:

There is a growing understanding that the simple solutions offered by legislative policies broadly applied to every offender have not been effective in keeping children safe or preventing child

Council of State Governments, “Some state leaders have expressed concern that the urgency of efforts to strengthen sex offender management policy is prohibiting lawmakers from fully considering the range of long-term impacts such policies will have.”<sup>7</sup> Little time is spent reviewing the evidence or collecting expert opinion when the public pressure is on to punish sex offenders. Prevention-related proposals are sometimes met with skepticism in this retributive environment because it is difficult to prove that a sexual violence crime did not occur and that its unaccountability has a causal link to a specific policy.<sup>8</sup> As the National Alliance to End Sexual Violence (NAESV), a victim-centered organization committed to educating federal policy makers about best practices in the sexual violence response, wrote in a 2008 position statement:

States and communities across the nation are developing measures to manage adult sex offenders with the express purpose of increasing safety for victims and communities. Unfortunately, not all measures currently being enacted do, in fact, increase safety. Some put communities at higher risk, while others create a false sense of security.<sup>9</sup>

One good example of misdirected public policy is residency restrictions, which according to some studies (including one by the Minnesota Department of Corrections) show little success in preventing re-offenses or providing a reliable protective strategy for public safety.<sup>10</sup> And yet this blanket solution still holds currency among many policy makers.<sup>11</sup>

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abuse. Furthermore, the isolating and stigmatizing effect of legislation on sex offenders and their families have generated a number of unintended consequences that limit family, community and societal ability to prevent sexual abuse in the first place. Tough restrictive policies are needed for the most dangerous sex offenders in society. But these policies are applied broadly and typically do not recognize the continuum of behaviors of sexual abuse, the range of ages of those who sexually abuse, and the range of risks posed by sex offenders to re-offend.

*Id.* at 42.

<sup>7</sup> See *A Reasoned Approach*, *supra* note 5 at 27, citing Council of State Governments, *Sex Offender Management Policy in the States: Strengthening Policy and Practice* (2010), <http://www.csg.org/policy/SexOffenderManagementProject.aspx> (last visited Oct. 7, 2012).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 27 citing National Alliance to End Sexual Violence, *Community Management of Convicted Sex Offenders: Registration, Electronic Monitoring, Civil Commitment, Mandatory Minimums and Residency Restrictions* (2008). See [www.endsexualviolence.org](http://www.endsexualviolence.org) (last visited Oct. 7, 2012).

<sup>10</sup> *Id.* at 24. See Minnesota Department of Corrections, *Residential Proximity and Sex Offense Recidivism in Minnesota 2* (April 2007) (re-offenses in study would have not been deterred by residential restrictions),

Victim advocacy organizations such as NAESV and the Minnesota Coalition Against Sexual Assault (MNCASA)<sup>12</sup> have a strong interest in a robust public policy response to ending sexual violence. But the response must make sense and take into account both prevention and intervention strategies, backed up by research and expertise in the field. The authors of this article contend that Minnesota policy makers are at a crossroads. They have an unprecedented opportunity to make some important changes, ones that incorporate prevention and intervention strategies. This opportunity comes out of necessity – not only because the harm persists but also because the current system, particularly the Minnesota Sex Offender Program, is under close scrutiny due to mounting costs and looming legal challenges.<sup>13</sup>

The key question we as a society confront is what changes will satisfactorily balance justice for victims with offender accountability, attempts at rehabilitation through treatment, and high community expectations about public safety? This article offers background on what the discussion about prevention of sexual violence can look like,<sup>14</sup> a theoretical analysis of the policy conundrum facing our lawmakers<sup>15</sup> and some examples of how prevention and intervention strategies can be put into practice in Minnesota law as advanced through MNCASA's legislative agenda<sup>16</sup> with the hope that a new direction can be charted toward the best possible public policy response for the state.

## II. Sexual Violence Prevention: Redefining the Discussion

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<http://www.doc.state.mn.us/documents/04-07SexOffenderReport-Proximity.pdf> (last visited Oct. 7, 2012). See also Colorado Department of Public Safety, Division of Criminal Justice, Sex Offender Management Board, *Report on Safety Issues Raised by Living Arrangements for and Location of Sex Offenders* (2004) (residency restrictions are not deterrents to sex offense crimes), [http://dcj.state.co.us/odvsom/sex\\_offender/SO\\_Pdfs/FullSLAFinal01.pdf](http://dcj.state.co.us/odvsom/sex_offender/SO_Pdfs/FullSLAFinal01.pdf) (last visited Oct. 7, 2012).

<sup>11</sup> See e.g. Minn. Stat. §260B.198, subd. 1a (signed into law on May 24, 2011; creates residency restrictions for some juvenile offenders).

<sup>12</sup> See [www.mncasa.org](http://www.mncasa.org) (last visited Oct. 7, 2012).

<sup>13</sup> See Section III.

<sup>14</sup> See Section II.

<sup>15</sup> See Section IV.

<sup>16</sup> See Section V.

Responsibility for the prevention of sexual violence is often placed on the individual and most commonly manifests itself in the form of risk reduction techniques such as self defense courses, safety tips, the buddy system and educational programs for children about good touch or bad touch. While these tools do have value they can also create a false sense of security, a belief that the individual alone can prevent sexual violence from occurring, a belief even that it is the individual's duty to do so.<sup>17</sup> Even the most prepared and informed person can still be a victim of sexual violence. There are only so many variables that can be controlled and ultimately it is the perpetrator who decides to commit the crime. Still, society continues to subscribe to beliefs about sexual assault that place blame on the victim.<sup>18</sup> When prevention strategies focus only on the victim's perceived responsibilities without regard to the potential perpetrator's criminal actions they only serve to perpetuate the myths.

Sexual violence prevention strategies are modeled upon a public health approach.<sup>19</sup> There are three levels of prevention strategies that can be applied to the analysis: primary, secondary and tertiary.<sup>20</sup> Primary prevention takes action to prevent problems from occurring in the first place. It involves a systematic process that promotes healthy behaviors and an environment that

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<sup>17</sup> There are also unintended consequences related to risk reduction strategies. For example, it may not be safe to fight back during an attack, especially if the perpetrator has a weapon, is bigger than the victim, or employs some sort of coercive or threatening tactic. Also, many risk reduction strategies are focused on stranger attacks when statistics show that the victim knows the assailant in some way (family, friend, intimate partner, acquaintance, fellow student or employee, etc.). Nonstranger perpetrators are able to use trust against a victim in ways that a stranger cannot. According to the Bureau of Justice Statistics, 64% of female victims and 40% of male victims knew the perpetrator. NATIONAL CRIME VICTIMIZATION SURVEY, 2010 9, <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv10.pdf> (last visited Oct. 7, 2012).

<sup>18</sup> See *State v. Obeta*, 796 N.W.2d 282, 293 (Minn. 2011). "The research provided by the State and amici shows that the public holds and gives credence to rape myths." *Id.* See also Kaarin Long, Caroline Palmer & Sara Thome, *A Distinction Without a Difference: Why the Minnesota Supreme Court Should Overrule its Precedent Precluding the Admission of Helpful Expert Testimony in Adult-Victim Sexual Assault Cases*, 31 *HAMLIN J. PUB. L. & POL'Y*, 569, 582-91 (August 2010) (hereinafter *A Distinction Without a Difference*).

<sup>19</sup> See Prevention Institute, <http://www.preventioninstitute.org> (last visited Oct. 7, 2012).

<sup>20</sup> Minnesota Department of Health, *The Promise of Primary Prevention of Sexual Violence: A Five-Year Plan to Prevent Sexual Violence and Exploitation in Minnesota*, 5 (2009), <http://www.health.state.mn.us/injury/pub/svppplan.pdf> (last visited Oct. 7, 2012) (citations omitted).

reduces the likelihood or frequency of occurrence. Secondary prevention is the immediate response after an incident. It addresses short-term consequences and is most commonly recognized as crisis intervention. Victim advocacy, responses from law enforcement and medical providers, and community-based awareness campaigns describing an assault are examples of secondary prevention responses. Tertiary prevention attempts to decrease the long-term disability associated with the problem and looks to prevent possible reoccurrence of the problem. Examples of tertiary prevention responses are extended support and treatment for sexual assault survivors, sex offender treatment programs and reform of criminal sexual conduct statutes. The justice system response is interwoven within the secondary and tertiary levels.<sup>21</sup>

Another common prevention analysis is *The Spectrum of Prevention*. Larry Cohen developed this nationally recognized response model while he was director of the Contra Costa Health Services Prevention Program in California.<sup>22</sup> It can be applied to a variety of public health concerns from violence prevention to nutrition, fitness, traffic safety and smoking cessation, among many others.<sup>23</sup>

There are six levels for strategy development in the *Spectrum* that “are complementary and when used together produce a synergy that results in greater effectiveness than would be possible by implementing any single activity.”<sup>24</sup> This multi-tiered approach creates roles for the individual, the community and greater society: 1) strengthening individual knowledge and skills; 2) promoting community education; 3) educating providers; 4) fostering coalitions and networks; 5) changing organizational practices; and 6) influencing policy and legislation.<sup>25</sup> What the

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at <http://www.preventioninstitute.org/component/jlibrary/article/id-105/127.html> (last visited Oct. 7, 2012). *The Spectrum* is based on the work of Dr. Marshall Swift in treating developmental disabilities.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

*Spectrum* demonstrates is that the prevention response depends on a variety of partners, organizing on both the grassroots and the formal systemic levels, to be successful. No one person or organization or policymaker can do it alone. A variety strategies need to be deployed and many different types of audiences (of all ages and developmental levels) should be targeted with specially tailored messages. Participants on all the levels of the *Spectrum* are engaged and innovating as the problem evolves over the passage of time.

Meaningful policy responses to sexual violence always consider the role of prevention. The *Governor's Commission on Sex Offender Policy*, convened by Minnesota Governor Tim Pawlenty from 2004-05, for example, included in its recommendations the need for “increased attention to the prevention of sex crimes.”<sup>26</sup> The Commission’s members noted that:

While the potential long-term cost savings to the public health system from preventing sex crimes are large – as is the potential to avoid suffering by victims – specific strategies on how to break cycles of offending are less clear. The Department of Health’s work on violence prevention is a valuable start; and more should be done to develop, research and discover effective prevention strategies.<sup>27</sup>

The Minnesota Department of Health later found that the cost of sexual violence to the state of Minnesota could be estimated at \$8 billion or \$1,540 per resident in 2005.<sup>28</sup> These are significant numbers that have caught the attention of policy makers in the time since they were reported but responsive action has been mostly limited to intervention efforts.<sup>29</sup> To this date, no state dollars have been invested in sexual violence prevention (current funding for the Minnesota Department

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<sup>26</sup> *Governor's Commission on Sex Offender Policy Final Report*, 6 (January 2005), <http://www.doc.state.mn.us/commissionsexoffenderpolicy/commissionfinalreport.pdf> (last visited Oct. 7, 2012) (hereinafter *Governor's Commission*).

<sup>27</sup> *Id.*

<sup>28</sup> *Costs Report*, *supra* note 2 at 6. The cost estimate was 3.3 times the costs incurred by alcohol-impaired driving. *Id.* The costs include medical care, mental health care, lost work, property damage, suffering and lost quality of life, sexually transmitted infections, pregnancy, suicide acts, substance abuse, victim services/out of home placement, investigation/adjudication, sanctioning/treatment, earning loss while confined, and primary prevention. *Id.* It is believed that the \$8 billion figure is actually low because several costs such as those borne by counties were not included in the study.

<sup>29</sup> *See* Section III.



of Health's in-house and contracting efforts in the area of prevention comes from federal sources such as the Centers for Disease Control and Prevention).<sup>30</sup>

It is time to shift the policy-making paradigm and prioritize prevention in an effective manner.<sup>31</sup> As Tabachnick and Klein stated in *A Reasoned Approach*, "The field of public health calls for policies 'that alter developmental trajectories leading to initial perpetration of violence' as opposed to exclusive after-the-fact responses."<sup>32</sup> Prevention and intervention "are not diametrically opposed constructs" – and as renewed attention is paid to improve the system response to sexual violence in Minnesota (and particularly the management of the sex offenders in the state's expensive and controversial civil commitment program), there is also a renewed opportunity to promote innovative solutions *before* the harm occurs.<sup>33</sup>

### **III. Relevant History of System Response to Sexual Violence in Minnesota**

It is helpful to review some of the legislative and other public policy response to sexual violence in Minnesota before moving forward to analyze where improvements would benefit from stronger integration of prevention and intervention responses. Many of these reforms emerged in the 1970's in an attempt to "craft a legal system that better reflects modern society's

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<sup>30</sup> See funding note at bottom of Minn. Dep't of Health Sexual Violence Prevention Program web page: <http://www.health.state.mn.us/injury/topic/svp/index.cfm> (last visited November 25, 2012).

<sup>31</sup> Caroline Palmer, *Understanding the Relationship Between Prevention and Intervention Strategies to Stop Sexual Violence*, Violence Against Women Monitor (March 2010), [http://www.stopvaw.org/the\\_vaw\\_monitor.html](http://www.stopvaw.org/the_vaw_monitor.html) (last visited Oct. 7, 2012) (hereinafter referred to as *Understanding the Relationship*).

<sup>32</sup> *A Reasoned Approach*, *supra* note 5, at 27.

<sup>33</sup> *Understanding the Relationship*, *supra* note 31. Note that the Minn. Dep't of Human Services formed, under court order, a Sex Offender Civil Commitment Advisory Task Force in October 2012. See Larry Oakes, *Magnuson Leads Task Force on Sex Offender Treatment* (Oct. 7, 2012), <http://www.startribune.com/local/173052971.html> (last visited Oct. 7, 2012).

norms and expectations relating to sexual assault cases.”<sup>34</sup> But even with these changes, conviction rates remain the lowest for any serious felony.<sup>35</sup>

Minnesota Rule of Evidence 412, one example of an early legal reform, bars evidence of a victim’s past sexual conduct from being admitted at trial except in narrow circumstances.<sup>36</sup> Commonly referred to as the “rape-shield law,” Rule 412 has its foundation in Minnesota Statute 609.347. Despite trial protections of a sexual assault victim’s character and past sexual activities being a more contemporary issue,<sup>37</sup> the rape-shield became law in 1975 amid sweeping reform to Minnesota’s treatment of sex crimes. Buried beneath criticism of a slow moving legislature and debates about gas taxes and handgun control, the reform received little attention.<sup>38</sup> Nonetheless, the statutes enacted on the last day of its 69th session the Minnesota Legislature are the basis for current sex crimes within the Minnesota Criminal Code.<sup>39</sup>

The reform diversified the nature of criminal sexual conduct and abandoned more primitive notions of offender accountability, improving understanding about the limits of consent and who holds the power of consent. Prior to 1975, the Criminal Code division labeled “sex crimes” contained 11 sections that failed to create culpability for most sexual violence. For example, sections 609.291 and 609.292, titled “aggravated rape” and “rape” respectively, only accounted for forced sexual intercourse by a man against a women *who is not the man’s wife*.<sup>40</sup> Section 609.296, “indecent liberties,” also created a spousal exception. Furthermore, unless the

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<sup>34</sup> *A Distinction Without a Difference*, *supra* note 18, at 574, citing Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 Akron L. Rev. 957, 961 (2008).

<sup>35</sup> *Id.* at 575 citing David Bryden & Sonja Lengnick, *Criminal Law: Rape in the Criminal Justice System*, 87 J. Crim. L. & Criminology 1194, 1210 (1997). See also Jane Kim, *Taking Rape Seriously: Rape as Slavery*, 35 Harv. J. L. & Gender 263, 264 fn. 8 (2012).

<sup>36</sup> “Probative value of the evidence is not substantially outweighed by inflammatory or prejudicial nature of conduct” and either “the defense is raising consent of victim as a defense” or “the prosecution is using evidence of semen, pregnancy, or disease.”

<sup>37</sup> See *Obeta*, 796 N.W.2d at 282.

<sup>38</sup> *Legislators, Legislature get poor marks*, Minneapolis Tribune, August 31, 1975, at 1A and 10A.

<sup>39</sup> All references herein to “Criminal Code” shall mean the Minnesota Criminal Code unless stated otherwise.

<sup>40</sup> Minn. Stat. §§ 609.291-92 (1974, *repealed* 1975).

sexual violence involved a child, these were the only mechanisms by which a person could be held liable for sexual assault.

In 1975, the Legislature repealed the “aggravated rape,” “rape,” and “indecent liberties” statutes; the replacements are present-day statute sections 609.341-609.3451 which have had some changes since 1975, but not any sort of wholesale overhaul. These statutes use the phrase “criminal sexual conduct” (a phrase absent from the Criminal Code prior to 1975) to represent varying degrees of sexual violence. By eliminating outdated notions of sexual violence, such as the spousal exception, and broadening the conduct constituting an offense, the Legislature began to recognize the complexity of sexual violence. Since 1975, that recognition has grown as cognizance of sexual violence becomes greater. Offenses such as solicitation of minors for sexual acts (enacted 1986), and non-consensual contact with a sexual intent (fifth degree criminal sexual conduct, enacted 1988) and sex trafficking (§§609.281-284, all enacted 2005; §§609.321-322, both enacted 1979 with updates in 2010) are examples of the Legislature’s attempts to cast a wider net on the problem of sexual violence.

However, as the culpability net has widened, the legislative considerations for victims have failed to keep pace. In addition to the rape-shield law, the 69th legislature passed section 609.35 which codified a county’s obligation to pay for medical expenses related to examining a sexual assault victim. These two sections symbolize a rarity in the politics surrounding sexual violence: victim-focused policy. Today, 32 statutes compose the “sex crimes” division of Chapter 609. Of those 32, only three (one addition since 1975) are aimed at victims (enacted in 1984, section 609.3471 keeps information pertaining to a minor sexual assault victim confidential).

Notably, Minnesota Statutes Chapter 611A is intended to aid victims of crime generally. Chapter 611A contains sections that allow for the creation of sexual violence victim services but without appropriate and consistent funding, the efficacy of these sections fails. Punishment, not restitution, has become the rule for sexual violence policy. The offender-focus of the legislature has become perhaps most vivid in the last two decades with the evolution in application of Minnesota's Sex Offender laws.

**a. Minnesota Sex Offender Program**

When determining whether to commit a sex offender, the state initially relied upon a 1939 law that allows for the civil commitment of individuals with sexual psychopathic personalities.<sup>41</sup> Immediately challenged (in 1939) on constitutional grounds, the Minnesota Supreme Court established the standard to determine if one is apt for civil commitment: “an utter lack of power to control [one’s] sexual impulses.”<sup>42</sup> The law remained almost dormant until high-profile sexual assaults in the 1980s led to its revival.<sup>43</sup> Yet, as of 1990, no more than 30 individuals were in the state’s civil commitment program.<sup>44</sup> Since 1990, there have been two important changes to the commitment process – one procedural, one substantive. Both of these changes were exacerbated by two high-profile events involving a sex offender.

Prior to 1991, county attorneys were charged with identifying possible candidates for the civil commitment program. If the county attorney deemed an individual to meet the “lack of power to control” standard, the county attorney could file a petition for a hearing. At that hearing, a judge (never a jury) would hear the case for civil commitment and the State would be

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<sup>41</sup> See Minn. Stat. §253B.02 (2011).

<sup>42</sup> ERIC JANUS, FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 29 (2006).

<sup>43</sup> OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINN., EVALUATION REPORT: CIVIL COMMITMENT OF SEX OFFENDERS 4 (March 2011).

<sup>44</sup> *Id.* at 4.

charged with meeting a burden of “clear and convincing evidence.” A would-be commitment had a right to appeal a judicial decision to commit. In 1991, the Department of Corrections began referring possible civil commitment candidates to the county attorneys; thus reducing the “legwork” county attorneys had to perform and easing their ability to commit an offender. The referral procedure coupled with the pre-1991 procedure is the current procedure for civilly committing sex offenders.

In 1992, the State recommended Dennis Darol Linehan for the civil commitment program. After spending nearly thirty years in jail for a rape/murder, the State argued Linehan still had an utter lack of control of his sexual impulses.<sup>45</sup> A trial court and the Minnesota Court of Appeals agreed. However, in 1994 the Minnesota Supreme Court overturned the commitment holding Linehan did not meet the high threshold of “utter lack to control.”<sup>46</sup> Despite Linehan’s somewhat advanced age (53 in 1994) and the fact that his release would be supervised, media and public outcry caused the Legislature to act.<sup>47</sup> In a special session convened in the aftermath of Linehan’s non-commitment, the Legislature passed the current standard for commitment of sex offenders.<sup>48</sup> A person with “sexual psychopathic behavior” still qualifies for civil commitment, but a lower threshold of “sexually dangerous person”<sup>49</sup> also qualifies an individual for commitment. The latter standard has three elements: 1) past harmful sexual conduct, 2) sexual, personality, or other mental disorder or dysfunction, and 3) recidivist risk.

In the face of the substantive change to civil commitment jurisprudence, in 2000 the Minnesota Sex Offender Program had grown to 149 individuals (a large increase from 1990, but low compared with the current population). In 2003 the number of commitments rose

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<sup>45</sup> JANUS, *supra* note 42, at 29, 30.

<sup>46</sup> *Id.* at 30.

<sup>47</sup> *Id.* at 31, 32.

<sup>48</sup> *Id.* at 31, 32.

<sup>49</sup> *See* Minn. Stat. §253B.02 (2011).

dramatically in response to outrage over the tragic rape/murder of college student Dru Sjodin by a recently released, not-committed sex offender. Pressured by the Governor, the Department of Corrections began referring large numbers of convicted sex offenders to county attorneys in hopes that another sex offender would not “slip through.” In the five years following the tragic events surrounding Sjodin, the Department of Corrections referred 157 sex offenders per year to county attorneys; in the previous 12 years the Department of Corrections had referred a total of 333 sex offenders for civil commitment. The procedural and substantive changes implemented by 2003 resulted in two-thirds of current “clients” of the Minnesota Sex Offender Program being committed between 2004 and 2012.

In 2010, the Legislative Auditor evaluated the sex offender program and returned unsettling results. Each commitment costs the state of Minnesota approximately \$120,000 per year, almost three times as much as an inmate in Minnesota’s prisons.<sup>50</sup> The program is predicted to grow at a rate slightly under 10% for the next ten years (or approximately 53 new commitments each year) totaling in 1109 commitments in 2020.<sup>51</sup> Thus far, the predicted growth rate has proved accurate as the sex offender program had 653 clients as of June 19, 2012<sup>52</sup> The underlying sexually violent offenses that each offender committed should not be minimized, however such growth is unsustainable.

Given that the Legislative Audit Committee is comprised of both Democrats and Republicans from both legislative bodies, lawmakers are cognizant of the unsustainability of such growth. With that awareness, seeking alternative means by which to combat sexual violence seems to be the next logical step. However, current policy still fails to account for

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<sup>50</sup> OFFICE OF LEGISLATIVE AUDITOR, *supra* note 43, at 1.

<sup>51</sup> *Id.* at 4.

<sup>52</sup> *Minnesota Sex Offender Program Overview*, MINN. DEP’T OF HUMAN SERVS., [http://www.dhs.state.mn.us/main/idcplg?IdcService=GET\\_DYNAMIC\\_CONVERSION&dDocName=dhs16\\_14991\\_4&RevisionSelectionMethod=LatestReleased](http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&dDocName=dhs16_14991_4&RevisionSelectionMethod=LatestReleased) (last visited Oct. 7, 2012).

prevention-focused policy as a legitimate method for curbing sexual violence and a wise outlet for State funds that can complement ongoing intervention-based responses.

**b. Practical Concerns**

All commitments to the Minnesota Sex Offender Program are considered “clients” receiving treatment for their disorders, and all have been committed following prison sentences for sexual violence.<sup>53</sup> Theoretically, they cannot be prisoners (and must be clients) or it would result in constitutional violations regarding double jeopardy and ex post facto laws. The United States Supreme Court dismissed these concerns by finding that civil commitment following a prison term is not punitive in nature.<sup>54</sup> However, in 1982 the Court ruled that a person civilly committed for a mental disorder must be receiving adequate treatment or such commitment violates 14th Amendment due process.<sup>55</sup> Some courts have applied this condition to the civil commitment of sex offenders and a failure to provide appropriate treatment has resulted in injunctive relief.<sup>56</sup> Within these cases lurks an alarming possibility: civil commitment may be a veneer for preventative detainment. Such concerns are beginning to arise in Minnesota because of the large number of offenders being committed and the low number being released (only one thus far). The most recent manifestation of these concerns is the certified class action by clients of the sex offender program against the Minnesota Department of Human Services.<sup>57</sup>

Another concern is the high number of individuals Minnesota commits. Of the 20 states that operate sex offender civil commitment programs, Minnesota commits the most per capita and third most in gross commitments behind Florida and California.<sup>58</sup> Each individual in

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<sup>53</sup> *Id.*

<sup>54</sup> *Kansas v. Hendricks*, 521 U.S. 346 (1997).

<sup>55</sup> *Youngberg v. Romeo*, 457 U.S. 307, 322-323 (1982).

<sup>56</sup> *Turay v. Seling*, 108 F.Supp.2d 114 (W.D. Wash. 2000).

<sup>57</sup> *Karsjens v. Jesson*, WL 3024440 (D. Minn. 2012).

<sup>58</sup> LEGISLATIVE AUDITOR, *supra* note 43, at 16-18.

Minnesota's sex offender program remains there at a cost of approximately \$120,000 per year.<sup>59</sup> The sex offender program operates at a budget of approximately \$70 million annually.<sup>60</sup> Absent a decrease in commitments and/or large-scale releases, the money needed to operate the sex offender program will continue to rise at alarming rates. And yet while the legislature continues to fund the Minnesota Sex Offender Program, it allocates zero dollars for the prevention of sexual violence. Furthermore, taking the legislature's approach to sexual violence as a whole, it spends more money on sexual offenders than it does on victims of sexual offenses.<sup>61</sup>

#### **IV. Analysis of Current Policy Response: The Problem of Induction**

The history of the policy response to sex offender management is defined by fear and reactionary politics. This is understandable; sexual violence is an emotionally charged issue with high public interest. In the wake of events such as Linehan's controversial release and the tragedy of Sjodin's death, the public demands immediate actions to ensure safety needs are met and its representatives act with little heed to the cost (both monetary and societal). Unfortunately, groups focused on sexual violence prevention receive less attention and as a result less funding. This course of action results in a tunneling of our focus. According to Eric Janus, as described in his book *Failure to Protect*, "We have restricted our focus to the downstream part of the problem – those individuals who continue to offend even after they have gone to prison – and have rendered less visible the upstream, but much larger, aspect of the problem."<sup>62</sup>

Although seemingly academic, there is another manner in which to characterize the problem that plagues the rationale behind sexual violence policy: the problem of induction. The problem of induction was championed by 19th century British philosopher David Hume

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<sup>59</sup> \$117,000 per resident in 2010; \$122,000 per resident in 2011. *Id.* at 12.

<sup>60</sup> Range in last four years: \$75 million in 2008 to \$67.5 million in 2011. *Id.* at 12.

<sup>61</sup> In 2006, Minnesota spent \$130.5 million on sexual offenders and \$90.5 million on victims of sexual violence. *Costs Report, supra* note 2, at 7-10.

<sup>62</sup> JANUS, *supra* note 42, at 50.



(although he did not explicitly call it such) in response to his concerns about causal inferences. Hume worried that over-reliance on past experience could lead one to believe that nature behaves in a uniform manner despite our experience demonstrating otherwise. Put simply, the problem of induction is creating a general rule from an isolated experience; the “problem” is unsound reasoning because there is a lack of necessary causation. For example, in the context of this paper’s discussion, the most recent sexual violent offender had traits x, y, and z; therefore, all sexual violent offenders will embody such traits. Yet, this type of erroneous reasoning continues to pervade sexual violence policy. Simple existential awareness of the beliefs and presumptions that drive current sexual violence policy could improve future reasoning and promote sounder approaches.

More contemporary work has been proliferated that further explicates the poor reasoning underlying current sexual violence policy. In 2007, epistemologist Nassim Taleb<sup>63</sup> advanced the problem of induction through his “Black Swan Theory.” The idea stems from the following fallacious example: It was once thought only white swans existed because only white swans had ever been observed; when a black swan was observed it had a profound impact because it undermined current “understanding.” Such is the course of a “black swan event.” Talib warns against the black swan event because the less it is accounted for, the greater impact it will have. At the same time, black swan events are not predictable, and they are not objective; they result from overconfidence in knowledge and a failure to recognize epistemic limitations.<sup>64</sup> The gravity of a black swan event results from the event being outside “the usual” and the (sometimes extreme) over-reliance on recurring but not *necessary* recurring events. However,

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<sup>63</sup> Nassim Nicholas Taleb is a Lebanese-born epistemologist focused on the problems of luck, uncertainty, and probability. He holds a professorship at the New York University’s Polytechnic Institute.

<sup>64</sup> NASSIM NICHOLAS TALEB, *THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE* xxiii (paperback ed. 2010).

their effect can be mitigated by checking what we think we “know” and by not attempting to retrospectively justify the event as foreseeable (thus circumventing the notion that such an event was ever outside our knowledge).

Perhaps most importantly, Taleb is not engaged in a purely academic exercise – he is concerned with the effect epistemic arrogance has on our everyday lives. This is because when pervasive false beliefs are unsettled, the consequences are magnified. The rationale underlying sexual violence policy fits squarely within Taleb’s paradigm. High profile, widely reported events like rape or murder lead people to believe such events are “the norm” instead of the rarity. Furthermore, it is believed that the same small group of people is responsible for this “norm.” This false norm coupled with the illusory belief that most sexual violence is committed by strangers (i.e., stranger danger) results in policies that are highly reactionary to soothe the general fear of the public. Yet, most individuals who commit sexually violent acts resulting in prison sentences have no prior history of a violent offense, and sex offenders with a prior conviction for a sexual offense comprise only 14% of those in prison for sexual violence.<sup>65</sup> Furthermore, it is estimated that in most sexual assaults the victim knows the perpetrator; approximately 15% of those in prison for sexual assault claim their victim was a stranger to them.<sup>66</sup> Finally, even though these statistics demonstrate violent sexual offenses do not fit the common stereotype, most sexual violence goes unreported and thus these statistics may be inflated.<sup>67</sup> Ignorance of common facts about sexual violence coupled with a failure to account for the sexual violence that is unseen leads to a failure to make comprehensive sexual violence policy.

Data defying what is believed to be the “norm” demonstrate the legislature’s sexual violence policies are a result of epistemological arrogance (i.e., believing that all sexual

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<sup>65</sup> JANUS, *supra* note 42, at 43.

<sup>66</sup> *Id.* at 46. *See also* NATIONAL CRIME VICTIMIZATION SURVEY, 2010 *supra* note 17.

<sup>67</sup> JANUS, *supra* note 42, at 46-47.

offenders fit the same traits). When a rare, high profile event (i.e., black swan event), such as the Sjodin tragedy, occurs, the public and legislature consider such an event as an *affirmation* of their “knowledge” (i.e., stranger danger, high recidivism) instead of an unpredictable *aberration*. This type of reasoning creates an inconsistency whereby people are reacting *abnormally* to what they perceive as *normal*. Meanwhile, the bulk of sexual violence never figures into the equation. Instead of over-relying on the usual (e.g., intra-family sexual violence) and being shocked by the rare event (e.g., the Sjodin tragedy), the rare event is relied upon as “the usual” and when this “usual” occurs it has the shock effect of the rare (because it is *in fact* a rare event). This is directly in line with Taleb’s warnings. The black swan event *cannot* be predicted, only hedged. Our false perceptions (i.e., epistemic arrogance) amplify the reaction to the rare (black swan) event. Instead of focusing on that which can be known, such is ignored in the quixotic quest to prevent an event outside our epistemic range. To reify, by believing the infrequent, horrific sexually violent act can be predicted (and thus prevented) the majority of sexual violence goes unheeded and the focus of sexual violence policy continues in vain.

In the wake of rare, shocking sexual violence, the reasoning behind policy for the last two decades has been that such assaults were “foreseeable” if only the “right factors” would have been noticed. This narrative fallacy<sup>68</sup> has led to the procedural and substantive changes occurring in the sex offender policy; legislatures believe the rare, unpredictable event is within their power to prevent. As such, significant resources (via Department of Corrections referrals, county attorney assessments, Minnesota Sex Offender Program) are devoted to detaining previously convicted sex offenders and creating obstacles to rejoining society for released sex

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<sup>68</sup> Taleb uses the phrase “narrative fallacy” in a similar manner as post hoc rationalizations. The narrative fallacy is our [humans] inability to look at a series of events without giving the events an explanation (i.e., narration). By linking events together through perceived causes (real or imaginary), those events “make more sense” to us but also give us a false sense of understanding [which exacerbates the black swan event].

offenders. Consequently, little or no resources are allocated to programs that focus daily on preventing common sexual violence (seen and unseen) because such efforts do not fit in the fight against the (false) paradigm.

We will return to the significance of the black swan event and its relation to the sexual violence policy response in this article's conclusion.<sup>69</sup>

## V. Uniting Intervention and Prevention Responses

*There is a growing understanding that the simple solutions offered by legislative policies broadly applied to every offender have not been effective in keeping children safe or preventing sexual abuse. Furthermore, the isolation and stigmatizing effect of legislation on sex offenders and their families have generated a number of unintended consequences that limit family, community and societal ability to prevent sexual abuse in the first place. Tough restrictive policies are applied broadly and typically do not recognize the continuum of behaviors of sexual abuse, the range of ages of those who sexually abuse, and the range of risk posed by sex offenders to re-offend.<sup>70</sup>*

MNCASA has advanced several legislative proposals in recent years with varying degrees of success. The coalition's annual policy agenda (developed with the assistance of a multidisciplinary committee) typically has three sections addressing sexual violence prevention, support and care for victims, and access to justice, recognizing that a well-rounded legislative response takes into account primary, secondary and tertiary prevention approaches.

MNCASA's legislative agenda is generally met with bi-partisan support so any barriers to passage tend to come from fiscal impact (costs to the system such as prison beds) rather than philosophical or political difference. For example, over the past four years MNCASA has worked with supportive legislators on both sides of the aisle to propose two noncontroversial bills: presumptive executed sentencing for repeat sex offenders and enhancement from a gross

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<sup>69</sup> See Section VI.

<sup>70</sup> *A Reasoned Approach*, *supra* note 5, at 42.

misdemeanor to a felony for repeat fifth degree criminal sexual conduct convictions.<sup>71</sup> The former addresses an omission when the sentencing guidelines were changed in 2006 and the latter recognizes that some sex offenders engaged in nonconsensual sexual contact could conceivably be convicted of the same crime over and over yet never reach a higher level of accountability.<sup>72</sup>

These bills are primarily concerned with system intervention with a sex offender but there are prevention aspects as well, namely identifying someone who has a propensity to re-offend. While it cannot be proven that an offender who repeatedly commits a low level criminal sexual conduct crime in the fifth degree will “graduate” to more serious sex crimes, heightened scrutiny will lead ideally to more system involvement with the offender and perhaps better opportunities to prevent future crimes.

The costs associated with these two bill proposals are relatively low (each comes in under \$100,000 in the first year with comparative amounts in the subsequent years) and yet they cannot seem to move at all through the legislature because of the associated costs related to more prison resources. Meanwhile, costs incurred by the Minnesota Sex Offender Program, for example, continue to rise at an alarming annual rate and the legislature continues to support these cuts, although with the recognition that they are not sustainable.<sup>73</sup> While fiscal caution is understandable given the significant state budget cuts over the most recent years, a small investment in early intervention and possible prevention seems like a reasonable price to pay. In the absence of a cost-benefit analysis to support a sure connection between policy change, fiscal investment and a successful system response, it still seems prudent to make small yet targeted

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<sup>71</sup> During the 2011-12 biennium, HF660/SF 415 and HF532/SF794, respectively. See <http://www.leg.state.mn.us> (last visited Oct. 7, 2012) for the bill texts.

<sup>72</sup> *Id.*

<sup>73</sup> OFFICE OF LEGISLATIVE AUDITOR, *supra* note 43, at 1.

changes in the criminal sexual conduct laws that ensure ongoing system involvement with repeat offenders and create the potential to prevent future crimes.<sup>74</sup>

A successful bill proposal from the 2012 legislative session requires the Minnesota Department of Health to report on sexual violence incidence and prevalence data.<sup>75</sup> Data collected from various sources will help to inform policy proposals on sexual violence in the future, promoting a more evidence-based approach. Data can be useful in evaluating both prevention and intervention-oriented legislative responses to sexual violence.

One area of controversy in the public policy arena is around the issue of comprehensive sexual health education. This concept that does not enjoy bipartisan support; there are political and philosophical differences about who should teach youth about sexuality and sexual health and what information should be shared with youth. In the past MNCASA has supported bills (none passed) with its community partners in the Coalition for Responsible Sex Ed<sup>76</sup> because a better understanding of sexuality, particularly among young people, provides a gateway opportunity for discussions about the prevention of sexual violence, coercive behaviors, what consent really means and other related issues.<sup>77</sup> Comprehensive sexual health education also plays an important role in related public policy discussions such as how to respond to sexting or bullying and sexual harassment, particularly amongst youth.<sup>78</sup> So even as lawmakers consider

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<sup>74</sup> A cost-benefit analysis of legislative policy regarding criminal sexual conduct laws would be a welcome addition to this discussion. A recent analysis of government-funded intervention in the lives of homeless and sexually exploited girls, for example, showed a return of \$34 for every \$1 spent. Lauren Martin & Richard Lotspeich, *Early Intervention to Avoid Sex Trading and Trafficking of Minnesota's Female Youth: A Benefit-Cost Analysis* (2012), [http://www.miwrc.org/system/uploaded\\_files/0000/0147/Benefit-Cost-Study\\_Full\\_Report\\_9-4-2012.pdf](http://www.miwrc.org/system/uploaded_files/0000/0147/Benefit-Cost-Study_Full_Report_9-4-2012.pdf) (last visited Oct. 7, 2012). For other discussions of cost-benefit analyses in the context of sex offender policy see Robert A. Prentky and Ann Wolbert Burgess, *Rehabilitation of Child Molesters: A Cost-Benefit Analysis*, CHILD TRAUMA I: ISSUES AND RESEARCH (1990) and *Examining Our Approaches*, *supra* note 1.

<sup>75</sup> Sue Hegarty, *A Positive Balance*, *Session Weekly* (May 25, 2012).

<sup>76</sup> See Coalition for Responsible Sex Ed, <http://www.sexedorforlife.org> (last visited October 7, 2012).

<sup>77</sup> Advocates for Youth, *Comprehensive Sex Education: Research and Results*, <http://www.advocatesforyouth.org/storage/advfy/documents/fscse.pdf> (last visited Oct. 7, 2012).

<sup>78</sup> Caroline Palmer, *Why Sexting is Vexing*, [http://www.mncasa.org/Documents/policy\\_organizing\\_17\\_3683469455.pdf](http://www.mncasa.org/Documents/policy_organizing_17_3683469455.pdf) (last visited Oct. 7, 2012). *See also*

intervention-style approaches to dealing with these sorts of problems, there should always be a prevention message attached.

Finally, MNCASA's legislative agenda is driven by guiding principles. With regard to the system response to sex offenders, MNCASA continues to see civil commitment as one option within a preferably wide-ranging system response, particularly for the most dangerous perpetrators, but also recognizes the need for less restrictive alternatives to secure facility commitments for some other offenders who present less of a risk to the public (including re-entry programs for better opportunities for housing and employment) and always maintains that continued meaningful financial support for victim services is essential.<sup>79</sup>

Various options such as indeterminate sentencing, specialized courts and sex offender review boards charged with determining the terms of release should be considered and the Department of Human Services Sex Offender Civil Commitment Advisory Task Force will look at these and many other potential recommendations for the 2013 legislative session and beyond in the months ahead (the Task Force will complete its work in December 2013).<sup>80</sup> Many of these issues were explored in great detail by the Governor's Commission on Sex Offender Policy and it is certain that the Task Force will also be looking to such areas as less restrictive alternatives to secure facility commitments as well as sentencing practices, changes to the criminal sexual conduct laws, funding and prevention.<sup>81</sup>

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Centers for Disease Control and Prevention, *Connection Between Bullying and Sexual Violence Perpetration*, [http://www.cdc.gov/violenceprevention/youthviolence/bullying\\_sv.html](http://www.cdc.gov/violenceprevention/youthviolence/bullying_sv.html) (last visited Oct. 7, 2012).

<sup>79</sup> See *A Reasoned Approach*, *supra* note 5, at 2-4.

<sup>80</sup> See minutes and resource materials from the *Sex Offender Civil Commitment Advisory Task Force*, [http://www.dhs.state.mn.us/main/idcplg?IdcService=GET\\_DYNAMIC\\_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=dhs16\\_171337](http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=dhs16_171337) (last visited Nov. 25, 2012). The Task Force composition is multidisciplinary with members including representatives from judicial, legislative (bipartisan), law enforcement, prosecutorial, defense, victim service, treatment and county administration perspectives.

<sup>81</sup> *Governor's Commission*, *supra* note 26. Among the report's many recommendations are development of a blended determinate-indeterminate sentencing system for sex offenders, creation of a Sex Offender Release Board, increasing the statutory maximum indeterminate sentencing to life for offenders with prior histories of criminal

In addition, MNCASA would like to see greater attention paid to increased access to sex offender treatment, policies for adolescents and children with sexual behavior problems, more cross-agency coordination of existing state intervention and prevention services to maximize the policy impact on primary prevention, and state funding for primary prevention services. Concurrently, support for sexual assault victim advocacy services must be maintained with reasonable funding and more access to services in every county and reservation in Minnesota. During the state government shutdown of 2011 the District Court and Special Master recognized that sexual assault advocacy and crisis response programs are “critical core functions of government” and are “crucial to the safety of Minnesota communities.”<sup>82</sup>

## **VI. Conclusion**

The problem of sexual violence is endemic, meaning its occurrence is steady (as opposed to spiking, like during an epidemic). Its relatively unchanging nature also suggests a certain level of acceptance by society that some portion of the population will be subjected to this type of harm. This isn't to say that society or policy makers are complacent about the problem, just the response is misplaced at times and as a result we haven't witnessed a dramatic positive change. This lack of success can feel defeating and demoralizing. We are only seeing the black swans – the aberrations that distract us – and failing to look more broadly to the expertise and experience that will help policymakers work toward the solutions that can create a difference.<sup>83</sup>

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sexual conduct, increased penalties for specific statutory sections, specialized sex offender caseloads under supervision, special considerations for juvenile offenders, establishment of a Sex Offender Policy Board, evaluation of sex offender registry information, creation of a specialized panel for civil commitments, creating structured treatment options, review of collateral consequences attendant to a sex offense conviction, and many more. *Id.* at 1-6.

<sup>70</sup> In re Government Shutdown Litigation, In re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota, Order Regarding Petitions of Minnesota Coalition Against Sexual Assault and Minnesota Coalition for Battered Women, Second Judicial District (July 12, 2011), [http://www.mncasa.org/policy\\_organizing\\_43\\_3563636280.pdf](http://www.mncasa.org/policy_organizing_43_3563636280.pdf) (last visited Oct. 7, 2012).

<sup>83</sup> See Section IV.



According to Tabachnick and Klein, “When communities hold offenders accountable in thoughtful ways that prevent re-offense, they increase the likelihood that others will get the help they need before they perpetrate sexual abuse.”<sup>84</sup> With each passing year we learn more about the nature of sexual violence, about the people who commit the crimes, about the societal norms that promote unhealthy sexual images, and what policies are most effective based upon evidence-based measures. The thoughtful response that Tabachnick and Klein put forth is one that balances prevention and intervention strategies in a comprehensive approach, one that is more pro-active than reactive, one that recognizes the specific needs of all involved (victims, offenders, society as a whole). In other words, the thoughtful response is perhaps the most difficult one of all, but as the problem of sexual violence persists and as public policy continues to miss the mark, it is the response that must be made.

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<sup>84</sup> See *A Reasoned Approach*, *supra* note 5, at 5.