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# Re-thinking Minnesota's Criminal Justice Response to Sexual Violence Using a Prevention Lens

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

Caroline Palmer<sup>†</sup> and Bradley Prowant<sup>††</sup>

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*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>

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1. Eric S. Janus, *Minnesota's Sex Offender Commitment Program: Would an Empirically-Based Prevention Policy Be More Effective?*, 29 WM. MITCHELL L. REV. 1083, 1085 (2003).

## 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 more than 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 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,

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2. TED R. MILLER ET AL., PACIFIC INST. FOR RESEARCH & EVALUATION, COSTS OF SEXUAL VIOLENCE IN MINNESOTA: MINNESOTA DEPARTMENT OF HEALTH 4 (2007), available at [http://www.pire.org/documents/mn\\_brochure.pdf](http://www.pire.org/documents/mn_brochure.pdf). The study contains statistics for the year 2005.

3. Rebecca Campbell et al., *An Ecological Model of the Impact of Sexual Assault on Women's Mental Health*, 10 TRAUMA, VIOLENCE, & ABUSE 225, 225 (2009).

4. *Id.* at 226.

5. JOAN TABACHNICK & ALISA KLEIN, ASS'N FOR THE TREATMENT OF SEXUAL ABUSERS, A REASONED APPROACH: RESHAPING SEX OFFENDER POLICY TO PREVENT CHILD SEXUAL ABUSE 3 (2011), available at <http://www.atsa.com/pdfs/ppReasonedApproach.pdf>.

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 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, 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 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 non-occurrence has a causal link to

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6. *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 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 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 risk posed by sex offenders to re-offend.

*Id.* at 42.

7. *See id.* at 28 (citing COUNCIL OF STATE GOV'TS, SEX OFFENDER MANAGEMENT POLICY IN THE STATES: STRENGTHENING POLICY AND PRACTICE 1 (2010), available at <http://www.csg.org/policy/documents/SOMFinalReport-FINAL.pdf>).

a specific policy.<sup>8</sup> As the National Alliance to End Sexual Violence (NAESV), a victim-centered organization committed to educating federal policymakers 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 policymakers.<sup>11</sup>

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 by research and expertise in the field. The authors of this article contend that Minnesota policymakers are at a crossroads. Policymakers 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

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8. *See id.*

9. *Id.* at 27 (citing NAT'L ALLIANCE TO END SEXUAL VIOLENCE, COMMUNITY MANAGEMENT OF SEX OFFENDERS: REGISTRATION, ELECTRONIC MONITORING, CIVIL COMMITMENT, MANDATORY MINIMUMS AND RESIDENCY RESTRICTIONS (2008), available at [http://new.vawnet.org/Assoc\\_Files\\_VAWnet/CommunityManagement.pdf](http://new.vawnet.org/Assoc_Files_VAWnet/CommunityManagement.pdf)).

10. *Id.* at 24; *see* MINN. DEP'T OF CORR., RESIDENTIAL PROXIMITY AND SEX OFFENSE RECIDIVISM IN MINNESOTA 2 (2007), available at <http://www.doc.state.mn.us/documents/04-07SexOffenderReport-Proximity.pdf> (finding that re-offenses would have not been deterred by residential restrictions); *see also* COLO. DEP'T OF PUB. SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 4 (2004), available at [http://dcj.state.co.us/odvsom/sex\\_offender/SO\\_Pdfs/FullSLAFinal01.pdf](http://dcj.state.co.us/odvsom/sex_offender/SO_Pdfs/FullSLAFinal01.pdf) (demonstrating that residency restrictions are not deterrents to sex offense crimes).

11. *See, e.g.*, MINN. STAT. § 260B.198, subdiv. 1a (2012) (creating residency restrictions for some juvenile offenders).

12. *See* MINN. COALITION AGAINST SEXUAL ASSAULT, <http://www.mncasa.org> (last visited Apr. 15, 2013).

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

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 and 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, or even a belief that it is the individual's duty to do so.<sup>17</sup> 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

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13. See *infra* Part III.A.

14. See *infra* Part II.

15. See *infra* Part IV.

16. See *infra* Part V.

17. 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 often knows the assailant in some way (family, friend, intimate partner, acquaintance, fellow student, employee, etc.). Non-stranger perpetrators are able to use trust against a victim in ways that a stranger cannot. According to the Bureau of Justice Statistics, sixty-four percent of female victims and forty percent of male victims of violent crimes knew the perpetrator. JENNIFER L. TRUMAN, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY 9 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv10.pdf>.

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 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.<sup>21</sup> The justice system response is interwoven within the secondary and tertiary levels.

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

18. 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."); see also Kaarin Long et al., *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, 579–91 (2010).

19. See MINN. DEP'T OF HEALTH, *THE PROMISE OF PRIMARY PREVENTION OF SEXUAL VIOLENCE: A FIVE-YEAR PLAN TO PREVENT SEXUAL VIOLENCE AND EXPLOITATION IN MINNESOTA* 8 (2009) [hereinafter *PROMISE OF PRIMARY PREVENTION*], available at <http://www.health.state.mn.us/injury/pub/svpplan.pdf>; see also *Our Approach*, PREVENTION INST., <http://www.preventioninstitute.org/about-us/our-approach.html> (last visited Apr. 15, 2013).

20. *PROMISE OF PRIMARY PREVENTION*, *supra* note 19, at 5.

21. *Id.*

22. See *The Spectrum of Prevention: Developing a Comprehensive Approach to Injury Prevention*, PREVENTION INST., <http://www.preventioninstitute.org/component>

variety of public-health concerns, from violence prevention to nutrition, fitness, traffic safety, and injury prevention, 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> The spectrum demonstrates 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, organization, or policymaker can do it alone. A variety of strategies needs 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 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 to 2005, for example, included in its recommendations the need for “increas[ed] attention to the prevention of sex crimes.”<sup>26</sup> The Commission’s members noted:

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

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/jlibrary/article/id-105/127.html (last visited Apr. 15, 2013). “[T]he *Spectrum* [of *Prevention*] is based on the work of Dr. Marshall Swift in treating developmental disabilities.” *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. GOVERNOR’S COMM’N ON SEX OFFENDER POLICY, FINAL REPORT 6 (2005) [hereinafter GOVERNOR’S COMMISSION], available at <http://www.doc.state.mn.us/commissionsexoffenderpolicy/commissionfinalreport.pdf>.



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 \$1540 per resident, in 2005.<sup>28</sup> These are significant numbers that have caught the attention of policymakers 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.<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 the exclusive use of 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>

27. *Id.*

28. MILLER ET AL., *supra* note 2, at 11. The cost estimate was 3.3 times the costs incurred by alcohol-impaired driving. *Id.* at 13. 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. *Id.* at 10.

29. *See infra* Part III.

30. *See Sexual Violence Prevention Program*, MINN. DEPARTMENT HEALTH, <http://www.health.state.mn.us/injury/topic/svp/index.cfm> (last visited Apr. 15, 2013). Current funding for the Minnesota Department 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. *Id.*

31. *See* CAROLINE PALMER, UNDERSTANDING THE RELATIONSHIP BETWEEN PREVENTION AND INTERVENTION STRATEGIES TO STOP SEXUAL VIOLENCE (2010), *available at* [http://www.ncdsv.org/images/MCASA\\_UnderstandingRelationshipBetweenPrevIntervenSV\\_3-2010.pdf](http://www.ncdsv.org/images/MCASA_UnderstandingRelationshipBetweenPrevIntervenSV_3-2010.pdf).

32. TABACHNICK & KLEIN, *supra* note 5, at 27 (internal quotation marks omitted) (citing NAT’L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, CDC INJURY RESEARCH AGENDA 2009–2018 (2009), *available at* [http://www.cdc.gov/injury/ResearchAgenda/CDC\\_Injury\\_Research\\_Agenda-a.pdf](http://www.cdc.gov/injury/ResearchAgenda/CDC_Injury_Research_Agenda-a.pdf)).

33. PALMER, *supra* note 31, at 3. Note that the Minnesota Department of Human Services formed, under court order, a Sex Offender Civil Commitment

### III. RELEVANT HISTORY OF SYSTEM RESPONSES TO SEXUAL VIOLENCE IN MINNESOTA

It is helpful to review some of the legislative and other public policy responses to sexual violence in Minnesota before moving forward to analyze the benefits of stronger integration of prevention and intervention responses. Many of these reforms emerged in the 1970s in an attempt to “craft a legal system that better reflects modern society’s norms and expectations relating to sexual assault cases.”<sup>34</sup> But even with these changes, conviction rates for sexual assault “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 Statutes section 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.<sup>38</sup> Buried beneath criticism of a slow-moving legislature and debates about gas taxes and handgun control, the reform received little attention.<sup>39</sup> Nonetheless, the statutes enacted on the last day of the 1975 legislative session of the Minnesota legislature are the basis for the current sex crimes within the Minnesota Criminal Code.<sup>40</sup>

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Advisory Task Force in October 2012. See Larry Oakes, *Magnuson Leads Task Force on Sex Offender Treatment*, STAR TRIB. (Minneapolis), Oct. 7, 2012, at A7, available at 2012 WLNR 21340608.

34. Long et al., *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)).

35. *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, Comment, *Taking Rape Seriously: Rape as Slavery*, 35 HARV. J.L. & GENDER 263, 264 n.8 (2012).

36. Such evidence is only admissible when the “probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature” and either the defense is raising “consent of the victim” as a defense or “the prosecution’s case includes evidence of semen, pregnancy or disease.” MINN. R. EVID. 412(1).

37. See *State v. Obeta*, 796 N.W.2d 282, 282 (Minn. 2011).

38. See Act of June 5, 1975, ch. 374, § 8, 1975 Minn. Laws 1243, 1249–50.

39. See *Legislators, Legislature Get Poor Marks*, MINNEAPOLIS TRIB., Aug. 31, 1975, at 1A.

40. All references herein to “criminal code” shall mean the Minnesota Criminal Code unless stated otherwise. See Act of June 5, 1975, ch. 374, § 8, 1975

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 eleven sections that failed to create culpability for most sexual violence.<sup>41</sup> For example, Minnesota Statutes sections 609.291 and 609.292, titled “aggravated rape” and “rape,” respectively, only accounted for forced sexual intercourse by a man against a woman *who is not the man’s wife*.<sup>42</sup> Minnesota Statutes section 609.296, “indecent liberties,” also created a spousal exception. Furthermore, unless the 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 Minnesota Statutes sections 609.341 through 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, this recognition has grown as cognizance of sexual violence has become greater. Offenses such as solicitation of minors for sexual acts,<sup>43</sup> nonconsensual contact with a sexual intent,<sup>44</sup> and sex trafficking<sup>45</sup> 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 Minnesota Statutes section 609.35, which codified a county’s obligation to pay for medical expenses related to examining a sexual assault victim.<sup>46</sup> These two sections symbolize a rarity in the politics surrounding sexual violence: victim-focused policy. Today, thirty-two statutes

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Minn. Laws 1243, 1249–50.

41. See generally MINN. STAT. §§ 609.291–.295 (1974).

42. *Id.* §§ 609.291–.292 (repealed 1975).

43. See MINN. STAT. §§ 609.281–.284 (2012).

44. See *id.* § 609.321.

45. See *id.* § 609.322.

46. See Act of June 5, 1975, ch. 374, § 11, 1975 Minn. Laws 1243, 1251.

compose the “sex crimes” division of chapter 609 of the criminal code.<sup>47</sup> Of those thirty-two, only three (one addition since 1975) are aimed at victims.<sup>48</sup>

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’s Sex Offender Program*

When determining whether to commit a sex offender, the State of Minnesota initially relied upon a 1939 law that allowed for the civil commitment of individuals with sexual psychopathic personalities.<sup>49</sup> After the law was immediately challenged on constitutional grounds, the Minnesota Supreme Court established the standard to determine whether one is apt for civil commitment: “an utter lack of power to control [one’s] sexual impulses.”<sup>50</sup> The law remained almost dormant until high-profile sexual assaults in the 1980s led to its revival.<sup>51</sup> Yet, as of 1990, less than thirty individuals were in the state’s civil commitment program.<sup>52</sup> Since 1990, there have been two important changes to the commitment process—one procedural and one substantive. Both of these changes were exacerbated by two high-profile events involving sex offenders.

Prior to 1991, county attorneys were charged with identifying possible candidates for the civil commitment program.<sup>53</sup> If the county attorney deemed an individual to meet the “lack of power to

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47. See §§ 609.293–.353.

48. Enacted in 1984, Minnesota Statutes section 609.3471 keeps information pertaining to a minor sexual assault victim confidential.

49. See § 253B.02, subdiv. 18b.

50. ERIC S. JANUS, FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 29 (2006) (quoting State *ex rel.* Pearson v. Probate Court, 205 Minn. 545, 555, 287 N.W. 297, 302 (1939)).

51. OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINN., EVALUATION REPORT: CIVIL COMMITMENT OF SEX OFFENDERS 4–5 (2011), available at <http://www.auditor.leg.state.mn.us/ped/pedrep/ccso.pdf>.

52. *Id.* at 3.

53. *Id.* at 4.

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 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 attorney,<sup>54</sup> thus reducing the “legwork” county attorneys had to perform and easing their ability to commit offenders. The referral procedure, coupled with the pre-1991 procedure, is the current process for civilly committing sex offenders.

In 1992, the State recommended Dennis Darol Linehan for the civil commitment program. The State argued that Linehan, after spending nearly thirty years in jail for rape and murder, should be committed because he had been a bad person, not because he had an “utter lack of power to control” his sexual impulses.<sup>55</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 ignored by the lower courts—“utter lack of power to control.”<sup>56</sup> Despite Linehan’s somewhat advanced age (fifty-three in 1994) and the fact that his release would be supervised, media and public outcry caused the legislature to act.<sup>57</sup> In a special session convened in the aftermath of Linehan’s non-commitment, the legislature passed the current standard for the commitment of sex offenders.<sup>58</sup> A person with “sexual psychopathic personality” still qualifies for civil commitment, but a lower threshold of “sexually dangerous person” also qualifies an individual for commitment.<sup>59</sup> 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<sup>60</sup> (a large increase from 1990 but low compared with the current population). In 2003, the number of

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54. *Id.*

55. JANUS, *supra* note 50, at 29–30.

56. *See id.* at 30 (referring to the *Pearson* standard).

57. *See id.* at 31–32.

58. *See id.* at 32.

59. *See* MINN. STAT. § 253B.185, subdiv. 1 (2012).

60. OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 51, at 3.

commitments rose dramatically in response to outrage over the tragic rape and murder of college student Dru Sjodin by a non-committed sex offender who had been recently released from a Minnesota correctional facility.<sup>61</sup> 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’s death, the Department of Corrections referred 157 sex offenders per year to county attorneys; in the previous twelve years, the Department of Corrections had referred a total of 333 sex offenders for civil commitment.<sup>62</sup> 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.<sup>63</sup>

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>64</sup> The program is predicted to grow at a rate slightly under ten percent for the next ten years (approximately fifty-three new commitments each year), totaling 1109 commitments in 2020.<sup>65</sup> Thus far, the predicted growth rate has proved accurate as the sex offender program had 683 clients as of March 31, 2013.<sup>66</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

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61. *Id.* at 17.

62. *Id.* at 5.

63. See DENNIS BENSON ET AL., MINNESOTA SEX OFFENDER PROGRAM: WORKING TO END SEXUAL VIOLENCE 5 (2012), available at [http://www.dhs.state.mn.us/main/groups/agencywide/documents/pub/dhs16\\_166449.pdf](http://www.dhs.state.mn.us/main/groups/agencywide/documents/pub/dhs16_166449.pdf); *Minnesota Sex Offender Program Overview*, MINN. DEPARTMENT HUMAN SERVICES, [http://www.dhs.state.mn.us/main/idcplg?IdcService=GET\\_DYNAMIC\\_CONVERSION&dDocName=dhs16\\_149914&RevisionSelectionMethod=LatestReleased](http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&dDocName=dhs16_149914&RevisionSelectionMethod=LatestReleased) (last updated Apr. 3, 2013 3:02 PM). The authors combined the statistical information from these two sources in order to calculate this number.

64. OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 51, at 1.

65. *Id.* at 4–5.

66. *Minnesota Sex Offender Program Overview*, *supra* note 63.

sexual violence seems to be the next logical step. However, current policy still fails to account for 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>67</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>68</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 the Due Process Clause of the Fourteenth Amendment.<sup>69</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>70</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>71</sup>

Another concern is the high number of individuals Minnesota commits. Of the twenty states that operate sex offender civil commitment programs, Minnesota commits the most per capita and has the third most in gross commitments behind Florida and California.<sup>72</sup> As noted above, each individual in Minnesota's sex offender program remains there at a cost of approximately

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67. *Id.*

68. *Kansas v. Hendricks*, 521 U.S. 346, 370–71 (1997).

69. *Youngberg v. Romeo*, 457 U.S. 307, 322–23 (1982).

70. *Turay v. Seling*, 108 F. Supp. 2d 1148 (W.D. Wash. 2000).

71. *See Karsjens v. Jesson*, No. 11-3659, 2012 WL 6044652 (D. Minn. Dec. 5, 2012).

72. OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 51, at 16–18.

\$120,000 per year.<sup>73</sup> The sex offender program operates at a budget of approximately \$70 million annually.<sup>74</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>75</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 costs (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>76</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 nineteenth century British philosopher David Hume (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

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73. \$117,000 per resident in 2010; \$122,000 per resident in 2011. *Id.* at 12.

74. Range in the last four years: \$75 million in 2008 to \$67.5 million in 2011. *Id.*

75. In 2006, Minnesota spent \$130.5 million on sexual offenders and \$90.5 million on victims of sexual violence. MILLER ET AL., *supra* note 2, at 7–10.

76. JANUS, *supra* note 50, at 50.



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, if the most recent sexually violent offender had traits x, y, and z, all sexually 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 proliferated that further explicates the poor reasoning underlying current sexual violence policy. In 2007, epistemologist Nassim Taleb<sup>77</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.” Taleb 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>78</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, their effects can be mitigated by checking what we think we “know” and by not attempting to retrospectively justify the events as foreseeable, thus circumventing the notion that such events were 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

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77. Nassim Nicholas Taleb is a Lebanese-born epistemologist who focuses on the problems of luck, uncertainty, and probability. He holds a professorship at New York University's Polytechnic Institute.

78. NASSIM NICHOLAS TALEB, *THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE*, AT xxiii (2d ed. 2010).

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 fourteen percent of those in prison for sexual violence.<sup>79</sup> Furthermore, it is estimated that in most sexual assaults the victim knows the perpetrator; approximately fifteen percent of those in prison for sexual assault claim their victim was a stranger to them.<sup>80</sup> Finally, even though these statistics demonstrate violent sexual offenses do not fit the common stereotype, a substantial proportion of sexual violence goes unreported, and thus, these statistics may be inflated.<sup>81</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 that the legislature's sexual violence policies are a result of epistemological arrogance (i.e., believing that all sexual offenders fit the same traits). When a rare, high profile event (i.e., black swan event) occurs, such as the Sjodin tragedy, the public and legislature consider such an event as an *affirmation* of their "knowledge" (e.g., 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." 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

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79. JANUS, *supra* note 50, at 43.

80. *Id.* at 46; *see also* TRUMAN, *supra* note 17, at 9.

81. JANUS, *supra* note 50, at 46–47.

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>82</sup> has led to the procedural and substantive changes occurring in 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, and the Minnesota Sex Offender Program) are devoted to detaining previously convicted sex offenders and creating obstacles to rejoining society for released sex 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.

#### 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-

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82. Taleb uses the phrase “narrative fallacy” in a similar manner as post hoc rationalizations. See TALEB, *supra* note 78, at 62–84. The narrative fallacy is our (i.e., humans’) inability to look at a series of events without giving the events an explanation (i.e., narration). *Id.* at 63–64. 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). *Id.* at 64.

offend.<sup>83</sup>

MNCASA has advanced several legislative proposals in recent years with varying degrees of success. MNCASA'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. The policy agenda recognizes that a well-rounded legislative response takes into account primary, secondary, and tertiary prevention approaches.

MNCASA's legislative agenda is generally met with bipartisan 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 misdemeanor to a felony for repeat fifth-degree criminal-sexual-conduct convictions.<sup>84</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>85</sup>

These bills are primarily concerned with system intervention for 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

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83. TABACHNICK & KLEIN, *supra* note 5, at 42.

84. During the 2011–12 biennium, HF660/SF415 and HF532/SF794, respectively. *See* H.F. 660, 87th Leg., Reg. Sess. (Minn. 2011); S.F. 794, 87th Leg., Reg. Sess. (Minn. 2011); H.F. 532, 87th Leg., Reg. Sess. (Minn. 2011); S.F. 415, 87th Leg., Reg. Sess. (Minn. 2011).

85. *See* Minn. H.F. 660; Minn. S.F. 794; Minn. H.F. 532; Minn. S.F. 415.

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 costs, although with the recognition that they are not sustainable.<sup>86</sup> While fiscal caution is understandable given the significant state budget cuts in 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 changes in the criminal sexual conduct laws that ensure ongoing system involvement with repeat offenders and create the potential to prevent future crimes.<sup>87</sup>

A successful bill from the 2012 legislative session requires the Minnesota Department of Health to report on sexual violence incidence and prevalence data.<sup>88</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 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 of which passed) with its community partners in the Coalition for

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86. OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 51, at 1.

87. 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 thirty-four dollars for every one dollar spent. LAUREN MARTIN & RICHARD LOTSPEICH, EARLY INTERVENTION TO AVOID SEX TRADING AND TRAFFICKING OF MINNESOTA'S FEMALE YOUTH: A BENEFIT-COST ANALYSIS 60 (2012), available at [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). For other discussions of cost-benefit analyses in the context of sex offender policy, see Janus, *supra* note 1; Robert A. Prentky & Ann Wolbert Burgess, *Rehabilitation of Child Molesters: A Cost-Benefit Analysis*, in CHILD TRAUMA I: ISSUES AND RESEARCH 417 (Ann Wolbert Burgess ed., 1992).

88. Sue Hegarty, *A Positive Balance*, SESSION WKLY., May 25, 2012, at 33, available at [http://www.house.leg.state.mn.us/sessionweekly/art.asp?ls\\_year=87&issueid\\_=78&storyid=3200&year\\_=2012](http://www.house.leg.state.mn.us/sessionweekly/art.asp?ls_year=87&issueid_=78&storyid=3200&year_=2012).

Responsible Sex Ed<sup>89</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>90</sup> Comprehensive sexual health education also plays an important role in related public policy discussions, such as how to respond to “sexting,” bullying, and sexual harassment, particularly amongst youth.<sup>91</sup> So, even as lawmakers consider 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. It 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 providing better opportunities for housing and employment) and always maintains that continued meaningful financial support for victim services is essential.<sup>92</sup>

Various options should be considered, such as indeterminate sentencing, specialized courts, and sex offender review boards charged with determining the terms of release. The Department of Human Services Sex Offender Civil Commitment Advisory Task Force will look at these and many other potential recommendations during the 2013 legislative session and beyond.<sup>93</sup>

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89. See COALITION FOR RESPONSIBLE SEX ED, <http://www.coalitionforsexed.org/> (last visited Apr. 15, 2013).

90. See ADVOCATES FOR YOUTH, COMPREHENSIVE SEX EDUCATION: RESEARCH AND RESULTS 1–3 (2009), available at <http://www.advocatesforyouth.org/storage/advfy/documents/fscse.pdf>; CAROLINE PALMER, WHY SEXTING IS VEXING 5 (2010), available at [http://www.mncasa.org/Documents/policy\\_organizing\\_17\\_3683469455.pdf](http://www.mncasa.org/Documents/policy_organizing_17_3683469455.pdf).

91. See PALMER, *supra* note 90, at 5; see also *Connection Between Bullying and Sexual Violence Perpetration*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 11, 2012), [http://www.cdc.gov/violenceprevention/youthviolence/bullying\\_sv.html](http://www.cdc.gov/violenceprevention/youthviolence/bullying_sv.html).

92. See TABACHNICK & KLEIN, *supra* note 5, at 2–4.

93. For a review of the Task Force’s meeting minutes and resource materials, see *Sex Offender Civil Commitment Advisory Task Force*, MINN. DEPARTMENT. HUMAN SERVICES, [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 updated Mar. 29, 2013 3:05 PM). The Task Force composition is multidisciplinary with members including representatives from judicial, legislative (bipartisan), law enforcement, prosecutorial, defense, victim service, treatment,

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, sentencing practices, changes to the criminal sexual conduct laws, funding, and prevention.<sup>94</sup>

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, 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 function[s] of government" and are "crucial to the safety of Minnesota communities."<sup>95</sup>

## VI. CONCLUSION

The problem of sexual violence is endemic—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 is not to say that society or

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and county administration perspectives. It will complete its work in December 2013.

94. See generally GOVERNOR'S COMMISSION, *supra* note 26. Among the report's many recommendations are the 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 sexual conduct, increased penalties for specific statutory sections, specialized sex offender caseload 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.

95. Special Master Recommendations Regarding Petition of Minnesota Coalition Against Sexual Assault at 3–4, *In re* Temporary Funding of Core Functions of the Exec. Branch of the State of Minn., No. 62-CV-11-5203 (Minn. Dist. Ct. July 14, 2011), available at [http://www.mncourts.gov/Documents/2/Public/Civil/Order\\_regarding\\_mn\\_casa.pdf](http://www.mncourts.gov/Documents/2/Public/Civil/Order_regarding_mn_casa.pdf).

policymakers are complacent about the problem, just that the response is misplaced at times, and, as a result, we have not 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>96</sup>

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>97</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 about the most effective policies using 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 proactive than reactive, and one that recognizes the specific needs of all involved (victims, offenders, and 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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96. See *supra* Part IV.

97. TABACHNICK & KLEIN, *supra* note 5, at 5.