A Primer on MSOP

- Eric S. Janus
 - President and Dean Emeritus, Mitchell Hamline School of Law
 - August 2, 2021
 - Opinions and views are my own, and do not reflect the views of MHSL.

FAILURE TO PROTECT

AMERICA'S SEXUAL
PREDATOR LAWS AND THE
RISE OF THE
PREVENTIVE STATE

Eric S. Janus



In re the Matter of Dennis Darol LINEHAN.

No. C1-95-2022.

Supreme Court of Minnesota.

Dec. 12, 1996.

State filed petition to have person committed under Sexually Dangerous Persons (SDP) Act. The District Court, Ramsey County, Bertrand Poritsky, J., granted petition. Committee appealed. The Court of Appeals, 544 N.W.2d 308, affirmed. Committee sought review. The Supreme Court, Keith, C.J., held that: (1) SDP Act did not

guments with different assumed base rates of recidivism. See Linehan II, 544 N.W.2d at 324

Lisbeth J. Nudell, Minneapolis, Michael F. Cromett, St. Paul, Eric S. Janus, Minneapolis, for appellant.

Daniel Homstad (Kathleen Milner, of counsel, Minnesota Civil Liberties Union), Minneapolis, for amicus curiae.

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant Ramsey County Attorney, St. Paul, for respondent Ramsey County.

Hubert H. Humphrey, III, Attorney General, John L. Kirwin, Assistant Attorney General, St. Paul, for respondent State.

Heard, considered and decided by the court en banc.

OPINION

KEITH, Chief Justice.

Appellant Dennis Darol Linehan was civil-

My testimony

- Summarize the history of the SDP/SPP laws in Minnesota.
- Summarize the history of litigation about these laws.
- Propose a framework for examining these laws and how they fit into our shared efforts to combat sexual violence.
- Not:
 - Offer my opinion about the wisdom or constitutionality of these laws.
 - Assess the successes or failure of these laws.

SDP/SPP Acts are SOCC (sex offender civil commitment).

Commitment: deprivation of liberty.

Civil, not criminal.

Based on mental health commitment laws.

History of SOCC in Minnesota

- Late 1930s Psychopathic Personality Commitment Act
 - "Utter inability to control" behavior + likelihood of future sexually dangerous behavior.
 - Alternative/diversion from criminal justice system for those "too sick to deserve punishment."
 - Minor crimes; consenting adults; short commitment periods.
 - Fell out of use in the 1960s-1980s.

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TO THE PARTY.

RECOMMENDATIONS:

1. The legislature should permit an indeterminate term of confinement for dangerous convicted sex offenders to be imposed in addition to a determinate prison term upon proof in a separate hearing of sexual dangerousness.

The Task Force received evidence that in some cases, the psychopathic personality statute is the only method available to control offenders who would otherwise escape custody. It may not be possible to prove a conviction beyond a reasonable doubt where the victim has been incapacitated by her injuries or is otherwise unable to testify. Sex offenders who are adjudicated not guilty by reason of insanity at the time of the offense may not be committable as mentally ill and dangerous by the time a petition is filed.

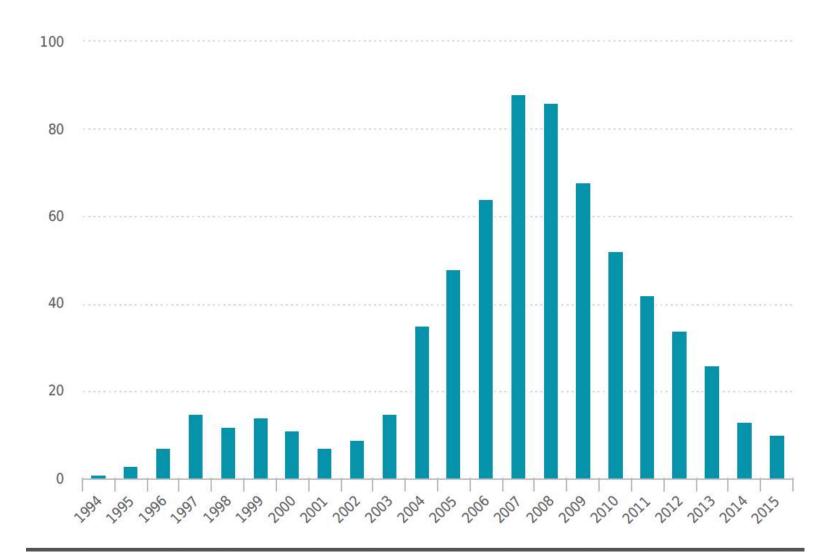
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Civil commitment was intended to be of short duration; its use was seen as a temporary fix.

- "Each of the four phases [of the MSOP treatment program] will last approximately 8 months for model patients." *In re Linehan III*, 557 N.W.2d 171, 187 (Minn. 1996).
- "The use of the psychopathic personality statute may decline in the future because the Legislature has enacted longer sentences for sex offenses." 1994 Legislative Auditor Report

SPP/SDP – 1990s - present

- 1990 DOC begins referring some individuals with sex offense convictions to county attorneys at the end of their sentences.
- Commitments in the range of 15-25/year.
- Minnesota Supreme Court upholds the SPP law as constitutional; Blodgett.
- In *Linehan*, the Court reversed a commitment for failure to prove "utter inability to control."
- Legislature passes the SDP law: no requirement to prove inability to control.
- US Supreme Court: Hendricks and Crane.
 - SOCC constitutional: (1)"difficulty controlling behavior" (2) risk of future sexual harm; (3) treatment provided; (4) durational principle: release as soon as the conditions justifying commitment no longer obtain.



Commitments to MSOP by year

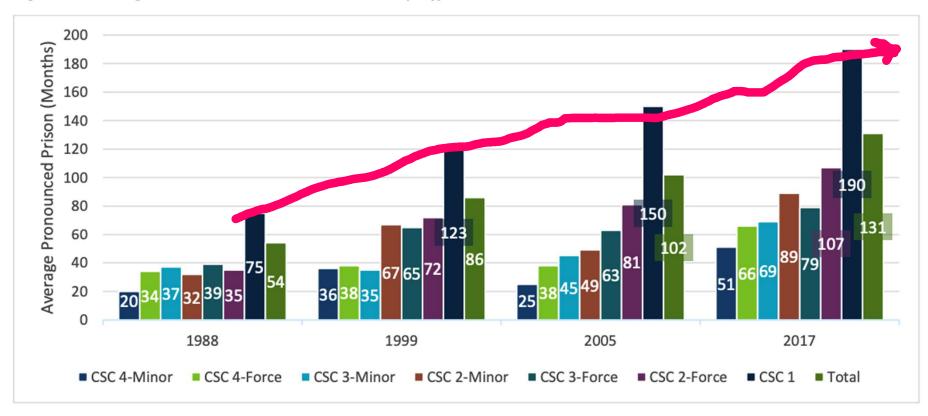
New Admissions included Judicial Hold, and Indeterminate Commitment

Statical Date Range: January 1, 2016 to July 1, 2021

Year	New Admissions
2016	10
2017	25
2018	23
2019	14
2020	18
2021	13
Total	103

CSC sentences have more than doubled.

Figure 8. Average Pronounced Prison Sentences by Offense, Executed Prison Sentences, 1988, 1999, 2005, & 2017



Source: MN Sentencing Guidelines Commission, Criminal Sexual Conduct Sentencing Practices Criminal Sexual Conduct Offenses Sentenced in 2017

Karsjens litigation

- Class action; Federal Court
- Phase I: The SDP/SPP Acts are unconstitutional because they don't comply with the *durational principle*.
- Phase II: the conditions at MSOP are punitive.
 - This aspect of the case is still pending.

Selected factual findings from Karsjens

State lacks systematic knowledge of suitability for less restrictive alternative.

"It is undisputed that there are civilly committed individuals at the MSOP who could be safely placed in the community or in less restrictive facilities."

State has placed bottlenecks and obstacles in the path to regaining liberty.

"providing less restrictive confinement options would be beneficial to the State of Minnesota and the entire civil commitment system without compromising public safety."

Minnesota has permitted its decisions to fall under "the influence of public opinion and political pressure on all levels of the commitment process."

Karsjens: Constitutionality

District Court:

- "Strict Scrutiny" is standard.
- Failure to release non-dangerous individuals violates constitution (creates punitive system).
- Remedy: perform regular risk assessments.

Court of appeals:

- Reasonable basis, shocks the conscience standard.
- Failures of state are not "egregious, malicious or sadistic," therefore not unconstitutional.

Reports and Studies

MSOP has been studied repeatedly.

1994 Legislative Auditor Report

 "The use of the psychopathic personality statute may decline in the future because the Legislature has enacted longer sentences for sex offenses."

MN DOC legislatively mandated Study (2000)

- Noted the "concentration of resources" entailed by sex offender commitments, and observed that the cost of the program would "quadruple in ten years." (The cost was \$20M/annum at that time.)
- Recommended a bi-annual evaluation of "all aspects of the sex offender management system." It should be "data-based" and "report on benchmarks that measure the performance of the system."
- The report was conveyed to the Legislature, which did not act on it.

Source: MN DOC, Sex Offender Policy and Management Board Study (2000), retrieved from www.doc.state.mn.us/publications /legislativereports / pdf/sexoffenderboard.pdf.



OFFICE OF THE LEGISLATIVE AUDITOR

STATE OF MINNESOTA

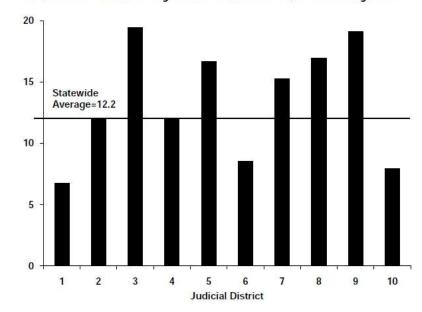
Evaluation Report Summary / March 2011

Civil Commitment of Sex Offenders

Key Recommendations:

 The Legislature should require MSOP to develop a plan for lower-cost alternative facilities to be used by certain sex offenders. The plan should also outline the changes needed to implement a stay of commitment option. Among Minnesota's judicial districts, commitment rates vary significantly, with the percentage of referred offenders being committed varying from 34 to 67 percent.

Figure 2.3: Sex Offender Civil Commitments per 100,000 Residents by Judicial District, as of July 2010



No civilly committed sex offender has ever been discharged from MSOP, although MSOP is the provisionary discharge two offenders in the next six months.

Several factors may explain why no MSOP clients have been discharged from the program. First, problems in the treatment program over the last ten years have likely affected the progress of some sex offenders. Second, while a specialized court now determines whether offenders are discharged, the previous administration issued an executive order discouraging any discharges. Finally, Minnesota has a release standard for offenders who are civilly committed that, in practice, is stricter than other states. MSOP does not support any discharges without completion of the treatment program. Most states explicitly allow for discharges if an offender no longer meets the commitment criteria

Summary of Agency Responses

In a letter dated March 3, 2011, Department of Human Services Commissioner Lucinda Jesson said that the evaluation team provided a "thorough review and analysis of the civil commitment process" and the "report reflects that hard work and objectivity." She said that the department "supports the majority of the recommendations made in the report" and believes that "many of the findings and recommendations are consistent with current objectives and goals to continue to provide sex offender treatment in a safe and secure facility." In a letter dated March 2, 2011, Department of Corrections Commissioner Tom Roy noted that the report found the department's referral policy to be "consistent with state law" and "empirically based." In recognition of the role played by referrals in the commitment process, he expressed willingness to "implement any changes in our procedures as legislatively directed."

December 2, 2013

MEMO

TO: Lucinda Jesson, Commissioner of Human Services

FROM: The Hon. Eric J. Magnuson, Chair,

The Hon. James Rosenbaum, Vice Chair,

Sex Offender Civil Commitment Advisory Task Force

SUBJECT: Final Report

Key Finding

"There is broad consensus that the current system of civil commitment of sex offenders in Minnesota captures too many people and keeps many of them too long,"

Detailed recommendations

- Create community-based resources.
- Create centralized screening and referral agency
 - Modeled on NY State system
- Independent judicial body, one that is not subject to local or other political pressures, should make commitment, transfer, and release decisions: centralized, specialized court.
- Independent, statewide defense panel.
- Need for continued commitment should be regularly reviewed.
- Special criteria for persons whose offending behavior was as a juvenile, developmentally disabled.
- Adopt of a public-health approach, evidencebased strategic objectives and funds for research and development.

How should we think about MSOP?

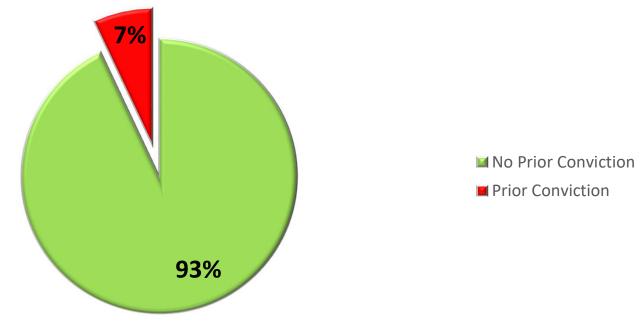
- All agree: prevent sexual violence.
- How should we use our limited public resources to achieve that end?
- MSOP: ~\$100M/year.
- MSOP: total focus on recidivism.
- Question: are we using our public resources in the most effective way?

Context

Recidivism; other states; efficacy

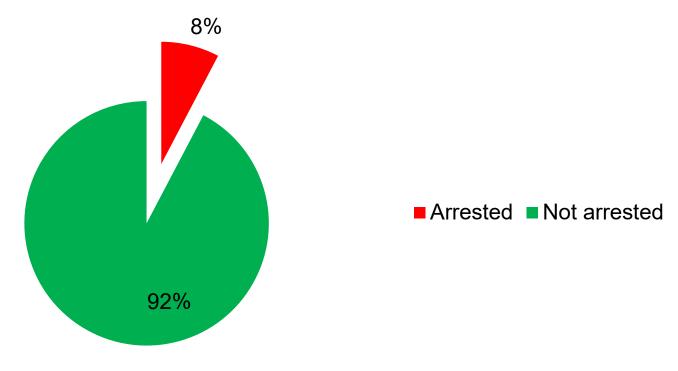
Most SO Convictions are first-time offenders

Criminal Sexual Conduct Convictions in Minnesota 2001-2015

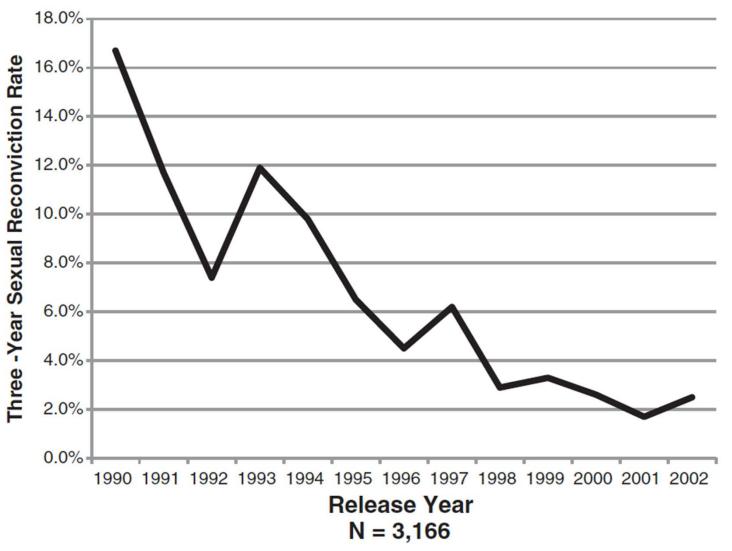


Brian Collins (2017) (Minnesota Sentencing Guidelines Commission, 2016)

Most individuals released from prison after a sex offense conviction – are not re-arrested for a new sex crime.



Source: BJS SO's released in 2005. 9-year recidivism.



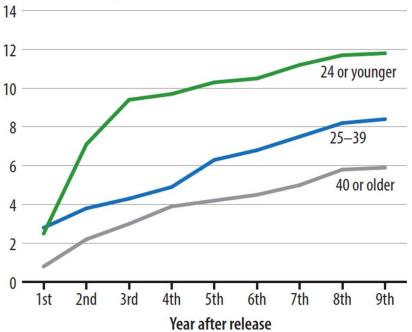
Recidivism has been declining in Minnesota.

Source: Duwe, G., To what extent does civil commitment reduce sexual recidivism? Estimating the selective incapacitation effects in Minnesota, Journal of Criminal Justice (2013), http://dx.doi.org/10.1016/j.jcrimjus.2013.06.009

FIGURE 2

Cumulative percent of prisoners released in 30 states in 2005 after serving a sentence for rape/sexual assault who were arrested for rape/sexual assault after release, by age and year after release

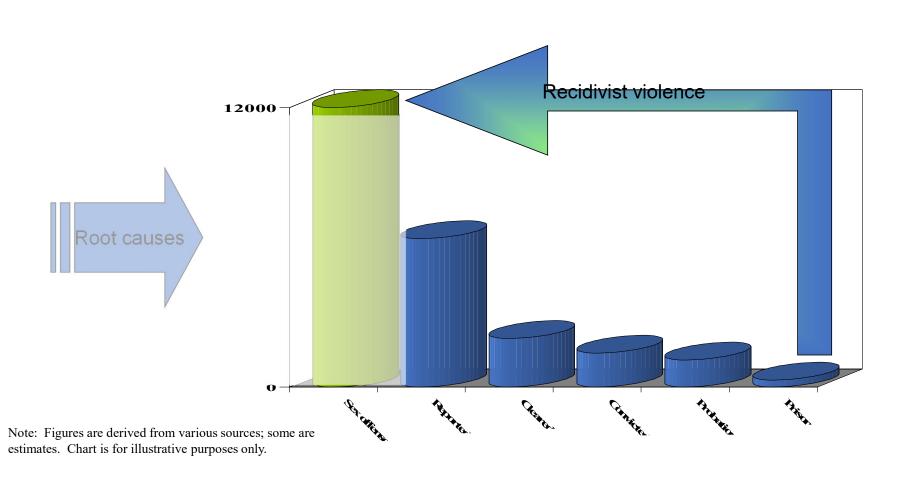




Source: BJS SO's released in 2005. 9-year recidivism.

Recidivism declines with age.

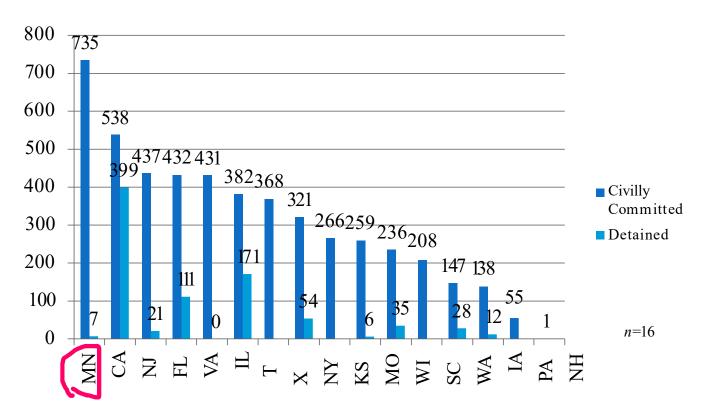
Recidivism is a very small part of the problem.



Other states?

30 States do not have SOCC

Current Census: Inpatient



Source: SOCCPN Annual Survey 2020

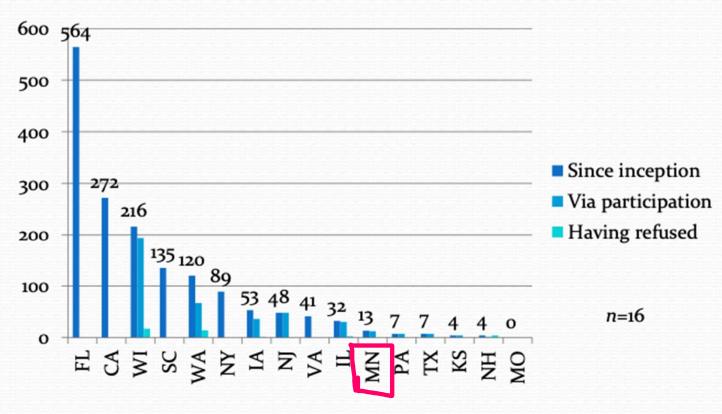
Per Capita Rates for Civil Commitment

State.	Years Enacted	Population Size (in millions)	Current Census Civilly Committed	Commitments per million
MN	26	5.7	735	128.9
KS	26	2.9	266	91.7
VA	17	8.6	431	50.1
NJ	21	8.9	437	49.1
IA	21	3.2	138	43.1
MO	21	6.2	259	41.8
WI	26	5.9	236	40
SC	22	5.2	208	40
IL	22	12.7	382	30
FL	22	22	432	19.6
WA	30	7.8	147	18.8
NY	13	19.4	321	16.5
CA	24	39.9	538	13.5
TX	20	29.5	368	12.5
PA	17	12.8	55	4.3
NH	12	1.4	1	.71

Source: SOCCPN Annual Survey 2020

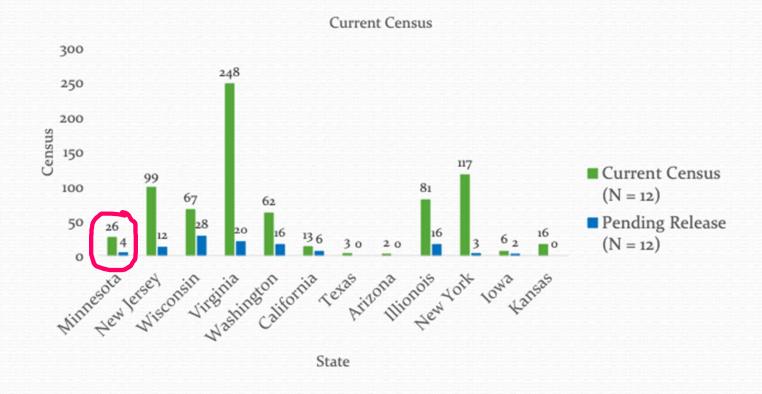
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Civilly Committed Individuals: Unconditional (Fully) Discharged



Source: SOCCPN Annual Survey 2020

Current CR Census



Source: SOCCPN Annual Survey 2020; CR = Conditional Release

Journal of Criminal Justice xxx (2013) xxx-xxx



Contents lists available at SciVerse ScienceDirect

Journal of Criminal Justice



To what extent does civil commitment reduce sexual recidivism? Estimating the selective incapacitation effects in Minnesota

Grant Duwe *

Minnesota Department of Corrections, 1450 Energy Park Drive, Suite 200, St. Paul, MN 55108-5219, United States

Recidivism Research and SOCC

"...existing research indicates the vast majority of sex offenders, including those with a relatively high sexual recidivism risk, can be safely managed in the community."

Grant Duwe, Ph.D. Research Director, MN DOC

Duwe, G. (2014). To what extent does civil commitment reduce sexual recidivism? Estimating the selective incapacitation effects in Minnesota. *Journal of Criminal Justice*; online first 7/5/2013, 42(2), 193-202.

Discussion

The findings suggest that 10 of the 105 civilly committed sex offenders would likely have been reconvicted of a new sex offense within four years had they been released to the community. Civilly committing these offenders decreased the four-year sex offense reconviction rate from 3.2 to 2.8 percent, a 12 percent reduction. Analyses performed on 220 sex offenders released during the early 1990s suggest that their estimated lifetime sex offense rearrest rate would be more than three times higher than their observed

Source: Duwe, G., To what extent does civil commitment reduce sexual recidivism? Estimating the selective incapacitation effects in Minnesota, Journal of Criminal Justice (2013), http://dx.doi.org/10.1016/j.jcrimjus.2013.06.009



Do Sexually Violent Predator Laws Violate Double Jeopardy or Substantive Due Process? An Empirical Inquiry

Tamara Rice Lave & Justin McCrary

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year 3, and then remains flat or declines slightly. The decline is statistically indistinguishable from zero, since zero is within the margin of error. As with the analysis of sex killings, the data indicate that SVP laws have had no discernible deterrent or incapacitation effects on the rate of forcible rape.

Legislation Targeting Sex Offenders: Are Recent Policies Effective in Reducing Rape?

Alissa R. Ackerman, Meghan Sacks and David F. Greenberg

In recent years, several pieces of state and federal legislation have imposed new restrictions on convicted sex offenders, including registration with law enforcement agencies, community notification provisions, and sexually violent predator designations permitting civil commitment following a prison sentence. This paper uses panel data for the American states for the years 1970-2002 to assess the impact of these policies on the rate at which rapes occur. Our research finds no evidence that our current policies reduce the incidence of rape.

Public health approach

Comprehensive and systematic

Primary, secondary and tertiary

Seek root causes

Evidence-based

Assess

Replicate best practices



The Promise of Primary Prevention of Sexual Violence

A Five-Year Plan To Prevent
Sexual Violence and Exploitation in Minnesota

June 2009



We can stop sexual violence and exploitation in Minnesota. Prevention works!

PREVENTION IS POSSIBLE: ALIGNING PRIORITIES TO END SEXUAL VIOLENCE

Donna Dunn

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41 William Mitchell Law Review 869 (2015)

That response became focused primarily on managing those sex offenders who were identified and prosecuted by the criminal justice system.²⁵ Over the past thirty years there has been a dramatic increase in public policy measures intended to protect communities by increasing incarceration and monitoring offenders in order to improve responses to victims and prevent child sexual abuse.26 It appears that many of these singular and focused measures are thought to have created unintended consequences that have silenced victims, distracted policy makers and the public, focused on a small minority of those who caused harm, and offered little opportunity for addressing constructive early intervention or prevention.²⁷ While effective monitoring and control of sex offenders is critical, this reliance on the criminal justice system's response has set a course that has resulted in a narrow menu of public policy options in which there is little room to ensure effective services for victims and funding for prevention strategies.²⁸ Additionally, sex offender management has become an increasingly expensive budget item in Minnesota. The cost of responding to

How can we prevent the most violence?

Comprehensive, systematic, empirically based.