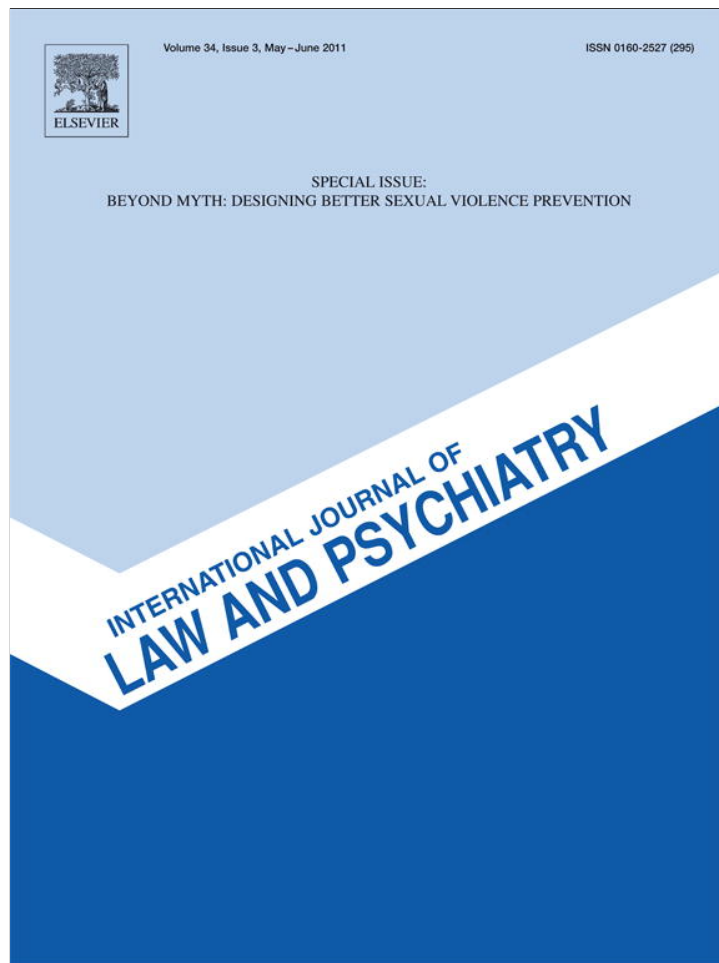


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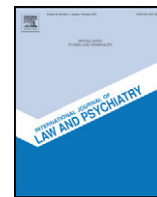
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Inevitable recidivism—The origin and centrality of an urban legend<sup>☆</sup>Tamara Rice Lave<sup>1</sup>

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## ABSTRACT

This paper examines the pervasive conviction that sex offenders – particularly child molesters – will continue to re-offend. This belief in inevitable recidivism turns out to be absolutely essential to both the justification for, and the structure of, the sexually violent predator laws. When actual evidence of sex offender recidivism is examined, however, a huge gap exists between what is assumed and what the data actually show because most sex offenders do not in fact re-offend. Thus there is a galaxy of sexually violent predator laws and an entire branch of Supreme Court jurisprudence that is founded upon a demonstrable urban legend.

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“Nothing is more important than keeping our children safe. We have taken decisive steps to help families protect their children, especially from sex offenders, people who, according to study after study are likely to commit their crimes again and again.” President Bill Clinton, 1996.<sup>2</sup>

“The only way to guarantee (that I won't molest children if I am released) is to die.” Leroy Hendricks, 1994.<sup>3</sup>

Experts show that rapists and child molesters have little or no chance of being rehabilitated. California Governor Pete Wilson, 1994.<sup>4</sup>

This paper examines the pervasive conviction that sex offenders—particularly child molesters—will continue to re-offend. The belief in inevitable recidivism has become an unexamined orthodoxy among politicians and the general public. The majority of Americans think that sex offenders will re-offend, no matter what treatment they receive or punishment they face. Ironically, however, empirical

evidence on sex offender recidivism shows just the opposite: sex offenders can and do control themselves.

This belief in inevitable recidivism turns out to be absolutely essential to both the justification for, and the structure of, the sexually violent predator (SVP) laws. The public clamored for the passage of laws to protect them against inevitable recidivists and legislators happily obliged. In the process, they wrote immutability into the very structure of the laws. At the SVP hearing, for instance, the state is constitutionally required to prove that an individual is presently dangerous even though the fact that the individual has been imprisoned for years means that there is almost never a recent overt act to demonstrate danger. The state got around this problem by defining it away; the SVP law stated that any act could prove present danger even if it had occurred many years prior.

I begin this paper by first examining the assumptions underlying the belief in inevitable recidivism. I then turn to the U.S. Supreme Court case *Kansas v Hendricks* (1997)<sup>5</sup> to discuss how the Supreme Court upheld the legality of the sexually violent predator laws based almost solely on Mr. Hendrick's professed inability to control his urge to molest children. Next I consider what empirical evidence actually exists on sex offender recidivism and on the accuracy of predicting future dangerousness. I then discuss the functional importance of this belief in framing and justifying the sexually violent predator laws. Finally, I offer a theoretical account for why the belief in inevitable recidivism is so prevalent.

## 1. Portrait of a predator—a website survey

This first section explores the nature of public beliefs about sex offender recidivism and describes a modest empirical assessment of such beliefs in the political setting where they have the most strategic influence on legislation. Crime and social control are primarily the

<sup>☆</sup> My thanks to Gwendolyn Leachman, Santhi Leon and Rob MacCoun for reading and commenting on earlier drafts of this article. I am especially indebted to Frank Zimring for overseeing the original, which was Chapter 3 of my dissertation. Thanks also to Eric Janus, John Douard, and the International Journal of Law and Psychiatry for inviting me to publish this piece. Finally, thanks to the editors and reviewers of IJLP for their helpful suggestions. Any mistakes, of course, are mine alone.

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<sup>2</sup> President Clinton's Weekly Radio Address, 6/22/96, <http://edition.cnn.com/US/9606/22/clinton.radio/transcript.html>.

<sup>3</sup> Hendricks stated this at his jury trial adjudicating whether he was a sexually violent predator. Brief of Petitioner. *Kansas v Hendricks*, 521 U.S. 346 (1997), 1995 U.S. Briefs 1649, 1996 S. Ct. Briefs LEXIS 448 at 21.

<sup>4</sup> Dana Wilkie, *Governor Challenged on rapists; Several studies find some are reformable*. San Diego Union Trib., April 19, 1994, at A1.

<sup>5</sup> *Kansas v Hendricks*, 521 U.S. 346 (1997).

responsibility of state government as it is states that decide what acts should be deemed illegal and how they should be punished. For this reason, I decided to look to state political leadership to see what was being said in the public sphere about sex offenders and what evidence was proffered to support these statements. Although almost all of the governors discussed how dangerous sex offenders are, I focused specifically on statements about inevitable recidivism.

This is essentially an internet survey. I went to each of the state's websites and researched governors' statements regarding sex offender recidivism. I also did a search on Lexis/Nexis to see whether there are any additional statements by governors that had not been included on their websites. I will describe that search in more detail below.

Next, I examined the opinions of the general public towards sex offenders. Since it is the general public that elects governors, it is important to see whether their beliefs jibe with those of their representatives. Again, I used the internet to research national level opinion polls. I primarily used a 2005 CNN/USA Today and Gallup poll, but I also used a 1991 Star Tribune National Poll.

1.1. The prevalence of the belief in universal and inevitable recidivism among governors

In November 2007, I went to each of the fifty governor's websites. Forty-two of these websites had an internal search engine, and I was able to put in "sex offenders." All of these states except Arkansas, Maine, and Montana yielded results, and I did not investigate these three any further.

For the eight websites<sup>6</sup> that did not have an internal search engine, I did a search of the governor's speeches, press releases—and when possible—links to public safety. I was able to find information on sex offenders in all of the states except Idaho, Iowa, and Nebraska. All but one or two of the statements about sex offenders were negative, and governors advocated laws that increased both surveillance and punishment of sex offenders. The issue was deemed serious enough to be part of several governors' state of the states address.

Once I had compiled all of this information, I read through it to see whether the governor had made any statements regarding the recidivism of sex offenders. If such a statement was made, I looked to see whether a source was provided and/or whether any contradictory data was discussed. See the table below for a detailed discussion of my findings.

In addition, I did a search on Lexis to see whether there were any additional statements not included on the governor's websites. I went to Major Newspapers, and put in the keywords, "Governor on sex offenders". I also did searches with the keywords, "sex offenders and political campaigns", "politicians and sex offenders cannot control themselves", "child molesters will always be dangerous", and "Megan's Law". I read each of the articles looking for the same information I had sought on the governor's websites. Although I found many negative statements about sex offenders, I focused only on statements about inevitable recidivism. In putting together my findings, I included statements made by representatives of the governor as well as the governor him or herself. I also included statements of governors who were no longer in office. The table below provides a profile of the ten commentaries found by this search.

Governor	Statement re. recidivism	Pro data	Con data
AL Bob Riley	R "Sex offenders are some of the most dangerous criminals, not only because of the horrific nature of their crimes, <u>but also because they are some of the most likely to reoffend.</u> " July 14, 2005, Website.	No	No

(continued)

Governor	Statement re. recidivism	Pro data	Con data
CT M. Jodi Rell	R "Sex offenders are among the most dangerous people in society and <u>have an extremely high rate of recidivism.</u> The longer these predators are out of our communities, the safer our children will be." 7/31/07, Website.	No	No
GA Sonny Purdue	R "The issue with sex offenders is by the time we catch them, they've been doing it for a while. And they'll be doing it again. If you're a pedophile and you abuse kids, typically you don't do that <u>once.</u> " John Bankhead, spokesman for the Georgia Bureau of Investigations. 3/30/03, The Atlanta Journal-Constitution.	No	No
MA Mitt Romney	R Governor Romney announced that the state's Sex Offender Registry Board will use the internet to publish names, addresses, and photos of Level 3 sex offenders. "Sex offenders in particular commit their crimes over and over again. They like to be under the radar. They don't like to have their information available." Charles McDonald, spokesman for the Sex Offender Registry Board. 5/15/03, The Boston Globe.	No	No
MA Paul Cellucci	R "It seems that almost every time we turn around there is another terrible instance of one of these monsters molesting a young child, raping a woman, or spreading fear in a community. <u>Rehabilitation rarely works.</u> Sex offenders are often a danger to the public for the rest of their lives. We can't allow convicted sex offenders to strike victim after victim." 3/16/99, The Boston Globe	No	No
MA William F. Weld	D "I'm a little skeptical about treatment for sex offenders. <u>There's quite a lot of evidence that the recidivism is so high for sex offenders, particularly child molesters, that you're almost better off concentrating on bars as the form of treatment.</u> " 5/2/96, The Boston Globe.	No	No
MO Matt Blunt	R "We need to be honest with ourselves. Society's efforts to rehabilitate sex offenders have not been effective. <u>No matter what the program, no matter what the punishment, statistics show us these criminals will re-offend.</u> " 6/9/06, Website	No	No
NJ Christine Todd Whitman	R " <u>(Sex offenders) appear to be a class of criminal where rehabilitation is extraordinarily difficult.</u> More so than, perhaps, with other types of offenders." 8/6/94, The New York Times.	No	No
OR John A Kitzhaber, M.D.	D "I am returning here with House Bill 2808, unsigned and disapproved. This bill would require anyone convicted of certain sex offenses between 1972 and 1989 to register as a sex offender. <u>I am vetoing this bill because it fails to target offenders who pose the greatest risk to society and spends scarce safety resources without any substantial benefit to public safety.</u> Most people subject to House Bill 2808 would have committed a single offense, which likely involved a family member, up to 25 years ago and have not committed another sex offense. <u>These individuals are not a threat to public safety,</u> yet they would be required to register as sex offenders for the rest of their lives, and to have information about them and the offense available to the public on the internet." 9/3/99, Website	No	No

<sup>6</sup> These websites were for the Governors of: Florida, Idaho, Iowa, Mississippi, Nebraska, Nevada, New Hampshire and South Dakota.

(continued)

Governor	Statement re. recidivism	Pro data	Con data
VA George Allen	R Governor ends funding for all sex offender treatment programs because he says that treating sex offenders doesn't work. Washington Post, 12/29/1994. "We have to face reality. You cannot just change someone's sexual orientation. What they do to get their thrill will continue throughout their whole life. I know of no chemical therapy, I know of no counseling that will change that." Allen appointee and Corrections Director, Ronald J. Angelone. Washington Post, 12/29/94.	No	No

Nine of the ten commentaries present a consistent picture of the sex offender as a future high risk. These sex offenders are "predators" who will pose a danger for the rest of their lives.<sup>7</sup> Nothing will stop them from re-offending, not treatment,<sup>8</sup> not rehabilitation,<sup>9</sup> not punishment.<sup>10</sup> The only way to protect the public from these "monsters"<sup>11</sup> is to keep them behind bars.<sup>12</sup> No empirical support is given for any of these views; they are merely stated as fact.

Governor Kitzhaber, M.D. of Oregon stands out starkly from his peers. He vetoed a bill that would have required sex offender registration for anyone convicted of certain sex crimes between 1972 and 1989. Kitzhaber criticized the fact that the bill applied to individuals who had committed one offense many years ago and who no longer posed any kind of threat. He declined to sign the bill on the grounds that it would be unfair and that it would waste "scarce safety resources without any substantial benefit to public safety."<sup>13</sup>

#### 1.1.1. What is the basis for these statements?

There are two linked puzzles in the orthodox statement of universal recidivism. The first is that the rhetoric is always empirical, but no facts are ever actually discussed. Instead, each of the governors refers to the existence of data without actually ever mentioning any particular studies or statistics.<sup>14</sup> For instance, consider the statement of Massachusetts Governor William F. Weld: "There's quite a lot of evidence that the recidivism is so high for sex offenders, particularly child molesters, that you're almost better off concentrating on bars as the form of treatment."<sup>15</sup> Yet Weld never actually provides this purported evidence.

Connecticut Governor M. Jodi Rell and Missouri Governor Matt Blunt also refer to the existence of data to buttress their statements without ever explaining the source of the data. Governor Rell said,

<sup>7</sup> Governor Rell Proposing Tough Sanctions for Sexual Predators, Website, State of Connecticut, Office of Governor, M. Jodi Rell, Press Releases – 7/2005.

<sup>8</sup> Shelley Murphy, *Hundreds get Parole, work release; Treatment for sex offenders at odds with Weld Statements*, The Boston Globe, May 2, 1996 at METRO/REGION, pg 1.

<sup>9</sup> Brian MacQuarrie, *Law could aid two-time offenders; 'Two strikes' rule risky*, Reilly says, The Boston Globe, March 16, 1999 at B1.

<sup>10</sup> Website of Matt Blunt, *Ensuring a Safe Missouri: Achievements – Stopping Sex Offenders*; <http://www.docstoc.com/docs/8869035/Penalties-For-Illegal-Immigrants>.

<sup>11</sup> Brian MacQuarrie, *Law could aid two-time offenders; 'Two strikes' rule risky*, Reilly says, The Boston Globe, March 16, 1999 at B1.

<sup>12</sup> Shelley Murphy, *Hundreds get Parole, work release; Treatment for sex offenders at odds with Weld Statements*, The Boston Globe, May 2, 1996 at METRO/REGION 1.

<sup>13</sup> Letter from John A. Kitzhaber, M.D. to Secretary Keisling, September 3, 1999, Oregon House Journal, HJ – 192, [http://www.leg.state.or.us/house/chiefclerk\\_2001finaljournal\\_june.pdf](http://www.leg.state.or.us/house/chiefclerk_2001finaljournal_june.pdf).

<sup>14</sup> This includes Governor John A. Kitzhaber, M.D. of Oregon, 9/3/99 (Website). Letter from John A. Kitzhaber, M.D. to Secretary Keisling, September 3, 1999, Oregon House Journal, HJ – 192, [http://www.leg.state.or.us/house/chiefclerk\\_2001finaljournal\\_june.pdf](http://www.leg.state.or.us/house/chiefclerk_2001finaljournal_june.pdf).

<sup>15</sup> Shelley Murphy, *Hundreds get Parole, work release; Treatment for sex offenders at odds with Weld Statements*, The Boston Globe, May 2, 1996 at METRO/REGION, pg 1 (emphasis added).

"Sex offenders are among the most dangerous people in society and have an extremely high rate of recidivism."<sup>16</sup> Similarly, Governor Blount stats, "[n]o matter what the program, no matter what the punishment, statistics show us these criminals will re-offend."<sup>17</sup> Although both Rell and Blount point to data that shows that sex offenders have a high recidivism rate, they never actually say what these levels are or give a source for their statements.

The second puzzle in the orthodox statement of universal recidivism is the absence of any kind of need to cite authority. Consider the statement of Massachusetts Governor Paul Celluci who said, "Rehabilitation rarely works. Sex offenders are often a danger to the public for the rest of their lives."<sup>18</sup> Celluci makes sweeping generalizations about sex offenders but does not even attempt to ground his statements in any kind of research.

Thus what we have is a nearly universal orthodox belief that sex offenders will re-offend no matter what. The belief is framed empirically, but it isn't actually anchored to anything empirical. The best explanation for this absence is that the belief in inevitable recidivism is so strong that empirical evidence is ultimately deemed unnecessary.

#### 1.2. Public attitudes

The American public seems to share the same belief as politicians, at least with regards to child molesters. Between April 19, 2005 and May 1, 2005 a poll sponsored by CNN/USA Today and Gallup asked respondents: "At your best guess, do you think people who commit the crime of child sexual molestation can be successfully rehabilitated to the point where they are no longer a threat to children, or not?" 27% of those who responded said that child molesters could be rehabilitated; whereas 65% said they could not.

People think that perpetrators of other violent crimes are more likely to be rehabilitated than child molesters. Half the 2005 sample was asked, "Just your best guess, do you think people who commit the crime of child sexual molestation are more likely or less likely to be successfully rehabilitated than people who commit other serious crimes? 8% said more likely and 77% said less."<sup>19</sup>

Nor did people seem to think that there was any punishment that could deter sex offenders. In 1991, the Star Tribune National Poll asked respondents whether they agreed or disagreed with the statement that most people convicted of sex offenses like rape, sexually abusing a child, or incest continued to repeat their crimes no matter what the punishment. 78% indicated that they agreed strongly and 9% indicated that they agreed not strongly, for a total of 87% who believed that punishment could not deter sex offenders. Just 7% disagreed.<sup>20</sup>

<sup>16</sup> Governor Rell Proposing Tough Sanctions for Sexual Predators, Website, State of Connecticut, Office of Governor, M. Jodi Rell, Press Releases – 7/2005.

<sup>17</sup> Website of Matt Blunt, *Ensuring a Safe Missouri: Achievements – Stopping Sex Offenders*; <http://www.docstoc.com/docs/8869035/Penalties-For-Illegal-Immigrants>.

<sup>18</sup> Brian MacQuarrie, *Law could aid two-time offenders; 'Two strikes' rule risky*, Reilly says, The Boston Globe, March 16, 1999, at B1.

<sup>19</sup> Interestingly, more people in the April 2005 study seemed to believe in the possibility of rehabilitation than in a similar study conducted fourteen years earlier. The Star Tribune National Poll interviewed 1,101 participants between August 6, 1991 and August 25, 1991. These participants were asked, "Now some questions about people convicted of sex offenses such as rape, sexually abusing a child or incest. Do you agree or disagree that most sex offenders continue to repeat their crimes no matter what the punishment. (If agree/disagree ask: Do you feel strongly or not so strongly about that?)" 78% agreed strongly, 9% agreed not strongly, 3% disagreed not strongly, 4% disagreed strongly and 7% didn't know. *Star Tribune National Poll, 8/6/91-8/25/91*, 1100 participants, Question 013.

<sup>20</sup> *Star Tribune National Poll, 8/6/91-8/25/91*, 1100 participants, Question 013. Interestingly, over half of these same respondents stated that psychological help could make a difference in lowering recidivism. They were asked, "Now, do you agree or disagree that...Sex offenders are much less likely to repeat their crime if they get the right psychological treatment." 29% agreed strongly, 22% agreed not strongly, 10% disagreed strongly, 30% disagreed not strongly and 10% didn't know. *Star Tribune National Poll, Question 035*.

There are two possibilities to explain the strong public belief in high sex offender recidivism. One is that the public belief is a function of the orthodox beliefs of political leadership; i.e. governors tell the public that recidivism is high, and the public believes them. The second possibility is that the orthodox attitudes of political leaders simply reflect the more general public attitudes. An alternative and more likely possibility is that the relationship between the attitudes of the general public and that of the political leadership is a dialectical one. The public believes that sex offenders will inevitably re-offend, which encourages governors to push for the passage of legislation targeted at inevitable recidivists and this confident belief on the parts of governors reinforces the public's beliefs. In effect, the dialectical nature of the belief cycle removes the necessity for empirical data: the public can point to the statements of governors to support their beliefs and vice versa.

## 2. *Kansas v. Hendricks*: inevitable recidivism personified

In 1994, the Kansas legislature enacted the Sexually Violent Predator Act as a response to enormous political pressure stemming from the 1993 rape and murder of a woman by a recently paroled rapist.<sup>21</sup> Leroy Hendricks was the first person committed under the new law after his 1984 conviction for child molest.<sup>22</sup> The maximum sentence Hendricks could have received for the crime was forty-five to 180 years in prison, but the state negotiated a plea agreement of five to twenty years in prison.<sup>23</sup> Hendricks earned all possible good time credits and was scheduled to be released on September 11, 1994—sixteen days before his 60th birthday.<sup>24</sup> On August 17, 1994—ten years after he had committed his last crime—Kansas filed a petition alleging that Hendricks was a sexually violent predator.<sup>25</sup> The case went to trial on October 3, 1994.<sup>26</sup>

1994 occurred a full decade after Hendrick's last offense; yet this ten year gap is only the beginning of the temporal problems that complicate the task of predicting sexual danger for long incarcerated offenders. Not only did the state need to show that Mr. Hendricks was still dangerous in 1994, but it needed to prove that he would remain dangerous from that point forward. Mr. Hendricks was fifty years old at the time of his last offense and sixty at the time of his trial as a sexually violent predator. At that point, Hendricks had been out of the community for ten years.

Kansas tried to get around this problem at trial by arguing that the best evidence of future conduct is past conduct.<sup>27</sup> To that effect, evidence was presented regarding Hendricks' extensive criminal history. Hendricks had a history of deviant acts with children that dated back to 1955 when at the age of twenty he exposed himself to two young girls. Two years later Hendricks was caught playing strip poker with a fourteen-year-old girl and was convicted of lewdness. In 1960, he was sent to prison for three years for fondling two young boys, ages seven and eight. After being paroled for those crimes, Hendricks was arrested for digitally penetrating a seven-year-old girl whose family Hendricks admitted he had befriended in order to take

the girl on trips and molest her. As a result of this conviction, Hendricks was adjudicated a sexual psychopath and was committed to a mental institution. Hendricks was released in 1965, and two years later, he was sent to prison for molesting an eight-year-old girl and an eleven year old boy. One year after his release in 1973, Hendricks started molesting his stepdaughter and stepson. Finally, in 1984, Hendricks was sentenced to ten years in prison for molesting two thirteen-year-old boys.<sup>28</sup>

Kansas called Mr. Hendricks to the stand because it was a civil hearing, and as such he did not have the right against self incrimination.<sup>29</sup> Hendricks testified that he was an uncured pedophile who when he gets "stressed out" cannot control his urge to sexually molest children.<sup>30</sup> Hendricks further testified that although he had not had any urges to molest children in the last ten years, the only way he could guarantee that he would not re-offend was by dying.<sup>31</sup>

The state also put on a psychologist who stated that it was his opinion that Mr. Hendricks was likely to re-offend. He based that opinion on three factors. First, he believed that "behavior is a good predictor of future behavior."<sup>32</sup> He also stated that it was his professional opinion that pedophiles tended to repeat their conduct. Finally, he said that based on an evaluation he had done of Mr. Hendricks the week before, it was his belief that Mr. Hendricks had little understanding of his behavior.<sup>33</sup> The state offered no general data on the recidivism of child molesters; nor did they offer information regarding the accuracy of clinical predictions of future dangerousness.

In response, the defense called a forensic psychiatrist who presented statistics regarding the recidivism rates of convicted sex offenders, both before and after treatment.<sup>34</sup> These rates ranged from a low of 3% to a high of 40%.<sup>35</sup> The psychiatrist also testified that based on current knowledge, "a psychiatrist or psychologist cannot predict whether an individual is more likely than not to engage in a future act of sexual predation."<sup>36</sup>

A jury found Hendricks to be a "sexually violent predator," and he appealed. The Kansas Supreme Court reversed the conviction, and the state of Kansas appealed to the U.S. Supreme Court which ended up reinstating the original finding.

In reviewing the case, the United States Supreme Court put extraordinary emphasis on Mr. Hendricks' own statements. Writing for the majority, Justice Thomas placed Kansas' Sexually Violent Predator Act among other laws upheld by the Supreme Court that "provided for the forcible civil detention of people who are unable to control their behavior and who thereby pose a danger to the public health and safety."<sup>37</sup> Thomas wrote further that, "To the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's inability to control his dangerousness, the Kansas Act sets forth comparable criteria and Hendricks' condition doubtless satisfies those criteria."<sup>38</sup>

Although Thomas noted that, "previous instances of violent behavior are an important indicator of future violent tendencies,"<sup>39</sup> he didn't actually mention any data on the recidivism rates of sex offenders. Furthermore, although Thomas pointed out that "from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct," he did not actually discuss

<sup>21</sup> Brief for Leroy Hendricks cross Petitioner at 4, 9 *Kansas v Hendricks*, 521 U.S. 346 (1997) Nos 9501649 and 95–9075, 1995 US Briefs 1649; 1996 US S. Ct. Briefs Lexis 496.

<sup>22</sup> Brief for Leroy Hendricks cross Petitioner at 4, 9 *Kansas v Hendricks*, 521 U.S. 346 (1997) Nos 9501649 and 95–9075, 1995 US Briefs 1649; 1996 US S. Ct. Briefs Lexis 496.

<sup>23</sup> This plea bargain meant that Hendricks was eligible for parole after three years and that if he earned all of his good time credits he would be entitled to mandatory release after ten years. Brief for Leroy Hendricks Cross Petitioner at 7, *Kansas v Hendricks*, 521 U.S. 346 (1997) Nos 95–9075, 1995 US Briefs 1649.

<sup>24</sup> Brief for Leroy Hendricks Cross Petitioner at 8 *Kansas v Hendricks*, 521 U.S. 346 (1997) Nos 95–9075, 1995 US Briefs 1649.

<sup>25</sup> Brief for Leroy Hendricks Cross Petitioner at 21 *Kansas v Hendricks*, 521 U.S. 346 (1997) Nos 95–1649 and 95–9075, 1995 US Briefs 1649.

<sup>26</sup> *Id.* at 22.

<sup>27</sup> *In re Hendricks*, 912 P.2d 129 (Kan. 1996).

<sup>28</sup> Brief of Petitioner *Kansas v Hendricks*, 521 U.S. 346 (1997) 1995 U.S. Briefs 1649, 1996 U.S. S.Ct. Briefs LEXIS 448 at 18–21.

<sup>29</sup> *In re Hendricks*, *supra* note 27.

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

<sup>31</sup> Hendricks, *supra* note 5 at 355.

<sup>32</sup> *In re Hendricks*, *supra* note 27, at 131.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Hendricks, *supra* note 5 at 357.

<sup>38</sup> *Id.* at 360.

<sup>39</sup> *Id.* at 358 (citations omitted).

techniques for such predictions or their accuracy.<sup>40</sup> Instead, the whole constitutional edifice seemed to rest on Mr. Hendricks' admitted inability to control himself around children. Thomas cited various statements that Hendricks had made including that "when he 'gets stressed out' he 'can't control the urge' to molest children."<sup>41</sup> He pointed to Hendricks' admission that he suffered from pedophilia and that he had not been cured.<sup>42</sup> Thomas also wrote that although Hendricks recognized that his behavior harmed children, and although he hoped he would not sexually molest them again, "the only sure way he could keep from sexually abusing children in the future was 'to die.'"<sup>43</sup>

In his dissenting opinion, Justice Breyer agreed with the majority that Kansas was permitted under the Due Process Clause to classify Hendricks as mentally ill and dangerous.<sup>44</sup> Breyer also specifically discussed the centrality of Hendricks' stated inability to control. He concluded that the state had the right to civilly commit Hendricks because his: "... abnormality does not consist simply of a long course of antisocial behavior, but rather it includes a specific, serious, and highly unusual inability to control his actions."<sup>45</sup> Breyer wrote that Hendricks suffered from a "... classical case of irresistible impulse, namely he is so afflicted with pedophilia that he cannot "control the urge" to molest children; and "... his pedophilia presents a serious danger to children."<sup>46</sup> Just like the majority, the dissent never considered how the state was going to prove dangerousness; it just relied on the statements of Mr. Hendricks.<sup>47</sup>

The significance Hendricks' statements play in legitimizing the state's civil commitment program cannot be overstated. Hendricks' statements are critical to the whole constitutional edifice of the sexually violent predator laws. His colloquy became a substitute for any empirical discourse on the future dangerousness of sex offenders. This oversight is significant because the US Supreme Court was upholding the sexually violent predator act for everyone in the class, not just Mr. Hendricks. Yet no evidence was ever presented within the majority, concurring, or dissenting opinions on overall sex offender recidivism or the state's ability to predict future dangerousness *other than* Mr. Hendricks' own extensive record or his own admissions.

Leroy Hendricks is now 76 years old and confined largely to a wheelchair due to a stroke, diabetes and circulatory problems. Despite his age and his health problems, Hendricks is still committed to a locked mental facility as a dangerous sexual offender.<sup>48</sup>

### 2.1. *Kansas v. Crane*—calling the Supreme Court's bluff

The U.S. Supreme Court revised its definition of the sexually violent predator when it was confronted with the implications of framing its decision around Mr. Hendricks' stated inability to control his urge to molest children. In 1998, the state of Kansas began involuntary commitment proceedings against Michael Crane pursuant

to the Kansas Sexually Violent Predator Act.<sup>49</sup> At trial, Crane argued repeatedly that the state had the burden of proving that, like Hendricks, he was unable to control himself. The judge refused to instruct the jurors of this standard, and Mr. Crane was found to be a sexually violent predator. Crane appealed to the Kansas Supreme Court, and they reversed, agreeing with him that *Kansas v. Hendricks* required an inability to control. Kansas appealed to the US Supreme Court, which vacated the judgment of the Kansas Supreme Court and remanded the case.<sup>50</sup>

In *Crane*, the U.S. Supreme Court held that the standard of proof was not inability to control as it had articulated in *Hendricks*. Instead, the Court distinguished *Hendricks* on the grounds that it had to do with a particular kind of offender—one suffering from pedophilia, "a mental abnormality that critically involves what a lay person might describe as a lack of control."<sup>51</sup> Writing for the majority, Breyer said that the general standard for commitment under the sexually violent predator law was "proof of serious difficulty in controlling behavior."<sup>52</sup> Breyer argued that to hold otherwise would be to create a standard that was too difficult to prove. Yet Breyer never actually discussed how even this lesser standard would be proved, stating only that, "it is enough to say that there must be proof of serious difficulty in controlling behavior."<sup>53</sup>

Writing for the dissent, Justice Scalia argued that the state should not have to meet the additional hurdle of proving "serious difficulty in controlling behavior." Instead Scalia argued that improper desire should be sufficient to warrant classification as a sexually dangerous predator. He wrote, "[i]t is obvious that a person may be able to exercise volition and yet be unfit to turn loose upon society. The man who has a will of steel, but who delusionally believes that every woman he meets is inviting crude sexual advances, is surely a dangerous sexual predator."<sup>54</sup>

Just as in *Hendricks*, the majority in *Crane* did not discuss what the actual dangerousness of sex offenders was as measured by recidivism statistics. Although the majority was now willing to consider the idea that some sex offenders would be able to control themselves, it specifically stated that pedophiles could not. In the dissent, Justice Scalia pushed the idea of inevitable recidivism even further; deviant thoughts, regardless of whether they had ever been acted upon, were enough to justify commitment as a sexually violent predator.

## 3. Some inconvenient truths

Implicit in the decisions of both *Hendricks* and *Crane* is the notion that once a sex offender has offended he will continue to re-offend. That explains why there is no discourse on the science and the accuracy of predicting future dangerousness. Sex offenders are lumped together as one homogenous class, and so the Court never considers how an individual's future dangerousness is affected by the kind of offense, the presence or lack of a prior criminal record, or advancing age and/or health problems. The reason these issues aren't discussed is that the major, implicit premise at play here is that almost all sex offenders have an extraordinarily high sex offender recidivism rate. The problem with this assumption, however, is that it is demonstrably untrue.

### 3.1. *Data on recidivism*

According to the governor's statements and survey results quoted above, as well as the implicit assumptions of the US Supreme Court,

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 355.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 355. In his discussion, Thomas neglected relevant facts such as that Hendricks had served his ten year sentence without incident and that he had received all of his possible good time credits. *Kansas v. Hendricks*, Brief for Respondent, 1995 U.S. Briefs 1649, 1996 U.S. S.Ct. Briefs LEXIS 599 at 4. More importantly, he left out Hendricks' prior testimony that he had not had any urges to have sex with children since 1985. *Id.* at 8.

<sup>44</sup> *Hendricks*, supra note 5 at 374.

<sup>45</sup> *Id.* at 375 (citations omitted).

<sup>46</sup> *Id.* at 376–77.

<sup>47</sup> Breyer's dissent was based on how the Kansas Sexually Violent Predator Act violated the ex post facto law which "forbids the application of any new punitive measure to a crime already consummated." *Id.* at 379. (citations omitted).

<sup>48</sup> Monica Davey and Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, *New York Times*, March 4, 2007, at 2, available at <http://www.nytimes.com/2007/03/04/us/04civil/html?scp=1&sq=Lefoy+Hendricks>.

<sup>49</sup> Crane had a criminal record that stretched back to 1979 and included convictions for sexual abuse. Brief of Petitioner at 3 *Kansas v. Crane*, 534 U.S. 407, 415 (2002).

<sup>50</sup> *Kansas v. Crane*, 534 U.S. 407, 415 (2002).

<sup>51</sup> *Id.* at 414.

<sup>52</sup> *Id.* at 413.

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

<sup>54</sup> *Id.* at 422.

the majority of Americans believe that sex offenders are monsters incapable of controlling themselves who will continue to prey on innocent women and children unless they are locked away. Despite the tenacity of these beliefs, they simply do not match reality. In 2003, the Department of Justice released a report studying the recidivism of sex offenders released in 1994.<sup>55</sup> In defining recidivism, the Department of Justice used arrests instead of convictions because sex offenses are often underreported.<sup>56</sup>

The Department of Justice study followed 9691 sex offenders released from prison in fifteen states.<sup>57</sup> This was the entire population of sex offenders released in 1994 from these fifteen states. Of these, 3115 had been convicted of rape; 6576 were convicted of sexual assault, 4295 were convicted of child molestation, and 443 were convicted of statutory rape for a total of 9691 out of 272,111 prisoners released in 1994.<sup>58</sup> 5.3% or 517 of the convicted sex offenders were rearrested for a new sex crime within three years after release from prison.<sup>59</sup> During that same three year period, 5.0% of convicted rapists were rearrested for a new sex crime.<sup>60</sup> Finally, 3.3% or 141 of the convicted child molesters were arrested for another sex crime against a child.<sup>61</sup>

It is true that convicted sex offenders were more likely to be arrested for a new sex crime than released offenders who had not been convicted of a sex crime, but the arrest rates are small. Specifically, 1.3% of released non-sex offenders were rearrested for a sex crime within three years after release.<sup>62</sup> Less than half of 1% of non-sex offenders were rearrested for a new sex crime against a child.<sup>63</sup>

For other types of crimes, sex offenders were less likely to be re-arrested than non-sex offenders. Specifically 43% of sex offenders released in 1994 were arrested for a new crime within three years. In contrast, 68% of non-sex offenders released in 1994 were arrested for a new crime within three years.<sup>64</sup> The discrepancy between re-arrest for a sex crime and re-arrest for any crime (5.3% versus 43%) suggests that sex offenders do have control over whether they commit a sex crime.

This paper will focus on the Department of Justice study because it is the largest, most recent national study of sex offender recidivism in the United States, but it is worth noting that other studies have come to similar conclusions. In the only other national level study on the recidivism rate of prisoners, the Bureau of Justice Statistics reported that 7.7% of rapists were rearrested for rape within three years after 1983 release.<sup>65</sup> In 1998, Hanson and Bussiere did a meta-analysis of sixty-one studies from six different countries, including the United States.<sup>66</sup> They found that over an average follow-up time of four to five years, the sex offense recidivism rate was 13.4%.<sup>67</sup> In 2007,

Sample and Bray used arrest data from 1990 to 1997 collected by the Illinois State Police.<sup>68</sup> They found that less than 4% of convicted child molesters were rearrested for any sex offense within one, three, and five years after release from custody.<sup>69</sup> They found that about 7% of convicted rapists were rearrested for any sex offense within the same period.<sup>70</sup>

#### 4. The functional necessity of inevitable recidivism

The central issue in the jurisprudence of civil commitment long before *Hendricks* and the sexually violent predator laws is the difficulty in predicting sexual dangerousness for persons long removed from community exposure. States had always required that there be a recent overt act to show danger, but, this was often difficult with incarcerated offenders. Washington State got around this problem by simply defining it away. In the brave, new world of the modern sexually violent predator law, crimes that had happened many years in the past now constituted “recent” acts. The theoretical underpinnings for this definitional change could only be one thing: the assumed immutability of an offender's past dangerousness.

##### 4.1. The State of Washington

In 1987, the State of Washington tried to prevent the release of Earl K. Shiner, a mentally retarded man with a criminal history that spanned some twenty-four years. At the end of Shiner's ten year prison sentence for kidnap and assault, he let it be known that he planned to customize a van with cages so that he could pick up children, molest, and then kill them. Shiner shared his plans with his cellmate and detailed them in his journal.<sup>71</sup> When prison officials learned of Shiner's plans they tried to use Washington's sexual psychopath law to block his release. Since the state could not demonstrate the requisite “recent overt act” to prove dangerousness, it had no choice but to release Shiner. Two years later Shiner was arrested for raping a seven-year-old boy, severing his penis, and leaving him in the woods to die.<sup>72</sup>

Shiner's horrific crimes were publicized along with two other violent crimes by released offenders. People were outraged and demanded that something be done. In response, the Governor of Washington created a task force to address the problem of dangerous sex offenders. Among other suggestions, the task force recommended the first modern sexually violent predator legislation, which authorized the creation of a new civil commitment scheme for sex offenders.<sup>73</sup>

One of the most distinctive features of the new sexually violent predator law as compared with Washington's previous civil commitment law is that the SVP law removes the state's burden of proving a recent overt act if the individual is in custody on the day the petition is filed.<sup>74</sup> A recent overt act is defined as “any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.”<sup>75</sup> If the individual is out of custody at the time the petition is filed, then the state still needs to prove a recent overt act.

<sup>55</sup> U.S. Department of Justice, Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994*, November 2003, NCJ 198281 (hereinafter *DOJ*).

<sup>56</sup> “Rearrest forms a conservative measure of reoffending because many crimes do not result in arrest...While some sex offenders in this study probably committed a new sex crime after their release and were not arrested or convicted, the study cannot say how many.” Of course not all people who are arrested for a crime are actually guilty—this will off-set at least some of those who committed a new crime but were not arrested. *Id.* at 6.

<sup>57</sup> Arizona, Maryland, North Carolina, California, Michigan, Ohio, Delaware, Minnesota, Oregon, Florida, New Jersey, Texas, Illinois, New York, and Virginia. *Id.* at 1.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 24.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1–2.

<sup>65</sup> Allen J. Beck and Bernard E. Shipley, Bureau of Justice Statistics Special Report, *Recidivism of Prisoners Released in 1983*, NCJ 116261 (1989) at 6.

<sup>66</sup> R. Karl Hanson and Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 *JOURNAL OF CONSULTING AND CRIMINAL PSYCHOLOGY* 348, 350 (1998).

<sup>67</sup> *Id.* at 357.

<sup>68</sup> Lisa L. Sample and Timothy M. Bray, *Are sex offenders different? An examination of rearrest patterns*, 17 *CRIMINAL JUSTICE POLICY REVIEW* 83 (2006).

<sup>69</sup> *Id.* at 95.

<sup>70</sup> *Id.*

<sup>71</sup> Roxanne Lieb, *Washington's Sexually Violent Predator Law: Legislative History and Comparisons with Other States*, Washington State Institute for Public Policy, December 1996.

<sup>72</sup> *Id.* at 1.

<sup>73</sup> *Id.*

<sup>74</sup> Wash. Rev. Code Section 71.09.020(2).

<sup>75</sup> *In re Marshall*, 125 P.3 d 111,114 (Wash. 2005).

If the person is in custody when the petition is filed, the statute allows the recent overt act requirement to be met by the crime for which the person is serving time. The trial court is then to determine whether that crime constitutes a sexually violent offense or an act that would have constituted a recent overt act. If it is—no matter how long ago the actual crime occurred—it counts as a recent overt act.<sup>76</sup>

The Washington Supreme Court held that it was not a violation of due process to remove the state's burden of proving a recent overt act when a person is in custody.<sup>77</sup> The Court reasoned that if a person is in custody he does not have the opportunity to commit such an act, and thus it is an impossible burden to meet.

In many cases, sexually violent predators are incarcerated prior to commitment. For incarcerated individuals, a requirement of a recent overt act under the Statute would create a standard which would be impossible to meet. Other jurisdictions have rejected the precise argument made by petitioners because it creates an impossible condition for those currently incarcerated. We agree that “due process does not require that the absurd be done before a compelling state interest can be vindicated.” Indeed in drafting the Statute, the Legislature expressly noted that the involuntary commitment statute, RCW 71.05, was an inadequate remedy because confinement prevented any overt act. We conclude that where the individual is currently incarcerated no evidence of a recent overt act is required.<sup>78</sup>

If the rationale for removing the recent overt act requirement is really that confinement prevented it from being committed then we would expect that the requirement would be reinstated if the person was released. Yet this turns out not to be the case. In *Henrickson v. Washington*, Mr. Henrickson was convicted of attempted kidnapping and sentenced to 120 months. The court allowed him to remain out of custody on bond pending appeal, however he was ordered to complete a sex offender treatment program. He was also prohibited from traveling anywhere without a chaperone, and for much of the period of his release, he was supervised by a Department of Corrections officer.<sup>79</sup>

Henrickson remained out of custody for three years before he began serving his sentence. One day before his scheduled release, the State of Washington filed a petition to have him committed as a sexually violent predator. In his appeal, Henrickson argued that the state should have to prove a recent overt act due to the fact that he had been living in the community for three years offense free before he started serving his time.

Eventually, the appeal reached the Washington Supreme court, which ruled that the three year period of release did not alter the State's burden of proof. In holding that the state did not have to prove a recent overt act, the Court reasoned:

To follow the Court of Appeals approach in *Henrickson* would elevate *Henrickson's* and *Halgren's* periods of temporary release during the disposition of their criminal cases over the sexually released criminal acts that actually gave rise to their extensive periods of confinement. This would lead to absurd results because, in effect, any post-arrest supervised release for whatever reason would provide the opportunity to circumvent the distinctions of the statute.<sup>80</sup>

The fact that proof of a recent overt act is not required in a case like *Mr. Hendrickson's* is significant. It calls into question the Court's

original rationale in removing this requirement—that a person's state of incarceration prevented him from re-offending. In effect the Court is saying that what matters most is that the person offended before. The statute assumes—and the Washington Supreme Court agrees—that sexually violent predators will remain dangerous no matter the passage of time. Thus sex offender recidivism is presumed to be inevitable.

#### 4.2. California

The belief in inevitable recidivism is also pivotal to California's sexually violent predator legislation. Just as in Washington, California does not require proof of a recent crime as long as the person is in custody.<sup>81</sup> Instead it defines a recent overt act as, “any criminal act that manifests a likelihood that the actor may engage in sexually violent predatory criminal behavior.”<sup>82</sup> Although legislators stated that a person could not be found to be a sexually violent predator unless there was “relevant evidence of a currently diagnosed mental disorder that makes the person a danger to others in that he/she will engage in sexually violent criminal behavior,”<sup>83</sup> the question is what assumptions are necessary for evidence to be considered relevant. Implicit in the claim that a past act proves current dangerousness is immutability; the statute assumes that sexually violent predators will remain dangerous no matter the passage of time.

The presumption of immutability is made even clearer by the way that sexually violent predator diagnoses are actually made. To prove the current mental disorder, the Department of Mental Health designates two psychologists or psychiatrists who attempt to interview the defendant. Since many defendants refuse to be interviewed by psychologists retained by the state, they must make their diagnoses relying solely on past reports and records. Sometimes these reports are many years old, yet they still form the basis of the psychologists' opinion. The only way that such reports could be relevant is if the defendant's risk of recidivism is viewed as unchanging and thus inevitable, because otherwise how could a psychologist make a diagnosis without actually talking to the defendant.

In 2006, Californians passed Proposition 83 which made it easier to commit people as sexually violent predators and changed the commitment from one that had to be renewed by a jury every two years to an indeterminate, potentially life-long commitment. Proposition 83 also removed the requirement of providing the person with annual written notice of his right to petition for conditional release.<sup>84</sup> In the past, unless a person affirmatively waived his right, a hearing was set in which the court had to determine whether the person's condition had changed to the degree that he no longer posed a risk. The committed had the right to be present at this hearing and to be represented by an attorney. Proposition 83 took this annual hearing away. Now, committed individuals are left with only the right to petition the court for release. Under the revised law, if a previous petition had been filed without the Director of Mental Health's approval and denied, then the court was *required* to deny the subsequent petition unless the person set forth facts that a court could find showed that his condition had materially changed.

These changes undermine the California Supreme Court's rationale for holding that the state's SVP law did not violate an accused's constitutional due process rights. In *Hubbart v. Superior Court*,<sup>85</sup> the Court explained the constitutional relevance of requiring a jury trial

<sup>76</sup> *Id.* at 157–58.

<sup>77</sup> *In re Young*, 857 P.2 d 989. (Wash. 1993); *Detention of Henricksen v. State*, 2 P.3 d 473 (Wash. 2000).

<sup>78</sup> *Young*, *supra* note 77.

<sup>79</sup> *Detention of Henrickson*, *supra* note 77 at 474.

<sup>80</sup> *Id.* at 478.

<sup>81</sup> AB 888 Assembly Bill – Bill Analysis, Assembly Committee on Public Safety, Paula L. Boland, Chair, AB 888 (Rogan) – As Amended: April 17, 1995, at 4, available at [http://www.leginfo.ca.gov/pub/95=96/bill/asm/ab\\_0851-0900/ab\\_888\\_cfa\\_950417\\_14118](http://www.leginfo.ca.gov/pub/95=96/bill/asm/ab_0851-0900/ab_888_cfa_950417_14118).

<sup>82</sup> *Id.* at 4.

<sup>83</sup> AB 888 Assembly Bill – Bill Analysis, Third Reading, Bill No. AB 888, at 2. [http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab\\_0851-0900/ab\\_888\\_cfa\\_950912\\_172319](http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_0851-0900/ab_888_cfa_950912_172319).

<sup>84</sup> Proposition 83, Text of Proposed Law, Section 6604.1(b).

<sup>85</sup> 969 P.2 d 584 (1999).

every two years as well as mandating an annual review for a change in circumstances. The Court wrote:

Commitment and treatment are proper under the Act only for as long as the person is both mentally disordered and dangerous. To this end, the maximum length of each commitment term is relatively brief – two years. A new mental evaluation and judicial review of the commitment are required each year, providing the SVP with an opportunity to receive unconditional release and discharge in the event his condition has materially improved.<sup>86</sup>

These changes in California's SVP law are significant, and the justification is clear. It is the immutability of sex offenders that justified removing the state's burden of proving dangerousness every two years; it is the conviction that an individual's risk of recidivism cannot change that rationalized taking away an individual's right to an annual hearing in front of a judge regarding his current dangerousness. If sex offenders are assumed to stay the same, then there is no reason to force the state to go through the process of proving continued dangerousness. It is simply wasted time and money.

### 5. Explaining the prevalence of the belief in inevitable recidivism

I have shown that politicians, judges, and the general public believe (or at least profess to believe) that sex offenders—particularly child molesters—will inevitably re-offend. This conviction thrives despite significant evidence to the contrary. In this section, I rely primarily on social constructionist theory to suggest why.

Truth is to a significant extent socially constructed.<sup>87</sup> That is not to say that there isn't a world that exists independently from us—mountains, grass, the sun. Instead, it is to say that the way we understand that world is socially defined. It is the product of relations among and between humans and is thus affected by social forces—history, culture, prior beliefs, and normative values. As the philosopher John Searle puts it, there are social facts and “brute” facts. A five-dollar-bill, for instance, is socially constructed—but for our system of exchange it would have no value. That hydrogen atoms have one electron, however, is an empirical fact that exists regardless of human observation or acceptance.<sup>88</sup>

Crime is one of the most fertile grounds for non-objective, socially defined truth. This is true not just in terms of what we define to be criminal, but also in terms of our perception of the incidence and prevalence of crime. Studies have shown that people's fear of victimization is often greatly exaggerated as compared with what crime data would expect. In 1979, James Garofalo used data from victimization and attitude surveys from eight American cities and found that men had higher victimization rates than women but less fear. He also found that older people were more fearful than younger even though they were less at risk. This led Garafalo to conclude that, “...the fear of crime is not a simple reflection of the risk or experience of being victimized.”<sup>89</sup> Jonathan Jackson conducted interviews in rural England and found that “...crime often operates as a symbol, expressing or condensing a number of other issues, conflicts, insecurities and anxieties regarding one's neighborhood, its social make-up and status, its place in the world, and the sense that problems from outside were creeping in.”<sup>90</sup>

Sex compounds the inherently social facticity of crime. People have very strong emotional responses to sex crimes, particularly those

against children. As a result, they receive significant attention by the press and the popular media. JonBenet Ramsey, for example, continues to be the subject of newspaper articles, magazine stories, and television programs. A Google search with her name yielded over 149,000 hits.<sup>91</sup> It's easy to forget that she has been dead for almost fifteen years.

And it is the repeat sex offender that we hear about the most. The media is quick to report when a previously convicted sex offender re-offends, but it fails to contextualize these stories as statistical anomalies. We are not told that the rate of forcible rape and child molestation has been dropping for over ten years. Nor do we hear that sex offenders have very low recidivism rates. Instead, we watch as more and more states pass sexually violent predator laws and require GPS for sex offenders. Why would we pay attention to a report from the New Jersey Department of Corrections that questioned whether Megan's Law is justified<sup>92</sup> when we can just watch on TV an episode of *Law and Order* or *To Catch a Predator* to be reassured that we are right.

Inevitable recidivism has saturated the media, political and popular discourse, and thus it has become the dominant frame due to its availability.<sup>93</sup> Due to the strong political and economic forces at play,<sup>94</sup> this is unlikely to change anytime soon. As the polls mentioned above show, the public is particularly concerned about child molestation as compared with other crimes. This makes protecting children from repeat sexual predators the “perfect apple pie issue”<sup>95</sup> for politicians. From an economic perspective, crime sells newspapers, which creates an incentive for newspapers to print a disproportionate number of stories about sex offenders. An extensive literature describes the role that the media—both print and screen—plays in shaping people's beliefs.<sup>96</sup> Public surveys have found that as much as 95% of the population report that the mass media is their primary information source about crime.<sup>97</sup> This sets up a dialectical process in which the public believes that sex offenders inevitably recidivate; the media writes stories that bolster this belief, and politicians pass laws

<sup>91</sup> Google search for “JonBenet Ramsey” conducted on August 31, 2010. This does not include the number of hits for related searches like: “Who killed jonbenet Ramsey” or “jonbenet ramsey autopsy photos.”

<sup>92</sup> The researchers found that there was a consistent downward trend in sex offenses across New Jersey since 1995, but they found that Megan's Law had nothing to do with it. Indeed they asked, “Given the lack of demonstrated effect of Megan's Law on sexual offenses, the growing costs may not be justifiable.” Kristen Zgoba, Phillip Witt, Melissa Dalessandro, and Bonita Veysey, *Megan's Law: Assessing the Practical and Monetary Effect*, 2008 at 2.

<sup>93</sup> Amos Tversky and Daniel Kahneman, *Availability: A heuristic for judging frequency and probability*, chapter 11 and 64 in *Judgement under Uncertainty: Heuristics and Biases* (2005) Daniel Kahneman, Paul Slovic and Amos Tversky editors. Shelly E. Taylor, Chapter 13, *The Availability bias in social perception and interaction* in *JUDGEMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (2005) Daniel Kahneman, Paul Slovic and Amos Tversky editors, 190 at 192.

<sup>94</sup> Katherine Beckett, *MAKING CRIME PAY* (1983); Barry Glassner, *THE CULTURE OF FEAR*.

<sup>95</sup> Glassner, *supra* note 94 at 62 quoting a congressional aide who was talking about missing children as being the “perfect apple pie issue.”

<sup>96</sup> The first large-scale study of the mass media was underwritten by the Payne Foundation in 1929. It looked at the effect that movies had on producing deviant, asocial and violent behavior in juveniles. Ray Surette, *MEDIA CRIME AND CRIMINAL JUSTICE: IMAGES AND REALITIES*(1998) at 32 citing H. Blumer, *THE MOVIES AND CONDUCT*(1933) and H. Blumer and P. Hauser, *MOVIES, DELINQUENCY AND CRIME* (1933). For a discussion of current research, see David L. Altheide, *CREATING FEAR: NEWS AND THE CONSTRUCTION OF CRISIS* (2002), *MEDIA, PROCESS, AND THE SOCIAL CONSTRUCTION OF CRIME* (Gregg Barak, ed. 1994), Barry Glassner, *THE CULTURE OF FEAR*(1999), Chris Greer, *SEX CRIME AND THE MEDIA: SEX OFFENDING AND THE PRESS IN A DIVIDED SOCIETY*(2003), Philip Jenkins, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN* (1998), *CRIMINAL VISIONS: MEDIA REPRESENTATIONS OF CRIME AND JUSTICE*(Paul Mason, ed., 2003), Ray Surette, *MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES AND REALITIES*(1998). For an interesting discussion of the role that the television show *CSI-Crime Scene Investigation* might play in changing juror standards of reasonable doubt see Tom R. Tyler, Review: *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 *YALE L.J.* 1050 (March 2006). For a critical look at the role of media in tort reform see Robert J. MacCoun, *Media Reporting of Jury Verdicts: Is the Tail (of the Distribution) Wagging the Dog?* Clifford Symposium on Tort Law, *DEPAUL LAW REVIEW*, 55, 539–562 (2006).

<sup>97</sup> Ray Surette, *MEDIA, CRIME AND CRIMINAL JUSTICE: IMAGES AND REALITIES* (1998) at 197.

<sup>86</sup> *Id.* at 1167–68.

<sup>87</sup> Peter L. Berger and Thomas Luckman, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966).

<sup>88</sup> John Searle, *THE SOCIAL CONSTRUCTION OF REALITY* (New York: The Free Press, 1995).

<sup>89</sup> James Garafalo, *Victimization and the Fear of Crime*, *JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY* 1979 16:80, 86.

<sup>90</sup> Jonathan Jackson, *Experience and Expression: Social and Cultural Significance in the Fear of Crime*, *BRIT. J. CRIMINOL.* (2004) 946, 950.

that are responsive to this belief. The effect is to have inevitable recidivism become a socially constructed fact.

## 6. Conclusion

Americans believe that sex offenders cannot control themselves and will continue to re-offend. In *Kansas v. Hendricks* – the seminal sexually violent predator case – Mr. Hendricks epitomized the inevitable recidivist, and the U.S. Supreme Court never bothered to consider whether Mr. Hendricks was in fact representative of the class of sex offenders. When actual evidence of sex offender recidivism is examined, a huge gap exists between what is assumed and what the data actually shows because most sex offenders do not in fact recidivate. Thus there is a galaxy of sexually violent predator laws and an entire branch of Supreme Court jurisprudence that is founded upon a demonstrable urban legend.

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