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1 | Introduction

There are few areas of law and policy (perhaps none) as contentious as the question of the legal, behavioral, and correctional treatment of those known as "sexually violent predators" (SVPs), individuals who, after conviction for a variety of sexually based offenses—some violent, some not—become eligible for long-term "civil" commitment under "sexually violent predator acts" (SVPAs) at the end of their prison term. This cohort is the most despised group of individuals in the nation, thus warranting our strongest condemnation,[1] and this population "has become the lightning rod for our fears, our hatreds, and our punitive urges."[2] No other population is more vilified, more subject to media misrepresentation, and more likely to be denied basic human rights.[3] The endless emotionally charged debates that have ensued—seeking a strategy to best maintain safety by containing the "sexual predator"—are often premised upon "incorrect facts and spurious data that have been distorted and skewed to support political agendas that respond to—or perhaps in some cases, incite—community outcries for retribution."[4] It is clear that sexual offender civil commitment and community containment laws were developed as reactionary responses to the widely feared but statistically rare, violent, child-directed, and stranger-perpetrated sex crime.[5]

In this book, we draw on law, behavioral sciences, and other disciplines to show that society's "solutions" to the issues before us are all wrong. Not only are they wrong; they are also counter-productive. Rather than making our communities safer, these "solutions" make our communities more dan-

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gerous. Rather than focusing on "the worst of the worst," sexual offender laws often drag into their wide nets a range of defendants whose criminal acts (displaying vulgar bumper stickers, "sexting" pictures, urinating in public) are comparatively trivial, and whose lives are ruined by this designation. By pandering to media hysteria, these laws reject potential solutions that would more likely make communities safer and, at the same time, not destroy civil rights and liberties in the name of "public protection."

In this book, we consider a broad range of controversial, contentious, and complex questions, questions that are—and should be—of great interest to those who study this area and who are involved in legal representation (both of individuals and of state entities) in this area. These questions include (but are not limited to) the following:

- The unreliability of the science underlying the laws as they relate to the constitutionality of how we predict future risk
- The inadequacy of counsel (or, in some states, the complete *lack* of counsel), making it less likely that trials and hearings actually "do justice,"[6] a mandate that is all too often missing in the cases we discuss here, and an inadequacy that often ignores the "special obligation" on the part of prosecutorial agencies "to promote justice and the ascertainment of truth"[7]
- The unconstitutional impact of these laws, with special focus on violations of the First and Fifth Amendments, privacy rights, and the ex post facto clause
- The inappropriate imposition of a presumption of dangerousness that distorts the entire fact-finding process
- The ways that trial courts regularly misstate and misunderstand the empirical and statistical "evidence" that is supposed to underpin individual decision making in this area, a topic inexorably related to the quality of research that is actually undertaken and the misuse of statistical information by some of those who do the research
- Issues related to treatment and institutional conditions in SVPA facilities and the "effectiveness" of long-term community supervision
- An empirical assessment of state responses to U.S. Supreme Court decisions such as *Kansas v. Hendricks*[8] and *Seling v. Young*[9] and an assessment of the procedures established by states following those decisions, raising the question of whether it is necessary to revisit the assumptions about confinement and treatment of individuals subject to SVPA laws that underlie both of those opinions and asking the hard question of whether *Hendricks* must be deemed "bad law," considering what has transpired in the intervening years (acknowledging the lack of *any sort of* treatment available at some SVPA facilities, the lack of *effective* treatment even where minimal

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treatment is provided, the reality of the low future risk and low recidivism rates of many institutionalized sexual offenders, and our inability to effectively predict positive risk), thus forcing society to reconsider the entire structure and implementation of sexual offender laws
- The conflicts between state and federal laws with regard to the enactment of the Adam Walsh Child Protection and Safety Act, specifically focusing on community notification, registration, and residency restrictions
- The implications of the inclusion of juveniles in many SVP laws following enactment of the Walsh Act[10] and, as part of that Act, the concomitant creation of a Sex Offender Registration and Notification Act (SORNA), authorizing a national registry and inspiring litigation over questions related to restrictions on where sexual offenders may be housed in the community
- The need to consider international perspectives, with regard to *comparative* law (how these issues are dealt with in other nations), *international human rights* laws (focusing on such questions as whether international conventions [e.g., the UN Convention on the Rights of Persons with Disabilities and the UN Convention Against Torture] are applicable to this population), and how our SVPA system is viewed in other nations
- How therapeutic jurisprudence (TJ) can and should be used as a lens and a filter in the study of this issue and how TJ offers the best hope at coming to a positive resolution of the dilemmas we discuss in this work

Shockingly, although there are some law review and behavioral science articles that deal with some of these issues,[11] there is currently no one source that covers this entire panoply of questions. We hope to do that in this work.

For years, both of us have been writing about these topics in a series of law review and medical journal articles and in a multi-volume treatise on mental disability law. In those articles, we have discussed such issues as the constitutionality of SVPA laws,[12] right to counsel in SVPA proceedings,[13] the role of therapeutic jurisprudence in sexual offender decision making,[14] how the focus of sexual offender laws is to shame and humiliate those persons subject to regulation,[15] treatment of sexual offenders both in institutions[16] and in the community[17] (with a special focus on ethical issues),[18] the impact of the media on sexual offender legislation,[19] and how SVPA laws do and do not reflect a merger of law and science.[20] Also, in the third edition of our treatise, there is a lengthy chapter on sexual offender laws.[21] Moreover, working together, we created a course in sexual offender law that has been taught at New York Law

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School since 2008 and that one of us (HEC) has taught at least once a year since that time; HEC's experiences in processing the responses of students—who are often aghast when they learn that their accumulated wisdom, culled from TV shows such as *Law and Order: SVU*, is incorrect on every level—have been invaluable as we have continued our scholarship in this area.

In addition, both of us have extensive "on the ground" experience in this area. One (MLP) regularly represented sexual offenders many years ago in New Jersey, when he was Deputy Public Defender in charge of the Mercer County (Trenton, New Jersey) trial office, prior to the era of Megan's Law and the Supreme Court's decision in the *Hendricks* case; the other (HEC) represented this population exclusively for seven years in the N.J. Department of the Public Defender (also in the N.J. Department of the Public Advocate) in the years following the advent of that law and other legislation in the "new era" of SVPA litigation. Among the reasons we have chosen to write this book was that, even in the array of fine books that recently have been published on these topics,[22] none deals extensively with issues of counsel, none deals with developments in international human rights law, none deals with any developments in therapeutic jurisprudence in the past decade, none deals with the impact of the media on litigation, and none fully covers the depth of information and vast range of relevant trial practice issues.

Individuals classified as sexual predators are the pariahs of the community.[23] Sexual offenders are arguably the most despised members of our society and therefore, we believe, warrant our harshest condemnation.[24] Twenty individual states and the federal government have enacted laws confining individuals who have been adjudicated as "sexually violent predators" to civil commitment facilities post-incarceration and/or post-conviction.[25] Additionally, in many jurisdictions, offenders who are returned to the community are restricted and monitored under community notification, registration, and residency limitations.[26] Targeting, punishing, and ostracizing these individuals has become an obsession in society, clearly evidenced in the constant push to enact even more restrictive legislation that breaches the boundaries of constitutional protections.[27]

We now know some important countervailing realities. Forensic psychologists have demonstrated—beyond doubt—that the actuarial instruments regularly used to determine who *is* such a "predator" are fatally flawed.[28] The evidence is indisputable that, once institutionalized, such individuals generally receive no treatment of any sort.[29] The strategies we have adopted to make our communities safer—including but not limited to sexual offender registries—have failed miserably in their intent and, in fact, have often had the opposite outcome.[30] Laws such as Megan's Law have been shown to have no significant ameliorative impact on the problems we face.[31] Media hysteria exacerbates all of this and strangles any attempts at legislatively remediating the situation.[32] And counsel appointed to represent this population—if,

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indeed, any counsel is appointed—is, in many jurisdictions, uniformly ineffective, to the degree that such lawyers are often, in the famous words of Judge David Bazelon, "walking violations of the Sixth Amendment."[33]

We have written this book to focus on these issues, to show how our social and legislative policies are not simply ineffective but counter-productive, failing to add to public safety while ruining lives. This counter-productive failure, again, is abetted by the basest sort of media pandering and the slavish responses of state legislators, each seeking to outdo each other in promoting the most repressive (and useless) laws. We hope that this book will inspire others to begin to focus more clearly on the problems in an effort to craft solutions that contribute to public safety in ways that do not mock constitutional principles.

The book proceeds as follows: In Chapter 2, we discuss four factors—sanism, pretextuality, heuristic reasoning, and false "ordinary common sense" (OCS)—that contaminate *all* of mental disability law,[34] but *especially* sexual offender law,[35] as well as the range of these issues, and we then explain how we address them in the subsequent chapters of this book. We believe that it is impossible to understand anything about any aspect of mental disability law—in its broadest definition—without an understanding of these concepts (and their poisonous residue) and that these concepts must be understood if we are to understand the key legislative, judicial, and social developments in sexual offender law.

In Chapter 3, we provide a history of sexual offender laws.[36] In order to make sense of the current state of affairs, we trace the history and foundations of the development of sexual offender civil commitment laws, the federal enactment of community notification laws, and registration laws. The laws that are currently in place are generally based on earlier legislation (such as "sexual psychopath" laws) that were—decades ago—either judicially struck down or, having fallen into disfavor, no longer used.[37]

We discuss further the new generation of sexual offender civil commitment and containment laws that are a direct result of fear and outrage over a handful of high-profile sex crimes (for example, the cases of Earl Shriner [Washington] and Jesse Timmendequas [New Jersey]).[38] The state of Washington enacted the first of the "new generation laws" calling for the civil commitment of sexual predators, but it was not until the Supreme Court decided *Kansas v. Hendricks* in 1997[39] that these new statutes ultimately survived constitutional objections premised on the due process and ex post facto clauses.[40] Once the Supreme Court upheld Kansas's civil commitment statute, many other states and the federal government[41] began to enact their own forms of sexual offender civil commitment legislation, again, almost inevitably and inexorably, in response to high-profile sexual crimes,[42] often as a symbolic gesture to the victims of these crimes.[43] As Professor Melissa Hamilton has noted, "Through repeated publication of their names and photographs, telegenic victims of sex crimes,

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particularly those young and cute, literally become the 'poster children' for the moral panic and public demands for officials to do something to protect potential future victims."[44]

We also consider how, in response to the media's depiction of offenders as high recidivists with a "child-snatching stranger" profile,[45] a general outcry arose for harsher sanctions once an offender was released to the community. Pressures from the general public inspired political agendas that demanded further control over and monitoring of sexual offenders in the community through residency restrictions and community notification.[46]

Finally, in this chapter, we also address questions of jurisdictional conflicts—between federal and state laws and between local ordinances and state laws—and we consider the impact of litigation that has emerged as a result of restrictions on where sexual offenders may be housed in community settings.[47]

In Chapter 4, we turn our attention to what we call "confounders": how this entire process is shaped—a better word, perhaps, is *warped*—by the role of the media. It cannot be denied that moral panic is the progenitor of the resulting laws, and media panic was, in almost all instances, the catalyst that spawned the political motivations leading to an outcry for stricter sexual offender laws and legislation.[48] The media has played a significant role in shaping public perceptions and has contributed to the enactment of harsher sexual offender legislation. Media portrayals of the offender as a "monstrous evil[49] . . . unable to control" sexual offending behavior[50] have also had an impact on court decisions—from the state trial courts to the U.S. Supreme Court—and, additionally, have disproportionately influenced congressional opinion. In this chapter, in discussing the role of the media,[51] we look especially closely at its impact on public perceptions in general[52] but also on legislators and judges in particular.[53] We broadly consider the role of the media in sexual offender issues and further theorize whether the recent shift in media presentation has affected public perceptions of sexual offenders and whether it has had any impact on recent legislation and the future enactment of sexual offender laws.

In Chapter 5, we outline the specifics of the litigation under sexual offender laws—the significance of a series of trial process issues that have a direct impact on the adjudicatory process, including the right to counsel, the right to experts and the application of evidentiary rules at trial, and the relationship between the assessment of risk and the science that allegedly underlies that assessment, including the complex and unique use of risk assessment tools in the determination of future dangerousness and how such use complicates the trial process.

On the question of trial process issues, we look at a broad array: matters involving ineffectiveness of counsel,[54] the lack of independent mental health professional expertise generally made available to persons subject to SVPA

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commitments,[55] the unreliability of so much of the underlying science that is relied upon in such cases (with a special focus on the myth that the actuarial tests often used are actually reliable),[56] the application at trial of the rules of evidence (with special focus on the admissibility of evidence of prior bad acts, hearsay rules, and the admissibility of polygraph tests),[57] the status of uncharged acts in this process,[58] and issues related to jurors' pre-existing attitudes.[59] In this section, we also examine a range of constitutional issues:

1. The defendant's right not to participate in "talk" treatment
2. The scope of the defendant's privacy rights
   a. The right to remain silent at trial
   b. The right to testify at trial
   c. The right to self-representation
3. The applicability of the patient-therapist privilege

As we discuss in this chapter, the public perceptions of offenders and of the frequency of certain sorts of offenses, and the constancy of false beliefs in erroneously inflated high rates of recidivism, have contributed to a panoply of serious legal errors in the adjudication of sexual offender cases. Evidentiary rules are bent and compromised, ineffective counsel is accepted, unreliable statistical tools based on "junk science" are admitted, and, overwhelmingly, courts rely on hearsay evidence that should be inadmissible. And this is all abetted by the Court's majority opinion in *Hendricks*,[60] which only encourages justification of the confinement of offenders without any substantive treatment or preparation for reintegration into society.

In Chapter 6, we consider post-adjudication treatment and the way the population in question has been treated (or, more likely, *not* treated) in special SVPA facilities. We also examine the extent to which Supreme Court decisions have had an actual impact on how sexual offender commitment is carried out "on the ground, " in those states that have SVPA laws.

We turn our attention to early treatment techniques and then consider current modes of treatment for institutionalized (and outpatient)[61] sexually violent predators. Here we discuss institutional conditions and the concerns over the quality and efficacy of treatment, focusing on the total lack of treatment available at some facilities, the lack of *effective* treatment at some facilities even when minimal treatment is made available, and the controversial types of treatment currently in use.[62]

Finally, we consider what we call (awkwardly, we know) "special populations," a catchall that covers some of the classification issues that must be acknowledged (special questions that arise in cases of persons with intellectual disabilities and of juveniles, the impact of recent revisions of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental*

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Disorders, and the significance of recent research into the cognitive schemes of this population). We address how these "special populations" (juveniles, females,[63] and persons with intellectual disabilities) are treated, along with the specialized issues involved in the housing, care, and release of these distinct groups of offenders.

Throughout all of these subsections, we consider the "real world" significance of the Supreme Court decisions already referred to, with an eye to their actual empirical and measurable impact on the population and facilities in question. Here we evaluate and assess state responses to, especially, the *Hendricks* and *Crane* cases and seek to answer these difficult questions:

- Is it necessary to revisit the assumptions about confinement, treatment, and the individuals subject to SVPA laws that underlie those opinions?
- Should the decision in *Hendricks* be revisited, considering what has transpired in the two decades since the case was decided?
- How do these decisions allow trial courts and state appellate courts to ignore the reality of the low future risk and low recidivism rates of many institutionalized sexual offenders? How can we meaningfully contextualize these decisions with the reality that we are still unable to effectively predict actual risk? And how important is the reality that courts will often disregard concerns about the validity and reliability of some of the statistical tools that are relied on in these cases, since paying attention to that reality might interfere with the legislative intent embodied in the SVPA laws?
- What impact, if any, do these cases have on (1) our ability to assess the "effectiveness" of community supervision, (2) the quality of research that is produced and published in this area and the attendant frequent misuse of statistical information, (3) the ways that courts continue to misstate/misunderstand empirical evidence, and (4) the reality that the registries that were created in response to these cases simply fail to provide community safety?

Then, in Chapter 7, we turn to international perspectives: to what extent is international human rights law relevant to these inquiries? Specifically, are international conventions such as the UN Convention on the Rights of Persons with Disabilities and the UN Convention Against Torture applicable to this population,[64] and how are these issues dealt with in other nations[65] (and the related question of how U.S. law is looked at in such other nations)?[66] It is essential that international human rights law constructs and comparative law insights be included in any analysis of domestic sexual

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offender law, just as it is essential that international human rights insights be incorporated into any analysis of any aspect of *domestic* mental disability law.[67] By way of example, Article 17 of the International Covenant on Civil and Political Rights provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation."[68] To what extent do residency restrictions that prevent individuals who have committed sexual offenses from living within specific proximities to schools, parks, and other areas where children congregate violate this article?[69]

American sexual offender laws are often viewed with horror abroad. Thus, a London (U.K.) High Court has refused to return an alleged sexual offender to Minnesota to face criminal charges after officials there refused to guarantee he would not be committed to the state's controversial sexual offender program, because such institutionalization "would be a 'flagrant denial' of the individual's human rights under Article 5 of the European Convention on Human Rights."[70] Plans to create an international sexual offender registry have met with strenuous opposition.[71] Serious questions arise about whether actuarial instruments were ever effectively "normed" on an international population.[72]

Then, in Chapter 8, we consider all of these issues through the lens of therapeutic jurisprudence. Therapeutic jurisprudence "asks us to look at law as it actually impacts people's lives."[73] Focusing on the law's influence on emotional life and psychological well-being,[74] it forces us to look at the "real world" implications of the statutes and court cases that we discuss throughout this work.

Importantly, the ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential *while not subordinating due process principles*.[75] There is an inherent tension in this inquiry, but David Wexler—one of the two creators of this school of thought—clearly identifies how it must be resolved: The law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."[76] Again, it is vital to keep in mind that an "inquiry into therapeutic outcomes does not mean that therapeutic concerns 'trump' civil rights and civil liberties."[77]

In this chapter, we assess all of the developments discussed in prior chapters in an effort to determine the extent to which therapeutic jurisprudence principles are honored in the way we have created our models of treating sexual offenders, and we offer some suggestions on how to remediate the current state of affairs.

One of the central principles of TJ is a commitment to dignity.[78] Professor Amy Ronner describes the "three Vs" as voice, validation, and voluntariness,[79] arguing:

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> What "the three Vs" commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronunciation that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.[80]

The question to be considered is this: to what extent are our sexual offender practices consonant or dissonant with TJ principles and to what extent are Professor Ronner's "three Vs" subordinated or privileged?

We then offer our conclusions. In previously published articles on this topic, we concluded that (1) states should re-allot their resources and focus on fostering rehabilitation and reintegration into the community by tailoring treatment to assist in reentering society,[81] (2) media frenzy has created an atmosphere of fear, thus directing legislators "towards finding feel-good solutions that briefly calm the fear frenzy" but that do nothing to actually "offer safety and security,"[82] and (3) only the enforcement of a rigorous effectiveness-of-counsel standard would give the underlying proceedings even a "patina" of fairness.[83] We build on these conclusions here and explain further why what we call the "confounders" must be examined carefully—through the lens of therapeutic jurisprudence and the filter of international human rights law—in order to better structure a coherent and constitutional system that provides increased treatment as well as safety and security in ways that do not compromise core due process values.

Our sexual offender laws are ostensibly meant to protect us, but they are also meant to shame and humiliate those who violate them.[84] In doing so, as we discuss in subsequent chapters, they ignore and mock the due process clause,[85] the ex post facto clause,[86] the double jeopardy clause,[87] and the cruel and unusual punishment clause.[88] In these ways, they truly shame the Constitution and stain the political and social fabric of our nation.

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