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## **Sex Offender as Scapegoat: The Monstrous Other Within**

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JOHN DOUARD

## Sex Offender as Scapegoat: The Monstrous Other Within

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No Wilder No. You've got to listen to me. People like fear. We all want to be frightened and we all want somebody to tell us how to live and who to fuck and why we should do this and think that. And that's the Devil's job. That's why I'm important to them, Wilder, because if you can make up a terrorist you've given people the Devil. They love the Devil. They need the Devil. That's my job. You get me?

—RICHARD FLANAGAN, THE UNKNOWN TERRORIST

## I. INTRODUCTION

In this paper I will argue that sex offenders in the United States are scapegoats, and for that reason are subjected to social violence far in excess of the dangers they pose. The media and the law frame certain sexually deviant behavior as *monstrous*, and those who engage in such behavior as *monsters*. Putative experts on deviance—psychologists and psychiatrists—generally do not directly refer to sex offenders as monsters, but instead create categorizations of mental disorders which perform a similar function: they brand sex offenders as persons who are unable to control their impulses. The result of such frameworks is the creation of a class of persons who are not simply unsympathetic, but are regarded as undeserving of certain legal and moral rights.

The metaphor of the monster is telling: a monster triggers fear and loathing because it is a creature with certain human characteristics. Humans branded as monsters are convenient scapegoats that society can blame for social disorder. Individuals who have committed sex offenses are framed as monsters and considered not entirely human. Society can then justify depriving them of liberty beyond the constitutional constraints of the criminal code on the ground that incarceration is necessary to protect the public.<sup>1</sup> Convicted sex offenders, after they serve their criminal terms, may be civilly committed for life under so-called sexually violent predator (or person) acts, or at a minimum subjected to community supervision for life under a state's Megan's Law.<sup>2</sup>

Modern psychiatric diagnoses, and the experts who make them, play crucial roles in both criminal and civil commitment proceedings. These diagnoses incorporate the framework of sexual offender as monster, in part, because psychiatry carries remnants of theology.<sup>3</sup> The early-modern, theology-infused monster has become, in this disenchanted age, the psychopath, the person with an anti-social personality

1. As I argue in section II, such crimes include sex offenses, especially against children, certain drug offenses, especially where children are victimized, and murders aggravated by virtue of being especially heinous.
2. See discussion *infra* pp. 41–48.
3. In a recent interview, psychiatrist Thomas Szasz pointed out:  
Three hundred years ago, every human predicament was seen as a religious problem—sickness, poverty, suicide, war. Now they are all seen as medical problems—as psychiatric problems, as caused by genes and curable with 'therapy.' In the past, the criminal law was imbued with theology; now, it's imbued with psychiatry.

Randall C. Wyatt, *An Interview with Thomas Szasz, M.D.: Liberty & the Practice of Psychotherapy*, PSYCHOTHERAPY.NET, Dec. 2000, [http://www.psychotherapy.net/interview/Thomas\\_Szasz](http://www.psychotherapy.net/interview/Thomas_Szasz).

disorder, and the sex offender.<sup>4</sup> The media's and lawmakers' framing of sex offenders as monsters, and the incorporation of the monster framework into legal proceedings through the use of psychiatric testimony and diagnoses, results in a nearly invisible, unjust deprivation of liberty.

In section II of this paper, I will provide a brief analysis of what I mean by framing, and apply that analysis to the role of the monster in modern culture. I show that when we pay attention to the ways sex offenders are reframed as monsters, their social role as scapegoats becomes apparent. In section III, I argue that the retributive response to sex offenses is far more severe than the risks sex offenders pose to society. I argue, further, that this extreme response is best understood as a reaction not simply to the risks posed by sex offenders, but to our fear of acknowledging that acts we criminalize and condemn as monstrous sex offenses are nonetheless acts of persons with very human, if often deviant, desires. I conclude by suggesting that the same strategies that are used to control sex offenders may be deployed to control other classes of violent offenders with similar consequences for justice.

## II. FRAMING, REFRAMING, AND THE CREATION OF MONSTERS

Sex offenders are, of course, persons. However, they have been framed as monsters by media, politicians, and academics. In this section, I examine the nature and functions of framing, and apply that analysis to the concept of the monster. Against this background, I argue that legal strategies for depriving sex offenders of their liberty are unjust, albeit nearly invisible.

### *A. Frames and the Organization of Experience*

Social psychologists, cognitive linguists, and cognitive scientists have developed overlapping theories of a powerful cognitive mechanism for organizing experience, variously called frames, schemas, scripts, and idealized cognitive models.<sup>5</sup> Sociologist, Erving Goffman, uses the term frame to refer to principles of organization, which “govern events—at least social ones—and our subjective involvement in them.”<sup>6</sup> These principles of organization, or cognitive patterns, organize the experience such that an experience means something very specific relative to the frame, model, category, schema, or pattern. Anthropologist, Gregory Bateson, analyzes play in terms of frames and models; a bit of serious activity may be used as a model to construct unserious versions of the same activity: chess is play based on the model of medieval warfare.<sup>7</sup> An action may be called a bite if framed by an animal fighting, or a “playful

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4. MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 155 (H. H. Gerth & C. Wright Mills eds. & trans., Routledge 1991) (1946) (“The fate of our times is characterized by rationalization and intellectualization and, above all, by the ‘disenchantment of the world.’”).

5. See generally GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND 5–115 (1987) [hereinafter LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS].

6. ERVING GOFFMAN, FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE 10 (1974).

7. *Id.* at 7.

nip” if we are talking about an animal at play.<sup>8</sup> Cognitive scientists and linguists have shown the extent to which models, frames, and patterns are responsible for the variations in the ways people experience an event that, from a God’s-eye point of view—an impartial or objective “view from nowhere”—might seem nearly identical.<sup>9</sup>

This notion of framing has been applied to morality. I may frame an act as an act of robbery, and you may frame the *same* act as a necessary stage in feeding your children. The legend of Robin Hood, a hero who steals from the rich and gives to the poor, suggests that reframing robbery as a courageous act of compassion is an example of moral framing. A foe of abortion will frame her opponents as pro-abortion; an opponent of legal prohibitions on abortion will frame her opponents as anti-choice. In both cases, a frame organizes experience.<sup>10</sup>

Metaphors play fundamental, indeed foundational, roles in constructing frames and hence deeply influence a person’s understanding of the world.<sup>11</sup> Reframing always involves changing metaphors.<sup>12</sup> Often one frame takes an activity to be a natural activity, part of the natural world, a literal model; while another frame takes the activity to be a metaphor. War to a soldier on the front lines is serious, non-metaphorical business; war as a frame for the game of chess or animal play is a metaphor. More to the point here, many victims of sex offenses endure very serious, literal invasions of their sense of self. Rape and child abuse in particular are deeply immoral acts precisely because they exemplify, are even models for, denying the victims’ dignity.

However, the perpetrators of sex offenses are persons who have made immoral choices. In the media and legal discourse, they are reframed as monsters and viewed as incapable of making choices, or exercising autonomy.<sup>13</sup> Within the monster frame, sex offenders are viewed as driven by non-human, animal impulses over which they

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8. Gregory Bateson, *A Theory of Play and Fantasy*, in APA RESEARCH REPORTS II, 1955, reprinted in GREGORY BATESON, *STEPS TO AN ECOLOGY OF MIND* 177–93 (5th ed., Univ. of Chicago Press 2000) (1972).
  9. LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS*, *supra* note 5, at 68–69. On the notice of impartiality as a “view from nowhere” or a God’s-eye point of view, see THOMAS NAGEL, *THE VIEW FROM NOWHERE* 76–77 (1986), arguing that to have experience is to have a point of view. If experience is always a point of view, then it is always organized in terms of some frame or other.
  10. See GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* 372–73 (2d ed. Univ. of Chicago Press 2002) [hereinafter LAKOFF, *MORAL POLITICS*] (arguing that political thinking is a cognitive activity shot through with framing, reframing, and categories that refer to prohibitions, permissions, and other moral judgments).
  11. See LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS*, *supra* note 5, at 5–7.
  12. See *id.* at 338–52 (illustrating that the mind was once metaphorically considered a “ghost in the machine” but is now regarded as a type of machine); LAKOFF, *MORAL POLITICS*, *supra* note 10, at 418–26 (arguing that the Democratic Party must reframe metaphors used in public discourse to modify public perceptions of their politics).
  13. Elizabeth Garfinkle, Comment, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163, 168–75 (2003).

have little or no control. Our standards of legal justice do not apply to persons re-framed as monsters.

*B. The Monstrous Other: A Long Tradition*

The term “monster,” like its semantic cousin “predator,” is a common metaphor for persons who commit horrifying, unnatural acts. However, a historical perspective can help us to recognize the less visible ways the words are incorporated into legal and psychiatric languages, such as the distinction between the normal and the abnormal. In this section, I begin my examination of the monster metaphor, with the twin aims of uncovering the sources of the social hysteria over sex offending and restoring humanity to the offender. It is necessary to look at this from a historical perspective, for if we only examine the response to malevolent sexual conduct from the vantage point of the present, features of that response may be hidden from view.

As I have demonstrated in my previous work, throughout the Renaissance and the Enlightenment a powerful figure of popular, literary, scientific, and legal cultures was the animal in human form: the prodigy, a species of monster.<sup>14</sup> Monsters, we learn from the history of the concept, may serve as sacrificial surrogates to purify sexual conduct of dangerous forms, because monsters symbolize our moral infirmities.<sup>15</sup> The language we use today to describe sex offenders retains the historical association of half-human monsters with deviant sexuality. Sexual offenders are referred to as predators in the law, as well as the media, suggesting that a sex offender is not a member of civilized society.<sup>16</sup>

We can trace the concept of the monster to St. Thomas Aquinas’s distinction between an unnatural sexual act and a sexual act that resulted from a moral choice to engage in sexual conduct that was *abhorrent* to the natural order created by God.<sup>17</sup> Aquinas used the term prodigy to demarcate the most abhorrent form of monster produced by bestiality and sodomy, traditionally the two most abominable sexual acts. The prodigy represented acts to which the only appropriate response was horror.<sup>18</sup> During the Renaissance, the prodigy was regarded with awe. In a sense, it was an example of the sublime. As sixteenth century chronicler of monstrosities, Ambroise Paré, put it:

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14. See, e.g., John Douard, *Loathing the Sinner, Medicalizing the Sin: Why Sexually Violent Predator Statutes Are Unjust*, 30 INT’L J.L. & PSYCHIATRY 36, 40–42 (2007); see also LORRAINE DASTON & KATHARINE PARK, *WONDERS AND THE ORDER OF NATURE* 173–214 (1998); ARNOLD I. DAVIDSON, *THE EMERGENCE OF SEXUALITY* 93–124 (2001).

15. A.W. BATES, *EMBLEMATIC MONSTERS: UNNATURAL CONCEPTIONS AND DEFORMED BIRTHS IN EARLY MODERN EUROPE* 43–57 (2005).

16. The first definition of predator in the *Oxford English Dictionary* is an animal that survives by eating its prey alive. 22 THE OXFORD ENGLISH DICTIONARY 328 (2d ed. 1989).

17. DAVIDSON, *supra* note 14, at 99–100 (discussing the early history of the connection between monsters and sexuality in Aquinas’s analysis of the effects of the “lustful vices”).

18. Douard, *supra* note 14, at 40.

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There are monsters that are born with a form that is half-animal and half-human . . . which are produced by sodomists and atheists who join together, and break out of their bounds contrary to nature, with animals, and from this are born several monsters that are hideous and very scandalous to look at or speak about . . . [I]t is . . . a great horror for a man or a woman to mix with or copulate with brute animals; and as a result, some are born half-men and half-animals.<sup>19</sup>

The social function of the concept of the monster, revealed by its history, is that the monster establishes and reinforces norms of conduct, while appearing to be a description of the progeny produced by copulation outside the natural order. The monster is abnormal both in a statistical sense and in a normative sense. Symbolically, the monster reflects the conviction that some conduct, especially deviant sexual conduct, is not only statistically abnormal, but also evil. Indeed, the very derivation of the term monster supports this interpretation: the Latin *monstrum* means both portent and abnormal birth.<sup>20</sup> The monster's role in establishing and reinforcing norms of conduct reflects an ambiguity in the concept of the normal. On the one hand, the normal is the statistically average, on the other hand, the normal is the right, and norms tend to *make right*. Deviations from right conduct are unnatural, and are considered both strange and horrible.<sup>21</sup> The history of the monster is the history of a conception of right conduct such that deviations from right conduct are unnatural, both strange and horrible.

In the seventeenth century, fear and loathing of sinful behavior in the United States, behavior widely believed to be caused by witches, was largely a response to what minister, Rhode Island founder, and advocate of religious tolerance, Roger Williams called “this wild and howling land.”<sup>22</sup> Contrary to Williams' arguments for religious tolerance, Massachusetts religious leader John Cotton urged religious persecution as a way to curb the “diseased” elements of society and maintain civic order.<sup>23</sup> Cotton, like many of his contemporaries in the Colonies, believed that sinfulness was a part of human nature, rendering man vulnerable to the attractions of sinful conduct. Protection of the public required banishment and persecution of sinners, as well as the creation, and subsequent burning of witches. Ironically, the depth of the terror caused by this type of social hysteria is in part responsible for the reaction to fear in the form of religious tolerance.<sup>24</sup> Thus, the incarnation of people who engaged in bad behavior as monsters, i.e., witches, played a powerful role in the development of both religious tolerance and intolerance in the United States.<sup>25</sup>

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19. DAVIDSON, *supra* note 14, at 103–04 (quoting Ambroise Paré).

20. Bates, *supra* note 15, at 13.

21. IAN HACKING, *THE TAMING OF CHANCE* 115–24 (1986).

22. MARTHA NUSSBAUM, *LIBERTY OF CONSCIENCE* 38 (2008).

23. *Id.* at 38.

24. *Id.* at 40.

25. *Id.* at 39–40.

Beginning in the eighteenth century, the monster was transformed into the moral monster. As philosopher Michel Foucault puts it, “Monstrosity . . . is no longer the undue mixture of what should be separated by nature. It is simply an irregularity, a slight deviation, but one that makes possible something that really will be a monstrosity, that is to say, the monstrosity of character.”<sup>26</sup> The criminal exemplified this monstrosity of character through his social deviance. Transposing the theological and religious trope of the monster into a mixture of criminological and psychiatric terms, the current conception of the psychopath or person with an anti-social personality disorder inhabits the social role of the monster, playing on the ambiguity of the normal/abnormal distinction. The moral monster, or criminal, triggers abjection, and can only be detected by the use of techniques developed by experts.<sup>27</sup> Psychiatric experts are presumably skilled in detecting creatures that enjoy, or are indifferent to, the pain of others.<sup>28</sup>

Creatures that cannot sympathize with the pain of others must be regarded as not fully human, and therefore can be, and perhaps must be, segregated. They are predators. The sexuality of Saint Thomas Aquinas’s monster and the psychopathy of the naturalized monster is the modern sex offender. Committing sexual offenses has now become a kind of madness that frightens us because it suggests a loss of control over sexuality, a central element of an integrated sense of self. The narratives about sex offending in the United States frame perverse desires as essential to the personal identity of offenders, and promote their legal segregation as a way to enforce sexual boundaries, rather than as bad acts that persons perform and for which they may be punished within the criminal justice system.<sup>29</sup> Our secular techniques for coping with this threat are treatment and incarceration, both of which target sex offenders as deviant predators. When sex offenders are framed as monsters, we hardly notice that they are also targets of discriminatory, retributive policies.

Discrimination against those who deviate from the normal and normative white, male, straight, sexually tame, and physically and cognitively unimpaired, has been the subject of a great deal of scholarship, much of which emphasizes the difficulties outsiders have in being included, not only in mainstream culture, but in routine democratic political practice.<sup>30</sup> Erving Goffman captured precisely the relationship between the normal and the abnormal, and the power of stigma in American social life:

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26. MICHEL FOUCAULT, *ABNORMAL: LECTURES AT THE COLLÈGE DE FRANCE 1974–1975*, at 73 (Arnold I. Davidson, ed., Graham Burchell, trans., Picador 2003) (1999).

27. *See, e.g.*, Robert Hare, Welcome to “Without Conscience”: Robert Hare’s Website Devoted to the Study of Psychopathy, <http://www.hare.org> (last visited Oct. 8, 2008) (Robert Hare has developed a well-tested instrument for detecting psychopathy called the Hare Psychopathy Checklist-Revised).

28. Douard, *supra* note 14, at 41.

29. Garfinkle, *supra* note 13, at 176–77.

30. IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 81–120 (2000) (arguing that norms of robust democratic deliberation require acknowledging important differences among people and groups, rather than marginalizing those differences in the interest of seeking a “common good”).



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[I]n an important sense there is only one complete unblushing male in America: a young, married, white, urban, northern, heterosexual Protestant father of college education, fully employed, of good complexion, weight and height, and a recent record in sports.<sup>31</sup>

When Goffman wrote those words, the United States was on the verge of a decade-long nervous breakdown that is often considered a watershed moment in history, and one which changed the boundaries around what was considered normal in terms of color, gender, and sexual orientation.<sup>32</sup> Goffman's characterization of the "unblushing male" remains, however, the prototypical normal individual. Differences continue to be grounds for stigmatization if we but scratch our surface politeness. Paradigmatic outsiders are now likely to be terrorists, illegal aliens, violent criminals, and sex offenders, who are widely regarded as domestic terrorists.

The usual academic examination of the role of otherness in achieving social and political unity focuses on those who have done nothing wrong, but who are simply different. When the targets of revulsion and fear are people of color, gays, women, Hispanics, and the disabled, exclusion now seems indefensible.<sup>33</sup> Most scholars, however, have not examined people who are stigmatized because they have engaged in conduct dangerous to themselves or others. In the United States, sanism is as virulent as, but more rarely noticed than, racism and sexism; discrimination against violent offenders is virtually invisible, because their criminal conduct creates a pretext to isolate them as sources of *contamination*.<sup>34</sup> Dangerously violent offenders may, of course, harm us, but to treat them as contaminants requiring isolation is a classic example of scapegoating.<sup>35</sup>

Fear and loathing of violent offenders, however, are also social and psychological responses to difference. The criminal justice system in the United States has created categories of monstrous crimes, one social function of which is social unity: we can join together in holding in contempt people who have committed such crimes as sex offenses, selling drugs to children, serial or mass killings, and, newest upon the stage, Islamic terrorism. The defining feature of such monstrous crimes is that those who commit them have no advocates, apart from a small group of criminal defense

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31. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 128 (Simon & Schuster 1986) (1963).

32. The 1960s were characterized by significant upheavals in culture, politics, and social structure. This was the era of the civil rights, antiwar, feminist, and gay rights movements. See SUSAN JACOBY, *THE AGE OF AMERICAN UNREASON* 131–62 (2008) (arguing that the 1960s contained both rebellious rights movements and growing conservative ideologies, which were to take root 15 years later).

33. See generally MARTHA NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW* 75–87 (2004).

34. See generally, Michael L. Perlin, *On "Sanism,"* 46 *SMU L. REV.* 373 (1992) (defining sanism as an irrational prejudice toward mentally ill persons, similar to other irrational prejudices).

35. See Mona Lynch, *Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 *LAW & SOC. INQUIRY* 529, 540 (2002).

attorneys, forensic experts, and legal scholars who recognize that categories of monstrous crimes can lead to deeply immoral and unconstitutional discrimination.<sup>36</sup>

Criminal offenders and the dangerously mentally ill have few advocates in their fight against discrimination primarily because criminal offenders are not perceived of as innocent victims of discrimination, and the dangerously mentally ill appear incapable of even minimal social cooperation. Sex offenders have elements of both groups: many (though not all) have committed terrible and violent crimes, sometimes against prepubescent or very young adolescent children; and they appear mentally disordered and addicted to harmful deviant sexual conduct. Nonetheless, sex offenders are constructed as other in a way that is different from most violent criminals: society treats them as monsters. By framing sex offenders as monsters, we not only dehumanize them, we also hide from our own anxieties about deviant sexual conduct and undermine rational strategies for addressing such conduct and the damage it causes.<sup>37</sup>

### *C. Scapegoats and the Social Utility of Outsiders*

The media describes certain categories of crime, such as serial murder and sex offenses, as monstrous, and the perpetrators of such crimes as monsters. Our current monsters serve the same role as they always have served: as scapegoats. A sign that men who commit sex offenses are scapegoats is that, contrary to common belief, sex offending recidivism rates are relatively low, while strategies for preventing recidivism are designed to permanently banish the offender from society. The underlying purpose for targeting sex offenders for special punishment is therefore less likely to be the legal aim of regulating disapproved conduct, but rather the affirmation of the orthodox moral order.

As noted above, society has historically created and defeated monsters to restore and affirm the morality of normal people. When certain persons are reframed as monsters, a line is drawn between us and them, a demarcation that lends itself to scapegoating them. Targeting scapegoats typically occurs during periods of social and cultural crisis. As law professor Joseph Kennedy observes:

The essence of scapegoating lies in the attribution of an internal problem to an external source. In the contemporary child abuse scare, the violent sexual predator of children, whose sexual appetites and violent tendencies are so deviant from social norms as to place them outside of normal society, is that external source. The violent sexual predator becomes a scapegoat, however, when the scope of social suffering laid at his feet is far greater than the facts merit, when a problem that is actually internal to society is projected on to

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36. That these advocates are themselves stigmatized—"How could you represent (treat) such monsters?"—was recently pointed out to me by social worker Stacey Caraballo, who is analyzing this important, but largely unnoticed, phenomenon.

37. See PAMELA D. SCHULTZ, *NOT MONSTERS: ANALYZING THE STORIES OF CHILD MOLESTERS* 184–85 (2005) (arguing, on the basis of detailed interviews with convicted sex offenders, that framing them as monsters not only dehumanizes them, robbing them of the capacity for choice, but undermines treatment).

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someone who is clearly outside of society in an important sense of the word.<sup>38</sup>

Relying on Emile Durkheim's conception of social solidarity, Kennedy argues forcefully that monstrous crimes, including sex offenses, create solidarity in an increasingly fragmented social life in the United States.

Kennedy suggests that the sex offender becomes a scapegoat when the scope of social suffering attributed to him is far greater than the facts merit. Kennedy is correct for two reasons. First, the overwhelming legal response to sex offenders is disproportionate to their recidivism rate, which recent studies report as being relatively low. According to a United States Justice Department study that tracked 9,691 male sex offenders for the three years following their release from prison and reported on findings related to their recidivism, 3.2% of released rapists were re-convicted for another rape, and of all sex offenders released in 1994, only 3.5% were re-convicted of a sex crime within the three-year follow-up period. The study further reports that of this group of offenders, the percentage rearrested for a sex crime against a child was only 2.2%. Of those, 1.4% were rapists and 2.5% were sexual assaulters.<sup>39</sup> Other studies place the recidivism rate at about 13.4%.<sup>40</sup> Interestingly the press rarely discusses the disagreement about the recidivism rate, but rather chooses to focus on the more aggressive numbers supporting the societal misconception that sex offenders are inherently repeat offenders.

Further, a curious feature of the fear of sex offenders, and the feature that lies at the heart of our condemnation of the sex offender, is that many sex offenders engage in conduct that is not as deviant as we want to believe. Many sex offenders served their prison terms for engaging in consensual sexual conduct with post-pubescent adolescents, and studies show that sexual attraction to post-pubescent adolescents is statistically normal.<sup>41</sup> If those studies are accurate and reliable, the implication is that many of us have socially disapproved sexual interests that are statistically normal so long as we do not act on them.

In addition to providing a focus of social solidarity, scapegoats absolve us from guilt. Professor René Girard, who analyzes myths for their social meanings, called violent scapegoating "that enigmatic quality that pervades the judicial system when that system replaces sacrifice. This obscurity coincides with the transcendental effectiveness of a violence that is holy, legal, and legitimately successfully opposed to a

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38. Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 882 (2000).

39. PATRICK A. LANGAN ET AL., RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, U.S. Dep't of Justice, 30-36 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf>.

40. R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-analysis of Sexual Offender Recidivism Studies*, 66 J. OF CONSULTING & CLINICAL PSYCHOL. 348 (1998). But see Marnie E. Rice & Grant T. Harris, *What Population and What Question?*, 48 CANADIAN J. OF CRIMINOLOGY & CRIM. JUST. 95, 97 (2006) (placing recidivism risk at 24% or higher).

41. Karen Franklin, *Invasion of the Hebephile Hunters*, IN THE NEWS: FORENSIC PSYCHOLOGY, CRIMINOLOGY, AND PSYCHOLOGY, Oct. 31, 2007, <http://forensicpsychologist.blogspot.com/2007/10/invasion-of-hebephile-hunters.html>.

violence that is unjust, illegal, and illegitimate.<sup>42</sup> Girard argues that during periods of social crisis scapegoats are identified with common characteristics:

First, there are violent crimes which choose as object those people whom it is most criminal to attack, either in the absolute sense or in reference to the individual committing the act: a king, a father, the symbol of supreme authority, and in biblical and modern societies the weakest and most defenseless, especially young children. Then there are sexual crimes: rape, incest, bestiality. The ones most frequently invoked transgress the taboos that are considered the strictest in the society in question . . . . Ultimately, the persecutors always convince themselves that a small number of people, or even a single individual, despite his relative weakness, is extremely harmful to the whole of society.<sup>43</sup>

Similarly, Kirkegaard and Northey identify four characteristics of scapegoating:

1. It emerges when society is in a period of crisis.
2. Acts that blatantly offend societal standards and threaten a sense of proper hierarchy are widely regarded as legitimate targets.
3. The target has stigmata of the victim.
4. The target is subjected to violence, including legal violence.<sup>44</sup>

The scapegoating of sex offenders has all four characteristics, and in the United States sex offenders are widely regarded as extraordinarily harmful to the social fabric as a whole.

#### *D. Scapegoats and Moral Panic*<sup>45</sup>

In the United States, sex offenders are the targets of “moral panic.” During a period of moral panic,

[a] person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to . . . .<sup>46</sup>

Sex offenders have been targets of moral panics more than once in the history of the

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42. RENÉ GIRARD, *VIOLENCE AND THE SACRED* 24 (Patrick Gregory trans., Continuum Int’l Publ’n Group 2005) (1972) [hereinafter GIRARD, *VIOLENCE*].

43. RENÉ GIRARD, *THE SCAPEGOAT* 15 (Yvonne Freccero trans., The Johns Hopkins University Press 1986) (1982).

44. Hugh Kirkegaard & Wayne Northey, *The Sex Offender as Scapegoat: Vigilante Violence and a Faith Community Response*, COLLOQUIUM ON VIOLENCE AND RELIGION (1999), [http://www.helping-people.info/articles/scapegoat\\_text.htm](http://www.helping-people.info/articles/scapegoat_text.htm).

45. In this section, I draw on material from John Douard & Pamela Schultz, *The Sex Offender—The Monstrous Other*, in VI *THE SEX OFFENDER: OFFENDER EVALUATION AND PROGRAM STRATEGIES* 1-1 to 1-22 (Barbara K. Schwartz ed., 2008).

46. STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* i (3d ed. 2002).

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United States.<sup>47</sup> During these periods of moral panic, sex offenders are scapegoated, for which they receive little sympathy even after the moral panic subsides.

The moral panic over sex offending emerged in the United States in the context of imposing increasingly harsh punishments on violent criminals, presumably reflecting a crisis of confidence in a criminal justice system incapable of predicting the future dangerousness of violent offenders.<sup>48</sup> The legal response to sex offending, as Kennedy argues, was part of the designation of a number of crimes as monstrous out of a sense of lawlessness or anomie.<sup>49</sup> In the 1970s and 1980s, determinate sentencing, such as mandatory minimum sentences and mandatory extended sentences, seemed to be a solution both to the racial disparities in sentencing and to growing anxieties about violent criminal behavior. Breakdown of a sense of social solidarity after the 1960s upheavals seemed to require both less judicial sentencing discretion and more severe penalties. Anxiety about child sexual abuse emerged in this context.<sup>50</sup>

Child sexual abuse is the paradigmatic category of sex offense. Parents, and especially fathers, who forsake their socially valued role as their children's caretakers disrupt the basic family hierarchy that to a large extent defines the civilizing process in the United States. Father-as-caretaker is a powerful metaphor that extends even to political leaders who fan fears of terrorism. Sex offenders threaten our standards of parental responsibility, just as political terrorists threaten our standards of political responsibility, and both are regarded as legitimate targets of scapegoating.

Sex offenders are widely regarded within the therapeutic community as having themselves been abused as children.<sup>51</sup> They are viewed as sharing the stigma of their victims. A significant component of sex offender treatment consists of eliciting from offenders stories of their own childhood abuse. Child abuse, in fact, is considered one factor responsible for fixing the offender's personality as antisocial.<sup>52</sup>

Sex offenders are clearly being subjected to legal violence, if we understand violence to include long periods of imprisonment. As Yale law professor Robert Cover

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47. See generally PHILIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* (1998) (analyzing the periodic emergence of moral panic over child sex abuse since the 1930s).

48. MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 77–114 (2006) (describing the increasingly retributive “carceral state” that focused on “victims”); CHRISTOPHER SLOBOGIN, *PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUSTING CULPABILITY* 99–130 (2007) [hereinafter SLOBOGIN, *PROVING THE UNPROVABLE*] (examining the increasing role of experts in predicting future dangerousness, and the complexity of such determinations); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001) (arguing generally that fear of crime and neoconservative politics has reconfigured the criminal justice system in the United States and Great Britain in ways that reflect insecurities about social order).

49. Kennedy, *supra* note 38, at 860–82.

50. *Id.* at 852–55.

51. ERIC S. JANUS, *FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE* 51 (2006) [hereinafter JANUS, *FAILURE TO PROTECT*].

52. THEODORE MILLON ET AL., *PERSONALITY DISORDERS IN MODERN LIFE* 184–86 (2d ed. 2004).

argues, courts enact violence whenever they impose punishments that result in prison terms, not to mention the most severe punishment: the death penalty.<sup>53</sup> Moreover, incarceration does not end with the termination of a sex offender's prison term, because he is often civilly committed under punitive circumstances.<sup>54</sup> Even when released into the community, the movements of sex offenders are subject to severe constraints by Megan's Laws.<sup>55</sup> Furthermore, whereas criminal offenders released from prison are generally described as ex-offenders, sex offenders are called sex offenders even after they are released from prison. Individuals convicted of sex offenses cannot escape the sex offender designation, in part because they are not simply perpetrators of monstrous crimes, but rather they are believed to have monstrous characters. As will be discussed in the next section of this article, the legal violence imposed on sex offenders does not end with the completion of their prison terms.

One other feature of scapegoating is its entertainment value. Mythologies about Evil Incarnate have always played social functions, both as a focus of solidarity and as a source of pleasure. As religion scholar David Frankfurter points out:

[T]he construction of the *social* Other as cannibal-savage, demon, sorcerer, vampire, or amalgam of them all, draws upon a consistent repertoire of symbols of inversion. The stories we tell about people out on the periphery play with their savagery, libertine customs, and monstrosity. At the same time, the combined horror and pleasure we derive from contemplating their Otherness . . . certainly affect us at the level of individual fantasy, as well.<sup>56</sup>

In light of such socially useful, albeit unarticulated, purposes served by framing sex offenders as monsters, framing them as antisocial personalities or paraphilics is far less entertaining, and far more threatening, than watching them degraded and busted on television shows in the United States like *To Catch a Predator*.<sup>57</sup> If sex offenders are indeed monsters, then they are so qualitatively different from us that they can be segregated without concern for their rights or for finding avenues for their reentry into society. If, however, they are only quantitatively different on a continuum of behavioral disorders, concern for contamination is likely to trigger moral panic: a social crisis over run-away sex offenders in our midst.

Scapegoats are identified as bearers of evil but also serve the function of a "sineater," a person or animal that averts away from the community its desire for

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53. Robert Cover, *Violence and the Word*, 95 *YALE L. J.* 1601, 1601-07 (1986).

54. For example, N.J. STAT. ANN. § 30:4-27.25 (West 2008), which civilly commits sex offenders indefinitely after expiration of their criminal terms. Civil committees have annual review hearings, but since the statute's inception in 1999, only about 85 out of approximately 400 have been released.

55. New Jersey's Megan's Law, N.J. STAT. ANN. § 2C:7-1 (West 2005), is long and complex, but it includes three levels of registration requirements, placement of names on the internet, and GPS bracelet for the second and third level of registration.

56. DAVID FRANKFURTER, *EVIL INCARNATE: RUMORS OF DEMONIC CONSPIRACY AND SATANIC ABUSE IN HISTORY* 208-09 (2006).

57. *See generally To Catch a Predator* (NBC television broadcast) (televising the capture and arrest of child predators who proposition news journalists posing as children online).

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self-destruction.<sup>58</sup> Rene Girard calls this need for a surrogate victim of violence “mimetic desire,” and states that “[a]s the catalyst for the sacrificial crisis, it would eventually destroy the entire community if the surrogate victim were not at hand to halt the process . . . .”<sup>59</sup> Mimetic desire is a community’s way of transforming its violent desires into not only harmless, but even cathartic, public displays. In ancient Greece, theater provided a source of mimetic desire. In modern Western culture, laws that are the subject of media attention and television shows may perform the same function for the sources of moral panic.

Sexual offenses have been a major source of moral panic for the past several years, and the panic does not appear to be subsiding.<sup>60</sup> There is much to gain for stakeholders in moral panic: media, politicians, the legal and therapeutic communities, and the general public. Sex offenders are frequently the targets of violence much the way Oedipus was the target of violence in Sophocles’ *Oedipus the King*—he was responsible for all the ills that had befallen his people.<sup>61</sup> Tiresias told Oedipus he was the pollution that caused the plague in Thebes.<sup>62</sup> Of course, Oedipus did no such thing, but he was also not innocent. There is certainly a sense in which Oedipus was guilty of the sins of which he was accused—incest and patricide—however, he was also scapegoated to settle the anxieties of his adopted community. I suggest that the sex offender, while certainly not innocent, is also being used as a scapegoat for our anxieties about the sexualized role of children in American society, and our fear that sexual desires, including harmful sexual desires, are part of the human condition.

Sex offenders are scapegoated, but does scapegoating sex offenders effectively combat the crimes they commit or merely assuage our guilt? Undeniably, child sexual abuse is a stigmatizing crime for good reasons, as it results in the violation of the weakest, most vulnerable members of a society. Nonetheless, the value of stigmatizing the crime does not warrant stigmatizing the offenders through disgust, humiliation, isolation, and exclusion, because in doing so, we undermine efforts to understand and treat sex offenders. Scapegoating does not identify and operationalize a social problem; it increases the likelihood we will avoid the problem. The socially constructed image of the sex offender as Monstrous Other ironically imbues the crime and the perpetrator with mythological import, allowing society to view the sex offender as one who cannot engage in self-reflection and restraint, and is incapable of the degree of rational control we attribute to persons.

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58. BERTRAM S. PUCKLE, *FUNERAL CUSTOMS* 46 (Forgotten Books 2008) (1926) (“[I]t was the province of the human scapegoat to take upon himself the moral trespasses of his client—and whatever the consequences might be in the after life—in return for a miserable fee and a scanty meal.”).

59. GIRARD, *VIOLENCE*, *supra* note 42, at 158.

60. *See generally* JENKINS, *supra* note 47.

61. SOPHOCLES, *OEDIPUS TYRANNUS* 13–19 (Peter Meineck & Paul Woodruff trans., Hackett Publ’g 2000).

62. *Id.*

### III. SEX OFFENDER AS MONSTER: THE LEGAL RESPONSE

Laws in the United States banish convicted sex offenders from social participation, not simply with criminal incarceration for acts committed in the past, but also with social strategies that severely constrain their liberties after they have been released from prison. In this section, I examine the use of psychiatric diagnoses to create mechanisms of preventive detention. Psychiatrists and psychologists are enlisted, by lawmakers, to provide grounds for marking off sex offenders as dangerous individuals. Certain kinds of sexual disorders are regarded by psychiatrists as so severely limiting the cognitive, affective, and volitional capacities of persons who suffer from them, as to require the creation of laws to protect the public from future sex offenses by individuals so afflicted. Psychiatric diagnoses attribute abnormal mental states to people who engage in harmful sexual conduct.<sup>63</sup> But the attribution of abnormal mental states constitutes a rhetorical transformation of the criminal into the monster in terms that are acceptable to a modern secular society.

#### *A. Statutes and the Courts Banish Sex Offenders from Social Participation*

Both statutory and common law banishes sex offenders from participation in common social networks, marking them as acceptable targets of scapegoating. A recent example of legal efforts to isolate, if not banish, sex offenders is the Georgia sex offender residency statute that would prohibit former sex offenders currently registered under that state's Megan's Law from living within 1,000 feet of "areas where minors congregate,"<sup>64</sup> including "all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, *school bus stops*, and public swimming pools."<sup>65</sup> Such residency restrictions are being implemented in several states, but Georgia's is instructive. Not only are sex offenders prohibited from living within 1,000 feet of schools or public parks, as is the case in most residency restriction laws, but they are prohibited from living within 1,000 feet of *school bus stops*. In effect, released sex offenders can live nowhere.

The most extensive deprivation of the liberty of sex offenders is not imprisonment or Megan's Law registration, but involuntary civil commitment statutes: sexually violent predator acts ("SVPAs"). Once criminal incarceration of sex offenders has reached its constitutional limit, SVPAs allow for the indefinite incarceration of sex offenders in civil commitment facilities based on vague diagnoses of "mental abnormality or personality disorder."<sup>66</sup> During these indefinite

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63. The Diagnostic and Statistical Manual of Mental Disorders defines a class of sexual disorders as paraphilia. Included in this class are pedophilia and sexual sadism. AM. PSYCHIATRIC ASS'N., THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 8, (4th ed., text rev. 1994) [hereinafter DSM-IV-TR].

64. GA. CODE ANN. § 41-1-15 (West 2006) (repealed 2008).

65. GA. CODE ANN. § 41-1-12 (West 2006) (emphasis added) (repealed 2008).

66. N.J. STAT. ANN. § 30:4-24.25 (West 1999).



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commitments, individuals are often provided with only rudimentary cognitive behavioral treatment, the efficacy of which is unknown.<sup>67</sup>

The first SVPA was enacted in Washington state in 1990, but there was a civil commitment program in Washington as early as 1971, run by the state's mental health department, called the Sexual Psychopath Program.<sup>68</sup>

Currently, in nineteen states and the District of Columbia,<sup>69</sup> persons convicted of one or more sex offenses may be involuntarily, civilly committed at the end of their criminal terms if they: (1) suffer from mental disorders that render them highly likely to commit sexually violent offenses because they suffer from a mental abnormality or personality disorder that (2) limits their ability to control their sex-offending behavior.<sup>70</sup> Facially, these statutes place the burden on the state to show that sex offenders meet a standard of dangerousness set by the United States Supreme Court. In practice, however, the burden often falls on the ex-offender to prove he does not meet that standard.<sup>71</sup>

Although civilly committed sex offenders are entitled under SVPA statutes to periodic review hearings to determine whether they remain committable, in my own experience representing civilly committed sex offenders, they are rarely released. In New Jersey, where I practice law, review hearings are virtually pro forma repetitions of the same diagnoses and risk assessments the State's experts presented at the initial hearings, heard by the same judges during bench trials. The standard of proof is clear and convincing evidence, because these are civil, and not criminal, trials. Moreover, because civil commitment is not legally regarded as criminal punishment, but as protective of society, civil committees are not afforded the constitutional protections given to convicted criminals, such as the rights against *ex post facto* laws and double jeopardy.<sup>72</sup> Nonetheless, the conditions in which offenders are held are extremely punitive, and offenders committed under SVPAs certainly suffer substantial loss of liberty.<sup>73</sup>

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67. See CTR. FOR SEX OFFENDER MGMT., DEP'T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS, (2001), available at <http://www.csom.org/pubs/recidsexof.html>. This authoritative assessment indicates the paucity of information on treatment effects.

68. Barbara K. Schwartz, *Overview of Rehabilitative Efforts in Understanding and Managing Sexually Coercive Behaviors*, 989 ANNALS OF THE N.Y. ACADEMY OF SCIENCES 360, 360–83 (2003).

69. States with some form of civil commitment of sexually violent offender statutes are: New Hampshire, New Jersey, New York, Kansas, Virginia, Washington, Illinois, Florida, California, Colorado, Massachusetts, Wisconsin, Minnesota, Iowa, North Dakota, Arizona, Missouri, South Carolina, and Texas. Texas is the only state with an outpatient civil commitment program, though several other states are considering that alternative.

70. See N.J. STAT. ANN. § 30:4-27.24, *et seq.* (West 1999).

71. Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, at A1.

72. *Seling v. Young*, 531 U.S. 250, 263 (2001) (holding that respondent could not obtain “as applied” relief on *ex post facto* or double jeopardy grounds).

73. *State v. Bellamy*, 835 A.2d 1231, 1238 (N.J. 2003) (“Confinement under the [Act] is theoretically without end. In that sense, it constitutes a greater liberty deprivation than that imposed upon a criminal

Despite the stark contrast between the rights afforded to incarcerated criminals and those afforded to civil committees, SVPA statutes were found constitutional in key United States Supreme Court decisions. For example, in *Kansas v. Hendricks*, the Court found that sex offenders have a diminished right to liberty if they are mentally abnormal, even though not mentally ill.<sup>74</sup> In *Kansas v. Crane*, the Court permitted commitment when the state can prove an offender has “serious difficulty” controlling his sex-offending behavior.<sup>75</sup> The state need only prove to the satisfaction of a jury or a judge that a sex offender has substantial volitional impairment to support commitment.<sup>76</sup> Certain psychiatric diagnoses, defined in the American Psychiatric Association’s *Diagnostic and Statistical Manual, Fourth Edition, Text Revision (DSM-IV-TR)*, are generally used to support a claim by the state that a sex offender suffers from a substantial volitional impairment, most commonly one of the paraphilias or personality disorders (or the older category of psychopathy, which is most closely approximated in the *DSM-IV-TR* by antisocial personality disorder).<sup>77</sup> The American Psychiatric Association (APA) has disavowed the use of the *DSM-IV-TR* to categorize persons as disordered for the purpose of predicting future behavior, or for any other forensic use, but these warnings have gone unheeded.<sup>78</sup>

On the face of it, framing sex offenders as mentally disordered, if not mentally ill, does not incorporate the normative characteristics of the monster frame. While their behavior may be construed as monstrous, these statutes appear to hold out hope that sex offenders may become normalized by accepting that they cannot control their behavior without life-long therapy and persistent attention to triggers. The resemblance to treatment for alcohol or drug abuse is not accidental: cognitive be-

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defendant who, in all but a handful of cases, is given a maximum release date.” (quoting *In re Civil Commitment of D.L.*, 797 A.2d 166, 168 (N.J. Super. Ct. App. Div. 2002))).

74. 521 U.S. 346 (1997).

75. 534 U.S. 407, 407 (2002).

76. *In re Civil Commitment of W.Z.*, 801 A.2d 205 (N.J. 2002) (holding that New Jersey’s SVPA is constitutional).

77. See *DSM-IV-TR*, *supra* note 63, at 301.7.

78. See Brief for American Psychiatric Ass’n as Amicus Curiae at 4, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080) (“The unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession.”). Despite the APA’s position, the Court in *Barefoot* found that the DSM diagnostic categories could be used to make such predictions. 463 U.S. at 896–963 (affirming the district court’s conclusion that the accuracy of psychiatric predictions is “within the province of the jury to resolve”), *superseded by statute on other grounds*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1217, *as recognized in* *Slack v. McDaniel*, 529 U.S. 473 (2000).

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havioral treatment incorporates the twelve steps of Alcoholics Anonymous.<sup>79</sup> And like all addicts, treatment theoretically provides a form of reentry into society.<sup>80</sup>

However, in practice, no such hope is realized, because the civil committees are rarely, if ever, released. The basis for commitment is the attribution to sex offenders of an essential trait that differentiates us from them. The trait may be antisocial personality disorder, paraphilia, impulse control disorder, or some combination of disorders. What these disorders have in common is that the criteria used to diagnose a person include the claim that these characteristics are relatively stable, if not permanent, qualities.<sup>81</sup> As the classical conception of the monster differentiated monsters from normal people in terms of physical and characterological traits, so the sex offender is differentiated from normal people in terms of personality traits and sexual dispositions. We remain in the grip of moral panic, which I will now argue has less to do with fear of the outsider's harmful conduct than fear of contamination by monsters. For sex offenders to serve as scapegoats, and targets of moral panic, they must remain outsiders.

### *B. Scapegoating the Monsters Among Us: A Test Case for the Preventive State?*

While sanism results in discrimination against the mentally ill, a therapeutic culture has developed in the United States that seems antithetical to construing psychiatric patients as monsters. At the heart of the insanity defense against criminal punishment of the mentally ill, is that they are not culpable for their acts.<sup>82</sup> The scapegoating of those society frames as monsters must, at the very least, hold that monsters are blameworthy, but mental illness is a ground for holding that a criminal defendant is incapable of controlling her or his behavior. Appearances to the contrary notwithstanding, the conferring of mentally disordered status on a person is a new way to create classes of outsiders that has much in common with designating outsiders as monsters. To say of a person that she is mentally ill seems to confer a status that does not imply moral judgment. However, mental illness marks the person as different, as abnormal. But to be abnormal is to be strange, much as monsters were thought to be strange, as described above, during the Renaissance.

However, as the Court held in *Kansas v. Crane*, a convicted sex offender may be diagnosed vaguely with a mental abnormality or personality disorder that leaves him

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79. Cognitive behavioral therapy ("CBT") explores ways for people with psychological problems to change their thought processes. A similar approach to developing coping skills is implicit in twelve-step programs, which focus on addictions. Cognitive patterns that lead to drinking or drug use are identified in twelve-step programs, and CBT techniques are employed in treatment programs. A similar linking of twelve-step programs to CBT is found in sex offender treatment. See Henry Tarkington, *Cognitive Behavioral Therapy in Substance Abuse Treatment*, First-Step Services, LLC, <http://www.firststepgarner.com/cognitive.html>.

80. See Hollida Wakefield & Ralph Underwager, *Sex Offender Treatment*, INST. PSYCH. THERAP. J. (1991), available at [http://www.ipt-forensics.com/journal/volume3/j3\\_1\\_2.htm](http://www.ipt-forensics.com/journal/volume3/j3_1_2.htm) (explaining that treatment programs should encourage social behavior).

81. See JANUS, FAILURE TO PROTECT, *supra* note 51, at 101–05.

82. SLOBOGIN, PROVING THE UNPROVABLE, *supra* note 48, at 7.

substantially, but not completely, volitionally impaired such that he poses sufficient risk to be civilly committed indefinitely at the expiration of his prison term.<sup>83</sup> While a sex offender is culpable for his monstrous acts, he remains sufficiently dangerous (due to volitional impairments) to be confined until he has been treated to the satisfaction of mental health experts.

Now, the very idea of future dangerousness suggests that a person who has committed a monstrous crime has a monstrous character. A sex offender has not only committed a predatory sexual act, but is intrinsically predatory. To frame a predatory character trait as a disordered personality, I suggest, is a rhetorically powerful form of scapegoating when the personality-disordered person is held responsible for what is widely regarded as an alarming increase in sexual violence. As Pamela Schultz, who has interviewed incarcerated child molesters and found them to be “not monsters,” points out, despite studies that indicate sex offenders are far less likely to reoffend than non-sex offenders, “the myth remains that child molesters have a vastly higher recidivism rate than any other type of offender.”<sup>84</sup>

The United States Supreme Court has encouraged the myth of future dangerousness, particularly with respect to sex offenders. In *Barefoot v. Estelle*, the Court held admissible psychiatric predictions of future dangerousness, despite the demurrer by the American Psychiatric Association that psychiatrists possess no special expertise entitling them to predict future dangerousness.<sup>85</sup> A few years later, the Court in *Kansas v. Hendricks* found that sexual predator statutes that rely on such predictions do not violate due process, despite noting evidence that “it was not possible to predict with any degree of accuracy the future dangerousness of a sex offender.”<sup>86</sup> While it is true that recent work in actuarial methods of recidivism risk assessment that place offenders in statistical risk categories primarily on the basis of static characteristics have proven to be more reliable and valid than psychiatric diagnoses in predicting risk of reoffense, SVPA’s and courts continue to rely heavily on psychiatric diagnostic categories.<sup>87</sup>

Psychiatric categories, however, differentiate us from them, the normal from the abnormal, in terms of a characteristic that inclines the sexual offender to commit monstrous acts of sexual violence. That characteristic—paraphilia, personality disorder, or impulse control disorder—marks the sex offender as the moral monster who

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83. 534 U.S. 407, 411–14 (2002).

84. PAMELA D. SCHULTZ, NOT MONSTERS: ANALYZING THE STORIES OF CHILD MOLESTERS 184 (2005).

85. 463 U.S. 880, 896–903 (1983).

86. 521 U.S. at 355 n.2; *id.* at 357–61; *see also* Addington v. Texas, 441 U.S. 418, 429 (1979) (“Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.”).

87. *See* Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 AM. CRIM. L. REV. 1443 (2003).

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is highly likely to commit such crimes.<sup>88</sup> The attribution to a person of a characteristic responsible for his deviant sexual conduct focuses social concern on that inner trait rather than the criminal conduct for which the person was punished. But a prison term lasts only as long as a constitutionally appropriate sentence permits.<sup>89</sup> Civil commitment, however, may last as long as the enduring characteristic attributed to the offender—the diagnosis—may affect his behavior.

So long as the criminal justice system in the United States rests on the assumption that people should be punished for their *acts* and not for their *status*,<sup>90</sup> criminal punishment for sex offenses will be limited by constitutional protections against cruel and unusual punishment. Sex offenders, however, are widely regarded as having a *status*—dangerousness—that warrants indefinite liberty deprivation.

The monster frame both enables and triggers the special status we assign to sex offenders. If sex offenders are described as monsters rather than persons, it is easier to view them as permanently so psychologically deviant that they are always tempted to engage in harmful sexual conduct. Their confinement, courts hold, serves a rational social purpose, and because they are regarded as mentally disordered (but not severely mentally ill), they are not a completely protected class.<sup>91</sup> Laws that deprive sex offenders of liberty are not subject to the highest standard of constitutional review, as *Kansas v. Hendricks* established.<sup>92</sup>

Sex offenders are a convenient target of legal scapegoating because, according to our social mythology of the mental disorders that are thought to cause deviant sexual conduct, they can never be reintegrated into society. They are forever outsiders who can be subjected to loss of liberty—legal violence—without triggering much sympathy. Our anxieties about social anomie, especially with respect to sexual disorders, can be blamed on sex offenders with impunity. Moreover, the law can be deployed to legitimize scapegoating sex offenders.

There is growing interest in shifting the goal of criminal justice from retribution to preventive detention, so long as certain substantive due process rights are not violated when violent offenders are found to be mentally ill and requiring civil

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88. It is worth noting that actuarial risk assessment instruments, like their models in the insurance industry, are statistical categories that organize all members of a population into risk categories. Just as every automobile driver seeking insurance is given a risk rating by an insurance actuary, so everyone can be given a sex offender risk rating.

89. See U.S. CONST., amend. VIII. In *Solem v. Helm*, the U.S. Supreme Court held that incarceration might be cruel and unusual if its duration is “disproportionate” to the severity of the offense. 463 U.S. 277 (1983). This holding was modified in *Harmelin v. Michigan*, in which the Court held that for non-capital offenses, incarceration duration fell under the eighth amendment only if it is “grossly disproportionate” to the severity of the offense. 501 U.S. 957 (1991). However, a life term for a non-capital offense would be open to constitutional challenge. *Id.*

90. The United States Supreme Court has long held that a status, such as being a drug addict, is not a criminal offense, in part because status is not conduct. See *Robinson v. California*, 370 U.S. 660 (1962) (striking down a California criminal statute making it a crime to be addicted to narcotics).

91. See JANUS, FAILURE TO PROTECT, *supra* note 51, at 19–20.

92. 521 U.S. at 358–60 (finding that dangerousness coupled with “mental abnormality” permits civil commitment).

commitment rather than long prison terms.<sup>93</sup> Legal scholars sympathetic to careful expansion of preventive detention are well aware of the dangers posed by statutes like SVPAs.<sup>94</sup> These scholars believe the problems with predicting dangerousness can be overcome, and the outcome of preventive detention may be both humane and better attuned to public safety considerations.<sup>95</sup> However, the reality of preventive detention in sex offender cases is that it is a miserable failure from both points of view. Sex offender civil commitment statutes are only humane in the most Pickwickian sense. In reality, civilly committed sex offenders are treated with contempt befitting persons reframed as monsters; and there is little, if any, evidence that society is safer because of civil commitment measures. We perhaps should examine proposals for preventive detention in light of this failure.

Law professor Eric Janus has argued that sex offender commitment statutes may serve as a template for intrusive government on a massive scale.<sup>96</sup> A preventive state may be the result of what appears to be the application of preventive detention to a limited, and despised, population. From the point of view of those who believe a preventive state is an effective way to protect the public, security seems more important than liberty. Creating classes of outsiders—and framing them as monsters—who warrant not simply heightened surveillance, but virtual exclusion from civil society, may seem limited today to sex offenders, but on the horizon looms a far more extensive use of these strategies of social control.<sup>97</sup>

As Janus points out, historically the United States has attempted in the past to create preventative legislation, but they were predominantly racially discriminatory. The most notorious of such laws, such as the interment of Japanese Americans during World War II, have never been overturned by the United States government.<sup>98</sup> The Supreme Court did hold, in 1962, that a person cannot be punished for having a certain status, such as being a drug addict,<sup>99</sup> but the sexually violent predator statutes open the possibility that mental disorder, even when not strictly speaking mental illness, will be used in the future to civilly commit people who are diagnosed by psychiatrists as antisocial personality disorder, if they also can be demonstrated to be dangerous (e.g., by committing a violent crime). However, as Janus points out, “[t]he predator template for radical prevention poses a threat to maintaining a sound balance between liberty and security.”<sup>100</sup> The danger is that the appearance of

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93. See generally CHRISTOPHER SLOBOGIN, *MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITIES OF LIFE AND LIBERTY* (2006) (examining the virtues and difficulties associated with expanding preventive detention in the United States).

94. See SLOBOGIN, *PROVING THE UNPROVABLE*, *supra* note 48, at 10–11.

95. See *id.* at 99–130.

96. JANUS, *FAILURE TO PROTECT*, *supra* note 51, at 93–109.

97. *Id.*

98. *Id.* at 98.

99. *Robinson*, 270 U.S. 660.

100. JANUS, *FAILURE TO PROTECT*, *supra* note 51, at 102.

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treating rather than punishing can mask severe constraints on liberty. The public may not find that result disturbing, but it would be a radical restructuring of the criminal justice system with vast constitutional implications.

### IV. CONCLUSION

I have argued that sex offenders in the United States are scapegoats, and for that reason are subjected to social violence far in excess of the dangers they pose. The media and the law frame certain sexually deviant behavior as *monstrous*, and those who engage in such behavior as *monsters*. Putative experts on deviance—psychologists and psychiatrists—generally do not refer to sex offenders as monsters, but certain categories of mental disorder perform a similar function: they mark off a domain of persons who are unable to control their impulses, and therefore ought to be treated as outsiders. The result of such frameworks is the creation of a class of scapegoats who are not simply unsympathetic, but are regarded as underserving of legal and moral rights. The sex offender may seem to be the prototype of a criminal from whom society needs protection, but sex offender laws may also be templates for a far more extensive preventive approach to criminal conduct.