SEXUALLY VIOLENT PREDATORES IN THE COURTROOM: SCIENCE ON TRIAL

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FAILURE *to* PROTECT

America's Sexual Predator Laws and the Rise of the Preventive State

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ROPER: You would give the devil the benefit of law.

SIR THOMAS MORE: Yes, what would you do? Cut a great road through the law to get at the devil?

ROPER: I would cut down every law in England to do that.

SIR THOMAS MORE: And when the law was down and the devil turned around on you, where would you hide; the laws being all flat? This country's planted thick with laws from coast to coast, and if you cut them down, do you think you could stand in the winds that would blow through them?

ROBERT BOLT, *A Man for All Seasons*

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Introduction: The Worst of the Worst?

> We keep getting sidetracked with issues like castration and pink license plates for sex offenders, as if they can't borrow or drive another car. . . . Don't get me wrong, we need extreme vigilance for some. But these people are coming from us—society—and we have to stop the hemorrhage. We have to stop pretending that these people are coming from other planets.
>
> —NANCY SABIN, executive director of the Jacob Wetterling Foundation

Dru Sjodin was last seen on November 22, 2003. Age twenty-two and a senior at the University of North Dakota, she was apparently abducted from the parking lot of a shopping center in Grand Forks on a busy Saturday afternoon. Ten days later, Alfonso Rodriguez Jr. was arrested and charged with her kidnapping. Rodriguez had been released from prison seven months earlier at the age of fifty. He had just served a twenty-three-year sentence as a repeat sex offender, a sexual predator who attacked strangers. Though he was classified as a level 3 offender, the highest risk category for released sex offenders, officials decided not to take the extraordinary step of seeking his civil commitment to a secure treatment facility as a "sexually dangerous person." Dru Sjodin's body was not found until the snow melted in April 2004. Rodriguez has pleaded not guilty, and his trial for capital murder was still pending as of March 2006.

Sjodin's death reminds us of the list of young women and children who have been sexually assaulted and murdered by repeat sex offenders following their

Epigraph is from Rubén Rosario, "GPS No 'Silver Bullet' for Sex-Offender Problem," *St. Paul Pioneer Press,* July 8, 2005, B1.

release from prison. In Minnesota alone, at least ten women have died over the past two decades, victims of released sex offenders. And throughout the nation, the headlines tell the same tragic story: nineteen-year-old Katie Poirier of Moose Lake, Minnesota, nine-year-old Dylan Groene of Coeur d'Alene, Idaho, thirteen-year-old Sarah Lunde of Hillsborough County, Florida, nine-year-old Jessica Lunsford of Homosassa, Florida, and eleven-year-old Carlie Brucia of Sarasota. With almost clockwork regularity yet another young innocent is found dead.

Who are the accused? They are men with long criminal records of violence and sexual assault, released from prison only to prey again. Poirier's confessed killer is Donald Blom, who had six felony convictions including sexual assault and kidnapping. Dylan Groene's accused killer is Joseph Edward Duncan III. He was released from prison in 2000, after serving a twenty-year sentence for raping and torturing a fourteen-year-old Tacoma, Washington, boy. Jessica Lunsford's accused killer, John Evander Couey, had a long criminal record of violence and sexual assault. So did Joseph P. Smith, the accused killer of Carlie Brucia. David Onstott, who has been charged with Sarah Lunde's murder, is a convicted rapist.

The recidivist crimes the men are accused of mark them as the "worst of the worst." These are the criminals we have come to call "sexual predators"—the most dangerous sex offenders, those who seem to be pathologically different from the rest of us. Punished severely for prior sexual assaults, sexual predators seem undeterred by the prospect of returning to prison. It seems that no sooner are they released from prison than they revert to their sick predilections, satisfying their deviant urges on the most vulnerable and innocent. These are the men who lurk in the bushes and parking lots, attacking strangers without provocation or warning. They often seem to lack the essential empathy and conscience that mark human beings. They are "monsters" and "beasts."

But sexual predators—and our powerful reaction to them—are doing another form of damage as well. We have come to think of these men as archetypical sex offenders and have shaped our public policy responses as if all sex offenders fit this mold. We are blind to the true nature of sexual violence in our society, which is far different from what we think it is. Rape-murders are exceedingly rare, and sexual predators represent but a small fraction—a thin sliver—of the sexual criminals in our country. In the 1980s and 1990s feminist scholars such as Florence Rush, Mary Koss, and Diana Russell have shown us that most sexual violence is perpetrated by acquaintances and intimates and family, not by strangers lurking in the dark.[1] But this clear view is being obscured by new legal initiatives and media spotlights on "the sexual predator."

Sexual predators—and our response to them—are in many ways the subject of this book. Decent people naturally feel outrage when horrible crimes are committed by recently released sexual predators. The outrage is directed not simply at the criminals but also at a system that seems incapable of protecting the most vulnerable among us. These rapists, after all, were safely locked up before being released. In hindsight, the warning signs of future tragedy seemed plain—if only state officials would have looked.

This outrage has been translated into a set of aggressive new laws aimed at disabling sexual predators before they strike. The touchstone of the new predator laws is regulatory prevention. Two legislative innovations of the early 1990s provide the focus for this book's inquiry. The first is the use of "civil commitment" to lock up "mentally disordered" dangerous sex offenders after they have finished serving their criminal sentences but before they have committed a new crime. The second is "Megan's law," named after seven-year-old Megan Kanka, a New Jersey girl who was raped and killed by a convicted pedophile who had moved into the neighborhood without her parents' knowledge. In the aftermath of the tragedy, the Kankas led a campaign to require authorities to warn communities about sex offenders in the area. All states now have a form of Megan's law.

Both of these laws impose a restraint on sex offenders before a new crime is committed. These new laws are based on the same power states use to warn consumers of the dangers of tobacco or alcohol and to manage the risk of nuclear waste by storing it in remote deserts. This regulatory power is now directed at protecting us from high-risk criminals. Yet these new tools were inadequate to save the lives of Dru Sjodin, Dylan Groene, Jessica Lunsford, Sarah Lunde, and Carlie Brucia.

A major thesis of this book is that these new laws—although well intentioned—are ill-conceived, bad policy. They were sold as innovative approaches to finding and incapacitating the worst of the worst, but there is little evidence they have succeeded in that important task. It is not simply that these new laws haven't been able to solve the problem of sexual violence. It is that our way of thinking about sexual violence is increasingly distorted. The distortion has led us to the predator laws, and the predator laws strengthen the distortion. We are in a vicious cycle of bad policy, and we need to find a way out if we want to fight sexual violence more effectively.

The distortion is straightforward. We have substituted a part of the problem for the whole. Sexual predators are rare, atypical sex offenders. But because of the intense focus of the media and these new laws, predators have become archetypical. In the headlines, and in these laws, sexual predators have come to symbolize the essence of the problem of sexual violence. In the

process, the thousands of women and children whose victimization does not fit this paradigm—only recently made visible through the work of feminist scholars—are at risk of becoming invisible once again.

The origins of the predator archetype are not hard to discern. The stories of Sjodin and Rodriguez, Lunsford and Couey, although awaiting proof in courts of law, sear our consciousness. We are horrified at the cruelty, randomness, and unpredictability of these cases. They symbolize a danger that we all dread. We must not minimize the reality that a small percentage of sex offenders are psychopaths with deviant sexual urges and that they do pose a high risk of repeat violence. But we distort this reality if we magnify this small part of the problem of sexual violence and come to think of it as the whole of the problem.

By distorting the real nature of sexual violence we will hurt our efforts to fight sexual violence in four important ways. First, our focus on the sexual predator will lead us to put more and more resources into trying to do the impossible—prevent the rare but horrible crimes committed by the worst of the worst. And every time our efforts fail—as inevitably they will—we will redouble the effort we put into our faulty strategy.

Second, the spotlight on sexual predators will push the great bulk of sexual aggression—crimes that do not fit the sexual predator paradigm—into relative obscurity, ignored in the allocation of societal resources for fighting sexual violence.

Third, we will begin to think that we can fulfill our societal responsibility by excising a discrete "cancer"—the sexual predator. But, through the work of feminist reformers, we now are aware that sexual violence not only is more common than we once thought but that it is part of the fabric of our society, which includes the tacit approval of sexism and violence in everyday life. While we all are repulsed by the rapist-murderer, tolerant attitudes toward acquaintance rape are common. The sexual predator template encourages us to think that by exiling this monster we have acquitted our responsibility, yet as a larger society we will not have changed the circumstances that allow sexual violence to flourish.

Fourth, we should fear the sexual predator archetype as much as, if not more than, the sexual predator himself because this template has led to extraordinary legal measures that have embraced legal principles that are harbingers of a "preventive state."[2] The preventive state claims the right to deprive people of liberty before criminal action is afoot. Under this approach, it is enough that there is a potential for harm, that the individual's psychological makeup—or political inclinations—poses a grave risk. This attitude rips a large hole in the fabric of our American concept of justice.

With the advent of the "war on terror," there is increasing pressure to expand the preventive actions of the government. Claiming the right of preemptive attack, the Bush administration launched a preventive war in Iraq. The administration detains "enemy combatants" indefinitely, without charge. Threats of bioterrorism have triggered a reinvigoration of the assertion of state power to quarantine and forcibly treat citizens. The USA Patriot Act as renewed in 2006 expands the government's right to conduct surveillance, collecting information even when no specific crime is suspected. The government claims the right to wiretap international messages without even the modest protections of a warrant from the secret Foreign Intelligence Surveillance Act court. The horrors of September 11 are putting pressure on the delicate balance between security and liberty.

It is a truism that liberty is at the heart of our national self-identity. But many of the freedoms we take for granted today have been won through two centuries of hard-fought legal battles. The state can deprive a person of liberty only under the strictest of circumstances. In general, this means only when he or she has been charged and then convicted (beyond a reasonable doubt) of having actually committed (at a specified time and place in the past) a specified crime. We do not allow incarceration for the propensity to commit a crime. In our system, the punishment should never precede the crime.

Yet this is precisely what the predator laws seem to do—except that they do not call the deprivation of liberty "punishment." The predator laws pick out a group of people and place them in a specially degraded legal status that allows the state to treat them in ways that no other person can be treated. Sexual predators are relegated, as it were, to a "reduced-rights zone."

How can the law justify treating one particular group in a legally degraded way? If the government can lock up sexual predators in advance of their (predicted) crimes, why not other criminals? Why not terrorists? Why not political subversives? What is to stop the state from assessing all of us for "risk" and locking up prophylactically those whose RQ—risk quotient—is assessed above an arbitrary threshold?

We are confident that our fundamental principles of justice, enshrined in the Constitution, do not allow this kind of preventive detention. But the legal protections against the preventive state are fragile. The predator laws provide a template for a radical assault on those protections in a two-step process. First, the predator laws resurrect a concept that has properly fallen out of favor in U.S. law: the notion of the "degraded other." In the past, we have used categories such as race, gender, national origin, sexual orientation, and disability to put people into reduced-rights zones. But the courts have, for the most part, put a stop to that. Now, the predator laws have reversed that trend, reintro-

ducing into our legal vocabulary the notion that we can designate a group to be put into this alternate legal universe where fundamental rights are diminished. The second step is the introduction of "risk" as a basis for putting people into the degraded status. Sexual predators are placed in the reduced-rights zone not because they have been convicted of a heinous crime but because we think they are at risk of committing one. Taken together, these two aspects of the predator template provide a formula for radically altering the balance between security and liberty.

How we conceptualize the scourge of sexual violence matters. The conceptual architecture we embrace will shape the legal and public policy choices we make. These, in turn, will determine whether we are spending our resources effectively or wastefully. And, because sexual violence carries such a powerful social meaning, the choices we make in this arena will have broad reverberations that shape our reactions to other threats to our security.

At the risk of oversimplification, we can identify two distinct and influential approaches to sexual violence that have emerged in the past several decades. One approach examines sexual violence at a societal level, asking which aspects of our society facilitate or inhibit the sexual victimization of women and children. The second approach looks at the individual sex offender and asks what biological or psychological factors are associated with sexual violence. The first approach will help us understand what societal changes we might take to prevent sexual violence. The second will prompt us to examine interventions at an individual level.

Prominent in the first approach have been feminist theorists and reformers. Law professor Catharine MacKinnon, for example, argues that sexual violence is "socially not biologically impelled." It is "an act not of [biological] difference but of dominance . . . of gender hierarchy." Sexual violence "flourishes with social support, enforcing and expressing" the socially imposed inferiority of women.[3] This theoretical orientation leads MacKinnon, like other feminist reformers, to understand sexual violence as a widespread feature of our society, thriving in intimate relationships and families, on dates, and between acquaintances. If sexual aggression is nourished by a widespread socially sanctioned hierarchy of gender, then solutions must also be widespread, and they must seek to dismantle the hierarchy.

Feminist ideas have had a powerful—but limited—influence in reshaping our approaches to sexual violence. That sexual aggression is relatively widespread has received broad acceptance, but the underlying implication—that sexual violence flourishes because of a sexist society—remains the subject of intense controversy.

The second approach to sexual violence is exemplified by the work of R.

Karl Hanson, a social science researcher with the Canadian government. Hanson is among the leading experts worldwide in the empirical analysis of sexual offending. He has put together massive databases about sexual offending and sex offenders, crossing continents and spanning decades. Using sophisticated statistical analysis, he mines these data. He is looking for "predictors" of sexual recidivism, measurable facts about individuals that correlate with recidivism. From this research, Hanson constructs and validates "actuarial risk assessment" tools, psychological protocols that combine and weight the facts about a person and produce a numerical score associated with his risk of reoffending sexually.

MacKinnon's theories tell us that if we want to do something about sexual violence, we should look around at social structures and attitudes to understand the extent and social characteristics of sexual violence. In contrast, psychological and biological theorists like Hanson prompt us to seek understanding of sexual violence by looking at—and within—the individual.

There is nothing inherently incompatible between broader societal and narrower individual approaches to explaining and understanding sexual violence. They can coexist. Occupying parallel conceptual worlds, they provide different lenses for understanding and trying to prevent the same social evil. We ought to embrace the truths of both if we want an effective program for addressing sexual abuse.

But if we are not careful, we can allow one approach or the other to occupy our field of vision, obscuring the truths of the other framework. Hanson's work, for example, has certain features that seem to pull us in a direction at odds with the socially conscious view of feminists like MacKinnon. Hanson's scientific techniques allow us—with reasonable accuracy and at reasonable expense—to classify people according to their risk. But these tools are likely to draw our attention disproportionately to identifying and neutralizing the "most dangerous." When we look too much at individual risk, societal patterns and root causes of sexual violence are obscured.

A major thesis of this book is that such a shift is occurring, and that the predator laws result from, and in turn strengthen, an important imbalance in the approach to sexual violence. We give inordinate attention to the question made possible by Hanson's work—who are the most dangerous and how can we protect ourselves from them—and give much less to the questions posed by MacKinnon—what are the patterns of sexual violence, and how do our social structures allow them to flourish.

How is this shift occurring? Consider the following story. In 1995, responding to the imminent release, after decades in prison, of an infamous rapist who had killed a fourteen year old, the governor of Minnesota called a

special session of the legislature to pass a new predator commitment law. The media attention on the matter was persistent and intense. At a legislative hearing to consider the bill, critics pointed to the serious questions of constitutionality that such preventive detention raises. In response, one of the most thoughtful (and politically liberal) members of the state senate posed the question: "How could any politician vote against this law? If we defeat this law what could I say to the family of the next victim, killed or raped by a person who would have been committed under this law?"

This powerful question has captured the American public's imagination. It seems so intuitively obvious that we ought to do all in our power to save the "next victim" from harm. Our failure to take available precautions seems clearly to implicate us in the tragedies that (looking backward) seem so preventable. We ought to spare no expense to stop the next murderer and save his next innocent victim.

But what underlies this question? We picture in our heads the deranged rapist-murderer who will surely strike again if released from prison. We conceptualize the predator laws as zeroing in on this man, picking him out of the thousands of "ordinary" criminals who pass every year through the criminal justice system and back into society. Just as the benefits of locking this "monster" away seem clear and indisputable, the alternative seems patently unacceptable. As the late U.S. Supreme Court chief justice William H. Rehnquist put it during the oral argument on the Kansas predator law: "So what's the State supposed to do, just wait till he goes out and does it again?"

The attraction of this paradigm is magnetic, but ultimately it is illusory. It is not just that the prospects of picking out the next rapist-murderer are vanishingly small. It is not simply that, once begun, this quest for safety from the "worst of the worst" will demand ever increasing resources in a spiral fueled by the politics of sexual violence. The real problem is that the vividness of this goal will blanch the larger threat from sexual violence. The real tragedy of deaths like Dru Sjodin's will be amplified because our moral fervor to prevent the next rape-murder will blind us to the concrete steps we can take to increase safety for the tens of thousands of children and women whose sexual victimization falls outside that narrow spotlight.

In this book I seek to help us find our way out of the magnetic attraction of this predator template. We need to turn from asking, how can we identify and lock up the most dangerous? to the more comprehensive, how can we design a system that will prevent the most sexual violence? We need to transfer our willingness to spare no expense from the highly visible but ultimately fruitless quest for perfect safety to the less flashy but broader efforts to get at the root causes of sexual violence and to take sensible safety precautions in regard to

the vast majority of sex offenders who are released into the community. And, finally, we need to make sure that we do not sacrifice our basic democratic principles in our quest for security.

The book is divided into three parts. Part 1 sets the groundwork. In chapter 1, I describe the new legal approaches that are at the center of the problem—what this book calls the "predator laws." In chapter 2, the constitutional litigation generated by the sex predator commitment laws is examined. Chapter 3 is a primer on what we know about sexual violence. In chapter 4, I demonstrate that the new laws, by focusing disproportionately on the rare "predator," probably fail in their implicit promise to offer us the best protection from sexual violence.

Part 2 discusses the more abstract, but no less worrisome, consequences of the predator template. In chapter 5, I argue that the predator laws support a retrenchment from the more comprehensive understanding of sexual violence achieved with the leadership of feminist reformers. Chapter 6 shows that the predator template may be the harbinger of a virulent "preventive state."

In part 3, I look to a more positive future. In chapter 7, I examine some promising alternative approaches to sexual violence and pose the question whether they would be substantially more effective than the predator approach. Chapter 8 examines the politics of sexual violence that impede moving toward a more rational and effective approach to prevention. Chapter 9 ends with a prescription for getting our policy on sexual violence on the right track.

I do not advocate going easy on sexual violence or sex offenders. Rather, I present a brief for being hard on sexual violence by being smart about it.[4] Sexual assaults and rapes are crimes of violence. Perpetrators deserve punishment, sometimes severe. Society has the right and the duty to impose penal control over offenders. Some offenders are truly psychopaths with deviant sexual appetites, who pose high risk of reoffending. The criminal justice system is an important forum to express our condemnation of sexual violence and to seek to incapacitate dangerous offenders.

But one of the disabling features of the current approach to sexual violence is that it has the power to stifle or even silence open discussion about how best to really reduce sexual violence. In the struggle to reach and hold the moral—and political—high ground, politicians and others use toughness, the idea of "zero tolerance," as a club to beat down those concerned with civil liberties or alternative approaches. But zero tolerance is a chimera, a hoax. The bluster about toughness often hides a failure to address the huge part of sexual violence that is not in the news, that is not flashy, and that is appallingly common.

People who are truly serious about addressing sexual violence will look carefully and empirically at the effectiveness of their policies in accomplishing that purpose.

Finally, although a central concern ought to be what works, we should not ignore what's right. Justice and truth matter. The predator laws create a reduced-rights zone, an alternate system of justice, for a group of degraded outsiders. To justify these efforts, courts have stretched the law and distorted the nature of sexual violence. We should be chary of building our fight against sexual violence on such questionable and shaky foundations.

CHAPTER FIVE

Feminism, the Culture Wars, and Sexual Violence

Collectively, women are more at risk of violence in intimate relations than in public spaces.

—Elizabeth Stanko

The institution that most strongly protects mothers and children from domestic abuse and violent crime is marriage.

—Heritage Foundation

We are in danger of being blinded to hard and valuable lessons we have learned about sexual violence. In the "culture war," launched by conservative forces such as the Heritage Foundation in part in a backlash to the women's movement and feminism, our new and enlightened architecture of sexual violence is at risk of becoming collateral damage. The predator laws are vehicles by which this retrograde effort might dismantle the fruits of years of reform and improved understanding of sexual violence. By placing the predator laws in this context, I seek to develop some understanding about the forces that are propelling these laws as well as the harm they can do.

In the traditional view, the paradigmatic example of sexual violence was the rapist who was a deranged stranger. The women's movement challenged this view, making the role of social norms and values a much more visible explana-

Epigraphs are from Elizabeth Stanko, "Naturalizing Danger: Women, Fear, and Personal Safety," Dangerous Offenders, ed. John Pratt and Mark Brown (New York: Routledge, 2000), 150; and Robert E. Rector, Patrick F. Fagan, and Kirk A. Johnson, "Marriage: Still the Safest Place for Women and Children," Mar. 9, 2004, http://www.heritage.org/Research/Family/bg1732.cfm.

tion for sexual violence. This was part of an agenda to change foundational aspects of gender relations, to dismantle patriarchy. This aspect of feminism was (and is) threatening to conservative forces in society, because it challenges deeply held beliefs about who we are. It suggests a need for fundamental change. But the seeds planted by feminist reformers have taken root, changing in important ways the received wisdom about sexual violence. So successful has been this change that many aspects of it cannot be challenged directly. But there remains strong resistance to the underlying deep meaning of this new architecture. The predator laws provide an indirect means to reassert the old paradigm and thus undercut the feminist approach. In the process the broadly accepted new insights, what we can call the new architecture of sexual violence, is placed at risk.

Social Attitudes and Mores

The traditional view of gender relations is real and very much in play. The cover story of a 1998 supermarket tabloid headlined the now iconic photo of President Bill Clinton hugging a beaming Monica Lewinsky: "Monica's Sexy Strip Show: How Bill Lost Control When That Little Blue Dress Came Off!"[1] Though a tabloid is just a tabloid, this headline embodied a particular "theory" about how sexual misconduct occurs. Women's provocative behavior triggers a loss of control, even in normal men. Therefore, a man's sexual misbehavior in response is not really his fault. Rather, it can be blamed in part on the woman (she triggered the behavior) and in part on his own biological and psychological makeup, the mechanisms that "made" him lose control when he encountered the woman's inviting behavior. In this story, there is no serious room for Clinton's personal responsibility, no notion that the power relationships between Clinton and Lewinsky played a part, and certainly no suggestion that social attitudes and mores allow sexual misbehavior to flourish.

Although no one accused President Clinton of any sexual crime, this tabloid story is illustrative of the traditional architecture of sexual violence and the steps we take to combat it. It was these values and attitudes that came under attack, beginning in the late 1960s, as part of a new agenda advanced by the women's movement and feminist theorists. Led by this movement, our society has experienced a sea change in how it understands sexual violence.

Yet these changes are at risk. There are powerful conservative forces that do not like the feminist underpinnings of the new architecture of sexual violence. These conservative forces have fought back, declaring a culture war over basic values of American society. The thesis of this chapter is that the new ways of

seeing and understanding sexual violence, which can help shape a more effective program for prevention, may become collateral damage in the culture war. Unwittingly, perhaps, the predator laws are a key tool of these conservative forces.

The tabloid model of gender violence is emblematic of a set of values and attitudes that were targeted by the feminist revolution of the last decades of the twentieth century. Feminists achieved fundamental changes in society's understanding of sexual violence. There was a restructuring of gender relations that replaced traditional attitudes and behaviors about women's roles and women's place in society.[2]

The feminist movement was essentially revolutionary in seeking to dismantle what was perceived as a patriarchal system. This agenda provoked fierce resistance from politically conservative circles. In the beginning of the twenty-first century, the culture war was about gay marriage and abortion, evolution and school prayer, among other topics. In the 1980s and 1990s, the culture war was about sexuality and violence, women's roles, and the family. When feminists pushed for fundamental change in the most basic institutions of society such as the family and male-female relations, conservatives fought to preserve traditional ways.

The predator laws support the antifeminist side in the culture wars. The new architecture of sexual violence is at risk because this legislation from the 1990s resurrected the traditional architecture of sexual violence, placing the old ways at the center of the fight against sexual violence. Predator legislation pushes against each of the planks of the new conceptualization.

The new architecture had its origins in the feminist reforms, stemming from a complex social movement with several waves and a myriad of streams.[3] The focus here is on second-wave feminism, whose beginnings are roughly marked by the formation of the National Organization for Women in 1966 and the publication of Kate Millett's *Sexual Politics* in 1970.[4] As described by John D'Emilio and Estelle B. Freedman in their authoritative work *Intimate Matters,* this movement produced "in short order a fairly elaborate body of theory that described and defined a system of gender oppression." The movement examined the most sacred institutions of American life—marriage, family, motherhood—casting them "as institutions that maintained the oppression of women."[5]

Led by theorists such as Catharine MacKinnon and Susan Brownmiller, the women's movement turned substantial attention to sexual violence.[6] Brownmiller saw in rape a key way in which the patriarchal society maintained the oppression of women. Rape, she wrote, is "nothing more or less than a conscious process of intimidation by which all men keep all women in a state of

fear."[7] Similarly, according to MacKinnon, feminist theory understood sexual violence as "an act not of [biological] difference but of dominance . . . of gender hierarchy." Sexual violence "flourishes with social support, enforcing and expressing" the socially imposed inferiority of women.[8] In this way of thinking about sexual violence, sociocultural explanations rise to the top because they "locate the causes of rape and sexual assault within the fabric of western culture and society."[9]

This move to a sociocultural explanation for sexual violence de-emphasizes psychological and biological explanations. The implications of this change of viewpoint are central to the perspective on sexual violence that grew out of the feminist movement. If sexual violence is essentially biological—as in the Clinton-Lewinsky tabloid theory—responsibility rests, in part, with the woman for triggering the male's biological impulses. The feminist formulation places responsibility, in contrast, both with society, for providing social support, and with the man, for acting not because of his internal psychological or biological impulses but out of the choices he makes because of the "sexual politics" and "sexual power" inherent in social norms and values. Andrea Dworkin put it this way: "Men are doing it, because of the kind of power that men have over women. That power is real, concrete, exercised from one body to another body, exercised by someone who feels he has a right to exercise it, exercised in public and exercised in private. It is the sum and substance of women's oppression."[10]

It is important to note that the perspective shift is as much normative as it is scientific. It is certainly possible to understand the feminist theorists as making an empirical assertion—that patriarchy *causes* sexual violence. But it is equally plausible that the new way of understanding sexual violence recognizes the complexity of the psychological factors that might predispose some men (and not others) to sexual assault, while simultaneously seeking to elevate the part of the causal equation that has its roots in attitudes and values. Read in this way, the new architecture does not assert that patriarchy *causes* sexual violence. Rather, it requires us to examine and understand the role that social norms and societal attitudes play as they interact with the individual differences inherent in human beings. It laid the groundwork for significant reforms, which were broadly adopted, to stop social structures from tolerating or facilitating sexual violence.

This shift in focus from biology and psychology to culture and norms engendered another key shift. In traditional ways of thinking (and under traditional legal concepts) the family was the "private" domain of the man of the house, whose conduct with respect to his wife and children was, within broad limits, not the province of law. Feminists saw the family as an important site

for the expression of the gender hierarchy that preserved male dominance and insisted that violence in the family and among acquaintances, just like violence "in public," needed to be legally prohibited. As history professor Sara Evans put it, "The [women's] movement politicized issues that had long been deemed outside the purview of 'politics,' including sexuality, domestic violence, and the exercise of authority within the family."

This shift had broad consequences, leading eventually to a key structure of the new architecture, the recognition that sexual violence is not a pathologically isolated cancer but a systemic dysfunction, spread broadly throughout the normal relationships of society. It is therefore not surprising, as Evans emphasizes, that the move to politicize the personal struck at the heart of important societal—and politically conservative—values:

> The result was a far more radical challenge (in the sense of *fundamental,* going to the roots) than efforts simply to gain admission for women into the public world of civic and economic rights. . . . It questioned one of the most fundamental and intimate forms of hierarchy, one that has been used in myriad contexts to explain, justify and naturalize other forms of subordination.

"The result of this feminist challenge," said Evans, "has been a political, legal, and cultural maelstrom."[11] The feminist agenda on sexual violence was, for a time, at the center of that maelstrom. And even as the feminist view has gained ascendancy legally and culturally, traditional forces have sought to push back. As we shall see, the predator laws have provided an effective (if not necessarily intended) vehicle for this retrograde campaign.

As they turned their attention to violence against women, feminist reformers sought to expose the underpinnings of the old architecture of sexual violence. They identified a set of rape myths, widely held misperceptions and false beliefs about the nature of sexual violence. The myths hold that rape is essentially a sexual crime of passion perpetrated by strangers; that women can exercise substantial control over whether they are raped, by modulating where they go and how they dress and by resisting hard enough; and that women, at some level, secretly want to be raped. As in the tabloid Clinton-Lewinsky headline, the myths portray men as unable to control their sexual urges when they reach some point during sexual arousal. They characterize "real rape" as that which is committed by a small proportion of men who are mentally deranged.[12] In the myths, women's accusations of rape are often false, designed to shift responsibility onto men for illicit acts invited and welcomed by the woman. Taken as a whole, these societal ideas and attitudes about rape tend to shift responsibility for sexual violence onto women, minimizing not only the

harm to the woman but also the responsibility of both the male perpetrator and the larger society.

Empirical work has demonstrated that the myths were both widely held and false.[13] For example, early surveys found that 25 percent of male undergraduates "hold beliefs that rape is provoked by the victim, that any woman can prevent rape and women frequently cried rape falsely."[14] Further, studies showed that men who raped were psychologically similar to "normal" men: "Attitudes and beliefs that lead to rape are extensions of normal sexual behavior and socialization, not products of sexual deviance."[15] For example, in one study, 35 percent of "normal" men "expressed some likelihood of raping."[16] In another study, 62 percent of ninth grade boys and 58 percent of ninth grade girls said that a man has a right to sexual intercourse against his date's consent "if they have dated for a long time."[17] Further, as is described more fully later in this chapter, extensive research showed that sexual assault was more widespread, and much more a product of intimate and family relationships, than portrayed by the rape myths.

Unsurprisingly, the rape myths were not simply part of the popular culture but shaped the legal system's treatment of sexual violence in fundamental ways. A number of aspects of the myth were explicitly espoused in the maxims routinely invoked by the courts.[18] In the 1700s, Sir Matthew Hale, lord chief justice of the Court of King's Bench, penned the maxim that rape is "an accusation easily to be made and hard to be proved, and harder to be defended against by the party accused, though never so innocent."[19] So deeply ingrained in our thinking was this fear of false rape accusations that this maxim was still being used in U.S. courts in the 1980s, as reflected in this 1983 jury instruction in an Oregon case: "[A rape charge] is easily made and once made, difficult to defend against even if the person accused is innocent."[20]

The rape myths shaped the warp and woof of the traditional architecture of sexual violence. No part of the legal system was clean of the taint of these societal attitudes and beliefs. In its formal rules and informal practices, the law reinforced a very specific set of assumptions about sexual violence, its perpetrators, and its victims. Women who made complaints of being raped were often treated hostilely by police and prosecutors, who were skeptical of their claims. The trauma experienced by victims was in this way ignored, and compounded, when they sought help from the legal system. Often, key physical evidence was not collected. The accounts of women whose behavior did not conform to the dictates of conventional morality were especially discounted. The system viewed stranger rapes as the only "real" rape, giving less attention and credit to complaints of acquaintance and date rape. The legal definitions of rape similarly ignored sexual assaults that did not fit a narrow, stereotypical

template, in which physical force overpowered physical resistance. Many rape laws required that the accusation be corroborated by a third person, a requirement not present in any other kind of crime of personal violence. When rape cases went to trial, defense lawyers often attacked the woman complainant, putting her life and experiences on trial. Even when men were convicted of sexual assault, sentences often did not reflect the seriousness of the injuries their actions had caused.

Thus, the rape myths both informed and were fostered by the broader architecture of sexual violence. The values of the legal system seemed congruent with those of the larger society in tolerating, or even supporting, a broad range of sexual violence against women. Many feminist thinkers viewed the law's traditional approach to sexual violence (in the words of Carole Goldberg-Ambrose) as "contributing significantly to a system of male dominance."[21] Conversely, the evidence suggested quite strongly that the values, attitudes, and practices of the society—what feminists might call "patriarchy"—could be fairly characterized as tolerant, or even permissive, of the sexual exploitation of women.[22]

Inspired originally by feminist reformers and thinkers, and reflecting many of their ideas, a new architecture of sexual violence began to emerge. In a series of initiatives loosely referred to as "rape reform," during the 1970s and through the early 1990s formal legal definitions and the practices of the legal system were changed in ways that were consistent with the feminist conceptualization of rape.

Beginning with Michigan's comprehensive rewriting of its criminal sexual assault law in 1974,[23] rape reform changed the law of rape in four broad ways. First, the single crime of rape was replaced with a series of criminal sexual offenses covering a broader range of sexual assaults. This broadening sought to capture sexual assaults that took place in the formerly "private" context of family and other close relationships. For example, the new laws captured sexual assault even if it did not involve penetration. The traditional requirement of "force" was broadened to cover misconduct where the perpetrator leveraged nonphysical forms of power (authority, age, incapacity) to abuse the victim.

Second, the legal requirement that the victim "resist to the utmost" was modified or removed, focusing the law's attention on the behavior of the offender rather than that of the victim.

Third, the "corroboration" requirement was eliminated, thus removing the formalized suggestion that women's accusations of rape were somehow inherently untrustworthy.

Fourth, rape shield laws were enacted.[24] These are restrictions on the permissibility of questioning rape victims about their prior sexual behaviors. By

1999, rape shield laws had been adopted by forty-nine states, the federal government, and the military.[25] In addition, penalties for criminal sexual conduct were toughened to recognize the newly acknowledged seriousness of the crimes, particularly those involving family and acquaintances. For example, the average time served by rapists sentenced to prison rose from about forty-one months in 1985 to about sixty-one months in 1996.[26] Finally, rape crisis centers and victims' services were established to reduce the hostility and isolation often experienced by sexual assault victims in the legal system.

The Ideology of Rape Reform and Conservative Backlash

While rape reform had its origins in feminist theory, many aspects of the reform agenda had broad appeal across the political spectrum, including among political conservatives. To be sure, the motivations of feminists and conservatives were different. Feminists sought to "abolish 'boys' rules' to sexual relations,"[27] while political conservatives sought to advance their law-and-order agenda. Conservatives and feminists had common cause to increase sentences for sexual crimes and tighten evidentiary rules at the expense of sex-crime defendants.

But the compatibility of the feminist and conservative agendas was little more than surface deep. For underlying the rape reform movement was the antipatriarchy agenda of feminists that was essentially revolutionary and, hence, deeply offensive to conservatives. Beginning in the 1970s, conservative commentators such as Phyllis Schlafly accused feminists of being "anti-family, anti-children and pro-abortion."[28] Over time, the two sides engaged in battles over day care, abortion, homosexuality, and the role of women in marriage and the workplace. But during the late 1980s and early 1990s the battle focused for a time on the question of sexual misbehavior by men—sexual assault and sexual harassment.[29]

Thus, underneath the broad acceptance of key aspects of the rape reform movement, an intense battle was raging. Evans characterizes the opposition to feminism in the 1980s and 1990s as "intense," suggesting that "one must read [the critics'] venom as a response to something they perceive to be very powerful."[30] Part of the intensity of the conservative opposition sprang from the hyperbole of some feminist rhetoric about sexual violence. Evans, for example, characterizes some "charismatic" feminist theorists as asserting that "most if not all heterosexual sex was comparable to rape."[31] Although such broad-brush accusations were easy targets for caricature, it was the core beliefs of the

feminist reforms that presented the most glaring danger to conservative values. For conservatives, the real threat came from the view—originally espoused by feminists, but soon broadly borne out by empirical research—that sexual violence (and violence against women more generally) was not the work of a monstrous few, but was common, mostly took place at the hands of intimates and acquaintances, and was supported by key cultural practices and values.

Beginning in the early 1980s, feminist scholars and social scientists began a sustained project of empirical work that supported this core feminist ideology about sexual violence. Diana Russell's 1982 book *Rape in Marriage* was the first large-scale study of sexual violence from a feminist perspective; it revealed the "commonness of men's violence for a sample of U.S. women. . . . One in six of the women reported some form of incestuous abuse before age eighteen. Nearly one in two of the women reported experiencing some form of sexual abuse at any point in their lives."[32] Research findings published in 1988 by Mary Koss proved further support for the feminist approach.[33] Koss's research reported that one in four college women had been victims of rape or attempted rape at some time in their lives. Other research from the same period found that one in eight women had been the victim of rape at some point in their lives.

Meanwhile, a similar transformation was taking place with respect to child sexual abuse. Operating against a backdrop in which "small girls were seen as 'seductresses,'"[34] Florence Rush published *The Best Kept Secret: Sexual Abuse of Children* in 1980. It recharacterized child sexual abuse as a product of the social institutions, belief systems, and myths of patriarchal societies.[35] Sharon Araji reports that by the mid-1980s "commonly cited estimates suggest that one in four girls and one in nine boys will be sexually abused by the time they reach eighteen."[36]

Debunking many of the prevailing myths about rape, the research findings showed that sexual violence was widespread and perpetrated mainly by nonstrangers. The clear implication was that society bore a heavy responsibility for allowing violence against women to flourish.

As it emerged, this empirical information about sexual violence provoked a vehement backlash from conservative forces. Conservative critics, wrote history professor Ruth Rosen, complained that feminists "have largely hallucinated the many gender crimes they claim to be ubiquitous." Summarizing the position of the conservative Women's Freedom Network, Rosen characterizes the conservative critique as claiming that "radical feminists [are] guilty of cooking their data, exaggerating the victimization of women, targeting men as enemies, and seeking special (governmental) privileges for women."[37]

A leading conservative critic was Christina Hoff Sommers, whose 1994 book *Who Stole Feminism?* leveled a lengthy attack on Koss's findings about the incidence of sexual violence and on her underlying methodology. Sommers argued that Koss defined rape too broadly.[38] As a result, she argued, Koss's "one in four" figure was highly exaggerated. The fight between Sommers and Koss was not about social science methodology. Rather, it was the implications of Koss's numbers—that American society was "divided against itself along the fault line of gender"—that was so worrisome to Sommers.[39] "High rape numbers," Sommers wrote, "promot[e] the belief that American culture is sexist and misogynist."[40] To be sure, Sommers, like other conservatives, saw a "general crisis of violence against persons" in the United States. But "patriarchy is not the primary cause of rape[; rather] rape, along with other crimes against the person, is caused by whatever it is that makes our society among the most violent of the so-called advanced nations."[41]

In two key ways Sommers's critique was on target. First, Koss and other feminists were quite deliberately trying to expand the definition of rape. Much of what feminists called "consciousness raising" was about helping women understand that the sexual violence they suffered at the hands of their families and lovers was not normal or inevitable but rather was properly understood as rape.[42]

Second, Sommers's fear about the implications of the statistics Koss presented was well founded. Empirical findings about the commonness of rape were an important foundation for the feminist antipatriarchy agenda. The new empirical findings provided strong support for the reform of rape laws. But it was the broader implication that most worried traditionalists. As succinctly put by British criminology professor Elizabeth Stanko, the new evidence demonstrated that "collectively women are more at risk of violence in intimate relations than in public spaces."[43] This conclusion challenged core conservative beliefs about the importance of family and that women's proper place was in the home. The new understanding of men's violence against women became not simply a reason to change the technical rules of the criminal law. The nature of the risk and the danger to women became a central feature of the campaign for women's liberation.[44]

By the late 1980s and early 1990s, political conservatives had growing reason to worry. There was clear evidence that the new architecture of sexual violence was gaining the upper hand. "Sexualized expressions of male power" in the form of sexual harassment drew intense media attention.[45] The 1990s began with an onslaught of high-profile cases, including the Tailhook scandal—the 1991 aviators' convention at the Las Vegas Hilton Hotel where more than eighty women were assaulted—and the termination of two senatorial

careers on allegations of persistent patterns of sexual harassment. Most memorable were the October 1991 Senate deliberations on the accusations of sexual harassment made by Anita Hill against Supreme Court nominee Clarence Thomas.[46] These incidents were an unmistakable signal that the old gender order was changing.

Meanwhile, further trouble for the traditional architecture of sexual violence was brewing. Beginning in the mid-1980s, the Department of Justice began contemplating changes to its venerable Crime Victimization Survey, one of two key measures of crime that had been used since the early 1970s. Following the approaches pioneered by Koss and others, the department began field testing a redesigned survey in 1989 that "broadened the scope of covered sexual incidents beyond the categories of rape and attempted rape to include sexual assaults and other unwanted sexual contacts."[47] For the first time, the survey measured sexual assault outside of the traditional categories of penetration by force, including unwanted or coerced sexual contact under a threat or attempt to harm.[48]

Results from the redesigned Crime Victimization Survey were first reported in 1994. The redesign results bolstered the feminist position in two important ways. The new statistics showed that sexual violence was both more common and more often perpetrated by acquaintances and intimates than previously reported. The changed methodology of the survey showed a 300–400 percent increase in sexual violence.[49] In 1977, for example, the Crime Victimization Survey reported that the rate for "rape and attempted rape" was 0.9 victimizations per 1,000 persons twelve or older (male and female). The rate for 1985 was 0.7 per 1,000, and it remained steady at or about that level through 1992 (varying between 0.6 and 0.8).

The 1994 survey report (describing victimizations in 1993) included—for the first time—data from the redesign. Reflecting the redesign's broader definitions of sexual violence, 1994 publications changed the reporting category from "rape and attempted rape" to a new category called "rape/sexual assault." The victimization rate reported for this new category was 2.3 per 1,000 persons twelve and older, a figure that was three to four times higher than the rate for "rape and attempted rape" reported in the most recent prior years.

The redesign of the Crime Victimization Survey also resulted in a marked increase in the measured level of nonstranger sexual violence. In a report on 1991 crime rates (published in 1993, immediately before the redesigned survey), the Bureau of Justice Statistics reported that more than half (52%) of rapes were committed by strangers. A post-redesign press release issued by the bureau in 1995 was headlined "Women Usually Victimized by Offenders They Know."[50] The press release stated that "the victim's friends or acquaintances

committed more than half of the rapes and sexual assaults, [and] intimates committed 26 percent." According to these official numbers, the measured rate for stranger rape had decreased from 52 percent in 1991 to "about one in five."

This new understanding was further boosted by results of the National Violence against Women Survey, sponsored by the National Institute of Justice and the Centers for Disease Control and Prevention. Data were collected in 1995 and 1996. The survey found that almost one in six (17.6%) U.S. women had experienced a completed or attempted rape as a child or adult,[51] results that clearly confirmed the earlier findings such as those of Koss. The same survey found that 76 percent of the perpetrators of sexual and physical assaults against women after age eighteen were intimate partners (i.e., current and former spouses, cohabiting partners, dates, and boyfriends/girlfriends); 16.8 percent were acquaintances; 8.6 percent were relatives other than spouses; and only 14.1 percent were strangers.[52] Almost 8 percent of women reported that they had been raped by an intimate partner at some time in their lives.[53]

Perhaps the height of the feminist theorists' success came in the mid-1990s. In 1993, UN Resolution 48/104 recognized violence against women as a violation of women's human rights.[54] In 1994, Congress passed the Violence against Women Act (VAWA), providing funding for a variety of rape-prevention services, including programs to combat campus-based sexual assault and rape prevention and education programs. The act "reflected the first comprehensive legislative plan designed to set into motion a national agenda for combating violence perpetrated against women."[55] Significantly, the act created a private legal damages claim for gender-motivated violence.

The passage of the VAWA has meaning on several levels. At one level, it provided important funding for broad-based services, in recognition of the new evidence about the widespread nature of sexual assault, its presence on college campuses and other "normal" settings, and the possibility of combating rape through prevention and education programs, in addition to a more traditional criminal justice approach. But at a more fundamental level, the new federal law had roots deep in feminist theory. By addressing violence in terms of gender, Congress appeared to be siding with the notion that violence against women was a civil rights issue, not just a criminal justice issue, and that violence against women had a political aspect to it. Especially in its adoption of a private legal damages claim, the VAWA seemed to be equating violence against women with racially motivated violence and other forms of civil rights violations motivated by bias.

For conservatives and feminists alike, the Violence against Women Act was seen as a key victory for the feminist notion that sexual violence is about sex-

ual power and politics, just as racial violence was about racial oppression and white supremacy. As conservative commentator Christina Hoff Sommers put it, the Violence against Women Act "buy[s] into the gender feminist ontology of a society divided against itself along the fault line of gender."[56] As a feminist, Elizabeth Stanko's view was similar: "Men's violence is now named as a public, collective harm to women."[57]

The Predator Laws and the Conservative Agenda

The predator laws arrived just in time to provide conservatives with a Trojan horse, a stealth vehicle for pushing back against the "tidal wave" of change wrought by the women's movement. The predator laws resurrect the old architecture of sexual violence, undermining, in almost every respect, the new architecture that had been broadly adopted under the tutelage of the feminist movement. Yet the predator laws were not viewed as part of the culture wars. Their support was not partisan, and it is not at all clear from the historical record that either feminists or conservatives foresaw the potential strength of the retrograde values inherent in these new laws.

Nonetheless, the predator laws provided conservatives a way out of a serious predicament. Despite the rape reform movement's *theoretical* underpinnings in the distinctly unconservative antipatriarchy agenda, conservatives found it difficult to oppose the *practical* reforms that made up the new architecture of sexual violence. In part, opposition would have looked soft on crime. But more important, the agenda originally advanced by feminists had achieved strong empirical and popular support. Conservatives had no way of challenging the feminist theories underlying the rape reform agenda without appearing insensitive to the women and children who are the victims of most sexual violence. As Janice Haaken and Sharon Lamb have written, "Sexual violations have acquired tremendous social symbolic power in American political culture so that any challenge to the gains of [the women's and children's rights] movements is perceived to be a threat to victims."[58]

The predator laws have proved to be a perfect vehicle for conservatives. The predator laws provide a highly visible symbol by which politicians can demonstrate their commitment to fighting sexual violence, while simultaneously resurrecting a set of assumptions about sexual violence—the traditional architecture of sexual violence—that is inconsistent with the fundamental advances inherent in the new architecture of sexual violence.

Three major ways in which the predator laws undercut the new architecture

deserve emphasis. First, the predator laws resurrect the archetypal sexual offense as stranger violence. Second, predator commitment laws reemphasize a psychological model of the sexual offender as a mentally disordered person who lacks the ability to control his sexual impulses. Third, the predator laws diminish the role that community values and morality play in understanding and eventually controlling sexual violence. In the remainder of this chapter I will briefly explore each of these retrograde constructs.

The predator laws create a very specific archetype for the sex offender—the sex predator. This is the quintessential outsider, the monster or animal who picks out his victims from afar, stalks, and pounces. By focusing intensely on rare but horrific crimes, the predator laws convey a clear message that the feminists—and the solid empirical science—are wrong: the "greatest threat" to women is not "within women's intimate relationships."[59] Rather, these laws tell us that the real sex criminals are those who lurk in the bushes and parking lots.[60]

A second way in which the sex predator laws work to undercut the feminist message is by adopting a psychological explanation for sexual violence. In the predator commitment laws, the "most dangerous" are defined to be offenders who are "predisposed" to violence by reason of an abnormal psychological makeup. Predator commitment laws require a psychological explanation for violence: to qualify for commitment, the offender's violence must be "caused" by a "mental disorder," rather than "chosen" because of bad values and attitudes.

Feminist theories, recall, de-emphasized bio-psychological explanations for sexual violence, instead insisting that society confront the role played by "systems, practices, ideologies that continue to privilege male power." A bio-psychological explanation for violence ignores societal responsibility. Further, as the Clinton-Lewinsky tabloid model demonstrates, a bio-psychological explanation of violence places at least part of the responsibility for sexual violence on women.

Together, the stranger danger and bio-psychological templates for sexual violence convey a strong message that women can control much of the risk of sexual violence by behaving properly. As Stanko puts it:

> In the literature listing women's "safe" actions in public, there is an assumption that such actions will deter all but the pathological offender. Women then are expected, as part of active citizenship, to be responsible for their own safety. Self-governance, in the form of acting like appropriate "feminine" women, provides the "right" signals to those non-pathological men not to abuse women.[61]

There is a further way in which this identification of sexual violence with psychopathology is at odds with the new architecture of sexual violence. Feminist theorists have argued that sexual violence is an extension of the norms of society and flourishes under those norms. Social science evidence, demonstrating the wide incidence of sexual violence among intimates, is consistent with that feminist view. The predator laws take a small group, label them mentally disordered sexual predators, and lock them up in a symbolic, as well as literal, "ritual exile."[62] The ultrasecure "treatment centers" for predators visibly allow us to demonstrate our rejection of sexual violence by exiling a small, aberrational group of "others." This ritual exile allows the broader society to define itself as not being composed of sexual predators. This cleansing requires no fundamental societal change in order to address sexual violence. Under the predator template, whatever obligation the broader society has to deal with sexual violence is visibly and dramatically fulfilled simply by expelling the symbolic sexual predators.

The bio-psychological model constructed by the predator commitment laws pushes back hard against the new architecture in yet a final way. Recall that the Supreme Court has held that predator commitments are available only to lock up those offenders whom psychologists identify as having "difficulty controlling" their sexual impulses. This is, of course, precisely the Clinton-Lewinsky model, in which Clinton is said to have "lost control" in the face of Lewinsky's flirtatious behavior. Sex predator commitment laws bring the official imprimatur—directly from the United States Supreme Court—to what psychology professor Sharon Lamb calls "the dominant discourse of sexuality widely believed and accepted in our culture"—"men's lack of control over their sex drive."[63]

The language we use to describe sexual violence matters. It reflects the way our society chooses to understand and evaluate the sexual relations of men and women.[64] It is not only descriptive but also normative. The nature of the discourse about hotly contested issues such as sexual violence is shaped by those who have power in the society.[65] The very concepts we use in our language convey important messages about social values.

The notion that a person could not control his or her behavior is common in our everyday conversations. Despite its familiarity, this notion is somewhat opaque. We say that "he had trouble giving up cigarettes" or "she could not stick to her diet." What do we really mean by these expressions? What we often are saying is that the person lacked the will power to overcome contrary desires or urges. At some point, the person gets tired of trying and gives in or acquiesces in the urge to do what he or she, at some level, did not want to do.

We often use the expression in a kind of metaphorical way, roughly invoking the image of a person forced, often through some physical pain or threat, to do something she does not wish to do. And, just as we would excuse the person who acted under such physical duress, the expression "he just couldn't help it" is a way of lightening the blame we might otherwise attribute to a person's undesirable behaviors.

When applied to sexual violence, characterizing a rapist as "lacking control" asserts that the man's urges overwhelmed his will, his choice.[66] This way of talking expresses, in a covert yet powerful way, a normative conclusion that undermines the rapist's moral responsibility for sexual violence.

The "lack of control" discourse is a serious setback to our progress in implementing the new architecture of sexual violence. This discourse provides authoritative social support to rapists themselves. Social scientists report that rapists employ excuses that appeal to "forces outside of their control which, the men argued, compelled them to rape." This way of thinking "allowed the majority of these rapists to view themselves as either non-rapists or 'ex-rapists'."[67]

More problematically, courts themselves buy into the same kind of justificatory reasoning. Typical is this language from a judge's decision acquitting a young man in an acquaintance-rape case:

> Young men must be sensitive to a young woman's right to say no, and *young women, in turn, must realize that when a young man becomes aroused during sexual activity beyond a moderate degree there is a danger that he will be driven by hormones rather than by conscience.*[68] (emphasis in original)

The predator laws' "inability to control" linguistic template does not appear in a vacuum but smack in the middle of the struggle to banish the old rape myths and replace them with a new architecture of sexual violence. The predator laws bring the highest level of support to the discourse of minimization and excuse.

Lastly, the predator laws threaten another key feature of the progress inspired by feminist reformers—an insistence that we must reform social values, attitudes, and beliefs that tolerate, or even facilitate, sexual violence. The predator laws are part of a larger contemporary phenomenon characterized by prominent sociologists as "the death of the social." Among the characteristics of this phenomenon are the transfer of responsibility for solving problems from the society to the individual, paying attention to blocking the symptoms of problems rather than attacking root causes, and "de-moralizing" problems by defining them "not in terms of absolute moral codes but because they risk

causing harm to us. . . . Actions are good not because they embody virtue but because they work."[69]

Predator laws de-emphasize the moral aspects of sexual violence, favoring instead a frame that focuses on the morally neutral concept of "risk." Predators are defined in these laws not by their guilt—which would imply a moral judgment—but rather by the risk they are deemed to present. This is an essential, not an accidental, feature of these laws. Because these laws claim to be "civil" rather than "criminal," they cannot be seen as condemning the sexual violence that they target. Risk is a morally neutral concept. It exists in nature. Though the harm from sexual violence is seen as bad, the application of the predator laws is no more a moral condemnation than is a cement cask designed to keep nuclear waste from escaping.

Further, the predator laws do not address the causes of sexual violence. The central task of the laws—assessing and then preventing risk—can be accomplished without knowing the causes of violence. And the success of the laws depends not on changing the conditions that produce violence—a task that would require some notion of causes—but rather on simply preventing risky individuals from reoffending.[70]

Looking specifically at Megan's laws we can see a further manifestation of the death of the social. The message of these laws is that society—acting through government—is in significant ways powerless to protect people from sexual violence. The core responsibility for addressing sexual violence must be turned over to individuals and families. Armed with the proper information about the sex offenders who are their neighbors, each individual is supposed to be able to defend herself and his or her children.

By undercutting the notion that our government—our means of acting collectively as a community—can do anything effective about sexual violence, Megan's laws undercut the idea that sexual violence flourishes in some measure because societal values permit it. Megan's laws transfer responsibility from the community to the individual, who, far from acting communally, will presumably simply take individual precautions.

Led by feminist thinking, our new understanding of sexual violence shows that effective prevention must include some communal effort to change societal values. But Megan's laws encourage a different approach, one that is essentially an individualistic and, one might even say, selfish approach to public safety. The stories are legion of neighborhoods organizing to protest the location of an offender in their midst, often forcing the offender to move to other neighborhoods. Though this may not have been the intent of Megan's laws, it is, to a substantial extent, their effect. Megan's laws promote an ethic that is the equivalent to the not-in-my-backyard phenomenon that is a perversion of

environmentalism. Here, however, the ethic is a starker version that might be framed as an assault-my-neighbor ethic.[71]

The predator laws arose out of authentic and deeply felt fear and outrage about horrible crimes. But these laws foster a conceptual architecture that aids and abets the conservative, antifeminist agenda. They threaten some of the real progress we have achieved in shedding the old and destructive myths about sexual violence. The predator laws ignore the root causes of sexual violence. They direct our attention solely to the monster, the other, so that we feel satisfied that we have excised the cancer of sexual violence and can safely ignore the social structures and values that allow sexual violence to flourish more broadly among "normal" members of our society.[72]

NOTES

Introduction The Worst of the Worst?

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Chapter 1 New Legislative Approaches

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