



## Megan's Law & Sexual Violence Risk Assessment

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The purpose of this article is to address current practices and standards in sexual violence risk assessment pursuant to Megan's Law type forensic psychological examinations. The author will describe sex offender typologies, risk assessment practices/procedures, and applications of risk assessments in legal proceedings.

### MEGAN'S LAW

All 50 states and the District of Columbia have passed community notification laws which aim at protecting the community from dangerous and high risk sex offenders. This legislation was initiated in reaction to two high profile sexual homicides. Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C 14071 §170101 (2000), in response to a sexually motivated kidnapping in Minnesota. New Jersey passed Megan's Law which was aimed at enforcing sex offender registration for especially high risk offenders.

State statutes differ in their methods to classify sex offenders. Some use a discretionary scheme based on a case-by-case analysis, whereas other jurisdictions enforce mandatory notification for certain more serious sex offenses. These statutes have survived constitutional challenges. The U.S. Supreme Court held in *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003) and *Smith v. Doe*, 538 U.S. 84 (2003) that these statutes do not violate the Constitution's prohibition on ex post facto laws and the Fourteenth Amendment's guarantee of procedural due process. The Court has held that the laws are civil, rather than criminal, in nature.

In the State of Ohio, the Ohio Legislature passed House Bill 180 and O.R.C. 2950.09, which is the state's version of Megan's Law. This statute withheld its own challenges to ex post facto laws, Double Jeopardy Clause, and retroactivity clauses. *State v. Cook*, Ohio App. LEXIS 3658; *State v. Jenkins*, 2003 App. LEXIS 2733. Within this statute, section (B)(3) addresses criteria attorneys must argue, and a judge must consider, including factors such as the offender's age; his prior criminal record and prior sexual offense history in particular; the age of the victim; the pattern of sex offending behavior; whether there were multiple victims; the defendant's mental illness; whether alcohol and drugs were used to impair the victim; cruelty and threats to the victim, and any additional factors. In *State v. Eppinger*, 91 Ohio St.3d 158 (2001), the Supreme Court of Ohio held that a court may place as much or as little weight on the preceding factors as it deems relevant.

### SEX OFFENDER TYPOLOGIES

Sex offenders are a heterogeneous group. There are several distinctions/classes of sex offenders including but not limited to:

- (1) Rapists
- (2) Child Molesters
- (3) Hebephiles (sex offenders perpetrating post-pubescent females, 14-17 years of age)
- (4) Crossover sexual offenders (individuals whose victims are from multiple age, gender, and relationship categories)
- (5) Non-contact pornography offenders including importuning offenders
- (6) Sex offenders who have engaged in hands-on sex offending and pornography possession
- (7) Non-contact sex offenders including voyeurs (peeping type offenders and/or exhibitionists)

When examining sexual violence risk assessment for contact sex offenders such as child molesters and rapists, actuarial risk assessment instruments are commonly utilized.

### SEXUAL VIOLENCE RISK ASSESSMENT ~ ACTUARIAL RISK ASSESSMENT INSTRUMENTS

When assessing sexual offenders, primarily rapists and child molesters, a forensic psychologist should utilize actuarial risk assessment instruments such as the Static 99, the Rapid Risk Assessment for Sexual Offender Recidivism (RRASOR), and the Minnesota Sex Offender Screening Tool Revised (MnSOST-R). The actuarial method is based on comparing an individual's background to a norm-based reference group. A given offender's score on an actuarial instrument describes that he shares specific characteristics with a subgroup of offenders in a certain research sample, a percentage of whom reoffended during a specific follow-up period. The test data includes statistically significant sexual violence risk factors. The data provides a probabilistic risk estimate of a particular outcome (sexual violence) over a specified time. Actuarial instruments essentially focus on static (unchangeable) risk factors that have been found to be correlated with sexual re-offending for extrafamilial child molesters and rapists. The instruments focus on offenders' sexual deviance, and general criminality/antisocial violence. They are not specifically designed to use with juvenile sex offenders, non-contact sex offenders (pornography only offenders), and are less useful with incest offenders.



Weaknesses of using actuarial data include, generalizing group data to an individual and relying on a fixed number of risk factors, while excluding dynamic and contextual risk elements that may be relevant to a particular sex offender's risk. One may argue that comparing Ohio or Michigan sex offenders with normative test data established on Canadian and British sex offenders is not statistically sound. Further, these instruments emphasize past sex offending history being a strongly weighted variable in predicting future sex offending. While the premise of "past behavior predicts future behavior" is a hallmark in the behavioral sciences, these instruments are still relatively novel and each offender's specific background and offense history must be considered in context by the expert and attorney. Further, actuarial methods lack congruence with offender treatment programs that focus on risk management.

## **ADMISSIBILITY OF ACTUARIAL RISK ASSESSMENT INSTRUMENTS**

Lawyers have profusely debated the admissibility of actuarial risk assessment instruments such as the Static 99 during indefinite civil commitment proceedings pursuant to the holdings in *Kansas v. Hendricks*, 521 U.S. 346 (1997) and *Kansas v. Crane*, 534 U.S. 407 (2002). They have been contested less frequently and intensely in community notification hearings, likely due to the less dramatic liberty ramifications in these legal proceedings than in the civil commitment arena. The major questions courts have considered regarding admissibility are the instruments' reliability and accuracy as products of science and the importance of examiners and courts using them properly. Courts have upheld the reliability of actuarial risk assessment instruments as an aid in predicting recidivism. *In re R.S.*, 773 A.2d at 75. However, they do not rely on them as litmus tests, rather they are interpreted as one piece of a broader clinical evaluation. The only appellate court (to this author's knowledge) to reject the admissibility of actuarial instruments was in *People v. Taylor*, 782 N.E.2d 920 (Ill. App. Ct. 2002). The court questioned the youth of the instruments and opined that the validity of the instruments has not been established. Overall, the instruments must be evaluated for "fit" (their association to the pertinent legal inquiry). Prejudicial impact of actuarial risk assessment instruments might be the most significant issue challenging their reliability. Judges are the gatekeepers of such evidence and there is concern that they may unduly influence the fact-finder.

## **RISK ASSESSMENT STANDARDS**

Actuarial risk assessment instruments are one factor to consider when conducting a sex offender evaluation. Some argue that the scores and subsequent risk ranges on these instruments should not be "clinically adjusted" by the experts as these adjustments may be subjective and they violate the statistical foundation of the instruments' objectives. However, only relying on actuarial scores again limits the consideration of equally important dynamic factors relevant to each sex offender. Therefore, it is this author's opinion that the expert witness utilize the following model of sexual violence risk assessment:

- (1) Incorporate actuarial risk assessment instrument(s) when appropriate based on the specific characteristics of the offender being evaluated;
- (2) Be current with research addressing sexual violence risk factors and apply them to the specific offender;
- (3) Incorporate an assessment of dynamic risk factors such as substance abuse/intoxication, poor coping skills, and anger management deficits and associate these issues to the defendant's patterns of offending;
- (4) Consider diagnostic categories relevant to sexual disorders, i.e., paraphilias including pedophilia, sexual sadism, exhibitionism, etc. The examiner must be aware that multiple paraphilias (sexual disorders) within the same offender may elevate his risk level;
- (5) Assess whether the defendant qualifies for antisocial personality disorder and psychopathy in particular. Psychopathy (severe criminal personality) and sexual deviancy have been collectively correlated with sexual recidivism, especially in rapists;
- (6) Consider remediation issues, i.e., sex offender treatment, intensive community supervision, access to victims.

The forensic mental health professional should utilize data from the actuarial risk assessment instruments and incorporate guided clinical judgment through the use of empirical research studies on sexual re-offending, dynamic factors relevant to the offender, and consider the context in which the offender will be placed (i.e., community with family, halfway house, treatment facility, etc.).

## **STATIC RISK FACTORS RELATED TO SEXUAL RECIDIVISM**

Unfortunately for criminal defense attorneys, they have to accept their defendant as they find him/her. Many sex offenders have prior sex offenses, including allegations, arrests, charges, and convictions. Obviously, charges and convictions are considered more seriously due to their definitive nature. Static factors, such as prior sex offense history, are based on the defendant's history and are unchangeable. They include, but are not limited to:



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- (1) Number of prior sexual offenses
- (2) Prior violent offenses/Prior nonviolent offenses
- (3) Beginning sex offending at a young age (25 years of age or younger)
- (4) Deviant victim choices (unrelated and stranger victims, male victims)
- (5) Antisocial personality disorder/Psychopathy
- (6) Sex offender treatment termination
- (7) Sexual deviancy indicated by types of offending, diagnosis, and plethysmographic assessment
- (8) Substance abuse problems
- (9) Single/Marital status
- (10) Violation of community supervision
- (11) History of high sexual drive strength
- (12) History of offense planning



These risk factors are incremental in nature, the more there are, the higher the risk level for the individual offender. Obviously, static factors are not resistant to change and they cannot be treated or rehabilitated. Many court hearings are based primarily on the defendant's prior sex offense history, which obviously is a main factor to consider, but the expert witness must assess each prior sex offense and consider how long ago it was, what type of victim is involved (male, female, child, adult), was alcohol involved, were they on supervision, and what life stressors the individual was experiencing at the time (divorce and unemployment). The offender's past offense history, including frequency, severity, and diversity of sexual offending must be established. Each prior sex offense has its own facts and needs to be examined in the context of the defendant's history and sexual offending patterns.

### **DYNAMIC RISK FACTORS RELATED TO SEXUAL RECIDIVISM**

Dynamic risk factors are changeable and subject to remediation. They affect the offender once he is released into the community and must be a matter of focus for probation officers, parole officers, and treatment providers. They include some of the following:

- (1) Negative affect/ depression, anger, frustration, hostility
- (2) General self-regulation and sexual regulation problems
- (3) Noncompliance with supervision
- (4) Alcohol and drug use
- (5) Association with criminal lifestyle and criminal peers
- (6) Attitudes supporting and condoning sexual interest in children
- (7) Current younger age
- (8) Living alone
- (9) Sexual preoccupation
- (10) Sexual interest in children, emotional identification with children, child oriented lifestyle
- (11) Intimacy deficits
- (12) Conflicts or absence of intimate partners
- (13) Access and use of pornography
- (14) Rape myths supporting sexual violence towards women

### **AGE AND RECIDIVISM**



Age diminishes risk. Simply put, the older the offender (whether sexual, violent, or general criminal) the lower the risk. Rapists are more similar to nonsexual offenders. Their recidivism rates steadily and more dramatically decrease after age 40. This is likely due to "age burnout," diminished criminal lifestyle, lowered sex drive, and decrease in victim access/opportunity. Conversely, child molesters who target extrafamilial victims continue offending more steadily than do rapists and incest child molesters. These offenders have a stronger and more deviant sex drive and have difficulties in volitional control. Their offending patterns are much more relaxed after age 50. Most sex offenders in general recidivate within the first five years of release from prison.

### **CONCLUDING REMARKS FOR THE CRIMINAL LAWYER PRACTITIONER**

Whether a prosecutor or defense attorney, the practicing lawyer in sex offender cases relevant to community notification hearings must understand risk assessment as community safety is the law's primary objective. The practicing lawyer should also consider the following *forensic/clinical issues*:

- (1) Heinousness, viciousness, and amount of victim injury within a sex offense does not equate with elevating one's risk. Research does not support this finding; however, human intuition supports this notion.

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- (2) Many sex offenders suffer from comorbid diagnoses including alcohol and drug abuse dependence, depression and psychosis. These other mental health issues must be the target of treatment to diminish the risk of sexual offending. These issues must be addressed at sentencing when considering treatment and community supervision.
- (3) Older age reduces risk. Age should be a significant risk factor in sex offender hearings when the defendant is 40 years of age or older.
- (4) Sex offenders are heterogeneous in nature. Rapists' risk factors and rates of re-offending are different than those of child molesters.
- (5) When representing hands-off internet pornography cases or importuning offenders, a sexual violence risk assessment should be handled differently than an offender with a history of contact sex offenses. The actuarial instruments are not appropriate for these non-contact offender populations and the expert must thoroughly examine a defendant's other psychiatric issues, the nature of the pornography the defendant possesses, and the extent/intensity of his computer activity.
- (6) Attorneys should query expert witnesses on the strengths and weaknesses of actuarial risk assessment instruments as well as current research on factors related to recidivism.
- (7) Sex offender treatment, primarily cognitive-behavioral relapse prevention therapy model and hormonal treatments, in combination with intense community supervision significantly reduces the likelihood of sexual recidivism.
- (8) Exhibitionistic offenders (indecent exposures) likely present with the highest likelihood of re-offending.



The practicing attorney should also consider the following *legal issues* relevant to Ohio case law:

- (1) **Age** - the fact that a sex offender was 54 years of age when he was designated a sexual predator alone did not concede that he was unlikely to commit another sex offense, *State v. Fears*, 2005 Ohio App. LEXIS 2757
- (2) **Prison Disciplinary Infractions** - are relevant to an offender's behavioral characteristics and risk of re-offending, *State v. Fears*, 2005 Ohio App. LEXIS 2757
- (3) **Cruelty** - evidence of cruelty, i.e., shoving, leaving bruises and scratches, ignoring pleas of leniency are related to recidivism, *State v. Jennings*, 2004 Ohio 5447
- (4) **Prior non-sex offenses** - prior convictions for breaking and entering and theft support a sexual predator classification, *State v. Calaway*, 2000 Ohio App. LEXIS 2222
- (5) **Totality of relevant circumstances** - A trial court may label an offender as a sexual predator with only one statutory factor present, *State v. Bagnall*, Ohio App. LEXIS 770
- (6) **First Time Offender** - A first time offender with an expert opinion of a low to moderate risk of sexual recidivism is not determinative of whether the individual should be labeled a sexual predator, *State v. Longnecker*, 2003 Ohio App. LEXIS 5588
- (7) **Probability Estimates** - the court rejecting the defendant's claim that a twenty-percent probability of re-offending is sufficient to rebut the concept of likely to re-offend sexually, *State v. Robertson* (2002), 147 Ohio App.3d 94.
- (8) **Internet crimes** - An offender may be classified as a sexual predator when using the Internet to solicit sex from who he thought was a 14 year old girl, *State v. Bieck*, 2004 Ohio App. LEXIS 3223. The offender does not have to engage in a contact sex offense to be labeled as a sexual predator, *State v. Maynard* (1999), 132 Ohio App.3d 820.



In conclusion, the aforementioned cases offer legal holdings that often conflict with the science relevant to sexual violence risk assessment. The attorneys involved with these Megan's Law hearings must be aware of both the case law and the science relevant to risk assessment.

## EMPLOYMENT OPPORTUNITIES

### Paralegal Position Wanted

Results oriented paralegal looking to work for a law firm or solo attorney. Paralegal has modest legal experience drafting pleadings, motions, and responses to discovery. Has typing, Word, and Excel experience. Effective legal research experience on Westlaw® and LexisNexis®. Professional attitude and effective communication skills. For details, call Vaden Anderson at (216) 581.2416 or (216) 332.0587. E-mail at [vadenanderson@hotmail.com](mailto:vadenanderson@hotmail.com).



### Collaborative Efforts

Certified Financial Planner looking to work with Estate Planning attorney. Public speaking a must! For details, call Jeff Pickholtz at (440) 546.7550