

**THE RISKY BUSINESS OF CONDUCTING RISK  
ASSESSMENTS FOR THOSE ALREADY CIVILLY  
COMMITTED AS SEXUALLY VIOLENT PREDATORS**

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## I. INTRODUCTION

There is always a name. There is always a lost soul. There is always a sex offender whom society scorns and wishes to castrate. There is always subsequent legislation, such as community notification and civil commitment for sex offenders. In Washington, it was Earl Shriver who had a long history of violent sexual offenses before sexually assaulting and mutilating a young boy.<sup>1</sup> His sexual violence provoked outrage among the public, and in response the state instituted its Sexually Violent Predator statute.<sup>2</sup> The Washington State Legislature found that a “small but extremely dangerous group of sexually violent predators exist” that need treatment and confinement in a secured setting.<sup>3</sup> The sexually violent predator is defined as “any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.”<sup>4</sup> The legislature also found that “sex offenders’ likelihood of engaging in repeat acts of predatory sexual violence is high.”<sup>5</sup> The prognosis for curing sexually violent offenders is poor, and the treatment needs for this population are very long-term in nature.<sup>6</sup> Moreover, the treatment modalities for the population of sex offenders are very different from treatment modalities for people committed under the customary involuntary commitment system for traditional mental illnesses.<sup>7</sup>

The State of Florida recently passed the Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators Treatment and Care Act (Jimmy Ryce Act).<sup>8</sup> The Florida legislation

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1. See Charles Oliver, *Sex Crime and Punishment*, REASON MAGAZINE, March 1993, available at <http://reason.com/9303/oliver.shtml>.

2. See *id.* The statute authorizes indefinite civil commitment for those sex offenders determined to be “sexually violent predators.” See WASH. REV. CODE §§ 71.09.010-.800 (2005).

3. WASH. REV. CODE § 71.09.010 (2005).

4. *Id.* § 71.09.020(16).

5. *Id.* § 71.09.010.

6. *Id.*

7. *Id.* (“The existing involuntary commitment act . . . is inadequate to address the risk to reoffend because during confinement these offenders do not have access to potential victims and therefore they will not engage in an overt act during confinement as required by the involuntary treatment act for continued confinement.”).

8. See FLA. STAT. §§ 394.910-.931 (2005). The Florida Legislature created the

was “enacted in the context of a national movement to ‘get tough’ on sex offenders”<sup>9</sup> after the heinous murder and rape of nine-year-old boy Jimmy Ryce by Juan Carlos Chavez.<sup>10</sup>

Unfortunately, some states, such as Minnesota, have experienced notoriously heinous sex offenses despite already having civil commitment sex offender laws on the books, such as the Sexually Dangerous Person statute<sup>11</sup> and the Sexual Psychopathic Personality statute.<sup>12</sup>

In Minnesota, the name of the lost soul was Dru Sjodin. Sjodin was allegedly kidnapped by Alfonso Rodriguez, a registered sex offender from Minnesota who had recently completed a twenty-three year prison term for a sex offense.<sup>13</sup> A federal grand jury charged Rodriguez with kidnapping and murder, and Drew Wrigley, the U.S. Attorney for North Dakota, will seek the death penalty upon securing a Rodriguez conviction.<sup>14</sup>

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Jimmy Ryce Act to provide a civil commitment procedure that includes long-term care and treatment for sexually violent predators, as opposed to the previously-provided short-term treatment. *Id.* at § 394.910.

9. See Mari M. Presley, Comment, *Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators’ Treatment and Care Act: Replacing Criminal Justice with Civil Commitment*, 26 FLA. ST. U. L. REV. 487, 494 (1999).

10. *Id.* at 488.

11. MINN. STAT. § 253B.02, subd. 18c(a)(1)-(3) (2004) (defining a sexually dangerous person as one who “has engaged in a course of harmful sexual conduct . . . ; has manifested a sexual, personality, or other mental disorder or dysfunction; and . . . is likely to engage in acts of harmful sexual conduct . . .”).

12. Minnesota Statutes section 253B.02, subdivision 18b defines the sexual psychopathic personality as a person with personality traits such as emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any of these [traits], which render the person irresponsible for personal conduct with respect to sexual matters, if the person has evidenced, by a habitual course of misconduct in sexual matters, an utter lack of power to control the person’s sexual impulses and, as a result, is dangerous to other persons.

(2004)

13. See Dave Forster, *Crime and Punishment: Behind Bars, Sjodin Suspect Showed Many Sides*, THE FORUM (Fargo, N.D.), Aug. 2, 2004, <http://www.in-forum.com/specials/drusjodin/index.cfm?page=article&id=65731&section=collection>.

14. See Dave Forster & Jeff Zent, *Rodriguez Faces Death*, THE FORUM (Fargo, N.D.), Oct. 29, 2004, <http://www.in-forum.com/specials/drusjodin/index.cfm?page=article&id=73944&section=collection>. Alfonso Rodriguez has a history of sexual offenses and attempted kidnapping against adult females. Forster, *supra* note 13. He used force and a weapon in order to gain compliance and was previously known to one victim and not previously known to two victims. *Id.* Due to this tragedy, the Minnesota Legislature is considering strengthened criminal

Civil commitment laws are intended to protect the public from and provide treatment to the worst of the worst sex offenders in each state. Despite this noble intention, there will always be sex offenders who are committed who should not be, because they ultimately would not commit a future sex offense when released from prison. In contrast, there will always be sex offenders who should be committed but are not, potentially like Alfonso Rodriguez, Jr.

The field of forensic psychology and psychiatry is struggling with the issue of predicting the likelihood of sexual recidivism. This article focuses on that issue and specifically examines the civil commitment reexamination process in contrast to the initial civil commitment evaluation process.<sup>15</sup> Although these two evaluation procedures are quite similar in nature and focus on assessing sexual recidivism, there are notable distinctions.<sup>16</sup>

This article will explore various state civil commitment

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sentencing, including mandatory life without the possibility of parole for the most heinous gross sexual imposition cases resulting in death, and a maximum of life in prison for certain sex offenses. See Don Davis, *Sexual Deviants May Get Life Term*, THE FORUM (Fargo, N.D.), Jan. 7, 2005, <http://www.in-forum.com/specials/drusjodin/index.cfm?page=article&id=79844&section=collection>. Minnesota Governor Pawlenty said that he wanted to discipline the Minnesota state doctors who decided against recommending civil commitment for Alfonso Rodriguez, Jr. Tom Scheck, *State Doctor Who Evaluated Rodriguez May be Removed from his Job*, MINN. PUB. RADIO NEWS, Dec. 18, 2003, [http://news.minnesota.publicradio.org/features/2003/12/18\\_scheckt\\_dru/](http://news.minnesota.publicradio.org/features/2003/12/18_scheckt_dru/). Rodriguez was a Level III sex offender. *Id.* One psychological evaluation on Rodriguez conducted in the Department of Corrections by psychologist Dwight Close in 2001 reported that Rodriguez did not have a high likelihood to reoffend because of his age. *Id.* In 2003, Close reported that Rodriguez had demonstrated a willingness to use substantial force, including the use of a weapon, in order to regain compliance from his victims. *Id.* He said Rodriguez's willingness to use force was increasing. *Id.* Rodriguez scored a thirteen on the Minnesota Sex Offender Screening Tool—Revised (MnSOST-R), an actuarial sex offending risk assessment instrument, indicating a high likelihood of sexual recidivism. See Matthew Von Pinnon, *Missing College Student: Evaluator Sounded Warning*, THE FORUM (Fargo, N.D.), Dec. 12, 2003, <http://www.in-forum.com/specials/drusjodin/index.cfm?page=article&id=46072&section=collection>. The authors of the MnSOST-R indicate that individuals with scores of eight or higher are twice as likely to reoffend as the average offender. See *id.* Rodriguez was not referred for civil commitment. *Id.* As a result, Governor Pawlenty has requested that all Level III sex offenders be referred for civil commitment evaluations by the Attorney General's Office. See Tom Scheck, *Corrections Officials Change Sex Offender Review Policy*, MINN. PUB. RADIO NEWS, Dec. 4, 2003, [http://news.minnesota.publicradio.org/features/2003/12/04\\_scheckt\\_sexoffupdate/](http://news.minnesota.publicradio.org/features/2003/12/04_scheckt_sexoffupdate/).

15. See *infra* Part V.A.

16. See *infra* Part V.A.

standards and practices as well as characteristics of offenders between and within states.<sup>17</sup> This article will emphasize the problems and pitfalls related to the sex offender civil commitment reexamination procedures that take place once a sex offender is engaged in treatment.<sup>18</sup> Such problems with the reexamination process include the question of who performs the reexaminations, the treatment team or an independent forensic clinician (the latter often incorporated to reduce bias in the process). Furthermore, this reexamination process will be quite arduous for the examiner, because the evaluation is somewhat artificial in nature, given that the patient has not been living in the “real world” for many years. Many of these sex offenders have been incarcerated and subsequently housed in treatment programs, and it is possible that a given offender’s last offense was over twenty years ago. It is questioned whether the current risk is the same as it would have been at the time of the offense, especially considering age effects on recidivism.

Specific assessment problems consistently arise, such as difficulties in differentiating diagnoses. Specifically, paraphilias such as sexual sadism versus paraphilia not otherwise specified, as well as personality disorders, including antisocial personality disorder and psychopathy, will be differentiated. As for the assessment of psychopathy, a quandary may exist regarding test re-test and consistency of psychopathy as a construct over time.<sup>19</sup> An offender may have had psychopathic traits when he was a young offender, but may not exhibit such profound traits in his fifties and sixties due to alleged “offender burnout.”<sup>20</sup> The stability of psychopathy as a lifetime clinical construct may be in question given issues such as a given offender’s age or the gains made in treatment affecting behavioral propensities.

Of heightened concern is the question of how the patient is

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17. See *infra* Part IV.A.

18. See *infra* Part IV.B.

19. See Robert D. Hare, *Psychopaths and Their Nature: Implications for the Mental Health and Criminal Justice Systems*, in PSYCHOPATHY: ANTISOCIAL, CRIMINAL, AND VIOLENT BEHAVIOR 188, 189-95 (Theodore Millon et al. eds., 1998); see also Robert H. Bodholt et al., *Assessing Psychopathy in Adults: The Psychopathy Checklist-Revised and Screening Version*, in THE CLINICAL AND FORENSIC ASSESSMENT OF PSYCHOPATHY: A PRACTITIONER’S GUIDE 55, 69-70 (Carl B. Gacono ed., 2000).

20. Joel Paris, *A Biopsychosocial Model of Psychopathy*, in PSYCHOPATHY: ANTISOCIAL, CRIMINAL, AND VIOLENT BEHAVIOR 277, 282 (Theodore Millon et al. eds., 1998).

currently functioning regarding sexual thoughts, fantasies, and overall sexual deviance. This author advocates that polygraph testing should be implemented in order to specifically address sexual fantasies and distinguish prior offenses and current behaviors while in treatment.<sup>21</sup> Further, the use of plethysmography<sup>22</sup> in order to obtain a current snapshot of the patient's sexual arousal system should also be employed.<sup>23</sup>

Critically, this author advocates that given all of the uncertainties in sex offender risk assessment, clinicians performing reexaminations should pay particular attention to what has been referred to as the "dynamic duo"—the combination of sexual deviancy (as measured through patterns of offensive behaviors, paraphilia diagnoses, and plethysmography) and severe criminal personality-psychopathy.<sup>24</sup>

This article begins with a brief history of civil commitment legislation for sexually violent predators.<sup>25</sup> Specifically, this article will focus on the issues of mental abnormality (volition/impulsivity) and dangerousness in light of the United States Supreme Court cases *Foucha v. Louisiana*,<sup>26</sup> *Kansas v. Hendricks*,<sup>27</sup> and *Kansas v.*

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21. See *infra* Part VIII.

22. DENNIS M. DOREN, EVALUATING SEX OFFENDERS: A MANUAL FOR CIVIL COMMITMENTS AND BEYOND 46 (2002) (defining penile plethysmograph (PPG) as "a device designed to assess a subject's sexual interests through direct measurement of penile reactions while the person is watching and/or listening to a set of stimuli").

23. See *infra* Part VI.B.

24. The term "dynamic duo" was used by Dr. Dennis Doren at a conference of the Minnesota Association for the Treatment of Sexual Abusers in April of 2005. Dr. Dennis Doren, Address at the 9th Annual Conference of the Minnesota Chapter of the Association for the Treatment of Sexual Abusers (Apr. 2005). Various articles have asserted that sexual recidivism is correlated with the combination of psychopathy and sexual deviance. See, e.g., Martin Hildebrand et al., *Psychopathy and Sexual Deviance in Treated Rapists: Association with Sexual and Nonsexual Recidivism*, 16 SEXUAL ABUSE: J. RES. & TREATMENT 1 (2004); see also, Ralph C. Serin et al., *Psychopathy, Deviant Sexual Arousal, and Recidivism Among Sexual Offenders*, 16 J. INTERPERSONAL VIOLENCE 234 (2001) (sampling sixty-eight incarcerated sexual offenders to determine rates of recidivism, predictions of psychopathy and sexual deviance, and the utility of grouping offenders based on combinations psychopathy and sexual deviance).

25. See *infra* Part II.

26. 504 U.S. 71 (1992) (holding that a Louisiana statute allowing continued confinement of defendant acquitted on insanity grounds based upon his antisocial personality but without evidence of mental illness violated due process).

27. 521 U.S. 346 (1997) (holding that a Kansas statute's definition of "mental abnormality" satisfied substantive due process requirements, did not establish criminal proceedings, and did not create punitive confinement).

*Crane*.<sup>28</sup> Further, this article will provide a short discussion on the vague definitions used with legal statutes for “mental disorder,” “mental abnormality,” and “dangerousness,” and how these definitions affect the assessment of civil commitment respondents.<sup>29</sup>

Next, there will be a discussion concerning the field of risk assessment for sexual offenders, focusing on the debate over whether actuarial risk assessment instruments are “good enough” to use in civil commitment evaluations.<sup>30</sup> This debate is heightened during the initial civil commitment hearing process as compared to the reexamination process.<sup>31</sup> Further, sexual recidivism studies will be explained, and the differential risk factors for rapists and child molesters will be described.<sup>32</sup> Both static and dynamic risk assessment factors will be addressed.<sup>33</sup> The use of polygraph testing, plethysmography, and attention to sexually deviant fantasies will be covered in addition to the necessary assessment of psychopathy.<sup>34</sup> Finally, the debate over treatment efficacy and effects of age on sex offenders will be addressed.<sup>35</sup>

When considering the reexamination process for those sex offenders already civilly committed, this author argues that the goals of forensic assessment and treatment implementation are mutually exclusive. More specifically, there are likely to be a certain number of sexually violent offenders who are so dangerous that their release would lead to both public outcry and new victims. Although political forces must consider public fear, protection, and the potential dangerousness of these offenders, such forces must also justify and pay heed to the state institutions that are attempting to treat these individuals. These mutually exclusive goals may

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28. 534 U.S. 407 (2002) (holding that the Kansas statute did not require state to prove defendants total lack of behavioral control, but that the Constitution does not allow civil commitment without a lack of control determination).

29. See *infra* Part III.

30. See *infra* Part V.C.

31. See generally TERENCE W. CAMPBELL, ASSESSING SEX OFFENDERS: PROBLEMS AND PITFALLS 62-82 (2004); DOREN, *supra* note 22, at 103-43; Eric S. Janus & Paul E. Meehl, *Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings*, 3 PSYCHOL. PUB. POL'Y & L. 33 (1997) (recommending that sex offender commitment courts use a set of proposed methods to quantify judicial standards and findings about predictions in order to assess claims of legitimacy of the commitment procedure).

32. See *infra* Part V.B.

33. See *infra* Part V.E.

34. See *infra* Parts V.A., VI.B., & VIII.

35. See *infra* Parts V.A., V.B., & X.

eventually lead to other tragic cases.

## II. BRIEF HISTORY OF CIVIL COMMITMENT LEGISLATION

Numerous scholarly books and articles have addressed the history of civil commitment laws for sexual offenders.<sup>36</sup> The involuntary commitment of sexual offenders began in the 1930s when state legislatures first introduced procedures for the confinement and incapacitation of sexual offenders and sexually dangerous persons.<sup>37</sup> Michigan was the first state to pass such legislation in 1937.<sup>38</sup> Many of the laws required evidence of mental illnesses and personality disorders as well as a likelihood of sexual reoffending.<sup>39</sup> Many states labeled their laws as mentally disordered sex offender (MDSO) statutes.<sup>40</sup> These statutes implemented sex offender treatment programming because offenders were deemed to be high risk in nature and amenable to such treatment.<sup>41</sup> “From 1940 to 1992, the Supreme Court decided a number of cases addressing the constitutional parameters of involuntary psychiatric commitment.”<sup>42</sup> Some of these cases related to sexual offender statutes.<sup>43</sup> Many states included indefinite commitment duration with subsequent release initiated by the hospital superintendent and later approved by the committing court.<sup>44</sup>

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36. See JOHN Q. LAFOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEXUAL OFFENDERS 129-30 (2005); PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY (Bruce J. Winick & John Q. La Fond eds., 2003); John Kip Cornwell, *Protection and Treatment: The Permissible Civil Detention of Sexual Predators*, 53 WASH. & LEE L. REV. 1293, 1302-05 (1996) (discussing the procedural safeguards embodied in most states' sexual predator statutes); Eric Janus & Nancy Walbeck, *Sex Offender Commitments in Minnesota: Descriptive Study of Second Generation Commitments*, 18 BEHAV. SCI. & L. 343 (2000) (questioning the effectiveness, legality, and fairness of Minnesota's sex offender commitment program in the quest for sexual violence prevention); Jennifer Ann Smulin, *Protecting Life and Liberty: The Constitutionality and Necessity of Civil Commitment of Sexual Predators*, 52 DEPAUL L. REV. 1245 (2003) (concluding that Kansas's civil commitment law is both necessary to preserve public safety and constitutional as written).

37. See Cornwell, *supra* note 36, at 1296.

38. SAMUEL JAN BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW 739 & n.550 (3d ed. 1985) (citation omitted).

39. See Cornwell, *supra* note 36, at 1296-97.

40. RALPH REISNER ET AL., LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 617 (3d ed. 1999).

41. *Id.*

42. Cornwell, *supra* note 36, at 1303.

43. *Id.*

44. See REISNER ET AL., *supra* note 40, at 617-18.



By 1960, the majority of states had sexual predator legislation,<sup>45</sup> though these laws were rarely implemented. By the end of the 1980s, the number of states with sexual predator legislation had been cut in half due to concerns about the violation of constitutional rights and about whether such treatment programs were successful in diminishing sex offending once the offender is released.<sup>46</sup>

In the 1990s, notorious sexually violent criminal cases in various states led state legislatures to reinstate modern versions of these laws.<sup>47</sup> Enacted in 1990, the Washington Sexually Violent Predator Law was the first revised sexual predator law passed in the United States.<sup>48</sup> Approximately seventeen states have implemented the new civil commitment of sex offender statutes.<sup>49</sup>

There are many constitutional arguments (particularly involving the Double Jeopardy Clause<sup>50</sup> and the Ex Post Facto Clause<sup>51</sup>) embedded in recent United States Supreme Court cases<sup>52</sup> concerning civil commitment of sex offenders that reach beyond the scope of this article. However, the reader should be aware of some of these foundational arguments.

The Supreme Court upheld the constitutionality of civil commitment laws for sexual violent predators in *Kansas v. Hendricks*.<sup>53</sup> The Court determined that the Kansas Act neither imposed punishment nor had a punitive purpose.<sup>54</sup> The Court noted that the State's goal of creating a civil proceeding was founded upon its establishment of the Sexual Violent Predator Act within the Kansas Probate Code rather than the Criminal Code.<sup>55</sup> The Court essentially stated that civil commitment proceedings for

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45. Cornwell, *supra* note 36, at 1297.

46. *Id.*

47. *Id.* at 1298.

48. See John Q. LaFond, *Symposium: Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 375, 379 (1999).

49. See generally V. Woerner, Annotation, *Statutes Relating to Sexual Psychopaths*, 24 A.L.R. 2d 350 (2005).

50. U.S. CONST. amend. V.

51. U.S. CONST. art. I, § 9, cl. 3.

52. See, e.g., *Seling v. Young*, 531 U.S. 250 (2001); *Kansas v. Hendricks*, 521 U.S. 346 (1997).

53. *Hendricks*, 521 U.S. at 371.

54. *Id.* at 369. The Court disagreed with Hendricks' argument that he was being punished twice for the same crime. *Id.*

55. *Id.* at 361.

sex offenders are consistent with requirements of other civil commitment statutes in that they “narrow[] the class of persons eligible for confinement to those who are unable to control their dangerousness.”<sup>56</sup> The Court held that the Act does not violate the Ex Post Facto Clause.<sup>57</sup> The Court believed the Act was not retroactive, because it allows for the civil commitment of a sex offender only if that individual currently suffers from a “mental abnormality” or “personality disorder” and is dangerous to society.<sup>58</sup>

The *Hendricks* Court opined that the Act did not implicate either retribution or deterrence, the two primary objectives of the criminal system.<sup>59</sup> Specifically, the Act’s purpose was not retributive, because it did not “affix culpability” for prior sex offenses or make criminal conviction a prerequisite for commitment.<sup>60</sup> The Court noted that conditions at institutions for sex offenders in civil commitment were essentially the same as conditions for others who were involuntarily committed at mental hospitals.<sup>61</sup> In the end the Court concluded that civilly committed patients, whether sex offenders or mentally ill and dangerous offenders, were not being punished and that civil commitment at such institutions did not constitute punishment.<sup>62</sup>

Interestingly, the dissent in *Kansas v. Hendricks* focused on the fact that the Kansas Act did not provide Hendricks with any treatment until after his release from prison.<sup>63</sup> The dissent concluded that this suggested an effort by the State to inflict further punishment on him, as opposed to simply civilly committing him.<sup>64</sup>

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56. *Id.* at 358.

57. *Id.* at 370. The Ex Post Facto Clause “forbids the application of any new punitive measure to a crime already consummated.” *Id.* (citing *Cal. Dep’t. of Corr. v. Morales*, 514 U.S. 499 (1995)).

58. *Id.* at 371.

59. *Id.* at 361-62.

60. *Id.* at 362.

61. *Id.* at 363.

62. *Id.* The Court stated that if the State’s intention of protecting society from harm did constitute a punishment, then all civil commitment statutes would be considered punishment. *Id.* The Supreme Court also agreed that the Kansas Sexually Violent Predator Act’s definition of “mental abnormality” satisfied due process requirements because while freedom from restraint is a fundamental liberty protected by the Due Process Clause, this freedom is not absolute. *Id.* at 356-57, 371.

63. *Id.* at 373.

64. *Id.*

In another prominent case, *Seling v. Young*,<sup>65</sup> the United States Supreme Court upheld another civil commitment scheme for sexually violent offenders as being civil rather than criminal in nature.<sup>66</sup> The Court assumed that the Washington civil commitment law for sex offenders was civil in nature, because it provided offenders with the right to “adequate care and individualized treatment.”<sup>67</sup> The Court indicated that the Act was designed to incapacitate and treat violent sex offenders, while due process requires that the conditions and durations of confinement bear some relation to the purpose for which offenders are committed.<sup>68</sup>

More recently, the Supreme Court heard *Kansas v. Crane*,<sup>69</sup> in which the Court reviewed the Kansas Supreme Court’s application of the Kansas Act in *Hendricks*.<sup>70</sup> The Court in *Crane* held that the Constitution requires the State to prove that sexually violent offenders have serious difficulty in controlling their behaviors.<sup>71</sup> The Court noted that the *Hendricks* Court “had no occasion to consider whether confinement based solely on ‘emotional’ abnormality [as opposed to a combination of emotional and volitional abnormality] would be constitutional”<sup>72</sup> because *Hendricks* had suffered from pedophilia, a mental abnormality involving a “lack of control.”<sup>73</sup> The *Crane* Court similarly did not reach this question.<sup>74</sup> The Court held that although the Kansas Supreme Court was incorrect in requiring a finding of a total and complete lack of control, some volitional component was required for civil commitment to be constitutional.<sup>75</sup>

### III. LEGAL DEFINITIONS OF PSYCHIATRIC TERMS

It is important for the forensic evaluator to understand the psycho-legal issues in the pertinent case law, especially considering the issues of mental abnormality, volition, and dangerousness.

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65. 531 U.S. 250 (2001).

66. *Id.* at 260.

67. *Id.* at 264 (quoting WASH. REV. CODE § 71.09.080(2) (Supp. 2000)).

68. *Id.* at 265.

69. 534 U.S. 407 (2002).

70. *Id.* at 409.

71. *Id.* at 412-13.

72. *Id.* at 415.

73. *Id.* at 414.

74. *Id.* at 415.

75. *Id.* at 412.

Interestingly, the focus in recent civil commitment cases, most notably in *Crane*, has been on the issue of volitional incapacity and mental abnormality.<sup>76</sup> In *Crane*, the Court looked to its decision in *Hendricks* to define the parameters of mental illness that would lead to civil commitment. Leroy Hendricks suffered from a psychiatric sexual disorder, pedophilia, and had a history of sexually assaulting young boys and girls.<sup>77</sup> Attempts were made to treat Hendricks for sexual deviance over the years and when he was released, he continued offending and refused to participate in treatment programming.<sup>78</sup> Hendricks even said that he could not “control the urge” to molest children.<sup>79</sup>

*Crane*’s sex offending history included a history of exhibitionism, attempted sexual misconduct, and a diagnosis of antisocial personality disorder.<sup>80</sup> *Crane* questioned whether it was constitutionally permissible to civilly commit him as a sexual predator without proving he was unable to control his sexually dangerous behavior.<sup>81</sup> He argued that the Supreme Court’s decision in *Hendricks* “read a volitional impairment requirement into the [Kansas] Act as a condition of its constitutionality”<sup>82</sup> and that there needs to be a volitional impairment when the person’s mental disorder is a personality disorder rather than a mental abnormality.<sup>83</sup>

In *Crane*, the Supreme Court cited *Hendricks* as determining that the statute’s “requirement of a ‘mental abnormality’ or

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76. *See id.* at 411.

77. *Id.* at 410.

78. *Kansas v. Hendricks*, 521 U.S. 346, 353-55 (1997).

79. *Id.* at 355. Hendricks was evaluated by a psychologist who indicated that pedophilia qualified as a mental abnormality within the statute’s definition. *Id.* at 356 n.2.

80. *Crane*, 534 U.S. at 411.

81. *In re Crane*, 7 P.3d 285, 287 (Kan. 2000). *Crane* argued that the trial court erred in ruling that the Supreme Court’s holding does not require proof of volitional impairment that prevents him from controlling his sexually deviant behavior, when the impairment is a personality disorder. *Id.*

82. *Id.* at 290.

83. *Id.* The Kansas Legislature stated that volitional capacity is “the capacity to exercise choice or will” and if this choice is affected, one could have problems controlling his/her behavior. *Id.* at 289. Emotional capacity was also identified as an “alternative faculty that could be affected by the condition.” *Id.* The Kansas Supreme Court reasoned that defining emotional capacity in addition to volitional capacity regarding mental abnormality is to include a source of bad behavior in addition to inability to control one’s behavior. *Id.* The Legislature included personality disorder as an alternative to mental abnormality, but did not specifically define personality disorder. *Id.*

'personality disorder' is consistent with the requirements of . . . other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness."<sup>84</sup> The Court distinguished Hendricks from other dangerous persons who are traditionally handled exclusively through criminal proceedings because he had a mental abnormality leading to future sexual dangerousness.<sup>85</sup>

As can be seen in these recent cases, the psycho-legal issues pertaining to the definitions of mental abnormality, volition, emotional abnormality, and personality disorder are quite vague and often lead to serious confusion. The debate concerning how to deal with various types of offenders through civil or criminal proceedings has plagued mental health professionals, attorneys, and psycho-legal academicians.

Notably, the *Crane* Court offered, in some ways, a contradictory opinion to a prior Supreme Court decision in *Foucha v. Louisiana*.<sup>86</sup> In *Foucha*, the Court held that a person acquitted by reason of insanity may only be held indefinitely if he is both mentally ill and dangerous.<sup>87</sup> Continuing to confine an insanity acquittee to a mental hospital on the basis of dangerousness alone, after he is no longer mentally ill, violates the Due Process Clause.<sup>88</sup>

Some scholars contend that the *Foucha* decision holds that dangerous or predatory sexual offenders cannot all be civilly committed to mental institutions.<sup>89</sup> As one scholar explained, "*Foucha* challenges sexual psychopath and psychopathic personality statutes, such as those in Washington and Minnesota, because the Court has now held that a person cannot be committed based

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84. *Crane*, 534 U.S. at 410 (quoting *Hendricks*, 521 U.S. at 358).

85. *Id.* The Court noted that Hendricks suffered from pedophilia, which the psychiatric profession itself classifies as a serious mental disorder and that Hendricks conceded that he could not control the urge to molest children. *Id.*

86. 504 U.S. 71 (1992).

87. *Id.* at 80 (citing *Jones v. U.S.*, 463 U.S. 354, 362 (1983)).

88. *See id.* at 86. *Foucha's* charges included aggravated burglary and illegal discharge of a firearm. *Id.* at 73. He was found insane and hospitalized. *Id.* at 74. A psychiatrist found that he suffered from a substance-induced psychosis for which he was treated for as well as antisocial personality disorder. *Id.* at 75. Anti-psychotic medications cleared up his psychosis and he continued to suffer from antisocial personality disorder. *Id.* Antisocial personality disorder is less amenable to change through treatment than a psychiatric disorder such as substance-induced psychosis. *Id.*

89. *See* Rudolph Alexander, Jr., *The Civil Commitment of Sex Offenders in Light of Foucha v. Louisiana*, 20 CRIM. JUST. & BEHAV. 371, 372 (1993).

solely on dangerousness.”<sup>90</sup> Civil commitment requirements outlined in *Foucha* require both a finding of mental illness and dangerousness.<sup>91</sup> An individual who has antisocial personality disorder and is dangerous cannot be civilly committed because his personality disorder is not a mental illness.<sup>92</sup> In contrast, *Crane* suggests that a sex offender can be committed indefinitely based on volitional impairments stemming from a personality disorder, which causes the individual to be dangerous.<sup>93</sup>

These opinions may suggest that a volitional requirement is part of a constitutional formula for involuntary civil commitment.<sup>94</sup> Because risk assessments for initial civil commitment hearings and later reexaminations consider diagnoses such as paraphilias and antisocial personality disorder, there is quite a concern about their association to volitional impairment and inability to control one’s behavior.<sup>95</sup> Further, these cases contain vague language regarding

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90. *Id.* at 377.

91. *Id.* at 377-78.

92. *Id.* at 378.

93. *See* *Kansas v. Crane*, 534 U.S. 407 (2002).

94. Stephen R. McCallister, *Sex Offenders and Mental Illness: A Lesson in Federalism and the Separation of Powers*, 4 PSYCHOL. PUB. POL’Y & L. 268, 294 (1998).

95. Clinicians are challenged in offering opinions that discuss the etiology of the sexual behaviors/offending. It is quite difficult to definitively indicate what diagnosis essentially causes one’s offending. For example, an offender may suffer from a sexual deviance disorder such as paraphilia not otherwise specified, with an affinity to rape, in addition to antisocial personality disorder. It may be difficult, if not impossible, for a forensic examiner to offer an opinion as to the etiological factors of the rapist’s offending. In *Crane*, the Court agreed that the *Hendricks* opinion set forth no requirement of total or complete lack of control. *Crane*, 534 U.S. at 411. The *Crane* Court noted that *Hendricks* “referred to the Kansas Act as requiring ‘a mental abnormality’ or ‘personality disorder’ that makes it ‘difficult, if not impossible, for the . . . person to control his dangerous behavior.’” *Id.* at 411 (quoting *Hendricks*, 521 U.S. at 358). The *Crane* Court stated that “[t]he word ‘difficult’ indicates that the lack of control to which this Court referred was not absolute.” *Id.* The Court stated that “most severely ill people—even those commonly termed ‘psychopaths’—retain some ability to control their behavior.” *Id.* at 412. The Court acknowledged that it did not give “the phrase ‘lack of control’ a particularly narrow or technical meaning” in the *Hendricks* decision. *Id.* at 413. Further, the Court stated that in cases where lack of control was an issue, “‘inability to control behavior’ will not be demonstrable with mathematical precision.” *Id.* The *Crane* Court further stated that

when viewed in light of such features of the case [such as] psychiatric diagnosis, and the severity of the mental abnormality itself, [these factors] must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.

what ‘inability to control’ and ‘volitional impairments’ mean.<sup>96</sup> Experts are always challenged in assessing sex offenders’ volitional impairments through psychological or psychiatric terminology, assessment instruments, and statutory language.

This author contends that a sexual offender can be civilly committed based on either a psychiatric disorder such as pedophilia and/or a personality disorder such as antisocial personality disorder. Simply, an offender who is dangerous based on emotional or volitional impairments due to paraphilias and/or personality disorders can be committed and an expert may not be able to completely distinguish the sole etiology of the sexual crimes.

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*Id.* The Court recognized that *Hendricks* “limited its discussion to volitional disabilities” but “did not draw a clear distinction between the purely ‘emotional’ sexually related mental abnormality and the ‘volitional’ one.” *Id.* at 415. The *Crane* Court acknowledged a fine line between “an irresistible impulse and an impulse not resisted,” thereby allowing considerable overlap between a defective understanding of a behavior and an inability to control behavior. *Id.* at 412 (quoting AM. PSYCHIATRIC ASS’N, STATEMENT ON THE INSANITY DEFENSE 11 (1982), reprinted in G. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 200 (2d ed. 1997)). The Court finally stated that when considering civil commitment, it did not ordinarily differentiate a volitional, cognitive, and emotional appearance for constitutional purposes. *Id.* at 415.

96. See Cynthia Calkins Mercado et al., *Evaluating Sex Offenders Under Sexually Violent Predator Laws: How Might Mental Health Professionals Conceptualize the Notion of Volitional Impairment?* 10 AGGRESSION & VIOLENT BEHAV. 289 (2005) (discussing volition and dangerousness); Georgia Smith Hamilton, Case Note, *The Blurry Line Between “Mad” and “Bad”: Is “Lack-of-Control” A Workable Standard for Sexually Violent Predators*, 36 U. RICH. L. REV. 481 (2002). A mental illness standard based on volitional control proves unworkable in a legal context and the standard incorporates no legal construct that would enable courts to make normative determinations regarding an offender’s ability to control his behavior. See Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOL. PUB. POL’Y & L. 534 (1995). Most sexual offenders are not mentally ill in the sense that would justify mental hospitalization or imposition of various forms of mental health treatment. *Id.* at 591; see also THE EVOLUTION OF MENTAL HEALTH LAW 129 (Lynda E. Frost & Richard J. Bonnie eds., 2001); Rebecca Kesler, *Running in Circles: Defining Mental Illness and Dangerousness in the Wake of Kansas v. Hendricks*, 44 WAYNE L. REV. 1871 (1999); John Q. LaFond, *The Future of Involuntary Civil Commitment in the U.S.A. after Kansas v. Hendricks*, 18 BEHAV. SCI. & L. 153, 164 (2000); Karol Lucken & Jessica Latina, *Sex Offender Civil Commitment Laws: Medicalizing Deviant Sexual Behavior*, 3 BARRY L. REV. 15 (2002); Robert F. Schopp & Barbara J. Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 BEHAV. SCI. & L. 437-58 (1995); Brian J. Pollock, Note, *Kansas v. Hendricks: A Workable Standard for “Mental Illness” or a Push Down the Slippery Slope Toward State Abuse of Civil Commitment*, 40 ARIZ. L. REV. 319 (1998).

#### IV. CURRENT STATE CIVIL COMMITMENT STANDARDS, PRACTICES, AND CHARACTERISTICS

##### A. *Standards and Practices*

Sexual violent predator (SVP) evaluations typically involve the consideration of the following three questions.<sup>97</sup> First, has the offender been convicted of a sexually violent offense?<sup>98</sup> Second, does the offender exhibit a diagnosable mental disorder that predisposes him to committing violent sexual acts?<sup>99</sup> And finally, if the offender is not committed and confined, is he substantially likely to sexually reoffend as the result of his diagnosed mental disorder?<sup>100</sup> The forensic psychologist is quite involved in providing data concerning these three questions.

The civil commitment process involves pre-commitment phases. Often the department of corrections notifies relevant prosecutors of impending prison releases of all potentially eligible civilly-committed sex offenders. In some states, such as Minnesota and North Dakota, department of corrections personnel make recommendations pursuant to a probable cause hearing regarding whether a particular offender should be evaluated pursuant to a commitment hearing.<sup>101</sup> Under most circumstances, the ultimate decision to pursue commitment is made by prosecutors and not by evaluators or other agencies.<sup>102</sup> Once a judge determines that there is probable cause, the offender can choose an evaluator of his choice in addition to the other evaluators working the case.<sup>103</sup>

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97. CAMPBELL, *supra* note 31, at 5.

98. *Id.*

99. *Id.*

100. *Id.*

101. MINN. STAT. § 253B.185, subd. 1(b) (2004); N.D. CENT. CODE § 25-03.3-03.1 (2003).

102. DOREN, *supra* note 22, at 5.

103. *See* N.D. CENT. CODE ch. 25-03.3. In North Dakota, there is no formal psychological assessment for probable cause, although the State reviews prison and treatment personnel recommendations. Interview with Rosalie Etherington, Clinical Psychologist, N.D. State Hospital (Aug. 29, 2004). Two experts must agree that the individual should be civilly committed at the commitment hearing. *Id.* If one evaluator agrees and the other disagrees, the respondent cannot be committed. *Id.* In North Dakota, the examinations are conducted by two evaluating psychologists who function separate from the treatment team. *Id.* Initially, after the commitment law was passed in North Dakota, a psychologist was participating in both treatment and evaluation practices. *Id.* After the program reached seven patients, there was a separation between treatment and evaluating



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Once an individual is civilly committed as a sexually violent offender, he is entitled to post-commitment reexaminations, typically administered annually.<sup>104</sup> Often laws fail to specify who will conduct these subsequent assessments.<sup>105</sup>

It is critical that an unbiased forensic evaluator, functioning as an employee within the state system or as a private practitioner in the community, conduct the reexamination process. This examiner should consult with the treatment team and the governing body should consider reports prepared by both the examiner and the treatment team.<sup>106</sup>

As previously mentioned, states have similar commitment criteria that incorporate definitions of both mental illness and

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psychologists. *Id.* In Iowa, if the court finds probable cause “the court shall direct that the respondent be transferred to an appropriate secure facility for an evaluation as to whether the respondent is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination.” IOWA CODE § 229A.5(1) (2003). The respondent has the right for an independent evaluation. Interview with Jason Smith, Director, Civil Commitment Unit for Sex Offenders, Iowa (Apr. 5, 2005). The State of Washington includes a review committee to examine every sex offender prior to release from confinement. Interview with Paul Spizman, Clinical Psychologist, Special Commitment Center, Wash. (Aug. 29, 2004). The committee includes members representing several state agencies and is chaired by the department of corrections. *Id.* It thoroughly reviews the sex offender’s history and involvement in progress in treatment as well as the offender’s mental health status and other information. *Id.* The committee assigns a risk level for the offender, including Level I as the lowest and Level III as the highest. *Id.* If the End of Sentence Review Committee finds an individual who potentially meets the legal definition of a sexually violent predator, the individual is referred for possible civil commitment to a commitment center. *Id.* Individuals referred for civil commitment are detained at the Special Commitment Center (SCC) pending an investigation by the prosecutor in a probable cause hearing. *See* WASH. REV. CODE § 71.09.250 (2005). If the judge agrees that there is probable cause that the individual meets the strict legal requirements for civil commitment, the court will order the person detained at SCC. *See id.* § 71.09.040. If not, the individual is released. Individuals detained after a probable cause hearing undergo an in depth evaluation with the court. *See id.* This evaluation is conducted by a forensic expert who is experienced in evaluating sex offenders and their risk for reoffense. *See id.* The civil commitment trial may be held before a judge or jury and is paneled by the court of commitment. *Id.* § 71.09.060. The court or jury must find beyond reasonable doubt that the individual meets the definition of a sexually violent predator. *Id.* If so, he is committed to treatment indefinitely. *Id.*

104. *E.g.*, WASH. REV. CODE § 71.09.070.

105. DOREN, *supra* note 22, at 7.

106. Examiners must discuss treatment issues including identification and management of dynamic risk factors. Interview with Paul Spizman, *supra* note 103. Examiners must ask whether management plans are in place, and whether offenders are able to implement them. *Id.*

dangerousness.<sup>107</sup> Some states, however, have different standards to determine the likelihood of future dangerousness.<sup>108</sup> States also differ on the burden of proof they require for findings of civil commitment for sex offenders. For example, Arizona,<sup>109</sup> Illinois,<sup>110</sup>

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107. For example, the State of Washington defines a sexually violent predator as “any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” WASH. REV. CODE § 71.09.020(16). In Iowa, “[m]ental abnormality” means a congenital or acquired condition affecting the emotional or volitional capacity of a person and predisposing that person to commit sexually violent offenses to a degree which would constitute a menace to the health and safety of others.” IOWA CODE § 229A.2. North Dakota defines a “[s]exually dangerous individual” [as] an individual who is shown to have engaged in sexually predatory conduct and who has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes that individual likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others. It is a rebuttable presumption that sexually predatory conduct creates a danger to the physical or mental health or safety of the victim of the conduct. For these purposes, mental retardation is not a sexual disorder, personality disorder, or other mental disorder or dysfunction.

N.D. CENT. CODE § 25-03.3-01(8). In Wisconsin, mental disorder is defined as “a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence.” WIS. STAT. § 980.01(2) (2004). Interestingly, in Minnesota, criteria of sexually dangerous persons and sexual psychopathic personalities have survived constitutional debate. A sexual psychopathic personality is defined as

the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any of these conditions, which render the person irresponsible for personal conduct with respect to sexual matters, if the person has evidenced, by a habitual course of misconduct in sexual matters, an utter lack of power to control the person’s sexual impulses and, as a result, is dangerous to other persons.

MINN. STAT. § 253B.02, subd. 18b (2004). Further, a sexually dangerous person is defined as “a person who: (1) has engaged in a course of harmful sexual conduct . . . (2) has manifested a sexual, personality, or other mental disorder or dysfunction; and (3) as a result, is likely to engage in acts of harmful sexual conduct . . .” *Id.* § 253B.02, subd. 18c(a)(1)-(3).

108. For example, in Iowa “[l]ikely to engage in predatory acts of sexual violence” means that the person more likely than not will engage in acts of a sexually violent nature.” IOWA CODE § 229A.2(4). In Washington, “likely” apparently means “likely to engage in predatory acts of sexual violence if not confined in a secured facility.” WASH. REV. CODE § 71.09.020(16). In Wisconsin, “[l]ikely” means more likely than not.” WIS. STAT. § 980.01(1m).

109. ARIZ. REV. STAT. ANN. § 36-3707(A) (2003).

110. 725 ILL. COMP. STAT. 207/35(d) (2002).

Kansas,<sup>111</sup> Massachusetts,<sup>112</sup> and California<sup>113</sup> require proof beyond a reasonable doubt. Florida,<sup>114</sup> Minnesota,<sup>115</sup> New Jersey,<sup>116</sup> and North Dakota<sup>117</sup> require clear and convincing evidence. States have also implemented various programs for treatment, but most states focus on relapse prevention, risk management techniques, and cognitive restructuring.<sup>118</sup> Actually, most sex offender treatment programs have several phases corresponding to a patient's security level and privileges.<sup>119</sup>

Most sex offender programs have never successfully released anyone into the community.<sup>120</sup> In California, the first offender conditionally released from Atascadero State Hospital was required to live in a trailer on hospital grounds for one year.<sup>121</sup> In Minnesota, only one individual has successfully completed all phases of treatment programming, and once released, failed on conditional release and was subsequently returned to treatment.<sup>122</sup>

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111. KAN. STAT. ANN. § 59-29a19(c) (Supp. 2004).

112. MASS. GEN. LAWS ANN. ch. 123A, § 14(d) (2003).

113. CAL. WELF. & INST. CODE § 6604 (West 1998).

114. FLA. STAT. § 394.918(4) (2002).

115. MINN. STAT. § 253B.18, subd. 1(a).

116. N.J. STAT. ANN. § 30:4-27.32(a) (West Supp. 1999).

117. N.D. CENT. CODE § 25-03.3-13.

118. Interview with Rosalie Etherington, *supra* note 103; Interview with Jason Smith, *supra* note 103; Interview with Paul Spizman, *supra* note 103.

119. Civil commitment programs typically have five stages or phases. Interview with Jason Smith, *supra* note 103. During Phase I, the patient is essentially locked down in a treatment unit. *Id.* Phase II involves the patient having rights to walk outside on campus within a secured setting. *Id.* Phase III may include patients' freedom of supervised visits in the community with staff. *Id.* During Phase IV, patients may be allowed conditional release and community visits such as home passes for the weekend. *Id.* Phase V will often include community living and placements. *Id.* Transitional release includes on-campus living in an apartment setting that may or may not be surrounded by secured perimeters. *Id.* The individual may ultimately obtain privileges to live in a community apartment setting or halfway house. *Id.*

120. See Eric S. Janus, *Minnesota's Sex Offender Commitment Program: Would an Empirically-Based Prevention Policy Be More Effective?*, 29 WM. MITCHELL L. REV. 1083, 1090 (2003).

121. Alan Gathright, *Judge Declares Molester Free to Leave, Brian DeVries Ends 1-year Monitoring Program at Soledad*, S.F. CHRON., Sept. 14, 2004, at A1.

122. Janus, *supra* note 120, at 1090. Minnesota's Department of State Operated Services is implementing a Community Preparation Services, an on-grounds halfway house setting for offenders to reside in and have full on-grounds privileges, and opportunities to have community work privileges. These offenders are required to wear electronic monitoring ankle bracelets to track their locations. Interview with Scott J. Schaffer, Social Work Specialist, Minnesota Sex Offender Program (May 12, 2005). In Iowa, the halfway house on campus is protected by

In the assessment/reexamination process, members of the treatment team can often be subconsciously biased because of their desire to see patients succeed and move out of the hospital. Some of those staff members may not be forensic psychological experts, but rather treatment therapists who are experienced in providing group and individual therapy for sex offenders. The national reexamination trend includes a separation of the treatment team evaluators from neutral examiners. In Minnesota, examinations were once conducted primarily by a treatment team staff; however, a separate forensic examination unit now provides risk appraisals for the treatment team. Once the patient petitions for movement and increased privileges, a special review board (SRB) considers both the forensic unit's risk appraisal and the treatment team's evaluation and recommendations. If denied by the SRB, the patient may appeal to the Judicial Appeals Panel (formerly Supreme Court Appeals Panel).

An issue of concern is the standard or threshold that a treatment team should use to determine whether patients should be conditionally released or granted greater privileges. For example, Iowa's evaluators ask whether "the mental abnormality [has] been mitigated enough by treatment so the person no longer meets the legal threshold of not more likely to reoffend."<sup>123</sup> In North Dakota, the reexamination process includes a comparison of progress in treatment as well as the age of the patient and other factors pursuant to dangerousness.<sup>124</sup> Some of these factors include whether the patient exhibits characteristics demonstrating sexual deviance, sexual preoccupation, aggression, sadistic and antisocial behaviors, as well as interpersonal deficits.<sup>125</sup> In Washington, examiners consider whether the offender is more likely to reoffend

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barbed wire fencing. Interview with Jason Smith, *supra* note 103. Only one offender has been successful in residing in the on-campus halfway house and moving to a halfway house in the community. *Id.* The offender violated conditional release by engaging in inappropriate behavior in a public restroom. *Id.* In Washington State, the Secure Community Transition Facility is a halfway house setting on the island where the commitment center is located. Interview with Paul Spizman, *supra* note 103. At least one offender who has completed the Transition Facility Program has been placed in a community family living situation. *Id.*

123. Interview with Jason Smith, *supra* note 103.

124. Interview with Rosalie Etherington, *supra* note 103.

125. *Id.* If the individual barely met the commitment threshold, then the treatment progress required is not as great as for a person who easily met the civil commitment threshold. *Id.*

and meets the definition of SVP, whether it is in the offender's best interest to be placed in a less restrictive environment, and whether there are conditions and risk management services in place to adequately protect the community.<sup>126</sup> In Kansas, if during an annual review the court finds that probable cause exists indicating that the patient's mental abnormality or personality disorder has changed to the extent that the State can safely release the person, the court will schedule a hearing in which the State has to prove beyond a reasonable doubt that the patient continues to meet the statutory definition of sexually violent predator.<sup>127</sup>

Other miscellaneous issues, such as the use of polygraph testing and plethysmography, are often considered within treatment programs and evaluation units. In order to obtain a more thorough snapshot of the patient's current sexual deviance status, polygraph testing and plethysmography could be employed.<sup>128</sup> However, some evaluators believe that polygraph and phallometric testing are unreliable and invalid, and thus should be prohibited because such data may lead to false positives, suggesting that an offender will reoffend when he ultimately does not.<sup>129</sup> Unreliable data suggesting sexual deviancy may impact decisions concerning the increase of privileges, freedom, and release of these individuals.<sup>130</sup> Treatment teams may wish to have polygraph and phallometric information to guide treatment programming; however, the neutral forensic examiner evaluating risk will ideally have access to that information and will likely utilize it when assessing risk.

Most initial commitment evaluations and reexaminations involve the assessment of psychopathy. Many older offenders have not been assessed for psychopathy, because the Hare Psychopathy Checklist Revised (PCL-R),<sup>131</sup> the current standard instrument for

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126. Interview with Paul Spizman, *supra* note 103.

127. KAN. STAT. ANN. § 59-29a08 (1995).

128. DOREN, *supra* note 22, at 26-47; *see also* CAMPBELL, *supra* note 31, at 74-75.

129. *See generally* Maureen E. Rice et al., *Sexual Recidivism Among Child Molesters Released From a Maximum Security Psychiatric Institution*, 59 J. CONSULTING PSYCHOL. 381, 385 (1991) (indicating that polygraph and phallometric testing may lead to false positives).

130. Interview with Rosalie Etherington, *supra* note 103. In Washington, the evaluators consider polygraphs and phallometric data to assess the offenders' sexual deviance and honesty. *See* State v. Riles, 957 P.2d 655 (Wash. 1998) (approving the use of both polygraph and plethysmograph testing as conditions of community placement for convicted sex offenders).

131. ROBERT D. HARE, HARE PSYCHOPATHY CHECKLIST-REVISED (Multi-Health Sys.

such assessment, did not exist at the time of their commitments.<sup>132</sup> The reexamination process should consider psychopathy assessment in two stages for older offenders, a retrospective assessment of psychopathy by file review concerning the past status of the offender, and a more current assessment of psychopathy via interview and record review. Nonetheless, most, if not all new commitments entail the use of the PCL-R.

### B. *Characteristics*

Researchers have addressed the common characteristics among those civilly committed as sexually violent predators.<sup>133</sup> Since civil commitment laws are based on committing a small, but extremely dangerous group of sexual offenders who suffer from psychiatric disorders and/or personality disorders, it is not a surprise that these offenders have many similarities from state to state. Civilly committed sex offenders are more likely to display risk factors for sex offense recidivism than those who do not meet the criteria.<sup>134</sup> They score significantly higher in actuarial risk assessment instruments and have higher frequencies of paraphilia diagnoses and antisocial personality disorder.<sup>135</sup>

## V. WHAT DO WE KNOW ABOUT SEX OFFENDER RISK ASSESSMENT?

### A. *Methodological Choices in Risk Assessment*

The risk assessment process at initial civil commitment hearings is both similar to and different from the reexamination process. The risk assessments for civil commitment hearings are

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Inc., ed., 2d ed. 1991).

132. The PCL-R was developed in 1985 and was formally published in 1991. See Robert D. Hare, *Psychopaths and Their Nature: Implications for the Mental Health and Criminal Justice Systems*, in *PSYCHOPATHY: ANTISOCIAL, CRIMINAL, AND VIOLENT BEHAVIOR* 188, 192 (Theodore Millon et al. eds., 1998).

133. See, e.g., Judith V. Becker et al., *Characteristics of Individuals Petitioned for Civil Commitment*, 47 *INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY* 185 (2003); Jill S. Levenson, *Sexual Predator Civil Commitment: A Comparison of Selected and Released Offenders*, 48 *INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY* 638 (2004).

134. See Levenson, *supra* note 133, at 643-44.

135. *Id.* Recent scholars have studied the characteristics of civil commitment respondents and found similar results. *Id.*; see also Becker et al., *supra* note 133, at 185; Eric S. Janus & Nancy H. Walbeck, *Sex Offender Commitments in Minnesota: A Descriptive Study of Second Generations Commitments*, 18 *BEHAV. SCI. & L.* 343 (2000).

subjected to vigorous direct and cross-examination. Once an individual is civilly committed, the adversary proceedings are in some ways diminished over time. There are different parties involved, such as the examiner, treatment team, attorneys, and a review board. Despite these differences, the assessment of risk and treatment progress remain the main objectives at any proceeding.

Forensic evaluators should employ a structured approach when evaluating individuals for initial civil commitment and during the reexamination process. The evaluator must examine the offender's background information and detail specific prior instances of sexual violence. Using clinical interviews and collateral sources, the evaluator must search for repetitive themes existing throughout any offenses committed by the offender.

Considerations related to risk assessment include dispositional factors such as demographic statistics including age, personality factors including anger, impulsivity, and psychopathic traits, and cognitive traits, including low IQ.<sup>136</sup> Historical data include social history of abuse, work and educational history, as well as mental hospitalization history and treatment compliance.<sup>137</sup> Other historical data may include history of offending, arrests and incarcerations, self reports of violence, and victim availability.<sup>138</sup> Other potential factors include perceived stress, poor social support networks, and weapons use history.<sup>139</sup> Clinical risk factors may include psychiatric diagnosis, violent fantasies, severity of symptoms, personality disorders, and substance abuse.<sup>140</sup>

Forensic clinicians should utilize actuarial instruments when conducting risk assessments, especially those instruments with solid empirical support on factors such as predictive validity. The extent to which evaluations may vary from the data provided by instruments will depend on factors such as the examiner's perception and the scale's quality and empirical strength.<sup>141</sup> Adjustments of actuarial predictions are unwarranted when possible mitigating factors are considered and rejected or are

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136. Ronnie B. Harmon et al., *Sex and Violence in a Forensic Population of Obsessional Harassers*, 4 PSYCHOL. PUB. POL'Y & L. 236, 239 (1998).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. R. KARL HANSON, RISK ASSESSMENT 3-6 (2000), available at <http://www.atsa.com/pdfs/InfoPack-Risk.pdf>.

already incorporated into the scale.<sup>142</sup>

There are various approaches and styles of risk assessment.<sup>143</sup> These approaches include both unguided clinical judgment and guided clinical judgment. The latter addresses empirically validated risk factors and arrives at recidivism estimates based on an offender's status on these factors.<sup>144</sup> In addition, one can employ clinical judgment based on an anamnestic approach,<sup>145</sup> and can also implement a clinically/empirically adjusted actuarial

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142. *Id.* at 6.

143. "[T]he choice of data categories is driven by empirical research that demonstrates which groups of individuals, because of specific characteristics that determine group membership, are at relatively higher risk." GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 284, 284 (The Guilford Press 2d ed. 1998) (1997). The ideal actuarial instrument involves a combination of these variables to create a risk prediction. *Id.*

144. See R. Karl Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 *J. CONSULTING & CLINICAL PSYCHOL.* 348 (1998). The authors assert that on average, the accuracy of an expert clinical opinion of sexual recidivism is  $r = 0.10$  (slightly above chance). *Id.* at 356; see also CAMPBELL, *supra* note 31. Campbell argues against clinical judgment and clinical experience due to the expert's preconceived stereotypical expectations. *Id.* at 22-44. He also cites the elasticity of clinical judgment allowing it to stretch to conform to the assumptions and expectations of the evaluator. *Id.* at 23. The examiner will read numerous volumes of documents placing the offender in a negative light before the examiner actually evaluates the offender. *Id.* at 24. He is also concerned with the diagnostic impressions of mental health professionals, which lead them to selectively recall their interviews. After reaching a diagnosis, the evaluator may recall the patient exhibiting some symptom if that symptom is consistent with his or her diagnostic impression. *Id.* at 25. "Evaluators frequently ask themselves why an offender may reoffend" and assume why some condition exists. *Id.* at 26. When evaluators assume the offender will reoffend, they overlook an alternative hypothesis that the overall risk is not elevated. *Id.* at 26-27. Evaluators may engage in one-sided questions assuming information about the patient's behaviors, and one-sided questions provide inevitable answers that are consistent with the question. *Id.* at 27. Mental health professionals often reach judgments early in the interviews and stick with those impressions even when confronted with contrary evidence. *Id.* at 28-29. Campbell cites attribution bias examining how we seem to explain people's behavior. *Id.* at 29-30. Examiners are biased toward explaining the behavior of others in terms of their dispositions and personality characteristics. This may lead to an attribution bias in SVP evaluations leading to biased outcomes. Reviewing documents detailing an offender's history encourages the evaluator to overestimate the influence of personality factors. *Id.* at 30. Examiners often disregard positive resources of the patient and overestimate the prevalence of psychopathology. *Id.* at 31.

145. See generally MELTON, *supra* note 143, at 284 (defining anamnestic as depending upon the identification of factors that have distinguished a person's aggressive behavior).



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approach.<sup>146</sup> Finally, a purely actuarial approach can be implemented for risk assessment purposes.<sup>147</sup>

This author advocates that forensic examiners consider primarily a combination of research guided clinical judgment and actuarial assessment,<sup>148</sup> while focusing on offending patterns<sup>149</sup> and specific population base rates.<sup>150</sup> It is pertinent for examiners to compare the background of the individual who is being examined to the normative group data from the actuarial instruments, as well as to the meta-analyses and various studies examining sexual recidivism. Examiners should be prudent in considering whether other factors could influence the score provided by actuarial scales. While actuarial scales consider static factors that are unchangeable based on the offender's history, the examiner must consider dynamic variables.<sup>151</sup> The examiner must also be fluent in the research of sexual recidivism. He or she must know various characteristics that are related to sexual reoffending for both child

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146. See generally DOREN, *supra* note 22, at 161-77 (discussing types of proper clinical adjustments and when they are appropriate).

147. See MELTON, *supra* note 143, at 284. Actuarial prediction identifies predictive variables which are each assigned weight. *Id.* Campbell critiques guided and clinical risk assessments, which include clinical judgments with additional consideration of empirically related sexual recidivism variables. CAMPBELL, *supra* note 31, at 45. Campbell questions Hanson and Bussiere's 1998 study and critiques the data from that study, posing the question of how to interpret the data when conducting a risk assessment. *Id.* at 49-55. For example, does "never married" include common-law relationships? *Id.* at 53. He cites Hanson and Bussiere's recommendation against using any of their variables for assessing recidivism risk and quotes their statement that the predictive accuracy of most variables were small and no variables sufficiently justified their use isolation. *Id.* at 54. It is uncertain how to combine these predictor variables because their intercorrelations are unknown. *Id.* No single predictor variable can be used to say "greater or lesser risk." *Id.* at 55. Campbell notes that many examiners do not obey Hanson's advice; rather, they simply apply the variables as they see fit and may sum the variables and their correlations. *Id.* at 56-57. One evaluator may believe certain Hanson variables are related to a sex offender's risk while another evaluator may think that other variables explain the offender's risk. *Id.* at 57. Ultimately, Campbell states that the examiner will rely on unreliable clinical judgment when assigning Hanson's variables. *Id.* at 57.

148. See R. Karl Hanson, *What Do We Know About Sex Offender Risk Assessment?* 4 PSYCHOL. PUB. POL'Y & L. 50, 52-53 (1998). Hanson describes the guided clinical approach, when expert evaluators consider numerous empirically validated risk factors, and then form an overall opinion concerning the offender's risk. *Id.* The strategy for translating the identified risk factors into recidivism rates is not specifically determined. *Id.* at 53.

149. See *id.* at 57.

150. See *id.* at 55.

151. DOREN, *supra* note 22, at 113.

molesters and rapists and have knowledge about treatment efficacy and risk management strategy.

Finally, the examiner should pursue the assessment of psychopathy, polygraph, and phallometric data. The issue of age mitigating risk of sex offending is of growing importance because many offenders who are petitioning for release have not committed a sex offense in years. In fact, many offenders are in their fifties and sixties when they petition review boards for release and are considered “burned out” and lower risk.<sup>152</sup>

*B. Recidivism Studies of Child Molesters and Rapists*

The most extensive study on sexual recidivism, conducted in 1998 by Karl Hanson and Monique Bussiere,<sup>153</sup> found that the overall sexual offense recidivism rate for both child molesters and rapists was 13.4% during a four to five year average follow-up, including rates at 18.9% for rapists and 12.7% for child molesters.<sup>154</sup> The rates increased with longer follow-up periods.<sup>155</sup> Hanson and Bussiere reviewed the most significant potential predictors of sexual offender recidivism and found the following factors to be significantly related to recidivism: sexual preference for children, deviant sexual preferences, prior sexual offenses, failure to complete treatment, antisocial personality disorder or psychopathy, prior offenses, young age at first offense, choice of victims that were unrelated victims, male, or strangers.<sup>156</sup>

A more recent study by Hanson and Kelly Morton-Bourgon<sup>157</sup> studied sexual recidivism with mixed groups of adult sexual

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152. See Paris, *supra* note 20, at 282.

153. Hanson & Bussiere, *supra* note 144.

154. *Id.* at 351.

155. See *id.* at 357. This research used a very large set of different sex offenders from various jurisdictions, time periods, and circumstances, and included incest offenders. *Id.* at 349-50. Criteria of recidivism usually were measured by reconvictions and overt measures of behavior. *Id.* at 350.

156. *Id.* at 351. The authors did not find that degree of sexual contact or force used, victim injury, denial, lack of empathy, history of being a victim of sexual abuse, or low motivation for treatment were significantly related to recidivism. *Id.* at 351, 353.

157. R. KARL HANSON & KELLY MORTON-BOURGON, DEP'T OF THE SOLICITOR GEN. CAN., PREDICTORS OF SEXUAL RECIDIVISM: AN UPDATED META-ANALYSIS (2004), available at [http://ww2.psepc-sppcc.gc.ca/publications/corrections/pdf/200402\\_e.pdf](http://ww2.psepc-sppcc.gc.ca/publications/corrections/pdf/200402_e.pdf). This study was an update from Hanson's earlier meta-analysis. *Id.* at 4. Whereas Hanson's 1998 study examined static and historical factors, the focus of the new study was on potentially changeable/dynamic risk factors. *Id.*

offenders including child molesters, rapists, exhibitionists, and mixed offense types.<sup>158</sup> The authors found that the sexual recidivism rate was 13.7% with an average follow-up time of five to six years.<sup>159</sup> The strongest predictors of sexual recidivism in this study included sexual deviancy and antisocial orientation.<sup>160</sup> The general categories of sexual attitudes and intimacy deficits significantly predicted sexual recidivism.<sup>161</sup> Deviant sexual interests, including interests in children and paraphilic interests, were also related to sexual recidivism.<sup>162</sup> Recidivism for child molesters was predicted by emotional identification with children, having children as friends, maintaining a child-oriented lifestyle, as well as by conflicts with intimate partners.<sup>163</sup> Self-regulation, including problems with lifestyle instability and impulsivity, was related to sexual recidivism.<sup>164</sup> Other antisocial traits, including employment instability, substance abuse, intoxication during the offense, and hostility, were also associated with sexual recidivism.<sup>165</sup> Lack of victim empathy, denial of the sex offenses, minimization, and lack of motivation for treatment, however, were not significantly related to sexual recidivism.<sup>166</sup>

Individuals with interest in deviant sexual activities were among the most likely to re-offend sexually,<sup>167</sup> and although the evidence was strongest for sexual interest in children and for general paraphilias, phallometric assessments of sexual interest in

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158. *Id.* at 5.

159. *Id.* at 8. They also found a violent non-sexual recidivism rate of 14% and general recidivism rate of 36.9%. *Id.*

160. *Id.*

161. *Id.* The general categories of adverse childhood environment, general psychological problems, and clinical presentation had little relationship with sexual recidivism. *Id.*

162. *Id.* at 9. Offenders with general self-regulation problems were more likely than offenders with stable lifestyles to sexually reoffend. *Id.* at 10. Self-regulation deficits, including problems with lifestyle instability and impulsivity, were related to sexual recidivism. *Id.* Other antisocial traits such as employment instability, substance abuse, intoxication during the offense, as well as hostility were associated with sexual recidivism. *Id.*

163. *Id.* Attitudes supporting and tolerating sexual crime were related to sexual recidivism. *Id.* Severe psychological dysfunction and psychosis, as well as anxiety and depression, were not related to sexual recidivism. *Id.* The degree of force used in sex offenses was mildly related to sexual recidivism. *Id.* at 10-11.

164. *Id.* at 10.

165. *Id.*

166. *Id.* at 11.

167. *Id.* at 15.

rape were not related to sexual recidivism.<sup>168</sup> Importantly, sexual preoccupations, including high rates of sexual interests and activities, were significantly predictive of sexual recidivism, as well as violent and general recidivism.<sup>169</sup> Non-compliance with supervision and violation of conditional release were associated with sexual offending.<sup>170</sup>

Another study by Hanson and Andrew Harris<sup>171</sup> examined sexual recidivism using data from ten follow-up studies of male offenders.<sup>172</sup> According to this study, most sex offenders did not sexually reoffend, and first-time sexual offenders were significantly less likely to sexually reoffend than those with previous sexual convictions.<sup>173</sup> Offenders over the age of fifty were less likely to reoffend than younger offenders.<sup>174</sup> The study also found that the longer offenders remained offense-free in the community, the less likely they were to offend sexually.<sup>175</sup> The authors found that rapists, incest offenders, and extrafamilial child molesters reoffend at different rates.<sup>176</sup> Most sex offenders did not sexually recidivate in the study; in fact, after fifteen years, 73% of sexual offenders had

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168. *Id.*

169. *Id.*

170. *Id.* at 10. Hanson found actuarial risk scales measuring accuracy for sexual recidivism were more accurate than the empirically guided approach to risk assessment. *Id.* at 11. The predictive accuracy of the empirically guided approach to risk assessment was more accurate than unstructured clinical assessments. *Id.* The average predicted accuracy of all individual risk scales was in the moderate to large range: VRAG .52, SORAG .48, Static-99 .63, RRASOR .59, MnSOST-R .66, SVR-20 .77. *Id.*

171. ANDREW J.R. HARRIS & R. KARL HANSON, DEP'T OF THE SOLICITOR GEN. CAN., SEX OFFENDER RECIDIVISM: A SIMPLE QUESTION (2004), available at <http://nicic.org/Library/019724>.

172. *Id.* at ii.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 7. The authors found that the overall sex offender recidivism rates were 14% for five years, 20% for 10 years, and 24% for 15 years. *Id.* Rapists sexually reoffended 14%, 21%, and 24%, respectively, and a combined group of child molesters reoffended 13%, 18%, and 23%, respectively. *Id.* Child molesters who offended against extrafamilial boy victims reoffended at 35% after fifteen years, and the lowest observed rates were for incest offenders, 13% after fifteen years. *Id.* Offenders with a prior sexual offense conviction had recidivism rates almost double the rate displayed by first-time sexual offenders, 19% versus 37% after fifteen years. *Id.* Offenders older than age fifty at the time of release reoffended at half the rate of the younger group, 12% versus 26% after fifteen years. *Id.*

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not been charged with or convicted of another sex offense.<sup>177</sup>

At least two recidivism studies address follow-up periods of at least twenty-five years.<sup>178</sup> In 2004, Langevin et al. studied the recidivism rates of sex offenders over a twenty-five year period and found that nearly 60% of the offenders reoffended (using sex reoffense charges, convictions, or court appearances as recidivism criteria).<sup>179</sup> This statistic increased to more than 80% when considering undetected sex offenses.<sup>180</sup> Child molesters and exhibitionists were the highest risk groups while incest offenders were the lowest.<sup>181</sup> The authors admit that sex offending recidivism rates are likely higher due to the nature of the long-term follow-up study as well as the “loose” recidivism criteria.<sup>182</sup>

Another study by Prentky et al.<sup>183</sup> examined the variability in sex offender recidivism rates of extrafamilial child molesters and rapists over a twenty-five year period after institutional release.<sup>184</sup> Rapists and child molesters remained at risk to reoffend at least fifteen to twenty years after discharge.<sup>185</sup> The authors found that the sexual recidivism arrest rate for rapists was 39% and the rate for child molesters was 52% over a twenty-five year period.<sup>186</sup>

A 1998 study by Doren<sup>187</sup> examined Prentky’s population,

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177. *Id.* at 11.

178. See R. Langevin et al., *Lifetime Sex Offender Recidivism: A 25 Year Follow-Up Study*, CAN. J. CRIMINOLOGY & CRIM. JUST. 532 (2004); R.A. Prentky et al., *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 LAW & HUM. BEHAV. 635 (1997).

179. Langevin et al., *supra* note 178, at 531.

180. *Id.*

181. *Id.* For many offenders, their criminal career spanned almost two decades. *Id.* The study consisted of extrafamilial child sexual abusers, incest offenders, sexual aggressives against adults, exhibitionists, and offenders who were mixed type (offended against males and females, men and women). *Id.* at 537. Extrafamilial child molesters had the highest recidivism rates 71% to 74.1%, and exhibitionists were also high at 68.6%. *Id.* at 545.

182. *Id.* at 547-49.

183. R.A. Prentky et al., *supra* note 144, at 635.

184. *Id.*

185. *Id.* at 635. Their study included 265 high risk male sex offenders (136 rapists, 115 child molesters, and 14 who could not be classified) who had been committed to Massachusetts Treatment Center for Sexually Dangerous Persons. *Id.* at 637-38. Recidivism was classified as criminal charges rather than convictions. *Id.* at 639.

186. *Id.* at 642-43. The authors measured recidivism as a function of changes in the domain of criminal offenses that are considered at outcome, changes in dispositional definitions of reoffenses such as charges and convictions, and changes in the length of exposure time. *Id.* at 641.

187. Dennis Doren, *Recidivism Base Rate Predictions of Sex Offender Recidivism*, and

focusing on base rates defined by the “true prevalence of the defined behavior within the defined population.”<sup>188</sup> Doren argues that most studies underestimate the true frequency in which sex offenses occur.<sup>189</sup> Doren contended that the Prentky recidivism rates for child molesters and rapists were a “conservative approximation of the true base rate for sex offense recidivism.”<sup>190</sup>

Another study by Quinsey et al. compared actuarial prediction of sexual recidivism.<sup>191</sup> The authors studied 178 sex offenders who were assessed at a facility and then followed for fifty-nine months after release; 28% were convicted of a new sex offense, and 40% were arrested, convicted, and returned to the hospital for committing a violent offense, including sexual offenses.<sup>192</sup> Rapists were more likely to recidivate than child molesters.<sup>193</sup> Psychopathy, sexual criminal history, and phallometric indexes of deviant sexual interests were useful predictors of sexual recidivism.<sup>194</sup> The authors attempted to find correlations between sexual recidivism and single marital status, psychopathy, admissions to corrections institutions for prior non-sexual offenses, previous convictions for violent offenses, total prior convictions for sexual offenses, and sexual misbehaviors against child males.<sup>195</sup> The highest correlative

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“*The Sexual Predator*” *Commitment Law*, 16 BEHAV. SCI. & L. 97 (1998).

188. *Id.* at 98.

189. *Id.* at 99. Doren asserts that current sex offender recidivism research underestimates true base rates because studies do not follow the offenders for long enough periods. *Id.* at 100.

190. *Id.* at 101. *But see* Dennis Doren, *Adversarial Forum Analyzing the Analysis: A Response to Wollert* (2000), 19 BEHAV. SCI. & L. 185, 186 (2001). Doren responds to a critical analysis of his 1998 article on base rates. The critique asserted that the exclusion of a group of incest offenders in Prentky’s sample, which comprised a large number of prison release classes, potentially impacted the error rates and the recidivism percentages summarized in Doren’s original article. *Id.* Other critiques raised in Doren’s summary suggest that there is not much research studying whether reconviction rates and rearrest rates underestimate true reoffense rates. *Id.* Critics also argue long-term studies might involve shortcomings that are not found in short-term studies. *Id.* Further, the critics believed Doren’s conclusion was too strongly based on the Prentky et al. sample, which included its own weaknesses, and that “the use of data derived from survival analysis is problematic.” *Id.*

191. Vernon L. Quinsey et al., *Actuarial Prediction of Sexual Recidivism*, 10 J. INTERPERSONAL VIOLENCE 85, 85-105 (1995) (studying demographics, psychiatry, sexual and nonsexual criminal history, and sexual misbehaviors in an attempt to find correlations to sexual recidivism).

192. *Id.* at 85.

193. *Id.*

194. *Id.*

195. *Id.* at 89-91.

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variable to sexual recidivism was sexual criminal history with prior sexual convictions.<sup>196</sup>

A 2003 study by Langdan et al.<sup>197</sup> examined male sex offenders released from prisons in 1994.<sup>198</sup> Within the first three years following release from prison, 5.3% of released sex offenders were rearrested for a sex crime.<sup>199</sup> The study found that “[t]he younger the prisoner when released, the higher the rate of recidivism.”<sup>200</sup>

The Ohio Department of Rehabilitation and Corrections administered a study measuring recidivism for rapists and child molesters that indicated a baseline recidivism rate for sex offenders (ten years after release from prison) of 34%.<sup>201</sup> Rapists’ recidivism rates (adult victim) were 17.5%; extrafamilial child molesters, 8.7%; and incest child molesters, 7.4%.<sup>202</sup> “Sex offenders who returned [to prison] for a new sex offense did so within a few years of release.”<sup>203</sup> Paroled sex offenders completing basic sex offender programming while incarcerated appeared to have a lower recidivism rate than those who did not have such programming.<sup>204</sup> Furthermore, “[s]ex offenders who were complete strangers to their victims were more likely to return to prison for a sex related offense within ten years of release . . . .”<sup>205</sup>

In 1990, Rice et al. conducted a study of fifty-four rapists who were released from prison before 1983.<sup>206</sup> After four years, 28% had been reconvicted for a sex offense, and 43% had a conviction

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196. *Id.* at 95.

197. PATRICK A. LANGDAN ET AL., U.S. DEP’T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON 1994 (2003), *available at* <http://www.sexcriminals.com/library/doc-1007-1.pdf>.

198. *Id.* at 1. The study included 3115 released rapists, 6576 released sexual assaulters, 4295 released child molesters, and 443 released statutory rapists. *Id.*

199. *Id.* About 40% of the sex crimes were allegedly committed in the first twelve months of release. *Id.* “[R]eleased child molesters were more likely to be arrested for child molesting.” *Id.*

200. *Id.* at 18.

201. OHIO DEP’T OF REHAB. & CORR., TEN YEAR RECIDIVISM FOLLOW-UP OF 1989 SEX OFFENDER RELEASES 8 (2001), *available at* [http://www.drc.state.oh.us/web/Reports/Ten\\_Year\\_Recidivism.pdf](http://www.drc.state.oh.us/web/Reports/Ten_Year_Recidivism.pdf).

202. *Id.* at 15.

203. *Id.* at 24.

204. *Id.* at 16-17. Sexual recidivism occurred for 7.1% of the paroled offenders participating in programming, compared with 16.5% without programming. *Id.*

205. *Id.* at 14. “[O]ffenders who victimized adult females were most likely to sexually recidivate, with offenders of non-related males having the next highest rate . . . .” *Id.*

206. Marnie E. Rice et al., *A Follow-Up of Rapists Assessed in a Maximum Security Psychiatric Facility*, 5 J. INTERPERSONAL VIOLENCE, 435, 435-48 (1990).

for a violent offense.<sup>207</sup> A follow-up study of sex offenders released from a maximum-security psychiatric institution in California found that ten of the fifty-seven rapists studied (17.5%) were reconvicted of a rape within five years.<sup>208</sup> Most of these offenses occurred during the first year of the follow-up period.<sup>209</sup>

Hanson et al. examined the long-term recidivism of 197 child molesters released from prison.<sup>210</sup> Approximately 42% of the total sample was reconvicted for sexual crimes, violent crimes, or both.<sup>211</sup> "Incest offenders were reconvicted at a [s]lower rate than were offenders who selected only boys."<sup>212</sup> Factors associated with recidivism included never being married and previous sexual offenses.<sup>213</sup> The authors found again that prior sexual offenses and admitted prior sexual offenses, as well as male victims, were related to sexual recidivism.<sup>214</sup> The recidivism rate was not significantly different for the offenders in a treatment group.<sup>215</sup>

Rice et al. found that over a six year follow-up period, 31% of extrafamilial child molesters were reconvicted of a new offense and 43% committed a violent or sexual offense.<sup>216</sup> Sexual recidivism<sup>217</sup> among child molesters was moderately well predicted by single marital status, previous admissions to correctional institutions, previous property convictions, previous sexual convictions, diagnosis of personality disorder, and inappropriate sexual interest in children with phallometric assessment.<sup>218</sup>

Research indicates that recidivism by intrafamilial incest child

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207. *Id.* at 435.

208. Vikki Henlie Sturgeon & John Taylor, *Report of a Five-Year Follow-Up Study of Mentally Disordered Sex Offenders Released from Atascadero State Hospital in 1973*, 4 CRIM. JUST. 31, 31-63 (1980).

209. *Id.*

210. R. Karl Hanson et al., *Long-Term Recidivism of Child Molesters*, 61 J. CONSULTING & CLINICAL PSYCHOL. 646, 646-52 (1993) (studying recidivism rates of child molesters released from prison in 1958 and 1974).

211. *Id.* at 648.

212. *Id.* at 649.

213. *Id.*; see also *id.* at 647-48 (defining "reoffending" as reconviction for sexual offense).

214. *Id.* at 649.

215. *Id.*

216. Marnie E. Rice et al., *Sexual Recidivism Among Child Molesters Released from Maximum Security Psychiatric Institution*, 59 J. CONSULTING & CLINICAL PSYCHOL. 381, 383 (1991).

217. *Id.* at 382-83 (defining recidivism in three different ways: sexual conviction, violent failure, and failure).

218. *Id.* at 383. The authors found no impact of treatment on recidivism. *Id.*



molesters is usually less frequent than recidivism by extrafamilial child molesters.<sup>219</sup> Studies also suggest that extrafamilial child molesters with a history of perpetrating male victims are more likely to sexually recidivate, as a history of male victims indicates heightened sexual deviancy in offenders.<sup>220</sup> Others believe there is not much difference between intrafamilial and extrafamilial child molesters in regards to sexual deviancy.<sup>221</sup>

The deficiencies in these sex offender recidivism studies include attempts to define what population of sex offenders is being studied and what definition of reconviction is being used. When considering the former, it must be acknowledged that sex offenders are a diverse group of individuals who have committed sexually violent assaults on family members, strangers, or both. Furthermore, the sexual and criminal behaviors of sex offenders are heterogeneous in nature. Some offenders have various psychiatric disorders and have received sex offender treatment, while others have not. These differences may ultimately affect

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219. See Philip Firestone et al., *Prediction of Recidivism in Incest Offenders*, 14 J. INTERPERSONAL VIOLENCE 511, 523-24 (1999) (describing research studies that found a higher rate of recidivism among extrafamilial child molesters than among intrafamilial child molesters). Firestone found that within six and one-half years after conviction, the percentage of incest offenders who committed a sexual, violent, or criminal offense of any kind was 6.4%, 12.4%, or 26.7%, respectively. *Id.* at 517. Incest offenders may not sexually reoffend as often as extrafamilial child molesters for reasons including lower base rates of offense, lack of reporting by family members, and loss of access to victims. DOREN, *supra* note 22, at 149. Cf. Robert A. Prentky et al., *Risk Factors Associated With Recidivism Among Extrafamilial Child Molesters*, 65 J. CONSULTING & CLINICAL PSYCHOL. 141, 147 (1997) (finding that risk factors for recidivism among extrafamilial child molesters included degree of sexual preoccupation with children, paraphilias, and number of prior sexual offenses).

220. See, e.g., Hanson, *supra* note 210, at 650.

221. See Ian Barsetti et al., *The Differentiation of Intrafamilial and Extrafamilial Heterosexual Child Molesters*, 13 J. INTERPERSONAL VIOLENCE 275, 283 (1998) (comparing the arousal patterns of intrafamilial and extrafamilial child molesters to the arousal patterns of non-offenders). The authors found that non-offenders showed a clear preference for adult stimuli. *Id.* at 281. Intrafamilial and extrafamilial child molesters did not discriminate between child and adult categories and exhibited similar sexual arousal patterns. *Id.* at 283. Both groups of child molesters responded similarly to deviant stimuli. *Id.* at 284. *But see* Vernon L. Quinsey & Terry C. Chaplin, *Penile Responses of Child Molesters and Normals to Descriptions of Encounters with Children Involving Sex and Violence*, 3 J. INTERPERSONAL VIOLENCE, 259, 271 (1988) (discussing the marked differences in child molester responses to stories involving sex with children and adults and finding that extrafamilial child molesters exhibited larger penile responses to child stimuli when compared to responses to stimuli depicting female adults).

recidivism rates. If researchers group various types of sex offenders and offenses into similar categories, then distinctions in the elements and patterns related to reoffending will be lost.

Defining recidivism is just as complex. There are many operational definitions of recidivism. Recidivism can be defined as a new arrest, charge, conviction, subsequent incarceration, or commitment study.<sup>222</sup> While the differences between the types of recidivism may appear to be minor, they will lead to widely varied outcomes. For instance, arrests and charges will show higher recidivism rates than convictions.<sup>223</sup> The examiner must be aware that countless factors, such as poor reporting of offenses, can cause an underestimation of the true base rate of offending. Furthermore, recidivism studies do not report crimes committed by offenders who disclose an enormous amount of undetected sexual aggression during treatment.<sup>224</sup> By incorporating self-reports of crimes committed by sex offenders during treatment, recidivism studies could lead to more reasonable estimates of true sexual recidivism.

In summary, the forensic psychologist preparing reexaminations should be familiar with the research. The variation across individual studies can be explained in some part by differences in study populations. The combination of heterogeneous groups of sex offenders in the analysis of recidivism may lead to confusion and inaccurate analysis. One method of dealing with this problem is for the examiner to analyze the studies with populations similar to the offender he or she is evaluating. The examiner must also recognize that many offenders have histories of assaulting across both genders and various age groups, rather than against only one specific victim population.<sup>225</sup>

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222. See, e.g., DOREN, *supra* note 22, at 146-49; Rice, *supra* note 216, at 382-83.

223. See R.A. Prentky et al., *supra* note 178, at 636.

224. See Mark R. Weinrott & Maureen Saylor, *Self-Report of Crimes Committed by Sex Offenders*, 6 J. INTERPERSONAL VIOLENCE 286, 268-88 (1991) (examining the potential for utilizing sex offender self-reports in empirical research); see also Sean Ahlmeyer et al., *The Impact of Polygraphy on Admissions of Victims and Offenses in Adult Sexual Offenders*, 12 SEXUAL ABUSE: J. RES. & TREATMENT 123, 134 (2000) (examining the utility of polygraph testing in eliciting self-reports of crime from sex offenders).

225. W.L. Marshall & H.E. Barbaree, *Outcome of Comprehensive Cognitive-Behavioral Treatment Programs*, in HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, AND TREATMENT OF THE OFFENDER 363, 371 (W.L. Marshall et al. eds., 1990). Marshall and Barbaree found that the recidivism rates for specific types of offenders varied: the recidivism rates of incest offenders ranged between 4% and

Nonetheless, empirically-guided clinical judgment based on recidivism studies is an ethical and sound practice despite the methodological flaws.

*C. Using Group Data to Assess Risk for the Individual: The Utility of Actuarial Risk Assessment Instruments*

Actuarial instruments are used to estimate the likelihood that a sex offender will recidivate based on retrospective studies of sex offenders released into the community.<sup>226</sup> Although it is beyond the scope of this article to provide a complete analysis of these instruments, it is pertinent for the forensic examiner to have a thorough understanding of the strengths and limitations of actuarial instruments.

The three actuarial instruments most often used when assessing the recidivism of sex offenders are the Rapid Risk Assessment for Sex Offender Recidivism (RRASOR),<sup>227</sup> the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R),<sup>228</sup> and Static-99.<sup>229</sup> These instruments are based on studies of both sex offenders who have reoffended and those who have not. The predictive factors are assigned relative weights and are retained if they were significantly related to reoffending. Actuarial risk assessment instruments can address four factors, including static-

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10%; rapists ranged between 7% and 35%; child molesters with female victims ranged between 10% and 29%; child molesters with male victims ranged between 13% and 40%; and exhibitionists ranged between 41% and 71%. *Id.*

226. Stephen D. Hart, *Actuarial Risk Assessment: Commentary on Berlin et al.*, 15 *SEXUAL ABUSE: J. RES. & TREATMENT* 383, 385 (2003) (discussing the use of actuarial risk assessment instruments in sex offender civil commitment proceedings); see also DOUGLAS L. EPPERSON ET AL., *MINNESOTA SEX OFFENDER SCREENING TOOL-REVISED (MNSOST-R) TECHNICAL PAPER: DEVELOPMENT, VALIDATION, AND RECOMMENDED RISK LEVEL CUT SCORES* 28 (2003), <http://www.psychology.iastate.edu/faculty/epperson/TechUpdatePaper12-03.pdf> (describing how actuarial instruments can yield different cut scores for different decisions).

227. See R. KARL HANSON, *THE DEVELOPMENT OF A BRIEF ACTUARIAL RISK SCALE FOR SEXUAL OFFENSE RECIDIVISM* 13 (1997), available at [http://www.sgc.gc.ca/publications/corrections/199704\\_e.pdf](http://www.sgc.gc.ca/publications/corrections/199704_e.pdf).

228. *Id.*

229. See R. Karl Hanson & David Thornton, *Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales*, 24 *LAW & HUM. BEHAV.* 119, 129 (2000) (comparing the predictive accuracy of RRASOR, SACJ-Min, and Static-99). Hanson also refers to another actuarial instrument called the Sex Offender Risk Appraisal Guide (SORAG). See *id.* at 120; see also VERNON L. QUINSEY ET AL., *VIOLENT OFFENDERS: APPRAISING AND MANAGING RISK* 156-59 (1998) (describing the variables and utility of the SORAG actuarial scale).

risk variables, static-protective variables, dynamic-risk variables, and dynamic-protective variables.<sup>230</sup> Most of the instrument variables in the offender's history are static, such as the number of prior sex offenses, history of unrelated victims, and age at the time of the first sex offense.<sup>231</sup>

There is a growing debate among experts concerning the use of actuarial risk assessment instruments to assess sexual dangerousness.<sup>232</sup> There are conflicting views as to whether actuarial instruments are good enough to predict recidivism in light of the possible consequences in civil commitment hearings, such as deprivation of liberty, the use of indefinite civil commitment, and the threat to society's safety and security.<sup>233</sup>

In many cases, offenders are civilly committed prior to the use of these instruments, and the reexaminer may be the first clinician to employ the use of these instruments.<sup>234</sup> The reexaminer must be

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230. CAMPBELL, *supra* note 31, at 65. Risk factors relate to variables indicating an elevated likelihood of recidivism, and protective variables relate to factors that decrease the likelihood of recidivism. *Id.*

231. *Id.* at 66.

232. See CAMPBELL, *supra* note 31, at 80-109; Howard E. Barbaree et al., *Evaluating the Predictive Accuracy of Six Risk Assessment Instruments for Adult Sex Offenders*, 28 CRIM. JUST. & BEHAV. 490 (2001) (assessing risk for recidivism utilizing actuarial instruments); William Grove et al., *Clinical Versus Mechanical Prediction: A Meta-Analysis*, 12 PSYCHOL. ASSESSMENT 19 (2000) (analyzing assessment instrument reliability in predicting sexual dangerousness); Hanson & Thornton, *supra* note 229, at 119; Grant T. Harris et al., *A Multisite Comparison of Actuarial Risk Instruments for Sex Offenders*, 15 PSYCHOL. ASSESSMENT 413 (2003) (examining Violence Risk Appraisal Guide (VRAG), Sex Offender Risk Appraisal Guide (SORAG), RRASOR, and Static-99 for predicting violent and sexual reoffending); Janus & Meehl, *supra* note 31, at 33; Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 AM. CRIM. L. REV. 1443 (2003) (discussing the controversy surrounding actuarial risk assessment for sex offenders); Thomas R. Litwack, *Actuarial Versus Clinical Assessments of Dangerousness*, 7 PSYCHOL. PUB. POL'Y & L. 409 (2001) (discussing the controversy within the psychology field between actuarial and clinical predictions of recidivism); Douglas Mossman, *Assessing Predictions of Violence: Being Accurate About Accuracy*, 62 J. CONSULTING & CLINICAL PSYCHOL. 783 (1994) (discussing the problems with violence predictors and how receiver-operating characteristic analysis can be used to solve them); Vernon L. Quinsey et al., *Actuarial Prediction of Sexual Recidivism*, 10 J. INTERPERSONAL VIOLENCE 85 (1995) (examining sexual recidivism predictors in child abusers and rapists).

233. Randy K. Otto & John Petrila, *Admissibility of Testimony Based on Actuarial Scales in Sex Offender Commitments: A Reply to Doren*, 3 SEX OFFENDER L. REP. 1, 16 (2002) (discussing the importance of carefully delineating the strengths and weaknesses of mental health professionals providing testimony).

234. Strenuous legal arguments against the scoring and assessment process, utility and predictive validity of actuarial instruments will likely be more common

aware of the strengths and weaknesses of these instruments. When considering which instrument to use, the examiner should consider statistical constructs, including: reliability and validity, degree of relationship between the legal referral and the predictive usefulness of the instrument, appropriateness of applying the instrument to a specific population, whether the person to be evaluated is similar to the sample normed on the instrument, accessibility to information required for scoring the tool, and the predictive utility of the instrument.<sup>235</sup>

In 2001, Campbell addressed the problems associated with the use of actuarial instruments in determining sexual recidivism with regard to civil commitment proceedings.<sup>236</sup> He believes that the instruments cannot reliably support expert testimony in legal proceedings.<sup>237</sup> Accordingly, Campbell asserts that actuarial instruments have statistical limitations and do not satisfy the *Daubert* standards for admissibility.<sup>238</sup> He also contends that SVP assessment

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during the initial commitment hearings and proceedings than upon reexamination years later. See, e.g., CAMPBELL, *supra* note 31, at 83-109. The examiner performing the reexaminations should be as knowledgeable about the instruments as the examiner conducting the evaluation at the initial proceeding. See DOREN, *supra* note 22, at 116. When the instruments are being utilized for the first time during the reexamination process, lawyers should be aware of this and treat any scoring of the instruments as they would at an initial commitment hearing.

235. DOREN, *supra* note 22, at 116.

236. See CAMPBELL, *supra* note 31, at 83-109; Litwack, *supra* note 232, at 409-43. It is very difficult to compare clinical and actuarial risk assessments of dangerousness. Litwack, *supra* note 232, at 409.

237. CAMPBELL, *supra* note 31, at 9. The field of actuarial risk assessment instruments is quite young, only three to five years of age. Thomas Grisso, *Ethical Issues in Evaluations for Sex Offender Re-offending*, presented at Symposium on Sex Offender Re-Offense Risk Prediction, Madison, WI (March 6, 2000). However, actuarial tools are promising infants in the test development world and there are gains to be realized in their standardization. *Id.*

238. *Id.* at 15; see also *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Campbell argues that, per *Daubert* standards, actuarial instruments do not hold up to testability, error rate, and acceptance by the forensic psychological community. CAMPBELL, *supra* note 31, at 15. Campbell found that the analysis of RRASOR, Static-99, and MnSOST-R could not satisfy the heightened scientific standards to which they are subjected based on their poor statistical foundations. *Id.* at 80-109. Campbell contends that the actuarial risk assessment instruments treat age in an ambiguous manner. *Id.* at 76. RRASOR and Static-99 have a cutoff age associated with decreased recidivism risk at twenty-five years, where the MnSOST-R cutoff is thirty years. *Id.* These actuarial instruments scored a recidivism risk of fifty-year-old offenders as equivalent to a thirty-year-old offender, all other factors being equal. *Id.*; see also Eric S. Janus, *Examining Our Approaches to Sex Offenders & the Law: Minnesota's Sex Offender Commitment Program: Would an*

procedures do not satisfy the heightened scientific standards.<sup>239</sup> Unlike other accepted psychological assessment instruments, actuarial instruments do not have manuals that satisfy applicable standards, and they have unacceptable levels of inter-rater reliability.<sup>240</sup>

Another argument against the use of actuarial instruments is that the focus on static factors comprising the actuarial tools is beyond the offender's control. These factors are unchangeable and ignore the individual and dynamic characteristics of each offender.<sup>241</sup> For example, if a twenty-six-year-old sex offender is evaluated with the Static-99 at the time of civil commitment, his score will never change during the time he is committed. He may be committed for fifteen years, and regardless of how much therapy he has been involved with and what personal changes he has made, his scores will always be the same. Ultimately, the fixed levels of risk cause problems in civil commitment hearings.<sup>242</sup>

Another problem with actuarial instruments is that studies erroneously use heterogeneous samples of sex offenders. The tools treat all sex offenders, including child molesters and rapists, as if they are more alike than different.<sup>243</sup> These types of offenders can be quite different in their dynamics from one study and instrument to another.<sup>244</sup> Various factors influence recidivism risk for different

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*Empirically-Based Prevention Policy Be More Effective?*, 29 WM. MITCHELL L. REV. 1083 (2003) (analyzing the effectiveness of Minnesota's sex offender commitment laws). Janus states that risk assessment decisions are subjective, relying on vague definitions such as "highly likely," and courts have rejected the notion that risk assessments should be based on state of the art assessment procedures. *Id.* at 1111; see Eric S. Janus, *Sexual Predator Commitment Laws: Lessons for Law and the Behavioral Sciences*, 18 BEHAV. SCI. & L. 5 (2000) (discussing the importance of additional research to improve recidivism predictors); Otto & Petrila, *supra* note 233, at 16 (asserting that the primary problem in SVP evaluations is misrepresenting to the court the results of actuarial data comparing groups to individuals).

239. CAMPBELL, *supra* note 31, at 10.

240. *Id.* Campbell cites the Specialty Guidelines for Forensic Psychologists, which states that experts who do not disclose the state of assessment tools will misinform the justice process. *Id.* at 11. (citing Comm. on Ethical Guidelines for Forensic Psychologists, *Specialty Guidelines for Forensic Psychologists*, 6 LAW & HUM. BEHAV. 655 (1991)). If testimony reveals the instruments' limitations, as well as problems with standardization, reliability, and base rates, experts may lead the courts to discount the instruments' utility and results altogether. CAMPBELL, *supra* note 31, at 11.

241. *Id.* at 74.

242. *Id.*

243. *Id.*

244. *Id.*

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types of sex offenders, and the normative group data in each sex offender instrument is different.<sup>245</sup> We will never know the motivations or specific variables that cause each offender in every normative sample to sexually offend. Therefore, it is very difficult to compare group data with actuarial instruments to individual sex offenders that one is evaluating.<sup>246</sup> A useful statistical prediction would be relevant to courts and review boards in civil commitment hearings if it allows generalizations from the instrument's normative database to the examinee being evaluated.<sup>247</sup> Ideally, states with civil commitment laws should collectively compile a standardized database of the variables among offenders that are correlated with recidivism.<sup>248</sup>

Campbell questions the accuracy of SVP assessment procedures.<sup>249</sup> It has been argued that actuarial instruments score

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245. *Id.* at 75.

246. *See generally* Janus & Meehl, *supra* note 31. Janus and Meehl attempted to describe the standards for evaluating the probability of predicted dangerousness and how they could be clarified and quantified. *Id.* at 38. Janus and Meehl cite the strengths and weaknesses in actuarial and clinical judgments and explain that actuarial methods may appear too mechanical and too general and are not individualized. *Id.* at 61. Some scholars argue that actuarial instruments cannot be used accurately to predict the likelihood of future acts of sexual violence with respect to any specific individual within such a group. Fred Berlin et al., *The Use of Actuarials at Civil Commitment Hearings to Predict the Likelihood of Future Sexual Violence*, 15 *SEXUAL ABUSE: J. RES. & TREATMENT* 377, 377 (2003). Berlin et al. contend that even if an individual scored a certain score on the RRASOR indicating that 49.8% of the persons with this score actually recidivate in a five year time span, this finding does not mean that everyone with the same score has a 49.8% risk of doing so. *Id.* at 378-79. "For any given individual [with this score], his true risk of recidivism may actually be much higher or much lower." *Id.* at 379; *see* Grant Harris, *Men in His Category Have a 50% Likelihood, But Which Half Is He In? Comments on Berlin, Galbreath, Geary, and McGlone*, 15 *SEXUAL ABUSE: J. RES. & TREATMENT* 389 (2003) (criticizing a commentary by Berlin et al. pertaining to probability, statistics, and research methodology as being essentially a layperson's commentary and based on mistakes due to the authors' unfamiliarity with the specialized field of risk assessment research). "[E]mpirically valid risk factors can be added to an actuarial instrument, but only if they afford *incremental* validity (i.e., they add to the predictive accuracy provided by the risk factors already part of the instrument)." *Id.* at 390. Harris asserts that actuarial instruments may not include all known risk factors, yet they are developed by selecting the strongest predictors of sexual recidivism first. *Id.*

247. For a discussion on actuarial instruments as estimates of probability and whether they stand up to *Daubert* and *Frye* standards, see G. Woodworth & Joseph B. Kadane, *Expert Testimony Supporting Post-sentence Civil Incarceration of Violent Sexual Offenders*, 3 *LAW, PROBABILITY & RISK* 221, 221 (2004).

248. *Id.* at 238.

249. T. Campbell, *Sexual Predator Evaluations and Phrenology: Considering Issues of Evidentiary Liability*, 18 *BEHAV. SCI. & L.* 111, 113 (2000). SVP evaluators prefer

the recidivism risk of a fifty-year-old person as being the same as a thirty-year-old person.<sup>250</sup> Moreover, Campbell asserts that the instruments do not exhibit sufficient specificity or sensitivity if one relies on the base rate alone.<sup>251</sup> Campbell does not believe that these instruments identify recidivists at a high enough rate to justify using these instruments for civil commitment.<sup>252</sup>

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relying on Receiver Operating Characteristic (ROC) methods which yield Area Under the Curve (AUC) values receiver. *Id.* at 114-15. ROC's provide information about the relative ranking of recidivism and non-recidivism on a scale. The AUC analysis cannot identify different levels of sensitivity and specificity of various cutoff scores. *Id.* at 115-16. AUC values do not assist SVP examiners in identifying the most appropriate cutoff scores and they distract evaluators from the use of base rates. *Id.* Campbell is concerned that judges and jurors will be misled to believe that AUC values are correlation coefficient data, resulting in high correlations between the instruments and recidivism. *Id.* at 117. For example, an AUC value of .71 on the Static-99 does not mean that the tool correlates with sex offender recidivism .71. *Id.* Rather than using AUC data, Campbell contends that examiners must use data measuring false positives and negatives and true positives and negatives. *Id.* at 119. Litwack and others believe that research today does not demonstrate actuarial methods of risk assessment are superior to clinical methods, because most clinical determinations of dangerousness are not predictions of violence. *Id.* Other researchers are not as optimistic about these actuarial risk assessment instruments. *See generally* Amy E. Amenta et al., *Sex Offender Risk Assessment: A Cautionary Note Regarding Measures Attempting to Quantify Violence Risk*, 3 J. FORENSIC PSYCHOL. PRAC. 39 (2003). The AUC represents the extent to which a randomly selected sexually recidivist would be likely to have a higher score on the risk measure than a randomly selected non-recidivist. *Id.* at 43. Any AUC of 75% is known to be a good number in violence risk literature, indicating there is a 75% chance that a randomly selected sexual recidivist would have a higher score than a non-recidivist. *Id.* Some scholars acknowledge that some risk measures have shown some degree of stability and, thus, appear to be more generally applicable to groups upon which they were not developed, while other instruments have not fared so well. *Id.* Even if an instrument has demonstrated stability across settings and populations, evidence is lacking to suggest that this data is generalizable without considering further data. *Id.* ROC curves only provide information about the relative rank of recidivists and non-recidivists on a scale, such as there is a 75% chance recidivists will have a higher score than a non-recidivist. *Id.* The authors suggest that ROC curves do not solve base rate problems and they ignore them, and the AUC values are not affected by base rate of the criterion in interest, including sexual reoffending. *Id.* at 44.

250. CAMPBELL, *supra* note 31, at 76. The RRASOR and Static-99 have a cutoff age associated with decreased recidivism at twenty-five, while the MnSOST-R cutoff is 30. *Id.* By crudely approximating the effect of age on sexual recidivism, these actuarial instruments disregard the relevant research. *Id.*

251. *Id.* at 91. For this proposition, Campbell points to the fact that "relying on the base rate alone accurately identifies all non-recidivists but misses all recidivists." *Id.*

252. *Id.* at 97, 109 (evaluating the Static-99 and MnSOST-R and concluding that neither actuarial instrument satisfies seven essential ethical testing criteria). Campbell observes that the correlation of an actuarial instrument of the Static-99



However, many other researchers have addressed the powerful data of actuarial risk prediction. Meehl was the first to publish a study comparing the accuracy of clinical judgment with actuarial procedures.<sup>253</sup> For each study, the actuarial procedure was equal or superior to clinical judgment.<sup>254</sup> Some supporters of actuarials believe that ROC methods describe accuracy of performances which are not affected by base rates or by clinician's prediction errors.<sup>255</sup> Others cite solid predictive accuracy among the instruments.<sup>256</sup> In fact, many studies report good inter-rater

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is moderate, at about 33%. *Id.* at 154. Epperson et al. assert that validity for the MnSOST-R is comparable to Hanson and Thornton's findings for the Static-99 and RRASOR. *See* EPPERSON ET AL., *supra* note 2256, at 26 (citing Hanson & Thornton, *Improving Risk Assessment for Sex Offenders: A Comparison of Three Actuarial Scales*, 24 LAW & HUM. BEHAV. 119, 119-136 (2000)); *see also* Hanson, *supra* note 148, at 62-63. However, the average correlation for unguided clinical judgment and sexual recidivism is 7%. CAMPBELL, *supra* note 31, at 154; *see also* H. Barbaree et al., *Evaluating the Predictive Accuracy of Six Risk Assessment Instruments for Adult Sex Offenders*, 28 CRIM. JUST. & BEHAV. 490, 509 (2001) (describing the correlations between seven actuarial instruments and one clinical instrument with recidivism outcomes); Niklas Langstrom, *Accuracy of Actuarial Procedures for Assessment of Sexual Offender Recidivism Risk May Vary Across Ethnicity*, 16 SEXUAL ABUSE: J. RES. & TREATMENT 107, 119 (2004) (concluding that "some caution is advisable" when using actuarial risk assessments on immigrant and minority offenders).

253. PAUL E. MEEHL, CLINICAL VERSUS THE STATISTICAL PREDICTION: A THEORETICAL ANALYSIS AND A REVIEW OF THE EVIDENCE 83-128 (1996) (a reprinting of Meehl's seminal work first published in 1954, which broke new ground in the debate surrounding the use of actuarial instruments instead of clinical predictions).

254. *See id.*; *see also* William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, 2 PSYCHOL. PUB. POL'Y & L. 293, 295 (1996). Grove and Meehl cite numerous studies revealing that actuarial instruments and methods are equal or superior to clinical judgment concerning risk assessment. Grove & Meehl, *supra*, at 293. They argue strongly for the complete replacement of clinical assessments of dangerousness with actuarial methods. *Id.* at 319; *see* V. QUINSEY ET AL., *supra* note 229, at 171. The Goldberg study summarizes that psychologists' clinical judgment based on clinical training experience was unrelated to accuracy. *See* L. R. Goldberg, *Simple Models or Simple Processes? Some Research on Clinical Judgments*, 23 AM. PSYCHOLOGIST 483, 483-96 (1986). The amount of information available to the clinician was unrelated to accuracy, but was highly related to the degree of competence in the judgment. *See* Marnie E. Rice & Grant T. Harris, *Actuarial Assessment of Risk among Sex Offenders*, 989 ANNALS N.Y. ACAD. SCI. 198 (2003). The authors state that ROC data on their actuarial instruments (VRAG and SORAG) offer high reliability and predictive accuracies near ROC areas of 90%. *Id.* at 201-02.

255. *See* Mossman, *supra* note 232, at 783. Accuracy should be described by trade-offs between sensitivity and specificity independent of an examiner's actual cutoff score or legal decision threshold. *Id.* at 784.

256. *See* Gabrielle Sjosted & Niklas Langstrom, *Actuarial Assessment of Sex*

reliability, predictive validity, and stability of interpretive risk percentages.<sup>257</sup>

In summary, actuarial risk assessment instruments are in their relative infancy, and while some scholars believe they exhibit good predictive accuracy, reliability, and consistency/stability, others disagree. Unfortunately, this field is not sophisticated enough for the evaluator to specifically quantify how much actuarial instruments are to be modified.<sup>258</sup> The examiner should use his best judgment in deciding what empirical risk factors are important to the individual being evaluated. Further, the evaluator should attempt to obtain information regarding the base rate of the specific population being evaluated.<sup>259</sup> For example, an examiner

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*Offender Recidivism Risk: A Cross-Validation of the RRASOR and the Static 99 in Sweden*, 25 LAW & HUM. BEHAV. 629 (2001); see also Grant T. Harris et al., *A Multi-site Comparison of Actuarial Risk Instruments for Sex Offenders*, 15 PSYCHOLOGICAL ASSESSMENT 413, 413 (2003); R.W. Wollert, *The Importance of Cross-Validation Actuarial Test Construction: Shrinkage in the Risk Estimates of the Minnesota Sex Offender Screening Tool-Revised*, 2 J. THREAT ASSESSMENT 87 (2002). The benefits of actuarial risk instruments include the estimates of false positive predictions (probability that offenders with risk scores at or above a specified cut point will sexually recidivate) as well as negative predictive power (probability that offenders scoring below a specified cut score will not sexually recidivate). Despite the accuracy of the instruments, some argue they are not accurate enough to adequately inform the criminal justice system.

257. See Dennis Doren, *Stability of the Interpretive Risk Percentages for the RRASOR and the Static 99*, 16 SEXUAL ABUSE: J. RES. & TREATMENT 25, 25, 33 (2004).

258. More research is needed before adjustments to actuarial scores can be done with confidence. R. Karl Hanson, *Introduction to the Special Section on Dynamic Risk Assessment with Sex Offenders*, 14 SEXUAL ABUSE: J. RES. & TREATMENT, 99, 100 (2002). The accuracy of adjustments of actuarial scores is unknown. CAMPBELL, *supra* note 31, at 153. The average correlation of guided clinical judgment with sexual recidivism is 23%, and the average correlation for unguided clinical judgment and sexual recidivism is 7%. See Hanson, *supra* note 148, at 55.

259. Base rate data are critical when assessing sex offenders. See DOREN, *supra* note 22, at 145. Base rates are the proportion of a particular population (sex offenders) sharing a certain characteristic (reoffending). *Id.* at 145. Base rates include the frequency with which sex offending occurs for a population of sex offenders. Base rate data affect the precision of any assessment procedure in accurately identifying recidivists. *Id.* at 151; see Doren, *supra* note 257, at 31; cf. CAMPBELL, *supra* note 31, at 91 (warning that reliance on base rates alone in commitment decision making leads to confusion of sensitivity and specificity accuracy). Doren found that although it may have been believed in the past that a sample's underlying recidivism base rate could affect the interpretation of the actuarial instrument scores, that belief was largely not supported in his study. *Id.* at 34. Evaluators, apparently, do not need to concern themselves with the underlying population base rate when high risk is shown by this instrument—a high risk finding is a high risk finding no matter what the presumed five-year recidivism base rate for the sample from which the subject was drawn. *Id.* at 33.

evaluating an extrafamilial victim child molester in Iowa would benefit from understanding the base rates of sex-offending for prison release classes in that state specific to that offender group.<sup>260</sup>

While actuarial instruments appear to have more predictive accuracy than clinical judgments, there is concern that actuarial instruments are not designed to assess the likelihood of offenders' lifetime sexual recidivism.<sup>261</sup> Actuarial instruments do not contain a full list of risk and protective factors, and they are not meant to be fully conclusive and comprehensive in nature.<sup>262</sup> Therefore, empirical/clinical adjustment based primarily on research should be employed separately when considering actuarial data.<sup>263</sup>

Actuarial instruments should be used and can be modified and adjusted based on empirical data.<sup>264</sup> The examiner must review the literature and understand what factors associate or correlate with sex offending for specific populations (e.g., rapists). The examiner should recognize that actuarial tools are only one piece of the evaluation in addition to consideration of individual and dynamic factors, base rates, and empirical research factors.

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Concerning the Static-99, the underlying base rate may matter the more extreme it is, but in differing ways for low risk and high risk scores. *Id.* at 33. There is value in knowing the expected recidivism base rate for any sample from which a subject is taken. Knowing extreme scores ensures the proper risk interpretation of any given Static-99 score. *Id.* at 34.

260. If a specific tool was developed and replicated with a particular sample of offenders and the subject being evaluated has similar characteristics to that group, then the instrument will be more accurate. The examiner must be aware that actuarial instruments do not examine lifetime base rates, rather five, ten, and fifteen year periods. The examiner must also be aware that the larger the proportion of non-offenders in a study sample or prison release class, the greater the number of mistaken commitments compared with accurate commitments. Janus & Meehl, *supra* note 31, at 47.

261. DOREN, *supra* note 22, at 113. This concern focuses on age of offending and the assumption that child molesters and rapists offend less over time as they age. *Id.*

262. *Id.*

263. *See id.*

264. Yet examiners must rely on adjusting actuarial scores where the instruments leave off. *Id.* at 161. Other scholars, however, believe that experts must adjust the actuarial instruments because the tools are misspecified by the omission of important risk factors and by the expert's failure to distinguish between different groups of offenders. *See* Woodworth & Kadane, *supra* note 247, at 230-34. Further, the experts likely have an assumption that the normative samples are not always aligned with offender populations in other regions. *Id.* at 234. Woodworth and Kadane assert that when an expert uses "clinical judgment" to adjust and modify an actuarial score, this process creates a new un-normed instrument. *Id.*

The forensic examiner plays a key role at both the commitment hearing and the reexamination. Although some may argue that the initial commitment status hearing is more important due to the potential liberty interests at stake, the reexaminer's role should never be minimized. A reexaminer's role is significant for many reasons, including the fact that many individuals already civilly committed have never had an actuarial score implemented because actuarial risk assessment instruments were not in existence at the time of the commitment. Consequently, examiners must be very thorough and knowledgeable about the research because they will have to defend their opinions to various groups, including SRBs.<sup>265</sup>

Even though some may recommend the use of actuarial risk assessment instruments in SVP evaluations, it may be difficult in practice to combine developing professional instruments and standards which emphasize probabilistic assessments with statutory standards emphasizing individual predictions.<sup>266</sup> The examiner must remember that an offender's score on an actuarial instrument indicates that he shares similar characteristics of certain items with a subgroup of offenders in a research sample, a percentage of whom recidivated during a particular follow-up period.<sup>267</sup> The examiner should keep in mind that his legal referral question is whether the offender is above a certain likelihood threshold for sexual reoffending, rather than whether the offender will specifically reoffend.

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265. To illustrate this importance, the Minnesota Department of Corrections psychologist who evaluated Mr. Rodriguez prior to release from prison in some ways ignored Rodriguez's score of thirteen on the MnSOST-R (a score indicating referral for civil commitment status). See Matthew Von Pinnon, *Missing College Student: Evaluator Sounded Warning*, THE FORUM (Fargo, N.D.), Dec. 12, 2003, <http://www.in-forum.com/specials/drusjodin/index.cfm?page=article&id=46072&section=collection>. The expert cited Rodriguez's age and he was not referred for civil commitment petition status. Tom Scheck, *State Doctor Who Evaluated Rodriguez May be Removed from his Job*, MINN. PUB. RADIO NEWS, Dec. 18, 2003, [http://news.minnesota.publicradio.org/features/2003/12/18\\_scheckt\\_dru/](http://news.minnesota.publicradio.org/features/2003/12/18_scheckt_dru/). After the offender's alleged involvement with the Dru Sjodin case, the Governor of Minnesota considered criminally charging this psychologist. *Id.*

266. See John Petrila & Randy K. Otto, *Admissibility of Expert Testimony of Sexually Violent Predator Proceedings*, in THE SEXUAL PREDATOR: LEGAL ISSUES, CLINICAL ISSUES, SPECIAL POPULATIONS 3-1, 3-1 to 3-21 (Anita Schlank ed., 2001).

267. See *id.*

*D. Sex Offender Subtypes: Child Molesters and Rapists*

A forensic examiner must be aware of the various categories of sex offenders including child molesters and rapists, and the specific subtypes within each group. Further, it is critical to understand sex offender pathways and the etiology of offending. In 1998, Tony Ward and Stephen Hudson explained a relapse process model incorporating a description of the cognitive, behavioral, motivational, and contextual factors related to sex offending.<sup>268</sup> Pathways to sex offending usually involve consideration of types of goals, including desire for deviant sexual activity, affective states, degree of offense planning, and post offense behaviors.

Sex offenders reaching civil commitment status are usually extrafamilial child molesters and rapists.<sup>269</sup> Extrafamilial child molesters may be classified as mixed child molesters because they have sexually offended within the family and outside of the family, and they are considered more sexually deviant than incestuous child molesters.<sup>270</sup> Child molesters have been classified into various categories.<sup>271</sup> Four types of child molesters include “pedophile-fixated type,” “pedophile-regressed type,” “pedophile-aggressive type,” and “pedophile-exploitive type.”<sup>272</sup> Child molesters usually

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268. Stephen Hudson et al., *Offensive Pathways in Sexual Offenders*, 14 J. INTERPERSONAL VIOLENCE 779 (1999); Tony Ward & Stephen Hudson, *A Model of the Relapse Process in Sexual Offenders*, 13 J. INTERPERSONAL VIOLENCE 700 (1998).

269. See generally Prentky et al., *supra* note 219, at 148 (noting that the sample of child molesters examined in the study had an average of three known sexual offenses before release).

270. See Howard E. Barbaree & William L. Marshall, *Deviant Sexual Arousal, Offense History, and Demographic Variables as Predictors of Reoffense among Child Molesters*, 16 BEHAV. SCI. & L. 267, 267-72 (1988). Barbaree and Marshall found that sexual deviancy as measured by deviant sexual arousal, the amount of force used in the offense, whether the offender had intercourse with the child victim, and number of previous victims, was correlated with sexual recidivism. *Id.* at 267, 278. Social status, as measured by socioeconomic status and IQ, correlated with the number of subsequent offenses. *Id.* at 278.

271. See ROBERT A. PRENTKY & ANN W. BURGESS, *FORENSIC MANAGEMENT OF SEXUAL OFFENDERS* 38-39 (2000).

272. See Murray Cohen et al., *Sociometric Study of the Sex Offender*, 74 J. ABNORMAL PSYCHOL. 249, 249-55 (1969); see also PRENTKY & BURGESS, *supra* note 271, at 38-40 (noting that the exploitive type was not added by Seghorn until 1970 and was formally incorporated into Cohen’s classification system in a 1979 article). The fixated type includes a history of difficulties in psychological development, inability to form social companions and mature relationships, and preference for children as friends. PRENTKY & BURGESS, *supra* note 271, at 38. Offense behavior involves little force, the victim is usually not a stranger, and the sexual acts are usually molesting types without serious genital contact. *Id.* The offender is usually

have a longstanding and fixated sexual and interpersonal preference for children.<sup>273</sup> Child molesters may regress from adult social functioning and relate more fluently to children during times of stress, or molesters may exploit children, because the molesters have poor social skills and children are easy victims.<sup>274</sup>

Rapists have been classified in research based primarily on the work of Raymond Knight and Robert Prentky.<sup>275</sup> The rapist

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of moderate to high intelligence and grooms his victims. *Id.* The regressed pedophile is usually not violent and the goal is sexual gratification. *Id.* at 39. The offender has higher social adaptation. *Id.* The regressed pedophile experiences a history of normal dating of the opposite sex same-aged peers, and is often married and regularly employed. *Id.* When encumbered by life stressors, these offenders may regress and their sense of inadequacy is heightened, leading them to engage in impulsive sexual offending against children. *Id.* There is no sexual fixation on victims and the offender will be at a greater risk of recidivism if exposed to stress and impaired with poor coping abilities. *Id.* The aggressive pedophile's prime aim is sexual and aggressive behaviors. *Id.* The victims are more likely to be male, and the assaults may be vicious in nature. *Id.* The offender may experience sadistic features and experience a history of poor adaptation in social realms. *Id.* The exploitive type hones in on the child's weaknesses and uses the child to gratify his own sexual needs. *Id.* They usually focus on the child's genitals and aggression is usually instrumental, especially to achieve compliance by the child. *Id.* The offender is likely to attack strangers and lack empathy or remorse for his offense. *Id.* In his article, Dietz classifies child molesters as Situational offenders and Preferential offenders. *See* PARK DIETZ, *ENCYCLOPEDIA OF CRIME AND JUST., SEX OFFENSES: BEHAV. ASPECTS 1485-93* (1983). The former includes four subtypes: the Regressed offender; the Morally Indiscriminate offender (the manipulative, exploitive type); the Sexually Indiscriminate offender (sexually assaulting children out of boredom); and the Inadequate offender including those who suffer from bizarre personality disorder, psychosis, and mental retardation. PRENTKY & BURGESS, *supra* note 271, at 40-41. The Preferential offender includes three subtypes: the Seduction offender who has a clear sexual preference for children and often uses child pornography; the Introverted offender who is socially inadequate; and the Sadistic offender. *Id.* at 41; *see* KENNETH V. LANNING ET AL., *CHILD MOLESTERS: A BEHAVIORAL ANALYSIS: FOR LAW ENFORCEMENT OFFICERS INVESTIGATING CASES OF CHILD SEXUAL EXPLOITATION* (1992); A.N. Groth & A.W. Burgess, *Motivational Intent in the Sexual Assault of Children*, 4 *CRIM. JUST. & BEHAV.* 253, 253-64 (1977) .

273. PRENTKY & BURGESS, *supra* note 271, at 41.

274. *Id.*

275. *See* Raymond A. Knight & Robert A. Prentky, *Classifying Sexual Offenders: The Development and Corroboration of Taxonomic Models*, in *HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, AND TREATMENT OF THE OFFENDER 23* (W.L. Marshall et al. eds., Plenum Press 1990). Knight and Prentky identify nine subtypes of rapists based on their Massachusetts Treatment Center (MTC) classification system. *See* PRENTKY & BURGESS, *supra* note 271, at 62. The MTC classification system for rapists is a motivation system that consists of four groups of motivating factors, including: (1) opportunity, (2) pervasive anger, (3) sexual gratification, and (4) vindictiveness. *Id.*; *see also* A. NICHOLAS GROTH & H. JEAN BIRNBAUM, *MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER* (1979) (identifying Groth's rapist

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subtypes include opportunistic-high social competence,<sup>276</sup> opportunistic-low social competence,<sup>277</sup> pervasive anger,<sup>278</sup> overt sadism,<sup>279</sup> muted sadism,<sup>280</sup> sexual-high social competence,<sup>281</sup> sexual-low social competence,<sup>282</sup> vindictive-low social competence,<sup>283</sup> and

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typologies as Power-Reassurance, Power-Assertive, Anger-Retaliatio, and Anger-Excitation).

276. The Opportunistic-High Social Competence rapist engages in aggression which is often instrumental. *See* PRENTKY & BURGESS, *supra* note 271, at 64. They are moderately impulsive and have high levels of social and interpersonal competence. *Id.* The offenses are usually not sexualized and the offender often lacks history of paraphilias. *Id.* The offenses are not compulsive or premeditated. *Id.*

277. *Id.* The Opportunistic-Low Social Competence rapist engages in instrumental aggression and there is no presence of pervasive anger. *Id.* The offender is moderately impulsive and there is likely a history of antisocial behavior in adolescence and adulthood. *Id.* These rapists have a low level of social competence and the offenses are usually not sexualized. *Id.* They likely have no history of paraphilias and no evidence of sadism. *Id.* The offenses are not compulsive and there is little evidence of premeditation. *Id.*

278. *Id.* The Pervasive Anger rapist engages in a high level of aggression and violence in many areas of his life. *Id.* They have a history of aggression directed at men and women and the offenses are usually not sexualized. *Id.* There is no evidence of sadism, the offenses are not compulsive, and there is a lack of premeditation. *Id.*

279. *Id.* The Overt Sadism rapist engages in significant aggression and violence in many areas. *Id.* Sexual offenses include sadistic elements and there is often a history of pervasive antisocial behavior. *Id.* A history of paraphilias, offense planning, and premeditation are often present. *Id.*

280. *Id.* The Muted Sadistic rapist engages in instrumental aggression and some impulsive or antisocial behavior that is not critical to this type. *Id.* They engage in sadistic sexual behavior with a low level of violence and there is limited injury to their victims. *Id.* The acts may be symbolic rather than injurious, and there is less violence in sexual acts than the overt type. *Id.*

281. *Id.* The Sexual-High Social Competence rapist engages in instrumental aggression, a lack of pervasive anger, and pervasive antisocial behavior. *Id.* They have a high level of interpersonal competence and sex offenses are characterized by a high degree of sexualization, rape fantasy, and interest in a victim as a sexual object. *Id.*

282. *Id.* The Sexual-Low Social Competence rapist engages in instrumental aggression and has a lack of pervasive anger. *Id.* Antisocial behavior is more common in adulthood than adolescence and the rapist has a low level of social competence. *Id.* The sexual offenses are marked by a significant sexualization, rape fantasy, and characterization of the victim as a sexual object. *Id.* at 65.

283. *Id.* The Vindictive-Low Social Competence rapist engages in a high level of aggression that is directed towards females in sex offenses and other contexts. *Id.* There is no history of pervasive anger, and a more significant history of adult antisocial behavior than adolescent criminal behavior. *Id.* These rapists have low levels of interpersonal competence and the offenses are not usually sexualized. *Id.* They have no history of paraphilias and no evidence of sadism. *Id.* The offenses are usually not compulsive and there is a lack of offense planning. *Id.*

vindictive-high social competence.<sup>284</sup>

The opportunistic motivated rapist engages in unplanned, predatory sexual assaults that are situational in nature, rather than planned and driven by sexual fantasy.<sup>285</sup> The offender is often unsocialized in many aspects of his life, experiences lifestyle impulsivity, instability with employment, many short term relationships, and his assaults include immediate sexual gratification and a willingness to use force.<sup>286</sup> The pervasive anger motivated rapists are angry in every facet of their lives, target both genders with their anger and violence, have a history of fighting and gratuitous assaults, and inflict serious injury onto their victims.<sup>287</sup> Their rages are often not sexualized and they are not driven by rape fantasy.<sup>288</sup> The sexually-motivated rapist is highly preoccupied with gratifying his sexual drive, experiences violent rape fantasies, and uses alternative outlets such as pornography to deal with sexual urges, often experiences multiple paraphilias, and engages in premeditated sexual assaults.<sup>289</sup> A forensic examiner should be able to distinguish amongst various sex offender subtypes and identify research articles describing their characteristics and factors associated with reoffending.

#### E. *Dynamic Risk Factors*

Thus far, this article has reviewed static and unchangeable actuarial risk factors relevant to sexual recidivism.<sup>290</sup> This section will focus on dynamic and changeable risk factors that a forensic

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284. *Id.* The Vindictive-High Social Competence rapist is characterized by significant aggression and violence towards women. *Id.* Anger is not pervasive and there is likely a history of adolescent antisocial behavior. *Id.* Antisocial behavior may be present in adulthood and there is a high level of social competence. *Id.* The offenses are usually not sexualized and the offenders lack a history of paraphilias and sadism. *Id.* Offenses are not compulsive and there is a lack of premeditation. *Id.*

285. *Id.* at 63.

286. *Id.* Opportunistic rapists have macho attitudes and will not accept refusal from women. *Id.* When rejected, the rapist will use heightened physical force and will lack empathy for his victims. *Id.*; see also Robert A. Prentky et al., *Predictive Validity of Lifestyle Impulsivity for Rapists*, 22 CRIM. JUST. & BEHAV. 106 (1995) (discussing lifestyle impulsivity as typological discriminator for recidivism among rapists).

287. PRENTKY & BURGESS, *supra* note 271, at 65.

288. *Id.*

289. *Id.* at 66.

290. See *supra* Part V.C.



examiner must be aware of as relevant to both child molesters and rapists. Although static factors have been researched more extensively, it is crucial for a forensic examiner to be knowledgeable about dynamic risk factors during reexamination. The civilly committed patient may have spent twenty-five years both in prison and in a psychiatric institution, and the static variables have obviously never changed. The reexamination must address dynamic and changeable factors relevant to the offender's requests of increased privileges and eventual release.

Dynamic or clinical risk factors for child molesters include enduring relationships and sexual preoccupation with children, use of child pornography, proximity and access to children, impulsivity, cognitive distortions that sex with children is appropriate and that the child initiated the sexual encounter, substance abuse, grooming the child, poor social and interpersonal skills, low self-esteem and feelings of inadequacy, sexual fantasy towards children, anger towards victims, denial of problems, and failure to comply with supervision in the community.<sup>291</sup> Dynamic or clinical risk factors for rapists include impulsivity and low frustration tolerance, antisocial peers, rape fantasy and rape myths, viewing women as sexual objects, anger and hostility, substance abuse and providing alcohol and drugs in order to disinhibit and take advantage of their victims, poor social skills and low self esteem, intimacy deficits and fear of rejection by women, denial of problems, unstable lifestyle or lifestyle impulsivity, and failure to successfully comply with community supervision.<sup>292</sup>

Rapists are more likely than child molesters to have a history of pervasive antisocial behaviors, including general criminal offending, violent offending, and psychopathy.<sup>293</sup> Child molesters who reoffend are more likely to be convicted of a new sex offense rather than a nonsexual violent offense, whereas rapists are about as likely to be convicted of a nonsexual violent offense as a sexually violent act.<sup>294</sup>

The most comprehensive work on dynamic factors of criminal offenders was conducted by D.A. Andrews and James Bonta.<sup>295</sup>

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291. PRENTKY & BURGESS, *supra* note 271, at 137.

292. *Id.* at 138.

293. *Id.* at 139.

294. Grant T. Harris et al., *Appraisal and Management of Risk in Sexual Aggressors: Implications for Criminal Justice Policy*, 4 PSYCHOL. PUB. POL'Y & L. 73, 85 (1998).

295. D.A. ANDREWS & JAMES BONTA, *THE PSYCHOLOGY OF CRIMINAL CONDUCT* (3d

They focused on targeting antisocial attitudes and self-control deficits—which they term “criminogenic needs”—that should be applied to both nonsexual offenders and sexual offenders, especially rapists.<sup>296</sup>

Karl Hanson’s study also assists with understanding dynamic predictors of sexual offense recidivism.<sup>297</sup> These researchers found that sexual recidivists were likely to have poor social supports, attitudes tolerant of sexual assault, antisocial lifestyles, poor self-management strategies, and difficulties cooperating with supervision.<sup>298</sup> The recidivists showed increased anger and subjective distress just before reoffending.<sup>299</sup> Sex offenders are more likely to sexually reoffend if they experience sexual energy aroused by many circumstances, including negative affect, and if they feel deprived or frustrated when they are unable to pacify their sexual urges.<sup>300</sup> They often experience stress, depression,

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ed. 2003).

296. *Id.* at 86. The targeting of antisocial associates reducing the association with criminal others and enhancing the association with anti-criminal others decreases criminal recidivism. *Id.* Personal criminogenic targets include antisocial, cognition, and skill deficits. *Id.* at 87. Interpersonal criminogenic targets include family process, antisocial associates, school, work, and substance abuse. *Id.*; see also V. QUINSEY ET AL., *supra* note 229, at 215 (discussing dynamic scale items predictive of antisocial failure including pro-criminal beliefs, noncompliance, depressed moods, and psychiatric symptoms). Dynamic antisociality includes items reflecting pro-criminal sentiments, such as showing no remorse, taking no responsibility for behavior, ignoring past previous violent acts, having more antisocial attitudes and values, having unrealistic discharge plans, and having made threats aimed at specific victims. *Id.* at 218-19. Inappropriate and pro-criminal social behaviors include impulsivity, lack of consideration for others, unconventional attitudes, criminal attitudes, shallow affect, superficiality, substance abuse, sexual misbehaviors, and criminal associates. *Id.* at 219.

297. R. Karl Hanson & Andrew J.R. Harris, *Where Should We Intervene? Dynamic Predictors of Sexual Offense Recidivism*, 27 CRIM. JUST. & BEHAV. 6 (2000) (studying retrospective comparisons of offenders who reoffended while on community supervision with offenders who did not reoffend). Hanson’s results indicated that recidivists were more likely to have employment problems, substance abuse problems, negative mood, anger, psychiatric symptoms, less positive social influences, more negative social influences, problems with intimacy, social problems, low remorse and victim blaming, rape attitudes, child molester attitudes, sexual entitlement, poor self-management attitudes, problems recognizing the risk of recidivism, significant victim access, as well as sexual preoccupations/sexual deviancy and antisocial lifestyle. *Id.* at 22.

298. *Id.* at 6.

299. *Id.* Dynamic risk factors reported by supervision officers were strongly associated with recidivism, even after controlling for pre-existing differences in static factors. *Id.*

300. R. KARL HANSON & ANDREW HARRIS, DEP’T OF THE SOLICITOR GEN. CAN.,

loneliness, fear of intimacy and rejection, often leading to feelings of hostility and anger.<sup>301</sup> Sex offenders may deal with these affective states through deviant sexual fantasy and masturbatory practices.<sup>302</sup> Ultimately, these factors may impede their ability to control their urge to engage in offending behaviors.

Hanson and Harris developed the Sex Offender Need Assessment Rating (SONAR), a method for measuring change in risk levels.<sup>303</sup> The authors note that sex offenders may have problems with emotional or sexual regulation, general self-regulation and impulse control problems, such as using drugs, quitting jobs or school, and having multiple short-term sexual relationships.<sup>304</sup> Acute risk factors include identifying elements when sex offenders are most likely to reoffend, including substance abuse, negative mood states (depression, anxiety, anger, and hostility), and opportunities for victim access.<sup>305</sup>

A forensic reexaminer must be knowledgeable of the research concerning both dynamic risk factors and sex offender typologies, and must be able to articulate this data when evaluating individual sex offenders.<sup>306</sup>

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THE SEX OFFENDER NEED ASSESSMENT RATING (SONAR): A METHOD FOR MEASURING CHANGE IN RISK LEVELS 4 (2000), available at <http://nicic.org/Library/016958>.

301. *Id.* at 5.

302. *Id.* at 4.

303. *Id.* The authors focused on dynamic variables that were amenable to deliberate interaction in treatment. The SONAR is based on a scoring system focusing on intimacy deficits, including empathy and kindred relationships, as well as social influences, including the number of criminal companions and their impact on sex offending. These social influences promote generally antisocial attitudes, poor behavior control, substance abuse, and dysfunctional coping strategies. *Id.* at 3. Other factors include attitudes (tolerance of sexual assaults including rape myths or beliefs supporting or condoning sexual assault) and sexual self-regulation (sexual urges relating to entitlement to act out sexual impulses, overall level of subjective distress, and behaviors used by sex offenders for regulating their emotional and sexual feelings). See generally R. Karl Hanson & Andrew J. Harris, *A Structured Approach to Evaluating Change Among Sexual Offenders*, 13 *SEXUAL ABUSE: J. RES. & TREATMENT* 105 (2001). Hanson and Harris found the SONAR to show adequate internal consistency and a utility in differentiating recidivists and non-recidivists. *Id.*

304. Hanson & Harris, *supra* note 303, at 108.

305. *Id.* at 109.

306. Other relevant articles discussing dynamic risk factors for sex offenders include: Kurt M. Bumby & David J. Hansen, *Intimacy Deficits, Fear of Intimacy, and Loneliness Among Sexual Offenders*, 24 *CRIM. JUST. & BEHAV.* 315 (1997); J. Geer et al., *Empathy, Social Skills, and Other Relevant Cognitive Processes in Rapists and Child Molesters*, 5 *AGGRESSION & VIOLENT BEHAV.* 99 (2000); Diane S. Hayashino et al., *Child Molesters: An Examination of Cognitive Factors*, 10 *J. INTERPERSONAL VIOLENCE*

## VI. PSYCHOPATHY AND SEX OFFENDING

A. *Limitations in the Assessment of Psychopathy*

Although psychopathy as a construct has been known to be a robust and useful predictor of violent recidivism among committed mentally ill patients and incarcerated felons, it has also been found among sex offender populations.<sup>307</sup> Many sex offenders, especially high-risk rapists of adult females who have a history of diverse criminal conduct, are psychopathic in nature.<sup>308</sup> However, there

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106 (1995); James Horley, *Cognitions Supportive of Child Molestation*, 5 *AGGRESSION & VIOLENT BEHAV.* 551 (2000); Steve M. Hudson et al., *Dynamic Risk Factors: Kia Marama Evaluation*, 14 *SEXUAL ABUSE: J. RES. & TREATMENT* 103 (2002); Stephen M. Hudson & Tony Ward, *Intimacy, Loneliness, and Attachment Style in Sexual Offenders*, 12 *J. INTERPERSONAL VIOLENCE* 323 (1997); David Lisak & Carol Ivan, *Deficits in Intimacy and Empathy in Sexually Aggressive Men*, 10 *J. INTERPERSONAL VIOLENCE* 296 (1995); W.L. Marshall & Laura Sona Hambley, *Intimacy and Loneliness, and Their Relationship to Rape Myth Acceptance and Hostility Toward Women Among Rapists*, 11 *J. INTERPERSONAL VIOLENCE* 586 (1996); Stephen Mihailides et al., *Implicit Cognitive Distortions and Sexual Offending*, 16 *SEXUAL ABUSE: J. RES. & TREATMENT* 333 (2004); Jacci Milsom et al., *Emotional Loneliness in Sexual Murderers: A Qualitative Analysis*, 15 *SEXUAL ABUSE: J. RES. & TREATMENT* 285 (2003); Marnie E. Rice et al., *Empathy for the Victim and Sexual Arousal Among Rapists and Non Rapists*, 9 *J. INTERPERSONAL VIOLENCE* 435 (1994); Bonnie T. Seidman et al., *An Examination of Intimacy and Loneliness in Sex Offenders*, 9 *J. INTERPERSONAL VIOLENCE* 518 (1994); Tony Ward & Thomas Keenan, *Child Molesters' Implicit Theories*, 14 *J. INTERPERSONAL VIOLENCE* 821 (1999); T. Ward et al., *Understanding Cognitive, Affective, and Intimacy Deficits in Sexual Offenders: A Developmental Perspective*, 5 *AGGRESSION & VIOLENT BEHAV.* 41 (2000); T. Ward & S. Hudson, *Sexual Offenders' Implicit Planning: A Conceptual Model*, 12 *SEXUAL ABUSE: J. RES. & TREATMENT* 189 (2000);

307. See Stephen Porter et al., *Profiles of Psychopathy in Incarcerated Sexual Offenders*, 27 *CRIM. JUST. & BEHAV.* 216 (2000). Porter et al. found that rapists and offenders who assaulted both adults and children had higher PCL-R scores than child molesters. *Id.* at 216-20. All sex offenders had higher interpersonal psychopathic traits (Factor 1 score). *Id.* Mixed rapists and child molesters had elevated PCL-R scores possibly indicating a need for thrill seeking and a link to diverse sexual crimes and victims. *Id.*; see also *PSYCHOPATHY: ANTISOCIAL, CRIMINAL, AND VIOLENT BEHAVIOR* (Theodore Millon et al. eds, Guilford Press 1998); Carl B. Gacono & Robert H. Bodholdt, *The Role of the Psychopathy Checklist-Revised (PCL-R) in Violence Risk and Threat Assessment*, 1 *J. THREAT ASSESSMENT* 65 (2001); Robert Hare et al., *Male Psychopaths and Their Criminal Careers*, 56 *J. CONSULTING & CLINICAL PSYCHOL.* 710, 710-14 (1988); Stephen Hart et al., *Performance of Male Psychopaths Following Conditional Release from Prison*, 56 *J. CONSULTING & CLINICAL PSYCHOL.* 227, 227-32 (1988); Ralph C. Serin et al., *Predictors of Psychopathy and Release Outcome in a Criminal Population*, 2 *PSYCHOL. ASSESSMENT: J. CONSULTING & CLINICAL PSYCHOL.* 419, 419-22 (1990); Ralph C. Serin, *Psychopathy and Violence in Criminals*, 6 *J. INTERPERSONAL VIOLENCE* 423, 423-31 (1991).

308. Psychopathy encompasses three facets: affective, interpersonal and behavioral/lifestyle. See ROBERT D. HARE, *HARE PCL-R: TECHNICAL MANUAL* 5 (2d

are problems in correctly assessing psychopathy in certain populations. For example, civilly committed sex offenders are often incarcerated in both prisons and psychiatric facilities for many years. Therefore, having lived in artificial environments since their last sex offense, it is difficult to accurately evaluate them. The evaluator is burdened with the task of predicting future sexual dangerousness. He also must determine whether the individual has benefited from treatment and has altered certain clinical features, including sexual deviance, sexual fantasy, and psychopathy. Although these traits may be seen as being dispositional in nature, they can diminish over time.

The examiner must consider problems specific to the assessment of psychopathy in civil commitment evaluations. These include issues such as comorbidity with acute mental disorder, test-retest reliability, and the precision of its measurement.<sup>309</sup> Many sex offenders have co-occurring psychiatric disorders, including substance abuse, and less frequently, mood, anxiety, and psychotic disorders.<sup>310</sup> Features of other psychiatric disorders, such as shallow affect in schizophrenics or impulsivity problems in substance abusers, may mimic traits of psychopathy.<sup>311</sup> A child molester who is socially isolative having few relationships may be described as displaying shallow affective response in their interpersonal relationships. Is a shallow affective response style measuring psychopathy or pedophilia? The examiner must rule out acute mental disorders before making diagnoses of mental disorders in

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ed. 2003) [hereinafter HARE, TECHNICAL MANUAL]. It should be noted that psychopathy is less common than antisocial personality disorder (APD) in criminal offender populations. Between 50% and 80% of incarcerated adult male offenders qualify for APD while only about 15% to 25% qualify for psychopathy. *Id.* at 92. APD underestimates psychopathic traits found in offender/forensic populations. See Robert Hare et al., *Psychopathy and the DSM-IV Criteria for Antisocial Personality Disorder*, 100 J. ABNORMAL PSYCHOL. 391, 391-98 (1991) (discussing the relationship between APD and psychopathy).

309. The PCL-R has been known to exhibit good inter-rater reliability and validity properties. See HARE, TECHNICAL MANUAL, *supra* note 308, at 63-64; Robert Hare et al., *The Revised Psychopathy Checklist: Reliability and Factor Structure*, 2 PSYCHOL. ASSESSMENT: J. CONSULTING & CLINICAL PSYCHOL. 338, 338-41 (1990); see also JAMES F. HEMPHILL & STEPHEN D. HART, *FORENSIC AND CLINICAL ISSUES IN THE ASSESSMENT OF PSYCHOPATHY*, HANDBOOK OF PSYCHOLOGY: VOL. 11 FORENSIC PSYCHOLOGY 87, 87-107 (2003). The PCL-R standard error of measurement is about 3.25. *Id.* at 96.

310. HEMPHILL & HART, *supra* note 309, at 97.

311. *Id.* at 100.

addition to psychopathy.<sup>312</sup> Importantly, the examiner should consider that the display of the trait is what is important relevant to risk, rather than the etiology. A clinician may never be able to definitively decipher the etiology of a PCL-R item, whether it derives from a criminal personality or a psychiatric disorder.

PCL-R scores should demonstrate high test-retest reliability across time. Importantly, individuals identified with psychopathic traits early in life should exhibit similar traits later in life.<sup>313</sup> The stability of PCL-R scores supports the view that psychopathy consists of a stable core of character and behavioral traits.<sup>314</sup> The PCL-R is expected to exhibit high test-retest reliability, because the key during the current assessment is lifetime functioning behaviors across many domains.<sup>315</sup> If the PCL-R scores were not stable over time, then the PCL-R would not be expected to accurately identify offenders at risk for committing future crimes.<sup>316</sup> However, little research has been conducted to examine stability of PCL-R scores over long periods of time with sex offender populations.<sup>317</sup>

Critical to the assessment of psychopathy in reexaminations is that many sex offenders have been institutionalized prior to the development of the PCL-R; thus, current assessments cannot be compared to past PCL-R scores. Some believe that many sex offenders are “burned out” as they enter their late fifties and sixties.<sup>318</sup> When they are reexamined, some of their psychopathic traits may have diminished over time. For example, consider the

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312. *Id.*

313. *Id.* at 101-02.

314. *Id.* at 102.

315. *Id.*

316. *Id.*

317. *Id.* Many of the test-retest reliability studies include measurements of inmates who had been reassessed in short periods of time, including less than a year. See Ann Rutherford et al., *The Two Year Test-Retest Reliability of the Psychopathy Checklist-Revised on Methadone Patients*, 6 PSYCHOL. ASSESSMENT 285, 286 (1999) (finding that the PCL-R demonstrated reasonably high test-retest reliability over an interval of two years).

318. See Paris, *supra* note 20, at 281-82 (discussing the Epidemiologic Catchment Area study by of 1991 that found a striking decrease in the prevalence of antisocial personality disorder (APD) after age forty-four and discussing the “burnout” of APD in middle ages); Stephen Porter et al., *Investigation of the Criminal and Conditional Release Profiles of Canadian Federal Offenders as a Function of Psychopathy and Age*, 25 LAW & HUM. BEHAV. 647 (2001) (finding that psychopathic offenders consistently committed more violent and non-violent crimes, as compared to non-psychopathic offenders, from their late adolescent years until their late forties; psychopathic offenders’ non-violent offending patterns were also found to burn out more rapidly than their violent offending patterns).

fifty-year-old patient who has not lived in the “real world” for many years and who may have committed his last sex offense at age twenty. The clinician must be aware of the stability of psychopathy over time. The examiner should consider assessing the offender’s past status of psychopathic traits based on record review information and then determine current psychopathy based on self-report and file review to allow for a comparison of the stability of psychopathy over time.

Unfortunately, there are limited studies addressing the stability of psychopathy in sex offenders over long periods of time. Despite a history of anecdotal descriptions of psychopathy and sociopathy in the records, it is unlikely that the clinical construct was formally, objectively assessed. Moreover, the offenders have also learned “treatment jargon” and determined the “right things to say” to reexaminers about what they have learned in treatment, i.e., empathy, remorse, and other emotions which ultimately affect scores on the PCL-R.<sup>319</sup>

Evaluators may consider having two psychologists perform the PCL-R assessment to consider inter-rater reliability and ensure accuracy of scoring. An examiner should also participate in PCL-R training, obtain as many collateral resources as possible, assess for comorbidity and differential acute mental disorder diagnoses, communicate the limitations of their assessment methods, provide a causal explanation of psychopathy to any legal impairment or definition, and avoid overstating the significance of antisocial behavior and APD in the assessment of psychopathy.<sup>320</sup>

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319. See Robert Hare, *The Hare PCL-R: Some Issues Concerning its Use and Misuse*, 3 LEGAL & CRIMINOLOGICAL PSYCHOL. 99, 99-119 (1998) (analyzing problems that arise when the PCL-R and PCL:SV are misused). Hare provides an example of an offender who scored a thirty-three on the PCL-R and, after treatment, his score decreased to twenty-two. *Id.* at 116. The treatment provider assessed him after treatment and found that during treatment his score on the PCL-R decreased on the affective and interpersonal items (due to treatment effects). *Id.* Hare points out that this change is remarkable and treatment staff should not administer the PCL-R due to bias. *Id.*

320. HEMPHILL & HART, *supra* note 309, at 101; see also John F. Edens, *Misuses of the Hare Psychopathy Checklist-Revised in Court. Two Case Examples*, 16 J. INTERPERSONAL VIOLENCE 1082, 1082-93 (2001) (reviewing predictive and ethical problems with the PCL-R based on two case examples and providing recommendations regarding its appropriate application).

B. *“The Dynamic Duo”: Psychopathy and Sexual Deviancy*

Although there are some weaknesses concerning psychopathy assessment, this author still recommends its assessment due to the strong relationship between psychopathy and sexual deviance, known as the “Dynamic Duo,” with sexual recidivism.<sup>321</sup> Further, the objective assessment of the offender’s current sexual deviancy may be another critical piece of data to consider rather than simply relying on the offender’s self-report and pattern of sexual offenses. There are inherent problems, however, with the assessment of sexual deviancy gathered through phallometric/plethysmographic instrument data.

Phallometry assessment through penile plethysmograph includes the measurement of male sexual arousal by assessing variance in the degrees of penile tumescence (sexual arousal) when exposed to normal and deviant sexual stimuli, usually visual or audio in nature.<sup>322</sup> It is useful in the assessment and treatment of sex offenders. The stimuli may include children and adults of both genders, as well as the use of force, sadism, or other various

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321. See Rice et al., *supra* note 206, at 443-47 (finding that sexual recidivism and violent recidivism were significantly related to phallometrically measured sexual interest in nonsexual violence and levels of psychopathy); see also Grant T. Harris et al., *A Multisite Comparison of Actuarial Risk Instruments for Sex Offenders*, 15 PSYCHOL. ASSESSMENT 413, 413-25 (2003) (finding that offenders who had elevated levels of psychopathy and sexual deviance were a high-risk group); Stephen Porter et al., *Characteristics of Sexual Homicides Committed by Psychopathic and Nonpsychopathic Offenders*, 27 LAW & HUM. BEHAV. 459, 459-70 (2003) (finding that most of the sexual murderers in their study scored in the moderate to high ranges on the PCL-R and most of the psychopaths exhibited some degree of sadistic behavior); Vernon L. Quinsey et al., *Actuarial Prediction of Sexual Recidivism*, 10 J. INTERPERSONAL VIOLENCE 85, 85-105 (1995) (stating that psychopathy, previous criminal history, and phallometric data of sexual deviancy are solid predictors of sexual reoffending); Ralph C. Serin et al., *Psychopathy and Deviant Sexual Arousal in Incarcerated Sexual Offenders*, 9 J. INTERPERSONAL VIOLENCE 3, 3-11 (1994) [hereinafter Serin, *Incarcerated Sexual Offenders*] (finding that high PCL-R scores and phallometric indexes of deviant sexual arousal were significantly correlated, especially for extrafamilial child molesters); Ralph C. Serin et al., *Psychopathy, Deviant Sexual Arousal, and Recidivism Among Sexual Offenders*, 16 J. INTERPERSONAL VIOLENCE 234, 234-46 (2001) [hereinafter Serin, *Psychopathy*] (finding that child molesters and rapists who displayed psychopathic traits and deviant sexual arousal reoffended sooner and at higher rates). But see Jan Looman & William Marshall, *Sexual Arousal in Rapists*, 32 CRIM. JUST. & BEHAV. 367, 367-89 (2005) (finding no significant relationship between sexual arousal, offense related variables, and psychopathy).

322. Rice et al., *supra* note 206, at 441.



paraphilias and portrayal of consensual acts or victim suffering.<sup>323</sup> The individual may be presented with a set of slides or audiotape scenarios that act as stimuli.

There is promising data regarding the statistical properties of phallometric data and its relationship to sexual deviancy and sexual offending.<sup>324</sup> Setbacks to such data include sampling bias, as only convicted sex offenders are usually evaluated, the presence of multiple paraphilias clouding results, false negatives and positives, suppressing deviant sexual arousal and increasing normal arousal, and deficits in reliability, validity, and sensitivity.<sup>325</sup> The plethysmograph continues to be controversial in both nature and result. Examiners cannot determine from phallometric data that an offender committed a past crime, although such data may be more useful in determining future sexually deviant behavior.<sup>326</sup>

Both psychopathy and sexual deviancy should be assessed due to the robust nature of their incremental validity pertaining to the prediction of sexual recidivism. It is critical to obtain a current snapshot of the offender's sexual deviancy, because his self-report

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323. *Id.* at 437-40.

324. See D. RICHARD LAWS & WILLIAM O'DONOHUE, *SEXUAL DEVIANCE: THEORY, ASSESSMENT AND TREATMENT* 46-48 (1997); Kurt Freund & Robin J. Watson, *Assessment of the Sensitivity and Specificity of a Phallometric Test: An Update of Phallometric Diagnosis of Pedophilia*, 3 *PSYCHOL. ASSESSMENT: J. CONSULTING & CLINICAL PSYCHOL.* 254 (1991); Grant Harris et al., *Maximizing the Discriminant Validity of Phallometric Assessment Data*, 4 *PSYCHOL. ASSESSMENT* 502 (1992); Martin L. Lalumiere & Vernon L. Quinsey, *The Discriminability Of Rapists From Non-Sex Offenders Using Phallometric Measures: A Meta-Analysis*, 21 *CRIM. JUST. & BEHAV.* 150 (1994); Martin Lalumiere et al., *Are Rapists Differentially Aroused by Coercive Sex in Phallometric Assessments*, 989 *ANNALS N.Y. ACAD. SCI.* 211 (2003); Gordon C. Nagayama Hall et al., *The Role of Sexual Arousal in Sexually Aggressive Behavior: A Meta-Analysis*, 61 *J. CONSULTING & CLINICAL PSYCHOL.* 1091 (1993).

325. Robin Wilson, *Psychophysiological Signs of Faking in the Phallometric Test*, 10 *SEXUAL ABUSE: J. RES. & TREATMENT* 113, 113-26 (1998). The choice of stimulus sets in phallometric assessment is important to consider. *Id.* at 113-14. Sex offenders may respond differently to audio versus visual stimuli. *Id.* at 113. There have been newer developments of standardized non-pornographic plethysmography assessments. One penile plethysmography (PPG) method is called the Behavior Technology Inc. Monarch Penial Plethysmograph (PPG). Behavioral Technology, Inc., Using Technology to Make the World a Safer Place, <http://www.btimonarch.com/m21.html> (last visited Oct. 28, 2005). There are reliability and validity issues and they have not been well established. Offenders can simulate or fake responses by manipulating mental images. Wilson, *supra* at 114-15.

326. See Gene G. Abel et al., *Identifying Dangerous Child Molesters*, in *VIOLENT BEHAVIOR: SOCIAL LEARNING APPROACHES TO PREDICTION, MANAGEMENT, AND TREATMENT* 116, 116-37 (Richard B. Stuart ed., 1981).

can be suspect.<sup>327</sup> Yet some believe that plethysmography testing is not necessary to evaluate sexual deviance as a history of a documented diagnosis and reliance on patterns of sex offending may suffice. Along these lines, the next section will briefly describe the problems with reliability of diagnoses pursuant to sex offender civil commitment assessments.

#### VII. DIAGNOSTIC CLASSIFICATION PROBLEMS IN SEX OFFENDER CIVIL COMMITMENT EXAMINATIONS

The most common diagnostic dilemmas pursuant to sex offender civil commitment evaluations lie within the assessment of antisocial personality disorder, pedophilia, sexual sadism, and paraphilia not otherwise specified (rape, non-consent type). At the time of the initial civil commitment hearing, diagnoses may be argued quite substantially pursuant to the mental abnormality and volitional impairment legal criteria. Once these individuals are committed, diagnostic criteria continue to be of vital importance, and after years of treatment, definitive diagnoses should be achieved. Examiners must rely on the DSM-IV for diagnostic classification.<sup>328</sup>

Critics of the DSM-IV's categorical classification argue that psychopathology falls into a continuum.<sup>329</sup> Some contend that the DSM-IV fails to "identify the point at which a set of symptoms amounts to a mental disorder," and this uncertainty may detrimentally impact its "evidentiary reliability in legal

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327. *Id.* at 135.

328. CAMPBELL, *supra* note 31, at 167. The Diagnostic and Statistical Manual of Mental Disorders, DSM-IV, assumes that people sharing the same diagnostic label are more similar to each other than not. *Id.* Campbell argues that "[t]here is no evidence indicating that the *DSM-IV* has reduced the biases [often] undermining [the intent] and efforts of diagnosticians." *Id.* at 169. Diagnostic classifications symbolize the ethnic and social class prejudices of diagnosticians, as well as social stereotypes that they may relate to a particular disorder. *Id.* He contends that the DSM-IV encourages the over-diagnosis of psychopathology. *Id.* at 170. Campbell also argues that the "not-otherwise-specified" categories are ill-defined and over-inclusive in that examiners can find evidence of a mental disorder for just about anyone. *Id.* at 171. Campbell also noted that the DSM-IV is skewed toward "ruling-in" psychopathology and creates a risk of false positive diagnostic classifications. *Id.* at 170. Campbell also warns against using clinical judgment of DSM-IV criteria when forced to rely only on clinical judgment (when the offender refuses an interview). *Id.* at 173.

329. *Id.* at 167.

proceedings.”<sup>330</sup> Clinicians may be forced to overuse clinical judgment due to the absence of a unifying theory in the DSM-IV to guide diagnostic assessment and decision making.<sup>331</sup>

Specific to SVP evaluations, there are problems with the DSM-IV concerning its definitions for paraphilias.<sup>332</sup> In the context of sex offender civil commitment assessments, some examiners have identified problems in applying certain phrases from DSM-IV’s definition of paraphilia, such as “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors.”<sup>333</sup> There are problems with obtaining reliable measures of an offender’s intentions and arousal patterns that are important in the diagnosis of sexual sadism.<sup>334</sup> The sadist must be distinguished from the

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330. *Id.* at 170. The DSM-IV does acknowledge its limitations when used in legal proceedings. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxxii-xxxiii (4th ed., text rev. 2000). “[T]he clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a . . . ‘mental disease’ or ‘mental defect.’” *Id.* at xxxiii. “[I]mpairments, abilities, and disabilities vary widely within each diagnostic category [and] assignment of a particular diagnosis does not imply a specific level of impairment or disability.” *Id.*

331. CAMPBELL, *supra* note 31, at 176-77.

332. *Id.* at 177-78; see also DOREN, *supra* note 22, at 56.

333. DOREN, *supra* note 22, at 56 (quoting AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 522 (4th ed. 1994) [hereinafter DSM-IV, 1994]).

334. See W.L. Marshall et al., *Diagnosing Sexual Sadism in Sexual Offenders: Reliability Across Diagnosticians*, 46 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 668, 668-69 (2002); W.L. Marshall et al., *Issues Concerning the Reliability and Validity of the Diagnosis of Sexual Sadism Applied in Prison Settings*, 14 SEXUAL ABUSE: J. RES. & TREATMENT 301, 302-03 (2002). Concerning sadism, a connection must exist between the victim’s suffering and either the offender’s intention or arousal. DOREN, *supra* note 22, at 60. Further, sexual sadists may engage in highly ritualized, sadistic rapes once or twice within a month yet have no known prior offenses, although research may indicate that they have developed their fantasies over extended periods of time before, during and after their offenses. *Id.* at 62. Sexual sadists may be difficult to distinguish from paraphiliac rapists. *Id.* at 77. Signs of sexual sadism include mutilating the victim, deliberate injury causing serious injury, bleeding, or causing death to the victim, and these behaviors should be related to the person’s sexual arousal. *Id.* at 78. The sexual sadist may perform acts solely to terrorize the victim, including blindfolding him or her and making repetitive comments about threats of killing him or her. *Id.* Sexual sadists may choke their victims to near death and engage in repetitive choking, use various tools such as pliers to squeeze genital parts. *Id.* They may bite genital and breast areas, force fellatio after anal intercourse, insert objects into orifices causing bleeding and other injuries. *Id.* They may force one victim to have sexual contact with another while the offender watches or also performs. *Id.* at 79. Sexual sadists may force one victim to watch the sexual assault of another and engage in prolonged periods of assault for many hours to days, and may take trophies of the

repeat power rapist; the latter may satisfy a paraphilia not otherwise specified diagnosis but formally lacks the enjoyment and sexual arousal of humiliating and torturing his victims.<sup>335</sup> The reexaminer must take an active role in gathering records to assess for consistent patterns of behavioral characteristics of the offender's sexual assaults.<sup>336</sup>

One segment of DSM-IV's definition of paraphilia includes the phrase "over a period of at least [six] months."<sup>337</sup> Frequently, offenders will sexually offend for a period of three months, then be incarcerated for many years, offend again for two months, and then

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experience, such as jewelry, hair, or photographs. *Id.*

335. DOREN, *supra* note 22, at 77-78. Rapists who are repeatedly caught for their crimes may not be paraphiliacs. *Id.* at 67. They must suffer from fantasies, urges, and behaviors in order to have a paraphilia. *Id.* at 67-68. Being aware of various behaviors of rapists will allow the examiner to determine whether a rapist has a paraphilia or not. *Id.* at 68. Such signs include ejaculation or signs of sexual arousal during nonconsensual assaults. *Id.* For example, rapists may like to physically assault someone for the reward violence brings, rather than sexual pleasure. *Id.* The combination of ejaculation and the defender's recognition that during the offense he was engaging clearly in non-consenting sexual contact may describe a paraphiliac rapist. *Id.* at 69. A significant portion of a paraphiliac rapist's criminal behavior is sexual in nature. *Id.* at 72. Paraphiliac rapists often rape when the victim had already been willing to have consensual sex and often rape quickly after being incarcerated for prior sex offenses. *Id.* at 72-73. Paraphilic rapists may rape under circumstances with high likelihood of being caught and may rape when they also have cooperative sexual partners in their life. *Id.* at 73-74. They often have various types of victims. *Id.* at 74-75. Other factors include demonstration of a victim's distress during the assault in which the perpetrator continues his arousal and ejaculates. *Id.* at 75. The paraphiliac rapist may cover the face of the victim during the assault for reasons other than protecting the offender's identity and may engage in violence beyond that which is necessary to obtain compliance. *Id.* at 75. The paraphiliac rapist may engage in sexual acts that are physically painful and injurious to the victims and offend the victims when they are asleep. *Id.* The examiner should note that some rapists experience a paraphiliac condition related to their sexual violence, yet there is no specific paraphilia indicated for rape. Hence, a paraphilia not otherwise specified diagnosis may be employed.

336. *Id.* at 70. Records may indicate factors including the offender's paying attention to the victim's reaction during the assault, his perpetrating against a stranger, and use of weapon and preparation of a "rape kit." *See id.* at 76 (describing a "rape kit" as "a set of implements a perpetrator keeps available . . . for use in fulfilling his sexual fantasy involving a nonconsensual . . . interaction."). Paraphiliac rapists exhibit repetitive behavioral patterns—"signature[s]"—that characterize their sexual assaults. *Id.* at 70. The examiner should assess whether the offender groomed the victim, how he initiated the attack, whether there were comments and "dirty talk" during the offense, whether he had the victim comply with certain acts, and how he treated the victim after the assault. *Id.*

337. *Id.* at 56 (quoting DSM-IV, *supra* note 333, at 523).

be incarcerated again.<sup>338</sup> Therefore, the offender may have sexually offended over a five-month period which does not technically satisfy the six-month criterion.<sup>339</sup> The “six months” symptom criterion included in paraphilia definitions may indicate that the relevant fantasies, urges, and behaviors have existed for at least that amount of time, but applying the definition to a specific case where only overt behaviors are available for the evaluators to review, such as behaviors detailed in police reports, makes a diagnosis very difficult.<sup>340</sup> Further, an offender may have offended repeatedly against children twelve years of age, and then against children fourteen years of age. The vague thirteen year old cutoff age range for pedophilia per the DSM-IV may not accurately classify this offender.<sup>341</sup> Essentially, it is often difficult to diagnose an individual with pedophilia due to age ranges of victims and periods of offending. It is difficult to distinguish whether an offender experienced one or two sexual urges, fantasies, or behaviors in a six month time frame, or whether that offender experienced repeated and heightened symptoms. This differentiation provides information about the strength of the drive and availability of sexual partners, but not about whether the paraphiliac criterion has been met.<sup>342</sup>

Relevant to SVP reexaminations, paraphilias are not known to go into remission.<sup>343</sup> Even if a person is incarcerated for years, participates in treatment during incarceration, and does not engage in paraphilic behavior during that time, “there is little reason to believe that he does not still suffer from the symptoms of the disorder.”<sup>344</sup>

The reliability of personality disorder diagnoses, especially

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338. *Id.* at 61.

339. *Id.* In such cases, Doren asserts that the “at least six months” is met. *Id.*

340. *Id.*

341. See W.L. Marshall, *Pedophilia: Psychopathology and Theory*, in *SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT* 152, 152-74 (D. Richard Laws & William O’Donohue eds., 1997).

342. DOREN, *supra* note 22, at 62.

343. *Id.* at 84.

344. *Id.* Campbell argues that without criteria for determining when paraphilias are in remission or resolved, the DSM-IV assumes that once diagnosed with paraphilia, individuals will always qualify for that diagnosis. CAMPBELL, *supra* note 31, at 179. Campbell argues that SVP evaluators diagnose such offenders with paraphilias on the basis of behavior history even when that behavior occurred many years before. *Id.*

antisocial personality disorder, has also been questioned.<sup>345</sup> Unfortunately, the accuracy with which evaluators can differentiate between personality traits and disorders remains unknown.<sup>346</sup> There is a lack of data concerning the reliability of personality disorder diagnoses and their criteria are vague; thus examiners need to make inferences that may lead to reliability problems in making a diagnosis.

As can be seen, there are numerous problems that examiners may find when diagnosing antisocial personality disorder and sexual paraphilias. Although clinicians may be aware of research pertaining to a specific case and disorder, they may not be able to be definitive with their diagnosis.<sup>347</sup> The evaluator should present research supporting the conclusion of a specific diagnosis. By the time the reexamination occurs, the records will be available and valuable self-report data will have been provided by the offender through years of therapy. The reexaminer is the beneficiary of this data whereas the offender may not have disclosed this information to the initial commitment evaluator. Nonetheless, examiners must rely on police reports, records, and behaviors that are well documented with an ultimate goal of assessing behavioral consistencies in various sexual crimes.<sup>348</sup>

As previously noted, evaluators should undertake a formal examination of psychopathy in addition to the consideration of antisocial personality disorder and phallometric assessments to assess the offender's current sexual arousal or deviance patterns. Ideally, the examiner will obtain information relevant to the patient's current sexual fantasy life. However, the offender may continue to be dishonest in therapy and during the reexamination.

#### VIII. SEXUAL FANTASIES AND THE USE OF POLYGRAPHS

The role of sexual fantasies is vital to the cycle of sexual recidivism. Obtaining a current snapshot of this internal mental status is critical; yet examiners and treatment teams often rely upon the offender's self-report.

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345. *Id.* at 181-82.

346. *Id.* at 182.

347. DOREN, *supra* note 22, at 62-63. Going beyond a "rule out" or "provisional diagnosis" based on general research knowledge of diagnoses can be difficult to defend in court. *Id.* at 63.

348. See Devon L.L. Polaschek et al., *Rapists' Offense Processes A Preliminary Descriptive Model*, 16 J. INTERPERSONAL VIOLENCE 523 (2001).

The role of deviant fantasy in sexual aggression was proposed years ago by Abel and Blanchard.<sup>349</sup> Fantasy is reinforced through masturbation, and as the deviant fantasy is reinforced, inhibitions decrease, which may place the individual at high risk to act on a sexual fantasy by offending.<sup>350</sup>

Ressler and Burgess defined organized sexual offenses as characterized by a fantasy life that drives the offenses, which are described as repetitive, planned, and well thought out, while disorganized offenses are not driven by fantasies.<sup>351</sup> The degree of organization in sexual assaults is said to be related to the elaborateness and specificity of the fantasy and length of rehearsal prior to the assault.<sup>352</sup> Paraphilias may be understood as the behavioral expression of an underlying fantasy.<sup>353</sup> Fantasy life is likely to be played out in repeated acts of sexual assaultive behavior.<sup>354</sup> Repeat sex offenders will often try to act out the fantasy and, when unable to do so, the perpetrator is likely to engage in a series of progressive attempts to recreate the fantasy as imagined.<sup>355</sup> The trial runs often do not match the fantasy, and consequently, the offender may attempt an offense or search for a new victim.<sup>356</sup>

A fantasy life satisfies the offender's need to create an inner world that cannot be satisfied in the real world.<sup>357</sup> The internal mechanisms that drive the fantasies, the elements which allow them to come to fruition, and the reenactment of the fantasies are important when understanding the specific content of the sexual fantasies.<sup>358</sup> It is critical for the examiner to understand how intrusive, preoccupying, persistent, and recurrent these sexual

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349. See generally G.G. Abel & E.B. Blanchard, *The Role of Fantasy in Treatment of Sexual Deviation*, 30 ARCHIVES GEN. PSYCHIATRY 467 (1974).

350. PRENTKY & BURGESS, *supra* note 271, at 254.

351. Robert K. Ressler & Ann W. Burgess, *Violent Crimes*, FBI L. ENFORCEMENT BULL., Aug. 1985, at 20.

352. PRENTKY & BURGESS, *supra* note 271, at 257.

353. *Id.*

354. *Id.* at 257-58.

355. *Id.* at 258.

356. *Id.*

357. *See id.*

358. There is an assumption that the content of sexual fantasies derives from sexually deviant and pathological experiences sustained at a young age. *Id.* Repeat sex offenders experience fantasies that are sexually deviant, leading the course of behavior. *Id.* Such fantasies often preoccupy the offender and the offender typically rehearses them. *Id.*

fantasies are.<sup>359</sup>

Research has been limited in terms of investigating the role of sexual fantasy and its relationship to sexual offending due to methodological considerations.<sup>360</sup> Studies have suggested that sexually deviant fantasies are preceded by negative affective states in most sex offenders.<sup>361</sup> Sex offenders who are engaged in treatment may report different levels of fantasy life than those who are not, and they are more likely to report frequent and vivid sexual fantasy.

In 2004, Gee et al. differentiated sexual fantasies into three categories including general sexual fantasy, nonspecific offense fantasy, and offense-specific fantasy.<sup>362</sup> As offenders move through phases of initial offense chains, general sexual fantasy themes often decline and offense-specific themes steadily increase.<sup>363</sup>

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359. *See id.* The more vivid or real the fantasy is, the greater the sexual arousal. *Id.* at 259. Fantasy and imagery stems from the visual and cognitive systems. *See id.* The content of one's sexual fantasies depends on what the person reads, sees, hears, and experiences, and it varies as a function of background experiences, cognition, personality, and the perpetrator's level of creativity. *See* D. Gee et al., *The Content of Sexual Fantasies for Sexual Offenders*, 16 *SEXUAL ABUSE: J. RES. & TREATMENT* 315, 316 (2004). Four categories of sexual fantasy have been observed, including "conventional homosexual or heterosexual imagery with past, present, or imaginary lovers who are usually known to the person; scenes expressing sexual power and irresistibility; fantasies involving somewhat varied or 'forbidden' sexual imagery; and submission-dominance scenes." *Id.*

360. D. Gee et al., *supra* note 359, at 317.

361. *See* L.W. Neidigh & N.R. Tomiko, *The Coping Strategies of Child Sexual Abusers*, 17 *J. SEXUAL EDUC. & THERAPY* 103, 107 (1991). Other research indicates that "[t]he presence of fantasies about children was related to the sex of the victim . . . with 83% of those with male victims . . ." Jan Looman, *Mood, Conflict, and Deviant Sexual Fantasies*, in *THE SEX OFFENDER: THEORETICAL ADVANCES, TREATING SPECIAL POPULATIONS AND LEGAL DEVELOPMENT* 3-1 (Barbara K. Schwartz ed., 1999). Only 19% of child molesters with female victims entertain such fantasies. D. Gee et al., *supra* note 359, at 318. Studies show that men with more than one sexually deviant behavior endorsed all types of fantasies at higher rates than other sex offenders. *Id.*

362. D. Gee et al., *supra* note 359, at 325.

363. *Id.* at 326. Gee et al. found in their sample that 75% had engaged in nonspecific offense fantasy, referring to fantasies that related generally to aberrant activities rather than to a specific offense, such as, "I had fantasies about young girls, but not anyone in particular." *Id.* at 323. They also found that 92% of their sample had engaged in specific-offense characteristics including a category of sexual fantasy involving specific victim characteristics, such as, "I think that I had thoughts about this particular boy," or "I had thoughts of doing oral sex with the first victim." *Id.* at 323-24. These researchers also found that nonspecific offense fantasies may play "an important stepping-stone role" in sex offending as offenders may consistently use nonspecific offense fantasies, providing them with a way of desensitizing themselves to the offense scene present within the fantasy, which



In 1997, Nashatar Deu and Robert Edelmann compared opportunistic and predatory sex offenders and found that the latter were more likely to have well planned, organized, and elaborate criminal fantasies.<sup>364</sup> In 2004, Beauregard et al. found that deviant sexual fantasies during childhood and adolescence were related to the development of deviant sexual preferences.<sup>365</sup> In 2003, Andrei Dandescu and Roger Wolfe found that the majority of child molesters and rapists in their sample used masturbatory deviant fantasies before and after their first offenses, but tended to use more deviant fantasies after they engaged in their first actual offense.<sup>366</sup>

Although we have seen that there is research suggesting the importance of sexual fantasies and deviance, some researchers suggest that deviant fantasies are not common amongst sexual offenders and do not offer much etiological significance in sexual offending.<sup>367</sup>

In addition to phallometric data, this author recommends the use of polygraph testing to assess the veracity of the offender's self-reports, especially those relating to an offender's current sexual fantasies. Polygraphs can offer valuable data relevant to current

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may lead to a likelihood of offending. *Id.* at 327.

364. Nashatar Deu & Robert J. Edelmann, *The Role of Criminal Fantasy in Predatory and Opportunistic Sex Offending*, 12 J. INTERPERSONAL VIOLENCE 18 (1997). See W.L. Marshall et al., *Early Onset and Deviant Sexuality in Child Molesters*, 6 J. INTERPERSONAL VIOLENCE 323, 328 (1991) (finding that 29% of their child molester group reported having deviant sexual fantasies prior to age twenty, most commonly among offenders who molested sons of other people).

365. Eric Beauregard et al., *An Exploration of Developmental Factors Related to Deviant Sexual Preferences Among Rapists*, 16 SEXUAL ABUSE: J. RES. & TREATMENT 151, 158 (2004).

366. Andrei Dandescu & Roger Wolf, *Considerations on Fantasy Use by Child Molesters and Exhibitionists*, 15 SEXUAL ABUSE: J. RES. & TREATMENT 297, 300 (2003). Dandescu and Wolf found no significant differences between the number of deviant fantasies reported for a specific victim versus the number of fantasies reported for a nonspecific victim. *Id.* at 301. They found a positive correlation between the number of deviant fantasies reported and the months spent in treatment by child molesters, but not for exhibitionistic offenders. *Id.* They found 64.9% reported having experienced deviant masturbatory fantasies prior to the first offense. *Id.* at 300. While only 19.3% of child molesters reported no masturbation to deviant fantasies after their first offense, 80.7% reported having experienced deviant masturbatory fantasies after their first actual offense. *Id.*

367. See Ron Langevin et al., *The Prevalence of Sex Offenders with Deviant Fantasies*, 13 J. INTERPERSONAL VIOLENCE 315 (1998). The authors suggest that there is no causative significance of sexual fantasy in its relation to sex offender's offenses. *Id.* at 315.

sexual fantasies, masturbatory practices, and past sexual offenses or behaviors.<sup>368</sup> Polygraphs are often utilized by treatment teams and are a measure of progress and a marker for initiation of privileges. Unfortunately, offenders can “fake” or “beat” a polygraph. The patient may not be candid with his sexual fantasy life while being evaluated at the initial commitment hearing, and he may have a similar motive during reexaminations because he wants to be released or granted increased privileges. However, patients are encouraged to describe their sexual fantasy life through both individual and group therapy while documenting these occurrences in treatment logs.

During treatment, the offender may feel conflicted as to the role of the polygraph. Patients are encouraged to disclose information about sexual fantasies and urges, yet they anticipate the use of polygraphs and are fearful that if they disclose deviant sexual fantasies, they will never be released. These two issues (disclosing current deviant sexual fantasies while in treatment and being granted conditional release) are mutually exclusive factors within the civil commitment hospital setting.

This author advocates that the most dangerous sexual and predatory offenders do engage in active sexually deviant fantasies, which are an etiological component of their offending cycle. This group of individuals is more likely to exhibit multiple paraphilias and be more sexually deviant based on behaviors and diagnoses. There is likely a link between multiple paraphilias, prior sexually deviant behavior, and current deviant sexual fantasy life and/or sexual preoccupations. Whether these sexually deviant fantasies go into remission over time is uncertain. The use of polygraph data is an important issue to consider when it comes to obtaining valid information from sex offenders pertaining to their sexually deviant fantasies/practices while in treatment. Many civilly committed SVP's engage in deviant sexual practices while in treatment, including collecting underwear, calling sex phone lines, and having

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368. Researchers in a 1999 study found through polygraph examinations that the number of offenders who “crossed over” age groups of victims is extremely high. S. Ahlmeyer et al., *The Impact of Polygraphy on Admissions of Crossover Offending Behavior in Adult Sexual Offender*, Presentation at the Association for the Treatment of Sexual Abusers 18th Annual Research and Treatment Conference (1999), available at <http://www.doc.state.co.us/Sex%20Offenders/pdfs/crsposter.pdf>. The study revealed that before polygraph examinations, 6% of a sample of incarcerated sex offenders had both child and adult victims, compared to 71% after polygraph exams. *Id.*

consensual sexual relationships with other patients.

There has been some research concerning the use of polygraphy with sex offenders. The polygraph has apparently taken more criticism than even the plethysmograph with this special population.<sup>369</sup> It is common for sex offenders to be polygraphed during treatment and asked several questions, including whether they have engaged in any sexually deviant acts or fantasies while in treatment. Bodily measures of general anxiety and arousal are good indicators as to whether an individual is telling the truth and such anxiety or arousal can be detected through a polygraph test. Therefore a polygraph can be used to ascertain whether an offender is being deceitful. Lie detectors are often not admissible in court and some lobby that the predictive validity of polygraphs is poor.<sup>370</sup> They can affect the responses of offenders, leading to their admission of wrongdoing and their entertainment of deviant sexual fantasies.<sup>371</sup> In 2000, Ahlmeyer et al. studied the effect of polygraphy on sex offenders' admissions of their victims and offenses.<sup>372</sup> While the authors found more admitted victims and offenses for inmates than parolees, there was a decline in the number of victim and offense admissions by the time of the second polygraph examination.<sup>373</sup> These results may suggest heightened reliability of testing after the first administration.

Despite the validity and reliability issues in polygraph assessment, this author advocates its use for treatment and reexaminations in order to understand the civilly committed offender's current sexual fantasy mental status. The evaluator performing the reexamination must obtain a thorough background

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369. LAWS & O'DONOHUE, *supra* note 324, at 49. The polygraph is different than the plethysmograph as the latter measures a physiological change and is more focused than the polygraph. *Id.*

370. *Id.* at 134.

371. See Don Grubin et al., *A Perspective Study on the Impact of Polygraphy on High Risk Behaviors in Adult Sex Offenders*, 16 *SEXUAL ABUSE: J. RES. & TREATMENT* 209 (2004). Grubin et al. found that polygraph testing results in offenders engaging in less high risk behavior, although there may be evidence that the offenders fabricated reports of high risk behaviors to satisfy the examiners. *Id.* at 215-20. The high risk behaviors included masturbation, deviant fantasies, unsupervised contact with children or vulnerable adults, collecting pictures of children for masturbation, and going to areas to view children for sexual arousal. *Id.* at 215.

372. See S. Ahlmeyer et al., *The Impact of Polygraphy on Admissions of Victims and Offenses in Adult Sexual Offenders*, 12 *SEXUAL ABUSE: J. RES. & TREATMENT* 123 (2000).

373. *Id.* at 123.

of the patient's sexual fantasies, including: their relationship to masturbatory practices, themes, structure, and content of the fantasy; frequency and duration of fantasies; clarity and content of fantasy; source of material for the fantasies; escalation of fantasies; the function of the fantasy including arousal and affect regulation; and their role in offending.<sup>374</sup>

#### IX. DOES TREATMENT WORK? TREATMENT EFFECTS IN THE REEXAMINATION PROCESS

The forensic psychologist performing the reexamination evaluation for civilly committed sex offenders must know about the effects of sex offender treatment on an individual's risk level. The examiner will likely evaluate the offender over time, separate from the treatment team's interventions and assessments of the individual. Unlike the initial commitment examination, at the time of the annual reexaminations, offenders will not only have had a longer history of treatment, but will also be active in treatment. Importantly, many of the sex offenders housed in civil commitment settings are not participating in treatment and continue to fight constitutional battles with their cases. Often times they are instructed by their attorneys not to participate in treatment to avoid risk of disclosing further damning information about their sexual crimes, fantasies, and behaviors. Consequently, these offenders will not be progressing through treatment and any requests for annual reexaminations will be futile. Obviously there will be no treatment effects for offenders who refuse to participate.

Perhaps the most telling statistical correlation between treatment effects and future recidivism for high risk offenders is a history of treatment dropout or termination. Many offenders who cannot complete treatment are psychopathic or markedly antisocial in nature. In addition, although the examiner may not be an expert in providing treatment, he or she needs to understand the base rates of offending for offenders in similar treatment modalities.

Cognitive behavior therapy, cognitive restructuring/behavior modification, and relapse prevention treatment have been the most common types of therapy with sex offenders as of late. Treatment focuses on dealing with a lack of empathy, problems with anger,

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374. D. Gee et al., *supra* note 359, at 320-21.

intimacy deficits, cognitive distortions, sexual fantasy/arousal/masturbatory practices, and antisocial/criminogenic needs. The offenders will focus on their offense histories and cycles of offending but will also be cognizant of future dynamic and changeable factors relevant to risk of relapse.

Many studies suggest statistically significant positive treatment effects for sexual recidivism. In 1995, Hall conducted a meta-analysis of sex offender treatment studies.<sup>375</sup> The recidivism rate for treated sex offenders was 19% versus 27% for untreated sex offenders.<sup>376</sup> In 1999, Gallagher et al. examined twenty-two studies and found a significant treatment effect for cognitive behavioral treatment, but did not find effect for hormonal treatments.<sup>377</sup> Hanson et al. reported a meta-analysis and found sexual recidivism rates were 12.3% for treated and 16.8% for untreated subjects and when considering the “modern” treatment studies, rates were 9.9% and 17.4%, respectively.<sup>378</sup>

In 2005, Hanson et al. studied a twelve year follow-up with 724 offenders (treated in community sex offender treatment programs) and found that there were no significant differences in the rates of sexual recidivism between treated and untreated groups (21.1% versus 21.8%).<sup>379</sup> Although this study is the most recent in sex offender treatment efficacy research, it lends to the question of whether treatment is useful with high risk sex offenders. Its population included groups of lower risk offenders, many of whom were treated in community programs after prison.<sup>380</sup>

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375. Gordon C. Nagayama Hall, *Sexual Offender Recidivism Revisited: A Meta-Analysis of Recent Treatment Studies*, 63 J. CONSULTING CLINICAL PSYCHOL. 802, 802-09 (1995) (finding a small but significant overall effect for treatment versus comparison conditions).

376. *Id.* at 802. Treatment effect sizes were heterogeneous amongst different studies, and the larger studies reported higher base rates of recidivism, had follow-up periods longer than five years, and included outpatient treatment programs. *Id.* at 806-07. Cognitive-behavioral and hormonal treatments were significantly more effective than behavioral treatments, but were not significantly different from one another. *Id.* at 807.

377. Catherine A. Gallagher et al., *A Quantitative Review of the Effects of Sex Offender Treatment on Sexual Reoffending*, 3 CORRECTIONS MGMT. Q. 19 (1999).

378. R.K. Hanson et al., *First Report of the Collaborative Outcome Data Project on the Effectiveness of Psychological Treatment for Sexual Offenders*, 14 SEXUAL ABUSE: J. RES. & TREATMENT 169, 169 (2002).

379. R. Karl Hanson et al., *Evaluating Community Sex Offender Treatment Programs: A 12-Year Follow-Up of 724 Offenders*, 36 CAN. J. BEHAV. SCI. 87, 87 (2004).

380. Interestingly, most of the civil commitment statutes say little on the issue of sex offender treatment modalities concerning routine standards, and since

Treatment efficacy obviously would be different among heterogeneous offender groups. For example, civilly-committed sexually-violent predators may engage in more consistent, intense, and long-term sex offender treatment than first time sex offenders who receive probation. These two offender groups will likely have much different treatment modalities and risk levels. Many of these studies in meta-analyses will include various types of sex offenders in diverse programs.

The most recent and perhaps most useful sex offender study is a 2005 study by Marques et al.<sup>381</sup> The authors “compared the reoffense rates of offenders treated in an inpatient relapse prevention (RP) program with the rates of offenders in two (untreated) prison control groups” and found no significant differences “among the three groups in the rates of sexual or violent offending over an [eight]-year follow-up period.”<sup>382</sup>

When analyzing treatment studies, the examiner must be aware of various treatment designs involving noncomparable groups of offenders and varied treatment programs, as many studies are contaminated by high risk offenders who would have refused treatment or been terminated if it was offered to them.<sup>383</sup> These high risk offenders will be similar to civilly committed

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these issues are medical in nature, they may not be in the territory of the legislature. Samuel Jan Brakel & James L. Cavanaugh, *Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States*, 30 N.M. L. REV. 69, 82 (2000).

381. Janice Marques et al., *Effects of a Relapse Prevention Program on Sexual Recidivism: Final Results from California's Sex Offender Treatment and Evaluation Project (SOTEP)*, 17 SEXUAL ABUSE: J. RES. & TREATMENT 79 (2005).

382. *Id.* at 79. The offenders in this study were high-risk prison inmates that were treated at a secure state hospital (similar to civil commitment hospitals for sex offenders). *Id.* at 83. Sex offender treatment did not assist rapists and child molesters with decreasing their reoffense rate. *Id.* at 98. Those treated offenders who met the program's treatment goals had lower reoffense rates than those who did not. *Id.* at 102. See W.L. Marshall & W.D. Pithers, *A Reconsideration of Treatment Outcome with Sex Offenders*, 21 CRIM. JUST. & BEHAV. 10, 10 (1994) (finding that the “treatment must be comprehensive, cognitive-behaviorally based, and include a relapse prevention component” to be more successful in treatment efficacy).

383. See Marnie E. Rice & Grant T. Harris, *The Size and Sign of Treatment Effects in Sex Offender Therapy*, 989 ANNALS N.Y. ACAD. SCI. 428 (2003) (concluding that some treatment studies are too weak to be used to draw inferences about treatment effectiveness) and Howard Barbaree, *Evaluating Treatment Efficacy with Sexual Offenders: The Insensitivity of Recidivism Studies to Treatment Effects*, 9 SEXUAL ABUSE: J. RES. & TREATMENT 111, 123 (1997) (finding that most studies have low base rates and small sample sizes, thus it is unlikely that treatment outcome studies will exhibit significant treatment effects).

offenders.

Finally, when considering treatment effects, the reexaminer must be aware of the typology of the sex offender he is evaluating, and pay special attention to whether the offender is a psychopath. Psychopaths<sup>384</sup> are essentially unaffected by treatment and may sexually reoffend at higher rates.<sup>385</sup> Seto and Barbaree analyzed psychopathy and its relation to treatment behavior and sexual reoffending and found that good treatment behavior was unrelated to parole failure or general recidivism, but it was associated with higher serious recidivism, including a new violent or sexual offense.<sup>386</sup> “[M]en who scored higher in psychopathy and better in treatment behavior were the most likely to reoffend.”<sup>387</sup> Some treatment programs separate psychopaths from nonpsychopaths, as the former group may disrupt treatment gains for the latter group.

In response to these findings, researchers have expressed concerns about the involvement of psychopaths in treatment.<sup>388</sup> Rice and Harris argue that perhaps “interventions [and treatment] with psychopaths should focus on increasing the detection and the perceived costs of their antisocial behavior targeting psychopathic characteristics that are empirically related to recidivism (such as impulsivity) and targeting characteristics that are related to recidivism (such as deviant sexual arousal in sex offenders).”<sup>389</sup>

It is critical for the examiner to assess efficacy of treatment by evaluating the changes that take place during treatment on dynamic risk factors and their link to recidivism.<sup>390</sup> Although “[t]he most dynamic of empirically validated risk factors” pursuant to sexual recidivism are treatment dropout, most causal factors are

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384. A psychopath is defined as “[a] person with a mental disorder characterized by an extremely antisocial personality that often leads to aggressive, perverted, or criminal behavior” or “[l]oosely, a person who is mentally ill or unstable.” A HANDBOOK OF CRIMINAL LAW TERMS 560 (Bryan A. Garner ed., 2000).

385. See *supra* Part V.; QUINSEY ET AL., *supra* note 229, at 130-31.

386. Michael C. Seto & Howard E. Barbaree, *Psychopathy, Treatment Behavior and Sexual Offender Recidivism*, 14 J. INTERPERSONAL VIOLENCE, 1235, 1235 (1999).

387. *Id.* “There was no difference between rapists, incest offenders, and extrafamilial child molesters in their scores on treatment behavior.” *Id.* at 1241. It is possible that group therapy and insight-oriented programs may assist psychopaths to develop better ways of conning others, rather than helping them to understanding themselves. *Id.* at 1245.

388. *Id.*

389. *Id.*

390. PRENTKY & BURGESS, *supra* note 271, at 216.

static in nature.<sup>391</sup>

In summary, the forensic reexaminer performing the evaluation must have good rapport and communication with the treatment team. Individuals in both positions can assist one another by sharing their perspectives regarding the offenders' risk factors. The examiner must keep current with empirical data concerning treatment effects for recidivism as well as offender specific data including: general sex offender treatment policy and transition levels, specific treatment goals and relapse prevention plans of the offender, and polygraph and plethysmography data.

#### X. AGE EFFECTS ON RECIDIVISM

The final topic in this article, age effects, may be appropriate in light of the Dru Sjodin case. Her alleged offender, Alfonso Rodriguez, was deemed to be a lower risk for recidivism because he was over the age of fifty, despite high risk factors and elevated actuarial data.<sup>392</sup> The issue of age is quite prevalent in the civil commitment world, as many offenders have repetitive sexual assault histories and have been imprisoned and institutionalized for years. Many offenders are in their fifties and sixties when they are evaluated for conditional release. Although there are perceptions and some data suggesting that these offenders "burn out,"<sup>393</sup> many politicians do not want to hear the age argument.

Recently, Karl Hanson investigated age effects on recidivism when considering the utility of the Static-99.<sup>394</sup> Results indicated that older age contributed to the prediction of sexual recidivism.<sup>395</sup> While thirty years of age was the age for greatest risk, there was a gradual decline in offending rates of offenders after the age of forty.<sup>396</sup> The five year recidivism rates of sexual offenders over sixty years of age was only 2%, compared to 14.8% for offenders under the age of forty.<sup>397</sup>

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391. *Id.*; see also Hanson & Bussiere, *supra* note 144. Hanson and Bussiere found that those sex offenders who dropped out of treatment were more likely to recidivate. Hanson & Bussiere, *supra* note 144, at 351, 356.

392. See, e.g., Scheck, *supra* note 14.

393. See Paris, *supra* note 20, at 281-82.

394. R. KARL HANSON, DEP'T OF THE SOLICITOR GEN. CAN., THE VALIDITY OF STATIC 99 WITH OLDER SEXUAL OFFENDERS (2005), available at <http://nicic.org/Library/020711>.

395. *Id.*

396. *Id.*

397. *Id.*



Previously, Hanson studied age by comparing child molesters and rapists, and found that the rapist group studied was younger than the child molesters and that the recidivism risk of rapists steadily increased with age.<sup>398</sup> Extrafamilial child molesters exhibited little decrease in recidivism risk until after the age of fifty.<sup>399</sup> Most sex offender research indicates that sexual offenders recidivate within about five to six years after release from institutionalization and recidivism rates “increase gradually with extended follow-up periods.”<sup>400</sup>

The association between age and criminal behavior is more established than between age and sexual crimes, and research tells us that sex offenders are quite a bit older than other general criminal offenders.<sup>401</sup> Hanson and Bussiere’s meta-analysis found a negative relationship between age and the recidivism rate of rapists.<sup>402</sup> Age and sexual recidivism may be different for various types of offenders, including child molesters and rapists.<sup>403</sup> While rapists are more likely to have non-sexual criminal and violent histories than child molesters, they are likely to sexually assault less frequently as they get older.<sup>404</sup> Notably, “[e]xtrafamilial child molesters are the sex offenders most likely to have deviant sexual preferences,” and the presence of these deviant behaviors may perpetuate the risk of recidivism into late adulthood.<sup>405</sup> It is uncertain whether incest offender recidivism rates substantially decrease with age.<sup>406</sup>

When attempting to theoretically explain age effects, Hanson hypothesized that rapists’ sexual deviancy, self-control, and

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398. R. KARL HANSON, DEP’T OF THE SOLICITOR GEN. CAN., AGE AND SEXUAL RECIDIVISM, A COMPARISON OF RAPISTS AND CHILD MOLESTERS 2 (2001), <http://www.sexcriminals.com/library/doc-1034-1.pdf>. Research suggests that the older the prisoner was when released, the lower the rate of recidivism. *Id.* at 9; see also P. LANGAN ET AL., U.S. DEP’T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf>.

399. HANSON, *supra* note 398, at 9.

400. *Id.* at 1.

401. *Id.* Research also tells us that adolescent sex offenders exhibit greater differences in the etiology of their offending and offense characteristics than adult offenders. *Id.*; see also Hanson & Bussiere, *supra* note 144, at 348-62.

402. HANSON, *supra* note 398, at 2.

403. *Id.* at 2. The authors acknowledged that the extent to which the recidivism rates of child molesters decreases with age is unknown. *Id.*

404. *Id.* (citing Hanson & Bussiere, *supra* note 144).

405. HANSON, *supra* note 398, at 2.

406. *Id.*

opportunity should decrease with age.<sup>407</sup> Concerning extrafamilial child molesters, “self-control should improve during the transition from the twenties to thirties,” although “opportunities for child molesting should increase.”<sup>408</sup> During late adulthood, opportunities for relationships with children decrease and, “combined with a reduction in sexual drive, contribute to a reduction in recidivism risk.”<sup>409</sup> Hanson found that rapists’ sexual recidivism steadily decreased with age, but extrafamilial child molesters showed relatively little decline in recidivism risk until after the age of fifty.<sup>410</sup> He also found that sex offenders released after the age of sixty showed very low recidivism rates.<sup>411</sup>

The Prentky study previously discussed may be the most useful study concerning recidivism rates and age, because it was a longitudinal and survival study covering a twenty-five year period, again indicating a 39% recidivism rate for victim-involved, sexual rapists and a 52% rate for victim-involved, sexual child molesters.<sup>412</sup>

Barbaree and others studied the development of sexual violence throughout the lifespan and focused on the effects of age on sexual arousal and recidivism.<sup>413</sup> The researchers hypothesized

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407. *Id.* at 15.

408. *Id.*

409. *Id.*

410. *Id.* at 16.

411. *Id.* Hanson found that young incest offenders were among the highest recidivism groups. *Id.* at 15. They may be a distinct group from the traditional father/daughter perpetrator type. *Id.* In general, the incest offenders groups were low recidivists, probably due to less sexual deviance and lifestyle impulsivity than other sexual offenders, combined with access to a smaller victim pool. *Id.*

412. R.A. Prentky et al., *supra* note 178, at 645, 651 tbl.3. The authors found that among rapists, there was a 9% recidivism rate for sexual charges in year one and then a rate of 2% to 3% per year through the fifth year, dropping to 1% per year until the twenty-fifth year. *Id.* at 651. “Among child molesters, there was a 6% recidivism rate for sexual charges in year [one], followed by 4% for the next [two] years, and 2%-3% for the following [two] years.” *Id.* at 652. Interestingly, after year five, the charge rate for new sexual offenses increases: 11% between years five and ten, 9% between years ten and fifteen, 7% between years fifteen and twenty, and 5% between years twenty and twenty-five. *Id.* at 650. Child molesters out-offended rapists, and by year twenty-five, there was a 13% difference between the two groups’ commission of new sexual offenses. *Id.* at 652. The authors suggest that the “decay process” is slow and constant. *Id.*; see also R. Karl Hanson et al., *Long-Term Recidivism of Child Molesters*, 61 J. CONSULTING & CLINICAL PSYCHOL. 646, 650 (1993) (finding that child molesters recidivated most between the first five to ten years after release and that child molesters are at risk to reoffend sexually throughout their lives).

413. Howard E. Barbaree et al., *The Development of Sexual Aggression Through the Life Span: The Effect of Age on Sexual Arousal and Recidivism Among Sex Offenders*, 989

that sex offenders would exhibit reductions in sexual arousal and libido with advancing age and, therefore, would offend less as they got older.<sup>414</sup> The researchers found that sex offender groups exhibit a linear decrease in recidivism with age.<sup>415</sup> The authors reexamined Hanson's study and cited the reasons that sexual aggression decreases with age, including that male sex hormones peak in their twenties and decrease thereafter.<sup>416</sup> Correspondingly, sexual arousal and libido decrease with age in men, and sexual arousal and recidivism decrease with age in sex offenders.<sup>417</sup>

Overall, research shows that rapists are more likely to have steadier declines in sexual recidivism as they get older. Rapists and child molesters are less likely to sexually reoffend after age sixty. Researchers must focus on whether age includes age at release or age at reoffense. Further, researchers must focus on high risk sex offenders who may have multiple paraphilias, heightened sexual deviancy, multiple offenses, and psychopathy. There is likely to be less reduction in risk over time for that type of population than first time offenders or incest offenders.

Critically, the definitions of type of offender and reoffense criteria must be examined. The Prentky study is quite useful as it contains high risk offenders from the Massachusetts Treatment Center for Sexually Dangerous Persons (civil commitment population).<sup>418</sup> Examining studies that are contaminated by lower offenders (such as probationers) does not assist in arriving at true base rates or age effects for the civil commitment high risk group. This author advocates at least a consideration of Doren's work which focuses on definitions of charges as reoffenses and examines Prentky's high risk population, as this is similar to the population assessed in reexaminations.<sup>419</sup>

Effects of treatment on recidivism with this high risk

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ANNALS N.Y. ACAD. SCI. 59, 59-60 (2003).

414. *Id.* at 63.

415. *Id.* at 65.

416. *Id.* at 69. *See also* HANSON, *supra* note 398, at 13, 16.

417. Barbaree et al., *supra* note 413, at 69. Estimates for rates of sexual recidivism based on actuarial data will overestimate rates for older men. *Id.* at 70.

418. R.A. Prentky et al., *supra* note 178, at 637.

419. *See* Dennis M. Doren, *Recidivism Base Rates, Predictions of Sex Offender Recidivism, and "Sexual Predator" Commitment Laws*, 16 BEHAV. SCI. & L. 97, 108-09 (1998) (reviewing research that found sexual recidivism for certain offenders is common when the definition of recidivism is consistent with the sex offender commitment laws).

population may be different for those older offenders despite some offender complaints about erectile dysfunction, prostate impairments, and diminished sexual drive with increase in age. Such complaints are based on self-report and may not be supported by medical data. Despite age “burnout,” psychopathy should be assessed in old offenders as it is theoretically a stable lifetime construct. Finally, sexually deviant fantasies and behaviors are consistent and stable through time, even in later adulthood, and should be assessed through polygraphy and phallometric devices.

### XI. CONCLUSION

The objective of this article was to analyze the reexamination process for civilly-committed, sexually-violent offenders. Although the reexamination process may be in some ways isolated and protected by a treatment status bubble, the evaluation is critical to the safety of the community. The initial civil commitment hearings may be more dramatic and subject to media exposure, intense litigation, and cross-examination among high profile experts. In some states, there is essentially unlimited funding for experts at the initial commitment stage.<sup>420</sup> Although this evaluation is one of the first steps in the civil commitment process, offenders who are committed will be subject to countless annual reexaminations that are just as critical to the issues of offender civil liberties and community safety.

States conduct their initial commitment hearing evaluations and reexaminations in both similar and different ways.<sup>421</sup> Perhaps one of the significant differences is the legal threshold of conditional release. Much more attention is placed on the legal threshold for the initial commitment, and the threshold for release seems to be similarly ambiguous in relation to statutory language and psychiatric/psychological terminology. The questions of “sexual predator,” “likely,” and “dangerous” are just as vague to the expert, court, or review board during the reexamination process as they were at the initial commitment hearing. At the reexamination and review hearings, words such as “treatment effects,” “age,”

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420. W. Lawrence Fitch, *Sexual Offender Commitment in the United States: Legislative and Policy Concerns*, 989 ANNALS N.Y. ACAD. SCI. 489, 493 (2003) (comparing costs and budgets including care, treatment, and legal costs for various states with commitment laws).

421. See *supra* Part II.

“relapse prevention techniques,” “dynamic factors,” and “community risk management supports” will be highlighted.

Even though a court is not likely to scrutinize reexaminations, examinations eventually may find themselves in a court, tribunal, SRB, or judicial appeals panel. The reexaminer, similar to the examiner at the initial commitment hearing, must perform his evaluations aligned with the principles of forensic mental health assessment in an ethical fashion.<sup>422</sup>

A critical piece of risk assessment is combining actuarial and dynamic risk factors into an overall evaluation.<sup>423</sup> The examiner must be aware of the research concerning unstructured clinical, structured clinical, empirically guided clinical, adjusted actuarial, and purely actuarial approaches.<sup>424</sup> The examiner should use a strong actuarial approach that is adjusted by empirical research data, individual characteristics, and contextual risk factors.<sup>425</sup>

The reexaminer must be knowledgeable about offender typology as well as various risk assessment studies pursuant to sexual recidivism of child molesters and rapists. Critically, the reexaminer must be familiar with base rates and definitions of recidivism and age effects within studies when comparing this data to the specifics of his examinee.<sup>426</sup> Many studies do not examine this high risk of a sex offender population, nor do treatment studies always assess in-patient programming for the worst offenders.

The reexaminer must be aware of the strengths and weaknesses of actuarial risk assessment instruments.<sup>427</sup> Many of these reexaminations will be with offenders who have been incarcerated and hospitalized for numerous years and have never received an actuarial study. The examiner must also consider the possibility that predictive accuracies of actuarial instruments are so great that they leave little room for further improvement in long-term prediction by dynamic risk factors.<sup>428</sup> However, the examiner

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422. See Kirk Heilbrun, *Principles of Forensic Mental Health Assessment: Implications for the Forensic Assessment of Sexual Offenders*, 989 ANNALS N.Y. ACAD. SCI. 167, 175 (2003) (explaining the need for forensic clinicians to remain impartial, even if they are examining an offender at the request of one party).

423. See *supra* Parts V.C. and V.E.

424. See *supra* Parts V.A., V.B., and V.C.

425. See *supra* Part V.C.

426. See *supra* Parts V.C. and X.

427. See *supra* Part V.C.

428. See Grant T. Harris & Marnie E. Rice, *Actuarial Assessment of Risk Among Sex*

should be cognizant of the instruments' limitations with older offenders. Nonetheless, examiners must be aware of the various dynamic risk factors relevant in the literature and how they are processed in treatment by the offender. The role of anger, insight, physiological arousal, sexual fantasies, masturbatory practices, denial, self-regulation and management, criminogenic influence and antisocial attitudes, impulsivity, sexual misbehaviors, and current treatment behavior and motivation are factors to consider.

Given the robust data associating the combination of psychopathy and sexual deviance to sexual recidivism, this author advocates the formal assessment of both using the PCL-R and plethysmograph.<sup>429</sup> The examiner should advocate for polygraph and plethysmography data in order to obtain a current snapshot of the offender's sexual deviance, fantasy life, arousal patterns, sexual misbehaviors and relationships, as well as honesty as to these issues. Polygraph data provide useful information about the offender's past and ideally, future sexually deviant behavior and should be supported within a containment context with the goal of supporting intense inpatient treatment and future community supervision.<sup>430</sup> Most importantly, this author advocates use of various data collection techniques for sex offender risk assessment (actuarial tools, plethysmograph, polygraph, and PCL-R) despite their empirical weaknesses. The examiner should consider all pieces of data because more information is better.

Perhaps the most complicated issue in reexamination is the fact that offenders have been encapsulated in an artificial prison/hospital environment for perhaps twenty-five or thirty years. The examiner must explore the stability and consistency of psychopathy over time, as well as be aware of the role that age plays in recidivism among child molesters and rapists.<sup>431</sup> The examiner will be at a disadvantage and may feel helpless when attempting to assess current sexual deviance. The evaluator should be aware of treatment efficacy pursuant to the type of treatment being employed at the facility where he is evaluating the patient. He or

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*Offenders*, 989 ANNALS N.Y. ACAD. SCI. 198, 204-05 (2003) (discussing the improvement of actuarial prediction).

429. See *supra* Part VI.

430. See Kim English et al., *Sexual Offender Containment: Use of the Postconviction Polygraph*, 989 ANNALS N.Y. ACAD. SCI. 411, 422-23 (2003) (discussing the implications of the containment approach).

431. See *supra* Part X.

she must understand that treatment does not address static variables *per se*, rather dynamic variables that may or may not be related to recidivism. Institutional treatment often ignores the differences between the institutional setting and the community setting where the offender would likely reside.

The reexaminer must have a collegial relationship with the offender's treatment staff, who knows the offender better than the examiner does. Most states assign the reexamination task to an independent forensic examiner to avoid potential bias by the treatment team and to obtain an expert risk analysis.

The goals of treatment and risk assessment of civilly committed sexual predators are mutually exclusive. The reader should consider Justice Thomas's opinion in *Kansas v. Hendricks*:

[A] small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [general involuntary civil commitment statute]. In contrast to persons appropriate for civil commitment under the [general involuntary civil commitment statute], sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high.<sup>432</sup>

State political systems continue to fuel requests for heightened scrutiny in risk reexaminations in light of horrific cases such as Dru Sjodin's, while encouraging treatment programs to consider releasing rehabilitated older and "burned out" sex offenders who are deemed lower risk. These goals may not be clearly integrated in especially high risk cases, and, unfortunately, the bulldozers will continue to push dirt for new buildings to house new offenders who are to be committed. The Dru Sjodin case will undoubtedly affect other states' commitment practices and it is feared that there will be "over commitments," and offenders who should probably not be committed will in fact be indefinitely committed.<sup>433</sup>

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432. 521 U.S. 346, 351 (1997).

433. Iowa and North Dakota experienced increases in civil commitments after the high profile Dru Sjodin case in Minnesota. Interview with Rosalie Etherington, *supra* note 103; Interview with Jason Smith, *supra* note 103.