

increase community anxiety.¹³ These laws may also make parents, who were notified, feel guilty if a sex offender commits a sex crime against their child.¹⁴ No research establishes that either type of law prevents sexual recidivism.¹⁵

9. Summary

Severe criminal sentences will prevent some dangerous sex offenders from committing more sex crimes. However, these laws over confine, locking up many offenders who would not reoffend if released and subjected to appropriate community supervision. Most convicted sex offenders will return to the community from prison. Unfortunately, too often there is little the government can do to protect the community. The choices are too limited: indefinite commitment under an SVP law or releasing offenders subject to registration and community notification.

B. *The Prediction Model of Dangerousness*

Both confinement and information control strategies rely on prediction models of dangerousness. This model requires authorities or experts to make a determination at a single moment about whether an offender will commit another sex crime over an extended period of time. The decisionmaker can only use information about the offender that is known at that moment of prediction. He or she cannot take into account new information learned about the offender after the prediction is made. Moreover, unless the offender is on probation or parole, it is extremely difficult to adjust the degree of control exercised over the offender in light of new data.

Mandatory minimum sentencing laws use a categorical approach to predicting risk; it is grounded exclusively on the offender's past criminal history. SVP laws authorize officials to use discretionary authority to initiate commitment based on their one-time prediction of risk. Registration laws are broad in their coverage and effectively predict that most sex offenders may reoffend over a long time period. Notification laws generally (but not always) allow the police to decide about which offenders they will notify the community and how extensive that notification will be.

¹³ Richard G. Zevits & Mary Ann Farkas, U.S. Dep't of Justice, *Sex Offender Community Notification: Assessing the Impact in Wisconsin* (2000), available at <http://www.ncjrs.org/pdffiles1/nij/179992.pdf> (last visited June 15, 2004).

¹⁴ Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 505, 554 (1998).

¹⁵ Peter Finn, U.S. Dep't of Justice, *Sex Offender Community Notification* (1997), available at <http://www.ncjrs.org/pdffiles/162364.pdf> (last visited June 15, 2004).

1. Prediction Method

Three methods have generally been used to predict sexual dangerousness when these determinations are discretionary: clinical, actuarial, and guided-clinical. The clinical method is subjective; experts conduct their own individual assessment of the criminal. The actuarial method is objective; it relies on instruments derived from studying groups of repeat sex offenders to determine their common characteristics. Guided clinical evaluation initially uses the actuarial approach and then adjusts in light of the individual's characteristics.¹⁶ It is both objective and subjective. Today, actuarial methods are the primary basis for predicting sexual dangerousness.

2. Duration

These predictions of sexual dangerousness generally apply over a lengthy time period. Criminal sentences protect the community from the risk of sexual reoffending while the offender is in prison or jail and, to a lesser extent, on parole or probation. SVP laws protect the community while he is committed to an institution, and to a lesser extent, during community release. Protection afforded by registration laws, which is minimal, lasts as long as the offender must register. Usually this is ten years, but it may last a lifetime. It is not clear how long notification protection lasts since it is usually a one-time event.

3. Criticisms of Actuarial Predictions of Sexual Dangerousness

Actuarial prediction only identifies a range of risk for a group of sex offenders. It does not identify which individual(s) among the group will reoffend. Nor can it tell where within the range any individual risk falls; it may be higher or lower than the group range. If it is, the person may be more or less dangerous than the group. An actuarial prediction does not furnish any psychological insight into an individual's sexual behavior.

Actuarial predictions make judgments about someone based on characteristics they have in common with others. This approach has been criticized because it is not a judgment based solely on the individual; instead, it is based on his similarity to a group. However, much public health information about risk is based on this same

¹⁶ Hanson, *supra* note 5, at 68; see also R. Karl Hanson, *Who Is Dangerous and When Are They Safe? Risk Assessment with Sexual Offenders*, in PROTECTING SOCIETY, *supra* note 6, at 63, 66-67.

approach.

In any event, some experts believe that this method is very accurate. They are confident that actuarial risk assessment can identify a group of sex offenders who will sexually reoffend at a rate that can "conservatively be estimated at 50% and could reasonably be estimated at 70% to 80%."¹⁷ Even if this high accuracy is achieved, predictions will have a false positive rate of from twenty percent to fifty percent. These predictions also assume that no control is exercised over the sex offender during the period of risk. Aggressive control should significantly lower that risk.

Predictions about sex offenders who are less dangerous are also less accurate because these individuals have a lower base rate of offending. Thus, these predictions will result in more erroneous predictions, including predictions of danger (an offender predicted to reoffend will not) and of safety (an offender predicted not to reoffend will). Consequently, whether these offenders should be confined for a long period or released is problematic.

4. The Problem of Accurately Determining Sexual Recidivism

Most researchers measure sexual recidivism (the commission of another sex crime) by studying official records to see if convicted sex offenders are subsequently arrested, charged, or convicted with another sex crime. This approach is typically used in measuring all types of criminal recidivism. The data indicate that, when compared to many other types of violent criminals, sex offenders, as a group, have a relatively low risk of sexual recidivism. Hanson and Bussiere conducted a meta-analysis of sixty-one sex offender recidivism studies involving 23,393 sex offenders.¹⁸ They found that 13.4 percent of them committed a new sex crime in the four- to five-year follow-up period; 18.9 percent of rapists committed another sex crime as did 12.7 percent of child molesters. Other research shows that burglars (31.9 percent), larcenists (33.5 percent), and drug offenders (24.8 percent) have *higher* recidivism rates than sex offenders.¹⁹

But this research has serious limitations. Many sex crimes are never reported to the police and, therefore, would not be measured

¹⁷ Hanson, *supra* note 5, at 68; see also Hanson, *supra* note 16, at 70.

¹⁸ R. Karl Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348 (1998), available at http://home.wanadoo.nl/ipce/library_two/han/hanson_98_text.PDF (last visited June 15, 2004).

¹⁹ U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1983 (1989).

in recidivism studies. Not all perpetrators are arrested even if their crimes are reported. Even when the police make an arrest, the case does not always go to trial. If tried, the defendant may not be convicted or may plead guilty to a non-sex crime. Thus, recidivism studies will necessarily under report sexual recidivism. Researchers also use victim surveys in which they ask women and children if they have ever been the victim of a sex crime. This research corroborates that not all sex crimes are recorded and counted. Indeed, it suggests that far more sex crimes are committed in the United States than official statistics would reflect. Sex offenders also tell researchers that they commit far more sex crimes than are reported to the police.

Simply put, sex offender recidivism research indicates that sex offenders commit many fewer sex crimes than victim surveys and offender self-reports would indicate. It is, therefore, very possible that sex offenders *may* be more dangerous as a group than official records and recidivism research indicate. If sex offenders *are* more dangerous, current methods of predicting sexual recidivism may grossly under-predict sexual dangerousness. Moreover, many sex offenders may have committed more sex crimes than their police and court records would suggest. If this is true, these particular offenders are more dangerous than actuarial instruments would suggest. Because the true rate of sexual recidivism is unknown and unknowable, it is essential that we employ risk-management strategies to prevent sex offenders living in the community from committing more sex crimes.

C. *Treatment Efficacy*

Beginning in the late 1980s public policy shifted its paradigm for sex offenders. Sex offenders were not “sick,” and treatment did not reduce sexual recidivism. Instead, sex offenders were morally responsible for their crimes and should be punished.

Recently, some experts argue that they can effectively treat sex offenders and reduce sexual recidivism. New treatment strategies employing cognitive restructuring, relapse prevention, other cognitive-behavioral techniques, and—in appropriate cases—pharmacological agents that reduce testosterone are now being used in a variety of settings to treat sex offenders. Cognitive-behavioral techniques do not assume that sex offenders suffer from a disease. Instead, they try to change offenders’ attitudes and behavior. Does treatment reduce sexual reoffending?

The Agnostics. Some researchers are agnostic. Rice and Harris, after reviewing the available literature concluded that there is simply

not enough high-quality research to establish that treatment reduces sexual reoffending.²⁰ A major failing of the treatment efficacy research to date is the absence of double-blind studies.

The Optimists. Other researchers, however, have concluded that there is some empirical basis to believe that treatment does reduce sexual recidivism. Hanson and several other distinguished international experts reviewed the available research on the effectiveness of psychological treatment in reducing sexual reoffending.²¹ They conducted a meta-analysis of forty-three studies with a combined sample of 9,454 sex offenders. Most of the studies examined rapists and child-molesters and had an average follow-up period of four to five years.

The committee determined that adult sex offenders who received cognitive-behavioral treatment and adolescent sex offenders who received systemic treatments that address family needs and other social systems that influence young offenders, on average, were less likely to reoffend than sex offenders who did not receive treatment. Contemporary treatments were associated with a significant reduction in both sexual recidivism (seventeen percent to ten percent) and general recidivism (from fifty-one percent to thirty-two percent).²² The Committee also concluded that community treatment appeared to be as effective as institutional treatment. Moreover, sex offenders who failed treatment were at higher risk of reoffending than sex offenders who completed treatment.

The Committee noted that its findings should be interpreted cautiously because there were few high-quality research studies, the treatment effects were not large in absolute terms (seven percent), and the findings provide little direction on how to improve treatment for sex offenders. The Committee also noted that not all treatment programs are effective; consequently, public officials should not assume that any treatment is better than no treatment. In addition, no treatment program can assure a complete cessation of offending.²³

Prominent Canadian researchers have used a novel approach that is different from meta-analysis to determine if treatment reduces

²⁰ Marnie E. Rice & Grant T. Harris, *What We Know and Don't Know about Treating Adult Sex Offenders*, in PROTECTING SOCIETY, *supra* note 6, at 101, 109.

²¹ R. Karl Hanson et al., *First Report of the Collaborative Outcome Data on the Effectiveness of Psychological Treatment for Sex Offenders*, 14 SEXUAL ABUSE: J. RES. & TREATMENT 169 (2002).

²² *See id.* at 187.

²³ Solicitor General Canada, *Research Summary: The Effectiveness of Treatment for Sexual Offenders* 2 (July 2002).