

sexual recidivism.²⁴ Howard Barbaree and his colleagues agree that a random control trial is the most rigorous and accurate method of evaluating whether treatment is effective in reducing sexual recidivism because this methodology ensures that all extraneous factors, which could affect recidivism, are randomly distributed across the treatment and control groups. Thus, there should be no variables other than treatment that could explain any difference in recidivism rates for the two groups. In their view, however, it is virtually impossible to employ random control trials for sex offender treatment given the current social and political climate.

So they used an alternative research strategy. To simplify matters, these researchers studied 468 sex offenders, all of whom were treated at the Warkworth Sexual Behavior Clinic in Ontario while serving custodial sentences. The treatment program offered there is representative of current "state of the art" treatment programs for sex offenders.

Stratifying their group by level of risk using actuarial instruments, the RRASOR and the STATIC-99, they examined the sexual recidivism rates for the group over an average five-year follow-up period and compared these rates with what two well-established actuarial instruments, the RRASOR and the STATIC-99, predicted the recidivism of this group to be. They believe that these instruments might control for extraneous variables that might otherwise explain any difference in recidivism. If the treated group had a significantly *lower* recidivism rate than the actuarial instruments predicted, they believe it is due to treatment rather than to other factors. Put another way, the actuarial instruments should accurately predict what the recidivism rate for this group should be if they had *not* received treatment.

Both instruments predicted that the sample would have approximately seventy recidivists over the five-year period. In fact, there were only fifty-three. Likewise, there were significant differences between the study's observed percentages of recidivists at the various actuarially-determined levels of risk and the percentages expected according to the instruments. This research is certainly consistent with the conclusion that treatment can reduce sexual

²⁴ Howard Barbaree et al., *The Evaluation of Sex Offender Treatment Efficacy Using Samples Stratified by Levels of Actuarial Risk* (paper presented at the Association for the Treatment of Sexual Abusers, St. Louis, Mo., Oct. 9, 2003); see also C.M. Langton, *Contrasting Approaches to Risk Assessment with Adult Male Sexual Offenders: An Evaluation of Recidivism Prediction Schemes and the Utility of Supplementary Clinical Information for Enhancing Predictive Accuracy*, ch. 2 (2003) (unpublished doctoral dissertation, Univ. of Toronto).

reoffending.

Thus, there does seem to be an empirical basis for concluding that treatment can reduce sexual reoffending. However, a more definitive resolution to that question awaits additional research. Because of this uncertainty, it would be prudent to provide incentives to sex offenders to participate in community treatment, while also monitoring them as long as necessary to prevent them from committing another sex crime.

D. *Predicting Safety*

Experts have made significant progress in predicting sexual dangerousness. Unfortunately, they have not developed comparable expertise in predicting sexual safety. Experts are unable to determine with great accuracy when sex offenders can be released into the community with minimal risk of committing another sex crime.²⁵

Though complex, predictions of risk are based primarily on past or fixed factors that, except for factors like age, do not change. (Some dynamic factors, such as failing in prison treatment programs, can also indicate a greater likelihood of sexual recidivism.) Predictions of safety are based primarily on dynamic factors that can change over time, such as changed attitudes toward women, empathy for victims, and successful mastery of relapse-prevention techniques. So far, experts have not identified specific factors that point to reduced risk with sufficient accuracy to determine if high-risk sex offenders can be safely released into the community. Nor have they developed the functional equivalent of actuarial instruments that could be used to identify a group of sex offenders whose risk of committing another sex crime have been lowered, which would provide good reason for conditionally releasing them into the community.

This problem is currently plaguing state SVP programs. The number of sex offenders committed as SVPs far exceeds the number given conditional release. And, very few SVPs have been given their final release.²⁶ Realistic risk assessment really cannot be done in an institutional environment because it provides no opportunities for reoffending. Consequently, ongoing monitoring and assessment of how an individual behaves in the real world to see how he applies what he has learned about sex offending there is essential.²⁷ Even

²⁵ Hanson, *supra* note 5, at 68.

²⁶ See, e.g., La Fond, *supra* note 7, at 490-91.

²⁷ John Q. La Fond, *Outpatient Commitment's Next Frontier: Sexual Predators*, 9

then, mistakes are inevitable. Some sex offenders will be released who will commit another sex crime.

E. The Risk Management Approach to Sexual Recidivism

Risk management is a strategy that is now being used more frequently to prevent sex offenders from committing more sex crimes. It is much more effective than simply using a prediction strategy.²⁸ Risk-management requires an initial risk assessment for each sex offender, employing state-of-the-art actuarial instruments and other techniques, when an offender is first sentenced. His release into the community would subsequently be managed using this strategy. Government authorities then increase or decrease control over the offender in the institution and in the community in light of ongoing assessments of risk.

1. Criminal Sentencing

Risk assessment would be used in imposing the initial sentence on a convicted sex offender. Offenders determined to be at high risk of reoffending would have an additional increment added to their normal prison sentence. If indicated by subsequent risk assessments, the offender could serve this added time on intensive parole. Comprehensive control over the offender using the community containment approach (discussed later in this article) would monitor the offender's activities in the community.

Washington State uses a different approach, sometimes called "determinate plus" sentencing. An offender is given a sentence based on the crime of conviction and his criminal history. In addition, Washington law requires that *nonpersistent* offenders who have committed a sex crime listed in the statute or a sexually motivated crime *must* be given the maximum sentence. The judge can sentence him to serve some of his sentence after his release from prison in community custody supervised by the Department of Corrections.²⁹

Under a risk management approach, low risk offenders could have their initial sentence reduced. In carefully selected cases, offenders could even be diverted into a rigorous supervision and

PSYCHOL. PUB. POL'Y & L. 159 (2003); see also Anita Schlank, *Guidelines for the Development of New Programs*, in THE SEXUAL PREDATOR: LAW, POLICY, EVALUATION AND TREATMENT 12-5, 12-6 (Anita Schlank & Fred Cohen eds., 1999).

²⁸ Kirk Heilbrun et al., *Sexual Offending: Linking Assessment, Intervention, and Decision Making*, 4 PSYCHOL. PUB. POL'Y & L. 138 (1998); see also Winick, *supra* note 14, at 558-65.

²⁹ WASH. REV. CODE §§ 9.94A.712, .713 (2002).

treatment program in the community.³⁰ Treatment should also be provided to all sex offenders in prison to reduce the risk that they will reoffend when released. This treatment should be made available as soon as possible to prevent sex offenders from denying or minimizing the seriousness of their crimes.³¹

2. Sexual Predators

Most SVP statutes do not permit *initial* commitment to a Least Restrictive Alternative (“LRA”) in the community.³² This statutory limit results in many more sex offenders being committed to long-term institutional confinement at enormous cost.³³ SVP laws should be changed to allow SVPs to be placed in LRAs from the outset. Risk management would be used for these individuals and also would used to release SVPs committed initially to institutions.³⁴

3. Advantages

Risk management has significant advantages over both long-term and indeterminate confinement and release into the community, subject to mandatory registration and community notification. Many more sex offenders can be supervised as they are released from criminal incarceration. The intensity of control can be adjusted as necessary, depending on episodic risk assessments. Knowing that they may gain more freedom generates strong incentives for offenders to change their attitudes and behavior. The community also knows that increased control, including sending high-risk offenders back to prison, will be placed on the offender if necessary to protect the community.

Risk management costs a lot less than confinement under either a state SVP law or a criminal sentencing law.³⁵ It will also protect the community better than requiring offenders to register with the police or warning the community to protect itself. In sum, risk management provides the best of both worlds: stronger community protection combined with powerful incentives for sex offender rehabilitation.

³⁰ *Id.* § 9.94A.670.

³¹ Wettstein, *supra* note 9, at 617.

³² La Fond, *supra* note 7, at 475.

³³ *Id.* at 476-95.

³⁴ *Id.* at 479.

³⁵ *Id.*

III. A PROPOSED SEX OFFENDER REENTRY COURT

A. *The Reentry Process For Sex Offenders*

An essential goal of any sensible correctional process is the successful reentry of the offender into the community.³⁶ Success in this context means not merely lack of recidivism, but also community reintegration. It is hoped that the returning offender has been rehabilitated and has undergone attitudinal and behavioral change in ways that avoid future offending. In addition, it is hoped that the returning offender will become a productive member of society, an asset to the community rather than a liability.

Successful reentry must be planned for, and must be worked for. Discharge alone will not accomplish the goal. Yet, our existing approaches to sex offenders do little to plan for and work for successful reentry. Our existing approaches are dichotomous: we either hold sex offenders in custody—in prison or in sexually violent predator commitment facilities—or we release them to the community with little more than providing notification of risk to a community ill-prepared to deal with it. Our existing approaches do not produce successful reintegration. We need to build bridges between custody and release, and to prepare offenders for release in ways that will help to ensure successful reintegration.

What does successful reentry mean in the context of sex offenders? First, it means developing risk assessment capacities through use of increasingly refined assessment tools already available, studying the accuracy of these instruments, and further refining these techniques based on experience and research. As noted earlier, tools for assessing future risk of sex offending have improved; unfortunately, we still know very little about how to predict when risk has been significantly reduced.³⁷

Making predictions about when risk has been reduced sufficiently to protect community safety is difficult with regard to sex offenders in prison or committed as sexually violent predators. How an individual behaves while in custody does not tell us enough about how he or she will behave in the community. Someone held in a

³⁶ See generally Jeremy Travis, *But They All Come Back: Rethinking Prisoner Reentry*, in SENTENCING & CORRECTIONS, NO. 7 (Nat'l Inst. of Justice, U.S. Dep't of Justice May 2000), available at <http://www.ncjrs.org/pdffiles1/nij/181413.pdf> (last visited June 15, 2004).

³⁷ See *supra* note 25 and accompanying text; see also Hanson, *supra* note 16, at 72 ("An unfortunate consequence of our limited knowledge of dynamic risk factors is that we have better evidence for identifying sex offenders as dangerous than we have for determining when they are safe to be released.").