

highly structured institutional setting will not have the opportunity to commit an additional sex offense; consequently, a long period of good behavior within the institution does not necessarily predict good behavior when the individual no longer is subject to strict custodial controls. Experiencing the stresses of the community that release will produce, as well as the opportunities for reoffending that it will present, are likely to change the calculus of risk substantially. A sex offender discharged to the community without employment and suffering from the continuing social stigma that sex offender registration and community notification laws produce is subject to intense stress.³⁸ Moreover, this stigma may be internalized in ways that significantly diminish the offender's sense of self-esteem and self-efficacy. This, in turn, may hamper the offender's ability to adhere to a relapse prevention plan when subjected to the temptations that inevitably will arise in the community.

As discussed earlier, predictions of safety or of danger are difficult to make in an institutional environment. Unsupervised release to the community of an offender accustomed to the controls of total institutionalization with little more than community notification significantly increases risk to the community. Instead, there should be a graduated release process in which offenders are subjected to close monitoring and supervision until they can demonstrate their successful adjustment to community life. Supervised release should also be accompanied by services in the community designed to help them to achieve this goal.

This graduated release strategy has reduced general recidivism; it also should reduce sexual recidivism. A comprehensive study of Colorado's community corrections system (twenty-five half-way houses throughout the state that serve both probation and parolee populations) found that offenders who were not placed on postrelease supervision after release from the community corrections system were almost twice as likely to reoffend when compared with offenders released from the community corrections system who were placed on postrelease supervision.³⁹ Moreover, among those offenders released from prison through the community corrections system who did reoffend (measured by a

³⁸ Winick, *supra* note 10, at 219.

³⁹ Suzanne Gonzalez Woodburn & Kim English, Colo. Dep't of Pub. Safety, *Community Corrections in Colorado: A Report of the Findings* (Feb. 2002), available at <http://dcj.state.co.us/ors/pdf/docs/2002COMCOREPORT.pdf> (last visited June 15, 2004).

new criminal charge), those who were not subject to postrelease supervision tended to reoffend more quickly.

Any sensible reentry process for sex offenders must focus both on community protection and on offender rehabilitation. Reentry should be graduated. The individual should gradually move from more restrictive to less restrictive supervision based upon changes in dynamic risk factors that suggest a decreasing risk of reoffending. Risk should be closely and continually monitored through periodic risk assessment. The individual should move gradually from the total institutionalization of the prison or hospital to partial release and, eventually, to total discharge. For example, an offender might start on work release from a prison, then move to a half-way house in the community with structured restrictions, then to living at home subject to partial home confinement or electronic monitoring. Gradually these restrictions would be eased, but with continued monitoring and supervision. The offender must earn these graduated reductions in the restrictions to which he is subjected through behavior that demonstrates a reduction in risk in the face of increasing exposure to opportunities in the community for reoffending. This process requires close monitoring and supervision of the individual by probation or parole professionals, periodic reassessment of risk, and participation by the offender in sex offender treatment designed to teach him how to avoid reoffending.

B. A Proposed Adaptation of the Community Containment Approach That Uses the Judiciary

How can such a sex offender reentry process be best structured? An innovative model is the community containment approach developed in Colorado.⁴⁰ The community containment approach involves a specially trained, multidisciplinary case management team composed of a probation or parole officer, a treatment provider, and a polygraph examiner acting together to reduce the offender's privacy, access to past or potential victims, and opportunities to reoffend. Limiting opportunities to reoffend requires accurate information about the offender's past and potential victims and high-risk behavior patterns. This information is solicited and verified through use of periodic polygraph testing. Such testing or its potential has been found to

⁴⁰ Kim English et al., *Community Containment of Sex Offender Risk: A Promising Approach*, in PROTECTING SOCIETY, *supra* note 6, at 265; see also Kim English, *The Containment Approach to Managing Sex Offenders*, 34 SETON HALL L. REV. 1251 (2004).

increase the scope and accuracy of sexual history information, provides a basis for verifying whether the offender is currently engaging in high-risk or assaultive behavior, and helps to break down the denial that perpetuates much sexual violence, enabling cognitive restructuring and other treatment interventions to be more successful.⁴¹

The community containment approach is a risk management/treatment model, which uses polygraph examinations extensively. Polygraph testing assists both the risk management and treatment process by producing much needed and otherwise largely unavailable information about the offender's sexual history and modus operandi, his preferred victim types and offending patterns, the frequency and extent of deviant sexual arousal and behaviors, and the events and emotional states that are precursors or triggers to reoffense.⁴² Assembling this more detailed information concerning the offender provides a superior foundation for supervision and surveillance plans tailored to the offender and designed to reduce risk by limiting his access to victims and to opportunities to reoffend. The individual typically is subjected to significant restrictions as conditions of probation or parole, such as restrictions on contact with children or being in locations where children are likely to be present, random home visits, urine testing, and electronic monitoring. Failure to comply with these conditions is both deterred by and detected by polygraph examination.

This information also assists in the treatment process by providing opportunities to confront and break down the offender's denial. In addition, it facilitates the design and implementation of more effective relapse-prevention plans customized to the individual. The answers provided by the offender in periodic polygraph examination significantly assist the monitoring and supervision process. Polygraph examination functions as a deterrent to the offender's engaging in high-risk behavior.⁴³

⁴¹ English et al., *supra* note 40, at 273-75.

⁴² *See id.* at 269. Polygraph testing combines interrogation with physiological measurements obtained using a polygraph—a piece of equipment that records physiological phenomena, typically respiration, heart rate, blood pressure, and electro-dermal response. NAT'L ACAD. OF SCIENCES, NAT'L RESEARCH COUNCIL, THE POLYGRAPH AND LIE DETECTION 12 (2003) [hereinafter NAS REPORT]; *see also* James R. Wygant, *Uses, Techniques, and Reliability of Polygraph Testing*, 42 AM. JUR. 2D *Trials* 313, § 39 (2003).

⁴³ Polygraph examinations may have utility to the extent that they can elicit admissions and confessions, deter undesired activity, and instill public confidence. . . . Indirect evidence supports the idea that a

If violations of an offender's conditions of release are discovered, a variety of sanctions can be imposed by the probation or parole officer, including increased surveillance, house arrest, electronic monitoring, home visits by the officer, requirements that the offender provide location information to the officer, additional mandated treatment, required community services, short-term jail sentences, placement in a half-way house for sex offenders, or even revocation of probation or parole. These sanctions are an essential condition for successful sex offender treatment. In sum, polygraph examination increases the offender's candor in treatment, helps to break down denial, and provides the external pressures that may be needed to keep the offender from reoffending.

The community containment model has much to offer. For it to work effectively, however, probation or parole officers should have caseloads limited to twenty or twenty-five sex offenders.⁴⁴ Unfortunately, in recent years many jurisdictions have eliminated parole or significantly reduced the extent of parole supervision. Moreover, in most jurisdictions probation officers have enormous caseloads, which can significantly undermine the effectiveness of the containment approach. Unless the probation or parole officer can closely monitor compliance with the conditions of release and enforce them through the court's authority, the likelihood of offender noncompliance is greatly increased.

We propose an expansion of the containment approach that adds a more active role by the judiciary, one that starts at the beginning of a criminal prosecution and ends with final discharge of the offender. It begins with plea-bargaining and continues with a sentencing process that plans from the very outset for the offender's eventual release. Judges, using the techniques of a risk management approach and principles of therapeutic jurisprudence, can strengthen the containment approach and provide even stronger incentives for offender rehabilitation and risk reduction. This proposal builds on some very promising developments occurring in the past fifteen years in which a variety of specialized treatment courts (or "problem solving courts," as they

technique will exhibit utility effects if examinees and the public believe that there is a high likelihood of a deceptive person being detected and that the costs of being judged deceptive are substantial. Any technique about which people hold such beliefs is likely to exhibit utility, whether or not it is valid.

NAS REPORT, *supra* note 42, at 214.

⁴⁴ English et al., *supra* note 40, at 272.

increasingly are becoming known) have been utilized to deal with a whole range of psychosocial problems.⁴⁵

C. *Reentry Courts and Other Problem-Solving Courts that Use the Principles and Approaches of Therapeutic Jurisprudence*

In recent years, a variety of specialized problem-solving courts have been established to deal with various offender populations.⁴⁶ The modern antecedents of this model can be traced to drug treatment court, founded in 1989 in Miami.⁴⁷ In order to avoid the revolving-door effect that traditional criminal approaches to drug possession that rely exclusively on prison have failed to deal with effectively, drug treatment court emphasizes offender rehabilitation and casts the judge as a central member of the rehabilitative team.⁴⁸ Offenders electing to participate in drug treatment court agree to remain drug-free, to participate in a prescribed course of drug treatment, to submit to periodic urinalysis to monitor their compliance with the treatment plan, and to report periodically to court for judicial supervision of their progress.⁴⁹

Other specialized treatment courts, or problem-solving courts have been based on the very promising success of the drug treatment model.⁵⁰ These include domestic violence court,⁵¹ and

⁴⁵ E.g., JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds., 2003) [hereinafter JUDGING IN A THERAPEUTIC KEY]; Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055 (2003).

⁴⁶ Winick, *supra* note 45, at 1055.

⁴⁷ See Peggy F. Hora, *A Dozen Years of Drug Treatment Courts: Uncovering Our Theoretical Foundation and the Construction of a Mainstream Paradigm*, 37 SUBSTANCE USE & MISUSE 1469 (2002); Peggy F. Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 454 (1999); Bruce J. Winick & David B. Wexler, *Drug Treatment Court: Therapeutic Jurisprudence Applied*, 18 TOURO L. REV. 479 (2002).

⁴⁸ JUDGING IN A THERAPEUTIC KEY, *supra* note 45, at 18; Winick, *supra* note 45, at 1056.

⁴⁹ Winick, *supra* note 45, at 1057; Winick & Wexler, *supra* note 47, at 481.

⁵⁰ CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT ADMINISTRATORS, CCJ RESOLUTION 22 & COSCA RESOLUTION 4: IN SUPPORT OF PROBLEM-SOLVING COURTS (Aug. 3, 2000), available at http://cosca.ncsc.dni.us/Resolutions/resolution_problemsolvingcts.html (last visited June 15, 2004).

⁵¹ See Randal B. Fritzler & Leonore M.J. Simon, *The Development of a Specialized Domestic Violence Court in Vancouver, Washington Utilizing Innovative Judicial Paradigms*, 69 UMKC L. REV. 139 (2000); Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33 (2000).