

sentence, the court will use risk assessment instruments and clinical assessment to develop an appropriate sentence and release plan. At appropriate intervals, the offender's risk of reoffending can be reassessed in light of his behavior in prison, including participation in prison treatment programs.

The judge should advise the offender that the extent of risk he presents will be all-important in determining when and if partial release to the community will be authorized. The offender should be told that, while many of the factors taken into account in performing the risk assessment are fixed, involving historic facts that will remain unchangeable, many are dynamic, subject to change through his behavior in prison and in the community, including participation in treatment, compliance with conditions of release, and the like.⁷³ This knowledge can help the offender to understand the instrumental value of engaging in appropriate behavior, including participation in prison rehabilitative programs and, in due course, those in the community.⁷⁴

How Reentry Court Judges Can Help Sex Offenders to Understand the Possibility of Future SVP Commitment. Because an increasing number of states have authorized sexually violent predator civil commitment following release from prison, the offender's post-arrest and post-sentence behavior is likely to be heavily influenced by the prospects of SVP commitment. The Supreme Court's recent decision in *Kansas v. Crane*⁷⁵ changes the ground rules for sexually violent predator commitment in ways that may have positive therapeutic effects. Prior to *Crane*, the state was not required to prove, as a condition for SVP commitment, significant diminution in the offender's ability to control his conduct. Instead, the prosecutor needed merely to demonstrate that the offender suffered from a mental abnormality or personality disorder that was likely to result in his reoffending. As a consequence, offenders committed as SVPs on the basis that they were mentally abnormal and likely to recidivate would probably come to see themselves, as did the offender in *Kansas v. Hendricks*,⁷⁶ as unable to control their conduct.⁷⁷ Psychologically, this would enable them to preserve a measure of ego strength, in effect saying, "I

⁷³ For a discussion of the distinction between fixed and dynamic risk factors in the risk assessment process, see Hanson, *supra* note 5, at 58-60.

⁷⁴ For a discussion of making offenders aware of dynamic risk factors that will bear on future restrictions of liberty, and how this can be used to motivate offenders to accept and respond more effectively to treatment, see Winick, *supra* note 51, at 58.

⁷⁵ 534 U.S. 407 (2002).

⁷⁶ 521 U.S. 346 (1997).

⁷⁷ See *id.* at 353.

couldn't help myself," rather than "I did it because I was bad." Seeing themselves as being unable to control their conduct as a result of their mental abnormality can have a negative effect on the capacity for self-control.⁷⁸

Crane changes this, however. It requires the state to prove that the offender's condition produced a significant difficulty in controlling his sexual conduct. This will interject into the SVP commitment hearing a new issue—controllability. The defendant will want to establish that, although he may have sexual attractions that are criminal if acted on, he has now learned how to control these urges, to avoid high-risk situations, and to follow a relapse prevention plan that will enable him to stay out of trouble when temptation happens to cross his path. "I might have a mental abnormality," he might concede, "but I now can control myself." Making this contention in his defense to civil commitment can have therapeutic benefits for the offender. It can help the individual to take responsibility for his conduct, and facilitate his acquisition of the skills needed to control his antisocial behavior.

Even an offender committed as an SVP after his release from prison should be told that it is in his best interests to avail himself of treatment offered in SVP commitment and learn how to control his behavior and convince the court of that fact. If he succeeds in doing so, the court can further advise him, and the judge will be able to permit his release from SVP commitment to the community. Although SVP commitment may occur following expiration of the offender's prison term, the possibility of reentry to the community should be planned for, and the reentry plan developed initially at sentencing can and should contemplate this potential. *Crane's* focus on controllability, by motivating the offender to gain control over his sexual urges, can be used by the judge in reentry planning as a catalyst for rehabilitation.

In jurisdictions that have SVP commitment statutes, the court can, at a prior criminal sentencing, explain the *Crane* requirement, allowing the offender to understand that there is instrumental value in developing the ability to control his behavior and learning how to do so. In this way, the offender may develop the understanding that, even though he may still suffer from a mental abnormality, he can still avoid civil commitment following release from prison should he acquire the ability to control his sexual urges, perhaps in a prison rehabilitative program. In short, *Crane* can be used to motivate the offender to participate meaningfully in treatment and help to

⁷⁸ Winick, *supra* note 14, at 529-30.

bring about positive treatment results.

The sex offender reentry court judge can function as an instrument of risk management, calibrating its release decision in light of the offender's risk as it may change over time.⁷⁹ Moreover, by making the offender aware of the court's risk management approach, the court can motivate the offender to engage in meaningful planning for ultimate release and to accept and participate in rehabilitative efforts in ways that will help to bring it about. The judge also could involve in the sentencing process the stakeholders who ultimately will be responsible for the offender's reentry. The offender's family members, friends, and other members of whatever support network he might have would be requested to help to develop the reentry plan, and asked what kind of support they would provide to help to prepare him for a successful reentry. A parole or probation officer, or similar official who ultimately will be involved in the offender's supervision in the community, also should participate in the planning process.

1. Polygraph Testing

Our proposal contemplates a system of graduated release, either from prison or from SVP commitment, correlated to the extent of risk the offender presents over time. Once institutional release is contemplated, we suggest the use of the community containment model developed and researched in Colorado and implemented there by the Colorado Sex Offender Management Board.⁸⁰ In this model, polygraph testing is used to increase information about the offender and his offending patterns in order to increase the efficacy of judicial supervision and monitoring in the community.

A key ingredient in the drug treatment court model is periodic urinalysis drug testing, the results of which are quickly made known to the judge and become the basis for judicial response—the application of positive reinforcement or sanctions.⁸¹ There is no parallel test to detect sex offending or engagement in risky behavior that might increase its likelihood. However, polygraph testing, although lacking the objectivity and precision of urinalysis, seems to be sufficiently reliable, when performed by trained polygraph examiners, to fulfill this function.

Polygraph testing has been deemed insufficiently reliable to be

⁷⁹ *Id.* at 561.

⁸⁰ English et al., *supra* note 40, at 268.

⁸¹ Winick & Wexler, *supra* note 47, at 481.

introduced as evidence in a criminal case, either by the state or the defendant.⁸² The reliability of the polygraph, however, may be little different than that of many other forms of scientific evidence that are readily accepted in civil and criminal trials, such as fingerprints and urinalysis testing.⁸³ A significant number of laboratory and field

⁸² See *United States v. Scheffer*, 523 U.S. 303, 309-12 (1998); PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, *SCIENTIFIC EVIDENCE* § 8-3 (1986); 1 *MODERN SCIENTIFIC EVIDENCE: THE LAW & SCIENCE OF EXPERT TESTIMONY* § 14-1.2 (David L. Faigman et al. eds., 1997) [hereinafter 1 *MODERN SCIENTIFIC EVIDENCE*].

⁸³ For discussions of the significant infirmities of fingerprint evidence, see *United States v. Llera Plaza*, 188 F. Supp. 2d 549 (E.D. Pa. 2002). See also Michael Specter, *Do Fingerprints Lie?*, *NEW YORKER*, May 27, 2002, at 96; Editorial, *The F.B.I. Messes Up*, *N.Y. TIMES*, May 26, 2004, at A22 (commenting on FBI confession of error in the case of an Oregon lawyer falsely charged based on inaccurate fingerprint evidence, and stating that “clearly fingerprint analysis is not the gold standard it is cracked up to be”).

Although urinalysis is widely used in judicial and pre-employment screening contexts as a drug abuse prevention and detection tool, the procedure has innate flaws. Urinalysis is generally composed of two tests: screening, where immunoassay is used; and confirmation, where gas chromatography/mass spectrometry (“GC/MS”) is often used. Diane Heckman, *The Evolution of Drug Testing of Interscholastic Athletes*, 9 *VILL. SPORTS & ENT. L.J.* 209, 225-26 (2002). GC/MS is used as a secondary, confirmatory check on the initial immunoassay test, if a positive test is reported, because GC/MS is considerably more expensive (\$80 to \$100 per test versus \$5 to \$25 for immunoassay) and requires a significant amount of supervision and expertise from the sampling stage to the testing stage to perform. See Scott S. Cairns & Carolyn V. Grady, *Drug Testing in the Workplace: A Reasoned Approach for Private Employers*, 12 *GEO. MASON L. REV.* 491, 507 (1990); Heckman, *supra*, at 226; Karen Manfield, *Imposing Liability on Drug Testing Laboratories for “False Positives”: Getting Around Privity*, 64 *U. CHI. L. REV.* 287, 289-90 (1997). Unlike immunoassay and other types of urinalysis drug testing, which test for the byproducts of narcotics, GC/MS tests for actual traces of the narcotic itself, and thus is considerably more accurate and less prone to false positives. *Id.*

Urinalysis using only the immunoassay method, which frequently occurs, has a false positive problem, i.e., it inaccurately shows illicit drug-taking when none has occurred. David A. Berger & John E. Deaton, *Campbell and Its Progeny: The Death of the Urinalysis Case*, 47 *NAVAL L. REV.* 1, 31 n.160 (citing B.M. Kapur, *Drug-testing Methods and Clinical Interpretations of Test Results*, 92 *BULL. ON NARCOTICS* 115, 130 (1993)); Manfield, *supra*, at 289-90. When immunoassay testing is used, poppy seeds often produce false positive results for morphine, and this form of testing also often cannot distinguish between illegal drug metabolites and those generated by the consumption of over-the-counter decongestants and antihistamines. Ellen M. Alderman, Note, *Dragnet Drug Testing in Public Schools and the Fourth Amendment*, 86 *COLUM. L. REV.* 852, 854-55 (1986); see also Manfield, *supra*, at 291 n.20 (citing James L. Abelson, Letter to the Editor, *Urine Drug Testing—Watch What You Eat!*, 266 *JAMA* 3130 (1991) (discussing poppy seeds); Oscar A. Cruz et al., *Urine Drug Screening for Cocaine after Lacrimal Surgery*, 111 *AM. J. OPHTHALMOLOGY* 703 (1991) (topical application of cocaine); M. Joseph Fedoruk & Loretta Lee, *Positive Preemployment Urine Drug Screen Caused by Foreign-Manufactured Vitamin Formulation*, 155 *W. J. MED.* 663 (1991) (foreign-made vitamin formulations); Marie Pulinio et al., Letter to the Editor, *False-positive Benzodiazepine Urine Test Due to Oxaprozin*, 273 *JAMA* 1905 (1995) (arthritis medicines); Teri Randall, *Infants, Children Test Positive for Cocaine after*

studies of the accuracy of the polygraph place the accuracy rates of the results of a “properly conducted” polygraph test, when used for purposes of monitoring, in excess of eighty-five percent.⁸⁴

Exposure to Second-Hand Crack Smoke, 267 JAMA 1044 (1992) (passive inhalation)). Manufacturers of non-GC/MS urinalysis drug tests claim accuracy in ninety-five to ninety-seven percent of all cases, but some studies show that in practice the tests yield incorrect results in twenty-five to sixty percent of the cases. *Id.* at 291 (citing R.J. Aalberts & J.L. Walker, *Worker Drug Testing: What the Small Firm Owner Needs to Know*, 26 J. SMALL BUS. MGMT. 53 (1988) (“finding false positive rates of 5 to 20 percent, but other studies show overall error rates of 25 to 97 percent”); Jennifer Harris, *Testing the Drug-Abuse Waters*, ADVANTAGE, Apr. 1, 1988, at 26); see also Shane J. Osowski, Comment, *Urinalysis Drug Testing of Employees At Will: The Need for Mandatory Standards*, 11 N. ILL. U. L. REV. 319, 344 n.191 (1991) (citing Robert V. Blanke, *Accuracy in Urinalysis*, in URINE TESTING FOR DRUGS OF ABUSE 43, 43-44 (Richard L. Hawks & C. Nora Chiang eds., 1986); H.J. Hansen et al., *Crisis in Drug Testing: Results of CDC Blind Study*, 253 JAMA 2382, 2382 (1985)); Dana Hawkins, *Trial by Vial: More Schools Give Urine Tests for Drugs—But at What Cost?*, U.S. NEWS & WORLD REP., May 31, 1999, at 70 (stating that urinalysis tests are wrong five to sixty percent of the time).

Urinalysis also can produce false negative results when drug abusers use undetectable countermeasures that are increasingly available to mask their drug-taking. These countermeasures include “flushers,” cleansing pills and beverages sold at health food stores, designer masking agents, “clean” urine to place in test cups, and prosthetic penises with temperature controlled reservoirs. See <http://www.ureasample.com> (last visited June 15, 2004); <http://www.cleartest.com> (last visited June 15, 2004).

⁸⁴ STAN ABRAMS, *THE COMPLETE POLYGRAPH HANDBOOK* 190-91 (1989) (reporting the overall accuracy rate from laboratory studies involving the common “control question technique” polygraph to be “in the range of 87 percent”); JAMES ALLAN MATTE, *FORENSIC PSYCHOPHYSIOLOGY USING THE POLYGRAPH* 121-29 (1996); Charles Daniels, *Using Polygraph Evidence After Scheffer*, 27 CHAMPION 12, 15 (2003); David L. Faigman et al., *Limits of the Polygraph*, ISSUES IN SCIENCE & TECHNOLOGY ONLINE (fall 2003), available at <http://www.issues.org/issues/20.1/faigman.html> (last visited June 15, 2004); cf. OFFICE OF TECH. ASSESSMENT, U.S. CONG., *SCIENTIFIC VALIDITY OF POLYGRAPH TESTING: A RESEARCH REVIEW AND EVALUATION—A TECHNICAL MEMORANDUM*, NO. OTA-TM-H-15 (1983), reprinted in 12 POLYGRAPH 196, 200 (1983) (citing six prior research reviews showing average validity ranging from sixty-four percent to ninety-eight percent, and concluding polygraph accuracy as better than chance); U.S. DEP’T OF DEF., *THE ACCURACY AND UTILITY OF POLYGRAPH TESTING* (1984), reprinted in 13 POLYGRAPH 63 (1984) (stating that the accuracy of the polygraph is from eighty percent to ninety percent); William Iacono & David Lykken, *The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests*, in 1 MODERN SCIENTIFIC EVIDENCE, *supra* note 82, at 582, 608 (citing the results of three independent studies putting the mean accuracy rate at seventy percent); David Raskin, *The Polygraph in 1986: Scientific, Professional and Legal Issues Surrounding Application and Acceptance of Polygraph Evidence*, 1986 UTAH L. REV. 29, 42 (finding combined accuracy rate of ninety-five percent based on five mock crime studies). Dr. David Lykken, one of the polygraph’s staunchest critics, measured polygraph sensitivity at eighty-four percent, meaning that it will correctly label a deceptive person as deceptive eighty-four percent of the time (a true positive), and incorrectly label a deceptive person as being truthful sixteen percent of the time (a false negative). David Lykken, *The Validity of Tests: Caveat Emptor*, 27 JURIMETRICS J. 263, 264-65 (1987). He also measured polygraph specificity at fifty-three percent, correctly labeling a truthful subject as being truthful fifty-three percent of the time (a