

are committed by family members and others known to the victim.<sup>105</sup> The new strategies developed in the 1990s to deal with sexual violence have distracted us from dealing effectively with the more extensive problem of preventing sexual violence by offenders who know their victims.

Reentry courts can help meet this neglected need. Collecting sex offense histories and offender patterns for each offender through clinical interviews and polygraph examination can identify the offender's previous victims in the community, allowing development of customized restrictions on contact with past victims and on the ability of the offender to visit places where he will be tempted to reoffend. Intense supervision and polygraph examination can also help assure that these restrictions are followed. When the offender has abused a child or other intimate within the household to which he will be returning, the threat of polygraph examination can significantly deter future abusive conduct, much of which might otherwise go undetected because family members are often reluctant to report crimes of intimate violence. The containment approach is most appropriate for use with perpetrators who know their victims. It acknowledges that eighty percent to ninety percent of sex crimes occur between those who know each other. The reentry court model thus can do considerably more than sex offender registration and community notification to protect prior victims.

In addition, the reentry court model can significantly improve the functioning of notification laws generally. While a majority of states using these notification laws base the degree of notification required on the offender's placement in one of several tiers of risk, thirteen states only use one tier of risk, and many others, in practice, rarely if ever consider a change in tier risk level.<sup>106</sup> As a result, many of these community notification schemes can be seen

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<sup>105</sup> NATIONAL VICTIM CENTER & CRIME VICTIMS RESEARCH AND TREATMENT CENTER, RAPE IN AMERICA: A REPORT TO THE NATION 4 (1992) (stating that most rape victims are raped by someone they know); Leonore M.J. Simon, *Matching Legal Policies with Known Offenders*, in PROTECTING SOCIETY, *supra* note 6, at 149, 149-50; Jenny A. Montana, Note, *An Ineffective Weapon in the Fight against Child Sexual Abuse: New Jersey's Meagan's Law*, 3 J.L. & POL'Y 569, 594 (1995) (reporting that the majority of child molestation is committed by relatives or friends of the child's family); Jane A. Small, Note, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. REV. 1451, 1455 (1999) ("Contrary to the popularly held belief that sex crimes are usually committed by sinister strangers, seventy-five percent of all sexual assaults are perpetrated by offenders known to the victim.").

<sup>106</sup> Winick, *supra* note 10, at 223.

as reflecting a prediction model because they are static, basing notification requirements on historic facts existing at the point of discharge. In contrast, states using several tiers of risk can be seen as applying a risk management model, at least to the extent that individuals are capable of being moved between tiers as new information develops over time. Those jurisdictions that use only one tier of risk or that rarely permit reconsideration of risk level can be criticized as antitherapeutic inasmuch as they provide no incentive to the offender to change.<sup>107</sup> It would be more therapeutic to have three or more tiers of risk and to allow periodic reassessment of the extent of risk based on changing circumstances and to permit changes to risk classification as a result.

For jurisdictions that convert their community notification statutory schemes from prediction to risk management models, the reentry court model proposed here can facilitate their functioning by providing constantly updated information about the offender and his functioning in the community. The reentry court should be in close contact with the prosecutor or local sheriff charged with administering these notification laws, funneling them updated information that can be used to reclassify offenders as new information emerges concerning their extent of risk. The reentry court, in the process of doing this, can further help to motivate offenders to obtain treatment and to act in ways that reduce risk. Indeed, consideration might be given to having the reentry court judge take over the function of risk classification for community notification law purposes.

In any event, whether administered by the reentry court or by the prosecutor or sheriff, restructuring notification laws to convert them into instruments of risk management can allow the reentry court judge to use an additional tool of motivation in the risk management process. By informing offenders that there will be a payoff for controlling their behavior, engaging in treatment, and complying with conditions of release, the court can provide an additional incentive for prosocial behavior and disincentive for antisocial behavior. Moreover, by taking into account the additional information that the reentry court process will generate, such restructured notification law schemes will further increase the accuracy of risk assessment, thereby allowing them better to achieve the community protection purposes they are designed to serve.

By requiring the released offender periodically to report to

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<sup>107</sup> *Id.*

court in a manner similar to the way drug treatment courts function, the reentry judge can come to know the offender better and have an ongoing dialogue with him. By treating the offender with dignity and respect and by demonstrating concern for his well-being, the reentry court judge can forge a personal relationship with the offender that can itself be therapeutic.<sup>108</sup> To perform this function effectively, the reentry court judge must develop enhanced interpersonal skills and use some basic principles derived from psychology and social work. The judge playing this role is functioning as a therapeutic agent. The emerging therapeutic jurisprudence literature on problem-solving courts provides a number of instrumental prescriptions for judges playing these new roles,<sup>109</sup> and these insights will be particularly helpful for sex offender reentry court judges.

Moreover, affording offenders the opportunity to participate in decisionmaking concerning the conditions of their reentry can have significant therapeutic value.<sup>110</sup> A body of research on the psychology of procedural justice demonstrates the psychological value of affording people an opportunity to participate in hearings that they regard as fair.<sup>111</sup> People given a sense of "voice," the opportunity to tell their story, and "validation," the feeling that what they have said is taken seriously by the judge, and who feel that they have been treated fairly, with respect for their dignity, will likely experience greater satisfaction with the hearing process and a greater willingness to comply with the results of it, even if unfavorable. The periodic provision of hearings that will characterize sex offender reentry court can thus have a therapeutic value for the offender.

These hearings will have the added benefit of placing offenders in the position of advocating to the court that they have gained from treatment and rehabilitative efforts, and that their present risk of reoffending is significantly reduced. Affording them this opportunity can further assist to facilitate their acceptance of

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<sup>108</sup> See JUDGING IN A THERAPEUTIC KEY, *supra* note 45, at 129-64; Winick, *supra* note 45, at 1068-72; see also Winick & Wexler, *supra* note 47, at 482.

<sup>109</sup> JUDGING IN A THERAPEUTIC KEY, *supra* note 45, at 105-326; Winick, *supra* note 45.

<sup>110</sup> Winick, *supra* note 45, at 1087; see also Winick, *supra* note 52; Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 44 (1999).

<sup>111</sup> E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Michele Cascardi et al., *Procedural Justice in the Context of Civil Commitment: An Analogy Study*, 18 BEHAV. SCI. & L. 731 (2000).

wrongdoing, the breakdown of denial and cognitive distortions about it, and their willingness to accept rehabilitative efforts.<sup>112</sup>

#### IV. CONCLUSION

Our existing approaches for dealing with sex offenders are flawed. Mandatory minimum sentencing laws and sexually violent predator laws are insufficient to protect the public and are extremely costly. They fail to incarcerate some sex offenders who are dangerous to the community and incarcerate some who no longer are dangerous for longer than necessary. Rather than fostering the rehabilitation of sex offenders, they often produce psychological pressures that are antitherapeutic. These approaches fail to plan for reentry of the offender to the community. Yet, most sex offenders will inevitably be released into the community. Registration and community notification laws, although providing notice to the community concerning discharged offenders, leave the public without the tools necessary to protect itself from their continued danger.

Our existing approaches therefore are inadequate. They also fail to reflect and effectively use new technologies of risk assessment and sex offender rehabilitation. Existing and developing techniques of offender rehabilitation are almost entirely behavioral and psychological in nature. As a result, to succeed, they require a high degree of offender motivation. Yet, our existing legal approaches for dealing with sex offenders, rather than serving to motivate offenders to accept treatment and participate in it meaningfully, often undermine such motivation.

New approaches therefore are needed either to replace or supplement our existing legal models. As a result, we propose the use of special sex offender reentry courts to manage the risk that sex offenders will reoffend and to motivate them to participate meaningfully in rehabilitative programs. Risk management practices will allow the court to readjust calculations of individual risk on an ongoing basis in light of new information about the offender, much of it generated through the judge's use of the containment model, which includes periodic polygraph examination, and to adjust and readjust the conditions of control that are imposed. In this way, the reentry court judge will function as a reentry manager and rehabilitation motivator.

In recent years, a variety of specialized problem-solving courts

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<sup>112</sup> Winick, *supra* note 8, at 321.

have been established to deal with special offender populations. These courts apply principles of therapeutic jurisprudence to motivate offenders to deal with their underlying problems, to engage in behavioral contracting in which they formally agree to achieve certain rehabilitative and risk reduction goals, and to facilitate the court's monitoring of their compliance with conditions and progress in treatment.

Our proposal adapts these approaches to the sex offender context, positing for the judge a leading role as a member of an interdisciplinary risk management and treatment team that uses the community containment approach. The offender must, as a condition for gaining his release from prison or SVP commitment, agree to enter into a behavioral contract with the court to engage in sex offender treatment and to undergo periodic polygraph examination to allow the court better to monitor compliance and manage risk. This model provides incentives for offenders to change their behavior and attitudes, thereby decreasing the degree of risk of recidivism and earning greater freedom. It also monitors compliance and manages risk in a more effective manner. In addition, this model can impose greater controls on offenders who manifest increased risk of sexual recidivism, thereby providing the appropriate level of protection for the community in light of the offender's current recidivism risk.

In sum, we propose a viable solution to the serious problem of sexual recidivism that is both smart and tough. It strikes an appropriate balance between enhancing community safety by aggressively monitoring more sex offenders in the community, while also creating and managing powerful incentives for sex offenders to invest in rehabilitation, thereby reducing sexual recidivism and increasing community protection.