

Sex Offender Reentry Courts: A Proposal for Managing the Risk of Returning Sex Offenders to the Community*

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I. INTRODUCTION

Enraged by sex crimes against young children committed by convicted sex offenders,¹ the public has demanded that government do whatever is necessary to prevent sexual recidivism. Victims' groups mobilized public opinion and politicians rapidly responded.² Since about 1990, policymakers in the United States have adopted two distinct strategies to prevent convicted sex offenders from committing more sex crimes. One strategy emphasizes long-term confinement either in the prison system or in the mental health system. The other strategy relies on information compilation and dissemination.

Both strategies assume that sex offenders are more dangerous

* We first proposed this concept in John Q. La Fond & Bruce J. Winick, *Sex Offender Reentry Courts: A Cost Effective Proposal for Managing Sex Offender Risk in the Community*, 989 ANNALS N.Y. ACAD. SCI. 300 (2003). This Article is a revised and expanded version of that earlier article.

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¹ A vicious sexual attack on a young boy generated the first sexually violent predator statute implemented in Washington State in 1990. See David Boerner, *Confronting Violence: In the Act and the Word*, 15 U. PUGET SOUND L. REV. 525 (1992) (citing sources). A brutal sexual killing of a young girl in New Jersey by convicted sex offenders living across the street from the victim prompted New Jersey to enact a mandatory community notification law. See *Man Charged in 7-Year-Old Neighbor's Killing*, N.Y. TIMES, Aug. 1, 1994, at B5. The murder of Polly Klaus in California by a convicted sex offender generated intense public pressure for law reform. Vlae Kershner & Carolyn Lockhead, *Politicians React with Calls for Stiffer Sentences*, S.F. CHRON., Dec. 7, 1993, at A4.

² Stuart Scheingold & Toska Olson, *The Politics of Sexual Psychopathy: Washington State's Sexual Predator Legislation*, 15 U. PUGET SOUND L. REV. 809 (1992).

than other criminals and are likely to reoffend during their entire lives. They also require public officials to predict whether a convicted sex offender will commit another sex crime if released into the community. These strategies present public officials with rather stark choices: confining sex offenders for a very long time or simply releasing them with minimal supervision into the community.

This Article explores why it is so difficult to predict when sexual offenders will commit another sex crime. It then proposes the use of sex offender reentry courts to control sex offenders in the community, using a risk-management approach that will protect the community effectively at reasonable cost and also create incentives for sex offenders to seek rehabilitation.

Sex offender courts, which are based on principles of Therapeutic Jurisprudence, can provide more intensive community supervision for a much larger group of sex offenders, while at the same time motivating them to change their attitudes and behavior.

II. THE DEFICIENCIES OF EXISTING LEGAL APPROACHES FOR DEALING WITH SEX OFFENDERS

A. *Limited Choices: Long-Term Confinement or Information Control*

1. Longer Criminal Sentences

Most states have aggressively used the criminal justice system to prevent sex offenders from committing more sex crimes. They have dramatically increased sentences for sex crimes, passed mandatory minimum sentences for repeat offenders, including sex offenders, and enacted life-time sentences under “one, two, or three strike(s)” laws. Between 1993 and 1995, twenty-four states and the federal government passed “three-strike” statutes. They increased sentences for repeat offenders, including serious sex crimes. Some of these laws required mandatory life sentences for specified repeat offenders.³

While the prison population in the United States increased by 206 percent from 1980 to 1994, the number of imprisoned sex offenders increased even more—by 330 percent. Between 1985 and 1993, the average time served by convicted rapists in state prisons increased from about three years to five years, an increase in

³ John Clark et al., U.S. Dep’t of Justice, *Three Strikes and You’re Out: A Review of State Legislation* (1997), available at <http://ncjrs.org/pdffiles/165369.pdf> (last visited June 15, 2004).

percentage of sentence served from thirty-eight percent to fifty percent. Put differently, for sex offenders released from prison from 1985 to 1993, there has been a significant increase in the average length of stay in prison and in the percentage of sentence served before release. Since 1980 the number of prisoners sentenced for violent sexual assault other than rape increased by nearly fifteen percent—faster than any other category of crime except drug trafficking.⁴

2. Critiques of Criminal Sentencing

Mandatory minimum and lifetime sentences confine many sex offenders who, in fact, do not pose a high risk of committing another sex crime. Thus, they are overinclusive. Because these sentencing laws use only an offender's criminal history and use it inaccurately to determine the risk of sexual recidivism,⁵ many sex offenders who do not pose a serious risk of reoffending will be confined.

These sentencing schemes are also underinclusive. Many sex offenders who pose a serious risk of committing more sex crimes will not be confined because these schemes do not use the best risk assessment techniques to identify dangerous sex offenders. Mandatory minimum sentences are also excessive because many sex offenders will be incarcerated much longer than is necessary to prevent them from committing another sex crime. As a result of these sentencing initiatives, sex offenders are an incredible "growth industry" for our prisons and jails.

3. Indeterminate Civil Commitment

Sixteen states have passed sexually violent predator ("SVP") laws that use the state's civil commitment authority to hospitalize mentally ill sex offenders who are likely to commit another sex crime if not confined. SVP laws authorize the indefinite commitment of sex offenders about to be released from prison, who suffer from a "mental abnormality" or a "personality disorder" that makes them likely to reoffend. These laws are designed to confine disordered and dangerous sex offenders who can no longer be held in the criminal justice system. Most states commit sexually violent predators for an indeterminate period; they cannot be released until they are "safe" to

⁴ Lawrence A. Greenfield, U.S. Dep't of Justice, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault* (1997), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/soo.pdf> (last visited June 15, 2004).

⁵ See generally R. Karl Hanson, *What Do We Know About Sex Offender Risk Assessment?*, 4 PSYCHOL. PUB. POL'Y & L. 50 (1998).

live in the community. California commits SVPs for two years initially, but this commitment can be renewed.⁶

4. Critiques of SVP Commitment

Because SVP laws confine some of the more dangerous sex offenders, they will prevent these individuals from committing new sex crimes while they are in secure facilities. But, these laws are also overinclusive. They can be used against any offender convicted of a *single* qualifying sex crime. Prosecutors win most of the cases they file, ranging from about seventy-five percent to just under one hundred percent. The inability to initially commit sex offenders to an outpatient program subject to intensive control and the understandable desire of juries to err on the side of safety rather than risk explain much of this amazing success rate.⁷ SVP laws thus commit some sex offenders who would not reoffend if released or placed in an outpatient program under aggressive supervision.

SVP commitment can only be used for a small number of sex offenders because these cases require the government to prove the statutory and constitutional elements and because commitment is extraordinarily expensive. Consequently, SVP laws are underinclusive. Many dangerous sex offenders must be released into the community following the expiration of their prison sentences.

These laws also create disincentives for charged sex offenders to accept criminal responsibility for their behavior by pleading guilty and for convicted offenders to participate in prison treatment programs.⁸ Treatment in prison is more likely to succeed because it is offered closer in time to the commission of the crime, thus discouraging denial and minimization.⁹

5. Offender Information Collection and Dissemination

The second strategy, information control, relies primarily on sex offender registration and community notification laws. These laws require offenders to provide information about themselves to law

⁶ W. Lawrence Fitch & Debra A. Hammen, *The New Generation of Sex Offender Commitment Laws: Which States Have Them and How Do They Work?*, in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY 27, 30 (Bruce J. Winick & John Q. La Fond eds., 2003) [hereinafter PROTECTING SOCIETY].

⁷ John Q. La Fond, *The Costs of Enacting a Sexual Predator Law*, 4 PSYCHOL. PUB. POLY & L. 468, 486, 502 (1998).

⁸ Bruce J. Winick, *A Therapeutic Jurisprudence Assessment of Sexually Violent Predator Laws*, in PROTECTING SOCIETY, *supra* note 6, at 317, 322.

⁹ See Robert M. Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predator Law*, 15 U. PUGET SOUND L. REV. 597, 617 (1992).

enforcement agencies. This information, in turn, may be provided to the community.¹⁰

6. Registration Laws

All fifty states have enacted a sex offender registration law. Most convicted sex offenders must register with the police where they live and furnish law enforcement agencies with detailed information about their residence, employment, and criminal history. Offenders may also have to provide pictures, fingerprints, and DNA samples. Policymakers assume that registration laws will deter registered offenders from committing another sex crime and, if they do, will aid police investigation.

7. Notification Laws

All fifty states have also passed community notification laws since 1990.¹¹ These laws authorize or direct law enforcement to disclose information about dangerous sex offenders to the community. Organizations, like schools and day care centers, and individual citizens can use this information to protect themselves from dangerous offenders living in the neighborhood. Though some of these laws limit where sex offenders may live,¹² they do not otherwise directly control how sex offenders live in the community.

8. Critiques of Registration and Notification Laws

Most registration laws require most sex offenders to register for at least ten years and often longer. Most also provide no incentive for sex offenders to participate in community treatment or to demonstrate that they pose little risk of reoffending and should no longer have to register. Policymakers assumed that providing this information would make people more confident of their ability to respond to any danger posed by sex offenders living nearby. However, some research indicates that notification laws actually

¹⁰ Bruce J. Winick, *A Therapeutic Jurisprudence Analysis of Sex Offender Registration and Community Notification Laws*, in PROTECTING SOCIETY, *supra* note 6, at 213, 213.

¹¹ Wayne A. Logan, *Sex Offender Registration and Community Notification: Emerging Legal and Research Issues*, 989 ANNALS N.Y. ACAD. SCI. 337, 337-38 (2003).

¹² One example is an Iowa law that prohibits anyone convicted of a sex offense against a minor from living within 2000 feet of an elementary or secondary school or a day care center. A federal judge struck down the law as unconstitutional because its practical effect was to banish sex offenders from living in many smaller towns and cities and severely limiting housing in big cities to expensive developments, industrial areas, or the outskirts. In addition, there was no evidence that the law actually protected children. *See Doe v. Miller*, 298 F. Supp. 2d 844 (S.D. Iowa 2004).

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).

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.”).

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).

mental health court.⁵²

These new judicial models involve a collaborative, interdisciplinary approach to rehabilitation and problem solving in which the judge plays a leading role. They all involve the explicit use of judicial authority to motivate offenders to accept needed treatment services and to monitor their compliance and progress.⁵³

The judge-offender interaction is an essential ingredient in the effectiveness of these new judicial models. Not only does the judge supervise and monitor treatment and adherence, but also the judge serves as a behavioral motivator, shaping successful performance in treatment through praise and other types of positive reinforcement, and punishing lack of required participation in treatment or instances of relapse through the application of agreed-upon sanctions, ranging from sitting in the jury box for several hours to brief periods of jail detention to revocation of probation. Anecdotal reports and preliminary research suggest that there is a kind of “magic” in the judicial robe; that is, the judge’s direct participation and interaction with the offender makes an important difference in offender compliance and rehabilitation.

A new application of these special judicial models is reentry court, designed to assist offenders released from prison on parole to effect a successful reintegration into the community.⁵⁴ These courts manage the return to the community of prisoners, using the authority of the court to apply positive reinforcement and graduated sanctions, and to marshal treatment and other resources in the community designed to help the offender make a successful adjustment to community life. They combine supervision with counseling and treatment, attempting to produce both rehabilitation and the protection of public safety.

Reentry courts were first proposed by former National

⁵² See Arthur J. Lurigio et al., *Therapeutic Jurisprudence in Action: Specialized Courts for the Mentally Ill*, 84 JUDICATURE 184 (2001); Bruce J. Winick, *Outpatient Commitment: A Therapeutic Jurisprudence Analysis*, 9 PSYCHOL. PUB. POL’Y & L. 107 (2003); John S. Goldkamp & Cheryl Irons-Guynn, U.S. Dep’t of Justice, *Emerging Judicial Strategies for the Mentally Ill in the Criminal Caseload: Mental Health Courts in Ft. Lauderdale, Seattle, San Bernardino, and Anchorage* (2000), available at <http://www.ncjrs.org/pdffiles1/bja/182504.pdf> (last visited June 15, 2004).

⁵³ Winick, *supra* note 45, at 1067.

⁵⁴ Joan Petersilia, *When Prisoners Return to Communities: Political, Economic, and Social Consequences*, in SENTENCING & CORRECTIONS, NO. 9, at 1, 5 (Nat’l Inst. of Justice, U.S. Dep’t of Justice Nov. 2000), available at <http://www.ncjrs.org/pdffiles1/nij/184253.pdf> (last visited June 15, 2004); Terry Saunders, *Staying Home: Effective Reintegration Strategies for Parolees*, 41 JUDGE’S J. 34 (2002); see also Travis, *supra* note 36, at 5.

Institute of Justice Director Jeremy Travis⁵⁵ and were based explicitly on the drug treatment court model. As with drug treatment court, offenders who agree to participate in reentry court enter into an explicit behavioral contract.⁵⁶ The contract sets forth specific intermediate and long-term goals. Motivation to achieve the goals is facilitated through contract terms providing for agreed-upon rewards or positive reinforcers for success, or sanctions or aversive conditioners for failure. The behavioral contract harnesses a number of principles of psychology to help to bring about compliance and goal achievement, including the goal-setting effect, intrinsic motivation, commitment, cognitive dissonance, and the psychological value of choice.⁵⁷

The court closely monitors and supervises the released offender's progress in the community. This involves compliance with contract provisions, including participation in treatment, employment, and desistance from the use of drugs or alcohol. The court closely monitors whether the offender has remained law-abiding. Through the application of judicial praise or other forms of positive reinforcement, including the gradual lessening of restrictions, and graduated sanctions, including home confinement, electronic monitoring, more restrictive conditions, and ultimately revocation of parole, the reentry court judge helps the offender to achieve a successful reintegration into society, fosters his or her rehabilitation, and protects community safety. If the offender does commit another sex crime during his supervised release, he has broken his contract with the court. In most cases, the offender will be immediately returned to custody and the prosecutor will be notified.

Like the other problem-solving courts, reentry court can be seen as applying principles of therapeutic jurisprudence.⁵⁸ Therapeutic jurisprudence is an interdisciplinary approach to legal scholarship and law reform that sees legal rules and the way they are applied as

⁵⁵ See Travis, *supra* note 36.

⁵⁶ *Id.* at 9; see also JUDGING IN A THERAPEUTIC KEY, *supra* note 45, at 227-30; Bruce J. Winick, *Harnessing the Power of the Bet: Wagering with the Government as a Mechanism for Social and Individual Change*, 45 U. MIAMI L. REV. 737, 772-88, 793-97 (1991) (describing behavioral contracting or contingency management, analyzing the psychological principles on which it is based, and illustrating its application by government to achieve various social and individual goals); Winick, *supra* note 45, at 1085.

⁵⁷ Winick, *supra* note 56, at 752-72.

⁵⁸ Leonore M.J. Simon, *Proactive Judges: Solving Problems and Transforming Communities*, in THE HANDBOOK OF PSYCHOLOGY IN LEGAL CONTEXTS 449, 463 (David Carson & Ray Bull eds., 2d ed. 2003); Winick, *supra* note 45, at 1064.

social forces that produce inevitable consequences for the psychological well-being of those affected.⁵⁹ Therapeutic jurisprudence calls upon scholars to study these consequences with the tools of the behavioral sciences, and upon legislators, judges, and policymakers to reshape law in ways designed to minimize law's antitherapeutic effects, and when consistent with other legal goals, to increase law's therapeutic potential.

Problem-solving courts often use principles of therapeutic jurisprudence to enhance their functioning.⁶⁰ These principles include ongoing judicial intervention, close monitoring of and immediate response to behavior, integration of treatment services with case processing, multidisciplinary involvement, and collaboration with community-based and governmental organizations.⁶¹ These courts can be seen as taking a therapeutic jurisprudence approach to the processing of cases inasmuch as their goal is the rehabilitation of the offender, and they use the legal process and the role of the judge in particular to accomplish this goal. Through their supervision and monitoring of the offender's treatment progress, these judges themselves function as therapeutic agents.⁶² Moreover, these courts apply principles of therapeutic jurisprudence to spark motivation for treatment, to reinforce treatment success, and to increase treatment compliance.⁶³

D. How the Proposed Sex Offender Reentry Court Would Work

We propose an adaptation of the problem-solving court model for sex offenders—a sex offender reentry court. As with other problem-solving courts, these proposed courts would apply principles of therapeutic jurisprudence to motivate sex offenders to deal with their underlying problems and to monitor their compliance with and

⁵⁹ See generally LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996).

⁶⁰ CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT ADMINISTRATORS, *supra* note 50; Simon, *supra* note 58, at 463-64; Winick, *supra* note 45, at 1064-66.

⁶¹ CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT ADMINISTRATORS, *supra* note 50.

⁶² JUDGING IN A THERAPEUTIC KEY, *supra* note 45, at 7-10; Winick, *supra* note 45, at 1065.

⁶³ Pamela Casey & David B. Rottman, *Therapeutic Jurisprudence in the Courts*, 18 BEHAV. SCI. & L. 445 (2000); Fritzler & Simon, *supra* note 51; Hora et al., *supra* note 47; Carrie J. Petrucci, *Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic Violence Court That Utilizes Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 263 (2002); Simon, *supra* note 58; Winick, *supra* note 51; Winick, *supra* note 45; Winick & Wexler, *supra* note 47.

progress in treatment, within both the prison or psychiatric facility and the community, once they have been released. As with these other courts, the judge in reentry court would function as a member of an interdisciplinary team, in this case serving as a “reentry manager” for sex offenders.⁶⁴

The reentry process can be seen as beginning at the offender’s initial sentencing. As with most criminal offenders, the overwhelming majority of sex offenders plead guilty to their charges. The plea colloquy at which such a plea is accepted can provide an important opportunity for the judge to assist the offender to accept responsibility for his offense. Because denial, minimization, and rationalization are common in sex offenders and help to perpetuate their reoffending, the sentencing judge should not accept pleas of *nolo contendere* or *Alford* pleas, both of which allow the offender to avoid acceptance of responsibility.⁶⁵ The plea colloquy can become an important opportunity for the offender to acknowledge his wrongdoing and recount the facts of his crime and the impact it had upon the victim. These discussions held in open court and on the record can help the process of breaking down the offender’s cognitive distortions that may facilitate repetitive offending, paving the way for a positive cognitive restructuring in treatment.

There is an inevitable gap in time between acceptance of the plea or a verdict of guilty and the imposition of sentence, and this period can be an important one during which to spark the offender’s motivation to accept treatment.⁶⁶ Courts increasingly have been recognizing post-offense rehabilitation as a ground for a reduction in sentence or a basis for probation.⁶⁷ When a thorough risk assessment concludes that the risk of reoffending appears to be low, perhaps in a case involving a first-time nonviolent sex offender, the court, in considering the setting of bail, can require the offender to accept treatment as a condition of release on bail. This condition often is applied in the context of domestic violence court,⁶⁸ and in appropriate low-risk cases, this same approach can be used by the sex offender reentry court. In cases in which the offender appears to be making

⁶⁴ Travis, *supra* note 36, at 8.

⁶⁵ David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 225, 229 (1992).

⁶⁶ See JUDGING IN A THERAPEUTIC KEY, *supra* note 45, at 181 (discussing how judges can spark motivation for rehabilitation in a variety of contexts).

⁶⁷ Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, 5 PSYCHOL. PUB. POL’Y & L. 1034, 1036 (1999).

⁶⁸ Winick, *supra* note 51, at 34.

substantial progress in treatment, the court may consider a deferral of sentencing to permit the treatment process to proceed.⁶⁹

The offender's knowledge that the court will take his progress in treatment into account in imposing sentence and that a deferred sentence is possible can serve as powerful motivators for the offender to participate meaningfully in treatment and to gain significant benefits from it. If the defendant has been given a deferred sentence conditioned on his successful participation in treatment in the community, the court can hold periodic hearings to monitor the offender's ongoing treatment, similar to how drug treatment courts monitor treatment compliance and progress for drug offenders.⁷⁰

Assuming that the judge decides to impose a sentence involving imprisonment, the judge, in pronouncing sentence, can and should discuss future reentry with the offender. The judge can motivate the offender to accept whatever treatment might be available within the prison, noting that participation in prison treatment (or a continuation within the prison of treatment that the offender began within the community) will be taken into account positively when consideration is given to the offender's release. When authorized, the court can impose a sentence involving a period of incarceration followed by a period of community release under the court's supervision.⁷¹

The court can advise the offender that the ultimate goal is his release into the community once he has paid his debt to society and has demonstrated his ability to be law-abiding.⁷² The court can further inform the offender that, starting at that very moment, the court and offender together will begin a process of developing a plan for attaining that goal. The plan will involve treatment in prison as well as in the community, and hopefully will include the participation of the offender's family, friends, and other support networks. The court can monitor the offender's prison adjustment and participation in prison programs designed to prepare him for community release.

Under this proposal, the court would retain sentencing discretion to permit early release when appropriate. In imposing

⁶⁹ William Edwards & Christopher Hensley, *Restructuring Sex Offender Sentencing: A Therapeutic Jurisprudence Approach to the Criminal Justice Process*, 45 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 646 (2001); Winick, *supra* note 67, at 1065.

⁷⁰ Winick, *supra* note 45, at 1065; Winick & Wexler, *supra* note 47, at 480.

⁷¹ Travis, *supra* note 36, at 8.

⁷² *Id.*

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.clearstest.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

In a recent report, however, the National Academy of Sciences seriously questioned the accuracy of polygraph evaluation.⁸⁵ The report examined the accuracy of polygraph testing in the context of the screening of government employees to identify spies or national security risks. The report concluded that the polygraph was inadequate as a tool for national security screening for two reasons. First, the report noted that when the polygraph is used for such a screening function, i.e., to identify people who have engaged in wrongdoing from a population that is overwhelmingly innocent of such wrongdoing, it is significantly less accurate than when used in the investigation of specific incidents.⁸⁶ Second, the report noted that when used to screen large numbers of individuals who are innocent of wrongdoing, the polygraph inevitably produces unacceptable numbers of false-positives, resulting in inaccurately impugning the reputations of large numbers of governmental employees.⁸⁷ The report, in distinguishing between such screening use of the polygraph and its use in the investigation of specific incidents, noted that “[m]uch of the evidence assessing the validity of polygraphs . . . is based on their use in the investigation of specific, known events such as crimes.”⁸⁸ The NAS acknowledged that the use of polygraphs for such investigatory purposes produces results that are well above chance, but is still far from perfect.⁸⁹

The weaknesses in the use of polygraph testing for screening purposes are largely absent when polygraph examination is used for purposes of compliance monitoring, the purpose for which it would be used in sex offender reentry court. In screening uses of the polygraph, the polygraph examiner has had no prior dealings with the individual examinee, and therefore has had no occasion to establish baseline patterns for the individual’s physiological reactions to questioning. In the sex offender reentry court context, by contrast, examinees will likely be examined by the same examiner consistently over time, allowing the examiner to learn the

true negative), and incorrectly labeling a truthful person as being deceptive forty-seven percent of the time (a false positive). *Id.*

⁸⁵ NAS REPORT, *supra* note 42; see APA *Response to the National Academy of Sciences (NAS) Report* (n.d.), at <http://www.polygraph.org/nasresponse.htm> (last visited June 15, 2004) (discussing deficiencies in the NAS REPORT); Faigman et al., *supra* note 84 (discussing NAS REPORT).

⁸⁶ NAS REPORT, *supra* note 42, at 4, 215-16.

⁸⁷ *Id.* at 47; Wygant, *supra* note 42, § 39.

⁸⁸ Press Release, The National Academies, Polygraph Testing Too Flawed for Security Screening (Oct. 8, 2002), available at <http://www4.nationalacademies.org/news.nsf/isbn/0309084369?OpenDocument> (last visited June 15, 2004).

⁸⁹ NAS REPORT, *supra* note 42, at 4; Wygant, *supra* note 42, at 313, § 39.

intricacies of the individual and thus increasing the accuracy of the examiner's interpretation of physiological responses. In addition, in the monitoring context involved in sex offender reentry court, the consequences of being caught in a deception are grave (loss of liberty), compared to the consequences of deception for a governmental employee subjected to polygraph screening (not obtaining a government job or possibly losing one). The literature, referring to this as "strength of issue," concludes that when the consequences of deception are great, the likelihood of detection is stronger.⁹⁰

Furthermore, polygraph examination for screening purposes typically involves the asking of generalized questions, such as "have you ever participated in an organization dedicated to overthrowing the government?" By contrast, polygraph evaluation for screening purposes is highly fact-specific and concrete in nature, asking questions such as "have you been in the Lincoln Elementary schoolyard in the past two weeks?" The literature establishes that the accuracy of polygraph evaluation is significantly higher when questions involving case-specific facts are used than when more generalized questions are involved.⁹¹ The use of the polygraph to detect espionage, the specific screening function found to be unreliable in the National Academy of Sciences Report, is a fishing expedition that covers many types of behavior and involves as many as eighteen to twenty relevant questions and thirty or more comparison questions. In the use of the polygraph for monitoring of sex offenders, by contrast, only two or three relevant questions are asked and these questions target specific behaviors in a context in which the examiner already knows a considerable amount about the offender.⁹²

Therefore, for several reasons, the weaknesses identified by the National Academy of Sciences in the use of polygraph evaluation for espionage or security risk screening purposes are largely absent in the context of polygraph testing for compliance monitoring purposes. The NAS itself acknowledged that the use of the

⁹⁰ "Strength of Issue" is the measure of the consequences feared by the test subject if the test indicates the subject is lying. Wygant, *supra* note 42, § 36. When the polygraph is used as a monitoring device in conjunction with probation, strength of issue is high. *Id.* In a review of fourteen studies of polygraph accuracy at the University of Utah, it was concluded that there is a decisively strong correlation between valid, accurate results and strength of issue. *Id.*; John C. Kircher et al., *Meta-analysis of Mock Crime Studies of the Control Question Polygraph Technique*, 12 L. & HUM. BEHAV. 79, 81, 87 (1988).

⁹¹ Faigman et al., *supra* note 84; Wygant, *supra* note 42, §§ 39, 58-60.

⁹² Personal communication from Kim English, dated March 10, 2003.

polygraph for investigative purposes (i.e., the investigation of specific incidents of wrongdoing) was considerably more accurate than its use for screening purposes.⁹³ Because compliance monitoring involves greater exposures by the examiner to the examinee and a greater “strength of issue” than even in the investigatory context, the use of polygraph evaluations for compliance monitoring purposes is even more accurate than for investigatory purposes. The weaknesses identified by the NAS concerning the accuracy of polygraph evaluation in the espionage screening context do not, therefore, suggest that polygraph evaluation will not be sufficiently accurate for the monitoring purpose we contemplate.

In addition to the false positive problem in the use of the polygraph discussed by the NAS Report, a question may be raised as to whether the polygraph has a false negative problem. In other words, can the examinee take countermeasures that will produce negative (i.e., exonerating) results even when the individual is guilty of wrongdoing? Many sex offenders are diagnosed with personality disorders. It is commonly assumed that, because they lack a guilty conscience, psychopaths are able to lie with impunity. Can such psychopaths beat the polygraph? These questions were extensively examined in a district court opinion in *United States v. Galbreth*.⁹⁴ Based on extensive expert testimony the court found these concerns to be insubstantial. The court noted studies cited by the expert witnesses indicating that psychopaths could not beat a properly conducted polygraph test, and that it is “at least as effective with psychopaths as with other individuals.”⁹⁵ He also concluded that no studies had demonstrated that drugs were an effective countermeasure to the polygraph, and that the possibility that physical countermeasures (such as biting the tongue or tensing the leg muscles) would succeed in creating false negative results “is very slight.”⁹⁶ The polygraph, therefore, would appear to produce a false negative problem that is no greater than that presented by other accepted modes of scientific evidence, such as fingerprint and urinalysis evidence.⁹⁷

⁹³ See *supra* note 86 and accompanying text.

⁹⁴ 908 F. Supp. 877 (D.N.M.1995).

⁹⁵ *Id.* at 889.

⁹⁶ *Id.*

⁹⁷ See *supra* note 83.

2. Use of Polygraph Results

In any event, we do not question the inadmissibility of polygraph evidence in criminal or civil litigation.⁹⁸ The sex offender reentry court would not use the results of polygraph testing for purposes of proving guilt concerning any past sex offenses. Indeed, we think that, to the extent polygraph examination probes into the existence of past criminal activity, the offender should be given a form of use-immunity with regard to the information revealed in the offender's responses and to other information gathered from links or leads provided by his responses.⁹⁹ Otherwise, such use of the offender's responses would raise serious Fifth Amendment and due process problems.¹⁰⁰

The reentry court's use of this information would be restricted to its risk management functions. Although the offender's responses to polygraph examination, together with other evidence, might lead to the imposition of sanctions by the reentry court judge, including revocation of parole for a released prisoner or of conditional release for an offender committed as an SVP, this use would not violate the Fifth Amendment ban on compulsory self-incrimination as long as the responses themselves were not admitted into evidence.¹⁰¹ These answers would also alert the community containment team that further investigation is warranted.

If in response to polygraph testing that suggests the offender has been deceptive in answering questions asked in the examination, the offender admits wrongdoing,¹⁰² can his admission be admitted into evidence consistent with the Fifth Amendment for purposes of determining whether probation or parole should be revoked? As long as the offender has agreed as part of the behavioral contract to respond truthfully to polygraph questioning, the answer would appear to be "yes." In *Minnesota v. Murphy*¹⁰³ the U.S. Supreme Court held that a state may compel answers to incriminating questions without violating the Fifth Amendment as long as the probationer had agreed to do so as a condition of probation and provided that the answers may not

⁹⁸ See *United States v. Scheffer*, 523 U.S. 303 (1998) (rejecting admissibility of polygraph evidence). For a persuasive criticism of *Scheffer*, see Robin D. Barovick, *Between a Rock and a Hard Place: Polygraph Prejudice Persists after Scheffer*, 47 BUFF. L. REV. 1533 (1999).

⁹⁹ *Kastigar v. United States*, 406 U.S. 441 (1972).

¹⁰⁰ *Cassamassima v. State*, 657 So. 2d 906 (Fla. Dist. Ct. App. 1995) (en banc).

¹⁰¹ *Id.*

¹⁰² NAS REPORT, *supra* note 42, at 214 ("There is substantial anecdotal evidence that admissions and confessions occur in polygraph examinations . . .").

¹⁰³ 465 U.S. 420 (1984).

be used in a criminal proceeding. The Court noted that a probation revocation proceeding is not itself a criminal trial; therefore, the Fifth Amendment does not apply when the probationer accepts this requirement as a probation condition.

Although *Murphy* involved a requirement that the probationer answer truthfully to questions asked by his probation officer, and did not involve polygraph testing, the court's analysis would appear to apply equally in the polygraph context provided the offender had agreed to submit to polygraph testing as a condition of release on probation, parole, or conditional release from SVP commitment. Because these release programs serve a "vital penological purpose," the "minimal incentives to participate" offered offenders would not amount to compulsory self-incrimination when they agree to participate in a treatment program that includes polygraph examination.¹⁰⁴ Thus, while polygraph results suggesting that the offender lied would not themselves be admissible at a probation or parole revocation hearing, an offender's refusal to respond to the polygraph examiner's questioning when he agreed to do so as a condition of release, or any admission that he might make that he violated a condition of release, would be admissible in a hearing to determine whether release should be revoked. While the offender could invoke his Fifth Amendment privilege to refuse to answer a particular question in polygraph examination, if his refusal to respond is itself a violation of an agreed-upon condition of his release, his invocation of the privilege can serve as a basis for revoking his probation or parole.

The increased information provided by the use of polygraph examination by the reentry court as a component of a multidisciplinary containment approach can considerably improve the court's ability to manage the risk of reoffending, protect the safety of the community, and facilitate the offender's rehabilitation and reintegration into the community.

E. Impact of Sex Offender Reentry Court on Sex Crimes by Familiars, Notification Laws, and Sex Offender Rehabilitation

The reentry court model proposed here also can do much to address the largely neglected problem of sex crimes committed by intimates or others familiar to the victim. The SVP laws and registration and community notification laws overemphasize the problem of sex crimes committed by strangers, neglecting the well-established fact that the overwhelming majority of sex offenses

¹⁰⁴ *McKune v. Lile*, 536 U.S. 24, 29 (2002).

are committed by family members and others known to the victim.¹⁰⁵ 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.¹⁰⁶ As a result, many of these community notification schemes can be seen

¹⁰⁵ 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.").

¹⁰⁶ 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.¹⁰⁷ 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

¹⁰⁷ *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.¹⁰⁸ 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,¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ 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

¹⁰⁸ 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.

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

¹¹⁰ 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).

¹¹¹ 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.¹¹²

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

¹¹² 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.