

Assessing Sex Offender Risk: New Jersey's Methods



PHILIP H. WITT, Ph.D.

&

NATALIE BARONE, Psy.D.

Philip Witt works with Associates in Psychological Services, P.A., Somerville, NJ, and is a Clinical Associate Professor, Robert Wood Johnson Medical School — UMDNJ

Natalie Barone works with Associates in Psychological Services, P.A., Somerville, NJ and the Ann Klein Forensic Center, Special Treatment Unit, Kearny, NJ

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I. Introduction

Sex offenses are among the most inflammatory crimes, causing disgust and anger among the public. In recent years, heinous and visible sex crimes, such as the rape and murder of Megan Kanka in New Jersey, have led to a toughening of sex offense statutes. Many of these statutory changes are linked to an assessment of the sex offender's risk, being defined as the likelihood of reoffense.¹ Although the popular press suggests that sex offense recidivism is 100%, or close to that figure, the reality is far different. Sex offenders, like virtually all other clinical groups, are heterogeneous, with some likely and others unlikely to relapse. Determining which sex offenders are most likely to reoffend involves an assessment of risk. This article will focus on such assessment in New Jersey.

A. Risk Assessment Methods

Methods of sex offender risk assessment can be placed on a continuum, from relatively unstructured and unempirical to highly structured and empirically validated:²

1. Unstructured clinical
 - Based on review of records and unstructured clinical interview
 - No explicit prediction formula
 - Rough, inexact prediction, sometimes without articulation of rationale
 - Advantage of convenience
 - May be inaccurate
 - May have relatively low level of agreement between independent evaluators who examine the same individual (i.e., low level of interrater reliability).
2. Structured clinical
 - Use of standardized list of risk criteria
 - Criteria not necessarily empirically supported
 - Advantage of increased interrater agreement
 - Examples include informal risk checklists used in various correctional institutions.
3. Empirically guided
 - Use of standardized list of risk criteria and specific formula or method for combining these criteria
 - Although the individual criteria have support in the empirical literature, the instrument as a whole does not have tested predictive validity.

- Examples include New Jersey's official risk assessment scale, the Registrant Risk Assessment Scale (RRAS),³ and the Sexual Violence Risk-20 (SVR-20).⁴

4. Clinically adjusted actuarial

- Use of actuarial scale to provide foundation for prediction
- Adjustment of prediction based on clinical factors
- Advantage of firm foundation in actuarial scale with flexibility of clinical adjustment
- Potential disadvantage if reasons for clinical adjustment are not well founded or not clearly articulated.

5. Actuarial

- Prediction based entirely on scale that has been validated with a predictive validity study
- Advantage of strong empirical foundation with explicit recidivism levels for different scores on scale
- Disadvantages of inflexibility, heavy reliance on static, historical risk factors (such as age of offender, prior criminal history, sex offense history, characteristics of victims), and inability to take into account variables beyond limited set used in scale
- Examples include Minnesota Sex Offender Screening Tool — Revised (Mn-SOST-R)⁵ and Static-99.⁶

In various contexts, each of the above methods of sex offender risk assessment is still in use in New Jersey.

II. Risk Assessment Contexts in New Jersey

A. Repetitive-compulsive Sex Offenders

In 1949 New Jersey's Governor empowered a commission to develop legislation that would allow special sentencing and treatment of those sex offenders found to present the greatest danger to the public. The statute, N.J.S.A. §§ 2A:164-3 to -13, and its successors did not use the explicit term "risk assessment" since such terminology was not yet in common usage. In effect, however, the statute fell broadly within sexual psychopath laws at the time in its attempt to sentence high risk sex offenders to specialized treatment, eventually in a specific facility in New Jersey, the Adult Diagnostic and Treatment Center (ADTC).

In New Jersey, to be eligible for such special sentencing, first, the offender must be convicted of one of specifically

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enumerated offenses — aggravated sexual assault, sexual assault, and aggravated criminal sexual contact.⁷ An amendment to § 2C:13-1(c) in 1994 added kidnapping as a predicate offense. In addition, prior to 1998 the offender's illegal sexual conduct needed to be characterized by a pattern of repetitive-compulsive behavior as determined by a psychological (or earlier, psychiatric) examination conducted by the New Jersey Department of Corrections (DOC). *Repetitive*, for the purposes of this psychological evaluation, involves more than one action, not necessarily more than one offense. For instance, if an offender sexually assaulted a victim twice over a two week period of time, but is charged with only one sex offense, he would still meet the criterion for *repetitive*. The term *compulsive* is defined as an inability to resist an irrational urge.

In 1998, the procedures for sentencing sex offenders to the ADTC were revised after a package of bills concerning sex offender commitment, sentencing, and parole were signed into law. These bills are collectively known as the New Jersey Sexually Violent Predator Act (NJSVPA).⁸ The purpose of this two-bill package was to improve the management and treatment of sex offenders. The revised law expands the list of sex offenses to include (1) endangering the welfare of a child by engaging in sexual conduct that would impair or debauch the morals of the child, and (2) endangering the welfare of a child through nudity if the child's nudity is used for sexual gratification, as in pornography.

Under the prior law, the psychological examination was conducted to determine whether the sex offender's conduct was characterized by a pattern of repetitive-compulsive behavior. Under the new law, if a determination is made that the sex offender is both repetitive and compulsive, a further determination is made regarding the offender's amenability to sex offender treatment and willingness to participate in such treatment; all three conditions must be met for the offender to be sentenced to the ADTC. The advantage of serving a sentence at the ADTC is that the offender has the opportunity to participate in a comprehensive sex offender treatment program, whereas little if any treatment is available in the general prison system. Moreover, because all individuals sentenced to the ADTC are sex offenders, an individual serving his sentence there does not need to fear harassment and abuse by other inmates, as he might as a sex offender serving a sentence in a general prison.

The psychological evaluations, as now performed, do not involve use of formal risk assessment instruments. Rather, the psychologist performs an unstructured clinical interview after a review of the file, evaluates the offender's psychological testing, and reaches a determination on whether the offender meets the statutory criteria of repetitive-compulsive, amenable, and willing. Hence, the form of risk assessment used in this procedure includes elements of unstructured clinical and structured clinical methods (given that at least the criteria are explicit).

A repetitive-compulsive offender (who is also amenable and willing) who is not placed on probation is to be, upon recommendation of the DOC, sentenced to the ADTC. There is nothing in the statute that prohibits a repetitive-compulsive sex offender from receiving probation, although this outcome is less common than incarceration. However, if the sentence imposed is greater than seven years incarceration, the DOC is first to confine the offender to a facility other than the ADTC until the offender has served all but five years of his sentence. The rationale here is that the legislators did not want the ADTC to be a warehouse for sex offenders serving lengthy sentences; rather, offenders with long sentences serve the bulk of their sentences in the general prison system and then come to the ADTC for treatment during their final five years of incarceration.

The amendments specify that when the sex offender is a female, she is to be confined to a facility designated by the Commissioner of Corrections, typically the women's facility in the New Jersey prison system, the Edna Mahn Correctional Facility. Moreover, the amendments clarify that female sex offenders are subject to the same statutes and rules and regulations as male sex offenders. Presently, there are only a few women who have been found repetitive-compulsive. These women receive group treatment by an ADTC staff member who comes to the Edna Mahn Correctional Facility once per week. Hence, although treatment is provided by ADTC staff experienced in treating sex offenders, the full ADTC treatment program is not available to these women.

In regard to parole of an offender serving his sentence at the ADTC, under the prior law, a sex offender became eligible for parole when it appeared to the satisfaction of the State Parole Board, upon the recommendation of the Special Classification Review Board (SCRB) (an outside review board for the ADTC appointed by the Governor), that the offender was capable of making an acceptable social adjustment in the community. Under the provisions of the new law, the wording has changed slightly, and the sex offender can be considered for parole upon referral of his case to the State Parole Board by the Special Classification Review Board, based on a determination that the offender has achieved a satisfactory level of progress in sex offender treatment. At first, an inmate only appeared before the SCRB when recommended for parole by the treatment staff. In 1995, following the settlement of a federal lawsuit, inmates at the ADTC also became eligible for an SCRB hearing automatically upon serving one-quarter of their maximum sentence.⁹ However, in reality, only 30% of the eligible ADTC inmates have taken advantage of this alternative route to the SCRB, because the likelihood is extremely small of their succeeding at the SCRB hearing unless they have the support and positive recommendation of the treatment staff. The vast majority of the SCRB reviews occur when an inmate is referred by the ADTC treatment staff as being ready for parole.

In reality, few sex offenders have been paroled in recent years from the ADTC. For example, in 2003, of the 650 sex offenders at the ADTC, three were paroled, whereas 150 were released after having served their maximum sentence. Even prior to the enactment of the new law in 1998, few ADTC inmates have received parole during the past decade. A study found that parole figures were low both immediately before and after the 1998 enactment of the new law. The number of ADTC inmates paroled in those years is: 1999: none paroled; 1998: none paroled; 1997: 4 paroled; 1996: 4 paroled; 1995: 3 paroled.¹⁰

Unfortunately, the low probability of parole can reduce treatment motivation among the ADTC inmates, who no longer see cooperation with treatment as a likely avenue of early release. However, given the cautious climate in New Jersey regarding release of incarcerated sex offenders, it has become increasingly difficult for all sex offenders to receive parole, even those in the regular prison system, as opposed to the ADTC. Ten years ago, the rule of thumb was that a sex offender would likely serve two-thirds of his sentence before being released after serving his maximum term at the ADTC, but only one-third before being paroled from the regular prison system.¹¹ In recent years, many sex offenders in the general prison system (for the most part, those not found repetitive-compulsive, as opposed to the small minority found repetitive-compulsive but either unwilling or not amenable) have been serving sentences before parole almost as long those in the ADTC, given the reluctance to parole sex offenders from any correctional facility.

B. Sexually Violent Predator Civil Commitment

Once a sex offender has served his criminal sentence, either at the ADTC or within a general prison population, he or she faces the possibility of being civilly committed according to the NJSVPA.¹² The SVPA defines a sexually violent predator as:

A person convicted, adjudicated delinquent or found not guilty by reason of insanity of a sexually violent offense, or who has been charged with a sexually violent offense but found to be incompetent to stand trial, and suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for control, care and treatment.¹³

The civil commitment of a sexually violent predator is a multistep process. Almost all the individuals presently referred to the Attorney General's office for sexual violent predator (SVP) civil commitment are referred from among sex offender inmates who are about to finish serving their maximum sentence in either a general prison or the ADTC. In 2003, of the 137 repetitive-compulsive sex offenders released from the ADTC (almost all for serving their maximum sentence), 31 (22%) were civilly committed under the SVP statute. In the same year, of the

885 sex offender inmates released from the general prison population, 25 (3%) were civilly committed under the SVP statute. Hence, the likelihood of being civilly committed if being released from the ADTC, while only 25%, is significantly higher than if being released from the general prison population. This disparity is not surprising when one considers that ADTC inmates have been previously found repetitive-compulsive.

Commitment referral procedures in both the general prison system and the ADTC are parallel. When an inmate is within 90 days of his release date, standard procedure has a psychologist perform a risk assessment using two actuarial scales, the Mn-SOST-R and the Static-99. The psychologist also uses a non-validated structured risk rating scale. The psychologist adjusts these scale findings based on clinical information, resulting in a clinically adjusted actuarial method. If the psychologist concludes that the inmate is committable as an SVP, the inmate is referred to a psychiatrist. The psychiatrist again performs a clinically adjusted actuarial assessment using the Mn-SOST-R and Static-99, or at least, relies on the Mn-SOST-R and Static-99 administered by the psychologist. If the psychiatrist concludes that the inmate is committable as an SVP, the inmate is referred to an institutional release committee, which can refer the inmate to the Attorney General's office. If the Attorney General's office supports the commitment, the commitment must be supported by two clinical certificates, one of which must be completed by a psychiatrist. The inmate is then referred back to the referring institution's psychiatrist, as well as an additional psychiatrist, for the signing of two civil commitment certificates, assuming that the psychiatrists continue to find the inmate civilly committable as an SVP.¹⁴ These certificates are forwarded to a judge, who has the authority to rule whether the individual meets statutory criteria for temporary commitment as a sexually violent predator. This complex system provides checks and balances to ensure proper precautions before a sex offender is civilly committed.

Once an individual is temporarily committed by the court, he is admitted to the Special Treatment Unit (STU) of the Ann Klein Forensic Center, where he awaits his civil commitment hearing. At the initial commitment hearing, the judge rules on whether to civilly commit the individual under the NJSVPA (as opposed to only a temporary SVP commitment pending evaluation). The STU is an all-male, high security inpatient facility designated for the treatment of those civilly committed under the NJSVPA. Although the Department of Corrections operates the STU, the New Jersey Department of Human Services, Division of Mental Health Services provides treatment services. To be admitted to the STU, an individual must be male, at least 18 years old, and identified as likely to engage in acts of sexual violence to such a degree as to pose a threat to the health and safety of others. Although the statute allows for the SVP civil commitment of women in New Jersey, none has yet been civilly committed under

this statute and no decision has been made on where they would be housed if committed.

Presently, the STU uses both psychologists and psychiatrists to evaluate individuals for civil commitment. Although the law requires only a psychiatric opinion, the state has gone beyond the requirements of the law in hiring and training a specialized team of psychologists to enhance the commitment decision process. The use of a specialized assessment team allows these evaluators to acquire considerable experience in both evaluation and testimony in these cases, presumably increasing the skill of their assessments. Psychologists at the STU follow a clinically adjusted actuarial assessment method, presently relying on the Static-99, but adjusting its risk rating based upon clinical factors, such as progress (or lack of progress) in psychotherapy or the presence (or absence) of a character disorder. Psychiatrists there follow an unstructured clinical method, relying on a clinical interview and records review, usually supplemented by access to the psychologist's report. Both professions testify in commitment hearings. Disagreements between the two professions in commitment hearings are rare, though occasionally occur, in part because the psychiatrists rely on the psychologists' prior evaluations.

C. Community Notification

One final area in which sex offender risk assessment is formally conducted in New Jersey is for placement as low, moderate, or high risk in accord with New Jersey's sex offender registration and community notification law, sometimes simply referred to as "Megan's Law."¹⁵ The law requires all individuals, whether adult or juvenile, male or female, convicted of specific enumerated sex offenses and additional offenses with a sexual component intent (such as certain instances of kidnapping, false imprisonment, and criminal restraint) to register with their local police departments as sex offenders. After the offender registers, the county prosecutor's office in the county where the offender resides reviews the case to determine the appropriate level of community notification.¹⁶

New Jersey law provides for a three-tier notification system. Those sex offenders found to be high risk for reoffense (tier three) receive the highest level of notification — door-to-door notification of neighbors and placement of their identifying information on the New Jersey State Police website. Those offenders considered moderate risk¹⁷ (tier two) are subject to police and community organization notification (such as schools, licensed daycare centers or other establishments that care for children or women) and to placement on the New Jersey State Police website. Finally, those offenders found to be low risk (tier one) are subject only to police notification.

New Jersey has an empirically guided risk assessment scale, the Registrant Risk Assessment Scale (RRAS) that it uses to place offenders in risk tiers. In 1995, New Jersey's attorney general appointed a committee to develop a

scale that would allow county prosecutors to assess risk in a reliable, uniform manner. The committee surveyed statutory requirements set forth in N.J.S.A. § 2C:7-6 as well as the empirical literature on sex offender risk assessment and selected criteria for the RRAS based on three factors: (1) the criterion must be consistently supported in the research literature as a predictor of reoffense; (2) the factor must be a consensually agreed-upon measure of offense seriousness; and (3) the factor must be reliably ascertainable from archival data, rather than requiring a psychological evaluation. The RRAS assesses the following broad areas: (1) seriousness of offense, (2) offense history, (3) characteristics of offender, and (4) community support.

The RRAS has not been the subject of a predictive validity study. That is, no study has yet examined to what extent specific RRAS scores are related to future recidivism. Consequently, the RRAS is not an actuarial scale. However, it was empirically guided in its construction, and it has been the subject of one study that examined its internal structure as well as its concurrent validity. The study found that two factors in the RRAS explain much of the variance — an antisocial behavior factor and a sexual deviancy factor. These two broad factors emerge repeatedly in the sex offender recidivism literature. Not surprisingly, those offenders scoring highest on both factors present the highest risk to the community. Moreover, this same study found among convicted sex offenders that probationers, prison inmates, repetitive-compulsive ADTC inmates, and civil commitment cases had RRAS scores in ascending order. This finding lends support to the concurrent validity of the RRAS in that those sex offenders viewed by the court as having increasing levels of risk (as determined by the severity of the sentence given) had increasingly elevated scores on the RRAS.¹⁸

III. Future Directions

Sex offender risk assessment in New Jersey is now performed in a variety of contexts — special sex offender sentencing, civil commitment, and community notification — and with a range of methods — unstructured clinical to clinically adjusted actuarial. Although one could make a case that empirically guided, actuarial, or clinically adjusted actuarial methods be used in all cases, being the three methods with the greatest level of empirical support, such is not the case, and it is likely that a variety of risk assessment methods will continue to be used in New Jersey. In part, the reasons for such a wide range of methods are legislative. To be sentenced to the ADTC, for example, a sex offender, by statute, must be found repetitive-compulsive, a term defined long before current risk assessment methods were developed. Thus, this determination lends itself to a less structured method of risk assessment. Civil commitments, by statute, require a medical opinion, and historically, psychiatrists have relied on unstructured clinical methods for civil commitment decisions, although this is slowly changing. Finally, some actuarial sex offender risk assessment scales have been

standardized on post-incarceration sex offenders, so such instruments may not be suitable for use, for example, with a pre-adjudication case, where an empirically guided (but not actuarial) instrument may be more suitable. However, it is clear that for those risk assessment situations implemented more recently, such as New Jersey's community notification law or the SVP civil commitment law, empirically supported methods are used more extensively.

Presently, the New Jersey Attorney General has appointed a committee to revise the standard sex offender risk assessment scale used for community notification to make it more suitable for juveniles. This modified scale, the Juvenile Risk Assessment Scale (JRAS), focuses particularly on risk criteria found to predict sex offenses among juveniles, such as general delinquency and conduct problems, as well as indicators of sexual deviance. Moreover, New Jersey is conducting a predictive validity study on the JRAS as part of its development process, so that when completed, the scale will be actuarial. Once finished and validated, this scale will be used to assess the risk of juvenile sex offenders with regard to New Jersey's community notification law, which applies both to juvenile and adult sex offenders.

Risk assessment is a burgeoning area of research nationally. One would hope that New Jersey follows this trend and focuses research efforts on examining the effects and effectiveness of sex offender risk assessment procedures. The consequences of risk assessment can be great — deprivation of liberty through civil commitment or public notification of one's criminal history — and presently little research exists to examine whether the public policies associated with sex offender risk assessment in New Jersey achieve their desired goals. One exception is a recent outcome study of the sex offender treatment program at the ADTC, the results of which are encouraging. The study found that sex offenders released from the ADTC had significantly lower rates of committing both non-sexual and other offenses, compared with the general prison population of sex offenders. For both groups, the ten-year sexual offense reconviction rates were relatively low, 8.6% for the ADTC offenders and 12.7% for the general prison sexual offenders, while ten-year reconviction rates for non-sexual offenses were 25.8% and 44.1% for ADTC and general prison sex offenders respectively.¹⁹

Moreover, the process itself of assessing risk can be expensive. For example, some of the larger, more urban counties in New Jersey have entire units within their prosecutors' offices that are devoted to assessing sex offender risk and, as mandated by statute, notifying the community. Whether the cost of this effort and the diversion of resources from other duties is worth the benefit is, at least in part, an empirical question as to what effect on sex offense recidivism risk assessment and community notification achieve. This is an area of some controversy. Victim advocates take as an article of faith that knowledge by community members that a sex

offender resides in the community will result in protective actions by community members and, consequently, that fewer sex offenses will be committed. Some sex offender treatment experts, however, contend that community notification only serves to increase the stigmatization of sex offenders, making it more difficult for them to readjust to the community, thereby making it more likely that they will commit sex offenses (perhaps in a distant community where they are not known). As of yet, no studies in New Jersey have examined this issue.

Notes

- ¹ The technical literature sometimes divides the prediction of a future offense into risk (likelihood of a new offense) and stakes (seriousness of a new offense should one occur). See, e.g., Gary D. Gottfredson, Denise C. Gottfredson & C. Conly, *Stakes and Risks: Incapacitative Intent in Sentencing Decisions*, 7 BEHAV. SCI. & L. 91 (1989). In this article, we assume that stakes are high (that is, that we are dealing only with serious offenses).
- ² See R. Karl Hanson, *What Do We Know About Sex Offender Risk Assessment?*, 4 PSYCHOL., PUB. POL'Y & L. 50 (1998).
- ³ Glenn E. Ferguson, Roy J. Eidelson & Philip H. Witt, *New Jersey's Sex Offender Risk Assessment Scale: Preliminary Validity Data*, 26 J. PSYCHIATRY & L. 327 (1998); Philip H. Witt et al., *Sex Offender Risk Assessment and the Law*, 24 J. PSYCHIATRY & L. 343 (1996).
- ⁴ DOUGLAS P. BOER ET AL., *MANUAL FOR THE SEXUAL VIOLENCE RISK 20* (Mental Health, L. & Pol'y Inst., Simon Fraser Univ. 1997).
- ⁵ Douglas L. Epperson, Denise Hesselton & James D. Kaul, Minnesota Dep't of Corrections, *Minnesota Sex Offender Screen Tool-Revised (MnSOST-R): Development, Performance, and Recommended Risk Level Cut Scores* (1999).
- ⁶ R.K. Hanson & D. Thornton, *Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales*, 24 LAW & HUM. BEHAV. 119 (2000).
- ⁷ N.J. STAT. ANN. §§ 2A:164-3 to -13 (West 1979). See also Philip H. Witt & Mark Frank, *Sex Offender Evaluations: An Update*, 5 N.J. TRIAL LAW. 45, 61 (1993) [hereinafter Witt & Frank, *Sex Offender Evaluations*]; Philip H. Witt & Mark Frank, *Psychological Evaluations Under the New Jersey Sex Offender Act*, 2 N.J. TRIAL LAW. 37 (1988); *State v. Howard*, 517 A.2d 1233, 1236 (N.J. Super. Ct. App. Div. 1986) (defining "compulsive" behavior).
- ⁸ N.J. STAT. ANN. § 30:4-27.24 (West 1999).
- ⁹ Those inmates sentenced after May 1995 must first complete any mandatory minimum sentence before appearing before the SCRB.
- ¹⁰ John Kip Cornwell, John V. Jacobi & Philip H. Witt, *The New Jersey Sexually Violent Predator Act: Analysis and Recommendations for the Treatment of Sexual Offenders in New Jersey*, 25 SETON HALL LEGIS. J. 1 (1999).
- ¹¹ See Witt & Frank, *Sex Offender Evaluations*, *supra* note 7.
- ¹² N.J. STAT. ANN. § 30:4-27.24 (West 1999).
- ¹³ N.J. STAT. ANN. § 30:4-27.26(b) (West 1999). See *In re Commitment of W.Z.*, 801 A.2d 205, 217 (N.J. 2002) (interpreting N.J. STAT. ANN. § 30:4-27.26(b) to mean an individual must be deemed "highly likely" to engage in acts of sexual violence in order to meet statutory criteria). Although the wording of the statute remains the same, the N.J. Supreme Court held that the legislative history and case law indicate that a somewhat higher level of certainty be used. See 801 A.2d at 817.
- ¹⁴ The authors thank Nancy Graffin, Ph.D., Clinical Director of Public Safety Concepts, ADTC, for providing information on the details of the ADTC's risk assessment procedures.

¹⁵ N.J. STAT. ANN. § 2C:7-6 (West 1994).

¹⁶ See Witt et al., *supra* note 3.

¹⁷ There are certain exceptions, such as some incest offenders and juveniles, who even if found to be moderate risk are treated as low risk for the purpose of community notification.

¹⁸ See Ferguson, Eidelson & Witt, *supra* note 3.

¹⁹ See Kristin M. Zgoba, Wayne R. Sager & Philip H. Witt, *Evaluation of New Jersey's Sex Offender Treatment Program at the Adult Diagnostic and Treatment Center: Preliminary Results*, 31 J. PSYCHIATRY & L. 133 (2003).