OAG Docket NO 117

against Retro active laws
against Sex Offenders/Predators.

I am absolutely appalled and against any retro-active laws.

You must ask yourself would my grandfather be under this law in any way shape or form, when people married under 18 year of age.

Especially, when Ex Con. Mark Foley is Free, as well as [redacted] in Florida, and urinating in public is now a felony, lewd and lacivious and John Walsh and Reve's early relationship should be examined more fully. It

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Public Comments on Office of the Attorney General; Applicability of the Sex Offender Registration and Notification Act:========

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Comment Info: ==========

General Comment:OAG Docket No. 117

Please see appended an op-ed by myself published in the Los Angeles Times, an academic review of non-punative aspects of sex offender sentencing by a Columbia law student and myself, and a piece of Journalism by a Judith Nathan, in which she suggests that the sentencing commission that decidied on sentencing regulations for Internet sex crimes was undely informed and inflamed by testimony from a New York Times reporter and by inaccurate New York Times reporting.

Regarding the retroactive applicability of sex offender notification on the Internet, I undestand that legal precident would allow for this, inasmuch as such notifation is civil, not criminal.

However, I think that that Internet notification of sex offenders, both prospective and retrospective, is problematic, and think that the appended documents and comments below may be of use.

I am in agreement that a sex offender registry is an appropriate measure, which

would allow both tracking and assesment of recidivism risk, and which is a clear improvement over the piecemeal system we have now. It is directly analogous to the national database developed to stop physicians who had commited crimes in one state from moving to another and hanging out a shingle in another.

I am concerned that penalities for child porngraphy sex offenders and for low risk sex offenders are too severe and that they are having an opposite effect, increasing rather than decreasing risk. My professional skills and expertise involve the assessment of risk of sex offenders, and I think that generally speaking, risk assessment is not accurately incorporated into the sentencing and post-sentence management guidelines. Many of the current crimes, for which individuals are receiving long sentences, do not involve the hands on victimization of a child, and this has enormouse implications for risk assessment.

I would be happy to discuss these matters further with anyone.

For your information, I have also included the manual for the best, most validated risk assessment instrument available, developed in Canada, and now used regularly in New York State.

This does not seem to be going through and it may be because of the size of the pdf file. Accordingly, I am duplicating this message and will attempt to send each of these attachments individually.

Thank you for your attention to this.

Dr. Krueger

Tells the Facts and Names the Names $5.00

CounterPunch

April 2007 *Alexander Cockburn and Jeffrey St. Clair* VOL. 14, NO. 7 / 8

The New York Times, Kurt Eichenwald and the World of Justin Berry

Hysteria, Exploitation and Witch-Hunting In the Age of Internet Sex

By Debbie Nathan

The latest scandal at the *New York Times* revolves around former business investigative reporter Kurt Eichenwald. He wrote the best-selling book about the Enron scandal, *Conspiracy of Fools*, and late last year quit the *Times* to work at *Portfolio*, a financial magazine soon to be launched by Condé Nast. In early March, a *Times* editor's note revealed that in 2005 Eichenwald sent $2,000 from his personal funds to a teenager named Justin Berry. Justin then became Eichenwald's main source for a sensational story about teens who use webcams to make sexual imagery of themselves, and even live sexual performances, then post the material online, where it's available to adults.

Eichenwald's editors did not know about the $2,000 until a few weeks ago, and after the editor's note came out, Eichenwald told a long, convoluted story about having acted as a "private citizen" when he gave Justin the money. He also said he'd neglected to tell the *Times* about the payment because it simply slipped his mind. That claim, however, was challenged on March 25 by the *New York Times*' public editor Byron Calame. He told readers that weeks after Eichenwald's article came out, the *Times* received a tip that Eichenwald had sent a large amount of money to Justin while reporting the story. Eichenwald was asked about it by his editor, Larry Ingrassia, but acted as though the charge was beneath contempt and still said nothing about the money. In his public editor column, Calame wrote that *Times*' editors were "misled by Mr. Eichenwald on the $2,000 payment". And Calame characterized as "baloney" Eichenwald's claim that he didn't have to disclose the transaction to his editors because he was acting as a private citizen. Still, Calame demurred that while the reporter broke ethics rules while reporting his article, at least "no facts in it have required correction."

But there's plenty that requires correction, according to dozens of documents examined by *CounterPunch*, to interviews conducted recently with Justin Berry's former friends, and to trial testimony in several criminal proceedings. This material suggests that Eichenwald's reporting was shockingly sloppy and that – intentionally or unintentionally – his sloppiness advanced some of the most malign and dangerous politicking currently going on in the country.

Periodically, the United States quakes with child sex abuse panic when society gets especially spooked about shifting ethnic relations, changing gender roles, advancing technology and the meanness of life limned by laissez-faire and consumerism. These days we live in war culture, market culture and the culture of self-possession and fame. Teens are recruited to Iraq via a military which touts itself as "an army of one". Images of their bodies are used in ads to sell things, even as they are denied education about sex. Amid this comes the dazzle and anarchy of the Internet – a medium that parents barely grasp but which youth wear like skin and e-paper with e-portraits – digital images of themselves clothed, partially clothed, and unclothed. They want to be American Idols. Who can blame them? Fifteen-year-olds desire our vote and will post sex pix of themselves to earn it. We stew about this. We panic. We want scapegoats. The *New York Times* is there to help.

Eichenwald's article certainly impacted the prison sentences – incarceration for hundreds of years – of a group of young, mostly gay men. Their sexual involvement with gay and bisexual teenagers probably would not have called out law enforcement if Eichenwald's employers hadn't published his poorly reported, inflammatory work about Justin Berry. That writing led to Con-

gressional hearings where baseless, exaggerated claims were made about the financial might and dangers of child porn. The "war against terror" since the Twin Towers fell has opened up a second front, in the form of draconian, cruel treatment of sex offenders, including children. The *New York Times* added fuel to the furor by publishing the work of Eichenwald. The paper has much to answer for. So does the reporter.

It may be a while, if ever, before he does. Since the $2,000 payment surfaced, Eichenwald has denied engaging in checkbook journalism. He says he ran across a photo of Justin online – with no last name – while researching a story idea about Internet fraud. The image appeared to him to be of someone about 14 years old, and it was on a porn site. Eichenwald says he was very worried that Justin was a child victim of sexual exploitation, and he and his wife vowed to find the boy and rescue him if necessary. Eichenwald now insists he was acting not as a journalist but as a Good Samaritan. He sent the $2,000 check, he has said, because he feared Justin was about to be auctioned off for a night as a child prostitute.

He thought mailing money would cancel the auction and be a chance to get Justin's name and address (which Eichenwald did get, but did not give to the police).

After several weeks of communicating with Justin online and still not knowing how old he was, Eichenwald says, he arranged a meeting on June 30, 2005 in Los Angeles. There, he learned that the picture he had seen was taken years ago, and Justin was now almost 19. He really had been involved in online porn – porn that he'd made of himself. But now he was an adult who was recruiting minors to make masturbation videos. Eichenwald says that five days after this first meeting, Justin gave the impression he was ready, as Eichenwald later put it, to "flip on his own industry". Only then, Eichenwald now says, did he don his reporter's hat, eventually getting access to what he has called "the biggest jackpot: hundreds and hundreds of chat log conversations" and other materials showing the teen had been deeply involved in webcam porn.

Even though this work clearly made Eichenwald a reporter, he continued giving Justin personal help. He found the young man a doctor. And he found a lawyer who helped get Justin immunity from prosecution in exchange for information about his illegal business, his subscribers, and the people who'd helped him create websites and collect money. Eichenwald wrote a reporter's essay describing these unorthodox activities. In it, he never described himself as a private citizen during any time that he was in touch with Justin Berry. And he "forgot" to mention the check.

He had first communicated with Justin in May or June 2005. And by October, Eichenwald has testified, he'd prepared a three-part series for the *New York Times* focusing on web-hosting services and credit-card processors that enabled teens to receive gifts and money for sexual performances. But, he also testified, in several months he'd found only about 90 minors whose webcam images had caught the attention of adults attracted to adolescents. *Times* editors therefore had "some level of discomfort" with the idea of running so many words on the subject. "Someone said, 'This isn't World War II'", Eichenwald recalls one editor saying. "There was a concern" that the *Times* would be making teen sexual webcamming "seem far worse than we knew it to be". Instead of scrapping the story completely, however, the editors sent Eichenwald back to the drawing board to do just one piece, focusing on a single child as "a tour guide" into this world. Eichenwald had only one teen on the record: Justin. He used him as his main source, quickly working to fashion a new piece. When it came out in December, it described how Justin had spent several years using webcams and other Internet technology to make and send porn of himself, starting when he was about thirteen – and how he'd made hundreds of thousands of dollars as – in Justin's words – a "webwhore" or "camwhore".

The article was a blockbuster, and the rest of the media loved it. *Slate*'s Jack Shafer was the only press critic to vigorously question Eichenwald and the *New York Times* for acting more as agents of the government than as the Fourth Estate in their relationship with Justin Berry. That criticism came on the heels of the Judith Miller affair, in which Miller was widely seen as having published disinformation that fueled the U.S. invasion of Iraq.

The government quickly got involved with Eichenwald and Justin. The *New York Times* article spurred congressional hearings by the House Committee on Energy and Commerce, in April 2006, about the danger posed to youth by the Internet.

Eichenwald and Berry testified at one session. Before and just after the hearing, they appeared on major TV talk shows including *The Oprah Winfrey Show* and *Larry King Live*. There, the reporter and his source warned audiences that these days, clever "predators" and "pedophiles" are everywhere in cyberspace and can easily turn teens into sexual performers on the net. "Hundreds and hundreds" of children are being "lost" to the porn industry, Eichenwald said on the shows and at the hearing, because teens are using webcams to send images of themselves into cyberspace – for free or for gifts and money. He warned that even the wildly popular teen and young adult social site MySpace is "the virtual Sears catalogue

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for pedophiles." Justin added that the details of what happened to him were "not the story of a few bad kids whose parents paid no attention". Teens at risk, Eichenwald added, are those who suffer from "loneliness". In fact, Eichenwald said, every single adolescent he found while reporting on the camwhore industry had this problem.

Justin Berry's life was one of loneliness, according to Eichenwald. His *Times* article described Justin as an adolescent with few friends, who got his first webcam hoping to meet girls. Instead, he was quickly contacted by men and seduced into camwhoredom. Except for these men, however, supposedly no one knew that Justin was spending much of his life in the sex trade. His mother has testified and told TV talk-show hosts that she never noticed what Justin was doing and Eichenwald has not questioned her claim. Other family members were purportedly equally unaware. Friends didn't know either, for a long time, according to Eichenwald. Nor did the authorities suspect anything.

Eichenwald's work and media statements imply that the enterprise Justin was involved in such "a vast, criminal conspiracy" – as he said on *Larry King Live* – so far-reaching, insidious and secretive, that teens can be victimized for years without anyone knowing except the "predators". These men, Eichenwald said on *Oprah,* are "the most manipulative people I have ever encountered in my life, working day after day after day on a child, to get that child to do what they want. They are very successful." He warned further that "your kid is going to be lured into this." Later, on *Paula Zahn Now*, he compared webcams to "guns and alcohol". Back on *Oprah* he proclaimed, "Every webcam in every child's room in America should be thrown out today".

"Thank you, Kurt," Oprah said at the end of Eichenwald's appearance. "Bravo. Bravo." With prime-time kudos like this, Eichenwald's work served as the pop-culture battering ram for a government-sponsored war against humane, constructive treatment of sex offenders, not to mention reason, free speech and civil liberties in general.

Less than four months after Eichenwald and Justin Berry gave their congressional testimony, President Bush signed the Adam Walsh Child Protection Act. Under this new law, convicted sex offenders – including some children as young as fourteen at the time of their offense – are listed on a national Internet database for at least 15 years. Adults are listed even if they committed non-violent offenses: public urination is one possible act that can lead to inclusion, for instance, as is mere possession of child porn.

Eichenwald's work served as the pop-culture battering ram for a government-sponsored war against humane, constructive treatment of sex offenders, not to mention reason, free speech and civil liberties in general.

Meanwhile, Oklahoma, Louisiana and South Carolina now mandate capital punishment for raping a child. The Texas House of Representatives voted last month for the death penalty for repeat sex offenders. (Because most sex crimes against children are committed by family members, many Texas prosecutors worry the law's punitiveness would discourage kin from reporting crimes against children. Several child protection advocates also note that a capital penalty may cause offenders to murder children after committing abuse, since there would be nothing to lose by offing the victim).

The past several months have also seen more states enacting laws to impose "civil commitment" on people who've served their time for sex crimes and lock them up for years in mental hospitals. Nineteen states now have these laws, even though, as even the Justice Department acknowledges, recidivism rates for sex offenders are much lower than for people who commit other crimes. The *Hartford Courant* recently compared current civil commitment policy to "the Bush administration's decision to suspend due process rights and incarcerate suspected terrorists indefinitely without charging them." It's "Guantanamo for Sex Crimes," said the *Courant.*

The terrorism metaphor is actually almost literal. The DOJ has been swinging the Internet-kid-exploitation-fear pendulum in front of Americans since shortly after September 2001. Amid popular worry that the ensuing Patriot Act violates privacy rights, the feds constantly counter that they use its provisions to fight not just terrorism, but also Internet child porn. In politics today, invoking that fight also makes a good personal defense. U.S. Attorney General Alberto Gonzalez has lately been under bipartisan attack for firing several U.S. attorneys and for revelations that the FBI has abused its authority under the Patriot Act to seize the personal records of thousands of citizens and legal residents. The *Washington Post* reported that Gonzalez said he wasn't fazed by the criticism, and that he would continue to focus on "his key initiatives, including programs aimed at prosecuting child pornography".

And the fight is used to justify attacks on adult entertainment. "Child pornography and sexual enticement", Gonzales said weeks after Eichenwald's and Justin's congressional testimony, "are not the only criminal activities that threaten our society. Obscenity debases men and women, fostering a culture in which these heinous crimes against our children become acceptable. That's why I formed the Obscenity Prosecution Task Force in the Criminal Division" – to prosecute people who use grown-up performers to make sex videos for grownups. At the same event, Gonzales proclaimed that "we are in the midst of an epidemic of sexual abuse and exploitation of our children" and that we must do "battle" with the problem.

In fact, studies show that child sex abuse seems to have declined during the past decade, and criminologists note

that most kiddie porn is made by kids' own family members (if not, lately, by the kids themselves).

Columbia University forensic psychiatrist Richard Kreuger who specializes in treating sex offenders wrote in the *Los Angeles Times* recently about the disconnect between reality and rhetoric, and about the policy fostered by such florid talk. "What is happening now with individuals who have committed sex crimes," Kreuger wrote, "is the modern-day equivalent of a witch hunt." By publishing Eichenwald's work (then praising it, as public editor Byron Calame did in January 2006), the *New York Times* threw gasoline on this firestorm of hysteria.

But Eichenwald himself has had a bumpy ride lately. On the heels of the emergence of the $2,000 check last month, *Portfolio* announced it was postponing publication of a flagship article on terrorism that Eichenwald wrote for the first issue of the new magazine. Press critics and bloggers were pursing their lips and snickering. And many had an opinion about why Eichenwald wrote the check to Justin. For most, the scandal was all about the money. But the buck doesn't stop with the buck. The raft of material I have reviewed for *CounterPunch* tells another story – not only of Justin's life, but also of Eichenwald's deficient reporting.

Most of this material has emerged since Eichenwald wrote his December 2005 piece. It has come to light mainly through the work of both defense attorneys and prosecutors. As a result of Eichenwald helping Berry approach the DOJ for immunity and because of the *New York Times*' piece that followed, four men were accused of working with the underage teen to make and distribute child porn. Three of them are gay, and three were in their twenties when they became involved with Justin. One, Greg Mitchel, pleaded guilty of making child porn and helping distribute and collect payment for it. His projected release date from prison, according to the federal government, is the year 2136. Another of the accused, Aaron Brown, awaits trial on similar charges. A third, Timothy Richards, was convicted in federal court in Nashville last August, on various charges including some related to managing one of Justin's websites. He is slated for sentencing in May and could get 220 years. The fourth defendant, Kenneth Gourlay, was convicted in March of multiple criminal counts. He is the only defendant charged with having had physical sexual contact with Justin. He faces up to twenty years and will be sentenced in early May.

The documents generated by these cases include chat logs between Justin and his friends, associates and customers; FBI and other investigative interviews; and trial testimony – including from Justin, his mother, and Kurt Eichenwald. This material suggests that Eichenwald was, to put it at its mildest, careless in portraying Justin as a straight-ahead heterosexual boy alone in the world and helplessly adrift in a swamp of all-powerful pederasts.

That version of the teen's life would work nicely for Hollywood or Lifetime Television. It makes great grist for moral conservatives, technophobes and witch hunters. But it says nothing about Justin's or other teens' actual lives: on the net, amid rampant consumerism, and in a world where the line between gayness and straightness is much fuzzier for young people than for their elders – yet where boys, especially, are still under grinding pressure to insist, while they're testing that line, that they're not really exploring their erotic impulses, they're just doing it for the money. Or worse, because they were duped. Nor does Eichenwald's version suggest anything that adults might think about or do to help adolescents – straight or gay – grow safely and happily into their emerging sexuality. The Justin Berry story that emerges from *CounterPunch*'s investigation, however, does help us move in that direction.

The World of Justin Berry

First of all, he was no loner. On the witness stand at Gourlay's trial in Michigan, Justin's mother, Karen Page, testified that her son had "tons of friends" as a teen and was popular enough to be elected president of his high-school freshman class in Bakersfield, California. Throughout high school, recalls a friend from childhood, Rob Vella, Justin "liked to surround himself with people and be the center of attention". He had several girlfriends, adds Vella. And he was a regular at Bakersfield LAN (local area network) parties. These are events that occur nationwide, where large groups of young, mostly male cyber-enthusiasts gather in, say, a church hall. There they spend all night hooked up to each other's computers, playing online games such as *Battlefield*, *Call of Duty*, and *F.E.A.R. Combat*. Eichenwald mentioned none of this in his article.

Amid popular worry that the ensuing Patriot Act violates privacy rights, the feds constantly counter that they use its provisions to fight not just terrorism, but also Internet child porn.

Nor did he discuss a telling piece of information that emerged in an FBI interview of Justin done in July 2005, months before Eichenwald wrote his piece. In that interview, Justin describes how he got a webcam at age 13 – as Eichenwald does say in his *Times* article – and went online with it, only to encounter grown men who flattered him, eventually persuaded him to remove pieces of clothing, and encouraged him to masturbate on camera in exchange for gifts and cash. According to old website archives, by the time Justin was 16, his site was accepting credit card payments; it also asked customers to "vote" for him as their favorite performer.

What Eichenwald does not mention is the segment in the FBI interview where Justin mentions another Bakersfield boy, Vic (whose name has been changed to protect his privacy). According to Rob Vella, Vic and Justin were good friends during adolescence.

"Michelle, I'm whoring to help out some friends. It's the only way I can think of how to get that much money, instantly... it's a job, and I enjoy it... I guess you don't see what I'm trying to accomplish with my cam."

Vic wore "exotic clothes, eyeshadow and fingernail polish" to school, recalls Vella.

Justin told the FBI that Vic was a year older than he. According to Justin's FBI interview, his first sexual experience with a man he met on the net was not just a coupling. It was a threesome, involving Vic. Justin also told the FBI that the grown man involved in this trio was Gilo Anthony Tunno, who was about 25. Tunno traveled to Bakersfield from his home in Oregon, dallied sexually with Justin and Vic in a hotel, and made videos. Justin said he was 13 when this happened. Doing the math with his birth date, his first sexual experience with a man occurred between summer 1999 and summer 2000.

Was Justin traumatized by the incident? It's hard to tell, because just after this period, he claims he was physically assaulted by his father, Knute Berry.

Knute and Karen Page, Justin's mother, were divorced in the late 1990s. One reason they broke up, Page would later testify in court, was because Knute had been verbally and physically abusing Justin ever since he was a young child. By the time of the divorce, Knute's violence had already come to the attention of authorities. In 1994 he was charged with battery on an adult and with disturbing the peace (two charges were later dismissed, and he received probation for a third). Page further testified that during a father-son visit at Justin's grandmother's home after the divorce, Knute rammed Justin's head into a door. Justin went to the hospital, and has since testified that he still has scars from the incident. Page got a restraining order barring Knute from seeing Justin. Knute was also charged with inflicting injury on, and willful cruelty to, a child. The case was filed in November 2000. In court a few months later, Justin testified against his father, but Knute said his son's injuries were accidental, and he was acquitted. Justin has since said he believes the verdict was the product of irregularities such as payoffs.

The acquittal occurred in early 2001, during the second semester of Justin's freshman year of high school. A classmate during this time, Christopher (who does not want his last name published), recalls that up until that time Justin had always been a "cool" person. But one day "his mood kind of snapped. He got wild and vicious. He almost got kicked out of school for hitting a girl with a cell phone. Everyone noticed how he'd changed. It was strange."

Who had turned Justin from being a "happy kid" for whom "life was going well" and "everything was great" – as he would later tell Congress and Oprah Winfrey – into a "pretty messed up kid"? Was the culprit the first grown man he had a sexual encounter with, or his 14-year-old friend Vic, who was involved in that incident? Or was it his dad, Knute Berry, who was accused and perhaps unjustly acquitted of bashing his son's head and leaving permanent injuries? The timing of the teen's symptoms suggests Knute was most to blame. But even if Justin's problems were related to having been touched sexually, one thing seems certain: the person doing the touching was not Ken Gourlay.

Gourlay was about 22 when he first ran across Justin's camwhoring. A University of Michigan student who ran a small web-hosting business in Ann Arbor Gourlay – now 29 – is slender and buff, with prominent cheekbones. On a blog that he maintained a few years ago, he described his opposition to the war in Iraq, urged people to sign a George Bush impeachment petition, and talked about how he enjoyed making pumpkin pies. Gourlay calls himself gay, and according to testimony at his trial, he is sexually attracted to adolescents. Also according to testimony, his twenties were marked by boyfriend relationships and sexual liaisons with 14- and 15-year-olds, also identified as gay.

Gourlay ran into Justin on the Internet when Justin was 13 or 14, according to interviews with law enforcement authorities and court testimony that Justin has given in the past several months. After Gourlay saw Justin camwhoring online, he contacted him, and the two discussed computers because Gourlay had advanced coding skills. He started mentoring Justin in coding. They became fast online friends. Justin would later testify that there was no one he was closer to than Gourlay, that he "wanted to be just like him," and that he "told Gourlay everything", including that he loved him. They did not meet in person until Justin was 15.

But that's not what Eichenwald wrote in his *New York Times* article. There, he claimed that Justin's first face-to-face sexual encounter with an adult occurred when he was only 13, with "a man... from Ann Arbor, Mich." Eichenwald further wrote that the man – who could only have been Gourlay – first met Justin when he "lured" the unsuspecting teen into attending a summer computer camp for kids in Ann Arbor, so he could seduce Justin while he was far from "the relative safety of his home".

In fact, according to court testimony given by Justin after Eichenwald's piece was published, Justin didn't go to summer camp until he was almost 16 and he'd already met Gourlay a few months before that – again, however, when he was 15, not 13. A year before this first meeting at age 15 – also according to later testimony – Gourlay had asked Justin to move to Michigan and live with him to work as Gourlay's "Executive Director of Sales". Justin asked his mother, Karen Page, if he could accept the job. Page would later testify that she found the idea "ridiculous" because Justin was only 14. But she has never

publicly indicated that any red flags went up in her mind about Gourlay's intentions.

Instead, the following year – with no knowledge of who Gourlay was except for information from Justin (he incorrectly told her his friend was a "youth minister" and an "adjunct professor" at the University of Michigan) – Page let her 15-year-old son fly to Michigan alone, to meet Gourlay. Justin had hatched a plan with Gourlay to drive to Virginia so Justin could have sex with a 13-year-old girl he'd met weeks earlier on a family Easter vacation to Florida. Gourlay offered to be the chauffeur. During the road trip, Justin has since testified, Gourlay stuck his hand down the teen's pants and fondled him. (Gourlay has denied that anything physical occurred.)

Two months later, Justin eagerly asked his mother to send him back to Michigan, to the summer camp, which specialized in computers. On the first day, he was threatened with expulsion after being accused of smoking. While the matter was being straightened out, Karen Page gave permission for Justin to leave the camp with Gourlay. Justin would testify later that the two again had sexual contact. (Gourlay has said nothing improper happened this time, either.)

There were more trips with men, which Page allowed. In November 2002, Justin, now 16, said he wanted to attend a computer convention in Las Vegas with Gourlay. Page agreed, not knowing that Justin was lying and that the man he was really going with was Gilo Tunno, the first adult he had done sexual things with in person, when he was about 13. Then, two weeks after returning from Las Vegas, Justin *again* asked to visit Gourlay (this time he really did intend to go to Michigan). Again, Page said yes. Gourlay admitted in instant messages he made sexual overtures to Justin during this visit. But the age of consent in Michigan is 16, so if Justin had accepted the advances the sex would have been legal. He rejected them, however, and angrily caught a plane back to Bakersfield.

Gourlay begged forgiveness via email. On his blog a few days later he posted an allegory titled "Mistakes", about a boy who befriends a rabbit in the woods in the cold of winter and accidentally burns the animal with a match while trying to keep it warm. "The boy loved the rabbit, and vowed never to hurt it again," Gourlay wrote. But one day the rabbit, seeking warmth, hopped into a "cooking fire... left by some hunters". The boy tried to save the rabbit but it had lost half its fur and fled. "Tears were running down the boy's face", Gourlay's post continues. "Then, the rabbit stopped. The boy was puzzled at first, as he slowed down. Then, overjoyed, he ran up to where the rabbit had stopped. Now crying for joy, the boy knelt down and began to apologize for scaring the rabbit. But as quickly as the rabbit had stopped, the boy then stopped and stared. The rabbit was dead."

Meanwhile, what was Karen Page thinking? Or, as Larry King asked Justin later on his show: "Where was your mother?" Page seems to have been utterly oblivious to her son's camwhoring and to the fact that his older male friends were sexually interested in him – though, according to numerous documents and to court testimony, clues were everywhere.

"She's just jealous... It's not like you're doing it for yourself. You're helping friends. It's not like you're having sex with people online."

In a chat log retrieved last year from Justin's computer hard drives, for instance, dated from when Justin had recently turned 15, he tells an online contact that he can't send a picture of himself because "my mom took my camera". "That sux!" answers the contact. "Guess who just talked and convinced his mom to give him the webcam everyday when she gets off work?" Justin emails a while later. "Why did she take it away in the first place?" asks the contact. "Lol [laugh out loud]," replies Justin, "because she found my porn." He sent a similar message to another online correspondent, adding, "Alright! It's showtime!!"

Presumably, he then began masturbating.

In his article, Eichenwald did not mention evidence suggesting that Page found porn associated with Justin's webcam. He did acknowledge that Justin's sexual performances were earning him mountains of perks from his customers – fancy new computer equipment and gobs of cash. Eichenwald has repeated Page's contention that she thought all this capital was profit from a desktop web-design business that Justin started when he was 12 to earn pin money. Old websites from the business advertise services, such as removing "red eye" from family photos, that were priced at $5 or $10. It's a stretch to think a 15- or 16-year-old amateur webpage maker in Bakersfield could earn $250 to $1,000 a day, but that's what Justin testified he pulled in. Christopher, the friend from his freshman year who'd noticed Justin seemed troubled, remembers going to Justin's and noticing that the rest of his house was modestly furnished, but his bedroom was a veritable wonderland of pricey cyber-gadgetry. Christopher was puzzled. More than that, he was jealous. In retrospect, he says, he thinks Justin may not have invited him to camwhore because at the time "I was real overweight."

Justin wasn't acquiring only computers. Sometime after he turned 16 and could obtain a drivers license, he got a 1999 Chevrolet Cavalier. He named it "HackerCar" and spent thousands of dollars outfitting it with add-ons. He proudly listed many of them on a car fixer upper website, including: chrome rims, shaved side markers, back window tinting, a specially painted dash, tweed inner doors, red racing seats, and a personalized license plate (1337 HAX).

Page does not seem to have wondered how he could afford all this. Eich-

enwald did not mention the Chevy.

Chat logs from Justin's hard drives also indicate that by summer 2002, when he was turning 16, he had quit public school and was studying through an online, homeschooling program. They suggest, too, that his mother was coordinating his lessons with the program. Justin's friend Rob Vella also left high school to home school. "It was a joke," he told me. "We did it so we could get out of class." And while out of class, Justin had even more time to camwhore.

He also got his own apartment at age 16, where he could do business for hours in guaranteed privacy. Gilo Tunno – the man who Justin later said had filmed him while they were having sex when he was 13 – signed the lease; Justin was too young to do so. Page has since testified that a few months after he got the apartment, Justin's stepbrother tattled to her about it. But Page has not publicly talked about examining the lease, or investigating why an adult male would want her underage son to have his own place. (It is not known whether Page's husband – Justin's stepfather – asked either his son or stepson about the apartment or if he suspected Justin was camwhoring. He lived in the same home as Justin did in Bakersfield. He has never made any public statements about Justin's case and declined to be interviewed by *CounterPunch*.) Though Eichenwald mentioned the apartment in his article, he did not reveal that Justin's mother knew about it but apparently did nothing.

It may seem strange that Karen Page repeatedly allowed her son to travel unaccompanied to visit men she'd never met and whom she knew nothing about; that she let Justin leave regular school; and that she learned he had his own apartment but never put two and two together. Stranger still is that for years Page has been a licensed marriage and family therapist. On a website (created by Justin) that advertises her services, she notes that having her own children gives her "the practical experience to help you." She has also testified that her specialty is "adolescent issues".

Eichenwald's article did not mention Page's occupation, or her specialty.

Eichenwald did not talk, either, about the fact that for many of Justin's high-school buddies in Bakersfield, Justin's camwhoring hardly seems to have been a secret. Rob Vella recalls discovering porn of Justin when the two were 14 or 15, after he hacked into Justin's computer and found images of him – as Vella put it – "whacking off". According to a chat log that Vella saved and sent to *CounterPunch*, Justin warned Vella that if he didn't send the pictures back, "the FBI will be at your door." Furthermore, according to chat logs obtained by defense lawyers, other friends knew about the apartment and the camwhoring, but didn't care, and they even encouraged Justin.

That's because – again according to chat logs – Justin was not the only one using his apartment. His stepbrother and buddies were hanging out too, partying down with each other and with girls. Also, according to chat logs, Justin was forking over as much as $1,000 apiece to fund LAN parties – those get-togethers where computer geeks rent a hall, buy chips and drinks, put up prizes for winners, then stay up all night and play online games. In addition, Justin was doling out hundreds, even thousands of dollars to his pals.

The one person who seemed distressed by all this was Justin's girlfriend, given the pseudonym Michelle here to protect her privacy. Eichenwald noted that when Michelle told Justin to stop the camwhoring, she was contravened by insidious online predators, who cajoled with treacly blandishments such as, "Just try and remember, Justin, that she may not love you, but most of us in your chat room, your friends, love you very much."

What Eichenwald doesn't reveal is that according to chat logs Justin's actual friends – his age peers in Bakersfield – were pressuring him much more intensely.

In an instant messaging log from December 2002, Justin argues with his girlfriend after she has just implored him to stop giving sex performances on the web:

"Michelle, I'm whoring to help out some friends. It's the only way I can think of how to get that much money, instantly... it's a job, and I enjoy it... I guess you don't see what I'm trying to accomplish with my cam."

The dispute turns into a three-way, as Justin's friend Robby joins in. Michelle has been complaining that Justin is only camwhoring to pay for improvements to his Chevy Cavalier. Robby sends an instant message, directly to Justin, saying that Michelle "said you cared more bout your car than you did her. I was like, 'wtf [what the fuck], he saved all of our asses.'"

Michelle protests. Justin, she tells Robby, has "decided that certain things" are "more important than me."

"Like saving all of our asses?" retorts Robby "And helping everyone out? ... So you think that saving my ass, Ian's ass, Hal's ass, Mark's ass, Peter's ass, Sam's ass ... and everyone else's ass, was less important than you? ... Saving the LAN... Psh, who cares [about camwhoring] if you're helping other people? I don't see a problem." (all friends' names have been changed to protect their privacy.)

Robby instant messages Justin to comment about Michelle that "She's just jealous. Just say that her not letting you do this is her not helping Robby, Hal, Ian, Morgan, Sam, Peter, everyone in [Bakersfield LAN]. It's not like you're doing it for yourself. You're helping friends. It's not like you're having sex with people online. Just tell her that you are helping out friends that need you... All I can say... is bros before hoes."

Then, Robby instant messages Michelle: "You stupid whore."

(And Robby to Justin: "Is she on her period? She seems all mood swingy.")

Plus, there was Vic, the kid who wore nail polish and eye shadow to school. By the time he was 17 and Justin was 16, Vic was also camwhoring and the two were collaborating to make sex videos.

Vic was openly, sexually attracted to Justin.

"You know if I wasn't your friend, I'd be just like those other fucked up pedos," he instant messages Justin in one chat log. "I would be paying 500 bucks for you to take your shirt off."

"Heh bro. I love you," answers

Justin.

" I love you too," writes Vic. " I'm doing this whole whoring thing for you just so you know... I want to make you happy with $$$"

Justin then gaves Vic a freebie by letting him spy on a show he is doing for a client. "Watch the cam," he said while performing for the paying viewer. "$350... I told him $350 to see me cumm."

"Nice :-)... fuck yeah!"

"I'll move the cam back so you can see."

"Hoe!..It' fuckin great... I love you. Seriously."

"I'm such a WHORE. I love it!...I love being a whore... fuck Michelle if she cares, fuck it."

"Dude, if we both get on cam... "

"I got an offer of $750 after Xmas, for two of us. Cool?"

"Sounds great."

Justin was helpful to his customers, too, according to chat logs. And though Eichenwald says nothing about this, Justin seemed unafraid of the police. He was even willing to assist them in catching some of his clients to make life easier for others.

One customer, 27-year-old William Bitzer, had become a friend. According to an FBI interview with Justin, Bitzer gave the teen $2,000 worth of auto parts for his Chevy. One night in late February 2003, Bitzer instant messaged with news that he'd recently been arrested in Anaheim, California, after conversing sexually on the net with a cop posing as a 14-year-old boy.

"I just spent 2 days in jail... for 'talking and stuff' to a 'kid' online," he writes.

"Shit!" replies Justin.

"I need some help, BAD," continues Bitzer.

"How can I help bro?" asks Justin. "U need people? I got people."

"It's a 3 for 1 trade... I help find and convict 3, then it's like a 'wash' for me."

Immediately, Justin sends Bitzer the name and address of a man in Texas – presumably one of Justin's camwhore customers.

"There's one," Justin instant messages. "He has child pornography."

Justin sends similar information regarding a man in Missouri. "There's two," he tells Bitzer.

Then Justin begins stinging people he is conversing with online at the same time he is communicating, separately, with Bitzer.

"Would you touch me in my private places?" Justin asks someone with the screen name Kevkevkev.

"Hehehe of course!" replies Kevkevkev.

"BAM and another one hits the dust," Justin types to Bitzer.

"What would we do in there?" he asks another correspondent.

"I would gently lay you down on my bed, and start to passionately kiss you on your lips."

" BAM and another one hits the dust... HAH BAM!!!... watch the HACKA AT WORK... HAHAHA-HAHA I'M so fucking great," Justin brags to Bitzer.

Teenage Bakersfield was roiling with gossip about Justin and his gay porn biz. Justin became the butt of jokes and was beaten up by a boy.

"Fuck," replies Bitzer. "maybe we can SELL these guys to the cops? $$$$$

"Tell them I will sell them for $1K a piece," says Justin.

(It's not clear whether Justin's sting work helped Bitzer. Two months after his arrest, Bitzer pleaded guilty to several counts of child molesting, and of making and possessing child porn. None of the people whose names Justin gave Bitzer are currently listed as federal prisoners or as registered sex offenders in the states encompassing the addresses they gave Justin when they were his customers.)

As his messages to Bitzer make clear, Justin usually seemed cocky about the authorities, even though chat logs (and later trial testimony) indicate that he believed the cops were on to him by the time he was 16, and perhaps before that.

"Hey," someone wrote to him in December 2002, "Just a warning that your new site is being watched by the Feds. Be careful."

"There was a cop in your room last nite," wrote another. "He was asking shit about you... he said some shit that you [private messaged] him and said you would do a private [sex show] for like 250 bux or some shit like that."

"What would they do to an underage webwhore?" asks Justin.

"I don't know if they can throw [you] in jail or not for making underage porn since you are a minor."

"I'm skerd," replied Justin.

But he was less "skerd" than angry in late February 2003, after his old friend Rob Vella again hacked into his computer and found two recently made videos: one of Justin masturbating, and one of Vic doing the same. Vella sent the videos to mutual friends, and soon teenage Bakersfield was roiling with gossip about Justin and his gay porn biz. Justin became the butt of jokes and was beaten up by a boy. He was so infuriated with Vella – according to Vella – that he threatened to report him to the authorities for possessing the child porn videos. Exasperated, Vella called the Bakersfield police and gave them the material, along with Justin's name. "I never heard back from the cops," he told *CounterPunch*. A spokesman for the Bakersfield Police Department confirmed that police did speak with Vella in 2003. But he said that Justin was a juvenile then, so the department cannot comment about anything relating to him that they "did or did not investigate."

Vella said Eichenwald never contacted him.

Also in February 2003, Bitzer, the man just arrested in Anaheim, told Justin there was illegal material related to him on Bitzer's computers seized by the police. Justin responded with bravado, noting that he'd once had the same

problem. "I got my computers taken and shit," he told Bitzer, "when the police came to my house last year for child pornograph[y]." But it didn't matter. "I have a fucking word way with those fuckers bro," Justin reassured Bitzer. "Trust me, I'm safe."

Eichenwald never mentioned that Justin believed the police knew about him. Nor did he note that during the last week of February 2003, Justin thought he was about to be arrested, and fled, almost in the dark of night, to Mexico.

It's not clear which crimes he was worried about. In addition to producing and distributing child porn, he was also involved in credit card theft, sitting in his apartment with at least a dozen numbers he'd purloined from the Internet, using them to order $5,000 worth of merchandise. Eichenwald does not mention this in his article.

For whatever reason, numerous chat logs indicate that Justin was so frightened on February 27 that he scheduled an early morning flight out of Bakersfield to Mazatlan, Mexico. Eichenwald does not talk about this, either.

Justin chose Mexico because his father, Knute Berry, had fled there weeks earlier. Knute had been running a therapeutic massage salon in Bakersfield, and was accused in 2002 of committing insurance billing fraud. Later that year, he was told that if he pleaded guilty he would spend a year behind bars, but if he went to trial and were convicted, he'd pull a seven-year sentence. He turned down the plea and jumped the border.

Now, Justin was preparing to join Knute. According to chat logs, he had his plane ticket, but there was still a problem. He was only 16, and as a minor he could not enter Mexico without his mother's legal permission.

At first she was reluctant to grant it.

"I'm going to Mexico," Justin instant messaged Gilo Tunno, the adult he'd had the sexual encounter with when he was 13 and who had signed his apartment lease. "I gotta get a notarized fucking letter from my mom, fuck... God damnit I need a notarized signed paper by my mom, and fucking she's saying I can't go see my dad... She said, 'I'm not going to waste all the money I spent on lawyers for nothing, I'm not going to break all the restraining orders.'"

"BEG your mom," answered Tunno. "Tell her there will be MORE lawyer fees if she doesn't sign it."

And that, apparently, is what Justin did (though Eichenwald says nothing about Page signing a notarized letter).

"Well I have some awesome news," Justin wrote a few hours later. "I called my mom last night. I'M GOING TO MEXICO TOMORROW MORNING ... I will be safe there. They can't get a warrant for my arrest."

Thus, apparently, did Justin's mother, a therapist specializing in the problems of adolescents, send her adolescent to a foreign country with a foreign language, where he knew no one except for an accused felon and absconder with a long history of charges against him for lawbreaking – and of abuse and violence against this very adolescent.

Knute Berry would then knowingly and enthusiastically help Justin continue his porn-performance business and grow it to unprecedented levels. In Mazatlan, according to Justin, Knute set up a computer and video room, then recruited female prostitutes for Justin to copulate with on webcam. Justin was 16 when he commenced this activity. Not only did Knute approve, but on at least one occasion he operated the camera. Knute used some of the earnings to operate his new spa and to eat in expensive restaurants, Justin has testified and told the media. Justin used the remainder to buy items such as cocaine – apparently in tremendous quantities. He also used an enormous amount of marijuana, drank too much, and was heavily addicted to cigarettes. All this by the time he was only 18. But an 18-year-old is no longer a minor. As a child porn star, Justin was over the hill.

* * *

By the time Eichenwald discovered him, Justin had spent months at loose ends. He'd traveled between Mexico, the U.S.A. and London, sometimes accompanied by a man in his 30s, Greg Mitchel, who Justin later would tell the FBI was his "boyfriend" and who had been convicted several years earlier in Florida of possessing child pornography.

By the end of this period, Justin's online porn sites had gone largely dormant. During the 2004-2005 Christmas and New Year season, he passed through Bakersfield, visiting family and spending a little time with his old high-school friend, Rob Vella. In chat logs that Vella saved from that time, Justin talked about how he was taking college courses, designing websites, and embracing Christianity. He was also apparently having problems with marijuana and cocaine. In a discussion he and Vella had via the Internet about religion and whether he was learning about it, he told Vella, "I'm not interested in studying at the moment because it only confuses me more... I like my drugs but I believe in God. Because if there was no God we'd be fucked."

Vella, who is an atheist, responded, "Am I fucked? No."

"I am," answered Justin.

Not long before he turned 19, Justin joined Greg Mitchel in Virginia, where Mitchel ran a Sonic hamburger franchise. Teens hung around in the summer, and one, whom we will call David, was 14. Sometime in May or June, Mitchel began encouraging David to make videos of himself masturbating, using Mitchel's recording equipment. Eichenwald would later write in the *Times* that during the same period he had just contacted Justin and was communicating with him only online. However, in an audiotaped interview done of David by a private investigator employed by lawyers for one of the defendants charged after Eichenwald's piece was published, David says Eichenwald also was talking to Justin by phone. David describes grabbing the phone at least once, and chatting with Eichenwald. Back then, David, Justin and Greg Mitchel were unaware of Eichenwald's true identity and that he was a *New York Times* reporter. "We all didn't know his real name," David says on the tape. "All of us knew him as... Roy."

Sometime in early June, Eichenwald testified in Michigan recently, he was monitoring Justin's Yahoo fan club and saw a post "offering Justin for sale...

for the night". Eichenwald said he was horrified. But he also deduced that Justin and his friends were broke and that he could stop the sale and make real contact with Justin if he sent a lot of money. Eichenwald said he and his wife decided he would accept a speaking engagement at a local community college, and use most of the fee to "save" Justin. (About men who communicated with him online, Justin later testified that "In order for them to have the ability to keep speaking with me, I asked for money or I wouldn't talk to them.) On June 8, Eichenwald Fed-Exed the $2,000. On June 9, Justin put the check in his bank account. Eichenwald has since said that he learned on the day Justin cashed the check that he spent it on radio-operated toys. But *CounterPunch* obtained a deposit slip filled out by Justin on June 9. It shows that Justin deposited the $2,000 late in the afternoon but withdrew only $300.

Then, sometime within the next ten days, Justin and Mitchel refreshed a long dormant website with new porn, including images of David masturbating with Justin. Justin also posted a "biography" telling viewers that 14-year-old David was 18.

Less than two weeks later, on June 30, Justin met Eichenwald for the first time at the Los Angeles International airport. There the *New York Times* man immediately told the porn star what he really did for a living and that he wasn't gay. He also handed Justin a copy of *Conspiracy of Fools*. On a witness stand in a later criminal trial, Eichenwald would tell about events surrounding this meeting. He'd been so afraid of Berry before coming face to face, he said, that he rented a convertible with the top down, whose interior arrangements precluded Justin placing his luggage anywhere but the trunk (he worried that Justin could have a weapon). With that level of fear, one wonders why Eichenwald didn't confine the rendezvous to the airport and the security of crowds.

Instead, the two went to a hotel, where each got his own room. But, Eichenwald also testified, Justin later went to Eichenwald's room – the room of a "private citizen," not a reporter – and used Eichenwald's computer to demonstrate the business he was involved in. Justin logged on and contacted men, who deluged him with messages that were "unbelievably debasing", according to Eichenwald – such as one person who "asked him the furthest [*sic*] distance he had ever ejaculated". According to Eichenwald's subsequent *Times* piece, "Justin's hands trembled" during these exchanges, and his "pale face dampened with perspiration".

Three months later David, the boy who'd made porn when he was 14 with the adult Justin, was located by the FBI and interviewed. Agents asked him about the man he had earlier known as Roy. By then, David knew who Roy really was. And, he said, Justin had told him something exciting. "Recently," the FBI interview has David saying, "Justin met a famous author, Kurt Ickenwald [*sic*]. Ickenwald was going to do a movie about Justin's life. Justin was to get paid approximately $500,000."

"Recently," the FBI interview has David saying, "Justin met a famous author, Kurt Ickenwald [sic]. Ickenwald was going to do a movie about Justin's life. Justin was to get paid approximately $500,000."

Justin has since said under court oath that he does "not recall" if he told David that Eichenwald talked to him about getting media deals. If Justin did tell David he was going to get rich with Eichenwald's help, it could be because he misunderstood the reporter, he was fantasizing, or he was lying. Rightly or wrongly, though, if Justin thought a Hollywood movie or a book was in the works, he could have felt pressure to tell Eichenwald a story of his life that would sell – and not necessarily a story that was factual. Justin has also testified that in February 2006 he turned down a book offer from ReganBooks – with an advance of $500,000. He said he rejected it because he was told he could not accept it and appear on *Oprah* before a book came out, yet he'd already been asked to be on *Oprah*. He said he believed he could communicate better on television to parents about the dangers of Internet webcamming than he could in a book. Justin testified recently that he has no book or movie deals currently on the table. Eichenwald's entry on his speakers' bureau website currently states that he has two Hollywood deals in progress, one involving Leonardo diCaprio and *Conspiracy of Fools* and the other a project based on his book on Archer Daniels Midland, *The Informant*, to be directed by Steven Soderbergh.

Eichenwald has testified that when he parted from his first, Los Angeles, meeting with Justin on July 1, the teen made a heartfelt vow to stop "debasing" himself with men. But there is evidence that, while working with Eichenwald as a source, Justin was either regaling the reporter with displays of mendacious "to catch a predator" prowess, or was still in the webcam demimonde. By early July 2005, he had moved to the home of cousins living about 30 miles from Eichenwald's home in Dallas. Justin has for years maintained a small website production business called "xpert-creations.com." In chat logs retrieved from his computer and dated July 12, 2005, a person with the moniker "Xp3rt" engages in the following conversation with "MNboi22":

Xp3rt: Hiya

NMboi: How are you

Xp3rt: Good

NMboi: asl [age/sex/location]?

Xp3rt: 16/m/tx... u?

MNboi22: 22 m mn. What you into...

Xp3rt: Money for shows?... I'm into $...

On July 26 – about four weeks after their first meeting – Eichenwald drove Justin to confer with the FBI. There Justin listed all the crimes for which he wanted immunity (child porn making, child porn distribution, recruiting children for porn when he was an adult, income tax evasion, credit card fraud, insurance fraud, and abetting

Once Justin had called Gourlay his best friend and professed love for him. Now he was accusing this same man of violating him and destroying his life.

alien smuggling from Mexico). He also named the men who'd helped him in his porn business, and those who he said touched him sexually.

One of the latter, Gilo Tunno – who Justin told the FBI was the first adult he had a sexual experience with, at age 13 or so – had already been arrested months earlier for traveling from Oregon to Spokane to have sex with an 8-year-old. The charges had no relation to Justin, and by the time Eichenwald found Justin, Tunno was already convicted and in prison. Locked up, he was no longer someone children needed to be saved from.

The only other man on Justin's FBI touching list, his "boyfriend", Greg Mitchel, denied he had sex with Justin until he was 18 and in any event did not seem to have even met Justin until he was 17. The two traveled widely together, and the age of consent in most states is 16 or 17. Mitchel was eventually accused of and pleaded guilty to helping Justin produce and distribute child porn. As for touching, Justin complained that Mitchel "molested" him including when he was 18. It would have been very hard to successfully prosecute Mitchel for child sex abuse.

And that was the end of the FBI list as far as molesters were concerned. Only two men were on it, one already in prison and the other possibly innocent and very difficult to pin a child sex abuse rap on.

But there was another man: Justin's former computer tech mentor, Ken Gourlay.

Recently, Eichenwald testified that the day he drove Justin to his appointment with the FBI, the teen confided that he didn't want to rat on Gourlay because he was such a good friend. He then went through the entire FBI interview without mentioning Gourlay. Regardless, Eichenwald's subsequent article in the *New York Times* talked about the "man... from Ann Arbor" who had introduced Justin to pederasty at age 13. But hard evidence would later emerge that Justin was 15 when he first met Gourlay in person. Eichenwald's sole source for citing a much younger age, apparently, was his conversations with Justin.

The House of Representatives Committee on Energy and Commerce read Eichenwald's page-one *New York Times* article with its accusation against the man from Michigan. Four months later, the committee held a hearing about sexual exploitation of children over the Internet. Justin was subpoenaed to testify and duly sworn. Eichenwald was, too. So was Ken Gourlay. He invoked the Fifth Amendment, and sat stonily behind Eichenwald, listening to Berry cite the same false timetable about tender age and summer camp and molestation that the *Times* had printed months earlier.

Committee members listened to misinformation such as this, and to Eichenwald claim, baselessly, that child porn is a $20 billion-dollar business. They wondered whether the crisis should be answered with laws to restrict freedom of the Internet. There was talk of solving the problem with a new law named for Justin Berry.

As the hearing drew to a close, Rep. Michael Ferguson, R-N.J., had a question for Justin. "What do you think would be a fair sentence for the men that you say molested you?"

"I would hope they would get life", Justin replied.

Mr. Berry," intoned Rep. Greg Walden, R-Oregon, a former radio announcer. "Is there anybody in this room who you believe molested you?"

"Yes, Ken Gourlay," replied Justin, and he pointed his finger. The exchange was captured by C-SPAN. Once Justin had called Gourlay his best friend and professed love for him. Now he was accusing this same man of violating him and destroying his life.

"Thank you," said Walden.

Representatives from the Michigan attorney general's office were at the hearing and witnessed the exchange. Immediately afterward, they interviewed Justin and he made his first claim to law enforcement officials that he'd been molested by Gourlay. Five weeks later Gourlay was arrested. Last month he was tried for producing and distributing child pornography, for "enticing" a child by encouraging Justin to have sex with his girlfriend, and for having oral sex while Justin was at the computer camp, when Gourlay was 24 and Justin was a month shy of his 16th birthday.

At Gourlay's trial, Kurt Eichenwald served as a witness for the prosecution – which is how his $2,000 check came to light. He testified about a porn video he saw of Justin while reporting his *Times*' story. Nobody could find the film anymore; it had disappeared. But Eichenwald recalled seeing it, and said Gourlay was in it. Gourlay was convicted on all ten counts he was accused of, and will be sentenced in a few weeks to as many as twenty years. In addition, the investigation branched beyond Justin's accusations. Gourlay

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has also been charged with molesting another underage boy who – unlike Justin – calls himself gay, pursued Gourlay on the Internet, and once wrote him love letters.

Weeks after the Congressional proceeding, Justin Berry was hospitalized for what his mother testified was "a nervous breakdown". She said it followed an episode of "decompensation" that Justin experienced subsequent to seeing Gourlay at the hearing and doing his *J'accuse* on national TV. Eichenwald, too, has had psychological problems. On numerous talk shows, he has mentioned that as a result of working on the Justin Berry story, he developed posttraumatic stress disorder and received therapy paid for by the *New York Times*. Though he testified in Michigan that he saw the beginnings of many sex videos, he said he always turned them off before they advanced to the child porn stage. Even so, Eichenwald told Congress the day Gourlay was put on national show trial, "There were images I couldn't get out of my head when the lights went out."

One image may have been of Justin in a legal pose, first displayed on his website after he turned state's evidence and not removed until about the time he gave his nationally televised congressional testimony. The image – a photo – shows him looking pensive, anxious, in sunglasses and shirtless. Viewers who click under the picture are transferred to MyLiveWebCam.com/Teen-Cams. Justin implores them to enter and register. By so doing, they can "vote" for him. But they must act soon because he is already 19, and soon will be too old for the election.

* * *

On March 8, hours after *CounterPunch* first asked Kurt Eichenwald for an interview, including one by email, he announced that he was suing this writer for $10 million. Days later, *CounterPunch* again requested an interview, but this time a recorded one-on-one, by phone or in person. Eichenwald declined an interview unless it was conducted in Dallas with his lawyer present, or by email with questions and documents sent in advance. *CounterPunch* declined these terms. Justin Berry's attorney, Stephen Ryan, said Justin is "a witness in several upcoming trials" and cannot be "openly questioned by any journalist for many months, at the request of prosecutive authorities". Ryan offered to make his client available for "a handful of questions in writing," whose answers from Justin would be vetted by Ryan. *CounterPunch* also declined these conditions. Justin's mother, Karen Page, did not respond to several requests for an interview. His stepfather declined to be interviewed.

Debbie Nathan is a freelance journalist living in New York. With Michael Snedeker she wrote *Satan's Silence: Ritual Abuse and the Making of a Modern American Witch Hunt*. She can be reached at naess2@gmail.com. CP

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Revised - 2003

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STATIQUE-99 Règles de codage révisées – 2003

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How To Use This Manual

In most cases, scoring a STATIC-99 is fairly straightforward for an experienced evaluator. If you are unfamiliar with this instrument we suggest that you turn to the back pages of this manual and find the one-page STATIC-99 Coding Form. You may want to keep a copy of this to one side as you review the manual.

We strongly recommend that you read pages 3 to 21 and the section "Scoring the STATIC-99 and Computing the Risk Estimates" before you score the STATIC-99. These pages explain the nature of the STATIC-99 as a risk assessment instrument; to whom this risk assessment instrument may be applied; the role of self-report; exceptions for juvenile, developmentally delayed, and institutionalized offenders; changes from the last version of the STATIC-99 coding rules; the information required to score the STATIC-99; and important definitions such as "Index Offence", Category "A" offences versus Category "B" offences, "Index Cluster", and "Pseudo-recidivism".

Individual item coding instructions begin at the section entitled "Scoring the Ten Items". For each of the ten items, the coding instructions begin with three pieces of information: **The Basic Principle, Information Required to Score this Item,** and **The Basic Rule.** In most cases, just reading these three small sections will allow you to score that item on the STATIC-99. Should you be unsure of how to score the item you may read further and consider whether any of the special circumstances or exclusions apply to your case. This manual contains much information that is related to specific uses of the STATIC-99 in unusual circumstances and many sections of this manual need only be referred to in exceptional circumstances.

We also suggest that you briefly review the ten appendices as they contain valuable information on adjusting STATIC-99 predictions for time free in the community, a self-test of basic concepts, references, surgical castration, a table for converting raw STATIC-99 scores to risk estimates, the coding forms, a suggested report format for communicating STATIC-99-based risk information, a list of replication studies for the STATIC-99, information on inter-rater reliability and, how to interpret Static-99 scores greater than 6.

We appreciate all feedback on the scoring and implementation of the STATIC-99. Please feel free to contact any of the authours. Should you find any errors in this publication or have questions/concerns regarding the application of this risk assessment instrument or the contents of this manual, please address these concerns to:

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Introduction

The Nature of the STATIC-99

The STATIC-99 utilizes only static (unchangeable) factors that have been seen in the literature to correlate with sexual reconviction in adult males. The estimates of sexual and violent recidivism produced by the STATIC-99 can be thought of as a baseline of risk for violent and sexual reconviction. From this baseline of long-term risk assessment, treatment and supervision strategies can be put in place to reduce the risk of sexual recidivism.

The STATIC-99 was developed by R. Karl Hanson, Ph.D. of the Solicitor General Canada and David Thornton, Ph.D., at that time, of Her Majesty's Prison Service, England. The STATIC-99 was created by amalgamating two risk assessment instruments. The RRASOR (Rapid Risk Assessment of Sex Offender Recidivism), developed by Dr. Hanson, consists of four items: 1) having prior sex offences, 2) having a male victim, 3) having an unrelated victim, and 4) being between the ages of 18 and 25 years old. The items of the RRASOR were then combined with the items of the Structured Anchored Clinical Judgement – Minimum (SACJ-Min), an independently created risk assessment instrument written by Dr. Thornton (Grubin, 1998). The SACJ-Min consists of nine items: 1) having a current sex offence, 2) prior sex offences, 3) a current conviction for non-sexual violence, 4) a prior conviction for non-sexual violence, 5) having 4 or more previous sentencing dates on the criminal record, 6) being single, 7) having non-contact sexual offences, 8) having stranger victims, and 9) having male victims. These two instruments were merged to create the STATIC-99, a ten-item prediction scale.

The strengths of the STATIC-99 are that it uses risk factors that have been empirically shown to be associated with sexual recidivism and the STATIC-99 gives explicit rules for combining these factors into a total risk score. This instrument provides explicit probability estimates of sexual reconviction, is easily scored, and has been shown to be robustly predictive across several settings using a variety of samples. The weaknesses of the STATIC-99 are that it demonstrates only moderate predictive accuracy (ROC = .71) and that it does not include all the factors that might be included in a wide-ranging risk assessment (Doren, 2002).

While potentially useful, an interview with the offender is not necessary to score the STATIC-99.

The authors of this manual strongly recommend training in the use of the STATIC-99 before attempting risk assessments that may affect human lives. Researchers, parole and probation officers, psychologists, sex offender treatment providers, and police personnel involved in threat and risk assessment activities typically use this instrument. Researchers are invited to make use of this instrument for research purposes and this manual and the instrument itself may be downloaded from www.sgc.gc.ca.

It is possible to score more than six points on the STATIC-99 yet the top risk score is 6 (High-Risk). In analyzing the original samples it was found that there was no significant increase in recidivism rates for scores between 6 and 12. One of the reasons for this finding may be diminishing sample size. However, in general, the more risk factors, the more risk. There may be some saturation point after which additional factors do not appear to make a difference in risk. It is useful to keep in mind that all measurement activities contain some degree of error. If the offender's score is substantially above 6 (High-Risk), there is greater confidence the offender's "true" score is greater than 6 (High-Risk) than if the offender had only scored a 6.

The STATIC-99 does not address all relevant risk factors for sexual offenders. Consequently a prudent evaluator will always consider other external factors that may influence risk in either direction. An obvious example is where an offender states intentions to further harm or "get" his victims (higher risk).

Or, an offender may be somewhat restricted from further offending either by health concerns or where he has structured his environment such that his victim group is either unavailable or he is always in the company of someone who will support non-offending (lower risk). These additional risk factors should be stated in any report as "additional factors that were taken into consideration" and not "added" to the STATIC-99 Score. Adding additional factors to the STATIC-99, or adding "over-rides" distances STATIC-99 estimates from their empirical base and substantially reduces their predictive accuracy.

- **Missing Items** – The only item that may be omitted on the STATIC-99 is "Ever Lived With ..." (Item #2). If no information is available, this item should be scored as a "0" (zero) – as if the offender **has lived** with an intimate partner for two years.

- **Recidivism Criteria** – In the original STATIC-99 samples the recidivism criteria was a new conviction for a sexual offence.

- **Non-Contact Sexual Offences** – The original STATIC-99 samples included a small number of offenders who had been convicted of non-contact sexual offences. STATIC-99 predictions of risk are relevant for non-contact sexual offenders, such as Break-&-Enter Fetishists who enter a dwelling to steal underwear or similar fetish objects.

- **RRASOR or STATIC-99?** On the whole, if the information is available to score the STATIC-99 it is preferable to use the STATIC-99 over the RRASOR as estimates based on the STATIC-99 utilize more information than those based upon RRASOR scores. The average predictiveness of the STATIC-99 is higher than the average predictiveness of the RRASOR (Hanson, Morton, & Harris, in press).

Recidivism Estimates and Treatment

The original samples and the recidivism estimates should be considered primarily as "untreated". The treatment provided in the Millbrook Recidivism Study and the Oak Ridge Division of the Penetanguishene Mental Health Centre samples were dated and appeared ineffective in the outcome evaluations. Most of the offenders in the Pinel sample did not complete the treatment program. Except for the occasional case, the offenders in the Her Majesty's Prison Service (UK) sample would not have received treatment.

Self-report and the STATIC-99

Ten items comprise the STATIC-99. The amount of self-report that is acceptable in the scoring of these questions differs across questions and across the three basic divisions within the instrument.

Demographic Questions: For Item #1 – Young, while it is always best to consult official written records, self-report of age is generally acceptable for offenders who are obviously older than 25 years of age. For Item #2 – Ever Lived With..., to complete this item the evaluator should make an attempt to confirm the offender's relationship history through collateral sources and official records. There may, however, be certain cases (immigrants, refugees from third world countries) where confirmation is not possible. In the absence of these sources self-report information may be utilized, assuming of course, that the self-report seems credible and reasonable to the evaluator. For further guidance on the use of self-report and the STATIC-99 please see section "Item #2 – Ever Lived with an Intimate Partner – 2 Years".

Criminal History Questions: For the five (5) items that assess criminal history (Items 3, 4, 5, 6, & 7) an official criminal history is required to score these items and self-report is not acceptable. This being said, there may be certain cases (immigrants, refugees from third world countries) where self-report of crimes may be accepted if it is reasonable to assume that no records exist or that existing records are truly un-retrievable. In addition, to the evaluator, the self-report must seem credible and reasonable.

Victim Questions: For the three (3) victim items self-report is generally acceptable assuming the self-report meets the basic criteria of appearing reasonable and credible. Confirmation from official records or collateral contacts is always preferable.

Who can you use the STATIC-99 on?

The STATIC-99 is an actuarial risk prediction instrument designed to estimate the probability of sexual and violent reconviction for adult males who have already been charged with or convicted of at least one sexual offence against a child or a non-consenting adult. This instrument may be used with first-time sexual offenders.

This instrument is not recommended for females, young offenders (those having an age of less than 18 years at time of release) or for offenders who have only been convicted of prostitution related offences, pimping, public toileting (sex in public locations with consenting adults) or possession of pornography/indecent materials. The STATIC-99 is not recommended for use with those who have never committed a sexual offence, nor is it recommended for making recommendations regarding the determination of guilt or innocence in those accused of a sexual offence. The STATIC-99 is not appropriate for individuals whose only sexual "crime" involves consenting sexual activity with a similar age peer (e.g., Statutory Rape {a U.S. charge} where the ages of the perpetrator and the victim are close and the sexual activity was consensual).

The STATIC-99 applies where there is reason to believe an actual sex offence has occurred with an identifiable victim. The offender need not have been convicted of the offence. The original samples used to create this instrument contained a number of individuals who had been found Not Guilty by Reason of Insanity and others who were convicted of non-sexual crimes, but in all cases these offenders had committed real sex crimes with identifiable victims. The STATIC-99 may be used with offenders who have committed sexual offences against animals.

In some cases, an evaluator may be faced with an offender who has had a substantial period at liberty in the community with opportunity to re-offend, but has not done so. In cases such as these, the risk of sexual re-offence probabilities produced by the STATIC-99 may not be reliable and adjustment should be considered (Please see Appendix #1).

STATIC-99 with Juvenile Offenders

It should be noted that there were people in the original STATIC-99 samples who had committed sexual offences as juveniles (under the age of 18 years) and who were released as adults. In some cases an assessment of STATIC-99 risk potential may be useful on an offender of this nature. If the juvenile offences occurred when the offender was 16 or 17 and the offences appear "adult" in nature (preferential sexual assault of a child, preferential rape type activities) – the STATIC-99 score is most likely of some utility in assessing overall risk.

Evaluations of juveniles based on the STATIC-99 must be interpreted with caution as there is a very real theoretical question about whether juvenile sex offending is the same phenomena as adult sex offending in terms of its underlying dynamics and our ability to affect change in the individual. In addition, the younger the juvenile offender is, the more important these questions become. In general, the research literature leads us to believe that adolescent sexual offenders are not necessarily younger versions of adult sexual offenders. Developmental, family, and social factors would be expected to impact on recidivism potential. We have reason to believe that people who commit sex offences only as children/young people are a different profile than adults who commit sexual offences. In cases such as these, we recommend that STATIC-99 scores be used with caution and only as part of a more wide-ranging assessment of sexual and criminal behaviour. A template for a standard, wide-ranging assessment can be found in the

Solicitor General Canada publication, Harris, A. J. R., (2001), High-Risk Offenders: A Handbook for Criminal Justice Professionals, Appendix "d" (Please see the references section).

At this time we are aware of a small study that looked at the predictiveness of the STATIC-99 with juveniles. This study suggested that the scale worked with juveniles; at least in the sense that there was an overall positive correlation between their score on the STATIC-99 and their recidivism rate. This Texas study (Poole et al., 2000) focused on older juveniles who were 19 when released but younger when they offended.

In certain cases, the STATIC-99 may be useful with juvenile sexual offenders, if used cautiously. There would be reasonable confidence in the instrument where the convictions are related to offenses committed at the age of 17. In general, the younger the child, the more caution should be exercised in basing decisions upon STATIC-99 estimates. For example, if a 17-year-old offender committed a rape, alone, on a stranger female, you would have reasonable confidence in the STATIC-99 estimates. On the other hand, if the offender is now an adult (18+ years old) and the last sexual offence occurred when that individual was 14 or 15, STATIC-99 estimates would not apply. If the sexual offences occurred at a younger age and they look "juvenile" (participant in anti-social behaviour towards peers that had a sexual component) we would recommend that the evaluator revert to risk scales specifically designed for adolescent sexual offenders, such as the ERASOR (Worling, 2001).

The largest category of juvenile sexual offenders is generally antisocial youth who sexually victimize a peer when they are 13 or 14 years of age. These juvenile sexual offenders are most likely sufficiently different from adult sexual offenders that we do not recommend the use of the STATIC-99 nor any other actuarial instruments developed on samples of adult sexual offenders. We would once again refer evaluators to the ERASOR (Worling, 2001).

When scoring the STATIC-99, Juvenile offences when they are known from official sources, count as charges and convictions on "Prior Sexual Offences" regardless of the present age of the offender. Self-reported juvenile offences in the absence of official records do not count.

STATIC-99 with Juvenile Offenders who have been in prison for a long time

In this section we consider juvenile offenders who have been in prison for extended periods (20 years plus) and who are now being considered for release. In one recent case a male juvenile offender had committed all of his offences prior to the age of 15. This individual is now 36 years old and has spent more than 20 years incarcerated for these offences. The original STATIC-99 samples contained some offenders who committed their sexual offences as juveniles and were released as adults. However, most of these offenders were in the 18 – 20 age group upon release. Very few, if any, would have served long sentences for offences committed as juveniles. Although cases such as these do not technically violate the sampling frame of the STATIC-99, such cases would have been sufficiently rare that it is reasonable for evaluators to use more caution than usual in the interpretation of STATIC-99 reconviction probabilities.

STATIC-99 with Offenders who are Developmentally Delayed

The original STATIC-99 samples contained a number of Developmentally Delayed offenders. Presently, research is ongoing to validate the STATIC-99 on samples of Developmentally Delayed offenders. Available evidence to date supports the utility of actuarial approaches with Developmentally Delayed offenders. There is no current basis for rejecting actuarials with this population.

STATIC-99 with Institutionalized Offenders

The STATIC-99 is intended for use with individuals who have been charged with, or convicted of, at least one sexual offence. Occasionally, however, there are cases where an offender is institutionalized for a non-sex offence but, once incarcerated, engages in sexual assault or sexually aggressive behaviour that is sufficiently intrusive to come to official notice. In certain of these cases charges are unlikely, e.g., the offender is a "lifer". If no sanction is applied to the offender, these offences are not counted. If the behaviour is sufficiently intrusive that it would most likely attract a criminal charge had the behaviour occurred in the community and the offender received some form of "in-house" sanction, (administrative segregation, punitive solitary confinement, moved between prisons or units, etc.), these offences would count as offences on the STATIC-99. If that behaviour were a sexual crime, this would create a new Index sexual offence. However, if no sanction is noted for these behaviours they cannot be used in scoring the STATIC-99.

The STATIC-99 may be appropriate for offenders with a history of sexual offences but currently serving a sentence for a non-sexual offence. The STATIC-99 should be scored with the most recent sexual offence as the Index offence. The STATIC-99 is not applicable to offenders who have had more than 10 years at liberty in the community without a sexual offence before they were arrested for their current offence. STATIC-99 risk estimates would generally apply to offenders that had between two (2) and ten (10) years at liberty in the community without a new sexual offence but are currently serving a new sentence for a new technical (fail to comply) or other minor non-violent offence (shoplifting, Break and Enter). Where an offender did have a prolonged (two to ten years) sex-offence-free period in the community prior to their current non-sexual offence, the STATIC-99 estimates would be adjusted for time free using the chart in Appendix One – "Adjustments in risk based on time free".

Adjusted crime-free rates only apply to offenders who have been without a new sexual or violent offence. Criminal misbehaviour such as threats, robberies, and assaults void any credit the offender may have for remaining free of additional sexual offences.

STATIC-99 with Black, Aboriginal, and members of other Ethnic/Social Groups

Most members of the original samples from which recidivism estimates were obtained were white. However, race has not been found to be a significant predictor of sexual offence recidivism. It is possible that race interacts with STATIC-99 scores, but such interactions between race and actuarial rates are rare. It has been shown that the SIR Scale works as well for Aboriginal offenders as it does for non-aboriginal offenders (Hann et al., 1993). The LSI-R has been shown to work as well for non-white offenders as it does for white offenders (Lowenkamp et al., 2001) and as well for aboriginal offenders as it does for non-aboriginal offenders (Bonta, 1989). In Canada there is some evidence that STATIC-99 works as well for Aboriginal sexual offenders as it does for whites (Nicholaichuk, 2001). At this time, there is no reason to believe that the STATIC-99 is culturally specific.

STATIC-99 and Offenders with Mental Health Issues

The original STATIC-99 samples contained significant numbers of individual offenders with mental health concerns. It is appropriate to use the STATIC-99 to assess individuals with mental health issues such as schizophrenia and mood disorders.

STATIC-99 and Gender Transformation

Use of the STATIC-99 is only recommended, at this time, for use with adult males. In the case of an offender in gender transformation the evaluator would score that person based upon their anatomical sex at the time their first sexual offence was committed.

What's New? What's Changed?

Since the last version of the Coding Rules

The most obvious change in the layout of the STATIC-99 is the slight modification of three of the items to make them more understandable. In addition, the order in which the items appear on the Coding Form has been changed. It is important to remember that no item definitions have been changed and no items have been added or subtracted. Present changes reflect the need for a clearer statement of the intent of the items as the use of the instrument moves primarily from the hands of researchers and academics into the hands of primary service providers such as, parole and probation officers, psychologists, psychometrists and others who use the instrument in applied settings. The revised order of questions more closely resembles the order in which relevant information comes across the desk of these individuals.

The first item name that has been changed is the old item #10, Single. The name of this item has been changed to "Ever lived with an intimate partner – 2 years" and this item becomes item number 2 in the revised scale. The reason for this change is that the new item name more closely reflects the intent of the item, whether the offender has ever been capable of living in an intimate relationship with another adult for two years.

The two Non-sexual violence items, "Index Non-sexual violence" and "Prior non-sexual violence" have been changed slightly to make it easier to remember that a conviction is necessary in order to score these items. These two items become "Index Non-sexual violence – Any convictions?" and "Prior Non-sexual violence – Any convictions?" in the new scheme.

Over time, there have been some changes to the rules from the previous version of the coding rules. Some rules were originally written to apply to a specific jurisdiction. In consultation with other jurisdictions, the rules have been generalized to make them applicable across jurisdictions in a way that preserves the original intent of the item. These minor changes are most evident in Item #6 – Prior Sentencing Dates.

Over the past two years, a large number of direct service providers have been trained in the administration of the STATIC-99. The training of direct service providers has revealed to us that two related concepts must be clearly defined for the evaluator. These concepts are "Pseudo-recidivism" and "Index cluster". Pseudo-recidivism results when an offender who is currently engaged in the criminal justice process has additional charges laid against them for crimes they committed before they were apprehended for the current offence. Since these earlier crimes have never been detected or dealt with by the justice system they are "brought forward" and grouped with the Index offence. When, for the purposes of scoring the STATIC-99, these offences join the "Index Offence" this means there are crimes from two, or more, distinct time periods included as the "Index". This grouping of offences is known as an "Index Cluster". These offences are not counted as "priors" because, even though the behaviour occurred a long time ago, these offences have never been subject to a legal consequence.

Finally, there is a new section on adjusting the score of the STATIC-99 to account for offenders who have not re-offended for several years. There is reason to downgrade risk status for the offender who has not re-offended in the community over a protracted period (See Appendix One).

Information Required to Score the STATIC-99

Three basic types of information are required to score the STATIC-99, Demographic information, an official Criminal Record, and Victim information.

Demographic Information

Two of the STATIC-99 items require demographic information. The first item is "Young?". The offender's date of birth is required in order to determine whether the offender is between 18 and 25 years of age at the time of release or at time of exposure to risk in the community. The second item that requires knowledge of demographic information is "Ever lived with an intimate partner – 2 years?". To answer this question the evaluator must know if the offender has ever lived in an intimate (sexual) relationship with another adult, continuously, for at least two years.

Official Criminal Record

In order to score the STATIC-99, the evaluator must have access to an official criminal record as recorded by police, court, or correctional officials. From this official criminal record you score five of the STATIC-99's items: "Index non-sexual violence – Any convictions", "Prior non-sexual violence – Any convictions", "Prior sex offences", "Prior sentencing dates", and "Non-contact sex offences – Any convictions". Self-report is generally not acceptable to score these five items – in the Introduction section, see sub-section – "Self-report and the STATIC-99".

Victim Information

The STATIC-99 contains three victim information items" "Any unrelated victims", "Any stranger victims" and, "Any male victims". To score these items the evaluator may use any credible information at their disposal except polygraph examination. For each of the offender's sexual offences the evaluator must know the pre-offence degree of relationship between the victim and the offender.

Definitions

Sexual Offence

For the purposes of a STATIC-99 assessment a sexual offence is an officially recorded sexual misbehaviour or criminal behaviour with sexual intent. To be considered a sexual offence the sexual misbehaviour must result in some form of criminal justice intervention or official sanction. For people already engaged in the criminal justice system the sexual misbehaviour must be serious enough that individuals could be charged with a sexual offence if they were not already under legal sanction. **Do not count offences such as failure to register as a sexual offender or consenting sex in prison.**

Criminal justice interventions may include the following:

- Alternative resolutions agreements (Restorative Justice)
- Arrests
- Charges
- Community-based Justice Committee Agreements
- Criminal convictions
- Institutional rule violations for sexual offences (Do not count consenting sexual activity in prison)
- Parole and probation violations

Sanctions may include the following:

- Alternative resolution agreements
- Community supervision
- Conditional discharges
- Fines
- Imprisonment
- Loss of institutional time credits due to sexual offending ("worktime credits")

Generally, "worktime credit" or "institutional time credits" means credit towards (time off) a prisoner's sentence for satisfactory performance in work, training or education programs. Any prisoner who accumulates "worktime credit" may be denied or may forfeit the credit for failure or refusal to perform assigned, ordered, or directed work or for receiving a serious disciplinary offense.

Sexual offences are scored only from official records and both juvenile and adult offences count. You may not count self-reported offences except under certain limited circumstances, please refer to the Introduction section – sub-section "Self-report and the STATIC-99".

An offence need not be called "sexual" in its legal title or definition for a charge or conviction to be considered a sexual offence. Charges or convictions that are explicitly for sexual assaults, or for the sexual abuse of children, are counted as sexual offenses on the STATIC-99, regardless of the offender's motive. Offenses that directly involve illegal sexual behaviour are counted as sex offenses even when the legal process has led to a "non-sexual" charge or conviction. An example of this would be where an offender is charged with or pleads guilty to a Break and Enter when he was really going in to steal dirty underwear to use for fetishistic purposes.

In addition, offenses that involve non-sexual behavior are counted as sexual offenses if they had a sexual motive. For example, consider the case of a man who strangles a woman to death as part of a sexual act but only gets charged with manslaughter. In this case the manslaughter charge would still be considered a sexual offence. Similarly, a man who strangles a woman to gain sexual compliance but only gets charged

with Assault; this Assault charge would still be considered a sexual offence. Further examples of this kind include convictions for murder where there was a sexual component to the crime (perhaps a rape preceding the killing), kidnapping where the kidnapping took place but the planned sexual assault was interrupted before it could occur, and assaults "pled down" from sexual assaults.

Physical assaults, threats, and stalking motivated by sexual jealousy do not count as sexual offenses when scoring the STATIC-99.

Additional Charges

Offences that may not be specifically sexual in nature, occurring at the same time as the sexual offence, and under certain conditions, may be considered part of the sexual misbehaviour. Examples of this would include an offender being charged with/convicted of:

- Sexual assault (rape) and false imprisonment
- Sexual assault (rape) and kidnapping
- Sexual assault (rape) and battery

In instances such as these, depending upon when in the court process the risk assessment was completed, the offender would be coded as having been convicted of two sexual offences plus scoring in another item (Index or Prior Non-sexual Violence). For example if an offender were convicted of any of the three examples above prior to the current "Index" offence, the offender would score 2 "prior" sex offence charges and 2 "prior" sex offence convictions (On Item #5 – Prior Sexual Offences) and a point for Prior Non-sexual Violence (Please see "Prior Non-sexual Violence" or "Index Non-sexual Violence" for a further explanation).

Category "A" and Category "B" Offences

For the purposes of the STATIC-99, sexual misbehaviours are divided into two categories. Category "A" involves most criminal charges that we generally consider "sexual offences" and that involve an identifiable child or non-consenting adult victim. This category includes all contact offences, exhibitionism, voyeurism, sex with animals and dead bodies.

Category "B" offences include sexual behaviour that is illegal but the parties are consenting or no specific victim is involved. Category "B" offences include prostitution related offences, consenting sex in public places, and possession of pornography. Behaviours such as urinating in public or public nudity associated with mental impairment are also considered Category "B" offences.

Rule: if the offender has **any** category "A" offences on their record - all category "B" offences should be counted as sex offences for the purpose of scoring sexual priors or identifying the Index offense. They do not count for the purpose of scoring victim type items. The STATIC-99 is not recommended for use with offenders who have only category "B" offences.

Offence names and legalities differ from jurisdiction to jurisdiction and a given sexual behaviour may be associated with a different charge in a different jurisdiction. The following is a list of offences that would typically be considered sexual. Other offence names may qualify when they denote sexual intent or sexual misbehaviour.

Category "A" Offences

- Aggravated Sexual Assault
- Attempted sexual offences (Attempted Rape, Attempted Sexual Assault)
- Contributing to the delinquency of a minor (where the offence had a sexual element)
- Exhibitionism

- Incest
- Indecent exposure
- Invitation to sexual touching
- Lewd or lascivious acts with a child under 14
- Manufacturing/Creating child pornography where an identifiable child victim was used in the process (The offender had to be present or participate in the creation of the child pornography with a human child present)
- Molest children
- Oral copulation
- Penetration with a foreign object
- Rape (includes in concert) (Rape in concert is rape with one or more co-offenders. The co-offender can actually perpetrate a sexual crime or be involved to hold the victim down)
- Sexual Assault
- Sexual Assault Causing Bodily Harm
- Sexual battery
- Sexual homicide
- Sexual offences against animals (Bestiality)
- Sexual offences involving dead bodies (Offering an indignity to a dead body)
- Sodomy (includes in concert and with a person under 14 years of age)
- Unlawful sexual intercourse with a minor
- Voyeuristic activity (Trespass by night)

Category "B" Offences

- Consenting sex with other adults in public places
- Crimes relating to child pornography (possession, selling, transporting, creating where only pre-existing images are used, digital creation of)
- Indecent behaviour without a sexual motive (e.g., urinating in public)
- Offering prostitution services
- Pimping/Pandering
- Seeking/hiring prostitutes
- Solicitation of a prostitute

Certain sexual behaviours may be illegal in some jurisdictions and legal in others (e.g., prostitution). Count only those sexual misbehaviours that are illegal in the jurisdiction in which the risk assessment takes place and in the jurisdiction where the acts took place.

Exclusions

The following offences would not normally be considered sexual offences

- Annoying children
- Consensual sexual activity in prison (except if sufficiently indiscreet to meet criteria for gross indecency).
- Failure to register as a sex offender
- Being in the presence of children, loitering at schools
- Possession of children's clothing, pictures, toys
- Stalking (unless sexual offence appears imminent, please see definition of "Truly Imminent" below)
- Reports to child protection services (without charges)

Rule: Simple questioning by police not leading to an arrest or charge is insufficient to count as a sexual offence.

Probation, Parole or Conditional Release Violations as Sexual Offences

Rule: Probation, parole or conditional release violations resulting in arrest or revocation/breach are considered sexual offences when the behaviour could have resulted in a charge/conviction for a sexual offence if the offender were not already under legal sanction.

Sometimes the violations are not clearly defined as a sexual arrest or conviction. The determination of whether to count probation, parole, or conditional release violations as sexual offences is dependent upon the nature of the sexual misbehaviour. Some probation, parole and conditional release violations are clearly of a sexual nature, such as when a rape or a child molestation has taken place or when behaviours such as exhibitionism or possession of child pornography have occurred. These violations would count as the Index offence if they were the offender's most recent criminal justice intervention.

Generally, violations due to "high-risk" behaviour would not be considered sex offences. The most common of these occurs when the offender has a condition not to be in the presence of children but is nevertheless charged with a breach - being in the presence of children. A breach of this nature would not be considered a sexual offence. This is a technical violation. The issue that determines if a violation of conditional release is a new sex offence or not is whether a person who has never been convicted of a sex offence could be charged and convicted of the breach behaviour. A person who has never faced criminal sanction could not be charged with being in the presence of minors; hence, because a non-criminal could not be charged with this offence, it is a technical violation. Non-sexual probation, parole and conditional release violations, and charges and convictions such as property offences or drug offences are not counted as sexual offences, even when they occur at the same time as sexual offences.

Taking the above into consideration, some high-risk behaviour may count as a sexual offence if the risk for sexual offence recidivism was truly imminent and an offence failed to occur only due to chance factors, such as detection by the supervision officer or resistance of the victim.

Definition of "Truly Imminent"

Examples of this nature would include an individual with a history of child molesting being discovered alone with a child and about to engage in a "wrestling game." Another example would be an individual with a long history of abducting teenage girls for sexual assault being apprehended while attempting to lure teenage girls into his car.

Institutional Rule Violations

Institutional rule violations resulting in institutional punishment can be counted as sex offences if certain conditions exist. The first condition is that the sexual behaviour would have to be sufficiently intrusive that a charge for a sexual offence would be possible were the offender not already under legal sanction. In other words, "if he did it on the outside would he get charged for it?" Institutional Disciplinary Reports for sexual misbehaviours that would likely result in a charge were the offender not already in custody count as charges. Poorly timed or insensitive homosexual advances would not count even though this type of behaviour might attract institutional sanctions. The second condition is that the evaluator must be sure that the sexual assaults actually occurred and the institutional punishment was for the sexual behaviour.

In a prison environment it is important to distinguish between targeted activity and non-targeted activity. Institutional disciplinary reports that result from an offender who specifically chooses a female officer and masturbates in front of her, where she is the obvious and intended target of the act, would count as a

"charge" and hence, could stand as an Index offence. The alternative situation is where an offender who is masturbating in his cell is discovered by a female officer and she is not an obvious and intended target. In some jurisdictions this would lead to a Disciplinary Report. Violations of this "non-targeted" nature do not count as a "charge' and could not stand as an Index offence. If the evaluator has insufficient information to distinguish between these two types of occurrences the offender gets the benefit of the doubt and the evaluator would not score these occurrences. A further important distinction is whether the masturbation takes place covered or uncovered. Masturbating under a sheet would not be regarded as an attempt at indecent exposure.

Consider these two examples:

(1) A prisoner is masturbating under a sheet at a time when staff would not normally look in his cell. Unexpectedly a female member of staff opens the observation window, looks through the door, and observes him masturbating. This would not count as a sex offence for the purposes of STATIC-99, even if a disciplinary charge resulted.

(2) In the alternate example, a prisoner masturbates uncovered so that his erect penis is visible to anyone who looks in his cell. Prison staff have reason to believe that he listens for the lighter footsteps of a female guard approaching his cell. He times himself so that he is exposed in this fashion at the point that a female guard is looking into the cell. This would count as a sexual offence for the purposes of scoring STATIC-99 if it resulted in an institutional punishment.

Rule: Prison Misconducts and Institutional Rule Violations for Sexual Misbehaviours count as one charge per sentence

Prison misconducts for sexual misbehaviours count as one charge per sentence, even when there are multiple incidents. The reason for this is that in some jurisdictions the threshold for misconducts is very low. Often, as previously described, misconduct will involve a female guard simply looking into a cell and observing an inmate masturbating. Even in prison, serious sexual offences, rape and attempted rape will generally attract official criminal charges.

Mentally Disordered and Developmentally Delayed Offenders

Some offenders suffer from sufficient mental impairment (major mental illness, developmental delays) that criminal justice intervention is unlikely. For these offenders, informal hearings and sanctions such as placement in treatment facilities and residential moves would be counted as both a charge and a conviction for a sexual offence.

Clergy and the Military

For members of the military or religious groups (clergy) (and similar professions) some movements within their own organizations can count as charges and convictions and hence, Index offences. The offender has to receive some form of official sanction in order for it to count as a conviction. An example of this would be the "de-frocking" of a priest or minister or being publicly denounced. Another example would be where an offender is transferred within the organization and the receiving institution knows they are receiving a sex offender. If this institution considers it part of their mandate to address the offender's problem or attempt to help him with his problem then this would function as equivalent to being sent to a correctional institution, and would count as a conviction and could be used as an Index Offence.

For members of the military, a religious group (clergy) or teachers (and similar professions) being transferred to a new parish/school/post or being sent to graduate school for re-training does not count as a conviction and cannot be used as an Index Offence.

Juveniles

Instances in which juveniles (ages 12–15) are placed into residential care for sexual aggression would count as a charge and conviction for a sexual offence. In jurisdictions where 16 and 17 year old sexual offenders remain in a juvenile justice system (not charged, tried, and sent to jail as adults are), where it is possible to be sent to a "home" or "placement", this would count as a charge and a conviction for a sexual offence. In jurisdictions where juveniles aged 16 and 17 are charged, convicted, sentenced, and jailed much like adults, juvenile charges and convictions (between ages 16 & 17) would be counted the same as adult charges and convictions.

Sexual misbehaviour of children 11 or under would not count as a sex offence unless it resulted in official charges.

Official Cautions – United Kingdom

In the United Kingdom, an official caution should be treated as equivalent to a charge and a conviction.

Similar Fact Crimes

An Offender assaults three different women on three different occasions. On the first two occasions he grabs the woman as she is walking past a wooded area, drags her into the bushes and rapes her. For this he is convicted twice of Sexual Assault (rape). In the third case he grabs the woman, starts to drag her into the bushes but she is so resistant that he beats her severely and leaves her. In this case he is convicted of Aggravated Assault. In order for the conviction to be counted as a sexual offence, it must have a sexual motivation. In a case like this it is reasonable to assume that the Aggravated Assault had a sexual motivation because it resembles the other sexual offences so closely. In the absence of any other indication to the contrary this Aggravated Assault would also be counted as a sexual offence. Note: This crime could also count as Non-sexual Violence.

Please also read subsection "Coding Crime Sprees" in section "Item #5 – Prior Sex Offences".

Index offence

The Index offence is generally the most recent sexual offence. It could be a charge, arrest, conviction, or rule violation (see definition of a sexual offence, earlier in this section). Sometimes Index offences include multiple counts, multiple victims, and numerous crimes perpetrated at different times because the offender may not have been detected and apprehended. Some offenders are apprehended after a spree of offending. If this results in a single conviction regardless of the number of counts, all counts are considered part of the Index offence. Convictions for sexual offences that are subsequently overturned on appeal can count as the Index offence. Charges for sexual offences can count as the Index Offence, even if the offender is later acquitted.

Most of the STATIC-99 sample (about 70%) had no prior sexual offences on their record; their Index offence was their first recorded sexual misbehaviour. As a result, the STATIC-99 is valid with offenders facing their first sexual charges.

Acquittals

Acquittals count as charges and can be used as the Index Offence.

Convictions Overturned on Appeal

Convictions that are subsequently overturned on appeal can count as an Index Offence.

"Detected" by Child Protection Services

Being "detected" by the Children's Aid Society or other Child Protection Services does not count as an official sanction; it may not stand as a charge or a conviction. This is insufficient to create a new Index Offence.

Revocation of Conditional Release for "Lifers", Dangerous Offenders, and Others with Indeterminate Sentences – As an Index Offence

Occasionally, offenders on conditional release in the community who have a life sentence, who have been designated as Dangerous Offenders (Canada C.C.C. Sec. 753) or other offenders with indeterminate sentences either commit a new offence or breach their release conditions while in the community. Sometimes, when this happens the offenders have their conditional releases revoked and are simply returned to prison rather than being charged with a new offence or violation. Generally, this is done to save time and court resources as these offenders are already under sentence.

> If a "lifer", Dangerous Offender, or other offender with an already imposed indeterminate sentence is simply revoked (returned to prison from conditional release in the community without trial) for a sexual behaviour this can serve as the Index Sexual Offence if the behaviour is of such gravity that a person not already involved with the criminal justice system would most likely be charged with a sexual criminal offence given the same behaviour. Note: the evaluator should be sure that were this offender not already under sanction that it is highly likely that a sexual offence charge would be laid by police.

Historical Offences

The evaluator may face a situation where an offender is brought before the court on a series of sexual offences, all of which happened several years in the past. This most often occurs when an offender has offended against children in the past and as these children mature they come forward and charge the perpetrator. After the first charge is laid it is not unusual for other victims to appear and lay subsequent charges. The evaluator may be faced with an offender with multiple charges, multiple court dates, and possibly multiple convictions who has never before been to court – or who has never before been sanctioned for sexual misbehaviour. In a case like this, where the offender is before the court for the first time, all of the charges, court appearances and convictions become what is known as an "Index Cluster" and they are all counted as part of the Index Offence.

Index Cluster

An offender may commit a number of sexual offences in different jurisdictions, over a protracted period, in a spree of offending prior to being detected or arrested. Even though the offender may have a number of sentencing dates in different jurisdictions, the subsequent charges and convictions would constitute an "Index Cluster". These "spree" offences would group together – the early ones would not be considered "priors" and the last, the "Index", they all become the "Index Cluster". This is because the offender has not been "caught" and sanctioned for the earlier offences and then "chosen" to re-offend in spite of the sanction. Furthermore, historical offences that are detected after the offender is convicted of a more recent sexual offence would be considered part of the Index offence (pseudo-recidivism) and become part of the Index Cluster (See subsequent section).

For two offences to be considered separate offences, the second offence must have been committed after the offender was detected and detained and/or sanctioned for the previous offence. For example, an offence committed while an offender was released on bail for a previous sexual offence would supersede

the previous charge and become the Index offence. This is because the offender knew he/she had been detected for their previous crimes but chose to re-offend anyway.

An Index cluster can occur in three ways.

The first occurs when an offender commits multiple offences at the same time and these offences are then subsequently dealt with as a group by the police and the courts.

The second occurs when an Index offence has been identified for an offender and following this the evaluator becomes aware of previous historical offences for which the offender has never previously been charged or convicted. These previous offences come forward and become part of the "Index Cluster". This is also known as "Pseudo-recidivism". It is important to remember, these historical charges do not count as "priors" because the offending behaviour was not consequenced before the offender committed the Index offence. The issue being, the offender has not been previously sanctioned for his behaviour and then made the choice to re-offend.

The third situation arises when an offender is charged with several offences that come to trial within a short period of time (a month or so). When the criminal record is reviewed it appears that a cluster of charges were laid at the end of an investigation and that the court could not attend to all of these charges in one sitting day. When the evaluator sees groups of charges where it appears that a lot of offending has finally "caught up" with an offender – these can be considered a "cluster". If these charges happen to be the last charges they become an Index Cluster. The evaluator would not count the last court day as the "Index" and the earlier ones as "priors". A second example of this occurs when an offender goes on a crime "spree" – the offender repeatedly offends over time, but is not detected or caught. Eventually, after two or more crimes, the offender is detected, charged, and goes to court. But he has not been independently sanctioned between the multiple offences.

> **For Example:** An offender commits a rape, is apprehended, charged, and released on bail. Very shortly after his release, he commits another rape, is apprehended and charged. Because the offender was apprehended and charged between crimes this does not qualify as a crime "spree" – these charges and possible eventual convictions would be considered separate crimes. If these charges were the last sexual offences on the offender's record – the second charge would become the Index and the first charge would become a "Prior".
>
> However, if an offender commits a rape in January, another in March, another in May, and another in July and is finally caught and charged for all four in August this constitutes a crime "spree" because he was not detected or consequenced between these crimes. As such, this spree of sexual offences, were they the most recent sexual offences on the offenders record, would be considered an "Index Cluster" and all four rape offences would count as "Index" not just the last one.

Pseudo-recidivism

Pseudo-recidivism occurs when an offender currently involved in the criminal justice process is charged with old offences for which they have never before been charged. This occurs most commonly with sexual offenders when public notoriety or media publicity surrounding their trial or release leads other victims of past offences to come forward and lay new charges. Because the offender has not been charged or consequenced for these misbehaviours previously, they have not experienced a legal consequence and then chosen to re-offend.

> **For Example:** Mr. Jones was convicted in 1998 of three sexual assaults of children. These sexual assaults took place in the 1970's. As a result of the publicity surrounding Mr. Jones' possible release in 2002, two more victims, now adults, come forward and lay new charges in 2002. These offences also took place in the 1970's but these victims did not come forward until 2002. Because Mr. Jones

had never been sanctioned for these offences they were not on his record when he was convicted in 1998. Offences for which the offender has never been sanctioned that come to light once the offender is in the judicial process are considered "pseudo-recidivism" and are counted as part of the "Index Cluster". Historical charges of this nature are not counted as "priors".

The basic concept is that the offender has to be sanctioned for previous mis-behaviours and then "chose" to ignore that sanction and re-offend anyway. If he chooses to re-offend after a sanction then he creates a new offence and this offence is considered part of the record, usually a new Index offence. If historical offences come to light, for which the offender has never been sanctioned, once the offender is in the system for another sexual offence, these offences "come forward' and join the Index Offence to form an "Index Cluster".

Post-Index Offences

Offences that occur after the Index offence do not count for STATIC-99 purposes. Post-Index sexual offences create a new Index offence. Post-Index violent offences should be considered "external" risk factors and would be included separately in any report about the offender's behaviour.

For Example, Post-Index Sexual Offences: Consider a case where an offender commits a sexual offence, is apprehended, charged, and released on bail. You are assigned to evaluate this offender but before you can complete your evaluation he commits another sexual offence, is apprehended and charged. Because the offender was apprehended, charged, and released this does not qualify as a crime "spree". He chose to re-offend in spite of knowing that he was under legal sanction. These new charges and possible eventual convictions would be considered a separate crime. In a situation of this nature the new charges would create a new sexual offence and become the new Index offence. If these charges happened to be the last sexual offences on the offender's record – the most recent charges would become the Index and the charge on which he was first released on bail would become a "Prior" Sexual Offence.

For Example, Post-Index Violent Offences: Consider a case where an offender in prison on a sexual offence commits and is convicted of a serious violent offence. This violent offence would not be scored on either Item #3 (Index Non-sexual Violence convictions) or Item #4 (Prior Non-sexual Violence convictions) but would be referred to separately, as an "external risk factor", outside the context of the STATIC-99 assessment, in any subsequent report on the offender.

Prior Offence(s)

A prior offence is any sexual or non-sexual crime, institutional rule violation, probation, parole or conditional release violation(s) and/or arrest charge(s) or, conviction(s), that was legally dealt with PRIOR to the Index offence. This includes both juvenile and adult offences. In general, to count as a prior, the sanction imposed for the prior offense must have occurred before the Index offense was committed. However, if the offender was aware that they were under some form of legal restraint and then goes out and re-offends in spite of this restriction, the new offence(s) would create a new Index offence. An example of this could be where an offender is charged with "Sexual Communication with a Person Under the Age of 14 Years" and is then released on his own recognizance with a promise to appear or where they are charged and released on bail. In both of these cases if the offender then committed an "Invitation to Sexual Touching" after being charged and released the "Invitation to Sexual Touching" would become the new Index offence and the "Sexual Communication with a Person Under the Age of 14 Years" would automatically become a "Prior" sexual offence.

In order to count violations of conditional release as "Priors" they must be "real crimes", something that someone not already engaged in the criminal justice system could be charged with. Technical violations such as Being in the Presence of Minors or Drinking Prohibitions do not count.

Scoring the 10 Items

Item # 1 - Young

The Basic Principle: Research (Hanson, 2001) shows that sexual recidivism is more likely in an offender's early adult years than in an offender's later adult years. See Figure 1, next page.

Information Required to Score this Item: To complete this item the evaluator has to confirm the offender's birth date or have other knowledge of the offender's age.

The Basic Rule: If the offender is between his 18th and 25th birthday at exposure to risk you score the offender a "1" on this item. If the offender is past his 25th birthday at exposure to risk you score the offender a "0" on this item.

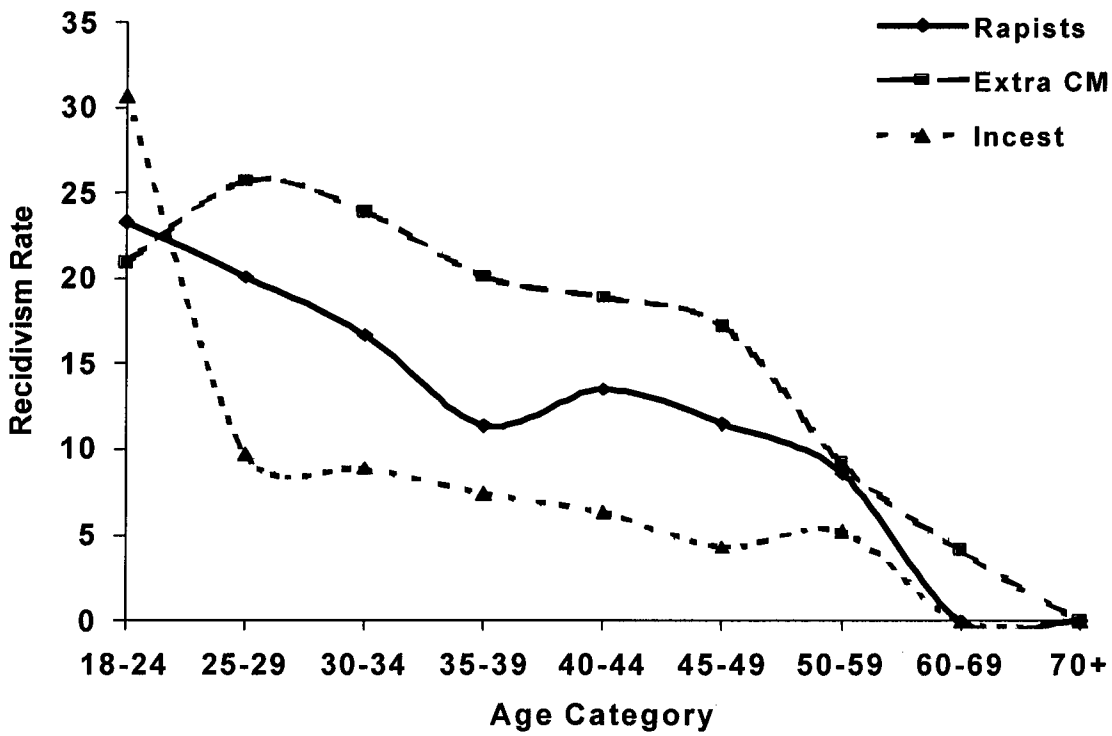
STATIC-99 is not intended for those who are less than 18 years old at the time of exposure to risk.

Under certain conditions, such as anticipated release from custody, the evaluator may be interested in an estimate of the offender's risk at some specific point in the future. This may occur if the offender is presently incarcerated (January) and you are interested in his risk when he is eligible for release in September. However, you know that the offender's 25th birthday will occur in May. If you were assessing the offender's estimated risk of re-offence for his possible release in September – because at time of exposure to risk he is past his 25th birthday - you would not give the risk point for being less-than-25 even though he is only 24 today. You calculate risk based upon age at exposure to risk.

Sometimes the point at which an offender will be exposed to risk may be uncertain, for example, if he is eligible for parole but may not get it. In these cases it may be appropriate to use some form of conditional wording indicating how his risk assessment would change according to when he is released.

Figure 1

Age Distribution of Sexual Recidivism in Sexual Offenders



Rapists (n = 1,133)
Extra-familial Child Molesters [Extra CM] (n = 1,411)
Incest Offenders (n = 1,207)

Hanson, R. K. (2002). Recidivism and age: Follow-up data on 4,673 sexual offenders. Journal of Interpersonal Violence, 17, 1046-1062.

Hanson, R. K. (2001). *Age and sexual recidivism: A comparison of rapists and child molesters.* User Report 2001-01. Ottawa: Department of the Solicitor General of Canada. Department of the Solicitor General of Canada website, www.sgc.gc.ca

Item # 2 – Ever Lived with an Intimate Partner – 2 Years

The Basic Principle: Research suggests that having a prolonged intimate connection to someone may be a protective factor against sexual re-offending. See Hanson and Bussière (1998), Table 1 – Items "Single (never married) and Married (currently)". On the whole, we know that the relative risk to sexually re-offend is lower in men who have been able to form intimate partnerships.

Information Required to score this Item: To complete this item it is highly desirable that the evaluator confirm the offender's relationship history through collateral sources or official records.

The Basic Rule: If the offender has never had an intimate adult relationship of two years duration you score the offender a "1" on this item. If the offender has had an intimate adult relationship of two years duration you score the offender a "0" on this item.

The intent of this item is to reflect whether the offender has the personality/psychological resources, as an adult, to establish a relatively stable "marriage-like" relationship with another person. It does not matter whether the intimate relationship was/is homosexual or heterosexual.

- **Missing Items** – The only item that may be omitted on the STATIC-99 is this one (Ever Lived With – Item #2). If no information is available this item should be scored a "0" (zero) – as if the offender has lived with an intimate partner for two years.

- To complete this item the evaluator should make an attempt to confirm the offender's relationship history through collateral sources and official records. In the absence of these sources self-report information may be utilized, assuming of course, that the self-report seems credible and reasonable to the evaluator. There may be certain cases (immigrants, refugees from third world countries) where it is not possible to access collaterals or official records. Where the evaluator, based upon the balance of probabilities, is convinced this person has lived with an intimate partner for two years the evaluator may score this item a "0". It is greatly preferred that you confirm the existence of this relationship through collateral contacts or official records. This should certainly be done if the assessment is being carried out in an adversarial context where the offender would have a real motive to pretend to a non-existent relationship.

- In cases where confirmation of relationship history is not possible or feasible the evaluator may chose to score this item both ways and report the difference in risk estimate in their final report.

If a person has been incarcerated most of their life or is still quite young and has not had the opportunity to establish an intimate relationship of two years duration, they are still scored as never having lived with an intimate partner for two years. They score a "1". There are two reasons for this. The first being, this was the way this item was scored in the original samples and to change this definition now would distance the resulting recidivism estimates from those validated on the STATIC-99. Secondly, having been part of, or experienced, a sustained relationship may well be a protective factor for sexual offending. As a result, the reason why this protective factor is absent is immaterial to the issue of risk itself.

The offender is given a point for this item if he has never lived with an adult lover (male or female) for at least two years. An adult is an individual who is over the age of consent to marriage. The period of co-habitation must be continuous with the same person.

Generally, relationships with adult victims do not count. However, if the offender and the victim had two years of intimate relationship before the sexual offences occurred then this relationship would count, and the offender would score a "0" on this item. However, if the sexual abuse started before the offender and the victim had been living together in an intimate relationship for two years then the relationship would not count regardless of it's length.

Cases where the offender has lived over two years with a child victim in a "lover" relationship do not count as living with an intimate partner and the offender would be scored a "1" on this item. Illegal relationships (Incestuous relationship with his Mother) and live-in relationships with "once child" victims do not count as "living together" for the purposes of this item and once again the offender would score a "1" on this item. A "once child" victim is the situation where the offender abused a child but that victim is either still living, as an adult, in an intimate relationship with the offender or who has lived, as an adult, in an intimate relationship with the offender.

Exclusions

- Legal marriages involving less than two years of co-habitation do not count
- Male lovers in prison would not count
- Prison marriages (of any duration) where the offender is incarcerated during the term of the relationship do not count
- Illegal relationships, such as when the offender has had an incestuous relationship with his mother do not count
- Intimate relationships with non-human species do not count
- Relationships with victims do not count (see above for exception)
- Priests and others who for whatever reason have chosen, as a lifestyle, not to marry/co-habitate are still scored as having never lived with an intimate partner

Extended Absences

In some jurisdictions it is common for an offender to be away from the marital/family home for extended periods. The offender is generally working on oilrigs, fishing boats, bush camps, military assignment, or other venues of this nature. While the risk assessment instrument requires the intimate co-habitation to be continuous there is room for discretion. If the offender has an identifiable "home" that he/she shares with a lover and the intimate relationship is longer than two years, the evaluator should look at the nature and consistency of the relationship. The evaluator should attempt to determine, in spite of these prolonged absences, whether this relationship looks like an honest attempt at a long-term committed relationship and not just a relationship of convenience.

If this relationship looks like an honest attempt at a long-term committed relationship then the evaluator would score the offender a "0" on this item as this would be seen as an intimate relationship of greater than two years duration. If the evaluator thinks that the relationship is a relationship of convenience, the offender would score a "1". If the living together relationship is of long duration (three plus years) then the periods of absence can be fairly substantial (four months in a logging camp/oil rig, or six months or more on military assignment).

Item # 3 – Index Non-sexual Violence (NSV) – Any Convictions

The Basic Principle: A meta-analytic review of the literature indicates that having a history of violence is a predictive factor for future violence. See Hanson and Bussière (1998), Table 2 – Item "Prior Violent Offences". The presence of non-sexual violence predicts the seriousness of damage were a re-offence to occur and is strongly indicative of whether overt violence will occur (Hanson & Bussière, 1998). This item was included in the STATIC-99 because in the original samples this item demonstrated a small positive relationship with sexual recidivism (Hanson & Thornton, unpublished data).

In English data, convictions for non-sexual violence were specifically predictive of rape (forced sexual penetration) rather than all kinds of sexual offenses (Thornton & Travers, 1991). In some English data sets this item has also been predictive of reconviction for any sex offense.

Information Required to Score this Item: To score this item the evaluator must have access to an official criminal record as compiled by police, court, or correctional authorities. Self-report of criminal convictions may not be used to score this item except in specific rare situations, please see sub-section "Self-report and the STATIC-99" in the Introduction section.

The Basic Rule: If the offender's criminal record shows a separate conviction for a non-sexual violent offence at the same time they were convicted of their Index Offence, you score the offender a "1" on this item. If the offender's criminal record does not show a separate conviction for a non-sexual violent offence at the same time they were convicted of their Index Offence, you score the offender a "0" on this item.

This item refers to convictions for non-sexual violence that are dealt with on the same sentencing occasion as the Index sex offence. A separate Non-sexual violence conviction is required to score this item. These convictions can involve the same victim as the Index sex offence or they can involve a different victim. All non-sexual violence convictions are included, providing they were dealt with on the same sentencing occasion as the Index sex offence(s).

Both adult and juvenile convictions count in this section. In cases where a juvenile is not charged with a violent offence but is moved to a secure or more secure residential placement as the result of a non-sexually violent incident, this counts as a conviction for Non-sexual Violence.

Included are:

- Aggravated Assault
- Arson
- Assault
- Assault causing bodily harm
- Assault Peace/Police Officer
- Attempted Abduction
- Attempted Robbery
- False Imprisonment
- Felonious Assault
- Forcible Confinement
- Give Noxious Substance (alcohol, narcotics, or other stupefacient in order to impair a victim)
- Grand Theft Person ("Grand Theft Person" is a variation on Robbery and may be counted as Non-sexual violence)
- Juvenile Non-sexual Violence convictions count on this item
- Kidnapping
- Murder

- "PINS" Petition (Person in need of supervision) There have been cases where a juvenile has been removed from his home by judicial action under a "PINS" petition due to violent actions. This would count as a conviction for Non-sexual violence.
- Robbery
- Threatening
- Using/pointing a weapon/firearm in the commission of an offence
- Violation of a Domestic Violence Order (Restraining Order) (a conviction for)
- Wounding

Note: If the conviction was "Battery" or "Assault" and the evaluator knew that there was a sexual component, this would count as a sexual offence and as a Non-sexual Violence offence.

Excluded are:

- Arrest/charges do not count
- Convictions overturned on appeal do not count
- Non-sexual violence that occurs after the Index offence does not count
- Institutional rules violations cannot count as Non-sexual Violence convictions
- Do not count driving accidents or convictions for Negligence causing Death or Injury

Weapons offences

Weapons offences do not count unless the weapon was used in the commission of a violent or a sexual offence. For example, an offender might be charged with a sexual offence and then in a search of the offenders home the police discover a loaded firearm. As a result, the offender is convicted, in addition to the sexual offence, of unsafe weapons storage. This would not count as a conviction for non-sexual violence as the weapons were not used in the commission of a violent or sexual offence.

A conviction for Possession of a firearm or Possession of a firearm without a licence would generally not count as a non-sexual violent offence. A conviction for Pointing a firearm would generally count as non-sexual violence as long as the weapon was used to threaten or gain victim compliance. Intent to harm or menace the victim with the weapon must be present in order to score a point on this item.

Resisting arrest

"Resisting Arrest" does not count as non-sexual violence. In Canadian law this charge could apply to individuals who run from an officer or who hold onto a lamppost to delay arrest. If an offender fights back he will generally be charged with "Assault a Peace/Police Officer" which would count as non-sexual violence.

Convictions that are coded as only "sexual"

- Sexual Assault, Sexual Assault with a Weapon, Aggravated Sexual Assault, and Sexual Assault Causing Bodily Harm are not coded separately as Non-sexual Violence – these convictions are simply coded as sexual
- Assault with Intent to Commit Rape (U.S. Charge) – A conviction under this charge is scored as only a sex offence – Do not code as Non-sexual Violence
- Convictions for "Sexual Battery" (U.S. Charge) – A conviction under this charge is scored as only a sex offence – Do not code as Non-sexual Violence

Situations where points are scored both for a "Sexual Offence" and a Non-sexual Violence offence

An offender may initially be charged with one count of sexual assault of a child but plea-bargains this down to one Forcible Confinement and one Physical Assault of a Child. In this instance, both offences

would be considered sexual offences (they could be used as an "Index" offence or could be used as "priors" if appropriate) as well; a risk point would be given for non-sexual violence.

If you have an individual convicted of Kidnapping/Forcible Confinement (or a similar offence) and it is known, based on the balance of probabilities, this was a sexual offence - this offence may count as the "Index" sexual offence or you may score this conviction as a sexual offence under Prior Sexual Offences, whichever is appropriate given the circumstances.

For Example

Criminal Record for Joe Smith			
Date	**Charge**	**Conviction**	**Sentence**
July 2000	Forcible Confinement	Forcible Confinement	20 Months incarceration and 3 years probation
If the evaluator knows that the behaviour was sexual this conviction for Forcible Confinement would count as One Sexual Offence (either for "priors" or an "Index") and One Non-sexual Violence (either "prior" or "Index")			

However, were you to see the following:

Criminal Record for Joe Smith			
Date	**Charge**	**Conviction**	**Sentence**
July 2000	1) Forcible Confinement 2) Sexual Assault	1) Forcible Confinement 2) Sexual Assault	20 Months incarceration and 3 years probation
If the evaluator knows that the Forcible Confinement was part of the sexual offence this situation would count as Two Sexual Offences (either for "priors" or an "Index") and One Non-sexual Violence (either "prior" or "Index")			

Military

If an "undesirable discharge" is given to a member of the military as the direct result of a violent offence (striking an officer, or the like) this would count as a Non-sexual Violence conviction and as a sentencing date (Item #6). However, if the member left the military when he normally would have and the "undesirable discharge" is equivalent to a bad job reference, this offence would not count as Non-sexual Violence or as a Sentencing Date.

Murder – With a sexual component

A sexual murderer who only gets convicted of murder would get one risk point for Non-sexual violence, but this murder would also count as a sexual offence.

Revocation of Conditional Release for "Lifers", Dangerous Offenders, and Others with Indeterminate Sentences

If a "lifer", Dangerous Offender, or other offender with an already imposed indeterminate sentence is simply revoked (returned to prison from conditional release in the community without trial) for a sexual behaviour that would generally attract a sexual charge if the offender were not already under sanction and at the same time this same offender committed a violent act sufficient that it would generally attract a

separate criminal charge for a violent offence, this offender can be scored for Index Non-sexual Violence when the accompanying sexual behaviour stands as the Index offence. Note: the evaluator should be sure that were this offender not already under sanction that it is highly likely that both a sexual offence charge and a violent offence charge would be laid by police.

Item # 4 – Prior Non-sexual Violence – Any Convictions

The Basic Principle: A meta-analytic review of the literature indicates that having a history of violence is a predictive factor for future violence. See Hanson and Bussière (1998), Table 2 – Item "Prior Violent Offences". The presence of non-sexual violence predicts the seriousness of damage were a re-offence to occur and is strongly indicative of whether overt violence will occur (Hanson & Bussière, 1998). This item was included in the STATIC-99 because in the original samples this item demonstrated a small positive relationship with sexual recidivism (Hanson & Thornton, unpublished data).

In English data, convictions for prior non-sexual violence were specifically predictive of rape (forced sexual penetration) rather than all kinds of sexual offenses (Thornton & Travers, 1991). In some English data sets this item has also been predictive of reconviction for any sex offense. Sub-analyses of additional data sets confirm the relation of prior non-sexual violence and sexual recidivism (Hanson & Thornton, 2002).

Information Required to Score this Item: To score this item the evaluator must have access to an official criminal record as compiled by police, court, or correctional authorities. Self-report of criminal convictions may not be used to score this item except in specific rare situations, please see sub-section "Self-report and the STATIC-99" in the Introduction section.

The Basic Rule: If the offender's criminal record shows a separate conviction for a non-sexual violent offence prior to the Index Offence, you score the offender a "1" on this item. If the offender's criminal record does not show a separate conviction for a non-sexual violent offence prior to their Index Offence, you score the offender a "0" on this item.

This item refers to convictions for non-sexual violence that are dealt with on a sentencing occasion that pre-dates the Index sex offence sentencing occasion. A separate non-sexual violence conviction is required to score this item. These convictions can involve the same victim as the Index sex offence or they can involve a different victim, but the offender must have been convicted for this non-sexual violent offence before the sentencing date for the Index offence. All non-sexual violence convictions are included, providing they were dealt with on a sentencing occasion prior to the Index sex offence.

Both adult and juvenile convictions count in this section. In cases where a juvenile is not charged with a violent offence but is moved to a secure or more secure residential placement as the result of a non-sexually violent incident, this counts as a conviction for Non-sexual Violence.

Included are:

- Aggravated Assault
- Arson
- Assault
- Assault Causing Bodily Harm
- Assault Peace/Police Officer
- Attempted Abduction
- Attempted Robbery
- False Imprisonment
- Felonious Assault
- Forcible Confinement
- Give Noxious Substance (alcohol, narcotics, or other stupefacient in order to impair a victim)
- Grand Theft Person ("Grand Theft Person" is a variation on Robbery and may be counted as Non-sexual violence)
- Juvenile Non-sexual Violence convictions count on this item

- Kidnapping
- Murder
- "PINS" Petition (Person in need of supervision) There have been cases where a juvenile has been removed from his home by judicial action under a "PINS" petition due to violent actions. This would count as a conviction for Non-sexual violence.
- Robbery
- Threatening
- Using/pointing a weapon/firearm in the commission of an offence
- Violation of a Domestic Violence Order (Restraining Order) (a conviction for)
- Wounding

Note: If the conviction was "Battery" or "Assault" and the evaluator knew that there was a sexual component, this would count as a sexual offence and as a Non-sexual Violence offence.

Excluded are:

- Arrest/charges do not count
- Convictions overturned on appeal do not count
- Non-sexual violence that occurs after the Index offence does not count
- Institutional rules violations cannot count as Non-sexual Violence convictions
- Do not count driving accidents or convictions for Negligence causing Death or Injury

Weapons offences

Weapons offences do not count unless the weapon was used in the commission of a violent or a sexual offence. For example, an offender might be charged with a sexual offence and then in a search of the offenders home the police discover a loaded firearm. As a result, the offender is convicted, in addition to the sexual offence, of unsafe weapons storage. This would not count as a conviction for non-sexual violence as the weapons were not used in the commission of a violent or sexual offence.

A conviction for Possession of a firearm or Possession of a firearm without a licence would generally not count as a non-sexual violent offence. A conviction for Pointing a firearm would generally count as non-sexual violence as long as the weapon was used to threaten or gain victim compliance. Intent to harm or menace the victim with the weapon must be present in order to score a point on this item.

Resisting arrest

"Resisting Arrest" does not count as non-sexual violence. In Canadian law this charge could apply to individuals who run from an officer or who hold onto a lamppost to delay arrest. If an offender fights back he will generally be charged with "Assault a Peace/Police Officer" which would count as non-sexual violence.

Convictions that are coded as only "sexual"

- Sexual Assault, Sexual Assault with a Weapon, Aggravated Sexual Assault, and Sexual Assault Causing Bodily Harm are not coded separately as Non-sexual Violence – these convictions are simply coded as sexual
- Assault with Intent to Commit Rape (U.S. Charge) – A conviction under this charge is scored as only a sex offence – Do not code as Non-sexual Violence
- Convictions for "Sexual Battery" (U.S. Charge) – A conviction under this charge is scored as only a sex offence – Do not code as Non-sexual Violence

Situations where points are scored both for a "Sexual Offence" and a Non-sexual Violence offence

An offender may initially be charged with one count of sexual assault of a child but plea-bargains this down to one Forcible Confinement and one Physical Assault of a Child. In this instance, both offences would be considered sexual offences (they could be used as an "Index" offence or could be used as "priors" if appropriate) as well; a risk point would be given for non-sexual violence.

If you have an individual convicted of Kidnapping/Forcible Confinement (or a similar offence) and it is known, based on the balance of probabilities, this was a sexual offence - this offence may count as the "Index" offence or you may score this conviction as a sexual offence under Prior Sexual Offences, whichever is appropriate given the circumstances.

For Example

Criminal Record for Joe Smith			
Date	**Charge**	**Conviction**	**Sentence**
July 2000	Forcible Confinement	Forcible Confinement	20 Months incarceration and 3 years probation
If the evaluator knows that the behaviour was sexual this conviction for Forcible Confinement would count as One Sexual Offence (either for "priors" or an "Index") and One Non-sexual Violence (either "prior" or "Index")			

However, were you to see the following:

Criminal Record for Joe Smith			
Date	**Charge**	**Conviction**	**Sentence**
July 2000	1) Forcible Confinement 2) Sexual Assault	1) Forcible Confinement 2) Sexual Assault	20 Months incarceration and 3 years probation
If the evaluator knows that the Forcible Confinement was part of the sexual offence this situation would count as Two Sexual Offences (either for "priors" or an "Index") and One Non-sexual Violence (either "prior" or "Index")			

Military

If an "undesirable discharge" is given to a member of the military as the direct result of a violent offence (striking an officer, or the like) this would count as a Non-sexual Violence conviction and as a sentencing date (Item #6). However, if the member left the military when he normally would have and the "undesirable discharge" is equivalent to a bad job reference, this offence would not count as Non-sexual Violence or as a Sentencing Date.

Murder – With a sexual component

A sexual murderer who only gets convicted of murder would get one risk point for Non-sexual violence, but this murder would also count as a sexual offence.

Revocation of Conditional Release for "Lifers", Dangerous Offenders, and Others with Indeterminate Sentences

If a "lifer", Dangerous Offender, or other offender with an already imposed indeterminate sentence has been revoked (returned to prison from conditional release in the community without trial) for a Non-sexual Violent offence that happened prior to the Index sexual offence (or Index Cluster) this revocation can stand as a conviction for Non-sexual Violence if that non-sexually violent act were sufficient that it would generally attract a separate criminal charge for a violent offence. Note: the evaluator should be sure that were this offender not already under sanction that it is highly likely that a violent offence charge would be laid by police.

Item # 5 – Prior Sex Offences

The Basic Principle: This item and the others that relate to criminal history and the measurement of persistence of criminal activity are based on a firm foundation in the behavioural literature. As long ago as 1911 Thorndyke stated that the "the best predictor of future behaviour, is past behaviour". Andrews & Bonta (2003) state that having a criminal history is one of the "Big Four" predictors of future criminal behaviour. More recently, and specific to sexual offenders, a meta-analytic review of the literature indicates that having prior sex offences is a predictive factor for sexual recidivism. See Hanson and Bussière (1998), Table 1 – Item "Prior Sex Offences".

Information Required to Score this Item: To score this item you must have access to an official criminal record as compiled by police, court, or correctional authorities. Self-report of criminal convictions may not be used to score this item except in specific rare situations, please see sub-section "Self-report and the STATIC-99" in the Introduction section.

The Basic Rule: This is the only item in the STATIC-99 that is not scored on a simple "0" or "1" dichotomy. From the offender's official criminal record, charges and convictions are summed separately. Charges that are not proceeded with or which do not result in a conviction are counted for this item. If the record you are reviewing only shows convictions, each conviction is also counted as a charge.

Charges and convictions are summed separately and these totals are then transferred to the chart below.

Note: For this item, arrests for a sexual offence are counted as "charges".

Prior Sexual Offences		
Charges	**Convictions**	**Final Score**
None	None	0
1-2	1	1
3-5	2-3	2
6+	4	3

Whichever column, charges or convictions, gives the offender the "higher" final score is the column that determines the final score. Examples are given later in this section.

This item is based on officially recorded institutional rules violations, probation, parole and conditional release violations, charges, and convictions. Only institutional rules violations, probation, parole, and conditional release violations, charges, and convictions of a sexual nature that occur **PRIOR** to the Index offence are included.

Do not count the Index Sexual Offence

The Index sexual offence charge(s) and conviction(s) are not counted, even when there are multiple offences and/or victims involved, and the offences occurred over a long period of time.

Count all sexual offences prior to the Index Offence

All pre-Index sexual charges and convictions are coded, even when they involve the same victim, or multiple counts of the same offence. For example, three charges for sexual assault involving the same victim would count as three separate charges. Remember, "counts count". If an offender is charged with six counts of Invitation to Sexual Touching and is convicted of two counts you would score a "6" under

charges and a "2" under convictions. Convictions do not take priority over charges. If the record you are reviewing only shows convictions, each conviction is also counted as a charge.

Generally when an offender is arrested, they are initially charged with one or more criminal charges. However, these charges may change as the offender progresses through the criminal justice system. Occasionally, charges are dropped for a variety of legal reasons, or "pled down" to obtain a final plea bargain. As a basic rule, when calculating charges use the most recent charging document as your source of official charges.

In some cases a number of charges are laid by the police and as the court date approaches these charges are "pled-down" to fewer charges. When calculating charges and convictions you count the number of charges that go to court. In other cases an offender may be charged with a serious sexual offence (Aggravated Sexual Assault) and in the course of plea bargaining agrees to plead to two (or more) lesser charges (Assault). Once again, you count the charges that go to court and in a case like this the offender would score as having more charges than were originally laid by the police.

When scoring this item, counting charges and convictions, it is important to use an official criminal record. One incident can result in several charges or convictions. For example, an offender perpetrates a rape where he penetrates the victim once digitally and once with his penis while holding her in a room against her will. This may result in two convictions for Sexual Battery (Sexual Assault or equivalent) and one conviction of False Imprisonment (Forcible Confinement or equivalent). So long as it is known that the False Imprisonment was part of the sexual offence, the offender would be scored as having three (3) sexual charges, three (3) sexual convictions and an additional risk point for a conviction of Non-sexual Violence [the False Imprisonment] (Either "Index" {Item #3} or "Prior" {Item #4} as appropriate).

Probation, Parole and Conditional Release Violations

If an offender violates probation, parole, or conditional release with a sexual misbehaviour, these violations are counted as one charge.

If the offender violates probation or parole on more than one occasion, within a given probation or parole period, each separate occasion of a sexual misbehaviour violation is counted as one charge. For example, a parole violation for indecent exposure in July would count as one charge. If the offender had another parole violation in November for possession of child pornography, it would be coded as a second charge.

Multiple probation, parole and conditional release violations for sexual misbehaviours laid at the same time are coded as one charge. Even though the offender may have violated several conditions of parole during one parole period, it is only counted as one charge, even if there were multiple sex violations.

The following is an example of counting charges and convictions.

Criminal History for John Jack			
Date	**Charges**	**Convictions**	**Sanction**
July 1996	Lewd and Lascivious with Child (X3) Sodomy Oral Copulation Burglary	Lewd and Lascivious with Child (X3) Sodomy (dismissed) Oral Copulation (dismissed) Burglary (dismissed)	3 Years
May 2001	Sexual Assault on a Child		

To determine the number of Prior Sex Offences you first exclude the Index Offence. In the above case, the May 2001 charge of Sexual Assault on a Child is the Index Offence. After excluding the May 2001

charge, you sum all remaining sexual offence charges. In this case you would sum, {Lewd and Lascivious with Child (X3), Sodomy (X1), and Oral Copulation (X1)} for a total of five (5) previous Sex Offence charges. You then sum the number of Prior Sex Offence convictions. In this case, there are three convictions for Lewd and Lascivious with Child. These two sums are then moved to the scoring chart shown below. The offender has five prior charges and three prior convictions for sexual offences. Looking at the chart below, the evaluator reads across the chart that indicates a final score for this item of two (2).

Prior Sexual Offences		
Charges	**Convictions**	**Final Score**
None	None	0
1-2	1	1
3-5	2-3	2
6+	4	3

Charges and Convictions are counted separately – the column that gives the higher final score is the column that scores the item. It is possible to have six (6+) or more charges for a sexual offence and no convictions. Were this to happen, the offender's final score would be a three (3) for this item.

Acquittals

Acquittals count as charges and can be used as the Index Offence. The reason that acquittals are scored this way is based upon a research study completed in England that found that men acquitted of rape are more likely to be convicted of sexual offences in the follow-up period than men who had been found guilty {with equal times at risk} (Soothill et al., 1980).

Note: Acquittals do not count for Item #6 – Prior Sentencing Dates.

Adjudication Withheld

In some jurisdictions it is possible to attract a finding of "Adjudication Withheld", in which case the offender receives a probation-like period of supervision. This is counted as a conviction because a sentence was given.

Appeals

If an offender is convicted and the conviction is later overturned on appeal, code as one charge.

Arrests Count

In some instances, the offender has been arrested for a sexual offence, questioning takes place but no formal charges are filed. If the offender is arrested for a sexual offence and no formal charges are filed, a "1" is coded under charges, and a "0" is coded under convictions. If the offender is arrested and one or more formal charges are filed, the total number of charges is coded, even when no conviction ensues.

Coding "Crime Sprees"

Occasionally, an evaluator may have to score the STATIC-99 on an offender who has been caught at the end of a long line of offences. For example, over a 20-day period an offender breaks into 5 homes, each of which is the home of an elderly female living alone. One he rapes, one he attempts to rape but she gets away, and three more get away, one with a physical struggle (he grabs her wrists, tells her to shut up). The offender is subsequently charged with Sexual Assault, Attempted Sexual Assault, B & E with Intent (X2), and an Assault. The question is, do all the charges count as sexual offences, or just the two charges

that are clearly sexual? Or, does the evaluator score the two sex charges as sex charges and the assault charges as Non-sexual Violence?

In cases such as this, code all 5 offences as sex offences - based upon the following thinking:

1) From the evidence presented this appears to be a "focused" crime spree – We assume the evaluator has little doubt what would have happened had the women not escaped or fought back.
2) Our opinion of "focus" is reinforced by the exclusive nature of the victim group, "elderly females". This offender appears to want something specific, and, the very short time span - 20 days – leads us to believe that the offender was feeling some sexual or psychological pressure to offend.
3) An attempted contact sex offence is scored as a contact sex offence for the purposes of the STATIC-99. Charges such as Attempted Sexual Assault (Rape) and Invitation to Sexual Touching are coded as contact sex offences due to their intention.
4) We recommend that if the evaluator "based on the balance of probabilities" (not "beyond a reasonable doubt") - is convinced that sex offences were about to occur that these actions can be counted as sex offences.
5) Please also read sub-section "Similar Fact Crimes" in the "Definitions" section.

Conditional Discharges

Where an offender has been charged with a sexual offence and receives a Conditional Discharge, for the purposes of the STATIC-99 a conditional discharge counts as a conviction and a sentencing date.

Consent Decree

Where applicable, "Consent Decree" counts as a conviction and a sentencing date.

Court Supervision

In some states it is possible to receive a sentence of Court Supervision, where the court provides some degree of minimal supervision for a period (one year), this is similar to probation and counts as a conviction.

Detection by Child Protection Officials

Being "detected" by the Children's Aid Society or other Child Protection Services does not count as an official sanction; it may not stand as a charge or a conviction.

Extension of Sentence by a Parole Board (or similar)

In some jurisdictions Parole Boards (or similar) have the power to extend the maximum period of incarceration beyond that determined by the court. If an offender is assigned extra time, added to their sentence, by a parole board for a sexual criminal offence this counts as an additional sexual charge and conviction. The new additional period of incarceration must extend the total sentence and must be for sexual misbehaviour. This would not count as a sexual conviction if the additional time was to be served concurrently or if it only changed the parole eligibility date. This situation is not presently possible in Canada.

Giving Alcohol to a Minor

The charge of Giving Alcohol to a Minor (or it's equivalent, drugs, alcohol, noxious substance, or other stupefacient) – can count as a sexual offence (both charge and conviction) if the substance was given with the intention of making it easier to commit a sexual offence. If there were evidence the alcohol (or substance) was given to the victim just prior to the sexual assault, this would count as a sexual offence. If

there is no evidence about what went on, or the temporal sequence of events, the substance charge would not count as a sexual offence.

Institutional Disciplinary Reports

Institutional Disciplinary Reports for sexual misbehaviours that would likely result in a charge were the offender not already in custody count as charges. In a prison environment it is important to distinguish between targeted activity and non-targeted activity. Institutional disciplinary reports that result from an offender who specifically chooses a female guard and masturbates in front of her, where she is the obvious and intended target of the act would count as a "charge" and hence, could stand as an Index offence. The alternative situation is where an offender who is masturbating in his cell and is discovered by a female employee and she is not an obvious and intended target. In some jurisdictions this would lead to a Disciplinary Report. Violations of this "non-targeted" nature do not count as a "charge' and could not stand as an Index offence. If you have insufficient information to distinguish between these two types of occurrences the offender gets the benefit of the doubt and you do not score the occurrence.

> An example of a behaviour that might get an inmate a disciplinary charge, but would not be used as a charge for scoring the STATIC-99, includes the inmate who writes an unwanted love letter to a female staff. The letter does not contain sexual content to the extent that the offender could be charged. Incidents of this nature do not count as a charge.
>
> Prison misconducts for sexual misbehaviours count as one charge per sentence, even when there are multiple incidents. The reason for this is that in some jurisdictions the threshold for misconducts is very low. Often, as previously described, misconduct will involve a female guard simply looking into a cell and observing an inmate masturbating. Even in prison, serious sexual offences, rape and attempted rape will generally attract official criminal charges.

Juvenile Offences

Both adult and juvenile charges and convictions count when scoring this item. In cases where a juvenile was not charged with a sexual offence but was moved to a secure or more secure residential placement as the result of a sexual incident, this counts as a charge and a conviction for the purposes of scoring Prior Sex Offences.

Juvenile Petitions

In some states, it is impossible for a juvenile offender to get a "conviction". Instead, the law uses the wording that a juvenile "petition is sustained" (or any such wording). For the purposes of scoring the STATIC-99 this is equivalent to an adult conviction because there are generally liberty-restricting consequences. Any of these local legal wordings can be construed as convictions if they would be convictions were that term available.

Military

For members of the military, a discharge from service as a result of sexual crimes would count as a charge and a conviction.

If an "undesirable discharge" were given to a member of the military as the direct result of a sexual offence, this would count as a sexual conviction and as a sentencing date (Item #6). However, if the member left the military when he normally would have, and the "undesirable discharge" is the equivalent to a bad job reference, the undesirable discharge would not count as a sexual offence or as a Sentencing Date (Item #6).

Military Courts Martial

If an offender is given a sanction (Military Brig or it's equivalent) for a criminal offence, rather than a purely military offence {failure of duty}, these offences count, both charges and convictions, when scoring the STATIC-99. If the charges are sexual they count as sexual offences and if violent, they count as violent offences. These offences also count as sentencing dates (Item #6). Pure Military Offences {Conduct Unbecoming, Insubordination, Not following a lawful order, Dereliction of Duty, etc.} do not count when scoring the STATIC-99.

Noxious Substance

The charge of Giving A Noxious Substance (or it's equivalent, drugs, alcohol, or other stupefacient) – can count as a sexual offence (both charge and conviction) if the substance was given with the intention of making it easier to commit the sexual offence. If there were evidence the substance was given to the victim just prior to the sexual assault, this would count as a sexual offence. If there is no evidence about what went on, or the temporal sequence of events, the substance charge would not count as a sexual offence.

Not Guilty

Being found "Not Guilty" can count as charges and can be used as the Index Offence. Note: This is not the case for Item #6, "Prior Sentencing Dates", where being found "Not Guilty" is not counted as a Prior Sentencing Date.

Official Cautions – United Kingdom

In the United Kingdom, an official caution should be treated as equivalent to a charge and a conviction.

Official Diversions

Official diversions are scored as equivalent to a charge and a conviction (Restorative Justice, Reparations, Family Group Conferencing, Community Sentencing Circles).

Peace Bonds, Judicial Restraint Orders and "810" Orders

In some instances a Peace Bond/Judicial Restraint Order/810 Orders are placed on an offender when sexual charges are dropped or dismissed or when an offender leaves jail or prison. Orders of this nature, primarily preventative, **are not counted** as charges or convictions for the purposes of scoring the STATIC-99.

"PINS" Petition (Person in need of supervision)

There have been cases where a juvenile has been removed from his home by judicial action under a "PINS" petition due to sexual aggression. This would count as a charge and a conviction for a sexual offence.

Priests and Ministers

For members of a religious group (Clergy and similar professions) some disciplinary or administrative actions within their own organization can count as a charge and a conviction. The offender has to receive some form of official sanction in order for it to count as a conviction. An example of an official sanction would be removal from a parish for a priest or minister under the following circumstances.

If the receiving institution knows they are being sent a sex offender and considers it part of their mandate to address the offender's problem or attempt to help, this would function as equivalent to being sent to a

correctional institution and would count as a charge and a conviction. A conviction of this nature may stand as an Index offence.

Allegations that result in a "within-organization" disciplinary move or a move designed to explicitly address the offenders problems would be counted as a charge and a conviction. A conviction of this nature may stand as an Index offence.

Being transferred to a new parish or being given an administrative posting away from the public with no formal sanction or being sent to graduate school for re-training would not count as a charge or conviction.

Where a priest/minister is transferred between parishes due to allegations of sexual abuse but there is no explicit internal sanction; these moves would not count as charges or convictions.

Prison Misconducts for Sexual Misbehaviours Count as One Charge per Sentence

Prison misconducts for sexual misbehaviours count as one charge per sentence, even when there are multiple incidents. The reason for this is that in some jurisdictions the threshold for misconducts is very low. Often, as previously described, misconduct will involve a female guard simply looking into a cell and observing an inmate masturbating. Even in prison, serious sexual offences, rape and attempted rape will generally attract official criminal charges.

Post-Index Offences

Offences that occur after the Index offence do not count for STATIC-99 purposes. Post-Index sexual offences create a new Index offence. Post-Index violent offences should be considered "external" risk factors and would be included separately in any report about the offender's behaviour.

> **For Example, Post-Index Sexual Offences:** Consider a case where an offender commits a sexual offence, is apprehended, charged, and released on bail. You are assigned to evaluate this offender but before you can complete your evaluation he commits another sexual offence, is apprehended and charged. Because the offender was apprehended, charged, and released this does not qualify as a crime "spree". He chose to re-offend in spite of knowing that he was under legal sanction. These new charges and possible eventual convictions would be considered separate crimes. In a situation of this nature the new charges would create a new sexual offence and become the new Index offence. If these charges happened to be the last sexual offences on the offender's record – the most recent charges would become the Index and the charge on which he was first released on bail would become a "Prior" Sexual Offence.
>
> **For Example, Post-Index Violent Offences:** Consider a case where an offender in prison on a sexual offence commits and is convicted of a serious violent offence. This violent offence would not be scored on either Item #3 (Index Non-sexual Violence convictions) or Item #4 (Prior Non-sexual Violence convictions) but would be referred to separately, outside the context of the STATIC-99 assessment, in any subsequent report on the offender.

Probation before Judgement

Where applicable, "Probation before judgment" counts as a charge, conviction, and a sentencing date.

Revocation of Conditional Release for "Lifers", Dangerous Offenders, and Others with Indeterminate Sentences

If a "lifer", Dangerous Offender, or other offender with an already imposed indeterminate sentence is simply revoked (returned to prison from conditional release in the community without trial) for a sexual behaviour that is of sufficient gravity that a person not already involved with the criminal justice system would most likely be charged with a sexual criminal offence, this revocation of conditional release would

count as both a Prior Sex Offence "charge" and a Prior Sex Offence "conviction". Note: the evaluator should be sure that were this offender not already under sanction that it is highly likely that a sexual offence charge would be laid by police. Revocations for violations of conditional release conditions, so called "technicals" (drinking violations, failure to report, being in the presence of minors, being in the possession of legally obtained pornography) are insufficient to stand as Prior Sentencing Dates.

RRASOR and STATIC-99 – Differences in Scoring

Historical offences are scored differently between the RRASOR and the STATIC-99. On the RRASOR, if the offender is charged or convicted of historical offences committed prior to the Index Offence, these are counted as Prior Sexual Offences (User Report, The Development of a Brief Actuarial Risk Scale for Sexual Offense Recidivism 1997-04, Pg. 27, end of paragraph titled Prior Sexual Offences). This is not the case for the STATIC-99. For the STATIC-99, if the offender is charged or convicted of historical offences after the offender is charged or convicted of a more recent offence, these offences are to be considered part of the Index Offence (pseudo-recidivism) – forming an "Index Cluster".

Suspended Sentences

Suspended sentences should be treated as equivalent to a charge and a conviction.

Teachers

Being transferred to a new school or being given an administrative posting away from the public with no formal sanction or being sent to graduate school for re-training would not count as a charge or conviction.

Where a teacher is transferred between schools due to allegations of sexual abuse but there is no explicit internal sanction; these moves would not count as charges or convictions.

Item # 6 Prior Sentencing Dates

The Basic Principle: This item and the others that relate to criminal history and the measurement of persistence of criminal activity are based on a firm foundation in the behavioural literature. As long ago as 1911 Thorndyke stated that the "the best predictor of future behaviour, is past behaviour". Andrews & Bonta (2003) state that having a criminal history is one of the "Big Four" predictors of future criminal behaviour. Prior Sentencing Dates is a convenient method of coding the length of the criminal record.

Information Required to Score this Item: To score this item you must have access to an official criminal record as compiled by police, court, or correctional authorities. Self-report of criminal convictions may not be used to score this item except in specific rare situations, please see sub-section "Self-report and the STATIC-99 in the Introduction section.

The Basic Rule: If the offender's criminal record indicates four or more separate sentencing dates prior to the Index Offence, the offender is scored a "1" on this item. If the offender's criminal record indicates three or fewer separate sentencing dates prior to the Index Offence, the offender scores a "0" on this item.

Count the number of distinct occasions on which the offender was sentenced for criminal offences. The number of charges/convictions does not matter, only the number of sentencing dates. Court appearances that resulted in complete acquittal are not counted, nor are convictions overturned over on appeal. The Index sentencing date is not included when counting up the sentencing dates.

If the offender is on some form of conditional release (parole/probation/bail etc.) "technical" violations do not count as new sentencing dates. For example, if an offender had a condition prohibiting drinking alcohol, a breach for this would not be counted as a new sentencing date. To be counted as a new sentencing date, the breach of conditions would have to be a new offence for which the offender could be charged if he were not already under criminal justice sanction.

Institutional rule violations do not count, even when the offence was for behaviour that could have resulted in a legal sanction if the offender had not already been incarcerated.

Count:

- Juvenile offences count (if you know about them – please see section on the use of self-report in the Introduction)
- Where applicable "Probation before judgment" counts as a conviction and a sentencing date
- Where applicable "Consent Decree" counts as a conviction and a sentencing date
- Suspended Sentences count as a sentencing date

Do Not Count:

- Stayed offences do not count as sentencing dates
- Institutional Disciplinary Actions/Reports do not count as sentencing dates

The offences must be of a minimum level of seriousness. The offences need not result in a serious sanction (the offender could have been fined), but the offence must be serious enough to permit a sentence of community supervision or custody/incarceration (as a juvenile or adult). Driving offences generally do not count, unless they are associated with serious penalties, such as driving while intoxicated or reckless driving causing death or injury.

Generally, most offences that would be recorded on an official criminal history would count – but the statute, as written in the jurisdiction where the offence took place, must allow for the imposition of a custodial sentence or a period of community supervision (adult or juvenile). Only truly trivial offences

are excluded; those where it is impossible to get a period of incarceration or community supervision. Offences that can **only** result in fines do not count.

Sentences for historical offences received while the offender is incarcerated for a more recent offence (pseudo-recidivism), are not counted. For two offences to be considered separate offences, the second offence must have been committed after the offender was sanctioned for the first offence.

Offence convictions occurring after the Index offence cannot be counted on this item.

Conditional Discharges
Where an offender has been charged with a sexual offence and receives a Conditional Discharge, for the purposes of the STATIC-99 a conditional discharge counts as a conviction and a sentencing date.

Diversionary Adjudication
If a person commits a criminal offence as a juvenile or as an adult and receives a diversionary adjudication, this counts as a sentencing date (Restorative Justice, Reparations, Family Group Conferencing, Community Sentencing Circles).

Extension of Sentence by a Parole Board (or similar)
If an offender is assigned extra time added to their sentence by a parole board for a criminal offence this counts as an additional sentencing date if the new time extended the total sentence. This would not count as a sentencing date if the additional time was to be served concurrently or if it only changed the parole eligibility date. This situation is presently not possible in Canada.

Failure to Appear
If an offender fails to appear for sentencing, this is not counted as a sentencing date. Only the final sentencing for the charge for which the offender missed the sentencing date is counted as a sentencing date.

Failure to Register as a Sexual Offender
If an offender receives a formal legal sanction, having been convicted of Failing to Register as a Sexual Offender, this conviction would count as a sentencing date. However, it should be noted that charges and convictions for Failure to Register as a Sexual Offender are not counted as sexual offences.

Juvenile Extension of Detention
In some states it is possible for a juvenile to be sentenced to a Detention/Treatment facility. At the end of that term of incarceration it is possible to extend the period of detention. Even though a Judge and a prosecutor are present at the proceedings, because there has been no new crime or charges/convictions, the extension of the original order is not considered a sentencing date.

Juvenile Offences
Both adult and juvenile convictions count in this item. In the case where a juvenile is not charged with a sexual or violent offence but is moved to a secure or more secure residential placement as the result of a sexual or violent incident, this counts as a sentencing date for the purposes of scoring Prior Sentencing Dates.

Military
If an "undesirable discharge" is given to a member of the military as the direct result of criminal behaviour (something that would have attracted a criminal charge were the offender not in the military),

this would count as a sentencing date. However, if the member left the military when he normally would have and the "undesirable discharge" is the equivalent to a bad job reference then the criminal behaviour would not count as a Sentencing Date.

Military Courts Martial
If an offender is given a sanction (Military Brig or it's equivalent) for a criminal offence rather than a purely military offence {failure of duty} this counts as a sentencing date. Pure Military Offences {Insubordination, Not Following a Lawful Order, Dereliction of Duty, Conduct Unbecoming, etc.} do not count as Prior Sentencing Dates.

Not Guilty
Being found "Not Guilty" is not counted as a Prior Sentencing Date.

Official Cautions – United Kingdom
In the United Kingdom, an official caution should be treated as equivalent to a sentencing date.

Post-Index Offences
Post-Index offences are not counted as sentencing occasions for the STATIC-99.

Revocation of Conditional Release for "Lifers", Dangerous Offenders, and Others with Indeterminate Sentences
If a "lifer", Dangerous Offender, or other offender with an already imposed indeterminate sentence is simply revoked (returned to prison from conditional release in the community without trial) for criminal behaviour that is of sufficient gravity that a person not already involved with the criminal justice system would most likely be charged with a criminal offence, this revocation of conditional release would count as a Prior Sentencing Date. Note: the evaluator should be sure that were this offender not already under sanction that a criminal charge would be laid by police and that a conviction would be highly likely. Revocations for violations of conditional release conditions, so called "technicals", (drinking violations, failure to report, being in the presence of minors) are insufficient to stand as Prior Sentencing Dates.

> Note: for this item there have been some changes to the rules from previous versions. Some rules were originally written to apply to a specific jurisdiction. Over time, and in consultation with other jurisdictions the rules have been generalized to make them applicable across jurisdictions in a way that preserves the original intent of the item.

Suspended Sentences
Suspended sentences count as a sentencing date.

Item # 7 - Any Convictions for Non-contact Sex Offences

The Basic Principle: Offenders with paraphilic interests are at increased risk for sexual recidivism. For example, most individuals have little interest in exposing their genitals to strangers or stealing underwear. Offenders who engage in these types of behaviours are more likely to have problems conforming their sexual behaviour to conventional standards than offenders who have no interest in paraphilic activities.

Information Required to Score this Item: To score this item you must have access to an official criminal record as compiled by police, court, or correctional authorities. Self-report of criminal convictions may not be used to score this item except in specific rare situations, please see sub-section "Self-report and the STATIC-99" in the Introduction section.

The Basic Rule: If the offender's criminal record indicates a separate conviction for a non-contact sexual offence, the offender is scored a "1" on this item. If the offender's criminal record does not show a separate conviction for a non-contact sexual offence, the offender is scored a "0" on this item.

This category requires a conviction for a non-contact sexual offence such as:

- Exhibitionism
- Possessing obscene material
- Obscene telephone calls
- Voyeurism
- Exposure
- Elicit sexual use of the Internet
- Sexual Harassment (Unwanted sexual talk)
- In certain jurisdictions "Criminal Trespass" or "Trespass by Night" may be used as a charge for voyeurism – these would also count

The criteria for non-contact sexual offences are strict: the offender must have been convicted, and the offence must indicate non-contact sexual misbehaviour. The "Index" offence(s) may include a conviction for a non-contact sexual offence and this offence can count in this category. The most obvious example of this is where an offender is charged and convicted of Exposure for "mooning" a woman from a car window. This would result in a coding of "1" for this item.

There are some cases, however, where the legal charge does not reflect the sexual nature of the offence. Take, for example, the same situation where an offender is charged with Exposure for "mooning" a woman from a car window, but the case is pled-down to, and the offender is finally convicted of Disorderly Conduct. In cases like this, while this item requires that there be a conviction, the coding of a non-contact sexual offence can be based on the behaviour that occurred in cases where the name of the offence is ambiguous.

Charges and arrests do not count, nor do self-reported offences. Sexual offences in which the offender intended to make contact with the victim (but did not succeed) would be considered attempted contact offences and are coded as contact offences (e.g., invitation to sexual touching, attempted rape). Some offences may include elements of both contact and non-contact offences, for example, sexual talk on Internet - arranging to meet the child victim. In this case, the conviction would count as a non-contact sex offence.

Attempted Contact Offences

Invitation to Sexual Touching, Attempted Rape and other such "attempted" contact offences are counted as "Contact" offences due to their intention.

Internet Crimes

Internet crimes were not recorded in the original samples for the STATIC-99 because the Internet had not advanced to the point where it was commonly available. As a result, determining how to score Internet crimes on the STATIC-99 requires interpretation beyond the available data. Internet crimes could be considered in two different ways. First, they could be considered a form of attempted sexual contact, where the wrongfulness of the behaviour is determined by what is about to happen. Secondly, they could be considered an inappropriate act in themselves, akin to indecent telephone calls (using an older technology). We believe that luring children over the Internet does not represent a fundamentally new type of crime but is best understood as a modern expression of traditional crimes. We consider communicating with children over the Internet for sexual purposes to be an inappropriate and socially harmful act in itself and, therefore, classify these acts with their historical precursors, such as indecent/obscene telephone calls, in the category of non-contact sexual offences.

Pimping and Prostitution Related Offences

Pimping and other prostitution related offences (soliciting a prostitute, promoting prostitution, soliciting for the purposes of prostitution, living off the avails of prostitution) do not count as non-contact sexual offences. (Note: prostitution was not illegal in England during the study period, though soliciting was).

Plea Bargains

Non-contact sexual offence convictions do not count if the non-contact offence charge arose as the result of a plea bargain. Situations such as this may appear in the criminal record where charges for a contact offence are dropped and the non-contact charges appear simultaneously with a guilty plea. An occurrence of this nature would be considered a contact offence and scored as such.

Revocation of Conditional Release for "Lifers", Dangerous Offenders, and Others with Indeterminate Sentences

If a "lifer", Dangerous Offender, or other offender with an already imposed indeterminate sentence is simply revoked (returned to prison from conditional release in the community without trial) for a Non-contact Sexual Offence that is of sufficient gravity that a person not already involved with the criminal justice system would most likely be charged with a Non-contact Sexual Offence, this revocation of conditional release would count as a conviction for a Non-contact Sexual Offence. Note: the evaluator should be sure that were this offender not already under sanction that it is highly likely that a non-contact sexual offence charge would be laid by police.

Items #8, #9, & # 10 – The Three Victim Questions

The following three items concern victim characteristics: Unrelated Victims, Stranger Victims, and Male Victims. For these three items the scoring is based on all available credible information, including self-report, victim accounts, and collateral contacts. The items concerning victim characteristics, however, only apply to sex offences in which the victims were children or non-consenting adults (Category "A" sex offences). Do not score victim information from non-sexual offences or from sex offences related to prostitution/pandering, possession of child pornography, and public sex with consenting adults (Category "B" sex offences). Do not score victim information on sexual offences against animals (Bestiality and similar charges).

In addition to all of the "everyday" sexual offences (Sexual Assault, Rape, Invitation to Sexual Touching, Buggery) you also score victim information on the following charges:

- Illegal use of a Minor in Nudity-oriented Material/Performance
- Importuning (Soliciting for Immoral Purposes)
- Indecent Exposure (When a specific victim has been identified)
- Sexually Harassing Telephone Calls
- Voyeurism (When a specific victim has been identified)

You do not score Victim Information on the following charges:

- Compelling Acceptance of Objectionable Material
- Deception to Obtain Matter Harmful to Juveniles
- Disseminating/Displaying Matter Harmful to Juveniles
- Offences against animals
- Pandering Obscenity
- Pandering Obscenity involving a Minor
- Pandering Sexually-Oriented Material involving a Minor
- Prostitution related offences

"Accidental Victims"

Occasionally there are "Accidental Victims" to a sexual offence. A recent example of this occurred when an offender was raping a woman in her living room. The noise awoke the victim's four-year-old son. The son wandered into the living room and observed the rape in progress. The victim instructed her son to return to his bedroom and he complied at once. The perpetrator was subsequently charged and convicted of "Lewd and Lascivious Act on a Minor" in addition to the rape. In court the offender pleaded to both charges. In this case, the four-year-old boy would not count as a victim as there was no intention to commit a sexual offence against him. He would not count in any of the three victim items regardless of the conviction in court.

A common example of an accidental victim occurs when a person in the course of his/her daily life or profession happens across a sexual offence. Examples include police officers, park wardens, janitors, and floor walkers who observe a sexual offence in the course of their duties. If a male officer were to observe an exhibitionist exposing himself to a female, the offender would not be given the point for "Male Victim" as there was no intention to expose before the male officer. The evaluator would not give the offender a point for "male victim" unless the offender specifically chose a male officer to expose himself to. In the same vein, a floor walker or janitor who observes an offender masturbating while looking at a customer in a store would not be counted as a "stranger victim" or an "unrelated victim". In short there has to be some intention to offend against that person for that person to be a victim. Merely

stumbling upon a crime scene does not make the observer a victim regardless of how repugnant the observer finds the behaviour.

Acquitted or Found Not Guilty

The criteria for coding victim information is "all credible information". In this type of situation it is important to distinguish between the court's stringent standard of determining guilt (Beyond a reasonable doubt) and "What is most likely to be true" – a balance of probabilities. When the court sticks to the "Beyond a reasonable doubt" criteria they are not concluding that someone did not do the crime, just that the evidence was insufficient to be certain that they did it. The risk assessment perspective is guided by: "On the balance of probabilities, what is most likely to be true?" If the assessor, "On the balance of probabilities" feels that the offence more likely than not took place the victims may be counted.

For the assessment, therefore, it may be necessary to review the cases in which the offender was acquitted or found "Not Guilty" and make an independent determination of whether it is more likely than not that there were actual victims. If, in the evaluators opinion, it were more likely that there was no sexual offence the evaluator would not count the victim information. In the resulting report the evaluator would generally include a score with the contentious victim information included and a score without this victim information included, showing how it effects the risk assessment both ways.

This decision to score acquittals and not guilty in this manner is buttressed by a research study in England that found that men acquitted of rape are more likely to be convicted of sexual offences in the follow-up period than men who had been found guilty {with equal times at risk} (Soothill et al., 1980).

Child Pornography

Victims portrayed in child pornography are not scored as victims for the purposes of the STATIC-99. They do not count as non-familial, stranger, nor male victims. Only real, live, human victims count. If your offender is a child pornography maker and a real live child was used to create pornography by your offender or your offender was present when pornography was created with a real live child, this child is a victim and should be scored as such on the STATIC-99 victim questions. (Note: manipulating pre-existing images to make child pornography [either digitally of photographically] is not sufficient – a real child must be present) Making child pornography with a real child victim counts as a "Category A" offence and, hence, with even a single charge of this nature, the STATIC-99 is appropriate to use.

The evaluator may, of course, in another section of the report make reference to the apparent preferences demonstrated in the pornography belonging to the offender.

Conviction, But No Victim

For the purposes of the STATIC-99, consensual sexual behaviour that is prohibited by statute does not create victims. This is the thinking behind Category "B" offences. Examples of this are prostitution offences and public toileting (Please see "Category "A" and Category "B" offences" in the Introduction section for a further discussion of this issue). Under some circumstances it is possible that in spite of a conviction for a sexual offence the evaluator may conclude that there are no real victims. An example of this could be where a boy (age 16 years) is convicted of Statutory Rape of his 15-year-old boyfriend (Assume age of consent in this jurisdiction to be 16 years of age). The younger boy tells the police that the sexual contact was consensual and the police report informs the evaluator that outraged parents were the complainants in the case. In a scenario like this, the younger boy would not be scored as a victim, the conviction notwithstanding.

Credible Information

Credible sources of information would include, but are not limited to, police reports, child welfare reports, victim impact statements or discussions with victims, collateral contacts and offender self-report.

If the information is credible (Children's Protective Association, victim impact statements, police reports) you may use this information to code the three victim questions, even if the offender has never been arrested or charged for those offences.

Exhibitionism

In cases of exhibitionism, the three victim items may be scored if there was a targeted victim, and the evaluator is confident that they know before whom the offender was trying to exhibit. If the offender exhibits before a mixed group, males and females, do not score "Male Victim" unless there is reason to believe that the offender was exhibiting specifically for the males in the group. Assume only female victims unless you have evidence to suggest that the offender was targeting males.

> Example: If a man exposed to a school bus of children he had never seen before (both genders), the evaluator would score this offender one risk point for Unrelated Victim, one risk point for Stranger Victim, but would not score a risk point for Male Victim unless there was evidence the offender was specifically targeting the boys on the bus.

In cases where there is no sexual context (i.e., the psychotic street person who takes a shower in the town fountain) there are no victims regardless of how offended they might be or how many people witnessed the event.

Internet Victims and Intention

If an offender provides pornographic material over the Internet, the intent of the communication is important. In reality a policeman may be on the other end of the net in a "sting" operation. If the offender thought he was providing pornography to a child, even though he sent it to a police officer, the victim information is counted as if a child received it. In addition, when offenders attempt, over the Internet, to contact face-to-face a "boy or girl" they have contacted over the Internet the victim information counts as the intended victim, even if they only "met" a policeman.

Intention is important. In a case were a child was pretending to be an adult and an adult "shared" pornography with that person in the honest belief that they were (legally) sharing it with another adult there would not be a victim.

Polygraph Information

Victim information derived solely from polygraph examinations is not used to score the STATIC-99 unless it can be corroborated by outside sources or the offender provides sufficient information to support a new criminal investigation.

Prowl by Night - Voyeurism

For these types of offences the evaluator should score specific identifiable victims. However, assume only female victims unless you have evidence to suggest that the offender was targeting males.

Sexual Offences Against Animals

While the sexual assault of animals counts as a sexual offence, animals do not count as victims. This category is restricted to human victims. It makes no difference whether the animal was a member of the family or whether it was a male animal or a stranger animal.

Sex with Dead Bodies

If an offender has sexual contact with dead bodies these people do count as victims. The evaluator should score the three victim questions based upon the degree of pre-death relationship between the perpetrator and the victim.

Stayed Charges

Victim information obtained from stayed charges should be counted.

Victims Not at Home

If an offender breaks into houses, (regardless of whether or not the victims are there to witness the offence) to commit a sexual offence, such as masturbating on or stealing their undergarments or does some other sexual offence – victims of this nature are considered victims for the purposes of the STATIC-99. Assume only female victims unless you have evidence to suggest that the offender was targeting males.

Item # 8 - Any Unrelated Victims?

The Basic Principle: Research indicates that offenders who offend only against family members recidivate at a lower rate compared to those who have victims outside of their immediate family (Harris & Hanson, Unpublished manuscript). Having victims outside the immediate family is empirically related to a corresponding increase in risk.

Information Required to Score this Item: To score this item use all available credible information. "Credible Information" is defined in the previous section "Items #8, #9, & #10 -The Three Victim Questions".

The Basic Rule: If the offender has victims of sexual offences outside their immediate family, score the offender a "1" on this item. If the offender's victims of sexual offences are all within the immediate family score the offender a "0" on this item.

A related victim is one where the relationship is sufficiently close that marriage would normally be prohibited, such as parent, brother, sister, uncle, grandparent, stepbrother, and stepsister. Spouses (married and common-law) are also considered related. When considering whether step-relations are related or not, consider the nature and the length of the pre-existing relationship between the offender and the victim before the offending started. Step-relationships lasting less than two years would be considered unrelated (e.g., step-cousins, stepchildren). Adult stepchildren would be considered related if they had lived for two years in a child-parent relationship with the offender.

Time and Jurisdiction Concerns

A difficulty in scoring this item is that the law concerning who you can marry is different across jurisdictions and across time periods within jurisdictions. For example, prior to 1998, in Ontario, there were 17 relations a man could not marry, including such oddities as "nephew's wife" and "wife's grandmother". In 1998 the law changed and there are now only 5 categories of people that you cannot marry in Ontario: grandmother, mother, daughter, sister, and granddaughter (full, half, and adopted). Hence, if a man assaulted his niece in 1997 he would not have an unrelated victim but if he committed the same crime in 1998 he would technically be assaulting an unrelated victim. We doubt very much the change in law would affect the man's choice of victim and his resulting risk of re-offence. As a result the following rules have been adopted.

People who are seen as related for the purposes of scoring the STATIC-99

1. Legally married spouses
2. Any live-in lovers of over two years duration. (Girlfriends/Boyfriends become related once they have lived with the offender as a lover for two years)
3. Anyone too closely related to marry (by jurisdiction of residence of the perpetrator)
4. The following relations whether or not marriage is permitted in the jurisdiction of residence of the perpetrator:
    - Aunt
    - Brother's wife
    - Common-law wife/Ex common-law wife (lived together for 2 years)
    - Daughter
    - Father's wife/step-mother
    - First cousins
    - Granddaughter
    - Grandfather
    - Grandfather's wife

- Grandmother
- Grandson's wife
- Mother
- Niece/Nephew
- Sister
- Son's wife
- Stepdaughter/Stepson (Must have more than two years living together before abuse begins)
- Wife and Ex-wife
- Wife's daughter/step-daughter
- Wife's granddaughter
- Wife's grandmother
- Wife's mother

The relationships can be full, half, adopted, or common-law (two years living in these family relationships). The mirror relationships of the opposite gender would also count as related (e.g., brother, sons, nephews, granddaughter's husband).

People who are seen as <u>unrelated</u>for the purposes of scoring the STATIC-99

- Any step-relations where the relationship lasted less than two years
- Daughter of live-in girlfriend/Son of live-in girlfriend
  (less than two years living together before abuse begins)
- Nephew's wife
- Second cousins
- Wife's aunt

Decisions about borderline cases (e.g., brother's wife) should be guided by a consideration of the psychological relationship existing prior to the sexual assault. If an offender has been living with the victim in a family/paternal/fraternal role for two years prior to the onset of abuse, the victim and the offender would be considered related.

Becoming "Unrelated"

If an offender who was given up for adoption (removed etc.) at birth (Mother and child having no contact since birth or shortly after) and the Mother (Sister, Brother etc.) is a complete stranger that the offender would not recognize (facial recognition) as their family, these biological family members could count as Unrelated Victims. This would only happen if the offender did not know they were offending against a family member.

Item # 9 - Any Stranger Victims?

The Basic Principle: Research shows that having a stranger victim is related to sexual recidivism. See Hanson and Bussière (1998), Table 1 – Item "Victim Stranger (versus acquaintance)".

Information Required to Score this Item: Use all credible information to score this item. "Credible Information" is defined in the section "Items #8, #9, & #10 - The Three Victim Questions".

The Basic Rule: If the offender has victims of sexual offences who were strangers at the time of the offence, score the offender a "1" on this item. If the offender's victims of sexual offences were all known to the offender for at least 24 hours prior to the offence, score the offender a "0" on this item. If the offender has a "stranger" victim, Item #8, "Any Unrelated Victims", is generally scored as well.

A victim is considered a stranger if the victim did not know the offender 24 hours before the offence. Victims contacted over the Internet are not normally considered strangers unless a meeting was planned for a time less than 24 hours after initial communication.

For Stranger victims, the offender can either not know the victim or it can be the victim not knowing the offender. In the first case, where the offender does not know the victim, (the most common case), the offender chooses someone who they are relatively sure will not be able to identify them (or they just do not care) and offends against a stranger. However, there have been examples where the offender "should" have known the victim but just did not recognize them. This occurred in one case where the perpetrator and the victim had gone to school together but the perpetrator did not recognize the victim as someone they knew. In cases like this, the victim would still be a stranger victim as the offender's intention was to attack a stranger.

The criteria for being a stranger are very high. Even a slight degree of knowing is enough for a victim not to be a stranger. If the victim knows the offender at all for more than 24 hours, the victim is not a stranger. For example, if the victim was a convenience store clerk and they recognized the perpetrator as someone who had been in on several occasions to buy cigarettes, the victim would no longer be a stranger victim. If a child victim can say they recognize the offender from around the neighborhood and the perpetrator has said "Hi" to them on occasion, the child is no longer a stranger victim. The evaluator must determine whether the victim "knew" the offender twenty-four hours (24) before the assault took place. The criteria for "know/knew" is quite low but does involve some level of interaction. They need not know each other's names or addresses. However, simply knowing of someone but never having interacted with them would not be enough for the victim to count as "known".

The Reverse Case

In cases of "stalking" or stalking-like behaviours the offender may know a great deal about the victim and their habits. However, if the victim does not know the offender when they attack this still qualifies as a stranger victim.

The "24 hour" rule also works in reverse – there have been cases where a performer assaulted a fan the first time they met. In this case, the victim (the fan) had "known of" the performer for years, but the performer (the perpetrator) had not known the fan for 24 hours. Hence, in cases such as this, the victim would count as a stranger because the perpetrator had not known the victim for 24 hours prior to the offence.

Internet, E-mail, and Telephone

Sometimes offenders attempt to access or lure victims over the Internet. This is a special case and the threshold for not being a stranger victim is quite low. If the offender and the victim have communicated over the Internet (e-mail, or telephone) for more than twenty-four hours (24 hours) before the initial face-

to-face meeting, the victim (child or adult) is not a stranger victim. To be clear, this means that if an offender contacts, for the first time, a victim at 8 p.m. on a Wednesday night, their first face-to-face meeting must start before 8 p.m. on Thursday night. If this meeting starts before 8 p.m., and they remain in direct contact, the sexual assault might not start until midnight – as long as the sexual assault is still within the first face-to-face meeting – this midnight sexual assault would still count as a stranger assault. If they chat back and forth for longer than 24 hours, the victim can no longer be considered a stranger victim for the purposes of scoring the STATIC-99.

It is possible in certain jurisdictions to perpetrate a sexual offence over the Internet, by telephone or e-mail and never be in physical proximity to the victim. If the offender transmits sexually explicit/objectionable materials over the Internet within 24 hours of first contact, this can count as a stranger victim; once again the "24 hour rule" applies. However, if the perpetrator and the victim have been in communication for more than 24 hours prior to the sending of the indecent material or the starting of indecent talk on the telephone then the victim can no longer be considered a stranger.

Becoming a "Stranger" Again

It is possible for someone who the offender had met briefly before to become a stranger again. It is possible for the offender to have met a victim but to have forgotten the victim completely (over a period of years). If the offender believed he was assaulting a stranger, the victim can be counted as a stranger victim. This occurred when an offender returned after many years absence to his small hometown and assaulted a female he thought he did not know, not realizing that they had gone to the same school.

Item # 10 - Any Male Victims?

The Basic Principle: Research shows that offenders who have offended against male children or male adults recidivate at a higher rate compared to those who do not have male victims. Having male victims is correlated with measures of sexual deviance and is seen as an indication of increased sexual deviance; see Hanson and Bussière (1998), Table 1.

Information Required to Score this Item: To score this item use all available credible information. "Credible Information" is defined in section "Items #8, #9, & #10 - The Three Victim Questions".

The Basic Rule: If the offender has male victims of sexual offences, non-consenting adults or child victims, score the offender a "1" on this item. If the offender's victims of sexual offences are all female, score the offender a "0" on this item.

Included in this category are all sexual offences involving male victims. Possession of child pornography involving boys, however, does not count. Exhibitionism to a mixed group of children (girls and boys) would not count unless there was clear evidence the offender was targeting the boys. Contacting male victims over the Internet does count.

If an offender assaults a transvestite in the mistaken belief the victim is a female (may be wearing female clothing) do not score the transvestite as a male victim. If it is certain the offender knew he was assaulting a male before the assault, score a male victim.

In some cases a sexual offender may beat-up or contain (lock in a car trunk) another male in order to sexually assault the male's date (wife, etc.). If the perpetrator simply assaults the male (non-sexual) in order to access the female you do not count him as a male victim on the STATIC-99. However, if the perpetrator involves the male in the sexual offence, such as tying him up and making him watch the rape (forced voyeuristic activity), the assault upon the male victim would count as a sexual offence and the male victim would count on the STATIC-99.

Scoring the STATIC-99 & Computing the Risk Estimates

Using the STATIC-99 Coding Form (Appendix 5) sum all individual item scores for a total risk score based upon the ten items. This total score can range from "0" to "12".

Scores of 6 and greater are all considered high risk and treated alike.

Once you have computed the total raw score refer to the table titled STATIC-99 Recidivism Percentages by Risk Level (Appendix 6).

Here you will find recidivism risk estimates for both sexual and violent recidivism over 5, 10, and 15-year projections. In the left-most column find the offender's raw STATIC-99 risk score. Remember that scores of 6 and above are read off the "6" line, high risk.

For example, if an offender scored a "4" on the STATIC-99 we would read across the table and find that this estimate is based upon a sample size of 190 offenders which comprised 18% of the original sample. Reading further, an offender with a score of "4" on the STATIC-99 is estimated as having a 26% chance of sexual reconviction in the first 5 years of liberty, a 31% chance of sexual reconviction over 10 years of freedom, and a 36% chance of sexual reconviction over 15 years in the community.

For violent recidivism we would estimate that an offender that scores a "4" on the STATIC-99 would have a 36% chance of reconviction for a violent offence over 5 years, a 44% chance of reconviction for a violent offence over 10 years, and a 52% chance of reconviction for a violent offence over a 15 year period. It is important to remember that sexual recidivism is included in the estimates of violent recidivism. You **do not** add these two estimates together to create an estimate of violent and sexual recidivism. The estimates of violent recidivism include incidents of sexual recidivism.

STATIC-99 risk scores may also be communicated as nominal risk categories using the following guidelines. Raw STATIC-99 scores of "0" and "1" should be reported as "Low Risk", scores of "2" and "3" reported as "Moderate-Low" risk, scores of "4" and "5" reported as "Moderate-High" risk, and scores of "6" and above as "High Risk".

Having determined the estimated risk of sexual and violent recidivism we suggest that you review Appendix seven (7) which is a suggested template for communicating STATIC-99 risk information in a report format.

Appendices

Appendix One

Adjustments in Risk Based on Time Free

In general, the expected sexual offence recidivism rate should be reduced by about half if the offender has five to ten years of offence-free behaviour in the community. The longer the offender has been offence-free, post-Index, the lower the expected recidivism rate. It is not known what the expected rates of sexual re-offence should be if the offender has recidivated post-Index with a non-sexual offence. Presently, no research exists shedding light on this issue. Arguments could be made that risk scores should be increased (further criminal activity), decreased (he has still not committed another sexual offence in the community) or remain the same. We suspect that an offender who remains criminally active will maintain the same risk for sexual recidivism.

Adjusted crime-free rates only apply to offenders who have been without a new sexual or violent offence. Criminal misbehaviour such as threats, robberies, and assaults void any credit the offender may have for remaining free of additional sexual offences. For these purposes, an offender could, theoretically, commit minor property offences and still remain offence-free.

The recidivism rate estimates reported in Hanson & Thornton (2000) are based on the offender's risk for recidivism at the time they were released into the community after serving time for a sexual offence (Index offence). As offenders successfully live in the community without incurring new offences, their recidivism risk declines. The following table provides reconviction rates for new sexual offences for the three STATIC-99 samples where survival data were available (Millbrook, Pinel, HM Prison), based on offence-free time in the community. "Offence-free" means no new sexual or violent convictions, nor a non-violent conviction that would have resulted in more than minimal jail time (1-2 months).

The precise amount of jail time for non-violent recidivism was not recorded in the data sets, but substantial periods of jail time would invalidate the total time at risk. We do not recommend attempting to adjust the survival data given below by subtracting "time in prison for non-violent offences" from the total time elapsed since release from Index sexual offence.

For example, if offender "A" has been out for five years on parole got 60 days in jail for violating a no-drinking condition of parole the adjusted estimates would most likely still apply. However, if offender "B" also out on parole for five years got 18 months for Driving While Under the Influence these adjustments for time at risk would not be valid.

Adjusted risk estimates for time free would apply to offenders that are returned to custody for technical violations such as drinking or failing to register as a sexual offender.

Table for Adjustments in Risk Based on Time Free

STATIC-99 Risk Level at original assessment	Years offence-free in community					
	0	2	4	6	8	10
	Recidivism rates – Sex Offence Convictions %					
0-1 (n = 259)						
5 year	5.7	4.6	4.0	2.0	1.4	1.4
10 year	8.9	6.4	4.6	3.3	3.2	(5.8)
15 year	10.1	8.7	9.5	7.7	(6.5)	
2-3 (n = 412)						
5 year	10.2	6.8	4.4	3.1	5.5	5.3
10 year	13.8	11.1	9.1	8.1	8.2	8.4
15 year	17.7	14.5	13.6	13.9	(18.7)	
4-5 (n = 291)						
5 year	28.9	14.5	8.0	6.9	7.6	6.8
10 year	33.3	21.4	13.7	11.5	(13.1)	(11.5)
15 year	37.6	22.8	(18.7)			
6+ (n = 129)						
5 year	38.8	25.8	13.1	7.0	9.4	13.2
10 year	44.9	30.3	23.7	16.0	(17.8)	(17.8)
15 year	52.1	37.4	(27.5)			

Note: The total sample was 1,091. The number of cases available for each analysis decreases as the follow-up time increases and offenders recidivate. Values in parentheses were based on less than 30 cases and should be interpreted with caution.

Appendix Two

Self-Test

1. **Question:** In 1990, Mr. Smith is convicted of molesting his two stepdaughters. The sexual abuse occurred between 1985 and 1989. While on conditional release in 1995, Mr. Smith is reconvicted for a sexual offence. The offence related to the abuse of a child that occurred in 1980. Which conviction is the Index offence?

   Answer: The 1990 and 1995 convictions would both be considered part of the Index offence. Neither would be counted as a prior sexual offence. The 1995 conviction is pseudo-recidivism because the offender did not re-offend after being charged with the 1990 offence.

2. **Question:** In April 1996, Mr. Jones is charged with sexual assault for an incident that occurred in January 1996. He is released on bail and reoffends in July 1996, but this offence is not detected until October 1996. Meanwhile, he is convicted in September 1996, for the January 1996 incident. The October 1996 charge does not proceed to court because the offender is already serving time for the September 1996 conviction. You are doing the evaluation in November. What is the Index offence?

   Answer: The October 1996 charge is the Index offence because the offence occurred after Mr. Jones was charged for the previous offence. The Index sexual offence need not result in a conviction.

3. **Question:** In January 1997, Mr. Dixon moves in with Ms. Trembley after dating since March 1996. In September 1999, Mr. Dixon is arrested for molesting Ms. Trembley's daughter from a previous relationship. The sexual abuse began in July 1998. Is the victim related?

   Answer: No, the victim would not be considered related because when the abuse began, Mr. Dixon had not lived for two years in a parental role with the victim.

4. **Question:** At age 15, Mr. Miller was sent to a residential treatment centre after it was discovered he had been engaging in sexual intercourse with his 12 year old stepsister. Soon after arriving, Mr. Miller sexually assaulted a fellow resident. He was then sent to a secure facility that specialized in the treatment of sexual offenders. Charges were not laid in either case. At age 24, Mr. Miller sexually assaults a cousin and is convicted shortly thereafter. Mr. Miller has how many prior sexual offences?

   Answer: For Item #5, Prior Sexual Offences, score this as 2 prior charges and 2 prior convictions. Although Mr. Miller has no prior convictions for sexual offences, there are official records indicating he has engaged in sexual offences as an adolescent that resulted in custodial sanctions on two separate occasions. The Index offence at age 24 is not counted as a prior sexual offence.

5. **Question:** Mr. Smith was returned to prison in July 1992 for violating several conditions of parole including child molestation, lewd act with a child and contributing to the delinquency of a minor. Once back in prison he sexually assaulted another prisoner. Mr. Smith has now been found guilty of the sexual assault and the judge has asked you to contribute to a pre-sentence report. How many Prior Sexual Offence (Item #5) points would Mr. Smith receive for his parole violations?

Answer: 1 charge and no convictions. Probation, parole and conditional release violations for sexual misbehaviours are counted as one charge, even when there are violations of multiple conditions of release.

6. **Question:** Mr. Moffit was charged with child molestation in April 1987 and absconded before he was arrested. Mr. Moffit knew the police were coming to get him when he left. He travelled to another jurisdiction where he was arrested and convicted of child molesting in December 1992. He served 2 years in prison and was released in 1994. He was apprehended, arrested and convicted in January of 1996 for the original charges of Child Molestation he received in April 1987. Which offence is the Index offence?

   Answer: The most recent offence date, December 1992 becomes the Index offence. In this case, the offence dates should be put back in chronological order given that he was detected and continued to offend. The April, 1987 charges and subsequent conviction in January of 1996 become a prior sexual offence.

7. **Question:** While on parole, Mr. Jones, who has an extensive history of child molestation, was found at the county fair with an 8 year-old male child. He had met the child's mother the night before and volunteered to take the child to the fair. Mr. Jones was in violation of his parole and he was returned to prison. He subsequently got out of prison and six months later re-offended. You are tasked with the pre-sentence report. Do you count the above parole violation as a prior sex offence charge?

   Answer: No. Being in the presence of children is not counted as a charge for prior sex offences unless an offence is imminent. In this case, Mr. Jones was in a public place with the child among many adults. An incident of this nature exhibits "high-risk" behaviour but is not sufficient for a charge of a sex offence.

Appendix Three

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Appendix Four

Surgical Castration in Relation to Sex Offender Risk Assessment

Surgical castration or orchidectomy is the removal of the testicles. In most cases this is done for medical reasons but in sex offenders may be done for the reduction of sexual drive. Orchidectomy was practiced in Nazi Germany and in post-war Europe in sufficient numbers that several studies have been conducted on the recidivism rates of those who have undergone the operation. In general, the post-operative recidivism rates are low, but not zero (2% - 5%). In addition, the subjects in the European samples tended to be older men and this data may not generalize well to ordinary sex offender samples. The recidivism rates reported, however, are lower than expected base rates. This may suggest that there is some protective effect from castration.

However, this effect can be reversed. There have been a number of case studies where a castrated individual has obtained steroids, reversed the effects of the operation, and gone on to re-offend.

In terms of overall risk assessment, if an individual has undergone surgical castration it is worth consideration but this is not an overriding factor in risk assessment. In particular, an evaluator must consider the extent to which sex drive contributes to the offence pattern and whether the offender has the motivation and intellectual resources to maintain a low androgen lifestyle in the face of potentially serious side effects (e.g., bone loss, weight gain, breast growth).

Appendix Five

STATIC-99 Coding Form

Question Number	Risk Factor	Codes	Score
1	Young (S9909)	Aged 25 or older Aged 18 – 24.99	0 1
2	Ever Lived With (S9910)	Ever lived with lover for at least two years? Yes No	 0 1
3	Index non-sexual violence - Any Convictions (S9904)	No Yes	0 1
4	Prior non-sexual violence - Any Convictions (S9905)	No Yes	0 1
5	Prior Sex Offences (S9901)	Charges / Convictions None / None 1-2 / 1 3-5 / 2-3 6+ / 4+	 0 1 2 3
6	Prior sentencing dates (excluding index) (S9902)	3 or less 4 or more	0 1
7	Any convictions for non-contact sex offences (S9903)	No Yes	0 1
8	Any Unrelated Victims (S9906)	No Yes	0 1
9	Any Stranger Victims (S9907)	No Yes	0 1
10	Any Male Victims (S9908)	No Yes	0 1
	Total Score	**Add up scores from individual risk factors**	

TRANSLATING STATIC 99 SCORES INTO RISK CATEGORIES

Score	Label for Risk Category
0,1	Low
2,3	Moderate-Low
4,5	Moderate-High
6 plus	High

Appendix Six

STATIC-99 Recidivism Percentages by Risk Level

Static-99 score	sample size	sexual recidivism			violent recidivism		
		5 years	10 years	15 years	5 years	10 years	15 years
0	107 (10%)	.05	.11	.13	.06	.12	.15
1	150 (14%)	.06	.07	.07	.11	.17	.18
2	204 (19%)	.09	.13	.16	.17	.25	.30
3	206 (19%)	.12	.14	.19	.22	.27	.34
4	190 (18%)	.26	.31	.36	.36	.44	.52
5	100 (9%)	.33	.38	.40	.42	.48	.52
6 +	129 (12%)	.39	.45	.52	.44	.51	.59
Average							
3.2	1086 (100%)	.18	.22	.26	.25	.32	.37

Appendix Seven

Suggested Report Paragraphs for Communicating STATIC-99-based Risk Information

The STATIC-99 is an instrument designed to assist in the prediction of sexual and violent recidivism for sexual offenders. This risk assessment instrument was developed by Hanson and Thornton (1999) based on follow-up studies from Canada and the United Kingdom with a total sample size of 1,301 sexual offenders. The STATIC-99 consists of 10 items and produces estimates of future risk based upon the number of risk factors present in any one individual. The risk factors included in the risk assessment instrument are the presence of prior sexual offences, having committed a current non-sexual violent offence, having a history of non-sexual violence, the number of previous sentencing dates, age less than 25 years old, having male victims, having never lived with a lover for two continuous years, having a history of non-contact sex offences, having unrelated victims, and having stranger victims.

The recidivism estimates provided by the STATIC-99 are group estimates based upon reconvictions and were derived from groups of individuals with these characteristics. As such, these estimates do not directly correspond to the recidivism risk of an individual offender. The offender's risk may be higher or lower than the probabilities estimated in the STATIC-99 depending on other risk factors not measured by this instrument. This instrument should not be used with Young Offenders (those less than 18 years of age) or women.

Mr. X scored a ?? on this risk assessment instrument. Individuals with these characteristics, on average, sexually reoffend at ??% over five years and at ??% over ten years. The rate for any violent recidivism (including sexual) for individuals with these characteristics is, on average, ??% over five years and ??% over ten years. Based upon the STATIC-99 score, this places Mr. X in the Low, [score of 0 or 1](between the 1st and the 23rd percentile); Moderate-Low, [score of 2 or 3] (between the 24th and the 61st percentile); Moderate-High, [score of 4 or 5] (between the 62nd and the 88th percentile); High, [score of 6 plus](in the top 12%) risk category relative to other adult male sex offenders.

Based on a review of other risk factors in this case I believe that this STATIC-99 score (Over/Under/Fairly) represents Mr. X's risk at this time. The other risk factors considered that lead me to this conclusion were the following: {Stable Variables: Intimacy Deficits, Social Influences, Attitudes Supportive of Sexual Assault, Sexual Self-Regulation, and General Self-Regulation; Acute Variables: Substance Abuse, Negative Mood, Anger/Hostility, Opportunities for Victim Access - Taken from the SONAR*}, (Hanson & Harris, 2001). Both the STATIC-99 and the SONAR 2000 are available from the Solicitor General Canada's Website www.sgc.gc.ca.

* Note: This list is not intended to be definitive. Evaluators may want to include other static or dynamic variables in their evaluations.

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[Evaluator – these paragraphs are available electronically by e-mailing Andrew Harris, harrisa@sgc.gc.ca and requesting the electronic file – Standard STATIC-99 Paragraphs]

Appendix Eight

STATIC-99 Inter-rater Reliability

Reliability is the extent to which the same individual receives the same score on different assessments. Inter-rater reliability is the extent to which different raters independently assign the same score to the same individual at a given point in time.

These independent studies utilized different methods of calculating inter-rater reliability. The Kappa statistic provides a correction for the degree of agreement expected by chance. Percent agreement is calculated by dividing the agreements (where both raters score "0" or both raters score "1") by the total number in the item sample. Pearson correlations compare the relative rankings between raters. Intra-class correlations compare absolute values between raters.

The conclusion to be drawn from this data is that raters would rarely disagree by more than one point on a STATIC-99 score.

Summary of Inter-rater Reliability			
Study	**N of cases double coded**	**Method of reliability calculation**	**Reliability**
Barbaree et al.	30	Pearson correlations between total scores	.90
Hanson (2001)	55	Average Item Percent Agreement	.91
	55	Average Item Kappa	.80
	55	Intra-class correlation for total scores	.87
Harris et al.	10	Pearson correlations between total scores	.96

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STATIC-99 Replications

Authors	Country	Sample	n	Reported ROC
Hanson & Thornton (2000)	**Canada & the UK**	**Prison Males**	**1,301**	**.71**
	These are the original samples for the Static-99 Prison Males			
Barbaree et al., (2001)	Canada	Prison Males	215	.70
Beech et al., (2002)	England	Community	53	.73
Hanson (2002) Unpublished	Canada	Community	202	.59
Harris et al., (Submitted)	Canada	Forensic Mental Health Patients	396	.62
Hood et al., (2002)	England	HM Prison Males	162	.77
McGrath et al., (2000)	United States	Prison Males	191	.74
Motiuk (1995)	Canada	Prison Males	229	.77
Nicholaichuk (2001)	Canada	Aboriginal Males	109	.67
Nunes et al., (2002)	Canada	Community Pre-trial	258	.70
Poole et al., (2001)	United States	Juv. sex offenders released after age 18	45	.95
Reddon et al., (1995)	Canada	Prison Males	355	.76
Sjöstedt & Långström (2001)	Sweden	All released male offenders (1993-1997)	1,400	.76
Song & Lieb (1995)	United States	Community	490	.59
Thornton (2000a)	England	Prison Males	193	.89
Thornton (2000b)	England	Prison Males	110	.85
Tough (2001)	Canada	Developmentally Delayed Males	76	.60
Wilson et al., (2001)	Canada	Detained High-Risk Offenders	30	.61
		TOTAL	**4,514**	**MEAN = 72.4**

Appendix Ten

Interpreting STATIC-99 Scores Greater than 6

In the original Hanson and Thornton (1999, 2000) study, all offenders with scores of 6 or more were grouped together as "high risk" because there were insufficient cases to provide reliable estimates for offenders with higher scores. Consequently, some evaluators have wondered how to interpret scores for offenders with scores greater than 6. We believe that there is insufficient evidence to conclude that offenders with scores greater than 6 are higher risk to re-offend than those who have a score of 6. However, as an offender's score increases, there is increased confidence that he is indeed a member of the high-risk group.

Below are the sexual and violent recidivism rates for the offenders with scores of 6 through 9. No offender in these samples had a score of 10 or greater. The rates were based on the same subjects and the same statistics (survival analysis) as those used to generate the estimates reported in Table 5 of Hanson and Thornton (1999, 2000).

Overall, the recidivism rates for the offenders with scores of 6, 7 and 8 were similar to the rates for the high-risk group as a whole. There were only three cases with a Static-99 score of 9, one of which sexually recidivated after 3 years, one re-offended with non-sexual violent offence after 18 years, and one did not recidivate. None of the differences between the groups were statistically significant.

Static-99 score	sample size	Sexual recidivism			Violent recidivism		
		5 years	10 years	15 years	5 years	10 years	15 years
6	72	.36	.44	.51	.46	.53	.60
7	33	.43	.43	.53	.43	.46	.56
8	21	.33	.52	.57	.43	.57	.62
9	3	.33	.33	.33	.33	.33	.33
10, 11, 12	0						
Scores 6 thru 12	129	.39	.45	.52	.44	.51	.59

STATIC-99 Coding Form

Question Number	Risk Factor	Codes	Score
1	Young (S9909)	Aged 25 or older Aged 18 – 24.99	0 1
2	Ever Lived With (S9910)	Ever lived with lover for at least two years? Yes No	 0 1
3	Index non-sexual violence - Any Convictions (S9904)	No Yes	0 1
4	Prior non-sexual violence - Any Convictions (S9905)	No Yes	0 1
5	Prior Sex Offences (S9901)	Charges / Convictions None / None 1-2 / 1 3-5 / 2-3 6+ / 4+	 0 1 2 3
6	Prior sentencing dates (excluding index) (S9902)	3 or less 4 or more	0 1
7	Any convictions for non-contact sex offences (S9903)	No Yes	0 1
8	Any Unrelated Victims (S9906)	No Yes	0 1
9	Any Stranger Victims (S9907)	No Yes	0 1
10	Any Male Victims (S9908)	No Yes	0 1
	Total Score	**Add up scores from individual risk factors**	

TRANSLATING STATIC 99 SCORES INTO RISK CATEGORIES

Score	Label for Risk Category
0,1	**Low**
2,3	**Moderate-Low**
4,5	**Moderate-High**
6 plus	**High**

STATIC-99 Coding Form

Question Number	Risk Factor	Codes	Score
1	Young (S9909)	Aged 25 or older Aged 18 – 24.99	0 1
2	Ever Lived With (S9910)	Ever lived with lover for at least two years? Yes No	 0 1
3	Index non-sexual violence - Any Convictions (S9904)	No Yes	0 1
4	Prior non-sexual violence - Any Convictions (S9905)	No Yes	0 1
5	Prior Sex Offences (S9901)	Charges / Convictions None / None 1-2 / 1 3-5 / 2-3 6+ / 4+	 0 1 2 3
6	Prior sentencing dates (excluding index) (S9902)	3 or less 4 or more	0 1
7	Any convictions for non-contact sex offences (S9903)	No Yes	0 1
8	Any Unrelated Victims (S9906)	No Yes	0 1
9	Any Stranger Victims (S9907)	No Yes	0 1
10	Any Male Victims (S9908)	No Yes	0 1
	Total Score	**Add up scores from individual risk factors**	

TRANSLATING STATIC 99 SCORES INTO RISK CATEGORIES

Score	Label for Risk Category
0,1	**Low**
2,3	**Moderate-Low**
4,5	**Moderate-High**
6 plus	**High**

Reforming (purportedly) Non-Punitive Responses to Sexual Offending

By Adam Shajnfeld* and Richard B. Krueger**

I. Introduction

Clovis Claxton, who was developmentally disabled and wheelchair-bound after contracting meningitis and encephalitis as a child, was twenty-four years old and living with his family in Washington state in 1991 when he exposed himself to the nine-year-old daughter of a caregiver.[1] Although he had the mental capacity of a ten- to twelve-year-old child, he was charged with first-degree child molestation and served twenty-seven months in prison.[2] When his family moved to Florida in 2000, Claxton was listed as a sexual offender on the Florida Department of Law Enforcement website, but the website inaccurately indicated he had been charged with the rape of a child.[3] Claxton had not been charged with any other offense since his release from prison, but sheriff's deputies in Florida did take him into custody at least five times for threatening suicide.[4]

In 2005, brightly-colored fliers were dropped into mailboxes and pinned to trees around Claxton's neighborhood, where he lived in an apartment adjoining his parents' house.[5] A short time before, a county commissioner had urged that warning signs be posted in neighborhoods where convicted sex offenders live.[6] The fliers displayed Claxton's picture and address, downloaded from the Florida website, and the words "child rapist."

Claxton, distraught and fearing for his life, called the sheriff's office and said he wanted to kill himself.[7] He was taken for an overnight psychiatric assessment, but released the next day.[8] The following morning he was found dead, an apparent suicide, with one of the fliers lying next to him.[9]

Alan Groome was eighteen years old when he was convicted of a sex offense.[10] He was paroled after serving a number of years behind bars in the state of Washington. Upon his release, he moved in with his mother, but they were evicted from their apartment when residents learned of his past. They then moved in with his grandmother, but Groome was forced to leave when police officers knocked on the doors of 700 neighbors, handing out fliers with his address and photo.

Groome became homeless, begging for money. "I got the feeling no one cares about me, so why should I care about myself and what I do?" said Groome. One detective described Groome as "a man without a country." His parole officer loaned him money because he believed Groome had "a lot of potential." A little over two years after being

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[1] Cara Buckley, *Town Torn Over Molester's Suicide*, MIAMI HERALD, Apr. 23, 2005, at 1; Daniel Ruth, *Who Was the Real Threat to the Town?* TAMPA TRIB., Apr. 27, 2005, at 2.

[2] Buckley, *supra* note 1, at 1.

[3] *Id.*

[4] *Id.*; Ruth, *supra* note 1, at 2.

[5] Buckley, *supra* note 1, at 1; Ruth, *supra* note 1, at 2.

[6] Buckley, *supra* note 1, at 1.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] The quotes and facts in this paragraph are taken from Daniel Golden, *Sex-Cons*, BOSTON GLOBE, Apr. 4, 1993, at 12. This article does not address the many issues surrounding juvenile sex offenders. For a treatment of these issues, see Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163 (2003).

released from prison, Groome had not been re-arrested but was living in a homeless shelter, looking for employment.[11]

As will be discussed, the United States Supreme Court has distinguished between society's punitive and non-punitive responses to sexual offenders, granting society more discretion and affording sexual offenders few protections in conjunction with non-punitive responses. Although all agree that sexual offenses should generally result in punitive sanctions, including prison sentences, the so-called non-punitive responses to sex offenders currently employed by society are not only very punitive in nature, but they are also largely unhelpful in curbing and may even be increasing sexual offending. Sex offender registration and notification requirements, for example, place offenders in physical danger, force offenders out of their homes and cause them to lose their jobs, and create public hysteria.[12]

These requirements often bear little relation to the risk posed by the offender. The label "sex offender" can refer to anyone from a child rapist to an adult involved in a consensual, albeit incestuous, relationship with another adult. These requirements are typically insensitive to differences in motivation and intent, the nature of the offense and its impact on the victim, and the likelihood of recidivism and risk to society. Further, these regimes rarely allow sex offenders who successfully undergo treatment or who can be demonstrated to be highly unlikely to reoffend to be relieved of these requirements before at least many years have passed, if at all.

Legal and societal responses should take better account of what is currently known about sex offenders and be changed accordingly. This Article describes the characteristics of sex offenders (Part II), discusses various registration and notification requirements (Part III), explores Constitutional challenges to registration and notification laws (Part IV), addresses the civil commitment of sex offenders (Part V), analyzes the various problems with current responses to sex offenders (Part VI), reports current options for treating sex offenders (Part VII), provides various recommendations for implementing a more appropriate societal response to sex offenders (Part VIII), and offers some concluding remarks (Part IX).

II. Characteristics of Sex Offenders

"Sex offender" is a legal, not a psychological term.[13] There is no uniform definition of a sex offender. One who engages or attempts to engage in a sexual act with a minor, or who commits or attempts to commit aggravated sexual battery against a person of any age, is widely considered to be a sex offender.[14] In many states, persons who have been

[11] *Turning Point with Barbara Walters* (ABC News television broadcast Sept. 21, 1994), transcript available on LexisNexis ("Interview with Alan Groome, Transcript #131").

[12] Although this article mainly addresses three particular so-called non-punitive responses: civil commitment, registration, and community notification, there are others, including restrictions on where a sex offender can reside and work. In Virginia, for example, a person convicted of various sex offenses involving children is permanently prohibited from loitering within 100 feet of a primary, secondary, or high school or a child day program (VA. CODE § 18.2-370.2 (2006)), residing within 500 feet of any child day center, or primary, secondary, or high school (VA. CODE § 18.2-370.3 (2006)), or working or engaging in any volunteer activity on property that is part of a public or private elementary or secondary school or child day center (VA. CODE § 18.2-370.4 (2006)).

[13] Richard B. Krueger & Meg S. Kaplan, *The Paraphilic and Hypersexual Disorders: An Overview*, 7 J. PSYCHIATRIC PRAC. 391, 393 (Nov. 2001).

[14] The federal enactment establishing the Jacob Wetterling, Megan Nicole Kanka, and Pam Lychner Sex Offender Registration and Notification Program Act defines "sex offender" as "an individual who was convicted of a sex offense" and defines "sex offense" generally as a criminal offense that has an element involving a sexual act or sexual contact with another, various listed criminal offenses against a minor, or an attempt or conspiracy to commit these offenses. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 111 (2006). Many state statutes are more specific. *See, e.g.*, VA. CODE ANN. § 9.1-902 (2006); WASH. REV. CODE § 9A.44.130(9) (2006).

convicted of possessing child pornography are also classified as sex offenders,[15] as are adults engaged in consensual incest,[16] persons who indecently expose themselves,[17] and statutory rapists (for instance, a twenty-two year old who has sex with her sixteen year-old boyfriend).[18] The legal definition of a sex offender includes a very wide range of offenders. From a psychological perspective, though, sex offenders are extremely diverse. The psychological profiles, recidivism rates, and effective treatment modalities of such offenders vary greatly. To appropriately respond to these individuals, a better understanding of these variations is needed.

For example, it is important to distinguish between paraphilic sex offenders and non-paraphilic sex offenders. Paraphilias are psychiatric disorders defined as

> recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons that occur over a period of at least 6 months.[19]

To be diagnosed as having a paraphilia, depending on the type of paraphilia,[20] the person must also either have acted on the urge or there must be resulting clinically significant distress or impairment in important areas of functioning.[21] Those who develop paraphilias tend to lack social skills and suffer from depression, substance abuse, or other co-occurring psychiatric disorders.[22] Far more men than women develop paraphilias.[23]

Paraphilias need not involve illegal behavior. Transvestic fetishism, where a heterosexual male engages in cross-dressing, is not a crime. Further, not all sex offenders suffer from paraphilias. For example, many rapists commit sex offenses out of anger and desire for domination, not for sexual gratification.[24] In one study involving thirty-six convicted male sex offenders, only 58% could be diagnosed with a paraphilia.[25]

Regardless of these variations, as of 2006, there were roughly 566,700 registered sex offenders in the United States.[26] This figure, however, is not a reliable measure of the actual number of sex offenders, as sex offenses are extremely underreported.[27] At

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[15] FLA. STAT. §§ 775.21(4)(a)1b, 827.071(5) (2006); BURNS IND. CODE ANN. § 35-42-4-4(c) (2006). An Indiana appellate court left open the question of whether that state's statute could be applied to virtual child pornography. Logan v. State, 836 N.E.2d 467, 472 (Ind. Ct. App. 2005). The federal law governing sex offender registration and notification was recently expanded to include possession, production, or distribution of child pornography. Adam Walsh Child Protection and Safety Act of 2006 § 111(7)(G).

[16] LA. REV. STAT. ANN. § 14:78 (2006). The statute includes within the definition of incest an uncle and niece either marrying or having sexual intercourse with one another, regardless of how old they are. *Id.*

[17] TEX. PENAL CODE § 21.08 (2006). Under Texas law, a person can be guilty of indecent exposure even if no one else actually sees the defendant's genitals. Boyles v. State, No. 05-94-01727-CR, 1996 WL 403992, at *8 (Tex. App. July 12, 1996).

[18] N.Y. PENAL LAW § 130.25(2) (Consol. 2006).

[19] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: FOURTH EDITION, TEXT REVISION 566 (2000) [hereinafter DSM-IV-TR].

[20] The various types of paraphilia include Exhibitionism, Fetishism, Frotteurism, Pedophilia, Sexual Masochism, Sexual Sadism, Transvestic Fetishism, Voyeurism, and Paraphilia Not Otherwise Specified. *See id.* at 569-76.

[21] *Id.* at 566.

[22] SIMON LEVAY & SHARON M. VALENTE, HUMAN SEXUALITY 469 (2002); Krueger & Kaplan, *supra* note 13, at 399-400.

[23] THE MERCK MANUAL OF DIAGNOSIS AND THERAPY, § 15, Ch. 192 (1999-2005), *available at* http://www.merck.com/mrkshared/mmanual/section15/chapter192/192d.jsp.

[24] KAREN J. TERRY, SEXUAL OFFENSES AND OFFENDERS: THEORY, PRACTICE, AND POLICY 92 (2006).

[25] Krueger & Kaplan, *supra* note 13, at 393 (citing Susan L. McElroy et al., *Psychiatric Features of 36 Men Convicted of Sexual Offenses*, 60 J. CLINICAL PSYCHIATRY 414, 416 (1999)).

[26] National Center for Missing and Exploited Children, *Registered Sex Offenders in the United States* (Mar. 6, 2006), *at* http://www.missingkids.com/en_US/documents/sex-offender-map.pdf.

[27] TERRY, *supra* note 24, at 7, 10.

the same time, this number can be mistakenly read to indicate the number of current active sex offenders in this country, a conclusion that fails to take into account the effects of treatment and monitoring, and the fact that many of these offenders are relatively unlikely to reoffend.

One of the most complicated and contested issues regarding sex offenders is that of recidivism.[28] Calculating their rate of recidivism is difficult for a number of reasons. First, as noted, sex offenses are underreported.[29] Second, sex offenders may continue to re-offend for many years, and thus recidivism rates differ depending on the length of time considered.[30] Third, recidivism differs substantially depending on the type of sex offender in question.[31] For instance, sex offenders who molest a family member (i.e., those who commit incest) are less likely to re-offend than those who molest non-family members.[32] Similarly, one study found recidivism rates for rapists and child molesters to be 18.9% and 12.7%, respectively, over an average four to five year follow-up period.[33] Collapsing all sex offenders together into a single category and making generalizations about this diverse range of offenders using this aggregate determination is likely to result in substantial mischaracterizations regarding the risk of re-offending for many of these individuals.

Even though lumping the recidivism rates of all sex offenders together is unhelpful in assessing the risk posed by these offenders, it does shed light on the dubiety of popular claims about sex offender recidivism. One meta-analysis of recidivism studies of over 23,000 sex offenders found the rate of recidivism to be 13.4% on average for a four to five year follow-up period.[34] Another study, from the United States Department of Justice, found recidivism for sex offenders released from prison to be 5.3% for a three-year follow-up period.[35] In contrast, a Department of Justice report of recidivism rates for nearly 300,000 released prisoners found that 13.4% of those imprisoned for robbery were rearrested for robbery after release, and 22% of those imprisoned for assault were rearrested for assault following release, all within a three-year follow-up period.[36] Thus, while recidivism rates are difficult to measure and reported results vary, and there are numerous factors that make recidivism for a particular individual more or less likely,[37] the recidivism of sex offenders is neither inevitable[38] nor nearly as high as popularly believed.[39]

A number of studies have reported higher recidivism rates for sex offenders, most prominently the so-called "Abel study" where 561 non-incarcerated paraphiliacs reported that they had committed a total of 291,737

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[28] For a good review of the recidivism issue, including the results of many studies, see CENTER FOR SEX OFFENDER MANAGEMENT (PRINCIPAL AUTHOR TIM BYNUM), RECIDIVISM OF SEX OFFENDERS (May 2001), http://www.csom.org/pubs/recidsexof.pdf.

[29] TERRY, *supra* note 24, at 7, 10.

[30] Lucy Berliner, *Sex Offenders: Policy and Practice*, 92 Nw. U. L. Rev. 1203, 1209 (1998) (citing R. Karl Hanson et al., *Long Term Recidivism of Child Molesters*, 61 J. CONSULTING & CLINICAL PSYCHOL. 646 (1993)).

[31] *Id.*

[32] Hanson et al., *supra* note 30, at 646.

[33] R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 351 (1998).

[34] *Id.* at 357. The meta-analysis included studies that measured recidivism in terms of re-conviction, re-arrest, and offenders' self-reports. *Id.* at 350.

[35] PATRICK A. LANGAN ET AL., RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, 1 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf.

[36] PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994, NCJ 193427, at 9 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf.

[37] LEVAY & VALENTE, *s upra* note 22, at 467.

[38] Hanson & Bussière, *supra* note 33, at 357.

[39] ROBERT ALAN PRENTKY & ANN WOLBERT BURGESS, FORENSIC MANAGEMENT OF SEXUAL OFFENDERS 237 (2000). *See also* SARAH BROWN, TREATING SEX OFFENDERS: AN INTRODUCTION TO SEX OFFENDER TREATMENT PROGRAMS 8 (2005).

"paraphilic acts" against 195,407 victims.[40] The Abel study suffers from a number of serious problems. First, "paraphilic acts" are defined very broadly, including fetishism, homosexuality, sadism, and masochism.[41] These behaviors, though, are not illegal when they involve a consenting adult, and homosexuality is no longer considered a paraphilia. In fact, the Abel study hints at this confusion, at one point using the term "victim/partner."[42] Thus, it is doubtful that the high rate of recidivism is reflective of what is currently thought to be a sex offense. Second, the median values of the number of victims per paraphiliac are significantly lower than the mean (average) values, which indicate that a small percentage of paraphiliacs are responsible for a disproportionately large amount of the sex offenses.[43] Broad generalizations from a study such as this one fuel panic, but do not accurately reflect the fact that, although there are outliers who are extreme offenders, recidivism rates are low for most sex offenders.

III. Registration and Notification Laws

In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act.[44] While not imposing mandatory obligations on the states, the Wetterling Act was a significant milestone because it provided significant financial incentives for the states to adopt various provisions pertaining to sex offenders.[45] For example, it required sex offenders to register for at least ten years with authorities following release from prison or placement on parole, supervised release, or probation.[46] Further, state officials were expected to collect and maintain information about offenders, such as their name, home address, photograph, fingerprints, offense history, and documentation of any treatment received for mental abnormality or personality disorder.[47] In 1996, the Wetterling Act was amended to include a notification provision, known as "Megan's Law," which allows states to disclose information collected through registration for "any purpose permitted under the laws of the State."[48] Megan's Law, like many other broad sex offender laws, was enacted in the politically and emotionally charged aftermath of a brutal act against a child.[49] Currently, all fifty states have enacted some type of Megan's Law.[50]

Recently, Congress passed a new version of the Wetterling Act as part of the Adam Walsh Child Protection and Safety Act of 2006.[51] The bill expands the sex offender registration and notification requirements previously imposed on the states. First, it broadens the definition of sex offender, divides sex offenders into three tiers (tier III being the most serious) based on the severity of the crime for which the offender was convicted, and requires that all sex offender registries include the offender's name (including any alias), physical description, current photograph, Social Security number, residential address, vehicle and license plate number, DNA sample, fingerprints, criminal offense, and criminal history; the name and

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[40] Gene G. Abel et al., *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 J. INTERPERSONAL VIOLENCE 3, 19 (1987).
[41] *Id.* at 18.
[42] *Id.* at 17.
[43] *See id.*
[44] 42 U.S.C. 14071 (2006). As will be discussed, this law was recently amended. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 (2006).
[45] *Id.* at (g), (i). States that do not comply face a reduction of 10% of funds allocated under § 42 U.S.C. 3751 for criminal justice projects.
[46] *Id.* at (b)(6).
[47] *Id.* at (b)(1)(A)(iv), (b)(1)(B).
[48] Pub. L. No. 104-145 (1996) (codified as 42 U.S.C. § 14071(e) (2006)).
[49] *See* Michele L. Earl-Hubbard, *Comment: The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U.L. REV. 788, 813 (1996); TERRY, *supra* note 24, at 184.
[50] Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan's Laws*, 42 HARV. J. LEGIS. 355, 357 (2005).
[51] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 (2006).

address of any employer; and the name and address of any school that is being attended.[52]

Second, it requires all jurisdictions to make virtually all sex offender registry information publicly accessible via the Internet and creates a national sex offender website.[53] This generally forces states to broadly disseminate information on every registered sex offender, not just those who pose the greatest risk of re-offending.[54]

A few items cannot be posted, including the identity of any victim, the Social Security number of the sex offender, and any reference to arrests that did not result in conviction, and a few items are left to the discretion of the state, including any information about a tier I sex offender convicted of an offense other than a specified offense against a minor, the name of the employer of the sex offender, and the name of an educational institution where the sex offender is a student.[55]

Third, the bill imposes a registration and Internet notification requirement of fifteen years for a tier I sex offender (with a reduction of five years if a "clean record" is maintained), of twenty-five years for a tier II sex offender, and of life-long duration for a tier III offender.[56] A tier I offender is required to re-register in person at least once a year, a tier II offender every six months, and a tier III offender every three months.[57]

For purposes of comparison, the following are some existing examples of state registration and notification regimes. In Washington, a sex offender can be relieved of the requirement to register ten years after the offender has either been released from confinement, or, if there was no confinement, ten years from entry of judgment and sentence.[58] In Florida, the earliest a sex offender who offended as an adult can be relieved of the requirement to register is twenty years after the offender has been released from sanction, supervision, or confinement, whichever is later.[59] To be relieved of this requirement after twenty years, the offender cannot have been arrested for any felony or misdemeanor (not just a sexual or related offense) since his release,[60] and a court must grant the offender's petition for relief.[61] In Washington and Florida, even if a sex offender no longer poses a risk of re-offending, he must still register as a sex offender until at least either ten or twenty years, respectively, have passed.[62]

Registration, though, did not necessarily mean that the community would be notified about the sex offender. Under the previous Wetterling Act, states were required to notify the community of certain offenders, while notification for others remained optional.[63] State-sponsored Internet sites were routinely used as a means to provide this notification.[64]

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[52] *Id.* at §§ 111, 114.
[53] *Id.* at §§ 118, 120.
[54] Some states had already begun to take this step. In Virginia, for example, the General Assembly in 2006 expanded dissemination via the Internet from individuals "convicted of murder of a minor and violent sex offenders" to individuals "convicted of an offense for which registration is required." *See* VA. CODE § 9.1-913 (2006).
[55] Adam Walsh Child Protection and Safety Act of 2006 § 118.
[56] *Id.* at § 115.
[57] *Id.* at § 116.
[58] WASH. REV. CODE § 9A.44.140(1)(c) (2006).
[59] FLA. STAT. § 943.0435(11)(a) (2006).
[60] *Id.* at 11(a).
[61] *Id.* at 11.
[62] In these states, an offender who was a physically castrated quadriplegic suffering from dementia would still have to register for this entire period of time.
[63] *See* 42 U.S.C. 14071(e)(2) (2006), which requires that states release information to the community when "necessary to protect the public concerning a specific person required to register under this section." The Department of Justice has interpreted this provision to require release of information to the community about the most dangerous offenders, but permits a state to choose not to release information regarding sex offenders it deems are not a threat to public safety. U.S. DEP'T OF JUSTICE, MEGAN'S LAW; FINAL GUIDELINES FOR THE JACOB WETTERLING CRIMES AGAINST CHILDREN AND SEXUALLY VIOLENT OFFENDER REGISTRATION ACT, AS AMENDED, No. RIN 1105-AA56, 582 (1997).
[64] Of the fifty states, only Rhode Island provides no information about sex offenders on an Internet site.

Many states, however, made information regarding *all* sex offenders accessible via the Internet as well.[65] The amount of information available on a particular offender varied from state to state, but all states included the offender's name, offense, physical characteristics, and age.[66] Florida's Internet sex offender database also included the offender's photograph and last known address.[67]

Some states employed risk-tiers, with offenders classified by their risk of re-offending. For example, Rhode Island law provided for three risk-tiers: low risk, moderate risk, and high risk.[68] The level of community notification, if any, depended on the offender's classification.[69] Law enforcement agents were notified of low risk offenders.[70] For moderate and high risk offenders, Internet notification was permitted.[71]

While community notification today is typically provided via the Internet, this need not be the exclusive means. Louisiana, in addition to having a searchable Internet data base of sex offenders,[72] also has perhaps the strictest and most comprehensive notification requirements of any state.[73] Upon release from confinement, a sex offender must supply his name, address, crime information, and photograph to all residences and businesses within a one-mile radius in a rural area, or 3/10 mile radius in an urban area, of the offender's residence. The offender must also notify all adults also residing in his place of residence and the superintendent of the school district in which he resides of his status.[74] A court may even require the offender to wear special clothing indicating that he is a sex offender.[75]

IV. Constitutionality of Registration and Notification Laws

The Supreme Court has issued two major rulings on the constitutionality of sex offender registration and notification laws, both in 2003.

A. Procedural Due Process: *Connecticut Department of Public Safety v. Doe*[76]

In 1999, a person (referred to as John Doe) required to register as a sex offender under Connecticut law,[77] filed a federal lawsuit under 42 U.S.C. § 1983[78] against the Connecticut agencies responsible for administering the State's sex offender registry. Connecticut's law required certain classes of sex offenders to register, and provided for community notification of the presence of these offenders without regard to the registrant's degree of dangerousness to the community.[79] Instead, the registration requirement was linked to whether they had been convicted of certain specified sex offenses.[80]

Doe asserted that this registration requirement harmed his reputation and altered his status under state law. Doe alleged, *inter alia*, that the failure to provide him with a pre-registration hearing to determine if he was

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See http://www.klaaskids.org/pg-legmeg.htm (last visited July 17, 2006).

[65] For example, Florida provides a searchable Internet database generally listing all convicted sex offenders available at http://www3.fdle.state.fl.us/sexual_predators/ (last visited July 17, 2006).

[66] Teichman, *supra* 50, at 381.

[67] *See* http://www3.fdle.state.fl.us/sexual_predators/search.asp?sopu=true&PSessionId=819208581& (last visited July 18, 2006).

[68] R.I. GEN. LAWS § 11-37.1-12 (2006).

[69] *Id.*

[70] *Id.* at (b).

[71] *Id.*

[72] *See* http://lasocpr1.lsp.org/ (last visited July 18, 2006).

[73] *See* LA. REV. STAT. ANN. § 15:542 (2006).

[74] *Id.* at § 15:542(B)(1)(a)-(c).

[75] *Id.* at § 15:542(B)(3) ("Give any other notice deemed appropriate by the court in which the defendant was convicted of the offense . . . including but not limited to signs, handbills, bumper stickers, or clothing labeled to that effect.").

[76] 538 U.S. 1 (2003).

[77] CONN. GEN. STAT. § 54-250-261 (2001).

[78] This section allows a person to sue, in federal court, for a state's violation of his or her civil rights.

[79] *Connecticut Department of Public Safety v. Doe*, 538 U.S. at 4-5, 7.

[80] CONN. GEN. STAT. § 54-258a (2001).

dangerous violated his procedural due process rights under the Fourteenth Amendment because he was deprived of his liberty interests without a hearing.

The Supreme Court found no violation of procedural due process.[81] The Court reasoned that procedural due process only requires a hearing on the existence of a particular fact (or facts) when such fact is relevant under a state statute.[82] Here, as the statute did not claim that the list was comprised of dangerous sex offenders, but instead merely claimed to be a list of sex offenders regardless of level of danger, Doe was not entitled to a hearing to determine his dangerousness.

In *dicta*, the Court noted that one could still challenge the State's law on substantive due process grounds, an issue not brought up nor addressed in the case.[83]

B. Ex Post Facto: *Smith v. Doe*[84]

The Ex Post Facto Clause of the Constitution[85] prohibits the government from imposing punishment for an act that was not a crime at the time it was committed, and from imposing more punishment for an offense than was prescribed by law at the time the crime was committed.[86]

In 1994, Alaska passed its Sex Offender Registration Act (SORA).[87] SORA contains a registration requirement and provides for community notification.[88] Alaska makes much of the information it gathers available on the Internet.[89] Of primary relevance to this lawsuit, however, was that SORA was made retroactive, thereby encompassing sex offenders who committed their crimes before SORA was enacted.[90] Respondents John Doe I and John Doe II, both convicted of sex offenses before passage of SORA and then, after the passage of SORA, required to register under it, brought an action under 42 U.S.C. § 1983 challenging SORA as it applied to them as a violation of the Ex Post Facto Clause. The Supreme Court found no violation of the Ex Post Facto Clause.[91]

The primary question as far as the Court was concerned was whether SORA imposed additional punishment after the fact (i.e., after the crime was committed). The Court determined that if the legislature intended to impose punishment through its legislation, then its retroactive application was indeed a violation of the Ex Post Facto Clause.[92] If the legislature intended to enact a civil (non-punitive) regulatory scheme through its legislation, however, there was an Ex Post Facto violation only if the statutory scheme was so punitive in its effect as to negate the legislature's stated intent.[93] The Court stated that it was required to be deferential to the legislature's stated intent,[94] requiring the "clearest proof" of punitiveness to overcome a presumption that the legislature had

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[81] *Connecticut Department of Public Safety v. Doe*, 538 U.S. at 1.
[82] *Id.* at 7.
[83] *Id.* at 8. A substantive due process claim asserts that the claimant has a fundamental right to some constitutionally-protected interest that is being infringed by the law/action in question, and that the government has to justify abridging that fundamental right. If a fundamental right is implicated, a court strictly scrutinizes the law/action, and a very strong justification is required to overcome a presumption of unconstitutionality. Less strict standards of review are applicable to abridgments of quasi- or non-fundamental rights. *See* Gunderson v. Hvass, 339 F.3d 639, 643-44 (8th Cir. 2003).
[84] 538 U.S. 84 (2003).
[85] U.S. CONST. art. I, § 9, cl 3.
[86] Cummings v. Missouri, 71 U.S. 277, 325-26 (1867).
[87] *See* 1994 Alaska Sess. Laws page no. 41 (codified at ALASKA STAT. §§ 12.63, 18.65.087 (1994)).
[88] *See id.*
[89] *Smith v. Doe*, 538 U.S. at 91.
[90] 1994 Alaska Sess. Laws page no. 41, § 12.
[91] *Smith v. Doe*, 538 U.S. at 84.
[92] *Id.* at 92.
[93] *Id.* at 92 (citing United States v. Ward, 448 U.S. 242, 248-49 (1980)).
[94] *Id.* at 92 (citing Kansas v. Hendricks, 521 U.S. 346, 361 (1997)).

accurately depicted the nature of its legislation.[95]

In the case before it, the Court noted that the Alaska legislature had stated that its intent in enacting SORA was to protect public safety.[96] As a result, the Court found that the stated intent of the legislature was not to impose punishment on sex offenders with the registration requirement.[97] The Court then proceeded to determine whether the legislation had sufficient punitive effect to undercut this characterization.

The Court discussed five of seven factors previously established,[98] which, while not "exhaustive or dispositive,"[99] provided "useful guideposts" in determining if a law is sufficiently punitive in effect to overcome the stated intent of the legislation.[100] The factors were whether the regulatory scheme: (1) has been historically/traditionally regarded as punishment, (2) serves the traditional aims of punishment, (3) imposes an affirmative restraint or disability on the offender, (4) has an alternative (non-punitive) purpose to which it may be rationally connected, and (5) is excessive in relation to the alternative purpose.[101]

Under this analysis, the Court found no punitive effect sufficient to overcome the legislature's stated intent.[102] First, while SORA might resemble colonial shaming punishments—in which the offender was held up before others, forced to confront them face-to-face, and sometimes expelled from the community—SORA was substantively different, as public shaming often involved corporal punishment and, even when it did not, involved more than mere dissemination of information.[103] Second, the Court found that SORA imposed no physical restraint on the offender, nor did it restrain the activities sex offenders may pursue, such as employment.[104] Third, while the statute might deter crimes, the mere presence of a deterrent effect did not render legislation criminal.[105] Fourth, SORA was determined to have a legitimate, non-punitive purpose, namely, that of promoting and ensuring public safety, and its execution was rationally connected to this purpose.[106] Fifth, SORA was not considered to exceed its non-punitive purpose, even though it was potentially over-inclusive by failing to mandate individual determinations of dangerousness, because Alaska could rationally conclude that a conviction for a sex offense provided evidence of a substantial risk of recidivism.[107]

C. Other Potential Constitutional Challenges

By casting Megan's Law statutes as non-punitive (i.e., they do not impose punishment on sex offenders), the Court has also precluded a constitutional challenge based on an Eighth Amendment "cruel and unusual punishment" theory.[108] In addition, although the Supreme Court has yet to address these issues, federal courts of appeals have generally rejected attacks against registration and notification statutes based on purported violations of substantive due process,[109] privacy,[110] and equal protection.[111] In light of

[95] *Id.* at 92 (quoting Hudson v. United States, 522 U.S. 93, 100, 139 (1997) (quoting Ward, 448 U.S. at 249)).
[96] *Id.* at 93.
[97] *Id.* at 96.
[98] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).
[99] *Smith v. Doe*, 538 U.S. at 96 (quoting Ward, 448 U.S. at 249).
[100] *Id.* at 96 (quoting Hudson, 522 U.S. at 99).
[101] *Mendoza-Martinez*, 372 U.S. at 168-69.
[102] *Doe*, 538 U.S. at 105.
[103] *Id.* at 98.
[104] *Id.* at 100.
[105] *Id.* at 102 (citing Hudson, 522 U.S. at 105).
[106] *Id.* at 102-03.
[107] *Id.* at 104.
[108] *See id.* at 102-03.
[109] Gunderson v. Hvass, 339 F.3d 639, 643-44 (8th Cir. 2003), *cert. denied* 540 U.S. 1124 (2003) (holding that no fundamental right is implicated by such a statute, and that the statute is rationally related to a legitimate government purpose). *See also In re* W.M., 851 A.2d 431, 450 (D.C. Cir. 2004), *cert. denied* 125 S. Ct. 885 (2005) (holding that Alaska's SORA statute does not implicate a fundamental right).
[110] A.A. v. New Jersey, 341 F.3d 206 (3d Cir. 2003) (stating that any privacy right of a sex offender is

the Court's unwillingness to strike down sex offender registration and notification laws in the two cases it considered, sex offenders would likely face an uphill battle pursuing these other challenges before the Supreme Court.

V. Civil Commitment

Another means widely thought to limit the danger posed by sex offenders is to impose on them civil commitment through "sexually violent predator" (SVP) laws.[112] Under this approach, sex offenders are confined to a treatment facility, typically following the completion of their prison term, based on a finding that "because of a mental abnormality or personality disorder, [the person] finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts."[113] "Mental abnormality" or "personality disorder" is frequently defined to mean "a congenital or acquired condition that affects a person's emotional or volitional capacity and renders the person so likely to commit sexually violent offenses that he constitutes a menace to the health and safety of others."[114] This approach employs the civil, rather than the criminal, process and allows a person to be involuntarily hospitalized if, following a hearing, that person is found to pose a risk of self-harm or harm to others.[115] This approach permits the state to confine the person until he or she no longer poses a danger to society.[116]

In *Kansas v. Hendricks*, the United States Supreme Court upheld a Kansas statute that allowed the involuntary civil commitment of a sex offender who, due to a "mental abnormality or personality disorder," is likely to engage in "predatory acts of sexual violence."[117] In *Hendricks*, the respondent was a convicted sex offender whose pedophilia was considered to constitute the requisite "mental abnormality."[118]

Five years later, the Court issued a second ruling that clarified that *Hendricks* does not require that the state prove that sex offenders are completely incapable of controlling themselves before the state may commit them.[119] In *Kansas v. Crane*, the Court established that the state is only required to prove that it would be "difficult" for the person to control his or her dangerous behavior as a predicate to civil commitment.[120]

As of 2006, nineteen states had civil commitment statutes for certain sex offenders.[121] After an initial rapid proliferation of such laws, enthusiasm for additional enactments has waned. In the decade of the 1990s, fifteen state programs were passed; since 2000, only four states have enacted such programs. Reasons for this vary, but prohibitive cost, lack of ability to control costs, better alternative uses of funds and resources, lack of release back into the community resulting in an ever increasing number of

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outweighed by the state's compelling interest in protecting public safety (citing Paul P. v. Farmer, 227 F.3d 98, 107 (3d Cir. 2000))).

[111] Doe v. Moore, 410 F.3d 1337, 1346-49 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 624 (2005) (finding no equal protection violation).

[112] *See* JOHN Q. LA FOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS 128 (2005).

[113] VA. CODE ANN. § 37.2-900 (2006).

[114] *Id.*

[115] ANDREW J. HARRIS, CIVIL COMMITMENT OF SEXUAL PREDATORS: A STUDY IN POLICY IMPLEMENTATION xiii (2005); John Kirwin, *One Arrow in the Quiver--Using Civil Commitment as One Component of a State's Response to Sexual Violence*, 29 WM. MITCHELL L. REV. 1135, 1137 (2003).

[116] *See, e.g.*, FLA. STAT. § 394.917(2) (2005).

[117] Kansas v. Hendricks, 521 U.S. 346, 350 (1997) (quoting KAN. STAT. ANN. § 59-29a01 (1994)). The phrase "predatory acts of sexual violence" has since been replaced with "repeat acts of sexual violence." KAN. STAT. ANN. § 59-29a01 (2005).

[118] *Kansas v. Hendricks*, 521 U.S. at 360.

[119] Kansas v. Crane, 534 U.S. 407, 411 (2002).

[120] *Id.* at 411.

[121] Susan Broderick, *Innovative Legislative Strategies for Dealing with Sexual Offenders*, 18(10) AMERICAN PROSECUTORS RESEARCH INSTITUTE UPDATE 1 (2006), http://www.ndaa-apri.org/publications/newsletters/update_vol_18_number_10_2006.pdf.

individuals committed, and lack of demonstrated efficacy are all cited.[122] As of December 2004, 3,943 people had been confined under these laws, with only 427 of them having been conditionally released (most of them) or discharged.[123]

Civil commitment is arguably the most draconian of the so-called non-punitive sex offender legislation in that it confines, for an indeterminate and potentially life-long period of time, offenders who have already served their criminal sentences. It confines these offenders essentially because of crimes they might commit in the future. Civil commitment should be used as a last resort and only for offenders whose dangerousness has been established on a case-by-case basis.

VI. Problems with the Current Responses to Sexual Offending

Current sex offender legislation regarding community notification in particular needs to be more focused. The broad range of offenders encompassed by these laws detracts attention and resources away from those offenders that need the greatest attention, monitoring, and supervision, namely, offenders who pose the highest risk of recidivism. As discussed, individuals who commit incest or statutory rape, or who possess child pornography, are often considered to be sex offenders for purposes of community notification. While the putative reason for sex offender legislation is a regulatory one–protecting citizens[124]–notification regimes are not risk-discriminating. For instance, adult relatives who engage in consensual sexual intercourse with one another pose little, if any, risk to the community, yet they can be subject to registration and notification requirements. This broad scope needlessly scares community members by overstating the presence of what are perceived to be dangerous offenders, places burdens on offenders who pose little or no risk of harming anyone, and drains financial, law enforcement, and administrative resources.

Notification also makes it difficult for offenders to obtain housing and employment. In a study involving thirty convicted sex offenders subjected to community notification, 83% reported that they had been excluded from a residence and 57% reported that they had lost employment as a result of their status as sex offenders.[125] In another study, 300 employers were surveyed as to whether they would hire ex-convicts, including offenders who had committed sexual crimes against children or sexual assault against adults.[126] The overwhelming majority of employers surveyed stated that they would not hire the sex offenders.[127] Job stability, however, significantly reduces the likelihood that a sex offender will re-offend,[128] making notification counterproductive in this respect.

Given that landlords are reluctant to house sex offenders, not surprisingly many are homeless.[129] Ironically, this makes monitoring them more difficult. In addition, with sex offenders forced to move from place to place, even state to state, it becomes harder for offenders to maintain needed ongoing relationships with mental health professionals and family members, friends, or community members and organizations that can provide

[122] John Q. La Fond & Bruce J. Winick, *Doing More Than Their Time* (op-ed), N.Y. TIMES, May 21, 2006, at sec. 14, p. 13.
[123] *Id.*
[124] *See, e.g.*, N.Y. CORRECT. LAW Art. 6-C Note (2005).
[125] Richard G. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance?* 18 BEHAV. SCI. & L. 375, 383 (2000).
[126] Shelley Albright & Furjen Denq, *Employer Attitudes Toward Hiring Ex-Offenders*, 76(2) PRISON J. 118, 124-25 (1996).
[127] *Id.* at 129-31.
[128] Candace Kruttschnitt et al., *Predictors of Desistance among Sex Offenders: The Interaction of Formal and Informal Social Controls*, 17 JUST. Q. 61, 80 (2000).
[129] *See, e.g.*, Monica Davey, *Iowa's Residency Rules Drives Sex Offenders Underground*, N.Y. TIMES, Mar. 15, 2006, at A1.

support services, which in turn may enhance the likelihood of recidivism.[130]

Vigilantism has also been associated with community notification laws. When communities are notified about the presence of a sex offender, some community members may harass, intimidate, or even violently attack the offenders. In one instance, a teenage offender received death threats and found his dog decapitated on his step.[131] In another instance, arsonists burned down the home where a released sex offender was supposed to live.[132] One study found that amongst 942 sex offenders in Washington state subject to community notification, there were thirty-three reported incidents of harassment of some form against the offender or his family.[133] While this number may seem low, one must keep in mind that such incidents may be underreported, as offenders may not want to call further attention to themselves or their families, and that even the possibility of such vigilantism can cause significant worry amongst offenders and their families and hamper treatment efforts.

Another common result of notification is isolation. Social ostracism that the sex offender experiences may push him farther from integrating with society, decrease social skills, and make re-offense more likely.[134]

While community notification increases public anxiety,[135] an article published in October 2005 noted that in the ten years that such laws have been in place, there has not been a single study that has shown reduced recidivism of sexual violence attributable to notification.[136] In December of that same year, a report from the Washington Institute of Public Policy did find that sex offenses had decreased in the years since Washington's passage of sex offender legislation that contained registration and notification provisions.[137]

There are a number of problems with drawing conclusions from this decrease, however. First, as the report acknowledges, Washington has increased the length of incarceration for sex offenders during this period.[138] If offenders are incarcerated for longer periods of time, they have less opportunity to offend. Thus, the decrease in recidivism could be attributable to increased length of incarceration. Second, even if one ignores the incarceration issue, the notification regime in Washington is risk-discriminating in that it provides for community notification only for

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[130] Further exacerbating this dislocation, a number of communities and states prohibit convicted sex offenders from living within a certain distance of designated locations such as schools or child-care centers. *See, e.g.*, IOWA CODE § 692A.2A (2005). These restrictions have had the effect of virtually excluding convicted sex offenders from urban areas, as well as preventing them from living with family members. Davey, *supra* note 129. Interestingly, the Iowa County Attorney's Association, an organization of Iowa prosecutors, has criticized such legislation as being counterproductive, asserting that it causes homelessness and is too broad, and that no research shows that such a restriction reduces sex offenses. IOWA COUNTY ATTORNEYS ASSOCIATION, STATEMENT ON SEX OFFENDER RESIDENCY RESTRICTIONS IN IOWA (Jan. 2006), http://spd.iowa.gov/filemgmt_data/files/SexOffender.pdf.

[131] Jan Hoffman, *New Law Is Urged on Freed Sex Offenders*, N.Y. TIMES, Aug. 4, 1994, at B1.

[132] Joshua Wolf Shenk, *Do 'Megan's Laws' Make a Difference?* U.S. NEWS & WORLD REP., Mar. 9, 1998, at 27.

[133] SCOTT MATSON & ROXANNE LIEB, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, COMMUNITY NOTIFICATION IN WASHINGTON STATE: 1996 SURVEY OF LAW ENFORCEMENT, Executive Summary, Doc. No. 96-11-1101 (Nov. 1996), *available at* http://www.wsipp.wa.gov/rptfiles/sle.pdf.

[134] TERRY, *supra* note 24, at 196.

[135] Mary Bolding, *California's Registration and Community Notification Statute: Does It Protect the Public from Convicted Sex Offenders?*, 25 W. ST. U.L. REV. 81, 81 (1997).

[136] EXECUTIVE BOARD OF DIRECTORS, ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS, THE REGISTRATION AND COMMUNITY NOTIFICATION OF ADULT SEXUAL OFFENDERS (Oct. 5, 2005), http://www.atsa.com/ppnotify.html.

[137] ROBERT BARNOSKI, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, SEX OFFENDER SENTENCING IN WASHINGTON STATE: HAS COMMUNITY NOTIFICATION REDUCED RECIDIVISM? Doc. No. 05-12-1202 (Dec. 2005), http://www.wsipp.wa.gov/rptfiles/05-12-1202.pdf.

[138] *Id.*

moderate and high risk offenders,[139] thus obviating some, but not all, of the inefficiencies and counterproductive components of notification regimes. Those notification regimes that are not risk-discriminating and that are not accompanied by treatment, employment, and housing for offenders are unjust and inefficient. Third, it is notable that with fifty states having enacted community notification laws, this is the only study that we have located that suggests some effect in terms of reducing recidivism. Clearly, more research on the impact of these laws is needed.

Civil commitment as a mechanism for responding to sexual offenders also carries a heavy price. First, a general right to be free from physical restraint and various liberty interests are afforded by the Constitution.[140] There are of course situations where these important guarantees can be tempered, but such restrictions should be limited.[141] Second, civil commitment is very expensive. The cost of housing and treating a civilly committed person for one year in Washington is $138,000.[142] Overall, the cost of operating special facilities for the commitment of sex offenders at the national level is estimated to be $224 million per year.[143] Thus, if there are cheaper or less restrictive ways to achieve the goals of civil commitment, namely, protect public safety and promote rehabilitation, they should be pursued.

VII. Treatment Options

While there is no known cure for inappropriate sexual thoughts and behavior,[144] there are treatments that can significantly reduce their strength and occurrence. Treatments include non-biological therapies such as cognitive behavioral therapy, and biological therapies such as surgical castration and pharmacological (drug) therapy.

Among the non-biological treatments for sex offenders, cognitive-behavioral therapy is the most common.[145] During cognitive-behavioral therapy, offenders may obtain social skills training, sex education, cognitive restructuring, aversive conditioning, and victim empathy therapy.[146]

Social skills training attempts to provide the offender with social competency, so that the individual may pursue appropriate social interactions; sex education informs the offender of the risks and practice of sexual behavior; cognitive restructuring helps the offender avoid cognitive distortions that may have provided the offender with a justification for his behavior; aversive conditioning pairs painful, annoying, or unpleasant experiences, such as a bad smell, with an offender's inappropriate sexual fantasy; and victim empathy therapy helps offenders understand the harm they have caused to the victim and that the victim is also a person with feelings.[147] Offenders may also undergo relapse prevention therapy, a type of cognitive-behavioral therapy, where they learn how to identify problematic thoughts and behaviors and stop their progression.[148]

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[139] WASH. REV. CODE § 4.24.550 (2006).
[140] *See Kansas v. Hendricks*, 521 U.S. at 356.
[141] *Id.*
[142] TERRY, *supra* note 24, at 211.
[143] ROXANNE LIEB & KATHY GOOKIN, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, INVOLUNTARY COMMITMENT OF SEXUALLY VIOLENT PREDATORS: COMPARING STATE LAWS, Doc. No. 05-03-1101 (2005), *available at* http://www.wsipp.wa.gov/rptfiles/05-03-1101.pdf. On the other hand, the average cost per year of housing an inmate in state prison is $22,650. JAMES STEPHAN, U.S. DEP'T OF JUSTICE, STATE PRISON EXPENDITURES, 2001, SPECIAL REPORT, NCJ 202949 (June 2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/spe01.pdf.
[144] TERRY, *supra* note 24, at 139.
[145] *Id.* at 154.
[146] Richard B. Krueger & Meg S. Kaplan, *Behavioral and Psychological Treatment of the Paraphilic and Hypersexual Disorders*, 8 J. PSYCHIATRIC PRAC. 24-25 (2002).
[147] *Id.*
[148] THE ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS, REDUCING SEXUAL ABUSE THROUGH REATMENT AND INTERVENTION WITH ABUSERS (1996), http://www.atsa.com/pptreatment.html [hereinafter ATSA].

Cognitive behavioral therapy, while often successful in reducing recidivism amongst sex offenders,[149] does not always work, either completely or at all.[150] Thus, it is very important for a mental health professional to determine when cognitive-behavioral therapy is appropriate, and to monitor its effectiveness.

Surgical castration[151] involves removal of the testes, which has the effect of significantly reducing circulating testosterone.[152] While surgical castration does decrease sex drive, [153] it does not always do so completely.[154] Further, many view surgical castration, which they associate with the eugenics movement that sought to sterilize those with undesirable traits thought to be hereditary,[155] with fear and skepticism. Additionally, the reduction of sex drive achieved through surgical castration can be overcome with the use of exogenous androgens, such as testosterone,[156] which may be obtained surreptitiously. Nevertheless, some authorities believe that surgical castration may become more common, as it has achieved the lowest recidivism rate of any treatment.[157]

Pharmacological therapy,[158] however, is a viable option for many, particularly those with paraphilias. One of the most noteworthy studies on pharmacological therapy for sex offenders tested the efficacy of triptorelin, a drug that reduces male testosterone levels, in decreasing the deviant sexual desire and behavior of thirty men.[159] All of the men suffered from paraphilias, with twenty-five of them suffering specifically from pedophilia.[160] Before triptorelin use, the men reported an average of forty-eight deviant sexual fantasies per week (with a standard deviation of ten) and five incidents of abnormal sexual behavior per month (with a standard deviation of two).[161]

During treatment, which involved monthly intramuscular injections of triptorelin, supplemented with regular supportive psychotherapy (one to four sessions a month), all of the men had a prompt reduction in paraphilic activities, with the maximal reduction in the intensity of their sexual desire and symptoms occurring after three to ten months with the exception of one man in whom it was achieved after two years.[162] All of the men reported that their sexual desire decreased considerably, that their sexual behavior became easily controllable, that their deviant sexual fantasies and urges disappeared completely, and that there were no incidents of abnormal sexual behavior during therapy.[163] Once the maximal effects of treatment were achieved, there were no sexual offenses reported by the men, by their relatives, or by a probation officer.[164] Symptoms returned among those men who stopped treatment, including three who

[149] Polizzi et al., *What Works in Adult Sex-Offender Treatment? A Review of Prison- and Non-Prison Based Treatment Programs*, 43 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 357, 371 (1999).
[150] See ATSA, *supra* note 148.
[151] Surgical castration is also referred to as physical castration or orcheictomy.
[152] Kurt Freund, *Therapeutic Sex Drive Reduction*, 62 (Supp. 287) ACTA PSYCHIATRICA SCANDINAVICA 5, 15 (1980). For an updated review of surgical castration, see Richard B. Krueger et al., Orchiectomy (in preparation).
[153] Richard Wille & Klaus M. Beier, *Castration in Germany*, 2 ANNALS SEX RESEARCH 103, 129 (1989).
[154] TERRY, *supra* note 24, at 154.
[155] *See* Charles Scott & Trent Holmberg, *Castration of Sex Offenders: Prisoners' Rights Versus Public Safety*, 31 J. AM. ACAD. PSYCHIATRY L. 502, 502 (2003).
[156] J. Michael Bailey & Aaron S. Greenberg, *The Science and Ethics of Castration: Lessons from the Morse Case*, 92 NW. U.L. REV. 1225, 1235 (1998).
[157] Ariel Rosler & Eliezer Witztum, *Pharmacotherapy of Paraphilias in the Next Millennium*, 18 BEHAV. SCI. & L. 43, 44 (2000).
[158] Pharmacological therapy is also referred to as drug therapy or chemical castration.
[159] Ariel Rosler & Eliezer Witztum, *Treatment of Men with Paraphilia with a Long-Acting Analogue of Gonadotropin-Releasing Hormone*, 338 NEW ENG. J. MED. 416 (1998).
[160] *Id.* at 417.
[161] *Id.* The study did not include a control group "because the men might have continued to offend while receiving a placebo." *Id.*
[162] *Id.* at 418.
[163] *Id.*
[164] *Id.* at 418-19.

reported intolerable side effects. Further, for three of these men who were subsequently given an alternative medication (cyproterone acetate), two were subsequently prosecuted and received prison sentences for sex crimes.[165] Case studies of another testosterone-reducing drug, leuprolide acetate (brand name Lupron), reported successful results similar to those of triptorelin.[166]

Currently, medroxyprogesterone acetate (MPA)[167] is the drug most commonly used to reduce serum testosterone levels.[168] MPA is given by injection and need only be administered once every three months.[169] Each injection costs about $30 to $75.[170] Gonadotropin releasing hormone agonists, such as depot-leuprolide acetate, though, are gaining a foothold[171] because they have fewer adverse side-effects[172] and are considered more effective[173] than MPA. Although leuprolide acetate is significantly more expensive than MPA,[174] considering its treatment potential, it may well be worth the cost.

Pharmacological therapies are generally given to those with paraphilias, as they have stronger and more intense deviant sexual desires than other sex offenders.[175] As noted, however, pharmacological therapies may induce unpleasant or harmful side effects or for other reasons may be resisted by sex offenders. While the testosterone-reducing effects of drugs like MPA and leuprolide acetate may be overcome by taking exogenous androgens, standard laboratory analyses of blood and urine can be used to test for the presence of such androgens.[176] It is also important to note that pharmacological therapies need not be life-long; these therapies may be employed for short-term treatment that allows offenders to obtain some measure of control over their sexual impulses and enables other forms of treatment, such as behavioral therapy, to become effective.[177]

However, pharmacological therapies have their limits. For instance, drugs that reduce

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[165] *Id.* 419.

[166] Richard B. Krueger & Meg S. Kaplan, *Depot-Leuprolide Acetate for Treatment of Paraphilias: A Report of Twelve Cases*, 30(4) ARCHIVES SEXUAL BEHAV. 409 (2001). *See also* Peer Briken et al., *Treatment of Paraphilia with Luteinizing Hormone-Releasing Hormone Agonists*, 27 J. SEX & MARITAL THERAPY 45, 52 (2001); Richard B. Krueger & Meg S. Kaplan, *Chemical Castration: Treatment for Pedophilia,i n* 2 DSM-IV-TR CASEBOOK 309, 309 (Michael B. First et al. eds., 2006).

[167] Available under the brand name Depo-Provera.

[168] TERRY, *supra* note 24, at 153.

[169] MPA can also be given orally. Luk Gijs & Louis Gooren, *Hormonal and Psychopharmalogical Interventions in the Treatment of Paraphilias: An Update*, 33(4) J. SEX RESEARCH 273, 275 (1996).

[170] JENNIFER JOHNSEN, PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., IS THE SHOT RIGHT FOR YOU? (2006), http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/birthcontrol/pub-depo-provera.xml.

[171] Fabian M. Saleh & Laurie L. Guidry, *Psychosocial and Biological Treatment Considerations for the Paraphilic and Nonparaphilic Sex Offender*, 31 J. AM. ACAD. PSYCHIATRY & L. 486, 490 (2003).

[172] Krueger & Kaplan, *supra* note 166, at 418 (citing Smith et al., *Clinical Effects of Gonadotrophin-releasing Hormone Analogue in Metastatic Carcinoma of Prostate*, 25 UROLOGY 106 (1985)). Side effects of MPA include hyperglycemia, nightmares, weight gain, and lethargy. Rosler & Witztum, *supra* note 159, at 420. Side effects of leuprolide acetate include hot flashes and decreases in bone density, which can be countered by administering, among other things, alendronate, vitamin D, and calcium. *Id.* at 419-20; Richard B. Krueger et al., *Prescription of Medroxyprogesterone Acetate to a Patient with Pedophilia, Resulting in Cushing's Syndrome and Adrenal Insufficiency*, SEXUAL ABUSE: J. RES. & TREATMENT (forthcoming 2006).

[173] *Id.* at 420-21.

[174] Although costs vary, the cost of one four-month dose has been set at $2,660. WALGREENS, LUPRON DEPOT 30MG INJ, http://www.walgreens.com/library/finddrug/druginfo1.jsp?particularDrug=Lupron&id=15887) (last visited July 19, 2006).

[175] TERRY, *supra* note 24, at 153.

[176] *See* Bailey & Greenberg, *supra* note 156, at 1236. For instance, anabolic steroids such as testosterone cypionate, which may help increase sex-drive, are easily detectible, even months after use. Lorenz C. Hofbauer & Armin E. Heufelder, *Endocrine Implications of Human Immunodeficiency Virus Infection*, 75 MED. 262, 271 (1996); Morris B. Mellion, *Anabolic Steroids in Athletics*, 30 AM. FAM. PHYSICIAN 113, 118 (1984).

[177] Krueger & Kaplan, *supra* note 166, at 419.

testosterone levels, like leuprolide acetate and MPA, may not have any effect on nonsexual violence.[178] Thus, for offenders without paraphilias or whose primary problems are non-sexual, or for offenders with paraphilias and nonsexual violence problems, behavioral therapies, either alone or in conjunction with pharmacological therapies, are necessary.

VIII. Recommendations

Before better means to reduce the occurrence of sexual offenses can be established, the potent obstacle of the political process must be recognized. In a representative democracy, elected legislators are responsible to and dependent upon the support of their constituents. Considering the significant inaccuracies in, and overall frenetic nature of, popularly held beliefs and attitudes regarding sex offenders, it is not surprising that legislators often feel they must adopt measures driven by fear rather than sound science or public policy.

In this vein, a Police Chief in Des Moines, Iowa, arguing for the repeal of an Iowa law placing residency restrictions on certain sex offenders that increased their homelessness and subsequently decreased the ability to monitor their whereabouts, worried that state legislators would not re-work the counterproductive statute out of political cowardice.[179] This fear needs to be overcome and the following recommendations implemented.

(1) Current medical practice has embraced "evidence-based medicine," which is "the conscientious, explicit, and judicious use of current best evidence in making decisions about the care of individual patients."[180] This approach integrates "individual clinical expertise with the best available external clinical evidence [drawn] from systematic research."[181] There is a similar need for "evidence-based legislation." Although recidivism rates are frequently bandied about in the course of legislative debates over proposed sex offender legislation, there is a need for more accurate and precise information on risk and treatment that will enable more appropriate decisions to be made. In general, educational and training programs regarding sex offenders should be made available to legislators and their staff to inform their decision-making.

(2) Sex offender legislation should be preceded by careful study and a projected cost-benefit analysis, rather than rely on speculation and public fears. In addition, any legislation that is enacted should always include a provision mandating and funding a cost-benefit analysis of the legislation and its effects. Building "sunset" provisions into this legislation can provide an opportunity for a systematic review of the cost-benefit analysis and the impact of the legislation, and can be considered in determining whether to modify the legislation.[182]

(3) Sexual offending is a complex behavior and understanding and redressing it is a difficult challenge. Accordingly, proposals to reduce this criminal behavior should be carefully considered and studied. To promote this effort, multidisciplinary commissions should be formed with governmental support and charged to fully evaluate the effects and integration of sex offender-related legislation. These commissions should include mental health professionals, lawyers, criminologists, judges, and legislators. Such commissions should address sex abuse as both a criminal justice and a public health problem. The Centers for Disease Control and Prevention and the World Health Assembly (the decision-making body for the World Health Organization) have declared violence to be a

[178] *Id.*
[179] Lee Rood, *New Data Shows Twice as Many Sex Offenders Missing*, DES MOINES REG. & TRIB., Jan. 23, 2006, at 1A.
[180] David L. Sackett et al., *Evidence Based Medicine: What It Is and What It Isn't*, 312 BRITISH MED. J. 71, 71 (1996).
[181] *Id.*
[182] A "sunset" provision provides that the legislation, unless renewed, will expire after a specified period of time or upon a given date.

public health priority, and The Association for the Treatment of Sexual Abusers has suggested that this framework be extended to sexual violence.[183] The public health model is used to complement the criminal justice approach and strives to prevent the occurrence of crimes through the identification of risk factors and the development of interventions to address these factors.[184] A public health approach can develop not only appropriate post-offense responses, but also generate broader, more systematic, long-term changes that can help prevent the occurrence of sexual abuse and the development of sex offenders.

(4) Risk level classifications should be incorporated into society's responses to sex offenders, particularly with regard to their community notification systems, and a graduated response employed that limits the use of the most "punitive" mechanisms to those offenders that have been shown to pose the greatest risk. This would enable offenders who pose minimal risk and are unlikely to re-offend to reintegrate into society, as well as motivate all offenders to seek and comply with needed treatment programs to obtain this level of classification. Mental health professionals can now identify factors that are related to recidivism and, using sophisticated, empirically-validated instruments, accurately assess the likelihood of future risk.[185] These instruments should be used, for example, to determine what level of community notification is employed for various categories of sex offenders. Community notification should be tailored to the risk these offenders present.

(5) Legislative responses to sex offending should incorporate incentives that reward offenders who undergo, comply with, and maintain treatment, such as relieving these offenders of some of the obligations and hardships they would otherwise face. As noted, the strictest measures should be reserved for those offenders who pose the greatest, most difficult-to-reduce risk of re-offending, thereby targeting scarce resources and focusing attention in a more efficient and productive manner. Such incentives will further motivate offenders to seek and comply with needed treatment programs.

(6) Less restrictive alternatives (including both behavioral and pharmacological treatment) should be considered before civilly committing a sex offender and, where appropriate, be offered to the offender.[186] Such treatment should be provided free of charge or at least at an affordable rate. The successful employment of these alternatives can avoid the huge costs associated with civil commitment, while enhancing the likelihood that an offender becomes a productive member of society. At the same time, the availability of civil commitment or other mechanisms can help ensure treatment compliance.

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[183] *See, e.g.,* THE ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS, SEXUAL ABUSE AS A PUBLIC HEALTH PROBLEM (2001), http://www.atsa.com/pppublichealth.html.

[184] *Id.*

[185] While there are a number of instruments used to predict the likelihood of recidivism, the Static-99 is the most common and most validated. R. KARL HANSON, PUBLIC SAFETY AND EMERGENCY PREPAREDNESS CANADA, THE VALIDITY OF STATIC-99 WITH OLDER SEXUAL OFFENDERS (2005), http://ww2.psepc-sppcc.gc.ca/publications/Corrections/20050630_e.asp. The Static-99 considers ten static factors about an offender, such as the offender's gender and prior sexual offenses, and assigns a score to an offender based on the answers to questions related to these factors. *See* TERRENCE W. CAMPBELL, ASSESSING SEX OFFENDERS 83-84 (2004). Static-99 shows "moderate predictive accuracy." R. Karl Hanson & David Thornton, *Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales*, 24 L. & HUM. BEHAV. 119, 129 (2000). Static-99 has its critics. *See, e.g.,* CAMPBELL, *supra*, at 83-97. It is properly used as a starting point, both in practice and as a springboard for further research. A more comprehensive view of risk would involve considering both static and dynamic (such as current employment stability) factors. Further research is necessary, but risk assessment instruments have experienced steady improvement, improvement that will continue with new research and testing.

[186] Involuntary pharmacological therapy is not addressed here, as it raises numerous constitutional and ethical concerns that merit a separate, thorough analysis.

(7) Government supported opportunities for offenders to obtain employment, housing, treatment, and support services should be enhanced. Offenders cannot reintegrate into society and develop healthy living habits if they have no income, shelter, treatment, or support. Enhancing the likelihood that offenders must or will continually relocate because they lack these opportunities not only virtually ensures that offenders will not improve and exhibit appropriate behavior, but also makes it more difficult to monitor the offender to enhance public safety.

(8) Resources available to treat potential offenders should receive more publicity. Existing state-sponsored websites, publications, and education programs appropriately highlight the resources available to victims, as well as how people can identify and locate sex offenders. There is little or no attention given to advertising how and where a person with a sexual disorder can obtain competent and confidential treatment that will prevent inappropriate behavior from occurring. Governmental funding should be provided to enhance awareness of these services.[187] Additionally, governmental support should be supplied to ensure that people can obtain these resources even when they lack the ability to pay for these services.

(9) Drug and mental health courts have been successfully implemented in some locations.[188] These courts hear mostly or exclusively drug cases or relatively minor criminal cases involving defendants with a mental disorder, respectively, and have thus developed significant experience and expertise in such matters. Sex offense courts may be a viable mechanism in which judges and parole or probation officers are knowledgeable about sex offenders, the treatment modalities specifically designed for sex offenders, the appropriate mechanisms to prevent recidivism, and how best to monitor and supervise offenders to ensure public safety.

However, there is much debate regarding specialized courts in the literature, and thus the matter needs further study.[189] Regardless of whether such specialized courts are implemented, educational and training programs regarding sex offenders should be made available to judges, as well as probation and parole officers, to inform their decision-making.

(10) Because of the limited knowledge and understanding of sex offending, funding and support for research to enhance this understanding is essential. Further research should focus on improving the collection and analysis of recidivism data; studying the effects on recidivism of existing non-punitive responses to sex offenders and possible alternatives; and examining, evaluating, and improving the efficacy of non-biological and biological treatment.

IX. Conclusion

[187] Examples of organizations that provide referrals to mental health professionals and programs that treat sex offenders include: The Safer Society Foundation, P.O. Box 340, Brandon, VT, 05733-0340, (802) 247-5141, www.safersociety.org; The Association for the Treatment of Sexual Abusers (ATSA), 4900 S.W. Griffith Dr., Suite 274, Beaverton, OR, 97005, (503) 643-1023, www.atsa.com, atsa@atsa.com.

[188] *See, e.g.*, Jonathan E. Fielding et al., *Los Angeles County Drug Court Programs: Initial Results*, 23 J. SUBSTANCE ABUSE TREATMENT 217, 223 (2002).

[189] The issue of specialized sex courts is not a simple one. Scholars have long debated the merits and drawbacks of specialized courts as compared to courts of general jurisdiction. Proponents see specialization as beneficial insofar as the courts can develop significant expertise in the area of specialization and produce efficiencies such as those that economists have noted flow from specialization in the production of goods and services. Opponents worry that specialization can render these courts more susceptible to special interests and bias, and that the monotony (hearing the same cases over and over) and lack of prestige of a specialized judgeship might attract a lower-quality judiciary than a generalized judgeship would. For an excellent review of these issues, consult Jeffrey Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67 (1995).

Crafting appropriate responses for sex offenders is no easy task. As they are some of the most hated and reviled members of society, legislators (even those who are well-intentioned) fear opposing legislation targeting these offenders, regardless of how misguided the legislation may be. In the long run, however, well-informed and carefully crafted measures will prove more effective than impulsive, ill-conceived responses in reducing sex offenses.

Four principles should guide the development of these responses. First, sex offenders should be recognized to be a heterogeneous group, distinguishable by offense type and risk of re-offense. Second, the law should take into account new pharmacological therapies, such as testosterone-suppressing drugs, as well as other innovations and therapeutic approaches as a means of reducing the likelihood of future offenses.[190] Third, greater efforts should be made to promote offender reintegration into society, thereby improving their chances for successful treatment and diminishing the likelihood that they will reoffend. Fourth, it is critical to assess the effects of such legislation and to invest in research into the causes, treatment, and prevention of sexual violence.

By integrating law and therapeutic efforts, responses can be formulated that prevent future offenses and victimization, offer offenders and potential offenders the optimal opportunity to lead healthy, productive lives, and decrease the cost of sexual offending to society. By implementing the recommendations described above, society can move one step closer to these goals.

This article is available electronically via Westlaw as 25 DMHL 81.

[190] These therapies are not cure-alls. They must be used appropriately, as discussed in this article and in the medical literature.

From: Leah Simon [redacted]
Sent: Sunday, April 22, 2007 7:33 PM
To: OLPREGS
Subject: [Docket No: OAG 117];[FR Doc: E7-03063];[Page 8894-8897]; Sex Offender Registration and Notification Act; applicability

Follow Up Flag: Follow up
Flag Status: Completed

Attachments: 251424419-SORNA.doc
Please see attached file
Thank You

Leah Simon
[redacted]

Ahhh...imagining that irresistible "new car" smell?
Check out new cars at Yahoo! Autos.

Re: OAG Docket No. 117

Please allow me to voice my grave concern and opposition for the Interim Rule issued as a result of the Adam Walsh Act (AWA) and SORNA. This law will allow double jeopardy which is legal because federal jurisdiction and state jurisdiction are separate. A person can now be punished by both the federal; and state government for the same violation of registration. Every state has a registry in place and this is certainly a duplicate effort and an excessively expensive and unnecessary law. A great many people who have moved on with their lives and living law abiding and productive lives will now be re-exposed with the retroactive clause of SORNA. This is tantamount to the Salem witch hunts only now it is the families of sex offenders who will brought down with this draconian and vindictive law. This is punishment, not public safety as SORNA will show places of employment in the Federal Registry which will be an open invitation to the fear mongers and hatemongers to protest their places of work or physically attack them. Posting places of employment in a federal database will stand in the way of any sex offender in California (and the nation) from being able to earn a living, no matter how minor their crime. This is completely counterproductive to the goal of reintegrating ex-felons back into society as self supporting, productive citizens. The Attorney General has said that SORNA's applicability will be to "virtually the entire existing sex offender population". Clearly the intent is cover "virtually" everyone, but there is no mention about whether Congress specifically limits what he can do. Why was this left out?

Please consider the effect this will have on the one million women and children attached to a sex offender when they cannot earn a living. Current laws have forced a group of people to live under a bridge in Florida. This is an excellent example of how this law will further affect the offenders and their families. They are unable to work and support their families or themselves The one time sex offender is lumped together with the violent sexual predator. In California, there are already laws in effect to handle the truly high risk offender and considering all sex offenders one and the same is simply not right or just. The tiny fraction of a percentage of sex offenders who are guilty of raping and/or murdering a child are mentally ill and they belong in places of healing. They are the people who need to be removed from society for the purpose of safety.

More than 90% of sex crimes involving a child occur within families. No registration, residency restriction or monitoring system will stop these crimes. This law is targeting an entire group of people and only a fraction of the group would possibly be stopped from a crime. We are so scared that those people who have been convicted of sex offense will reoffend, but look at the statistics. The Department of Justice states that the average rate of recidivism is 5%, one the lowest rates among all felonies. It is an invented lie that has been perpetrated to the public that sex offenders cannot be rehabilitated and that they have a high rate of recidivism. This is simply not true. Our conservative leaders are constantly preaching about building the family and knocking the liberals for not having stricter morals, but laws such as this are destroying families over mental illness. It's barbaric, opportunistic and political grandstanding at its worst.

SORNA can be passed as Federal Interim Rule because Congress empowered Attorney General Gonzales, whose character is now being assassinated to do so. All of his initiatives should simply be cancelled. He has proven not to be trustworthy and

everything he has touched is now tainted, including SORNA. In addition, the Attorney General fails to point out anything relative to Sec. 117 (Duty to Notify Sex Offenders of Registration Requirements and to Register) which places a requirement on him (and his office). Notification is a basic tenet of due process, is it not? Why was this left out of the Interim Rule? This is an ill conceived, poorly thought out Rule and I ask that it be struck down before we allow the invented hysteria that has pervaded our country continue to destroy families. A child is 40 times more likely to be killed by a drunk driver than a sex offender. Why are these people being ostracized, forced to live in exile and banishment, on the streets of our FREE country? This is all too reminiscent of the nightmare of Nazi Germany. That is a frightening state of affairs for our country.