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Forecasting Harm: The Law and Science of Risk Assessment  
Among Prisoners, Predators, and Patients

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Abstract

Scientifically valid instruments are being used for the first time to assess an individual's risk of violence in criminal sentencing and in the civil commitment of mental patients and sexual predators. Risk factors on these

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instruments pertain to what the person is (e.g., gender), what the person has (e.g., personality disorder), what the person has done (e.g., past violence), and what has been done to the person (e.g., past victimization). In this Article, I argue that in criminal law, with its emphasis on blameworthiness for actions taken, the admissibility of scientifically valid risk factors is properly constrained to those that simultaneously index moral blameworthiness, i.e., to the defendant's prior criminal conduct. In contrast, the civil commitment of people with mental disorder—a determination in which moral blameworthiness plays no part—should not constrain the admissibility of violence risk factors, except for those subject to strict Equal Protection scrutiny.

Finally, in the commitment of sexually violent predators, courts should keep evidentiary issues about the admissibility of violence risk factors apart from substantive questions about the constitutionality of the statutes that trigger risk assessment. If commitment as a sexually violent predator is properly categorized as *civil* commitment, the admissibility of violence risk factors in implementing such commitments should parallel the admissibility of violence risk factors in the civil commitment of mental patients. Disagreement with the substantive merits of sexually violent predator statutes does not justify depriving decision makers of the only kind of scientific evidence—empirically-validated actuarial violence risk assessment—that can effectuate their statutory goals.

At the penalty hearing of Victor Saldano’s capital murder case, a Texas jury was made to answer the statutory question of whether the defendant, if not executed, “would commit criminal acts of violence that would constitute a continuing threat to society.”<sup>2</sup> The state introduced as a scientific expert witness a psychologist who found that Saldano possessed many risk factors for violence, among them his Hispanic ethnicity, which the expert testified was “a factor weighing in favor of future dangerousness.”<sup>3</sup> The jury sentenced the defendant to death, and, after the Texas Court of Criminal Appeals upheld the sentence,<sup>4</sup> Saldano successfully petitioned for certiorari to the United States Supreme Court. He argued that the use of race or ethnicity for assessing violence risk violated the Equal Protection Clause.<sup>5</sup>

In its response to the defendant’s federal petition, the state—which had vigorously pursued the death penalty in Texas courts—had a dramatic change of

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2. TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(B)(1) (Vernon 2002). The statute was upheld in *Barefoot v Estelle*, 463 U.S. 880 (1983).

3. The same expert offered similar testimony regarding race or ethnicity as a risk factor for violence in eight other cases in Texas. *See* Press Release, John Cornyn, Attorney General, Texas, Statement Regarding Death Penalty Cases (June 9, 2000) (on file with author) [hereinafter Cornyn Press Release].

4. *Saldano v. State*, No. 72,556 (Tex. Crim. App. Sept. 15, 1999).

5. “The question for review was, ‘Whether a defendant’s race or ethnic background may ever be used as an aggravating circumstance in the punishment phase of a capital murder trial in which the State seeks the death penalty.’” *Saldano v. State*, 70 S.W.3d 873, 875 (Tex. Crim. App. 2002).

heart. On the eve of oral argument, then-Attorney General John Cornyn<sup>6</sup> conceded to the Court that “because the use of race in Saldano’s sentencing seriously undermined the fairness, integrity, or public reputation of the judicial process, Texas confesses error and agrees that Saldano is entitled to a new sentencing hearing.”<sup>7</sup> Then-Governor George W. Bush praised his Attorney General’s confession of error as “an indication that there are safeguards in the system.”<sup>8</sup> Codifying the Attorney General’s revised position, the legislature passed, and a new Governor<sup>9</sup> signed, an amendment to the Texas Code of

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6. Attorney General Cornyn was elected to the United States Senate in November 2002.

7. Cornyn Press Release, *supra* note 2. Accordingly, the U. S. Supreme Court vacated the judgment. *Saldano v Texas*, 530 U.S. 1212 (2000). On remand from the U.S. Supreme Court, the Texas Court of Criminal Appeals held that since Saldano’s counsel did not object to the psychologist’s testimony at trial, the issue could not be presented on appeal. The death sentence, therefore, was upheld. *Saldano*, 70 S.W.3d at 875. Saldano then filed a motion for a writ of habeas corpus with the U. S. District Court for the Eastern District of Texas. In May, 2002, Texas Attorney General Cornyn confessed error to this court. The following month, the District Attorney of Collin County, Texas – whose office was responsible for the original prosecution of Victor Saldano – filed a motion to intervene in the case, seeking to have the death penalty upheld over the Attorney General’s objection. On July 16, 2002, the district court held that the District Attorney’s application for intervention presented a non-justiciable political question. The District Attorney appealed this decision. The Fifth Circuit reversed the District Court’s finding of non-justiciability and remanded the District Attorney’s case to the district court “for disposition on the merits.” *Saldano v O’Connell*, 322 F. 3d 365 (5th Cir. 2002). The District Court denied the District Attorney’s motion to intervene, but granted Saldano’s petition for a writ of habeas corpus. *Saldano v. Cockrell*, 267 F. Supp. 2d 635 (E.D. Tex. 2003). The District Court ordered the Texas Department of Criminal Justice “to release Saldano from custody unless the State of Texas, within 180 days from the date of entry of this order and judgment, either commences a new punishment hearing or reforms his sentence to life imprisonment.” *Id.* at 645. The District Attorney appealed the District Court’s order to the Fifth Circuit, which affirmed the District Court’s order. *Saldano v. Roach*, 363 F.3d 545 (Fifth Cir. 2004).

8. Associated Press, *Bush Comments on Death Row Case*, Washington Post, June 6, 2000.

9. Rick Perry had assumed the governorship of Texas when George W. Bush resigned that position after being elected President of the United States.

Criminal Procedure stating: “Evidence may not be offered by the state to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct.”<sup>10</sup>

Debate about what risk factors for future violence constitute admissible evidence in court is not limited to Texas or to capital punishment hearings. It is occurring throughout the country—indeed, throughout the world<sup>11</sup>—and for a variety of legal purposes. This Article explores the contexts in which violence risk assessments are being introduced as scientific evidence, reviews the risk factors for violence that social science research has validated, and addresses the admissibility of using given risk factors for specific legal purposes.

In Part I, I describe developments in substantive law that have amplified the salience of violence risk assessment. Despite their notoriety in cases such as *Saldano*, forward-looking risk assessments of future violence in criminal sentencing have been deemphasized for the past two decades in favor of backward-looking procedures designed to assess blameworthiness for past conduct. Most of the recent developments implicating violence risk assessment have been civil rather than criminal in nature. By playing on exaggerated public

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10. Admissibility in a Criminal Trial of Race or Ethnicity As a Predictor of Future Criminal Behavior, TEX. CODE CRIM. PROC. ANN. art. 37.07(3)(a)(2) (Vernon 2002) (effective Sept. 1, 2001).

11. See, e.g., SENTENCING AND SANCTIONS IN WESTERN COUNTRIES (Michael Tonry & Richard Frase eds., 2001).

fear of violence by people with mental disorder, treatment advocates have been successful in loosening legal strictures on commitment to mental hospitals for those found to be “dangerous to others.”<sup>12</sup> For the first time, these same advocates also have been successful in creating in many states legally enforceable commitment to outpatient treatment in the community. In addition, the United States Supreme Court, in *Kansas v. Hendricks*<sup>13</sup> and *Kansas v. Crane*,<sup>14</sup> has upheld sexually violent predator statutes, providing for the post-imprisonment civil commitment of sex offenders who have a “mental abnormality”—but *not* a major mental disorder, such as schizophrenia—which results in their becoming “likely to engage in predatory acts of sexual violence.”<sup>15</sup>

Alongside these developments in the law have been developments in the science of violence forecasting.<sup>16</sup> I consider these in Part II. For fifty years, behavioral scientists have known in theory that actuarial (sometimes called statistical) risk assessment is far more accurate than reliance on unstructured

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12. See, for example, Oregon Revised Statute 426.130.

13. 521 U.S. 346 (1997)

14. 534 U.S. 407 (2002).

15. KAN. STAT. ANN. ch. 59, art. 29A (2001).

16. The analogy between forecasting harmful weather and “forecasting” harmful behavior is explored in John Monahan and Henry Steadman, *Violent Storms and Violent People: How Meteorology Can Inform Risk Communication in Mental Health Law*. 51 AMERICAN PSYCHOLOGIST 931 (1996).

professional judgment in predicting a wide variety of outcomes. But instruments for implementing this knowledge in the context of assessing risk of violence had not been developed. In the past several years, however, a number of actuarial violence risk assessment tools have become widely available. The best known of these instruments, and risk factors common to many of them, are considered here.

In Part III I address the admissibility in various criminal and civil law contexts of the scientifically valid risk factors for violence described in Part II. In criminal law, with its emphasis on blameworthiness for past actions, I argue that the admissibility of violence risk factors in sentencing is properly constrained to those that index the extent or seriousness of the defendant's prior criminal conduct. In contrast, law authorizing the civil commitment of people with serious mental disorder to inpatient or outpatient treatment involves a legal determination about future conduct in which blameworthiness for past conduct plays no part. I contend, therefore, that the admissibility of violence risk factors in civil commitment can be unconstrained except for classifications subject to strict Equal Protection scrutiny, which in the case of violence risk assessment is limited to the individual's race or ethnicity. Finally, if commitment as a sexually violent predator is properly categorized as *civil* commitment, as the Supreme Court twice has held, I argue that the admissibility of violence risk factors in effectuating such commitments should parallel the use of violence risk factors in traditional civil commitment: any risk factor that validly forecasts violence—with the single

exception of race or ethnicity—is a legitimate candidate for inclusion on actuarial risk assessment instruments.

## PART I: DEVELOPMENTS IN THE LAW OF VIOLENCE RISK

### ASSESSMENT

In recent years, developments regarding violence risk assessment have taken place in three legal contexts: criminal sentencing, the civil commitment of people with serious mental disorder, and the commitment of sexually violent predators. Different legal and policy concerns have led reliance on violence risk assessment to ebb in the first of these contexts and to flow in the second and third.

#### A. Criminal sentencing.

The federal Sentencing Commission,<sup>17</sup> created by the Sentencing Reform Act of 1984,<sup>18</sup> confronted what it referred to as a “philosophical problem”<sup>19</sup> when it set out to draft guidelines for use in sentencing convicted offenders. The problem had to do with determining “the purposes of criminal punishment.”

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17. *See* 28 U.S.C.S. §§ 991 (2002).

18. 18 U.S.C.S. §§ 3551 (2002).



Some argue that appropriate punishment should be defined primarily on the basis of the principle of “just deserts.” Under this principle, punishment should be scaled to the offender’s culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical “crime control” considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.<sup>20</sup>

Assessing the likelihood of future crime is irrelevant to sentencing under the backward-looking principle of punishment as just deserts, but is a central task of sentencing under the forward-looking principle of crime control. Yet in the view of the Commission, choosing between these two fundamental principles of punishment was unnecessary, “because in most sentencing decisions, the application of either philosophy will produce the same or similar results.”<sup>21</sup> This

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19. See U.S. SENTENCING GUIDELINES MANUAL § 1A3 (2000).

20. *Id.*

21. *Id.* See also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 15 (1988) (referring to this “important compromise.”). But see Paul Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1438-41 (2001) (“Dangerousness and desert are distinct criteria that commonly diverge... [T]hey inevitably distribute liability and punishment differently. To advance one, the system must sacrifice the other.”). The separation of desert-based from consequence-based justifications for state intervention has been a major theme in the work of Stephen Morse. See *Blame and Danger: An Essay on Preventive Detention*, B. U. L. REV. 113 (1996); *Neither Desert Nor Disease*, LEGAL THEORY 265 (1999); *Uncontrollable Urges and Irrational People*, 88 VA L REV 1025 (2002). See also Aaron Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY LAW JOURNAL 557 (2003); Paul Hofer and Mark Allenbaugh, *The Reason Behind the Rules: Finding*

brief and facile treatment issued in 1987 has been the Commission's first and last word on the purposes of criminal punishment.

While theoretically agnostic about *why* we punish, the Sentencing Guidelines<sup>22</sup> promulgated by the Commission were remarkably explicit on *how* we punish: race, sex, religion, national origin, socioeconomic status, and a disadvantaged upbringing “are not relevant” in the determination of a sentence.<sup>23</sup> In addition, education, vocational skills, employment record, family ties,

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*and Using the Philosophy of the Federal Sentencing Guidelines.* 40 AM. CRIM. L. REV. 19 (2003).

22. In *Blakely v. Washington*, 124 S.Ct. 2531 (decided June 24, 2004), the United States Supreme Court held that a Washington State trial court's imposition of an “exceptional sentence,” above the standard maximum sentence, on the basis of the judge's—rather than the jury's—finding that the defendant had acted with “deliberate cruelty” violated the defendant's Sixth Amendment right to trial by jury. Justice Scalia, writing for the five-person majority, stated that “The Federal [Sentencing] Guidelines are not before us, and we express no opinion on them.” *Id.* at 2538. Justice O'Connor, dissenting, believed otherwise: “The court ignores the havoc it is about to wreak on trial courts across the country. It is no answer to say that today's opinion impacts only Washington's scheme and not others, such as, for example, the Federal Sentencing Guidelines... What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy.” *Id.* at 2249-50. Since June, several lower federal courts have ruled that the reasoning in *Blakely* applies to the Federal Sentencing Guidelines. *See, e.g.*, *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004); *United States v. Ameline*, No. 02-30326, 2004 WL 1635808 (9th Cir. Jul 21, 2004). In July the Acting Solicitor General filed a certiorari petition stating that “The result [of *Blakely*] has been a wave of instability in the federal sentencing system that has left the government, defendants, and the courts without clear guidance on how to conduct the thousands of federal criminal sentencings that are scheduled each month.” Petition for Writ of Certiorari at 8, *United States v. Booker*, No. 04-104 (July, 2004). In response, the Supreme Court has added *Booker* and another case to its docket for the first day of oral argument in the October 2004 term. *Booker, supra, cert. granted*, 73 U.S.L.W. 3074 (U.S. Aug. 2, 2004) (No. 04-104); *United States v. Fanfan*, 2004 WL 1723114 (D. Me. June 28, 2004), *cert. granted*, 73 U.S.L.W. 3074 (U.S. Aug. 2, 2004) (No. 04-105).

23. U.S. SENTENCING GUIDELINES MANUAL § 4H1.10 (2000) [hereinafter U.S.S.G.]. The Sentencing Reform Act directed that the Guidelines be “entirely neutral” with respect to race, sex, religion, national origin, and socioeconomic status. The Commission responded by adopting a Policy Statement that listed the above factors -- plus an additional one of “a disadvantaged upbringing.” 28 U.S.C. § 994(d) (2002).

community ties, age, mental and emotional condition, and substance abuse, are “not ordinarily relevant” in the determination of a sentence.<sup>24</sup> As Professor Kate Stith and Judge Jose Cabranes note, “the Commission has never explained why it chose to exclude a variety of factors (especially those relating to the personal history of the defendant) from the sentencing calculus.”<sup>25</sup>

With the single exception of criminal history—which the Guidelines state “*is* relevant in determining the appropriate sentence”<sup>26</sup>—virtually all of the variables that potentially could be used as scientifically valid risk factors for violence<sup>27</sup> under a forward-looking consequentialist “crime control” theory of

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24. U.S.S.G., *supra* note 18, §§ 4H1.1-.6. While not “ordinarily” relevant, the noted factors may sometimes be relevant. Examples given in the Guidelines Manual include the misuse of special training or education to facilitate criminal activity, which is permitted to aggravate sentence length. While some factors may not ordinarily be relevant in the sense that they are not to be used in determining the *length* of imprisonment, they may be used for other purposes. Thus, the Guidelines Manual states:

Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program.

*Id.* § 5H1.4. Likewise, “[m]ental and emotional conditions may be relevant in determining the conditions of probation or supervised release, e.g., participation in a mental health program.” *Id.* § 5H1.3.

25. KATE STITH & JOSE CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 56 (1998). See also Aaron Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L. REV. 557 (2003); Paul Hofer and Mark Allenbaugh, *Reconstructing the Philosophy of the Federal Sentencing Guidelines: Still Incoherent After All these Years?* 15 FEDERAL SENTENCING REPORTER 211 (2003).

26. U.S.S.G., *supra* note 18, § 4H1.7 (emphasis added).

27. See discussion *infra* Part II.

punishment are explicitly excluded from consideration in federal sentencing procedures. While no rationale for this exclusion is forthcoming from the Act or the Guidelines, the implicit concerns seem clear enough. Mark Moore is representative of the commentators:

Some characteristics [used as risk factors for violence in sentencing], such as prior criminal conduct and current illegal drug use, are themselves crimes and therefore of direct interest to the criminal justice system. Others, such as race, religion, and political beliefs, are the opposite: they are specially protected against being used by criminal justice officials in making decisions. Some characteristics, such as prior crimes, drug use, and perhaps employment, are thought to be under the control of the offenders and therefore expressions of their inclinations and values. Other characteristics, such as age or race, are not under the control of the offenders and consequently are of little moral significance: they cannot be expressions of a person's character although they might be good predictors of future conduct.<sup>28</sup>

Even if crime control is one of the primary purposes of criminal punishment, therefore, concern with just deserts is sufficiently strong that it will

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28. Mark H. Moore, *PURBLIND JUSTICE: Normative Issues in the Use of Prediction in the Criminal Justice System*, in *CRIMINAL CAREERS AND "CAREER CRIMINALS"* 314, 317 (Alfred

constrain the variables that can be used in the pursuit of crime control. Criminal history can be relied upon, since, in the words of one of the reports that led to the creation of the Sentencing Commission, “a record of prior offenses bears *both* on the offender’s deserts *and* on the likelihood of recidivism.”<sup>29</sup> But variables reflecting characteristics of the defendant that have no “moral significance” cannot be used to set sentence length in federal court, even if they have great statistical significance in predicting recidivism, including violent recidivism.<sup>30</sup>

#### B. The civil commitment of people with mental disorder.

All states have statutes allowing certain people with a mental disorder to be involuntarily hospitalized in a psychiatric facility.<sup>31</sup> Prior to the late 1960s,

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Blumstein et al. eds., 1986).

27. Andrew von Hirsch, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976) at 87.

30. At the state level, sentencing systems vary greatly. As Michael Tonry has noted, “there is no longer anything that can be called ‘the American system’ of sentencing and corrections.” M. Tonry, *The Fragmentation of Sentencing and Corrections in America*, Research in Brief: Sentencing and Corrections – Issues for the 21<sup>st</sup> Century (Office of Justice Programs, National Institute of Justice, September 1999) at 1. A recent survey noted that 18 states have some form of sentencing guidelines, and proposals for sentencing guidelines were pending in four additional states. R. Lubitz and T. Ross, *Sentencing Guidelines: Reflections for the Future*, Research in Brief: Sentencing and Corrections – Issues for the 21<sup>st</sup> Century (Office of Justice Programs, National Institute of Justice, June 2001). These state guidelines, like the federal ones, “typically reduce authorized sentencing criteria solely to the offender’s crime and to some measure of his or her criminal history.” M. Tonry, *Reconsidering Indeterminate and Structured Sentencing*, Research in Brief: Sentencing and Corrections – Issues for the 21<sup>st</sup> Century (Office of Justice Programs, National Institute of Justice, September 1999).

31. See e.g., LAWRENCE GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 210 (2002):

involuntary commitment to psychiatric hospitals was justified primarily by a paternalistic concern for people who were seen to be "in need of treatment." Beginning at that time however, public safety began to dominate as a rationale for commitment, and risk of harmful behavior—called "dangerousness" in statutes and court decisions—became a primary focus of legal attention.<sup>32</sup> Typically, to qualify for involuntary civil commitment as a hospital inpatient, the individual has to be "seriously mentally disordered," and because of this serious disorder, to be either "dangerous to others" or "dangerous to self."<sup>33</sup> While there was a flurry of interest in the constitutionality of commitment statutes during the 1970s, the United States Supreme Court left no doubt that such laws would be upheld, provided that adequate procedural safeguards were in place, such as proof of disorder and dangerousness by clear and convincing evidence.<sup>34</sup>

Advocates for family members of people with mental disorder have long argued that these 1960s-era state civil commitment statutes were written so

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Civil commitment is the detention (usually in a hospital or other specially designated institution) for the purposes of care and treatment. Civil commitment, like isolation and quarantine, is both a preventive measure designed to avert risk, and a rehabilitative measure designed to benefit persons who are confined. Consequently, persons subject to commitment usually are offered, and sometimes are required to submit to, medical treatment. Civil commitment is normally understood to mean confinement of persons with mental illness or mental retardation, but it is also used for containing persons with infectious diseases, notably tuberculosis, for treatment.

32. See PAUL APPELBAUM, *ALMOST A REVOLUTION: MENTAL HEALTH LAW AND THE LIMITS OF CHANGE* (1994).

33. See *generally*, MICHAEL PERLIN, *LAW AND MENTAL DISABILITY* (1994).

34. See *Addington v. Texas*, 441 U.S. 418 (1979).

narrowly and with so many procedural protections that many people who need mental health services but refuse to adhere to those services—refuse, according to this view, because their disorder rendered them incompetent to make treatment decisions<sup>35</sup>—were effectively left untreated. These advocates urged looser due process protections and longer time limits on hospital treatment. For two decades, a combination of civil libertarian and fiscal concerns thwarted moves in this direction.<sup>36</sup>

In the past several years, however, the tide has turned in many states. This development has less to do with an increase in legislative compassion for people with mental disorder than with a shift in the lobbying tactics of the treatment advocates. No longer appealing to humanitarian concerns, advocates of reinvigorated commitment statutes have sold their approach to state legislatures by playing on already exaggerated<sup>37</sup> public fears of violence committed by people with a mental disorder. As stated by one of the most visible figures in the treatment advocacy movement,

Laws change for a single reason, in reaction to highly publicized incidents

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35. THOMAS GRISSO & PAUL APPELBAUM, *ASSESSING COMPETENCE TO CONSENT TO TREATMENT: A GUIDE FOR PHYSICIANS AND OTHER HEALTH PROFESSIONALS* (1998).

36. For an insightful history of these developments, see Paul Appelbaum, *supra* note \_\_.

37. See Bernice Pescosolido et al., The Public's View of the Competence, Dangerousness and Need for Legal Coercion Among Persons with Mental Illness. 89 *AM. J. PUB. HEALTH* 1339 (1999).

of violence. People care about public safety. I am not saying it is right, I am saying this is the reality. . . . So if you're changing your [civil commitment] laws in your state, you have to understand that. . . . It means that you have to take the debate out of the mental health arena and put it in the criminal justice/public safety arena.<sup>38</sup>

Examples of the new, less libertarian and more treatment-oriented commitment statutes include South Dakota, which in 2000 extended the time frame over which a violent act could be predicted to occur by deleting the word “very” from the previous statutory language that had read “very near future.”<sup>39</sup> Likewise, Minnesota in 2002<sup>40</sup> and Maryland in 2003<sup>41</sup> removed the requirement that dangerousness be “imminent.” Wyoming in 1999 broadened the definition of “dangerous to himself or others” to include not only “death” and “serious physical injury,” but also “destabilization from lack of or refusal to take prescribed psychotropic medications.”<sup>42</sup> Similarly, in 2002, the Wisconsin Supreme Court upheld a statute authorizing the commitment of people with mental disorder who,

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38. D. J. Jaffe, Speech to the National Alliance for the Mentally Ill (orfile with author). *See also* E. Fuller Torrey & Mary Zdanowicz, *Why Deinstitutionalization Turned Deadly*, WALL ST. J., Aug. 4, 1998, at A18 (“approximately 1,000 homicides a year are committed nationwide by seriously mentally ill individuals who are not taking their medication.”).

39. S.D. CODIFIED LAWS § 27A-1-1 (Michie 2001).

40. 2002 Minn. Sess. Law Serv. 335 (West).

41. Maryland Senate Bill 273/House Bill 668 (enacted May 22, 2003; effective October 1, 2003).

42. WYO. STAT. ANN. § 25-10-101(a)(ii) (Michie 2001).



if left untreated, will lose their “ability to function independently in the community.”<sup>43</sup>

More dramatic than the loosening of existing civil commitment statutes for *inpatient* hospitalization has been the proliferation of new statutes allowing for civil commitment to *outpatient* treatment for people with mental disorder. Mandating adherence to mental health treatment in the community through outpatient commitment has now become the most contested issue in mental health law.<sup>44</sup> Although 40 U.S. jurisdictions have statutes that nominally authorize outpatient commitment, until recently few states made substantial use of these laws.<sup>45</sup> With the 1999 enactment in New York State of “Kendra’s Law,”<sup>46</sup> nationwide interest in outpatient commitment (euphemistically termed “assisted outpatient treatment” in the statute) has greatly increased. Kendra’s Law

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43. State v. Dennis H., 647 N.W.2d 851 (Wis. 2002).

44. See John Monahan et al., *Mandated Community Treatment: Beyond Outpatient Commitment*, 52 PSYCHIATRIC SERVICES 1198 (2001); John Monahan, Marvin Swartz and Richard Bonnie, *Mandated Community Treatment for Mental Disorder*, 22 HEALTH AFFAIRS 28 (2003); Marvin Swartz & John Monahan, *Special Section on Involuntary Outpatient Commitment*, 52 PSYCHIATRIC SERVICES 323 (2001). There are three types of outpatient commitment. The first is a variant of conditional release from a hospital: a patient is discharged on the condition that he or she continues treatment in the community. The second type is an alternative to hospitalization for people who meet the legal criteria for inpatient treatment: they are essentially given the choice between receiving treatment in the community and receiving treatment in the hospital. The third type of outpatient commitment is preventive: people who do not currently meet the legal criteria for inpatient hospitalization but who are believed to be at risk of decompensation to the point that they will qualify for hospitalization if left untreated are ordered to accept treatment in the community. Joan Gerbasi, et al., *Resource Document on Mandatory Outpatient Treatment*, 28 J. AM. ACAD. PSYCHIATRY & L. 127-44 (2000).

45. Gerbasi et al., *supra* note 37.

mandates adherence to mental health treatment in the community for a person who meets a number of statutory qualifications, including suffering from mental illness, and who, “because of mental illness is unlikely to participate voluntarily in recommended treatment and . . . needs assisted outpatient treatment to prevent a relapse or deterioration which would likely result in serious harm to the person or others.” Kendra’s Law has withstood a number of constitutional challenges in New York State courts<sup>47</sup> and in February 2004 was unanimously upheld by the New York Court of Appeals.<sup>48</sup> Since it was enacted in late 1999, 9,323 people in New York State have been evaluated for outpatient commitment under Kendra’s

46. N.Y. MENTAL HYG. LAW § 9.60 (Gould 2002).

47. *See e.g., In re Urcuyo*, 714 N.Y.S.2d 862, 873 (2000):

Clearly, the state has a compelling interest in taking measures to prevent these patients who pose such a high risk from becoming a danger to the community and themselves. Kendra’s Law provides the means by which society does not have to sit idly by and watch the cycle of decompensation, dangerousness and hospitalization continually repeat itself.

*See also* Ilissa Watnik, Comment, *A Constitutional Analysis of Kendra’s Law: New York’s Solution for Treatment of the Chronically Mentally Ill*, 149 U. PA. L. REV. 1181(2001).

48. *In the Matter of K.L. (Anonymous) v. Glenn Martin*. 2004 NY Int. 14 (February 17, 2004):

[T]he assisted outpatient's right to refuse treatment is outweighed by the state's compelling interests in both its police and parens patriae powers. Inasmuch as an AOT [Assisted Outpatient Treatment] order requires a specific finding by clear and convincing evidence that the patient is in need of assisted outpatient treatment in order to prevent a relapse or deterioration which would be likely to result in serious harm to self or others, the state's police power justifies the minimal restriction on the right to refuse treatment inherent in an order that the patient comply as directed... In addition, the state's parens patriae interest in providing care to its citizens who are unable to care for themselves because of mental illness is properly invoked since an AOT order requires findings that the patient is unlikely to survive safely in the community without supervision.... Id at 10.

Law, of whom 3,455 were committed and another 2,614 “voluntarily” agreed to adhere to treatment in the community before a judgment was rendered.<sup>49</sup>

“Laura’s Law,” modeled on the New York statute, went into effect in California on January 1, 2003.<sup>50</sup> Florida amended its civil commitment statute to allow for outpatient commitment, effective January 1, 2005.<sup>51</sup>

### C. The commitment of sexually violent predators.

The most influential case dealing with violence risk assessment in recent years has been the United States Supreme Court’s 1997 upholding of sexually violent predator statutes in *Kansas v. Hendricks*.<sup>52</sup> Under the Kansas Sexually Violent Predator Act,<sup>53</sup> an offender, after being convicted of a specified sexual crime and serving the prison sentence associated with that criminal conviction, can be found to be a sexually violent predator. This finding can serve as the predicate for civil commitment to a mental hospital for an indefinite period. The Act defined a "sexually violent predator" as “any person who has been convicted of or charged with a

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49. [http://www.omh.state.ny.us/omhweb/kendra\\_web/kstatus\\_rpts/statewide.htm](http://www.omh.state.ny.us/omhweb/kendra_web/kstatus_rpts/statewide.htm) (last visited August 15, 2004).

50. The Outpatient Treatment Demonstration Act of 2002 (AB 1421).

51. Amendments to the Baker Act (S.700).

52. 521 U.S. 346 (1997)

sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.”<sup>54</sup>

Justice Thomas, writing for the 5-4 majority, made clear that it was pivotal in the decision that the statute under review was *civil* in nature. “The categorization of a particular proceeding as civil or criminal ‘is first of all a question of statutory construction.’ We must initially ascertain whether the legislature meant the statute to establish ‘civil’ proceedings. If so, we ordinarily defer to the legislature's stated intent.”<sup>55</sup> He continued:

Here, Kansas' objective to create a civil proceeding is evidenced by its placement of the Sexually Violent Predator Act within the Kansas probate code, instead of the criminal code, as well as its description of the Act as creating a "*civil* commitment procedure." Nothing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm.<sup>56</sup>

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53. KAN. STAT. ANN. ch. 59, art. 29A (2001)

54. *Id.* at § 59-29a02(a).

55. *Hendricks*, 521 U.S. at 361 (citation omitted).

56. *Id.*(citation omitted). Justice Thomas elaborated on why the statute in question was properly categorized as civil rather than criminal:

[C]ommitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence. The Act's purpose is not retributive

Even Justice Breyer, dissenting in *Hendricks*, noted that “Civil commitment of dangerous, mentally ill individuals by its very nature involves confinement and incapacitation. Yet ‘civil commitment,’ from a constitutional perspective, nonetheless remains civil.”<sup>57</sup> Five years later, in *Kansas v. Crane*,<sup>58</sup> the Supreme Court reaffirmed the view that, in sexually violent predator cases, “the confinement at issue [is] civil, not criminal, confinement.”<sup>59</sup>

Sixteen states have now enacted sexually violent predator statutes modeled on the Kansas law upheld in *Hendricks* and in *Crane* providing for the post-imprisonment civil commitment of sex offenders who have a mental

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because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes, either to demonstrate that a "mental abnormality" exists or to support a finding of future dangerousness...Nor can it be said that the legislature intended the Act to function as a deterrent. Those persons committed under the Act are, by definition, suffering from a "mental abnormality" or a "personality disorder" that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement.

*Id.* at 361-62.

57. *Id.* at 380. See also Paul Robinson, *Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 693 (1993); Stephen Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, With Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69 (1996).

58. 534 U.S. 407 (2002). See Peter Pfaffenroth, *The Need for Coherence: States' Civil Commitment of Sex Offenders in the Wake of Kansas v. Crane*, STANFORD L. REV. 2229 (2003).

59. *Id.* at 868. The Court in *Crane* held that proof of a complete inability to control one's behavior was not a Constitutionally necessary prerequisite to being found to be a sexually violent predator and civilly committed to a hospital.

It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case. *Id.* at 870.

abnormality and are believed to be at high risk of violent recidivism.<sup>60</sup> The latest data indicate that across these 16 states 1,632 people have been adjudicated to be sexually violent predators and are currently confined in psychiatric facilities, with a further 846 people hospitalized for evaluation and currently awaiting trial for commitment as a sexually violent predator.<sup>58</sup>

## PART II: DEVELOPMENTS IN THE SCIENCE OF VIOLENCE

### FORECASTING

In this Part, I first clarify a fundamental distinction, that between clinical and actuarial approaches to risk assessment. I then briefly review several of the actuarial violence risk assessment instruments that have recently become available for use by expert witnesses. Finally, I consider in more detail ten risk factors for violence that often appear on these actuarial instruments.

#### A. Clinical and actuarial approaches to risk.

There are two basic approaches to the risk assessment of violence, or of

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60. W. Lawrence Fitch, *Sex Offender Commitment in the United States: Legislative and Policy Concerns*, in *SEXUALLY COERCIVE BEHAVIOR: UNDERSTANDING AND MANAGEMENT* (New York Academy of Sciences ed. 2003). *See also* Bruce Winick and John LaFond (Eds), *PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY* (2003).

any other form of human behavior. One approach, called clinical prediction, relies on the subjective judgment of experienced decision makers—typically, in the case of violence, psychologists and psychiatrists, but also parole board members or judges. The risk factors that are assessed in clinical prediction might vary from case to case, depending on which seem more relevant. These risk factors are then combined in an intuitive manner to generate an opinion about violence risk. The other approach, termed actuarial (or statistical) prediction, relies on explicit rules specifying which risk factors are to be measured, how those risk factors are to be scored, and how the scores are to be mathematically combined to yield an objective estimate of violence risk.<sup>62</sup> Christopher Slobogin,

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<sup>58</sup> Id.

<sup>59</sup> As stated by Barbara Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1421-22 (1979):

Techniques for predicting individual behavior generally use one of two competing approaches to the problem. One approach relies on the subjective judgment of experienced decision makers, who evaluate each applicant on an individual basis in light of the experience accumulated by the decision maker and his profession.

The alternative method for making predictions evaluates each applicant according to a predetermined rule for counting and weighting key characteristics. The relevant characteristics are specified in advance, and so is the rule for combining them to produce a score for each applicant. This score must be convertible into an estimate of the applicant's expected performance. This method of making predictions is often called statistical prediction, because statistical techniques are generally used to generate the rule from an analysis of prior cases to measure the accuracy of the rule in describing those prior cases, and to decide whether the rule should be used to predict results in future cases.

<sup>62</sup> As stated by Barbara Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1421-22 (1979):

Techniques for predicting individual behavior generally use one of two competing approaches to the problem. One approach relies on the subjective judgment of

writing almost 20 years ago, stated that “read in their best light the data suggest that neither the clinical nor the actuarial method of prediction provides information that will permit an accurate designation of a ‘high risk’ group whose members have more than a forty to fifty percent chance of committing serious assaultive behavior.”<sup>63</sup>

Recent research, reviewed below, confirms the continuing validity of Professor Slobogin’s claim regarding clinical prediction, but indicates that his conclusion regarding actuarial prediction has been superceded by the data.

### Clinical Prediction

Neither the customary inpatient or outpatient forms of civil commitment—nor civil commitment as a sexually violent predator—are predicated on the assumption that *all* people with mental disorder or mental abnormality will be violent. Rather, they are premised on the belief that behavioral scientists can

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experienced decision makers, who evaluate each applicant on an individual basis in light of the experience accumulated by the decision maker and his profession.

The alternative method for making predictions evaluates each applicant according to a predetermined rule for counting and weighting key characteristics. The relevant characteristics are specified in advance, and so is the rule for combining them to produce a score for each applicant. This score must be convertible into an estimate of the applicant's expected performance. This method of making predictions is often called statistical prediction, because statistical techniques are generally used to generate the rule from an analysis of prior cases to measure the accuracy of the rule in describing those prior cases, and to decide whether the rule should be used to predict results in future cases.



distinguish with a reasonable degree of accuracy between those people with mental disorder or abnormality who are “dangerous” and those who are not.

One early review of the research challenging this assumption about the accuracy of clinical predictions of violence concluded that “psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several-year period among institutionalized populations that had both committed violence in the past (and thus had high base rates for it) and who were diagnosed as mentally ill.”<sup>64</sup>

Little has transpired in the intervening decades to increase confidence in the ability of psychologists or psychiatrists, using their unstructured clinical judgment, to accurately assess violence risk.<sup>65</sup> Only two studies of the validity of clinicians’ predictions of violence in the community have been published in the past 20 years. One studied court-ordered pre-trial risk assessments and found that 39% of the defendants rated by clinicians as having a “medium” or “high” likelihood of being violent to others were reported to have committed a violent act during a two-year follow-up, compared to 26% of the defendants predicted to

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63. Christopher Slobogin, *Dangerousness and Expertise*, 122 U. PA. L. REV. 97, 126 (1984).

64. JOHN MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* 47-49 (1981).

65. See John Monahan, *The Scientific Status of Research on Clinical and Actuarial Predictions of Violence*, in *MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY*

have a "low" likelihood of violence,<sup>66</sup> a statistically significant difference, but one small in absolute terms.

In the second study,<sup>67</sup> the researchers took as their subjects male and female patients being examined in the acute psychiatric emergency room of a large civil hospital. Psychiatrists and nurses were asked to assess potential patient violence to others over the next six-month period. Patients who elicited professional concern regarding future violence were moderately more likely to be violent after discharge (53%) than were patients who had not elicited such concern (36%). In other words, of the patients predicted to be violent by the clinicians, one-in-two later committed a violent act, while of the patients predicted to be safe by the clinicians, one-in-three later committed a violent act.

Despite such modest scientific support, courts repeatedly have held that clinical predictions of violence are sufficiently valid to be legally admissible as scientific evidence.<sup>68</sup>

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423-445 (D. Faigman et al., Eds.) (2d ed. 2002).

66. Diana S. Sepejak et al., *Clinical Predictions of Dangerousness: Two Year Follow-up of 408 Pre-trial Forensic Cases*, 11 BULL. AM. ACAD. PSYCHIATRY & L. 171 (1983).

67. Charles Lidz et al., *The Accuracy of Predictions of Violence to Others*, 269 J. AM. MED. ASS'N 1007 (1993).

68. See John Monahan, *Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility*, 57 WASH. & LEE L. REV., 57, 901 (2000); MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 409-423 (D. Faigman et al., Eds.) (2d ed. 2002). As the American Bar Association stated, courts rely on information in the form of clinical risk assessments when making legal decisions "because courts are ultimately responsible for making these decisions and though the information may remain open to challenge, it is the best information available. The alternative is to deprive fact finders, judges and jurors of the guidance

### Actuarial Prediction

The general superiority of actuarial over clinical risk assessment in the behavioral sciences has been known for half a century.<sup>69</sup> William Grove and Paul Meehl<sup>70</sup> provide the most recent review. They located 136 empirical studies comparing clinical and actuarial prediction and found them overwhelmingly to support the superiority of the latter over the former (In only 8 of the 136 studies was clinical prediction favored). Their conclusion: “We know of no social science controversy for which the empirical studies are so numerous, varied, and consistent as this one.”<sup>71</sup>

Unfortunately, the tools for implementing the knowledge that actuarial

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and understanding that psychiatrists and psychologists can provide." AMERICAN BAR ASSOCIATION, NATIONAL BENCHBOOK ON PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE AND TESTIMONY 49 (1998). See also Erica Beecher-Monas and Edgar Garcia-Rill, *Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World*, 25 CARDOZO L. REV. 1845 (2003); Erica Beecher-Monas, *The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process*, 60 WASH. & LEE L. REV. 353 (2003); Alexander Scherr, *DAUBERT & Danger: The “Fit” of Expert Predictions in Civil Commitments*, 55 HASTINGS LAW JOURNAL 1 (2003).

69. See PAUL MEEHL, *CLINICAL VERSUS STATISTICAL PREDICTION* (1954). See also John Swets et al., *Psychological Science Can Improve Diagnostic Decisions*, 1 PSYCHOL. SCI. PUB. INT. 1 (2000).

70. William Grove & Paul Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, 2 PSYCHOL. PUB. POL’Y & L. 293 (1996). See also Dale McNiel et al, *Utility of Decision Support Tools for Assessing Acute Risk of Violence*, 71 J. CONSULTING AND CLINICAL PSYCHOL. 945 (2003).

prediction is generally more accurate than clinical prediction had never been developed in the context of predicting violent behavior. In the past several years, however, a number of violence risk assessment tools have become available, and courts<sup>72</sup> as well as legislatures<sup>73</sup> have become remarkably receptive to their

71. *Id.* at 318.

72. Courts are increasingly approving of the use of actuarial instruments when a statute calls for an assessment of violence risk. *See, e.g.*, *State v. Kienitz*, 597 N.W.2d 712 (Wis. 1999) (Violence Risk Appraisal Guide [VRAG] and Historical-Clinical-Risk Management-20 [HCR-20] admissible); *Johnson v. Washington*, No. 43434-9-I, 2001 Wash. App. LEXIS 994 (2001) (VRAG admissible); *Washington v. Strauss*, 20 P.3d 1022 (Wash. Ct. App. 2001) (Minnesota Sex Offender Screening Tool Revised [MnSOST-R], Rapid Risk Assessment for Sexual Offense Recidivism [RRASOR], and VRAG admissible); *In re Commitment of R.S.*, 773 A.2d 72 (N.J. Super. Ct. App. Div. 2001) (RRASOR, MnSOST-R, California Actuarial Risk Assessment Tables [CARAT], and Registrant Risk Assessment Scale [RRAS] admissible); *Pedroza v. Florida*, 773 So. 2d 639 (Fla. Dist. Ct. App. 2000) (RRASOR and MnSOST-R admissible); *In re Detention of Walker*, 731 N.E.2d 994 (Ill. App. Ct. 2000) (RRASOR and Psychopathy Checklist-Revised [PCL-R] admissible); *In re Detention of Dean*, 2000 WL 690142 (Wash. Ct. App. 2000) (VRAG and Sex Offender Risk Appraisal Guide [SORAG] admissible); *State v. Barret*, 2000 WL 566155 (Ohio Ct. App. 2000) (MnSOST-R admissible); *United States v. Barnette*, 211 F.3d 803 (4th Cir. 2000) (PCL-R admissible); *People v. Williams*, 2001 Cal. App. LEXIS 2245 (2001); *State v. Watkins*, 2001 Ohio App. LEXIS 3858 (2001) (RRASOR admissible); *Muhammad v. State*, 46 S.W.3d 493 (Tex. Crim. App. 2001) (PCL-R admissible); *In re Shaw*, No. P29560437, 1997 WL 243454 (Minn. Ct. App. May 13, 1997) (PCL-R admissible); *In re Wilson*, 2000 WL 1182807, \*2, \*5 (Minn. Ct. App. Aug. 22, 2000) (referring to the PCL-R as one “used by many researchers to classify an individual as a psychopath; PCL-R admissible); *State v. Lauderdale*, 1998 WL 906482, at \*1 (Ohio Ct. App. Dec. 31, 1998) (PCL-R admissible); *United States v. Doe*, 113 F. Supp. 2d 604 (S.D.N.Y. 2000) (PCL-R admissible); *In re Detention of Thorell*, 2000 Wash. App. LEXIS 319 (2000) (SORAG and RRASOR admissible); *State v. Bare*, 2000 WI App. 31, 622 N.W.2d 769 (RRASOR and VRAG admissible); *People v. Roberge*, 2000 WL 1844791 (Cal. Ct. App. Dec. 15, 2000) (RRASOR admissible); *In re Detention of Walker*, 731 N.E.2d 994 (Ill. App. Ct. 2000) (RRASOR admissible); *People v. Otto*, 95 Cal. Rptr. 2d 236 (Cal. Ct. App. 2000) (RRASOR admissible); *State v. Wilson*, 2000 WI App. 71, 610 N.W.2d 511 (RRASOR admissible); *People v. Poe*, 88 Cal. Rptr. 2d 437 (Cal. Ct. App. 1999) (RRASOR admissible); *State v. Moore*, No. CR-049702, 2000 WL 1176870 (Ohio Ct. App. Aug. 17, 2000) (RRASOR; and MnSOST-R admissible); *State v. Morris*, 2000 WL 1010822 (Ohio Ct. App. July 18, 2000) (RRASOR and MnSOST-R admissible); *In re Poole*, 2000 WL 781381, at \*2 (Minn. Ct. App. June 20, 2000) (PCL-R admissible); *People v. Turner*, 93 Cal. Rptr. 2d 459, 463 at n. 13 (Cal. Ct. App. 2000) (PCL-R admissible); *People v. Dacayana*, 91 Cal. Rptr. 2d 121, 123 (Cal. Ct. App. 1999) (PCL-R admissible); *State v. Watson*, 595 N.W.2d 403, 410 (Wis. 1999) (PCL-R admissible); *Smetana v. State*, 991 S.W.2d 42, 46 (Tex. Ct. App. 1998) (PCL-R admissible); *In re Detention of Holtz*, 653 N.W.2d 613 (Iowa Ct. App. 2002) (RRASOR, Static-99, and MnSOST-R admissible); *Lee v.*

introduction in evidence. The promise of actuarial prediction of violence appears finally to have arrived.<sup>74</sup> Here, I will briefly describe three of the best-known instruments.

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State, 854 So.2d 709 (Fla. Dist. Ct. App. 2003) (RRASOR, MnSOST-R, PCL-R, SORAG, and VRAG admissible) *Cf* State v Taylor, 335 Ill.App. 3d 965, 782 NE2d 920 (2002) (RRASOR, Static-99, and MnSOST not admissible under *Frye*). *See in general*, Bernard Harcourt, *From the Ne'er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law*, 66 LAW & CONTEMP. PROBLEMS 99 (2003); Eric Janus and Robert Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: ACCURACY, ADMISSIBILITY AND ACCOUNTABILITY*, \_\_ AM CRIM L REV \_\_ (in press).

73. Virginia became the sixteenth state to enact a sexually violent predator statute, and the first state to incorporate actuarial risk assessment in such a statute, in April of 2003 (Chapter 989, Virginia Acts of Assembly). The statute provides:

Each month, the Director [of the Department of Corrections] shall review the database of prisoners incarcerated for sexually violent offenses and identify all such prisoners who are scheduled for release from prison within 10 months from the date of such review who receive a score of four or more on the Rapid Risk Assessment for Sexual Offender Recidivism or a like score on a comparable, scientifically validated instrument as designated by the Commissioner. § 37.1-70.4 (C).

The Rapid Risk Assessment of Sexual Offender Recidivism (RRASOR) is an actuarial instrument consisting of four items: (1) number of prior sex offense convictions or charges (from 1 to 6 or more), (2) age at release (more than 25 versus less than 25), (3) victim gender (only females versus any males) and (4) relationship to victim (only related versus any non-related). The latter items within the parentheses are scored higher than the former. A total score of 4 or more on the RRASOR corresponds to a 10-year recidivism rate of 55 percent. R. Karl Hanson, *The Development of a Brief Actuarial Scale for Sexual Offense Recidivism* (1997). *See also* R.Karl Hanson and M. T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*. 66 J. CONSULTING & CLINICAL PSYCHOL. 348(1998). As of October 2003, the Virginia Attorney General had sought the civil commitment of 11 prisoners as sexually violent predators: 1 prisoner was committed, 1 case was dismissed, and 9 cases are still pending. 18 (19) VIRGINIA LAWYERS WEEKLY 473 (Oct. 13, 2003).

74. Clinical judgment, however, is still necessary to review the risk estimates produced by statistical prediction. According to one group of researchers, “actuarial instruments...are best viewed as ‘tools’ for clinical assessment -- tools that support, rather than replace, the exercise of clinical judgment. This reliance on clinical judgment -- aided by an empirical understanding of risk factors for violence and their interactions -- reflects, and in our view should reflect, the standard of care at this juncture in the field’s development.” John Monahan et al., *RETHINKING*

(1) Violence Risk Appraisal Guide.

The Violence Risk Appraisal Guide (VRAG)<sup>75</sup> was developed from a sample of over 600 men from a maximum-security hospital in Canada. All had been charged with serious criminal offenses. Approximately fifty predictor variables were coded from institutional files. The criterion measure used to develop the instrument was any new criminal charge for a violent offense, or return to the institution for a similar act, over a time at risk in the community that averaged approximately seven years after discharge. A series of analyses identified twelve variables for inclusion in the instrument.<sup>76</sup> These twelve

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RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE 134 (2001) [hereafter Monahan et al., RETHINKING RISK ASSESSMENT].

75. Grant T. Harris et al., *Violent Recidivism of Mentally Disordered Offenders; The Development of a Statistical Prediction Instrument*, 20 CRIM. JUST. & BEHAV. 315 (1993); see also Vernon Quinsey et al., *Actuarial Prediction of Sexual Recidivism*, 10 J. INTERPERSONAL VIOLENCE 85 (1995); David Villeneuve & Vernon Quinsey, *Predictors of General and Violent Recidivism Among Mentally Disordered Inmates*, 22 CRIM. JUST. & BEHAV. 397 (1995); Marnie Rice & Grant Harris, *Violent Recidivism: Assessing Predictive Validity*, 63 J. CONSULTING & CLINICAL PSYCHOL. 737 (1995); Marnie Rice & Grant Harris, *Cross-Validation and Extension of the Violence Risk Appraisal Guide for Child Molesters and Rapists*, 21 LAW & HUM. BEHAV. 231 (1997); Grant Harris & Marnie Rice, *Risk Appraisal and Management of Violent Behavior*, 48 PSYCHIATRIC SERVICES 1168 (1997); Marnie Rice, *Violent Offender Research and Implications for the Criminal Justice System*, 52 AM. PSYCHOLOGIST 414 (1997); Marnie Rice & Grant Harris, *The Treatment of Mentally Disordered Offenders*, 3 PSYCHOL. PUB. POL'Y & L. 126 (1997). A variant of the VRAG, for use specifically with sexual offenders, the Sex Offender Risk Appraisal Guide (SORAG) has also been developed. VRAG and SORAG scores correlate highly, as would be expected given the overlap in the risk factors. See Vernon Quinsey et al., *VIOLENT OFFENDERS: APPRAISING AND MANAGING RISK* (1998). For updates on studies using the VRAG and the SORAG, see the website <http://www.mhcva.on.ca/Research/ragreps.htm>.

76. The variables were (1) score on the Psychopathy Checklist, (2) separation from parents under age 16, (3) victim injury in index offense, (4) DSM-III schizophrenia, (5) never married, (6) elementary school maladjustment, (7) female victim in index offense, (8) failure on prior

variables were used to place patients into one of nine categories reflecting their actuarial risk of future violence. In a recent prospective replication of this research with 347 male forensic patients, 11 percent of the patients who scored in category 1 on the VRAG were later found to commit a new violent act, compared with 42 percent of the patients in category 5, and 100 percent of the patients in category 9.<sup>77</sup>

## (2) The HCR-20

The "HCR-20," which consists of 20 ratings addressing Historical, Clinical, or Risk management variables,<sup>78</sup> is a structured clinical guide that can be scored in an actuarial manner to assess violence risk. In one study with prisoners,

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conditional release, (9) property offense history, (10) age at index offense, (11) alcohol abuse history, and (12) DSM—III personality disorder. For all variables except numbers 3, 4, 7, and 10 the nature of the relationship to subsequent violence was positive. (That is to say, subjects who injured a victim in the index offense, who were diagnosed as schizophrenic, who chose a female victim for the index offense, or who were older, were significantly *less* likely to be violent recidivists than other subjects.)

77. Grant Harris et al., *Prospective Replication of the Violence Risk Appraisal Guide in Predicting Violent Recidivism Among Forensic Patients*, 26 LAW & HUM. BEHAV. 377 (2002).

78. The Historical items are (1) previous violence, (2) young age at first violent incident, (3) relationship instability, (4) employment problems, (5) substance use problems, (6) major mental illness, (7) psychopathy, (8) early maladjustment, (9) personality disorder, and (10) prior supervision failure. The Clinical items are (11) lack of insight, (12) negative attitudes, (13) active symptoms of major mental illness, (14) impulsivity, and (15) unresponsive to treatment. The Risk Management items are (16) plans lack feasibility, (17) exposure to destabilizers, (18) lack of personal support, (19) noncompliance with remediation attempts, and (20) stress. See Christopher Webster et al., HCR-20: ASSESSING RISK FOR VIOLENCE (VERSION 2) (1995).

researchers found that scores above the median on the HCR-20 increased the odds of past violence and antisocial behavior by an average of four times.<sup>79</sup> In another study, the HCR-20 was completed for civilly committed patients who were followed for approximately two years after discharge into the community. When HCR-20 scores were divided into five categories, 11 percent of the patients scoring in the lowest category were found to have committed or threatened a physically violent act, compared to 40 percent of the patients in the middle category and 75 percent of the patients in the highest category.<sup>80</sup>

### (3) The Classification of Violent Risk.

The most recent development in this area is the creation of the first violence risk assessment software, called the Classification of Violence Risk (COVR®). This software was constructed from data generated in the MacArthur Violence Risk Assessment Study.<sup>81</sup> In this research, over 1,000 patients in acute

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79. See Kevin Douglas & Christopher Webster, *The HCR-20 Violence Risk Assessment Scheme: Concurrent Validity in a Sample of Incarcerated Offenders*, 26 CRIM. JUST. & BEHAV. 3 (1999).

80. Kevin Douglas et al., *Assessing Risk for Violence Among Psychiatric patients: The HCR-20 Violence Risk Assessment Scheme and the Psychopathy Checklist: Screening Version*, 67J. CONSULTING & CLINICAL PSYCHOL. 917, 925 (1999); Kevin Douglas et al., *Evaluation of a Model of Violence Risk Assessment Among Forensic Psychiatric Patients*, 54 PSYCHIATRIC SERVICES 1372 (2003).

81. Henry Steadman et al., *A Classification Tree Approach to the Development of Actuarial Violence Risk Assessment Tools*, 24 LAW & HUM. BEHAV. 83 (2000); John Monahan et al.,



civil psychiatric facilities were assessed on 134 potential risk factors for violent behavior. Patients were followed for 20 weeks in the community after discharge from the hospital. Measures of violence to others included official police and hospital records, patient self-report (under a Federal Confidentiality Certificate<sup>82</sup>), and the report of a collateral (most often, a family member) who knew the patient best in the community.

To develop a risk assessment instrument, the MacArthur Study relied on “classification tree” methodology. This approach allows many different combinations of risk factors to classify a person as high or low risk. Based on a sequence established by the classification tree, a first question is asked of all persons being assessed. Contingent on the answer to that question, one or another second question is posed, and so on, until each person is classified by the tree into a final “risk class.”<sup>83</sup> Using only those risk factors commonly available in

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*Developing a Clinically Useful Actuarial Tool for Assessing Violence Risk*, 176 BRITISH J. PSYCHIATRY 312 (2000); Eric Silver et al., *Assessing Violence Risk Among Discharged Psychiatric Patients: Toward an Ecological Approach*, 23 LAW & HUM. BEHAV. 235 (1999); Paul Appelbaum et al., *Violence and Delusions: Data from the MacArthur Violence Risk Assessment Study*, 157 AM. J. PSYCHIATRY 566 (2000); Thomas Grisso et al., *Violent Thoughts and Violent Behavior Following Hospitalization for Mental Disorder*, 68 J. CONSULTING & CLINICAL PSYCHOL. 388 (2000); Steven Banks et al., *A Multiple Models Approach to Violence Risk Assessment Among People with Mental Disorder*, 31 CRIM. JUST. & BEHAV. 324 (2004). See generally John Monahan et al., RETHINKING RISK ASSESSMENT.

82. Public Health Service Act §301(d), 42 U.S.C. §241(d)

83. This contrasts with the usual approach to actuarial risk assessment, such as the HCR-20 and the VRAG, in which a common set of questions is asked of everyone being assessed and every answer is weighted and summed to produce a score that can be used for purposes of categorization.

hospital records or capable of being routinely assessed in clinical practice,<sup>84</sup> the MacArthur researchers were able to place all patients into one of five risk classes for which the prevalence of violence during the first 20 weeks following discharge into the community was one percent in the lowest risk class and 76 percent in the highest.<sup>85</sup>

### B. Common Actuarial Risk Factors for Violence

Each of these recently developed actuarial instruments has relied on a different set of risk factors.<sup>86</sup> But many risk factors are common to all or most of

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84. The risk factors that emerged most often in the classification trees were the seriousness and frequency of prior arrests, young age, male gender, being unemployed, the seriousness and frequency of having been abused as a child, a diagnosis of antisocial personality disorder, a diagnosis of schizophrenia, whether the individual's father used drugs or left the home before the individual was 15 years old, substance abuse, lack of anger control, violent fantasies, loss of consciousness, and involuntary legal status. Note that a diagnosis of schizophrenia was associated with a *lower* risk of violence than other diagnoses (primarily depression and personality disorder). See *infra*.

85. More specifically, the rates of violence in the community during the 20 weeks following discharge for each of the five risk categories were 1%, 8%, 26%, 56%, and 76%, respectively. Many more patients were in the lower than in the higher risk categories. For example, 37% of all patients were in the lowest risk category (i.e., the category in which 1% of the patients were later violent), and only 7% in the highest risk category (i.e., the category in which 76% of the patients were later violent). See MONAHAN ET AL., *RETHINKING RISK ASSESSMENT* (2001). Software to administer this instrument, called the Classification of Violence Risk (COVR) has been developed and is currently undergoing prospective testing.

86. It is important to be clear on what a "risk factor" is and is not. To call *A* a risk factor for *B* means two things and only two things. It means that (1) *A* statistically correlates with *B*, and (2) *A* comes before *B* in time. A simple risk factor, in other words, is "a correlate that precedes the outcome," and nothing more. In particular, to call *A* a risk factor for *B* is not in any sense to imply that *A* "caused" *B*. To make this latter assertion – to claim that *A* is what is referred to in

the available instruments.<sup>87</sup> These empirically valid risk factors might usefully be organized into four categories: what the person is, what the person has, what the person has done, and what has been done to the person. Here, I summarize what is known about the ability of illustrative risk factors in each of these categories to predict future violence.<sup>88</sup>

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epidemiology as a “causal risk factor” for *B* – would require that two additional conditions be met. It would require that (1) *A* is capable of changing, and (2) when *A* changes, *B* changes as well. Helena Kraemer et al, *Coming to Terms With the Terms of Risk*, 54 ARCHIVES OF GENERAL PSYCHIATRY 337 (1997). All of the items found on violence risk assessment instruments are simple risk factors (if they were not risk factors – if they did not correlate with violence and were not measured before violence was measured – they would not have been included in the instrument). One often-raised question is whether in addition to being simple risk factors, the items on actuarial risk assessment instruments are also causal risk factors. The answer is that many, indeed most, of the simple risk factors found on violence risk assessment instruments could not possibly be causal risk factors, if for no other reason than that they are incapable of changing (e.g., gender, past violence). If one is interested primarily in preventing violence by targeting a population of individuals at high risk of violence and incapacitating them until the high risk abates (e.g., through treatment or through aging) – clearly the primary legislative intent behind both police power civil commitment and civil sexual predator statutes – then relying on simple risk factors is no more problematic, as a scientific matter, than relying on causal risk factors. Indeed, relying on simple, non-changeable (and therefore non-causal) risk factors such as gender or age is often affirmatively *preferable* to relying on causal risk factors for the simple reason that simple, non-causal risk factors, being “fixed,” are usually easier than causal ones to measure reliably. *Id.*

87. With one exception – race or ethnicity – for reasons that will become clear, *infra*. In addition, recall that the MacArthur Study relied on “classification tree” methodology, which allows *different* combinations of risk factors to classify a person as high or low risk. The same risk factors are not applied to each person. Rather, whether a given risk factor applies to a given individual depends on which branch of the tree his or her previous responses have led. Scores on these risk factors, therefore, cannot simply be summed to produce an estimate of risk.

88. For the prediction of sexual violence, see Marnie Rice & Grant Harris, *The Scientific Status of Research on Sexual Aggressors*, in 1 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 423-445 (D. Faigman et al., Eds.) (2d ed. 2002) (reviewing these instruments). For the prediction of violence by offenders with mental disorder, see James Bonta et al., *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-Analysis*, 123 PSYCHOL. BULL. 123 (1998), who found risk factors for violence among mentally disordered offenders to be remarkably similar to risk factors for violence among the general offender population:

Criminal history, antisocial personality, substance abuse, and family dysfunction are

### Individual Risk Factors: What the Person “Is”

Four risk factors that frequently qualify for appearance on an actuarial violence risk assessment instrument pertain to the fundamental characteristics that make someone an “individual”: age, gender, race or ethnicity, and personality. Each will be considered briefly in turn.<sup>89</sup>

#### (1) Age.

Few would dispute the conclusion that Robert Sampson and Janet Lauritsen offered in their definitive review for the National Research Council’s Panel on the Understanding and Control of Violent Behavior: “Age is one of the major individual-level correlates of violent offending. In general, arrests for

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important for mentally disordered offenders as they are for general offenders. In fact, the results support the theoretical perspective that the major correlates of crime are the same, regardless of race, gender, class, and the presence or absence of mental illness. Id at 139.

89. It has become accepted in criminology to distinguish *participation* in violence—whether or not a person engages in violence at all—from the *frequency* with which those who engage in violence commit violent acts. CRIMINAL CAREERS AND “CAREER CRIMINALS” 1 (Alfred Blumstein et al. eds., 1986). Risk factors for participating in violence need not be the same as risk factors for committing violent acts at a high frequency. That is, risk factors for committing a first violent act need not be the same as risk factors for violent recidivism. Demographic variables have been found to be stronger risk factors for participating in violence than for violent recidivism. Id at 4. Even for recidivism, however, demographic variables continue to be significant risk factors. For example, the recidivism rate of robbery and assault is approximately twice as high among young male offenders as among young female offenders. Id at 67. In the context of the civil commitment of people with mental disorder, prior violence is not a prerequisite for a finding of “dangerous to others,” and therefore data on the risk of a patient’s initial participation in violence are as relevant to the commitment decision as data on the risk of a patient’s repeat violence.

violent crime peak around age 18 and decline gradually thereafter.”<sup>90</sup> Age is a risk factor for crimes of sexual violence as well as violence more generally. For example, a recent report from the Office of the Solicitor General of Canada asked the question, “Does the risk of sexual offending decrease with age?” Ten studies from the United States, the United Kingdom, and Canada, involving a total sample of over 4,600 male sex offenders were reviewed. The answer to the question was as follows:

On average, the rate of sexual recidivism decreased with age... For rapists, the highest risk age period was between 18 and 25 years, with a gradual decline in risk for each older age period. There were very few old rapists (greater than age 60) and none were known to recidivate sexually.<sup>91</sup>

Age is also a risk factor for violence committed by people with mental disorder. In the MacArthur Study of violence by people between eighteen and forty years old who were in psychiatric facilities, for every one-year increase in a

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90. Robert Sampson & Janet Lauritsen, *Violent Victimization and Offending: Individual, Situational, and Community-Level Risk Factors*, in 3 UNDERSTANDING AND PREVENTING VIOLENCE: SOCIAL INFLUENCES 1, 18 (Albert Reiss & Jeffrey Roth eds., 1994).

91. R. Karl Hanson, *Age and Sexual Recidivism*, 6 CORRECTIONS RESEARCH AND DEVELOPMENT RESEARCH SUMMARY 1 (Solicitor General Canada, May 2001), at 1. The report notes that “the patterns were different for rapists, extrafamilial child molesters, and intrafamilial child molesters (incest offenders).” For example, extrafamilial child molesters were at their highest risk of recidivism between the ages of 25 and 35, rather than the 18-25 year period at which rapists were at highest risk of recidivism. Id. See also R. Karl Hanson, *Recidivism and Age; Follow-up Data from 4,673 Sexual Offenders*, 17 JOURNAL OF INTERPERSONAL VIOLENCE 1046 (2002),

patient's age, the odds<sup>92</sup> that the patient would commit a violent act within the first several months after discharge decreased by twenty percent.<sup>93</sup>

(2) Gender.

That women commit violent acts at a much lower rate than men is a staple in criminology, and has been known for as long as official records have been kept. The earliest major review of this topic, by Eleanor Maccoby and Carol Jacklin, concluded in 1974 that "The sex difference in aggression has been observed in all cultures in which the relevant behavior has been observed. Boys are more aggressive both physically and verbally... The sex difference is found as early as social play begins – at age 2 or 2 1/2."<sup>94</sup> Another major review, by Robert Sampson and Janet Lauritsen concluded in 1993: "Sex is one of the strongest correlates of violent offending... males are far more likely than females to be arrested for all crimes of violence including homicide, rape, robbery, and assault."<sup>95</sup> Of the 434,391 persons arrested for a violent crime in the United

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92. An odds ratio indicates the number of times the odds is increased for every unit change in the risk factor. For example, if the odds ratio for the effect of male gender on violence is 2.0, then the odds of violence for males are twice as great as the odds of violence for females.

93. Monahan et al., RETHINKING RISK ASSESSMENT, at 163.

94. ELEANOR MACCOBY & CAROL JACKLIN, THE PSYCHOLOGY OF SEX DIFFERENCES 352 (1974).

95. Sampson and Lauritsen, *supra* n.\_\_\_\_, at 19. See also Candice Kruttschnitt, Rosemary Gartner, and Kathleen Ferraro, *Women's Involvement in Serious Interpersonal Violence*, 7 AGGRESSION AND VIOLENT BEHAVIOR 529 (2002).

States in 2001, 359,116 (83 percent) were men and 75,275 (17 percent) were women.<sup>96</sup> While gender differences are sometimes lower for self report than for official report,<sup>97</sup> national crime survey findings closely parallel the arrest record data: 14 percent of violent offenders were perceived by their victims to be females.<sup>98</sup> For violent offending that is explicitly sexual in nature, the gender disparity is overwhelming: of the 18,576 people arrested for forcible rape in 2001, 18,356 were men (99 percent) and 220 (1 percent) were women.<sup>99</sup> Of the 352 convicted offenders found to be violent sexual predators and currently civilly committed in California mental hospitals, 351 are men and one is a woman.<sup>100</sup>

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96. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2002 (Kathleen Maguire & Ann L. Pastore eds., 29th ed. 2001) [hereinafter SOURCEBOOK], available at <http://www.albany.edu/sourcebook/> (last visited August 15, 2004). Violent crimes include murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault. *Id.* at 354, tbl. 4.8.

97. See D. Steffensmeier & E. Allan, *Gender and Crime: Toward a Gendered Theory of Female Offending*, 22 ANN. REV. SOC. 459 (1996).

98. See LAWRENCE GREENFELD & TRACY SNELL, BUREAU OF JUSTICE STATISTICS, WOMEN OFFENDERS: BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (1999).

99. See SOURCEBOOK, *supra* note \_\_\_\_.

100. See Maura Dolan, *Not Only Men are Molesters*, LOS ANGELES TIMES, Aug. 16, 2002, at A1. Washington State also has only one woman among its 137 sexually violent predators. See <http://www.wa.gov/dshs/mediareleases/2001/pr01118.shtm>. The Missouri Court of Appeals recently ordered the discharge of the state's only woman sexually violent predator. In the Matter of the Care and Treatment of Angela M. Coffel, 2003 WL 716682 (Mo.App. E.D. (2003)). See Todd Frankel, *State's Only Woman Sexual Predator Heads Home*, ST. LOUIS POST-DISPATCH, November 5, 2003. Among people with serious mental disorder, the gender ratio in violence is less pronounced than it is among the general population, but still very significant: in the MacArthur Study, the odds that a patient who was a man would commit a violent act within several months after discharge from the hospital were fifty-one percent higher than the odds that a patient who was a woman would do so. Monahan et al., RETHINKING RISK ASSESSMENT, at

(3) Race.

Most of the research on race and violence has focused on differences between whites and African Americans.<sup>101</sup> African Americans accounted for 12 percent of the American population in 2001<sup>102</sup> and for 38 percent of the people arrested for violent crime.<sup>103</sup> In a well-known study, Michael Hindelang investigated the extent to which the over-representation of African Americans in arrest statistics for violent crime was due to the differential *involvement* of African Americans in violence or to the differential *selection* of African Americans for arrest by the police.<sup>104</sup> He compared FBI national arrest data with data from the National Victimization Panel, a large-scale survey done in conjunction with the United States Census Bureau that asks crime victims about the perceived characteristics of their offenders. While some evidence of differential selection was found, Hindelang concluded that the “data for rape,

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163. See also Pamela Robbins, John Monahan, and Eric Silver. *Mental Disorder and Violence: The Moderating Role of Gender*. 27 LAW AND HUMAN BEHAVIOR 561 (2003).

101. As noted in the report of the PANEL ON THE UNDERSTANDING & CONTROL OF VIOLENT BEHAVIOR, NAT'L RESEARCH COUNCIL, UNDERSTANDING AND PREVENTING VIOLENCE (Albert Reiss & Jeffrey Roth Eds., 1993), “Other minorities are also overrepresented among all arrestees and among those arrested for violent crimes. Particularly striking is the relatively high representation of American Indians and Alaska natives, especially for aggravated and other assaults.” *Id.* at 71.

102. U.S. Census Bureau, Census 2000, Population by Race and Hispanic or Latino Origin for the United States (PHC-T-1).

103. See SOURCEBOOK, *supra* note \_\_ at Table 4.10

104. Michael Hindelang, *Race and Involvement in Crimes*, 43 AM. SOC. REV. 93 (1978). See also VIOLENT CRIME: ASSESSING RACE AND ETHNIC DIFFERENCES (Darnell Hawkins ed, 2003).



robbery, and assault are generally consistent with official data and support the differential involvement hypothesis.”<sup>105</sup>

(4) Personality.

A wide variety of components of what psychologists would call “personality”<sup>106</sup> and what the Federal Rules of Evidence refer to as “character”<sup>107</sup> have been empirically linked to the commission of violent acts.<sup>108</sup> For example, one facet of personality that appears to be closely associated with violence is anger and the individual’s ability to control its expression. According to Raymond Novaco, the preeminent scholar in this area,

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105. Id at 93 As expressed more recently and colloquially by Jesse Jackson: “There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery -- then look around and see somebody white and feel relieved.” *Quoted in* Stuart Taylor, Jr., *Cabbies, Cops, Pizza Deliveries, and Racial Profiling*, 32 NAT’L J. 1891, 1891 (2000). Among people with serious mental disorder, the racial ratio in violence is less pronounced, but still significant: In the MacArthur Study, the odds that a patient who was African American would commit a violent act within several months after discharge from the hospital were eighty-five percent higher than the odds that a patient who was white would do so. *See* Monahan et al., *RETHINKING RISK ASSESSEMENT*, at 163 (the standardized odds ratio reported in Monahan et al. of 0.54 for being white is equivalent to a standardized odds ratio of 1.85 for being African American (1.0/0.54 = 1.85)). Since the vast majority of this violence came from the patients’ own self-report, official bias in arrest or hospitalization practices cannot account for this difference. *See* Eric Silver, *Race, Neighborhood Disadvantage, and Violence Among Persons with Mental Disorders: The Importance of Contextual Measurement*, 24 LAW & HUM. BEHAV. 449, 455 (2000).

103. E.g., Randy Larsen and David Buss, *PERSONALITY PSYCHOLOGY* (2002).

104. Federal Rule of Evidence 404.

108. Blackburn R., *Violence and Personality: Distinguishing Among Violent Offenders*, in *PSYCHOLOGICAL PERSPECTIVES ON SERIOUS CRIMINAL RISK* 109 ( D. Curran & W.G. McCartney eds., 1999).

One aspect of anger that influences the probability of aggression is its degree of intensity. The higher the level of arousal, the stronger the motivation for aggression, and the greater the likelihood that inhibitory controls will be overridden. Strong arousal not only impels action, it impairs cognitive processing of aggression-mitigating information. A person in a state of high anger arousal is perceptually biased toward the confirmation of threat, is less able to attend to threat-discounting elements of the situation, and is not so capable of reappraising provocation cues as benign.<sup>109</sup>

#### Clinical Risk Factors: What the Person “Has”

Three risk factors having to do with disorders with which a person can be diagnosed pertain to a major mental disorder, a personality disorder, and a substance abuse disorder.

##### (5) Major mental disorder.

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109. Raymond Novaco, *Anger*, in 1 *ENCYCLOPEDIA OF PSYCHOLOGY* 170, 171 (Alan Kazdin ed., 2000). See also Dale McNiel et al, *The Relationship Between Aggressive Attributional Style and Violence by Psychiatric Patients*, 71 63 *J. CONSULTING & CLINICAL PSYCHOL* 399 (2003). In the MacArthur Study, a one standard deviation increase in his or her score on the Novaco Anger Scale raised the odds that a patient would commit a violent act within several months after discharge by fifty-two percent. See Monahan et al, *RETHINKING RISK ASSESSMENT*, at 163. See also Dale McNiel et al, *The Relationship Between Aggressive Attributional Style and Violence by*

A large and growing body of epidemiological literature on major mental disorder—schizophrenia, major depression, and bi-polar disorder—as a risk factor for violence was summarized in the 2002 edition of *Modern Scientific Evidence* to the following effect:

The data, which have only become available since 1990, fairly read, suggest that whether the measure is the prevalence of violence among the disordered or the prevalence of disorder among the violent, whether the sample is people who are selected for treatment as inmates or patients in institutions or people randomly chosen from the open community, and no matter how many social and demographic factors are statistically taken into account, there appears to be a greater-than-chance relationship between mental disorder and violent behavior. Mental disorder may be a statistically significant risk factor for the occurrence of violence.<sup>110</sup>

In terms of specific diagnoses, much clinical lore attests to the relationship between a diagnosis of schizophrenia and the occurrence of violence. It is important, however, to address the “compared to whom?” question. For example, people with the diagnosis of schizophrenia may have a *lower* rate of violence than people with other diagnoses, yet have a *higher* rate of violence than people with

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*Psychiatric Patients*, 71 J. CONSULTING AND CLINICAL PSYCHOL. 399 (2003).

110. Monahan, *supra* note \_\_\_\_.

no diagnosis at all. Indeed, this is exactly what was found in the MacArthur Study: 8.7 percent of the patients who had a diagnosis of schizophrenia committed at least one violent act during the first ten weeks after discharge, a figure lower than the 10.7 percent violence rate of the patients with a diagnosis of major depression, but higher than the 4.6 percent violence rate of a comparison group of people without mental disorder living in the same communities.<sup>111</sup>

(6) Personality Disorder.

A “personality disorder” is defined in the fourth edition of the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) as “an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual’s culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.”<sup>112</sup> One condition generally considered to be a personality disorder is “psychopathy” – a cluster of personality traits including manipulativeness, lack of empathy, and impulsivity.<sup>113</sup> Research on psychopathy

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111. Data on file with author and also available at <http://macarthur.virginia.edu>.

112. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL 629 (4th ed. 1994) [hereinafter DSM-IV].

113. Stephen Hart et al., *Psychopathy As a Risk Marker for Violence: Development and Validation of a Screening Version of the Revised Psychopathy Checklist*, in *VIOLENCE AND MENTAL DISORDER: DEVELOPMENTS IN RISK ASSESSMENT 4* (J. Monahan & H. Steadman eds., 1994). Psychopathy is not among the personality disorders listed in DSM-IV, however. Rather, the related construct of “antisocial personality disorder” is included. In the MacArthur Study, the

has been building considerable momentum over the past decade, with this construct now considered by some to have an “unparalleled” ability to predict future violence in criminal samples.<sup>114</sup> Much of this work has been based on one version or another of the Hare Psychopathy Checklist-Revised (Hare PCL-R).<sup>115</sup> Studies suggest that the Hare PCL-R is a strong risk factor for violent recidivism among non-disordered prison inmates<sup>116</sup> and among mentally disordered offenders.<sup>117</sup> For example, Kevin Douglas and his colleagues<sup>118</sup> assigned scores on the Hare PCL to involuntarily civilly committed patients in the hospital and assessed the measure’s ability to predict community violence over an average two-year period. Following discharge, patients who scored at or above the Hare PCL sample median were five times more likely to commit a physically violent

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odds that a patient with a diagnosis of antisocial personality disorder on his or her chart would commit a violent act within several months after discharge from the hospital were three times higher than the odds that a patient without such a diagnosis would do so.

114. Randy Salekiret al., *A Review and Meta-Analysis of the Psychopathy Checklist and Psychopathy Checklist-Revised: Predictive Validity of Dangerousness*, 3 CLINICAL PSYCHOL.: SCI. & PRAC. 203 (1996).

115. ROBERT HARE, THE HARE PSYCHOPATHY CHECKLIST-REVISED (1991).

116. See Stephen Hart et al., *Performance of Psychopaths Following Conditional Release from Prison*. 56 J. CONSULTING & CLINICAL PSYCHOL. 227 (1988). *But see* John Edens et al., *Psychopathy and the Death Penalty: Can the Psychopathy Checklist-Revised Identify Offenders Who Represent “a Continuing Threat to Society”?*, 29 J. Psychiatry & L. 433 (2001).

117. See Kirk Heilbrun, et al., *Inpatient and Post-Discharge Aggression in Mentally Disordered Offenders: The Role of Psychopathy*, 13 J. INTERPERSONAL VIOLENCE 514 (1998).

118. Kevin Douglas et al., *Assessing Risk for Violence Among Psychiatric Patients: The HCR-20 Violence Risk Assessment Scheme and the Psychopathy Checklist: Screening Version*, 67 J. CONSULTING & CLINICAL PSYCHOL. 917 (1999).

act than those who scored below the median.<sup>119</sup>

(7) Substance abuse disorder.

Forty-one percent of all people serving a jail sentence in the United States for the commission of a violent crime were drinking alcohol at the time they committed the crime,<sup>120</sup> and 36 percent were under the influence of illegal drugs.<sup>121</sup> In terms of a full-fledged DSM-IV substance abuse disorder, the most careful estimate is that 29 percent of all male jail detainees, and 53 percent of all female jail detainees could be so diagnosed, vastly higher than the prevalence of this disorder in the general population.<sup>122</sup> In their review for the National Research Council's Panel on the Understanding and Control of Violent Behavior, Klaus Miczek and colleagues stated "Alcohol is the drug that is most prevalent in individuals committing violence... Experimental studies have repeatedly demonstrated that alcohol causes an increase in aggressive behavior, in both

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<sup>119</sup> Apropos of this finding, in the MacArthur Study of civil psychiatric facilities, the odds that a patient who scored high on psychopathy would commit a violent act within several months after discharge from the hospital were four times higher than the odds that a patient who scored low would do so. See Monahan et al., RETHINKING RISK ASSESSEMENT, at 67.

120. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL OFFENDER STATISTICS, at <http://www.ojp.usdoj.gov/bjs/crimoff.htm#alcohol> (last visited August 15, 2004).

121. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, DRUG USE, TESTING, AND TREATMENT IN JAILS, at <http://www.ojp.usdoj.gov/bjs/abstract/duttj.htm> (last visited August 15, 2004).

122. GAINS Center Factsheet, The Prevalence of Co-Occurring Mental Illness and Substance Use

animals and humans.”<sup>123</sup> That there is a pharmacological relationship between certain illegal drugs—notably cocaine and amphetamines—and violence is also clear.<sup>124</sup>

### Historical Risk Factors: What the Person “Has Done”

The principal risk factor for future violence to be found in an individual’s life history is the extent to which he or she already has committed violent or other criminal acts.

#### (8) Prior crime and violence.

The field of criminology has repeatedly demonstrated that prior violence and criminality are strongly associated with future violence and criminality—

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Disorders in Jails (Spring 2002).

123. Klaus Miczek et al., *Alcohol, Drugs of Abuse, Aggression and Violence*, in 3 UNDERSTANDING AND PREVENTING VIOLENCE: SOCIAL INFLUENCES 377, 406 (Albert Reiss & Jeffrey Roth eds., 1994). See also William Fals-Stewart, *The Occurrence of Partner Physical Aggression on Days of Alcohol Consumption: A Longitudinal Diary Study*, 71 J. CONSULTING AND CLINICAL PSYCHOL. 41 (2003).

124. David Boyum and Mark Kleiman, *Substance Abuse Policy from a Crime-Control Perspective*, in CRIME: PUBLIC POLICIES FOR CRIME CONTROL 331, 334 (James Q. Wilson and Joan Petersilia eds., 2002). In the MacArthur Study, the odds that a patient who had a DSM diagnosis of alcohol or drug abuse or dependence would commit a violent act within several months after discharge from the hospital were 2.7 times higher than the odds that a patient without such a diagnosis would do so. 124. See Monahan et al., RETHINKING RISK ASSESSEMENT, at 163.

indeed no risk factor has been more thoroughly validated.<sup>125</sup> Similar relationships have been found specifically for persons with mental illnesses. For example, presence of a juvenile or adult record has been found to be highly predictive of adult violence among psychiatric patients. Measures of prior offending have included the number of prior arrests for property crime, violent crime, or sexually violent crime, number of prior convictions, number of prior incarcerations, and patient self-reports of violent incidents.<sup>126</sup>

#### Experiential Risk Factors: What Has Been “Done To” the Person

Two kinds of experiences that an individual can have as a child have been found to be risk factors for whether he or she acts violently as an adult: whether the individual was raised in a pathological family environment, and whether the

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125. See ALFRED BLUMSTEIN, A. ET AL., *CRIMINAL CAREERS AND “CAREER CRIMINALS”* (1986). See also THOMAS GUTHEIL & PAUL APPELBAUM, *CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW* 68 (3<sup>rd</sup> ed. 2000) (past violence “repeatedly appears as the strongest correlate in actuarial studies of violence and related phenomena.”); Dale McNeil, *Empirically Based Clinical Evaluation and Management of the Potentially Violent Patient*, in *EMERGENCIES IN MENTAL HEALTH PRACTICE: EVALUATION AND MANAGEMENT*, 95, 96 (Kleespies, P. ed., 1998). (“A history of violence has been consistently shown to be the best single predictor of future violent behavior.”).

126. Deidre Klassen & William O’Connor, *Demographic and Case History Variables in Risk Assessment*, in *VIOLENCE AND MENTAL DISORDER: DEVELOPMENTS IN RISK ASSESSMENT*, 10, 229 (J. Monahan & H. Steadman eds., 1994). In the MacArthur Study, the odds that a patient who had recently committed a violent act would commit another violent act within several months after discharge from the hospital were 2.3 times higher than the odds that a patient without recent violence would do so. See Monahan et al., *RETHINKING RISK ASSESSEMENT*, at 163.



individual was physically abused.

(9) A pathological family environment.

That exposure to a pathological family environment as a child is a risk factor for violence committed as an adult is a widely recognized tenet in developmental psychology. As the National Research Council's Panel on the Understanding and Control of Violent Behavior concludes, "violent offenders tend to have experienced poor parental childrearing methods, poor supervision, and separations from their parents when they were children... [T]hey tend to have alcoholic or criminal parents, and they tend to have disharmonious parents who are likely to separate or divorce."<sup>127</sup>

This association between pathological family environments in childhood and later violence is as true of people with mental disorder as it is of people without it. For example, an adult patient's report that as a child his or her parents fought with people outside the family is significantly associated with the patient's subsequent arrest and rehospitalization for violence.<sup>128</sup>

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127. UNDERSTANDING AND PREVENTING VIOLENCE: SOCIAL INFLUENCES (Albert Reiss & Jeffrey Roth eds., 1994), at 367-68.

128. Deidre Klassen & William O'Connor, *A Prospective Study of Predictors of Violence in Adult Male Mental Patients*, 12 LAW & HUM. BEHAV. 143 (1988). In the MacArthur Study, the odds that a patient whose father had frequently used drugs during the patient's childhood would commit a violent act within several months after discharge from the hospital were 2.4 times higher than the

(10) Victimization.

Two types of studies exist regarding whether being abused as a child is a risk factor for later violence. One type focuses specifically on subsequent victimization of the children of the abused individual him or herself. The other type looks more broadly to subsequent violence toward any victim, not necessarily the abused individual's own children.

Research on the effects of child abuse on later violent behavior toward one's own children was reviewed as follows:

The best estimate of intergenerational transmission [of violence] appears to be  $30\% \pm 5\%$ . This suggests that approximately one-third of all individuals who were physically abused, sexually abused, or extremely neglected will subject their offspring to one of these forms of maltreatment, while the remaining two-thirds will provide adequate care for their children... The rate of abuse among individuals with a history of abuse... is approximately six times higher than the base rate for abuse in

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odds than a patient whose father was not a drug-abuser would do so. The comparable figure for a patient whose mother used drugs was fifty-four percent higher. Similar effects were obtained for a patient's father or mother having been arrested when the patient was a child. *See Monahan et al., RETHINKING RISK ASSESSEMENT*, at 163.

the general population (5%).<sup>129</sup>

In terms of the effects of being victimized as a child on later crime in general, Cathy Spatz Widom and Michael Maxfield recently reported data from a large study that followed children processed by the courts for having been abused or neglected, and a comparison group of children who had not been abused or neglected. At the time of the follow-up, the subjects' mean age was thirty-two years.

Of primary interest was the question, "Would arrest histories of those who had been abused or neglected be worse than those with no reported abuse?" The answer [w]as evident: Those who had been abused or neglected as children were more likely [than those not abused or neglected] to be arrested as juveniles (27 percent versus 17 percent), adults (42 percent versus 33 percent), and for violent crime (18 percent versus 14 percent).<sup>130</sup>

### PART III: DETERMINING THE ADMISSIBILITY OF SCIENTIFICALLY

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129. Joan Kaufman & Edward Zigler, *Do Abused Children Become Abusive Parents?*, 57 AM. J. ORTHOPSYCHIATRY 186, 190 (1987).

130. An Update on the "Cycle of Violence," National Institute of Justice Research in Brief, February 2001, at 3. In the MacArthur Study, the odds that a patient who had been seriously physically abused as a child would commit a violent act within several months after discharge from the hospital were 2.2 times higher than the odds that a patient who had not been so abused would be violent. *See* Monahan et al., RETHINKING RISK ASSESSEMENT, at 163.

## VALID RISK FACTORS FOR VIOLENCE

Items such as the ten described above are valid risk factors for the occurrence of violence. Absent legal concerns, each would be a candidate for inclusion on an actuarial violence risk assessment instrument. Legal concerns, of course, are not absent. How is one to decide which scientifically valid risk factors are admissible in court for assessing violence risk and which are not? The answer will vary according to the legal context in which the violence risk assessment is made, and according to the legal principles that govern decision making in each context.

### A. Criminal sentencing

The use of risk factors in sentencing must be constrained by the applicable theory of criminal punishment. As we have seen, however,<sup>131</sup> there *is* no coherent theory of criminal punishment at the federal level. Rather, the official view is that since both the backward-looking theory of punishment as just deserts and the forward-looking theory of punishment as crime control will result in the same sentences, there is no need to choose between the two rationales.

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This fundamental “philosophical problem,”<sup>132</sup> which has vexed federal sentencing since the Sentencing Reform Act of 1984 and which vexes the statutes of many states,<sup>133</sup> need not be resolved in order to address the legitimacy of using given violence risk factors in criminal sentencing, however. In practice, modern sentencing is either purely retributive, or it is a mix of retributive and crime-control considerations. Retribution deeply colors the implementation of all sentencing schemes, including those whose avowed goals include crime control. That is to say, even in those states in which crime control is one of the acknowledged purposes of criminal punishment, “the idea that personal and moral autonomy are important values is still influential.”<sup>134</sup> Just as the decision in criminal law of *whether* to punish an individual at all is based on the determination that he or she chose to commit the blameworthy act charged, so too the decision of *how much* to punish an individual is in large part based on the degree to which blame inheres in his or her actions. Given this state of affairs, the use of violence risk factors in sentencing—including capital sentencing cases such as *Saldano*—should properly be limited to those that index the extent or seriousness of the defendant’s prior criminal conduct.

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131. See text *infra* at \_\_\_\_.

132. U.S. SENTENCING GUIDELINES MANUAL § 1A3 (2000).

133. See *supra* note \_\_\_\_.

It is a fundamental orthodoxy of our criminal justice system that the punishment should fit the crime and the individual, not the statistical history of the class of persons to which the defendant belongs. To allow a criminal defendant's sentence to be determined to any degree by his unchosen membership in a given [group] denies the very premise of self-determination upon which our criminal justice system is built. It raises the threat that defendants will be sentenced not on the basis of their personal merit or conduct, but on the basis of their "status."<sup>135</sup>

As Paul Robinson has put it, relying even on scientifically validated risk

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134. Michael Tonry, *The Fragmentation of Sentencing and Corrections in America*, Research in Brief: Sentencing and Corrections – Issues for the 21<sup>st</sup> Century (Office of Justice Programs, National Institute of Justice, September 1999) at 5.

135. Daniel Goodman, *Demographic Evidence in Capital Sentencing*, 39 STAN. L. REV. 499, 521 (1987). See also Underwood, *supra* note \_\_\_\_, at 1416:

The conflict between prediction and respect for autonomy is most acute when the predicted behavior is strongly and directly subject to individual control. For example, the act of obeying or violating the criminal law is subject to individual control, and indeed that fact is central to the structure of the criminal law. The strong tradition of respect for individual autonomy in criminal law theory may account for a large measure of the resistance to efforts to predict crime for purposes of sentencing and parole.

The issue of responsibility arises in other areas of the law that involve risk assessment. In the context of insurance law, for example, Kenneth Abraham has stated:

Noncontrollable variables can be criticized on the ground that their use makes the exercise of individual responsibility irrelevant to the price of insurance. No amount of care or safety... can affect the cost of coverage when such variables distinguish risk classes. Thus, the use of noncontrollable variables denies individuals the opportunity, through the exercise of individual responsibility, to alter the effect of being "grouped."

Kenneth Abraham, *Efficiency and Fairness in Insurance Risk Classification*, 71. VA L. REV. 403,

factors for future violence that do not index blameworthiness “would be offensive to a system of just punishment. A person does not deserve more punishment for an offense because... he is young or has no father in his household.”<sup>136</sup> Or, it might be added in light of the above review, because of anything else a person is (e.g., a gender), anything else a person has (e.g., a disorder), or anything else that has been done to a person (e.g., being abused as a child). Blame attaches to what a person has done. Past criminal behavior is the only scientifically valid risk factor for violence that unambiguously implicates blameworthiness, and therefore the only one that should enter the calculus of criminal sentencing.<sup>137</sup>

#### B. The civil commitment of people with serious mental disorder.

While public health law shares with criminal law an interest in preventing violence by incapacitating those at high risk of committing it, public health law lacks the consideration of deterrence and retribution that define the criminal sanction.<sup>138</sup> Blameworthiness is central to criminal law, and irrelevant to public

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437 (1985).

136. Robinson, *supra* note \_\_, at 1440.

134. In some states, *sentencing* is based largely on retributive considerations, but *parole* has an explicit crime-control focus. See JOHN MONAHAN AND LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS (5<sup>th</sup> ed 2002) 369-374 for a discussion of risk factors found admissible in state administrative parole hearings.

138. *Hendricks*, 521 U.S. at 361

health law. As stated by Barbara Underwood, “When the predicted fact is not subject to individual control, then predicting that fact is less threatening to the value of respect for autonomy. For example, prediction of violent behavior by the mentally ill...is seldom characterized as a threat to the autonomy of the mentally ill.”<sup>139</sup> Therefore, the use of violence risk factors in the civil commitment of people with serious mental disorder to inpatient or outpatient treatment should—with one significant exception—be unconstrained.

The sole constraint on the use of violence risk factors in civil commitment should be a prohibition on those constitutionally suspect classifications whose use the courts will subject to strict Fourteenth Amendment scrutiny, which in this context will be limited to race or ethnicity.<sup>140</sup> Racial classifications, the Supreme Court has stated, “must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”<sup>141</sup> A number of circuit courts have directly addressed the issue of risk factors in the context of denying parole,<sup>142</sup> and

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139. Underwood, *supra* note \_\_ at 1415.

140. While strict scrutiny review also applies to national origin, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), and to alienage, *Graham v. Richardson*, 403 U.S. 365 (1971), neither of these factors has been linked to violent behavior. Should national origin or alienage be found to be a risk factor for violence, the same analysis employed here for race and ethnicity would preclude their use in actuarial prediction schemes.

141. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

142. *Block v Potter*, 631 F.2d 233 (3d Cir. 1980); *Candelaria v. Griffin*, 641 F.2d 868 (10<sup>th</sup> Cir. 1981); *Thompson v Davis*, 282 F.3d 780 (9<sup>th</sup> Cir. 2002); *White v Bond*, 720 F.2d 1002 (8<sup>th</sup> Cir. 1983).



all have held that using race as a risk factor for violence fails this test. It is difficult to see how a racial classification that repeatedly has been held not to be “narrowly tailored” for the purpose of decision making regarding parole from prison could be found to be “narrowly tailored” for the purpose of decision making regarding discharge from a mental hospital. The modest correlation between race and violence<sup>143</sup> is far from the “most exact connection”<sup>144</sup> that the Court has stated would be necessary to justify the inclusion of race as a risk factor in effectuating these commitments.<sup>145</sup>

In this regard, race and gender are very differently situated, both constitutionally and empirically. In *J.E.B. v. Alabama ex rel. T.B.*, the Court noted that it consistently has subjected gender-based classifications to heightened scrutiny “in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of ‘archaic and overbroad’ generalizations about gender . . . or based on ‘outdated

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143. In the MacArthur study, the correlation between race and violence was .12. Monahan et al., *RETHINKING RISK ASSESSEMENT*, at 163.

144. Adarand, *supra* note \_\_\_ at 236.

145. Excluding race as a predictor variable was, in fact, exactly what the researchers conducting the MacArthur Violence Risk Assessment Study did.

We eliminated one variable, race, from the final [risk assessment] models on ethical and political grounds... In order to avoid any possible misinterpretation of our risk assessment procedures as a form of “racial profiling,” we removed the variable of race... The revised models without race differed only trivially in accuracy from the original ones which included race.

misconceptions . . . .”<sup>146</sup> In *United States v. Virginia*,<sup>147</sup> the Court more explicitly stated that, in reviewing classifications based on gender, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." Justice Ginsburg wrote for the majority that the State must show

"at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' The justification must be genuine, not hypothesized or invented post hoc in response to litigation.”<sup>148</sup>

The Court did not rule out all gender classifications, however, and recognized that “the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both.”<sup>149</sup>

Tested against the considerations articulated in cases such as *J. E. B.* and *Virginia*, classifying by gender for the purpose of violence risk assessment should have no difficulty surviving Equal Protection challenge: the government’s police power objective in preventing violence in society is surely “important,”<sup>150</sup> and

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Monahan et al., *RETHINKING RISK ASSESSEMENT*, at 119.

146. 511 U.S. 127, 135 (1994) (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 506-507 (1975); *Craig v. Boren*, 429 U.S. 190, 198-199 (1976)).

147. 518 U.S. 515 (1996). Internal citations omitted.

148. *Id.* at 533.

149. *Id.*

including gender as a risk factor on an actuarial prediction instrument is “substantially related” to the accuracy with which such an instrument can forecast violence—and therefore assist in its prevention. Gender differences in violence are genuine and not hypothesized, as the research reviewed in Part II demonstrates. And while they may be archaic, they are not outdated: the same gender difference found in the earliest published crime statistics (men made up 91 percent of homicide offenders in 13<sup>th</sup> century England)<sup>151</sup> are found eight hundred years later in the latest published crime statistics (men make up 88 percent of homicide offenders in 21<sup>st</sup> century America).<sup>152</sup>

Apropos of Justice Ginsburg’s statement in *United States v. Virginia*, Martin Daly and Margo Wilson recently have reported violence rates for “a community made up exclusively of one” gender. They assembled data from 20 studies of homicides among unrelated people in which the offender and the victim were of the same gender. The studies were done in the United States, Canada, England, Mexico, Iceland, India, Nigeria, Uganda, Kenya, and Botswana, over

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150. See *O’Connor v Donaldson* 422 US 563, 582 (1975) (“There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts.”) (Berger, CJ, concurring); *United States v Salerno*, 481 U.S. 739, (1987) (“[T]he government may detain mentally unstable individuals who present a danger to the public... [There is a] well-established authority of the government, in special circumstances, to restrain individuals’ liberty prior to or even without criminal trial.”) *Kansas v Hendricks*, supra, note \_\_\_, at 357 (“It ...cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty.”)

151. James Given, *SOCIETY AND HOMICIDE IN THIRTEENTH-CENTURY ENGLAND* (1977), at 134.

periods ranging from the 1920s to the 1990s. Their results: male offender/male victim homicides made up 98 percent of the total; female offender/female victim homicides made up the remaining two percent.<sup>153</sup> Regarding violence, it is hard to gainsay the conclusion of Michael Gottfredson and Travis Hirschi's classic *A General Theory of Crime*: "gender differences appear to be invariant over time and space."<sup>154</sup>

The remaining risk factors for violence—age, personality, major mental disorder, personality disorder, substance abuse disorder, prior crime and violence, a pathological family environment, and victimization—are subject to the lowest level of judicial review.<sup>155</sup> The research reviewed above demonstrates that there is at least a rational basis for classifications based on these risk factors in order to fulfill the police power goals of civil commitment statutes—goals that the Supreme Court repeatedly has upheld.<sup>156</sup>

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152. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (2002), at Table 4.8 (arrests for murder and nonnegligent manslaughter).

153. See Martin Daly & Margo Wilson, *Risk-Taking, Intrasexual Competition, and Homicide*, 47 NEB. SYMP. ON MOTIVATION 1, 16 (2001).

154. Michael Gottfredson and Travis Hirschi, *A GENERAL THEORY OF CRIME* (1990), at 145. See also Martin Daly and Margo Wilson, *HOMICIDE* (1988), at 146 ("The difference between the sexes is immense, and it is universal. There is no known human society in which the level of lethal violence among women even begins to approach that among men.")

155. See Christopher Slobogin, *Dangerousness As a Criterion in the Criminal Process*, in *LAW, MENTAL HEALTH, AND MENTAL DISORDER* 377 (B. Sales & D. Shuman eds., 1995) ("In short, outside of race, if demographic characteristics improve the predictive process, they should be used.")

156. See *supra* note \_\_,.

C. The commitment of sexually violent predators.

There remains the difficult question of whether the use of violence risk factors in the civil commitment of sexually violent predators should be constrained to those that index the individual's prior criminal history—as in criminal sentencing—or should be unconstrained save for the use of race or ethnicity—as in traditional civil commitment.

On the one hand, the Supreme Court clearly held in *Hendricks* and *Crane* that sexually violent predator statutes were *civil* in nature, suggesting that the same violence risk factors allowed in traditional civil commitment are permissible to use in the commitment of sexually violent predators. On the other hand, almost all legal and behavioral science commentators view *Hendricks* and *Crane* as improperly decided.<sup>157</sup> For the commentators, the “civil” designation of the

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157. E.g., Stephen Morse, *Fear of Danger, Flight from Culpability*, 4 PSYCHOL. PUB. POL'Y & L. 250 (1998); Stephen J. Morse, *Preventive Confinement of Dangerous Offenders*, 32 J. LAW, MEDICINE & ETHICS 56 (2004); Mara Krongard, *A Population at Risk: Civil Commitment of Substance Abusers After Kansas v. Hendricks*, 90 CAL. L. REV. 111 (2002); Laura Barnickol, *Missouri's Sexually Violent Predator Law: Treatment or Punishment?*, 4 WASH. U. J.L. & POL'Y 321 (2000); Sarah Spierling, *Lock Them Up and Throw Away the Key: How Washington's Violent Sexual Predator Law Will Shape the Future Balance Between Punishment and Prevention*, 9 J.L. & POL'Y 879 (2001); Adam Hirtz, *Lock 'Em Up and Throw Away the Key: Supreme Court Upholds Kansas' Sexually Violent Predator Act in Kansas v. Hendricks*, 42 ST. LOUIS U. L.J. 545 (1998); Kimberly Dorsett, *Kansas v. Hendricks: Marking the Beginning of a Dangerous New Era in Civil Commitment*, 48 DEPAUL L. REV. 113 (1998); Adam Falk, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment after Kansas v. Hendricks*, 25 AM. J.L. & MED. 117 (1999) Grant Morris, *The Evil That Men Do: Perverting Justice to Punish Perverts*, 2000 U. ILL. L. REV. 1199 (2000); Lawrence Fitch & Richard Ortega,

sexually violent predator statute at issue in *Hendricks* and *Crane* was a legislative pretext to circumvent constitutional concerns regarding double jeopardy and the *ex post facto* application of law.

Hostility by commentators to the unconstrained use of non-suspect violence risk factors in sexual predator commitments can be understood in large part as hostility to—and an attempt to undermine the operation of—the *Hendricks* and *Crane* decisions themselves. To prohibit the state in sexual predator commitments from using the very risk factors that scientifically permit high-risk classifications to be validly made would accomplish via evidentiary means the evisceration of statutes that commentators find substantively objectionable.

An alternative approach, endorsed here, is to keep separate evidentiary and substantive concerns. If commitment as a sexually violent predator is truly a *civil* commitment—as the Supreme Court holds it to be—then the evidentiary use of violence risk factors in such statutes should parallel the use of violence risk factors in traditional civil commitment—any valid risk factor except race or ethnicity is a candidate for inclusion on an actuarial risk assessment instrument.<sup>158</sup>

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*Law and the Confinement of Psychopaths*, 18 BEHAV. SCI. & L. 663 (2000); Lisa Kavanaugh, *Massachusetts's Sexually Dangerous Persons Legislation: Can Juries Make a Bad Law Better*, 35 HARV. C.R.-C.L. L. REV. 509 (2000); Peter Pfaffenroth, *The Need for Coherence: State's Civil Commitment of Sex Offenders in the Wake of Kansas v Crane*, 55 STANFORD LAW REVIEW 2229 (2003). Cf. Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NORTHWESTERN UNIVERSITY LAW REVIEW 1 (2003).

158. By the same logic, risk assessments of violence for the purpose of committing to a hospital persons acquitted of crime by reason of insanity would also be unconstrained in their use of valid risk factors, with the exception of race, since blameworthiness plays no part in the judgment. See

If, on the other hand, a state Supreme Court, hearing the commentators, found that under the state's constitution sexually violent predator commitments were only pretextually civil, and actually function more as a form of extended criminal punishment, then the use of any violence risk factors in such commitments would be moot: the statutes would clearly violate the double jeopardy clause by punishing the offender twice for the same conduct.<sup>159</sup>

#### PART IV: CONCLUSION

In the past, courts rarely have had to confront the admissibility of specific risk factors for violence, because actuarial instruments with scientific validity in assessing violence risk did not exist. Now, such instruments do exist and are being used with increasing frequency in criminal sentencing, the civil commitment of people with serious mental disorder, and the civil commitment of sexually violent predators. Among the empirically valid risk factors that are candidates for inclusion on these instruments are those that pertain to what the person is (age, gender, race/ethnicity, and personality), what the person has

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Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (In the commitment of insanity acquittees, "the State has no . . . punitive interest. As Foucha was not convicted, he may not be punished. Here, Louisiana has by reason of his acquittal exempted Foucha from criminal responsibility.").

159. Depending on whether the violent predator statute was enacted after the crime for which the offender was originally sentenced, the statute may be unconstitutional for *ex post facto* reasons as well.

(major mental disorder, personality disorder, and substance abuse disorder), what the person has done (prior crime and violence), and what has been done to the person (being raised in a pathological family environment and being physically victimized). Confronting the admissibility of these risk factors can no longer be avoided: their presence on actuarial prediction instruments makes their use transparent.

In making these unavoidable decisions about admissibility, I argue that courts first should categorize appropriately the legal context in which each form of violence risk assessment is made, and then apply accepted legal principles that govern decision making in that context. In criminal law, with its emphasis on blameworthiness for actions taken, these principles dictate that the admissibility of scientifically valid risk factors in sentencing, including capital sentencing in cases such as Victor Saldano's, is properly constrained to those factors that simultaneously index moral blameworthiness, i.e., to the defendant's prior criminal conduct. In mental health law authorizing the civil commitment of people with serious mental disorder to inpatient or outpatient treatment—a legal determination in which moral blameworthiness plays no part—the admissibility of violence risk factors should be unconstrained, except for the use of classifications subject to strict Equal Protection scrutiny, which in the case of violence risk assessment is limited to the individual's race or ethnicity.

Finally, in the commitment of sexually violent predators, I argue that



courts should keep evidentiary issues about the admissibility of violence risk factors apart from substantive questions about the constitutionality of the statutes that trigger risk assessment. If commitment as a sexually violent predator is properly categorized as *civil* commitment, the admissibility of violence risk factors in implementing such commitments should parallel the admissibility of violence risk factors in traditional civil commitment. Disagreement with the substantive merits of sexually violent predator statutes does not justify depriving decision makers of the only kind of scientific evidence—empirically-validated actuarial violence risk assessment—that can effectuate their statutory goals.