ASSESSING SEX OFFENDERS

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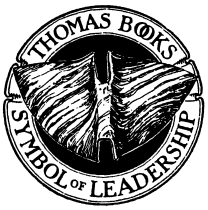
Second Edition

ASSESSING SEX OFFENDERS

Problems and Pitfalls

By

TERENCE W. CAMPBELL, PH.D., ABPP



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To the hard-working attorneys who feel overwhelmed
by the complexity of these data and concepts but
master them better than they ever anticipated

FOREWORD

Since the initial publication of *Assessing Sex Offenders,* a great deal has occurred with respect to constitutional challenges to *sexually violent person* statutes. A few attorneys are mounting serious attacks on *how* one determines with reliability, who is and who is not a potentially violent person. As attorneys from all over the United States have found, the material in *Assessing Sex Offenders,* aids counsel in formulating just this kind of challenge to the bases of these difficult laws.

Noted forensic psychologist Terence Campbell makes the point here that much of what passes as evaluation on the question of *sexually violent predators* is frankly unethical.[1] Dr. Campbell makes this point with citations to the ethical principles of the various disciplines the evaluators are drawn from and from considerations of the practical application and limitations of science. These arguments are balanced against due process considerations and are a valuable source for any cross examiner facing an attempt by the State to commit a person as a dangerous potential recidivist.

Several interesting cases describe the intersection of law and behavioral sciences in this difficult area. For example, in the recent *In re G.R.H.*[2] the Supreme Court of North Dakota faced a circumstance where the State filed a petition seeking involuntary civil commitment of a sex offender as a sexu-

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1. Following Dr. Campbell's lead, attorneys are now making these points as well. See, e.g., Douard, J., Friedman, R. I. and Greenfield, D. (2004) "Forensic Psychology:A Pathological Enterprise," paper presented at the American College of Forensic Psychologists annual conventions San Francisco, California April, 2004. These authors, Ph.D.s, M.D.s and attorneys - [John Douard, J.D., Ph.D.; Richard I. Friedman, J.D.; Daniel Greenfield, M.D., M.Ph., M.S.] draw upon sources such as: Robert L. Spitzer, R. L. & Jerome C. Wakefield, J. C. (1999) DSM-IV Diagnostic Criterion for Clinical Significance: Does It Help Solve the False Positives Problem? 156 *American Journal of Psychiatry* 1856–1864; Winnick, B. J. (2002) *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis,* 4 *Psychology, Public Policy and Law 505* and Foucault, Michael (2003) *Abnormal: Lectures at the College de France 1974–1975.* pp. 1–26.
2. 711 N.W.2d 587 (Supreme Court of North Dakota 2006).

ally dangerous individual. When the District Court granted the petition, the offender appealed. The Court noted that in a supplemental evidentiary hearing on remand, the State's two expert psychologists testified the G.R.H. suffered from a serious lack of ability to control his behavior. Dr. Campbell's readers will note that four psychological tests were used to determine whether G.R.H. would have a likelihood of recidivism. Only one of the four tests indicated a recidivism rate that could logically be denoted as "likely" to re-offend.[3] Nevertheless, as this data went to the judge without real explication, the petition was granted and upheld on appeal. This is partly because the State's psychologists testified that within a five-year period, the RRASOR (see Chapter 4) showed a 14 percent chance of recidivism, the Static-99 (see Chapter 5) showed a 39 percent chance of recidivism, and within a six-year period, the MnSOST-R (see Chapter 5) showed a 78 percent chance of recidivism. According to the record, a PCL-R test (see Chapter 7) was also done on G.R.H. The State's expert reported that G.R.H.'s score on the PCL-R test was "not clearly indicative" of a finding that G.R.H. was high risk for sexual recidivism.[4] Her report stated that "such a finding would seem to require, based on existing research, the combination of this PCL-R score range with some type of relevant deviant sexual interest. Such a condition was not diagnosed for [G.R.H.]."[5] Nevertheless, G.R.H. languishes in State mandated treatment. What would have happened if the cross examiner had brought the following to the court's attention?

In *In Re Detention of Marshall v. State,*[6] the Supreme Court of Washington took up a "sexually violent predator" case. In this matter, the Court reiterated that a sexually violent predator is a person who "suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility."[7] They explained that their law requires that mental abnormality must be "tied directly to present dangerousness."[8] The Court went on to explain that this tie to present dangerousness is constitutionally required, because due process requires that an individual must be both mentally ill and presently dangerous before he or she may be indefinitely committed.

V.L.Y. v. Board of Parole and Post-Prison Supervision[9] found the Supreme

3. 711 N.W.2d at 600.
4. *Id.*
5. 711 N.W.2d at 600.
6. 156 Wash.2d 150, 125 P.3d 111(Supreme Court of Washington 2005).
7. 156 Wash.2d at 154.
8. *Id.*
9. 388 Or. 44 106 P3d. 145 (2005).

Court of Oregon instructing it's Board of Parole and Post-Prison Supervision on science and due process. It seems that when the board first took on the task of identifying predatory sex offenders, it adopted a decisional process that relied, in part, on the SORAG[10] (see Chapter 7). Curiously, the Board did not allow for input from the potential designees. However, in *Noble v. Board of Parole,*[11] the Oregon Supreme Court held that the board violated a parolee's due process rights by designating him as a predatory sex offender under that procedure. The Court in Noble further held that due process required the board to give a potential designee notice and an evidentiary hearing before the designation takes place.[12] The Board developed a new rule for assessment that took up the STATIC-99.[13] Examining the new scheme, the Oregon Supreme Court reasoned that a detainee facing such a designation, whatever the reasons for that designation, must be accorded the basics of due process.[14] The Court reasoned that the board is not at liberty to substitute a purely documentary exercise for the hearing that any person faced with such a designation is entitled to receive.[15] Finally, the Court held that: ". . . under the present statutory scheme, the board erred in using a procedure that permitted it to rely exclusively on the sex offender risk assessment scale in making its predatory sex offender designation."[16]

The Static-99 underwent another court review recently concerning *In re care of Kapprelian.*[17] In this case, the Missouri appellate court explained that the Static-99 is an actuarial instrument that is widely used and accepted in the field of psychology to make statistical predictions about the likelihood of a sex offender being reconvicted of another sexual offense within five, ten and fifteen-year periods after being released from confinement. It measures ten risk factors for reconviction stated the court and, according to this appellate panel, is generally accepted as a reliable instrument for predicting future sexually violent behaviors by professionals who evaluate sexually violent

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10. The *Sex Offender Risk Assessment* or SORAG, was developed by Quinsey and his colleagues based on their many years of work in the Ontario correctional system. *See:* Quinsey, V.L., Harris, G.T., Rice, M.E. & Cormier, C.A. (1998). *Violent offenders: Appraising and managing risk.* Washington, D.C., American Psychological Association.
11. 327 Or. 485, 964 P.2d 990 (1998).
12. *Id.* at 498, 964 P.2d 990.
13. *V.L.Y. v. Board of Parole and Post-Prison Supervision,* 388 Or. 44,47; 106 P3d. 145,146 (2005).
14. 106 P3d. 145, 150–151 (2005).
15. *Id.*
16. 388 Or. 44,55; 106 P3d. 145,150 (2005).
17. 168 S.W.3d 708 (Missouri App 2005).

predators.[18]

Commonwealth v. Dube,[19] represents one of the rare cases where the State's experts don't line up to say "he didn't admit it so he must be dangerous. . "[20] While in prison, Dube steadfastly refused to admit that he had committed the offenses for which he was found guilty and refused to take part in sexual offender counseling and treatment. His ". . . course of incarceration was entirely incident-free. Consequently, the parole board voted to release him on parole. . . ."[21]

However, before Mr. Dube was scheduled to be released, the county district attorney filed a petition to commit him as sexually a dangerous person. The superior court dismissed the petition at preliminary stage and the Commonwealth appealed. The appeals court, held *inter alia,* that the evidence was insufficient to support a finding of probable cause. During the process, as the Commonwealth cast around for experts to testify that the defendant was dangerous, the trial, then appellate court impressed upon them that:

> . . . As the Supreme Court of the United States put it : '[w]hether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists'. . . .[22]

In *State v. Gibson,*[23] an Oregon Court of Appeals panel faced an individual

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18. 168 S.W.3d 712. The appellate panel went on to accept at face value, the witnesses' sense that the Static-99 "has been validated and cross-validated approximately 15 times, and it has been tested for inter-rater reliability approximately five times. Validation means the instrument is actually able to measure what it purports to measure in a test population. Cross-validation means the instrument measures what it is supposed to measure when applied to a different population of test subjects. Inter-rater reliability means different psychologists using the instrument would arrive at the same score when evaluating the same test population. . . ." 168 S.W.3d 712.
19. 59 Mass.App.Ct. 476; 796 N.E.2d 859 (2003). *Dube* involved two petitions on two defendants convicted of sexual offenses. In the case of Rubin Sepulveda, the psychological report describing him as dangerous was withdrawn.
20. On the issue of "admit it or else–no privileges–no parole–etc." please *see also: James v. State,* 75 P.3d 1065; 2003 WL 21854474 (Alaska App 2003) and *Bender v. New Jersey Dept. of Corrections,* 356 N.J. Super. 432; 812 A.2d 1154 (2003).
21. 796 N.E.2d 859,862.
22. 796 N.E.2d 859, 868 *citing inter alia:* in *Addington v. Texas,* 441 U.S. 418, 429, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).
23. 187 Or. App. 207; 66 P.3d 560 (2003).

suffering from what one psychiatrist described as "multiple paraphilias."[24] In *Gibson,* the defendant appealed from the judgment that adjudicated him to be mentally ill and involuntarily committed him to the State's mental health division. Relying on evidence of past acts, the court of appeals ruled that if "past acts" form the foundation for a prediction of future dangerousness, they can support a finding required to establish that an individual is a mentally ill person subject to involuntary commitment.[25]

In this case, a psychologist with experience in assessing sanity and evaluating sex offenders, was among the mental health experts who evaluated the defendant to determine whether he was insane years before.[26] This same psychologist opined that the length of time that the defendant had suffered from paraphilia (as evidenced by defendant's professed overwhelming urge to rape beginning at age 19) created an especially high likelihood that his paraphilia remained active.[27]

Another witness, a psychiatrist who evaluated the defendant for Depo-Provera treatment, at the request of the Department of Corrections[28] diagnosed him as having "multiple paraphilias." This psychiatrist concluded that the defendant "had some measure of sadism," as well as a history of voyeurism and frotteurism.[29] Other mental health professionals who evaluated the defendant's current condition diagnosed him as suffering from paraphilia as well. For example, a psychiatrist who examined him at the time of the involuntary commitment proceeding, concluded that Gibson's paraphilia involved "compulsions to engage in sadistic and violent behavior towards particularly women."[30]

The appellate panel properly noted that the evidence to support the defendant's commitment should not turn on the existence of evidence that he committed sexual acts *in the past* and did so with sufficient volition to be criminally responsible for his conduct. The central question, wrote the panel, was whether his mental disorder was characterized by "sufficiently impaired impulse control to distinguish him from the 'dangerous but typical recidivist' sex offender."[31]

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24. 66 P.3d at 563.
25. 66 P.3d at 566.
26. 66 P.3d at 562.
27. 66 P.3d at 563.
28. 66 P.3d at 563: Depo-Provera is a "medicine to lower sexual drive." In addition to reducing sexual drive, it is said to reduce aggression generally.
29. 66 P.3d at 563.
30. 66 P.3d at 563. Both of the county mental health investigators who examined him agreed that he suffered from paraphilia as well.
31. 66 P.3d 560, 567–568.

In two recent "Boyer" cases, the Massachusetts courts distinguished themselves. The problems of the potentially dangerous recidivist and *creeping hearsay* were joined in *Commonwealth v. Boyer.*[32] After the lower court found the defendant to be a sexually dangerous person and committed him for an indeterminate period of time, an appeal was taken. The record reveals that Boyer pled guilty to two counts of rape of a child and to four counts of indecent assault and battery on a child. The children involved were three of his nephews. He received a sentence of eighteen years and the Commonwealth filed a petition for commitment of Boyer as a sexually dangerous person a day before his release from prison. Two examiners filed written reports of their examinations, diagnoses and recommendations. The judge found the defendant a "sexually dangerous person" and committed him to a treatment center for an indeterminate period of time.[33]

The appellate court described the problem of *creeping hearsay* in the various reports and noted its effect on the trial judge. The appellate panel noted ". . . If there is not an exception for each statement, the hearsay is not admissible substantively. . . . However, it may be admissible if used for an alternative purpose, i.e., by an expert in forming his opinion."[34] The appellate panel went on to point out ". . . that hearsay contained in a report may be used for one purpose–here, as a basis for the expert's opinion–does not necessarily mean that it may be used for all substantive purposes by a factfinder who has to make a finding beyond a reasonable doubt."[35]

Calling the hearsay upon hearsay in the various reports "totem pole hearsay" the appellate panel went on to specify that its additive effect can be quite difficult for the trier of fact:

> Assuming independent admissibility, if the admission of the totem pole hearsay contained in the report was for the purpose of ascertaining the basis of the examiners' opinions, and not for the substantive facts set forth, there is no error. However, it is error where, as here, the judge, over objection, relied upon the statement as proven and substantive. It was improper for the judge to consider it in the manner he did.[36]

This "totem pole hearsay" caused the appellate court to remand the case with instructions to its trial courts.[37]

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32. 58 Mass. App. Ct. 662; 792 N.E.2d 677 (2003). This is the Peter Boyer case.
33. 92 N.E.2d 677, 676 - 679 *internal citations omitted.*
34. 92 N.E.2d 677 *internal citations omitted.*
35. 92 N.E.2d at 682.
36. 792 N.E.2d at 682 *internal citations omitted.*
37. *Id.*

In *Commonwealth v. Boyer*[38] a convicted sex offender faced continued confinement as a sexually dangerous person. The State retained psychologist Paul Zeizel to evaluate the detainee and testify against him. Relying on what he candidly described as "nominal" information, Zeizel reported that the defendant had symptoms *consistent with* pedophilia and that he remained a sexually dangerous person.[39] Based on that report, a judge of the Superior Court found probable cause to believe that the defendant was sexually dangerous and temporarily committed him to a treatment center for examination and diagnosis.[40] During the ensuing sixty-day commitment, Mr. Boyer was examined and interviewed by two qualified examiners, Dr. Niklos Tomich and Dr. Michael J. Murphy. In lengthy and detailed reports filed with the court, they *each* concluded that the defendant was not a sexually dangerous person under the statute.[41] Mr. Boyer demanded a jury trial and the Commonwealth called Zeizel as an expert witness. Over Mr. Boyer's objection, the written report that Zeizel had prepared the previous year was admitted into evidence. However, under close examination, Zeizel recanted the opinion that the defendant remained sexually dangerous and agreed with Tomich and Murphy that the defendant failed to meet the criteria for indefinite commitment to the treatment center.[42]

Mr. Boyer then called Dr. Leonard Allen Bard, a licensed psychologist, who had performed several hundred evaluations regarding sexual dangerousness. Based upon Dr. Bard's interview and a review of pertinent records, he too concluded that Mr. Boyer was not a sexually dangerous person. Nevertheless, the jury returned a verdict that the defendant was a sexually dangerous person as defined by the statute. Thereafter, the judge ordered him committed to the treatment center.[43] The appellate court carefully reviewed the record and relied on their holdings in *Commonwealth v. Dube.*[44] The panel determined that although Mr. Boyer could be said to be suffering from a paraphilia–pedophilia, the expert testimony offered by the Commonwealth was not sufficient to define Mr. Boyer as a sexually danger-

38. 61 Mass.App. Ct. 582, 812 N.E.2d 1235 (2004) This is the Ronald Boyer case.
39. 812 N.E.2d at 1237 (2004).
40. *Id.*
41. *Id.*
42. 812 N.E.2d at 1238 (2004).
43. *Id.*
44. "We repeat what we said in *Commonwealth v. Dube,* 59 Mass.App.Ct. 476, 482, 489, 796 N.E.2d 859 (2003), that expert testimony is required to prove sexual dangerousness. See *Commonwealth v. Bruno,* 432 Mass. 489, 510-511, 735 N.E.2d 1222 (2000)." 61 Mass.App. Ct. 582,587; 812 N.E.2d 1235,1239 (2004).

ous person.

Courts such as those in *Commonwealth v. Dube,*[45] *V.L.Y. v. Board of Parole and Post-Prison Supervision,*[46] and *Commonwealth v. Boyer*[47] could not reach their due process-based decisions without courageous works like this one from Terence Campbell.

DEMOSTHENES LORANDOS, PH.D., J.D.
Ann Arbor, Michigan 2007

45. 59 Mass.App.Ct. 476; 796 N.E.2d 859 (2003).
46. 388 Or. 44 106 P3d. 145 (2005).
47. 61 Mass.App. Ct. 582, 812 N.E.2d 1235 (2004).

FOREWORD TO THE FIRST EDITION

Over the years society has been particularly concerned about sex offenses. They generate more anxiety than other offenses. Prior to the enactment of the current "sexual violent predator" (SVP) laws, one-half the states during the period from 1930 through 1970 enacted "sexual psychopath" statutes to deal with sex offenders. The legislation operated in a legal system that already provided criminal sanctions for the same conduct. In addition, civil commitment procedures in all states are applicable to mentally ill persons who might constitute a danger to themselves or others who are in need of care or treatment.

These statutes usually provided for the indeterminate commitment of the so-called sexual psychopath. The term was usually defined as "one lacking the power to control his sexual impulses or having criminal propensities toward the commission of sex offenses." The statutes divided into preconviction and postconviction types. The legislation was not implemented with staff and facilities for treatment, one of the major purposes of the legislation. By the early 1990s, of the 26 states that had enacted the legislation, half of them repealed it. They were called a "failed experiment."

In the 1990s, prompted by the commission of grave sex offenses, no less than 17 jurisdictions have enacted SVP laws. The legislation establishes commitment procedures for individuals with "mental abnormality" or "personality disorder" who are "likely" to engage in "predatory acts of sexual violence." The laws are different from the early sexual psychopath statutes and from ordinary civil commitment laws in several important respects. First, they do not require a medically recognized serious mental disorder. Second, they do not require any allegation or proof of recent criminal wrongdoing. Third, they require sex offenders to serve their full prison term prior to commitment. Fourth, no bona fide treatment program need be in place.

Not long after their enactment, the United States Supreme Court in two decisions addressed "mental abnormality." In 1997, in a 5–4 decision in *Kansas v. Hendricks,* the Court reversed the Kansas Supreme Court which had

held that due process was violated because the definition of "mental abnormality" did not satisfy what is perceived to be the definition of "mental illness" required in a context of involuntary civil commitment. Writing for the majority, Justice Clarence Thomas said that due process does not require that this condition be a mental disorder recognized by treatment professionals, and he noted that psychiatrists disagree widely and frequently on what constitutes mental illness. In the second case, in 2002 in *Kansas v. Crane,* the Court noted that in its ruling in *Hendricks,* reference was made to the Kansas SVP law as requiring a mental abnormality or disorder that made it difficult for the person to control his behavior. In its decision in *Hendricks* no requirement was made for a complete lack of control determination. In *Crane,* the Court held that while an "'inability to control behavior' will not be demonstrable with mathematical precision, it is enough that there be proof of serious difficulty in controlling behavior." The Court noted that the states retain considerable flexibility in the definition of mental abnormality and personality disorder that may make an individual subject to commitment.

In this book, the well-known and highly regarded clinical psychologist Terence W. Campbell writes about the assessment of sex offenders. He challenges mental health professionals to recognize and respond to their scientific and professional responsibilities. The SVP laws call upon psychologists and psychiatrists to determine whether the individual meets the criteria for commitment, and to evaluate the inmate prior to release on parole. As an expert, the psychologist or psychiatrist is asked to render an opinion on two critical issues: does the individual have a "mental abnormality" and what is the "likelihood" of sexual recidivism?

Risk analysis focuses on the term "likely," whether a quantitative description of such risk is acceptable peer practice. Discussion in the literature often involves actuarial versus clinical analysis (though a competent evaluation would involve *both* an actuarial and clinical analysis). Actuarial rating scales have been developed through the use of statistically derived factors to differentiate between sexual recidivists and nonrecidivists. What is the status of their accuracy? Dr. Campbell raises and responds to the following queries: (1) Does the classification accuracy of actuarial instruments satisfy the heightened scientific standards to which they should be subjected? (2) Are the methods for identifying the classification accuracy of actuarial instruments sufficiently standardized? (3) Is there a manual available for addressing the classification accuracy of actuarial instruments? (4) Are the interrater reliabilities of actuarial instruments consistent with classification accuracy? (5) At their current level of classification accuracy, are actuarial instruments being rushed prematurely into legal proceedings? (6) In legal proceedings, can the classification accuracies of actuarial instruments survive full disclosure of

their limitations? And (7) does the classification accuracy of actuarial instruments create an appearance of precision that substantially exceeds their actual accuracy?

SVP evaluators often use various assessment procedures to supplement actuarial instruments. The "adjusted actuarial assessment" is a process of estimating the base rate of recidivism through a rating scale and adjusting this risk by external empirically derived risk factors. Both critics and proponents of SVP evaluations agree that actuarial instruments cannot be used as "standalone" devices. Dr. Campbell discusses whether the instruments combined with one or more supplementary procedures can claim general acceptance for assessing sex offender recidivism risk. He concludes that in SVP proceedings the data is more prejudicial than probative.

Notwithstanding Justice Thomas's comment in *Hendricks* about the disagreement among mental health professionals about the definition of mental abnormality, SVP evaluators routinely rely on the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders.* In no uncertain terms, Dr. Campbell critiques the category classifications. He argues that the diagnostic criteria are arbitrarily selected, hence the *DSM* amounts to a definitional disaster. Relying on actuarial procedures without an interview of an offender is arguably defensible, he says, but reaching diagnostic conclusions via the *DSM* without an interview is rarely defensible.

SVP evaluators, assessing whether previously committed offenders can be released from confinement, frequently seek the opinions of their therapists. However, Dr. Campbell points out, the relevant research demonstrates that this is an ill-advised practice. As an expert witness, a therapist is obligated to testify objectively, which they may not be able to do, and even if they could, the testimony would threaten whatever therapeutic alliance that exists. Professional codes of ethics abjure dual roles. Yet, as a rule, lawyers consider that judges and juries, for various reasons, give more credibility to the testimony of a therapist than to that of a forensic expert. Moreover, the courts hold that a therapist by undertaking treatment implied agrees to testify on behalf of the patient (see, e.g., *Spaulding v. Hussain,* (N.J.1988)).

In sum and substance, like the earlier sexual psychopath legislation, the SVP laws are a woefully awkward and misleading way of dealing with offenders. Then too, implementation of the legislation is an expensive way of achieving social control over a relatively small number of offenders. Sooner or later, it will be realized that the costs in implementing the SVP laws, like the earlier laws, are so exorbitant, and their efficacy so dubious, that they will be abandoned or repealed. Better approaches are indeterminate sentencing of all offenders or heavier sentences for repeat violent sex offenders.

Dr. Campbell specializes in forensic psychology and family psychology in his private practice in Sterling Heights, Michigan. I have known Dr. Campbell for many years and with pleasure, I have heard many of his presentations as well as reading his writings. He is a member of the Scientific and Professional Advisory Board of the False Memory Syndrome Foundation (I am also a member of the Advisory Board), and he has written about the devastating effect of false sexual abuse claims. He serves on the Scientific Advisory Board of the National Association for Consumer Protection in Mental Health Practices.

RALPH SLOVENKO
Editor
American Series in Behavioral Science and Law

PREFACE

As indicated in the Preface to its first edition, this book is not an attempt at creating sympathy for sex offenders. It reviews issues related to sex offenders in considerable detail. Ultimately, however, this book challenges psychologists to recognize and respond to their scientific and professional responsibilities. When testifying as expert witnesses, ethical obligations prohibit psychologists from misinforming and misleading legal proceeedings. These same obligations necessitate that psychologists support their opinions with relevant research data.

Psychology's history in our courtrooms is a checkered one. In *Brown v. Board of Education,* psychologists exposed "separate but equal" education as a myth. Relevant research supported their efforts via compelling evidence documenting the pernicious effects of school segregation. Elizabeth Loftus' laboratory work has dramatically demonstrated how eyewitness recall can be fraught with errors. The efforts of Loftus and others have alerted judges and juries to the many problems undermining our memory. When undertaking child custody evaluations, psychologists now respond to well-defined guidelines detailing appropriate practices. As a result of responding to these guidelines, psychologists can effectively assist family courts in dealing with the complex matters before them.

Unfortunately, psychologists have also misinformed and misled legal proceedings. Ill-informed claims regarding supposedly repressed memories of child sexual abuse underscored the enormous costs of neglecting relevant research. These claims sent innocent people to prison and tore families apart. Other psychologists have cited behavioral indicators of child sexual abuse, contending that these indicators reliably identify sexually abused children. In fact, however, the vast majority of children who exhibit these "indicators" have not been sexually abused. Legions of psychologists have expressed expert opinions premised on instruments such as the Rorschach Ink Blot Test. Too often, however, interpretation of Rorschach responses reveals more about the interpreting psychologist than the subject taking this test.

Now, substantial numbers of psychologists claim they can accurately identify the recidivism risk of sex offenders. Despite the very limited, peer-

reviewed data related to these claims, many psychologists insist the scientific evidence supports their efforts in this regard. This book reviews the scientific evidence relevant to assessing the recidivism risk of sex offenders. Too often, the issues detailed in these chapters have been overlooked and/or misinterpreted. As a result, the likelihood of psychologists misusing and abusing scientific data when assessing sex offenders should not be underestimated. This book identifies numerous instances of such misuse and abuse.

If psychologists regularly misinform and mislead legal proceedings, respect for their work will plummet. In these circumstances, the influence of legitimate and relevant psychological science would also diminish. In turn, speculation and conjecture about the human condition could too often masquerade as evidence in legal matters. Such an outcome would ill serve any search for truth and justice in our courtrooms.

T.W.C.

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Various people assisted me in writing this book. Greg Bal, formerly with the Iowa Public Defender's Office, oversees the list serve for the Sex Offender Commitment Defense Association. That list serve was a valuable source of information for this volume. Christopher Cosden, formerly with the Florida Public Defender's Office, has developed and distributed CDs with numerous relevant articles. Luis Rosell and Hollida Wakefield were also exceedingly helpful in sending me various articles and related information.

Natalie Brown's insights and perspectives have led me to consider issues I would have overlooked without her input. Opportunities to discuss issues with Gregory DeClue and Stephen Hart were typically informative and enlightening. Although Dr. DeClue, Dr. Hart, and I do not always agree, their input assisted me to sharpen my own thinking. Additionally, the opportunities to work with various attorneys in different states has afforded me input and recommendations aiding the preparation of this edition of *Assessing Sex Offenders.*

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American Journal of Forensic Psychology:
Challenging the evidentiary reliability of DSM-IV, 1999, 17 (1), 47–68.
Assessing sexual offender recidivism risk: Static-risk variables alone?, 2001, 19 (4), 15–22.

Behavioral Sciences and the Law:
Sexual predator evaluations and phrenology: Considering the issues of evidentiary reliability, 2000, 18, 111–130.
Sex offenders and actuarial risk assessments: Ethical considerations, 2003, 21, 269–279.

Journal of Forensic Psychology Practice:
The validity of the Psychopathy Checklist-Revised in adversarial proceedings, 2006, 6 (4), 43–53.

Previously published books authored
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Beware The Talking Cure:
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Assessing Sex Offenders:
Problems and Pitfalls, First Edition

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ASSESSING SEX OFFENDERS

Chapter 1

SEXUALLY VIOLENT PERSON CIVIL COMMITMENT STATUTES

Sex offenders typically arouse contemptuous anger and disgust. These reactions become especially pronounced when sex offenders victimize children. Reacting to the specter of disturbed predators preying upon innocent victims, politicians and policymakers have called for action. In the state of New York, for example, Governor George Pataki advocates civil commitment and treatment of sex offenders. Governor Pataki contends, "Experience tells us sexual predators pose a serious threat to society even after they have served their sentences" (Office of the Governor, 2001). Pataki moreover insisted, "We must strike a balance between increasing public safety and protecting the rights of individuals. By providing additional treatment for sexual predators after they've completed their prison terms, we'll achieve that goal." Though large segments of our population likely find his comments appealing, Pataki's rhetoric warrants closer examination.

HEATED CLAIMS VERSUS LEGITIMATE EVIDENCE

The strong emotions provoked by sex offenders can inspire heated claims that ignore legitimate evidence. While expressing support for New York's proposed sexually violent person law, State Senate Majority Leader Joseph Bruno claimed, "Studies have shown that sex offenders are more likely to repeat their crimes than any other offenses" (Office of the Governor, 2001). The available data, however, demonstrate that Senator Bruno's position is overstated. A U.S. Bureau of Justice study reported that the overall recidivism rate of sex offenders is less, on average, than that of nonsexual criminals (Beck & Shipley, 1989).

Karl Hanson, a psychologist affiliated with the Solicitor General's Office of Canada, has extensively researched sex offenders and their recidivism

risk. Commenting on his data, obtained from numerous studies, Hanson (2000) indicated "Not all sex offenders reoffend, and even high-risk offenders can change their ways" (p. 106). Despite well-informed sources advising even-handed objectivity when considering sex offenders, heat too often prevails over light.

The fear and prejudice elicited by sex offenders encourages public policy premised on emotional appeal. In turn, legal proceedings deliberating civil commitment of sex offenders can deteriorate into pro forma exercises. The outcomes of these proceedings often seem inevitable, committing more than 90 percent of offenders. Janus and Nudell (1999) attributed these typically predictable verdicts to ". . . the great pressures to lock up sex offenders and the difficulty the trier-of fact [judge or jury] has in understanding the bases for 'sophisticated' professional judgments" (p. 3–3).

As Slovenko detailed in this volume's Foreword, statutes specifically addressing sex offenders are not new. Between 1930 and 1970, twenty-seven states and the District of Columbia passed various "sexual psychopath" laws (Janus, 2006). Although driven by goals of treatment and rehabilitation, these statutes never realized their intentions. In 1977, the Group for the Advancement of Psychiatry (GAP) strongly recommended repealing the sexual psychopath laws. The GAP report characterized these laws as failed experiments, providing neither effective treatment nor incapacitation of the most dangerous offenders (Janus, 2006). By the 1980s, most sexual psychopath laws had been repealed or no longer used. Nevertheless, it appears that numerous state legislators have ignored this history, and as a result, they seem determined to repeat its mistakes.

CIVIL COMMITMENT STATUTES

In response to public outrage evoked by highly publicized sexual assaults, eighteen states have enacted sexually violent person (SVP) statutes (Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin). These laws mandate a civil hearing to determine whether a sex offender should be committed and confined indefinitely for treatment. Texas' SVP statute is unique in that it places committed offenders into supervised community settings (Fitch & Hammen, 2003).

The vast majority of offenders subject to SVP commitments are close to completing their prison sentences. Previously convicted for their sex offenses, they have often served lengthy prison terms. Because of double jeopardy

considerations, civil libertarians anticipated that appellate courts would rule SVP statutes unconstitutional. Constitutional safeguards against double jeopardy prohibit punishing people twice for the same offense. In *Hendricks v. Kansas,* however, the U.S. Supreme Court cited the treatment available to those committed as SVPs. The Court ruled that given treatment availability for those committed, the intent of SVP statutes is not punitive; and therefore, claims of double jeopardy do not apply to SVP commitments (Winick, 2003).

If committed as a SVP, the offender is confined in a setting more like a maximum security prison than not. Once committed, he remains confined until another hearing finds that his response to treatment warrants release. At the present time, only 5 percent of committed offenders have been released (LaFond, 2003). These circumstances have prompted characterizations of SVP commitment as tantamount to a death sentence given the likelihood of lifetime confinement (LaFond, 2003).

The American Psychiatric Association is vehemently opposed to SVP statutes. In a 1999 monograph, the association declared: "Sexual predator commitment laws represent a serious assault on the integrity of psychiatry. . . . By bending civil commitment to serve essentially non-medical purposes, sexual predator commitment statutes threaten to undermine the legitimacy of the medical model of commitment. . . . This represents an unacceptable misuse of psychiatry" (American Psychiatric Association, 1999, pp. 173–174).

Similarly, the National Association of State Mental Health Program Directors (NASMHPD) also deplores SVP statutes. In 1997, the NASMHPD insisted that SVP statutes: ". . . disrupt the state's ability to provide services for people with treatable psychiatric illnesses . . . undermine the mission and integrity of the public mental health system . . . divert scarce resources away from people . . . who both need and desire treatment . . . and endanger the safety of others in those facilities who have treatable psychiatric illnesses" (NASMHPD, 1997, p. 1).

SVP COMMITMENT PROCEDURES

SVP evaluations typically proceed in a step-wise manner to consider four questions: (1) Has the offender been convicted of a sexually violent offense? (2) Does the offender exhibit a personality or mental disorder that predisposes him to committing violent sexual acts? (3) Does the personality or mental disorder impair the offender's emotional or volitional control? (4) If not committed and confined, is the offender likely to sexually reoffend as a result of his diagnosed mental disorder?

Doren (2002) points out how the latter three questions inevitably necessi-