

Registering Dangerous Strangers:
Psychology and Justice in the Politics of the Sex Offender Registry

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ABSTRACT

My dissertation addresses the phenomenon of stranger danger to children and tries to answer the question of how the category of sex offender has been produced to become the primary target in contemporary sex crime control. I examine the period from the 1960s through the 1990s, the period beginning with the rising awareness of child abuse and criminal and psychiatric patient rights challenges to preventive confinement and ending with institutionalizing the regime of sex offender risk management. I attend particularly to psychological techniques that were designed and used to produce sex offender categories, by focusing on three interconnected dimensions: first, the formation of a new discipline of forensic psychology in the crime control area; second, the methods of knowledge production about sex offenders; and third, the institutional aspects of crime control centered on repeat stranger offenders.

This dissertation examines the shaping of risk as a value-laden cultural product, involving the identification of risks to be managed, the selection of risk factors, and the decisions of “acceptable” levels of risk. In engaging in conversation about ongoing policy issues, my work intends to go beyond the opposition between civil rights and public safety to understand how the politics of crime control came to center on the dangerous stranger, a center around which the two political values of rights and safety have collided and been negotiated. I provide a genealogy of actuarial risk management and situate its origins in relation to the civil rights revolution. By examining the shift from psychiatric dangerousness prediction to psychological risk management, I argue that the risk management regime is an outgrowth of psychologists’ attempts to

accommodate civil rights claims in a broader context where socio-cultural tensions over the changing family values have zeroed in on stranger danger.

While psychologists initially promoted actuarial justice as a rational method of balancing conflicting social values, its implementation was dictated by institutional demands for efficiency in regulating an increasing number of sex offenders. Risk management technologies led to the mutual reproduction of crime data and criminal populations at risk of reoffense, which contributed to the expansion of populations under criminal supervision.

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Chapter 1 Introduction

1.1. Research Questions and Objectives

As of May 2013, approximately three quarters of a million individuals were registered as sex offenders in the United States.¹ Sex offenders are subject to a variety of regulation measures, such as increased prison sentences, indefinite detention after the completion of their sentences, registration, community notification, monitoring with electronic bracelets and global positioning devices, and residency restriction. The contemporary sex offender regulations began to be developed in 1990 when the State of Washington passed the Community Protection Act, which provided sex offender registration and the indefinite civil commitment of a “small but extremely dangerous group” of violent repeat sex offenders.² As the title indicates, the stated aim was the promotion of public safety, especially the protection of children from sex offenses committed by stranger repeat offenders.

However, it was not until the early 1990s that outsiders and predators were foregrounded as the major perpetrators of child sexual abuse. When the issue of child sexual abuse was initially raised in the 1970s, policy responses did not identify a stranger to the victim as the main target. Rather, feminist movements against incest and anti-pornography movements pointed to family members and acquaintances as the major source of threat. By the late 1970s, the problem of child abuse and exploitation, whether physical or sexual, was framed as stemming primarily from the dysfunctional or pathological family, rather than strangers. In contrast, by the early 1990s, the dysfunctional family threatened from within became overshadowed by the family

¹ “Map of Registered Sex Offenders in the United States,” National Center for Missing and Exploited Children, accessed September 30, 2013, http://www.missingkids.com/en_US/documents/Sex_Offenders_Map.pdf.

² Community Protection Act of 1990, 2SSB 6259, 51th Washington State Legislature (1990).

threatened by strangers. The current measures of sex offender registration and community notification are founded upon and reinforce the idea of stranger danger to child victims.

It is often noted that the current regime of crime control assumes and promotes the conception of a zero-sum relationship between the civil rights of the offender and the safety of the (potential) victim.³ The idea is that public safety should be guaranteed at the expense of the civil rights of offenders. However, the current efforts at sex crime control have been deeply problematic for both offenders and victims. As for the offenders, it is not only that sex offenses are conceived of as being committed by strangers but that registered sex offenders are rendered strangers both literally in the case of those who end up being homeless and symbolically through the attachment of otherness to the sex offender as a distinct category. In this regime of crime control, civil rights claims recede to the background to function in setting the limit of punitive sanctions rather than in giving voice to political and legal endeavors to reintegrate offenders into the community.

Sex offender regulations centered on repeat stranger offenders not only mark a retrenchment of criminal and psychiatric patient rights but also reverse the achievements of feminist movements against sexual violence. The dominant figure of stranger danger is at odds with a feminist claim that most sexual violence occurs in intimate or familial settings. If one of the achievements of feminism is the revelation that sexual violence is more prevalent than assumed, criminal justice that focuses on individuals deemed dangerous strangers shifts the problem of sexual violence from the framework of gender relations that saturate everyday life to that of securing the boundary of the community by distinguishing between self and other. This

³ David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001); Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford: Oxford University Press, 2007).

feature of sex crime control is also interlocked with the choice of the ideal victim, namely the child sexually assaulted by a stranger. The child occupies the position of the politically popular victim not only because it is capable of easily provoking, and thus mobilizing, public outrage but because the child victim can be a more suitable symbol in the war on crime than the victim of intimacy violence. It is especially so when crime control is conceived as the zero-sum game over the boundary of the community that separates the offender on the one hand and the victim and the community at large as potential victim on the other.

My dissertation addresses the phenomenon of stranger danger to children and tries to answer the question of how the category of sex offender as stranger danger has been produced to become the primary target in contemporary sex crime control. I examine the period from the 1960s through the 1990s, the period beginning with the rising awareness of child abuse and criminal and psychiatric patient rights challenges to preventive confinement and ending with institutionalizing the regime of sex offender risk management. This inquiry provides an understanding of two transformations pertaining to sex crime control: first, the shift of focus from domestic, parental abuse to stranger danger; and second, the production of sex offender categories as a knowledge object of risk management rather than as a legal subject with civil rights.

In so doing, I attend particularly to psychological techniques that have been designed and used to produce sex offender categories, by focusing on three interconnected dimensions: first, the formation of a new discipline of forensic psychology in the crime control area; second, the methods of knowledge production about sex offenders; and third, the institutional aspects of crime control centered on repeat stranger offenders. By examining the shift from psychiatric dangerousness prediction to psychological risk management, I argue that the risk management

regime is an outgrowth of psychologists' attempts to accommodate civil rights claims in a broader context where socio-cultural tensions and anxieties over the changing family values have zeroed in on stranger danger.

1.2. Scientific Risk Management and the Symbolic Boundary between Self and Other-Stranger Danger

This dissertation builds upon previous studies of the role of the human sciences in the construction of social problems and in the policy processes regarding crime control. The development of psychiatry, psychology, criminology, and sociology since the nineteenth century made an impact on public policy by propagating the medical model of social problems based on the contrasting pair of the normal and the pathological.⁴ The category of the “criminal” is one of the most significant effects brought about by the medical models of crime.⁵ With the production of psychiatric and psychological knowledge, criminals became defined not only by their illegal acts but also by their impalpable interiority as a locus of criminality. In this way, psychiatry and

⁴ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Random House, 1979); Ian Hacking, *The Taming of Chance* (Cambridge: Cambridge University Press, 1990); Ellen Herman, *The Romance of American Psychology: Political Culture in the Age of Experts* (Berkeley: University of California Press, 1995); Robert A. Nye, *Crime, Madness, and Politics in Modern France: The Medical Concept of National Decline* (Princeton: Princeton University Press, 1984); Nikolas Rose, *Governing the Soul: The Shaping of the Private Self*, 2nd ed. (London: Free Association Books, 1999).

⁵ Peter Becker and Richard F. Wetzell, eds., *Criminals and Their Scientists: The History of Criminology in International Perspective* (New York: Cambridge University Press, 2006); Piers Beirne, *Inventing Criminology: Essays on the Rise of 'Homo Criminalis'* (Albany: State University of New York Press, 1993); Michel Foucault, “The Dangerous Individual,” in *Politics, Philosophy, Culture: Interviews and Other Writings of Michel Foucault, 1977-1984*, ed. Lawrence D. Kritzman (New York: Routledge, 1988), 125-151; Pasquale Pasquino, “Criminology: The Birth of a Special Knowledge,” in *The Foucault Effect: Studies in Governmentality*, eds. Graham Burchell, Colin Gordon, and Peter Miller (Chicago: University of Chicago Press, 1991), 235-50; Nicole Hahn Rafter, *Creating Born Criminals* (Urbana: University of Illinois Press, 1997).

psychology invented a special kind of people inclined to committing crimes. The current sex offender laws embody this “criminology of the other,” which produces knowledge about criminals as a distinct group from the general population.⁶

The focus on the role of science in crime control provides insights into policy changes since the late 1970s. The rise of tough-on-crime policies during this period has often been understood as a product of moral populism in policy-making.⁷ A number of commentators have accounted for the sex offender laws in particular, as hastened in response to public outrage in the aftermath of high-profile crime incidents involving child abduction, rape, and murder committed by stranger repeat offenders.⁸ These accounts usually contrast populist policy-making driven by moral panic with expert-driven policy-making founded upon scientific studies. One response to this situation has been that sex offender regulations should be remedied by adopting more sensible and rational approaches based on empirical data about the causes of the problems and the possible consequences of the policies; put another way, evidence-based criminal justice.⁹

However, as Mary Douglas and Sheila Jasanoff point out, contemporary risk analysis that emphasizes the objective assessment of probability, as opposed to the value-laden perception of

⁶ Garland, *Culture of Control*.

⁷ Garland, *Culture of Control*; John Pratt, *Penal Populism* (New York: Routledge, 2007).

⁸ David C. Anderson, *Crime and the Politics of Hysteria: How the Willie Horton Story Changed American Justice* (New York: Times Books, 1995); Eric S. Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Ithaca: Cornell University Press, 2006); Roger N. Lancaster, *Sex Panic and the Punitive State* (Berkeley: University of California Press, 2011).

⁹ Robert J. McGrath et al., *Current Practices and Emerging Trends in Sexual Abuser Management: The Safer Society 2009 North American Survey* (Brandon, Vermont: Safer Society Press, 2010); National Institute of Corrections, *Public Protection through Offender Risk Reduction: Evidence Based Practice* (Washington, D.C.: U.S. Department of Justice, 1994).

danger, is in and of itself a moralized symptom of social organization.¹⁰ Douglas argues that the evaluation of risk is a “political, aesthetic, and moral matter” that assigns blame for misfortunes by establishing and reinforcing the symbolic boundary between Self and Other.¹¹ The notions of contamination and pollution that threatened the integrity of the community have often been found in public discourses regarding child protection against sex offenders.¹² Likewise, the “containment approach” to crime risk, which has been promoted as a method of evidence-based offender management, conveys the idea of policing the symbolic border by “containing” danger.¹³

Moralities that are embedded in the scientific risk management system are manifest in the origins of statistics, which was known as “political arithmetic” or “moral science.” Ian Hacking highlights the purpose of social control in the development of the science of probability and statistics in the nineteenth century.¹⁴ The classification of populations centered on the idea of “norm” germinated out of the study of social laws pertaining to deviance. In this regard, statistically assessed risk as an indicator of “deviance” is a “socio-cognitive realm arising from the clear-cut boundary between managed territories and dangerous others.”¹⁵

¹⁰ Mary Douglas, *Risk and Blame: Essays in Cultural Theory* (New York: Routledge, 1992); Sheila Jasanoff, “Bridging the Two Cultures of Risk Analysis,” *Risk Analysis* 13, no. 2 (1993): 123-29.

¹¹ Douglas, *Risk and Blame*, 31; Deborah Lupton, *Risk* (New York: Routledge, 1999).

¹² Mona Lynch, “Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation,” *Law and Social Inquiry* 27, no. 3 (2002): 529-66.

¹³ Kim English, “The Containment Approach: An Aggressive Strategy for the Community Management of Adult Sex Offenders,” *Psychology, Public Policy, and Law* 4, no. 1/2(1998): 218-35; Kim English, Suzanne Pullen, and Linda Jones, *Managing Adult Sex Offenders in the Community: A Containment Approach* (Washington, D.C.: U.S. Department of Justice, 1997).

¹⁴ Hacking, *Taming of Chance*.

¹⁵ Michaelis Lianos and Mary Douglas, “Dangerization and the End of Deviance: The Institutional Environment,” *British Journal of Criminology* 40, no. 2 (2000): 274.

While the sex offender laws have often been recounted as populist policy-making not grounded in scientific knowledge, my work illuminates the scientific and technical elements of risk management that have underpinned the policies. Building upon those studies above, I examine the shaping of risk as a value-laden cultural product, involving the identification of risks to be managed, the selection of risk factors, and the decisions of “acceptable” levels of risk. By examining how scientific knowledge has operated in the politics of sex offender regulation, this project sheds light on the ways in which the interplay between crime control and science buttresses the current regime of sex offender management.

1.3. Actuarial Justice and Civil Rights

The Sexually Violent Predators laws that defined sex offenders as having a “mental abnormality or personality disorder” mark the inception of contemporary sex offender regulation. Nikolas Rose discusses the framing of violence in terms of a mental health issue as a “new strategy to control anti-citizens.”¹⁶ Rose argues that the potential offenders with mental disorders are considered to fail to conform to the norms of freedom and self-control in “advanced liberal” society, and thus become a target of control and preventive intervention. However, what makes mentally disordered offenders problematic is not only that they are “anti-citizens” who pose a threat to society but that they are also “citizens” with civil rights that can be limited only through lawful procedures that satisfy the standard of political legitimacy in liberal society. In other words, those deemed dangerous individuals with mental abnormalities are not only targeted for control to guarantee the protection of the public but also form a problematic dilemma posed to a liberal politics.

¹⁶ Nikolas Rose, “The Biology of Culpability: Pathological Identity and Crime Control in a Biological Culture,” *Theoretical Criminology* 4, no. 1 (2000): 5-34.

The dilemma touches upon the long-standing issues concerning the basic social values of individual liberty and public safety. When critics claim that preventive detention such as the civil commitment of dangerous sex offenders results in civil rights violations by excessive state power, advocates reply that the unconditional protection of the individual rights of offenders could compromise public safety by failing to prevent crimes.¹⁷ This conflict involves the issue of defining the status of dangerous individuals as citizens or anti-citizens, on the one hand, and the issue of how to identify and categorize particular individuals as dangerous, on the other.

In engaging in conversation about ongoing policy issues, my work intends to go beyond the opposition between civil rights and public safety to understand how the politics of crime control came to center on the dangerous stranger, a center around which the two political values of rights and safety have collided and been negotiated. I provide a genealogy of actuarial risk management and situate its origins in relation to the civil rights revolution. Beneath the contention over public safety and civil rights lie the questions of who dangerous offenders are, what can be known of them, and by what means. In other words, how can we know who are dangerous to the extent that requires and justifies the limitation of their civil rights for the benefit of public safety? During the course of debates since the early 1970s, scientific knowledge has been drawn on to answer these questions. Scientific knowledge production about sex offenders has become a realm that policy questions involving fundamental social values have revolved around.

I analyze political discourses concerning civil rights and public safety and consider how these discourses interacted with the scientific methods for producing and establishing knowledge

¹⁷ Human Rights Watch, *No Easy Answers: Sex Offender Laws in the US* (New York: Human Rights Watch, 2007); Janus, *Failure to Protect*; Stuart A. Scheingold, Jana Pershing, and Toska Olson, "Sexual Violence, Victim Advocacy and Republican Criminology," *Law and Society Review* 28, no. 4 (1994): 729-63.

about sex offenders. Attending to the mutual construction of social problems and scientific knowledge, this dissertation illuminates the process by which the category of sex offenders became constituted simultaneously as a policy agenda and knowledge object. This inquiry offers an understanding of the ways in which modes of scientific knowledge production develop and change in specific political configurations.

1.4. Human Sciences in Crime Control

While sex offenders are considered to be the quintessential deviant individuals and are socially marginalized, they occupy a symbolically central place in public discourse and policy agendas.¹⁸ As Foucault shows, the emergence of abnormal, problematic populations in the nineteenth century was conditioned by and entailed the explosion of discourses and technologies – scientific knowledge and techniques for regulating them.¹⁹ In investigating knowledge production in relation to the regulation of sex offenders, this dissertation stresses methods for producing and establishing knowledge. Problem individuals and events are rendered visible, and thus governable, through the form, procedure, and rule of producing, accumulating, and circulating knowledge.²⁰ The methods for producing knowledge about sex offenders and the techniques of identifying dangerous offenders are constitutive of the way in which crime control strategies and practices are organized. In this regard, the forms of knowledge and the logics embedded in knowledge production are significant in understanding contemporary sex offender management.

¹⁸ Lupton, *Risk*, 144.

¹⁹ Michel Foucault, *Abnormal: Lectures at the Collège de France, 1974-1975* (New York: Picador, 2003); Foucault, *The History of Sexuality: An Introduction* (New York: Pantheon Books, 1978).

²⁰ Richard V. Ericson and Kevin D. Haggerty, *Policing the Risk Society* (Toronto: University of Toronto Press, 1997).

Mental health and corrections professionals have espoused the statistical calculation of probability as the most scientific way of identifying sex offenders at risk of reoffense. However, as Douglas points out, the pursuit of scientific knowledge about risks can be indicative of contemporary cultural change. Put differently, “the possibility of a scientifically objective decision about exposure to danger is part of the new complex of ideas.”²¹ In a similar vein, this dissertation traces the development of sex offender risk management back to the 1970s when demands for scientific objectivity in classifying dangerous offenders arose. Specifically, I investigate controversies around the methods of clinical diagnosis and statistical calculations of probability, by which knowledge claims about dangerous offenders have been produced, contested, and hardened into facts. In so doing, this dissertation intends to show how psychological methods have been developed to tackle the questions of the fundamental social values and how these new ways of knowledge production have been embedded in the categorization of sex offenders and the practices of registering and confining them.

It has become criminological conventional wisdom that psychiatric expertise eroded away by the late 1970s as the objective of offender rehabilitation gave way to more punitive policies in crime control.²² Many commentators have pointed to the current sex offender regulations that have been implemented since the 1990s as a manifest indicator of the decline of psychiatrists.²³ My work highlights the other side of the picture: the rise of psychology in crime

²¹ Douglas, *Risk and Blame*, 14.

²² Malcolm M. Feeley and Jonathan Simon, “The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications,” *Criminology* 30, no. 4 (1992): 449-74; Garland, *Culture of Control*; Roger Matthews, “The Myth of Punitiveness,” *Theoretical Criminology* 9, no. 2 (2005): 175-201.

²³ Simon A. Cole, “From the Sexual Psychopath Statute to ‘Megan’s Law’: Psychiatric Knowledge in the Diagnosis, Treatment, and Adjudication of Sex Criminals in New Jersey, 1949-1999,” *Journal of the History of Medicine and Allied Sciences* 55, no. 3 (2000): 292-314; Jonathan Simon, “Managing the Monstrous: Sex Offenders and the New Penology,” *Psychology, Public Policy, and Law* 4, no. 1 (1998): 452-67.

control. I attend to the competition between psychiatry and psychology and the formation of forensic psychology that provides new expertise in risk management. The shift of expertise is interlocked with changes in the method of producing knowledge: the shift from clinical dangerousness prediction to actuarial risk assessment. By analyzing the development of new ways of knowing and regulating problem populations, this dissertation provides an understanding that mental health professions are repositioned in the criminal justice system, rather than a wholesale rejection of expertise.

1.5. Research Methods

This dissertation examines the mutual constitution of the risk management regime and its objects – sex offenders as stranger danger to children. For this purpose, I draw upon a Foucauldian approach to governmentality. Foucault’s works highlight knowledge production, the governing of problem populations, and the production of subjectivity as an integrated process. In this approach, discourses are not treated as mere representations of a given reality but as constitutive of objects in the sense that a particular way of articulating diverse discursive elements renders visible the objects such as abnormality or dangerousness. This constitution of objects provides in turn the space that invites new ways of knowing and governing the objects.²⁴ In this light, policy-making can be understood as a practice of delineating a specific governable domain by articulating discourses with the effect of creating new fields of objects.²⁵

²⁴ Foucault, *History of Sexuality*; Foucault, *The Archaeology of Knowledge* (New York: Pantheon Books, 1982); Foucault, “Governmentality,” in *The Foucault Effect: Studies in Governmentality*, eds. Graham Burchell, Colin Gordon, and Peter Miller (Chicago: University of Chicago Press, 1991).

²⁵ Andrew Barry, Thomas Osborne, and Nikolas Rose, eds., *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government* (Chicago: University of Chicago Press, 1996); Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (London: Sage Publications, 1999); Herbert Gottweis,

The governmentality approach to crime control is an attempt to analyze the crime control area with a focus on rationalities (ways of thinking), technologies (ways of acting), and subjectification (ways of producing individuals and populations to be governed).²⁶ These three dimensions of analysis can be referred to as an “apparatus,” which means “a thoroughly heterogeneous ensemble consisting of discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions – in short, the said as much as the unsaid.”²⁷ To put it another way, an apparatus is a “machine of governance.”²⁸ In this context, Foucault defines government as “the conduct of conduct,” or a way of directing or guiding the manner in which a person behaves, or an activity is carried out.²⁹ “To govern in this sense, is to structure the possible field of action of others.”³⁰

Drawing on this approach, I examine policies for sex offender management not as reactions to given problems but as integral to the construction of the social problem itself. In this view, policy-making and the production of knowledge about sex offenders are analyzed as engaged endeavors to direct the process of framing problems in a particular way. I examine how political and scientific discourses and techniques for regulating sex offenders were produced and

Governing Molecules: The Discursive Politics of Genetic Engineering in Europe and the United States (Cambridge, MA: MIT Press, 1998).

²⁶ David Garland, “‘Governmentality’ and the Problem of Crime: Foucault, Criminology, Sociology,” *Theoretical Criminology* 1, no. 2 (1997): 173-214.

²⁷ Michel Foucault, “The Confession of the Flesh,” in *Power/Knowledge: Selected Interviews & Other Writings: 1972-1977*, ed. Colin Gordon (New York: Pantheon Books, 1980), 194.

²⁸ Giorgio Agamben, *What is an Apparatus? And Other Essays* (Stanford: Stanford University Press, 2009), 20.

²⁹ Michel Foucault, “The Subject and Power,” afterword to *Michel Foucault: Beyond Structuralism and Hermeneutics*, 2nd ed., by Hubert Dreyfus and Paul Rabinow (Chicago: University of Chicago Press, 1983), 220.

³⁰ Simon, *Governing through Crime*, 17.

mobilized in a way that gave rise to new fields of objects and new ways of objectifying, knowing, and intervening in them – the risk management of sex offenders.

Materials for the study were drawn from three domains: legislation regarding the regulation of sex offenders, the work of psychologists and psychiatrists within their fields, and the courts dealing with dangerous offenders and child sexual abuse cases.

I collected *academic* works by searching on-line databases with combinations of various keyword and author search terms; by reviewing the bibliographies of relevant books and articles; and by locating academic works cited in governmental and court documents. Primary materials include published works of social scientists and mental health professionals who engaged in debates concerning criminal and psychiatric patient rights and the standard of dangerousness. This dissertation analyzes how methodological and technical issues directed the category of the dangerous offender in particular ways. Because of the urgency in the legal and policy areas, the mental health professionals who have produced materials on these issues often propose policy implications of their work in tandem with scientific findings. Many of their works therefore contain policy narratives, which allow me to compare and connect the ways in which the discourses and narratives were formulated in the policy processes and the scientific work. I examine the ways in which researchers used these discourses in the process of developing methods for assessing and managing risk for sex offense. I attend particularly to how researchers framed evidence-based risk assessment as a means for balancing public safety and the civil rights of offenders, and how the methodological issues were debated and solved in relation to the pursuit of the policy objectives.

Data regarding *federal legislation* were collected through THOMAS, the website of the Library of Congress, and archival research at the Library of Congress. I collected introduced bills; transcripts of congressional floor proceedings; and committee reports relating to child protection and sex offender laws. My dissertation analyzes the political dynamics yielding changes in legal definitions of child abuse and sex offenders and in the measures for regulating them. By examining the legislative records, I identify key actors involved in the policy processes and the discursive elements that comprised the policy narratives. In order to map the discursive configurations regarding the issues of child abuse and sex offender regulation, I analyze how a variety of actors generated narratives by articulating a set of discursive elements and how these elements produced different significations depending on the ways in which they were connected with each other in competing narratives. I pay special attention to the statements made by mental health professionals in the policy processes and the role of mental health professionals and knowledge as defined in the laws.

I also collected documents of court cases that brought changes in the practices of regulating the dangerously mentally disordered and sex offenders, especially in relation to civil rights claims. I located court cases through databases such as HeinOnline and LexisNexis; anthologies of court cases; and commentaries published in academic journals and books regarding mental health and law. I then selected cases for closer examination based on their influence on later court cases and on discussion among legal and mental health professionals. I collected *U.S. Supreme Court Opinions* from the U.S. Reports available via HeinOnline, which contains the official version of Supreme Court decisions published by the Court. *State court cases and laws* and related legislative documents were collected through the website of each state's legislature, courts, library, and archives. Examining legal documents, I identify scientific

and legal issues around the admissibility of various psychiatric and psychological assessment results, and analyze the ways in which discourses concerning public safety and the civil rights of offenders were deployed in relation to dangerousness prevention and risk management.

1.6. Organization of the Dissertation

Chapter 2 provides a historical genealogy of discourses pertaining to child abuse, leading to the emergence of the dangerous stranger. This chapter examines the creation of discursive spaces for stranger danger during the period spanning from the 1960s to the early 1990s. I focus upon how current concern over sex offense against children superseded the earlier issues of incest and physical abuse by parents. I argue here that crime control strategies concerning sex offense emerged out of anxiety about social changes with respect to the family and that the family problems, such as parental child abuse, anxiety about the loss of family values in society at large, and changing gender roles have been displaced into the problem of external threat embodied in the figure of stranger danger.

Chapter 3 discusses the emergence of actuarial risk assessment and the concurrent transformations of expertise in crime control: the fall of psychiatry and the rise of forensic psychology. This chapter shows the political and intellectual conditions for the development of psychological techniques for statistics-based risk management. During the period of the 1960s and 1970s, the issue of how to regulate dangerous individuals became controversial, especially through the civil rights challenges to psychiatric authority in relation to dangerousness prediction. The controversies around the preventative confinement of dangerous individuals and the civil rights issues set the stage for the development of violence risk assessment, which is a major building block of contemporary sex offender regulation. In the wake of civil rights challenges,

psychologists promoted statistical risk assessment as a scientific method for balancing the risk of recidivism and the risk of civil rights violations. This chapter examines the debates and competition among different methods of predicting dangerous behavior, which were interlocked with the rise of forensic psychology over psychiatry in the crime control area.

Chapter 4 examines psychological techniques for sex offender regulation, specifically, actuarial risk assessment and psycho-physiological measurement of sexual deviance. With respect to actuarial risk assessment, I examine the driving force behind its development, in particular, how the institutional aspect of expanding sex offender regulation has shaped risk assessment. This chapter shows that psychologists made a deliberate choice to use a limited number of risk factors in order to meet institutional demands for efficiency and that the resultant risk assessment tools were structured by criminal justice practices that pointed to stranger offenders as the most dangerous group. While actuarial risk assessment produces dangerous “repeat” offenders, psycho-physiological assessment creates “deviant” offenders by means of a technique that is deliberately designed to generate “deviant” desires or sexual arousal in sex offenders.

Chapter 5 discusses how those techniques have been deployed in the criminal justice system. Since 1990, sex crime control practices became geared toward the management of sex offenders. Sex offender management, as distinct from traditional punishment or treatment, is centered upon containing and monitoring high-risk offenders and provides an institutional context where the psychological techniques have been put into operation to classify sex offenders into different risk categories. In this chapter I examine the assemblage of legal measures and discourses of stranger danger and look at how the boundary between criminal justice and mental health institutions has been rearranged initially to confine a small number of

extremely dangerous repeat offenders but then expanded to cast wide nets to capture a broad range of sexual activities.

Chapter 2 Rising Concern over the Child Victim and the Stranger Danger

Introduction

Sex offender legislation since 1990 has two characteristics: first, many of the laws were enacted in the aftermath of high-profile crime incidents and second, sex offender regulations have drawn bipartisan support in the legislature as well as wide public support. In 1990, for example, the Community Protection Act of Washington was passed unanimously nine months after a released sex offender had committed a violent offense against a young boy. A similar pattern of legislation has been found in other states as in the legislation of Megan's law in New Jersey. However, atrocious incidents of child abuse and murder do not necessarily raise public concern and policy responses in the same way but rather they unfold in different directions depending on public sentiments and socio-political arrangements pertaining to crime and punishment. In this regard, the implementation of new sex offender regulations over the last two decades cannot be explained by particular crime events but required a larger social frame that structured public and policy responses to the events.

Katherine Beckett, a sociologist, points out that the consensual attitudes toward child abuse are "the result of ideological work."³¹ Beckett argues that, although there is no "pro-child abuse" stance, divergent frames of the issue have competed to gain dominance in the discursive field.³² The current dominance of "dangerous outsider" discourses, Beckett argues, has been achieved by excluding controversial or troubling features that do not sit well with the larger set of cultural meanings. For example, feminist discourses which target the family as a site of sexual

³¹ Katherine Beckett, "Culture and the Politics of Signification: The Case of Child Sexual Abuse," *Social Problems* 43, no. 1 (1996): 58.

³² *Ibid.*, 57.

abuse are perceived to be disruptive to patriarchal social relations and thus have not made their way into a repertoire of dominant cultural meanings.³³

In a similar vein, Joel Best and Philip Jenkins offer social constructionist explanations of the child abuse issue by analyzing the rhetorical strategies that diverse claims-makers used to bring public attention to the issue.³⁴ Tracing the transformations in the concept of child abuse, Jenkins states that “all concepts of sex offenders and sex offenses are socially constructed realities: all are equally subject to social, political and ideological influences, and no particular framing of offenders represents a pristine objective reality.”³⁵ In their accounts, social concern over and policy responses to child abuse have always been mediated by interpretations of interest groups such as feminists, religious groups, medical or psychological professionals, and law-and-order politicians. Through the interactions and competitions among those groups, the idea of child abuse evolved by connecting as diverse phenomena as toddlers battered by their parents, daughters raped by their fathers, child abduction and murder by strangers, runaway adolescents, child pornography, and consensual sexual activities between adults and minors. While the concept of child abuse has incorporated such diversity, the construction of child abuse as a social problem involved the fixing of meaning by typifying the phenomena. Best and Jenkins argue that the foregrounding of a particular phenomenon as typical, and by extension, the construction of types of the perpetrator and the victim, is a major rhetorical strategy in the defining of child abuse as a social problem.

³³ Ibid.

³⁴ Joel Best, *Threatened Children: Rhetoric and Concern about Child-Victims* (Chicago: Chicago University Press, 1990); Philip Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America* (New Haven: Yale University Press, 1998).

³⁵ Jenkins, *Moral Panic*, 4.

Building upon those previous studies, this chapter provides a brief historical backdrop to the emergence of a governable category, the sex offender. The establishment of the sex offender management system since the 1990s was only possible when sex offenses and offenders were identified and grouped together under a specific heading and perceived as a “regular” threat, as opposed to a singular event. To put it another way, it requires and produces discursive practices that turn strikingly heinous crimes into regular ones, thus perpetuating the everyday fear of stranger danger lurking in neighborhoods. The crimes that prompted legislative efforts do not explain in and of themselves the durability of the new sex offender management regime. In this regard, it is valuable to ask the question of how the category of sex offender as stranger danger has resulted from and buttressed the basic assumptions and rationales on which the current sex offender control strategies operate.

In order to answer this question, this chapter examines the creation of discursive spaces for stranger danger during the period spanning from the 1960s to the early 1990s. Tracing the historical emergence of the pair of stranger offender and child victim of sexual abuse helps illuminate how current concern over sex offense has superseded the earlier issues of incest and physical abuse by parents. The focus of analysis lies on transformations in the triad of child, family, and perpetrator of child abuse. I argue that what was at stake in crime control strategies concerning sex offense against a minor was not so much the stranger offender as the family and that the family problems have been displaced into the problem of external threat embodied in the figure of the dangerous stranger.

In the following pages, I examine a dual historical development that set the stage for contemporary sex offender regulation: the sexualization of the child abuse issue and the demonization of the sex offender. The first part of the chapter discusses rising concern over child

abuse in the 1960s, encapsulated by the discovery of the “battered child syndrome.” I then examine the refocusing of attention from physical abuse to sexual abuse since the late 1970s. In subsequent years, public concern about child sexual abuse, which had been an issue of an abusive parent, began to target the abuser from outside of the home. As allegations of satanic ritual abuse at day care made news in the national media in the early 1980s, cultural representation of sexual abusers became imbued with the idea of evil. In the last section, I discuss the transformations of the relationship between the family and the state in terms of the child abuse issue. Since child abuse became a social issue in the 1960s, the initial pair of the abusive parent and the interventionist state has gradually transformed into that of the responsible autonomous family and the supportive state helping the family fend off stranger danger.

2.1. The Battered Child and the Pathological Parent

Two decades before the Community Protection Act of Washington opened the floodgates to new sex offender laws in the 1990s, a federal bill addressing child abuse was first signed into law, the Child Abuse Prevention and Treatment Act of 1974. The act, passed at about the same time as the fall of the sexual psychopath laws, was not concerned primarily with sexual abuse. It addressed the problem of “child abuse and neglect,” which initially emerged as the issue of physical domestic violence in the early 1960s.

In 1962, a physician in Denver, named Henry Kempe, and his colleagues reported in the *Journal of the American Medical Association* that they had discovered a series of mysterious traces of bone fracture in their child patients.³⁶ This article was hailed as a breakthrough that established a medical approach to the maltreatment of children, thereby spurring the

³⁶ C. Henry Kempe et al., “The Battered-Child Syndrome,” *JAMA* 181, no. 1 (1962): 17-24.

contemporary child advocacy movement.³⁷ Kempe urged physicians to consider the possibility of child abuse when a child patient exhibited any of such symptoms as a bone fracture, subdural hematoma, failure to thrive, soft tissue swellings, skin bruising, or sudden death. Kempe defined the “battered child syndrome” as “a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent.”³⁸ The article did not mention sexual abuse but called attention to physical battery, especially of children under the age of 3.

The concept of battered child syndrome made significant contributions to the later development of child protection effort in various ways. First of all, Kempe’s work medicalized child abuse by offering systematic diagnostic criteria for recognizing battery-related wounds and by, more importantly, defining the abuser in psychological terms. The psychiatric and psychological framing of the child abuse issue gave a peculiar form that would shape the issue throughout the late twentieth century.³⁹ The Kempe et al. 1962 article became a harbinger of the psychologization of child abuse by claiming that “psychiatric factors are probably of prime importance in the pathogenesis” of the battered child syndrome.⁴⁰ However, in contrast to the attention later given to psychological harms to abused children, Kempe’s work did not discuss psychological effects of abuse on the children. He instead devoted his attention to physical trauma inflicted on children and how battery and neglect made their bodily health deteriorate. Psychological interest was reserved to explain the behavior of abusers.

Although the current state of knowledge was not developed well enough to pinpoint precisely the root psychiatric problems, Kempe reported, abusers were often found to have

³⁷ Stephen J. Pfohl, “The ‘Discovery’ of Child Abuse,” *Social Problems* 24, no. 3 (1977): 310-23.

³⁸ Kempe et al., “Battered-Child Syndrome,” 17.

³⁹ Joseph E. Davis, *Accounts of Innocence: Sexual Abuse, Trauma, and the Self* (Chicago: University of Chicago Press, 2005).

⁴⁰ Kempe et al., “Battered-Child Syndrome,” 24.

aggression control problems. Kempe pointed to psychological factors such as a frank psychosis, a borderline IQ, anxiety and unhappiness with an unwanted pregnancy, experience of abuse in childhood as possible causes of “parental attacks.” The parents were often “immature, impulsive, self-centered, hypersensitive, and quick to react with poorly controlled aggression,” in other words, they had “psychopathic or sociopathic characters.”⁴¹ A “defect in character structure” described here prefigured the later psychological conception of the sexual predator.⁴² The difference is that Kempe’s psychopathic abuser was a parent or foster parent, hence “the parent-inflicted battered-child syndrome.”⁴³

The call for medical and legal intervention was justified by the psychiatric conditions of abusers. Kempe reported that abusive parents were often found to be in denial of abuse, whether consciously or because of unconscious repression. A physician was expected to reveal the parent’s abusive character despite their concerned and caring appearance. A physician, instead of a suspicious parent, was called on to take the initiative in protecting the child. When a parent was under suspicion of threatening the health and even life of the child, Kempe urged, the physician was duly expected to assume the role of identifying and treating battered children. The role of the medical profession was not restricted to treatment but extended to prevention by means of mobilizing the state. In this vein, Kempe strongly suggested removing battered children from home, which he called the “dangerous environment.”⁴⁴

The American Medical Association expressed their approving opinion about legal intervention. In the same issue as the Kempe et al. article, the *JAMA* editorial supported Kempe’s

⁴¹ Ibid., 18.

⁴² Ibid.

⁴³ Ibid., 17.

⁴⁴ Ibid., 24.

position, stating that “consideration should be given to mandatory reporting of suspected cases of parental neglect and assault and of reevaluating state and local laws and regulations regarding the problem.”⁴⁵ Physicians and policy makers across the country soon responded to the effort of the Denver group by joining research and advocacy activities. Their concerted efforts were brought to fruition with the enactment of mandatory reporting statutes, which provided that physicians whose patients had symptoms suggestive of child battering and neglect were required to report to the authorities. By 1967, all states and the District of Columbia enacted mandatory reporting laws, and in 1974, the federal Child Abuse Prevention and Treatment Act (CAPTA) required states to meet the national guidelines for mandatory reporting.⁴⁶ The mandatory reporting statutes granted physicians immunity from legal liability to encourage physicians who were hesitant to appeal to the state to intervene into family affairs.

The emergent child protection measures in the 1970s aimed first and foremost at the family. The 1974 act defined “child abuse and neglect” as “the physical or mental injury, sexual abuse, negligent treatment, or a maltreatment of a child under the age of eighteen *by a person who is responsible for the child’s welfare.*”⁴⁷ The suspected culprit was in most cases the parent who lacked adequate parenting skills.

Although child abuse was identified as a family problem, it did not touch upon power relations in the family or larger culture. Senator Walter Mondale, who sponsored CAPTA consciously avoided discussing social issues that could be associated with child abuse, such as poverty and unemployment. In the legislative process, policymakers deliberately framed the

⁴⁵ “The Battered-Child Syndrome,” editorials, *JAMA* 181, no. 1 (1962): 42.

⁴⁶ Barbara J. Nelson, *Making an Issue of Child Abuse: Political Agenda Setting for Social Problems* (Chicago: University of Chicago Press, 1984); Beckett, “Culture and the Politics of Signification”; Philip Jenkins, *Decade of Nightmares: The End of the Sixties and the Making of Eighties America* (Oxford: Oxford University Press, 2006).

⁴⁷ Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. 5102 (1974) (emphasis added).

issue as independent of other social problems and authoritarian power relations in the family in order to guarantee the passage of the law.⁴⁸ Likewise, Kempe persistently stressed that the problem cut across class boundaries. It was not a gender specific issue either. Kempe et al.'s article from 1962 provided two cases, both of which involved mothers as abusers and female infants as patients but gender of the children did not play any significant role in the stories. By pointing to pathologies inherent in an individual, the battered child syndrome obliterated socio-cultural markers attached to child abuse.

With its medical perspective, the battered child syndrome ushered in a new era of child advocacy, distinguished from the old philanthropist crusade for children. Although child protection was not a novel issue since the Progressive Era had launched a movement against “cruelty to children,” child advocacy in the 1960s took on a new meaning by virtue of the initiative of the medical profession. One of the crucial differences separating newly invented “child abuse” from “cruelty to children” was that abusers began to draw medical attention. As a corollary, whereas those cruel to children had never been identified with a distinguishing mark, new abusers came to be conceived of as a distinct group of people with particular medical conditions.⁴⁹ The discourse of battered child syndrome framed the problem of child abuse as originating from the family, but only from pathological families that were removed from the imagery of the idealized family.

⁴⁸ Nelson, *Making an Issue of Child Abuse*, 127; Beckett, “Culture and the Politics of Signification.”

⁴⁹ Ian Hacking, “Making up People,” in *The Science Studies Reader*, ed. Mario Biagioli (New York: Routledge, 1999), 161-71; Hacking, “The Sociology of Knowledge about Child Abuse,” *Noûs* 22 (1988): 53-63.

2.2. The Child Victim of Sexual Abuse

Although CAPTA specified sexual abuse as one instance of various kinds of child abuse and neglect, the act addressed the issue of child abuse in general terms. In contrast, policy discourses since the 1990s have highlighted sex offense as the primary concern in child protection. Sexual abuse ceased to be a subcategory of child abuse and became a master category that other sorts of offenses, such as kidnapping, belong to. “Child sexual abuse” gained ascendancy as a social issue in the late 1970s. It was achieved through a dual transformation: a redefining of sex offense as a major harm to children and a refocusing of the child abuse issue on sexuality.

Sexual violence is an amorphous entity that has been subject to constant articulation and rearticulation of meaning.⁵⁰ Before the feminist movement yielded rape law reform in the early 1970s, sexual violence had been enmeshed with racial politics. Until the mid-twentieth century, violence against women came to the attention of the criminal justice system especially when involving black men assaulting white women. During the period between the 1920s and the 1950s, most of the sex offenses that caught attention of the mainstream press were “assault by a Negro” of white victims in a southern state.⁵¹ “Sexual racism” was embedded in the criminal justice system as well. Offenders deemed sexual psychopaths were diverted from prison to mental health facilities under sexual psychopath statutes. The sexual psychopath laws, which targeted minor violations in many cases, imposed more lenient sanctions composed of treatment instead of imprisonment. Those who were hospitalized under the statutes were disproportionately

⁵⁰ Pamela Haag, *Consent: Sexual Rights and the Transformation of American Liberalism* (Ithaca: Cornell University Press, 1999); Stephen Robertson, *Crimes Against Children: Sexual Violence and Legal Culture in New York City, 1880-1960* (Chapel Hill: University of North Carolina Press, 2005); Georges Vigarello, *A History of Rape: Sexual Violence in France from the 16th Century to the 20th Century* (Cambridge, UK: Polity Press, 2001).

⁵¹ Jenkins, *Moral Panic*, 95.

white.⁵² In contrast, during approximately the same period, harsher punishments for sex offenses were imposed on people of color. Between 1930 and 1967, 455 men convicted of rape were executed in the U.S., among whom 405 were African American.⁵³ Under such circumstances, controversies surrounding sex offenses revolved around the issue of law enforcement enmeshed with flagrant racial discrimination. Since the mid-1950s, media responses to sex offense cases concentrated on the issues of false accusations and injustices against men of color, especially in the South.⁵⁴

The intersection of violent sexuality and race played a role in furthering the due process revolution in the 1960s. The Miranda ruling is a case in point. Ernesto Arturo Miranda was arrested on March 13, 1963, for kidnapping and raping an eighteen-year-old white woman, which would have been designated a sex offense subject to registration in the 1990s. At the height of the 1960s, however, this case was subsequently escalated into public disputes and accusations of the police for unjust treatment of the suspect based on his skin color.

In the court, John Flynn, the lawyer recruited by the American Civil Liberties Union to defend Miranda, highlighted Miranda's ethnicity by calling him a twenty-three-year-old from "Spanish-American extraction." Also, Flynn put an emphasis on Miranda's low socioeconomic status, pointing to his eighth-grade education, poverty, and history of mental illness.⁵⁵ The landmark ruling issued on June 13, 1966 upheld the constitutional right against self-incrimination and reversed Miranda's conviction, stating that his confessions obtained from custodial police

⁵² Jenkins, *Moral Panic*, 88.

⁵³ J. Robert Lilly and J. Michael Thomson, "Executing US Soldiers in England, World War II: Command Influence and Sexual Racism," *British Journal of Criminology* 37, no. 2 (1997): 263.

⁵⁴ Jenkins, *Decade of Nightmares*, 112; Jenkins, *Moral Panic*, 97, 110.

⁵⁵ Carlos R. Soltero, *Latinos and American Law: Landmark Supreme Court Cases* (Austin: University of Texas Press, 2006): 65-6.

interrogation were inadmissible. In the court opinion written by Chief Justice Warren, Miranda was described as “the indigent Mexican defendant” who “was a seriously disturbed individual with pronounced sexual fantasies.”⁵⁶

The *Miranda* case stands in stark contrast with the *Hendricks* case of 1997 where the U.S. Supreme Court rejected the civil rights claims of a designated “violent sexual predator” in a 5-4 decision. In this case, the sex offender was constructed as an uncontrollable danger devoid of any class or racial connotations and imbued with psychological defects. Put another way, the sex offender since the 1990s is stripped of a minority identity and becomes a figure who provokes public outrage without reservation for fear of the racist overtones. In contrast, by 1966 when the *Miranda* ruling was issued, the Warren Court had made a series of landmark rulings that had significant impacts on criminal justice practices, especially with respect to the due process rights of the accused. In this socio-political landscape, Miranda’s attempted and completed incidents of rape were overshadowed by the more pressing issues of civil rights and racial justice.⁵⁷

In the subsequent years, as the feminist movement ushered in a new era of anti-rape campaigns, sexual violence gained new significations of male prerogatives in a patriarchal society. After rape law reform was achieved across the country from 1971 to 1975, feminists began to expand the issue of rape to include child rape, especially in the home. Feminists focused on the patriarchal structure where women and children shared similar positions vulnerable to male violence. In the late 1970s, feminists endeavored to call attention to the issue of child abuse,

⁵⁶ *Miranda v. Arizona*, 384 U.S. 436 (1965). As for Miranda, the State of Arizona retried him without the use of his confession and another jury convicted him again of rape and kidnapping for another twenty-year sentence. Soltero, *Latinos and American Law*, 74.

⁵⁷ However, as the fact that the Supreme Court made a 5-4 decision in favor of Miranda shows, it was also a controversial case, in which dissenting court opinions expressed concern about public safety, espousing the rights of the victims.

not as the problem of pathological individual families but as indicating a socio-cultural structure of male dominance. Thus, “child abuse was realized as an instance of the patriarchal reproduction of oppressive social relations.”⁵⁸ In 1979, the first national conference on the issue of child sexual abuse was held. Also, during this period of the late 1970s and early 1980s, books and articles that provided a new frame to the issue came out, such as *Betrayal of Innocence: Incest and Its Devastation* in 1978 by Susan Forward and Craig Buck, *The Best-Kept Secret: Sexual Abuse of Children* in 1980 by Florence Rush, and *Father-Daughter Incest* in 1981 by Judith Lewis Herman.

However, the feminist claim that women and children were situated in structurally similar positions under patriarchy gradually lost its ground such that child abuse and violence against women became separate issues in public discourses. By 1994 when the Violence Against Women Act was passed in 1994, it addressed domestic violence and rape that targeted adult women, while child abuse was dealt with as a derivative issue of domestic violence.⁵⁹ Sexual violence, which had been a civil rights issue entangled with racial justice, was reframed by the feminist movements as a gender inequality issue. When expanded to reach the child abuse issue, however, discourses about the structural problem were subsequently superseded by discourses of child protection with the emphasis on the sacrosanct status of innocent childhood. This is so in part because the social consciousness of child sexual abuse was not an achievement of the

⁵⁸ Chris Jenks, “Child Abuse in the Postmodern Context: An Issue of Social Identity,” *Childhood: A Journal of Global Child Research* 2, no. 3 (1994): 114.

⁵⁹ Nancy Whittier, *The Politics of Child Sexual Abuse: Emotion, Social Movements, and the State* (New York: Oxford University Press, 2009), 187-88.

feminist movements alone. It was driven by a convergence of several strands, including the feminist anti-rape movement, the anti-pornography campaign, and homophobia.⁶⁰

The late 1970s witnessed not only feminist movements against child sexual abuse but also anti-pornography movements composed of a wide spectrum of political stances from feminist to conservative. In part, the anti-pornography movements emerged as a counteraction to the permissive social atmosphere during the 1960s and early 1970s, when legal regulation of sexually explicit material was loosened. In 1970, for example, the Presidential Commission on Obscenity and Pornography issued a report that there was “no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youths or adults” nor “adversely affects character or moral attitudes regarding sex and sexual conduct.” The Commission thus suggested that “federal, state, and local legislation prohibiting the sale, exhibition, or distribution of sexual materials to consenting adults should be repealed.”⁶¹

By the mid-1970s, as the pornography industry had been thriving, pornography became a policy concern and battleground over sexuality. While feminists mounted criticism of pornography that degraded women, moral conservatives blamed sexually explicit material for the decaying culture. Conservative attitudes were encapsulated in the statement of Richard Nixon, who was in office when the report of the Commission on Obscenity and Pornography was issued. Nixon expressed outright rejection of the report’s conclusions, calling them “morally

⁶⁰ John Pratt, “Child Sexual Abuse: Purity and Danger in an Age of Anxiety,” *Crime, Law, and Social Change* 43, no. 4 (2005): 263-87.

⁶¹ Commission on Obscenity and Pornography, *The Report of the Commission on Obscenity and Pornography* (New York: Bantam Books, 1970).

bankrupt.”⁶² He claimed that “pornography can corrupt a society and a civilization,” and “the pollution of our culture, the pollution of our civilization with smut and filth is as serious a situation for the American people as the pollution of our once-pure air and water.”⁶³ The message was that the issue of pornography was not simply about sexual conduct but about social order. Nixon thus warned that “if an attitude of permissiveness were to be adopted regarding pornography, this would contribute to an atmosphere condoning anarchy in every field – and would increase the threat to our social order as well as to our moral principles.”⁶⁴

In 1977, New York City set out to crack down on sex-related businesses around Times Square. The issue of child pornography, in particular, drew media attention and became connected to the seduction and exploitation of runaway and missing children. In the late 1970s and 1980s, feminists and conservatives made common cause in anti-pornography campaigns to pass child protection legislation, in part as a means of attacking the sex industry in general.⁶⁵

It is noteworthy that discourses about child sexual exploitation in the 1970s did not necessarily identify a stranger to the victim as the perpetrator. Although counterintuitive, child pornographers have been found to often be the victims’ fathers, step-fathers, or relatives.⁶⁶ Legal action against child pornography also reflected this perception. Amidst the surging concern about child pornography came a piece of legislation devoted solely to the issue of child sexual abuse, the Protection of Children Against Sexual Exploitation Act of 1978 that banned the production of

⁶² Richard Nixon, “Statement About the Report of the Commission on Obscenity and Pornography,” October 24, 1970, *The American Presidency Project*, accessed July 17, 2013, <http://www.presidency.ucsb.edu/ws/?pid=2759>.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Jenkins, *Moral Panic*.

⁶⁶ Emily Bazelon, “The Price of a Stolen Childhood,” *New York Times Magazine*, January 24, 2013, <http://www.nytimes.com/2013/01/27/magazine/how-much-can-restitution-help-victims-of-child-pornography.html>.

pornography involving a minor. The 1974 Child Abuse Prevention and Treatment Act and the 1978 act, which dealt with, respectively, domestic child abuse and child pornography often involving the trafficking of minors, had a striking similarity. Like the 1974 act, the 1978 Sexual Exploitation Act identified “any parent, guardian or person having custody or control over a minor,” rather than an itinerant kidnapper, as a potential perpetrator who could sexually exploit the child to produce pornographic material for a pecuniary purpose.⁶⁷

By the end of the 1970s, while the child abuse issue was refocused on sexual abuse, the perceived identity of the perpetrator was not clearly defined as a stranger. Rather, the Kempe group and the feminist movements consistently pointed to the family as the site where child abuse occurred the most, whether physically or sexually. The difference between those two groups lay in their claims about the root causes of child abuse. As discussed above, the Kempe group constructed the abusers with psychological defects, which attributed inherent pathological traits to an individual, while feminists tried to reveal the hitherto untold reality of prevalent sexual abuses, which was embedded in the socio-cultural structure. To put it differently, from the feminist perspective, the traditional family structure was pathological in and of itself.

In this way, the problem of child abuse and exploitation, whether physical or sexual, was framed in the policy processes as stemming from the dysfunctional and pathological family. By the early 1990s, the dysfunctional family, although never vanishing from policy discourses, became overshadowed by the family under the threat of strangers. In the 1970s, however, a space

⁶⁷ “Any parent, guardian or person having custody or control over a minor who knowingly permits such minor to engage in, or to assist any other person in, sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct”... “for pecuniary profit.” “ ‘[M]inor’ means any person under the age of sixteen years.” Protection of Children Against Sexual Exploitation Act of 1978, 18 U.S.C. 2251, 2253 (1978).

for public discourses had yet to be invented to put under siege dangerous strangers singled out as the archenemy of the family and children.

2.3. The Demonization of Stranger Danger

What was required in creating that discursive space were setting up the boundary and identifying the enemy. A recurrent theme in the politics of child protection since the 1990s is that there are serious external threats that people on this side must fight and fend off to defend the most vulnerable within the boundary; put in another way, protecting us – the family and children – from them – stranger danger. The child protection measures newly put into operation have significant characteristics distinct from the 1974 and 1978 acts: the bifurcation between domestic and stranger violence and the foregrounding of the stranger offender.

Jenkins points out that it was in the early 1990s that the issue of child sexual abuse was reframed in a way that focused on outsiders and predators as the major perpetrators.⁶⁸ As the legislation since 1990 makes explicit in the definition of the terms, the measures for registering and tracking down sex offenders are predicated on an assumption that the malfeasant is likely a stranger to the child victim. This assumption becomes more manifest when we consider the residency restriction laws that were later added to the litany of sex offender regulations. The criminal justice system has intended to incapacitate sex offenders to the extent that prohibits access to children under any circumstances, except the offenders' own children. Thus, it has been

⁶⁸ Jenkins, *Moral Panic*, 165.

pointed out that restrictions on certain offenders' proximity to schools deprive the offenders' children of adequate education.⁶⁹

Then, who is the stranger danger that these laws aim at and who is the child that should be protected from the danger? Many of the contemporary sex offender laws have emblematic children inscribed in the title of the laws. For example, the 1994 Jacob Wetterling Act and the 1996 Megan's Law, an amendment to the 1994 act, marked the inception of contemporary sex offender regulation. During the legislative processes of these two and other laws subsequently enacted, the victims' names were repeatedly invoked in honor for saving other children's lives by alerting people to the lurking danger of repeat child abusers by their own deaths.

Those hapless victims whose lives were taken by strangers are stereotypical, but not typical of victims of child abuse and murder. The missing children campaign that emerged in the 1980s clearly shows this discordance between the poster child and statistical figures. While atrocious crimes involving stranger abduction, rape, and murder were used to bring public attention to the missing children issue, those high-profile crimes were statistically unusual cases that accounted for a small portion of missing children cases. According to a report of the U.S. Department of Justice, it was estimated that 1.3 million children became missing in 1999. Among them, 99.8 percent were returned home or located soon after the reporting. Less than 0.01 percent of estimated missing children were found to be "stereotypical kidnappings" by a stranger or slight acquaintance. Nearly a half of missing children were runaways or throwaways and more than 40 percent were reported missing because of miscommunications between children and caretakers. The remaining were "family abductions" by a non-custodial parent or

⁶⁹ Human Rights Watch, *No Easy Answers: Sex Offender Laws in the US* (New York: Human Rights Watch, 2007); Human Rights Watch, *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US* (New York: Human Rights Watch, 2013).

other members of the child's family, which accounted for more than 1,000 times the number of stereotypical abductions.⁷⁰

Even in the cases of stranger abduction and murder, the offenders were often not in fact strangers but acquaintances to the victims, such as the one who victimized Megan Kanka. Child abduction and murder had been popular news items for decades when the sex offender emerged as a public concern. However, it was not until the late 1980s and early 1990s that such crime incidents appeared as a driving force in policy-making on a full blown scale. One contributing factor that made the difference is the perceived identity of the sex offender. The sex offender, who was designated a stranger in public and policy discourses and targeted for registration, was someone who had settled down in the community. Indeed, the registration measures imply this point by requiring up-to-date information of home addresses. Such systematic surveillance and community notification both assume and necessitate fixed residency in the community. To put it differently, the impetus for the registration laws was provided when the stranger as an itinerant murderous kidnapper was displaced by the stranger as someone who stays in the vicinity but ought to be kept out of the family boundary.

This displacement took place during the 1980s when a series of day care crises swept the country. It was child care providers rather than strangers that became the first target for surveillance on the federal level. In 1993, the U.S. Congress passed the National Child Protection Act to improve the national criminal background check system to prevent those with criminal child abuse histories from being hired in child care and youth-service settings.⁷¹ It was a year

⁷⁰ Andrea J. Sedlak, David Finkelhor, Heather Hammer, and Dana J. Schultz, *National Estimates of Missing Children: An Overview – National Incidence Studies of Missing, Abducted, Runaway, and Thrownaway Children* (Washington, D.C.: U.S. Department of Justice, 2002).

⁷¹ National Child Protection Act of 1993, Pub. L. No. 103-209 (1993).

before the Jacob Wetterling Act came into effect and Megan Kanka was murdered on July 29, 1994. In other words, concern about child abuse by strangers was raised well before the death of Megan Kanka, who became an emblem in child protection efforts. The regulation of repeat sex offenders, especially information disclosure, was initiated with candidate employees in child care facilities, and was subsequently expanded to full scale in Megan's Law.

The day care crises that led to the legislation of the National Child Protection Act of 1993 were sparked by the McMartin preschool case where day care providers were accused of abusing children in satanic rituals in 1983. In this case, 369 children were reported to have been abused and seven care providers were charged with 321 counts of child abuse involving 48 children. The parents of the children established Believe the Children, an organization that ran a clearinghouse about ritual abuse and provided support for alleged victims' parents in other day care abuse cases. The allegations of child abuse against day care providers and the ensuing controversies over the credibility of child witnesses received a high level of national media coverage. The McMartin trial lasted until 1990 when all charges were dropped. In the meantime, over a hundred day care facilities were investigated for satanic ritual abuse and many of the care providers were put on trial.⁷² In many of the cases charges were dropped and even the cases leading to convictions finally turned out to be miscarriages of justice. The day care crisis during this period has often been referred to as a moral panic or hysteria that was characterized by irrational, volatile, and hostile overreactions.⁷³ By the beginning of the 1990s, skepticism about ritual abuse allegations and concern about false accusations became pervasive, as attested to by the recurrent theme of

⁷² Mary deYoung, "Another Look at Moral Panics: The Case of Satanic Day Care Center," *Deviant Behavior* 19, no. 3 (1998): 257-78.

⁷³ *Ibid.*; Beckett, "Culture and the Politics of Signification"; Philip Jenkins and Daniel Maier-Katkin, "Satanism: Myth and Reality in a Contemporary Moral Panic," *Crime, Law, and Social Change* 17, no. 1 (1992): 53-75.

“witch-hunt” and “Salem” in the media.⁷⁴ However, heightened concern did not dissipate but evolved into legislative effort to strengthen the qualification of care providers.

The ritual child abuse scare in the 1980s had counter-narrative elements that offset the achievements of the feminist movements against child sexual abuse in the 1970s. Day care abuse affairs disarticulated the linkage between child abuse and structural male dominance. The alleged perpetrators included more women than men and those women were depicted as evil and monstrous in the media and academic treatises on child abuse in day care facilities.⁷⁵ This idea of the monstrous evil also contributed to undermining the achieved awareness that sexual violence and child abuse were embedded in the larger structure of gender relations. The allegations of satanic ritual abuse conveyed the notion that child abuse occurred in unorthodox, occult settings removed from ordinary everyday life.⁷⁶ In this context, child sexual abuse was framed in relation to the religious agenda of sexual morality rather than the sexual politics of power relations.

The day care crisis in the 1980s was associated with other cultural themes that conveyed the idea of evil. Besides those allegations of day care child abuse, the threat of the occult and Satanism emerged as one of the main elements that composed of the fundamentalist Christian outlook on the world. By the late 1980s, the evangelical Right used the label of evil to accuse what they viewed as social ills, such as liberal sexual morality and rock music in youth culture.⁷⁷ In this regard, the accusation of Satanism was related to the fundamentalist religious groups’ struggles to reinstate conservative moral values in American society.⁷⁸

⁷⁴ Jenkins, *Moral Panic*, 179.

⁷⁵ deYoung, “Another Look,” 269-70.

⁷⁶ *Ibid.*, 273.

⁷⁷ Jenkins, *Moral Panic*.

⁷⁸ Jenkins and Maier-Katkin, “Satanism,” 65.

Traditional family values were one of the most crucial elements that conservatives viewed as the building blocks of society. By pointing to day care facilities as the site where the most egregious child abuse occurred, the ritual abuse affairs painted day care providers as potentially harmful and dangerous for children. The implications of such perception were that children would be most safe at home with a family member caregiver, the mother in particular, and that two-income families who had to send their children to day care could jeopardize the children's safety. In other words, the accusation of Satanism at day care was indirectly aimed at societal changes in women's role as homemakers.⁷⁹

It was not only religious conservatives that promoted distrust of day care workers but economic factors also contributed to anxiety about child care. In 1980, 49 percent of children under age 6 had working mothers, and in 1982 about three thirds of children under 5 with working mothers were given non-parental child care.⁸⁰ Despite dramatic increases in the use of child care facilities, the federal government cut Social Services Block Grants by 21% in 1981, from which a large proportion of child care centers received subsidies. During the early 1980s, many states reduced spending on public child care centers.⁸¹ Cuts in government funding adversely affected the quality of child care, especially by leaving the problems of high staff turnover and lack of trained providers.⁸² Under such circumstances, fear of the stranger child abuser was not provoked by a single atrocity story, but rather anxiety of ever-increasing two-income families who had to leave a child to a non-family member provided a fertile ground for generalizing a singular crime event into rampant everyday fear, as attested to by the spread of

⁷⁹ Ibid., 65-66.

⁸⁰ Sandra L. Hofferth and Deborah A. Phillips, "Child Care in the United States, 1970 to 1995," *Journal of Marriage and the Family* 49, no. 3 (1987): 559-71.

⁸¹ Ibid., 567.

⁸² deYoung, "Another Look," 260.

nanny cams.⁸³ The idea of pathological familial abusers was displaced onto strangers who could not be allowed to intrude into the family as a safe haven.

2.4. The Child, the Family, and the State

In 1976, Martin Scorsese's film *Taxi Driver* portrayed Jodie Foster as Iris, a twelve-year-old prostitute. By the mid-1970s, popular culture, and rock music in particular, increasingly portrayed sexualized images of children and young teenagers.⁸⁴ This permissive era ended in 1978 when the Protection of Children Against Sexual Exploitation Act made the production of pornographic material involving a minor illegal. In 1984, the federal government passed the Child Protection Act to amend the 1978 act. The 1984 amendment eliminated the word "obscene" and made any material depicting sex involving a minor illegal "even if the material is not found to be 'obscene.'" In addition, it outlawed sexually explicit material involving older teenagers as well as children by raising the age of a minor from sixteen to eighteen.⁸⁵ By the beginning of the 2000s, it became hard to come by underage sex in mainstream popular culture.

1976 was also the year when the film director Brian de Palma released his new movie, *Carrie*, which presented a story of a teenage girl who was abused by her Christian fundamentalist mother and humiliated by her classmates. The movie ended with a tragic massacre where Carrie killed all classmates and her mother and died in her collapsed house. In contrast, it was not an abusive parent but a vengeful nanny who destroyed the family in the 1992 film *The Hand That Rocks the Cradle*, or a social work agency in the 2001 film *I Am Sam*. In the

⁸³ Cindi Katz, "The State Goes Home: Local Hyper-Vigilance of Children and the Global Retreat from Social Reproduction," *Social Justice* 28, no. 3 (2001): 47-56.

⁸⁴ Jenkins, *Decade of Nightmares*, 33-4.

⁸⁵ Child Protection Act of 1984, Pub. L. No. 98-292 (1984).

latter, the movie depicted a very sympathetic picture of Sam, the father with a developmental disability who struggled to secure his parental rights when social workers took his seven-year-old daughter away and placed her in a foster home. Whereas a low IQ was identified as a cause of parental child abuse that called for state intervention in Kempe et al.'s work in the 1960s, Sam in the 2000s was depicted as a child-like but affectionate parent, a victim to the coercive welfare bureaucracy.

What happened during the period between Kempe's 1960s and Sam's 2000s was that the discursive space capturing the dangerous stranger evolved riddled with allusions to a threat from the outside disturbing the otherwise peaceful family. This frequently heard theme of an external threat is not an invention of the 1990s and 2000s but has been found across time.⁸⁶ In the years well before the stranger sex offender came to the fore in the child protection issue in the 1990s, external disturbance to the family had been perceived to come from excessive state intervention. The thorny issue of state intervention in the family lurked in the way of the contemporary child advocacy movements from the beginning. Indeed, the 1962 article of Kempe and colleagues was hailed not only as an exposure of the hitherto hidden predicaments facing vulnerable children but because it lent legitimacy to state intervention.⁸⁷ Even when the Kempe group's claim of the prevalence of child abuse was accepted in the policy area, it was framed as the problem of pathological individual parents. In other words, state intervention was justified only when abusive parents were constructed as a separate group of people who deviated from the normal family.

⁸⁶ Douglas, *Risk and Blame*; Mary Douglas and Aaron Wildavsky, *Risk and Culture* (Berkeley: University of California Press, 1982).

⁸⁷ Pfohl, " 'Discovery' of Child Abuse."

While the medical concept of child abuse did not address broader socio-cultural issues, it was liberal advocates of children's rights that raised the structural issue of unequal power relations between parents and children. The children's rights movement emerging in the early 1970s challenged the authority of parents who wielded violence to discipline their children. In 1974, two books pioneering youth and children's rights were published: *Birthrights: A Bill of Rights of Children* by Richard Farson, a psychologist, and *Escape from Childhood: The Needs and Rights of Children* by John Holt, an educator who pioneered the idea of unschooling. Holt opened his book by claiming that "I propose . . . that the rights, privileges, duties, responsibilities of adult citizens be made available to any young person, of whatever age, who wants to make use of them."⁸⁸ Farson and Holt maintained that the U.S. Bill of Rights should apply to all citizens regardless of age and children should have the right to vote, to work, to privacy, to live away from home, and to seek and choose guardians other than one's own parents.⁸⁹

However, the children's rights movement did not go uncontested. The children's rights movement comprised several threads running in opposite directions, falling broadly into the two conflicting positions of protectionism and liberationism. While liberationist child advocates, such as Farson and Holt, sought to endow children with the same rights as adults, protectionists put stress on the right to be a child in the safe environment. For example, Marion Wright Edelman who founded the Children's Defense Fund was more concerned with improving the welfare of children in need than with the right to self-determination for children.⁹⁰

⁸⁸ John Holt, *Escape from Childhood: The Needs and Rights of Children* (New York: Ballantine Books, 1974), 1.

⁸⁹ Richard Farson, *Birthrights: A Bill of Rights of Children* (New York: MacMillan, 1974); Holt, *Escape from Childhood*.

⁹⁰ Marian Wright Edelman, *Families in Peril: An Agenda for Social Change* (Cambridge, MA: Harvard University Press, 1987).

In reference to child abuse, the two streams diverged at the question of “the best interests of children.” From the beginning, the liberationist child advocates pushed for the separation of the abused child from the parent’s custody, permanently if necessary, and some of them espoused the right of children to sue their own parents for abuse and neglect. The state was called on to take part by intervening on behalf of children with reference to the doctrine of *parens patriae*, parent of the nation. The state as the ultimate parent was expected to act in the best interests of children.⁹¹

Advocates aligned with the protectionist position took issues by raising the question whether removal of children from home served their best interests. Protectionists subscribed to the idea that children “are not adults in miniature, they are beings per se, different from their elders in their mental nature, their functioning, their understanding of events, and their reactions to them.”⁹² Put differently, children were not mature individuals capable of making decisions on their own but were expected to achieve development and education suitable for their ages. With recourse to psychological knowledge, protectionist advocates emphasized the role of parents in healthy child development, especially in the emotional aspect. From this perspective, the deprivation of parental care was as harmful as parental abuse, which suggested that the solution of separation from an abusive parent was less obvious than the Kempe group had envisioned. Especially foster care, which was utilized to provide abused children with a safe haven, was discredited as emotionally disturbing, if physically safe. While Kempe and his colleagues did not attend to the psychological aspects on the part of the abused children, a new emphasis on the

⁹¹ Daniel B. Griffith, “The Best Interests Standard: A Comparison of the State’s *Parens Patriae* Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients,” *Issues in Law and Medicine* 7, no. 3 (1991): 283-338.

⁹² Joseph Goldstein, Anna Freud, and Albert J. Solnit, *Beyond the Best Interests of the Child* (New York: Free Press, 1973), 13.

psychological health of children cast into doubt intervention by the state that claimed to act in the best interests of children. Insofar as it acted at a distance, the state as the ultimate parent could not fulfill the role of a biological or “psychological parent,” another term for an adoptive parent, who had intimate interaction with the child on a daily basis.⁹³

As controversies continued over the best interests of children, protectionists began to claim that the state unnecessarily expanded its jurisdiction beyond the cases involving serious physical injuries to other cases that simply fell short of ideal parental care. For example, law professor Robert J. Levy argued that “a democratic society must provide freedom from authoritarian interference by governmental agencies – that freedom must be maximized even if it entails leaving children to their parents’ sometimes not very tender mercies.”⁹⁴ At this juncture, critics converted the preventive measures against parental abuse into the questionable abuse of state power, attempting to reclaim the rights of parents from the state as the ultimate parent. Again, Levy stated that “the current ‘children’s rights’ campaign, by increasing government intrusion into family decision-making, has at least the potential to upset the traditional social compact that undergirds these family-centered values.”⁹⁵ In the same vein, Bruce C. Hafen, a law professor, claimed that a more emphasis should be placed on children’s rights to protection than their rights to choice.⁹⁶ In the protectionist frame, the state that was called on to intervene into the private space to save children was recast as a suspicious external agent that threatened the family and threw the child’s psychological health into jeopardy.

⁹³ Goldstein, Freud, and Solnit, *Beyond the Best Interests of the Child*.

⁹⁴ Robert J. Levy, “The Rights of Parents,” *Brigham Young University Law Review* 1976, no. 3 (1976): 699.

⁹⁵ *Ibid.*, 693.

⁹⁶ Bruce C. Hafen, “Children’s Liberation and the New Egalitarianism: Some Reservations About Abandoning to Their ‘Rights,’ ” *Brigham Young University Law Review* 1976, no. 3 (1976): 605-58.

Whereas advocacy for children's rights emerged as an attempt to liberate children from parental authority, a paradox contained in the claim of children's rights to protection was that it entailed strengthening the rights of parents. By the beginning of the 1990s, political opponents of Bill Clinton attacked Hilary Clinton who had espoused children's rights and equal family relationships in the 1970s, accusing her of having promoted "anti-family" values.⁹⁷ The 1990s witnessed the growing parents' rights movement associated with pro-family organizations, in which children's rights were counter-posed against family values centered on parental authority and responsibility.⁹⁸

In the 1990s, child sexual abuse also became a battleground over parents' rights, known as the memory wars. As child abuse was framed in terms of enduring psychological harms and traumas in the 1980s, adult women who participated in psychotherapy sessions began to raise claims that they had recovered repressed memories of child sexual abuse by their parents. In 1992, Pamela and Peter Freyd, who were accused by their adult daughter of child sexual abuse, established the False Memory Syndrome Foundation (FMSF). The FMSF used the rhetoric of restoring families by getting back their estranged children from the hands of misleading therapists. The debate on the truth of recollections of child sexual abuse escalated into scientific controversy over the malleability and suggestibility of childhood memory. Some renowned psychologists, such as Elizabeth Loftus, joined the FMSF to refute the claims of recovered memories with psychological experiments.⁹⁹ As the 1990s went by, the allegations of child abuse

⁹⁷ Joann Conrad, "Lost Innocent and Sacrificial Delegate: The JonBenet Ramsey Murder," *Childhood: A Journal of Global Child Research* 6, no. 3 (1999): 339.

⁹⁸ Whittier, *Politics of Child Sexual Abuse*, 162-64.

⁹⁹ Malcolm Ashmore, Steven D. Brown, and Katie MacMillan, "Lost in the Mall with Mesmer and Wundt: Demarcations and Demonstrations in the Psychologies," *Science, Technology, & Human Values* 30, no. 1 (2005): 76-110.

based on recovered memories were cast into doubt and the claims of the FMSF gained more acceptance among the legal and mental health professionals as well as in the media.¹⁰⁰ Backed by growing support, the FMSF successfully lobbied to change the laws regarding child abuse. In 1994, the Child Abuse Prevention and Treatment Act was reauthorized and amended to narrow the definition of child abuse to a “*recent*” act.¹⁰¹

The rise of the parents’ rights aligned with child protectionism discourses at the expense of children’s rights to self-determination repositioned the boundary delineating what was to be protected from danger. When the early child advocates declared home the dangerous environment from which the child needed to be removed, the landscape of safe childhood was partitioned by crisscrossed boundaries blurring the inside and the outside. By the late 1980s and early 1990s, however, the dividing line between danger and safety was rearranged along the boundary of the family unit composed of parents and children, a boundary within which the child was to be kept. One of the consequences is that the child became a public figure who represented the victim status in war on crime. At the same time, parents’ responsibility to their children was not limited to keeping them safe from dangerous predators but included the role of a gatekeeper who disciplined the children so that they would not go astray. What disappeared from the scene was the parent whose authority over the child was easily turned into violent force, which prompted the child’s rights movement during the 1970s.

Children, who had availed themselves of the civil rights movements to claim their autonomy, appeared in this picture either as an innocent victim or as an incorrigible dangerous

¹⁰⁰ Beckett, “Culture and the Politics of Signification”; Davis, *Accounts of Innocence*; Ian Hacking, *Rewriting the Soul: Multiple Personality and the Sciences of Memory* (Princeton: Princeton University Press, 1995).

¹⁰¹ Whittier, *Politics of Child Sexual Abuse*, 188-89.

victimizer, that is, “children who molest children.”¹⁰² These two figures, the innocent child victim and the dangerous juvenile criminal are in fact no different in age. The age of a juvenile offender who can be tried at the adult court has been lowered to 13, while the victims whose names are invoked in the preambles of child protection legislation are as old as 31.¹⁰³ Child protection discourses, combined with the emphasis of family values and parents’ rights, have defined adolescents as children to be protected on the one hand, and constructed childhood as “a space to be policed,” on the other.¹⁰⁴

By the early 1990s, the unease about external intrusion disturbing the family, whether from the interventionist welfare state or from a suspicious child care provider, was channeled into fear of the dangerous stranger who threatened taking a child from the parents. This diversion of antipathy from the state to strangers was achieved through transformations in the role of the state in child protection. Over the course of the 1980s, conservative and neo-liberal politics reemphasized the autonomous responsible family, while having cut welfare benefits for children and families.¹⁰⁵ Then who is the child that should be protected? It is neither those children in public day care centers or in the benefit system nor those whose (deviant) parents were sent to increasingly crowded prisons. The poster children to be protected are white, suburban, middle class children whose parents have political and cultural resources to formulate child protection discourses.

¹⁰² Julie Brownlie, “The ‘Being-Risky’ Child: Governing Childhood and Sexual Risk,” *Sociology-The Journal of the British Sociological Association* 35, no. 2 (2001): 519-37; Jenkins, *Moral Panic*, 227-28.

¹⁰³ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 590 (2006).

¹⁰⁴ Richard Tithecott, *Of Men and Monsters: Jeffrey Dahmer and the Construction of the Serial Killer* (Madison: University of Wisconsin Press, 1997), 46.

¹⁰⁵ Conrad, “Lost Innocent”; Nikolas Rose, *Governing the Soul: The Shaping of the Private Self*, 2nd ed. (London: Free Association Books, 1999).

If the state-professional initiative had been characteristic of the child protection measures in the 1960s and 1970s, the role of parents was prominent in the 1990s. The parents of the victims took active part in the policy processes through authoring or lobbying for the laws, and testifying before the legislature. The parents also founded child protection organizations after their children's names, such as the KlaasKids Foundation, the Megan Nicole Kanka Foundation, and the Jacob Wetterling Foundation, now the Jacob Wetterling Resource Center. Through such parents' initiative action, the parent moved from a defensive position trying to fend off state intervention to a new position demanding state protection. As the parent transfigured from a potential malefactor to one who grieved the loss of their precious child at the hands of an evil predator, the role of the state in keeping children safe became reconceived from intervention into family affairs to assistance in the family's effort to secure the safe family boundary. In other words, parents ought to be vigilante for the sake of their child's safety and, for this purpose, they needed the state to provide information of the whereabouts of dangerous offenders. If antagonism lay between the dysfunctional family and excessive state intervention in the 1970s, the family and the state in the 1990s formed an alliance against stranger danger. Danger was now perceived to come neither from the pathological family nor from the meddling state, but from the stranger who could elude the eye of vigilante-parents aided by state-provided information. Over the period of two decades, the triad of parent, child, and perpetrator has undergone transformations entailing a twist in child protection measures aimed at the stranger offender.

Conclusion

Historian Linda Gordon points out that charity and social workers in the late nineteenth century were well aware of the plight of girls falling prey to incestuous fathers. By the 1920s,

however, child-protective agencies moved their focus from home to streets as the main locus of child sexual assault and the culprit was redefined from family members to perverted strangers. Gordon calls this shift “historical amnesia,” which waited for the feminist movement to bring voice to silent and invisible incest victims.¹⁰⁶ In the late 1970s and early 1980s, public concern over and policy responses to the issue of child sexual abuse and exploitation began to take shape, which was in part an achievement of the feminist movement.

However, the contemporary regime of sex offender management has slid into another historical amnesia. By the 1990s when the laws providing for registration and civil commitment for sex offenders began to be enacted, claims of child sexual abuse by family members came to be debated and refuted and the label of otherness was attached to the sex offender as a distinct category. The dominant figure of dangerous stranger is at odds with the feminist claim that most sexual violence occurs in intimate or familial settings. If one of the achievements of feminism is the revelation that sexual violence is more prevalent than assumed, criminal justice that focuses on individuals deemed dangerously abnormal shifts the problem of sexual violence from the framework of gender relations that saturate everyday life to that of securing the boundary of the community by distinguishing others from us. Also, discourses of child protection from stranger danger have been aligned more closely with the rights of parents than with children’s rights to self-determination, while redefining adolescents as children. In the next chapter, I will examine the development of the management of dangerous offenders in relation to the civil rights of the mentally disordered and offenders.

¹⁰⁶ Linda Gordon, “The Politics of Child Sexual Abuse: Notes from American History,” *Feminist Review* 28 (1988): 56-64.

Chapter 3 Disciplining the Profession

Introduction

In 1990, the State of Washington passed the Community Protection Act that provided for the registration and civil commitment of sex offenders. Other states were quick to follow suit. New crime regulation measures propagated across the country in the subsequent years, ushering in a full-blown regime of sex offender management. As the title of the Washington law indicates, the promotion of public safety, specifically the protection of children from violent crimes including sexual violence, is the stated aim of the new sex offender laws. The honoring of the memory of child victims is characteristic of these laws, which typically declare that they were enacted in response to recent crime events. The names of the victims were repeatedly invoked in the policy-making processes as the personalized symbol representing the political cause of public safety.

These sex offender laws, even the unanimously passed law of Washington, have invited opposition on various fronts. Advocacy organizations such as Human Rights Watch and the American Civil Liberties Union claim that the laws are over-inclusive and fail to allocate resources to prevent crimes, while violating the civil rights of those who pose no danger.¹ Legal scholars have raised questions as to the constitutionality of the laws.² The question of constitutionality was heard in the lawsuits where sex offenders or advocacy organizations

¹ Human Rights Watch, *No Easy Answers: Sex Offender Laws in the US* (New York: Human Rights Watch, 2007).

² Eric S. Janus, "Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments," *Indiana Law Journal* 72, no. 1 (1996): 157-214; Joel A. Sherwin, "Are Bills of Attainder the New Currency: Challenging the Constitutionality of Sex Offender Regulations that Inflict Punishment without the Safeguard of a Judicial Trial," *Pepperdine Law Review* 37, no. 4 (2010): 1301-46; Douglas G. Smith, "The Constitutionality of Civil Commitment and the Requirement of Adequate Treatment," *Boston College Law Review* 49, no. 5 (2008): 1383-429.

challenged the laws.³ The main points of contention concerned whether the laws violated the constitutional rights of the offenders to due process, such as the protection against double jeopardy or *ex post facto* laws.

The U.S. Supreme Court has approved of the cause of public safety in its rulings that the civil commitment and community notification laws were constitutional. Many criminologists and legal scholars have interpreted those rulings as a stark example showing that the current regime of crime control assumes a zero-sum relationship between the victim and the offender: the criminal justice system has been preoccupied with public safety at the expense of offenders' constitutional rights.⁴ In debates surrounding sex offender regulation, the opposition between the two political values of civil liberty and public safety is a recurring theme. When critics claim that the sex offender laws result in civil rights violations by excessive state power, supporters of the laws reply that the unconditional protection of the individual rights of offenders could compromise public safety by failing to prevent crimes.⁵

This chapter situates the opposition of civil liberty and public safety in the historical context of the 1960s and 1970s when the civil rights revolution reached the areas of criminal justice and mental health. This period is significant in understanding the evolution of current sex offender management for several reasons. First of all, the issue of how to regulate dangerous individuals was foregrounded during the course of debates over the civil rights of the mentally disordered. It was in the 1960s and 1970s that the issue of how to define and diagnose

³ *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Kansas v. Crane*, 534 U.S. 407 (2002).

⁴ David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001); Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford: Oxford University Press, 2007).

⁵ Eric S. Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Ithaca: Cornell University Press, 2006); Stuart A. Scheingold, Jana Pershing, and Toska Olson, "Sexual Violence, Victim Advocacy and Republican Criminology," *Law and Society Review* 28, no. 4 (1994): 729-63.

dangerousness became a crucial question around which civil rights claims and challenges to psychiatric expertise revolved.

Second, debates on dangerousness prediction paved the way for risk assessment studies, which are a major building block of contemporary sex offender management. Violence risk studies emerged in the aftermath of civil rights challenges to the psychiatric expertise of predicting dangerousness. Around 1980 a group of legal and mental health professionals set out to respond to criticism of the dangerousness standard by putting forth risk management as a way of preventing violence with violations of civil rights minimized. Unlike those who criticize contemporary sex offender management for sacrificing the civil rights of offenders, I argue that the risk management regime of sex offender regulation is an outgrowth of attempts to reconcile civil rights claims by reformulating them into the question of scientific accuracy.

Third, the transformations from dangerousness prediction to risk assessment and management involved the shift of authority from psychiatry to psychology in the crime control area. In the 1960s and 1970s, civil rights advocates raised vehement criticism that psychiatrists were compromising social justice by making arbitrary diagnoses of dangerousness. Combined with emerging skepticism about offender-rehabilitation programs, psychiatric expertise began to lose a foothold in the criminal justice system. Instead, psychologists made inroads into the crime control area to take over as the major mental health profession in the area. The shift of authority was interlocked with fundamental changes in the ways of evaluating and regulating dangerousness. The second section of this chapter discusses the rise of forensic psychology over psychiatry in crime control and the intellectual and institutional conditions for establishing a specific way of defining predictive accuracy. I argue here that what was at stake in the formation of a “scientific” discipline was the development of a new method of seeing – standardized

statistical risk assessment – as well as a new object that was to be seen – offenders at risk of reoffense.

3.1. Dangerousness Prediction and the Civil Rights of Offenders

The first section of the chapter examines psychiatric and social scientific knowledge production pertaining to dangerousness and how this knowledge was laid out in relation to the issue of the civil rights of the mentally disordered. I first discuss the practices of preventive detention before the civil rights movement emerged in the 1960s. At that time, dangerousness was mingled with other categories of mental disorder rather than standing out as a discrete category. The next part discusses how these categories became separated through legal challenges to civil commitment. I analyze the language of civil rights, specifically the right to due process and the right to treatment, in order to show that civil rights claims led to the restriction of civil commitment to dangerous individuals. In this phase, psychiatric patient rights advocates espoused the dangerousness standard as the sole basis for civil commitment. The focus on dangerousness, however, was followed by controversies surrounding psychiatric expertise. In the late 1960s and early 1970s, sociologists and reform-minded psychiatrists and psychologists began to tackle the arbitrariness and fallibility of psychiatric judgment about future dangerousness. During the course of debates, the issue of diagnostic accuracy became intertwined with the discourses of civil rights as the explosion of civil rights claims on behalf of those incarcerated in prison or psychiatric facilities brought cases to court. The discursive entanglement of civil rights and scientific accuracy set the stage for psychologists to develop risk assessment procedures to replace the clinical expertise of psychiatrists. Through this process, psychologists emerged as the primary profession that would provide scientific solutions to the

issue of dangerousness in a way that balanced the two conflicting demands, that is, the protection of the public and the protection of individual civil rights. The resulting risk management strategies formed the foundation that has buttressed contemporary sex offender regulation.

3.1.1. Preventive Detention and Dangerousness

The confinement of individuals by the state involves a variety of forms: at one end of the spectrum was imprisonment as punishment for past acts proven beyond a reasonable doubt and at the other end was the therapeutic commitment of non-dangerous mentally ill persons. Until the 1960s, despite the theoretical distinction, variegated forms of incarceration were marked with vague and blurred boundaries. First of all, the purposes of incarceration, such as punishment, treatment, and prevention, did not provide a clear-cut distinction among various institutions. Imprisonment was not restricted to the purpose of punishment. As the words “penitentiary” and “reformatory” indicate, the earlier prison was designed to serve the purpose of reforming and rehabilitating offenders as well as serving a retributive purpose.⁶ In addition, prevention has long been referred to as an objective of imprisonment. For one thing, imprisonment has been expected to function as a means to prevent further crimes by isolating criminals. For another, from the nineteenth century on, the prison was built around the belief that the threat of imprisonment would deter crime.⁷ To put it another way, although the primary function of the prison is usually considered to be punishing for what an offender did in the past, it has also been expected to prevent or change future behavior of the offender or potential offender.

⁶ Piers Beirne, *Inventing Criminology: Essays on the Rise of ‘Homo Criminalis,’* (Albany: State University of New York Press, 1993); Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Random House, 1979).

⁷ Beirne, *Inventing Criminology*; Alan M. Dershowitz, “Preventive Confinement: A Suggested Framework for Constitutional Analysis,” *Texas Law Review* 51, no. 7 (1973): 1277-324.

The function of prevention has also been shared by the mental health system. Civil commitment, as opposed to the criminal confinement of convicted offenders, has had different rationales with varying functions through its history. Until the early 1970s, the rationale of involuntary civil commitment was a provision of “care, maintenance, and treatment” for those who were “in need of hospitalization,” which purported to achieve (1) restoration of health, (2) comfort and well-being, and (3) the security of society.⁸ These three purposes for the confinement were proposed by Issac Ray in the nineteenth century and had been generally accepted until the 1950s when the demand of deinstitutionalization was raised out of skepticism about the therapeutic effects of hospitalization and out of criticism of the inhumane conditions of state mental hospitals.⁹

When psychiatric patient rights advocacy began to develop in the 1960s, two classes of individuals were hospitalized under the civil commitment laws: those who were mentally ill *and* dangerous and those who were mentally ill *and* in need of care, maintenance, and treatment.¹⁰ The confinement of the two groups had different justifications with respect to the state’s power to govern particular groups of individuals. The doctrine of *parens patriae* accorded the state the

⁸ James Spensley and Paul H. Werme, “The Involuntary Patient: Empirical Literature from a Clinical Viewpoint,” in *Psychiatric Patient Rights and Patient Advocacy: Issues and Evidence*, eds. Bernard L. Bloom and Shirley J. Asher (New York: Human Sciences Press, 1982), 86.

⁹ Gerald N. Grob and Howard H. Goldman, *The Dilemma of Federal Mental Health Policy: Radical Reform or Incremental Change?* (New Brunswick: Rutgers University Press, 2006). Even after the movement of deinstitutionalization began to change the mental health system in general, the restoration of health and comfort of patients, as well as the prevention of dangerousness, remained the rationales of civil commitment. Grob and Goldman point out that the movement of deinstitutionalization did not eliminate the state mental hospitals as some of its proponents had expected. Rather, deinstitutionalization provoked a backlash that claimed the necessity of institutionalization for the well-being of patients. This claim was supported particularly by the poor conditions of life and health of discharged patients with “severe” mental illnesses.

¹⁰ Joseph M. Livermore, Carl P. Malmquist, and Paul E. Meehl, “On the Justifications for Civil Commitment,” *University of Pennsylvania Law Review* 117, no. 1 (1968): 79.

beneficent role of caring for individuals who were in need of care and treatment, whereas the police power of the state enabled the confinement of dangerous people in order to protect society from possible harm.¹¹ These two different justifications and their target groups of individuals, however, were jumbled together. In the 1960s, many states had civil commitment statutes that required a psychiatric determination of dangerousness, where dangerousness was often equated with mentally ill conditions, especially psychosis.¹² In this way, the systems of criminal justice and mental health were not clearly differentiated in their target populations, purposes, and practices.

Under such circumstances, the vague concept of dangerousness contained the seeds for struggles over the boundaries. Dangerousness, which was situated at the intersection between the crime control and mental health institutions, functioned as a conceptual-institutional conduit. In the criminal justice system, for example, dangerousness involved a mental abnormality as a defining element. The American Law Institute's Model Penal Code suggested that a judge sentence a convicted felon a prison term beyond the maximum for the crime when "the defendant is a dangerous, mentally abnormal person whose commitment for an extended term is necessary for protection of the public."¹³ Likewise, the Model Sentencing Act proposed by the Advisory Council of Judges of the National Council on Crime and Delinquency defined

¹¹ "The Nascent Right to Treatment," *Virginia Law Review* 53, no. 5 (1967): 1138-39.

¹² *Ibid.*

¹³ American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes: Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962* (Philadelphia: American Law Institute, 1985), 1108-109. The Model Penal Code also states: "The Court shall not make such a finding unless the defendant has been subjected to a psychiatric examination resulting in the conclusions that his mental condition is gravely abnormal; that his criminal conduct has been characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior with heedless indifference to consequences; and that such condition makes him a serious danger to others." *Ibid.*

“dangerous offenders” as “suffering from a severe personality disorder indicating a propensity towards criminal activity.”¹⁴

In the criminal justice system, the notion of dangerousness was entrenched in such a way that legal decisions at various points were based upon judgments of dangerousness. Under the indeterminate sentencing system, parole boards decided when and whether to release prisoners based upon psychiatric evaluations indicating the extent to which the individual had achieved rehabilitation and could be released to the community without posing a danger.¹⁵ Another occasion when dangerousness is at issue is “not guilty by reason of insanity.” Insanity defense cases deal with the issue of whether the defendant had cognitive impairment at the time of the crime, which does not constitute dangerousness in itself. The standard of dangerousness comes into the picture when the individual is acquitted by reason of insanity and subject to hearings to determine whether to discharge or to commit the individual to psychiatric facilities. In this way, dangerousness was considered at various stages in decision-makings as to whether to place an individual inside or outside of the criminal justice system and the criminal justice system brought in psychiatric authority through the judgment of dangerousness.¹⁶

To sum up, the concept of dangerousness entangled with that of mental illness blurred the boundary between the preventive detention of dangerous individuals and the supposedly

¹⁴ Manfred S. Guttmacher, “Dangerous Offenders,” *Crime and Delinquency* 9, no. 4 (1963): 381.

¹⁵ John Monahan, “The Prediction of Violent Behavior: Toward a Second Generation of Theory and Policy,” *American Journal of Psychiatry* 141, no. 1 (1984): 10.

¹⁶ Dangerousness is also considered in deciding where to place convicted criminals within the criminal justice system. Here, inmates deemed too dangerous to be imprisoned in regular prisons are transferred to high or maximum security facilities. Saleem Shah, “Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychology,” *American Psychologist* 33 (March 1978): 225. Lastly, although not frequently, the judgment of dangerousness is used to determine life or death of the convicted. Dangerousness is factored in as an aggravating element when sentencing a convict to death. Mark D. Cunningham, “Dangerousness and Death: A Nexus in Search of Science and Reason,” *American Psychologist* 61, no. 8 (2006): 828-39.

therapeutic commitment of non-dangerous mentally ill individuals. Until the 1960s, dangerousness served as a conceptual conduit that enabled the inter-infiltration between discourses on criminality and mental illness. When advocates of civil rights and mental health reform raised challenges to civil commitment practices during the 1960s and 1970s, dangerousness emerged as a field for boundary work.

3.1.2. Civil Rights Challenges to Psychiatric Authority

The Right to Due Process

Challenges to psychiatric authority over confinement were mounted in the 1960s when the claim of the therapeutic purpose of civil commitment was being eroded on many fronts. The prevalent view at that time held that the primary interest of the state in committing psychiatric patients against their will was benevolent and that its purpose was therapeutic rather than punitive.¹⁷ However, when major court decisions pertaining to commitment to state mental hospitals began to appear in the early 1970s, skepticism had grown as to the therapeutic effectiveness of long-term hospitalization. The question about therapeutic effectiveness emerged in the early twentieth century when the proportion of long-term patients increased in state mental hospitals and an emphasis in hospitalization was put on a custodial function rather than a therapeutic one in both the policy area and public perceptions.¹⁸ By the 1950s, a prevalent concern was that the growth of both the number of inpatients and the proportion of long-term patients rendered state hospitals overpopulated, resulting in the deterioration of hospital

¹⁷ David Greenberg, "Involuntary Psychiatric Commitments to Prevent Suicide," *New York University Law Review* 49 (May-June 1974): 227-69.

¹⁸ Ian Robert Dowbiggin, *Keeping America Sane: Psychiatry and Eugenics in the United States and Canada, 1880-1940* (Ithaca: Cornell University Press, 1997).

conditions and of the quality of care. This change in population composition was pointed to as a cause of ineffective care, but at the same time it began to be regarded as evidence of the therapeutic ineffectiveness of hospitalization. Data that showed the increase in average length of hospitalization was interpreted to demonstrate ineffective treatment, on the assumption that discharge amounted to cure.¹⁹

A gradual shift of psychiatric practices also contributed to the growing skepticism about the therapeutic purpose of hospitalization. Until the 1950s, American psychiatry was centered largely on public institutions and a large number of psychiatrists worked for state mental hospitals. During the first half of the twentieth century, however, a group of psychiatrists began to establish privately-owned hospitals that accommodated voluntary patients rather than involuntary patients referred by the state, in an attempt to improve their professional reputation as superintendents who merely played a custodial role in a “madhouse.”²⁰ In addition, by the 1950s private clinics began to carve out a new area of mental health, which employed a psychoanalytic approach introduced in America during the 1920s. The increasing prevalence of psychoanalysis provided a “scientific” alternative to hospitalization, along with antipsychotic drugs developed in the 1950s.²¹

It was against this backdrop that the attempts to restrict psychiatrists’ authority found its way into the court through civil rights claims that long-term hospitalization provided hardly more than custodial services. The emerging psychiatric patient rights advocates argued that the lack of treatment services and the deteriorated conditions of state mental hospitals rendered civil

¹⁹ Grob and Goldman point out that this concern did not necessarily reflect the reality of state mental hospitals in that the increase of a proportion of long-term patients was due to the aging population with senility or dementia. Grob and Goldman, *Dilemma of Federal Mental Health Policy*.

²⁰ Dowbiggin, *Keeping America Sane*.

²¹ Grob and Goldman, *Dilemma of Federal Mental Health Policy*.

commitment similar to, or worse than, imprisonment.²² If civil commitment was comparable to imprisonment, civil rights advocates argued that it was to be subject to a legal decision. Alan M. Dershowitz, a civil liberties lawyer and legal scholar at Harvard Law School, vehemently claimed that civil commitment, which deprived individuals of liberty, was a legal issue that could not be relegated to psychiatrists.²³ By the early 1960s, the civil commitment proceeding from admission to discharge was under the control of psychiatrists with little legal regulation. Although most states had statutes that stipulated eligibility criteria for hospitalization, commitment decisions made by psychiatrists were not subject to strict judicial reviews. Psychiatrists' diagnoses of a mental illness were accepted as a sufficient condition for long-term involuntary hospitalization and individuals deemed mentally ill were often committed without a chance to be heard at court.²⁴

During the 1960s, legal professionals began to raise questions about psychiatrists' diagnoses in an attempt at judicial intervention into civil commitment. The state of psychiatric knowledge supported the claim that psychiatric diagnosis was irrelevant to the legal decision regarding the involuntary commitment of the mentally ill. In 1968, the American Psychiatric Association (APA) published the second edition of its official classificatory scheme, the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-II). With its psychoanalytic approach, the first and second editions of the DSM fell short of providing explicit diagnostic

²² Morton Birnbaum, "The Right to Treatment," *American Bar Association Journal* 46 (May 1960): 499-505; "The Nascent Right to Treatment."

²³ Alan M. Dershowitz, "Preventive Detention and the Prediction of Dangerousness – The Law of Dangerousness: Some Fictions about Predictions," *Journal of Legal Education* 23, no. 1 (1970): 24-47.

²⁴ Bruce J. Ennis and Thomas R. Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," *California Law Review* 62, no. 3 (1974): 747.

criteria available for psychiatrists to make consistent judgments.²⁵ As a consequence, the DSM-I and II failed to obtain authority as the standard diagnostic system in American psychiatry such that psychiatrists from different schools relied on their divergent clinical training and experience. Concern about inconsistency among psychiatrists later led the APA to make fundamental revisions to the DSM in order to increase diagnostic reliability.²⁶ However, it was not until 1980 that the third edition of the DSM was published to expand its influence as the diagnostic standard. During the 1960s and 1970s, inconsistency among psychiatrists raised the issue of fairness in the judicial context. In this vein, legal professionals pointed out that the psychiatric classification of mental illness failed to offer any definition that satisfied the legal purposes of civil commitment, that is, prevention and treatment against or regardless of one's will.²⁷

Pointing to the inadequacy of psychiatric knowledge, legal professionals urged the court to play its due part in the civil commitment proceeding, instead of according unchallenged authority to psychiatrists' judgments. Supported by growing psychiatric patient advocacy, non-criminal individuals who were hospitalized against their will began to bring their cases to the court, making claims for their civil rights. Those cases yielded a series of court rulings that strengthened the standards for involuntary admission and for the duration of hospitalization.

The *Lessard v. Schmidt* case, in particular, spurred a movement of protecting the civil rights of psychiatric patients by recognizing the right to due process. This case was a class action brought on behalf of all involuntarily committed adults in Wisconsin, challenging the

²⁵ Ennis and Litwack, "Presumption of Expertise," 707; Livermore, Malmquist, and Meehl, "Justifications for Civil Commitment," 80.

²⁶ Stuart A. Kirk and Herb Kutchins, *The Selling of DSM: The Rhetoric of Science in Psychiatry* (New York: Aldine de Gruyter, 1992); Rick Mayes and Allan V. Horwitz, "DSM-III and the Revolution in the Classification of Mental Illness," *Journal of the History of the Behavioral Sciences* 41, no. 3 (2005): 249-67.

²⁷ "Mental Illness: A Suspect Classification," *Yale Law Journal* 83, no. 6 (1974): 1263.

constitutionality of the state's commitment laws. Alberta Lessard was committed to the local mental health center against her will in 1971. In several hearings held in her absence, the County Court Judge extended her detention based on the requests of the police officers who took Lessard to the mental health center and of a psychiatrist from the center who diagnosed her as schizophrenic. Wisconsin, at that time, had a loose statute regarding involuntary commitment, which provided that the state could commit the mentally ill, defined as an individual who "requires care and treatment for his own welfare, or the welfare of others in the community." Specifically, the eligibility criteria under which Lessard was committed was "mentally ill or infirm or deficient and . . . a proper subject for custody and treatment."²⁸ Lessard was released after a month commitment on outpatient parole. After release, Lessard brought the case to court, arguing that the deprivation of her liberty violated due process.

The court ruling of this case heightened the standard of proof required to commit an individual from "preponderance of the evidence" to "beyond a reasonable doubt" as in criminal trials.²⁹ Until then, the court had applied a less stringent standard in involuntary commitment hearings than in criminal cases, which was justified by the view that civil commitment was designed to provide therapeutic services.³⁰ In this regard, the court cases such as *Lessard v. Schmidt* were significant not only because they tightened the procedures but because they applied the same standard of proof as in criminal cases.

In the subsequent years, *O'Connor v. Donaldson* made a land-mark case that endorsed the civil rights of those committed to state mental hospitals by enforcing periodic re-

²⁸ Stanley S. Herr, Stephen Arons, and Richard E. Wallace, Jr., *Legal Rights and Mental-Health Care* (Lexington: Lexington Books, 1983), 21.

²⁹ *Lessard v. Schmidt*, 349 F.Supp. 1078 (E.D. Wisconsin 1972).

³⁰ Greenberg, "Involuntary Psychiatric Commitments."

determination of commitment. Kenneth Donaldson, a plaintiff, was committed to the Florida State Hospital against his will in 1957 under the State Public Health Code providing that any person could be committed to a Florida state mental hospital for “care, maintenance, and treatment” whenever the person was adjudged “mentally incompetent” and required “confinement or restraint to prevent self-injury or violence to others.” After hearings for involuntary admission, Donaldson was diagnosed as “paranoid schizophrenic” and adjudged not dangerous but “incompetent.”³¹ After 15 years of confinement, Donaldson, who had repeatedly requested to be released, sued J. B. O’Connor, the hospital’s superintendent, and other staff members, alleging that “they had intentionally and maliciously deprived him of his constitutional right to liberty.”³² The U.S. Supreme Court held that “even if his involuntary confinement was initially permissible [on a constitutionally adequate basis], it could not constitutionally continue after that basis no longer exists.”³³ According to the court ruling, the assumption underlying involuntary commitment is that the mentally ill can be cured, thus there must be periodic evaluations to determine whether or not the person has recovered and is allowed to be discharged.³⁴

³¹ At that time in Florida, “incompetent” was defined as “incompetent by reason of mental illness, sickness, drunkenness, excessive use of drugs, insanity, or other mental or physical condition, so that he is incapable of caring for himself or managing his property, or is likely to dissipate or lose his property or become the victim of designing persons, or inflict harm on himself or other. . .” Bernard L. Bloom and Shirley J. Asher, “Patient Rights and Patient Advocacy: A Historical and Conceptual Appreciation,” in *Psychiatric Patient Rights and Patient Advocacy: Issues and Evidence*, eds. Bernard L. Bloom and Shirley J. Asher (New York: Human Sciences Press, 1982): 37.

³² O’Connor v. Donaldson, 422 U.S. 563 (1975).

³³ *Ibid.*, at 575.

³⁴ Bloom and Asher, “Patient Rights,” 39. At issue in this case was not the standard of initial admission but duration of hospitalization without a justifiable reason for it. That is, Donaldson did not sue O’Connor because of the initiation of his commitment but because of the continuation of his commitment despite, as Donaldson alleged, his recovery from mental illness. Even though this case did not address directly the standard of involuntary commitment, the court opened up room for the “right to treatment.”

What was significant in such civil rights claims was that advocates called for the right to due process with reference to criminal cases. For instance,

In fact, paradoxically, we protect the alleged criminal better than we do the candidates for civil commitment. . . . If the stigma from civil commitment is comparable to that from a criminal conviction, then clearly the person facing involuntary commitment is entitled to all the due process protections available for defendants in criminal trials.³⁵

The judges in the *Lessard* case also stated that “the interests in avoiding civil commitment are at least as high as those of persons accused of criminal offenses,”³⁶ and as recent studies showed, “the civil deprivations faced by the mental patient are more serious than those confronting the felon, the stigma is worse, and the mortality rates in mental hospitals are higher.”³⁷ In this way, the shift in standard of proof signaled the legal recognition that involuntary civil commitment resulted in consequences comparable to those of criminal commitment, and thus the same right to due process as in criminal trials should be protected in civil commitment proceedings.

The Right to Treatment

What justified the claim for the equal right to due process was not just the principle of “the rule of law” but the “stigma” and the “mortality rates” which patients would face once institutionalized. The studies the *Lessard* court mentioned that demonstrated the problem of

³⁵ Gerald T. Jorgensen and Daniel D. Lyons, “Human Rights and Involuntary Civil Commitment,” *Professional Psychology* 3, no. 2 (1972): 149.

³⁶ *Lessard*, 349 F.Supp. at 1090.

³⁷ Bloom and Asher, “Patient Rights,” 33.

stigma were produced mostly around 1970, a period witnessing a transition in attitudes toward psychiatric knowledge and authority. Around this period, while the courts were “modernizing” the practice of involuntary commitment by redefining the standard of admission and by setting rigorous limits on the duration of hospitalization, legal discussions regarding the mental health system proliferated and empirical studies using statistics and case studies of mental health care also increased. These studies ranged from sociological criticism of psychiatry to examinations of the system in terms of legal doctrines, including studies conducted by psychiatrists themselves.³⁸

The studies of state mental hospitals lent support to the claim of the right to treatment, which was first proposed by Morton Birnbaum in 1960. Birnbaum, who was a physician and lawyer, cited a sociological study of a state mental hospital to make his point. The study which was conducted in the mid-1950s by Ivan Belknap, a sociologist at the University of Texas, showed that:

[t]he understaffing and lack of physical facilities caused a social organization that resulted: (1) in custodial, rather than therapeutic, care that was a hindrance both to providing proper treatment and to planning for improvement; and, (2) in the least trained member of the staff, the ward attendant, rather than the psychiatrist, having the greatest control over the care and treatment of the patients.³⁹

Arguing that these current practices of civil commitment violated the due process principle, Birnbaum maintained that it was unconstitutional to deprive a psychiatric patient of individual

³⁸ Paul S. Appelbaum, *Almost a Revolution: Mental Health Law and the Limits of Change* (New York: Oxford University Press, 1994), 11.

³⁹ Birnbaum, “Right to Treatment,” 500.

liberty on the grounds of the need of treatment and not provide necessary treatment. Thus, Birnbaum claimed that involuntarily committed patients had a right to receive adequate medical care and treatment. This argument was affirmed by a court in the *Rouse v. Cameron* case of 1966, in which the U.S. Court of Appeals held that involuntarily committed patients had an enforceable right to adequate treatment.⁴⁰

The right to treatment included a variety of elements under its rubric, which allowed various actors to employ it in order to achieve their diverse aims. Even though the right was formulated as criticism of civil commitment practices, it was possible to take advantage of the right to treatment in order to justify involuntary commitment on condition that proper treatment was provided. In this regard, psychiatrists had good reason to advocate the right to treatment, especially in relation to a budgetary issue. For instance, in endorsing the right to treatment, the APA maintained that mentally ill persons suffered neglect and discrimination, “especially in public hospitals, which are usually underfunded and consequently understaffed.”⁴¹ The claim of the right to treatment was raised as a foundation for judicially enforceable standards of treatment and funding in the *Wyatt v. Stickney* case. In 1970, the patients and the soon-to-be terminated employees at Bryce Hospital filed suit against the mental health commissioners and the hospital administrators of the State of Alabama. They alleged that the budget cuts and staff reductions would threaten the quality of care and thus deny patients the right to adequate treatment. The court held that there was a constitutional right to effective treatment and promulgated the standards that included minimum staff-patient ratios, nutritional requirements, the abolition of

⁴⁰ *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966).

⁴¹ Herr, Arons, and Wallace, *Legal Rights*, 51.

peonage, provisions to insure a humane psychological environment, and treatment plans and programs.⁴²

The right to treatment also provided a strategic tool for attacking involuntary commitment by enabling patients and their advocates to pose an enforceable release-or-treat claim.⁴³ This claim was employed in a series of court cases, such as *O'Connor v. Donaldson* and *Rouse v. Cameron*. In these cases, Donaldson and Rouse challenged their continued commitment on the grounds that they did not receive treatment and they were no longer mentally ill. Accepting their claims, the courts ruled that if they were not mentally ill, they were to be released, or if they were mentally ill as the psychiatrists claimed, the hospitals should provide adequate treatment. Here, treatment was to be provided to involuntarily committed persons as a “constitutional right” and when the hospital was unable to provide adequate treatment, commitment turned out to be a violation of liberty.⁴⁴

⁴² Wyatt v. Stickney, 325 F.Supp. 781 (M.D. Ala. 1971).

⁴³ Herr, Arons, and Wallace, *Legal Rights*, 59.

⁴⁴ What was at issue here was the question of what constituted “adequate” treatment. Judge Bazelon’s opinion in *Rouse v. Cameron* set standards of adequate treatment as follows,

[t]he hospital need not show that the treatment will cure or improve him but only that there is a bona fide effort to do so. This requires the hospital to show that initial and periodic inquiries are made into the needs and conditions of the patient with a view to providing suitable treatment for him, and that the program provided is suited to his particular needs.... The effort should be to provide treatment which is adequate in light of present knowledge. ... Continuing failure to provide suitable and adequate treatment cannot be justified by lack of staff or facilities. *Rouse*, 373 F.2d, at 456, 457.

The *O'Connor* case also specified the definition of “adequate treatment” in such a way that “will give him a realistic opportunity to be cured or to improve his mental conditions.” *O'Connor*, 422 U.S., at 570. In this way, the court rejected the claim of the petitioner, Dr. O'Connor, that the hospital provided Donaldson with “milieu therapy.” *O'Connor*, 422 U.S., at 569.

Both the rights to due process and to treatment were raised in the context where the traditional assumption that civil commitment provided therapeutic services failed to uphold the less stringent standard than in criminal cases. The right to due process and the right to treatment represented two different tactics to equate and distinguish civil commitment and criminal imprisonment. On the one hand, the claim of the right to due process drew a parallel between imprisonment and civil commitment by pointing to the fact that the latter was operated in a similar way to imprisonment. A series of court rulings by the early 1970s heightened the standard of proof in civil commitment proceedings to evidence beyond a reasonable doubt, which guaranteed the mentally ill the equal protection of due process as in criminal cases. On the other hand, the right to treatment emerged to claim that “being mentally ill is not a crime.”⁴⁵ Advocates formulated the right to treatment by putting forth how civil commitment ought to be operated, which should be different from imprisonment. To put it another way, when the due process claims negated the therapeutic effect of civil commitment, the right to treatment claims re-affirmed its therapeutic purpose. A redrawing of the boundary between the prison and the mental hospital in this way served as a tactic to guarantee the civil rights of the mentally ill.

The Confinement of Dangerous Individuals

The court rulings that subjected civil commitment to stricter legal regulation was part of the deinstitutionalization movement that had been well under way. Until the 1940s, psychiatry was centered on the practice of institutional confinement. During the period between the late 1940s and the mid-1950s, the proportion of the APA members who worked in state mental hospitals or Veterans Administration facilities dropped from more than two thirds to less than

⁴⁵ Birnbaum, “Right to treatment,” 503.

one fifth.⁴⁶ However, the number of inpatients in public mental hospitals started declining in 1957. By the time the due process revolution reached the mental health area in the late 1960s, mental hospitals were providing more short-term service, while long-term custodial care for elderly and chronic patients were reduced.⁴⁷

The changes in the composition of hospitalized patients and the workplace of psychiatrists indicate the shift in focus from institutional psychiatry to community-based outpatient treatment. The policy of deinstitutionalization and the criticisms of involuntary commitment, on the grounds of patient rights in particular, pointed to a larger trend toward a community-based mental health system. The movement of deinstitutionalization was crystallized in the Community Mental Health Centers Construction Act (CMHC Act) of 1963. Bernard L. Bloom, who was a prominent advocate of community-based mental health and participated in the policy process of mental health system reform, wrote that the CMHC Act could be seen as part of the broader civil rights movement.⁴⁸ The issues of the rights to treatment and to the least restrictive alternative, in particular, were addressed in the community mental health centers legislation.⁴⁹ In this context, the right to treatment in the least restrictive settings, such as in the community mental health centers, was expected to contribute to the process of deinstitutionalization.

However, this principle of treatment in the least restrictive settings turned out to be complicated to implement in practice. First of all, there was concern about readjustment of

⁴⁶ Ellen Herman, *The Romance of American Psychology: Political Culture in the Age of Experts* (Berkeley: University of California Press, 1995), 257.

⁴⁷ Gerald N. Grob, *From Asylum to Community: Mental Health Policy in Modern America* (Princeton: Princeton University Press, 1991).

⁴⁸ Bernard L. Bloom, *Community Mental Health: A General Introduction*, 2nd ed. (Monterey: Brooks/Cole Publishing Company, 1984), 34.

⁴⁹ *Ibid.*, 35.

discharged patients to the new settings of communities. Mental health professionals pointed out that after years of commitment to institutions, many patients had lost basic coping and self-care skills.⁵⁰ This problem of readjustment was not only due to the patients' lack of coping skills but due to an underlying assumption of the mental health system reform. The community mental health movement was predicated on the assumption that patients had home to return to and families willing to take care of them.⁵¹ When policies to discharge institutionalized patients to communities were implemented, a significant number of them were found without family relationships, and were absorbed into semi-institutional residential environments, such as nursing homes and board-and-care facilities.⁵² In this regard, the movement of deinstitutionalization was in actuality a parallel shift of patients from state mental hospitals to other institutions.⁵³

Under this circumstance, a question was raised about whether new institutions were less restrictive than traditional state mental hospitals. Studies addressing this question found that privately owned board-and-care facilities provided living conditions worse than in state mental hospitals.⁵⁴ Moreover, criticism arose that supposedly "alternative" facilities including CHMCs were unable to accommodate and treat patients with "severe disorders."⁵⁵ Thus, some mental health and legal professionals argued that traditional institutions such as state mental hospitals should not be completely abolished, suggesting that various levels of mental health care facilities form a continuity of care while serving different roles. A role assigned to the community mental

⁵⁰ Susan M. Barrow and Linda Gutwirth, "Community Treatment as the Least Restrictive Alternative: Costs and Benefits," in *Psychiatric Patient Rights and Patient Advocacy: Issues and Evidence*, eds. Bernard L. Bloom and Shirley J. Asher (New York: Human Sciences Press, 1982), 198.

⁵¹ Grob and Goldman, *Dilemma of Federal Mental Health Policy*, 39.

⁵² Barrow and Gutwirth, "Community Treatment," 198.

⁵³ Grob and Goldman, *Dilemma of Federal Mental Health Policy*.

⁵⁴ Barrow and Gutwirth, "Community Treatment," 199.

⁵⁵ Grob and Goldman, *Dilemma of Federal Mental Health Policy*.

health system was the prevention of mental disorders, while civil commitment was specifically assigned the role of preventing dangerousness. When psychiatrists left the state mental hospital to stretch out into society, the confinement institution was left for dangerous individuals.

The land-mark court rulings that recognized the civil rights of those involuntarily committed to mental hospitals also restricted civil commitment to the function of dangerousness prevention. For instance, the *O'Connor* court stated that involuntary hospitalization as mere custodial care, as opposed to treatment, could be justified only when “the plaintiff was dangerous either to himself or others”:

[a] finding of “mental illness” alone cannot justify a State’s locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the “mentally ill” can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom. . . . May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty.⁵⁶

The *Lessard* court also established a definition of dangerousness that an individual should be proved dangerous “based upon a finding of *recent overt* act, attempt or threat to do *substantial*

⁵⁶ *O'Connor*, 422 U.S. at 575.

*harm to oneself or another.*⁵⁷ This statement shows legal changes toward a stricter definition of dangerousness compared to, for instance, the *Overholser v. Russell* case in 1960. In the latter case, the court held that evidence that the individual may commit *any criminal act*, “check-writing proclivity” in this instance, was sufficient to indicate dangerousness to the community.⁵⁸

By the early 1970s, the dangerousness standard came to be a principal test by which particular kinds of criminals and mentally disordered individuals were sorted out and secluded in institutions designed for containing violence. Legal recognition of the two rights to due process and to treatment implied that civil commitment became liable to the test of civil rights. In other words, no one could be denied their rights to liberty without lawful procedures and justifiable reasons, such as “danger to self or others.”⁵⁹ Dangerousness became foregrounded as the primary justification for confinement.

3.1.3. Controversies around the Psychiatric Diagnosis of Dangerousness

Civil Rights Challenges to Dangerousness Prediction

While civil rights claims contributed to the establishment of the dangerousness standard as the primary basis for civil commitment, psychiatric practices of preventing dangerousness did not go without controversy. The advocates of psychiatric patient rights who had promoted the restriction of the involuntary commitment standard to dangerousness found their achievement unsatisfactory in furthering justice in the mental health system. For instance, Nicholas Kittrie, who was a prominent critic of institutional psychiatry and participated in the drafting of the law that set the dangerousness standard in the District of Columbia, said that he was “very proud of

⁵⁷ *Lessard*, 349 F.Supp. 1078.

⁵⁸ Shah, “Dangerousness: A Paradigm,” 226.

⁵⁹ Appelbaum, *Almost a Revolution*.

that great accomplishment” until he found that someone diagnosed with a mental illness was easily considered dangerous even without any signs of danger.⁶⁰ Likewise, Judge David L. Bazelon expressed his disappointment about the state of affairs in his keynote address at the Conference on Mental Health and the Law in 1974.⁶¹ In this speech, Bazelon accused institutional psychiatry of serving as “institutional gatekeepers for society,” while failing to treat patients, especially the socially deprived and disadvantaged groups who populated mental hospitals.⁶² In this vein, critics of psychiatry were not content at restricting involuntary civil commitment to the cases of dangerousness but made claims for the complete abolition of civil commitment.

These attempts to reduce the influence of psychiatrists initially aimed to enhance prisoners’ and psychiatric patients’ rights by restricting state power, especially confinement based on future dangerousness. Civil rights discourses, however, did not converge into a single trajectory. Rather, libertarian civil rights advocates and psychiatric patient rights advocates took diverse rationales in critiquing the practice of incarceration, which led to two claims posed in opposite directions: the “medicalization of crimes” and the “criminalization of mental disorders.”

Thomas Szasz, a libertarian critic of psychiatry, claimed that the involvement of psychiatry in the criminal justice system infringed on civil liberties by incarcerating innocent citizens based on a judgment of future dangerousness, while failing to protect social order by exempting criminals from legal responsibility for their acts when they were deemed mentally

⁶⁰ Nicholas N. Kittrie, “The Prediction of Dangerousness: The Experts, the Courts, and the Criminal Justice System,” in *Mentally Ill Offenders and the Criminal Justice System: Issues in Forensic Services*, eds. Nancy J. Beran and Beverly G. Toomey (New York: Praeger Publishers, 1978), 43-53.

⁶¹ David L. Bazelon, “Institutional Psychiatry—‘The Self Inflicted Wound,’ ” *Catholic University Law Review* 23, no. 4 (1974): 643-48.

⁶² *Ibid.*, 645.

disordered. Szasz argued that liberal democracy should protect both civil liberties and society through stern punishment for past acts, not through detention for future acts.⁶³ Thus, Szasz maintained that the insanity defense as well as involuntary civil commitment should be abolished because it is just to punish criminals no matter whether the crime is due to mental disorder or not. Dangerousness as a question of future possibility had no room for functioning in this libertarian point of view.

In contrast, a group of psychiatric patient rights advocates including mental health professionals and legal scholars argued that the deinstitutionalization policy resulted in the mental health system abandoning patients into the street and letting them end up in the criminal justice system.⁶⁴ Their criticism was pointed at the court as well as the mental health system, that is, the court unjustly convicted mentally disordered individuals who could not be adjudged responsible for their acts. In contrast to Szasz, they acknowledged a social need to prevent violence by the mentally disordered. They argued that the best way to serve the psychiatric patients' interests would be to provide them with preventive treatment instead of "criminalizing mental disorders" by letting them commit crimes and punishing them retrospectively.⁶⁵

If Szasz opposed the involvement of psychiatry in crime control, those psychiatric patients' rights advocates who supported the maintenance and even expansion of the role of psychiatry held two different positions. On the one hand, some psychiatrists called for reestablishing their therapeutic role. Alan Stone, a psychiatrist and legal scholar, crafted a so-

⁶³ Thoas S. Szasz, "Psychiatric Diversion in the Criminal Justice System," in *Mentally Ill Offenders and the Criminal Justice System: Issues in Forensic Services*, eds. Nancy J. Beran and Beverly G. Toomey (New York: Praeger Publishers, 1978), 54-73.

⁶⁴ Grob and Goldman, *Dilemma of Federal Mental Health Policy*, 39.

⁶⁵ Patricia E. Erickson and Steven K. Erickson, *Crime, Punishment, and Mental Illness: Law and the Behavioral Sciences in Conflict* (New Brunswick: Rutgers University Press, 2008).

called “Thank You Theory” to support the maintenance of involuntary commitment. According to this theory, if a set of criteria would be developed in such a way that emphasized the patients’ need for treatment, incapacity to make their own decisions, and reasonable expectations of benefit from care, patients who were involuntarily institutionalized and treated without their consent would say “thank you, doctor” at the end of their hospitalization.⁶⁶ The “Thank You Theory” was put forth as criticism leveled by psychiatrists themselves at the psychiatric practices focusing on predicting and preventing dangerousness. Stone argued that psychiatry as medicine should serve as the healer of people’s minds instead of an agent of social control. In this vein, Stone suggested that involuntary commitment be maintained, but on the condition that it was devoted to treatment rather than the prevention of dangerousness.⁶⁷

On the other hand, other advocates of psychiatric patients’ rights who criticized involuntary hospitalization espoused community-based primary prevention. They proposed that mental health professionals intervene before an individual puts oneself or others in danger, and thus gets involved in criminal justice or committed to psychiatric facilities. The efforts at community-based primary prevention held a social model of mental disorders with an emphasis on the values of social justice and equality.⁶⁸ From this perspective, incarceration based on the dangerousness standard was not only ineffective – it was a retrospective remedy at best, but also was an injustice of blaming and punishing the victim for social ills.

In sum, attacks on the practice of incarcerating dangerous individuals could be described as challenging psychiatric authority, institutional psychiatry in particular, in two directions. First,

⁶⁶ Appelbaum, *Almost a Revolution*, 331.

⁶⁷ John Monahan. *The Clinical Prediction of Violent Behavior* (Washington, D.C.: National Institute of Mental Health, 1981).

⁶⁸ Marc Kessler and George W. Albee, “Primary Prevention,” *Annual Review of Psychology* 26, no. 1 (1975): 557-91.

libertarian criticism was leveled at the entanglement of criminal justice with psychiatry through the notion of dangerousness. The claim of “medicalization of crimes,” as voiced by Szasz, was based on a view that did not differentiate people into responsible citizens and those deemed mentally disordered and thus not legally responsible for their acts. In other words, Szasz believed that all criminal activities deserved punishment, regardless of who committed them. Second, criticisms from inside the psychiatric profession accused institutional psychiatry of playing the role of an agent of social control while abandoning the role of a healer. A group of mental health professionals denounced “criminalization of mental disorders” with an assumption that those with mental disorders were different from other responsible citizens in that they needed special treatment and help. Although these positions held divergent views as to the legal status of the mentally disordered and the role of psychiatry in criminal justice, they together represented a social milieu that undermined the dangerousness standard as the principle for promoting public security and regulating individuals deemed a threat to society. The goal of public safety embedded in the dangerousness standard was counterposed to the claim of civil rights, whether understood as individual liberty in libertarianism or as social justice and equality in community mental health.

Scientific Challenges to Dangerousness Prediction

Most problematic, the critics pointed out, was the definition of dangerousness as a future possibility. Dangerousness in the area of mental health was defined as “a high probability of inflicting imminent substantial physical harm based on a recent explicit act,”⁶⁹ or “a propensity (i.e., an increased likelihood when compared with others) to engage in dangerous behavior,” which in turn refers to “acts that are characterized by the application of or the overt threat of force and that are likely to result in injury to other persons.”⁷⁰ Thus, insofar as dangerousness is defined as a matter of prediction for future behaviors, a possibility of wrong prediction always exists, which would result in an unnecessary confinement for the sake of prevention, accompanying an unjustifiable deprivation of liberty. The advocates tackled this point and maintained that the dangerousness standard left room for a violation of civil rights.

The advocates of psychiatric patient rights used the right to due process in a strategic way with the intent of abolishing involuntary hospitalization. They had an expectation that the replacement of the “preponderance of evidence” standard with evidence “beyond reasonable doubt” would practically preclude involuntary commitment. Unlike criminal cases in which the question is about proving particular actions that have already happened, involuntary commitment as preventive intervention targets actions that might happen or not in the future. Taking into consideration situational factors affecting human behavior and the limitations in psychiatric knowledge, abolitionists claimed, there would always arise a reasonable doubt about a prediction of future behavior. In other words, the beyond reasonable doubt standard would almost always

⁶⁹ John Monahan and Henry Steadman, “Violence Risk Assessment: A Quarter Century of Research,” in *The Evolution of Mental Health Law*, eds. Lynda E. Frost and Richard J. Bonnie (Washington, D.C.: American Psychological Association, 2001), 196.

⁷⁰ Shah, “Dangerousness: A Paradigm,” 224.

be unreachable. Thus, if no one could meet a legal standard of proof for dangerousness and if dangerousness was the only commitment standard, then no one would be committed.⁷¹

The opposition to preventive detention was backed by empirical studies on the accuracy of the psychiatric prediction of dangerousness. Those studies were carried out amidst increasing suspicion that psychiatrists might fail frequently in predicting dangerousness. Despite the suspicion, however, there was virtually no way to prove or disprove the validity of dangerousness predictions until the early 1970s. One of the difficulties involved in the controversy was that those who were judged dangerous were committed to security facilities. In other words, the institutional intervention prevented them from expressing their dangerous tendencies, and thus obstructed mental health professionals from testing their predictions.⁷² It was the policy of deinstitutionalization that enabled empirical studies by lifting that difficulty with a series of court decisions to discharge individuals despite expert judgments that they were dangerous. In this sense, deinstitutionalization provided an opportunity to test psychiatric predictions of dangerousness against the “natural course” of the behaviors in question, undisturbed by institutional intervention.

The most influential study of this kind was the *Baxstrom* study carried out by Joseph Cocozza and Henry Steadman in the early 1970s. Cocozza and Steadman traced the patients who had been transferred from the New York State hospitals for the criminally insane to civil hospitals and then later released to the community as a result of the court decision in *Baxstrom v.*

⁷¹ Joseph J. Cocozza and Henry J. Steadman, “The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence,” *Rutgers Law Review* 29, no. 5 (1976): 1084-101; Greenberg, “Involuntary Psychiatric Commitments,” 266; Monahan and Steadman, “Violence Risk Assessment,” 196.

⁷² John Monahan and Henry Steadman, “Toward a Rejuvenation of Risk Assessment Research,” in *Violence and Mental Disorder: Developments in Risk Assessment*, eds. John Monahan and Henry Steadman (Chicago: University of Chicago Press, 1994), 5.

Herold. These patients were transferred or discharged by the court despite psychiatric judgments of dangerousness. The four-year follow-up study found that only 20 percent of them exhibited physical aggression to others in either civil psychiatric facilities or in the community. Based on this finding, Coccozza and Steadman argued that the deprivation of liberty on the basis of future dangerousness was unconstitutional.⁷³ Civil rights advocates drew from this and other similar studies the conclusion that it was impossible to predict future behaviors accurately enough to avoid committing individuals who were not actually dangerous.⁷⁴ The “evidence” of the psychiatric inability to accurately predict dangerousness was used to support the position that involuntary psychiatric commitment should be abolished because it could not avoid unacceptable civil rights violations in any way.

It was notable that the problem was posed in terms of the “right not to be a false positive.” By the time that these follow-up studies appeared, the language of civil rights was proliferating in such a way that the list of rights was continuously expanding to include the rights to equal protection, to treatment – and later to treatment in the least restrictive setting, and to refusal of treatment, each of which included subdivided specific rights.⁷⁵ The advocates took advantage of this development and posed the problem of over-prediction in terms of the “right not to be a false positive,” that is, the right not to be committed based on a false prediction.⁷⁶ The advocates appropriated the flexibility and inclusiveness of the rights language in order to expand the scope covered by civil rights discourses.

⁷³ Coccozza and Steadman, “Failure of Psychiatric Predictions.”

⁷⁴ Monahan and Steadman, “Violence Risk Assessment,” 196.

⁷⁵ Bernard L. Bloom and Asher, Shirley J., *Psychiatric Patient Rights and Patient Advocacy: Issues and Evidence* (New York: Human Sciences Press, 1982).

⁷⁶ Henry Steadman, “The Right Not To Be a False Positive: Problems in the Application of the Dangerousness Standard,” in *Psychiatric Patient Rights and Patient Advocacy: Issues and Evidence*, eds. Bernard L. Bloom and Shirley J. Asher (New York: Human Sciences Press, 1982) 129-47.

At the same time, the “right not to be a false positive” heralded the moment when the language of civil rights became intertwined with the question of scientific validity. Critics claimed that psychiatrists who acted as gatekeepers of society violated civil rights by making arbitrary predictions of future dangerousness without scientific validity. The problem of a violation of civil rights was translated into that of false positive errors and was displaced to the area of scientific controversy. For instance, Saleem Shah, a psychologist, argued that the possibility of illegitimate abuse of state power was due to the “fact” that clinical judgment frequently made errors of false positive.⁷⁷ In the same vein, Kittrie asked, “[s]hould we go on with a social policy based on scientific data that is so troublesome and questionable, or is it our duty to make sure that the social policy be based on valid data?”⁷⁸ In this regard, the standard of dangerousness was inadequate as a basis for policy, because “dangerousness at this time is not a scientific fact; it is not a scientific test”⁷⁹

The intertwinement of civil rights claims and scientific validity questions functioned to buttress attacks on the dangerousness standard with an empirical demonstration of over-prediction, but at the same time it opened up a possibility of technical solutions to political problems. In other words, when the question of justice was posed in terms of scientific validity, one possible solution to injustice was to protect the right not to be a false positive by developing new prediction methods with better accuracy. Those two different effects of empirical studies could be found in the career of the same researchers involved in dangerousness prediction studies. For instance, around the beginning of the 1980s Henry Steadman and John Monahan shifted their position on the predictability of dangerousness from pessimistic criticism to cautious

⁷⁷ Shah, “Dangerousness: A Paradigm.”

⁷⁸ Kittrie, “Prediction of Dangerousness,” 50.

⁷⁹ *Ibid.*, 48.

optimism. Monahan, who had said that the attempts to predict future dangerousness had been “doomed,” stated later in 1980 that “there may be circumstances in which prediction is both empirically possible and ethically appropriate.”⁸⁰

It was psychologists, not psychiatrists, who put forth the idea that dangerousness prediction should and could be improved by applying scientific methods rather than relying on psychiatrists’ judgments. When the controversy over the dangerousness standard reached its height during the 1970s, the influence of the psychiatric profession was declining in the crime control area. As the bond between psychiatrists and the criminal justice system was loosening, psychologists, a newly emerging profession, began to build their expertise in crime control to replace psychiatrists.

3.2. Debates over Clinical and Actuarial Methods

As the professional authority of psychiatrists waned in crime control, psychologists involved in the legal field began to gather momentum to establish the specialized field of forensic psychology by developing a methodology distinct from that of psychiatrists. In the late 1970s, psychologists set out to refine statistical methods, which originated in the early developments in psychology such as intelligence tests, and applied them to the issues bearing upon the criminal justice system. The actuarial-statistical approach to evaluating dangerousness emerged out of attempts to establish psychology as a science that produced probabilistic knowledge through the formalization of expert judgment.

This section analyzes intellectual conflicts through which the actuarial approach to prediction gained predominance in psychology. While a number of psychologists accused

⁸⁰ Monahan, *Clinical Prediction*, v.

psychiatrists of making subjective and arbitrary judgments ignoring statistical principles, the competition between a clinical approach and a statistical approach also took place vigorously among psychologists. The debates over methodology touched upon some fundamental questions such as the issue of the predictability and lawfulness of human behavior and how to define objectivity and accuracy in prediction. In the following pages, I first discuss psychologists' efforts to establish a new specialty of forensic psychology by espousing statistical methods. I then analyze three issues involved in the debates between clinical and statistical approaches: what constituted the basic unit of the person, what counted as scientific knowledge, and the nature of human cognition. As these issues unfolded in the debates and the statistical approach became accepted in the crime control area, it entailed the disciplining of the profession in both senses of the term: establishing forensic psychology as a discipline and regulating psychologists' expertise by formalizing dangerousness prediction procedures.

3.2.1. The Psyche in Crime Control

In 1962, the Court of Appeals for the District of Columbia Circuit held that expert testimony from any mental health professional was admissible if a court decided that they were qualified by training and experience.⁸¹ This decision opened up an opportunity for psychologists to develop their expertise in legal matters.⁸² Subsequently, the American Psychological Association (ApA) appointed a Committee on Clinical Psychology and the Law to review legal

⁸¹ *Jenkins v. United States*, 307 F.2d 637 (D.C. Cir.1962).

⁸² Brief for American Psychological Association as Amicus Curiae, *Brief, Jenkins v. United States*, 307 F.2d 637 (D.C. Cir.1962).

issues that psychologists could participate in. Saleem Shah chaired the Committee, which included Eric Dreikurs, Bernard Levy, and John Mariano.⁸³

Dreikurs went ahead to form a professional society for the emerging field of psychology and law. In 1968, Dreikurs and Jay Ziskin, both of whom were clinical psychologists, set out to establish the American Psychology-Law Society (AP-LS). The Society's constitution, ratified in 1969, stated the Society's objectives of promoting the influence of psychology in legislation, public policy, and legal process.⁸⁴ Following the establishment of the AP-LS, another group of psychologists created the American Board of Forensic Psychology (ABFP) out of the attempts to develop diplomate certification for forensic psychologists and established the American Academy of Forensic Psychology.⁸⁵ In 1980, the AP-LS, the ABFP, and the American Association of Correctional Psychologists submitted a proposal to the ApA to create the Division of Psychology and Law. The ApA's Council of Representatives approved the establishment of the Division in the summer of 1980.⁸⁶

One of the major figures who spurred the development of this new field was Saleem Shah, who was trained as a clinical psychologist with a behaviorist view. In his earlier career, Shah joined Legal Psychiatric Services, a court-psychiatric clinic in the District of Columbia, Department of Public Health, as a staff member and later became its Chief Psychologist. At this clinic Shah had an opportunity to conduct evaluations and predictions of dangerousness, which would lead to his later interest in this issue. Shah left Legal Psychiatric Services to join the National Institute for Mental Health (NIMH) in 1966. In the same year, he became a consultant

⁸³ Thomas Grisso, "A Developmental History of the American Psychology-Law Society," *Law and Human Behavior* 15, no. 3 (1991): 215.

⁸⁴ *Ibid.*, 216-7.

⁸⁵ *Ibid.*, 225-6.

⁸⁶ *Ibid.*

to the President's Crime Commission, for which he wrote a paper on "the Mentally Disordered Offender." In the NIMH, Shah was appointed Chief of the Center for Studies of Crime and Delinquency in 1968.⁸⁷ The title of the Center was changed in 1981 to the Center for Studies of Antisocial and Violent Behavior and in 1985 to the Antisocial and Violent Behavior Branch. Shah directed the Center and Branch until 1987 when he became Senior Research Scholar for Law and Mental Health in the NIMH Division of Biometry and Applied Sciences.⁸⁸

Crime and violence was one of the themes to which the NIMH devoted research resources, which provided a favorable environment for psychologists to develop their expertise on the issue. Shah played a key role in this development by producing influential works, as well as supporting other psychologists' works. In particular, Shah took pains to critique and improve the ways in which dangerousness prediction was conducted. In the height of the debate over dangerousness prediction, Shah joined critics of psychiatric expertise to warn against arbitrary judgments of dangerousness. In 1975, Shah published an article where he stated that dangerousness prediction "could in itself be regarded as a rather dangerous activity," because of the "very vague definitions of 'dangerousness,' the very low predictive accuracy and the glaring overpredictions of such behavior."⁸⁹ After analyzing these problems, Shah concluded this article by arguing that involuntary commitment for preventing future dangerousness should be abolished.

⁸⁷ Charles W. Lidz and Edward P. Mulvey, "Dangerousness: From Legal Definition to Theoretical Research," *Law and Human Behavior* 19, no. 1 (1995): 41-48.

⁸⁸ Ecford S. Voit, "Developing a Research Program: Saleem Shah's Leadership Role at the National Institute of Mental Health," *Law and Human Behavior* 19, no. 1 (1995): 5-14.

⁸⁹ Saleem A. Shah, "Dangerousness and Civil Commitment of the Mentally Ill: Some Public Policy Considerations," *American Journal of Psychiatry* 132 (1975): 505.

During the subsequent years, however, Shah published articles that showed his changing view on the issue. In his widely cited article from 1978, Shah identified several judgmental heuristics as the causes of the high false positive rate.⁹⁰ Among the factors that resulted in over-prediction, Shah pointed out that clinical judgments of future dangerousness ignored statistical rules, and were vulnerable to the social pressures demanding confinement of dangerous individuals, especially when a violent crime committed by the mentally disordered caused public concern. Unlike his 1975 article, Shah drew from this analysis a different conclusion as follows:

[g]reater awareness of and sensitivity to the aforementioned systematic errors, and related training efforts, should help both to distinguish the technical difficulties of the predictive task from the social pressures and to develop procedures that make more effective use of normative statistical principles in efforts to reduce the error rates.⁹¹

Shah suggested that dangerousness predictions be improved through an actuarial approach. Here, an actuarial approach to dangerousness was proposed as a solution to the problem of false positive errors caused by “a subjective assessment” of clinicians and the social pressure of “better safe than sorry.”⁹²

As Chief of the Center for Studies of Crime and Delinquency, Shah sponsored research on issues related to crime and mental health, and facilitated circulation of research findings among practitioners in the field. With the aim of disseminating useful scientific information, Shah created the “Crime and Delinquency Monograph Series.” More than one-third of the series

⁹⁰ Shah, “Dangerousness: A Paradigm,” 228-30.

⁹¹ Shah, “Dangerousness: A Paradigm,” 230.

⁹² Ibid.

were published on the topic of dangerousness, one of which was Monahan's *Clinical Prediction of Violent Behavior*, published in 1981.⁹³

Monahan, a legal scholar, proposed a separation of science and politics as a solution to the conundrum of uncertain prediction of dangerousness. According to his proposition, science should provide as accurate and valid evaluations of dangerousness as possible, and politics should make decisions of what to do with the results. In other words, if a mental health professional provided information of the degree of an individual's dangerousness, it was the politics' role to decide whether the individual was dangerous to the extent that required state intervention.⁹⁴ In an attempt to extricate science from politics, Monahan suggested shifting the term from "dangerousness prediction" to "violence risk assessment."⁹⁵ Insofar as "prediction" was the matter of telling in advance what might or might not happen, Monahan argued, predictions of dangerousness would ineluctably fail in many cases, whether due to psychiatrists' inability to accurately predict or due to preventive intervention. In contrast, the notion of assessment did not address the question of whether assessment would become a reality in the future or not. Assessment instead involved efforts to manage and lower the risk of violence. In this sense, Monahan stated that what was important in the issue of dangerousness was not prediction but assessment and management.⁹⁶

The change of the term from dangerousness to risk was also significant in Monahan's attempt to develop scientific studies of risk. As discussed earlier, "dangerousness," primarily as a legal concept rather than a psychiatric one, invited vociferous controversies due to its vagueness.

⁹³ Thomas Grisso, "Saleem Shah's Contributions to Forensic Clinical Assessment," *Law and Human Behavior* 19, no. 1 (1995): 27

⁹⁴ Monahan, *Clinical Prediction*, 18-19.

⁹⁵ *Ibid*, 19.

⁹⁶ Monahan, *Clinical Prediction*.

For instance, Szasz asked in a derisive manner what made persons with paranoid delusions of persecution more dangerous than drunken drivers or racecar drivers.⁹⁷ Szasz suggested that the labeling of dangerousness meant no more than that the behavior was socially unacceptable or unpalatable. The warning against an arbitrary abuse of the dangerousness standard was also heard from legal professionals. Judge Bazelon of the U.S. Court of Appeals stated as follows:

[w]ithout some such framework [that specifies the type of conduct, the likelihood or probability, the effect such conduct will have on others], “dangerous” could readily become a term of art describing anyone whom we would, all things considered, prefer not to encounter on the streets. We did not suppose that Congress had used “dangerous” in any such Pickwickian sense.⁹⁸

Another issue related to terminological vagueness was the question of what the labeling of dangerousness designated, that is, whether it was behaviors or persons that were judged dangerous. Behaviors and persons were often confounded in dangerousness prediction. In this regard, Shah pointed out that predictions of dangerous “behaviors” were often slipped into a classificatory term of dangerous “persons” with a stable and consistent personality trait prone to violent behaviors.⁹⁹ In order to avoid an arbitrary abuse of “dangerousness,” Monahan suggested displacing “dangerousness” with a “conceptually crisper” term of “violent behavior,” defined as “*acts characterized by the application or overt threat of force which is likely to result in injury to*

⁹⁷ Thomas S. Szasz, *Law, Liberty, and Psychiatry: An Inquiry into the Social Uses of Mental Health Practices* (New York: Collier Books, 1968), 46.

⁹⁸ *Cross v. Harris*, 418 F.2d 1095, 1099 (D.C. Cir. 1969).

⁹⁹ Shah, “Dangerousness: A Paradigm,” 226-27.

people.”¹⁰⁰ Again, dangerousness had not been necessarily equated with violent behavior in the previous years, as shown in a court ruling that considered “check-writing proclivity” to be dangerous.¹⁰¹

In redefining the problem, Monahan followed Shah’s suggestion that an actuarial approach overcome the weaknesses of clinical judgment. The actuarial approach refers to an attempt to assess the probability of future violent behaviors based on large-scale statistical data containing a variety of variables relevant to violence, such as demographic information, crime records, psychiatric symptoms, and situational factors.¹⁰² The results of violence risk assessment employing this approach would indicate the degree of dangerousness in a numeric form instead of an either-or form. Politics would then take up the place to determine the “cutoff score.” Monahan defined a controversial issue inherent in the deprivation of liberty on the grounds of dangerousness as the problem of balancing public safety and individual liberty. Monahan suggested that the decision of the cutoff score be made in a way that would best serve the social values both of public safety and individual liberty.¹⁰³ In this way, Monahan expected the actuarial innovation to extricate the field from the charge of injustice. Armed with the new term of “violence risk assessment” and the actuarial approach, Monahan called for the “second generation” of the study of violent behavior, as distinguished from the first generation that demonstrated the inadequacy of dangerousness prediction.¹⁰⁴

¹⁰⁰ Monahan, *Clinical Prediction*, 5 (emphasis in original).

¹⁰¹ Shah, “Dangerousness: A Paradigm,” 226.

¹⁰² Marnie E. Rice, Grant T. Harris, and Vernon L. Quinsey, “The Appraisal of Violence Risk,” *Current Opinion in Psychiatry* 15, no. 6 (2002): 589-93.

¹⁰³ Monahan, *Clinical Prediction*, 18-24.

¹⁰⁴ Monahan, “Prediction of Violent Behavior.”

3.2.2. The Basic Unit of Analysis in the Science of Psychology

The concerted efforts of psychologists to develop actuarial risk assessment were rooted in the broader debates over clinical versus actuarial methods, which dated back to the 1940s. As clinical psychology was beginning to form as an independent specialty during and after World War II, psychologists were divided over the objective of clinical psychology and the ways to achieve it. A dividing line was drawn between the psychologists who were aligned with the statistical method and those who pursued the case-study approach.

The psychologists at the University of Minnesota led the way toward statistical studies for assessing mental pathology and personality from the late 1930s on. The strongly anti-Freudian Minnesota group developed the Minnesota Multiphasic Personality Inventory (MMPI), which would contribute to the enhancement of clinical psychology as an independent specialty in the mental health field around World War II.¹⁰⁵ In 1941, Theodore Sarbin, who earned a Ph.D in psychology the same year, presented a paper at the annual meeting of the ApA. In this paper, Sarbin compared the relative accuracy of statistical versus clinical prediction of undergraduate success, using data gathered at the University of Minnesota. Sarbin's paper, later published in *Psychometrika*, a renowned psychology journal, provided Paul Meehl with a platform for launching an extensive comparative study of prediction methods.

Trained in clinical psychology, Meehl participated in the development of the MMPI with his Ph. D advisor, Starke R. Hathaway and remained affiliated with the University of Minnesota throughout his career. Under the statistics-oriented intellectual surroundings at Minnesota, Meehl published a highly influential and controversial book in 1954, titled *Clinical versus Statistical Prediction: A Theoretical Analysis and a Review of the Evidence*. In this book, which Meehl

¹⁰⁵ Roderick D. Buchanan, "The Development of the Minnesota Multiphasic Personality Inventory," *Journal of the History of the Behavioral Sciences* 30, no. 2 (1994): 148-61.

later called “my disturbing little book,” he devoted a chapter to comparative studies of the relative accuracy of clinical versus actuarial predictions.¹⁰⁶ After presenting the findings that actuarial methods yielded more accurate predictions than clinical methods, Meehl concluded that the former was more scientific than the latter.

Although Meehl compared the two methods on the same level in terms of predictive accuracy, they have more fundamental differences. It was Gordon Allport, who espoused case-study methods, that set the tone of the debate by distinguishing two methods for studying personality: the idiographic and the nomothetic approaches. Adopted from German philosopher Wilhelm Winderband, Allport used the term “nomothetic” to refer to an approach to knowledge through generalizing individual phenomena and establishing general laws, while the “idiographic” approach intended to illuminate individual phenomena in its idiosyncrasy. Since Allport’s book published in 1937 provoked the debate through the 1960s, psychologists who were engaged in the debates of actuarial-nomothetic versus clinical-idiographic methods touched upon several fundamental issues that were crucial in the formative years of clinical and personality psychology. Among them were included such questions as what constituted the basic unit of the person, what counted as scientific knowledge, and the nature of human cognition.

To begin with, the two approaches have different conceptions of the person. The actuarial approach conceives of the individual as composed of traits that are measurable with psychological instruments. The procedures of actuarial prediction segment personal dispositions into measurable behavioral traits. Actuarial methods do not account for the mutual interaction among those traits but consider them independent of each other and simply add those variables

¹⁰⁶ Paul E. Meehl, “Causes and Effects of My Disturbing Little Book,” *Journal of Personality Assessment* 50, no. 3 (1986): 370-75; Meehl, *Clinical Versus Statistical Prediction: A Theoretical Analysis and a Review of the Evidence* (Minneapolis: University of Minnesota Press, 1954).

up to the total sum of scores. Unlike the clinical case-study approach that determines the peculiar quality that characterizes a given individual, the statistical approach intends to find common traits that a group of individuals share. Individual difference comes into the picture only as variance in degree delivered in the form of score difference. This actuarial procedure presupposes and renders an individual a member of a class as opposed to a unique being.

When Allport published his book in 1937, psychologists had been concerned with developing and administering assessment tests for the purposes of differential diagnosis in clinical setting or personnel and student selection in employment and education. Allport observed that the conventional psychology of personality and assessment had been tilted toward what he called nomothetic approaches, which he viewed as failing to understand the person. In line with Allport's view, Samuel J. Beck delivered in 1952 a presidential address of the Division of Clinical and Abnormal Psychology at the meeting of the ApA. At that time, Beck had been working to improve and promote the Rorschach inkblot test for more than two decades. As a principal proponent of the Rorschach test, one of the most widely used non-statistical psychological tests, Beck cautioned against the use of statistics in promoting the science of personality. Although statistical research of personality traits had been recognized as science with its successful prediction and control of human behaviors, Beck argued, the nomothetic method fell short of contributing to the development of psychology by imposing restrictions on further progress.

From the idiographic perspective, the deficit of the nomothetic approach lay in its basic unit of analysis. For Beck, the personality as a whole was the proper object of fledgling psychological research as distinct from adjacent disciplines such as neurology, physiology, anthropology, and sociology. Beck disapproved of statistical procedures that they failed to

capture the whole personality insofar as the relationship between a variety of traits was not considered within a particular individual. Consequently, “the individual is atomized; and we stop with studying the atom.”¹⁰⁷ Even though the nomothetic approach could be called science, Beck argued, it could not be the science of personality. It took “the person out of the observed datum” and concentrated on “the extraperson event.”¹⁰⁸ In order to overcome the shortfalls of the nomothetic approach, Beck suggested employing the idiographic approach to study “a universe of traits, variables in mutual interplay, affecting one another.”¹⁰⁹ This universe defined the individual, the proper subject matter of psychology.

The conception of the person as a whole was also repeatedly found in Allport’s work. Allport, who had studied in Germany, adopted the concept of *Verstehen* as a main methodology for investigating personality. Borrowing Eduard Spranger’s words, Allport defined *Verstehen* as “the mental process of ‘grasping events as fraught with meaning in relation to a totality.’”¹¹⁰ Put differently, Allport maintained that the objective of psychology was to study “each single aspect of a man’s being, each experience, each act as meaningful in relation to that constellation of values which expresses the unity of his life.”¹¹¹ Allport borrowed from biology the term “morphogenesis” to expound his research project that intended to explore internal patterns of various traits within an individual. When understood as the integrated structure, trait components

¹⁰⁷ Samuel J. Beck, “The Science of Personality: Nomothetic or Idiographic?” *Psychological Review* 60, no. 6 (1953): 355.

¹⁰⁸ *Ibid.*, 357.

¹⁰⁹ *Ibid.*

¹¹⁰ Gordon W. Allport, “The Study of Personality by the Intuitive Method: An Experiment in Teaching from The Locomotive God,” *The Journal of Abnormal and Social Psychology* 24, no. 1 (1929): 14.

¹¹¹ *Ibid.*, 15.

could not be accounted for as an independent variable but as interacting with each other to yield different meanings depending on the personal pattern of interrelationship.¹¹²

Allport's understanding of personality as a whole structure was intricately intertwined with his emphasis on individual uniqueness. Allport claimed that the objective of psychology was to understand the complex inner life of an individual, a human being irreducible to a member of a group that appeared to share common traits. He found a justification for his emphasis on a single individual in the inherent quality of the subject matter, that is, personality. Allport aligned himself with the German phenomenological tradition that contrasted natural science and social science. Under this distinction, the subject matter of personality with its idiosyncrasy and uniqueness could not be properly studied with the methods of natural science. Instead, Allport called attention of psychologists to the individual case, not as illustrative of general laws but as a legitimate object of research in its own right.

The emphasis on the uniqueness of an individual was at odds with the basic premise of the statistical method that human behavior was best understood and anticipated when analyzed in aggregate. The two approaches to personality proceeded in opposite directions: the idiographic-clinical method pursued the particular through the integration of the whole personality, while the nomothetic-actuarial method pursued the general through the fragmentation of personality. The idea of applying statistics to diagnosis was anathema to the clinical and personality psychologists who endorsed the case-study approach. They considered statistics as leading to the impoverishment of clinical practice by leaving out rich information that psychologists gained in their encounters with clients. In their view, statistics was a descriptive study of groups, and not of individuals.

¹¹² Allport, "Study of Personality."

3.2.3. What Counts as Scientific Knowledge

The disagreement between idiographic-approach psychologists and nomothetic-approach psychologists grew stark as the question of prediction occupied the center of the debate. In his influential article from 1941, Sarbin touched upon general issues concerning the role of the psychologist in clinical settings and the status of psychology as a discipline. The main question Sarbin raised was whether clinical psychology was a science or an art. In developing his argument in support of the actuarial approach, Sarbin posited that prediction was that which distinguished science from art: science conveyed diagnosis projected into the future, whereas art remained at the description and understanding of the present conditions. In Sarbin's view, clinical psychology should be a science in that diagnosis involved prediction of the future course of events or behaviors. Put differently, Sarbin claimed, diagnosis aimed at more than an understanding of an individual; diagnosis was meaningful only when it directed action in the future, such as the choice of therapy and the counseling of students at university. Insofar as diagnosis in clinical psychology intended prediction, or future-oriented action, clinical psychology deserved the title of science.

When defining the essence of science in terms of prediction, Sarbin subscribed to a particular way of defining what counted as valid predictions. He viewed that scientific prediction, as opposed to clairvoyance, involved the projection of known knowledge into the unknown future, which required as a prerequisite a finding of generalized laws. It was only when the psychologist established consistent tendencies among a certain population and when a given individual was found to belong to the group that the individual's future behavior could be predicted with a reasonable accuracy. From the perspective of Sarbin and Meehl, the idiographic method was incapable of making scientific predictions by definition because it precluded the

possibility of prediction made on the basis of generalized knowledge. Therefore, Sarbin suggested that the clinical method of diagnosis be discarded since the understanding of a single case could not pass scientific muster.¹¹³

For the proponents of the case-study approach, however, the uniqueness of individual personality was no hindrance to searching for the laws of human behavior. Rather they claimed that understanding uniqueness was the best way of obtaining knowledge necessary to find laws that determined the future of a given individual. In fact, despite different logics of personality research, the nomothetic and idiographic methods had the same goal in terms of practical application: the prediction of individual behaviors. What was at issue here was the proper level of generalization. For Allport, it was lawfulness found on the level of a particular individual that enabled prediction. Instead of anchoring prediction to interpersonal comparison based on group norms, Allport suggested that prediction concerning a particular individual be projected from knowledge obtained at the individual level – the intrapersonal pattern of consistency. Allport argued that if prediction regarding a particular individual was of interest in practical settings, statistical knowledge of populations was of no avail in generating effective predictions.¹¹⁴ From this perspective, extrapolating data about populations to the individual case amounted to an unjustifiable transfer of knowledge from the general to the particular.

Beneath the diverging conceptualizations of the relation between the general and the particular lay different views of scientific knowledge production. The advocates of the nomothetic-actuarial approach subscribed to the idea that knowledge was inferential and inductive by nature. From this view, knowledge obtained from a single case was nothing other

¹¹³ Theodore Sarbin, "Clinical Psychology—Art or Science," *Psychometrika* 6, no. 6 (1941): 391-400.

¹¹⁴ William McKinley Runyan, "Idiographic Goals and Methods in the Study of Lives," *Journal of Personality* 51, no. 3 (1983): 413-37.

than a hypothesis, which needed to be tested by reference to other cases in order to be established as scientific knowledge. One of the difficulties of the idiographic method was that, Meehl argued, the insistence on the unrepeatable uniqueness of an individual case left it impossible to test and confirm a hypothesis generated by a clinician.

However, the term “test” and “accurate prediction” signified different things for each side of the debates. The psychologists in favor of the idiographic method reversed this relation of hypothesis-test. Beck and Allport denounced that statistics only produced approximate knowledge with regard to a single case of interest and remained to be a hypothesis until it was validated by the examination of the case. Allport intended a case study to serve as a test that enabled the psychologist to arrive at certainty in prediction. He found it meaningless to predict someone’s behavior with a probability between 0 and 1, say, the probability of John’s attempting suicide was 0.45. The target behavior would take place or not, put differently, the possibility ought to be either 0 or 1 if the prediction was to be accurate. Allport expressed his belief that exact prediction was possible if the psychologist reached a full understanding of a given individual. In this vein, Allport argued that statistical data merely provided a basis on which the psychologist started examining a case but it needed to be tested against materials collected through the case study. From this perspective, the use of group statistics to predict an individual case only yielded probabilistic knowledge, which was less than certain, and thus invalid.

Meehl took issues that certainty was more the exception than the rule in clinical settings. He identified the conditions that would need to be satisfied to make the exception. Certain prediction on the basis of an understanding of a single case would be possible and necessary only if two conditions were met: 1) the case contained uniqueness that was not accounted for in group statistics; and 2) the unique factor was straightforward and strong enough to determine the

outcome with certainty. The problem was that, Meehl went on, clinicians rarely encountered cases that satisfied those two conditions in practice. In all other cases, probable prediction was the best the psychologist could hope for.¹¹⁵

One significant implication of Meehl's position was that error was ineluctable in the process of knowledge production. The psychologists who subscribed to the actuarial-nomothetic approach conceived of approximate and partial knowledge as what characterized the nature of science. By the same token, they argued, when mental health professionals claimed their predictions to be scientific, that meant that they were bound to make errors.¹¹⁶ The question was, Meehl argued, how accurate predictions could be when using different approaches. Meehl and other nomothetic approach psychologists answered this question by presenting the comparative studies that "statistically demonstrated" that clinicians without recourse to statistics made wrong predictions at higher rates.

¹¹⁵ Meehl made his point with an example of the broken leg case. Imagine a psychologist attempting to predict whether Professor A will go to the movies on a Friday night. Given the frequencies for the class to which Professor A is ordered, a certain probability can be arrived at between 0 and 1, say .90. However, if there is additional information available that the professor has recently broken his leg, the probability drops to near zero. In other words, no matter which group Professor A belongs to and no matter what the probability is for the group to do the target behavior, the peculiarity of the given case overrides all other factors. Meehl argued that this broken leg case represented the only situation where certain prediction could be made with recourse to the uniqueness of a single case. Meehl, *Clinical Versus Statistical Prediction*.

¹¹⁶ George A. Lundberg, "Case-Studies Vs. Statistical Methods-An Issue Based on Misunderstanding," *Sociometry* 4, no. 4 (1941): 379-83; Theodore R. Sarbin, "A Contribution to the Study of Actuarial and Individual Methods of Prediction," *The American Journal of Sociology* 48, no. 5 (1943): 593-602; Sarbin, "The Logic of Prediction in Psychology," *Psychological Review* 51, no. 4 (1944): 210-28.

3.2.4. The Nature of Human Cognition

The accusation that clinicians were prone to errors did not stop at comparative studies but developed into the study of the clinician's mind. Taking advantage of the development of cognitive psychology, proponents of actuarial methods conducted experiments that investigated how clinicians made decision-makings in diagnostic settings. In these attempts, the debates over actuarial versus clinical methods expanded from what constituted the basic unit of study to the nature of the clinician's cognitive process, in other words, from the nature of the knowledge object to that of the knowing subject.

As discussed so far, the different ways of conceptualizing the individual were connected to the differences in the conceptions of scientific knowledge, especially predictive accuracy. The question of understanding human cognition was also tied to them. Allport, influenced by the Gestalt school, claimed that the human mind possessed a creative capacity that structured information into a whole. He argued that the mind was not a passive receptacle of external stimuli. What enabled cognition was intuition that captured meaning of phenomena at hand through building the interconnection among fragments of information. For Allport, this Gestaltian process of cognition was the definitive feature of clinical judgment. Diagnosis on the basis of algorithmic procedures could only account for predetermined factors in a rigid manner, and thus statistical diagnosis, the cookbook method as Meehl called, was "like giving to the cook ingredients that will produce only dumplings while imagining that she has the freedom to produce a cake."¹¹⁷ The computer or the actuary equipped with computational algorithm and

¹¹⁷ Gordon W. Allport, "The General and the Unique in Psychological Science," *Journal of Personality* 30, no. 3: 413.

statistical tables could cook dumplings but not a cake. “The cookbook procedure rules out insights peculiarly relevant to the individual.”¹¹⁸

Those who espoused the actuarial method responded with empirical studies of clinical prediction that supported their philosophical claim of the error-prone human mind. While previous studies of the clinical method had been restricted to finding the percentage of successful clinical predictions by comparing predictions against actual outcomes, a group of psychologists set out to conduct research designed to explain what was going on in the clinician’s mind, regardless of the accuracy of prediction. By the late 1960s, the new field of cognitive psychology was coming into its own, a major issue of which was the process of decision-making. Daniel Kahnman, Amos Tversky, and Paul Slovic began to publish their works that would later become classic texts in the field and provide a springboard for the emergence of violence risk studies in the late 1970s and early 1980s.

Among them, Slovic was a co-worker of Lewis R. Goldberg at the Oregon Research Institute in the late 1960s. While working at the Institute, Goldberg published in 1968 a paper that contained an idea of what would be called the “Goldberg paradox.” In this paper, Goldberg attempted to find a mathematical model that best simulated the judgmental process of the clinician. More specifically, Goldberg tried to find a mathematical equation that described how much consideration the clinician gave to which information, when given a set of data about a patient. Clinicians, who were composed of PhD clinical psychologists, advanced graduate students in clinical psychology, physicians, nurses, and psychiatric social workers, were given contrived data about hypothetical patients and were asked 1) to decide whether to permit temporary liberty for a chronic patient committed to a psychiatric hospital and 2) to make a

¹¹⁸ Ibid.

differential diagnosis of psychosis versus neurosis. After gathering the clinicians' reports, Goldberg and his colleagues constructed multiple regression models by which the patient data were combined and weighted to reproduce the clinicians' judgments.

The findings were scandalous: the clinical judgments were best accounted for with a linear regression model. Put differently, clinicians judged in a way that a simple linear formula would do.¹¹⁹ These findings were the diametrical opposite of Allports' claim that the clinician considered the interrelation among data to capture the whole structure of meaning in a way that additive statistical formulae were not capable of. Moreover, the more latitude the clinicians were given in paying selective attention to data, the further the validity and reliability of their judgments decreased. In Goldberg's words, "models of the men" were "generally more valid than the men themselves" because clinicians did not apply their own rules of judgment consistently.¹²⁰

Goldberg's and other similar studies of clinical judgment contained an underlying assumption about the human mind that was embodied in the experimental designs. Studies of decision-making of this kind started with the belief that human cognition was amenable to mathematical formulation no matter how complex it was. Goldberg, for instance, took a strategy of proceeding from the simplest equation of combining data to gradually include more complex, nonlinear mathematical terms until the equation generated the same results as a clinician's judgment on the data. One interesting feature of this design was that Goldberg did not try to get to the bottom of how the clinician's mind was working in the decision-making process. His

¹¹⁹ Lewis R. Goldberg, "Simple Models or Simple Processes? Some Research on Clinical Judgments," *American Psychologist* 23, no. 7 (1968): 483-96.

¹²⁰ Lewis R. Goldberg, "Man versus Model of Man: A Rationale, plus Some Evidence, for a Method of Improving on Clinical Inferences," *Psychological Bulletin* 73, no. 6 (1970): 422.

research procedure was intended to construct a mathematical formula that approximated the “products” of the thought process, instead of simulating or mapping the “process” itself. When a final equation came out, Goldberg interpreted the equation as a representation of the judgmental process involved in clinical diagnosis and prediction. The mind of the clinician was blackboxed and substituted for by a mathematical formula.

Such substitution was accomplished through a specific research design that rendered all variables, including a clinician’s judgment, amenable to mathematical analyses. Experiment participants were given quantitative data and were asked to make judgment in a quantitative form or in a form easily transformable into a set of numbers. In Goldberg’s experiments, the researchers presented to the clinicians MMPI scores and yes-or-no variables, each answer coded as 0 and 1, for example, “does the patient have a problem with drinking?” Likewise, they asked the clinicians to give responses in a numeric form. It was only through this research design transforming both the data and responses into numbers that made possible the mathematical representation of the clinical judgments.

The psychologists who conducted such studies of clinical judgment subscribed to the view that equated probabilistic thinking with *the* way the human mind works. The attempts to build a statistical model for simulating and explaining human cognition were predicated on a philosophical position that denied any fundamental difference between the mind of the clinician who allegedly engaged in intuitive thinking and the computer that processed data in accordance with programmed statistical algorithms. If Allport asserted the creativity of the human mind that the computer could not imitate, the studies of decision-making turned the superiority of the human mind over the computer into an analogy between the mind and the computer. From this perspective, the difference only lay in how consistently they followed rules in decision-makings

and which rules were better in achieving accurate judgments. When vying with the computer, the human mind represented by the clinician's judgment was found unable to outperform the computer.

3.2.5. Disciplining the Profession

From the beginning, Meehl took pains to redirect the controversies to concentrate on the capacity of the clinician. In his 1954 book, Meehl made a distinction that reformulated the terms of the debates: a distinction between the type of data and the method of combining them. Meehl made it clear that the latter was the issue. He left untouched the question of what data should be adequate for diagnosing patients and what its nature was. Meehl and Goldberg relegated to the periphery the initial issue that Allport raised, that is, whether to approach the person as a unique whole or as a sum of common traits that could be distributed in aggregate. It was through refocusing the issue on the data processing at the expense of the issue of data itself that Meehl and Goldberg effectively excluded qualitative data such as case history from the clinical scene. Even though they did not directly tackle the issue of data, their research objectives and designs precluded the introduction of qualitative data irreducible to numbers.

As discussed above, actuarial approach psychologists promoted the quantification of diagnosis as a way to develop psychology as a scientific discipline. In the crime control area in particular, the claim of scientific discipline can be understood against the backdrop of competition with psychiatry. When psychologists began to cast into doubt the methods of psychiatrists making diagnoses, they strove to enhance the professional prestige of the clinical psychologists through statistical devices and skills of psychologists.¹²¹ At the same time, the

¹²¹ Meehl, *Clinical Versus Statistical Prediction*, 7.

quantification of diagnosis was justified on the claim that clinical judgment relying on qualitative data was unethical. For example, Meehl combined his demand for scientific practice with the issue of professional ethics: clinical judgment using qualitative data did not guarantee social accountability because it was virtually impossible to validate the judgment with empirical, which for Meehl meant statistical, evidence.

When the question of psychology as a science involved that of ethics, psychologists who practiced in different settings maintained divergent ethics. Meehl's view of professional ethics was in stark contrast with the then emerging trend of humanistic psychology. Psychologists who led this trend, including Allport, pioneered the expansion of clinical psychology into the area of psychotherapy by breaking the restriction on psychologists who previously remained subordinate to psychiatrists. Allport deprecated statistically-oriented psychologists for their "subservient" attitudes toward established science. In his view, psychologists' attempts to seek status by trying to conform to the standard of natural science were grossly misled because the subject matter of psychology was inherently different from that of natural science.¹²² Humanistic psychologists instead took another tack of carving out a new market for their professional service. Karl Rogers, another prominent figure in humanistic psychology, developed in this vein the "client-centered psychotherapy."¹²³ As his choice of the word "client" instead of "patient" indicates, the psychologists were tapping into the niche market that had fallen outside the traditional psychiatric ward. In this new world teeming with troubled, but not insane, people, humanistic

¹²² Gordon W. Allport, "Personalistic Psychology as Science: A Reply," *Psychological Review* 53, no. 2 (1946): 132-35.

¹²³ In 1928, Rogers joined the Society for the Prevention of Cruelty to Children in Rochester, New York and published *The Clinical Treatment of the Problem Child* (Boston: Houghton Mifflin Company, 1939), based on his experience in working with troubled children.

psychologists gained full responsibility of diagnosis and therapy independent of the psychiatrist's intervention.¹²⁴

In contrast, Meehl was dealing with those people who could not afford the luxury to be called a client. Most comparative studies of the actuarial and clinical predictions that Meehl participated in or cited were conducted in three areas: (1) success in some kind of training or schooling, particularly in relation to military recruitment; (2) criminal recidivism as in predicting parole success or violation; and (3) prognosis of a major psychosis among hospitalized patients.¹²⁵ Inductees, prospective students, criminals, and psychotic patients were not expected or able to cooperate with the psychologist in exploring their interiority as in the humanistic psychotherapy session. In all three cases, the task assigned to the psychologist was to find the most effective way of predicting and controlling the subject's behavior. In those circumstances, Meehl insisted, it was crucial that the psychologist give a straight prediction of the target behavior instead of wasting time and money rambling on about each subject's unique mental structure. It was in this particular context that Meehl called for socially accountable practice and defined morality in terms of a duty of the psychologist to subject his judgment to empirical review rather than improve the client's subject feeling of wellness as in psychotherapy. If the responsibility of the psychologist in the client-centered setting was to the client who could afford to pay for service, the primary responsibility of the psychologist like Meehl was to the society, more specifically taxpayers. When a large amount of taxpayer money was spent on predictive tasks of psychologists involved in the areas of education, the military, criminal justice, and public mental health, Meehl claimed, it was immoral and unethical to employ costly, unvalidated

¹²⁴ Herman, *Romance of American Psychology*.

¹²⁵ Meehl, *Clinical Versus Statistical Prediction*, 119.

procedures. The validation of predictive procedures constituted an obligation of an honest, ethical psychologist.¹²⁶

It was in this context that statistics provided the answer to the ethical question. The actuarial approach psychologists conducted comparative studies based on the assumption that the only way of deciding whether the clinical judgment was valid and which of the clinical and the statistical methods was better in prediction was through statistical validation and comparison. To put it another way, statistics ceased to be one of the competing methods and became the final arbiter of the competition itself. Meehl and Goldberg not only promoted statistics as a method for diagnosing and predicting problem behaviors but also utilized statistics to test the validity of expert judgment. In this sense, Meehl claimed, “*always* the actuary will have the final word.”¹²⁷

According to the actuary, experts could not achieve more than probabilistic knowledge and “models of the men” were “generally more valid than the men themselves” in predicting human behavior.¹²⁸ Supported by the combination of the comparative studies of predictive methods and the study of cognitive processes, statistically-minded psychologists called for clinicians to stop pursuing exact and certain prediction, which they accused of betraying clinicians’ “professional narcissism.”¹²⁹ Instead, accuracy meant the reduction of errors as far as possible by following the guide of statistical tables, which could be achieved only when clinicians admitted that they were bound to make errors.¹³⁰

¹²⁶ William M. Grove and Paul E. Meehl, “Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical–Statistical Controversy,” *Psychology, Public Policy, and Law* 2, no. 2 (1996): 293-323; Meehl, *Clinical Versus Statistical Prediction*.

¹²⁷ Meehl, *Clinical Versus Statistical Prediction*, 138.

¹²⁸ Goldberg, “Man versus Model of Man,” 422.

¹²⁹ Grove and Meehl, “Comparative Efficiency.”

¹³⁰ Hillel J. Einhorn, “Accepting Error to Make Less Error,” *Journal of Personality Assessment* 50, no. 3 (1986): 387-95.

Conclusion

Since the nineteenth century in Europe and the United States, psychiatry and psychology have played a crucial role in formulating the issue of sex offender regulation by producing scientific explanations of “deviant” sexuality and providing a means to control “dangerous” individuals.¹³¹ At the same time, the close relationship between mental health and criminal justice have generated friction and negotiation with respect to the understanding of human nature and the possibility of scientific knowledge of human behavior. The 1960s and 1970s was a period fraught with conflicts and controversies around the role of psychiatry in the criminal justice system, especially in relation to the prediction of future dangerousness. By the late 1970, civil rights challenges to psychiatric authority, centered on the issue of due process protections, became intertwined with scathing skepticism about the scientific validity of psychiatric prediction of dangerousness. As the authority of psychiatrists waned, the field of psychology and law emerged to replace psychiatry as the main mental health profession in the criminal justice system. The psychologists who were devoted to the ideal of scientific practice contributed to promote actuarial approach as a method of balancing civil rights and public safety. By the early 1980s, scientific validity became equated with reliable, consistent assessment procedures based on statistical tables, entailing the standardization of expert judgment.

¹³¹ Peter Becker and Richard F. Wetzell, eds., *Criminals and Their Scientists: The History of Criminology in International Perspective* (New York: Cambridge University Press, 2006); Beirne, *Inventing Criminology*; Michel Foucault, *Abnormal: Lectures at the Collège de France, 1974-1975* (New York: Picador, 2003).

Chapter 4 Containing the Dangerous Body

Introduction

This chapter investigates psychological techniques for the surveillance and management of sex offenders. It focuses particularly on two techniques: actuarial risk assessment and psycho-physiological measurement. Risk assessment for sex offender regulation was first developed in the 1990s and has become established as the main approach to managing sex offenders. The language of risk serves as an overarching rationality that guides practices of sex crime control in terms of their targets, objectives, and techniques. Risk assessment instruments are a technology that incorporates this risk rationality, and puts it into practice. Psycho-physiological assessment of sex offenders has a longer history that traces back to the 1950s. While risk assessment instruments evaluate standardized risk factors that can be found in official documents, psycho-physiological assessment is designed to observe inner fantasies and desires by measuring bodily responses. Taken together, risk assessment and psycho-physiological assessment are intended to capture the past records and deviant desires of offenders at risk of reoffense.

In examining these psychological techniques, this chapter focuses on the production of knowledge about sex offenders and the role of this knowledge in producing the criminal subject. I attend to how specific *forms* of knowledge and *methods* for producing knowledge, as well as specific scientific claims, emerged as solutions to the question of social order in specific social and political configurations.¹ This focus on form and method helps us understand three

¹ Kurt Danziger, *Constructing the Subject: Historical Origins of Psychological Research* (Cambridge: Cambridge University Press, 1990); Rick Mayes and Allan V. Horwitz, "DSM-III and the Revolution in the Classification of Mental Illness," *Journal of the History of the Behavioral Sciences* 41, no. 3 (2005): 249-67; Jill G. Morawski, *The Rise of Experimentation in American Psychology* (New Haven: Yale University Press, 1988); Theodore M. Porter, *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life* (Princeton: Princeton University Press, 1995).

questions. First is the question of how risk has been shaped in specific settings. Risk has diverse forms, functions, and meanings that reflect the different political, institutional, and academic contexts in which it is articulated. Thus, this chapter attends to the specificity of risk by tracing how the practices and concepts of risk in current crime control efforts came into being and by examining the peculiar logic embedded in its form and method.

Second, a study of form and method is beneficial in exploring the connections between the scientific culture and the moral politics surrounding the regulation of problem populations. The “scientific” aspirations of psychological techniques do not merely provide technical answers to given questions, but have played a central role in orienting the field of sex offender management toward rational, technical solutions. The language of science lends credence to “evidence-based practices” that drive the current sex offender policy. In so doing, psychological techniques contribute to translating political questions such as civil liberty versus public safety into questions of scientific validity and objectivity. This chapter tries to answer the questions of how the moral politics surrounding sex offenders are embedded in these scientific methods and how the scientific methods enable the interpenetration of science and policy.

Third, an analysis of form and method helps address the question of subjectivity produced in the current regime of crime control. Sex offender management has revolved around classification of individuals into discrete groups subject to different levels of regulation. Risk assessments that employ statistical techniques constitute the main procedure for assigning sex offenders to different risk groups, which has significant impacts on the offenders’ lives. In so doing, risk assessments and psycho-physiological assessments produce particular kinds of criminal subjectivity. This chapter investigates how psychological methods have been designed in a way that has produced sex offender categories.

4.1. Numbers: Actuarial Risk Assessment

The effort to develop actuarial risk assessment instruments for sex offenders began in the 1990s and the instruments propagated during the 2000s. In the first part of this section, I discuss the rise of the risk principle in the aftermath of controversies over psychiatric expertise. Since the early 1980s, psychologists promoted the risk approach as a scientific method of balancing civil rights and public safety in order to overcome skepticism about dangerousness prediction and rehabilitation. In this process, the statistical method of risk assessment transformed the notion of dangerousness from imminent danger to long-term probabilistic risk. The next part examines the construction process of actuarial risk assessment tools. In the development process, psychologists made a deliberate choice to use a limited number of risk factors in order to meet institutional demands for efficiency and administrative ease. As a result, the risk assessment tools are composed of items that can be evaluated by reference to readily accessible official records. I argue that the assessment of risk has been structured by criminal justice practices embedded in crime statistics and the definition of offense and offender. The resultant risk assessment tools point to stranger offenders as the most dangerous group, which provides scientific credence to the sex offender management regime that targets stranger danger.

4.1.1. The Rise of the Risk Principle

In the aftermath of prison strikes and riots in the 1960s, Robert Martinson published a highly influential article on the effects of rehabilitation programs in 1974. Motivated to answer policy questions concerning prison reform, Martinson and his colleagues analyzed 231 studies published in the U.S. and other countries from 1945 through 1967. After reviewing those studies that reported the effects of various rehabilitation programs ranging from education and

vocational training, individual and group counseling, to transforming the institutional environment, Martinson concluded that “[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.”² This statement that “Nothing Works” made a catchphrase that encapsulated the pessimistic view about offender rehabilitation, which became prevalent by the mid-1970s and would last until the late 1980s. During this time period, efforts to treat and rehabilitate offenders were deemed ineffective and crime control policy turned to strengthening punishment.³

A number of commentators have pointed to sex offender laws as a key indicator of dominant tendencies in crime control: the decline of the rehabilitative regime and the rise of managerialism and populist punitiveness.⁴ By the early 1990s, however, interest in offender treatment began to be revived as risk approaches and new treatment techniques made their way into the field. While those authors above claimed the demise of the rehabilitative regime, other scholars pay attention to recent developments such as restorative justice, therapeutic justice, risk-needs model, and cognitive-behavioral therapy, which indicate that rehabilitative rationalities

² Robert Martinson, “What Works? – Questions and Answers about Prison Reform,” *The Public Interest* 35 (Spring 1974): 25 (emphasis in original).

³ Martinson, “What Works?”

⁴ Simon A. Cole, “From the Sexual Psychopath Statute to ‘Megan’s Law’: Psychiatric Knowledge in the Diagnosis, Treatment, and Adjudication of Sex Criminals in New Jersey, 1949-1999,” *Journal of the History of Medicine and Allied Sciences* 55, no. 3 (2000): 292-314; David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001); Bill Heberton and Toby Seddon, “From Dangerousness to Precaution: Managing Sexual and Violent Offenders in an Insecure and Uncertain Age,” *British Journal Criminology* 49, no. 3 (2009): 343-62; Mona Lynch, “Pedophiles and Cyber-predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation,” *Law and Social Inquiry* 27, no. 3 (2002): 529-66; Jonathan Simon, “Managing the Monstrous: Sex Offenders and the New Penology,” *Psychology, Public Policy, and Law* 4, no. 1 (1998): 452-67.

and practices persist and adapt to the changing policy environment.⁵ Especially, Kelly Hannah-Moffat emphasizes the flexibility of risk knowledges, which enables the revival of therapeutic interventions by incorporating techniques for transforming a criminal subject.⁶ Pat O'Malley also points to the possibility that the risk-needs approach provides sites where the rehabilitation professions pursue maintaining and furthering welfare-oriented treatment.⁷ To put it another way, what characterizes current crime control practices is less a rupture that makes correctional treatment obsolete than a new configuration where rehabilitation has evolved to conflict with and adapt to managerial and punitive penal practices.⁸

The risk approach emerged as part of these renewed efforts at rehabilitation. As discussed in chapter 3, by the mid-1970s it became received wisdom that dangerous criminal behavior could not be predicted with acceptable accuracy and that long-term hospitalization did not provide effective treatment to alter individuals' behavior. Against this backdrop of pessimism, the transition from dangerousness prediction to risk assessment was achieved through "re-marketing rehabilitation."⁹

In 1989, Don A. Andrews, a psychologist in Canada, published an article titled "Recidivism Is Predictable and Can Be Influenced: Using Risk Assessments to Reduce

⁵ Kelly Hannah-Moffat, "Criminogenic Needs and the Transformative Risk Subject," *Punishment and Society* 7, no. 1 (2005): 29-51; Steven Hutchinson, "Countering Catastrophic Criminology: Reform, Punishment and the Modern Liberal Compromise," *Punishment and Society* 8, no. 4 (2006): 443-67; Roger Matthews, "The Myth of Punitiveness," *Theoretical Criminology* 9, no. 2 (2005): 175-201; Gwen Robinson, "Exploring Risk Management in the Probation Service: Contemporary Developments in England and Wales," *Punishment and Society* 4, no. 1 (2002): 5-25; Robinson, "Late-Modern Rehabilitation: The Evolution of a Penal Strategy," *Punishment and Society* 10, no. 4 (2008): 429-45.

⁶ Hannah-Moffat, "Criminogenic Needs."

⁷ Pat O'Malley, *Crime and Risk* (Los Angeles: SAGE, 2010).

⁸ Robinson, "Late-Modern Rehabilitation."

⁹ *Ibid.*

Recidivism.”¹⁰ Putting forth the argument that countervailed the pessimism of the previous decades, Andrews, and his colleagues, James Bonta and R.D. Hoge, formulated the risk-need-responsivity principle. Their argument was that offenders could be effectively managed and treated by creating correctional settings according to three principles: “the management and treatment of offenders according to their risk levels (the risk principle), choosing appropriate targets of rehabilitative programming (the need principle), and employing styles and modes of treatment that are appropriate for offenders (the responsivity principle).”¹¹ Taken together, the risk-need-responsivity principle shifted the main question as to offender treatment and rehabilitation from whether treatment works to what treatment works for whom. In this way, the risk approach was promoted as a method of removing widespread skepticism about rehabilitation, promising effective management by selecting particular classes of offenders amenable to different levels of intervention.

Risk approaches gained acceptance in the general corrections literature in the early 1990s and extended to sex offender regulation by the early 2000s.¹² The risk principle has two elements: prediction and matching. Risk assessments are conducted to classify sex offenders into risk groups and to match each group to different levels of treatment programs and regulatory measures. The idea that the matching of risk and intervention levels could yield effective crime control is relatively new. During the previous years of “Nothing Works,” skepticism pervaded

¹⁰ Don A. Andrews, “Recidivism Is Predictable and Can Be Influenced: Using Risk Assessments to Reduce Recidivism,” *Forum on Corrections Research* 1, no. 2 (1989): 11-17.

¹¹ Andrews, “Recidivism Is Predictable,” 14; also, Don A. Andrews, James Bonta, and R.D. Hoge, “Classification for Effective Rehabilitation: Rediscovering Psychology,” *Criminal Justice and Behavior* 17, no. 1 (1990): 19-52; Andrews et al., “Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis,” *Criminology* 28, no. 3 (1990): 369-404.

¹² Robert J. McGrath et al., *Current Practices and Emerging Trends in Sexual Abuser Management: The Safer Society 2009 North American Survey* (Brandon, Vermont: Safer Society Press, 2010).

that offenders, especially those who committed serious offenses, were unresponsive to rehabilitative interventions. In other words, rehabilitation efforts could be effective only for those at lower risk. Andrews referred to this as the “casework paradox – services are great, as long as the client is not in difficult circumstances.”¹³ The proponents of the risk principle counterclaimed that more intense supervision and treatment was found to be effective in reducing recidivism among offenders at higher risk.

If there was to be effective matching, offenders at different risk levels should be identified with an acceptable validity. By the early 1990s, the belief that recidivism could not be accurately predicted gave way to the promise that mental health professionals could make reasonably accurate predictions.¹⁴ Mental health professionals attributed the change in their attitudes to the development of statistical techniques and risk assessment tools. However, a more fundamental change lay beneath the novel promise of accurate prediction, which was a newly refined conception of predictive accuracy.

Evidence of successful or unsuccessful predictions is not self-evident but involves interpretation influenced by socio-political culture. For example, in 1972 Harry L. Kozol, a psychiatrist, and his colleagues reported a 34.7 percent of recidivism among sex offenders diagnosed as dangerous. The authors interpreted this result as indicating reliable diagnoses.¹⁵ John Monahan, a then civil rights critic of dangerousness prediction, sent a letter to the editor of the journal, pointing out that a 34.7 percent of hit rate meant that mental health professionals were inaccurate in two out of every three predictions, which could not be called reliable or valid

¹³ Andrews, “Recidivism Is Predictable,” 14.

¹⁴ Douglas Mossman, “Assessing Predictions of Violence: Being Accurate About Accuracy,” *Journal of Consulting and Clinical Psychology* 62, no. 4 (1994): 783-92.

¹⁵ Harry L. Kozol, Richard J. Boucher, and Ralph F. Garofalo, “The Diagnosis and Treatment of Dangerousness,” *Crime and Delinquency* 18, no. 4 (1972): 371-92.

predictions.¹⁶ Arguing that Kozol's findings actually confirmed the professionals' inability to predict, Monahan stated that "if for every correct psychiatric prediction of dangerousness there are two incorrect ones, the right of the "false positives" to remain free of unnecessary incarceration becomes a central consideration."¹⁷

One of the differences between prediction studies in the 1970s and 1990s is whether they put an emphasis on false positives or false negatives. In the midst of the due process revolution, dangerousness prediction studies that undermined psychiatric authority in the 1970s focused on the rate of false positive. For example, the famous Baxstrom study conducted by Cocozza and Steadman reported approximately 80 percent of false positives. Based on this and other studies, the 1970s critics asked the question of whether prediction with so many false alarms could be justified in terms of civil rights issues. In contrast, later in the 1980s and 1990s, the proponents of the risk principle recast the accusations of inaccuracy by paying attention to the problem of false negatives. The question now was whether letting a 'false negative' out to commit a violent crime could be justified and perhaps it could be worse than confining a 'false positive.' From this perspective, an 80 percent of false positives meant a 20 percent of hit rate, which was not necessarily bad from the perspective of public safety.

By the time Andrews and other mental health professionals promoted the risk approach as a promising method of predicting and managing violent offenders, what had changed was the very meaning of predictability. Whereas 1970s studies required examiners to provide yes-or-no predictions and measured the proportion of correct predictions of dangerousness, later studies did not expect examiners to offer definite predictions. Rather, as discussed in Chapter 3, since Meehl

¹⁶ John Monahan, "Dangerous Offenders: A Critique of Kozol *et al.*," *Crime and Delinquency* 19, no. 3 (1973): 418-20.

¹⁷ Monahan, "Dangerous Offenders," 420.

forcefully argued that probabilistic predictions counted as scientific knowledge, yes-or-no predictions, or predictions with a probability of 0 or 1, became an unattainable dream revealing professional narcissism. Accordingly, advocates of the risk principle admitted that prediction mistakes were ineluctable. For example, Douglas Mossman, a forensic psychiatrist, wrote in 1995 that “the inherent nature of violent behavior, with its complex interplay of individual and environmental variables, makes it unlikely that very accurate predictions will soon be possible.”¹⁸ For the risk principle advocates, however, the inevitability of mistakes did not lead to the conclusion that prediction was a futile enterprise. Mossman instead argued that “because clinicians cannot avoid making mistakes, they have to choose what kind of mistakes they prefer to make.”¹⁹

This idea of balancing the two types of mistake – false positive and false negative – became “one of the essential features of violence predictions.”²⁰ In the early 1990s, Mossman proposed a new method of evaluating predictive accuracy in terms of the trade-offs between false positive and false negative. The method called “receiver operating characteristic” (ROC) analysis, initially developed during World War II in order to analyze radar signals, is designed to show the ratio of true positive rate to false positive rate at different cut-off scores in categorizing different risk levels. This method enables decision makers to choose different cut-off scores in risk

¹⁸ Douglas Mossman, “Dangerousness Decisions: An Essay on the Mathematics of Clinical Violence Prediction and Involuntary Hospitalization,” *University of Chicago Law School Roundtable* 2, no. 1 (1995): 136.

¹⁹ Mossman, “Assessing Predictions of Violence,” 790.

²⁰ John Monahan, *The Clinical Prediction of Violent Behavior* (Washington, D.C.: National Institute of Mental Health, 1981); Mossman, “Dangerousness Decisions,” 126.

assessment that satisfy an acceptable level of prediction mistakes in diverse contexts, while the absolute number of successful predictions has ceased to be an index of predictive accuracy.²¹

As ROC analysis has become the standard method of evaluating predictive accuracy, the notion of risk as well as that of predictability has changed. Unlike dangerousness prediction, the assessment of risk aims to search for the best balancing of predictive errors while admitting the inevitability of mistakes. The difference in the method of evaluation was linked to the different ideas of predicting future behavior. The dangerousness standard set by the court in the 1970s did not employ a probabilistic concept in a strict sense. For example, in *Lessard v. Schmidt* in 1972, the court required “a finding of *imminent* danger to oneself or others” to initiate civil commitment, where “dangerousness is based upon a finding of a *recent overt act*, attempt or threat to do substantial harm to oneself or another.”²² The requirement of a “recent overt act” indicating “imminent danger” meant that dangerousness could be determined based on actual, attempted, or threatened harm in the present, rather than by projecting long-lasting potentialities into the future. Thus, in some states, civil commitment statutes provided that a “clear and present danger of harm to others may be demonstrated by proof that the person made threats of harm and committed acts in furtherance of the threat to commit harm.”²³

In contrast, since Monahan called for the second generation of violent behavior prediction studies in the early 1980s, the development of actuarial risk assessment transformed the notion of risk as imminent danger to that of risk as probability. The STATIC-99, a risk

²¹ Mossman, “Assessing Predictions of Violence”; Mossman, “Dangerousness Decisions”; Douglas Mossman, Allison H. Schwartz, and Elise R. Elam, “Risky Business Versus Overt Acts: What Relevance Do ‘Actuarial,’ Probabilistic Risk Assessments Have for Judicial Decisions on Involuntary Psychiatric Hospitalization?” *Houston Journal of Health Law and Policy* 11, no. 2 (2011): 365-454.

²² *Lessard v. Schmidt*, 349 F.Supp. 1078 (E.D. Wisconsin 1972) (emphasis added).

²³ Mossman, Schwartz, and Elam, “Risky Business Versus Overt Acts,” 381.

assessment tool for sex offenders, provides numerical probabilities of future offense in a specified span of time. For example, if an offender scored a “4” on the STATIC-99, the result means that the offender “is estimated as having a 26% chance of sexual reconviction in the first 5 years of liberty, a 31% chance of sexual reconviction over 10 years of freedom, and a 36% chance of sexual reconviction over 15 years in the community.”²⁴ Such estimates of risk indicate a degree of future possibility, which is completely different from an imminent danger that means, for example, “an individual with a history of child molesting being discovered alone with a child and about to engage in a ‘wrestling game.’ ”²⁵ The development of actuarial risk assessment was underpinned by the idea of balancing false positives against false negatives through providing probabilistic estimates of risk instead of definite yes-or-no predictions. The risk profile produced by the actuarial assessment projects probability beyond the near future, thus enabling precautionary measures against long-term risk, as opposed to preventing imminent danger.

4.1.2. Constructing Assessment Instruments for Evidence-Based Practices

Risk assessment instruments specifically designed for sex offenders began to be developed in the 1990s.²⁶ Since Washington State enacted post-sentence civil commitment for

²⁴ Andrew Harris et al., *STATIC-99 Coding Rules Revised*, 2003, accessed November 7, 2011, http://www.static99.org/pdfdocs/static-99-coding-rules_e.pdf, 57.

²⁵ *Ibid.*, 16.

²⁶ Risk studies for the general correctional population began to be developed in the 1980s and several risk assessment tools were put to use since the 1990s, such as the Psychopathy Checklist-Revised, the Level of Service Inventory-Revised, and the Violence Risk Appraisal Guide. Don A. Andrews and James Bonta, *LSI-R: The Level of Service Inventory-Revised User's Manual* (Toronto: Multi-Health Systems, 1995); Robert Hare, *The Hare Psychopathy Checklist-Revised*, 2nd ed. (Toronto: Multi-Health Systems, 2003); Grant T. Harris, Marnie E. Rice, and Vernon L. Quinsey, “Violent Recidivism of Mentally Disordered Offenders,” *Criminal Justice and Behavior* 20, no. 4 (1993): 315-35. These instruments provide standardized scales that indicate the possibility of an individual’s reoffending, which includes sexual reoffending. One of the issues involved here is whether sexual offending is

sex offenders in 1990, nineteen states followed suit. These statutes, which are collectively called sexually violent predator (SVP) laws, provide that sex offenders who are considered too dangerous to be at large should be committed to treatment programs upon release from prison. Whereas criminal confinement in prison constitutes punishment for past unlawful acts, it is a future possibility of reoffense that determines civil commitment under SVP laws. Since the SVP program involves the categorization and selection of offenders according to the level of risk, it became the initial site where demands for the risk assessment of sex offenders were raised.

Evaluations of sex offenders in terms of eligibility for SVP programs are composed of various documents and psychological tests. Among them, standardized risk assessments are conducted as a necessary evaluation procedure. The standards developed by the Association for the Treatment of Sexual Abusers (ATSA) require that SVP evaluations include actuarial risk assessments to estimate risk for recidivism, although they leave practitioners to choose among different instruments available.²⁷ By the late 2000s, most SVP evaluators (95.1%) reported that they used actuarial risk assessments always or most of the time.²⁸

The development of sex offender regulations during the 1990s and 2000s propagated the use of risk assessment instruments. In 1994, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act established national guidelines for sex offender

similar to other criminal behavior or it is a distinct type of offence committed by a particular type of people. As new sex offender laws began to be implemented in the 1990s, researchers in the area of sex crime control set out to construct risk assessment tools for sex offenders on the assumption that sexual offending has different risk factors than other violent crimes. While the instruments above evaluate a “criminal lifestyle,” exemplified by anti-social personality and psychopathy, sex offender risk assessments focus on “sexual deviance,” as well as general risk factors.

²⁷ Association for the Treatment of Sex Abusers, “Civil Commitment of Sexually Violent Predators,” 2001, accessed March 9, 2011, <http://www.atsa.com/ppcivilcommit.html>.

²⁸ Rebecca L. Jackson and Derek T. Hess, “Evaluation for Civil Commitment of Sex Offenders: A Survey of Experts,” *Sexual Abuse: A Journal of Research and Treatment* 19, no. 4 (2007): 425-48.

registration. Although the federal government recommended categorization of sex offenders based on the seriousness of offense, states are allowed to manage offenders according to the level of risk, regardless of offenses. Approximately 20 states employ risk-based management systems. In these states, a sex offender management agency decides which offenders are at higher risk of reoffense so that they need to be subject to enhanced registration and community notification requirements.²⁹ As a tiered risk-management system was put in operation, the use of risk assessment tools spread throughout the field as well as within SVP programs. Risk became an organizing principle on which decision making centers at many points such as sentencing, facility assignment, release from prison, screening sex offenders for post-sentence civil commitment, and assignment of level for community notification and post-release supervision in the community.

The most widely used risk assessment instrument is the Static-99, followed by the Rapid Risk Assessment for Sexual Offense Recidivism (RRASOR) and the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R). The Static-99 is a combination of the risk factors drawn from two instruments: the RRASOR, which was developed by R. Karl Hanson of the Solicitor General Canada, and the Structured Anchored Clinical Judgement – Minimum (SACJ-Min), which was developed by David Thornton of Her Majesty’s Prison Service, England.

Compiling statistical data concerning recidivism rates of sex offenders constitutes the first step to constructing an actuarial risk assessment instrument. The assessment of dangerousness of sexual offenders requires information concerning the overall recidivism rate of

²⁹ Brandy L. Blasko, Elizabeth L. Jelic, and Cynthia Calkins Mercado, “Are Actuarial Risk Data Used to Make Determinations of Sex Offender Risk Classification? An Examination of Sex Offenders Selected for Enhanced Registration and Notification,” *International Journal of Offender Therapy and Comparative Criminology* 55, no. 5 (2011): 676-92.

sexual offenders and information about which factors increase or decrease a particular sexual offender's recidivism risk. At this stage, the developers of the RRASOR, the Static-99, and the MnSOST-R relied on existing recidivism studies sets instead of generating new data.

Crime statistics has different implications in terms of crime control, depending on the context where the statistics are produced and utilized. Since the actuarial approach emerged in response to criticism of the clinical judgment of dangerousness, the role of statistics changed along with its logic and objective. Before the advent of actuarial assessments, statistical studies of sex offender recidivism aimed to examine the efficacy of treatment. For instance, five out of six studies that Hanson analyzed for the purpose of identifying risk factors were conducted in treatment settings.³⁰ In the original context, recidivism studies had implications at the policy level, such as the question of whether treatment is effective in reducing crime. During the late 1970s and early 1980s, sex offender policies varied among jurisdictions, especially in terms of the priority of mental health treatment. This period was characterized by a vacuum of guiding principles in corrections as the rehabilitative ideal was crumbling but a new principle to replace it had yet to come.³¹ Many jurisdictions that had provided mental health treatment for sex offenders diminished the service while others newly adopted treatment approaches, which generated wide inconsistency across jurisdictions. Recidivism studies were conducted in this context in order to provide an answer to policy questions by statistically examining the effectiveness of sex offender programs.³²

³⁰ R. Karl Hanson, *Development of a Brief Actuarial Risk Scale for Sexual Offense Recidivism* (Ottawa: Department of the Solicitor General of Canada, 1997).

³¹ Garland, *Culture of Control*; Martinson, "What Works?"

³² Lita Furby, Mark R. Weinrott, and Lyn Blackshaw, "Sex Offender Recidivism: A Review," *Psychological Bulletin* 105, no. 1 (1989): 3-30.

In contrast, the actuarial risk assessment that came later utilized the recidivism studies for the purpose of evaluating an individual's risk of reoffence in order to sort out dangerous offenders. Constructing actuarial risk assessment instruments requires recidivism statistics from which contributing factors to reoffence can be drawn. Whereas whether treatment could change criminal behaviors was the main research question in the previous recidivism studies, actuarial risk assessments take advantage of those studies in order to identify unchangeable traits of sex offenders that are associated with recidivism. To put it another way, the main contributing factor to crime under examination shifted from institutional practices to individual traits. Recidivism studies, which had problematized the system by debunking the psychiatric authority on dangerousness prediction, now became a prerequisite that enabled offender management by means of risk assessment.

When the issue ceased to be about evaluating a specific treatment program, the evaluation of offenders in order to match them with regulatory measures demanded data sets that covered a large number of offenders who were dispersed among different institutions. The developers conducted meta-analyses of previous recidivism studies in order to gather large enough data sets to increase the predictive power. To take an example of the RRASOR, the predecessor of the Static-99, Hanson and his colleagues conducted a statistical summary of 87 studies on 61 different data sets. These studies include published articles, government reports, unpublished program evaluations, and raw data sets from six different countries ranging from 1943 to 1995. This method of collecting data can be problematic because legal definitions of sex offenses and law enforcement practices widely vary from jurisdiction to jurisdiction. Researchers involved in the field, including the developers of actuarial risk assessment tools, recognized the problem

inherent in generating a single statistical table based on recidivism studies from a range of settings.

One way to deal with this problem was to treat those elements as “extraneous factors.”³³ Hanson followed Lita Furby and her associates’ recommendation that recidivism studies adopt “experimental design principles.”³⁴ The first and foremost principle of experimental design is to control for extraneous factors in order to evaluate the “true” effect of variables under examination. The method that Hanson and Bussière chose in order to control for differences in definitions of sex offence and recidivism, follow-up periods, and local criminal justice practices was to compare recidivism rates of different groups within a single study. By calculating correlations among potential risk factors and recidivism within each study and then combining the correlations across studies, Hanson believed that “extraneous factors” could be controlled.³⁵ The resultant risk assessment instrument was believed to show the difference between likely recidivists and non-recidivists. The assumption is that risk assessments using this tool are not affected by, or minimize at least, the effect of local differences.³⁶

In constructing the RRASOR, Hanson and his colleagues selected the risk factors by three criteria: administrative ease, differentiating capacity, and the possibility of individualization. Based on the data of 28,972 sexual offenders, Hanson examined 69 potential predictors of sexual recidivism, 38 predictors of nonsexual violent recidivism, and 58 predictors of general (any) recidivism. Among those predictors, Hanson identified potential predictors to be

³³ Ibid.

³⁴ Ibid., 6; Hanson, *The Development of a Brief Actuarial Risk Scale*.

³⁵ R. Karl Hanson and Monique T. Bussière, “Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies,” *Journal of Consulting and Clinical Psychology* 66, no. 2 (1998): 348-62.

³⁶ However, researchers in the field agree that validation studies need to be completed before applying an actuarial risk assessment instrument developed on different population samples.

considered further: prior sex offenses, any prior non-sexual offenses, any stranger victims, any non-related victims, any male victims, and never married. Hanson then selected seven recidivism studies representative of settings where sex offender risk assessments are often used, such as correctional institutions, specialized treatment programs, and secure mental health facilities. Based on these development samples, potential predictors were evaluated in terms of the correlation with recidivism. Among the factors that satisfy the criteria of administrative ease, Hanson selected four variables based on the calculation of correlations among potential risk factors and recidivism: prior sex offenses, age at release less than 25, male victims, and non-related victims. These four risk factors comprise the RRASOR.³⁷

Actuarial risk assessment has been developed in an attempt to promote evidence-based practices, and for that very reason, it has the feature of science in policy. As described above, statistical and probabilistic calculations were the main method that guided the construction of risk assessment instruments. At the same time, the institutional context where the instrument was developed and would be used shaped risk assessments in a significant way. Sex offender management is distinct from the former sex crime control practices in that it extends to all offenders including those in the community. This new regime of management demands an effective and efficient method for screening a large number of offenders into manageable groups as well as singling out individuals for special attention. As the scope and intensity of criminal supervision increased, policy-makers and professionals who worked in the field called for a standardized assessment tool in order to achieve a uniform and less expensive procedure for classifying offenders. Actuarial risk assessment instruments were developed in this context for

³⁷ Hanson, *Development of a Brief Actuarial Risk Scale*; R. Karl Hanson and Monique T. Bussière, *Predictors of Sexual Offender Recidivism: A Meta-Analysis* (Ottawa: Department of the Solicitor General of Canada, 1996).

the purpose of routine risk assessments rather than comprehensive assessments for a small number of special cases.

Efficiency and resources availability were two major considerations that dictated the development process and application of the instruments. Hanson and Epperson intended the RRASOR and the MnSOST-R to be conducted by correctional personnel as well as trained professionals in risk assessment. In an attempt to provide a tool that could be used in routine assessment for an increasing number of sex offenders, the developers aimed at constructing a “brief, efficient actuarial tool.”³⁸ During the assessment, the risk evaluator does not have to interact with the offender, which constituted the main element of dangerousness prediction.³⁹ Instead, the task of the risk evaluator is to gather the information required to assess risks and fill out the form as instructed in the manual. The resultant assessment instruments were designed to facilitate management of sex offenders on a routine basis by employing standardized procedures, whereas the former dangerousness prediction relied on expert discretion.⁴⁰

One of the ways that the consideration of administrative ease shaped risk assessments was through the selection of risk factors. Risk assessments do not rely on the expert to generate knowledge about an offender under examination but instead utilize by and large existing information that can be found in official documents. In order to achieve efficiency and administrative ease, risk assessments take into account particular kinds of information, that is,

³⁸ Hanson, *Development of a Brief Actuarial Risk Scale*, 4.

³⁹ Stephen J. Pfohl, *Predicting Dangerousness: The Social Construction of Psychiatric Reality* (Lexington, MA: Lexington Books, 1978).

⁴⁰ “Expert knowledge is properly seen not as a property of professionals who have it but rather as a property of the institutional communication systems through which professionals interact. It is through such systems that expert knowledge becomes standardized and robust enough to use in routine diagnosis, classification, and treatment decisions by professionals.” Richard V. Ericson and Kevin D. Haggerty, *Policing the Risk Society* (Toronto: University of Toronto Press, 1997), 104.

assessable and accessible information. Given the fact that actuarial risk assessment involves statistical calculations, it is imperative to select information that can be quantified. In this regard, risk assessment instruments are composed of items that the evaluator can encode into numbers, such as prior offences and the type of victims. Also, Hanson and Epperson deliberately chose risk items that can be evaluated on the basis of readily available information such as a criminal history.

4.1.3. Science in Policy and the Criminal Subject

Statistical calculations for the purpose of determining recidivism predictors are not a straightforward process. Above all, the enterprise of constructing risk assessment tools inherited the weaknesses of recidivism studies. When the task was to differentiate likely recidivists from non-recidivists based on existing data sets, the quality of the previous studies became a crucial issue. In this regard, sex offence recidivism studies as late as around 1990 turned out problematic in many respects. Among them, underreporting of sex crime has long been an obstacle to determining the frequency of occurrence in real life. It is well known that the reporting rates of sex crime are extremely low, compared to other crimes.⁴¹ The fact that many studies define recidivism as reconviction is also a potential problem. For instance, of 315 rapes reported to the police in Seattle, Washington, in 1974, only 15 resulted in conviction.⁴² Considering the discordance among reporting, arrest, and conviction rates, most recidivism studies using administrative records have limitations in capturing sex crime patterns as occurring in reality.

⁴¹ It was estimated less than 10% of rape assaults were reported to the police by the early 1980s. Diana E.H. Russell, "The Prevalence and Incidence of Forcible Rape and Attempted Rape of Females," *Victimology* 7, no. 1-4 (1982): 81-93.

⁴² Furby, Weinrott, Blackshaw, "Sex Offender Recidivism," 9.

In that regard, it can be said that recidivism data reflects the behavior of the criminal justice system as well as the criminal behavior of offenders. Risk assessments that rely upon the existing criminal data are only able to identify risks based on crimes that have come to the attention of the criminal justice system. Most recidivism studies that are conducted to inform policy decisions use official administrative records, which ineluctably register a variety of institutional factors that come into play in finding someone guilty, such as “(a) law enforcement practices affecting the probability of apprehension, (b) district attorney policies in prosecuting sex offenders, (c) the nature and amount of plea bargaining, and (d) statutes pertaining to the definition and disposition of sex crimes.”⁴³

The structure of crime data, however, shapes risk assessment instruments in a more fundamental way. Risk assessments are a policy tool that “articulates standards of acceptable risk and distributes risks.”⁴⁴ Here, the risk of recidivism by known offenders is of most concern in sex offender management, which is related to the issue of how to define recidivism. The meaning of recidivism varies, which includes arrest, charge, conviction, and parole revocation. As mentioned above, sex crime data show a particularly high degree of discordance among those different measures of recidivism. Accordingly, recidivism rates, and by extension, the risk scale can be different depending on which definition is adopted.

The Static-99 and the RRASOR define recidivism in terms of conviction. Hanson and Bussière found in their meta-analysis that strangers had the highest recidivism rates, which was followed by acquaintances and family members in order.⁴⁵ Correspondingly, the RRASOR and the Static-99 include the risk factors of having a stranger victim and of having an extrafamilial

⁴³ Ibid., 6.

⁴⁴ Ericson and Haggerty, *Policing the Risk Society*, 95-6.

⁴⁵ Hanson and Bussière, “Predicting Relapse.”

victim, while an offence against a family member does not count as a risk factor. While crime incidence statistics have shown that the majority of sex offences occur between family members or acquaintances, the risk assessment scale implies that the home and other familiar environments are relatively safe.

One of the issues leading to these conflicting implications is the lack of correspondence among the numbers of criminal episodes, victims, charges, and convictions. For example, it is well known that many cases of incest are chronic and involve a single victim but a large number of criminal episodes. These cases often result in one conviction, which contributes to the low estimate of recidivism rates for incest offenders. As a corollary, an offender who committed two offences against two stranger or unrelated victims is assigned to a higher risk level, whereas incest offenders over the age of 25 with no prior conviction score '0' on the RRASOR, irrespective of the duration of abuse. The actuarial risk assessment instrument has been developed in a particular institutional context where controlling recidivism by the same offender is of more concern than incidence. The underlying belief is that risk to society concerns the number of victims and that risk can be attributed to individual offenders rather than circumstances where the combination of close social relations and unequal power relations enables those offenders to access victims.

The construction process of the MnSOST-R shows that data sets collected in a particular institutional context determine the selection of risk factors. Epperson used the data of sex offenders incarcerated in Minnesota in order to identify factors predictive of recidivism. The development sample for the MnSOST-R was composed of two categories: sex offenders with a history of extrafamilial child molestation or rape of related or unrelated victims. According to the definition of rape in the development process, the sample did not include those who had an

exclusive history of intrafamilial offenses that did not involve vaginal or anal penetration. A rationale behind this sample choice was that “this population presented fewer concerns regarding three potential decisions that risk assessments might inform: level of supervision upon release, level of community notification, or possible referral for commitment.”⁴⁶ As a result, the MnSOST-R contains the stranger victim item, while showing limited predictive accuracy for “intrafamilial fondlers.”⁴⁷

In risk management, a question arises as to which factors have the most valid predictive power. There has been a consensus among researchers and practitioners in the field that the most powerful predictive risk factor for future crimes is past crimes. While the risk approach to crime control claims to provide preventative measures instead of reacting to what happened, the method of risk assessment involves the statistical calculation of crime data accumulated in the criminal justice system. The prediction by reference to the past is a defining feature of what is called “static” risk assessment. Static risk assessment tools, such as the Static-99, are composed of risk factors frozen in time, and by definition, cannot be changed over time.

Such static risk assessment has raised concern among researchers and practitioners working with sex offenders. For one thing, the “static” nature cannot enable psychologists to trace and assess improvement of sex offenders, especially in treatment settings. For another, there has been criticism, and even the developers of those tools acknowledge this flaw, that most of the static assessment tools are of limited utility because they leave out some important risk

⁴⁶ Douglas L. Epperson et al. *Minnesota Sex Offender Screening Tool-Revised (MnSOST-R) Technical Paper: Development, Validation, and Recommended Risk Level Cut Scores*. December 2003. Accessed October 29, 2013, <http://rsoresearch.files.wordpress.com/2012/01/ia-state-study.pdf>, 10.

⁴⁷ Grant Duwe and Pamela J. Freske, “Using Logistic Regression Modeling to Predict Sexual Recidivism: The Minnesota Sex Offender Screening Tool-3 (MnSOST-3),” *Sexual Abuse: A Journal of Research and Treatment* 24, no. 4 (2012): 356.

factors, one of which is “sexual deviance.” I turn to the psycho-physiological assessment of sexual deviance in the next section.

4.2. Body: Psycho-Physiological Assessment

Penile plethysmography (PPG), or phallometry as it is often called, is the most widely used method for assessing deviant sexual preferences. It is a monitoring device that is designed to measure change in the size of a penis when the subject is exposed to sexual material. Despite continuing debates with respect to its validity and ethical issues, proponents of this controversial method have claimed that it is the most effective way to assess sex offenders especially when an offender is in denial of his deviant desire for children. Beneath this claim of effectiveness lies an assumption that the body reveals the truth that the untrustworthy subject tries to conceal. This section analyzes this particular configuration of the body, desire, and behavior that penile plethysmography both builds on and produces in examining sex offenders.

4.2.1. Measuring Sexual Deviancy

Penile plethysmography was developed in the early 1950s by Czechoslovak psychiatrist Kurt Freund, with the aim of diagnosing homosexual men. Adopting the belief that homosexuality was a type of neurosis but rejecting psychoanalysis as a treatment method, Freund turned to physiological methods for differential diagnosis between homosexuality and heterosexuality. After several attempts to measure changes in breathing and heart rate while showing the subject pictures of nude males and females, Freund concluded that the volume of a penis was the most objective indicator of sexual preferences. Stemming from the Wundtian tradition of psychophysics, the initial device was adapted from finger plethysmography, which

was designed to measure volume changes of a finger. Freund used this device for the purposes of identifying draft dodgers who claimed to be homosexual as well as “treating” homosexuality at the psychiatric university hospital in Prague.⁴⁸ Later Freund emigrated to Canada and settled at the Clarke Institute of Psychiatry where Freund and his colleagues pioneered the studies of “sexual deviance” including gender nonconformity and pedophilia.⁴⁹

The penile plethysmograph measures penile tumescence as the subject is presented with slides, audio-tapes, or video-tapes depicting various sexual stimuli. The magnitude of the individual’s erection response to a certain category of stimuli is considered to be an indication of his sexual interest in that behavior or in persons of that age and gender. PPG has two methods for measuring sexual arousal. Freund’s plethysmograph, which is called the “volumetric method,” consists of an airtight glass tube that completely encloses the penis. When the penis becomes engorged with blood during arousal, the volume of air inside the tube decreases. The tube is wired to a machine that allows researchers to measure changes in air volume, which in turn allows for the measurement of minute changes in penile tumescence. In 1966, John Bancroft devised the “circumferential method.” Bancroft’s device consists of a strain gauge – essentially a silicone rubber ring – that fits around the penis. The gauge is filled with mercury or indium gallium and is plugged with electrodes, which allows a weak electrical current to be passed

⁴⁸ Kurt Freund, “Reflections on the Development of the Phallometric Method of Assessing Erotic Preferences,” *Annals of Sex Research* 4, no. 3-4 (1991): 221-28. “Curing” homosexuals involved aversion therapy which required administering an electric shock to subjects whose plethysmographic tests indicated arousal to homoerotic stimuli.

Jason R. Odeshoo, “Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders,” *Temple Political and Civil Rights Law Review* 14, no. 1 (2004): 7.

⁴⁹ David M. Friedman, *A Mind of Its Own: A Cultural History of the Penis* (New York: Free Press, 2001).

through the ring. Changes in the size of the penis cause corresponding changes in the ring, which are then recorded electronically.⁵⁰

PPG is currently used quite widely in sex offender regulation in the United States and Canada. The procedure is mostly used for identifying those in need of special therapy, evaluating treatment effectiveness, and predicting risk for recidivism. Although there have been constitutional challenges to PPG testing on the grounds that it violates the right to privacy, it is legally sanctioned in many jurisdictions to impose periodic PPG examinations as a condition of parole or probation as well as a requirement of in-prison treatment.⁵¹ The percentage of sex offender treatment programs using PPG has ranged from about 25 to 35 percent over the last two decades.⁵² Test results are shared by treatment service providers, who in most cases are psychologists, and criminal justice system agencies.

While PPG testing for sex offenders has shown consistent rates of use for the last two decades among treatment programs, the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association cautioned about the use of PPG in clinical settings due to its questionable validity and reliability.⁵³ In legal settings as well, phallometric assessments are not admitted as evidence to prove the guilt or innocence of a

⁵⁰ J.H.J. Bancroft, H. Gwynne Jones, and B.R. Pullan, "A Simple Transducer for Measuring Penile Erection," *Behaviour Research and Therapy* 4, no. 3 (1966): 239-41.

⁵¹ While the courts have found it constitutional to require convicted offenders to undergo PPG testing, PPG examinations are rarely administered to the accused. It is in part due to the fact that constitutional rights of the convicted are not protected to the same extent as the rights of the accused whose guilt has not been proven. Odeshoo, "Of Penology and Perversity."

⁵² McGrath et al., *Current Practices*.

⁵³ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV*, 4th ed. (Washington, DC: American Psychiatric Association, 1994).

defendant.⁵⁴ Besides continuing controversy and disagreement as to the scientific validity of PPG, commentators raised concern about the lack of standardization in PPG examinations.⁵⁵ The question is then how PPG continues to be used in sex offender regulation despite the fact that it has not achieved the acceptable level of standardization and validity. In order to answer this question, the next section examines the science and theoretical assumptions behind PPG testing.

4.2.2. The Science behind PPG

Penile plethysmography is currently used for two purposes with respect to sex offender management: categorization and prediction. The main purpose of PPG is sorting out those who have deviant sexual desires from other sex offenders rather than distinguishing sex offenders from non-offenders. PPG is the most widely used method for identifying genuine pedophiles. Pedophilia refers in technical terms to “the erotic *preference* for prepubescent children,” as distinguished from the criminal *behavior* that the subject displays. There is a consensus among mental health professionals working with sex offenders that not all sex offenders with child victims have pedophilia.⁵⁶ The argument is that there are subgroups of child sex offenders who act on their deviant sexual preferences for children, as opposed to “situational” offenders who choose children as “substitute sexual objects” when unable to find “appropriate” partners due to

⁵⁴ Odeshoo, “Of Penology and Perversity.”

⁵⁵ James G. Barker and Robert J. Howell, “The Plethysmograph: A Review of Recent Literature,” *Bulletin of the American Academy of Psychiatry and the Law* 20, no. 1 (1992): 13-25; Grant T. Harris and Marnie E. Rice, “The Science in Phallometric Measurement of Male Sexual Interest,” *Current Directions in Psychological Science* 5, no. 5 (1996): 159; Richard J. Howes, “A Survey of Plethysmographic Assessment in North America,” *Sexual Abuse: A Journal of Research and Treatment* 7, no. 1 (1995): 9-24.

⁵⁶ W.L. Marshall and M.M. Christie, “Pedophilia and Aggression,” *Criminal Justice and Behavior* 8, no. 2 (1982): 145-58.

their unfavorable situations.⁵⁷ In this vein, the proponents of PPG have claimed that it is crucial to distinguish different motivations behind crimes of apparently the same nature. As the objective of PPG assessment is defined in terms of identifying those with deviant preferences, it becomes impossible to determine deviant desires by reference to outward behavior.

A large body of research literature has been produced on the scientific validity of PPG, in which the two purposes of categorization and prediction are discussed in terms of discriminant validity and predictive validity, respectively. Validity in the technical context means the extent to which a procedure measures what it purports to measure. Unlike other scientific areas where objects to be measured are relatively easy to define and observe, it is typical of psychological studies of mental process that delineating an object to be studied presents a considerable challenge to researchers. It is not only the question of defining an object but involves the question of how to confirm that the measurement correctly targets the object.⁵⁸

Measuring sexual desires requires the transformation of intangible phenomena into observable signals, which raises the question of which signal best represents sexual desire. However, the very fact that the phenomena are impalpable and amorphous makes the selection of signals problematic because there is no method of observation independent of the measurement itself. When a phenomenon is not susceptible to direct observation, against which a measurement method can be validated, researchers have to determine the validity by reference to other methods of measurement, which in turn need to be validated. Moreover, establishing validity requires as a precondition, and entails in some cases, the existence of the object, deviant sexual

⁵⁷ Kurt Freund et al., "The Female Child as a Surrogate Object," *Archives of Sexual Behavior* 2, no. 2 (1972): 119-33; Michael C. Seto, Martin L. Lalumière, and Michael Kuban, "The Sexual Preferences of Incest Offenders," *Journal of Abnormal Psychology* 108, no. 2 (1999): 267-72.

⁵⁸ Jill G. Morawski, *The Rise of Experimentation in American Psychology* (New Haven: Yale University Press, 1988).

preferences in this instance. In regards to discriminant validity, PPG is predicated upon the idea that different types of sexual desire can be distinguished and attributed to specific groups of individuals. Sexual desires are, however, elusive and constantly in flux, which creates variations over time within an individual as well as among individuals. In this regard, the measurement of deviant sexual desires involves a theoretical assumption that such types of desire exist as discrete entities that belong to certain individuals.

The concept of “preference” is a hypothetical construct rather than an entity that exists in an observable form. PPG is a device that renders the hypothetical construct visible in the form of bodily change through the mediation of fantasies. Sexual fantasies are considered to be the behavior most closely related to sexual preferences.⁵⁹ In other words, fantasy is an unobservable behavior that the subject creates in his mind through mental operations. When a fantasy, a voluntary behavior by definition, leads to sexual arousal, it leads in turn to physiological responses in the penis. Proponents claim that penile tumescence is an involuntary reaction to sexual arousal, and thus provides the most truthful indicator of what happens in the subject’s mind. Once brought to the surface of the body, sexual preferences that are rendered visible undergo a further step of transmitting the bodily signals to the reading machines through electronic devices attached to the body. An assemblage of inscription devices renders detected bodily change legible in a numeric form that can be analyzed and compared both among and within individuals. In this way, PPG enables psychologists to fathom the inner space of the subject that is attainable neither through the subject’s history nor the speech of the subject himself who is often in denial.

⁵⁹ Harris and Rice, “Science in Phallometric Measurement,” 156.

Calculating risks for sex offenders based on the measurement of penile tumescence is never straightforward but involves a considerable degree of theoretical assumption. PPG rests upon a multilayered chain of reasoning that connects visual-auditory stimuli, penile erection, sexual arousal, sexual fantasy, sexual preferences, and future behavior, each step of which can be disrupted by theoretical disagreements and practical difficulties. First of all, penile erection is a physiological response, which is not always interchangeable with sexual arousal.⁶⁰ Furthermore, even under circumstances deliberately designed to elicit sexual arousal, a penile response to a particular type of sexual material does not necessarily determine the content of a sexual fantasy that the subject creates in his mind in response to the stimuli. This is so because material the subject is presented with comprises a number of elements, and thus it is not obvious which element of the rich material the subject responds to.⁶¹ As a corollary, arousal can be a questionable indicator of sexual preferences, setting aside the question of whether such preferences exist as fixed categories.

Given the complexity involved in the physiological mechanism of sexual arousal, there has been disagreement as to the procedures of PPG examinations. A crucial issue in this regard is whether the volumetric method and the circumferential method yield significantly different results. Although some comparative research found that the volumetric method was more accurate, researchers who espoused the use of the circumferential method argued that the two methods only produced slight differences to the extent that they could be considered

⁶⁰ Richard D. McAnulty and Henry E. Adams, "Validity and Ethics of Penile Circumference Measures of Sexual Arousal: A reply to McConaghy," *Archives of Sexual Behavior* 21, no. 2 (1992): 177-86.

⁶¹ Gene G. Abel et al., "Measurement of Sexual Arousal in Male Homosexuals: The Effect of Instructions and Stimulus Modality," *Archives of Sexual Behavior* 4, no. 6 (1975): 623-29; D.R. Laws, "The Assessment of Dangerous Sexual Behaviour in Males," *Medicine and Law* 3 (1984): 127-40.

equivalent.⁶² Other researchers such as Nathaniel McConaghy, C.M. Earls, and W.L. Marshall took issue that the volumetric device was more accurate in assessing sexual preferences. The gist of their argument was that the volumetric device was more sensitive in measuring the relative degree of immediate penile responses to different types of stimuli. As the onset of tumescence entails the rapid lengthening of the penis, the diameter of the penis decreases before a subsequent increase, which results in a reverse relation between the volumetric and circumferential measures during the initial stage of arousal. Because of this, the circumferential method requires a longer duration of stimulus exposure than the volumetric method, which McConaghy, Earls, and Marshal argue leads to the incapability of observing the onset stage of erectile responses in the circumferential measures.⁶³ Despite the opposition that it is crucial to measure the onset of responses in determining sexual preferences, the majority of practitioners use the circumferential method because of its low cost and convenience.⁶⁴

⁶² D.R. Laws, "A Comparison of the Measurement Characteristics of Two Circumferential Penile Transducers," *Archives of Sexual Behavior* 6, no. 1 (1977): 45-51; McAnulty and Adams, "Validity and Ethics."

⁶³ Christopher M. Earls and William L. Marshall, "The Simultaneous and Independent Measurement of Penile Circumference and Length," *Behavior Research Methods and Instrumentation* 14, no. 5 (1982): 447-50; Nathaniel McConaghy, "Validity and Ethics of Penile Circumference Measures of Sexual Arousal: A Critical Review," *Archives of Sexual Behavior* 18, no. 4 (1989): 357-69.

⁶⁴ Kurt Freund, Ron Langevin, and David Barlow, "Comparison of Two Penile Measures of Erotic Arousal," *Behaviour Research and Therapy* 12, no. 4 (1974): 355-59; Nathaniel McConaghy, "Measurements of Change in Penile Dimensions," *Archives of Sexual Behavior* 3, no. 4 (1974): 381-88.

4.2.3. Faking and the Suspicious Criminal Subject

A factor that undermines the validity of the circumferential measures is the higher possibility for an examinee to control his penile responses when exposed to stimuli for a longer duration.⁶⁵ This issue of faking conjures up the deceitful criminal that PPG attempts to see through. In the assessment of sex offenders, self-reports by offenders have been found to be unreliable because they have interests in avoiding criminal sanctions. In other cases, many sex offenders are in denial due to unconscious repression. When confronting an untrustworthy subject, it is claimed that PPG is useful in that penile tumescence is an involuntary reaction to sexual arousal, and thus provides the most truthful indicator of what happens in the subject's mind. Moreover, PPG researchers boast that the plethysmograph is capable of measuring changes in tumescence long before the subject himself becomes aware of them. In other words, the technology knows the subject better than himself. It is very rare for a subject to become fully aroused during an examination. Instead, an increase of about forty percent is considered to indicate a high degree of attraction.⁶⁶

However, the possibility of voluntary control undermines the validity of PPG that rests upon the idea of involuntary erection. The issue of faking has repeatedly arisen since the onset of psycho-physiological studies of sexual minorities.⁶⁷ While penile plethysmography is an attempt to place the untruthful subject under surveillance, rendering impalpable desires and fantasies transparent by creating the links connecting the inner lives to the outward behavior of the subject,

⁶⁵ Geary S. Alford, Dan Wedding, and Stanton Jones, "Faking 'Turn-Ons' and 'Turn-Offs': The Effects of Competitory Covert Imagery on Penile Tumescence Responses to Diverse Extrinsic Sexual Stimulus Materials," *Behavior Modification* 7, no. 1 (1983): 112-25.

⁶⁶ Freund et al., "Female Child as a Surrogate Object," 132; Odeshoo, "Of Penology and Perversity," 9.

⁶⁷ D.R. Laws and Martin L. Holmen, "Sexual Response Faking By Pedophiles," *Criminal Justice and Behavior* 5, no. 4 (1978): 343-56

the subject is capable of dislocating such linkages. Many studies have demonstrated how it is possible, under instruction, for a sex offender to use cognitive, masturbatory, and mechanical manipulation to fake increases in arousal to a nonpreferred stimulus, and to use a variety of cognitive strategies to decrease arousal to a preferred stimulus.⁶⁸ Some subjects who were instructed to suppress arousal reported that they used cognitive strategies, for example, “thinking about work” or “telling myself the woman had an STD.”⁶⁹

In response to this issue, researchers have devised a variety of methods for detecting and preventing faking. For example, it is possible that many of the subjects who were successful at inhibiting arousal were in fact simply choosing not to attend to the presentation of the sexual stimuli during the examination. In an attempt to minimize nonattendance, PPG researchers devised a procedure where subjects are required to provide an ongoing verbal description of the material they are viewing in order to insure they are truly attending to the stimuli.⁷⁰ Another technique is monitoring subjects visually using a low-light video camera in order to determine the direction of their gaze. In some other assessment settings, psychologists arrange the screens in a semicircular way surrounding the subject so that the sexual stimuli covers the subject’s visual field completely.⁷¹ In other words, the observation of sexual arousal is made possible only

⁶⁸ Kurt Freund, Robin Watson, and Douglas Rienzo, “Signs of Feigning in the Phallometric Test,” *Behaviour Research and Therapy* 26, no. 2: 105-12; D.R. Laws and H.B. Rubin, “Instructional Control of an Autonomic Sexual Response,” *Journal of Applied Behavior Analysis* 2, no. 2 (1969): 93-99.

⁶⁹ John M. Mahoney and Donald S. Straasberg, “Voluntary Control of Male Sexual Arousal,” *Archives of Sexual Behavior* 20, no. 1 (1991): 13.

⁷⁰ Donald E. Henson and H.B. Rubin, “Voluntary Control of Eroticism,” *Journal of Applied Behavior Analysis* 4, no. 1 (1971): 37-44; Jean Proulx, Gilles Côté, and Pier Angelo Achille, “Prevention of Voluntary Control of Penile Response in Homosexual Pedophiles during Phallometric Testing,” *Journal of Sex Research* 20, no. 2 (1993): 140-47.

⁷¹ Howes, “Survey of Plethysmographic Assessment,” 15.

when additional devices place the subject's hands, gaze, and the thought process itself under surveillance.

The management of sex offenders using PPG is predicated on the assumption that the technology provides "objective" measures of sexual deviance by placing under surveillance the inner fantasies and desires of offenders. This procedure requires and entails the taming of the deceitful, dangerous offender into the passive subject who reveals his innermost desires through involuntary responses to given stimuli. Taking a closer look, however, the subject persists in retaining certain unfathomable truths and PPG remains a controversial technique. In this regard, it can be said that the real function of PPG is not revealing the truth of the subject but surrounding sex offenders with surveillance apparatuses. For one thing, PPG results are referred to in making decisions regarding the type and degree of supervision of sex offenders. Faking is not a hindrance to the identification of deviant offenders in this regard, rather it can be a support for intensive surveillance. Some claim that those who are found deviant on PPG tests despite their attempts at faking are dangerous enough to demand a high level of supervision.⁷² More importantly, practitioners utilize PPG testing as a means to let offenders know that the examiners are capable of observing their desires through the technology. One of the uses of PPG is to elicit admissions from denying offenders by confronting them with the examination results.⁷³ In this setting, the actual validity of PPG is less important than its function of changing offenders' attitudes by showing them that they are under surveillance.

⁷² Odeshoo, "Of Penology and Perversity."

⁷³ Christopher M. Earls, "Some Issues in the Assessment of Sexual Deviance," *International Journal of Law and Psychiatry* 6, no. 3-4 (1983): 431-41; McCounaghy, "Validity and Ethics"; Sheldon Travin et al., "Pedophile Types and Treatment Perspectives," *Journal of Forensic Sciences* 31, no. 2 (1986): 614-20; Glen Kercher, *Use of the Penile Plethysmograph in the Assessment and Treatment of Sex Offenders: Report of the Interagency Council on Sex Offender Treatment to the Senate Interim Committee on Health and Human Services and the Senate Committee on Criminal Justice* (Austin, TX, 1993).

The question is then who the suspicious offender under increasing surveillance is. As discussed above, PPG is designed to distinguish sex offenders with deviant sexual preferences – pedophiles – from situational offenders. This distinction traces back as early as the 1960s when sex offenders were composed of different types.⁷⁴ Freund and his colleagues tackled this issue in 1972 by using PPG to show that nondeviant males sexually responded to children as a “surrogate object.”⁷⁵ Later in the 1980s, researchers formulated theories to explain the behavior of situational offenders: the theory of situational blockage and the relative deprivation theory.⁷⁶ According to these theories, “men who prefer adult females as sexual partners but who lack opportunity (e.g., because they are not sufficiently attractive to adult females) may be more likely to have sexual contact with less preferred partners, such as prepubescent females.”⁷⁷ It is notable that studies pertaining to the relative deprivation theory focus by and large on incest offenders, explaining the behavior of incest offenders as a result of broken marital relationships.⁷⁸

The scientific attempts to find deviant sexual preferences have resonance with the emphasis on stranger danger. Much of the research literature on PPG draws a conclusion that incestuous offenders are less deviant than stranger offenders, thus incest offenders do not need special treatment both in terms of criminal sanction and medical treatment. This conclusion is to some extent embedded in the design of the assessment procedure and the concept of preference. The measurement of preference does not simply indicate whether an individual has sexual

⁷⁴ Paul H. Gebhard et al. *Sex Offenders: An Analysis of Types* (New York: Harper & Row, 1965).

⁷⁵ Freund et al., “Female Child as a Surrogate Object.”

⁷⁶ David Finkelhor, *Child Sexual Abuse: New Theory and Research* (New York: Free Press, 1984); Randy Thornhill and Nancy Wilmsen Thornhill, “Human Rape: An Evolutionary Analysis,” *Ethology and Sociobiology* 4, no. 3 (1983): 137-73.

⁷⁷ Seto, Lalumière, and Kuban, “Sexual Preferences,” 271.

⁷⁸ Finkelhor, *Child Sexual Abuse*, 43-44; Seto, Lalumière, and Kuban, “Sexual Preferences.”

interests in minors but the procedure is designed to measure the difference between his appropriate desires, meaning desires for adult females, and desires for minors. This difference between different types of desires determines a preference.⁷⁹ One of the consequences of defining sexual deviance in terms of preference is that incest offenders who often have comparable desires for both adults and minors appear to have less clear preferences, and by implication, less deviant than stranger offenders who have interests only in minors. Also relevant is the composition of stimuli. The images used in the procedure depict children unknown to the subject, which reflects the crime patterns of stranger offenders rather than those of incest offenders who repeatedly molest one or just a few victims who are close to them.⁸⁰ In this way, the assessment procedure using PPG is designed to produce results that support and reinforce the view that incest offenders are not as dangerous as stranger offenders, and therefore implies that sex offender regulation should allocate more resources to crime prevention targeting stranger offenders.

Conclusion

Risk assessment and penile plethysmography emerged in different institutional contexts and entailed different ways of conceptualizing the criminal subject. Actuarial risk assessment became a main element to the regime of sex offender management that revolves around the policy objective of preventing recidivism by repeat offenders. In an attempt to articulate standards of acceptable risk and distribute risks, actuarial risk assessment produces offender

⁷⁹ Harris and Rice, "Science in Phallometric Measurement," 157-58; Martin L. Lalumière and Grant T. Harris, "Common Questions Regarding the Use of Phallometric Testing with Sexual Offenders," *Sexual Abuse: A Journal of Research and Treatment* 10, no. 3 (1998): 230.

⁸⁰ W.L. Marshall and Yolanda M. Fernandez, "Phallometric Testing with Sexual Offenders: Limits to Its Value," *Clinical Psychology Review* 20, no. 7 (2000): 809.

categories at risk of recidivism by examining records of an offender by reference to aggregate data of past crime patterns. The criminal subject produced here is marked by a standardized risk rather than an individual diagnosis of abnormality. In contrast, phallometry retains the concept of mental abnormality, which traces back to the technique's original setting of diagnosing and treating sexual nonconformity. Instead of relying on official documents, PPG claims to bring inner desires of the subject to the surface of the body, which measuring and recording devices attached to the body transform into a legible form of numbers. Through this process, phallometric assessment promises to reveal abnormal desires residing in the potentially dangerous and suspicious subject. Despite the conflicting logics of the techniques, actuarial risk assessment and PPG are used complementarily in practice. Taken together, they form two psychological techniques that produce particular kinds of criminal subjectivity: the repeat stranger offender and the deviant stranger offender. Such scientific techniques have buttressed the offender management system that zeroes in on stranger danger.

Chapter 5 The Management of the Sex Offender

Introduction

Since the 1990s, the federal and state governments have expanded three aspects of regulation: sex offender data collection of sex offenders, public access to information, and the regulation of the mobility of offenders by means of residency restriction and indefinite civil commitment. As the “management” of sex offenders has become the centerpiece of sex crime control, the psychological techniques discussed in chapter 4 found their way into the crime control field to produce criminal subjects at risk. While the public scenes of the court and the congress have been inundated with moral condemnation evoking the rhetoric of evil sin, sex offenders, once introduced into the corrections system, become subject to a broad range of management measures based on the idea of evidence-based, “best practice.” Such sex offender management geared toward containing and monitoring high-risk offenders provides an institutional context where the psychological techniques are put into operation to classify sex offenders into different risk categories and regulate their behavior with reference to their degrees of risk.

This chapter traces the evolution of sex offender management with a focus on the assemblage of legal measures and discourses of stranger danger that have been developed in Washington State. Washington is a pioneering state that created the legal category of sexually violent predators (SVP) and reintroduced the indeterminate detention of violent offenders. The Washington Community Protection Act of 1990, in this regard, marked a significant juncture in the regulation of sex offenders in the United States. Over the next decade leading to the Sex Offender Management Act of 2001, Washington State enacted and modified a number of sex offender laws. The current configurations of sex offender management are an outgrowth of those

legislative efforts, administrative struggles, and legal disputes. An in-depth investigation into the developments in Washington State reveals interesting paths along which an offender management system emerged to change crime control practices.

The focus of analysis lies on three dimensions of interwoven transformations leading to the sex offender management regime: institutional boundary, the role of treatment in crime control, and target population. First, sex offender regulation has traditionally involved the institutions of both criminal justice and mental health. Theoretically, each system has different objectives and modus operandi. However, the boundary that distinguishes between criminal justice and mental health is not always clearly defined, as discussed in chapter 3, but subject to negotiation and conflict. For example, the civil commitment of sex offenders, which is defined as “civil” with the purpose of treatment, has served as a battleground for legal and mental health professionals debating over the definition of “civil” versus “criminal” measures. In this regard, several scholars have drawn attention to the historical malleability of the civil-criminal divide.¹ Among them, Arie Freiberg calls for “boundary studies” that examine historical conditions for the emergence of specific boundaries between civil, criminal, and administrative laws. He suggests that “instead of assuming that distinctions are the inevitable product of some supra-human evolutionary process, they should be regarded as historically specific accomplishments.”² This chapter examines sex offender laws in Washington State as a lens through which to investigate struggles surrounding the civil-criminal boundary, arguing that the new regime of sex

¹ Katherine Beckett and Naomi Murakawa, “Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment,” *Theoretical Criminology* 16, no. 2 (2012): 221-44; John Braithwaite, “What’s Wrong with the Sociology of Punishment?” *Theoretical Criminology* 7, no. 1 (2003): 5-28; Arie Freiberg, “Reconceptualizing Sanctions,” *Criminology* 25, no. 2 (1987): 223-55; Arie Freiberg and Pat O’Malley, “State Intervention and the Civil Offense,” *Law and Society Review* 18, no. 3 (1984): 373-94.

² Freiberg, “Reconceptualizing Sanctions.”

offender management not only involved the negotiation and redrawing of the civil-criminal divide but also created a hybrid institution that straddled the divide.

Second, as the relationship between the two realms has changed, the role of treatment has also become a point of contention. The civil commitment of sex offenders has many differences from the general civil commitment of non-sex offenders, which also reflects changes in the socio-political atmosphere since the 1960s. One of the differences is that while “adequate treatment” served as a constitutional right to challenge civil commitment in the 1960s as discussed in chapter 3, treatment in the new management regime becomes a tool for containing violence that provides a pretext to justify confinement as a civil measure. It also stands in stark contrast to a treatment option for familial offenders introduced in the early 1980s. Whereas Washington State offered a lenient treatment option in lieu of imprisonment for sex offenders who victimized family members, treatment of stranger offenders was intended to prolong the confinement of the offenders in treatment facilities.

Third, the development of the sex offender management regime was initially focused on stranger danger, with the stated aim of preventing sex offenses by “sexually violent predators” with a “mental abnormality or personality disorder.” However, as the management system evolved, it became geared toward containing offenders known to be at risk of recidivism, which does not necessarily mean “extremely dangerous abnormality” by definition. As a consequence, target populations expanded beyond the original aim to include a broader range of sex offenders. Sex offenders on the registries now include exhibitionists who urinated in public, young adults who had consensual sex with minors, and even those who flirted with a minor at a party.

I argue that institutions for containing stranger danger were created and expanded through the rearrangement and manipulation of the interface between criminal justice and mental

health. Drastic measures such as indefinite confinement that may last for life, which was prompted and justified by the claim of the existence of a “small but extremely dangerous group,” formed a hybrid institution that put sex offenders in no-man’s-land between the civil and criminal realms. This boundary feature entailed an ambiguous legal status of sex offenders, and in turn, caused uneasiness and tension in the existing systems. Legal disputes and administrative struggles involved in implementing sex offender regulations have played into the evolution of the sex offender management regime in a way that widened the net to reach a wide range of sexual behavior to an extent that structured contemporary American culture.

In the pages that follow, I first analyze the development of sex offender treatment sentencing in the 1980s in Washington State to highlight that court-ordered treatment options for incest and acquaintance offenders have since the 1990s been redefined as a means for surveillance of stranger offenders. The next part examines the legislative process of the Community Protection Act of 1990. Here, I show that the perceived threat of sex offenders translated into outrage about the failure of the crime control system, leading to the establishment of a hybrid institution of civil and criminal areas. I then discuss due process challenges to the civil commitment program and analyze how these conflicts contributed to the expansion of sex offender management practice. The chapter concludes by discussing changes in the status of the sex offender and the meaning and practice of treatment in crime control.

5.1. Treatment for Incest Offenders under Determinate Sentencing

In 1981, the Legislature of Washington State passed the Sentencing Reform Act (SRA) that eliminated parole and probation and introduced a determinate sentencing scheme. The sentencing reform movement that spread across the country marked a departure from the

rehabilitative regime characteristic of the criminal justice system in the previous decades. The criminal court prior to the early 1980s handed down indeterminate sentences with a certain range of prison term and the parole board decided whether and when to release offenders from prison. Under this indeterminate sentencing regime, the parole board took into account the degree of rehabilitation that an imprisoned offender had achieved as well as the nature of the offense. As a result, offenders who committed similar offenses were given different criminal sanctions depending on their progress in rehabilitation. It was during the 1970s that the criminal justice system founded on the basis of the modern ideal of rehabilitation came under fire on the grounds that indeterminate sentencing led to disproportionality and disparity in sentencing. During this period many policy-makers and legal professionals raised criticism about arbitrariness and inconsistency of the parole board. The sentencing reform movement beginning in the late 1970s across the country was the concerted efforts to “promote respect for the law by providing punishment which is just” by ensuring that “the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender’s criminal history” and that “the punishment imposed on any offender is commensurate with the punishment imposed on others committing similar offenses.”³

The legislation of the SRA in 1981 and its implementation in 1984 had considerable impacts on sex offender sentencing. Washington State’s new sentencing guidelines, which came into effect in 1984, encapsulate the law-and-order politics that would come to the fore during the next decades. Prior to the implementation of the SRA, Washington State utilized mandatory treatment for sex offenders, which ranged from the commitment of “sexual psychopaths” to state

³ Sentencing Guidelines Commission (WA), *The Sentencing Reform Act at Century's End: An Assessment of Adult Felony Sentencing Practices in the State of Washington: Report to the Governor and the Legislature* (Olympia, WA: Sentencing Guidelines Commission, 2000).

hospitals to outpatient treatment of sex offenders placed on probation. At the time of the passage of the SRA, over 70 percent of convicted sex offenders were sentenced to probation with a requirement of outpatient treatment.⁴ As the SRA abolished parole and probation, it increased both the number of the prison population and the length of sentencing terms for sex offenses. During the period between 1984 and 1997, the Legislature of Washington State increased sentences for sex offenders six times. Median sentence length increased 146% for child sex offenses and 95% for adult rape offenses between 1988 and 1997, with a precipitous increase of 100% between 1989 and 1990 as a consequence of the Community Protection Act of 1990.⁵ By 2003, sex offenders were sentenced to 90.8 months on average, which was the highest except murder, the average for all felonies being 37.3 months.⁶

The continuing increase in sentence terms for sex offenses represented the drive at work since the early 1980s to incarcerate law-breakers. The increases in prison sentences, however, were accompanied by exceptional sentencing to treatment for a subset of sex offenders. In 1983, the Washington State Legislature directed the Sentencing Guidelines Commission to review the issue of sex offender sentencing and make recommendations to the Legislature. In preparing for their report, the Commission consulted with prosecutors, defense attorneys, sex offender and victim treatment professionals and solicited comments from citizen groups and individuals.⁷ Mental health professionals who participated in this process succeeded in creating leeway to provide treatment to some sex offenders instead of determinate prison sentences. Following the

⁴ Task Force on Community Protection. 1989. *Final Report to Booth Gardner Governor State of Washington* (Olympia, WA: Task Force on Community Protection), IV-23.

⁵ Roxann Lieb and Scott Matson, "Sex Offender Sentencing in Washington State," *Federal Sentencing Reporter* 10, no. 2 (1997): 85-89.

⁶ Sentencing Guidelines Commission (WA), *Sex Offender Sentencing* (Olympia, WA: Sentencing Guidelines Commission, 2004).

⁷ Task Force on Community Protection, *Final Report*, IV-24.

recommendations by the Commission, the Legislature enacted in 1984 the Special Sex Offender Sentencing Alternative (SSOSA) to allow for a “disproportionately” lenient punishment, even in the midst of the movement toward strict punishment of violent crime. In this way, sex offenders formed one of the exceptions to determinate sentencing, the other groups being drug offenders and first-time offenders.

SSOSA allowed the court to impose a suspended sentence for sex offenders who did not have prior sex offense convictions nor committed sexual offenses involving weapons or physical violence. When an eligible offender decided to seek the sentencing alternative option, he needed to find a professional evaluator specializing in sex offender treatment and to pay for the cost of evaluation. The evaluator was required to submit the results and a treatment plan to the court. If the court agreed to grant a suspended sentence, the sentence included a mandatory treatment requirement that lasted up to two years, usually on an outpatient basis. When the offender completed planned treatment, he was released from supervision. If the offender failed to comply with treatment, there was a possibility that the suspended sentence would be revoked and the offender was sent to prison to complete the sentence.

Among felony sex offenders convicted between January 1985 and July 1986 in Washington State, approximately 80% were eligible for SSOSA, most of which involved child victims and about half of them received SSOSA.⁸ While the proportion of those who received SSOSA among convicted sex offenders decreased during the decades after its introduction, this was in part explained by the increase of the total number of sex offense convictions during that period. The absolute number of those granted SSOSA remained relatively constant until 1994 as

⁸ Lucy Berliner et al., *The Special Sex Offender Sentencing Alternative: A Study of Decision-Making and Recidivism: Report to the Legislature* (Seattle: Harborview Sexual Assault Center, 1991).

was the proportion of success in cases where eligible offenders requested SSOSA; roughly 46 % of all dispositions since in the early 1990s.⁹

Combined with the fact that sex offenders became subject to increasingly strict punishment, including longer terms of imprisonment, since the enactment of the SRA, the legislation of SSOSA and its trends during the subsequent years show that, first of all, treatment of sex offenders has continued to be a part of the system despite growing public concern about “dangerous sex offenders,” which precipitated stringent regulations leaning toward punishment. The coexistence of increasing punishment and continued treatment also reflects that sex offenders comprise diverse groups that the criminal justice system has used different strategies to control. To answer the question of how sex offender regulations produce specific subject positions, it is necessary to examine the differential treatment of diverse groups of sex offenders.

In conjunction with the lengthened sentencing terms, the impetus for stricter punishment accompanied the changes in sex offender categories since the 1980s. Washington State created in 1988 new sex offense categories subject to enhanced sentences by changing the offense of “statutory rape” to that of “rape of a child” and “indecent liberties” to “child molestation.” It also created a new crime of “sexual misconduct with a minor” to punish sexual contact between a minor at the age of sixteen or older and an adult school employee or foster parent.¹⁰ Creating new subcategories is one way of widening the net and the newly identified targets were focused on sexual activities involving minors.

While the legislature tightened legal sanctions against child rape and molestation, the treatment option was adopted as a way to deal with sex offence within the family. The initial

⁹ Lucy Berliner, *Sex Offender Sentencing Options: Views of Child Victims and Their Parents* (Olympia: Washington State Institute for Public Policy, 2007); Lieb and Matson, “Sex Offender Sentencing.”

¹⁰ Lieb and Matson, “Sex Offender Sentencing.”

criteria of eligibility for SSOSA included a first-time offender and the standard sentencing range for the offence being less than six years.¹¹ However, a study conducted in the early years of SSOSA reveals that those who offended their victims only once were less likely to receive SSOSA than those with a long history of abusing their victims.¹²

This apparent paradox can be explained by two facts regarding the motivations behind SSOSA and the meaning of a “repetitive offender.” First, the persistence of interest in treatment originated in the policy efforts to deal with the issue of sexual abuse in the family settings. While the Sentencing Guidelines Commission prepared for recommendations about sex offender sentencing in the early 1980s, the Commission received comments from victims and their families that many of them did not want the offender to be incarcerated.¹³ One of the rationales behind the stipulation of SSOSA was that the sentencing alternative option would encourage victims to report crime when they were unwilling to do so because of harsh punishment facing their family members. In this way, despite the new policy emphasis on “just desert,” familial and acquaintance sex offenders were given opportunities for leniency in sentencing.

Second, the definition of a “repetitive offender” as used in the legislation of SSOSA also had to do with the reporting issue. A first-time offense, which was a condition for the request of SSOSA, did not mean a first-time criminal act but a first-time conviction. Considering the fact that many sex offense convictions that involved family members are made after a long period of chronic abuse, the definition of a repetitive offender as one with no prior conviction acted in favor of incest offenders. As a result, during the initial period of SSOSA, 52 % involved family

¹¹ Accordingly, the legislation provided that “repetitive sex offenders and those who committed sexual crimes using weapons and who caused physical injury were not eligible for treatment and must be incarcerated.” Task Force on Community Protection, *Final Report*, II-13.

¹² Berliner et al., *Special Sex Offender Sentencing Alternative*.

¹³ Task Force on Community Protection, *Final Report*, II-13.

members (37% parent figure), while only 7% of the eligible cases involved stranger offenders.¹⁴

Two decades after the implementation of SSOSA, the Washington State Legislature amended the statute to explicitly restrict the alternative option to non-stranger offenders.¹⁵

In the 1980s, the alternative treatment option effectively excluded stranger offenders by establishing a set of eligibility criteria that fit familial and acquaintance offenders. The differential treatment of sex offenders based on their relationships with victims continued into the 2000s. The label of repeat sex offender, which stirred public concern and led to the implementation of extraordinary measures for sex crime control, is not self-evident but shaped in this particular context that allowed the familial offender to elude the category. The notion of repeat offender became increasingly tied to the stranger offender, providing a core element to the stranger-danger discourse.

5.2. Sex Offender Categories in Reform

In 1990 Washington state embarked on sex offender law reforms in the wake of high-profile crimes. On May 20, 1989, a 7-year-old boy was found in the woods in Tacoma alive but with his penis cut off. The police acted promptly and arrested Earl Shriner who had a history of sex offenses. The legislative efforts began right after the crime. In less than a month after the attack, Governor Booth Gardner issued an executive order that created the Governor's Task Force on Community Protection. It took the Task Force about five months to prepare its final report after the first meeting on July 6. The Legislature subsequently introduced a bill that closely followed the Task Force's recommendations and passed it unanimously. On February 28,

¹⁴ Berliner et al., *Special Sex Offender Sentencing Alternative*.

¹⁵ Act Relating to Sentence Enhancement for Sex Crimes Against Minors, ESHB 2400, 58th Washington State Legislature (2004).

1990, Governor Gardner signed into law the Community Protection Act. It was nine months after the attack had occurred in Tacoma and, according to a member of the Task Force, that was a slowed-down pace resulting from policy makers' efforts not to rush.¹⁶

One significance of the legislation of the Community Protection Act is that it emerged out of the initiative of victim advocacy groups. Victim advocacy groups were active from the start in the legislative process. The Task Force was composed of twenty four members including legal and medical professionals, legislators, academics, and three representatives of victims – Helen Harlow, the Tacoma boy's mother; Ida Ballasiotes whose daughter was raped and murdered in 1988 by Gene Raymond Kane who was on work-release after serving 13 years for two previous sexual assaults; and Trish Tobis, a victim of a violent assault and the president of Family and Friends of Missing Persons and Violent Crime Victims.¹⁷ At the first meeting, Ballasiotes said that "Helen Harlow and I will be your conscience."¹⁸ This statement exemplifies the moral pressure facing policy makers and potential charge that would befall them if they raised objection to the legislation. The political atmosphere surrounding the issue at the time was attested by the unanimous passage of the bill. No vote against the bill is notable because the civil

¹⁶ The attacked boy's mother and other victim advocates had initially pushed for more prompt action through calling a special session of the legislature to put the agenda on the table. David Boerner, "Confronting Violence: In the Act and in the Word," *University of Puget Sound Law Review* 15, no. 3 (1992): 525-77.

¹⁷ Task Force on Community Protection, *Final Report*.

¹⁸ Boerner, "Confronting Violence," 540. The critical role of victims, or rather, victims' families and advocates, is manifest if we consider the difference between the Tacoma case and other criminal acts that Shriner had committed before. After released from prison in 1987, Shriner had contact with the criminal justice system twice, which did not lead to public outrage or legislative action, partly due to the absence of the victims' voice. The first victim moved to Florida after the event and never appeared in the court to give a testimony. The second victim was a "street boy" and could not be located during the following legal process.

commitment of sex offenders would possibly undermine the integrity of the fair, disproportionate sentencing scheme enacted a decade ago in Washington State.¹⁹

The prominent role of victims and their advocates provided the springboard for significant transformations in the subsequent development of sex crime control. At first, the public outrage at the brutal crimes committed by strangers triggered concerted efforts to revamp the system. Governor's executive order to create the Task Force states that the initial legislative intent concerned the problem of "certain categories of people who represent the most risk to society." As the Task Force proceeded to solicit public input, however, reform efforts expanded to go beyond those who would be called "sexually violent predators." In response to public pressure to reconsider the system for controlling sex offenders, the Task Force held public hearings in an attempt to gather public opinions. These public hearings provided a forum at which citizens, especially victims and their families, could reveal their anguish and raise demands for system reform. At the twelve hearings held between August and November, 1989, the Task Force encountered concern about familial and acquaintance sexual abuse. Members of the public, including family violence victims, urged that the Task Force address a broad range of violent or abusive behavior rather than focusing only on sex crime by repeat violent offenders. Following these public testimonies and written questionnaires collected at the hearings, the Task Force expanded their focus to include diverse groups of sex offenders.²⁰

The expansion of focus resulted in the comprehensive reform of sex offender policy. In this regard, the Community Protection Act is more than a response to a series of heinous crimes. The highly publicized crime event in Tacoma did not stop at inciting public indignation at the

¹⁹ Stuart Scheingold, Toska Olson, and Jana Pershing, "The Politics of Sexual Psychopathy: Washington State's Sexual Predator Legislation," *University of Puget Sound Law Review* 15, no. 3 (1992): 809-20.

²⁰ Boerner, "Confronting Violence"; Task Force on Community Protection, *Final Report*.

criminal but provided a vehicle that conveyed heightened consciousness of sexual abuse and violence over the last few decades. Right after the media report of the Tacoma event, for example, victim advocacy organizations started to take advantage of the event as a rallying point for changes in the ways that the system dealt with sexual violence. The Task Force put together and translated public comments into an overall enhancement of the presumptive sentence ranges for all sex offenses in a way that reflected the perceived seriousness of those crimes.²¹

The categorization of offenders into different groups was how the Task Force reconciled the two demands to address the threat of stranger danger and the prevalent but not adequately dealt-with issue of familial and acquaintance violence. The Final Report of the Task Force suggested different strategies for dealing with four categories of sex offenders: the registration of repeat felony offenders; early intervention and treatment for juvenile offenders; the strengthening of SSOSA for familial and acquaintance abusers; and the civil commitment of sexually violent predators.²² Governor Gardner subsequently signed into law the Community Protection Act of 1990 that contained those four differential approaches to dealing with each category of offenders.

²¹ Another tack the Task Force took to target a broader range of crime was widen the net catching sex offenders by changing the definition of sex offender in some cases. Prior to 1990, offenders and their attorneys widely utilized plea bargaining, which involved the dropping of a sex offense charge in exchange for pleading guilty to other charge such as burglary or assault. Because sexual violence occur in tandem with other types of offenses rather than in isolation in many cases, when an offender entered this type of plea bargaining, he ended up not being labeled as a sex offender and thus could evade the system designed to control sex offenders. The Task Force tackled this issue by creating the category of “sexually motivated crime,” which would result in the crime being classified as a “sex offense” in the future when sexual components were found. In this way, the Community Protection Act intended to fix the moving target by changing the ways in which the criminal justice practice identified and categorized offenders.

²² Task Force on Community Protection, *Final Report*.

5.3. The Establishment of a Hybrid Institution

Despite the broadening of the scope of reform, the stranger danger remained the primary target. The Task Force continued to retain their initial purpose as stated in the Governor's executive order that created the Task Force: "Research the feasibility of creating a specialized, secure facility for certain categories of people who represent the most risk to society."²³ Right after the attack in Tacoma the media started to pour out a spate of news articles that excavated Shriner's past offenses and contact with the criminal justice and mental health systems. The media revealed that law enforcement personnel had pursued extended detention of Shriner upon his release from prison in 1987, but to no avail. It was this knowledge of Shriner's dangerousness that fuelled public outrage about the crime control system. Victims' advocates repeatedly raised the question why the system had let Shriner at large when they had known there had been a great chance that he would commit a violent crime. By mobilizing this sense of regret that it could have been prevented, victims' advocates succeeded in framing the issue as the failure of the system in protecting the public from the threat of "known" dangerous repeat offenders.

From the start, victim advocacy groups and the media pointed to the presumptive sentencing scheme as one of the culprits that disabled the system from taking action to prevent crime. While the determinate sentencing scheme implemented in 1984 promised to promote law and order with stricter punishment, as a result, the criminal justice system had relinquished its means to keep offenders under supervision beyond the terms stipulated in the legal code. In

²³ The other responsibilities assigned to the Task Force were: review the current criminal justice system and the mental health civil involuntary commitment process to measure their effectiveness in confining persons who are not safe to be at large in the community; assess the relationship between these criminal and mental health systems to identify the shortcomings; and consider research and approaches to enhancing our ability to accurately predict future behavior of individuals who have committed or who have threatened to commit violent criminal acts and establish legal criteria for confining them. Boerner, "Confronting Violence."

addition, the mental health system could only detain dangerous offenders up to two years under the sexual psychopath statute. After reviewing Shriner's records, the Task Force determined that law enforcement personnel and mental health professionals did not err in deciding to release Shriner. They followed the rules but what was to blame, the Task force concluded, was the system. The Task Force defined the problem as the "absence of governmental power." In other words, "it was the apparent powerlessness of the state to act under such compelling circumstances that presented the core issue."²⁴

As the Task Force worked toward a reform of the system, the rhetoric that "it could have been prevented" encapsulated the blame that victim advocates put on the system and formed the main guiding question. That is, "if the reform had been in effect in 1987" when Shriner was released, "would it have given the state the power to act to prevent Shriner from committing future violent acts?"²⁵ Insofar as the issue is how to prevent known offenders from committing further offences, the reform needs to be applicable to offenders in prison at the time of legislation as well as those who will be brought to justice under the new law. The crucial issue lay in the possibility of retroactive enforcement of the new law, which had a high chance of causing constitutional challenges.

In their consideration of possible measures for protecting the public from dangerous sex offenders, the Task Force examined three options: a return to life maximum indeterminate sentences for all serious sex offenses; a return to a sexual psychopath statute; and a broadening of the eligibility criteria under the general civil commitment statute. Among those three choices, the Task Force rejected the options of sentencing reform and utilizing general civil commitment

²⁴ Boerner, "Confronting Violence," 541, 546.

²⁵ *Ibid.*, 550.

on the grounds that they could not satisfy the requirement of retroactive enforcement without violating the Constitution.

Moreover, indeterminate sentencing and expanding general civil commitment were at odds with the purposes of the current criminal justice and mental health systems. Reintroducing indeterminate sentences for all sex offenses would have undermined the intent of the Sentencing Reform Act, that is, fair and proportionate punishment. The judgment of the Task Force was that, above all, not all sex offenses were the same in terms of the seriousness of harm or danger, and thus imposing uniformly enhanced indeterminate sentences regardless of the type of crime would pose a problem of over-breadth.

Utilizing the general civil commitment statute to detain dangerous repeat offenders for a long period of time would raise the same problem of over-breadth. As discussed in chapter 3, the civil commitment of the mentally disordered faced a series of constitutional challenges during the late 1960s and 1970s, which contributed to the shortening of commitment periods. The Task Force pondered that if they enabled long-term civil commitment of sex offenders by loosening admission criteria, it would affect other mental patients in a way that would erode the achievements of the due process revolution of the 1970s. After considering three possibilities, the Task Force finally dropped the options of returning to indeterminate sentencing and of utilizing general civil commitment on the grounds that the reform should be in line with the existing systems to the extent possible.

The Task Force finally opted for the establishment of civil commitment for a small group of sex offenders, which was modeled after the sexual psychopath statute. Under the Washington sexual psychopath statute, those who were adjudged by the court to be sexual psychopaths received court-ordered treatment at the Eastern and Western State Hospitals. The treatment was a

replacement for prison sentences and if an offender went through treatment successfully, which lasted about two years, he was discharged without additional criminal sanctions. If an offender was determined sexual psychopathic but unsuitable for treatment or failed in completing treatment, the offender was returned to criminal court and served time in prison.²⁶ In other words, the sexual psychopath law was designed to provide a small number of sex offenders with treatment for a relatively short period of time rather than isolating them from society.

By the time that the Task Force was convened, the sexual psychopath law had long been considered a failure in the midst of growing skepticism about the role of treatment in the criminal justice system. A report issued in 1985 found that only about 20 percent of those adjudged sexual psychopaths successfully completed treatment. In 1986, Washington State shut down the sexual psychopath treatment program in the hospital and created a voluntary in-prison treatment program.²⁷ Since Robert Martinson concluded in 1974 that “nothing works,” a movement away from the therapeutic objective began to get under way in the criminal policy area and by the 1990s only 13 states and the District of Columbia retained sexual psychopath statutes.²⁸

While modeled after the sexually psychopath statute, the Sexually Violent Predator Statute differs from the previous law in that a sex offender was committed to a mental health facility for an indefinite period, in many cases for life, after completing a prison sentence. In terms of the constitutionality of the new law, the Task Force learned that most of the prior constitutional challenges to civil commitment had dealt with the issue of procedural due process protections rather than imposing substantive due process limits to the state power to incarcerate

²⁶ Lieb and Matson, “Sex Offender Sentencing”; Lieb and Matson, *Sexual Predator Commitment Laws in the United States: 1998 Update* (Olympia: Washington State Institute for Public Policy, 1998).

²⁷ Lieb and Matson, “Sex Offender Sentencing.”

²⁸ Robert Martinson, “What Works? - Questions and Answers about Prison Reform,” *Public Interest* 35 (Spring 1974): 22-54; Lieb and Matson, *Sexual Predator Commitment Laws*.

dangerous individuals. After having reviewed relevant precedent court cases, David Boerner, a Task Force member and law professor, anticipated that if they would be able to set up rigorous procedural standards that abide by due process protections, the reform intended to incarcerate dangerous sex offenders would pass constitutional muster.

While many commentators observed that the Community Protection Act was a result of populist policy-making that succumbed to victim advocacy mobilizing public indignation, the act was a product of compromise between the public pressure to revamp the system and the policy-makers' attempts to preserve the existing systems and their values such as "just desert" and due process. The category of SVPs – a "small but extremely dangerous group" – is itself an outgrowth of the efforts to reconcile the conflicting demands. The proponents justified the creation of a facility for SVPs on the grounds that they were in a small number so that minimized possible disturbance in the existing systems and that they were extremely dangerous to the point that demanded drastic control measures.

In order to manage the risk this "extremely dangerous group" of offenders posed, Washington State initiated the creation of a hybrid institution that did not fit into the dual system of criminal justice and mental health. On one hand, the civil commitment of SVPs is not completely civil in the traditional meaning in that a criminal conviction or arrest constitutes a condition for the initiation of the commitment procedure and that the facility is authorized to commit offenders whether they are adjudged treatable or not. In contrast, under the general civil commitment system for the mentally disordered, commitment against one's will constitutes a constitutional violation without a provision of effective treatment. The SVP statute also differs from the former sexual psychopath statute in that regard. The sexual psychopath statute, which was designed for the purpose of treatment, did not allow the facility to detain offenders without a

prospect of effective treatment and release. This led the treatment facility to decline the admission of Shriner on the grounds that he was too dangerous for treatment.²⁹ The SVP statute identified this lacuna and stated that the new law was predicated on the assumption that sexual predators were not amenable to treatment in general. In this way, the SVP statute created a possibility of placing sex offenders under constant surveillance by committing them to a sexual predator facility until they are judged safe to be released. Unlike the sexual psychopath statute or the general civil commitment, this could lead to incarceration for life.

On the other hand, the SVP statute is not technically a criminal law because, first of all, it departed from the general intent of the Washington State's criminal code that was predicated on the principle of "just desert." The civil commitment of SVPs after prison terms do not constitute punishment as a "just" response to a convicted crime but an addition to the punishment. As a corollary, the commitment proceedings are not subject to the due process protections applied in the criminal case, but lower standards typical in the civil case are applied in determining the commitment of SVPs. Taken together, the creation of an institution that was neither strictly criminal nor civil made possible the regulation of the problem population by circumventing traditional legal protections such as the due process clause. The policy reform efforts that began in response to the accusation that neither the criminal justice system nor the mental health system could deal with dangerous sex offenders ended up carving out a new space while leaving the existing systems intact. Under the SVP statute, sex offenders are caught in no-man's-land, between the civil and criminal areas.

²⁹ The Community Protection Act of 1990 repealed the Sexual Psychopath Statute of Washington State.

5.4. “A Small but Extremely Dangerous Group” in No-Man’s-Land

The legislation of the SVP civil commitment program shows the main features of what Richard V. Ericson calls “counter-law.” Ericson discerns two forms of counter-law: laws against law and surveillant assemblages. Laws against law are an attempt to “erode or eliminate traditional principles, standards, and procedures of criminal law that get in the way of preempting imagined sources of harm,” for example, creating leeway to incarcerate and investigate terrorist suspects by bypassing due process protections.³⁰ Counter-law represents a “state of exception,” where law is suspended in an emergency; in other words, the “legal order must be broken to save the social order.”³¹ Giorgio Agamben and Ericson claim that the generalized state of exception is a characteristic feature of neo-liberal governmentality; that is, “the state of exception comes more and more to the foreground as the fundamental political structure and ultimately begins to become the rule.”³²

The SVP statute exemplifies counter-law that has become a generalized feature in the sex offender management regime. Although it was meant to affect a small number of offenders, the SVP statute had a symbolic import beyond its actual impact on target offenders. The civil commitment of SVPs was created as a hybrid institution out of an attempt to redress the deficits in the criminal justice and mental health systems. The SVP program thus problematized the divide between civil and criminal laws, representing the trend of relying on civil actions to

³⁰ Richard V. Ericson, *Crime in an Insecure World* (Malden, MA: Polity Press, 2007): 24.

³¹ Bill Heberton and Toby Seddon, “From Dangerousness to Precaution: Managing Sexual and Violent Offenders in an Insecure and Uncertain Age,” *British Journal Criminology* 49, no. 3 (2009): 343-62.

³² Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998), 20.

control crime.³³ For that very reason, it became a problematic itself that invited fierce controversies and constitutional challenges. The political and legal conflicts following the creation of the SVP statute grappled with the issue of how to draw a boundary between civil and criminal laws: is the civil commitment of sexual predators a civil action or a criminal punishment?

The issue of civil versus criminal confinement was one of the main points of contention in a series of lawsuits brought against the statute. In 1997, the U.S. Supreme Court made its first decision on the constitutionality of civil commitment of SVPs in *Kansas v. Hendricks*. Leroy Hendricks was civilly committed under the Kansas Sexually Violent Predator Act, which was modeled after Washington's Community Protection Act. Hendricks challenged his commitment on constitutional grounds, arguing that it was punitive because he was not provided adequate treatment. While the Court was dealing with the Hendricks case, Andre Brigham Young, a sex offender found to be a SVP under the 1990 Community Protection Act of Washington, filed a lawsuit against the Special Commitment Center (SCC) at Monroe where he was committed for an indefinite period of time. Young raised two challenges that the involuntary civil commitment violated the constitutional protections against double jeopardy and ex post facto laws. He argued that the State failed to provide adequate treatment, which rendered the civil commitment indistinguishable from a criminal confinement. If the commitment to the SCC was criminal in nature, it would constitute a violation of the prohibition against the double jeopardy clause because Young was committed there after he had completed his criminal sentence. In addition, Young argued, the statute violated the ex post facto clause in that it went into effect after he had

³³ Mary M. Cheh, "Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction," *Hastings Law Journal* 42, no. 5 (1991): 1325-413; Scheingold, Olson, and Pershing, "Politics of Sexual Psychopathy."

been convicted. Those two challenges, which were also raised in other court cases regarding the SVP laws, can be accepted in court only when the commitment of sexually violent offenders is found to be criminal in nature because the constitutional protections against double jeopardy and ex post facto laws apply only to criminal punishments and not to civil commitment.³⁴

Neither Young nor Hendricks attempted to dispute the civil nature of the statutes as enacted, but both argued that the ways the statutes were implemented made them criminal in nature. In this line of argument, they asked the court to consider their commitment in light of an “as applied” test, as opposed to a “facial” test. Under the facial test, the court determines whether the statute is civil or criminal in nature by examining the language of the statute on its face and by deferring to the stated legislative intent. Young argued that although the statute was civil on its face, its application in his particular case was punitive. The Court admitted that the application of the statute could be punitive but that did not alter the civil nature of the law. The Court held that “[a]n Act, found to be civil, cannot be deemed punitive ‘as applied’ to a single individual in violation of the Double Jeopardy and *Ex Post Facto* Clauses and provide cause for release.”³⁵ Here, the Court did not deny the plaintiffs’ arguments that the commitment was criminal in effect. Put in another way, sexually violent offenders were caught in the hybrid institution that was nominally civil but criminal in actuality.

5.5. Incurable but in Need of Treatment

When the issue at stake was whether the civil commitment of SVPs constituted punishment or treatment, Young and Hendricks challenged the label “civil” by pointing to the

³⁴ Jennifer M. Connor, “*Seling v. Young*: Constitutionally Protected but Unjust Civil Commitment for Sexually Violent Predators,” *Journal of Contemporary Health Law and Policy* 18, no. 2 (2002): 520.

³⁵ *Ibid.*, 522; *Seling v. Young*, 531 U.S. 250 (2001).

fact that they were not provided with adequate treatment. The lack of treatment, however, had different, sometimes opposite, implications in diverse contexts: a shift of responsibility for the failure of the criminal justice system onto the mental health area; a justification for the indefinite commitment of incurable dangerous persons; and a lack of effort on the part of the state.

The issue of whether civil commitment constituted punishment or treatment involved the fundamental question of who the sexually violent predator is: is sex offense a behavior disorder and if so, are sex offenders treatable? During the early years after the SVP law was enacted, organizations of mental health professionals expressed concern and disapproval on the grounds that there were no effective treatment methods for those offenders. For psychiatrists and psychologists, the commitment of sex offenders to mental health facilities amounted to the imposition of the burden on them when the criminal justice system failed to deal with violent offenders. Above all, there was no consensus among mental health communities whether sex offense was a symptom or product of mental disorders. It followed that an appropriate remedy should consist of modifications to the criminal justice system, such as enhancements of prison sentences.³⁶

For proponents of the SVP statute, on the contrary, it was the untreatability of dangerous sex offenders that justified the indefinite confinement measure. Indeed, incurability was one of the rationales behind the statute, thus lack of treatment did not constitute an effective challenge to the statute, rather it provided a justification. The Community Protection Act states that sexually violent predators “do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act” but “generally have antisocial personality features which are not amenable to existing mental illness treatment modalities,” and “the prognosis for

³⁶ American Psychiatric Association, *Sexually Dangerous Offenders: A Task Force Report of the American Psychiatric Association* (Washington, D.C.: American Psychiatric Association, 1999).

curing sexually violent offenders is poor.”³⁷ As the Task Force was concerned to maintain the principles of proportionate determinate sentencing, which had been in place for a decade, they rejected the option of relying on criminal detention to incapacitate sex offenders for an indefinite period. The argument of those in favor of the statute was that the civil commitment of SVPs should be considered a civil action to protect the public and that it was legitimate because SVPs were untreatable and could only be controlled through indefinite incarceration. Civil commitment here is not meant to provide treatment, as mental health professionals understood, but rather the label of civil enables the confinement of SVPs to operate outside of the established criminal sentencing system.

Although it was labeled civil, the indefinite commitment of sex offenders to a mental health facility had a stated purpose of ensuring public safety and crime control. In this regard, the SVP statute marked a clear departure from the determinate sentencing scheme as a principle for promoting law and order. By returning to indeterminate incarceration, the policy added an interesting twist to the relation between treatment and punishment. While indefinite sentences prior to the SRA of 1981 were criminal sanctions with the intention of rehabilitation, incarceration under the SVP statute functions as a civil action to incapacitate incurable offenders. Put differently, the revival of indeterminate incarceration accompanied a new emphasis on incapacitation instead of rehabilitation and it was the label of civil that helped the system serve that purpose through bypassing possible conflicts with the established presumptive sentencing system designed to punish for past offenses rather than incapacitate potentially dangerous persons. The court recognized this by ruling that the incapacitative confinement of sexual predators was civil in nature and thus constitutional.

³⁷ Community Protection Act of 1990, 2SSB 6259, 51th Washington State Legislature (1990).

Considering that one of the accepted purposes of civil commitment in general is treatment, however, the attempt to create a counter-law resulted in the ambiguous, inconsistent status of sex offenders in relation to treatment. The argument that the SVP statute was civil and meant to incapacitate dangerous offenders led to a contradictory situation that SVPs were untreatable but in need of treatment. A series of court decisions on the SVP statute reflected this conundrum. While the U.S. Supreme Court rejected an “as applied” test in favor of a “facial” test, the application of the statute was not entirely ignored in court. At lower level courts, the implementation of civil commitment appeared as a crucial issue where the lack of treatment implicated the state’s failure to fulfill its responsibility to run a program in accordance with the statute at face.

Richard Garrett Turay was found to be an SVP and committed to the Special Commitment Center (SCC) at Monroe, Washington in 1991. In 1994, Turay filed a motion to dismiss the commitment proceeding “because the conditions of his confinement are punitive, not treatment oriented in nature,” and thus violated the double jeopardy clause. The United States District Court for the Western District of Washington found that the officials at the SCC had violated Turay’s constitutional right to access to adequate mental health treatment that offered “a realistic opportunity to be cured or to improve the mental conditional for which he was confined.” The presiding judge, William L. Dwyer, found that the SCC did not provide properly trained clinical staff and that there were no objective measures for evaluating treatment progress. The Court awarded Turay \$100 in compensatory damages and issued an injunction requiring the

State to improve the conditions of the SCC in compliance with the statute and constitutional standards.³⁸ The court injunction continued until 2007.

Implementing the “civil” commitment program proved far more complicated than ruling that the SVP statute was civil based on the analysis of the statute’s language. In stark contrast to enthusiastic public support culminating in the unanimous passage of the bill, low morale dominated the SCC in its early years. As the constitutionality of the statute was not established, policy-makers showed a “wait and see” attitude instead of devoting resources to the program, which affected the attitudes of staff working with sex offenders. On the part of residents, to gain release, they were required to show that their mental and behavioral conditions had improved to the extent that they no longer posed a risk to the community. It was difficult, however, to prove improvement because their most common diagnosis was “personality disorder,” which is diagnosed on the basis of unchangeable historical factors. In this way, the prognosis of incurability was internalized into technical practice. Above all, sexual predators were confined at the SCC on the grounds that “the prognosis for curing sexually violent offenders is poor.”³⁹ Under such circumstances, residents chose to seek release through legal challenges to the commitment program rather than through making progress in treatment. As of 1992, only three out of nine residents were participating in the treatment program and the other six refused treatment.⁴⁰

Besides the difficulties in building therapeutic rapport between residents and treatment staff, the physical environment of the SCC was a crucial issue in ensuring its civil nature.

³⁸ Roxanne Lieb, “After *Hendricks*: Defining Constitutional Treatment for Washington State’s Civil Commitment Program,” *Annals of the New York Academy of Sciences* 989 (June 2003): 474-88; *Turay v. Weston*, No. C91-664WD (W.D. Wash. 1994).

³⁹ Community Protection Act of 1990, 2SSB 6259, 51th Washington State Legislature (1990).

⁴⁰ Lieb, “After *Hendricks*.”

Considering that the law included a mental health treatment component and designated the Department of Social and Health Services (DSHS) in charge of the program, an obvious option for siting the SCC was a state mental hospital where sexual psychopaths had been committed. However, in 1986 Washington State eliminated a hospital program for sexual psychopaths and instead created a prison treatment program after escapes of hospitalized offenders raised concern about security in a hospital setting.⁴¹ For this security reason, the Legislature excluded this option of a hospital program from the start.⁴² The SCC opened instead in a wing of the Special Offender Unit of the Department of Corrections despite the fact that the SVP statute provided that the DSHS operate a facility for control, care, and treatment of sexual predators.⁴³

After visiting the SCC in 1997, Judge Dwyer wrote in his court order that the physical plant was a “serious obstacle to providing constitutionally adequate treatment” and prospects for compliance with the injunction would be enhanced by having the SCC move to a “better facility as soon as possible.” In late 1997, the state moved the SCC to McNeil Island Correctional Center (MICC), a medium-security prison located on an island off Puget Sound. In 1998, Dwyer visited the relocated facility and determined that the standards for providing mental health treatment were “still unmet.” In his order, Dwyer quoted Dr. Craig Harvey who testified at the court:

⁴¹ Lieb and Matson, “Sex Offender Sentencing.”

⁴² “The facility shall not be located on the grounds of any state mental facility or regional habilitation center because these institutions are insufficiently secure for this population.” Community Protection Act of 1990, 2SSB 6259, 51th Washington State Legislature (1990), §87 (3).

⁴³ “If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services in a secure facility for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. Such control, care, and treatment shall be provided at a facility operated by the department of social and health services.” Community Protection Act of 1990, 2SSB 6259, 51th Washington State Legislature (1990), §87.

[t]he first is that, as I suggested earlier, the Department of Corrections very clearly dominates physically, administratively, procedurally, and psychologically the MICC and really in many significant ways encompasses the SCC. It is, for all intents and purposes, a prison. Feels like a prison, looks like a prison, and for the most part operates like a prison. . . . It is also my opinion that these things collectively represent impediments to any possibility that any significant therapy or treatment can be done under the present circumstances.⁴⁴

In 1998, Washington State settled with 16 long-term SCC residents, paying each \$10,000 for the inadequate mental health treatment plus \$250,000 in legal fees. In 1999 the court decided to impose financial penalties on the State instead of releasing SCC residents. Subsequently, the State budgeted \$17 million for hiring and training staff and building a new facility.⁴⁵

As the SVP program was constitutionally challenged, the Washington legislature kept trying to modify sex offender sentencing policies as a possible alternative to the civil commitment program that might be ruled unconstitutional. When the *Seling* court rejected the constitutional challenge and found the statute constitutional, the decision ruled out the possibility of immediate release of SCC residents through constitutional challenges. For policy makers and SCC staff, *Young* signified that the civil commitment program finally obtained a firm constitutional ground after a decade had elapsed since its inception and bills intending to change

⁴⁴ Lieb, "After *Hendricks*," 482.

⁴⁵ Lieb, "After *Hendricks*."

the policy died in committee.⁴⁶ However, the court injunction to implement a constitutionally adequate treatment program continued to impose financial burdens on the State. Washington State finally passed in 2001 the Management of Sex Offenders Act that established a sentencing system for sex offenders that would replace the SVP commitment program.

5.6. Containment of Danger

The Management of Sex Offenders Act is composed of two parts, each of which addresses the constitutional and budgetary issues involved in controlling high-risk sex offenders. First, the act authorizes the creation of “secure community transition facilities (SCTF).”⁴⁷ This part was the Legislature’s response to Judge Dwyer’s injunction that the State operate a community transition program for those who have made progress in treatment to the extent that total confinement is not necessary. This “less restrictive alternative” principle is one of the safeguards provided in the SVP statute as well as a constitutional right established through the due process revolution in the 1970s. Since the court issued the injunction in 1994, DSHS tried to create a community transition facility but failed due to opposition from local residents. Finally, the Legislature decided to solve this issue with legislation since the State was “under the gun and

⁴⁶ Act Relating to Sentencing of Sexually Violent Predators, H.B. 3124, 56th Washington State Legislature (2000); Act Relating to Sentencing of Sexually Violent Predators, S.B. 6836, 56th Washington State Legislature (2000); Jennifer M. McKinney, “Washington State’s Return to Indeterminate Sentencing for Sex Offenses: Correcting Past Sentencing Mistakes and Preventing Future Harm,” *Seattle University Law Review* 26, no. 2 (2002): 309-36.

⁴⁷ “ ‘Secure community transition facility’ means a residential facility for persons civilly committed and conditionally released to a less restrictive alternative.” Act Relating to the Management of Sex Offenders in the Civil Commitment and Criminal Justice Systems, 3ESSB 6151, 57th Washington State Legislature (2001), § 102 (10).

the most frightening possibility is to let them out with no supervision or conditions and that is possible if the state can't meet its constitutional obligations.”⁴⁸

Here, a “less restrictive” alternative means “less than total confinement,” which is not necessarily synonymous with “less surveillance.” As the word “secure” indicates, SCTF residents are placed under high level supervision. The act provides that all residents must have 24-hour electronic monitoring, using the global positioning system; must be accompanied by trained escorts when away from the facility; and there must be a one-to-one staff to resident ratio during waking hours and two staff for every three residents at night. Also, noncompliant residents will be returned to the SCC or a higher level of security. These sex offenders who are “conditionally released” to a community residential program are subject to a rigorous treatment program combined with close monitoring.⁴⁹

A provision regarding the siting of SCTFs was not a part of the original bill but added later in order to keep committed SVPs under surveillance by complying with the state's constitutional duty. This was a stopgap measure to avoid a court order requiring immediate release of sex offenders from the SCC. A more fundamental solution to this issue was sought in another direction, that is, the elimination or reduction of civil commitment. The other part of the act introduced a new sentencing policy that paved way for achieving this aim by combining indeterminate sentences with the presumptive sentencing scheme. The Management of Sex Offenders Act provides that since 2001, offenders who committed serious sex offences receive “determinate-plus sentences,” which consist of two parts: a minimum term of imprisonment

⁴⁸ Senate Committee on Human Services and Corrections, Senate Bill Report, Act Relating to the Management of Sex Offenders in the Civil Commitment and Criminal Justice Systems, 3ESSB 6151, 57th Washington State Legislature (2001).

⁴⁹ Act Relating to the Management of Sex Offenders in the Civil Commitment and Criminal Justice Systems, 3ESSB 6151, 57th Washington State Legislature (2001).

equal to the determinate sentence imposed under the sentencing grid and an indeterminate maximum term of confinement equal to the statutory maximum sentence for the offense. When an offender completes the minimum term, the Indeterminate Sentence Review Board decides whether the offender is more likely than not to engage in sex offenses if released. If the Board finds the offender still dangerous by a preponderance of the evidence, the Board may extend the prison term beyond the minimum. If an offender is released from prison before he reaches the maximum term, the offender is supervised in the community until the expiration of the maximum term, which in most cases is for life.⁵⁰

Determinate-plus sentencing is designed to serve the same purpose as the civil commitment of SVPs, that is, preventative confinement of dangerous sex offenders.⁵¹ As the same function is now achieved with different institutional settings, significant modifications have been made to the system for controlling sex offenders. While SVPs are civilly committed to the custody of DSHS after serving prison terms, the Department of Corrections takes sole responsibility for sex offenders sentenced under the new act and treatment services are offered in prison but not mandatory. Under this institutional setting, treatment ceases to be a constitutional right that an offender can muster to challenge his confinement conditions.

Parallel with this shift of mandate is the change in the eligibility criteria. Unlike the SVP statute that requires a finding of mental abnormality or personality disorder, the new sentencing structure only requires the Board to find the offender is more likely than not to re-offend, based

⁵⁰ Ibid.

⁵¹ However, the Act did not lead to the closure of SCC. Criminal sanctions imposed under the new act only apply to offenders who commit offenses after the effective date because of the prohibition against ex post facto laws. Thus, legislators expressed concern about maintaining the SVP program as attested by the provision for the construction of SCTFs, while they pursued another avenue to substitute civil commitment. The two parts that make up the 2001 Act were an attempt to keep under control sex offenders who committed offenses before and after the Act, respectively.

on a risk assessment. With the Management of Sex Offenders Act, the indefinite incarceration of sex offenders, created by a counter-law, became incorporated into the criminal justice system by dropping the mental abnormality component. As a corollary, the target for lengthened confinement has been broadened beyond a “small but extremely dangerous group” of sexual predators, who were the focus of the 1990 Task Force. While less than 10 percent of sex offenders released from prison were sent to the SCC under the SVP statute, the Indeterminate Sentence Review Board decided to retain in prison approximately 60 percent of determinate-plus sentenced offenders past the minimum term as of 2011.⁵²

Another significant facet of the Act is that it increased supervision of released offenders. A maximum term of life, which most offenders sentenced under the Act receive, does not terminate upon release from prison. These offenders are not released to the community but to “community custody,” which was introduced as a replacement of “community supervision” with the passage of the Offender Accountability Act in 1999. “Community custody” means a “portion of an offender’s sentence of confinement . . . served in the community subject to controls placed on the offender’s movement and activities by the department of corrections.”⁵³ The 1999 act also amended the SRA by adding the purpose of reducing the risk of re-offending in the community and explicitly mandated that the supervision of offenders be based on risk.⁵⁴ Taken together, the Offender Accountability Act and the Management of Sex Offenders Act have had an effect of broadening the target populations for lengthened confinement and intense supervision by

⁵² Indeterminate Sentence Review Board, *Determinate Plus/CCB Statistical Report*, June 31 (Olympia, WA: Indeterminate Sentence Review Board, 2011).

⁵³ Offender Accountability Act of 1999, E2SSB 5421, 56th Washington State Legislature (1999) § 2 (4).

⁵⁴ The OAA applies to sex offenses, violent offenses, crimes against persons, and felony drug offenses.

establishing a risk management system with the mental health condition removed from eligibility criteria.

Conclusion

Sex offender regulations that came into effect since the early 1990s revived and strengthened indeterminate confinement and treatment. These components have long existed in the criminal justice area. The emergence of sex offender management, however, has accompanied significant changes in their targets, purposes, and practices. One of the main differences that distinguish new sex offender laws is that treatment supplements criminal sanctions whereas treatment options before the 1990s replaced criminal sanctions such as imprisonment. While court-ordered treatment was initially designed to encourage the reporting of undetected sex crime by allowing for leniency in sentencing, treatment was reconceived as a means to ensure the extended surveillance of known sex offenders.

The evolution of sex offender management involves changes in the category and status of sex offenders. The most significant is the foregrounding of stranger danger in crime control discourse. As manifested in the legislative process of the Community Protection Act, the sexually violent predator who is a stranger to the victim by definition emerged in public discourse as the quintessential embodiment of danger to the community. The new category of sexually violent predators designating this uncontrollable dangerous stranger was instrumental in spurring sex offender policy reform over the next decade. The concerted efforts to contain sex offenders while minimizing constitutional challenges resulted in the creation of a no-man's-land between civil and criminal areas.

However, although the SVP category conveyed a symbolic import in reform efforts, more significant than its high visibility is that the SVP program served as a transition to the risk management regime in Washington State. The creation of the SVP category initiated a new institution that is geared toward management as distinct from older practices of both treatment and punishment. While the SVP program initially emerged for the purpose of containing a “small but extremely dangerous group,” continued constitutional challenges and budgetary issues posed difficulties in keeping the program in operation as intended. After a decade of struggles, the SVP program gave way to the prison-based indeterminate incarceration as a primary strategy for managing sex offenders. Along with this, Washington State removed the troubling admission criteria of mental abnormality and established the management system solely on the basis of risk assessment. The repeat felony offender who poses a high risk of recidivism became merged with the category of SVP and indeterminate incarceration targeting those offenders is finally entrenched in the criminal justice system.

Chapter 6 Conclusion

In the early 2000s, a spate of news articles poured out on child sexual abuse in the Catholic Church. A central figure of the scandals, Father Paul Shanley was accused of repeatedly committing sexual abuse on multiple children since the 1960s. However, unlike the publicly circulated image of a monstrous pedophile priest, many of the alleged victims were in their late teens or twenties when Shanley had sexual contacts with them. Many of the accusations were made based on the claims of recovered memories, which were admitted as evidence and led to the conviction of Shanley in 2005.¹ Another priest in the Boston scandal, Father John J. Geoghan was accused of sexually abusing almost 150 children during his 34-year service in the Church. After the press made scandalous reports about the allegations of priest child abuse and the Church's attempts at coverup, the Archdiocese of Boston made a \$10million settlement with the victims in 86 cases against Geoghan.² In 2002, 67-year-old Geoghan was sentenced to 9-to-10 years for molesting a 10-year-old boy in 1991, with other criminal charges and trials awaiting.

Geoghan did not have a chance to stand other trials. On August 23, 2003, while serving his sentence at the Souza-Baranowski Correctional Center, Geoghan was strangled to death by another inmate, Joseph L. Druce, who was sentenced to life without parole in 1989 for strangling and beating to death a man he believed was gay. Druce, who had sent letters with swastikas to attorneys with Jewish names, was reported to be a Nazi sympathizer who had a "vendetta against gays, African-Americans and Jews."³ However, the fact that Geoghan was confined in the protective custody unit at the time of the murder shows that it was not only Nazi sympathizers or

¹ Roger N. Lancaster, *Sex Panic and the Punitive State* (Berkeley: University of California Press, 2011), 75-6.

² "17 Suits Name Former Priest in Sex Abuse," *New York Times*, October 4, 2002, <http://www.nytimes.com/2002/10/04/us/17-suits-name-former-priest-in-sex-abuse.html>.

³ Katie Zezima, "News of Ex-Priest's Death Evokes Range of Emotions," *New York Times*, August 25, 2003, <http://www.nytimes.com/2003/08/25/us/news-of-ex-priest-s-death-evokes-range-of-emotions.html>.

pronounced homophobes that persecuted sex offenders. Another article reported that in the Concord prison where Geoghan was imprisoned before his transfer to the Souza-Baranowski prison, guards “urinated and defecated on his bed and encouraged other inmates ‘to kill him.’”⁴ Geoghan faced pervasive threats of violence and was reported to have felt in danger in prison.⁵

Convicted sex offenders are often sent to the protective custody unit in order to protect them from violence and harassment by other inmates. Anthropologist Lorna A. Rhodes conducted an ethnography of supermaximum security prisons, in which she describes how inmates tried to reclaim their symbolic citizenship by persecuting sex offenders. Rhodes quotes an inmate saying that “[w]e try to express a lot of compassion for children in society, so we’re not complete beasts. It’s just one way that we try to make up for what we’ve done. So we’re not so bad.”⁶ Put another way, participating in the persecution of sex offenders in the name of children proves that you legitimately belong to the society.

The dynamics among prison inmates show that child protection from sexual abuse serves as a boundary issue that delineates Self from Other.⁷ Pervasive violence against sex offenders in prison mirrors the moral order in society at large. Sex offenses against children are considered to be the most despicable, depraved, unspeakable violations even among supermax prison inmates. It is not murder but rather sexual violations of a child that ostracizes the criminal from the community. Sex offenders cannot even be members of the supermax prison society that is

⁴ Fox Butterfield, “Prison Policy Put Priest in Unit With His Killer, Experts Say,” *New York Times*, August 29, 2003, <http://www.nytimes.com/2003/08/29/us/prison-policy-put-priest-in-unit-with-his-killer-experts-say.html>.

⁵ Zezima, “News of Ex-Priest’s Death.”

⁶ Lorna A. Rhodes, “Changing the Subject: Conversation in Supermax.” *Cultural Anthropology* 20, no. 3 (2005): 398.

⁷ Mary Douglas, *Risk and Blame: Essays in Cultural Theory* (New York: Routledge, 1992).

designed to exclude and isolate hard criminals from society. The murdered “pedophile” priest is a “monster” who “was killed by a monster,” as the Reverend Richard Casey puts it.⁸

My dissertation examines the creation of sex offenders as dangerous strangers beyond redemption, with a focus on the development of the risk management regime. Contemporary risk technologies that employ an actuarial approach germinated in the wake of civil rights challenges to dangerousness prediction and growing skepticism about offender rehabilitation. Risk assessment and management technologies are designed to identify and classify sex offenders as problem populations, based on probabilistic calculations of individual liberty and public safety. While psychologists initially promoted actuarial justice as a rational method of balancing conflicting social values, its implementation was dictated by institutional demands for efficiency in regulating an increasing number of sex offenders. Risk management technologies led to the mutual reproduction of crime data and criminal populations at risk of reoffense, which contributed to the expansion of populations under criminal supervision.

Although proponents of risk management promise to provide a sensible, scientific alternative to populist law enforcement driven by moral panic, both evidence-based and populist policies focus on individual offenders, as opposed to a structural approach to socio-cultural factors associated with crime control practices. On actuarial risk assessment scales, personal hardship and privation, such as unemployment and troubled family relationships, indicate increased risks of committing offenses, and thus a need of increased criminal supervision, rather than suggesting that they need more social support in order to be integrated back into the community. In this regard, the risk management system that purports to sort out dangerous

⁸ Zezima, “News of Ex-Priest’s Death.”

offenders has a consequence of creating dangerous strangers by depriving them of secure housing and employment.

6.1. Stranger Danger, Child Victim, and Child Offender

The formation of the sex offender management system since the 1990s was an outgrowth of the family values politics combined with the law-and-order politics that run deep in American society. In the 1960s when American society “discovered” child abuse, physicians and lawmakers embarked on efforts to establish a child protection system that put the family under surveillance and guidance. Mandatory reporting laws charged medical and social service experts with responsibility to ensure that children grew up in a safe family environment. Child protection campaigns in the 1960s and early 1970s placed parenting practices under medical guidance and legal regulation by circumscribing pathological families.

Over three decades from the early 1960s to the 1990s, child protection emerged as a dominant cultural theme that could be immediately translated into the protection of the family. The developments in child protection presupposed and reinforced the idea of the normative family that was supposed to provide a safe haven for children. By the early 1990s, the normative family, against which the pathological family was defined, came to the fore to gird itself for the battle against stranger danger. The legitimate child victim who deserves public support and grief now belongs to the normative family, as opposed to the pathological family who drains tax money from law-abiding citizens. This was achieved at the expense of children’s rights against parent-adult authority on the one hand, and through turning a blind eye to other predicaments facing children such as poverty, malnutrition, and crumbling public child care and education, on

the other. In this sense, it can be said that the right victim in the neo-liberal era is the sexually victimized (white suburban) child, not deprived children in poverty-stricken neighborhoods.

The rhetorical emphasis on family values in child protection has often been entangled with the victim advocacy movement that emerged as a major influence in crime control policy since the 1980s. While laws were named after the sponsors of legislation in the previous years, sex offender laws use the first names of child victims whose parents took initiative in legislation. First name-based law-making personalizes and infantilizes a criminal justice system that conveys the message that wrongdoers will be brought to justice in the name of victims and their families, which serves as a driving force behind crime control policies that emphasize law and order.

The law-and-order rhetoric gained ascendancy in American politics in the wake of the civil rights revolution, anti-war, and counter-culture movement in the 1960s. Richard Nixon, then presidential candidate, declared the War on Crime in the turbulent year of 1968. By the late 1970s, crime control became a central political agenda that structured the legal regulation of other areas such as education, family relations, and workplace, in other words, the regime of “governing through crime.”⁹ Contemporary sex offender laws are an exemplar in this respect. Initiated in response to brutal violence against young children, the sex offender laws have served the aims of regulating non-violent sexual activities, especially adolescent sexuality, and nuisances, such as urination in public spaces.

A number of criminologists, legal scholars and civil rights activists have vehemently criticized sex offender regulations for imposing ineffective, disproportionately harsh sanctions on too wide a range of people who are neither dangerous nor recidivistic. However, constitutional challenges to sex offender laws have not been very successful in keeping state

⁹ Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford: Oxford University Press, 2007).

police power in check. The U.S. Supreme Court has upheld civil commitment, community notification, and risk assessment, deciding that those measures involve no violations of constitutional rights. The civil commitment cases, in particular, addressed the fundamental issue of the boundary between treatment and punishment. The Supreme Court's decisions that found civil commitment non-punitive, even if it did not provide treatment, reversed the received legal wisdom established during the 1960s and 1970s. The due process revolution of past years stated that confinement without adequate treatment should be considered punishment. In contrast, the Supreme Court's decisions since the 1990s indicate that it is a legitimate state interest to implement radical regulatory measures that perform neither punishment nor treatment. The newly created area is devoted to the function of incapacitative management.

Although sex offender laws passed constitutional muster in the federal Supreme Court, divided court decisions and injunctions at lower level courts show that the civil rights of sex offenders raise thorny issues. In addition, conflicts with respect to the implementation of the laws have hampered the full deployment of ever expanding regulations. The federal Sex Offender Registration and Notification Act (SORNA) of 2006, in particular, caused resistance from local law enforcement and as a consequence, the federal government extended the deadline for state compliance several times.¹⁰

One of the controversial issues involved in SORNA is the registration and community notification of juvenile sex offenders. The criminal sanctions imposed on juvenile sex offenders raise a set of revealing questions about current practices of sex offender regulation. Above all, what is child protection meant to achieve when both the victim and perpetrator are children?

¹⁰ U.S. Government Accountability Office, *Sex Offender Registration and Notification Act: Jurisdictions Face Challenges to Implementing the Act, and Stakeholders Report Positive and Negative Effects*, GAO-13-211 (Washington, D.C.: Government Accountability Office, 2013).

SORNA requires minors who are prosecuted as adults or adjudicated delinquent to register if they are 14 years old or older at the time of the crimes. Some jurisdictions have gone further to put minors as young as 9 years old on the registry and subject them to community notification. Many of those young registrants “pay their debt to society” for “sexually touching” their playmates or having sexual relationships with their consensual peers.¹¹

It has been suggested that contemporary sex offender regulations are not only ineffective but in fact harmful for children.¹² The rhetoric of stranger danger to children scares parents into confining children’s activities within the home, where a large majority of child abuse occurs.¹³ Above all, child protection does not necessarily coincide with the interests of children in reality. Rather, what it achieves is the “the preservation of adult fantasies of childhood as a time of sexual innocence.”¹⁴ Thus, child protection in this context could mean withdrawing sexual knowledge and sex education from minors.¹⁵ Children (and adolescents redefined as children) who do not conform to the expectation of sexual innocence and ignorance raise a red flag for parents and authorities.¹⁶ For example, young children who display sexual knowledge are

¹¹ Human Rights Watch, *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US* (New York: Human Rights Watch, 2013).

¹² Stevi Jackson and Sue Scott, “Risk Anxiety and Social Construction of Childhood,” in *Risk and Sociocultural Theory: New Directions and Perspectives*, ed. Deborah Lupton (Cambridge: Cambridge University Press, 1999), 86-107; James R. Kincaid, *Erotic Innocence: The Culture of Child Molesting* (Durham: Duke University Press, 1998).

¹³ Joann Conrad, “Lost Innocent and Sacrificial Delegate: The JonBenet Ramsey Murder,” *Childhood: A Journal of Global Child Research* 6, no. 3 (1999): 313-51.

¹⁴ Lancaster, *Sex Panic*, 2.

¹⁵ Marty Klein, *America’s War on Sex: The Attack on Law, Lust and Liberty* (Westport: Praeger, 2006).

¹⁶ Claudia Castañeda, *Figurations: Child, Bodies, Worlds* (Durham: Duke University Press, 2002); Estelle B. Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* (Cambridge, MA: Harvard University Press, 2013); Pamela Haag, *Consent: Sexual Rights and the Transformation of American Liberalism* (Ithaca: Cornell University Press, 1999); Stephen Robertson, *Crimes Against Children: Sexual Violence and Legal Culture in New York City, 1880-1960* (Chapel Hill: University of North Carolina Press, 2005).

suspected of having been victims or victimizers of sexual abuse.¹⁷ Teenagers who send self-taken nude photos to their girlfriends or boyfriends are prosecuted for the production and distribution of child pornography.¹⁸ Children as vulnerable victims of sexual abuse and as dangerous victimizers who need close supervision are two sides of the same coin: two different figures who invoke innocent childhood in danger.

6.2. Science in the Politics of Law-and-Order

Youth sex offenders subject to the same registration and notification requirements as adult offenders are a stark example of the production of sex offenders as problem populations governed by indiscriminate law enforcement. The catch-all label of “sex offender” invariably applies to wildly diverse behaviors that can be interpreted as sexual, regardless of the offender’s intention. For example, public urination can lead to the conviction of indecent exposure, which entails registration as a sex offender.¹⁹ In 2006, California passed Proposition 83, Jessica’s Law, by 70.5 % approval of state voters. Proposition 83 requires lifetime GPS monitoring of all registered felony sex offenders and prohibits all registered sex offenders, whether felony or misdemeanor, from living within 2,000 feet of a school or park.²⁰ Sex offenders with varying

¹⁷ Sonja N. Brilleslijper-Kater, William N. Friedrich, and David L. Corwin, “Sexual Knowledge and Emotional Reaction as Indicators of Sexual Abuse in Young Children: Theory and Research Challenges,” *Child Abuse and Neglect* 28, no. 10 (2004): 1007-17.

¹⁸ Tamer Lewin, “Rethinking Sex Offender Laws for Youth Texting,” *New York Times*, March 20, 2010, http://www.nytimes.com/2010/03/21/us/21sexting.html?_r=0.

¹⁹ Ian Lovett, “Public-Place Laws Tighten Rein on Sex Offenders,” *New York Times*, May 29, 2012, <http://www.nytimes.com/2012/05/30/us/sex-offenders-face-growing-restrictions-on-public-places.html>.

²⁰ Proposition 83 Sex Offenders. Sexually Violent Predators. Punishment, Residence Restrictions and Monitoring. Initiative Statute, 2006, *California General Election Official Voter Information Guide*, accessed November 13, 2013, http://vote2006.sos.ca.gov/voterguide/pdf/prop83_text.pdf.

degrees of culpability are tarred with the same brush as the rapist-murderer of 9-year-old Jessica Lunsford.

Civil rights advocates, criminologists, and psychologists have suggested evidence-based criminal justice practice as a solution to the “one-size-fits-all” approach to sex offender regulation. In 2007, Human Rights Watch published a report on sex offender laws, listing a variety of human rights violations befallen former sex offenders. The report concludes:

[t]here is, however, no inherent contradiction between protecting the rights of children and protecting the rights of former offenders. Both are protected if registration is limited to former offenders who have been individually assessed as dangerous, and only for so long as they pose a high or medium risk of reoffending.²¹

The key is, in their view, identifying dangerous sex offenders whose rights could be compromised for the sake of public safety, while keeping excessive punitive power of the state at bay. My dissertation analyzes such a claim not as undermining but as part and parcel of the current regime of sex offender regulation by tracing the origins of the emphasis on scientific evidence in regulating dangerous offenders.

Many have pointed out that the current practices of sex offender regulation are tainted by unfair law enforcement, miscarriages of justice, and disproportionately harsh punishment.²²

Criticism often focuses on populist criminal justice driven by moral panic. The sex offender laws

²¹ Human Rights Watch, *No Easy Answers*, 130.

²² Eric S. Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Ithaca: Cornell University Press, 2006); Human Rights Watch, *No Easy Answers*; Lancaster, *Sex Panic*; Jonathan Simon, “Managing the Monstrous: Sex Offenders and the New Penology,” *Psychology, Public Policy, and Law* 4, no. 1 (1998): 452-67.

that were enacted through public initiative, especially child victims' parents, exemplify a major transformation since the 1980s: the incorporation of victim advocacy into the criminal justice system. A number of criminologists and legal professionals have warned against the influence of victim advocacy in populist justice.²³ In their criticism, populist punitiveness has often been contrasted with sensible, rational approaches to criminal justice. For example, Stuart A. Scheingold, Toska Olson, and Jana Pershing argue: "Victim advocacy is rooted in, and dependent on, an overheated and *fear-ridden political climate*. At such times, recourse to simplistic solutions and scapegoating thrives and *enlightened political leadership* falters."²⁴ As law-and-order politics gained dominance, the argument goes on, tough-on-crime policies have become a popular political strategy to win the electorate over at the expense of professional moderation.²⁵

One of the often suggested antidotes to populist excessiveness is criminal justice practices based on scientific studies about the causes of crime and the effectiveness of interventions. The principle of evidence-based practices (EBP) has formed important leverage in organizing the regime of sex offender management. Although the idea of EBP has not been fully deployed to dictate the operation of the criminal justice system, resources and efforts have been invested in developing a sex offender management system along the principle of EBP.²⁶

²³ David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001); Lancaster, *Sex Panic*; John Pratt, *Penal Populism* (New York: Routledge, 2007); Simon, *Governing through Crime*.

²⁴ Stuart A. Scheingold, Toska Olson, and Jana Pershing, "Sexual Violence, Victim Advocacy and Republican Criminology," *Law and Society Review* 28, no. 4 (1994): 760 (emphasis added).

²⁵ Simon, *Governing through Crime*.

²⁶ Kim English, Suzanne Pullen, and Linda Jones, *Managing Adult Sex Offenders in the Community: A Containment Approach* (Washington, D.C.: U.S. Department of Justice, 1997); National Institute of Corrections, *Public*

The current contrast of populist justice and evidence-based justice traces back to Saleem Shah's proposition from 1978 that an actuarial approach could help curb the problem of "strong social and political pressures that demand certain types of decision rules, namely, 'better safe than sorry.'"²⁷ On the one hand, critique of the populist model posed the expertise of mental health professionals in contrast with a populist drive toward excessive punitiveness. On the other hand, concern about expertise influenced by public pressure was juxtaposed with concern about unchecked, arbitrary expert discretion. The social control model that was developed in the 1960s and 1970s presented a reversed picture of the populist model: mental health professionals were accused of yielding their expert authority to punish and control socially disadvantaged populations. In the late 1970s and 1980s, Shah and reform-minded psychologists promoted the actuarial approach as a solution to both problems raised in the populist and social control models by providing disciplined expertise.

The development of actuarial risk assessment, which is an essential element of EBP, is predicated on the belief that decision-making informed by statistical analysis of accumulated criminal data provides the most effective method of curbing crime, in particular, recidivism. However, what is left out in the emphasis on scientific management is the question of the predictability of human behavior. Behavior prediction in relation to sex offender regulation involves, first of all, the issue of how to define a sex offender, in other words, who sex offenders are. Given the constant fluctuation in the criminalization of various sexual activities, defining a sex offender is a moving target. The first thing that sex offender laws perform is to assign the

Protection through Offender Risk Reduction: Evidence Based Practice (Washington, D.C.: U.S. Department of Justice, 1994).

²⁷ Saleem A. Shah, "Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychology," *American Psychologist* 33 (March 1978): 228.

label of sex offender to those whose criminally charged acts are embedded in a complex context of socio-cultural settings and interpersonal relationships. When convicted sex offenders are converted into data, the rich and often vague context is removed, except a set of information indicating dry facts such as conviction charges and date, age and gender of the victims.

Actuarial risk assessment is designed to categorize offenders with reference to facts that are recorded in readily accessible official documents. For the purpose of managing a rapidly increasing number of sex offenders, risk assessment instruments were developed as screening tools that could be administered by correctional personnel on a daily basis. Institutional demands for efficiency and administrative ease dictated the construction of risk scales, which excluded the time-consuming examination of offenders' mental health. The promise of reliable, disciplined expertise is achieved through utilizing a limited number of risk factors that are captured by crime data. The consequence is the vicious circle of increasing criminal supervision of sex offenders whose risk profiles reflect past criminal justice practices embodied in crime statistics, which in turn increases the future chances of arrest and conviction. The resultant risk assessment tools point to a stranger offender as the most dangerous group, which provides scientific credence to the sex offender management regime that targets stranger danger.

6.3. Civil Rights Discourses and Scientific Risk Management

My dissertation addresses the question of how divergent ways of problematizing and solving the issues of child abuse and dangerous offenders have come to form a particular arrangement of crime control as it is now. Contemporary crime control policies that are characterized by tough-on-crime risk management can be viewed as a product of the articulation of heterogeneous discourses and apparatuses pertaining to crime control. One of the questions

that I address is how liberal voices emphasizing the civil rights of the accused and convicted were defused and subsumed into a risk management regime that accentuates public safety.

Many scholars have observed that during the 1970s skepticism about offender rehabilitation became pervasive among the public and policy-makers as well as professionals involved in corrections.²⁸ By the early 1980s, the therapeutic concern with personal maladjustment as a deep cause of crime was pushed to the background and the punitive aim of targeting the criminal act itself came to the fore.²⁹ It is paradoxical that liberals contributed to paving the way for the law-and-order politics by facilitating the demise of rehabilitative criminal justice. During the 1960s and 1970s, renowned scholarly works that challenged the contemporary arrangements of penal-psychiatric practices came out, such as Erving Goffman's *Asylums* and Michel Foucault's *Discipline and Punish*. In the latter work, Foucault conducts "the history of the present," where he traces the historical formation of the modern penal system buttressed by the ideal of rehabilitation.³⁰ In other words, *Discipline and Punish* is a critique of what David Garland calls penal-welfarism, which dominated criminal justice and criminology until the mid-1970s.³¹

This period also witnessed the burgeoning movement of psychiatric patients' and prisoners' rights advocacy, which yielded landmark court decisions. In the dissertation, I attend to the roles of civil rights discourses in the undermining of clinical dangerousness prediction and the evolution of actuarial risk management. Civil rights claims were a staple of liberal challenges to the preventive confinement of mentally disordered and dangerous individuals since the 1960s.

²⁸ Robert Martinson, "What Works? – Questions and Answers about Prison Reform," *Public Interest* 35 (Spring 1974): 22-54.

²⁹ Simon, *Governing through Crime*.

³⁰ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Random House, 1979), 31.

³¹ Garland, *Culture of Control*.

The advocates of psychiatric patient rights who subscribed to the idea of community mental health discredited the social and individual benefits of long-term hospitalization for the mentally disordered. In their earlier efforts to reduce involuntary civil commitment, the advocates suggested that psychiatric authority in charge of public mental health facilities should be subject to stringent legal rules and supervision. In terms of eligibility for civil commitment, courts ruled that the hospitalization of the mentally disordered against their will should not be allowed unless they posed imminent danger. As dangerousness was brought to the fore as the main criterion, it became a center around which controversies regarding psychiatric practices revolved.

Since the 1960s, challenges to preventive detention based on dangerousness were framed in terms of the violation of civil rights that were equated with individual liberty. Civil rights claims could be associated with diverse sets of discourses, such as the freedoms of speech and thought, protection from discrimination, protection from coercive state power, and equal protection under the law. In the height of the civil rights movements for psychiatric patients and offenders, advocates deployed rights discourses in alignment with other issues pertaining to social justice. For example, advocates of community-based mental health held onto the values of social justice and equality in their endorsement of the right to treatment in the least restrictive settings, that is, in the community. In their efforts to reduce reliance on large-scale psychiatric facilities, the advocates promoted a social model of mental disorders. George W. Albee, a prominent psychologist who participated in the policy processes of community mental health, claimed that “prevention [of mental disorders] requires efforts at social justice.”³²

³² George W. Albee, “Prevention of Mental Disorders,” in *Psychology and the National Institute of Mental Health: A Historical Analysis of Science, Practice, and Policy*, eds. Wade E. Pickren and Stanley F. Schneider (Washington, D.C.: American Psychological Association, 2005), 295.

The whole structure of our polluted, industrialized, overpopulated, overenergized, overcrowded sexist and racist society breeds such massive human injustice and distress that the only hope for prevention is for major social reorganization. To prevent mental and emotional disorders, . . . , we must abolish such injustices as unemployment, bad housing, social discrimination, personal insecurity, and poverty.³³

When the rights of psychiatric patients were framed in relation to social justice in general, civil rights claims against coercive state intervention referred to the freedoms of speech and thought. Critics of psychiatric authority in defining and controlling “deviance” put forward the right to freedom of thought, belief, opinion, and expression. Involuntary civil commitment and forced treatment that purported to change “abnormal” thoughts and behavior were accused of violating the freedom of thought.³⁴ In a similar vein, Nicholas Kittrie discussed “the right to be different” in his critique of psychiatric social control.³⁵

However, those diverse possibilities of crafting civil rights discourses withered away as dangerousness was singled out as a (possible) justification for the restriction of civil rights and became a locus of controversy surrounding individual liberty versus public safety. When civil rights claims challenged and destabilized the rehabilitative regime of crime control in the 1960s and 1970s, the debates over preventive confinement came to revolve around psychiatrists’ inability to provide reliable diagnoses. The problem of incorrect dangerousness predictions and

³³ Marc Kessler and George W. Albee, “Primary Prevention,” *Annual Review of Psychology* 26, no. 1 (1975): 576.

³⁴ Lawrence O. Gostin, “Freedom of Expression and the Mentally Disordered: Philosophical and Constitutional Perspectives,” *Notre Dame Lawyer* 50, no. 3 (1975): 419-47; Todd Wellsch, “The Right of the Civilly Committed Mental Patient to Refuse Treatment,” *Saskatchewan Law Review* 48, no. 2 (1984): 269-91.

³⁵ Nicholas N. Kittrie, *The Right To Be Different: Deviance and Enforced Therapy* (Baltimore: Johns Hopkins Press, 1971).

the claim of the right not to be a false positive overshadowed other possible development paths for civil rights discourses.

The logic of risk management has parallels in civil rights discourses that focused on due process of law and the protection of individual liberty from unnecessary confinement. The actuarial assessment of risk embodies statistical calculations of civil rights and public safety. Despite the proponents' promise of objective, scientific practice, risk assessment is a gray area where diverse values have collided and been negotiated in relation to the question of who deserves the protection of civil rights. It can also be said that civil rights discourses address the principle of categorizing individuals into deserving and non-deserving groups. Civil rights are not universally accorded but are specific criteria that indicate an individual's inclusion or exclusion in relation to the civil society. In the final analysis, civil rights discourses and contemporary risk management have the mirrored logic of sorting out populations into different categories: those assessed at high risk do not deserve civil rights protections. Thus, civil rights talk is integral in the risk management regime in the sense that it serves as a principle for dividing and sorting out Other from Self.

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