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## The Adam Walsh Child Protection and Safety Act: Legal and Psychological Aspects of the New Civil Commitment Law for Federal Civil Commitment Law For Federal Sex Offenders

John Fabian

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# THE ADAM WALSH CHILD PROTECTION AND SAFETY ACT: LEGAL AND PSYCHOLOGICAL ASPECTS OF THE NEW CIVIL COMMITMENT LAW FOR FEDERAL SEX OFFENDERS

JOHN FABIAN\*

## ABSTRACT

The Adam Walsh Act (AWA) became law on July 27, 2006, and is the most expansive and punitive sex offender law ever initiated by the federal government. One aspect of the statute, and the topic of this article, is the civil commitment of federal sex offenders. The AWA civil commitment law has its roots in prior U.S. Supreme Court cases including *Kansas v. Hendricks* and *Kansas v. Crane*.<sup>1</sup> While the federal commitment statute is similar to traditional state commitment laws, the AWA does not provide for a finding of “likely” to commit sex offenses. Rather, the statute defines a “sexually dangerous person” as having “serious difficulty refraining from sexually violent conduct or child molestation if released.” Assessing the likelihood of recidivism and volitional impairments leading to sexual recidivism in light of the AWA and state commitment statutes are critical determinations. The accuracy, validity, and interrater reliability of the measurement of volitional impairment is considerably lacking among experts and within the empirical literature of sex offending in general. Similarly, examining the legal terms “mental illness, abnormality, or disorder” under the AWA will entail a thoughtful application of clinical psychiatric diagnoses recognized in the mental health profession. Many of these psychiatric diagnoses (primarily paraphilias) utilized in legal commitment proceedings are debated by adversarial expert witnesses in these hearings. As the AWA pertains to federal sex offenders, the expert witness must consider their differences from state sex offenders, as many of the former group are more likely to

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<sup>1</sup> John Fabian, *Examining Our Approaches to Sex Offenders & the Law: Kansas v. Hendricks, Crane and Beyond: “Mental Abnormality,” and “Sexual Dangerousness”: Volitional vs. Emotional Abnormality and the Debate between Community Safety and Civil Liberties*, 29 WM. MITCHELL L. REV. 1367, 1382 (2003).

have histories of online solicitation and child pornography possession in their criminal backgrounds.

Keywords: Adam Walsh Act, sexually violent predator, civil commitment, risk assessment, volitional impairment, child pornography, paraphilias, psychopathy

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## I. INTRODUCTION

The United States Congress recently passed the most comprehensive sex offender law in U.S. history. This statute, the Adam Walsh Act (AWA),<sup>2</sup> is a comprehensive federally initiated sex offender law responding to political and public concern about keeping society safe from sex offenders. The law represents high profile victims such as Adam Walsh, Megan Kanka, Dru Sjodin, and Jessica Lunsford and incorporates far reaching procedures that the government perceives will prevent other high profile sex offenses from occurring.

While the AWA has many aspects including an emphasis on enhancing penalties for sex crimes, establishing new federal sex offenses, and creating a national sex offender registry database, this Article will focus on one element of the statute, namely the civil commitment of federal sex offenders. The author will briefly outline the U.S. Supreme Court landmark sex offender civil commitment cases, *Kansas v. Hendricks* and *Kansas v. Crane*,<sup>3</sup> which lay the foundation for federal civil commitment. In addition to discussing the legal principals of the AWA and comparing them to current state civil commitment statutes, the author will consider the AWA's language with the science of sexual violence risk assessment. Particular attention will be paid to the assessment of volitional impairment in sex offenders as the AWA does not specifically delineate a finding of "likely" to commit sex offenses. Instead, the statute defines a "sexually dangerous person" as "a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others."<sup>4</sup> Being "sexually dangerous to others" means having "serious difficulty refraining from sexually violent conduct or child molestation if released."<sup>5</sup> A finding of likelihood of sexual recidivism is a constitutional mandate outlined in *Hendricks*, and the field of forensic psychology and psychiatry is making gains in risk assessment examining likelihood of sexual recidivism. However, the field of risk assessment is lacking consistent empirical support defining volitional impairments relevant to a threshold for legal civil commitment. The author will comment on diagnostic dilemmas that experts face in sexual offender civil commitment proceedings. The differentiation of federal sex offenders from state sex offenders will be explored as federal offenders are more likely to have a history of non-contact sex offenses and convictions for online solicitation and child pornography possession.

## II. ADAM WALSH ACT CIVIL COMMITMENT LAW

In addition to focusing on creating harsher sentencing and penalties for federal sex crimes, the AWA's legislative intent was to protect society from high risk and dangerous federal sex offenders. Pursuant to this aim, and the crux of this Article, the AWA incorporates the first federal law for the civil commitment of sex offenders in the U.S. through its traditional civil commitment statute, 18 U.S.C. § 4248. The statute has legislative objectives including allotting funding to states that are

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<sup>2</sup> Adam Walsh Act (AWA), 42 U.S.C. § 16911 et seq. (2006).

<sup>3</sup> Fabian, *supra* note 1, at 1374-78; *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Kansas v. Crane*, 534 U.S. 407 (2002).

<sup>4</sup> 18 U.S.C. § 4142(a)(5) (2006).

<sup>5</sup> 18 U.S.C. § 4142(a)(6) (2006).

considering or already entertaining civil commitment laws and to mandating the civil commitment of sexually dangerous federal offenders.<sup>6</sup>

Considering the former objective, about twenty states currently have implemented civil commitment statutes confining sexually violent predators and many states that have not elected to do so often reject bills due to various reasons. The cost of implementing such treatment programs and funding for legal representation and expert witnesses to evaluate the offenders has led many states to consider harsher sentencing laws for sex offenders on the front end rather than commitment laws for those about to be released. The AWA considers these state level concerns and provides federal funding for states who wish to implement commitment statutes.

Important to the primary objective of the AWA civil commitment law appears to be protection of society and treatment/rehabilitation. The AWA authorizes the Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons to attempt to certify any sex offender who is in the custody of the Federal Bureau of Prisons (BOP), who has been committed to the custody of the Attorney General pursuant to 18 U.S.C. § 4241(d), or against whom all criminal charges have been dismissed solely due to the mental condition of the offender as a sexually dangerous person.

In order to initiate commitment proceedings, the BOP must provide evidence based on a clear and convincing standard that a particular offender is a sexually dangerous person.<sup>7</sup> A “sexually dangerous person” means that the defendant “has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others.”<sup>8</sup> The definition of sexually dangerous to others “means that the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.”<sup>9</sup>

The statute does not define the terms “sexually violent conduct” or “child molestation,” and the U.S. Department of Justice, Bureau of Prisons, is presently attempting to interpret them in part through federal criminal statutes.<sup>10</sup> Further, the

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<sup>6</sup> FLA. STAT. ANN. § 394.910 (West 1998).

<sup>7</sup> See Civil Commitment of a Sexually Dangerous Person, 72 Fed. Reg. 43,205, 43,205 (Aug. 3, 2007) (to be codified at 28 C.F.R. pt. 549, subpart H).

<sup>8</sup> 18 U.S.C. § 4247(a)(5) (2006).

<sup>9</sup> 18 U.S.C. § 4247(a)(6) (2006); 28 C.F.R. § 549.94 (2008).

<sup>10</sup> Civil Commitment of a Sexually Dangerous Person, 72 Fed. Reg. at 43,206. See Memorandum for All Regional Directors and Wardens (Sept. 28, 2007) (on file with U.S. Dep’t of Justice Fed. Bureau of Prisons). The BOP has considered interim procedures for implementation of AWA civil commitment of sexually dangerous persons, definitions of *sexually violent conduct* including the use or threatened use of force against the victim; threatening or placing the victim in fear that the victim or any other person will be harmed; rendering the victim unconscious and engaging in conduct of a sexual nature with the victim; administering to the victim by force or threat of force or without knowledge, substances impairing the victim’s ability to appraise control or thought; engaging in such conduct with a victim who is incapable of appraising the nature of the conduct, or physically or mentally incapable of declining participation in or communicating unwillingness to engage in that conduct; engaging in any conduct of a sexual nature with another person with knowledge of having tested positive for HIV or other potentially life-threatening sexually-transmissible

AWA does not define the terms “serious mental illness,” “abnormality,” or “disorder.”

The BOP’s first step of determining evidence of sexually violent conduct or child molestation includes gathering information from the Pre-Sentence Investigative Report, Statement of Reasons, Criminal Judgment, and other resources indicated in 28 C.F.R. § 549.90(c).<sup>11</sup> Further records the BOP may consider include, but are not limited to, information from civil and criminal proceedings, information obtained by U.S. Attorney offices, federal and non-federal authorities, statements and admissions by the offender, and medical records. The determination of whether the offender is a sexually dangerous person includes a forensic examination by a psychologist or psychiatrist pursuant to the statute’s psycho-legal criteria.

The BOP Certification Review Panel Guidelines include: (1) a *behavioral element* (engaged or attempted to engage in sexually violent conduct or child molestation); (2) a *diagnostic element*, including possible diagnoses not limited to pedophilia, sexual sadism, paraphilia not otherwise specified (NOS) non-consent, hebephilia, etc.; sexual disorder; antisocial personality disorder; and personality disorder NOS; and (3) a *risk element* that the inmate will have serious difficulty refraining from sexually violent conduct or child molestation.<sup>12</sup> The risk element includes a review of risk factors related to sex offending and can include documented patterns of behavior, statements made during treatment and actuarial assessment data used to determine sexual recidivism. Further, the Guidelines support the clinical adjustment of actuarial instruments that add incrementally to the predictive accuracy of the actuarial method with various aggravating and mitigating factors.<sup>13</sup>

Federal offenders who are found incompetent to stand trial or not guilty by reason of insanity, or other offenders who have at some time demonstrated sexually violent conduct or child molestation through past charges or dismissed charges (does

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disease without the informed consent of the other person. The BOP considers a definition of *child molestation*, including any unlawful conduct of a sexual nature with a person under eighteen years of age.

<sup>11</sup> Civil Commitment of a Sexually Dangerous Person, 28 C.F.R. § 549.90(c) (2008).

<sup>12</sup> Memorandum, Bureau of Prisons, *supra* note 10.

<sup>13</sup> *See generally id.* (stating that the Guidelines support clinical adjustments to actuarial risk assessment data with the following information: evidence of significant victim injury, torture, or death; forcible confinement of victims; evidence of sadistic behavior including paraphernalia such as rape kits and torture devises or other methods indicating sadistic behavior; evidence of statements of future intent or plans to commit sexual offenses or exploitation; behavioral evidence of paraphilic sexual activity, compulsion, or gross sexual dysregulation; evidence of psychopathy and PCL-R score of twenty-seven or greater; evidence of deviant sexual arousal as measured by penile plethysmography; sex offender treatment failure; and history of violation of supervised release). Mitigating factors to be considered include completion of a sex offender treatment program demonstrating knowledge of sex offender treatment skills; advanced age—sixty years of age or older and when remaining community supervision covers a substantial portion of person’s remaining life; chronic and severe medical condition diminishing risk of sex offending, i.e., impotence and sexual dysfunction; absence of a pattern of sex offending; cases in which the offender’s sex offense history is in the remote past and when there is no history of offending during the last 15 years, especially when the offender was living in the community for long periods without sex offending.

not mandate that sex offender conduct be based on a current conviction), can be considered for commitment. In essence, the current crime for which the offender is serving a period of incarceration does not need to be a sexually related offense. Rather, the offender can have a prior sex offense in his record and a current nonsexual offense, or he can have demonstrated sexually inappropriate behavior while in prison, and these acts can be the justification for the implementation of commitment proceedings.

Accordingly, when considering the definition of a sexually dangerous person, “it is not necessary that a person have been charged with or convicted of any criminal act related to the conduct being considered—a limitation that could prevent a mental health professional from considering probative and relevant evidence such as long-established patterns of behavior, admissions of criminal activity previously undetected by authorities, and statements of intent to commit future sexually violent crimes or acts of child molestation.”<sup>14</sup> In essence, under the AWA, the BOP grants the forensic examiner wide latitude in the amount of collateral information he can consider when assessing for difficulty in refraining from violent sex offending even if this information is not based on formal charges/convictions.

After the government has initiated a certification for commitment of a federal offender under the AWA, the commitment process becomes adversarial in nature. The court may request a psychiatric and/or psychological examination of the defendant to be conducted and the subsequent report(s) be filed with the court.<sup>15</sup> The adversary hearing process includes a determination by the court and not through a civil jury trial, by clear and convincing evidence burdened by the government, as to whether the offender meets the sexually dangerous person criteria.<sup>16</sup> If the civil respondent (formerly criminal defendant) is found to meet criteria, then he will be committed to the custody of the Attorney General and placed within a sex offender management or treatment type facility.

When considering detention and treatment of federal sex offenders, the BOP provides for sex offender management programming that monitors offenders but does not formally provide treatment. The AWA mandates the BOP to provide appropriate treatment to sex offenders who are in need of rehabilitation and who are appropriate for such treatment.<sup>17</sup> One of the main treatment programs will be located at Federal Medical Center Fort Devins, Massachusetts. Many of the sex offenders who will be petitioned for potential civil commitment may not have been offered sex offender treatment programming during their incarceration and will only be able to participate after they are found to be commitment eligible.

Before the offender is discharged from commitment, the court will order a hearing to determine whether the offender should be released based primarily on treatment success and risk assessment.<sup>18</sup> The legal threshold for release into the

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<sup>14</sup> Civil Commitment of a Sexually Dangerous Person, 72 Fed. Reg. at 43,207.

<sup>15</sup> See 18 U.S.C.A. § 4247(b) (West 2006). After filing the certificate, the inmate’s release depends on a decision of the merits and the offender will continue to be detained even beyond his release date.

<sup>16</sup> 18 U.S.C.A. § 4248(d) (West 2006).

<sup>17</sup> 18 U.S.C.A. § 3621(f)(1) (West 2008).

<sup>18</sup> 18 U.S.C.A. § 4247(h) (West 2006).

community includes a preponderance proof standard that the offender is no longer sexually dangerous to others or will not be sexually dangerous to others if released under a prescribed regiment of medical, psychiatric, or psychological care or treatment.

The AWA statutory guidelines leave many unanswered questions. The law does not establish a standard or burden of proof for risk to reoffend and does not permit a jury trial. The law does not conclude whether the respondent has a right to remain silent and does not mandate him to participate in a court ordered examination. The AWA does not resolve discovery procedures, does not distinguish whether attorneys should incorporate the Federal Rules of Criminal Procedure, does not provide for a probable cause determination for proceedings, nor does it provide for periodic annual reviews and examinations. The AWA does not describe procedures before the offender is released. It allows for the indefinite commitment pursuant to the traditional commitment law under 42 U.S.C. § 4248, and it does not delineate least restrictive treatment/placement alternatives.

Before analyzing the statutory language of the AWA civil commitment scheme, the author will discuss critical legal foundations stemming from two landmark cases that grant constitutional support to federal civil commitment, including the U.S. Supreme Court holdings in *Kansas v. Hendricks*<sup>19</sup> and *Kansas v. Crane*.<sup>20</sup>

#### A. *Kansas v. Hendricks and Crane*

It is beyond the scope of this Article to provide a history of U.S. sex offender civil commitment laws. However, readers must be reminded of the U.S. Supreme Court's monumental holdings in *Kansas v. Hendricks* and *Kansas v. Crane*. In *Hendricks*, Leroy Hendricks had a remarkable history of child molesting type offenses towards boys and girls and was diagnosed with paraphilic disorders including pedophilia and exhibitionism. He admitted to being unable to control his urge to molest children and refused to participate in sex offender treatment. In *Hendricks*,<sup>21</sup> the Court upheld a Kansas law providing for the civil commitment of sex offenders who engaged in harmful predator sexual offending in the past, currently suffer from a mental abnormality including a mental illness and/or personality disorder, and because of this mental abnormality or personality disorder, posed as being likely to engage in future predatory acts of harmful sexual reoffending.<sup>22</sup>

The Court articulated that the indefinite commitment condition was not punitive; rather, its objective was treatment of the offenders' mental abnormality and personality disorders to diminish their likelihood of future dangerousness.<sup>23</sup> Further, the Court supported the *legal* definitions of "mental abnormality" and "personality disorder" as satisfying "substantive" due process requirements. This finding

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<sup>19</sup> *Kansas v. Hendricks*, 521 U.S. 346 (1997).

<sup>20</sup> *Kansas v. Crane*, 534 U.S. 407 (2002).

<sup>21</sup> *Hendricks*, 521 U.S. at 355.

<sup>22</sup> *See id.* at 371. *See also* KAN. STAT. ANN. § 59-29a01 (West 1996).

<sup>23</sup> *Hendricks*, 521 U.S. at 363.



ultimately thinned offenders eligible for confinement to those who are unable to control their dangerousness.<sup>24</sup>

In *Kansas v. Crane*, the Court again heard similar issues, but was asked to take another look at Kansas's commitment act by focusing on mental abnormality and volitional requirements leading to sex offending behaviors. The Court acknowledged that in *Hendricks* it was not asked to set a formal volitional requirement associated with the amount of control a person might lack over his sex offending behaviors in order to qualify for commitment. The Court in *Crane* considered that the "nature" and "severity" of the mental disorder "must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case."<sup>25</sup>

Michael Crane, unlike Leroy Hendricks, suffered primarily from an antisocial personality disorder (APD) as well as exhibitionism, rather than a primary paraphilic disorder as did Hendricks. Crane argued that if the state was to commit a personality disordered individual, this individual must have a volitional impairment and be unable to control his sexually violent offending patterns.<sup>26</sup> The Court in *Crane* held that in order to civilly commit a sex offender, the person's mental abnormality or personality disorder must cause the individual to have "serious difficulty in controlling behavior,"<sup>27</sup> rather than "total or complete lack of control."<sup>28</sup> This distinction is a key issue to the evaluation of sexual dangerousness. The Court attempted to differentiate the typical sexual recidivist to the volitionally impaired recidivist. The latter qualifying for commitment.

While it is true that the holding in *Crane* concerned the definition of "mental abnormality" as causing serious difficulty in controlling behavior, the future dangerousness factor outlined in *Hendricks* continues to be the constitutional prerequisite even after *Crane*. The issue of volition and assessment of sexual violence is pertinent to the topic of this paper as the AWA requires an assessment of an offender's lack of control. Before the Article examines this issue, the author presents a list of several current state sex offender civil commitment laws as they compare to the AWA requirements.

### *B. How Do States Handle Civil Commitment?*

Nearly twenty states have implemented sexually violent predator (SVP) civil commitment statutes. Table 1 includes a sampling of four state SVP statutes and the AWA civil commitment scheme characterized by the name of the statutes, their

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<sup>24</sup> *Id.* at 358.

<sup>25</sup> *Crane*, 534 U.S. at 413; see also KAN. STAT. ANN. § 59-2902(b) (West 2000) (stating the definition of "mental abnormality" includes a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person to menacing the health and safety of others).

<sup>26</sup> *In re Crane*, 7 P.3d 285, 287 (Kan. 2000).

<sup>27</sup> *Crane*, 534 U.S. at 407.

<sup>28</sup> *Id.* at 411.

definitions of a sexually violent predator, definitions of the criteria for mental abnormality, and legal thresholds for commitment. Table 1:

<b>Jurisdiction</b>	<b>SVP Statute</b>	<b>Mental abnormality</b>
Florida 394.912 <sup>29</sup>	A sexually violent predator is any person who: (a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.	A mental condition affecting the person's emotional or volitional capacity which predisposes the person to commit sexually violent offenses.
Washington 71.09.020 <sup>30</sup>	Any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined to a secure facility.	A congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.
Arizona 36-3701 <sup>31</sup>	A sexually violent person: (a) has ever been convicted of or found guilty but insane of a sexually violent offense or was charged with a sexually violent offense and was determined incompetent to stand trial; and (b) has a mental disorder that makes the person likely to engage in acts of sexual violence.	Mental disorder . . . a paraphilia, personality disorder, or conduct disorder or any combination of paraphilia, personality disorder, or conduct disorder that predisposes a person to commit sexual acts to such a degree as to render the person a danger to the health and safety of others.
New York 10.03 <sup>32</sup>	A person who is a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to	Means a congenital or acquired condition, disease, or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes

<sup>29</sup> FLA. STAT. § 394.192(10), (5) (2008).

<sup>30</sup> WASH. REV. CODE § 71.09.020(18), (8) (2009).

<sup>31</sup> ARIZ. REV. STAT. ANN. § 36-3701 (2010).

<sup>32</sup> N.Y. MENTAL HYG. § 10.03(e), (i) (McKinney 2011).

commit sex offenses if not confined to a secure treatment facility.	him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct.
AWA “Sexually dangerous person” means that the defendant has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others.	Serious mental illness, abnormality, or disorder as a result of which he would have <i>serious difficulty refraining from sexually violent conduct or child molestation if released.</i>

When reviewing the civil commitment standards of select states, their criteria are similar. However, the State of New York and the AWA, being the two most recent civil commitment laws in the U.S. at the time of this Article’s preparation, both adhere to the *Crane* holding requiring a finding of volitional impairment—“serious difficulty refraining from” found in the AWA and “inability to control behavior” and “serious difficulty controlling” as listed in the New York statute. The other state statutes primarily require a commitment threshold as being “likely” to commit future sexual offenses.

### *C. A Comment on Defining Psychiatric Terms Within Legal Language*

In the wake of *Hendricks* and *Crane*, courts, experts, and attorneys are burdened with attempting to define various ambiguous terms relevant to the commitment of a sex offender such as “likely” and “mental abnormality.” Importantly, forensic examiners and lawyers handling these civil commitment cases have joined in consensus that formal psychiatric diagnoses outlined in the DSM-IV-TR are required to substantiate legal mental abnormality. The common statutory language in SVP statutes, “congenital/acquired condition” affecting “emotional/volitional capacity” alludes to a psychiatric diagnosis listed in the DSM-IV-TR. In California, the SVP statute refers to “diagnosed mental disorder,”<sup>33</sup> Minnesota<sup>34</sup> and North Dakota<sup>35</sup> refer to “sexual disorder,” Arizona refers to “paraphilia,”<sup>36</sup> while Nebraska refers to “mental illness.”<sup>37</sup> This agreement amongst legal and mental health professionals causes strenuous debate about the fortitude of these diagnoses.

Critical to this discussion, the term “mental abnormality” is a legal term rather than a psychiatric idiom which usurps psychiatric terminology to achieve a social

<sup>33</sup> See CAL. WELF. & INST. CODE §§ 6600-6609 (Deering 2011).

<sup>34</sup> MINN. STAT. § 253B.02(18c) (2011).

<sup>35</sup> N.D. CENT. CODE § 25-03.3-01(8) (2011).

<sup>36</sup> ARIZ. REV. STAT. § 36-3701(5) (LexisNexis 2011).

<sup>37</sup> See NEB. REV. STAT. ANN. § 71-1204 (LexisNexis 2011).

and political result.<sup>38</sup> To simplify matters, the Court ruled in *Crane* that any psychiatric diagnosis and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.<sup>39</sup> These diagnoses in SVP cases are centered around paraphilias such as pedophilia and exhibitionism as well as personality disorders, namely antisocial personality disorder and the construct of psychopathy.

Despite disagreement—by some experts and definitely by lawyers representing sex offenders—that there is little interrater reliability among experts relevant to how accurately and consistently examiners diagnose<sup>40</sup> and come to similar conclusions, courts will continue to rely heavily on experts' diagnostic opinions in defining legal mental abnormalities and disorders. Scholars have debated that diagnoses are not particularly relevant to defining legal mental abnormality.<sup>41</sup> Others have specifically addressed the connection between the individual's psychological impairment and the legal criteria for eligibility of commitment rather than between the impairment and the criteria for clinical diagnostic categories.<sup>42</sup>

<sup>38</sup> *Position Statement on Sexually Violent Predators Civil Commitment Legislation*, N.Y.S. PSYCHIATRIC ASS'N (Mar. 13, 2006), [http://www.nyspsych.org/public/components/society\\_tools/admin/viewNewnews.asp?newsjob=ArticleID&ArticleID=6922&ArticleName=Position+Statement+on+Sexually+Violent+Predators+Civil+Confinement+Legislation](http://www.nyspsych.org/public/components/society_tools/admin/viewNewnews.asp?newsjob=ArticleID&ArticleID=6922&ArticleName=Position+Statement+on+Sexually+Violent+Predators+Civil+Confinement+Legislation).

<sup>39</sup> *Kansas v. Crane*, 534 U.S. 407, 413 (2002). *See generally* *Wisconsin v. Post*, 541 N.W.2d 115 (Wis. 1995) (holding that every condition is congenital or acquired and emotional and volitional capacity describes decision making processes affecting how people act; therefore, mental disorder under the statute means no more than a person's predisposition to engage in sexually violent conduct). One can assume that a person's mental disorder is derived from their past sex offenses.

<sup>40</sup> Lea H. Studer & A. Scott Aylwin, *Pedophilia: The Problem with Diagnosis and Limitations of CBT Treatment*, 67 *MED. HYPOTHESES* 774, 777 (2006); *see, e.g.*, Terence W. Campbell, *Challenging the Evidentiary Reliability of DSM-IV*, 17 *AM. J. FORENSIC PSYCHOL.* 47, 47-68 (1999); Stuart A. Kirk & Herb Hutchins, *The Myth of the Reliability of DSM*, 15 *J. MIND & BEHAV.* 71, 71-86 (1994); Jill S. Levenson, *Reliability of Sexually Violent Predator Civil Commitment Criteria in Florida*, 28 *LAW & HUM. BEHAV.* 357, 362 (2004); William L. Marshall & Steven J. Hucker, *Issues in the Diagnosis of Sexual Sadism*, 1 *SEX OFFENDER TREATMENT* 4, 6 (2006); William O'Donohue, Lisa G. Regev & Anne Hagstrom, *Problems with the DSM-IV Diagnosis of Pedophilia*, 12 *SEXUAL ABUSE: J. RES. & TREATMENT* 95, 95-105 (2000); Richard Wollert, *Poor Diagnostic Reliability, the Null-Bayes Logic Model, and Their Implications for Sexually Violent Predator Evaluations*, 13 *J. PSYCHOL. PUB. POL'Y & L.* 167, 174 (2007).

<sup>41</sup> *See* Stephen Morse, *Law and Mental Health Professionals: The Limits of Expertise*, 9 *PROF. PSYCHOL.* 289, 396 (1978); Stephen Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, *S. CAL. L. REV.* 526, 530 (1978) (espousing that the field of psychology and psychiatry has not demonstrated special knowledge concerning the relation between the observed symptoms and the specific behaviors that are related to the law's questions and concerns). Experts' opinions about specific functional abilities and behaviors are not based on any specialized knowledge about the relations of the symptoms or diagnoses to the functional abilities in question.

<sup>42</sup> *See* Robert F. Schopp & Barbara J. Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 *BEHAV. SCI. & L.* 466, 466 (1995) (stating that psychiatric diagnoses describe behavioral symptoms of disorders, and many of these symptoms are present within

In the face of strenuous debate on this issue, courts will likely accept any psychiatric diagnosis that is recognized in the “medical or psychiatric literature”<sup>43</sup> despite their vagueness. Diagnoses addressing sexual deviance and antisocial behavior are included in the Diagnostic and Statistical Manual for Mental Disorders<sup>44</sup> and provide descriptive lists of behavioral requirements for each diagnosis. If experts refused to utilize the DSM-IV-TR for example, they would have to rely on the offender’s past behaviors relevant to commitment, i.e., offenses, which in part define the clinical diagnoses. Importantly, the DSM-IV-TR provides behavioral symptomatology for a diagnosis but does not define the intensity required for such a diagnosis.

In addition to the acceptance of antisocial personality disorder as a diagnosis associated with the commitment of sex offenders, courts will also accept the construct of psychopathy reformulated and enhanced by psychologist, Dr. Robert Hare,<sup>45</sup> as it also appears in the psychological literature pertaining to its etiological link to criminality and sex offending.<sup>46</sup>

When commenting on the ambiguity of the term “mental abnormality,” courts similarly have not clinically defined other psycholegal terms such as “incompetency” or “insanity.”<sup>47</sup> In fact, the Court commented in its *Hendricks* ruling that “mental illness” is devoid of any talismanic significance as “psychiatrists disagree widely and frequently on what constitutes mental illness.”<sup>48</sup> The Court opined, “[I]f it were shown that mental abnormality is too imprecise a category to

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the offenders’ criminal and sex offending behaviors). Therefore, diagnoses are an imperative component to civil commitment determinations.

<sup>43</sup> Transcript of Oral Argument at 20-22, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (Nos. 95-1649, 95-9075).

<sup>44</sup> AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 701 (4th ed. 2000).

<sup>45</sup> Robert Hare, *Hare Psychopathy Checklist Revised*, in 2 ENCYCLOPEDIA OF PSYCHOLOGY AND LAW (Brian L. Cutler ed., 2008).

<sup>46</sup> See *In re Young*, 857 P.2d 989, 997 (Wash. 1993); Jeffery Abracen, Jan Looman & Calvin M. Langton, *Treatment of Sexual Offenders with Psychopathic Traits: Recent Research Developments and Clinical Implications*, 9 TRAUMA, VIOLENCE & ABUSE 144, 144-66 (2008); Calvin M. Langton et al., *Sex Offenders’ Response to Treatment and its Association with Recidivism as a Function of Psychopathy*, 18 SEXUAL ABUSE: J. RES. & TREATMENT 99, 106; Jan Looman et al., *Psychopathy, Treatment Change, and Recidivism in High-Risk, High-Need Sexual Offenders*, 20 J. INTERPERSONAL VIOLENCE 549, 554 (2005); Mark E. Olver & Stephen C. P. Wong, *Psychopathy, Sexual Deviance, and Recidivism Among Sex Offenders*, 18 SEXUAL ABUSE: J. RES. & TREATMENT 65, 69 (2006); Ralph C. Serin, Donna L. Mailloux & P. Bruce Malcolm, *Psychopathy, Deviant Sexual Arousal, and Recidivism Among Sexual Offenders*, J. INTERPERSONAL VIOLENCE 234, 235 (2001); Michael C. Seto & Howard E. Barbaree, *Psychopathy, Treatment Behavior, and Sex Offender Recidivism*, 14 J. INTERPERSONAL VIOLENCE 1235, 1236 (1999).

<sup>47</sup> George Smith Hamilton, *The Blurry Line Between “Mad” and “Bad”: Is “Lack-Of-Control” a Workable Standard for Sexually Violent Predators?*, 36 U. RICH. L. REV. 481, 482 (2002).

<sup>48</sup> *Kansas v. Hendricks*, 521 U.S. 346, 358-59 (1997) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985)).

offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.”<sup>49</sup>

The Washington State Supreme Court provided a helpful legal opinion on this topic of defining psychiatric terms within the legal arena in *In re Young*.<sup>50</sup> The court held that “[o]ver the years, the law has developed many specialized terms to describe mental health concepts. For example, the legal definitions of ‘insanity’ and ‘commitment’ vary substantially from their psychological and psychiatric counterparts.”<sup>51</sup> “In using the concept of ‘mental abnormality’ the legislature has invoked a more generalized terminology that can cover a much larger variety of disorders . . . What is critical for our purposes is that psychiatric and psychological clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM.”<sup>52</sup>

The key issue is that expert witnesses on both sides testify in good faith and this is always subject to question given the adversarial nature of our court system.

When we contemplate the evaluation of AWA cases we must focus on the language of the statute. The language follows the holding of *Crane* and mandates an evaluation of volitional impairment in addition to the prerequisite finding of likelihood of reoffending pertinent to the holding in *Hendricks*. The AWA requires a mental illness, abnormality, or disorder which results in the person having serious difficulty refraining from sexually violent conduct or child molestation. When considering the legal language, similar to other state statutes, the offenders qualifying for federal commitment will likely qualify for pedophilia due to the numbers of federal offenders with child pornography and child sex crimes. Secondary diagnoses of exhibitionism, paraphilia not otherwise specified (NOS), non-consent (rape) subtype and hebephilia subtype, antisocial personality disorder, and a finding of psychopathy will also be considered as commitment diagnoses/constructs.<sup>53</sup>

#### *D. Defining Volitional Impairments and Distinguishing “Serious Difficulty Refraining” from “Likely”*

Many of the state civil commitment statutes include a “likely” to reoffend component. The expert witness’s business of risk assessment in state cases is

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<sup>49</sup> *Id.* at 373.

<sup>50</sup> *In re Young*, 857 P.2d 989, 1001 (Wash. 1993) (quoting Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709, 733 (1992)).

<sup>51</sup> *Id.* at fn. 5.

<sup>52</sup> *Id.* at 1001.

<sup>53</sup> See Jack Vogensen & Amy Phenix, *Antisocial Personality Disorder Is Not Enough: A Reply to Sreenivasan, Weinberger, and Garrick*, 32 J. AM. ACAD. PSYCHIATRY & L. 440, 441 (2004) (discussing that, despite the holding in *Crane* supporting a commitment of offenders whose serious difficulty refraining is caused by antisocial personality disorder, many experts do not believe and will not opine or testify to the recommendation of commitment for an offender based only on an antisocial personality disorder diagnosis). Similarly, other experts will not agree that a paraphilia disorder nonconsent rape type exists within the psychiatric nomenclature.

typically founded in legal statute by determining the likelihood of future acts. As mentioned, despite the holding in *Hendricks* outlining a constitutional “likelihood” requirement, the AWA does not mention the term likely; rather, it incorporates *Crane* terminology of volitional impairment. As reviewed in *Crane*, the Court ruled that a potential sex offender being considered for commitment need only be found to have a mental abnormality or disorder that makes it “difficult, if not impossible, for the [dangerous] person to control his dangerous behavior.”<sup>54</sup> The Court held that the SVP standard required a substantial loss of volitional impairment, rather than a *total* loss of control because the latter could not be demonstrated with mathematical precision.<sup>55</sup> Notably, the U.S. Supreme Court estimated that the existence of a mental abnormality or personality disorder that causes a likelihood of sexual recidivism thereby establishes the requisite difficulty if not impossibility of control over one’s behavior.<sup>56</sup>

The question of whether one’s likelihood of future sexual recidivism and one’s volitional impairment are the same is a fascinating inquiry. Interestingly, in many state civil commitment hearings in which the state has a likelihood threshold of future dangerousness, trial court judges do not allow the experts to testify to *Crane* volitional impairment opinions.<sup>57</sup> In essence, the judges are adhering to the “likelihood” language of their particular statute developed by the respective legislature, rather than allowing the jury to consider the specific volitional language in *Crane*.<sup>58</sup>

The holding in *Crane* leaves federal courts hearing AWA commitment cases with many unanswered questions. How does a federal court define “serious difficulty refraining from sexually violent conduct or child molestation if released?”<sup>59</sup> Should the court presume that *likely* and *serious difficulty refraining* are the same? If so, how does a federal court define *likely*? It may be argued that likely means more than likely (greater than 51%). It may also be debated that having serious difficulty

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<sup>54</sup> *Kansas v. Crane*, 534 U.S. 407, 583 (2000).

<sup>55</sup> *Id.* at 413.

<sup>56</sup> *Id.* at 407.

<sup>57</sup> This comment is based on this author’s evaluation and testimony experience in sexually violent predator civil commitment proceedings.

<sup>58</sup> See *Florida v. White*, 891 So. 2d 502, 507 (Fla. 2004) (holding that the defendant requested the court instruct the jury that to be civilly committed, the defendant had to be unable to control his dangerous behavior). The Supreme Court of Florida cited the U.S. Supreme Court’s opinion in *Crane* which does not require a specific volitional impairment jury instruction, but rather proof of serious difficulty in controlling behavior in order to be civilly committed. See also *In re Detention of Barnes*, 658 N.W.2d 98, 100 (Iowa 2003); *In re Civil Commitment of Ramey*, 648 N.W.2d 260, 263 (Minn. Ct. App. 2002). A few states have found that *Crane* imposes an affirmative additional duty to determine lack of control and two states found that the jury must be instructed that the respondent must have serious difficulty controlling behavior.

<sup>59</sup> See *Crane*, 534 U.S. at 423 (Scalia, A., dissenting) (questioning how the majority opinion defines an offender’s inability to control sex offending behaviors when considering features of the case and the nature of psychiatric diagnosis and the severity of the mental abnormality: The law “gives trial courts not a clue in how they are supposed to charge a jury!”).

refraining means the offender is more than likely to sexually reoffend. If a court applying *Crane* questions the mathematical precision in assessing inability to control, should expert witnesses incorporate mathematically based actuarial risk assessment instruments in their sex offender assessments when attempting to address volitional impairments in AWA commitment hearings? Simply, the Court's assumption that the qualitative and quantitative assessment of substantial loss of control has more mathematical precision is seriously questioned by mental health professionals.

When addressing this latter question, the AWA statute does not require the use of these instruments to assess risk of future sex offenses, but the BOP encourages their use.<sup>60</sup> Experts may utilize these instruments to assess the volitional threshold of commitment and will also attempt to obtain other information including the offenders' offense record and self-report of other crimes, number of victims, fantasies, behaviors etc., that are related to assessing paraphilia diagnoses associated with volitional impairment.

The AWA's legislative intent recognizes the U.S. Supreme Court volitional language found in *Crane*. The intent may include avoiding the use of terms such as "likely" and "substantial probability" because they do not lend themselves to percentages or numerical exactness very easily in its statutory definition. However, the federal courts hearing AWA cases may still consider qualifying the ambiguous language of "serious difficulty refraining from future sexual violence and child molestation" through assessments of likelihood of future risk of sex offending since the likelihood language is recognized in *Hendricks*.

Some state courts have not translated "likely" into a statistical probability.<sup>61</sup> Other courts have understood likely to mean "highly probable"<sup>62</sup> or "substantial danger that is, a serious and well founded risk,"<sup>63</sup> and even have distinguished between likelihood of recurrence of sexual misconduct, the likely frequency of any such behavior, and the magnitude of harm to other persons that is likely to result.

When assessing volitional impairments, courts have historically struggled with the qualification and quantification of such a construct and its relationship to behavior. Following the John Hinckley insanity trial in which psychiatric experts battled about Hinckley's ability to control his behavior with a history of delusions, the American Bar Association (ABA) and the American Psychiatric Association (APA) advocated for the abolition of the American Law Institute's (ALI) volitional insanity prong. The APA stated, the "line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk."<sup>64</sup> The ABA criticized volitional tests by noting there is no valid or reliable basis for measuring incapacity for self-control.

<sup>60</sup> See Civil Commitment of a Sexually Dangerous Person, 72 Fed. Reg. 43,205, 43,206 (Aug. 3, 2007) (to be codified at 28 C.F.R. pt. 549, subpart H).

<sup>61</sup> Commonwealth v. Boucher, 780 N.E.2d 47, 50 (Mass. 2002).

<sup>62</sup> *In re Detention of Wilber W.*, 53 P.3d 1145, 1151 (Ariz. Ct. App. 2002).

<sup>63</sup> People v. Superior Court (*In re Ghilotti*), 44 P.3d 949, 954 (Cal. 2002).

<sup>64</sup> Insanity Defense Work Group, *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 685 (1983); see also John Q. La Fond, *The Future of Involuntary Civil Commitment in the U.S.A. After Kansas v. Hendricks*, 18 BEHAV. SCI. & L. 153, 156 (2000).



Laws that address volitional impairments lead to psychiatric disagreement, error, and interrater reliability issues as there is “no way to calibrate the degree of impairment of behavioral controls.”<sup>65</sup> Critics argue that the *Crane* Court’s “serious difficulty” rule assumes that people have freewill, yet one author asserts, “[t]he science of the mind simply has not advanced far enough to permit experts to know with any confidence what decisions were ‘controllable’ and which ones were not.”<sup>66</sup> Conversely, some argue that clinicians can assess cognitive and volitional standards pertaining to the insanity defense for example, with some degree of interrater reliability.<sup>67</sup> The problem is not only assessing interrater reliability, but the accuracy and validity of what we are trying to measure and whether we can precisely measure volition.

Statutes, case law, and clinical behavioral data do not provide a clear conception of what we are trying to identify and measure when we assess volition and freewill. The Federal Bureau of Prisons has been working on creating, in a sense, user guidelines and suggestions relevant to the assessment of sex offending issues as applied to the AWA civil commitment statute, and in particular whether an offender has a “serious difficulty refraining from sexually violent conduct or child molestation if released.”

The BOP indicates that a mental health professional may consider any of the following information (not an exhaustive or complete list) pertaining to serious difficulty refraining:

1. to the person’s repeated contact, or attempted contact, with one or more victims;
2. to the person’s denial of or inability to appreciate the wrongfulness, harmfulness, or likely consequences of engaging in sexually violent conduct or child molestation;
3. to, established through interviewing, and testing of the person, or other risk assessment tools, that are relied upon by mental health professionals;

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<sup>65</sup> Richard Bonnie, *Morality, Equality, and Expertise: Renegotiating the Relationship Between Psychiatry and the Criminal Law*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 5, 17 (1984); see ROBERT F. SCHOPP, AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY: A PHILOSOPHICAL INQUIRY 202 (Jules Coleman ed., 1991); Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1587 (1994) (stating that people can exercise control over their behaviors when they have well developed self awareness and self monitoring, fear consequences of their negative behavior, display accurate cognitive perception and rational reasoning, desire moral behavior, have control over emotions, exhibit empathy for their behaviors, have the ability to suppress desires, and exert good judgment and practical wisdom).

<sup>66</sup> David L. Faigman, *Making Moral Judgments Through Behavioural Science: The ‘Substantial Lack of Volitional Control’ Requirement in Civil Commitments*, 2 L. PROBABILITY & RISK 309, 315 (2003).

<sup>67</sup> Richard Rogers, *APA’s Position on the Insanity Defense*, 42 AM. PSYCHOL. 840, 840 (1987).

4. to, established by forensic indicators of inability to control conduct, such as:
  - a) offending while under supervision
  - b) engaging in offense(s) when likely to get caught
  - c) statement(s) of intent to reoffend, or
  - d) admission of inability of difficulty to control behavior; or
  - e) indicating successful completion of, or failure to complete, a sex offender treatment program.

These factors may intuitively tap into some issues that lead to volitional impairment, however, are any of them empirically associated with difficulty controlling or refraining? For example, having multiple victims as outlined in the first item may indicate evidence of sexual deviance. The second item appears to address the issue of legal insanity such as appreciating wrongfulness and consequences of one's sex offending acts. The third item suggests that an expert's use of risk assessment instruments might assist in assessing degree of impairment of one's serious difficulty in refraining. Finally, the fourth item includes some descriptive elements that in common sense appear to relate to inability to control one's sex offending but they are doubtfully related scientifically to the AWA volitional construct.

These items provided by the BOP will likely fail in defining one's serious difficulty refraining from sexually violent conduct or child molestation because these premises lack a clear conception of what we are trying to measure and identify.<sup>68</sup> However, courts will likely accept expert testimony that is relevant and offered in good faith despite many experts' exhaustive discourses on the theoretical components of volitional impairment.

#### *E. A Closer Look at Expert Witness Assessment of Volition*

Pertinent to the AWA it is important to address how experts evaluate sex offenders' inability to control their sex offending behaviors.

There are no formal psychological and even neuropsychological assessment instruments that will provide certain answers to the processes by which an individual decides on and actually commits a particular behavior. The psychological literature provides no clear cut definitions on how we should measure self-control, freewill and volition.<sup>69</sup> Most theories are quantitative in nature, implying degrees to which individuals possess self-control and elements that influence self-control.<sup>70</sup> Further, while many experts and scholars view self-control as being associated with criminal behavior, it is not clear whether individuals abandon self-control or ultimately lose control and therefore if the concept may be considered on a continuum. Self control

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<sup>68</sup> Robert F. Schopp, Mario J. Scalora & Marc Pearce, *Expert Testimony and Professional Judgment: Psychological Expertise and Commitment as a Sexual Predator After Hendricks*, 15 PSYCHOL. PUB. POL'Y & L. 120, 127 (1999).

<sup>69</sup> PHILIP WITT & MARY ALICE CONROY, EVALUATION OF SEXUALLY VIOLENT PREDATORS 31 (2009).

<sup>70</sup> Cynthia Calkins Mercado, Robert F. Schopp & Brian H. Bornstein, *Evaluating Sex Offenders Under Sexually Violent Predator Laws: How Might Mental Health Professionals Conceptualize the Notion of Volitional Impairment?*, 10 AGGRESSION & VIOLENT BEHAV. 289, 302 (2005).

and freewill over behavior superimposes criminal behavior including the traits of impulsivity, risk taking, lack of empathy, poor behavioral controls, immediate gratification, deficits in considering consequences of behavior, low frustration tolerance, and lack of insight.<sup>71</sup>

Scholars have been thoughtful in considering elements pertaining to volitional impairment.<sup>72</sup> Evaluators should assess whether the offender's sexual offending has an enduring driven quality and lacks the ability to make meaningful choices. Does the offender disregard personal consequences and minimize consequences of his offending behaviors? Is the offender able to delay sexual gratification for long periods of time? Does the offender verbalize a lack of control, have a chronic and lengthy history of sexual offending, lack offense planning, and commit some of their offending while under the influences of substances which ultimately inhibits his behaviors?

Significant concern has been raised about the lack of empirical support regarding whether persons diagnosed with paraphilias and/or personality disorders are unable to control their behavior.<sup>73</sup> Human behavior is a complex phenomenon based on a combination of affective, motivational, and cognitive elements. An offender's choice to repeatedly act on aberrant desires does not provide evidence of volitional impairment.<sup>74</sup>

Recently, researchers investigated legal professionals, psychologists, and mock jurors germane to their decision making of volitional impairment in hypothetical sexually violent predator proceedings.<sup>75</sup> Results indicate that these participants heavily considered the offenders' history of sexual violence, verbalized lack of control over sex offending behavior, history of planning and premeditation of the offenses, and the context of the civil commitment hearing while discounting the effects of substance abuse on offending behaviors.

Experts are challenged with determining whether a sex offender is lacking in ability or will to control. These questions are not subject to quantifiable terms and answers. For example, utilizing actuarial risk assessment instruments includes incorporating a mechanical procedure which overlooks the clinically complex elements of assessing volitional abilities in relationship to the offender's mental abnormality.<sup>76</sup> Simply, one cannot equate high scores on actuarial risk assessment instruments with one's ability to control or not control their behaviors because one cannot generalize from the many to the individual. The sex offender normative

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<sup>71</sup> *Id.* at 305.

<sup>72</sup> Cynthia Calkins Mercado, Brian Bornstein & Robert Schopp, *Decision-Making About Volitional Impairment in Sexually Violent Predators*, 30 LAW & HUM. BEHAV. 587, 590 (2006); see also RICHARD ROGERS & DANIEL W. SHUMAN, FUNDAMENTALS OF FORENSIC PRACTICE: MENTAL HEALTH AND CRIMINAL LAW 348 (2005).

<sup>73</sup> Stephen J. Morse, *Fear of Danger, Flight from Culpability*, 4 PSYCHOL. PUB. POL'Y & L. 250, 263(1998). See generally Calkins Mercado et al., *supra* note 70, at 305; Schopp & Sturgis, *supra* note 42, at 440; Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 505, 521 (1998).

<sup>74</sup> Robert F. Schopp, *Civil Commitment and Sexual Predators: Competence and Condemnation*, 4 PSYCHOL. PUB. POL'Y & L. 323, 342 (1998).

<sup>75</sup> See Calkins Mercado et al., *supra* note 72, at 591.

<sup>76</sup> See ROGERS & SHUMAN, *supra* note 72.

samples on these instruments and the sex offenders we evaluate and compare to these norms all have different etiological pathways and emotional, cognitive, and behavioral processes that led to their offending. Some offenders scoring high on actuarial risk assessment instruments may indeed be high risk offenders, yet willfully choose their criminal sex offending behavior and not possess significant problems refraining from their acts.

Let us briefly examine a clinical case example. Consider a sex offender who is sexually interested only in children and he has a mental condition, pedophilia, which creates drives that are unbearable and overriding. He has a history of numerous sex offending behaviors against children that are frequent and persistent. He suffers from abnormal sexual fantasies towards children and frequently masturbates to these fantasies until climax. He seeks out children to fulfill his masturbatory fantasies even when at risk to do so and even after being imprisoned on a few prior occasions. This offender may be considered by some to lack volition and most pedophiles would not likely qualify in this category. Those less deviant pedophiles may fall in the “typical recidivist” category and simply *choose* to commit their crimes against children rather than lacking an ability to control and will to control.

As one author describes the atypical offender child molester who would qualify for commitment,

hypersexual severity, which makes this man’s psychological condition a SVP-relevant ‘mental disorder.’ . . . [T]his man’s deviant interest is the current behind his sexual offending. The hyper-sexuality provides the voltage. It is the voltage, not the current, ‘overpowering’ this man’s ability to use the switch and restrain sexual behavior. Our TSR [typical sexual recidivist] has the same current but not the same voltage; he can use his switch if he chooses . . . It is this man’s hyper-sexuality that drives his paraphilia to the point where he is ‘made’ dangerous beyond typical criminal volition . . . .<sup>77</sup>

When considering diagnostic issues, one’s particular diagnosis may explain little of his functional capacity pertaining to volition over his behavior.<sup>78</sup> Just because one suffers from pedophilia does not mean that he is that functionally impaired. Although most individuals who are committed will ultimately qualify for a paraphilic diagnosis, the key issue in determining volitional impairment is to address in what ways the mental condition interferes with behavioral control.

Researchers who study Florida civil commitment detainees<sup>79</sup> assert that in Florida, no diagnosis by itself meets the legal threshold for commitment because it must be also demonstrated that the individual is likely to commit future acts of sexual violence. Therefore, a combination of a diagnosis predisposing the person to sexual violence, and a finding of “likely” to commit future sexual violence are required in that state and neither factor alone are sufficient to justify commitment.

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<sup>77</sup> Daniel F. Montaldi, *The Logic of Sexually Violent Predator Status in the United States of America*, 2 SEXUAL OFFENDER TREATMENT 1, 14 (2007).

<sup>78</sup> *Id.* at 15.

<sup>79</sup> Levenson, *supra* note 40, at 364.

Similarly, when considering AWA commitments, the statute includes both a finding of mental illness, abnormality, or disorder and a finding of *serious difficulty from refraining from sexually violent conduct or acts of child molestation*. As we know, the terms “mental illness,” “abnormality,” or “disorder,” are legal definitions written into the AWA law as conditions required for commitment. The mere presence of any of these terms is not legally sufficient to commit someone; rather, the condition must predispose the offender to future serious difficulty refraining in their sexual behavior. Critically, one’s clinical psychiatric diagnoses as displayed through his behavioral, cognitive, and emotional processes may not only predispose him to reoffending, but overpower his volitional capacities to not reoffend. If an offender simply chooses to continue to reoffend, then he should not qualify for commitment.

Scholars have attentively considered factors relevant to volition that should be addressed in AWA hearings despite some of their ambiguous empirical connections to willfulness:<sup>80</sup>

- 1) Lack of choicefulness (investigate evidence of planning or rational decisions);
- 2) Disregard for personal consequences (offended without any regard for personal consequences and failed to reduce likelihood of their apprehension);
- 3) Incapacity for delay (inability to delay sexual deviations and gratification);
- 4) Evidence that sexual deviations formed a discernible and stable pattern;
- 5) Evidence of delusions and/or command hallucinations associated with sexual deviations;
- 6) Evidence of manic based behavior associated with sexual deviations;
- 7) Evidence of uncontrollable impulses associated with severe paraphilias;
- 8) Evidence that the volitional impairment results directly in a risk of sexual recidivism.

Other researchers have listed methods for determining the presence of volitional impairment including: existence of personality disorder combined with previous sex offending; existence or non-existence of a paraphilia; self report that volitional impairment is present; neuropsychological testing indicating impaired impulse control.<sup>81</sup>

One can argue that the simple presence of a paraphilia disorder, such as pedophilia, makes a predisposition of volitional impairment obvious. However, the

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<sup>80</sup> See ROGERS & SHUMAN, *supra* note 72.

<sup>81</sup> Rebecca L. Jackson & Derek T. Hess, *Evaluation for Civil Commitment of Sex Offenders: A Survey of Experts*, 19 SEXUAL ABUSE: J. RES. & TREATMENT 425, 436 (2007).

strength of the deviant sexual drive and its relationship to inability to resist one's behavior is the important element.<sup>82</sup>

Scholars have also cited potentially promising areas of scientific inquiry regarding diminished behavioral control with its roots being psychophysiological and neurological in nature.<sup>83</sup> Various brain abnormalities focus on frontal and temporal lobe areas have been indicated to be associated with impulse control dysfunction, deviant sexual behavior, and personality disorders, including psychopathy.<sup>84</sup>

What makes this process of assessing will power so difficult is the lack of empirical findings providing us with quantifiable definitions of volition. Accordingly, one may question whether Leroy Hendricks's admissions about not being able to control his sexual urges and likelihood of acting on them again in the future has any empirical foundation in his likelihood of future offending, or inability to refrain from sex offense crimes in the future. However, most clinicians would heavily weigh an offender's admissions that he cannot control his sex offending behaviors and would consider himself as high risk in their support for the offender's commitment.

Former Supreme Court Justice Warren Burger addressed the irresistible impulse label—It “has always been a misleading concept because it has connotations of some sudden outburst of impulse and completely overlooks the fact that people do a lot of weird and strange and unlawful things as a result of not just sudden impulse but long brooding and disturbed emotional makeup.”<sup>85</sup>

Similarly, the field of forensic psychology and psychiatry lacks reliable standards in assessing and diagnosing volitional impairments.<sup>86</sup> When considering court

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<sup>82</sup> DENNIS DOREN, *EVALUATING SEX OFFENDERS: A MANUAL FOR CIVIL COMMITMENT AND BEYOND* 32 (2002).

<sup>83</sup> See Holly A. Miller, Amy E. Amenta & Mary Alice Conroy, *Sexually Violent Predator Evaluations: Empirical Evidence, Strategies for Professionals, and Research Directions*, 29 *LAW & HUM. BEHAV.* 29, 29-54 (2005).

<sup>84</sup> See Antoine Bechara, Hanna Damasio & Antonio R. Damasio, *Emotion, Decision Making and the Orbitofrontal Cortex*, 10 *CEREBRAL CORTEX* 295, 306 (2000); R.J.R. Blair & Lisa Cipolotti, *Impaired Social Response Reversal: A Case of 'Acquired Sociopathy'*, 123 *BRAIN* 1122, 1122-41 (2000); Jeffery Burns & Russell Swerdlow, *Right Orbitofrontal Tumor with Pedophilia Symptom and Structional Apaxia Sign*, 60 *ARCHIVES NEUROLOGY* 437, 440 (2003); Kent A. Kiehl et al., *Semantic and Affective Processing in Psychopaths: An Event-Related Potential (ERP) Study*, 36 *PSYCHOPHYSIOLOGY* 765, 770 (1999); Kent A. Kiehl et al., *An Event-Related Potential Investigation of Response Inhibition in Schizophrenia and Psychopathy*, 48 *BIOLOGICAL PSYCHIATRY* 210, 215 (2000); Adrian Raine et al., 1134, 1141 (2003); Jeffery L. Saver & Antonio R. Damasio, *Preserved Access and Processing of Social Knowledge in a Patient with Acquired Sociopathy Due to Ventromedial Frontal Damage*, 29 *NEUROPSYCHOLOGIA* 1241, 1245 (1991).

<sup>85</sup> GARY MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 67 (2nd ed. 1997).

<sup>86</sup> See Bradley Grinage, *Volitional Impairment and the Sexually Violent Predator*, 48 *J. FORENSIC SCI.* 861, 862 (2003) (indicating that the field of psychiatry lacks a valid or reliable method to infer a patient's volitional capacity and no uniform clinical definition exists). The medical literature describes volitional capacity loosely as impulse control and compulsive behavior. The medical literature also alludes that elements of volition may be psychiatrically evaluated.

testimony in AWA cases, some scholars recommend that forensic examiners simply describe symptom behavioral patterns and offender characteristics rather than offer definitive opinions on volitional capacity because the construct is unknown and ambiguous.<sup>87</sup>

*F. Volitional Diagnostic Dilemmas: Paraphilias, Antisocial Personality Disorder, and Psychopathy*

There appear to be two camps of adversarial experts who hold contrary beliefs as to the existence, reliability, validity, and utility of various psychiatric diagnoses applicable in sex offender civil commitment proceedings. Essentially, defense experts seriously question these diagnoses while prosecution experts utilize them freely.

The AWA civil commitment cases will be burdened with many sex offenders who suffer from pedophilia due to widespread federal child-related sex crimes including possession of child pornography, online solicitation activity, and sexual crimes against children. Despite this trend, this author will describe some psychiatric diagnostic dilemmas typically found in civil commitment cases throughout the U.S.

The most common diagnoses/constructs relevant to AWA proceedings, some which are under heavy scrutiny by forensic mental health professionals, will likely include:

- 1) Pedophilia;
- 2) Hebephilia;
- 3) Paraphilia Not Otherwise Specified-Nonconsent (rape subtype);
- 4) Antisocial Personality Disorder (APD);
- 5) Psychopathy (severe criminal personality);
- 6) Exhibitionism;
- 7) Substance abuse, dependency and intoxicated states.

As previously discussed, the issue of inability to control and the choice to not control or lacking the will to control, similar to an irresistible impulse and an impulse not resisted, will often lie within an offender's diagnosis as labeled by an expert witness. The finding of how functionally impaired the offender is relevant to controlling his sex offending behaviors is paramount more so than only considering the psychiatric diagnosis he carries.

There is a debate about whether intense, impulsive, and sometimes abnormal sexual behaviors should be explained by conditions other than paraphilias. Accordingly, some sex offenders who are diagnosed with paraphilias and lack some control over their sexually deviant impulses are often viewed similarly to those who suffer from obsessive compulsive disorders.<sup>88</sup> Similarly, paraphilic disorders have

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<sup>87</sup> See Calkins Mercado et al., *supra* note 70, at 307.

<sup>88</sup> Richard B. Krueger & Meg S. Kaplan, *The Paraphilic and Hypersexual Disorders: An Overview*, 7 J. PSYCHIATRIC PRAC. 391, 399 (2001); see also Robert Barth & Bill Kinder, *The Mislabeled of Sexual Impulsivity*, J. SEXUAL & MARITAL THERAPY 13, 15 (1997); Donald Black, *Compulsive Sexual Behavior: Area Review*, 4 J. PRACT. PSYCHIATRY BEHAV. HEALTH 219, 223 (1998); Eli Coleman, *The Obsessive-Compulsive Model for Describing Compulsive Sexual Behavior*, 2 J. PREVENTIVE PSYCHIATRY & NEUROLOGY 9, 13 (1990).

been compared and contrasted to nonparaphilic hyper-sexuality disorders.<sup>89</sup> Scholars have argued that paraphilic disorders referred to as nonparaphilic sexual addictions, hypersexual disorders, or sexual compulsivity include socially sanctioned sexual fantasies, urges and activities (i.e., compulsive masturbation, pornography dependence, cyber sex chat rooms) that increase in intensity and frequency as to cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.<sup>90</sup>

Paraphilias on the other hand are currently defined in the DSM-IV-TR as “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving 1) nonhuman objects, 2) suffering or humiliation of oneself or one’s partner, or 3) children or other nonconsenting persons for a period of at least 6 months” that causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.<sup>91</sup>

Important to this diagnosis is recent literature addressing the question of whether a paraphilia can be based on behavior alone without evidence of sexual fantasies and/or urges.<sup>92</sup> The definition lists “sexually arousing fantasies, sexual urges, *or* behaviors,” suggesting that behaviors alone are sufficient for the diagnosis. Further, the DSM-IV authors emphasized that it is behavior that most typically brings individuals to clinical attention.<sup>93</sup> However, the same authors have acknowledged a mistake and urge for a correction in the DSM-V in that their intention was not to allow the diagnosis of a paraphilia based on behavior (often criminal sexual behavior) alone. Diagnosing a paraphilia based on behaviors alone would distort the division between mental disorder and criminality and decisions pertaining to indefinite commitment should not be based on a misreading of a poorly worded DSM-IV listed symptom.<sup>94</sup> These authors recommend a removal of the current terms “or behaviors” and a reinstatement of the requirements of sexual urges and fantasies.

This issue is a much contested concern because many SVP examiners only rely on the police reports detailing the sexual crimes without any other support of a paraphilic condition. In their defense, these experts may not have access to other data, i.e., fantasies and masturbatory practices, given the tendency for offenders to

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<sup>89</sup> Martin P. Kafka & John Hennen, *Hypersexual Desire in Males: Are Males with Paraphilias Different from Males with Paraphilia-Related Disorders?*, 15 *SEXUAL ABUSE: J. RES. & TREATMENT* 307, 311 (2003).

<sup>90</sup> Martin P. Kafka & John Hennen, *The Paraphilia-Related Disorders: An Empirical Investigation of Non-Paraphilic Hypersexuality Disorders in Outpatient Males*, 25 *J. SEX & MARITAL THERAPY* 306, 306 (1999); see Martin Kafka & Robert Prentky, *A Study of Nonparaphilic Sexual Addictions and Paraphilias in Men*, 53 *J. CLINICAL PSYCHIATRY* 345, 347 (1992).

<sup>91</sup> AM. PSYCHIATRIC ASS’N, *supra* note 44 (discussing diagnoses including exhibitionism, frotterism, sexual sadism, pedophilia, and voyeurism can be based on the person having acted on paraphilic urges and do not require the person experiencing distress or impaired functioning).

<sup>92</sup> Michael First, *Issues for DSM-V: Unintended Consequences of Small Changes: The Case of Paraphilias*, 39 *AM. J. PSYCHIATRY* 1240, 1240 (2008).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*



not admit to these experiences during civil commitment examinations. In contrast, an examiner could assume that one's sexual behaviors are based in part by sexual urges and these two elements together may comprise a paraphilia.

Importantly, some experts believe that *only* sex offenders who carry paraphilia diagnoses should be committed as the disorders designate a deviant sexual preference, whereas antisocial personality disorder is indicative of general criminality and willful behavior and should not be cited as the sole disorder supporting mental abnormality for commitment.<sup>95</sup> However, some experts argue that APD alone is a qualifying disorder for civil commitment.<sup>96</sup>

### 1. Antisocial Personality Disorder

Given the contradictory holding in *Crane* associated to volitional impairment and its allowance for a sex offender to be committed based on an emotional disorder or personality disorder, there has been heightened scholarly debate as to whether antisocial personality disorder is enough to commit someone indefinitely.<sup>97</sup> Many APD sex offenders may not carry paraphilia diagnoses and their sex offending may be one of the many antisocial behaviors in which they engage. In essence, the APD diagnosis will likely not adequately differentiate the typical recidivist from the atypical recidivist outlined in *Crane* and it does not completely address impairment in volition as a diagnosis standing alone.

For example, consider a single middle-aged career criminal with a juvenile and adult history of violent and nonviolent offenses and no history of sex offending. He enters a house and during his burglary, he commits an opportunistic rape against a stranger female occupant (offender takes goods of value and sex from the victim). This sex offender will score high on some actuarial risk assessment measures in major part due to his nonsexual criminal history despite only one detected sex offense on record.

In contrast, consider a single middle-aged offender with prior nonviolent criminal offenses and one prior rape offense who burglarizes a home with a specific intent of finding a woman to rape. He collects her underwear and experiences sexual gratification and pleasure in raping, ultimately demonstrating symptoms of paraphilic behavior (falling short of a paraphilia diagnosis due to a six month

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<sup>95</sup> See Vognsen & Phenix, *supra* note 53. *see also* Patrick Lussier, *The Criminal Activity of Sexual Offenders in Adulthood: Revisiting the Specialization Debate*, 17 *SEXUAL ABUSE: J. RES. & TREATMENT* 269, 269 (2005) (the interested reader should also consider the generalist versus specialist debate of sex offending). Some scholars question whether sex offenders are specialists who tend to repeat sexual crimes or whether they are merely generalist criminals who do not tend to restrict themselves to one particular type of crime.

<sup>96</sup> Gregory DeClue, *Paraphilia NOS (Nonconsenting) and Antisocial Personality Disorder*, 34 *J. PSYCHIATRY & LAW* 495, 499 (2006); *see also* Adams v. Bartow, 330 F.3d 957 (7th Cir. 2003) (finding that APD alone is sufficient enough to indicate that an offender cannot control his sex offending and ultimately the diagnosis by itself can support civil commitment); United States v. Wilkinson, No. 07-12061-MLW, 2008 U.S. Dist. LEXIS 10628, at \*29 (D. Mass. Feb. 14, 2008) (stating that when considering the third prong of a commitment proceeding under the AWA, APD alone as a disorder was not enough to commit an individual). The court found that APD is not associated in the literature with sex offending to such an extent as paraphilic disorders.

<sup>97</sup> See Vognsen and Phenix, *supra* note 53, at 441.

behavior requirement). This offender may have a similar actuarial risk score as the former case, but yet be driven to rape by different causative pathways and possess heightened deviant volitional impairments more so than the first offender.

The question in AWA proceedings will focus on which offenders experience serious difficulty refraining from their sexually violent acts. It may be difficult to prove that either one of these offenders has serious difficulty in refraining, yet a finding of likelihood of reoffending based on actuarial estimates of probability could very well occur in these cases.

Many offenders with APD are not sex offenders and the APD diagnosis does not require sex offending behavior. In fact, about 60 to 80% percent of all prisoners incarcerated in the U.S. meet diagnostic criteria for APD and many of them are not sex offenders.<sup>98</sup> With such high prevalence of the disorder within offender populations, APD as a diagnosis may lack validity.<sup>99</sup> Further, the thresholds for the diagnosis provided by the DSM-IV are mostly unexplained, softly justified, and recent investigation is questioning the discriminant validity of APD and personality disorders in general within the DSM-IV.<sup>100</sup> These offenders with APD have an ability to exercise a choice more so than the sex offender who has a paraphilic sexual deviancy disorder. Simply put, it can be argued that APD is a catchall diagnosis for persons with socially problematic behavior and because it does little to distinguish offenders, its validity is questioned.

## 2. Psychopathy

The dimension or construct of psychopathy<sup>101</sup> (affective, interpersonal, lifestyle, and behavioral components of a severe criminal personality), similar but yet distinct from APD, is especially relevant to SVP proceedings because of its prevalence in those high risk sex offenders who are ultimately civilly committed.<sup>102</sup> Psychopathy has been known to be correlated with outcomes of general criminal, violent, and to a lesser degree, sexually violent behavior.<sup>103</sup>

<sup>98</sup> THOMAS WIDIGER & ELIZABETH CORBITT, THE DSM-IV PERSONALITY DISORDERS 109-10 (W.J. Livesley ed., 1995); Paul Moran, *The Epidemiology of Antisocial Personality Disorder*, 34 SOC. PSYCHIATRY EPIDEMIOLOGY 231, 231, 233 (1999).

<sup>99</sup> PAUL MORAN, ANTISOCIAL PERSONALITY DISORDER: AN EPIDEMIOLOGICAL PERSPECTIVE 88 (1999).

<sup>100</sup> DAVID J. KUPFER, MICHAEL B. FIRST & DARREL A. REGIER, A RESEARCH AGENDA FOR DSM-V 123 (1999); Thomas. Widiger, *An Empirically Based Classification of Personality Pathology: Where We Are Now and Where Do We Go?*, 14 CLINICAL PSYCHOL.: SCI. & PRAC. 94, 95 (2007).

<sup>101</sup> Hare, *supra* note 45, at 87.

<sup>102</sup> Rebecca L. Jackson & Henry J. Richards, *Diagnostic and Risk Profiles Among Civilly Committed Sex Offenders in Washington State*, 51 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 313, 315 (2007); *see also* Eric Janus & Nancy Walbek, *Sex Offender Commitments in Minnesota: A Descriptive Study of Second Generation Commitments*, 18 BEHAV. SCI. & L. 5, 5-21 (2000).

<sup>103</sup> *See* R. Karl Hanson & Andrew J. R. Harris, *Where Should We Intervene? Dynamic Predictors of Sexual Offense Recidivism*, 27 CRIM. JUST. & BEHAV. 6, 8 (2000); Ron Langevin et al., *Lifetime Sex Offender Recidivism: A 25-Year Follow-Up Study*, CAN. J. CRIMINOLOGY & CRIM. JUST. 532, 533 (2004); Looman et al., *supra* note 46, at 550; James R. P. Ogloff, *Psychopathy/Antisocial Personality Disorder Conundrum*, 40 AUSTR. & N.Z. J. PSYCHIATRY

The use of the instrument to assess psychopathic traits, (Psychopathy Checklist-Revised: PCL-R) is utilized by many experts and notably the highest risk offenders may be the ones with a paraphilia and antisocial personality disorder diagnosis and presence of significant psychopathic traits.

Although the personality dimension of psychopathy may show promise with its link to sexual offending, its usefulness for the prosecutor may be more in its prejudicial impact on the offender as a pejorative label. Current research tells us that prosecution experts in SVP proceedings often find offenders to have higher levels of psychopathic traits than defense experts.<sup>104</sup> The construct of psychopathy has weaknesses including validity, test-retest stability and generalizability, life-course stability, and comorbidity with other psychiatric diagnoses.<sup>105</sup> Finally, psychopathy can be characterized as a dimension of personality, thus its use in legal proceedings is questionable because it is not listed in the DSM-IV-TR and one cannot be diagnosed with it because it is not a formal psychiatric diagnosis.

When considering volitional impairment on behavior, some research informs us that psychopaths have difficulty incorporating new environmental feedback into their decision making, they are impaired with their abilities to inhibit their behavior, and they suffer from low cortical arousal in their brain.<sup>106</sup> In fact, researchers are citing growing evidence that even psychopathic individuals have impairment in amygdala functioning that leads to deficits in instrumental emotional learning, expression of basic emotional reactions, attention, reward and punishment processing, and socialization.<sup>107</sup> Whether these psychopathic traits that have their roots in biopsychosocial phenomenon can be accurately measured has yet to be seen.

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519, 526 (2006); Vernon L. Quinsey, Marnie E. Rice & Grant T. Harris, *Actuarial Prediction of Sexual Recidivism*, 10 J. INTERPERSONAL VIOLENCE 85, 91 (1995); Marnie E. Rice & Grant T. Harris, *Cross-Validation and Extension of the Violence Risk Appraisal Guide for Child Molesters and Rapists*, 21 LAW & HUM. BEHAV. 231, 232 (1997); R.J. Dempster, *Prediction of Sexually Violent Recidivism: A Comparison of Risk Assessment Instruments* (1998) (unpublished M.A. thesis, Simon Fraser University) (on file at Simon Fraser University).

<sup>104</sup> See Daniel C. Murrie et al., *Does Interrater (Dis)agreement on Psychopathy Checklist Scores in Sexually Violent Predator Trials Suggest Partisan Allegiance in Forensic Evaluations?*, 32 LAW & HUM. BEHAV. 352, 357 (2007) (showing that current research has indicated that state and defense experts have significantly different Psychopathy Checklist Revised scores of offenders they evaluate, as defense experts are more conservative and state experts are more liberal with their scoring of the instrument). These results question whether assessments are based in part by allegiance of the examiner with their retaining legal party.

<sup>105</sup> See John Matthew Fabian, *A Literature Review of the Utility of Selected Violence and Sexual Violence Risk Assessment Instruments*, 34 J. PSYCHIATRY & L. 307, 317 (2006); Terence Campbell, *The Validity of the Psychopathy Checklist-Revised in Adversarial Proceedings*, 6 J. FORENSIC PSYCHOL. PRAC. 43, 49 (2006); David Freedman, *False Prediction of Future Dangerousness: Error Rates and Psychopathy Checklist-Revised (PCL-R)*, 29 J. AM. ACAD. PSYCHIATRY & L. 89, 89-95 (2001).

<sup>106</sup> DAVID COOKE ET AL., *PSYCHOPATHY: THEORY, RESEARCH, AND IMPLICATIONS FOR SOCIETY* (1998); see Willem H. J. Martens, *Antisocial and Psychopathic Personality Disorders: Causes, Course, and Remission-A Review Article*, 44 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 406, 410 (2000).

<sup>107</sup> JAMES BLAIR, DEREK MITCHELL & KARINA BLAIR, *THE PSYCHOPATH: EMOTION AND THE BRAIN* 130 (David Cooke, Adelle Forth & Robert Hare eds., 2005).

While it can be argued that psychopathy and APD are not disorders that fit into the traditional medical model of involuntary civil commitment, scholars cite ample legal opinion evidence to the contrary.<sup>108</sup> Simply, the law answers the question as legislatures are including the term personality disorder as a requisite condition for civil commitment and many courts are agreeing that APD is enough in rendering offenders likely to commit future sex offenses.<sup>109</sup>

The dilemma remains as to whether a personality disorder diagnosis alone and/or the presence of psychopathy, qualifies a sex offender to have a serious difficulty refraining from future sexual conduct.<sup>110</sup> Offenders with APD and psychopathy have control over most if not all of their behaviors and are considered unwilling to restrain their impulses. Expert testimony should focus on sexual deviancy facets of APD rather than opportunistic sex offending only.<sup>111</sup> Despite experts providing clinical answers to this debate, the issue is subject to a legal answer, namely based on the holding in *Crane*.<sup>112</sup> Accordingly, personality constructs will often be admitted in

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<sup>108</sup> Shoba Sreenivasan, Linda E. Weinberger & Thomas Garrick, *Expert Testimony in Sexually Violent Predator Commitments: Conceptualizing Legal Standards of "Mental Disorder" and "Likely to Reoffend,"* 31 J. AM. ACAD. PSYCHIATRY & L. 471, 476 (2003).

<sup>109</sup> See *Martin v. Reinstein*, 987 P.2d 779, 803 (Ariz. Ct. App. 1999); *In re Commitment of W.Z.*, 773 A.2d 97, 103 (N.J. Super. Ct. App. Div. 2001); *In re Detention of Brooks*, 937 P.2d 486, 492 (Wash. Ct. App. 1999).

<sup>110</sup> See *In re Commitment of Taylor*, 621 N.W.2d 386, 388 (Wis. Ct. App. 2000) (supporting the association between antisocial personality disorder with sexually violent behavior). The court cited the nexus was not between the disorder and the violent sexual act, rather between the disorder and its specified effect on the individual to predispose him to sexual violence. See also *Commonwealth v. Reese*, 438 Mass. 519, 526 (Mass. 2003) (holding that a diagnosis of antisocial personality disorder is adequate to satisfy the definitional requirements of a sexually dangerous person set forth in G.L.C. 123A § 1); Judith Becker & William Murphy, *What We Know and Do Not Know About Assessing and Treating Sex Offenders*, 4 J. PSYCHOL. PUB. POL'Y & L., 116, 118 (1998) (stating sexual predator laws should not be applied to nonparaphilic individuals). Some APD offenders may commit occasional sex offenses as part of their offending patterns but they do not have a recurrent pattern of sexually disordered behavior and are not appropriate for sexually violent predator programs. There is clear evidence indicating that psychopathy is a risk factor for sexual recidivism among paraphilic individuals.

<sup>111</sup> See *Foucha v. Louisiana*, 504 U.S. 71, 82-83 (1992).

<sup>112</sup> *Id.* at 86-87 (reasoning that "the State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct . . . he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term."). See also John Kip Cornwell, *Understanding the Role of the Police and Parens Patriae Powers in Involuntary Civil Commitment Before and After Hendricks*, 4 PSYCHOL. PUB. POL'Y & L. 377, 397 (1998) (reasoning that most prison inmates suffer from APD, constitutionalizing the commitment of those with antisocial personalities would give states broad authority to civilly detain prisoners at the end of their sentences).

court to explain volitional impairments, ultimately satisfying requisites for commitment.<sup>113</sup>

### 3. Paraphilia Disorder NOS (nonconsenting-rape type)

Another diagnostic dilemma occurring in SVP state civil commitment proceedings is whether the diagnosis Paraphilia Not Otherwise Specified-Nonconsent (rape subtype) exists as psychiatric diagnosis in the DSM-IV-TR. This diagnosis is common amongst offenders qualifying for civil commitment in state courts. In Arizona, this diagnosis has been found to occur in 56% of their SVP proceedings while in Washington its prevalence is nearly 43%.<sup>114</sup>

Numerous examiners utilize this diagnosis to indicate that an offender has an affinity to rape, enjoys raping, and obtains sexual arousal from raping yet does not enjoy the repetitive infliction of suffering on the victim which would indicate features of sexual sadism. Many practitioners endorse that a paraphilia nonconsent diagnosis must include an ongoing clear and special lust for the aggressive taking of sex and/or a sexualized hostility towards women causing distress and interpersonal difficulty.<sup>115</sup> However, in practice, many clinicians who endorse this diagnosis substantiate it in their evaluations solely by the fact that an offender has two rape incidences that occurred over a period of six months or longer, without any history of sexually deviant fantasies or other information supporting a diagnosis beyond the rape itself.

The DSM-IV-TR indicates in the definition of paraphilia—"children or other nonconsenting persons,"<sup>116</sup> yet the manual does not specifically endorse a rape subtype relevant to nonconsenting adults who are raped. Further, the term nonconsenting person was apparently meant to apply only to exhibitionism, voyeurism, and sadism and not to adult rape victims.<sup>117</sup> Subsequently, many clinicians assume that an adult rape victim is a nonconsenting person, and if the perpetrator has a pattern of this behavior (usually more than one nonconsenting

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<sup>113</sup> See Vognsen & Phenix, *supra* note 53, at 24. Mental health professionals will likely not generally accept as a group that APD alone qualifies as a severe mental disorder justifying civil commitment. Such opinions violate historical medical models to civil commitment of those offenders who are mentally ill and dangerous. Given the controversy that surrounds whether APD offenders are amenable to treatment and whether such treatment is efficacious with such offenders, many experts will not support commitment unless there is a comorbid sexual paraphilia. The authors warn that experts should not interpret the law by excluding APD offenders from commitment.

<sup>114</sup> Judith V. Becker et al., *Characteristics of Individuals Petitioned for Civil Commitment*, 47 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 185, 185 (2003). See Jackson & Richards, *supra* note 102, at 320.

<sup>115</sup> See Vognsen & Phenix, *supra* note 53, at 380; Witt & Conroy, *supra* note 69, at 34 (stating that a Paraphilia NOS nonconsent diagnosis is difficult to implement because there is a problem in inferring sexual arousal to nonconsenting sexual interactions unless the offender admits to it).

<sup>116</sup> AM. PSYCHIATRIC ASS'N, *supra* note 44.

<sup>117</sup> See Allen Frances, Shoba Sreenivasan & Linda E. Weinberger, *Defining Mental Disorder When It Really Counts: DSM-IV-TR and SVP/SDP Statutes*, 36 J. AM. ACAD. PSYCHIATRY & L. 375, 377 (2008) (highlighting that the DSM-IV-TR did not include rape as a coded diagnosis or example of not otherwise specified (NOS) category).

victim), he would qualify for the diagnosis. Other experts emphasize that deviant sexuality need not be either obligatory or exclusive for a person to meet criteria for a diagnosis of paraphilia not otherwise specified; rather, the repetitive coercive sexual behavior alone is definitive enough for the diagnosis.<sup>118</sup> However, it can be debated whether the DSM-IV-TR dictates that repetitive rape cannot be justified on the basis of behaviors alone, rather, these behaviors must be based on paraphilic urges and fantasies associating the coercive sex to sexual arousal. One problem remains as to whether this viewpoint endorses the repetitive sexual activity as being a product of a paraphilia, substance intoxication disinhibition, opportunity, power, control, anger, or APD.<sup>119</sup>

Some experts believe the diagnosis is too broad, unreliable, imprecisely defined and in essence, a “wastebasket” diagnosis.<sup>120</sup> Utilizing the diagnosis may be inappropriate as it is not formally listed in the DSM-IV or DSM-IV-TR, it does not appear to fit with the intentions of the authors of the DSM, and there is no research conducted to establish this diagnosis’s validity.<sup>121</sup> Importantly, recent commentary by authors of the DSM, indicate that “it was the deliberate intent of DSM-IV to exclude any reference in DSM-IV to rape as a paraphilia. That is why rape is not listed under the various examples of paraphilia NOS and is not listed in the DSM-IV Index.”<sup>122</sup> DSM-IV specifically did not include either rape or nonconsent as an NOS

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<sup>118</sup> *Id.*

<sup>119</sup> HOWARD ZONANA ET AL., DANGEROUS SEX OFFENDERS: A TASK FORCE REPORT OF THE AMERICAN PSYCHIATRIC ASSOCIATION (1999); see AM. PSYCHIATRIC ASS’N, SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT (D. Richard Laws & William O’Donahue eds., 1997) (stating that researchers have also opined that “nonconsenting persons” pursuant to a paraphilia include only necrophiliacs (sex with corpses)).

<sup>120</sup> Robert Prentky et al., *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 PSYCHOL. PUB. POL’Y & L. 357, 363 (2006).

<sup>121</sup> See Miller et al., *supra* note 83, at 17; William L. Marshall, *Diagnostic Issues, Multiple Paraphilias, and Comorbid Disorders in Sex Offenders: Their Incidence and Treatment*, 12 AGGRESSION & VIOLENT BEHAV. 16, 17 (2007); Brown v. Watters, No. 06C0753, 2007 U.S. Dist. LEXIS 80064, at \*2 (E.D. Wis. Oct. 15, 2007) (finding that sex offender expert Dennis Doren admitted on cross examination that he coined the diagnosis Paraphilia Not Otherwise Specified nonconsent diagnosis). He testified that neither the DSM-IV-TR or any professional organizations for psychologists recognized this diagnosis. The court reasoned that legal definitions of mental illness need not mirror those advanced by the medical profession. A diagnosis that may not be recognized by the general medical community may still satisfy due process. The fact that the diagnosis is not in the DSM-IV-TR nor is it readily recognized by the psychology field in general did not answer the question of whether petitioner could control himself. The court opined that while the diagnosis was novel, it appears to be consistent with recognized diagnostic principles. See also Brief for the American Psychiatric Association and American Academy of Psychiatry and the Law as Amici Curiae Supporting Respondent, Kansas v. Crane, 534 U.S. 407 (2002) (No. 00-957), 2001 WL 873316. But see Frances et al., *supra* note 117 (stating that NOS categories in the DSM-IV-TR are designed to allow clinicians to use their clinical judgment for each individual as to whether the symptom cluster caused enough distress or impairment to be a mental disorder). The vagueness in guidelines for NOS diagnoses was intentional to permit the clinician flexibility in their diagnostic process.

<sup>122</sup> Allen Frances & Michael B. First, *Paraphilia NOS, Nonconsent: Not Ready for the Courtroom*, J. AM. ACAD. PSYCHIATRY LAW 39:555–61, at 557 (2011).

example, because paraphilic rapism had been considered and ruled out as a paraphilia in the Diagnostic and Statistical Manual of Mental Disorders, Third Edition (DSM-III), Diagnostic and Statistical Manual of Mental Disorders, Third Edition, Revised (DSM-III-R), and DSM-IV. In conclusion, these authors indicate that “rape is always a crime and is never, by itself, sufficient evidence of a mental disorder.”<sup>123</sup> Coincidentally, around the time of writing this Article, an article in the *Psychiatric Times* dated May 12, 2011, by author Allen Frances, M.D., indicated that the proposal to include coercive paraphilia as an official diagnosis in the main body of DSM-V has been rejected by the American Psychiatric Association due in part to insufficient reliability and validity of such a diagnosis.

When considering the DSM’s historical rejection of a rape paraphilia, a Paraphilia Subcommittee was formed in the 1980s to make recommendations to the DSM-III-R and they voted against a “paraphilic coercive disorder” due to the small amount of offenders who would qualify for sexual arousal to a coercive assault and the fact that the disorder could be used in forensic settings to exculpate rapists.<sup>124</sup> Moreover, the American Psychiatric Association (APA) task force cites that the DSM-IV has not classified paraphilic rapism as a mental disorder. They recognized that some researchers believe that a small group of rapists have diagnostic features similar to those with other paraphilias. However, it is unclear what percentage of rapists would be diagnosed as having such a coercive paraphilic rape disorder, and the ability to make the diagnosis with a sufficient degree of validity and reliability remains problematic (there was insufficient empirical data to support the disorder).

Conversely, those supporting such a diagnosis cite other research indicating a tendency for some rapists to be sexually aroused to nonconsenting sexual interactions as measured by plethysmographic instruments.<sup>125</sup> In fact, some research has shown that about 60% of rapists show equal or greater arousal to rape stories than to consenting sex stories compared to 10% of men with no history of rape.<sup>126</sup> These data would suggest that there is a sexually deviant arousal pattern to nonconsenting sexual interaction for some rapists and hence a paraphilia disorder nonconsent type would be appropriate in some cases. This would also suggest that some APD offenders who have an affinity to rape may not show deviant arousal patterns in laboratory studies.

Ultimately, the paraphilia NOS nonconsenting condition is a weak construct given a lack of a set of denied criteria and consequently there is a danger of using the diagnosis as a catch-all diagnosis for offenders with a history of sex offenses for whom the examiner cannot clearly identify a specific diagnostic category.<sup>127</sup>

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<sup>123</sup> *Id.* at 560.

<sup>124</sup> *See* Frances et al., *supra* note 117, at 379.

<sup>125</sup> Martin L. Lalumiere & Vernon L. Quinsey, *The Discriminability of Rapists from Non-Sex Offenders Using Phallometric Measures*, 21 CRIM. JUST. & BEHAV. 150, 150-175 (1994).

<sup>126</sup> MARTIN LALUMIERE ET AL., *THE CAUSES OF RAPE: UNDERSTANDING INDIVIDUAL DIFFERENCES IN MALE PROPENSITY FOR SEXUAL AGGRESSION* (2005).

<sup>127</sup> *See* Frances et al., *supra* note 117.

## 4. Pedophilia

One of the most common diagnoses that is easily identified and supported amongst state civilly committed sex offenders is pedophilia. In Florida, about 39% of the offenders committed carry this diagnosis,<sup>128</sup> while in Minnesota, about 35% of the committed offenders were diagnosed the same.<sup>129</sup> About 63% of committed sex offenders in Arizona were diagnosed with pedophilia<sup>130</sup>, while about 59% of those committed in Wisconsin carry the disorder.<sup>131</sup>

Important to the substance of this Article is the fact that most sex offenders being considered for federal civil commitment via the AWA will have child victims either through hands-on offending across state lines, possession of child pornography, or solicitation pursuant to a child or adolescent victim. Consequently, experts will be asked to determine the presence or absence of pedophilia in order to substantiate or reject the diagnosis as the mental disorder, abnormality, or disorder required for commitment.

Recently there has been strenuous debate on the utility of the diagnosis of pedophilia.<sup>132</sup> For example, an area of disagreement of experts is whether pedophilia and other paraphilias qualify as mental disorder and genuine psychopathology.<sup>133</sup>

When considering the reliability and validity of the paraphilias, there has been question on the psychometric quality of the diagnosis of pedophilia.<sup>134</sup> Particular attention has been paid to the problems with interrater reliability and test-retest reliability of the diagnosis.<sup>135</sup> Debates have centered around the ambiguous terms of “recurrent” and “intense” within the criteria as well as the consistency of clinicians to accurately assess whether behaviors, urges, and fantasies cause distress or impairment. Though the diagnostic criteria for the disorder appears straightforward, problems with the reliability of the disorder include the subjective manner in which

<sup>128</sup> Jill S. Levenson, *Sexual Predator Civil Commitment: A Comparison of Selected and Released Offenders*, INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 189, 189 (2004).

<sup>129</sup> Eric S. Janus & Nancy H. Walbek, *Sex Offender Commitments in Minnesota: A Descriptive Study of Second Generation Commitments*, 18 BEHAV. SCI. & L. 343 (2000).

<sup>130</sup> Judith Becker et al., *Characteristics of Individuals Petitioned for Civil Commitment*, 47 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 185, 189 (2003); see Jeffery Abracen & Jan Looman, *Evaluation of Civil Commitment Criteria in a High Risk Sample of Sexual Offenders*, 1 J. SEXUAL OFFENDER CIV. COMMITMENT: SCI. & L. 124, 128 (2006). The authors found that within their sample of civilly committed offenders in Canada, 19% were diagnosed with pedophilia.

<sup>131</sup> Letter from Thomas Zander, Psy. D, J.D. to author (Oct. 25, 2008) (on file with author).

<sup>132</sup> See Drew A. Kingston et al., *The Utility of the Diagnosis of Pedophilia: A Comparison of Various Classification Procedures*, 36 ARCHIVES SEXUAL BEHAV. 423, 423 (2007).

<sup>133</sup> Richard Green, *Is Pedophilia a Mental Disorder?* 31 ARCHIVES SEXUAL BEHAV. 467, 467 (2002); Charles Moser, *Are Any of the Paraphilias in DSM Mental Disorders?*, 31 ARCHIVES SEXUAL BEHAV. 490, 490 (2002).

<sup>134</sup> Moser, *supra* note 133; Levenson, *supra* note 40, at 359; Nathaniel McConaghy, *Unresolved Issues in Scientific Sexology*, 28 ARCHIVES SEXUAL BEHAV. 285, 285 (1999).

<sup>135</sup> William L. Marshall, *Diagnostic Problems with Sexual Offenders*, in SEXUAL OFFENDER TREATMENT: CONTROVERSIAL ISSUES 33, 41 (William L. Marshall et al. eds., 2006); O'Donahue et al., *supra* note 40, at 98.



information about sexual interests is combined by examiners and the dilemma experts experience when assessing sex offenders against children as they often are unwilling to admit to deviant sexual thoughts and practices.<sup>136</sup>

When considering the assessment of pedophilic interests, scholars have developed a brief screening scale which includes the following variables: any male victim, more than one victim, any prepubescent victims, and any extrafamilial victims.<sup>137</sup> These sex offense history variables were associated with phallometric assessment data differentiating pedophiles from nonpedophiles.<sup>138</sup>

While roughly 50 to 70% of pedophiles can be diagnosed as having another paraphilia such as exhibitionism or voyeurism, multiple paraphilia offenders are more likely to commit future sex offenses.<sup>139</sup> While the prevalence of pedophilia among men who commit sexual offenses against children is about 50%,<sup>140</sup> pedophilic child molesters on average commit about ten times more sexual offenses against children than nonpedophilic child molesters.<sup>141</sup> While only about 7% of pedophiles identify themselves as exclusively sexually attracted to children, this exclusive type is more likely to have a history of multiple child victims and are considered more likely to sexually reoffend in the future.<sup>142</sup> Research indicates that pedophiles who offend boys are much more likely to have more victims and committed more offenses than those who have offended against girls.<sup>143</sup>

##### 5. Hebephilia

Relevant to the AWA, many federal sex offenders have hands-on, solicitation, and pornography victims in this hebephilic (pubescent-post-pubescent) age group. Importantly, hebephilia is not a paraphilia diagnosis recognized by the DSM-IV-TR

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<sup>136</sup> MICHAEL C. SETO, PEDOPHILIA AND SEXUAL OFFENDING AGAINST CHILDREN: THEORY ASSESSMENT, AND INTERVENTION 24-25 (2008).

<sup>137</sup> Michael C. Seto & Martin L. Lalumière, *A Brief Screening Scale to Identify Pedophilic Interests Among Child Molesters*, 12 SEXUAL ABUSE: J. RES. & TREATMENT 15, 16 (2001).

<sup>138</sup> *Id.*

<sup>139</sup> Gene G. Abel et al., *Multiple Paraphilic Diagnoses Among Sex Offenders*, 16 BULL. AM. ACAD. PSYCHIATRY L. 153 (1988); Lisa J. Cohen & Igor I. Galynker, *Clinical Features of Pedophilia and Implications for Treatment*, 8 J. PSYCHIATRIC PRAC. 276, 281 (2002); Nancy Raymond et al., *Psychiatric Comorbidity in Pedophilic Sex Offenders*, 156 AM. J. PSYCHIATRY 786, 787 (1999).

<sup>140</sup> SETO, *supra* note 136, at 8.

<sup>141</sup> GENE G. ABEL & NORA HARLOW, THE STOP MOLESTATION BOOK 9 (2001), available at <http://www.childmolestationprevention.org/pdfs/study.pdf>.

<sup>142</sup> *Id.* at 11.

<sup>143</sup> Gene G. Abel et al., *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 J. INTERPERSONAL VIOLENCE 3, 22 (1987). The authors found that among nonincarcerated nonincest related pedophiles, heterosexual pedophiles on average reported abusing 19.8 children and committing 23.2 acts whereas homosexual pedophiles had abused 150.2 children and committed 281.7 acts.

and has come under recent brutal attack by some clinicians, challenging the conception that sexual interests in pubescent minors imply a mental disorder.<sup>144</sup>

A key feature of the definition of pedophilia is the age and pubertal status of the children of interest which has a typical age threshold of thirteen years. In contrast, hebephilia is the sexual preference for pubescent children and often is considered sexual preference for females ages thirteen to sixteen years of age<sup>145</sup> or eleven or twelve to fourteen years of age.<sup>146</sup> The ability to distinguish pedophiles from hebephiles concerns the problems with the variability and definitions of pubertal onset in children and the decreasing age of pubertal onset.<sup>147</sup> The DSM-IV-TR draws the distinction between pathological age-related sexual preferences as adult sexual arousal to prepubescent is considered pathological and adult arousal to pubescent and postpubescent is non-pathological.

Pedophiles can be distinguished from hebephiles as the latter include a more intense interest in having reciprocal sexual affairs or relationships with children; they are more opportunistic in their offending, and they have better developed social skills and better post-treatment progress than pedophiles.<sup>148</sup>

Current research has revealed that hebephilia exists as a discernable erotic age-preference apparently separate and distinct from pedophilia.<sup>149</sup> Blanchard and his colleagues studied men who verbally reported maximum sexual attraction to pubescent children and found they had greater penile responses to depictions of pubescent children than to depictions of younger or older persons.<sup>150</sup> Therefore, there was a remarkable consistency between the offenders' self-reported age preferences and their phallometric results.<sup>151</sup> Penile responses distinguished these men from those who reported maximum attraction to prepubescent children and those who reported sexual attraction to adults.<sup>152</sup> Some offenders have repeatedly

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<sup>144</sup> See Charles Moser, *When is an Unusual Sexual Interest a Mental Disorder?*, 38 ARCHIVES SEXUAL BEHAV. 323, 323 (2009); Philip Tromovitch, *Manufacturing Mental Disorder by Pathologizing Erotic Age Orientation: A Comment on Blanchard et al. (2008)*, 38 ARCHIVES SEXUAL BEHAV. 328, 328 (2009); Thomas K. Zander, *Adult Sexual Attraction to Early-Stage Adolescents: Phallometry Doesn't Equal Pathology*, 38 ARCHIVES SEXUAL BEHAV. 329, 329 (2009).

<sup>145</sup> Ryan C. W. Hall & Richard C. W. Hall, *A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, 82 MAYO CLINIC PROC. 457, 458 (2007).

<sup>146</sup> Ray Blanchard et al., *Pedophilia, Hebephilia and the DSM-V*, 38 ARCHIVES SEXUAL BEHAV. 335, 335 (2009).

<sup>147</sup> Zander, *supra* note 144, at 329.

<sup>148</sup> Kristin A. Danni & Gary D. Hampe, *An Analysis of Predictors of Child Sex Offender Types Using Presentence Investigation Reports*, 44 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 490, 493 (2000); T. Howard Stone, William J. Winslade & Craig M. Klugman, *Sex Offenders, Sentencing Laws and Pharmaceutical Treatment: A Prescription for Failure*, 18 BEHAV. SCI. & L. 83, 90 (2000).

<sup>149</sup> See Blanchard et al., *supra* note 146, at 335.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

sexually assaulted pubescent victims and have responded most strongly to laboratory stimuli depicting pubescent more so than those depicting prepubescents and adults.<sup>153</sup> Consequently, the authors report the DSM-IV-TR shortcomings in diagnosing paraphilias and offer recommendations such as replacing the diagnosis of pedophilia with pedohebephilia and allowing clinicians to specify subtypes, i.e., Sexually Attracted to Children Younger than 11 (Pedophilic Type), Sexually Attracted to Children ages 11-14 (Hebephilic Type), or Sexually Attracted to Both (Pedohebephilic Type).<sup>154</sup>

Blanchard's study has come under scrutiny by scholars for various reasons.<sup>155</sup> First, there is a contention that the term hebephilia as diagnosed under paraphilia NOS is not widely accepted nor is there a professional consensus among practicing clinicians of such a diagnosis. Secondly, there is a lack of consistent research supporting the diagnosis. Thirdly, specific to the study, scholars have noted a methodological limitation including the absence of models aged fifteen to eighteen (mid to late adolescence) among the phallometric stimuli.<sup>156</sup> Therefore, the authors of the study could not determine whether the adult offenders, who were aroused to early-stage adolescence, might also be equally or more aroused to mid to late aged adolescents. Accordingly, the judgment to assign behavior as pathological should not be based on phallometric data alone, rather it should also consider the extent to which the behavior is abnormal in one's particular culture.<sup>157</sup>

Other empirical data has refuted the perception that hebephiles are sexually deviant. In particular, research has revealed heterosexual men to be sexually aroused by adolescents<sup>158</sup> and that both pedophiles and a control group could be distinguished in their sexual arousal to prepubescent stimuli but both groups showed similar arousal patterns to stimuli in the hebephilic age range.<sup>159</sup> Further, research has revealed no evidence of deviant sexual arousal patterns among either rapists or heterosexual hebephiles.<sup>160</sup>

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Zander, *supra* note 144; see Gregory DeClue, *Should Hebephilia Be a Mental Disorder? A Reply to Blanchard et al. (2008)*, 38 ARCHIVES SEXUAL BEHAV. 317, 317 (2009); Karen Franklin, *The Public Policy Implications of "Hebephilia": A Response to Blanchard et al. (2008)*, 38 ARCHIVES SEXUAL BEHAV. 319, 319 (2009); Richard Green, *Sexual Preference for 14-Year-Olds as a Mental Disorder: You Can't Be Serious!!*, 39 ARCHIVES SEXUAL BEHAV. 585, 585 (2010); Moser, *supra* note 144; Tromovitch, *supra* note 144.

<sup>156</sup> Zander, *supra* note 144.

<sup>157</sup> *Id.* at 330.

<sup>158</sup> K. Freund & R. Costell, *The Structure of Erotic Preference in the Nondeviant Male*, 8 BEHAV. RES. & THERAPY 15, 15-20 (1970).

<sup>159</sup> See Vernon L. Quinsey et al., *Penile Circumference, Skin Conductance, and Ranking Responses of Child Molesters and "Normals" to Sexual and Nonsexual Visual Stimuli*, 6 BEHAV. THERAPY 213, 218 (1975).

<sup>160</sup> D.J. Baxter et al., *Deviant Sexual Behavior: Differentiating Sex Offenders by Criminal and Personal History, Psychometric Measures, and Sexual Response*, 11 CRIM. JUST. & BEHAV. 477, 477 (1984).

Others question the diagnosis of hebephilia as it may not be abnormal for men to be attracted to the adolescent age group in various cultures.<sup>161</sup> Surveys of social organizations of persons acknowledging erotic interest in children, samples of sex offenders, and surveys from the general population have revealed that attraction to children of pubescent ages is more often reported than is the attraction to those of prepubescent ages.<sup>162</sup>

These clinicians who opposed the hebephilia diagnosis say it will lack interrater reliability and validity as a diagnosis since it is not a formally recognized diagnosis in the DSM-IV-TR. These examiners often will cite that the DSM-IV-TR provided a number of commonly known paraphilias such as coprophilia, urophilia, and zoophilia, but neglect other paraphilic conditions such as hebephilia, which is likely more prevalent amongst the general population and within sex offender populations than these other paraphilias.

An area of heightened debate is whether pedophilia, hebephilia, and other paraphilia diagnoses for that matter can be in remission.<sup>163</sup> This question occurs after an offender has been incarcerated for years and has not been exposed to a victim pool (children in prison) and therefore has not demonstrated symptoms of the disorder for years. One can argue that the remoteness of the offending period and the offender's current denial of emotional identification with children and sexual fantasies and masturbatory practices towards children, etc., indicates that his condition is in remission.

Recently, Paraphilias Sub-workgroup is proposing changes to the diagnosis of pedophilia to be called pedohebephilic disorder in which the diagnosis includes hebephilic type (sexually attracted to pubescent children—generally ages eleven through fourteen).<sup>164</sup>

Before the advent of new-age sexually violent predator civil commitment laws, the term hebephilia was not given much consideration by experts or the courts. In fact it has been suggested that the term is proposed as a quintessential example of pretextuality in which special interests promote a pseudoscientific construct that advances an implicit instrumental goal (that of civil commitment by states). To this date, there appears to be no clear professional consensus as to the clinical application of hebephilia.

This author contends that adult sexual arousal in response to pubescent and post-pubescent females is not likely to be pathologically deviant.<sup>165</sup> As others have asserted, the DSM-IV-TR draws the distinction between pathological age-related sexual preferences, as adult sexual arousal to prepubescents is considered to be pathological and adult arousal to pubescents and postpubescents is considered to be nonpathological. Put simply, hebephilia is not in the DSM-IV-TR currently as a listed paraphilia, and the paraphilia NOS category in the DSM-IV-TR does not

<sup>161</sup> See Franklin, *supra* note 155; Freund & Costell, *supra* note 158; Moser, *supra* note 144, at 324; Quinsey et al., *supra* note 159; Zander, *supra* note 144, at 330.

<sup>162</sup> See Blanchard et al., *supra* note 146, at 336.

<sup>163</sup> See SETO, *supra* note 136; Frances et al., *supra* note 117, at 379.

<sup>164</sup> *Proposed Revisions*, AM. PSYCHIATRIC ASS'N (Oct. 14, 2010), <http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=416>.

<sup>165</sup> John Matthew Fabian, *Diagnosing and Litigating Hebephilia in Sexually Violent Predator Civil Commitment Proceedings*, J. AM. ACAD. PSYCHIATRY LAW 39:496–505 (2011).

include evidence suggesting that it is intended to include hebephilia as a paraphilia. Since hebephilia is absent from the DSM-IV-TR, its reliability and validity as a diagnosis is negated. Along these lines, sexual attraction to adolescent females or males, for that matter, is not a rare form of behavior. Scientific research, as outlined above, is imprecise in its attempt to pathologize sexual attraction to adolescents.

#### G. Volition and the DSM

In conclusion, the assessment of volition is a legal decision. A diagnosis of sexual deviance through a paraphilia by itself cannot be used to infer volitional impairment. Further, the lack of interrater reliability and validity of various paraphilias listed in the DSM-IV-TR, and whether other paraphilias not even mentioned in the manual, can be formally used as diagnoses are at question in civil commitment proceedings. Alternatively, the intensity, frequency, and severity of the sexual urges for example are essential to consider when assessing sex offending and volition.

The expert must remember that diagnostic labels should not be considered dispositive of a legal issue.<sup>166</sup> This is a useful premise to keep in mind because the reliability of diagnoses by clinicians is quite poor in SVP proceedings. For example, the interrater reliability of eight DSM-IV diagnoses applied by experts to determine whether a client has a “mental abnormality that predisposes him to sexual violence” was found to be poor to fair in a study of civil commitment proceedings in Florida.<sup>167</sup>

The expert witness must also be mindful of the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) which states that the inclusion of diagnostic categories such as pedophilia does not imply that the conduct meets legal criteria for what constitutes mental disease and may not be wholly relevant to legal determinations.<sup>168</sup> There is an imperfect fit between the questions of ultimate concern to the law and the information obtained in the clinical diagnosis. The DSM includes, “[i]n determining whether an individual meets a specified legal standard . . . additional information is usually required beyond that contained in the DSM-IV diagnosis. This might include information about the individual’s functional impairments and how these impairments affect the particular abilities in question.”<sup>169</sup>

When applying diagnoses such as pedophilia to questions of volition, the DSM-IV states, “even when diminished control over one’s behaviors is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.”<sup>170</sup> Rather, the intensity, frequency, and severity of the deviant sexual drive leading to dysfunction are the issues in civil commitment proceedings.

As mentioned previously, the law answers the question of what legal threshold is required to assess whether a sex offender lacks enough serious difficulty refraining

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<sup>166</sup> Christopher Slobogin, Gary B. Melton & C. Robert Showalter, *The Feasibility of a Brief Evaluation of Mental State at the Time of the Offense*, 8 LAW. & HUM. BEHAV. 305 (1988).

<sup>167</sup> See Levenson, *supra* note 40, at 357.

<sup>168</sup> AM. PSYCHIATRIC ASS’N, *supra* note 44, at xxiii.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* The fact that an individual’s presentation meets the criteria for a diagnosis does not carry any necessary implication regarding his degree of control over the behaviors that may be associated with the disorder.

from sex offending behaviors in order to be committed. However, the law is often guided by the science and vice versa, therefore, the expert witness may wish to consider the following elements (not in isolation) relevant to assessing an offender's volitional impairment despite their lack of empirical support:

- 1) Historically and currently meets criteria for a paraphilia diagnosis and preferably multiple paraphilias;
- 2) Frequent acts of sexual violence within a closely proximate period of time when at risk in the community (while on supervision or while participating in outpatient sex offender treatment programming);
- 3) Offender sexually reoffends while he is participating in a sex offender treatment program;
- 4) Offender engages in behavior when he is aware of a high probability of getting apprehended;
- 5) Offender actively grooms a victim in the presence of an adult;
- 6) Sexual offending while in prison or awaiting civil commitment hearings;
- 7) Multiple victims;
- 8) Offender lacks insight and understanding into his offending behavior;
- 9) Offender lacks control of his behavior when it is unreasonable to expect him to engage or not engage in a certain act under his particular circumstances (considering context of offender's offending patterns);
- 10) Offender sexually acts out to relieve overwhelming anxiety and distress;
- 11) Offender's strength of sexual desire interferes with his ability to consider alternative courses of action and decision/ability not to offend;
- 12) Offender consistently utilizes child pornography, including collecting great numbers of images, i.e., thousands to tens of thousands, categorizes them into various meaningful categories, and spends a significant amount of time viewing them on the computer, i.e., ten hours per day.

When considering this vague and unoperational statutory language as to whether an offender has "serious difficulty refraining from sexually violent conduct or child molestation if released," courts will accept clinical testimony as long as it is derived and presented in good faith as to mental abnormality.<sup>171</sup>

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<sup>171</sup> *In re Young*, 857 P.2d 989, 1001 (Wash. 1993).

*H. Recent AWA Case Law on Legal Mental Illness*

Since the implementation of the AWA, there have been relatively recent cases addressing psychiatric diagnoses in civil commitment proceedings, usually pertaining to whether a defendant meets the legal threshold of “serious difficulty in refraining from sexually violent conduct or child molestation if released.”

One recent AWA sexually violent predator civil commitment case, *United States v. Abregana*, included the consideration of hebephilia as a mental disorder under the statute.<sup>172</sup> The defendant Abregana exposed his genitals to a twelve year-old boy in a movie theater. Abregana then sent sixteen diskettes containing child pornography to an undercover U.S. Postal Inspector. The disks included 221 images of prepubescent, adolescent, and teenage boys engaged in sexually explicit conduct. Upon executing a search warrant at his residence, agents found five discs which contained child pornography including pictures of Abregana engaged in oral sex with a fifteen year-old boy. Abregana was sentenced to prison and was subsequently released and violated supervision, and admitted to having sexual contact with a seventeen year-old minor during his supervision in which the boy touched Abregana’s penis through his clothing and on another occasion Abregana masturbated the minor’s penis. Abregana was placed in custody and began a second term of supervised release. He again violated supervision by viewing pornography and contacting three minors through email. He had accessed photos of nude males, some sexually explicit, and he created a profile on an online chat-room claiming to be fourteen years of age. He sent emails to male youth who were ten, twelve, and fourteen years of age. Prior to his completion of his federal sentence, the Bureau of Prisons certification review panel certified him as a sexually dangerous person.<sup>173</sup>

The federal court heard testimony from three sex offender psychologist experts.<sup>174</sup> The government’s expert diagnosed Abregana with hebephilia under the paraphilia NOS diagnostic category due to his sexual arousal to post-pubescent adolescents, i.e., teenagers or minors having secondary sex characteristics. The defense expert testified that Abregana had an attraction to adolescents but noted that hebephilia is not listed as a sexual deviance disorder in the DSM-IV-TR.<sup>175</sup> The other defense expert agreed with the government’s diagnosis of hebephilia.<sup>176</sup> This expert recognized the controversy over whether hebephilia is a valid diagnosis. While acknowledging that hebephilia is not included in the DSM-IV-TR, he agreed that there are authorities in the field who consider it a mental disorder and it has been part of the literature for a number of decades.<sup>177</sup> However, the expert testified that the degree of pathology of hebephilia is much less than that of other paraphilias, such as pedophilia or sexual sadism.<sup>178</sup>

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<sup>172</sup> *United States v. Abregana*, 574 F. Supp. 2d 1145 (D. Haw. 2008).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 1150.

<sup>175</sup> *Id.* at 1153.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

In its opinion, the federal trial court opined that the government had not proven that Abregana “suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.”<sup>179</sup> The court found that Abregana suffered from a mental disorder, namely paraphilia NOS hebephilia, yet based on the expert evidence, hebephilia did not constitute a serious mental disorder.<sup>180</sup>

In another recent federal civil commitment case, *United States v. Shields*,<sup>181</sup> the court ruled that the government had not provided persuasive expert evidence that the offender has a mental illness, abnormality, or disorder named hebephilia.<sup>182</sup> The court reasoned that while the peer-reviewed literature may establish that hebephilia is generally accepted in the field as a group identifier or label, it does not establish that hebephilia is generally accepted as a mental disorder by professionals who assess sexually violent offenders.<sup>183</sup> The court recognized that both sides agreed that the attraction of an adult male to a pubescent adolescent is not, without more, indicative of a mental disorder.<sup>184</sup> The court acknowledged the state experts’ opinions that hebephilia included abnormal behavior; however, it found that the government did not point to any peer-reviewed literature recognizing either experts’ diagnostic definition of a mental disorder called hebephilia.<sup>185</sup> The court ruled, “[s]ignificantly, the American Psychiatric Association considered and rejected hebephilia as a diagnostic category for a mental disorder. [] Moreover, there is no expert testimony in this record that psychiatric experts generally accept this definition of hebephilia as a mental disorder.”<sup>186</sup>

Another federal district court case addressing psychiatric diagnosis and hebephilia in particular is *United States v. Carta*.<sup>187</sup> In *Carta*, the federal government sought to commit Todd Carta.<sup>188</sup> After pleading guilty to child pornographic charges in October 2002, Carta was sentenced to five years in federal prison and three years of supervised release.<sup>189</sup> Carta began sex offender treatment within the Bureau of Prisons and withdrew in part due to his inability to curb his sexual interest in the program’s younger participants.<sup>190</sup> During sex offender treatment, Carta described his sexual interest in children ages twelve to seventeen

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<sup>179</sup> *Id.* at 1159; 18 U.S.C.A § 4247(a)(6) (West 2006).

<sup>180</sup> *Abregana*, 574 F. Supp. 2d at 1159.

<sup>181</sup> *United States v. Shields*, No. 07-12056-PBS, 2008 U.S. Dist. LEXIS 13837 (D. Mass. Feb. 26, 2008).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at \*5.

<sup>187</sup> *United States v. Carta*, 620 F. Supp. 2d 210 (D. Mass. 2009).

<sup>188</sup> *Id.* at 212.

<sup>189</sup> *Id.* at 214.

<sup>190</sup> *Id.* at 215.



and secondary interest in children ages seven to eleven.<sup>191</sup> He admitted to storing up to 20,000 images on his computer while spending up to fourteen hours per day looking at child pornography prior to his arrest.<sup>192</sup> He admitted to sexually abusing minors on many occasions with his youngest victim being a child in diapers. His primary victim age group by self-report was males between ages thirteen and twenty-eight.<sup>193</sup> Prior to his release date, the Bureau of Prisons certified that Carta was a sexually dangerous person and began civil commitment proceedings.<sup>194</sup> The government expert diagnosed Carta with paraphilia NOS that was characterized by hebephilia.<sup>195</sup> The defense's expert concluded that hebephilia was not a generally accepted diagnosis in the mental health community and did not fit within the DSM definition of paraphilia, lacked diagnostic criteria and could not be consistently defined, that normal adults may find adolescents arousing, and that articles offered by the government to support a hebephilia diagnosis were not legitimate peer-reviewed research.<sup>196</sup>

The district court found that the government had not proved by clear and convincing evidence that Carta was a sexually dangerous person and that hebephilia was not a "serious mental illness, abnormality, or disorder" under the statute.<sup>197</sup> The court acknowledged that hebephilia is not listed within the DSM category of paraphilia NOS and is not otherwise found within the DSM.<sup>198</sup> The court considered whether classing hebephilia as a mental disorder was supported by research in the field of psychology and whether it was generally accepted in the psychiatric and psychological community, finding that there was some dispute in the field and it was not generally recognized as serious mental illness.<sup>199</sup>

The court cited *United States v. Shields* and *United States v. Abregana* in that the only federal courts to have addressed the diagnosis of hebephilia in sexually dangerous person cases have rejected it as a basis for commitment.<sup>200</sup> The court questioned why the DSM editors would limit examples of paraphilia NOS to rare sexual fixations if the category was intended to include a sexual interest as common as attraction to post-pubescent adolescents.<sup>201</sup> The court recognized that research has indicated that normal adult males experience sexual arousal to sexually developed adolescents and subsequently the definition of hebephilia could pathologize normal men.<sup>202</sup> The court considered the difficulty in determining what age range qualifies

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 214.

<sup>193</sup> *Id.* at 215.

<sup>194</sup> *Id.* at 216.

<sup>195</sup> *Id.* at 217.

<sup>196</sup> *Id.* at 218.

<sup>197</sup> *Id.* at 229.

<sup>198</sup> *Id.* at 225.

<sup>199</sup> *Id.* at 222, 225.

<sup>200</sup> *Id.* at 222.

<sup>201</sup> *Id.* at 223-24.

<sup>202</sup> *Id.* at 224.

as adolescence given that the age of consent varies across jurisdictions as well as to the extent to which the difference in age between the adolescent and the adult affects the diagnosis.<sup>203</sup>

Upon review of this district court's decision, the U.S. Court of Appeals for the First Circuit reviewed the district court's decision in *Carta*.<sup>204</sup> To this date, this is the only federal court of appeals case dealing with hebephilia. The appellate court criticized the district court's approach in considering hebephilia as qualifying for the legal civil commitment criteria a "serious mental illness, abnormality, or disorder."<sup>205</sup>

The court believed *Carta* fell into the paraphilia diagnostic category in the DSM.<sup>206</sup> Specifically, the Court cited the paraphilia NOS category as a catch-all category that lists various paraphilias.<sup>207</sup> When applied to *Carta*, his past history of sexually abusing minors, his decades-long sexual fixation on minors causing him significant distress or impairment in his life, his in-prison behavior and expressed attitudes seemingly justify classifying him as suffering from a paraphilia.<sup>208</sup> The court opined that it would be clear error to state that the DSM definition of paraphilia excluded an intense sexual fixation on young teenagers similar to *Carta*'s offending behaviors.<sup>209</sup> While the district court did not want to stretch hebephilia into the paraphilia NOS category because it could pathologize normal men, the appellate court accepted hebephilia as a diagnosis simply pointing to adolescents as the target of *Carta*'s fixation.

The court ruled that not everyone sexually attracted to adolescents is mentally disordered, rather, those offenders whose urges are so strong as to produce the symptoms and consequences identified in the DSM (similar to *Carta*), could be classified with a paraphilia NOS, that was characterized by hebephilia.<sup>210</sup> Finally, the court suggested that the government's position depended only on showing whether *Carta*'s sexual attraction to teenagers fell within the DSM definition of paraphilia NOS, not on showing that hebephilia is a mental disorder.<sup>211</sup> The court remanded the case back to the district court to consider whether *Carta* is a sexually dangerous person.<sup>212</sup>

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<sup>203</sup> *Id.*

<sup>204</sup> *United States v. Carta*, 592 F.3d 34 (1st Cir. 2010).

<sup>205</sup> *Id.* at 39.

<sup>206</sup> *Id.* at 40.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 41.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 42.

*I. Risk Assessment Instruments and Volition*

A question remains as to whether actuarial risk assessment instruments should be utilized in AWA commitment proceedings to provide for an assessment of “serious difficulty refraining from sexually violent conduct or child molestation.”<sup>213</sup>

Actuarial risk assessment instruments identify predictive variables for a specific outcome that are each assigned weight. The choice of data categories is driven by empirical research which demonstrates what groups of individuals, because of specific characteristics determining group membership, are at relatively higher risk. Actuarial assessments estimate the absolute likelihood or specific probability that an individual person will sexually/violently recidivate in the future on the basis of retrospective studies of groups of sex offenders released into the community.<sup>214</sup> Hence, group data define the individual one is evaluating.

But as mentioned before, the expert evaluating an AWA commitment claim must realize there are different pathways to offending, and the sex offender specific actuarial risk assessment instruments tap into these constructs, based primarily on elements of sexual deviance and antisocial lifestyle.<sup>215</sup> At this juncture, we have no empirical data linking the actuarial items to volitional impairments. However, some experts, and certainly U.S. attorneys, may assume that high actuarial scores indicating high risk probability estimates are the best indicators of one’s serious difficulty refraining from sexual violence. This is a major assumption and one that is not likely supported by empirical data. Furthermore, the normative samples of the Static 99 for example, included exhibitionist type noncontact offenders but did not include online solicitation type offenders, common in federal court.<sup>216</sup> Similarly, the Static 99 cannot be used to assess risk amongst sole child pornography possessors.

There is a heightened standard of reliability and validity in risk assessment evidence given the consequences of loss of liberty and protection of the community from potential sexual violence.<sup>217</sup> However, state courts handling sexually violent predator (SVP) cases have consistently admitted clinical judgment testimony

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<sup>213</sup> As stated previously, the BOP has recommended the use of actuarial risk assessment instruments, Static-99 and RRASOR, to aid in assessing an offender’s serious difficulty in controlling his sex offending behaviors. They recommend a risk assessment method of clinical adjustment to actuarial data. Overriding factors to continue pursuit of commitment include Static-99 scores of six or greater and RRASOR scores of four or greater.

<sup>214</sup> Howard, E. Barbaree, Calvin M. Langton & Edward J. Peacock, *Different Actuarial Risk Measurements Produce Different Risk Rankings for Sexual Offenders*, 18 SEX ABUSE: J. RES. & TREATMENT 423, 423 (2006); Anthony R. Beech, Dawn D. Fisher & David Thornton, *Risk Assessment of Sex Offenders*, 34 PROF. PSYCHOL.: RES. & PRAC. 339, 340 (2003); Michael C. Seto, *Is More Better? Combining Actuarial Risk Scales to Predict Recidivism Among Adult Sex Offenders*, 17 ASSESSMENT 156, 156 (2005).

<sup>215</sup> See Beech et al, *supra* note 214; see also Caton F. Roberts, Dennis M. Doren & David Thornton, *Dimensions Associated with Assessments of Sex Offender Recidivism Risk*, 29 CRIM. JUST. & BEHAV. 569, 570 (2002).

<sup>216</sup> STATIC 99 CLEARINGHOUSE, [www.static99.org](http://www.static99.org) (last visited May 21, 2012).

<sup>217</sup> Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 AM. CRIM. L. REV. 1443, 1463 (2003).

establishing low levels of reliability in the courtroom.<sup>218</sup> There is little doubt that the courts will allow actuarial testimony even when it is utilized to assess volitional impairment.

The major questions state courts have considered regarding admissibility are the instruments' reliability and accuracy as products of science and the importance of examiners and courts using them properly. Courts such as the one in *In re R.S.*,<sup>219</sup> have upheld the reliability of actuarial risk assessment instruments as an aid in predicting recidivism. However, they do not rely on them as litmus tests; rather, they are interpreted as one piece of a broader clinical evaluation.

State appellate courts have considered the issues of evidentiary reliability of these instruments. Two admitted actuarials<sup>220</sup> and one denied their use,<sup>221</sup> yet all three courts accepted clinical judgment. The admissibility question surrounded not how accurate the instruments are to justify liberty infringements, but rather how accurate must they be to avoid potential prejudice arising from labeling actuarial prediction a science.<sup>222</sup> One court established that scientific reliability was contextual and depended upon the complexity of the testimony and the likely impact of the testimony on the fact-finding process.<sup>223</sup>

In *People v. Taylor*,<sup>224</sup> the court rejected the use of actuarial instruments and questioned the youthfulness of the instruments and opined that the validity of the instruments has not been established. Trial judges in Arizona and Missouri state commitment cases have held that the exclusion of actuarial risk testimony did not prevent the introduction of clinical judgment risk assessments.<sup>225</sup>

In the case *In re Valdez*, a trial court in Florida granted an order to exclude actuarials as it opined that they may define sexual violence differently from the statute that is the basis of the legal proceedings. They fail to address the causal nexus issue, they have potential for prejudice as they give a false impression that they provide an accurate and reliable estimate about the ultimate legal issue of risk assessment, they lack general acceptance, they lack probative value, and none of the tests included whether an offender has been treated or is on supervision, and the court stressed the instrument's sole reliance on static factors.<sup>226</sup>

Federal district courts have allowed the use of actuarial risk assessment instruments in federal sex offender cases, including AWA civil commitment cases.<sup>227</sup>

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<sup>218</sup> Charles Patrick Ewing, *Preventive Detention and Execution: The Constitutionality of Punishing Future Crimes*, 15 LAW & HUM. BEHAV. 139, 148 (1991).

<sup>219</sup> *In re Commitment of R.S.*, 773 A.2d 72, 75 (N.J. Super. Ct. App. Div. 2001).

<sup>220</sup> *Id.*; *In re Detention of Holtz*, 653 N.W.2d 613, 619 (Iowa Ct. App. 2002).

<sup>221</sup> *People v. Taylor*, 782 N.E.2d 920, 931 (Ill. App. Ct. 2002).

<sup>222</sup> *See Prentky et al.*, *supra* note 120, at 384.

<sup>223</sup> *Holtz*, 653 N.W.2d at 616.

<sup>224</sup> *Taylor*, 782 N.E.2d at 979.

<sup>225</sup> *In re Woods*, No. 0P200000005.

<sup>226</sup> *In re Valdez*, No. 99-000045C1 (Fla. 2000).

<sup>227</sup> *See United States v. Abregana*, 574 F. Supp. 2d 1145, 1154 (D. Haw. 2008).

In *United States v. Shields*,<sup>228</sup> the U.S. District Court ruled that actuarial risk assessments (RRASOR, STATIC-99) and any adjusted actuarial approach, including the “guided clinical method” and the “adjusted actuarial method,” are reliable under the standards set forth in *Daubert*.<sup>229</sup> The court reasoned that these assessments are generally accepted as a reliable methodology within the relevant scientific community and they have been subject to peer review. Further, the court found that experts in at least nineteen other states rely upon actuarial risk assessment in forming their opinions on sex offenders’ risk of recidivism and only Illinois was found to rule that some expert testimony based upon actuarial risk assessment was deemed inadmissible on the question of sexual recidivism.<sup>230</sup>

Overall, the instruments must be evaluated for “fit” (their association to the pertinent legal inquiry), and the prejudicial impact of actuarial risk assessment instruments might be the most significant issue challenging their reliability. The legal inquiry in AWA cases addresses the issue of “serious difficulty refraining,” and federal courts must consider whether the instruments’ foundations and objectives satisfy the legal fit issue for admissibility. One can consider that a high score indicates that an offender is high risk and therefore he has serious difficulty refraining, yet the actuarial instruments may appear to be a better fit with the ambiguous term “likely” than the AWA volitional language.

Actuarial instruments will likely continue to be admitted into state and federal courts due to their proclaimed accuracy and utility as they tout interrater reliability, measurement error, predictive validity with future sexual violence, and have been tested and published in peer review literature.<sup>231</sup> Judges will continue to perceive that they are probative to legal questions and will consider them as support to experts’ clinical opinions. Additionally, the Bureau of Prisons also recommends that psychologists practicing within the BOP who are performing AWA commitment assessments, utilize risk assessment tools that are relied upon by professionals in the field.<sup>232</sup>

Most experts who are asked to assess for future sexual violence utilize these instruments in their risk assessments. However, experts, attorneys, and judges in these cases must be aware of the strengths, weaknesses, and limitations of the instruments. They must challenge their use when applying them to the statutory language “serious difficulty refraining” in AWA cases.

We turn now to the dispositive answer to our volitional questions, namely how the courts assess and interpret one’s volitional impairments as they relate to sex offending behaviors.

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<sup>228</sup> *United States v. Shields*, No. 07-12056-PBS, 2008 U.S. Dist. LEXIS 13837, at \*2 (D. Mass. Feb. 26, 2008).

<sup>229</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

<sup>230</sup> *Id.*

<sup>231</sup> See AM. PSYCHIATRIC ASS’N, *supra* note 44.

<sup>232</sup> Determining “Serious Difficulty in Refraining from Sexually Violent Conduct of Child Molestation if Released,” 72 Fed. Reg. 43, 209 (Aug. 3, 2007) (to be codified at 28 C.F.R. pt. 549, subpart H).

*J. Distinguishing State and Federal Sex Offenders: Profiles of State Civilly Committed Sex Offenders*

One may ask what is the difference between the atypical sex offender appropriate for indefinite civil commitment versus the dangerous but typical recidivist considered in the holdings of *Hendricks* and *Crane*? A few states offer some analysis of the demographic and clinical profiles of their committed offenders. In Florida, researchers found that offenders who were of a nonminority race, carried diagnoses and/or assessments of pedophilia and paraphilia NOS, had significant evidence of psychopathy, had high actuarial risk assessment scores, offended against a younger age victim, and had more total victims and offended against victims of both genders were more likely to be civilly committed under the state's Jimmy Ryce Act.<sup>233</sup>

Another study in Arizona assessed commonalities amongst civilly committed sex offenders in Arizona and found that they averaged 2.6 sex offense convictions and 85% had prior nonsexual offenses.<sup>234</sup> Most of the offenders abused children sexually, some abused both children and adults, and a small number of offenders sexually offended against adults. About 90% of the Arizona sample had a history of alcohol abuse, 68% marijuana abuse, and 42% cocaine abuse. About 63% had a diagnosis of pedophilia, 56% paraphilia not otherwise specified, 14% exhibitionism, 13% voyeurism, and 40% antisocial personality disorder.<sup>235</sup>

A study examining Minnesota's civil commitment detainees revealed that about 5% of all sex offenders released from the state's prisons eventually were civilly committed.<sup>236</sup> About 46% of the detainees had four or more previous felony convictions, 77% had two or more previous sex crimes, and 27% had four or more previous sex crimes.<sup>237</sup> About 37% of the detainees victimized adults, 37% victimized children, and 25% victimized children aged ten to seventeen.<sup>238</sup> About 51% of the detainees victimized acquaintances and only 13% were relatives of their victims, while 7% had stranger victims.<sup>239</sup> About 70% of the detainees offended against females, 20% against males, and 10% had victims of both sexes.<sup>240</sup> Most often the detainees carried substance abuse diagnoses (52%), followed by Pedophilia

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<sup>233</sup> Jill S. Levenson & John W. Morin, *Factors Predicting Selection of Sexually Violent Predators for Civil Commitment*, 48 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 609, 609 (2004); Levenson, *supra* note 128, at 638.

<sup>234</sup> Kafka & Hennen, *supra* note 89.

<sup>235</sup> *Id.*

<sup>236</sup> Eric S. Janus & Nancy H. Walbek, *Sex Offender Commitments in Minnesota: A Descriptive Study of Second Generation Commitments*, 18 BEHAV. SCI. & L. 343, 354 (2000).

<sup>237</sup> *Id.* at 359.

<sup>238</sup> *Id.* at 361-62.

<sup>239</sup> *Id.* at 362.

<sup>240</sup> *Id.* at 363.

(35%), and APD (26%).<sup>241</sup> The authors of this study found that their civil detainees were highly variable and heterogeneous in nature.<sup>242</sup>

*K. Understanding the Federal Sex Offender*

As of February 2007, the Bureau of Prison's (BOP) Central Office Review Panel had reviewed 2,386 inmates for potential 18 U.S.C. § 4248 civil commitment, and only 22 inmates have been certified as sexually dangerous persons and were pending civil commitment hearings.<sup>243</sup>

To date, the BOP has filed certificates on prisoners to be considered for civil commitment who have diagnoses with pedophilia, paraphilia, antisocial personality disorder, or a combination of those three diagnoses.<sup>244</sup> Many have had sexual paraphilia diagnoses including exhibitionism, voyeurism, fetishism, sexual sadism, and frotterism, while others have had nonsexual disorder diagnoses including bipolar disorder, borderline, depressive, or histrionic personality disorders.<sup>245</sup>

Many federal sex offenders differ from state sex offenders as they have committed federal specific sex crimes. These federal sex offenses often are noncontact sex offenses such as Internet solicitation and possession of child pornography. Some federal sex offenders being considered for civil commitment under the AWA will also have a history of state sex offense crimes prior to their incarceration within the BOP.

Imperative to the language of the AWA, is the fact that any sex offender within the BOP can be petitioned for commitment. For example, consider a one-time sex offender who attempted to solicit a federal agent for sex believing she was thirteen years-old; this can be defined as "attempting to engage in sexually violent conduct or child molestation" and be deemed sexually dangerous to others and be subject to commitment proceedings. However, this offender would not likely be considered as having a serious difficulty in refraining from acts of sexual violence. In contrast, a pornography possessor who has no hands-on sexual offenses, and who may have attempted to solicit another with intent of a contact sex offense, could potentially be committed indefinitely without ever physically assaulting anyone.

When considering the assessment of federal sex offenders, questions arise including what are the risks of reoffending for pornography and solicitation offenders. Does pornography possession lead to future contact and noncontact sex offenses? Are pornography possession sex offenders pedophilic and present as high risk sex offenders? Is there a difference between solicitors who have interacted with

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<sup>241</sup> *Id.* at 369.

<sup>242</sup> Thomas K. Zander, *Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Link in Psychodiagnosis*, 1 J. SEXUAL OFFENDER CIV. COMMITMENT: SCI. & L. 17 (2005). Common diagnoses in Wisconsin civilly committed sex offenders include pedophilia 59%; Antisocial Personality Disorder 42%; Paraphilia NOS 40.5%; and Personality Disorder NOS 39-89% with antisocial personality disorder features.

<sup>243</sup> Letter from Amy Baron-Evans and Sara Noonan to Defenders & CJA Counsel (Sept. 10, 2007), available at [http://www.fd.org/pdf\\_lib/Adam.Walsh.III.REV.9.24.07.FINAL.pdf](http://www.fd.org/pdf_lib/Adam.Walsh.III.REV.9.24.07.FINAL.pdf). The BOP has identified 10,000 to 12,000 inmates eligible for review and the BOP has reviewed half of the offender files and has filed 46 sexually dangerous certifications.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

real victims versus those whose offenses were against undercover law enforcement officers?

*L. Online Solicitation*

Many federal sex crimes are noncontact and “hands-off” in nature. They often include solicitation and pornography possession cases. These offenders are still vulnerable to AWA commitment proceedings. The former crime includes the trendy “catch a predator” cases in which an individual will solicit an underage person through online Internet contact and attempt to meet the underage person at a certain destination, only to find undercover police or federal law enforcement there to arrest him. These online solicitation cases are policed by county or federal law enforcement agency sting-type operations.

Each year, one in five youth encounter online solicitations via chat-rooms or instant messaging routes that are sexual in nature. The National Juvenile Online Victimization Survey has studied law enforcement investigations of Internet sex crimes against minors. They have found that 25% of all arrests for Internet sex crimes against minors were due to “proactive” investigations where police/federal agents pose online as minors or pretend to be mothers teaching their children about sex.<sup>246</sup> These investigations allow law enforcement to catch suspects before they have an opportunity to offend. Undercover investigations can be referred to as “reactive” or “take over” when police learn of a solicitation to a real child victim and then they pose as the original minor and target the suspect.

In the year 2000, one quarter (644) of the Internet sex crimes against juveniles (about 2,500 total arrests) were based on proactive investigation. Other arrests were for crimes committed by the offenders who met the juveniles online (20%), other sex crimes committed against juveniles by family members or acquaintances against juvenile victims (19%), and the possession, distribution, or trading of pornography on the Internet (36% of arrests).<sup>247</sup>

Because proactive and many reactive solicitation cases include no contact sex offenses, these offenders’ characteristics and sexual dangerousness is questioned. Offenders who attempted to target online (law enforcement) victims have a tendency to be lower risk than those who targeted actual juvenile victims. Those who target actual juvenile victims were more likely to have more prior arrests for non-sexual offenses and for sexual offenses against minors, have a lower income, and were less likely to be employed full-time at the time of the offense. Both groups had similarly high rates of child pornography possession and drug and alcohol use patterns.<sup>248</sup>

Research has indicated that among sex offenders with Internet sex crimes (solicitation with identified victims, solicitations with law enforcement, and possessors of child pornography), about two-thirds have possessed child

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<sup>246</sup> Kimberly J. Mitchell, Janis Wolak & David Finkelhor, *Police Posing as Juveniles Online to Catch Sex Offenders: Is It Working?*, 17 *SEXUAL ABUSE: J. RES. & TREATMENT* 241, 241 (2005).

<sup>247</sup> *Id.* at 250.

<sup>248</sup> *Id.* at 251.



pornography, about 10% have prior arrests for sex offenses against minors, and 11% had been known to be violent to any degree.<sup>249</sup>

*M. Illegal Pornography Possessors*

Many federal sex offenders have only child pornography possession and/or distribution type cases in their sex offending history. Others will have contact sex offenses in addition to their pornography type cases. In some cases, a sex offender will have a history of possession of pornography and will entice a live victim to engage in the production of pornographic material.

Researchers also suggest that Internet offenders may fall into three categories: collecting pornography as part of a larger pattern of sexual offending; collecting to feed a developing sexual interest in children; and accessing indecent images of children out of curiosity.<sup>250</sup> Importantly, the expert evaluating offenders with illegal possession of child pornography must be able to distinguish higher risk offenders with an affinity for child pornography and a significant deviant sexual drive towards children versus the offender who “got caught up” in online trade and possession of child pornography which was fueled in part by curiosity, social isolation, and need for power.<sup>251</sup>

There is scant research on the criminal histories and later offending of child pornography offenders. At least one study has indicated that offenders who accessed child pornography often had no prior criminal background.<sup>252</sup> Research data reveals that child pornography offenders with prior criminal records were significantly more likely to offend in various ways (general, violent, and sexual offenses).<sup>253</sup> About a quarter of the sample of pornography offenders had prior contact sex offenses and 15% had prior child pornography offenses.<sup>254</sup> After an average time at risk of 29.7

<sup>249</sup> JANIS WOLAK, KIMBERLY MITCHELL & DAVID FINKELHOR, NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, INTERNET SEX CRIMES AGAINST MINORS: THE RESPONSE OF LAW ENFORCEMENT 7 (Nov. 2003), available at <http://www.unh.edu/ccrc/pdf/CV70.pdf>.

<sup>250</sup> Joe Sullivan & Anthony Beech, *Assessing Internet Sex Offenders*, in CHILD SEXUAL ABUSE AND THE INTERNET: TACKLING THE NEW FRONTIER 69 (Martin C. Calder ed., 2004).

<sup>251</sup> See RICHARD WORTLEY & STEPHEN SMALLBONE, U.S. DEP’T OF JUSTICE, CHILD PORNOGRAPHY ON THE INTERNET (2006), available at <http://www.cops.usdoj.gov/files/ric/Publications/e04062000.pdf>; Stephen Smallbone & Richard Wortley, AUSTL. INST. CRIMINOLOGY, *Child Sexual Abuse in Queensland: Offender Characteristics & Modus Operandi*, (2001), <http://www.aic.gov.au/documents/1/D/7/%7B1D7F5F5E-2B6A-44CA-B2CB-9B330AE888A8%7Dt193.pdf>. The authors acknowledge ten levels of image severity including: Indicative, Nudist, Erotica, Posing, Erotic Posing, Explicit Erotic Posing, Explicit sexual activity, Assault, Gross assault, Sadistic/bestiality. The authors report that before the advent of the Internet, between 20% and 33% of those arrested for child pornography offenses were involved with hands-on abuse. Further, they cite that 10% of those sex offenders with child abuse victims had sought out and/or collected child pornography. See also A. Dobson, *Caught in the Net*, CARE AND HEALTH 6, 6-9 (Feb. 13, 2003).

<sup>252</sup> Anne Burke et al., *Child Pornography and the Internet: Policing and Treatment Issues*, 9 PSYCHIATRY, PSYCHOL. & L. 79, 81 (2002).

<sup>253</sup> Michael C. Seto & Angela W. Eke, *The Criminal Histories and Later Offending of Child Pornography Offenders*, 17 SEXUAL ABUSE: J. RES. & TREATMENT 201 (2005).

<sup>254</sup> *Id.* at 205.

months, 17% of the sample had reoffended.<sup>255</sup> Only 9% of the contact sex offenders committed a further contact sexual offense and 5% committed a further pornography offense.<sup>256</sup> In contrast, about 1% of the child pornography-only offenders escalated to committing a contact sexual reoffense and 4% committed a further pornography offense.<sup>257</sup> Those child pornography offenders who had committed a prior or concurrent contact sex offense were the most likely to offend again, either generally or sexually. As expected, a history of contact sex offenses is predictive of future hands-on sex offenses even with pornography type offenders.

Contemporary research by Wolak, Finkelhor, and Mitchell<sup>258</sup> examined child pornography possessors and trends in offender characteristics and found that only 9% had a prior arrest for a sex offense against a minor, 5% had been registered as a sex offender at the time of the crime. About 45% of these offenders were dual offenders charged with both child pornography and concurrent child sexual abuse.

One recent article examined the characteristics of Internet child pornography offenders versus child molesters.<sup>259</sup> The former group was significantly younger, possessed lower psychopathic traits, had more psychological difficulties in adulthood, and fewer prior sexual convictions than the child molester group.<sup>260</sup> However, in one recent study, researchers found that child pornography offenses are a valid diagnostic indicator of the diagnosis of pedophilia.<sup>261</sup> In fact, offenders charged with child pornography offenses were more sexually aroused phallometrically towards children than were child molesters who had offended against child victims.<sup>262</sup> Whether this indicates that this group is more likely to hands-on sexually reoffend is unclear.<sup>263</sup>

The characteristics of online sex offenders have been recently explored.<sup>264</sup> The researchers found that when comparing online to offline offenders, the former group had more victim empathy and greater sexual deviancy, while both groups reported significantly greater rates of childhood physical and sexual abuse than the general population.

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<sup>255</sup> *Id.* at 206.

<sup>256</sup> *Id.* at 207.

<sup>257</sup> *Id.*

<sup>258</sup> Janis Wolak, David Finkelhor, and Kimberly Mitchell, *Child Pornography Possessors: Trends in Offender and Case Characteristics*, SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT, 23(1), 22-42 (2010).

<sup>259</sup> L. Webb, J. Craissati & S. Keen, *Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters*, 19 SEXUAL ABUSE: J. RES. & TREATMENT 449, 450 (2007).

<sup>260</sup> *Id.* at 455.

<sup>261</sup> Michael C. Seto, James M. Cantor & Ray Blanchard, *Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia*, 115 J. ABNORMAL PSYCHOL. 610, 610 (2006).

<sup>262</sup> *Id.* at 613.

<sup>263</sup> *See id.* at 614.

<sup>264</sup> Kelly M. Babchishin, R. Karl Hanson, & Chantal A. Hermann, *The Characteristics of Online Sex Offenders, a Meta-Analysis*, SEXUAL ABUSE: J. RES. & TREATMENT 23(1), 92-123 (2010).

In a meta-analytic study, the authors found that 12% of online sexual offenders (particularly child pornography offenders) had an officially known contact sexual offense history at the time of their index offense.<sup>265</sup> Another meta-analysis revealed that 4.6% of online offenders committed a new sexual offense of some kind during a 1.5 to 6-year follow-up period (2% committed a contact sexual offense and 3.4% committed a new child pornography offense).<sup>266</sup>

Another recent study analyzed a group of offenders who were subsequently charged with consumption of illegal pornographic material over a six year follow-up period.<sup>267</sup> The researchers found that 3% of the sample recidivated with a violent and/or sex offense or with a hands-off sex offense (0.8%).<sup>268</sup> They concluded that consuming child pornography alone is not a risk factor for committing hands-on sex offenses.<sup>269</sup>

#### *N. Does Use of Pornography Escalate to Contact Sex Offending?*

One critical issue to address in AWA civil commitment cases is the link between child pornography possession and contact sex offenses. The AWA does not require a hands-on offense and an offender can even be civilly committed due to one possession or solicitation case. However, federal prosecutors may be prudent to elect to petition for commitment of higher risk sex offenders with multiple sex crimes and victims in their history as these offenders may have volitional impairments.<sup>270</sup>

There are possible associations between pornography use and the sexual abuse of children:

- 1) Child pornography use is an expression of existing sexual interests;
- 2) Child pornography is used to prime the individual to offend and disinhibits deviant sexual behavior;
- 3) Child pornography has a corrosive effect (prolonged use of child pornography includes increased use, increased attraction to images and desensitized views of harm to victims);
- 4) Child pornography has a cathartic effect (viewing pornography is the sole outlet for an individual's attraction to children);

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<sup>265</sup> Michael C. Seto, R. Karl Hanson & Kelly M. Babchishin, *Contact Sexual Offending by Men with Online Sexual Offenses*, 23 *SEXUAL ABUSE: J. RES. & TREATMENT* 124, 124 (2011).

<sup>266</sup> *Id.*

<sup>267</sup> Jérôme Endrass et al., *The Consumption of Internet Child Pornography and Violent and Sex Offending*, 9 *BMC PSYCHIATRY* 43, 43 (2009), available at <http://www.biomedcentral.com/1471-244X/9/43>.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> Federal prosecutors may also target child pornography possessors who collect sadistic/bestiality pornography due to the heinousness of the images and the offenders' likelihood of having a history of hands-on sex offending. See Levenson, *supra* note 128. Certifications filed to date include offenders with a history of at least one contact offense.

- 5) Child pornography is a by-product of pedophilia and it reinforces pedophilic arousal patterns;
- 6) Child pornography use dehumanizes children and encourages adult and child sexuality;
- 7) Child pornography is utilized by certain offenders as a grooming tool.

Pornography use can escalate to the commission of hands-on contact offenses through the processes of downloading and collecting of images, viewing of images, distributing of images, and the fantasy and masturbation towards the images.<sup>271</sup> Viewing of non-violent and violent pornography may increase aggression and rape-myth acceptance.<sup>272</sup>

Yet many studies do not reveal a causal link between use of pornography and contact sex offenses.<sup>273</sup> For example, a recent study in Switzerland analyzed the association between the consumption of child pornography and subsequent hands-on sex offenses in a sample of child pornography users and found low rates of hands-on offending over a six year period.<sup>274</sup> The authors studied 231 male offenders who were charged with consumption of illegal pornographic material after being detected by a special operation against Internet child pornography conducted by the Swiss Police in 2002. The authors found that 4.8% of the sample of offenders had a prior conviction for a sexual and/or violent offense and 1% for a hands-on sex offense involving child sexual abuse, 3.3% for a hands-off sex offense and one for a nonsexual violent offense. The authors found that only 3% of the study sample recidivated with a violent and/or sexual offense, 3.9% recidivated with a hands-off sexual offense, and 0.8% recidivated with a hands-on sex offense over a six year follow-up period. The authors concluded that consuming child pornography alone is not a risk factor for committing hands-on sex offenses and the prognosis for hands-on sex offenses as well as for child pornography recidivism is favorable.<sup>275</sup> These results are similar to previously mentioned meta-analysis<sup>276</sup> finding that 2.0% of

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<sup>271</sup> Joe Sullivan & Anthony Beech, *Are Collectors of Child Abuse Images a Risk to Children?*, in *POLICING PAEDOPHILES ON THE INTERNET* (Allyson MacVean & Peter Spindle eds., 2003); SETO, *supra* note 136, at 68. A psychological typology of child pornography online users includes recreational users, at-risk users, and sexual compulsives. Offending typologies may include browsers, private fantasizers, trawlers, non-secure collectors, secure collectors, groomers, and physical abusers.

<sup>272</sup> Mike Allen, Dave D'Alessio & Keri Brezgel, *A Meta-Analysis Summarizing the Effects of Pornography II: Aggression After Exposure*, 22 *HUM. COMM. RES.* 258, 258 (1995); Mike Allen et al., *Exposure to Pornography and Acceptance of Rape Myths*, 45 *J. COMM.* 5, 5 (1995).

<sup>273</sup> Sullivan & Beech, *supra* note 271, at 81; Robert Bauserman, *Sexual Aggression and Pornography: A Review of Correlational Research*, 18 *BASIC & APPLIED SOC. PSYCHOL.* 405, 411 (1996); William L. Marshall, *Revisiting the Use of Pornography by Sex Offenders: Implications for Theory and Practice*, 6 *J. SEXUAL AGGRESSION* 67, 77-87 (2000).

<sup>274</sup> Endrass et al., *supra* note 267.

<sup>275</sup> *Id.*; see ABSTRACT.

<sup>276</sup> See Allen et al., *supra* note 272.

online offenders committed a future hands-on sex offense over a 1.5 to 6 year follow-up period. Another study examined the association between child pornography consumption and the subsequent perpetration of hands-on sex offenses.<sup>277</sup> In their sample of convicted child pornography consumers (24% who had been also convicted for a hands-on sex offense against a minor), Seto and Eke found a recidivism rate of 1.3% for hands-on sex offenses and 5.3% for hands-off sex offenses in a follow-up time of two and a half years.<sup>278</sup>

Other data appear inconclusive as Howitt investigated convicted hands-on sex offenders who reported that the source of sexual stimuli did not stem solely from child pornography material, but from the cognitive manipulation of legal adult pornography or from seeing arousing images in newspapers and magazines usually not involving nudity.<sup>279</sup> The author concluded that it is not possible to establish an association between hands-on sex offenses and the consumption of illegal child pornography.

Some child molesters commit a contact sex offense against a child in order to have proximity with the child to produce pornographic material with the goal of viewing and/or distributing. Viewing child pornography and masturbating towards images may be a substitute for a hands-on sex offense against a child. In fact, one author studied men who were attracted to male child pornography and found that they self-reported that viewing child pornography was a substitute for hands-on offending and it did not lead to an increase in seeking out boys to satisfy sexual needs.<sup>280</sup>

Conversely, other research has revealed that offenders who view child pornography exhibit greater sexual arousal to children than adults and differed from a group of sex offenders who had contact-offense child victims.<sup>281</sup> Small groups of sex offenders, perhaps about 10%, have admitted using pornography as an element to the preparation of a hands-on sex offense or as part of the sex offense itself.<sup>282</sup> Most likely, those sex offenders with many risk factors to reoffend may be more vulnerable in utilizing pornography as a catalyst to their hands-on offending patterns.

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<sup>277</sup> Seto & Eke, *supra* note 253, at 207.

<sup>278</sup> *Id.*

<sup>279</sup> Dennis Howitt, *Pornography and the Paedophile: Is It Criminogenic?*, 68 BRIT. J. MED. PSYCHOL. 15, 23 (1995).

<sup>280</sup> David L. Riegel, *Effects on Boy-Attracted Pedosexual Males of Viewing Boy Erotica*, 33 ARCHIVES SEXUAL BEHAV. 321, 322 (2004).

<sup>281</sup> Seto et al., *supra* note 265.

<sup>282</sup> See Ron Langevin et al., *Pornography and Sexual Offences*, 1 ANNALS OF SEX RES. 337, 359 (1988). Cf. Mary Kearns Condron & David E. Nutter, *A Preliminary Examination of the Pornography Experience of Sex Offenders, Paraphiliacs, Sexual Dysfunction Patients, and Controls Based on Meese Commission Recommendations*, 14 J. SEX & MARITAL THERAPY 285, 296 (1988) (8% of sex offenders “indicated that pornography had led them to engage in the unusual sexual act” which included rape, incest, child molesting, being sexually attracted to children, etc.); David E. Nutter & Mary E. Kearns, *Patterns of Exposure to Sexually Explicit Material Among Sex Offenders, Child Molesters, and Controls*, 19 J. SEX & MARITAL THERAPY 77, 83 (1993) (about 15.7% of sex offenders feel that “pornography led them to commit sexual offenses.”).

However, Marshall found that 53% of his sample of child molesters deliberately used pornographic stimuli as part of their planned preparation for offending.<sup>283</sup>

Kingston and colleagues examined convicted hands-on sex offenders and found that the consumption of illegal pornography was a relevant risk factor and that offenders who had consumed illegal pornography were more likely to reoffend irrespective of their risk level of recidivism.<sup>284</sup>

Additionally, a recent study indicated that 17% of sex offenders (incest offenders, offenders against children, offenders against adults, and exhibitionists) utilized pornography in their sex offenses, and of the users, 13% used pornography to stimulate themselves to commit a hands-on sex crime, 55% showed pornographic material to their victims, and 36% took pictures, mostly of child victims.<sup>285</sup> About 25% of the extrafamilial offenders against boys and 29% of the incest offenders against girls utilized pornography during the commissions of their crimes.<sup>286</sup>

The National District Attorney's Association (NDAA) published a paper in 2004 citing recent studies suggesting that there is a significant link between viewing child pornography and molesting children.<sup>287</sup> According to the U.S. Postal Inspection Service, at least 80% of purchasers of child pornography are active hands-on offenders of children and about 40% of the child pornographers who were investigated in a several year period had sexually abused children.<sup>288</sup> From January of 1997 through March of 2004, 1,807 child pornographers were arrested and 620 of them were confined child molesters.<sup>289</sup> About 35% of these child pornographers were actual child molesters defined as an offender who had confessed to acts of child molesting or who had a record for molestation, or who were involved in an overt act in order to procure children for sexual purposes. The 620 confirmed child molesters led to 839 child victims who were identified and rescued.<sup>290</sup>

The NDAA cites other studies suggesting a link between child pornography and hands-on sex offending. Reports by state-based Internet Crimes Against Children (ICAC) task forces confirm a positive connection between the possession of child

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<sup>283</sup> William L. Marshall, *The Use of Sexually Explicit Stimuli by Rapists, Child Molesters, and Nonoffenders*, 25 J. SEX RES. 267, 280 (1988).

<sup>284</sup> Drew A. Kingston et al., *Pornography Use and Sexual Aggression: The Impact of Frequency and Type of Pornography Use on Recidivism Among Sexual Offenders*, 34 AGGRESSIVE BEHAV. 341, 341 (2008).

<sup>285</sup> Ron Langevin & Suzanne Curnoe, *The Use of Pornography During the Commission of Sexual Offenses*, 48 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 572, 572 (2004).

<sup>286</sup> *Id.* at 579.

<sup>287</sup> Candice Kim, *From Fantasy to Reality: The Link Between Viewing Child Pornography and Molesting Children*, 1 UPDATE 1, 1-2 (2004), [http://www.ndaa.org/pdf/Update\\_gr\\_vol1\\_no3.pdf](http://www.ndaa.org/pdf/Update_gr_vol1_no3.pdf).

<sup>288</sup> *Id.* (citing *Stopping Child Pornography: Protecting Our Children and the Constitution: Before the Senate Comm. on the Judiciary*, 107th Cong. 58 (2002) (statement of Ernie Allen, Director, The National Center for Missing and Exploited Children)). The NDAA cites that the data collected by the U.S. Postal Inspection Service is derived from child pornography crime scene investigations and police reports.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

pornography and the commission of crimes against children.<sup>291</sup> In fact, the Pennsylvania ICAC task force found that 51% of offenders arrested for pornography related offenses were last determined to be actively molesting children or to have molested them in the past.<sup>292</sup> In Dallas, the ICAC task force found that 32% of the offenders arrested over the course of one year for child pornography offenses were also molesting children or had molested them in the past.<sup>293</sup>

In another study of thirteen men convicted of downloading child pornography off the Internet, Quayle and Taylor found that there was a relationship between use of child pornography and achieving sexual arousal.<sup>294</sup> They also found that some of the offenses used the child pornography as collectibles in that pleasure was obtained from collecting pictures a part of a series.<sup>295</sup>

When considering child molester and rapist groups, both have similar rates of exposure to pornography in the home or during their developmental years. However, child molesters are more likely than rapists to utilize pornography in adulthood and use materials prior to and during their offenses.<sup>296</sup> Those child molesters, who had been sexually assaulted during childhood and when the perpetrator used pornographic materials, were more likely to have followed similar behavior patterns during their sex offenses as perpetrators. Child molesters are more likely to utilize pornography to relieve the impulse to commit a sex offense than are rapists.<sup>297</sup>

Unpublished and published data have indicated that about one third of men who use child pornography have previously committed sexual offenses against children.<sup>298</sup>

The National Juvenile Online Victimization Study data has revealed that 40% of the cases involving child pornography possession included “dual offenders” who not only possessed illegal pornography but victimized a child in the same investigation.<sup>299</sup> While 27% of dual offenders showed or gave child pornography to children in a grooming type fashion, 9% of the dual offenders sent child

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<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> Ethel Quayle & Max Taylor, *Child Pornography and the Internet: Perpetuating a Cycle of Abuse*, 23 *DEVIANT BEHAV.* 331, 353 (2002).

<sup>295</sup> *Id.* at 354.

<sup>296</sup> Daniel Lee Carter et al., *Use of Pornography in the Criminal and Developmental Histories of Sexual Offenders*, 2 *J. INTERPERSONAL VIOLENCE* 196, 196 (1987).

<sup>297</sup> *Id.* at 206.

<sup>298</sup> See SETO, *supra* note 136, at 57. The author cites that about 34% of 1,807 child pornography offenders arrested between 1997 and 2004 had a record contact sexual offending or had engaged in an attempt to contact a child for sexual purposes (data from the U.S. Postal Inspection Service).

<sup>299</sup> JANIS WOLAK, DAVID FINKELHOR & KIMBERLY J. MITCHELL, NAT'L CENTER FOR MISSING & EXPLOITED CHILDREN, *CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES* viii (2005), available at <http://www.unh.edu/ccrc/pdf/jvq/CV81.pdf>.

pornography to undercover officers posing as juveniles.<sup>300</sup> Interestingly, 25% of the dual offenders admitted to grooming (interest a victim in or overcome inhibitions about sexual activity).<sup>301</sup> Further data reveal that child pornography offenders who organized their collections or who distributed pornography differed from other offenders in being more likely to have 1,000 more images of child pornography and images of children under age six.<sup>302</sup> However, no studies have supported the effect of child pornography use and hands-on offending even with this more deviant group.<sup>303</sup>

When considering this information, it is speculative to assume that possession of pornography is a causative factor to hands-on offending. A mental health professional examining such a case should look at patterns of sex offending behavior, view the images himself to understand what stimulates the sex offender, and distinguish the period of time the offender possessed and viewed the images.

Despite these efforts, the federal prosecutor may continue to push commitment proceedings on sex offenders who have multiple pornography type crimes believing that noncontact sex offenders too can have serious difficulty refraining from their illegal sex acts. Additionally, they may wish to target sex offenders who possess “hardcore” abusive type pornography due to its heinousness and marked deviance. Whether an expert can reliably provide a risk assessment for future contact and noncontact sex offenses relevant to an offender with only child pornography possession in his record has yet to be seen. Furthermore, whether actuarial risk assessment instruments which are geared to assessing future hands-on sex crimes can be adequately used with pornography possession offenders is unclear.

#### *O. Undetected Sex Offenses*

Another topic that will likely flood AWA commitment hearings is the question of undetected sex offenses among sex offender groups. This matter is relevant due to research data that arose from the BOP Butner sex offender treatment facility implying that many of the pornography type sex offenders admitted to numerous hands-on type sex offenses during their disclosures in treatment.<sup>304</sup>

Dr. Hernandez, Director of the Sex Offender Treatment Program (SOTP) at Federal Correctional Institution-Butner, has presented data regarding 155 sexual offenders in a voluntary intensive residential sex offender-specific treatment program at a medium-security federal prison. At the time of sentencing, 115 (74%) of the offenders had no documented hands-on victims. Twenty-six percent had

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<sup>300</sup> *Id.* at 18.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 10.

<sup>303</sup> See Vanessa Vega & Neil M. Malamuth, *Predicting Sexual Aggression: The Role of Pornography in the Context of General and Specific Risk Factors*, 33 *AGGRESSIVE BEHAV.* 104, 114 (2007). The authors found that high pornography consumption added significantly to the prediction of sexual aggression.

<sup>304</sup> Michael L. Bourke & Andres E. Hernandez, *The ‘Butner Study’ Redux: A Report of the Incidence of Hands-On Child Victimization by Child Pornography Offenders*, 24 *J. FAM. VIOLENCE* 183, 188 (2009).



known histories of abusing a child via a hands-on sexual act. The number of victims known at the time of sentencing was 75 (an average of 1.88 victims) per offender.<sup>305</sup>

By the end of the eighteen month residential treatment program, 24 (15%) of the subjects denied they committed hands-on sexual abuse and 131 (85%) admitted they committed at least one hands-on sexual offense indicating a 59% increase in the number of subjects with known hands-on offenses.<sup>306</sup> The number of reported victims known at the end of treatment among all offenders was 1,777, an average of 13.56 victims per offender<sup>307</sup> and an increase of 2,369% in the number of hands-on sexual contact offenses acknowledged.<sup>308</sup> The 40 subjects who had known histories of hands-on offending at the time of sentencing disclosed an average of 19.4 victims during their treatment period, while the 115 subjects with no known histories of hands-on sex offenses disclosed an average of 8.7 victims.<sup>309</sup> Further, the authors found that the majority of participants reported that they committed acts of hands-on abuse prior to seeking child pornography on the Internet and consequently, the Internet is a causal factor in contact sex offenses.<sup>310</sup> Specifically, the authors argue that the results of their study suggest that many Internet child pornography offenders may be undetected child molesters and their use of child pornography demonstrates their paraphilic orientation.<sup>311</sup>

In defense of their study, the authors site that despite the motivations of the offenders to volunteer for the treatment program, most of the offenders were not parole eligible and therefore their participation would not affect their release date. Additionally, the authors found that polygraph studies among half of the offender group did not indicate over-reporting with any subject.<sup>312</sup>

The authors found that a significant number of Internet sex offenders in their sample admitted to committing hands-on sexual abuse, which in part was facilitated by their participating in the treatment program.<sup>313</sup> The authors surmise that few if any offenders would have admitted to the initially undisclosed hands-on offenses if it were not for the treatment program.<sup>314</sup> Further, the authors contend that the study supports the belief that child pornography offenders are involved in more than collecting pictures, but many are committing hands-on assaults.<sup>315</sup> Finally, the authors conclude that child pornography for some offenders reinforces pedophilic arousal patterns, desensitizes them to the harm inflicted to the victims, normalizes

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<sup>305</sup> *Id.* at 187.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 188.

<sup>309</sup> *Id.* at 187.

<sup>310</sup> *Id.* at 189.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 187-88.

<sup>314</sup> *Id.* at 188.

<sup>315</sup> *Id.*

child/adult sexual relations, dehumanizes children, and disinhibits deviant sexual behavior.<sup>316</sup>

In another study, Hernandez studied ninety inmates who had been treated through the same sex offender treatment program.<sup>317</sup> Specifically, Hernandez summarized that sixty-two of the ninety offenders were convicted of Internet-related sexual offenses such as possession and distribution of pornography as well as interstate travel with the intent to meet a child (solicitation). At the time of sentencing, those sixty-two offenders were known to have committed contact sexual offenses against a total of fifty-five victims. Following the treatment, the same group reported committing contact sex offenses against an additional 1,379 victims. About 42% of the offenders were known contact sexual offenders at the time of sentencing, yet 76% reported contact sexual crimes.<sup>318</sup> Importantly, Hernandez's studies have been questioned due to their statistical underpinnings and potential manipulation of inmates in treatment to report sex crimes.

Underscoring this issue of undetected sex crimes, data from the National Crime Victimization Survey reported 260,300 incidents of attempted or completed rapes; however, those crimes actually reported to police were 97,460, suggesting that only 37% of the sexual crimes were reported to law enforcement.<sup>319</sup> Only about half of all reported rapes were cleared by arrest and only about 19% of the rapes and attempted rapes reported to the National Crime Victims Survey were cleared by arrest.<sup>320</sup> Data suggests that the observed rates including arrests and reports to law enforcement highly underestimate the actual rates of sexual offending. This data can be used by the government to suggest that sex offenders, in general, commit more offenses on average than might be suspected.

### III. CONCLUSION

The Adam Walsh Act provides the most punitive and far reaching sex offender legislation in this country's history. This Article has focused on one element of this law, namely the civil commitment of federal sex offenders.

While the federal government appears to be exercising its police powers, it also enacted the commitment scheme while preserving U.S. Supreme Court landmark holdings in *Kansas v. Hendricks* and *Kansas v. Crane*. Many state commitment laws focus on the assessment of an offender's mental abnormality and/or personality disorder and a finding of likelihood of future offending. Many jurisdictions ignore the holding in *Crane*, and some judges will not allow the expert to comment on the volitional requirement, nor do they mandate the communication of this condition to the trier of fact. Simply, trial court judges adhere to legislative statutory language without considering U.S. Supreme Court case law. Positively, the AWA civil

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<sup>316</sup> *Id.*

<sup>317</sup> See *Sexual Exploitation of Children over the Internet: The Face of a Child Predator and Other Issues: Before the Subcomm. on Oversight and Investigations Committee on Energy and Commerce*, 109th Cong. 4 (2006) (statement of Andres E. Hernandez, Director, Sex Offender Treatment Program Federal Correctional Institution, Butner, N.C.).

<sup>318</sup> *Id.* at 4.

<sup>319</sup> LAWRENCE A. GREENFIELD, BUREAU OF JUSTICE STATISTICS NCJ-163392, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 3-4 (1997).

<sup>320</sup> *Id.* at 4.

commitment format follows the volitional spirit articulated in *Crane* and experts should testify to this volitional issue.

Similar to state commitment proceedings and pursuant to the decision in *Hendricks*, the forensic evaluators must assess, and the courts must determine, which federal sex offenders are atypical and subject to commitment, versus which ones are typical recidivists who have served their criminal sentences and need to be released. Proving whether a person has a volitional impairment—"serious difficulty refraining from sexually violent conduct or child molestation if released"—should be a very difficult issue to prove as most criminal and sexual offenders exercise significant control over their behaviors. Experts should never solely equate psychiatric diagnoses or scores from actuarial instruments with volitional impairments, nor should they confuse the term "likely" with inability to "refrain/control." Accordingly, there is no scientific basis for distinguishing whether an act is a function of freewill or an irresistible type impulse.<sup>321</sup> Rather, one's serious difficulty refraining from sexually violent conduct is a moral question to ultimately be decided by the trier of fact with aid from the expert witness.

This point outlines a main theme in the *Crane* holding that distinguishes typical recidivists from those repeat sex offenders who simply cannot control their behaviors. The *Crane* decision assumes that those offenders being considered for commitment have more than one prior sex offense conviction, and that one time sex offenders are not appropriate for commitment.

The U.S. Supreme Court in *Crane* essentially differentiated a typical sex offender from one who should be civilly committed by incorporating an abstract "freewill" doctrine. It is easy for an expert witness to simply say an offender lacks control over his behaviors, yet, they need to utilize an assessment process that attempts to dissect this offender's offending patterns to satisfactorily answer the question. Pursuant to the objectives of the AWA commitment act, the expert must specify his sex offender risk assessment to the federal sex offender, one who often has a history of child pornography and/or solicitation type cases.

The fields of psychology and psychiatry readily admit they have serious difficulties in answering this volitional impairment question. Additionally, numerous typical recidivists display multiple sex offenses and deviant sexual interests. Many experts and juries assume that because an offender has a criminal record of more than one sex offense, that the offender did not and does not have control over his behavior. This hypothesis is flawed and simply not true in many cases. The challenge in AWA civil commitment of sex offender cases is for the expert to attempt to accurately differentiate the typical recidivist who chooses to commit crimes and is willfully dangerous and unwilling to restrain himself, versus the recidivist who cannot control his behaviors and who suffers from volitional impairments.

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<sup>321</sup> See Calkins Mercado et al., *supra* note 70. Forensic experts examining civil commitment cases do not have an objective working definition of "serious difficulty controlling."