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Volume 98 | Number 4

Article 7

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5-1-2020

## Sexual Abuse and Statistic Misuse: An Analysis of the Static-99R

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## Sexual Abuse and Statistic Misuse: An Analysis of the Static-99R\*

*Gauging sexual offender recidivism is akin to looking in a crystal ball to determine the future. The science simply cannot concretely say who will reoffend and who will not. Now that the Adam Walsh Act has statutorily authorized civil commitment for sexual offenders at the federal level, federal courts must grapple with the question state courts have battled for decades: What evidence shows whether an individual would, as a result of mental illness, have serious difficulty refraining from reoffending?*

*This Comment explores one particular piece of evidence that courts have tended to find persuasive: actuarial instruments, which are statistic mechanisms based on historical data specific to each offender. Courts find comfort in such instruments because of their objectivity. The numeric output provides courts with something concrete to hold on to in an otherwise ambiguous field based largely on expert opinions. A thorough analysis of the instrument—and the courts’ interpretation of it—reveals important flaws that must be considered given the liberty interest at stake in civil commitment settings.*

*By exploring in depth an emblematic actuarial instrument, the Static-99R, as well as judicial treatment of the instrument and the statutory language of the Adam Walsh Act, this Comment seeks to expose important issues seemingly overlooked by the courts. At present, the Static-99R as it is interpreted in judicial opinions does not adequately speak to the statutory language of the Adam Walsh Act. Simple, important considerations can remedy the problem and ensure that courts are civilly committing individuals based on evidence of “serious difficulty in refraining from reoffending” rather than just a demonstration of “likelihood of reoffending.*

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#### INTRODUCTION

In 2006, President George W. Bush signed into law the Adam Walsh Child Protection and Safety Act (“AWA” or “Act”) to “protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety, and to honor the memory of Adam Walsh and other child crime victims.”<sup>1</sup> To achieve its purpose, the AWA created a federal database for sexual offenders, strengthened enforcement and detection of online crimes against children, and increased punishments for sexual crimes against children.<sup>2</sup>

One provision of the Act garnered less media attention: the creation of civil commitment for federal sexual offenders.<sup>3</sup> Under this provision, the government may seek civil commitment for an inmate at the end of his sentence if the individual (1) has committed a past act of sexual violence; (2) has a serious mental illness, abnormality, or disorder; and (3) as a result of that mental illness, abnormality, or disorder, would have “serious difficulty in refraining from

1. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, 120 Stat. 587 (2006) (codified as amended in scattered sections of 18 and 34 U.S.C.).

2. *Six-Year-Old Adam Walsh Is Abducted*, HIST. (July 24, 2019), <https://www.history.com/this-day-in-history/adam-walsh-is-abducted> [https://perma.cc/278H-UC8E].

3. 18 U.S.C. § 4248(a) (2018).

sexually violent conduct or child molestation.”<sup>4</sup> In order for the government to win a civil commitment hearing, the government must show by clear and convincing evidence that each prong is met.<sup>5</sup>

The first and second prongs are not ordinarily at issue in these hearings; by contrast, the third prong, concerning serious difficulty refraining from reoffending, is much contested and presents “the most vexing issue.”<sup>6</sup> Although the advent of actuarial statistical instruments has improved assessments of sexual reoffense when compared to unstructured clinical judgment, the actuarial instruments have their own substantial limitations.<sup>7</sup> An instrument frequently invoked by the government and respondents to demonstrate sexual dangerousness is the Static-99R.<sup>8</sup> Though the instrument itself professes to “demonstrate[] only moderate predictive accuracy,”<sup>9</sup> courts have widely adopted it to gauge sexual dangerousness.<sup>10</sup> Most importantly, the Static-99R, a revised edition of the Static-99, speaks to a *likelihood of recidivism*,<sup>11</sup> but the Act itself requires a finding of *serious difficulty refraining from reoffending*.<sup>12</sup> Therefore, reliance on the Static-99R is improper in AWA<sup>13</sup> hearings: the statute requires that an individual would have *serious difficulty refraining*, a distinctly different inquiry than whether an individual is *likely* to reoffend.

4. *Id.* § 4247(a)(5)–(6).

5. *United States v. Comstock*, 560 U.S. 126, 130–31 (2010). For an example of a commitment order that details each prong, see *United States v. Lange*, 5:08-HC-2070, 2012 U.S. Dist. LEXIS 159498, at \*24–35 (E.D.N.C. Nov. 7, 2012).

6. *United States v. Carta (Carta II)*, 690 F.3d 1, 8 (1st Cir. 2012).

7. Anthony M. Tarescavage, Bruce M. Cappel & Yossef S. Ben-Porath, *Assessment of Sex Offenders with the Minnesota Multiphasic Personality Inventory–2–Restructured Form*, 30 *SEXUAL ABUSE* 413, 414–15 (2018).

8. *See, e.g.*, *United States v. Perez*, 752 F.3d 398, 409–11 (4th Cir. 2014) (describing two expert witnesses’ usage of the most recent statistical instruments available, including the Static-99); *United States v. Bolander*, 722 F.3d 199, 208–13 (4th Cir. 2013) (discussing three expert witnesses’ usage of the Static-99 as evidence of sexual dangerousness); *United States v. Hall*, 664 F.3d 456, 464 (4th Cir. 2012) (discussing three expert witnesses’ usage of different editions of the Static-99 instrument); Leslie Helmus, R. Karl Hanson & Kelly E. Morton-Bourgon, *International Comparisons of the Validity of Actuarial Risk Tools for Sexual Offenders, with a Focus on Static-99*, in *INTERNATIONAL PERSPECTIVES ON THE ASSESSMENT AND TREATMENT OF SEXUAL OFFENDERS: THEORY, PRACTICE, AND RESEARCH* 55, 58 (Douglas P. Boer et al. eds., 2011). The Static-99R is one of four editions of the same instrument. Sophie G. Reeves, James R.P. Ogloff & Melanie Simmons, *The Predictive Validity of the Static-99, Static 99R, and Static-2002/R: Which One to Use?*, 30 *SEXUAL ABUSE* 887, 888–90 (2018). The other three editions are the Static-99, the Static-2002, and the Static-2002R. *Id.*

9. AMY PHENIX ET AL., *STATIC-99R CODING RULES 7* (2016), [http://www.static99.org/pdfdocs/Coding\\_manual\\_2016\\_v2.pdf](http://www.static99.org/pdfdocs/Coding_manual_2016_v2.pdf) [https://perma.cc/F4DT-NSG9].

10. *See, e.g.*, *State v. Rosado*, 889 N.Y.S.2d 369, 380 (Sup. Ct. 2009) (discussing the Static-99 as a valid instrument for sexual offender civil commitment matters).

11. PHENIX ET AL., *supra* note 9, at 6.

12. 18 U.S.C. § 4247(a)(6) (2018); *United States v. Comstock*, 560 U.S. 126, 130 (2010).

13. As it is used in this paper, AWA refers to the civil commitment portion of the Act, codified at 18 U.S.C. § 4248. In connection with this statute, 18 U.S.C. § 4247 contains information pertinent to all civil commitment hearings, whether specifically for sexual offenders or not.

The utility of the Static-99R is limited both by its scientific construction and by the way courts interpret it. The sample population used to develop the Static-99R is drawn from predominately European countries and is therefore not directly applicable to a United States population.<sup>14</sup> The Static-99R's use at various stages in civil commitment proceedings leaves courts with a false impression of its ability to change over time.<sup>15</sup> Although scientific studies have found that different scorers will score one individual identically, the scores assigned by forensic evaluators are often different, which indicates inconsistency in its use.<sup>16</sup> Lastly, courts often over-rely on the instrument, trusting its score over important factors unique to each individual, such as behavioral changes over time.<sup>17</sup>

This Comment proceeds in four parts. Part I describes the AWA, specifically the constitutional challenges that have led to its current interpretation, and explores the legal evolution and application of each of the prongs, with a focus on the “serious difficulty refraining” prong. Part II critiques sexual offender assessments with a specific focus on the Static-99R<sup>18</sup> and its limitations. Part III examines courts’ understanding and application of the Static-99R in civil commitment hearings. Part IV, in response to common criticisms, recommends much-needed changes to the instrument.

#### I. THE ADAM WALSH ACT

Among the multiple provisions of the AWA, the civil commitment provision is little known but carries dramatic consequences for those to whom it is applied. Apart from the AWA and the many state-level civil commitment statutes for sexual offenders,<sup>19</sup> there is no other state or federal law that allows

14. See *infra* Section II.D.

15. See *infra* Section III.A.

16. See *infra* Section III.B.

17. See *infra* Sections III.C, D.

18. The Static-99R is one of four iterations of what is sometimes referred to as the STATIC suite. Amy Phenix & Douglas L. Epperson, *Overview of the Development, Reliability, Validity, Scoring, and Uses of the Static-99, Static-99R, Static-2002, and Static-2002R*, in *SEXUAL OFFENDING* 437, 437–55 (Amy Phenix & Harry M. Hoberman eds., 2016); see R. Karl Hanson et al., *What Sexual Recidivism Rates Are Associated with Static-99R and Static-2002R Scores?*, 28 *SEXUAL ABUSE* 218, 218–19 (2016) [hereinafter Hanson et al., *Recidivism Rates*]. This paper discusses the Static-99R primarily because it is presently the most widely used. However, some cases may reference the Static-99, the Static-2002, or the Static-2002R since they were the current versions available at the time of the case. Because the questions discussed in those instruments have not changed through the iterations of the instrument, the distinction between the three versions is not relevant for the purposes of this Comment, except where specifically noted.

19. As of 2015, “[t]wenty states (Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin) and the District of Columbia have enacted laws permitting the civil commitment of sexual offenders.” *Civil*

for civil commitment based on a category of crime; there is no statute that permits civil commitment for those who have committed murder, armed robbery, fraud, or any other type of crime. Instead, civil commitment statutes focus solely on severe mental illnesses that require continuing treatment, with the purpose of ensuring that an individual does not represent a substantial danger to himself<sup>20</sup> or others.<sup>21</sup> These individuals typically have multiple severe and generally untreated mental illnesses.<sup>22</sup> Therefore, a detailed overview of the important provisions and issues that arise in a crime-specific civil commitment context is necessary. This part will begin with an overview of the purpose of the AWA and the transition from federal inmate to civilly committed respondent to released party. Next, each of the three prongs will be discussed in detail. Finally, this part will end by describing the different interpretations of the troublesome “serious difficulty refraining” prong.

#### A. *Purpose and Process*

The civil commitment portion of the AWA selects sexual offenders who present a substantially greater threat than the “ordinary ‘dangerous but typical recidivist.’”<sup>23</sup> The government may, within the thirty days prior to the end of a federal inmate’s sentence, seek to certify that individual as a “sexually dangerous person.”<sup>24</sup> The filing of intent to seek certification automatically acts as a stay of release and affords the government time to prepare for a civil commitment hearing.<sup>25</sup> The government, the court, and the respondent may obtain psychological or psychiatric evaluations of the respondent before the hearing.<sup>26</sup>

If the government shows by clear and convincing evidence that the individual is sexually dangerous, the respondent is then committed to the Attorney General’s custody.<sup>27</sup> The statute requires annual reports to the court from the “director of the facility in which a person is committed.”<sup>28</sup> The facility

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*Commitment*, ATSA (Oct. 2015), <http://www.atsa.com/civil-commitment-2> [<https://perma.cc/4MWQ-8XQU>].

20. There is no statutory requirement that the AWA applies only to men because the statute uses the word “person.” 18 U.S.C. § 4248(a) (2018). However, it has not been applied to women nor has any court addressed this anomaly.

21. *See, e.g., id.* § 4246.

22. *See, e.g., United States v. Henley*, 8 F. Supp. 2d 503, 505 (E.D.N.C. 1998) (describing that the combination of severe antisocial personality disorder and severe borderline personality disorder give the “synergistic effect” of the respondent’s combined diagnosis and explaining that personality disorders would not generally qualify for civil commitment).

23. *United States v. Antone*, 742 F.3d 151, 159 (4th Cir. 2014) (quoting *Kansas v. Crane*, 534 U.S. 407, 413 (2002)).

24. 18 U.S.C. § 4248(a).

25. *Id.*

26. *Id.* §§ 4247(b), 4248(b).

27. *Id.* § 4248(d).

28. *Id.* § 4247(e)(1)(B). The Act requires the “director of the facility in which a person is committed” to provide a summary of the respondent’s commitment, the respondent’s treatment since

director is also required to inform the respondent about any applicable rehabilitation programs offered at that facility.<sup>29</sup>

The AWA implicates a critical liberty interest: the right to be free from confinement. Because the statutory language requires that the government submit a certificate of dangerousness within the last month before the individual is scheduled for release, some have argued that the Act violates an individual's due process rights.<sup>30</sup> Furthermore, civil commitment may be indefinite; neither the statute nor case law provides any maximum length of time for commitment.<sup>31</sup> There are two pathways to release: (1) recommendation by the facility or (2) petition by the respondent.<sup>32</sup> Because the legislators recognized the gravity of the liberty interest at stake and the infrequency with which the facility recommends release, a respondent may petition the court for a release hearing every six months.<sup>33</sup> The court must grant a discharge hearing if the motion for the discharge hearing "contains sufficient factual matter, accepted as true, to state a claim for discharge that is plausible on its face."<sup>34</sup> The court must release the respondent if it finds by a preponderance of the evidence that the respondent either "will not be sexually dangerous to others if released unconditionally"<sup>35</sup> or that "he will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment."<sup>36</sup>

#### B. *Constitutional Challenges and the Limited Guidance from the Supreme Court*

Soon after the Act was put into place, respondents began attacking the Act on a myriad of grounds, including the evidentiary standard, procedural due process, the doctrine of constitutional avoidance, the right to a trial by jury, lack of adequate notice, vagueness, and equal protection.<sup>37</sup> Early judicial decisions at the district court level declared the statute unconstitutional.<sup>38</sup> Ultimately, though, the Supreme Court reversed these decisions in the only AWA case it

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the last report, any changes to the respondent's physical and mental health diagnoses, and recommendations about the necessity of continued commitment. *Id.*

29. *Id.* § 4247(e)(2).

30. *See generally* United States v. Shields, 522 F. Supp. 2d 317, 329–34 (D. Mass. 2007) (detailing multiple due process considerations).

31. United States v. Comstock, 560 U.S. 126, 174 (2010) (Thomas, J., dissenting) (discussing that upholding the Act allows the government the "power to exercise indefinite civil control over" a respondent).

32. 18 U.S.C. § 4247(e).

33. *See id.* § 4247(h).

34. United States v. Maclaren, 866 F.3d 212, 218 (4th Cir. 2017).

35. 18 U.S.C. § 4248(e)(1).

36. *Id.* § 4248(e)(2).

37. *See generally* United States v. Shields, 522 F. Supp. 2d 317, 329–34 (D. Mass. 2007) (detailing multiple due process considerations).

38. *See* Timms v. Johns, 700 F. Supp. 2d 764, 774 (E.D.N.C. 2010).

has heard, *United States v. Comstock*.<sup>39</sup> Despite the plethora of due process challenges, both in *Comstock* itself and in other cases, the *Comstock* decision explicitly focused only on the congressional authority to enact the AWA under the Necessary and Proper Clause.<sup>40</sup> The Court plainly refused to decide any due process challenges.<sup>41</sup>

After upholding the statute's validity under the Necessary and Proper Clause, the Court reiterated that it decided no due process questions, stating that "[w]e do not reach or decide any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution. Respondents are free to pursue those claims on remand, and any others they have preserved."<sup>42</sup>

To date, the Supreme Court has yet to hear an AWA case on due process grounds despite the fact that the Act clearly implicates due process concerns. While it is settled law that the AWA is "civil and not criminal in nature," courts recognize that AWA commitments are different from ordinary civil suits and provide certain additional protections.<sup>43</sup> Those protections have evolved to include the right to confront witnesses, the right to counsel, and a heightened burden of proof from the ordinary civil standard of preponderance of the evidence.<sup>44</sup> These rights are afforded because of the gravity of the liberty interest at stake.<sup>45</sup> Such factors appear to mimic the rights of those who have been charged with a crime, which may continue to blur the line between *civil* and *criminal*.

### C. *AWA's Three Prongs*

#### 1. Past Sexual Offense

The first prong of the AWA requires that the individual has "engaged or attempted to engage in sexually violent conduct or child molestation."<sup>46</sup> Often, this is a clear-cut analysis. Generally, the government seeks to commit individuals who have either confessed to or been convicted of past acts of sexual violence or child molestation.<sup>47</sup> In 2010, at the time of the *Comstock* oral

39. 560 U.S. 126, 150 (2010).

40. *Id.* at 132–33 (citing U.S. CONST. art. I, § 8, cl. 18).

41. *Id.* at 133.

42. *Id.* at 149–50.

43. *United States v. Searcy*, 880 F.3d 116, 125 (4th Cir. 2018) (recognizing the significant liberty interest at stake).

44. *Id.* at 125.

45. *Id.*

46. 18 U.S.C. § 4247(a)(5) (2018).

47. Transcript of Oral Argument at 24–25, *United States v. Comstock*, 560 U.S. 126 (2010) (No. 08-1224) [hereinafter *Comstock* Oral Argument] (describing that out of the 103 persons certified as sexually dangerous, eighty-three were most recently in prison for sexual crimes, and the remaining



argument, the federal Bureau of Prisons had found that 15,000 individuals met the factual predicate of having engaged in a crime of sexual violence and only sought commitment for 105 of them.<sup>48</sup> Justice Stevens quickly noted in oral argument for *Comstock* that having prior sexual convictions is not a necessary factual prerequisite to proving this element.<sup>49</sup>

For those currently serving a sentence for a conviction of a crime of sexual violence or child molestation, this prong is straightforward. For those serving a sentence for a nonsexual crime, this prong is more complex. Because the AWA aims to protect the public from the most dangerous of *sexual* offenders,<sup>50</sup> civilly committing someone who is presently serving a sentence for a nonsexual crime, but has a past conviction of violence, presents a paradox.<sup>51</sup>

A third category of respondents may exist: those who have never been convicted of sexual violence or child molestation.<sup>52</sup> Under the letter of the law, the government could seek to commit an inmate it had reason to believe was sexually dangerous even if that individual did not have any past convictions for sexually related crimes.<sup>53</sup> This raises a procedural due process issue: a respondent may be committed for an alleged crime if the government can meet a *clear and convincing* standard, possibly in violation of well-settled constitutional criminal law requiring the government to prove its case *beyond a reasonable doubt*.<sup>54</sup>

## 2. Mental Illness

The second prong requires the government to prove by clear and convincing evidence that the individual “suffers from a serious mental illness,

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twenty had past histories of sexual offending; those twenty individuals were released at the ordinary termination of their sentence).

48. *Id.* at 25.

49. *Id.* at 24–25.

50. *United States v. Antone*, 742 F.3d 151, 159 (4th Cir. 2014).

51. This category represents more uncertainty than clarity. There are many reasons why someone may be serving a present sentence for a nonsexual crime, such as a probation violation or the commission of an ordinary violent crime. This category becomes much more complex in circumstances where the present reason for incarceration may have had a sexual component but the prosecutor decided not to pursue that particular line of evidence or charge. The second category is meant to reference circumstances where the reason the individual is presently incarcerated does not involve an additional sexual component.

52. This is in contrast to category two, where at some point in the individual’s life they did have a conviction for a crime of sexual violence or child molestation but were not *currently* serving a sentence for such a crime.

53. *Comstock* Oral Argument, *supra* note 47, at 24–25.

54. There is no case to date that directly addresses this issue. However, especially in the context of plea bargaining, it is feasible that the government would seek to civilly commit an individual who pled down from a higher offense. That person would have conceded guilt to a lesser offense that might not rise to the level of sexual violence or child molestation, but the government may have sufficient evidence to demonstrate by clear and convincing evidence that the individual had, in fact, committed a higher-level offense.

abnormality, or disorder.”<sup>55</sup> Commonly in AWA cases these are diagnoses of pedophilia (or pedophilic disorder),<sup>56</sup> antisocial personality disorder, alcohol and substance abuse, and paraphilia not-otherwise-specified.<sup>57</sup>

Prior to a commitment hearing, the statute permits the court, the government, the defendant, or all of the above to order a psychological evaluation of the respondent.<sup>58</sup> The report will include all the diagnoses that the evaluator, generally a psychologist or a psychiatrist, believes the respondent has; often multiple evaluations presented by opposing parties will volunteer conflicting opinions.<sup>59</sup> Furthermore, “the statutory definition of ‘serious mental illness’ is not limited to either the consensus of the medical community or to maladies identified in the [Diagnostic and Statistical Manual],” so courts may find diagnoses not recognized in scientific literature or by the scientific community at large.<sup>60</sup> As stated in a state law case with similar requirements, “the term ‘mental illness’ is devoid of any talismanic significance.”<sup>61</sup> The court is ultimately tasked with deciding if the respondent has any mental illness and, if so, what mental illness.

In *United States v. Wooden*,<sup>62</sup> the respondent, Wooden, petitioned the court for release in 2016 after he was committed in 2014.<sup>63</sup> At the hearing, four experts testified—two for the respondent and two for the government.<sup>64</sup> Of the four experts, three diagnosed the respondent with pedophilia based on past historical data.<sup>65</sup> Two experts also diagnosed the respondent with Intellectual Deficit Disorder (“IDD”).<sup>66</sup> Ultimately, the court had to decide which disorders to assign to the respondent. The court found that “IDD is a better explanation for

55. 18 U.S.C. § 4247(a)(6) (2018).

56. Because these diagnoses are provided by psychologists who typically adhere to the Diagnostic and Statistical Manual (“DSM”) definitions of mental illnesses, the names for illnesses may change as the DSM changes names and diagnostic criteria. The DSM is considered by the health community to be the authoritative source of diagnostic criteria for mental health conditions.

57. See, e.g., *United States v. Wood*, 741 F.3d 417, 422 (4th Cir. 2013) (discussing diagnoses of pedophilic disorder and antisocial personality disorder and alluding to substance abuse); *United States v. Carta*, 592 F.3d 34, 38–41 (1st Cir. 2010) (discussing at length paraphilia not-otherwise-specified and the legal validity of the diagnosis). Paraphilia not-otherwise-specified is a catchall for deviant sexual behaviors, with a loose definition that evolves with every iteration of the DSM.

58. 18 U.S.C. §§ 4247(b), 4248(b); *infra* Part II.

59. See, e.g., *United States v. Wooden (Wooden II)*, 887 F.3d 591, 597–99 (4th Cir. 2018).

60. *Carta II*, 690 F.3d 1, 4 (1st Cir. 2012). In practice, experts can diagnose and testify that individuals have psychological conditions not recognized in the DSM, and the court adopts whichever diagnosis it finds most supported by the evidence.

61. *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997) (describing the ambiguity as to what might constitute a serious mental illness or abnormality).

62. 887 F.3d 591 (4th Cir. 2018).

63. *Id.* at 594.

64. *Id.* at 597–98.

65. *Id.*

66. *Id.*

Mr. Wooden's past criminal behavior than Pedophilic Disorder."<sup>67</sup> The court then found that IDD was not a qualifying mental disease, abnormality, or disorder and ordered Wooden to be released from civil commitment because he no longer met the requirements for commitment.<sup>68</sup> This case marks the first time that a court found that a mental illness, abnormality, or disorder did *not* meet the criteria for continued commitment. Such a recognition is an important, positive shift in AWA cases because it indicates that courts can discern that not all mental illnesses—whether recognized by the Diagnostic and Statistical Manual (“DSM”) or not—are related to sexual dangerousness.

### 3. Serious Difficulty

Courts struggle the most in determining whether the serious difficulty prong is met and often look to the Static-99R for answers.<sup>69</sup> To commit an individual, the government must show by clear and convincing evidence that, as a result of the mental illness, abnormality, or disorder, the individual “would have serious difficulty in refraining from sexually violent conduct or child molestation if released.”<sup>70</sup> Precedent affecting this prong predates the AWA because the statutory language is nearly identical to existing state law civil commitment statutes, such as the Kansas statute at issue in two U.S. Supreme Court cases.<sup>71</sup>

In *Kansas v. Hendricks*,<sup>72</sup> the Supreme Court had to determine the constitutionality of a sexual offender civil commitment statutory scheme.<sup>73</sup> The Court upheld the statute because it not only asked whether or not an individual might be dangerous but linked that dangerousness to an additional component—mental illness.<sup>74</sup> Specifically, *Hendricks* stated that the statute “requires a finding of future dangerousness, and then links that finding to the existence of a ‘mental abnormality’ or ‘personality disorder’ that makes it difficult, if not impossible, for the person to control his dangerous behavior.”<sup>75</sup> Perhaps unintentionally, the Court introduced an important word in this ruling that may have turned a seemingly one-factor test into a two-factor test.<sup>76</sup> The Court stated that the respondent conceded that he “cannot ‘control the urge’ to molest children. This admitted lack of *volitional control*, coupled with a

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67. *Id.* at 599.

68. *Id.* at 610 (“Wooden does not suffer from a serious mental illness, disease, or abnormality, and . . . therefore is *not* sexually dangerous.”).

69. *Carta II*, 690 F.3d 1, 8 (1st Cir. 2012).

70. 18 U.S.C. § 4247(a)(6) (2018).

71. *Kansas v. Crane*, 534 U.S. 407, 409 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997).

72. 521 U.S. 346 (1997).

73. *Id.* at 350.

74. *Id.* at 358.

75. *Id.* at 358.

76. *Crane*, 534 U.S. at 419 (Scalia, J., dissenting).

prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.”<sup>77</sup> The term “volitional” has spurred much discussion,<sup>78</sup> and the subsequent cases attempting to resolve the confusion have tangled the web further rather than providing answers.

Five years later, the Supreme Court was asked to clarify *Hendricks* in *Kansas v. Crane*.<sup>79</sup> In *Crane*, the respondent argued that *Hendricks* required a finding of a total lack of control, while Kansas essentially argued that no lack of control finding was necessary.<sup>80</sup> Crane argued that some diagnoses are purely emotional disorders and do not relate to a volitional control issue; essentially, someone who has a mental illness unrelated to actions cannot constitutionally be shown to have serious difficulty refraining from reoffending.<sup>81</sup> In its opinion, the Court turned to the issue of an “emotional” disorder versus a “volitional” one, acknowledging that *Hendricks* was limited to a volitional issue.<sup>82</sup> The Court then explicitly refused to resolve the question, stating that “[t]he Court in *Hendricks* had no occasion to consider whether confinement based solely on ‘emotional’ abnormality would be constitutional, and we likewise have no occasion to do so in the present case.”<sup>83</sup>

Justice Scalia’s strongly worded dissent in *Crane* indicated that the Court added an additional element to civil commitment: “a separate finding of inability to control behavior.”<sup>84</sup> He specified that

[t]oday’s opinion says that the Constitution requires the addition of a [new] finding: . . . that the subject suffers from an inability to control behavior—not utter inability and not even inability in a particular constant degree, but rather inability in a degree that will vary “in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself.”<sup>85</sup>

He added the prediction that “[u]nfortunately, it gives trial courts, in future cases under the many commitment statutes similar to Kansas’s [sexual offender

77. *Hendricks*, 521 U.S. at 360 (emphasis added) (citations omitted).

78. Transcript of Oral Argument at 50–51, *Kansas v. Crane*, 534 U.S. 407 (2002) (No. 00-957) [hereinafter *Crane* Oral Argument]. The oral argument focused on psychological diagnoses that tend to indicate complete volitional control but represent a distorted reality, with one Justice likening the question to an individual who, due to delusions, thinks all people are rocks but is completely in control of his behavior. *Id.* at 50. The oral argument focused entirely on the different categories of diagnoses, including volitional, emotional, intellectual, and personality diagnoses. *See id.* at 3.

79. 534 U.S. 407 (2002).

80. *Id.* at 411–13.

81. *Crane* Oral Argument, *supra* note 78, at 50–51; *see supra* note 78 and accompanying text.

82. *Crane*, 534 U.S. at 415.

83. *Id.*

84. *Id.* at 419 (Scalia, J., dissenting) (emphasis omitted).

85. *Id.* at 423 (quoting the majority opinion).

civil commitment statute], not a clue as to how they are supposed to charge the jury!”<sup>86</sup>

The aftermath of *Crane* has led to considerable confusion and differing outcomes. Likely in an effort to highlight the complexity, the Second Circuit in *Richard S. v. Carpinello*<sup>87</sup> detailed the different nuanced interpretations of the prong.<sup>88</sup> The court, attempting to determine what the standard actually required, identified that a majority of states found that *Crane* did not require an *additional* finding of volitional control issues, but notably indicated that states required a volitional control component.<sup>89</sup>

Ambiguous terminology that conflates emotional and volitional issues leads to confused legal opinions. A careful reading of many of the cases referenced in *Richard S.* reveals that, although an additional factor was not created, the court nonetheless found a volitional control issue.<sup>90</sup> Alternatively, the courts conflate emotional and volitional impairments, with one court stating that “[a] person with an emotional impairment might be subject to fits of anger or meanness so extreme that he cannot control his actions.”<sup>91</sup> Importantly, the Fourth Circuit, where many of these cases are heard,<sup>92</sup> has found that “[t]he ‘serious difficulty’ prong of [the AWA] refers to the degree of the person’s ‘volitional impairment,’ which impacts the person’s ability to refrain from acting upon his deviant sexual interests.”<sup>93</sup> Judges are not psychologists, and they often acknowledge that they are not equipped to fully understand nuanced diagnoses and how different conditions interface with dangerousness.<sup>94</sup>

86. *Id.* (emphasis omitted).

87. 589 F.3d 75 (2d Cir. 2009).

88. For a thorough description of how various jurisdictions interpret this requirement, see *id.* at 83–84.

89. *Id.* at 82–83.

90. See, e.g., *Laxton v. Bartow*, 421 F.3d 565, 571 (7th Cir. 2005) (“By concluding that Laxton has a mental disorder and that his mental disorder creates a substantial probability that he will engage in acts of sexual violence, the court explained, the jury had to conclude that Laxton’s mental disorder involved serious difficulty to him in controlling his behavior.”).

91. *In re W.Z.*, 773 A.2d 97, 108 (N.J. Super. Ct. App. Div. 2001).

92. The overwhelming majority of AWA cases are heard in the Fourth Circuit because the only treatment facility for civilly committed sexual offenders is located in Butner, North Carolina. *Lifelong Pedophile and Violent Offender Committed to Federal Custody as a Sexually Dangerous Person*, U.S. DEPT JUST.: U.S. ATTY’S OFF. E. DISTRICT N.C. (Oct. 24, 2018), <https://www.justice.gov/usao-ednc/pr/lifelong-pedophile-and-violent-offender-committed-federal-custody-sexually-dangerous> [<https://perma.cc/4FAT-GYC7>] (“The United States Attorney’s Office for the Eastern District of North Carolina litigates all Adam Walsh Act cases for the entire country. All sexually dangerous persons who are committed to federal custody are housed in a federal facility in that district, where intensive, residential treatment is offered to them.”).

93. *United States v. Hall*, 664 F.3d 456, 463 (4th Cir. 2012) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997)).

94. See *Crane* Oral Argument, *supra* note 78, at 48 (“We’re not psychiatrists or psychologists either. That’s . . . part of the problem . . .”).

## II. SCIENTIFIC CONSIDERATIONS OF SEXUAL OFFENDER ASSESSMENT METHODS

Courts hear evidence for each of the three prongs of the AWA and rely heavily on expert testimony about psychologists' clinical impressions of the individual.<sup>95</sup> One important tool that clinicians rely on for their testimony and reports to the court is risk assessments of sexual offenders.<sup>96</sup> These reports are thoroughly developed and often include tools like the Static-99R.<sup>97</sup> Although the Static-99R is not more predictive than other actuarial tools, it is the most researched and easily used by "diverse professionals using commonly available information" such as past criminal history and the individual's age.<sup>98</sup> Because the Static-99R is the primary tool used in court reports and has been widely researched, it will be the focus of this Comment as illustrative of other similar tools.

This part will begin by explaining the major components of a sexual offender report and will then discuss the Static-99R in detail, culminating with an analysis of the instrument's limitations.

### A. *The Forensic Sexual Offender Risk Assessment Reports*

When considering an individual for civil commitment, the court must order a psychological evaluation of that individual, which culminates in a report to the court.<sup>99</sup> The "[r]isk assessment informs all participants in the criminal justice system, from police to treatment providers, of the future likelihood of certain individuals to cause harm."<sup>100</sup> The lengthy evaluation may vary from one evaluator to another, but there are generally accepted components and practices.<sup>101</sup> A well-written report will "clearly demonstrate how conclusions

95. For an example, see Order at 22, *United States v. Yates*, No. 5:08-HC-02073-BR (E.D.N.C. Mar. 2, 2018), ECF No. 168 [hereinafter *Yates* Order].

96. Kevin Baldwin, *Sex Offender Risk Assessment*, in *SEX OFFENDER MANAGEMENT ASSESSMENT AND PLANNING INITIATIVE* 133, 136–37 (2017), [https://www.smart.gov/SOMAPI/pdfs/SOMAPI\\_Full%20Report.pdf](https://www.smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf) [perma.cc/G2MX-ZJZ2] (discussing unstructured clinical judgment as the first generation of sexual offender assessment methodology and describing advancements in expert reporting).

97. For a thorough summary of different evaluators' reports, see *Yates* Order, *supra* note 95, at 22 n.3.

98. R. Karl Hanson et al., *Communicating the Results of Criterion Referenced Prediction Measures: Risk Categories for the Static-99R and Static-2002R Sexual Offender Risk Assessment Tools*, 29 *PSYCHOL. ASSESSMENT* 582, 584 (2016) [hereinafter Hanson et al., *Risk Categories*].

99. 18 U.S.C. § 4247(b) (2018).

100. *Sex Offender Risk Assessment*, ATSA (Aug. 30, 2012), <https://www.atsa.com/pdfs/SexOffenderRiskAssessmentBriefWithBibliography2012.pdf> [https://perma.cc/6B2Y-P4BF].

101. See Anita Schlank, Saprina Matheny & Jessica Schilling, *Overview of Assessment of Sexual Offenders*, in *SEXUAL OFFENDING*, *supra* note 18, at 247, 247.

were drawn and . . . highlight any inconsistencies in the data or limitations to the conclusions.”<sup>102</sup>

Sexual offender evaluations may serve different purposes and different portions may be appropriate only for certain populations; an evaluation for child custody situations clearly will contain different material than one for civil commitment purposes.<sup>103</sup> Because over twenty states have enacted civil commitment statutes in addition to the AWA,<sup>104</sup> the evaluator must ensure that his or her report speaks specifically to the language of the statute under which the respondent falls and apply the appropriate burden of proof, which varies by statute.<sup>105</sup>

A typical civil commitment evaluation has three parts: (1) a clinical diagnosis and opinion; (2) implementation and integration of statistical instruments (like the Static-99R) and other scientific research; and (3) a determination of present dangerousness.<sup>106</sup> Generally, the first portion consists of clinical judgment determinations, which are based on a clinician’s professional experience.<sup>107</sup> The evaluator conducts a clinical interview where the sexual offender is informed about the purpose of the interview and told that any information the offender offers in the interview will not be treated as confidential.<sup>108</sup>

The next portion of the evaluation attempts to determine a likelihood of reoffense by looking at many factors, including general rates of reoffense, combined results of actuarial instruments, risk factors associated with reoffense,

102. *Id.* at 247–48.

103. *See id.* at 248.

104. *Civil Commitment*, *supra* note 19.

105. Compare 18 U.S.C. § 4247(a)(6) (2018) (requiring a demonstration of “serious difficulty in refraining from sexually violent conduct or child molestation”), with WASH. REV. CODE § 71.09.020(18) (2019) (defining a sexually violent predator for civil commitment purposes as someone who would be “likely to engage in predatory acts of sexual violence”).

106. See Rebecca L. Jackson & Derek T. Hess, *Evaluation for Civil Commitment of Sex Offenders: A Survey of Experts*, 19 SEXUAL ABUSE 425, 430 (2007); Schlank et al., *supra* note 101, at 248. The purpose of the interview is to understand the individual’s sexual history, so the psychologist will attempt to discern information such as the individual’s perception and account of his past sexual offenses. *See id.* at 249. Supplemented by the individual’s factual and criminal record, the evaluator will then conduct assessments for a wide array of diagnoses, such as pedophilia, substance abuse, antisocial personality disorder, anxiety, depression, attention-deficit/hyperactivity disorder, and intellectual deficits. *See id.* at 249–53.

107. See *Risk Assessment*, ATSA, <http://www.atsa.com/risk-assessment> [<https://perma.cc/85GC-RGW2>].

108. Harry M. Hoberman & Rebecca L. Jackson, *Forensic Evaluations of Sexual Offenders: Principles and Practices for Almost All Sexual Offender Appraisals*, in SEXUAL OFFENDING, *supra* note 18, at 353, 367.

clinical judgment, and any relevant special considerations.<sup>109</sup> Often, one or more common statistical instruments are used.<sup>110</sup>

Finally, the evaluator will write a report detailing the diagnoses and risk results of the evaluation as well as a recommendation to the court as to whether the individual meets the criteria for civil commitment.<sup>111</sup> A well-written report incorporates, but does not solely rely on, clinical judgment and primarily refers to scientifically validated sources to best explain the conclusions reached by the evaluator.<sup>112</sup>

### B. *Instrument Types and Statistic Viability*

An actuarial risk instrument establishes risk predictions based only on known, factual information, such as the number of past convictions or the offender's age.<sup>113</sup> It is devoid of clinical judgment.<sup>114</sup> Modern evaluators praise these instruments for their improved accuracy over clinical judgment, their inter-user reliability, and their ability to be researched and evaluated—a distinct benefit over the unstructured clinical judgment approach.<sup>115</sup>

Multiple statistical instruments gauge sexual offender recidivism with approximately equal accuracy when looking at population-level risk factors and rates of recidivism.<sup>116</sup> However, when these instruments are applied to an

109. *See id.* at 384.

110. *Id.* Some frequent examples include the MnSOST-R, SVR-20, Rapid Risk Assessment for Sexual Offense Recidivism (“RRASOR”), and Static-99. Baldwin, *supra* note 96, at 139–40.

111. For a thorough discussion about the report writing process, see Hoberman & Jackson, *supra* note 108, at 386–89.

112. *See Civil Commitment of Sexually Violent Predators*, ATSA (Aug. 17, 2010), <https://www.atsa.com/civil-commitment-sexually-violent-predators> [<https://perma.cc/ZVB8-3WCQ>].

113. Shoba Sreenivasan et al., *Actuarial Risk Assessment Models: A Review of Critical Issues Related to Violence and Sex-Offender Recidivism Assessments*, 28 J. AM. ACAD. PSYCHIATRY & L. 438, 438 (2000).

114. *Id.*

115. Helmus et al., *supra* note 8, at 58; Sreenivasan et al., *supra* note 113, at 438.

116. Howard E. Barbaree, Calvin M. Langton & Edward J. Peacock, *Different Actuarial Risk Measures Produce Different Risk Rankings for Sexual Offenders*, 18 SEXUAL ABUSE 423, 423–24 (2006) [hereinafter Barbaree et al., *Different Actuarial Risk Measures*]. For a summary of the comparative predictive accuracy of actuarial instruments, see Dale Arnold & Marianne Davis, *Risk Factors and Risk Assessments for Sexual Offense Recidivism*, in SEXUAL OFFENDING, *supra* note 18, at 417, 429. Many studies have explored the comparative accuracy of common static instruments including but not limited to the Static-99, RRASOR, SACJ-Min, Sex Offender Risk Appraisal Guide (“SORAG”), and Risk Matrix 2000. *See generally* Howard E. Barbaree et al., *Evaluating the Predictive Accuracy of Six Risk Assessment Instruments for Adult Sex Offenders*, 28 CRIM. JUST. & BEHAV. 490, 490 (2001) (comparing multiple sexual offender actuarial instruments); R. Karl Hanson & David Thornton, *Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales*, 24 LAW & HUM. BEHAV. 119, 119 (2000) (describing that the predictive accuracy of three actuarial instruments, the RRASOR, SACJ-Min, and Static-99, were all approximately equal); Drew A. Kingston et al., *Long-Term Predictive Validity of the Risk Matrix 2000: A Comparison with the Static-99 and the Sex Offender Risk Appraisal Guide*, 20 SEXUAL ABUSE 466, 466 (2008) (comparing the predictive accuracy of the Static-99, SORAG, and



individual sexual offender, they may incorrectly predict whether that offender is likely to recidivate.<sup>117</sup> In fact, one study found that when comparing the five most common instruments, 55% of the study participants were classified as “high risk” in at least one of the instruments, but only 3% of the participants were classified as high risk in all five instruments.<sup>118</sup> The challenge for an evaluator is to determine which instrument they believe paints the most correct image of the offender—a determination that relies heavily on clinical judgment, the factor that actuarial instruments were designed to remove.

In contrast to actuarial instruments, a dynamic assessment focuses on factors likely to change with time, such as progress in treatment, self-regulation, and deviant sexual interest.<sup>119</sup> Dynamic instruments, though often used for general crime assessments, are a newer creation in the field of sexual offender assessments and, as such, are not as well researched.<sup>120</sup> Preliminary studies show promise for certain dynamic instruments and indicate that, when dynamic instruments are combined with an actuarial risk instrument, they better predict recidivism risk than either tool alone.<sup>121</sup>

### C. *The Static-99 and Its Progeny*

Although there are over a dozen actuarial risk assessments created specifically for determining likelihood of sexual offender recidivism, by far the most prominent, most researched, and most common is the Static-99R.<sup>122</sup> Because the instrument is short and concise, it is available at appendix A to assist the reader in understanding the instrument.<sup>123</sup>

The Static-99R gauges an individual’s relative risk rather than absolute risk.<sup>124</sup> Risk measures how likely a certain *outcome* is to occur based on certain *exposures*. Relative risk measures how much more likely an *exposed* group is to have a certain *outcome* than an *unexposed* group. For instance, we may want to know how much more likely smokers are than nonsmokers to develop lung cancer. The “exposed” group would encompass those who have smoked, and the

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Risk Matrix 2000, finding the three approximately equal with the SORAG having a slightly higher predictive accuracy).

117. Barbaree et al., *Different Actuarial Measures*, *supra* note 116, at 437.

118. *Id.*

119. Gwenda M. Willis, Tony Ward & Jill S. Levenson, *The Good Lives Model (GLM): An Evaluation of GLM Operationalization in North American Treatment Programs*, 26 *SEXUAL ABUSE* 58, 60 (2014).

120. See Reinhard Eher et al., *Dynamic Risk Assessment in Sexual Offenders Using STABLE-2000 and the STABLE-2007: An Investigation of Predictive and Incremental Validity*, 24 *SEXUAL ABUSE* 5, 6 (2012).

121. Robert J. McGrath, Michael P. Lasher & Georgia F. Cumming, *The Sex Offender Treatment Intervention and Progress Scale (SOTIPS): Psychometric Properties and Incremental Predictive Validity with Static-99R*, 24 *SEXUAL ABUSE* 431, 443 (2012).

122. Helmus et al., *supra* note 8, at 58.

123. *Infra* Appendix A.

124. See Hanson et al., *Recidivism Rates*, *supra* note 18, at 219.

“unexposed” group would be those who have never smoked. After finding the risk rates for each group, we would calculate the relative risk (sometimes called risk ratio) to determine how much *more* likely the exposed group would be to develop lung cancer than the unexposed group. For another example, we know that we always risk getting in a car crash when traveling in a car. We also know that someone who is driving while intoxicated is more likely to get in a car crash than someone who is sober. We would look at the risk of the *exposed* group (drunk drivers) and the *unexposed* group (non-drunk drivers) to determine each group’s risk of incurring a certain outcome (car crashes). The relative risk measures how much more likely it is that a drunk driver would be in a car crash than an ordinary person. Similarly, the Static-99R does not answer how likely anyone is to commit a crime of sexual violence but instead how much more likely *one* group of sexual offenders is to recidivate than *another* group of sexual offenders.<sup>125</sup> The mechanism used to determine recidivism rate is the individual’s score on the actuarial instrument and the most current statistical tables of recidivism.<sup>126</sup>

The protective factors (factors that can decrease the likelihood of recidivism) of the Static-99R include advanced age at release, having lived with a lover for at least two years, and having exclusively female victims.<sup>127</sup> Conversely, factors identified as likely to increase rates of recidivism include current and prior convictions and charges for both sexual and nonsexual violence, victims who are related (incest) or who are strangers (not known and also not related), and the inclusion of male victims.<sup>128</sup> Because it is an actuarial instrument, the Static-99R does not include any dynamic factors; the score someone receives when they enter prison will not change except for the age factor.

The final scores range from -3 to 13, and relative risk increases as the score increases.<sup>129</sup> A score of -3 or -2 indicates a low risk for reoffense (Level I); a score of -1 or 0 indicates below-average risk of reoffense (Level II); a score of 1–3 indicates an average risk of reoffense (Level III); a score of 4 or 5 indicates an above-average risk of reoffense (Level IVa); and a score of 6+ indicates a well-above-average risk of reoffense (Level IVb).<sup>130</sup> Notably, the creators of the Static-99R acknowledge in other scholarship that “[t]here are no universal standards for labeling relative or absolute likelihoods of adverse events . . . . A 10% chance of a hurricane is high risk; a 10% chance of rain is not.”<sup>131</sup>

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125. *Id.*

126. *Id.* at 220.

127. PHENIX ET AL., *supra* note 9, at 94.

128. *Id.*

129. *Id.*

130. *Id.*

131. Hanson et al., *Risk Categories*, *supra* note 98, at 583 (citation omitted).

With a basic understanding of the instrument's design in place, this Comment will now analyze the accuracy and implementation of the Static-99R.

#### D. *Accuracy and Sample Population*

The primary statistic used to gauge the accuracy of both actuarial and dynamic instruments is the derivative of the Receiver Operating Characteristics, called the Area Under the Curve (“AUC”).<sup>132</sup> This statistic compares how often false positives occur compared with true positives at each predictive point.<sup>133</sup> It is used with binary groups to determine how correctly a test can determine who is “in” and who is “out.”<sup>134</sup> For sexual offenders, the “in” group is those who recidivate, and the “out” group is those who do not recidivate.<sup>135</sup> Metrics for an AUC range from 0.5 to 1.0, with 1.0 representing a perfect classification system that can always classify who is in the “in” group correctly and who is in the “out” group correctly.<sup>136</sup> An output of 0.5 indicates that the instrument is no better at predicting who falls in what group than random guessing.<sup>137</sup>

Despite the moderate accuracy of the Static-99R, courts still routinely use the instrument in civil commitment settings without adequately contextualizing the instrument's professed accuracy. In fact, only in four AWA cases has a court described the instrument as having “moderate predictive accuracy,”<sup>138</sup> even though the Static-99R itself professes “moderate predictive accuracy,”<sup>139</sup> which is validated in other studies revealing an AUC of 0.69–0.70.<sup>140</sup> When combined with other assessments, particularly dynamic ones, the AUC increases to 0.80–0.83.<sup>141</sup> The sample population used to develop the original Static-99 consisted of only 1086 sexual offenders, but the risk tables were updated with new information from a sample consisting of 6706 offenders from seventeen

132. See Roos Colman, *Interpretation of the AUC*, DATASCIENCE+ (Sept. 15, 2018, 3:42 PM), <https://datascienceplus.com/interpretation-of-the-auc/> [<https://perma.cc/AU89-GHDJ>].

133. *Id.*

134. *See id.*

135. See Hanson et al., *Risk Categories*, *supra* note 98, at 587.

136. See *ROC Curves and Area Under the Curve Explained*, DATA SCH. (Nov. 19, 2014), <https://www.dataschool.io/roc-curves-and-auc-explained/> [<https://perma.cc/D2SA-2UEW>].

137. *Id.*

138. A search on Lexis Advance on December 26, 2019 for “moderate predictive accuracy” returned thirty-two cases total that use the term “moderate predictive accuracy.” Of those, seven cases were federal cases. Of those seven, only four were AWA cases. See *United States v. King*, No. 5:09-HC-2076-FA, 2013 U.S. Dist. LEXIS 54655, at \*24 (E.D.N.C. Ap. 17, 2013); *United States v. Volungus*, No. 07-12060-GAO, 2012 U.S. Dist. LEXIS 31069, at \*24 (D. Mass. Mar. 8, 2012); *United States v. Hunt*, 643 F. Supp. 2d 161, 171 (D. Mass. 2009); *United States v. Harnden*, No. CV 06-6960 DSF, 2006 U.S. Dist. LEXIS 97341, at \*28 (C.D. Cal. Dec. 27, 2006). Notably, only one of these cases was published.

139. PHENIX ET AL., *supra* note 9, at 7.

140. Hanson et al., *Risk Categories*, *supra* note 98, at 589.

141. PHENIX ET AL., *supra* note 9, at 93; McGrath et al., *supra* note 121, at 444.

different replication studies when the creators found significantly lower rates of recidivism than originally published, a change that has been incorporated into the Static-99R.<sup>142</sup> The present AUC rates are based off of a sample of 8805 sexual offenders from twenty-three different studies.<sup>143</sup> Even though the sample population has increased significantly since the first iteration of the Static-99, its accuracy remains overlooked—or, at a minimum, underacknowledged—in judicial opinions.

Though rarely discussed in the literature, the sample population used to develop and validate the Static-99R presents problems for its use in a United States population. Of the twenty-three studies, only 21% of the individuals studied were from the United States (n = 1811).<sup>144</sup> Though it is beneficial to assess the Static-99R's applicability across different countries and cultures, the Static-99R developers did not include a variable for how the *law* in different countries might have an effect on the accuracy of the instrument.<sup>145</sup> Instead, the creators only looked at the time between release and the next charge or conviction if there was one. Although these two categories were evenly split in the study overall (charges n = 10, convictions n = 11), only one of the five studies from the United States used conviction data; the other four used only charges.<sup>146</sup> While many of the countries generally agree on crimes that constitute sexual offenses, there are important differences as well.

For example, in Canada, which comprises 33% of the population studied (n = 2865),<sup>147</sup> the Solicitor General's High Risk Offenders Working Group concluded that civil commitment processes would “not meet the constraints posed by Canada's Charter of Rights and Freedoms,” which led to the government's decision not to create a civil commitment scheme in the country.<sup>148</sup> Studies have noted that although there are “myriad similarities between the United States and Canada . . . correctional philosophies and practices can be quite different, with criminal sentences in the United States tending to be longer and more frequently employed in managing risk posed by offenders.”<sup>149</sup> The study also notes that sexual offenders in Canada “receive determinate sentences and return to the community at the end of those

142. Hanson et al., *Risk Categories*, *supra* note 98, at 593.

143. *Id.*

144. See Hanson et al., *Recidivism Rates*, *supra* note 18, at 223.

145. See *id.* The data provided in this study indicates that there was no variable accounting for differences in law in different countries.

146. *Id.* at 223–24.

147. *Id.* at 223.

148. Michael Petrunik, Lisa Murphy & J. Paul Fedoroff, *American and Canadian Approaches to Sex Offenders: A Study of the Politics of Dangerousness*, 21 FED. SENT'G REP. 111, 117 (2008).

149. Robin J. Wilson et al., *Comparing Sexual Offenders at the Regional Treatment Centre (Ontario) and the Florida Civil Commitment Center*, 57 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 377, 378 (2012).

sentences,” in direct contrast to the United States where many states and the federal government permit civil commitment.<sup>150</sup> Though a small-scale study suggests that civil commitment has no effect on recidivism rate,<sup>151</sup> it remains unknown whether the Static-99R is equally accurate in the United States and Canada.

In Sweden, which accounts for 15% of the study population (n = 1278),<sup>152</sup> the Ministry of Foreign Affairs recognizes that the increase in sexual offenses within the past decade is due, in large part, to changes in Swedish legislation, such as expanding the definition of rape.<sup>153</sup> The Ministry specifically acknowledges that “it is difficult to compare the figures [of sexual offenses rates] over time.”<sup>154</sup> Furthermore, the Ministry adds that “[i]t is also difficult to make international comparisons based on crime statistics, as many acts that are considered rape under Swedish law are not considered rape in many other countries.”<sup>155</sup> Though the Swedish government does not delineate specifically what countries record and charge crimes differently, the government highlights “three important factors to remember” that differentiate Swedish criminal statistics from other countries: (1) all reported events are recorded as crimes, even if some of these events are later found not to constitute criminal offenses; (2) every offense that occurs at the same time is counted separately, even though many countries may record “offenses of the same kind against a single victim” as one crime; and (3) attempted offenses are “counted together with completed crimes.”<sup>156</sup> As a result, Sweden may be calculating higher recidivism rates than those in the United States, particularly as it relates to charged but not convicted offenses, thereby skewing the applicability of the Static-99R’s dataset to a United States population.

Other notable differences exist in the international population. Germany, which accounts for 10.6% of the sample (n = 936),<sup>157</sup> does not have mandatory reporting laws for suspected incidents of child molestation.<sup>158</sup> Compared to

150. *Id.*

151. *See id.* at 388.

152. Hanson et al., *Recidivism Rates*, *supra* note 18, at 223.

153. Ministry for Foreign Affairs, *Facts About Migration, Integration and Crime in Sweden*, GOV’T OFFS. SWED. (Mar. 15, 2019), <https://www.government.se/articles/2017/02/facts-about-migration-and-crime-in-sweden/> [<https://perma.cc/VLP2-SAT2>].

154. *Id.*

155. *Id.*

156. *Crime in Sweden—The Difficulties in Making International Comparisons*, BRÅ (emphasis omitted), <https://www.bra.se/bra-in-english/home/crime-and-statistics/international-comparisons.html> [<https://perma.cc/N4VG-X4VA>].

157. Hanson et al., *Recidivism Rates*, *supra* note 18, at 223.

158. Henning Wißmann, Mike Peters & Sabine Müller, *Physical or Psychological Child Abuse and Neglect: Experiences, Reporting Behavior and Positions Toward Mandatory Reporting of Pediatricians in Berlin, Germany*, 98 CHILD ABUSE & NEGLECT 104165, 104165 (2019); Andreas Witt et al., *Trends in Child Maltreatment in Germany: Comparison of Two Representative Population-Based Studies*, 12 CHILD & ADOLESCENT PSYCHIATRY & MENTAL HEALTH 24, 24 (2018).

countries which require mandatory reporting, Germany may have lower charge and conviction rates, since fewer cases are investigated. Austria, which accounts for 8% of the sample population (n = 706),<sup>159</sup> changed its age of consent laws in 2002, lowering the age from nineteen to fourteen.<sup>160</sup> Since the Static-99 creators relied on a study of recidivism in the timeframe of 2000–2005, it is unclear whether these recidivism rates are accurate within Austria, let alone outside of Austria. New Zealand, accounting for 5.6% of the population (n = 492),<sup>161</sup> allows a court to impose an additional sentence of up to five years for sexual offenders who the court believes may be likely to reoffend.<sup>162</sup> While similar to civil commitment, the maximum length of time differentiates it, and the deterrent effect of this law remains unclear. The United Kingdom represents 4.6% of the study population (n = 406).<sup>163</sup> The UK, however, does not permit civil commitment and recognizes it as a human rights violation, famously going so far as to refuse to extradite an accused United States sexual offender on the grounds that he could be civilly committed if returned to the United States.<sup>164</sup> Denmark, which hosts 3.5% of the study population (n = 311),<sup>165</sup> recently increased penalties for sexual offenses, and the deterrent effect of this law has not yet been studied as it relates to the applicability of the Static-99R.<sup>166</sup> The combined inconsistency of laws and policies and lack of research on each of these specific populations as it relates to the accuracy of the Static-99R raises serious concerns about the applicability of the instrument to United States sexual offenders.

Experts routinely generalize the findings from these twenty-three sexual offender studies to the United States' federally incarcerated population despite criticism.<sup>167</sup> The different countries represented in the studies all have different

159. Hanson et al., *Recidivism Rates*, *supra* note 18, at 223.

160. See generally *L. and V. v. Austria*, 2003-I Eur. Ct. H.R. 29 (evaluating the age of consent and whether equal rights were violated if the age of consent is different for heterosexual adolescents and homosexual adolescents).

161. Hanson et al., *Recidivism Rates*, *supra* note 18, at 223.

162. Kristina White, *Registering Public Fear: An Analysis of the New Zealand Child Sex Offender Government Agency Register*, 8 VICTORIA U. WELLINGTON LEGAL RES. PAPERS 1, 19 (2017).

163. Hanson et al., *Recidivism Rates*, *supra* note 18, at 223.

164. David Post, Opinion, *U.K. Court Declares that California Civil Confinement Law Constitutes a 'Flagrant Abuse' of Human Rights*, WASH. POST (Oct. 26, 2015, 1:03 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/26/u-k-court-declares-that-california-civil-confinement-law-constitutes-a-flagrant-abuse-of-human-rights/> [https://perma.cc/9532-7LJQ (dark archive)].

165. *Id.*

166. Wendy Zelden, *Denmark: Higher Penalties for Rape and Other Violent Crimes Contemplated*, LIBR. CONGRESS: GLOBAL LEGAL MONITOR (Aug. 19, 2015), <https://www.loc.gov/law/foreign-news/article/denmark-higher-penalties-for-rape-and-other-violent-crimes-contemplated/> [https://perma.cc/V6K7-ZRZU].

167. See *Sex Offender Risk Assessment*, *supra* note 100.

laws and cultural norms for sexual offenses.<sup>168</sup> A paper authored by many of the creators of the Static-99R provides an example, cautioning that since “[n]ot all sexual offenses are universal,” to apply “actuarial tools to behaviors beyond the scope of the scale’s development can be an inappropriate extrapolation.”<sup>169</sup> The authors give the example of statutory rape, describing that “laws in some countries prohibit an 18-year-old male from having sex with his willing 16-year-old girlfriend,” but that “this activity was not illegal in the countries on which Static-99 was developed (Canada and the United Kingdom). The meaning of this type of behavior may be sufficiently distinct from the types of activities captured in the development of Static-99.”<sup>170</sup> The authors then specifically state that “applying [the Static-99] to cases of ‘consensual’ teenage sex among similar-aged peers is not recommended.”<sup>171</sup>

A short hypothetical helps to explain the dilemma of the Static-99R. Mr. Scott is a thirty-four-year-old male. When he was eighteen, he had consensual sex with his sixteen-year-old girlfriend of one year. Her parents found out, and because of the multiple instances of sexual intercourse, the district attorney charged Mr. Scott with three counts of statutory rape—a sexual crime—but later dropped the charges. Four years later, when Mr. Scott was twenty-two, he was in a bar fight and was convicted of assault. Mr. Scott has never lived with any of his girlfriends. Now, Mr. Scott is to be released from his present sentence for sexual battery and physical assault of his new girlfriend of three months but maintains his innocence and says his public defender told him he needed to take a plea deal.

On the Static-99R, Mr. Scott would receive one point for being released after age eighteen but before thirty-five, one point for never having lived with a lover for at least two years, one point for having a violent crime attached to the offense for which he is currently in prison, one point for having a prior conviction for a violent act, and two points for simply having three prior *charges* for sexual crimes. Whether or not he was convicted of these charges is irrelevant for the purposes of the Static-99R. Mr. Scott would score a six on the Static-99R, placing him in the category labeled “well-above-average risk” of reoffending, which is the highest category of risk provided in the Static-99R, despite never being *convicted* of a sexual offense until the present instance.

If Mr. Scott lived in Canada, where statutory rape is not an offense for which he could be charged, and had served one more year in prison so his age at release would be thirty-five, his score would be a three on the Static-99R, which would place him in the “average risk” of reoffending category, indicating that he is no more likely to recidivate than any other offender.

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168. Helmus et al., *supra* note 8, at 59.

169. *Id.*

170. *Id.* at 59–60.

171. *Id.*

The government likely would not even attempt to civilly commit Mr. Scott since there is no indication of a mental illness. The above example illustrates how easy it is to score in a high-risk category with relatively common charges and convictions and shows how simply living in a different jurisdiction could dramatically affect the likelihood of reoffense analysis. Because of the variability in laws from the countries included in the study, the populations studied may not accurately reflect risks of reoffense in the United States; statutory rape is just one example where countries differ on sexual crimes.<sup>172</sup> Even studies limited to determining the accuracy of the Static-99R within one country have found that the accuracy of the instrument varies by race or ethnic group.<sup>173</sup> Because the United States only represented 21% of the study's sample and no studies have focused on the application of the Static-99R to an exclusively American population, the accuracy of the instrument as applied to an American population is unknown, which is problematic.<sup>174</sup>

E. *Understanding What the Static-99R Means*

In addition to the above problem of the demographic sample, the Static-99R also does not speak to an *individual's* likelihood of reoffending. Instead, it explains the rate at which all offenders who scored similarly reoffend. To illustrate this nuance, consider rates of smoking. In the United States, 17.1% of the adult population is classified as a smoker.<sup>175</sup> That does not mean that each person in the United States is 17.1% likely to *become* a smoker; it means that presently, out of all of the people in the United States, 17.1% smoke.<sup>176</sup> Because of extensive scientific research, we know what traits are more closely associated with smokers as compared to nonsmokers, such as having a low income, not completing high school, and living in an urban setting.<sup>177</sup> We can combine those factors and get a more accurate prediction as to whether someone is likely to become a smoker or not in the first place, and ultimately we find out whether or not someone is a smoker. We also know that, of the 55.4% of smokers who

172. For instance, many countries still consider homosexual acts to be sexual crimes. Pamela Duncan, *Gay Relationships Are Still Criminalised in 72 Countries, Report Finds*, GUARDIAN (July 27, 2017), <https://www.theguardian.com/world/2017/jul/27/gay-relationships-still-criminalised-countries-report> [<https://perma.cc/74T5-BMAY>].

173. Niklas Långström, *Accuracy of Actuarial Procedures for Assessment of Sexual Offender Recidivism Risk May Vary Across Ethnicity*, 16 SEXUAL ABUSE 107, 116 (2004) (finding that the Static-99 was “not able to distinguish African Asian recidivists from nonrecidivists” but did prove “accurate for the prediction of any sexual recidivism in Nordic and European sexual offenders”).

174. See PHENIX ET AL., *supra* note 9, at 63–67 (instructing how to code the prior charges and convictions item but not commenting on statutory rape as an excluded charge or conviction).

175. AM.'S HEALTH RANKINGS, ANNUAL REPORT 68 (2018).

176. See *id.*

177. *Id.* at 68–69.



have attempted to quit, less than 10% were successful.<sup>178</sup> We do not have the science to understand why such a small number were successful (although we do have suspicions), nor do we know any scientifically validated factors that might make one person with equal access to the same resources more successful than another at quitting smoking despite his or her stated desire to quit.<sup>179</sup>

The Static-99R functions much in the same way. It looks at what the past traits of sexual offenders are to determine what factors are most related to sexual reoffense. It can tell us how often something happens within a group of people, but not *why* that thing happens with some people but not others.

For instance, if Mr. Scott scores a six (Level IVb well-above-average risk), he can then be compared to all study participants who have scored a six according to the “high risk/need” classification.<sup>180</sup> The most recent analysis demonstrated that sixteen out of thirty-nine offenders studied who scored a six reoffended, or 41%, at a ten-year follow-up.<sup>181</sup> Think of this first part like knowing that 17.1% of the population smokes. The next step is a nuanced distinction. Mr. Scott is not *himself* 41% likely to recidivate (just like how each person in the United States is not 17.1% likely to be a smoker); rather, individuals who score the same as Mr. Scott recidivate at a rate of 41% over ten years. Similarly, we do not know why out of 55.4% of people who try to quit smoking, only 10% are successful. But we do know that 10% are successful. The Static-99R does not predict whether Mr. Scott *himself* will recidivate (or successfully quit smoking), nor does it offer any information that might indicate whether Mr. Scott would be in the “in” group, representing 41% of the population studied, or in the “out” group, representing 59% of the population studied.

It would be incorrect to say that Mr. Scott has a 41% chance of reoffending. It would be much more accurate to say that out of the individuals studied who scored the same as Mr. Scott on the Static-99R, within ten years, 41% had reoffended. We do not have the science to know what specific factors are associated with the individuals who made up the 41%. We only know that they did reoffend. Therefore, we do not know if Mr. Scott will reoffend. Mr. Scott himself may have anywhere from a 0% chance to a 100% chance of reoffending. All we know is that out of a cohort who received the same score, 41% will reoffend within ten years.

The creators of the Static-99R were well aware that the instrument does not capture all relevant information.<sup>182</sup> The instrument’s manual even states that

178. Stephen Babb, *Quitting Smoking Among Adults—United States, 2000–2015*, 65 MORBIDITY & MORTALITY WKLY. REP. 1457, 1459–60 (2017).

179. *See id.*

180. Hanson et al., *supra*, supp.

181. *Id.*

182. PHENIX ET AL., *supra* note 9, at 7.

“a prudent evaluator will always consider other external factors, such as dynamic or changeable risk factors, that may influence risk in either direction.”<sup>183</sup> The manual elaborates with examples, such as if the offender states he wants to harm his victims (higher risk) or if the offender was constantly in the “company of someone who will support non-offending (lower risk).”<sup>184</sup> As the manual wisely advises, the “Static-99R is intended as one component of a risk assessment report. Additional information should be considered external to the scale.”<sup>185</sup>

### III. LEGAL CONSIDERATIONS OF USING THE STATIC-99R

Now that the scientific limitations of the Static-99R have been explored, the instrument’s limitations will be explored from the legal perspective. This part will look at how courts actually apply the Static-99R in AWA cases and whether that application is appropriate to demonstrate that an individual would have serious difficulty refraining from reoffending, as the Act requires. This part begins with some considerations specific to those who are civilly committed, explores how courts understand the Static-99R, and ends with a discussion of whether the Static-99R speaks to the statutory language.

#### A. *Special Considerations of the Static-99R for Civilly Committed Persons*

As the name indicates, the Static-99R involves factors that are designed not to change while incarcerated.<sup>186</sup> Although this Comment primarily focuses on the use of Static-99R in initial commitment hearings, this problem is compounded for release hearings. The Static-99R is used in both types of hearings frequently and is often incorporated in a new evaluation to determine if the individual is sexually dangerous, rather than referencing the previous Static-99R from the record.

Rescoring the Static-99R as a new piece of evidence is problematic because it signals to judges that the person has not “progressed” in some way. These reports do not typically acknowledge that only unusual circumstances would cause the Static-99R to change, and the government in particular is quick to point out when a decrease is due only to age.<sup>187</sup> Rescoring the Static-99R implies that there are individuals whose Static-99R scores *could* change, and that this particular offender is not one of them. This is misleading. Though theoretically

183. *Id.*

184. *Id.*

185. *Id.*

186. Some factors may increase while in prison. For example, an individual *could* be charged with other sexual crimes, and even convicted of them. But most individuals, particularly those who are incarcerated for lengthy sentences, will not be charged with or convicted of an additional crime. Thus, it is unlikely that someone who is serving a twenty-year sentence would be charged with an additional crime in year twenty of his sentence, just before his civil commitment certification.

187. *See, e.g., United States v. Schmidt*, 295 F. Supp. 3d 586, 593–94 (E.D.N.C. 2018) (discussing that the government’s expert witnesses gave less weight to the age factor on the Static-99R).

a Static-99R score may decrease, perhaps due to an initial miscalculation or a reversal of a conviction on appeal, by the time someone reaches the civil commitment stage, either in an initial commitment or a release hearing, his Static-99R score is likely so high that any minor error would not make a meaningful difference in the Static-99R classification.

An individual's Static-99R score, at the time all crimes have been revealed, would have no ability to change aside from advancing age.<sup>188</sup> Prior to an initial commitment hearing, an individual would likely not have had a reason to be scored on the Static-99R, so its inclusion in these hearings is understandable, though often misinterpreted as described below. Many individuals who are civilly committed under the AWA were early commitments, dating nearly to the start of the Act, and have been committed for a decade or more. The use of the Static-99R, particularly coupled with statements indicating that any decrease due to age is not meaningful, skews both what the instrument is designed to do and what information can be gleaned from the instrument.

B. *Issues in Court Analyses of Static-99R Scores*—United States v. Schmidt

Perhaps the biggest drawback to the Static-99R's use is that courts must grapple with the Static-99R in the context of complex expert witness testimony. In AWA cases, that testimony can become highly statistical and somewhat manipulated; well-intentioned judicial opinions display the misuse of these instruments. One issue that frequently arises in civil commitment hearings is determining which expert is correct.<sup>189</sup> Nearly all experts will use the Static-99R, among other tools, to evaluate an offender.<sup>190</sup> Interestingly, evaluators will commonly score the offender differently,<sup>191</sup> despite the Static-99R's claim of great inter-rater reliability leading to consistency in scoring. The recent case *United States v. Schmidt*<sup>192</sup> provides useful language for analysis. This case revolved around a seventy-five-year-old man who committed his first act of child molestation in 1984 and had a lengthy criminal sexual history.<sup>193</sup> The Bureau of Prisons attempted to certify Schmidt as a sexually dangerous person, but the district court found that he did not meet the criteria for commitment.<sup>194</sup>

The court explained that out of the five experts who testified, “the Court elect[ed] to give [one of the government's experts] testimony less weight, apart

188. See *supra* Part II.

189. See, e.g., *Wooden II*, 887 F.3d 591, 601 (4th Cir. 2018) (discussing credibility and consistency of expert testimony).

190. Reinhard Eher et al., *Failure of Static-99 and SORAG to Predict Relevant Reoffense Categories in Relevant Sexual Offender Subtypes: A Prospective Study*, 3 SEXUAL OFFENDER TREATMENT 1, 1 (2008) (“Presently, the Static-99 is the most widely used actuarial risk assessment tool for sex offenders.”).

191. See, e.g., *Schmidt*, 295 F. Supp. 3d at 593.

192. 295 F. Supp. 3d 586 (E.D.N.C. 2018).

193. *Id.* at 590, 593.

194. *Id.* at 589.

from again emphasizing her determination that respondent scored a 3–4 on the Static-99R, which corresponds to a moderate risk.<sup>195</sup> The other four experts “all scored the respondent as a 5 on the Static 99R.”<sup>196</sup> Two experts “put his risk of recidivism at 15 to 21% over a five year period,” but a third expert “found that the recidivism rate was 15.2% over five years.”<sup>197</sup> After describing that two experts also conducted additional assessments, including the Static-2002R<sup>198</sup> and SVR-20, each finding different results, the court noted that “these assessments represent averages, and do not cleanly line up with any one individual’s actual risk of offending.”<sup>199</sup>

The court addressed dynamic risk factors before summarizing the testimony:

Both Dr. Saleh and Dr. Plaud testified that respondent would not have serious difficulty refraining from sexually violent conduct or child molestation if released. Dr. Hastings and Dr. Zinik, while coming to similar conclusions in their actuarial analysis, gave less weight both to respondent’s age and his lack of infractions over the last fifteen years in finding that he would have difficulty. Because this Court finds that respondent’s age and current status are highly relevant, it chooses to give Dr. Saleh and Dr. Plaud’s testimony more weight. While respondent was first convicted later in life than others committing similar offenses, at the age of 41, he is still now 75 years old.<sup>200</sup>

To begin, the court acknowledged a credibility issue arising out of differing Static-99R scores. The court, however, did not proceed to analyze (1) how the scores could possibly be different between the evaluators and (2) how an evaluator could have a range for a Static-99R score given that the assessment is supposed to be based off of concrete and agreed-upon facts. The same issue arose with the Static-2002R scoring. Given that these are actuarial instruments, each scorer should have identical information and therefore should arrive at the same score. Furthermore, because the Static-99R instrument is accompanied with a scoring chart, two evaluators should not be able to give a range of risk of reoffense scores if one can give a precise numeric value to risk of reoffense.

*Schmidt* is one of many cases that expose courts’ apparent acceptance of rater discretion when scoring the Static-99R. In *United States v. Matherly*,<sup>201</sup> for

195. *Id.* at 593.

196. *Id.*

197. *Id.*

198. The Static “suite” has undergone several minor revisions over time and each has been validated with new score tables. The Static-99R is considered presently to be the most accurate. For more information, see generally STATIC-99: CLEARINGHOUSE, <http://www.static99.org/> [https://perma.cc/NRL7-VBAT].

199. *Schmidt*, 295 F. Supp. 3d at 593.

200. *Id.* at 593–94.

201. No. 5:06-HC-2205-BR, 2012 U.S. Dist. LEXIS 190629 (E.D.N.C. May 3, 2012).

instance, the court noted that Dr. Zinik assigned a score of 7 on the Static-99R, and that, “[s]imilar to Dr. Zinik, Dr. Cunic gave . . . a score of 7 on the Static-99R.”<sup>202</sup> By including “similar,” the court implied that there is an option, or even an expectation, that the scores might not match and that because the scores actually did the result is more valid. The court’s default understanding is opposite of what it should be: that the Static-99R score should be the same across all evaluators and any differences should raise skepticism about the instrument’s validity for that individual.

The *Schmidt* court importantly recognized that these scores do not equate to an individual’s risk of reoffending and engaged in a discussion of relevant dynamic factors.<sup>203</sup> However, this portion of the opinion exposes some misunderstandings about what questions are contained in the Static-99R and how that impacts the likelihood of recidivism. Because age is inherently a part of the Static-99R scoring—so much so that it can affect an offender’s final score by a range of four points—age is already accounted for in the score. To say that an evaluator gave more or less weight to age essentially says that they are providing an opinion as to the validity of the Static-99R itself. Those factors *not* accounted for in the Static-99R, such as lack of infractions while confined, provide new and additional information that a judge should consider to more accurately assess the third prong that does not call into question the validity of the Static-99R.

The problems with the Static-99R scoring are not limited to judicial interpretations. Evaluators themselves clearly err when administering the Static-99R. In an earlier AWA case, one evaluator changed her score via testimony after hearing portions of other experts’ testimony.<sup>204</sup> She apparently determined that the respondent had a “lack of intimate, adult relationships,” and consequently added one point to the second item, thereby making her score match that of the other evaluators.<sup>205</sup> The second item is scored either as a “1” or “0” based on whether the offender has “[e]ver lived with a lover for at least two years.”<sup>206</sup> Using professional judgment to gauge whether an offender has well-developed adult relationships is a clinical judgment issue, not a factual inquiry. This is the exact type of discretion that the Static-99R was designed to avoid, yet the evaluator used such discretion to increase her score of the respondent, consequently placing the respondent in a higher risk category than the instrument should have.

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202. *Id.* at \*22 n.7.

203. *Schmidt*, 295 F. Supp. 3d at 593 (“[T]hese assessments represent averages, and do not cleanly line up with any one individual’s actual risk of offending.”).

204. *United States v. Perez*, No. 5:11-HC-2015-BR, 2012 U.S. Dist. LEXIS 161916, at \*12 n.3 (E.D.N.C. Nov. 13, 2012).

205. *Id.*

206. PHENIX ET AL., *supra* note 9, at 94.

*C. Past Criminal History Versus Present Condition*

In determining present dangerousness, courts must balance the weight afforded to past acts as compared with present condition. Courts should consider a respondent's present condition in addition to his past criminal history. Courts have expressed that past criminal history alone is insufficient to demonstrate by clear and convincing evidence that an individual would have serious difficulty refraining from reoffending. Yet, courts are willing to acknowledge that past criminal history may have a role in future offending. Although some decisions indicate that courts are aware that the Static-99R is based on past acts,<sup>207</sup> they do not seem to understand the dual weight being placed on past criminal history when incorporating the Static-99R into their analysis of dangerousness.

A compelling and logical recidivism argument is that an offender who perpetually repeats their crimes has historically demonstrated that they have serious difficulty refraining from reoffending, since they have been convicted of the crime already and will choose to do it again. Not surprisingly, Dr. Phenix, a creator of the Static-99R, has testified that she chooses to focus on pre-incarceration actions because of her "belief that actions taken while in the outside world are more accurate predictors of future behavior upon release."<sup>208</sup>

The First Circuit has recognized that "[a] court could reasonably conclude that an individual who has committed multiple offenses but successfully completed a rehabilitation program may be less dangerous than someone who has committed one offense but exhibits a perpetual desire or propensity to commit more offenses."<sup>209</sup> Although this analysis is correct, a court's hesitance to release a sexual offender with a lengthy and disturbing criminal history is understandable.<sup>210</sup>

AWA hearing opinions—particularly those in which an initial commitment is overturned on appeal—emphasize that past acts and criminal history are relevant but cannot be the sole basis of determining recidivism.<sup>211</sup> By ignoring past actions in a determination of dangerousness, one overlooks important information. Recently, the Fourth Circuit upheld a release order over the government's appeal in part because the district court found that the government's experts "relied too heavily upon historical criminal behavior to justify their conclusions that [the respondent] is currently sexually

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207. See, e.g., *Schmidt*, 295 F. Supp. 3d at 593.

208. *United States v. Antone*, 742 F.3d 151, 168–69 (4th Cir. 2014).

209. *United States v. Volungus*, 730 F.3d 40, 49 (1st Cir. 2013).

210. See, e.g., Anne Blythe, *Man Who NC Prosecutors Tried To Keep in Prison Now Wanted for Murder in Missouri*, NEWS & OBSERVER (Raleigh May 22, 2015, 7:25 PM), <https://www.newsobserver.com/news/local/crime/article21733404.html> [<https://perma.cc/YR98-JJ66>].

211. See *Antone*, 742 F.3d at 167–68.

dangerous.”<sup>212</sup> The Fourth Circuit supported the district court’s decision not to heavily weigh actuarial instruments because they are “based almost entirely on historical factors which can never change and do not account for any development in . . . mental health.”<sup>213</sup>

Yet courts and evaluators alike seem to “double count” these factors. For example, one evaluator’s report stated that the offender’s “past history *and* high scores on the Static-99R . . . indicate a very high probability that his past patterns of sexually abusing children will continue.”<sup>214</sup> Thus, past history appears to have been a factor outside the Static-99R; yet the Static-99R, as explained in Part II, is comprised entirely of the known past history.<sup>215</sup> The court then explained that it acknowledged the actuarial instruments but placed “greater weight” on “factors outside the actuarial scheme,” including relapse (meaning the commission of another sexual crime).<sup>216</sup> In doing so, the court demonstrated its misunderstanding of what is actually included in the actuarial scheme since relapse *is* incorporated.<sup>217</sup>

#### D. *The “Serious Difficulty Refraining” Issue and Static-99R*

Given these problems, both intrinsic to the instrument and the way courts use the instrument, courts should critically analyze experts’ opinions, particularly those that heavily rely on actuarial instruments like the Static-99R. Courts must remember that although “likelihood of reoffense” and “serious difficulty refraining” from reoffense can overlap, they are not inherently the same inquiry. Therefore, courts should be cautious and ensure their analysis matches the statutory language. Courts should recognize that the Static-99R provides a background framework to understand statistical risk of reoffense while also recognizing that traits unique to the individual that are used to gauge whether an individual should be civilly committed are not captured in the instrument.

The intention of the AWA is clear: to civilly commit sexual offenders who, because of a mental illness, are likely to reoffend.<sup>218</sup> The statutory language does not match the intention of the Act. Instead, it requires confinement of those who would have serious difficulty refraining from reoffending.<sup>219</sup> Courts are in the unenviable position of having to toe the line between upholding the

212. *Wooden II*, 887 F.3d 591, 601 (4th Cir. 2018).

213. *Id.*

214. *United States v. Bolander*, 722 F.3d 199, 212–13 (4th Cir. 2013) (emphasis added).

215. *See supra* Part II.

216. *Bolander*, 727 F.3d at 215.

217. *See PHENIX ET AL.*, *supra* note 9, at 94.

218. *See United States v. Antone*, 742 F.3d 151, 158 (4th Cir. 2014).

219. 18 U.S.C. § 4247(a) (2018).

intention of the act and adhering to the statutory language. Such a conundrum results in opinion passages like the following:

[E]ven if the court were to fully credit Drs. Ross and Malinek's estimate that respondent's risk of re-offense is 30% at five years, . . . that still leaves a greater than 70% chance respondent will not re-offend. Given the evidence of volitional control in this particular case . . . the actuarial assessments do not leave the court with a definite and firm conviction respondent will commit another contact sex offense if released.<sup>220</sup>

Here, the court uses the Static-99R to estimate *this* respondent's likelihood to reoffend.<sup>221</sup> Such an assumption, as discussed earlier, is not supported by the literature and is erroneous.<sup>222</sup> The court then appropriately acknowledged a volitional control consideration which would tend to speak to the "serious difficulty from refraining" language in the Act.<sup>223</sup> The court ended not with the statutory language but with the intention of the Act.<sup>224</sup> Although the court used some of the correct scientific considerations, the court here appeared to be confused about whether to adhere to the *intention* of the Act or the Act itself, ultimately misusing the Static-99R and misapplying the inferences gleaned from it.<sup>225</sup>

Some opinions have grappled with the issue by simply concluding that, because the actuarial instruments "by their own terms" have classified someone as high risk for reoffending, the respondent "may be presumed to have the most difficulty refraining from sexual reoffending."<sup>226</sup> This conclusory language is highly flawed in a scientific application. Simply because someone has conducted an act many times in the past does not definitively determine whether or not they would have *serious difficulty refraining* from that activity in the future. When considering the liberty interest at stake, since civil commitment is indefinite, it is vitally important that courts do not assume scientific truths just because the evidence would be easier to understand that way.

Courts have said that the crux of the difficulty in resolving the third prong is that "there is no crystal ball that an examining expert or court might consult to predict conclusively whether a past offender will recidivate."<sup>227</sup> Though this statement is undoubtedly true, the court's logic is flawed. The statute requires

220. *United States v. Castle*, No. 5:17-HC-2204-FL, 2018 U.S. Dist. LEXIS 133426, at \*52 (E.D.N.C. Aug. 8, 2018).

221. *Id.*

222. *Supra* Section II.E.

223. *Castle*, 2018 U.S. Dist. LEXIS 133426, at \*53.

224. *Id.*

225. *See id.*

226. *United States v. Lange*, No. 5:08-HC-2070, 2012 U.S. Dist. LEXIS 159498, at \*35 (E.D.N.C. Nov. 7, 2012) (internal quotation marks omitted) (quoting *United States v. Wooden*, 693 F.3d 440, 461 (4th Cir. 2012)).

227. *United States v. Shields*, 649 F.3d 78, 89 (1st Cir. 2011).



a finding that an individual would have *serious difficulty* refraining from reoffending, not whether a past offender will or is likely to recidivate. But there are many things that an individual may be *likely* to do at some point in their life that he or she would not have *serious difficulty refraining* from doing. Here is an innocuous example: someone with a sweet tooth might be very likely to purchase and eat a doughnut later in life. That does not indicate that they would have serious difficulty refraining from purchasing and eating a donut if they were forbidden from doing so. The issues faced by sexual offenders and those with mental illness are much more complex, but the premise that *control* is not synonymous with *likelihood* spans the analogy.

Because the AWA is relatively young, the case law surrounding the nuance between likelihood and difficulty is limited. State law cases provide an important question that federal courts will inevitably grapple with as well. Many states have attempted to create a “threshold” risk of recidivism to answer the third prong by the relevant evidentiary burden. While some states indicate that the risk of reoffense must be higher than 50%,<sup>228</sup> others have held the risk must be “more likely than not,”<sup>229</sup> and others still have simply held that a majority likelihood is not necessary.<sup>230</sup> In each of these cases the state statute specified that the respondent must be *likely* to reoffend.<sup>231</sup>

The early AWA cases likely looked to state cases to attempt to resolve the “serious difficulty” inquiry. The Fourth Circuit made clear the relationship of likelihood to serious difficulty, finding that the district court erred by insisting on “proof of a greater than 50% risk of recidivism,” because it “finds no support in the language of the Act.”<sup>232</sup> The Fourth Circuit then adopted a portion of a Massachusetts opinion, which held that “[r]ecidivism rates are *circumstantially relevant* to the serious difficulty inquiry because offenders who continually expose themselves to punishment may be presumed to have the most difficulty refraining from sexual reoffending.”<sup>233</sup> But the court recognized that “*the ultimate question called for by the Act concerns the self-control of an individual, not the statistical rearrest patterns of a given population.*”<sup>234</sup> The court invoked the *Crane*

228. *Westerheide v. State*, 767 So. 2d 637, 660, 662 (Fla. Dist. Ct. App. 2000) (Sharp, J., concurring) (noting that because of the liberty interest at stake, a high barrier should be in place to civilly commit).

229. *In re W.Z.*, 773 A.2d 97, 112 (N.J. Super. Ct. App. Div. 2001).

230. *In re G.R.H.*, 711 N.W.2d 587, 594–95 (N.D. 2006) (finding that, under North Dakota’s statute, when expert testimony established that a respondent would have serious difficulty refraining from reoffending, the court permissibly inferred that the respondent would be likely to reoffend).

231. See *Westerheide*, 767 So. 2d at 660; *In re W.Z.*, 773 A.2d at 115–16; *In re G.R.H.*, 711 N.W.2d at 594–95.

232. *United States v. Wooden*, 693 F.3d 440, 461 (4th Cir. 2012).

233. *Id.* (emphasis added) (internal quotation marks omitted) (quoting *United States v. Hunt*, 643 F. Supp. 2d 161, 180 (D. Mass. 2009)).

234. *Id.* (emphasis added) (internal quotation marks omitted) (quoting *United States v. Hunt*, 643 F. Supp. 2d 161, 180 (D. Mass. 2009)).

analysis, which emphasized that serious difficulty and recidivism risk will not be demonstrable with mathematical precision.<sup>235</sup>

The case law is scattered in its treatment of the Static-99R. Some decisions place great weight on expert opinion based on the instrument while others seem underwhelmed by its incorporation into an expert opinion.<sup>236</sup> The prevailing definition of “clear and convincing evidence” is that the evidence is of such a nature as to produce a firm conviction in the mind of the trier of fact so that there is no hesitancy in the perceived truth.<sup>237</sup> Given that the Static-99R is riddled with more questions than answers, it is difficult to imagine how the instrument could be construed to rise to the level of “clear and convincing” evidence.

What is clear in courts’ treatment of the Static-99R, whether the instrument is highly regarded or mentioned in passing, is that it is poorly understood. This inconsistency in application raises serious concerns about the Static-99R and its use in courts. Given the gravity of the liberty interest at stake, clarity and consistency are necessary moving forward.

#### IV. RECOMMENDATIONS

*I believe there are many factors that you look at as far as a civil commitment is concerned. Certainly you have heard the last two days of a lot of discussion about actuarials. One of the things that is really missing is the dynamic factors of how that person is now [as compared to his former] acts. Static, meaning it’s all said and done and it’s easy to score, . . . but the dynamic factors allow for the growth of a person to change or it allows for the person not to change.*<sup>238</sup>

“Sex offender” is not a mental health diagnosis; instead, sexual offending can occur as a result of one too many mental health diagnoses, or of none at all.<sup>239</sup> The causes of sexual offending are not well understood, and the reason a violent rapist offends is likely different than that of a child pornography creator.<sup>240</sup> Scientific meta-analyses demonstrate that treatment can be effective at reducing rates of sexual recidivism.<sup>241</sup> Given that the reasons that individuals

235. *Id.*

236. See, e.g., *Wooden II*, 887 F.3d 591, 601 (4th Cir. 2018); *United States v. Schmidt*, 295 F. Supp. 3d 586, 593 (E.D.N.C. 2018).

237. *Addington v. Texas*, 441 U.S. 418, 423–24 (1979).

238. *United States v. Antone*, 742 F.3d 151, 163 (4th Cir. 2014) (quoting one of the expert witnesses).

239. Renee Sorrentino et al., *Sex Offenders: General Information and Treatment*, 48 *PSYCHIATRIC ANNALS* 120, 120–21 (2018); see also *supra* Section II.D (discussing Mr. Scott and the case of statutory rape).

240. See Dominique A. Simons, *Sex Offender Typologies*, in *SEX OFFENDER MANAGEMENT ASSESSMENT AND PLANNING INITIATIVE*, *supra* note 96, at 61, 80.

241. Sorrentino et al., *supra* note 239, at 120–21.

sexually offend vary widely, an individualized approach is necessary to accurately assess an individual's dangerousness.<sup>242</sup>

The Static-99R and other similar static instruments provide necessary information to the courts, and this Comment does not argue that they should never be used. Rather, this Comment aims to demonstrate their *misuse* by courts and the availability of other information that, when combined with other information, paints a more accurate depiction of what “serious difficulty refraining from reoffending” means. No scientific literature specifically links the Static-99R with difficulty refraining from reoffending. Regarding the Static-99R in a vacuum when a statute calls for an assessment of *likelihood* of reoffense is a legitimate use of the instrument—though other factors may still be relevant. The language of “likelihood” is simply not what the AWA requires, and instead evidence must demonstrate something more than actuarial information about how often offenders in a particular group reoffend.

As the quote above indicates, courts can look at many other factors aside from actuarial instruments that either speak to different aspects of the third prong or increase the reliability of the data. This section discusses the alternatives to relying on actuarial instruments.

#### A. *Conduct While Confined*

One contested factor critical to understanding if an individual would have “serious difficulty refraining” from reoffense is the respondent's conduct while confined. Conduct while confined can speak to volitional control, and although it remains uncertain whether a volitional control issue is required as a finding in order to civilly commit a respondent, many cases still discuss volitional control.<sup>243</sup>

Failure to recognize conduct while incarcerated and reliance only on acts that occurred prior to conviction can potentially rob an offender of decades of personal growth and progress. One recent ruling recognizes this delicate balance for an offender who had been in prison for sixteen years and civilly committed for an additional ten.<sup>244</sup> In a lengthy opinion, the court found that the respondent had progressed in treatment and that his behavior had improved over the length of his sentence.<sup>245</sup> The court further found that, because of the respondent's neurocognitive disorder, he was unable to progress further in treatment and that the Static-99R did not apply to him as it might to other offenders.<sup>246</sup> This nuanced approach recognizes the importance of time and

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242. Pamela M. Yates, *Treatment of Sexual Offenders: Research, Best Practices, and Emerging Models*, 8 INT'L J. BEHAV. CONSULTATION & THERAPY 89, 93 (2013).

243. *United States v. Hall*, 664 F.3d 456, 463 (4th Cir. 2012).

244. *See Yates Order*, *supra* note 95, at 2–3.

245. *Id.* at 26.

246. *See id.* at 21.

progress while confined, something that is absent particularly from older AWA cases.

Many courts quickly dismiss exemplary conduct while confined under the pretext that confinement does not represent reality since there are not conventional external stimuli.<sup>247</sup> Although earlier AWA cases stated that conduct while confined was important, they often failed to include such an analysis when the facts may well have been beneficial to the respondent.<sup>248</sup> Newer cases more heavily weigh the fact that “a period of incarceration does not freeze the inquiry at the moment an inmate entered prison,” recognizing that for lengthy sentences “[m]uch of the expert testimony offered by the government would have been identical if this inquiry had been held [at the date of incarceration].”<sup>249</sup>

Critics argue that confinement does not reflect the outside world, and therefore conduct while confined should not be considered in commitment hearings.<sup>250</sup> While prison provides a controlled environment, certain offenders continually get into fights or commit other acts of aggression against fellow inmates.<sup>251</sup> Given that the entire purpose of the AWA is to civilly commit the atypical and exceptionally dangerous offender and that nearly 0.5% of the adult male prison population will be a victim of sexual violence,<sup>252</sup> it is illogical to think that a primary way to identify who would have the most serious difficulty refraining from reoffending would exclude conduct while confined. Though not identical to the outside world, conduct while confined can be a valuable indicator of present dangerousness, especially when considering that a civilly committed individual has typically been confined for decades.

Furthermore, the scientific analyses of this principle do not support the proposition.<sup>253</sup> Some experts are rightly wary of unstructured clinical opinions, viewing them as less accurate than actuarial instruments, and an evaluator considering conduct while confined would require clinical opinion.<sup>254</sup> However, incorporating conduct while confined is a far cry from the poorly predictive, unstructured clinical judgments in the early days of civil commitment.<sup>255</sup>

247. *United States v. Schmidt*, 295 F. Supp. 3d 586, 594 (4th Cir. 2018).

248. Findings and Conclusions at 23, *United States v. Blackledge*, No. 5:09-HC-02118-D (E.D.N.C. March 7, 2017), ECF No. 156 (acknowledging that conduct while confined was important to an inquiry of sexual dangerousness but never discussing the respondent’s conduct while confined).

249. *Schmidt*, 295 F. Supp. 3d at 594.

250. *United States v. Antone*, 742 F.3d 151, 168–69 (4th Cir. 2014).

251. Nancy Wolff et al., *Sexual Violence Inside Prisons: Rates of Victimization*, 85 J. URB. HEALTH 835, 835 (2006).

252. *Id.*

253. See, e.g., Baldwin, *supra* note 96, at 136.

254. *Risk Assessment*, *supra* note 107.

255. Baldwin, *supra* note 96, at 136–37 (discussing unstructured clinical judgment as the first generation of sexual offender assessment methodology and describing advancements in expert reporting).

Modern assessments rely on multiple actuarial instruments in addition to relevant factors not captured in actuarial instruments.<sup>256</sup> Some experts explain that certain acts while confined demonstrate an increased propensity to have serious difficulty refraining, such as alcohol use while incarcerated.<sup>257</sup> Nonetheless, conduct while confined cannot ethically be used exclusively to harm a respondent's case yet never assist someone in demonstrating that they would not have serious difficulty refraining from reoffending. As best stated by the *Schmidt* court, "Time passes. Respondent's volitional control as it is now is the subject of this inquiry, not his posture in 1985. . . . The recent years, in which respondent has shown volitional control, even in prison, are evidence in his favor."<sup>258</sup>

#### B. *Dynamic Factors and Combining Static and Dynamic Instruments*

Courts' desire to assign concrete numeric values to dangerousness is understandable given how complex the analysis of "serious difficulty refraining" from reoffense can be. Indeed, the Static-99R can serve as a good baseline. Studies show predictive accuracy increases when the Static-99R is combined with other instruments as opposed to a single test.<sup>259</sup> For example, the Sexual Offender Treatment Intervention and Progress Scale ("SOTIPS"), when combined with the Static-99R, increased predictive accuracy up to 0.89, with significant prediction of recidivism in *all* six categories of risk—something the Static-99R alone cannot claim.<sup>260</sup> Because these dynamic assessments incorporate questions that speak to volitional ability, they can speak much more clearly to the question the statute asks than the Static-99R alone.<sup>261</sup> They cover categories such as emotional regulation,<sup>262</sup> risk management,<sup>263</sup> and impulsivity.<sup>264</sup>

Furthermore, new research indicates that simply knowing a risk of recidivism is not nearly as important as knowing which personality traits highly influence that individual's actions. Researchers recently found that knowing the underlying reason for the acts captured in actuarial instruments was more

256. See *United States v. Schmidt*, 295 F. Supp. 3d 586, 593 (E.D.N.C. 2018).

257. *United States v. Montgomery*, 310 F. Supp. 3d 637, 641–44 (E.D.N.C. 2018) (discussing whether substance abuse while confined can be a serious mental disorder that would demonstrate ongoing dangerousness).

258. *Schmidt*, 295 F. Supp. 3d at 594.

259. McGrath et al., *supra* note 121, at 443–53.

260. *Id.*

261. See generally ROBERT J. MCGRATH, GEORGIA F. CUMMING & MICHAEL P. LASHER, SEX OFFENDER TREATMENT INTERVENTION AND PROGRESS SCALE 6–37 (2013), <https://www.csom.org/pubs/SOTIPSMANUALOctober2013.pdf> [<https://perma.cc/5SAL-XEZL>] (describing each scoring criterion in detail).

262. *Id.* at 26–27.

263. *Id.* at 14–15.

264. *Id.* at 30–31.

important than just knowing their overall score<sup>265</sup>: “[K]nowing that an offender scored moderately on the Static-99R is not as useful as knowing that this offender scored highly on Persistence/Paraphilia and low on General Criminality and Youthful Stranger Aggression. For this specific offender, treatment providers might de-emphasize anger management treatment programs and emphasize self-regulation of paraphilic interests.”<sup>266</sup> The most useful information comes from “explain[ing] the source of the risk.”<sup>267</sup>

Given that civil commitment is intended to provide treatment for mental health conditions, the evidence used to determine dangerousness should match the criteria that is known to reduce risk.<sup>268</sup> Addressing dynamic factors in treatment has been scientifically shown to reduce risk of reoffense.<sup>269</sup> Critics may argue that the science is young on such incorporated lesser-studied factors, but recent reports indicate the field of sexual offender recidivism analysis is moving towards this hybrid approach.<sup>270</sup> Court decisions also mirror this trend, acknowledging that individuals may legitimately change over the course of lengthy sentences and treatment interventions.<sup>271</sup> With the possibility of lifelong incarceration on the table, even an incremental improvement in predictive validity should be enough to require the use of a more accurate methodology to assess an individual’s dangerousness.

#### CONCLUSION

The safety of the public is the utmost priority. Civil commitment through the AWA is the mechanism Congress has chosen in order to ensure the public’s safety from sexual offenders. Courts have a difficult task to ensure public safety while not violating the liberty interests of an offender. As it stands, one of the primary pieces of evidence used in civil commitment hearings is the Static-99R, which has low predictive accuracy, is commonly misunderstood, and gauges only a likelihood of recidivism. To use such an instrument when the Act explicitly calls for a determination that an offender would have *serious difficulty refraining from sexually violent conduct or child molestation*, combined with the high burden of proof, is both unethical and unconstitutional. Viable alternatives exist to demonstrate sexual dangerousness, but because the Static-99R has not been

265. Sébastien Brouillette-Alarie, Jean Proulx & R. Karl Hanson, *Three Central Dimensions of Sexual Recidivism Risk: Understanding the Latent Constructs of Static-99R and Static-2002R*, 30 SEXUAL ABUSE 676, 694–95 (2018).

266. *Id.* at 695.

267. Ruth E. Mann, R. Karl Hanson & David Thornton, *Assessing Risk for Sexual Recidivism: Some Proposals on the Nature of Psychologically Meaningful Risk Factors*, 22 SEXUAL ABUSE 191, 191 (2010) (emphasis omitted).

268. Baldwin, *supra* note 96, at 136.

269. Yates, *supra* note 242, at 93.

270. Baldwin, *supra* note 96, at 133.

271. *United States v. Schmidt*, 295 F. Supp. 3d 586, 593–94 (E.D.N.C. 2018).

convincingly challenged in court, it remains the most prevalent instrument in use. By combining dynamic instruments and valuing a sexual offender's progress while confined, courts can both uphold public safety while valuing the constitutional liberty interests of respondents who are held past the completion of their criminal sentence.

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\*\* Mara Howard-Williams, MPH. I would like to thank Professor Joan Krause for assisting in the development of this Comment. I also thank the *North Carolina Law Review* Volume 98 Board and editors who suggested wonderful ways to strengthen the Comment. Additionally, I thank my family and friends for reading drafts and supporting me throughout this process.

APPENDIX A

**Static-99R – TALLY SHEET**

Assessment date: \_\_\_\_\_ Date of release from index sex offence: \_\_\_\_\_

Item #	Risk Factor	Codes		Score
1	Age at release from index sex offence	Aged 18 to 34.9		1
		Aged 35 to 39.9		0
		Aged 40 to 59.9		-1
		Aged 60 or older		-3
2	Ever lived with a lover	Ever lived with lover for at least two years?		
		Yes		0
		No		1
3	Index non-sexual violence - Any convictions	No		0
		Yes		1
4	Prior non-sexual violence - Any convictions	No		0
		Yes		1
5	Prior sex offences	<u>Charges</u>		<u>Convictions</u>
		0		0
		1,2		1
		3-5		2,3
		6+		4+
6	Four or more prior sentencing dates (excluding index)	3 or less		0
		4 or more		1
7	Any convictions for non-contact sex offences	No		0
		Yes		1
8	Any unrelated victims	No		0
		Yes		1
9	Any stranger victims	No		0
		Yes		1
10	Any male victims	No		0
		Yes		1
<b>Total Score</b>		<b>Add up scores from individual risk factors</b>		

Nominal Risk Levels (2016 version)	<u>Total</u>	<u>Risk Level</u>
	-3, -2,	I - Very Low Risk
	-1, 0,	II - Below Average Risk
	1, 2, 3	III - Average Risk
	4, 5	IVa - Above Average Risk
	6 and higher	IVb - Well Above Average Risk

There [ was, was not] sufficient information available to complete the Static-99R score following the coding manual (2016 version). I believe that this score [ fairly represents, does not fairly represent] the risk presented by Mr. XXXX at this time. Comments/Explanation: \_\_\_\_\_

\_\_\_\_\_  
(Evaluator name)

\_\_\_\_\_  
(Evaluator signature)

\_\_\_\_\_  
(Date)



