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After 25 Years, It Is Past Time To Reform New York's Sex Offender Risk Assessment System: Part I

In this article, the author outlines the significant flaws of the sex offender risk assessment instrument. A second article to be published later will explain why these deficiencies are not adequately corrected by court departure determinations.

By **Daniel Conviser** | January 05, 2021

Convicted sex offenders under New York law must have their risk of reoffense assessed by courts under the Sex Offender Registration Act ("SORA" or "Megan's Law") with courts determining whether offenders are at low, moderate or high risk to re-offend. The rankings not only determine the length and intrusiveness of sex offender registration and community notification, which often last for life, but vital collateral matters, like whether offenders may live within 1,000 feet of a school, receive Section 8 housing vouchers or live in public housing.

Courts are required to base their risk-level determinations on an offender's scores on a Risk Assessment Instrument (the "RAI") created by a state entity, the Board of Examiners of Sex Offenders (the "Board"). The RAI provides a presumptive risk level which courts can then depart up or down from if there are factors the RAI doesn't adequately consider. There is little evidence, however, that the RAI has any predictive validity

The instrument was created in January 1996, almost 25 years ago, by the five state employees who comprised the Board, and even at the time was not based on actuarial data correlated to reoffense risk. It mixes risk predictions with "harm" value judgments and other policy considerations to create numerical rankings which have no direct relationship with either the modern science of sex offender risk assessment or the implicit value judgments about the relative harms caused by various kinds of sex crimes made by New York's Penal Law. Judges, moreover, given the absence of expert risk evidence at the vast majority of SORA hearings lack the appropriate tools to make valid risk decisions.

The SORA statute outlines non-exclusive factors the Board must use to "develop guidelines and procedures to assess the risk of a repeat offense … and the threat posed to public safety" but does not require the development of a risk assessment instrument or mandate any of the RAI's scoring parameters. The RAI applies some of the statute's requirements, modifies others to create materially different criteria and ignores some. Compare Correction Law §168-l with the "Sex Offender Risk Assessment Guidelines and Commentary", discussed infra.

As I first opined in an extended decision 10 years ago, *People v. McFarland*, 29 Misc.3d 1206(A) (Sup. Ct., NY County 2010), the risk determinations of the RAI are arbitrary. I am not the only person or organization who thinks so. Many of the issues discussed here were also outlined in great detail in a report reissued earlier this year by three Committees of the New York City Bar Association. See "Report on Legislation by the Criminal Courts Committee, Criminal Justice Operations Committee and Corrections and Community Reentry Committee on legislation to amend the correction law in relation to SORA risk assessments" (hereinafter the "City Bar Report"). These concerns are also routinely raised during SORA hearings and are well understood by professionals in the field. Yet, despite the well-established flaws of this system, nothing significant about it has changed in 25 years. It is time for those who care about our justice system to take another look.

In this article, I will outline the significant flaws of the RAI. A second article to be published later will explain why these deficiencies are not adequately corrected by court departure determinations. The *McFarland* decision and City Bar report are repeatedly cited here because they cite to numerous additional authorities.

How Valid Sex Offender Risk Assessments Are Made

For 12 years, I have presided over a docket of cases under New York's Sex Offender Management and Treatment Act (Article 10 of the Mental Hygiene Law, "SOMTA"), a system not directly related to SORA, under which a small category of particularly dangerous sex offenders may be subject to indefinite confinement or strict and intensive supervision and treatment in the community following the completion of their criminal sentences. I have listened to hundreds of hours of expert testimony by psychologists and psychiatrists about sex offender risk assessment and have learned how valid sex offender risk assessments are made.

The outlines of how such assessments are created are simple. An expert psychologist or psychiatrist, one who has often devoted his or her entire professional life to evaluating and treating sex offenders, reviews every piece of information about the offender which can be found and conducts an extended interview with him, if possible. The expert may administer tests and interview collateral contacts, like an offender's relatives or sex offender treatment providers. When determining risk, evaluators also score or review "actuarial risk assessment instruments." These are conceptually no different than the actuarial tables used by insurance companies to underwrite insurance policies.

Decades of research on tens of thousands of convicted sex offenders throughout the world have determined the factors which are correlated to offenders who reoffend and those who don't. These actuarial tables cannot precisely predict what any individual offender will do. To draw an analogy, while we know that smoking is correlated with an increased risk of lung cancer, there are people who will contract lung cancer who never smoked and some who have smoked and will not contract lung cancer. The analysis of sex offender risk assessment, moreover, is far less advanced than our understanding of what causes cancer.

Among other limitations, such instruments do not account for the fact that that most sex offenses are not reported and do not result in arrests or convictions. But actuarial instruments can be useful in helping to inform the "clinical judgment" which professionals use to determine risk.

How the RAI Works

The RAI looks like an actuarial risk assessment instrument because it is a scale with numbers. But it isn't. It wasn't designed to correlate to risk data. Rather, when it was created in 1996, the five state employees who developed it (members of the Board, in consultation with some outside "experts") picked things which they felt were especially egregious or had some relationship to risk, some of which were required under the SORA statute, and combined them into a numerical scale with 15 categories they made up. The RAI is accompanied by a 24-page "Sex Offender Registration Act Risk Assessment Guidelines and Commentary" (the "Commentary") which explains how the instrument should be scored and provides background about its development and rationale.

Some of the factors on the scale are about harm, some are about risk, some are apparently about both, some are based on other policy goals and the rationale for some are simply unclear. Thus, under the first risk factor, an offender gets 10 points if forcible compulsion is used in a scored offense, 15 points if physical injury is caused and 30 points if the offender is armed with a "dangerous instrument." These are obviously all significant aggravating facts about a sex offense. A *conviction* for a violent crime along with a sex crime (not required under the RAI) has an actuarial relationship with increased risk. See *McFarland,* 2010 NY Slip op. at 19-20. But the specific manner in which the RAI defines and grades these characteristics has no relationship to the science of risk assessment.

An offender with a prior non-violent misdemeanor conviction for a drug crime gets 5 extra points. But if it is a felony, 15 points are added. If an offender touches a victim's sexual or intimate parts *over* clothing, 5 points are scored. But if the contact is *under* the clothing 10 points are scored. None of these distinctions are supported by any research on sex offender recidivism. See *McFarland,* 2010 NY Slip op. at 28 (discussing Risk Factor #9); 20-21 (discussing Risk Factor #2).

Nor are they consistent with the harm determinations the Legislature has made in the Penal Law. Under the Penal Law, sexual abuse is not less serious if clothing is not penetrated. Under the Penal Law, a 21 year-old who has sexual intercourse with a 16 year old victim or an 11 year old victim, in either case without forcible compulsion, both commit felonies. But while intercourse with a 16 year old post-pubescent victim is a Class E felony punishable by up to four years in prison, a crime sometimes referred to as "statutory rape", the same conduct with an 11 year-old is a Class A-II felony requiring a mandatory life maximum sentence with a minimum term of between 10 and 25 years. Compare PL §130.25 (2) (Rape in the Third Degree) with PL §130.96 (Predatory Sexual Assault Against a Child). Under the RAI, however, the harm caused in both such cases is considered identical. The rape of the 11 year old without forcible compulsion is not more serious than the rape of the 16 year old. In both cases, 20 points are added to an offender's score. Commentary, Risk Factor #5, "Age of Victim."

The precise numerical scores under the RAI also have no correlation to risk data. Each factor is scored with 5, 10, 15, 20, 25 or 30 points. Only one general explanation for these scoring ranges, applicable to 2 of the RAI's 15 scoring categories, is provided by the Commentary. It explains that because the two risk factors dealing with an offender's "release environment" (#14 and #15) "are prospective and can readily change, the Board chose not to weigh this section as heavily as others in the assessment instrument." Commentary, General Principles, paragraph 8. But even this limited explanation is inaccurate. The maximum number of points under these "release environment" factors is replicated in other non-release environment categories and, as discussed infra, release environment factors are not only scored when they are prospective, but also when they occurred in the past.

Nor do the scoring *ranges* have any apparent rationale. Scores from 0 to 70 are low risk; from 75 to 105 are moderate risk and from 110 to 300 are high risk. Thus the "low risk" category comprises 23% of the scoring range; the "moderate risk" category 10% and the "high risk" category 63%. No one has ever attempted to explained why. Roughly 25% of SORA offenders are classified as "high risk" even though other measures indicate the actual percentage of such high risk offenders in New York is far lower. See City Bar Report, p. 7.

The Distorted Impacts of 'Suggested Departures'

Inappropriate results also arise under the RAI because of "suggested departures." New York courts have consistently held that risk assessment courts must follow the dictates of both the RAI and the Commentary—without exception. See *McFarland,* 2010 NY Slip op. at 39.

While many factors are scored under the RAI, however, the Commentary provides that some factors the RAI considers important are *not* scored but may be considered in "departures" upward or downward from the presumptive risk level. For "departures" however, scores of from 5 to 30 points are not assessed. An entire level is jumped, which, depending on where an offender randomly happens to fall on the RAI matrix prior to a departure, can mean a difference of 5 points or also, for example, 50 or 75 points.

Under Risk Factor #9, for example, an offender is scored 30 points for a prior violent felony, sex crime or the misdemeanor of Endangering the Welfare of a Child. The Commentary explains that the crime of Endangering the Welfare of a Child, although not a sex crime under the Penal Law or SORA, is treated "as if it were a sex crime because it generally involves sexual misconduct", a proposition for which no evidence is cited. However, the Commentary continues, "where there was no such [sexual] misconduct, a departure may be warranted."

Thus, courts have two options. The first is to score the prior misdemeanor endangering offense as a sex crime with 30 points even though it is not a sex crime. In *People v. Sincerbeaux,* 27 NY3d 683, 691 (2016) the Court of Appeals held this was permissible in that case because of the "violent nature" of the prior endangering crime and the "gravity of the current incest offense."

The second option is to score the points and then depart down an entire level. So, for example, suppose an offender with the 30 points added to an otherwise total point score of 150 is a level 3 offender with a total point score of 180 points. A downward departure to Level 2 would put him within the Level 2 point score range, of between 75 to 105 points, a reduction of 75 points (to 105) the highest point score for a moderate risk offender. Thus, this offender will get a 45 point windfall point reduction he could not obtain with *no* criminal history (the original score of 150 reduced to 105) because he was previously convicted of Endangering the Welfare of a Child. What is *not* allowed under the RAI is what is obviously rational (given the RAI's general constructs): where an offender's prior misdemeanor did not reflect sexual misconduct, simply score the points as a prior non-sexual offense misdemeanor (which is assessed 5 points under the RAI). The *Sincerbeaux* court, following the RAI's dictates, rejected this approach as "misguided, as it is in contravention of the [SORA] Guidelines" noting that a 5 point assessment of points in the case would have been imposed "arbitrarily." n. 3.

Additional Illustrative Irrational Results Dictated by the Commentary

10 points are added under the RAI if a prior felony or sex crime occurred within three years because of its "recency", another factor with no basis in risk-assessment science. See *McFarland,* 2010 NY Slip op. at 31. But if the same crime occurs on the same date or *after* the sex crime at issue, no points are scored, even though such crimes are even more recent. The RAI also scores extra points for prior criminal convictions. However, if a criminal conviction occurs at the same time or *after* a sex offense is committed, no points are scored. In that situation the RAI recommends considering an upward departure. No such upward departure

recommendation is made, however, for a crime which is not scored for "recency" because it occurred *later* than a scored sex crime and is thus too recent. See Commentary, Risk Factor #9, (Number and Nature of Prior Crimes); Risk Factor #10 (Recency of Prior Felony or Sex Crime).

Under Risk Factor #14, offenders get five extra points if they are released with supervision which is not "specialized" for sex offenders and given 15 points if released without supervision. There is no empirical evidence that the degree of such supervision is correlated with reoffense risk. But there are two other more obvious problems. The first is that specialized sex offender supervision is less likely for the *least dangerous offenders*. Thus, if parole or probation authorities were to determine that specialized sex offender supervision was not justified because of an offender's low risk to reoffend, the offender would have to be given points for being at *increased risk* because that low-risk determination resulted in an absence of specialized sex offender supervision. See *McFarland,* 2020 NY Slip op. at 34.

Second, where a risk level determination is made many years after a supervision term commenced or would have commenced, on a motion to modify a risk level determination in the future, for example, these *prospective* supervision parameters still may be scored, even though they concern events which occurred long in the past and have no conceivable relation to reoffense risk now. See, e.g., *People v. McGrigg,* 67 AD3d 1426 (4th Dept. 2009) (upholding point assessment and denial of downward departure for being released from prison without supervision 10 years ago with no evidence of sexual offending since); *People v. Ferrara*, 38 A.D.3d 1302 (4th Dept, 2007) (point assessment for being released without supervision proper, where defendant released 8 years before SORA hearing).

The Commentary provides that where an offender relocates to New York from another jurisdiction and has "satisfactorily completed the terms of that jurisdiction's community supervision" the offender will be scored zero points. However, if the offender long ago completed the terms of a *New York State* term of community supervision, the offender will still be scored with additional points if that past supervision was not specialized. Commentary, Risk Factor #14, "Supervision."

Recall that the Commentary treats the harm caused by the rape of an 11 year old without forcible compulsion the same as a non-forcible compulsion rape of a 16 year-old under Risk Factor #5. Under a *different* scoring parameter, however, where the specific type of sexual contact with a victim is scored, rather than the victim's age, (Risk Factor #2) the Commentary provides for a suggested downward departure where a lack of consent is based on a victim's age (without specifying what age might qualify). Such departures are suggested, but only under the most serious of the three scoring categories under this non-age related factor. The Commentary provides, without further elaboration, that such downward departures should be considered for age-based crimes if the assignment of points "results in an over-assessment of the offender's risk to public safety."

While a crime involving sexual intercourse is scored with 25 points under this factor, an attempted rape without sexual contact is scored zero points. However, the Commentary suggests that an upward departure should be considered if a defendant "intended [not attempted] to rape his victim." Such a departure will then result in an effective scoring increase for "intended" rapists of less or *more* than the points scored for a completed rape, depending on where the offender falls on the scoring matrix prior to the departure.

A further complication is that the Commentary requires a presumptive high-risk determination regardless of any RAI score or departure consideration if one of four "overrides" to the scoring rules apply. Commentary, General Principles, paragraph 4. These "overrides" reflect the authors' views that certain facts about an offender or an offense, like a prior felony conviction for a sex crime or a recent threat to reoffend, are particularly egregious. There is no evidence, however, that any of these "overrides" *alone* put offenders at a high risk to reoffend. See *McFarland,* 2010 NY Slip op. at 36-37. In a different portion of the Commentary, however, it provides that "the guidelines should eschew per se rules and that risk should be assessed on the basis of a review of all pertinent factors." Commentary, General Principles, paragraph 2.

The Lack of Validation Studies

It would be easy to determine how predictive the RAI actually is in predicting sex offender recidivism. All of the data is readily available. Each sex offender's risk level could be put into a computerized program. Then, data about which offenders were arrested or convicted of additional sex offenses over time could be compared. Matching the data would tell us how predictive SORA risk level determinations have been. No such analysis has ever been published by the State.

In 2011, Dr. Jeffrey C. Sandler of the State University of New York at Albany conducted a statistical study of sex offender outcomes under SORA but his work is available only through a slide show. The City Bar Report summarized his analysis as finding "that an individual's score on the RAI marginally corresponds to their risk of re-offending, but that a better-designed risk assessment instrument would much more accurately predict an individual's risk." The report also said that Dr. Sandler's analysis "concluded that the RAI does not significantly predict the harm caused by an individual's reoffending B the second aim of the RAI." City Bar Report, pp. 7-8.

The RAI Is Frozen in Time

The RAI has not been amended, except for technical changes, since it was created in 1996. The current edition was published in 2006. It lists 36 scholarly articles the RAI's developers purportedly relied on. The most recent was published in 1995. Beginning in 1995 when a raft of new sex offender laws like SORA were enacted, however, the sex offender risk assessment field was revolutionized by new research tools, most importantly the use of "meta-analyses", compilations of numerous individual studies which allowed risks to be assessed for tens of thousands of offenders over time. See *McFarland,* 2010 NY Slip op. at 18-19. Experts who assess offenders today rely on a recognized body of actuarial studies and scholarly works. None remotely approach the 25 year vintage of the articles the RAI was purportedly based on.

The RAI is so outdated that its creation predated by 10 months the effective date of legislation making it a crime under New York law to simply possess (rather than produce or distribute) child pornography. See Chapter 11 of the Laws of 1996, PL §263.16, effective Nov. 1, 1996. Under the RAI, a contact offense against a "stranger" is scored with additional points. This actually does correlate to an increased risk to reoffend for contact offenses, although that is inadvertent, since this "stranger" factor was not intended by the RAI to assign points for recidivism risk.

The Commentary explains that offenders against "strangers" pose a "heightened concern for public safety and the need for community notification." Commentary, Risk Factor #7. That may well be true, but the "need for community notification" does not speak directly either to the risk that a new sex offense will occur or the harm which would be caused by a reoffense. Rather, the RAI assigns points under this factor based on its view that community notification is necessary for stranger offenders, then uses those points as part of an "objective" risk score (see Commentary, General Principles, p.3) which then justifies enhanced community notification under the SORA statute. The "objective" risk score thus justifies the policy which was the basis for assigning the points in the first place.

Since the RAI was created before the possession of child pornography was a crime in New York, however, this stranger factor has also been held by the Court of Appeals to provide for the scoring of additional points where a child pornographic image depicts a "stranger" to the defendant, a rule no one believes makes any sense with respect to risk, harm or any other goal. Thus, the normal child pornography offender who possesses images of stranger children is scored with more points than in the unusual case where an offender knows an abused child depicted in an image, the obviously more dangerous scenario.

In *People v. Gillotti,* 23 NY3d 841 (2014) the Court of Appeals held that courts could remedy such anomalous results through departures, but that the RAI had to be read in accordance with its plain meaning. See also *People v. Johnson,* 11 NY3d 416 (2008) (similar). In 2012, in response to concerns which had been expressed in case law about the irrationality of scoring points for "stranger" victims in child pornography cases as well as concerns that the RAI's assessment of points for multiple victims in child pornography cases did not make sense, since virtually all child pornography cases included multiple victims, the Board issued a lengthy and cryptic "Position Statement" on child pornography SORA scoring which seemed to disavow scoring points for stranger victims. The *Gillotti* court held, however, that courts could not rely on this Position Statement to decline point scores for stranger victims since the Board had not modified the RAI itself.

In *People v. Jusino*, 11 Misc.3d 470, 477-83 (Sup. Ct., NY County 2005 [Kahn, J.]) the court read the four articles the RAI cited as authorities for the proposition that recidivism risk was increased where offenders committed a first sex crime under the age of 20 (for which 20 points are added under the RAI), found the articles did not support the assessment of points in the case and noted that the articles relied upon by the Board included studies dating back to 1938.

The Road Not Taken: What Actually Determines Risk

The RAI does not consider most of the significant actuarial factors which do correlate to risk and for the issues it touches on, considers them in a way which does not reflect the data. An easy way to see some of the factors which correlate to risk is to look at the Static 99R, "the most widely used sex offender risk assessment instrument in the world" which is "extensively used in the United States, Canada, the United Kingdom, Australia and many European nations." Static 99 Clearinghouse (available on the web). The Static 99R is based on research on thousands of offenders and was created by reviewing which factors correlate to increased or decreased risk based on this data. It measures "static" or unchanging variables.

The most significant scoring factor under the Static 99R is the simplest: the offender's age at release. Reoffense risk is increased for offenders between the ages of 18 and 35. At age 40, the risk of reoffense begins to drop. By 60, it reduces dramatically. If you cannot recall hearing accounts of 75 year old forcible rapists, your memory has not failed you. Such crimes rarely occur. Offenders who have sexually assaulted male victims pose a greater risk than those who have assaulted females. Offenders who offend against unrelated persons pose a higher risk than those who offend against family members. Offenders who have committed "non-contact" sex offenses, like public masturbation, which reflect deviant sexual interests, pose a higher risk than offenders who have committed contact offenses alone. Living with a lover for at least 2 years reduces the actuarial risk to reoffend. See Static 99 Clearinghouse; Static 99R Coding Rules, Revised 2016; Static 99R "Tally Sheet" (2016) (available on the web); *McFarland,* 2010 NY Slip op. at 38. None of these factors are considered by the RAI.

Time spent offense-free in the community reduces the actuarial risk to re-offend. An offender who has been at liberty with no evidence of sexual offending for 10 years poses a lesser risk than one who has been at liberty for half that time. *McFarland,* 2010 NY Slip op. at 37. This factor is not considered by the RAI. There is significant evidence that the completion of a properly designed sex offender treatment program reduces recidivism risk. See, e.g., United States Department of Justice, Sex Offender Management Assessment and Planning Initiative, "The Effectiveness of Treatment of Adult Sexual Offenders", 2015; Static 99R Clearinghouse, "Treatment." The Commentary, however, recounts that their "experts" in 1996 "encouraged skepticism toward treatment" and recommended that the completion of treatment "should not reduce his [an offender's] risk level." Commentary Appendix. The Commentary provides that treatment participation is generally not scored unless an offender has an "exceptional" response to treatment (a term which is not otherwise defined), in which case a downward departure can be considered. The reason, the Commentary explains, is that "the efficacy of sex offender treatment is open to question." It cites two studies, published 27 and 30 years ago. Commentary, Risk Factor #14, Supervision.

The Sometimes Inaccurate 'Harm' Presumption

To assess the harm which would be caused by a reoffense, the RAI considers the harm caused by a scored offense and then presumes the Defendant would be most at-risk to commit that identical crime again. Commentary, General Principles, paragraph 1. But that may not be true. For example, I once supervised an offender under SOMTA who had previously committed exhibitionism and voyeurism crimes hundreds of times. He frequently masturbated in public places. On one occasion he also attempted to commit a contact sex offense, a type of crime subsequent events revealed he was never known to attempt again. Although his risk of committing this attempted contact offense was much less than his risk of committing another crime involving exhibitionism or voyeurism, upon being scored for the attempted contact offense, the RAI required that the harm caused by a reoffense be the same as that caused by the scored offense, rather than the type of crime the Defendant was at most risk to commit again.

Part II: The Limits of Departure Jurisprudence

The RAI sets the presumptive risk level but courts have the final say in what level is set. Court departure determinations, however, do not effectively correct the RAI's flaws. Part 2 of this article will explain why and offer suggestions for reform.

Daniel Conviser *is acting Supreme Court Justice, Manhattan Criminal Term.*