

An Untenable Standard: “No” vs. “Low” Risk in the Adam Walsh Act

by Robin J. Wilson and David S. Prescott*

Introduction

The Adam Walsh Child Protection and Safety Act (AWA; H.R. 4472 [109th] [2006]) has implications for American citizens convicted of specified child sexual offenses who wish to sponsor a spouse or other family member for permanent resident status (i.e., Green Card). Indeed, the AWA requires that the petitioner—the citizen convicted of the child sexual offense—represent no risk for harm, beyond a reasonable doubt, to the person for whom sponsorship is being offered. In Section 402—Barring Convicted Sex Offender from Having Family-Based Petitions Approved, subsection (a)(2)—the AWA amends Section 204(a)(1) of the Immigration and Nationality Act, noting that a citizen of the United States who has been convicted of a specified offense against a minor may not petition for permanent resident status for a spouse or other family member “unless the Secretary of Homeland Security, in the Secretary’s sole and unreviewable discretion, determines that the citizen poses *no risk* to the alien with respect to whom a petition . . . is filed [italics added].”

On the surface, the impetus for such a standard is understandable. Those seeking permanent resident status in the United States have certain inherent vulnerabilities (e.g., the risks of starting afresh in a foreign country), and any reasonable person would want the safest possible entry and eventual residency status for them. However, we would submit that the no-risk standard is unachievable and likely unfair. This paper

reviews what is known and not known about the no-risk standard and offers suggestions for policy and practice.

The no-risk standard is unachievable even for persons without a prior history of child sexual abuse or, for that matter, any other criminal offending. In practical usage, a no-risk standard does not exist in other arenas where risk assessment is typically employed. For instance, most U.S. states and Canadian provinces have mandatory automobile insurance, even for those who have never had an accident and might believe that they are at no risk for future accidents. To cite another example, the Patient Protection and Affordable Care Act (H.R. 3590 [111th][2010], aka “Obamacare”) made it essentially illegal for U.S. residents to be without health insurance,

accidents. When tragedies occur, there is little discussion about the thousands of other airliners that landed safely on the same day.

Studies have shown repeatedly that the likelihood of persistence in sexual offending after conviction is far less common than was once believed (Hanson et al., 2014; 2018). Although research has shown clearly that punishment-only approaches toward crime are ineffective (Aos et al., 2006; Lipsey & Cullen, 2007; Smith et al., 2002), it is still the case that detection by the legal system has a profound effect on stopping sexual offending and that the sexual offenders are most commonly convicted only once (Harris & Hanson, 2004).

Two key implications follow. The first is that there is a big difference between people

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regardless of their current health status or probability of future health difficulties.

Even outside the scope of these closely related examples is the fact that “zero tolerance” policies—although sensible on paper—often fail in their implementation. In the spirit of the American tradition of life, liberty, and the pursuit of happiness, it may make more sense for policies to support and emphasize the importance of sexual abuse prevention. For example, providing information about the inherent risks (including sexual exploitation) in seeking current-resident status may actually be more beneficial in the long term (Kaufman, 2010).

Risk to Reoffend

Many laypersons and policymakers believe that sexual offenders are intractable monsters, unable to change their lascivious interests or control their drive to engage in more and more offenses. To some degree, this is to be expected given that media accounts typically focus on the most egregious cases and that policymakers typically get more information from the media than from scientifically sound sources about people who have sexually abused (Sample & Kadleck, 2008). An analogy is to airplane

who sexually abuse and are caught and those who are not. The second implication is that it is easy to develop a retrospective bias based on knowledge of someone’s history. An analogous situation occurred when it became known that presidential candidate Bill Clinton had smoked marijuana in college. Some people became concerned that this behavior—engaged in several decades prior—might reflect on his judgment as president. Similar discussions are currently being had in relation to President Donald Trump’s past behaviors and his current fitness for office.

Although a small minority of people who abuse are truly at high risk for reoffending (Hanson et al., 2014), the distribution of risk in sexual offenders is heavily positively skewed. This means that there are many more low-risk offenders than there are high-risk offenders. According to actuarial risk ratings (see Phenix et al., 2016), fewer than 10% of sexual offenders would be considered at high risk, or “well above average risk” to sexually reoffend on an actuarial risk assessment instrument known as the Static-99R (i.e., with scores of 6 or greater; Hanson et al.,

*Robin J. Wilson, Ph.D., ABPP, is clinical and forensic consultant at Wilson Psychology Services LLC, in Sarasota, Florida, and assistant clinical professor in the Department of Psychiatry and Behavioural Neurosciences at McMaster University in Hamilton, Ontario, Canada. He is the author or coauthor of numerous books and articles on the diagnosis and treatment of social and sexual psychopathology and is currently focused on collaborative models of risk management and restoration as persons of risk are transitioned from institutional to community settings. He can be reached by email at robin@rjwphd.com. David S. Prescott, LICSW, is clinical services development director for the Becket Family of Services, in Portland, Maine, and provides consultation to agencies around the world. Mr. Prescott has produced 17 book projects and numerous articles and chapters in the areas of assessing and treating sexual violence and trauma. He can be reached by email at DSP@DavidPrescott.net.

2017), while nearly 70% (i.e., with scores of 3 or lower) would be considered to be at low or low-moderate risk for reoffending—or at “average risk” or lower according to Hanson and colleagues. Fewer than 5% of offenders would be considered to be at such high risk for new sexual offending that they merit designation as sexually violent predators in sexual offender civil commitment proceedings (Wilson et al., 2012).

As noted above, lawmakers and laypersons are often susceptible to misinformation about people who sexually abuse, including incidence, prevalence, and the nature of risk. The degree to which triers of fact and political decision makers are misinformed

Sadly, although restrictions such as residence restrictions and electronic and GPS monitoring are intended to decrease the likelihood of new sexual offending by identified sexual offenders, many have questioned whether iatrogenic effects are occurring. In other words, these risk prevention measures may actually be increasing risk by making it more difficult for released sexual offenders to establish balanced, self-determined lifestyles (see Huebner et al., 2013; Levenson & D'Amora, 2007; Levenson & Hern, 2007; Mercado et al., 2008; Socia, 2011; Willis & Grace, 2008, 2009; Wilson & McWhinnie, 2013). For example, it is worth noting that having a stable intimate relationship of two years or longer with an age-appropriate partner is itself a protective factor against sexual

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deserves a closer look. Community perspectives on sexual offending are often based more on media interpretations than on scientific reality (Center for Sex Offender Management, 2010). In general, research has shown that the media tends to over-report sexual crimes by a factor of almost 14 times the actual rates (Ditton & Duffy, 1983). Furthermore, the media typically present sexual crimes in a manner that causes fear in the community much more often than for other violent offenses such as homicide, robbery, or assault (Dowler, 2006). In many ways, such representations have fueled the current use of increasingly stricter measures with sexual offenders, including registration and notification, use of GPS technologies, residency restrictions, and restrictions regarding immigration matters, among others. Moreover, calling attention to these facts can be destructive to one's career. For example, in 2012, the prominent director of a treatment program for high-risk sexual offenders lost his job in the wake of media coverage of an email he had written in which he (correctly) noted the inherent difficulties of balancing the needs of public safety and the rights of the individual. His attempts to find another job were actually thwarted by the governor's office of another state familiar with the press coverage. One lawmaker told the media that he was a “bad egg” who had a “catch and release policy towards violent sexual predators” (Stein & Bice, 2014).

abuse, while social isolation can elevate risk (Hanson & Morton-Bourgon, 2005; Hanson et al., 2007).

Meta-analytic reviews (e.g., Hanson et al., 2017, 2018) of the rates at which sexual offenders recidivate suggest that the average sexual recidivism rates of identified sexual offenders are in the 10% reoffense range over five to six years of follow-up, with many U.S. jurisdictions now reporting lower rates. Rates of other types of reoffending (e.g., violent or general) in sexual offenders are always higher than rates of sexual recidivism. In a study of high-risk sexual offenders released to the community and followed for four and a half years, Wilson and associates (Wilson et al., 2007) found that 10.8% reoffended sexually, while 25% reoffended in a violent manner (including sexual offending) and 35.8% reoffended generally (including all types of criminal offending). Further, in a review of data from 15 states, the Bureau of Justice Statistics (see Langan et al., 2003) found that only 5.3% of 9,691 sexual offenders released in 1994 reoffended sexually, while rearrest rates for property offenders and drug offenders were 73.8% and 66.7%, respectively (Langan & Levin, 2002). In California, persons on the sexual offender registry were at least 14 times more likely to experience a parole violation than a new sexual offense (84.4% vs. 5.9%; California Department of Corrections and Rehabilitation, 2011).

Child Sexual Abuse

Estimates of the incidence of pedophilia in the adult male population put the rate of offending at about 1% and note that of those persons who sexually interact with children, about half are diagnosable with pedophilic disorder (see Seto, 2017) according to DSM-5 criteria (American Psychiatric Association, 2013). Additional research (Hall & Hall, 2007) has suggested that a majority of sexual offenses against children are perpetrated by persons with a pedophilia diagnosis using DSM-IV-TR criteria (American Psychiatric Association, 2000). A further study (Wurtele et al., 2013) recently indicated that as many as 6% of males would engage in sexual behavior with a child if they were guaranteed not to be caught or punished. In this latter study, the participants were persons with no documented history of sexual abuse against children. This suggests that the concept of “no risk” is not supportable even within populations without known engagement in child sexual abuse.

Not all persons who commit sexual offenses against children are necessarily pedophilic with regard to their sexual interests and preferences (Freund & Watson, 1991). Indeed, there are certain markers known in the etiological and risk assessment literatures that increase the likelihood that someone will be diagnosed as pedophilic. Identification of pedophilic interests during phallometric testing (psychophysiological measurement of penile tumescence; see Freund & Blanchard, 1989) was more likely when the offender had more than one victim and solicited his victims from outside familial contexts (Freund et al., 1991). Further, offenders who select child victims who are either unrelated or are strangers are more likely to be at higher risk, as are those who target boys in their sexual offending (Hanson & Thornton, 2000). Pertinent to the AWA immigration issue that forms the focus of this review, research has consistently shown that sexual offenders who are able to establish rewarding, stable, and intimate relationships with age-appropriate partners are at lower risk for sexual recidivism (Hanson & Thornton, 2000; Hanson et al., 2007).

Recidivism

The vast majority of new sexual assaults are not committed by registered sexual offenders (Langan et al., 2003; Sandler et al., 2008). Indeed, Sandler et al. (2008) found that 95% of arrests in New York State for sexual offenses were leveled against persons with no prior sexual offense conviction. If the benchmark for risk for future sexual

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offending was a history of prior offending, then each person in this 95% might have been assessed as no risk, which is clearly not supportable.

In recent reports, Hanson and associates (Hanson et al., 2014; 2018) called into question the assessment of risk in sexual offenders, specifically as that risk pertains to offenders who have been in the community for extended periods of time. In these two studies, Hanson and colleagues found that risk for future sexual offending was most pronounced during the first few years after release (or conviction, in the case of those who received community-based sentences only), and that risk decreased substantially as time in the community without offending increased. They concluded that offense history is a valid predictor of future offending, but that it is time-dependent, with an

extended period of time offense-free in the community being ultimately a better predictor variable. In their meta-analytic study of 7,740 offenders from 21 samples, Hanson et al. (2014) found that low-risk offenders typically demonstrated recidivism rates of no greater than, but typically lower than, 5% over 10 years or more of post-release follow-up.

Other Considerations

Although the preceding findings speak for themselves, the simple fact is that there are numerous other factors that render a conclusion of no risk impossible. For example, science is only just beginning to consider the ways that various unpredictable factors can elevate risk for sexual aggression generally. For example, recent attention to the impact of traumatic brain injury has shown its contribution to a range of problematic behaviors (Longo, 2012).

Likewise, an often-forgotten element of risk assessment is what psychologist and commentator Paul Meehl (1954) referred to as the “broken-leg” phenomenon. This refers to the idea that if one has a perfect instrument for predicting whether or not a person will engage in an activity in the very near future, what will happen to the assessment process if the evaluator learns that the subject has broken his or her leg that morning? Will that alter the conclusions, or will the evaluator believe that the measure is so good that it must take into account these twists of fate?

As one example of the points above, consider the case of Brett Favre, the famous professional football player. After a highly successful career, he was alleged to have sent a photograph of his genitals to an unsuspecting media reporter. Mr. Favre had no

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prior history of this behavior. Was he at no risk for further offense, or did his long-time participation in football (which involved literally butting heads with others) contribute to undetected head injuries that contributed to engagement in illegal sexual behavior? Favre is, of course, only one possible example, albeit a high-profile one. Recognition of these unforeseeable events has gone on for decades, since the famous Phineas Gage case (http://en.wikipedia.org/wiki/Phineas_Gage). Under these conditions, is it possible to conclude that anyone is at no risk for a sexual crime?

- Preferring individualized risk assessments in cases where there are questions of dangerousness. After all, not all people who abuse are equally dangerous, and there are many factors to consider when limiting someone's basic human rights (e.g., marriage). Even beyond the consideration of time at risk noted above, it is clear that aging and other maturational forces also have a dramatic impact on risk (Barbaree et al., 2009; Helmus et al., 2012; Lussier, 2016). The available research provides conclusive evidence that risk reduces over time in the vast number of cases where sexual abuse has occurred (Hanson et al., 2018), even among juveniles (Caldwell, 2016).

Science has shown that there are effective ways of significantly reducing risk without entering into the ethically questionable fray of limiting human rights and restricting liberties.

Finally, when considering policy and the law, it is important to remember that marriage holds a special place in discussions of human rights. For example, Article 16 of the United Nations Universal Declaration on Human Rights (http://www.ichrp.org/en/article_16_udhr) holds that:

- 1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
- 2) Marriage shall be entered into only with the free and full consent of the intending spouses.
- 3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

When considering what science has demonstrated about sexual reoffense risk against the backdrop of human rights, the wisdom of efforts such as the Adam Walsh Act is far more open to question.

What Works?

Science has shown that there are effective ways of significantly reducing risk without entering into the ethically questionable fray of limiting human rights and restricting liberties. Rather than establishing untenable policies, policymakers should consider the following alternatives:

- Giving preference to short-term and aggressive solutions like supervision and treatment rather than to longer term and more passive solutions such as those contained in the Adam Walsh Act. The former have a more proven track record in reducing sexual violence than the restrictions promulgated in the Adam Walsh Act (McGrath et al. 2003; Zgoba et al., 2015).
- Giving preference to funding for sexual violence prevention rather than to strategies that appear to have no scientific basis and may actually increase risk (Kaufman, 2010; Tabachnick & Klein, 2011).

Conclusion

In the authors' combined 60 plus years of experience in the field of sexual offender risk assessment and treatment, there has never been a credible forensic psychological report in which a professional referred to someone as posing "no risk." Indeed, we know of no empirically supported risk assessment measure that includes a no-risk category—the lowest risk measurable on such instruments is noted as "very low risk" (e.g., Hanson et al., 2017; see also Harris et al., 2015).

Although it is scientifically and professionally indefensible to offer a no-risk rating, it is clear that risk can be reduced, either by intervention or simply by the passage of time. The factors that ameliorate risk in persons previously convicted of sexual

offenses are not fully known. However, research strongly suggests that completion of an empirically informed course of treatment is likely to reduce risk going forward (see Bonta & Andrews, 2016; Hanson et al., 2009). Access to strong prosocial community support also appears to play a significant role in the long-term management of risk (Wilson et al., 2009). Specifically, those persons with extended prosocial support networks tend to experience considerably less difficulty in almost all domains in life (see Harris & Hanson, 2010, and Wilson & McWhinnie, 2013, regarding sexual offending; see Bonta & Andrews, 2016, regarding criminality in general). Additionally, age-related desistance also appears to play a significant role in diminishing risk, with older persons being much less likely than younger persons to engage in further acts of sexual violence (see Barbaree et al., 2009; Helmus et al., 2012; Lussier, 2016).

Ultimately, all people involved in the prevention of sexual violence are also advocates for public safety. We all desire to be tough on crime. However, we will be most successful when we develop realistic standards and expectations for public policy. Despite the fact that sexual offenders are among society's most reviled members, it is still the case that many of their human rights are also related to decreases (although not the complete elimination) in risk. Examples of factors that are protective against risk for general crime include education and stable relationships. Setting the bar too high simply does not work and unnecessarily restricts basic human rights.

In conclusion, the no-risk standard regarding sponsorship of family members or potential spouses for permanent resident status required by the Adam Walsh Act is unreasonable and not supported by the science of sexual offender risk prediction or our understanding of the nature and manifestations of child sexual abuse. The AWA requirement that citizens with child sexual abuse perpetration histories demonstrate beyond a reasonable doubt that they pose no risk to the age-appropriate partners they wish to sponsor for permanent residency is insurmountable as written.

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