

Sex Offender  
Recidivism  
and FRE 413

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# Overview of this presentation

- Estimating sexual recidivism
  - Decisions about the estimate
  - Estimates using 'official' records
- Public perceptions of recidivism
  - Common misconception
  - The 'High and Frightening' myth
  - Issues relating to labels and risk
  - Recidivism rates and labels
- Recommendations regarding FRE 413

# Estimating sexual recidivism

- Estimating recidivism depends on exactly *what* is being measured
  - Type of 'recidivism' event
    - Charge vs. Arrest vs. Conviction
  - Type of crime
    - Sex offenses vs. Any crimes? Do violations count?
  - Population/Sample
    - Child molesters vs. Rapists vs. Child Pornographers vs. Voyeurs
    - Adults vs. Juveniles
  - Follow up period
    - 3 years? 5 years? 25 years?

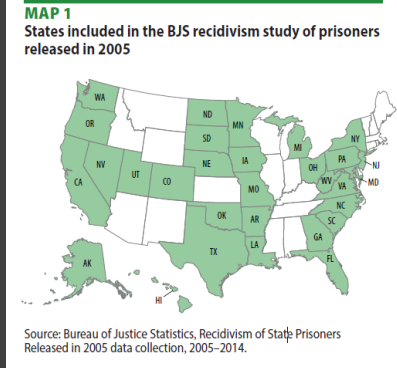
# Each decision influences the result

- Type of event
  - Charges will yield a higher %, but also more 'false positives'
  - Convictions will yield a lower %, but also more 'false negatives'
  - Rearrest is a common measure for 'recidivism'
- Type of crime
  - Most recidivism estimates specify sexual recidivism (i.e., a new sex crime)
- Population/Sample
  - The sample (and population) varies a lot from study to study
  - More specific samples yield estimates that are more precise, but less generalizable
- Time period
  - This varies based on the study

# Estimates using 'official' records

- A rough estimate of the sexual recidivism rate for individuals with prior sex crime convictions is that between 5 and 15% will be rearrested for a new sex crime within 5 years of release.
  - Letourneau et al., 2010; Levenson & Shields, 2012; Zgoba et al., 2012; Zgoba et al., 2016
- Alper and Durose (2019) found the sexual recidivism rate of sex offenders was 7.7% within 9 years of release.
- While longer time periods show a higher overall recidivism %, the risk of rearrest for a new sex crime *decreases* over time.
  - In other words, the longer you stay out, the less likely you'll be rearrested.

# Alper and Durose's (2019) findings



- Alper and Durose (2019) examined the recidivism rates (rearrest) of individuals across 30 states who were released in 2005.
- Sex offenders' sexual recidivism rate was 7.7% within 9 years of release.
- After the 2<sup>nd</sup> year post-release, <1% rearrested for a new sex crime in any given year.

**TABLE 2**  
Percent of prisoners released in 30 states in 2005 who were arrested within 9 years following release, by most serious commitment offense and types of post-release arrest charges

Most serious commitment offense	Post-release arrest offense								
	Any offense	Violent							
		Total violent <sup>d</sup>	Homicide	Rape/sexual assault	Robbery	Assault	Property	Drug	Public order
All prisoners	83.3%	39.1%	1.2%	2.6%	7.8%	31.3%	48.0%	48.0%	68.4%
Violent <sup>a</sup>	78.1%	43.4%	1.4%	4.0%	9.2%	34.1%	39.6%	36.7%	65.0%
Homicide	60.0	29.5	2.7	1.9	4.3	23.1	24.4	26.1	45.8
Rape/sexual assault	66.9	28.1	0.2	7.7	3.8	18.7	24.2	18.5	58.9
Robbery	84.1	47.2	1.5	3.4	16.8	34.3	47.7	45.3	67.1
Assault	82.9	50.7	1.4	2.8	7.7	44.2	44.3	43.2	69.6
Property	87.8%	40.3%	1.0%	2.5%	9.1%	31.9%	63.5%	48.4%	72.4%
Drug	83.7%	34.0%	1.1%	1.6%	5.8%	28.0%	42.4%	60.4%	66.9%
Public order	81.8%	39.8%	1.3%	2.4%	6.7%	32.5%	42.5%	38.8%	70.1%
Rape/sexual assault*	66.9%	28.1%	0.2%	7.7%	3.8%	18.7%	24.2%	18.5%	58.9%
Offense other than rape/sexual assault <sup>b</sup>	84.1% †	39.6% †	1.2% †	2.3% †	8.0% †	31.9% †	49.2% †	49.6% †	68.9% †

**TABLE 5**  
Cumulative percent of prisoners released in 30 states in 2005 after serving a sentence for rape/sexual assault who were arrested for rape/sexual assault after release, by age and year after release

Most serious commitment offense	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9
All prisoners	0.5%	0.9%	1.2%	1.5%	1.8%	2.0%	2.2%	2.4%	2.6%
Prisoners released after serving a sentence for rape/sexual assault	1.9	3.5	4.4	5.1	5.9	6.3	6.9	7.6	7.7%
Age at release									
24 or younger	2.5	7.1	9.4	9.7	10.3	10.5	11.2	11.7	11.8
25-39	2.8	3.8	4.3	4.9	6.3	6.8	7.5	8.2	8.4
40 or older	0.8	2.2	3.0	3.9	4.2	4.5	5.0	5.8	5.9
Race/Hispanic origin									
White <sup>a</sup>	1.6	2.6	3.2	3.9	4.6	5.1	5.5	5.8	6.2
Black/African American <sup>a</sup>	1.7	4.4	4.6	6.0	6.5	6.8	7.7	9.7	9.7
Hispanic/Latino	3.3	4.9	7.5	7.5	8.1	8.1	8.6	8.6	8.6
Other <sup>a,b</sup>	1.0	2.6	3.8	4.1	4.5	4.7	6.7	6.7	6.9

# Public perceptions of recidivism

- Recidivism estimates are a problem, because they do not match the public's misconceptions about sex offenders.
- The general public (and CJ/Judicial officials) views 'sex offenders' as:
  - Homogenous
  - Untreatable
  - Sexual predators
  - Pedophiles
  - Having stranger victims
  - Extremely high risk for sexual recidivism

Table 1

*Risk Estimates of the RSO Population*

% of RSOs who are . . .	N	Estimated % of RSOs				
		<10%	25%	50%	75%	>90%
Pedophiles	944	10%	19%	34%	21%	16%
Sexual predators	942	8%	16%	30%	26%	21%
Strangers to victims	942	21%	25%	32%	13%	9%
High risk						
New sex crime	942	6%	11%	24%	27%	32%
Abducting kids	941	20%	21%	26%	17%	15%
Child victims	938	14%	21%	26%	20%	18%
Teen victims	940	9%	19%	32%	23%	17%
Adult victims	942	10%	20%	34%	22%	14%
Nonsex crime	938	24%	23%	27%	13%	13%

*Note.* RSO = registered sex offender.

# How a misused quote influenced the courts

- Justice Anthony Kennedy:
  - Sexual recidivism “of untreated [sex] offenders has been estimated to be as high as 80%” (*McKune v. Lile*).
  - “The risk of recidivism posed by sex offenders is ‘frightening and high.’” (*Smith v. Doe*)
- That frightening and high ‘80%’ statistic was taken from a DOJ manual (Schwartz & Cellini, 1988)...Which cited an article in *Psychology Today*, a mass-market magazine (Freeman-Longo & Wall, 1986).
- Dr. Freeman-Longo:
  - 1986 quote: “Estimates of the recidivism rate among untreated sex offenders **range between 35% to 80%.**”
  - From a recent interview: “That [80% statistic] got taken to say all sex offenders recidivate at 80%. That’s absolutely incorrect, it’s wrong, it’s untrue.” (see Ellman & Ellman, 2015; Feige, 2017; Sullum, 2018).
- **This ‘high and frightening’ recidivism statistic of 80%, cited in multiple court cases, and believed by the public, is based on absolutely no evidence!**



# Issues relating to Labels and Risk

- In part, these views of ‘frightening and high’ recidivism rates have led to the stigmatizing label of ‘sex offender’
- Simply using the term ‘sex offender’ increases the public’s fear
  - Compared to ‘people convicted of crimes of a sexual nature’, using the term ‘sex offender’ yields more public support for restrictive policies and higher risk perceptions (Harris and Socia, 2016).
  - This is because the public uses the label as an either/or categorization.
    - “Once a sex offender, always a sex offender”
    - All sex offenders are seen as high-risk.
    - Therefore, if you are dubbed a ‘sex offender’ you are high risk.
    - A prior arrest increases the likelihood of police deciding to arrest someone in the future (Stolzenberg et al., 2020)

# The problem of recidivism rates and labels

- The category of 'sex offender' is much too broad to be of any real use in estimating risk.
- The question is whether a defendant's prior conviction alone automatically makes them 'high risk' to offend again (e.g., 7.7% rearrested after 9 years = high risk??).
- *Many* other things matter: Factors on the Static-99R, the number of prior sexual offense convictions, current employment/stable housing, years since release, etc. etc. etc.
- Knowing whether an individual had committed a prior sexual offense before says little about whether they are guilty of *the offense they're currently charged with*.

# Recidivism rates and labels, cont.

- Yet given the stigma of the 'sex offender' label, and the public misconceptions, presenting evidence of *any* prior sexual offense will likely have the jury see the defendant as a 'sex offender', and thus likely guilty of the current crime.
- The issue is the **gap** between:
  - The *actual predictive value* of knowing about a prior sex crime offense, and
  - The *predictive value the jury gives to that fact*
- It is likely that this gap is very large, and thus the jury may see the defendant as *more likely to be guilty of the current crime* than the prior history actually predicts.
- The federal rule is a dramatic departure from the normal rules of evidence. Under Rule 413, one does not need to be convicted of a prior crime (or even charged for it) for it to be used against them.

# Recommendations regarding Rule 413

- Due to the aforementioned issues, I believe FRE 413 poses many potential problems if adopted.
- FRE 413 should not be adopted by the Utah Supreme Court because:
  - It may result in undue stigma being applied to the defendant, without the safeguards offered by the traditional rules of evidence.
  - The public (jurors *and* judges) do not easily distinguish different risk levels among 'sex offenders.' In other words, one is either a 'sex offender' or not.
  - Providing accusations of prior (unconvicted) sex crimes may bias a juror/judge to see defendant as a 'sex offender' who is guilty of the current crime, based simply on *prior* (unproven) accusations, rather than the current evidence.
  - Individuals with the common 'once a sex offender, always a sex offender' belief are likely not open to evidence contradicting these misperceptions.

# References and other sources to consider

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## Rejecting the original FRE 413/414 provisions:

- 159 F.R.D. 51, 53 (Feb. 9, 1995).
- American Bar Association Criminal Justice Section Report to the House of Delegates,
- Perspectives on Proposed Federal Rules of Evidence 413-415, 22 FORDHAM URB. L.J. 343 (1995).
- Uniform Rule of Evidence (1999), introductory note.

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