

A Look at Polygraph During Civil Commitment – Is it Evidentiary or Investigative?

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Abstract: Civil commitment, during the first generation of “sexual psychopath” laws, was envisioned as an alternative to the criminal justice system while the second generation of similar laws now uses civil commitment as an extension for criminal sentencing. The first generation was based on the assumption that criminal sexual conduct, or at least some form of it, was the product of mental disorder, and that afflicted individuals were too sick to deserve punishment. The second generation was aimed at those considered “too dangerous” to release from prison with the goal of making these individuals safe for return to the community.

Thresholds for determining dangerousness are indistinct and the amelioration of an indistinct problem is also problematic. Polygraph is one of the tools used in this effort and the purpose of this paper is not to take either side of what has been a constant argument, but to study how polygraph can best be used during civil commitment – serving both the community and the detainee being examined.

Note: While some individuals detained as part of the civil commitment procedure have yet to be committed while others have been, this paper will refer to all of these individuals as “detainees”.

First generation: The Progressive movement of the early 20th century “was an effort to cure many of the ills of American society that had developed during the great spurt of industrial growth in the last quarter of the 19th century. The frontier had been tamed, great cities and businesses developed, and an overseas empire established, but not all citizens shared in the new wealth, prestige, and optimism” (www.u-s-history.com).

It was time for introspection. This effort took form in several ways including Prohibition and the Red Scare. The influx of psychiatry into the courts and newly developed psychiatric explanations of habitual criminality paved the way for another manifestation, the first generation of ‘sexual psychopath’ statutes in the United States.

The first laws were approved in the 1930’s, and by the 60’s about half the states had enacted some form of sexual psychopath law. Conceived as alternatives to the criminal justice system, some laws were commitment statutes – some were sentencing statutes, and some were hybrids. All of these statutes included a common denominator: they were based on the assumption that criminal sexual conduct, or at least some forms of it, were the product of mental disorder and afflicted individuals were too sick to deserve punishment.

For example, in 1939 Minnesota enacted a “psychopathic personality” (PP) law that allowed for indefinite civil commitment of sex offenders to the Department of Human Services for treatment. The rate of commitment in Minnesota during the period 1939–1969 was approximately 15 percent of those convicted, whereas in California in the 1950s, about 35 percent of apprehended sex offenders were committed as psychopaths. By the 1970s, the focus of the Minnesota law had shifted from “exhibitionists, consenting homosexuals, nonviolent pedophiles -- people who were seen at the time as deviant and unpleasant to have around.” (Janus) to violent recidivists, and the rate of commitments had dropped by 90 percent.

In 1975 the United States Supreme Court ruled in *O’Connor v. Donaldson* that involuntary commitment or treatment was a violation of a person’s civil rights. This was when a patient committed to a Florida State Hospital, Kenneth Donaldson, sued the hospital and staff for confining him for fifteen years against his will. The decision did not directly effect sexual psychopath laws as it was a ruling that “it is unconstitutional to commit for treatment a person who is not imminently a danger to himself or others and is capable to a minimal degree of surviving on his own.”

In 1977, the Group for the Advancement of Psychiatry (“GAP”) issued an influential report entitled *Psychiatry and Sex Psychopath Legislation: The 30s to the 80s*. The GAP Report characterized sex offender commitment statutes as an “experiment [that] has failed” (p. 942) and recommended the repeal of the sex offender commitment legislation. By the 1980s, most of the states with sex offender commitment laws had either repealed them, or had ceased actively using them.

Second generation: The beginnings of the second generation of sex offender commitment laws took root in about 1989 as task forces in the states of Washington and Minnesota proposed a renewed use of civil commitment as a tool for containing sexually violent individuals. In an attempt to become preventative rather than reactive – with the laudable goal being the control of individuals who pose the danger of future sexual harm – both states turned to civil commitment to increase social control. The main tools of this new approach were registration, notification, and civil commitment.

Debate on these laws was typically prompted by the pending release of a repeat sex offender or by a highly publicized sex crime, as well as by a general desire to toughen laws dealing with sex offenders. In May 1989, 7-year-old Ryan Alan Hade was raped and stabbed, and his penis was severed by a repeat offender in Tacoma, Washington. In October 1989, 11-year-old Jacob Wetterling was kidnapped in St. Joseph, Minnesota. Although Jacob was never found, there were similar abductions in the near area that included sexual assault and it was assumed that his abductor was the same perpetrator. Washington signed civil commitment into law in 1990 and the following year Minnesota modified its older psychopathic personality law.

Wisconsin passed the next civil commitment law in 1993 and it became effective in June 1994. (Wisconsin Act 479) In July 1993, 19-year-old Kansas college student Stephanie Schmidt was raped and murdered by a co-worker who had recently received an early release from prison after serving half of a twenty year sentence for raping a 20-year-old. Stephanie's parents successfully lobbied and established a sexual predator law in Kansas. In 1996 California became the fifth state to pass a civil commitment law.

Proponents often point to the incapacitation of committed individuals as proof of the efficacy of commitment laws while opponents have challenged these laws, based on two constitutional concepts. The double jeopardy clause prevents the state from “punishing twice, or attempting a second time to punish criminally, for the same offense” (*Witte v. United States*, 515 U.S. 389, 396 (1995)). The *ex post facto* clause “forbids the application of any new punitive measure to a crime already consummated” (*Lindsey v. Washington*, 301 U.S. 397, 401 (1937)).

The State Supreme Courts of Washington, Minnesota, and Wisconsin held the laws to be constitutional while a federal court in Washington and the Kansas Supreme Court held the laws to be unconstitutional. In 1997, in a 5-4 decision, the U.S. Supreme Court reversed the Kansas Supreme Court decision and upheld the constitutionality of the Kansas commitment law in *Kansas v. Hendricks*, 521 U.S. 346 (1997). Two days after the Supreme Court announced its ruling on *Hendricks*, the New York State Legislature passed its own version of the law.

As of the writing of this report (2/08), a total of twenty states (Arizona, California, Florida, Iowa, Illinois, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, North Dakota, New Jersey, New York, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin) and the District of Columbia have civil commitment laws. The new use of civil commitment differs in one critical respect from the first generation of laws. Instead of being addressed to persons considered “too sick” for punishment, the new laws were aimed at those considered “too dangerous” to release from prison.

Sex offender commitment laws typically contain four essential elements. The laws aim at individuals who have (1) a history of sexually violent or dangerous conduct and (2) a mental or personality disorder or “abnormality” that (3) “causes” or “predisposes” the individual to (4) likely future dangerous sexual conduct. Statutes are flexible as to the type of conduct, the type of mental disorder, or the risk threshold for dangerousness. Commitment statutes generally require the provision of treatment and release is typically based on “successful treatment.” Committed individuals can expect to remain committed until the conditions giving rise to the commitment—either the presence of a mental disorder or the prediction of future dangerousness—are ameliorated.

Doubts about the efficacy of treatment were central to the critique of the earlier sex offender commitment laws, and challengers of today’s laws often argue that the failure to provide effective treatment to committed individuals is evidence of a punitive intent. In 1999 the American Psychiatric Association Task Force on Sexually Dangerous Offenders issued a report that opposed the sexual predator laws that established post-incarceration civil commitment because the laws “misused psychiatry to detain a class of people for whom confinement rather than treatment was the real goal.” (*Psychiatric News*, November 18, 2005)

In its 2007 Report of the Sex Offender Policy Task Force, the National Association of Criminal Defense Lawyers states: “NACDL opposes civil commitment laws because they punish offenders who have paid their debt to society. If employed at all, sex offender civil commitment statutes should provide a full panoply of due process rights including the right to a jury trial, the right to confront adverse witnesses, the right to present evidence, rules of evidence, a high burden of proof on the government and a process for review and discharge which levels the burden squarely on the government.”

The NACDL report also includes “Because the liberty interest implicated by a civil commitment statute is similar to the liberty interest effected in criminal trials the person facing civil commitment should be afforded all of the same rights afforded to a criminal defendant.” (Page 9)

Polygraph in Civil Commitment:

Commitment laws generally ignore confidentiality that was assumed during pre-commitment treatment disclosures and permit prosecutors to base commitment cases on information disclosed during treatment sessions, related polygraph, and other testing. The same is true for disclosures made during treatment while committed. Release from commitment is typically based on “successful treatment” and success depends on full investment by the treatment subject, including disclosure of past sexual misconduct. The lack of confidentiality, during both phases of the civil commitment procedure, discourages detainees from disclosing or being “transparent.”

One of the most common tools used in civil commitment, outside of group therapy, is the polygraph. Commitment facilities typically hire examiners for testing of detainees and direct the examiner on the issue or issues to be visited. Since detainees have limited if any access to any society outside of the facility, the main use of polygraph in civil commitment is as a measure of “transparency” in regards

to pre-conviction sexual history. As of the writing of this article ten (Illinois, Iowa, Massachusetts, Missouri, North Dakota, New York, South Carolina, Texas, Virginia, Nebraska) of the twenty states with civil commitment laws have polygraph licensing. Facilities seldom have their own polygraph standards or a quality control mechanism and automatically incorporate the standards of the American Polygraph Association (APA) into their own.

The standards of the APA classify a polygraph examination as either an evidentiary or an investigative examination and do not identify civil commitment examinations as either one. An evidentiary examination is defined as: “A polygraph examination, the written and stated purpose for which, agreed to by the parties involved, is to provide the diagnostic opinion of the examiner as evidence in a pending judicial proceeding. An investigative examination is defined as: “A polygraph examination for which the examination is intended to supplement and assist an investigation and for which the examiner has not been informed and does not reasonably believe that the results of the examination will be tendered for admission as evidence in a court of record.”

In the same standards, “Types of investigative examinations can include applicant testing, counterintelligence screening, and post-conviction sex offender testing, as well as routine multiple-issue or multiple-facet criminal testing. Investigative examinations are required to be conducted with a testing and analysis technique that has been validated through published and replicated research.”

A validated testing technique is defined as “A polygraph technique for which exists a body of published and replicated studies demonstrating an average accuracy of:

90% or greater for evidentiary examinations, excluding inconclusive results, which cannot exceed 20%; or 80% or greater for investigative examinations, excluding inconclusive results, which cannot exceed 20%.”

As of the writing of this report (2/08) the APA has identified seven test formats as “validated” per the following research criteria:

1. The research had to be published in full.
2. The research had to be replicated.
3. The published polygraph technique had to be identified by name or reported in sufficient detail so that the correct name for the technique could be determined.
4. When multiple techniques were reported, accuracy figures had to be available for each technique.
5. The accuracy figures had to be broken out separately for truthful and deceptive cases.
6. Ground truth criteria must have been independent of the polygraph results.
7. The testing and scoring technique must have been representative of field practices.

8. Field cases must have been randomly selected or, with laboratory studies, subjects must have been randomly assigned to either deception or non-deception conditions.
9. The formulation of decisions of deception or truthfulness on individual cases could not consider the results of other examinations on the same crime.
10. For laboratory data, programmed countermeasure cases were excluded.

While the Army Modified General Question Technique (MGQT), the Concealed Information Test (AKA Guilty Knowledge Test), Federal Zone Comparison Test (AKA Army ZCT), Reid Technique, Relevant-Irrelevant (RI) Screening Test, Test for Espionage and Sabotage (TES), and Utah Zone Comparison Technique all meet the definition of “validated format” (Krapohl, 2007), they are not all applicable in civil commitment testing. Each of these techniques has a different level of specificity and sensitivity and the Utah is the only format which meets the required 90% overall accuracy for an evidentiary examination.

While some will assume that civil commitment examinations are post-conviction examinations and therefore investigative, this author will offer that Post-Conviction examinations are typically non-custodial interviews of offenders in the community while civil commitment examinations are custodial examinations and are subject to evidentiary usage. Some would agree that civil commitment examinations are, as a result, evidentiary.

Conclusion: No matter how civil commitment polygraph is categorized, we must realize that civil commitment laws abrogate confidentiality and permit prosecutors to base commitment cases on information gleaned during treatment. The same is true for disclosures made during treatment while committed. Subsequently, all information disclosed during polygraph interviews as well as the results of civil commitment polygraph are likely to be presented as evidence in commitment hearings as well as during habeas corpus or petition for a less restrictive alternative hearings.

For this reason, civil commitment polygraph must be conducted using the most specific methods available. This author is concerned with the fact that APA standards do not demand the best possible examinations and, due to the negative effect of this error, urges the American Polygraph Association and other organizations such as the National Association of Criminal Defense Lawyers to take whatever course is necessary to guarantee optimal examinations during civil commitment.

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