

"For me, hope is a feeling that makes you get up and fight for what you know is right." — Greta Thunberg

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 - ✓ Hello? Hello?: The Deliberate Disconnection of SOCC Victims as Involuntary Laryngectomy: Why We Desperately Need Internet Access as a Public Voice
 - ✓ Conscience Confrontation of Legislators (Real Psychopaths)
- So much to learn, you'll need a cranial 20 TB solid-state drive!

Feedback? News? Write!

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Late-Breaking News: *Karsjens et al. v. Harpstead et al.* —

Federal District Court Again Rules Against Class Action Plaintiffs. Appeal Expected. See 1-Sheet Extra Edition.

Sinking Our Own Ships?

In Court Contests, Don't Let Ourselves Become Our Own Worst Enemy

Editor's Note: As we wait for details on the latest decision by Judge Frank in *Karsjens v. Harpstead et al.*, it is good to ponder the advice that the following article excerpt offers. Roslyn K. Myers, "Class Action Infighting Leads to Lost Opportunity for SVPs to Shape Their Own Risk Review Protocols," *Sex Offender Law Report*, 21(4) *Sex Offender Law Report* 59-62 (June/July 2020)

Abstract Excerpt:

"...Missouri is one of 20 states that has operated a treatment program for SVPs. However, Missouri's program has been subject to numerous lawsuits complaining of the low 'graduation rate,' which results in detainees languishing at facilities long after they have been or should have been authorized for release to less restrictive living sites. This article examines the practices and outcomes in poor performing states like Missouri, Minnesota, and Kansas, as described in class action suits against the states brought by program participants denied release (such as *Van Orden*, 129 F. Supp. at 844), and contrasts them with highly ranked programs such as those in Washington State, Iowa, and Wisconsin. While plaintiffs (individuals ruled Sexually Violent Predators or SVPs under their respective state laws) have scored partial victories in securing the right to treatment in federal district courts, infighting among different members of the class and their attorneys led to a failure to gain important system improvements in the remedy phase of the litigation."

Editor's Comment: This article's focus on the problems specific to the states examined is not necessary to the point made here. Regardless of such differences, it is clear that the problems experienced in conducting the Missouri class actions appear to be the same as those experienced in other states with such challenges, including Minnesota.

Despite the lack of legal education on the part of the SOCC detainees who initiate such lawsuits, almost every one of such initiators believes that their 'brainchild' is the best argument for reliefs sought. This ill-founded certainty typically causes stubborn resistance to the input of other detainees in the same program who may have clearly better ideas.

This resistance by case initiators to input by others even extends to the choices that attorneys appointed to represent them may make, whether based on more accurate views of reigning case law or better strategies toward victory. This latter problem confounds the

attorneys' attempts to present cogent and persuasive arguments to the court, in the midst of unexpected, contradictory testimony by their client representative-plaintiffs aimed at forcing their attorneys, in the middle of the case, to change the direction and focus of their arguments for the reliefs sought, or even to try to change the reliefs requested.



"The Argument"

This obvious confusion between clients and counsel typically inadvertently persuades the presiding judge that the claims advanced are unclear even to the party advancing them and that their arguments are inconsistent, and thus appear to be poorly thought through. This is a classic recipe for losing a case, even where a judge may then be leaning, out of sympathy to the plight of the plaintiff-detainees, toward providing reliefs. In some cases of which this editor is aware, such misconduct by the representative plaintiffs has risen to the level of (privately or publicly) baselessly accusing their attorneys of betrayal of their clients' interests.

In at least one class action, one or more representative plaintiffs went even further, to the desperate extreme of suggesting that picketing by their supporters of the houses of opposing assistant attorney generals and the presiding federal judge would be appropriate. This, in case you don't know, constitutes a federal crime. Whether or not prosecution for that incitement ensues, it is a suggestion that will, with certainty, cause judges who are or will be ruling upon the case to become deeply biased against such plaintiffs. If you were a judge, you would have the same reaction.

The lesson to be taken by present or prospective plaintiffs (including plaintiff class members) is that the time for thorough examination of facts to be alleged and ultimately to be proved and the validity of various legal

arguments intended to be made in court is before a case is filed, even by *pro se* plaintiffs.

Courts have long-since tired of careless, sometimes even reckless complaints and briefs submitted by *pro se* plaintiffs. A demonstration of incompetence will not garner judicial sympathy these days. Get used to it.

Far more than ever before, make every possible appeal for attorney representation before filing a lawsuit. Whenever an attorney turns you down, ask him/her why. This may identify glaring legal flaws or other fatal shortcomings or legally impossible arguments that you may have missed. If you find that no attorney will represent you, redouble your efforts to make sure you haven't overlooked something deeply adverse to the claims you intend to make or some procedural step you may have failed to see as needed.

Assuming that you do gain the interest of an attorney in representing you, carefully dialog with him/her to be sure that you are on the same page about the claims you are making and the availability of the relief that you seek. If not, be open-minded when listening to his/her explanation of why your claims, arguments or the reliefs you wish to seek are either certain to fail or are subject to such legal doubt or other obstacles that they clearly are not the best choice. If, after examining the points of law he/she cites, you believe that his/her analysis of the case is incorrect, do whatever you can to persuade him to the contrary. The point is that you must do all this before even accepting such representation. This kind of clear dialog in advance will prevent any later baseless suspicions that the attorney is 'selling you out.'

The fact is that law is an uncertain tool for relief. We use our system of laws because there is nothing better that has yet been invented for dispute resolution and because the alternative to law is chaos (in which no one is safe, and no one really has any rights at all). People in our position would do well to bear in mind how we might fare if we had no protection by the organized system of laws and those whose job it is to apply (judges) and to enforce (police and allied government agents).

Attorneys know this, and often are forced by moral devotion to essential concepts of rights and wrongs to fight a system that often does, or at least reasonably appears to, thwart and

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resist such concepts and their unpopular application. An honest attorney will always stress to his clients that in judicial cases, no outcome is certain, no victory can be assured with near-certain confidence, no matter how seemingly meritorious. Nonetheless, such pre-representation conferences can clarify and resolve any differences of opinion or can point up starkly the need to decline such representation and to move on.

Once an attorney has been retained, consider it as the "set" before the football play. This is no time for second-guessing or for actions inconsistent with the principle that the attorney is, from this point forward, in charge of the case.

If some irreconcilable difference emerges only later, or an attorney takes some action which appears clearly contrary to his client(s)' interests in the case, an immediate, private conference is needed to determine the actual facts about either of these things and to determine whether the attorney can and will adjust his stance on a given point or take any action that may be required to prevent or correct some misimpression that anything beforehand may create with the court.

The point here is that, if such private resolution cannot be reached, the client (s)' options are almost nonexistent. He/they can choose to request the court to remove their attorney and to seek a replacement. However, this move will raise substantial questions in the judge's mind about the merit of the claims advanced in the case, given that a member of the bar (with legal knowledge and ethical obligations) has not acted as his clients demand.

Even if the motion is granted, there may not be any other attorney willing to come forward to assume such a case, especially if it has already progressed significantly past filing. Even if one can be found that expresses a willingness to look at the case, the preceding misunderstanding that separated clients from their former attorney will cause the potential substitute to view the matter with considerable caution. In sum, the odds are very long indeed against gaining replacement counsel, much less an attorney who is likely to be more in tune with the views of the clients who jettisoned the preceding attorney.

As an additional point worth mentioning, clients who constantly pester their attorney with questions about status or some fine points of argument are an attorney's worst nightmare and definitely can quickly become a source of regret on the attorney's part for having assumed the mantle of representation. An attorney's time and skill are his stock in trade, to paraphrase old Uncle Abe. It is unlikely that an appointed attorney can ever successfully recoup the cost to him/her of such 'hand-patting' conversations. Therefore, named plaintiffs in class actions should repeatedly dissuade their co-

plaintiffs (including those who are simply "class members") from calling the attorneys representing the class. Among other things, constantly pestering the attorneys will reduce the time available to them to prepare the case and to move it forward in the desired way.

Finally, class-representative plaintiffs should make sure that all members of the proposed class are on board with being in that status. This should not be difficult, since if the claims are valid, all class members will actually be benefitted if the case is successful. Further, it is almost always obvious that those opting against class membership will not be able to retain counsel for themselves to individually bring the same claims that the class action will bring. Nonetheless, if someone cannot be persuaded to voluntarily join the class, be sure that their self-exclusion is handled at the very first opportunity in the case.

Attempts to convince one to join in as a class member should always be purely polite and certainly never pressuring. Likewise, if someone states that he want to opt-out of class membership or later seeks to withdraw from the class, do nothing other than offer to talk it over with him first – briefly and politely. If he sticks by such intent, simply so notify the attorneys for the class at the earliest opportunity.

Do not take this as any sign of case weakness. In almost all cases, it is based on stubborn ignorance. That's on the declining person. The case will almost always be allowed to continue as is – just without that person.

Sex Offending is a Matter of Choice, Not an Inability to Control.

Theodore S Donaldson, Ph.D., Initial Comments on DSM-IV-TR, July 25, 2000 (unpublished manuscript)

Text Excerpts:

p. 4: "It is worth noting that the most prevalent treatment for sex offenders is cognitive-behavioral-relapse prevention.

This form of treatment is aimed at getting the offender to change their behavior primarily to avoid punishment. The approach reflects the position that sex offending is a matter of choice. Thus, the wide use of this treatment modality strongly implies that most sex offenders are viewed as not suffering from a condition that renders them unable to control their dangerous behavior."

Editor's Note: MSOP uses this treatment mode. And yet, despite its acknowledgement of choice as to whether or not to reoffend, it persists in holding most of its detainees until death on the patently false pretense that, if released, they

could not control their sexual behavior.

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Meningitis can cause seizures — a true loss of control over one's actions

Static-99R Revisited: 2 Crucial Observations

(1) *Static-99R Is Misused When Evaluators Attempt to Apply It to Volitional Control by Sex Offenders.*

Mara Howard-Williams, "Sexual Abuse and Static Misuse: An Analysis of the Static-99R," 98 N.C. L. Rev. 933 (May 2020)

Text excerpts:

p. 963-4: D. *The 'Serious Difficulty Refraining' Issue and Static-99R*

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.'²²⁶ 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.²²⁷ Though this statement is undoubtedly true, the court's logic is flawed. The statute requires 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 doughnut 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."

[Notes follow next excerpt.]

Sex offending is a matter of choice. ...[T]he wide use of cognitive-behavioral-relapse prevention treatment modality [as in SOCC facilities] strongly implies that most sex offenders are viewed as not suffering from a condition that renders them unable to control their dangerous behavior.

(2) *Did the Static-99 Creators 'Cherry Pick' Samples to Make Extreme Recidivism Seem to Be a Tendency of All Sex Offenders?*

[Another excerpt from same article, supra]: p. 950: "II. Scientific Considerations of Sexual Offender Assessment Methods

D. Accuracy and Sample Population

...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.¹³⁵ An output of 0.5 indicates that the instrument is no better at predicting who falls in what group than random guessing.¹³⁷ [See underlined portion of next article's Abstract.]

pp. 951-52: 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 23 studies, only 21% of the individuals studied were from the United States (n = 1811).¹⁴⁴ 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.¹⁴⁵ 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

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from the United States used conviction data; the other four used only charges.¹⁴⁶ 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),¹⁴⁷ 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 Human Rights and Freedoms*,' which led to the government's decision not to create a civil commitment scheme in the country.¹⁴⁸ 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.'¹⁴⁹ The study also notes that sexual offenders in Canada 'receive determinate sentences and return to the community at the end of those sentences,' in direct contrast to the United States where many states and the federal government permit civil commitment.¹⁵⁰ Though a small-scale study suggests that civil commitment has no effect on recidivism rate,¹⁵¹ it remains unknown whether the Static-99R is equally accurate in the United States and Canada.

pp. 952-53: In Sweden, which accounts for 15% of the study population (n = 1278)¹⁵², 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.¹⁵³ The Ministry specifically acknowledges that 'it is difficult to compare the figure [of sexual offense rates] over time.'¹⁵⁴ 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 no considered rape in many other countries.'¹⁵⁵ 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.'¹⁵⁶ 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.

ity 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),¹⁵⁷ does not have mandatory reporting laws for suspected incidents of child molestation.¹⁵⁸ Compared to 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),¹⁵⁹ changed its age of consent laws in 2002, lowering the age from 19 to 14.¹⁶⁰ 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),¹⁶¹ 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.¹⁶² 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).¹⁶³ 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.¹⁶⁴ Denmark, which hosts 3.5% of the study population (n = 311),¹⁶⁵ 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.¹⁶⁶ 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.

pp.953-54: Experts routinely generalize the findings from these 23 sexual offender studies to the United States' federally incarcerated population despite criticism.¹⁶⁷ The different countries represented in the studies all have different laws and cultural norms for sexual offenses.¹⁶⁸ A paper authored by many of the creators of the Static-99R provides an example, cautioning that since 'not all sexual offenses are universal,' to apply 'actuarial tools to behaviors beyond the scope of the scale's development can be an inappropriate extrapolation.'¹⁶⁹ 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-99'¹⁷⁰ The authors then specifically state that 'applying [the Static-99] to cases of 'consensual teenage sex among similar aged peers is not recommended.'¹⁷¹

p. 956: E. *Understanding What the Static-99R Means*

...The Static-99R ...looks at what the past traits of sexual offenders are to determine what factors are most related to sexual re-offense. 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.

In Canada, which comprises 33% of the population studied (n = 2865),¹⁴⁷ 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 Human Rights and Freedoms*,' which led to the government's decision not to create a civil commitment scheme in the country.

p. 958: III. *Legal Considerations of Using the Static-99R*

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

...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.

[Note: *United States v. Schmidt*, 295 F.Supp.3d 586 (E.D. N.C. 2018), stating, at pp. 593-94, "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.]"

p. 962: C. *Past Criminal History Versus Present Condition*

...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.'²¹⁴ 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.²¹⁵ The court then explained that it acknowledged the actuarial instruments but placed 'greater weight' of factors outside the actuarial scheme, including relapse (meaning the commission of another sex crime).²¹⁶ In doing so, the court demonstrated its misunderstanding of what is actually included in the actuarial scheme since relapse is incorporated.²¹⁷

Notes:

¹³⁶ ROC Curves and Area Under the Curve Explained, Data Sch. (Nov. 19,

2014), <https://www.dataschool.io/roc-curves-and-auc-explained/>.

¹³⁷ *Id.*

¹⁴⁴ R. Karl Hanson et al., "What Sexual Recidivism Rates Are Associated with Static-99R and Static-2002R Scores?," 28 *Sexual Abuse* 218, 223 (2016).

¹⁴⁵ *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 et al., *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).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 388.

¹⁵³ Ministry of 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>.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ "Crime in Sweden – The Difficulties in Making International Comparisons," *Brå* (emphasis omitted), <https://bra.se/bra-in-english/home/crime-and-statistics/interbational-comparisons.html>.

¹⁵⁷ Hanson et al., *Recidivism Rates*, *supra* note 144, at 223.

¹⁵⁸ Henning Wißmann, et al.

"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).

¹⁵⁹ Hanson et al., *Recidivism Rates*, *supra* note 144, at 223.

¹⁶⁰ *L end V. v. Austria*, 2003-1 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 144, 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*, (Continued on page 4)

supra note 144, 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), <https://www.washingtonpost.com/news/oblog-konspiracy/wp/2015/10/26/u-k-court-declares-that-california-civil-confinement-law-constitutes-a-flagrant-abuse-of-human-rights/>.

165 *Id.*
166 Wendy Zeiden, "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 Sex Offender Risk Assessment, ATSA (Aug. 30, 2012).
168 Leslie Helmus et al., "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 (Douglas P. Boer et al. eds., 2011), at 59.

169 *Id.*
170 *Id.* at 59-60.
171 *Id.*
214 *United States v. Bolander*, 722 F.3d 199, 212-13 (4th Cir. 2013)
215 *Supra*, Part II.
216 *Bolander*, 727 F.3d 215.
217 Amy Phenix et al., *Static-99R Coding Rules* (2016), at 94.
226 *United States v. Lange*, 2012 U.S. Dist. LEXIS 1549498, *35 (E.D. N.C. Nov. 7, 2012) (quoting *United States v. Wooden*, 593 F.3d 440, 461 (4th Cir. 2012)).
227 *United States v. Shields*, 649 F.3d 78, 89 (1st Cir. 2011).

Is the Static-99R as Inaccurate as Pure-Chance Guessing at Predicting SOCC-Release Recidivism?

Allen Azizian, Mark Oliver, James Rokop, Deirdre M. Orazio, "A Preliminary Analysis of Sexual Recidivism and Predictive Validity of the Static-99R in Men Discharged from State Hospitals Pursuant to California's Sexually Violent Predator Act," *PubMed*, <https://journals.sagepub.com/doi/abs/10.1177/107906322110197267> journalCode=saxb (June 21, 2021)

Abstract Excerpts:
"We examined the recidivism rates and the predictive validity of the Static-99R in 335 men who were detained or civilly committed and released from California

State Hospitals pursuant to the Sexually Violent Predator (SVP) Act, and followed up for approximately 21 years from the date of hospital admission. ... The Static-99R demonstrated small in magnitude discrimination for sexual, violent, and general recidivism (area under the curve ["AUC"]/C = .56 to .63. [Editor's note: AUC equal to .50 equals pure-chance guessing; see second excerpt from last preceding article.] Calibration analyses, conducted through expected/observed (E/O) index, demonstrated that the Static-99R overpredicted sexual recidivism, irrespective of whether the Routine or High Risk/Need norms were used. Observed recidivism rates were lower than predicted by Static-99R scores and may be the result of the sample's older age at release, lengthy hospitalization, or other factors."

Does Treatment Really Only Prevent Recidivism in 1 Out of Every 28 Sex Offenders?

Source article: Gregory DeClue & Denis L. Zavodny, "This Just In: Sex Offender Treatment Is Beneficial for One in 28 Patients," 17(4) *Sex Offender Law Report* 49-54 (June/July 2016)
Summary and Commentary by Cyrus Gladden:
(We'll get to the 28 patients further below, but to properly understand that concept, start here for the necessary background.)

Have you ever heard the extravagant claim that sex offender treatment reduces sexual recidivism by as much as 26.3%? The article cited above by two forensic psychologists, DeClue and Zavodny, explains the deceptive math that those making such claims use to arrive at such publicized figures. Follow this example to learn the truth:

DeClue and Zavodny cited a meta-analysis performed by Schmucker and Lösel that found an average of 10.1% recidivism among sex offenders who underwent treatment, whereas recidivism among a group of sex offenders without treatment (but otherwise generally similar) experienced recidivism at a rate of 13.7%. Note that the actual recidivism reduction was only 3.6%. So how did they get 26.3% instead?

By dividing the absolute difference in recidivism by the detected-sexual-recidivism rate of the untreated offenders (13.7%), they derived 0.263 (that is, 26.3%). While this sounds impressive, you have to firmly bear in mind that the actual ("absolute") difference was only 3.6%. The much higher derived figure is only the "relative" difference.

Further, similarity between participant and non-participant groups can never be

taken for granted. For example, in the earlier years covered by the studies examined by Schmucker and Lösel, sex offender treatment was mandatory only for imprisoned offenders with more serious sex-offender records and hence, likely also far longer prison sentences. Longer sentences translate to offenders released at older ages. The relationship between increasing ages and reducing recidivism rates for sex crimes is not only well known and beyond question, it is as powerful an impact by itself on recidivism as are all other known factors added together. (P. Lussier & J. Healey, "Rediscovering Quetelet, Again: The 'Aging' Offender and the Prediction of Recidivism in a Sample of Adult Sex Offenders," 26 *Justice Quarterly* No. 4, p. 827, at 827 (2009) flatly declare, "by itself, age at release showed a predictive accuracy comparable to that of [Static-99]." See also: Howard E. Barbaree & Ray Blanchard, "Sexual Deviance over the Lifespan: Reduction in Deviant Sexual Behavior in the Aging Sex Offender," In D.R. Laws & E. O'Donohue (Eds.), *Sexual Deviance: Theory, Assessment and Treatment* (2nd ed., Ch. 3: pp. 37-60, New York: Guilford); Howard E. Barbaree et al., "Aging Versus Stable Enduring Traits as Explanatory Constructs in Sex Offender Recidivism: Partitioning Actuarial Prediction into Conceptually Meaningful Components," 36(5) *Criminal Justice and Behavior* 443-465 (2009).)

Further, the natural phenomenon of eventual complete desistance from crime is now known to build during imprisonment as well as after release. Patrick Lussier & Evan McCuish, "Desistance from Crime without Reintegration: A Longitudinal Study of the Social Context and Life Course Path to Desistance in a Sample of Adults Convicted of a Sex Crime," 60(15) *International Journal of Offender Therapy and Comparative Criminology* 1791-1812 (2016). Thus, these two factors pose confounding causes contemporaneous to any effect by sex offender treatment.

Lastly, in more recent decades, sex-crime recidivism rates have plunged dramatically – down from rates in the mid-teens before the millennium to 3% or less on average now, irrespective of treatment. Consequently, even a similar claim of relative reduction of recidivism let's say, that same claim of 26.3% would now only yield an actual reduction in recidivism of about ¾ of 1%. Such far lesser absolute differences in current recidivism, coupled with contemporaneous, confounding factors such as increased age and desistance call into question whether sex offender treatment now contributes anything statistically significant toward reducing the incidence of sex crimes.

Another factor only recently strongly documented (contrary to earlier

'mythology' of sex offending) is that far more sex crimes are committed by those who have never been arrested for a sex crime before than those who are already recidivists. It is close to certainty that almost all of such never-before-arrested persons have never participated in treatment, much less completed it. Now that these facts are known, it becomes obvious that the real level of contribution of sex offender treatment toward sex-crime prevention must in fact be far less than previously thought in times when it was incorrectly assumed that recidivists were responsible for almost all sex crimes. In other words, if the correct, current actual level of recidivism-reducing effect among recidivists is only about 0.75%, then the overall impact on all sex crimes (most by those with no past record and hence, no treatment) must be even far lower than that – perhaps one-quarter of 1%, or one out of 400 offenders. In this perspective, the importance of treatment of recidivists toward further reducing sex crimes now appears to be trivially minimal at most.

Even beyond these statistics, the overall lack of impact of treating sex offenders on sex-crime recidivism is an inference supported by the fact that "there is no evidence from existing research trials to show that any psychotherapeutic treatment reduces sexual recidivism rates to a significant degree." Alexandra Lewis, Don Grubin et al., "Gonadotrophin-Releasing Hormone Agonist Treatment for Sexual Offenders: A Systematic Review," 31(110) *Jour. of Psychopharmacology* 1281-1293, 1290 (2017).

DeClue and Zavodny addressed a closely related question: whether "improving" sex offender treatment can further reduce overall sex offending significantly, focusing on another study. That study found that, even as early as 2008, over 95% of arrests for sex crimes were of those without any sex crime record. Hence anything new/further to use to treat sex offenders would necessarily be 95% ineffective at reducing sex crimes overall, as compared to new measures that could deter all sex crimes.

Returning to the absolute risk reduction figure found by Schmucker and Lösel (3.6%), DeClue and Zavodny posed the question of treatment benefit to any individual sex offender (as measured by that decreased likelihood of later sexual offending by that offender). In order to



1 in 28: Whack a Mole?

(Continued on page 5)

grapple with this question, they had to turn to a statistical technique known as the number-needed-to-treat ("NNT"). This technique has been repeatedly deemed a useful measure of treatment effectiveness.

The NNT is calculated from the inverse of that absolute risk reduction to determine the average number of offenders that are needed to treat to ensure that at least one offender will be prevented from reoffending. Using standard calculation procedures, the NNT obtained in that meta-analysis by Schmucker and Lösel is 28. That is, on average, only about 1 in every 28 treated offenders will benefit from treatment, as measured by later refraining from sexually offending.

Once it is realized that sex offender treatment benefits only one in 28 offenders, ask DeClue and Zavodny, "Does it make sense to require that a person complete sex offender treatment," before releasing him? "If we do not consider sex offender treatment to be punishment," they press, "then is it fair to require that the 27 people who will not benefit from treatment have to pay for the treatment that will benefit the 28th person?"

In the context of committed sex offenders, the stakes are infinitely higher than payment for treatment – literally life or death, in terms of whether one ever gains freedom, or is detained until death.

Notes:

Martin Schmucker & Friedrich Lösel, The Effects of Sexual Offender Treatment on Recidivism: An International Meta-Analysis of Sound Quality Evaluations, 11(4) *Jour. of Experimental Criminology* 597 (2015).

Jeffrey C. Sandler et al., "Does a Watched Pot Boil?... [etc.]," 14(4) *Psychology, Public Policy, and Law* 284 (2008).

G. DeClue & D.L. Zavodny, "Forensic Use of the Static-99R: Part 4. Risk Communication," 1(3) *Jour. of Threat Assessment & Management* 145 (2014); Jay Singh, "Predictive Validity Performance Indicators in Violence Risk Assessment: A Methodological Primer," 31(1) *Behavioral Science and Law* 2013). See also www.TheNNT.com; www.CEBM.net/Number-Needed-To-Treat-NNT.

Treatment: For Better, or for Worse?

[Excerpts summarized by Editor]

The British Ministry of Justice evaluation of the "Core" psychological sexual offender treatment program (SOTP) in standardized use in the UK recently highlighted the importance of understanding "what works" in treating sexual offending. Mews, A. et al., *Impact of Evaluation of the Prison-Based Core Sex Offender Treatment Programme*, Ministry

of Justice Analysis Series (2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/623876/sotp-report-web-pdf.

In this study, -- which is the largest single study evaluation of its type to date -- the reoffending rates for men who completed the "Core" SOTP (n = 13,219) in England and Wales (between 2000 and 2012) were compared to those of a propensity score-matched untreated comparison group (n = 2562).

Over an average 8.2-year follow-up, nonsexual reoffending rates appeared largely similar across the groups. However sexual reoffending for the treated sample was found to be higher than that of the untreated comparison group (10% versus 8%, respectively), representing an absolute increase in sexual reoffending of 2% and a relative increase of 25%. (See immediately preceding article, *supra*.) The findings from this study understandably created concern.

In short, commentators suggested that tens of thousands of individuals who had sexually offended and received psychological "treatment" may have been made worse by a program intended to make them better. See, e.g., Brown, P., Ross, C., Academic Oversight in Policy Research: Questions Arising from the Sex Offender Treatment Programme Study, 3 *Lancet Psychiatry* 224-6 (2019), [https://doi.org/10.1016/S2215-0336\(19\)30374-8](https://doi.org/10.1016/S2215-0336(19)30374-8).

A number of meta-analyses have been undertaken over the last 20 years that have synthesized outcome evaluations of treatments for sexual offending. See, e.g., each of the following: Gannon, T.A., Oliver, M.E., Mallon, J.S., James, M., Does Specialized Psychological Treatment for Offending Reduce Recidivism? A Meta-Analysis Examining Staff and Program Variables as Predictors of Treatment Effectiveness, *Clin. Psychol. Rev.* (2019), <https://doi.org/10.1016/j.cpr.2019.101752>; Dennis, J.A. et al., Psychological interventions for adults who have sexually offended or are at risk of offending, *Cochrane Database Syst. Rev.* 2012;12, <https://doi.org/10.1002/14651858.CD007507.pub2/full>; and Beech, A. et al., An Examination of Potential Biases in Research Designs Used to Assess the Efficacy of Sex Offender Treatment, 7 *Jour. Aggress Confl Peace Res.* 204-22 (2015), <https://doi.org/10.1108/JACPR-01-2015-0154>. Many of these studies have examined both biological and psychological treatments. See, e.g., Beech, *supra*.

Gannon et al., *supra*, also examined whether or not programs included polygraph testing as part of their treatment protocol. Although only a small number of programs incorporated polygraph testing (k = 6), they generated weaker effects than programs that did not contain this element or for whom this element was unknown. It is possible that use of

the polygraph may impede the treatment process and effectiveness. The use of the polygraph within treatment has been found to be associated with poorer outcomes.

Schmucker and Lösel's 2015 meta-analysis found that only community-based treatment programs (as opposed to institutional programs) significantly reduced sexual reoffending. Schmucker, M., Lösel, F., The Effects of Sexual Offender Treatment on Recidivism: An International Meta-Analysis of Sound Quality Evaluations, 11 *J. Exp. Criminol.* 5987-630 (2015), <https://doi.org/10.1007/s11292-015-9241-z>.

**Virginia Report, # 11
Public Safety Needs
Do Not Support
SOCC Laws.**

C. High Sex-Crime Recidivism Is a Baseless Myth; LOW Sex-Crime Recidivism Is Universal, Even as to Former Recidivists.

"A base rate is simply the proportion of a designated population sharing a certain characteristic.... The base rate for criminal sexual recidivism for previously convicted sex offenders is the concept of relevance within the risk assessment portion of sex offender commitment evaluations." Dennis M. Doren, *Evaluating Sex Offenders, supra*, at p. 145 (emphasis supplied). This definition refers to all convicted sex offenders, taken as a group – not sub-segments within that group.

The claim in support of a claimed need for SOCC commitment to protect public safety from purported high recidivism as to sex crimes is an utter myth contrary to the facts.

A 2015 academic article by a Professor Ira Ellman & Tara Ellman, titled "Frightening and High: The Supreme Court's Crucial Mistake about Sex Crime Statistics," 30 *Constitutional Commentary* 495, serves as a classic exposé of the false claims against sex offenders as a class that are eagerly picked up and disseminated (in this case by Ted Olson, one of the chief officials of the United States Justice Department. This particular falsehood was swallowed hook, line & sinker by Justice Kennedy, causing him to vote against a sex offender in a crucial case.

Worse, it appears that Justice Kennedy continued to think later that this false statement, claiming extremely high recidivism by sex offenders, is true. Since then, notably, he decided against sex offenders in the critical case about federal commitment of sex offenders, *United States v. Comstock*.

	Sex offenders with new sex-crime conviction	
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98		
96		
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2		
0	2.219%	0.089%
	I	IO Year

True sex offender recidivism rates, per a California study of 10,000 prison releases. In the first year, that rate was tiny. By Year 10, it is effectively non-existent. The total over 10 years: 3.38% – still smaller than small. Science is made of verifiable facts, not hysteria.

Without more ado, here is the set of relevant excerpts from this important article.

pp. 495-96: "[Referring to the 4-justice plurality opinion in *McKune v. Lile*, 536 U.S. 24, 33 (2002)] Justice Kennedy...wrote that the recidivism rate 'of untreated offenders has been estimated to be as high as 80%.' The treatment program, he explained 'gives inmates a basis...to identify the traits that cause such a frightening and high risk of recidivism.'"

p. 496: [*Smith v. Doe*, 538 U.S. 84 (2003), quoting Justice Kennedy's opinion in *McKune v. Lile*.] "The legis-

(Continued on page 6)

lature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is "frightening and high." *McKune v. Lile*, 536 U.S. 24, 34 (2002)."

pp. 497-98: "McKune provides a single citation to support its statement 'that the recidivism rate of untreated offenders has been estimated to be as high as 80%': the U.S. Dept. of Justice Nat. Institute of Corrections, *A Practitioner's Guide to Treating the Incarcerated Male Sex Offender* xii (1988). Justice Kennedy likely found that reference in the amicus brief supporting Kansas filed by the Solicitor General, then Ted Olson, as the SG's brief also cites it for the claim that sex offenders have this astonishingly high recidivism rate. This *Practitioner's Guide* itself provides but one source for the claim, an article published in 1986 in *Psychology Today*, a mass-market magazine aimed at a lay audience. [Footnote 12: Robert E. Freeman-Longo & R. Wall, "Changing a Lifetime of Sexual Crime," *Psychology Today*, Mar. 1986, at 58. Freeman-Longo is the author described in the rest of this paragraph. Wall, the second author, is identified in the article as a therapist in a treatment program Freeman-Longo directed; no further information about him came up in a Google search.]

"That article has this sentence: 'Most untreated sex offenders released from prison go on to commit more offenses – indeed, as many as 80% do.' [id. at 64]. But the sentence is a bare assertion: the article contains no supporting reference for it. Nor does the author appear to have the scientific credentials that would qualify him to testify at trial as an expert on recidivism. [Footnote 14: "...[A] Google search found that [Freeman-Longo's] only professional degree is a Master of Rehabilitation Counseling. His online CV indicates no academic or research appointments at any institution.... [T]he author has elsewhere expressed the view that current registration laws 'may do more harm than good' because, among other things, they apply to many people who are low-risk and often burden efforts at rehabilitation. Robert E. Freeman-Longo, "Revisiting Megan's Law and Sex Offender Registration: Prevention or Problem," in *Sexual Violence: Policies, Practices, and Challenges in the United States and Canada* (James Hodgson & Debra Kelley, eds. 2001). It appears the author has in recent years moved from traditional counseling to providing biofeedback services under the name Serendipity Healing Arts; see SERENDIPITY HEALING ARTS, <http://roblongo.com/index.php> (last visited Aug. 26, 2015).]

Crystal gazing, also called scrying; Divination of distant or future events based on visions seen in a ball of rock crystal. — *Encyclopedia Britannica*, 2013 Digital version.

pp. 499-500: "The Solicitor General's brief in *Smith* is also the likely source of a second influential phrase about sex offenders. The brief frames the question before the Court with this opening statement:

'Sex offenders exact a uniquely severe and unremitting toll on the Nation and its citizens for three basic reasons: 'they are the least likely to be cured'; 'they are the most likely to reoffend'; and 'they prey on the most innocent members of our society.' United States Dep't of Justice, Bureau of Justice Statistics (BJS), National Conf. of Sex Offender Registries (National Conf.) 93 (Apr. 1998)

"...[T]he statement is rather odd. What does it mean to say that sex offenders are 'the least likely to be cured? Least likely to be cured of what? Of the inclination to commit sex crimes? In that case, who's more likely to be cured? People who don't have that inclination in the first place? It's hard to imagine any scientist making such an incoherent statement, and a search for the referenced 'Justice Department Report' reveals that none did. The 'report' is merely a collection of speeches given at a 1998 conference of advocates for sex offender registries. The collection's cover sheet disavows any Justice Department endorsement of its contents. The 'least likely' phrase is taken from a speech in this collection given by a politician from Plano, Texas, who never claimed any scientific basis for it. Indeed, she did not even claim it was true. What she actually said was that it is a statement she likes to make. The Solicitor General's representation of this statement as a Justice Department conclusion about the nature of sex offenders was at best irresponsible."

Jeffrey Abracen & Jan Looman, "Evaluation of Civil Commitment Criteria in a High Risk Sample of Sexual Offenders," 1 *Jour. of Sexual Offender Commitment: Science and the Law*, 124-140 (2006), at p. 124, reported finding "...that none of the sub-groups of [purportedly high-risk] offenders [i.e., scores of 5 or higher on the Static-99] reoffended at rates which approached 50% (approximately 5-year follow-up)..." (emphasis supplied).

A 2002 study by the U.S. Dept. of Justice found that of sex offenders released in 1994 from prisons in 15 states, only 5.3% were rearrested for another sex crime within three years. Of the convicted child molesters in this group, only 3.3% were rearrested for another sex crime against a child.

A 2007 Minnesota Dept. of Corrections

study derived a mere 3.2% sex-crime recidivism base rate over an average 8.4-year post-prison-release period for all sex offenders. This is a virtual tie with murderers for lowest recidivism. That report attributed that low recidivism rate, in substantial part, to "the longer and more intense post-releases supervision of sex offenders." (*Id.*, p. 3).

Furthermore, that 3.2% figure represents an exaggeration. The report announcing it explains at page 1, "Because the baseline rate for sexual recidivism is relatively low, all three offense levels (misdemeanor, gross misdemeanor, and felony) were included in this study..." This choice of inclusion of misdemeanors is inconsistent with all other known ARAs and with the universal reporting practice of all other states. No breakdown between felonies and misdemeanors is given in that report. However, it would appear to be reasonable to assume that perhaps one-third of the recidivistic sex crimes included were only misdemeanors. If so, the felony sex-crime recidivism base rate in Minnesota comparable to other states would be approximately 2.1%. This over-reporting of the Minnesota base rate of sex crime recidivism is the basis of the MnSOST-3/3.1/3.12. In the downward adjustment used here, this means that the predicted probabilities of recidivism start from an inbuilt overestimate of 3/2 (or +50%). Thus, someone predicted to have a recidivism probability of 30% would actually only have a 20% probability. This is before consideration of Wollert's inherent prediction error due to any low base rate.

Grant Duwe, Ph.D., a Minnesota Department of Corrections psychologist, in "Better Practices in the Development and Validation of Recidivism Risk Assessments: The Minnesota Sex Offender Screening Tool-4," (July 13, 2017) *Criminal Justice Policy Review* (2017; hard-copy citation still unavailable), proves up this exaggeration, reporting the result of a vast statistical survey of fifteen recent years of releases of sex offenders:

"...Using sex offense conviction rates within 4 years of release from prison as the failure criterion, the data showed that 130 (2.3%) offenders in the overall sample were recidivists..." This finding parallels those in other states in the last ten years.

Abracen & Looman continues at p. 125:



Predicting future recidivism is as uncertain as driving into a California coastal fogbank at high speed.

"...The phenomenon of relatively low base rates of sexual offense recidivism is commonly referred to as the base rate problem. The base rate problem is critical, as [E.S.] Janus & [P.E.] Meehl [Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings," 3 *Psychology, Public Policy and Law* 33-64] (1997) have demonstrated that with a base rate of under 30%, given the current state of the art in risk assessment, prediction will be wrong most of the time. Even if one disputes the assumptions made by Janus & Meehl, the fact that there is a relatively low base rate of long-term sexual recidivism suggest that evaluators may have a difficult time differentiating those offenders who are going to offend sexually in the future from those who are not."

[p. 135:] "The results of the present study fail to support the validity of the criteria commonly used in SVP assessments. ...[R]ecidivism rates were well below the standard set by SVP commitment criteria."

[p. 136:] "...[I]t would be unlikely that even well trained clinicians could accurately predict who might represent a lifetime risk of sexual offense recidivism of over 50% except under the most extreme circumstances. Given such extreme circumstances are very rare (e.g., a score of 7 or higher on the Static-99 perhaps with a clear statement that the offender intends to reoffend sexually) one has to question the reliability of predictions where the necessary criterion (i.e. over 50%) is so many times higher than the observed rates of sexual recidivism..."

Contrary to false assertions that sex offense recidivism cumulates on a straight-line probability basis over post-release years, that Minnesota Department of Corrections study concluded that most sex offenders who reoffended after prison release did so within the first five years. Indeed, the actual statistics in that report ("Sex Offender Recidivism in Minnesota," April 2007) actually shows that almost all sexual reoffending occurs in the first five years, if at all. This contradicts claims that 20-year or longer extrapolations of chances of recidivism must be considered in sex offender commitments. Of importance, that study also found that the first-three-year post-release recidivism rate among sex offenders had dropped from 16.7% for those released in 1990 to 2.5% for those released in 2002. That report attributed that reduction, in substantial part, to "the longer and more intense post-release supervision of sex offenders." (*Id.*, p. 3). It is equally important to note that this study's protocol excluded the impact of commitment from the dwindling recidivism percentages reported. That is,

(Continued on page 7)

those newer low rates would still exist in the absence of commitment.

Similar low rates of sex-crime recidivism have been found in other states in the last ten years as well.

A 2007 study by the Missouri Dept. of Corrections found a 3% re-offense rate among sex offenders released in 2002.

An Alaska Judicial Council report in 2007 matched this 3% figure.

A 2008 study by California's Sex Offender Management Board of 4,204 sex offenders found 3.38% sex-crime recidivism after ten years of prisoner release.

An Indiana corrections report on sex offenders released in 2005 found only 1.05% recidivism over three years.

With a base rate of under 30%, given the current state of the art in risk assessment, prediction will be wrong most of the time.

Michael Barzoo, in "Fifteen Years and Counting: The Past, Present, and Future of Missouri's Sexually Violent Predator Act," 82 *UMKC Law Rev.* 513 (Winter 2014), at p. 527, offers these congruent figures:

"...[S]everal state studies involving sex-crime recidivism found relatively similar small percentages of rearrests – Iowa's rate of recidivism was three percent over a four-year period, Washington's rate of recidivism was three percent after about five years, and Ohio's was eight percent at ten years." (citing Melissa Hamilton, "Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws," 83 *Temp. L. Rev.* 697 at 708-09 [2011])

Daniel Montaldi, "A Study Of The Efficacy Of The Sexually Violent Predator Act In Florida," 41 *Wm. Mitchell Law Rev.* 780-865 at p. 811, 818 (2015), found that, even as to sex offenders considered for commitment in Florida but not ultimately committed, only 1.88% were subsequently re-convicted of a new sex charge within an average release time of six years. Even among those recommended for commitment, but released, the reconviction rate totaled only about 3.6% (*id.*), even though most of this cadre had only minimal supervision (*id.*, p. 819). Montaldi also reports sex-crime recidivism rates from other states as equally low: Connecticut: 3.6%; Washington: 2.7%; and Texas: 5.5% (without supervision) and 2% (with supervision), all within five years of prison release.

Montaldi concluded that sex offenders who get committed present only the same risk of re-offense as first-time sex offenders, that is, about 3-5% probability of re-offense within 5 years. Two separate studies of sex offenders in Florida that he analyzed show this quite clearly. This demolishes the utter myth of high recidivism by sex offenders, and particularly by the so-called 'worst of the worst'.

In contrast, Marcus A. Galeste, Henry F. Fredella & Brenda Vogel, "Sex Offender Myths in Print Media: Separating Fact from Fiction in U.S. Newspapers," 13 *Western Criminology Review* 4-24 (2012) (<http://wcr.sonoma.edu/v13n2/Galeste.pdf>), notes at p. 5 that these infinitesimal figures of sex offender recidivism stand "in sharp contrast to the three-year recidivism rates for burglary, which was estimated at 74%, larceny, estimated at 75%, auto theft, estimated at 70%, or driving under the influence, estimated at 51%" (Patrick A. Langan & David J. Levin, "Recidivism of Prisoners Released from Prison in 1994", Washington, DC: U.S. Dept. of Justice, Bureau of Justice Statistics (2002); Marcus Nieto & David Jung, "The Impact of Residency Restrictions on Sex Offenders and Correctional Management Practices: A Literature Review," (CRB # 08-008), Sacramento, CA: California Research Bureau 2006); <http://www.library.ca.gov/crb/06/08/06-008.pdf>; Lisa L. Sample & Timothy M. Bray, "Are Sex Offenders Dangerous?", 3 *Criminology and Public Policy* 59-82 (No. 1, 2003)..... The notion of sexual compulsion suggests that sex offenders recidivate at an unusually high rate, yet research suggests otherwise...

Simply put, high sex-crime recidivism is only a myth – anywhere. The fundamental, governing fact here is that low sex-crime recidivism is universal, even as to former recidivists.

Given this fundamental reality, regardless of the horrors in any given sex offender's past record of sex crimes, there is virtually no one who can be said to have a statistical probability of re-offense greater than 50%, much less "highly likely." Hence, concern about a need to detain those deemed "truly dangerous" is a case of tilting at windmills mistaken in myopia for opponents. Especially because of that low recidivism rate, no one "probably will" recidivate. Therefore, identifying which sex offenders will probably recidivate is a scientific impossibility. Montaldi, p. 813.

At p. 843, Montaldi sums up the situation thus:

"...Despite experts' best efforts to be selective, a group of offenders distinguished as being in need of evaluation and a final group assessed to be the most dangerous, differ only somewhat (within a few percentage points) from sex offenders left undifferentiated (after vast differences in sample sizes are taken into account, e.g., 30,000 vs. 1200 vs. 366). With regard to the risk-related characteristics of representative offenders in each group, such differences are unlikely to be clinically meaningful: the overwhelming majority of offenders in all groups give no indication of continued sexual offending. Very serious problems exist in evaluation methods and technologies when sexual recidivism rates for offenders deter-

Sex offenders who get committed present only the same risk of re-offense as first-time sex offenders, that is, about 3-5% probability of re-offense within 5 years.

mined to be "likely" to continue sexual violence if released differ only slightly from offenders determined to not meet this standard."

D. Prediction of Future Individual Behavior is Impossible: the Baselessness of the Assertion That 'The Past Is The Best Predictor Of The Future'

Precise predictions of human individual behavior are scientifically impossible because human behavior is a paradigmatic complex system. Complexity theory explains that human individuals are interacting parts of a complex world, interacting with our environment and



Let's suppose that there is some book that contains fate – predictions of everything that is going to happen in the future, all that each individual will do in the rest of their lives. Except that there is some small possibility that something will happen differently than predicted; let's say that this happens to 1% of the predictions. Because of this, a new edition of the book of fate will have to be printed each day to account for those unexpected changes and the ramifications that they produce going forward into the future.

Each day this set of changes and ramifications erodes the accuracy of the original book's predictions. In less than four months, the entire set of original predictions will have either already happened, or never will (unless by sheer chance), because of those exponential daily differences. Each passing day, the probability that a given original prediction will happen erodes on an accelerating basis. This applies to sex-crime recidivism predictions as well as to everything else.

By incorrectly accord certainty to predictions, we inadvertently try to 'bind' the future to our expectations. Because people tend to act in accordance to their expectations, this tends to have some self-fulfilling prophecy effect.

If prophecy actually can have this self-fulfilling effect to some degree, why on earth would one choose to prophesize bad future events? Have you ever seen these two films: *The Adjustment Bureau* and *Tomorrowland*? You should!

other humans, and that each brain originating behavior is itself a complex organ. Human experience, including both day-to-day experience and internal processes, is utterly dynamic, fluid, and unpredictably variable. Future behavior is a result of so many factors, many unknown, and some even unknowable, that predicting one's behavior even over the next several days is as challenging, if not more so, than predicting the weather accurately for that same period. Predictions of individual behavior over as little as the ensuing six months, let alone over the course of several years, or even decades, is in complete defiance of the complexity theory, and therefore is inherently doomed to inaccuracy. Human future behavior cannot be reliably predicted by probabilities.

Erica Beecher-Monas and Edgar Garcia-Rill, "Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World," 24 *Cardozo L. Rev.* 1845 (May 2003), explain the application of this complexity principle thus:

(p. 1865): "Complexity Theory and the Problem of Prediction

"Predictions in closed systems are always highly contingent, and human behavior is an emblematic complex system. 'A complex adaptive system is a collection of individual agents with freedom to act in ways that are not always totally predictable, and whose actions are interconnected so that one agent's actions changes the context for other agents.' The principles of complexity theory have largely replaced deterministic notions of causation in biology, and some aspects of physics as well. Complexity theory explains that we, as individuals, are interacting parts of a complex world, we have numerous interactions with our environment, and the instigator of our actions, the brain itself, is a complex organ.

"Interactions of complex systems simply cannot be predicted far in advance with any accuracy. We cannot predict the occurrence of an idea or the behavior that results from it any more than we can predict next week's weather. We can discern regular patterns of weather which recur under particular conditions, but the weather will change in unpredictable ways when any of the underlying conditions change. The problem is two-fold: first, small errors in determining the original conditions (i.e., the predictors) may yield large errors in calculating expected outcomes; and second, even when the properties of the individual components are understood, the behavior of a system with many interacting components is inherently unpredictable.

"Complexity theory explains the notorious difficulty of predicting violent storms. As one judge noted, 'A weather forecast is a classic example of a

(Continued on page 8)

prediction of indeterminate reliability, and a place peculiarly open to debatable decisions.... Weather predictions fail on frequent occasions.' Why should this be so? The weather is a classic case of chaotic behavior (where small errors in measurement of initial conditions give rise to grossly inaccurate predictions) and emergent phenomena (where many components interact). Weather is due to 'the behavior of the gases that make up the earth's atmosphere under the influence of the rotation of the earth and the sun's radiant energy.' Although the atmosphere obeys the equations of fluid dynamics and should therefore be determinable, it also is governed by the nonlinear dynamics of the Lorenz attractor, a mathematical description of the trajectories of motion of atmospheric flow in three dimensions. As a result, the weather patterns display both order and chaos. What this means in terms of predictability is that weather predictions are fairly accurate for the next day, but fall off rapidly for three-day forecasts, and become highly chaotic after six days.

"The importance of measuring relevant information is stressed in complexity theory. In weather prediction, for example, 'over 10,000 land-based stations and hundreds of ships collect weather information daily at six-hour intervals.' Feedback about prediction is crucial. In addition to the weather stations, there are satellites, balloons, aircraft, and human spotters making daily observations, and funneling them to one of several meteorological centers. These centers generate regional reports, which are then adapted to local conditions. A huge amount of information is generated and analyzed at frequent intervals, something unlikely to be achieved in human behavior.

(p. 1887). "This illustrates an important failing of the actuarial future dangerousness instruments. None of the actuarial instruments incorporates any of the biological information about violence. Given what we know about the importance of measuring initial conditions in complexity theory, this is a huge gap. All the available actuarial instruments, even the best, would be more predictive if they also assessed biological information about the brain. Those factors would include



You can't predict in the eye of the storm.

'physiological measures and assessments of neurocognitive function and how individuals process emotional information.'

"Moreover, even using all available data, there are limits to prediction. There are three reasons for these limits. First, the human brain is the premier example of nonlinearity: that is, there is no predictable relationship between cause and effect. The brain itself is composed of multiple interacting and self-regulating physiological systems including biochemical and neuroendocrine feedback loops, which influence human behavior partly through an internal set of responses and partly through adaptive responses to new stimuli from the environment, forming a web of interacting systems that are dynamic and fluid. Second, an individual's conduct results from both internal stimuli and environmental stimuli, including a web of relationships affecting beliefs, expectations, and behavior. Third, individuals and their immediate social relationships are further embedded within wider social, political, and cultural systems that are continuously interacting; nature, nurture, and notions of free will all interact in a way that can only be considered probabilistic. The equilibrium of each of these systems can be radically altered by seemingly inconsequential stimuli.

"Thus, no matter how accurate the instrument, it will be impossible to predict a particular individual's behavior. The most that can be said is a probabilistic statement for the group within which the individual fits. Why, then, would anyone propose that actuarial instruments be used for predicting violence? If the best that can be achieved is the contingent reliability of weather predictions, is that reliable enough to sentence someone to death? The best that can be said is that actuarial instruments may improve on the woeful inadequacy of clinical predictions."

Parenthetically, "actuarial risk assessment" ("ARA") applied to sex offenders, does not even derive an individual's probability of re-offense. It merely reports a percentage statistic representing the number of other sex offenders in the past thought to share a few yes/no historical events with the offender at hand who later committed another sex offense. Even were ARA instruments capable of reporting a high percentage of likelihood of sexual re-offense — say 75 out of 100 other offenders — there is no way to know (even assuming accuracy, but see *infra*) whether the offender at hand will reoffend, or may be among the other 25 who do not. This is sheer guessing.

As a corollary of the allegations of the immediately preceding paragraph, the claim, often asserted by expert witnesses

for the prosecution in sex-offender commitment trials, that "the past is the best predictor of the future," is scientifically baseless. Without any actual correlation to sex crime recidivism, this claim is merely a veiled way of expressing that, since the commitment defendant committed a sex crime or crimes previously, he is inherently highly likely to commit another sex crime upon release. Were this true, all statistics reporting low sex-offender recidivism would have to be incorrect, such that every sex offender would be a future recidivist. In point of fact, sex-offense recidivism rates have plummeted drastically in recent years to a mere 3.2% over 8.4 years post-release for all released sex offenders in Minnesota, as stated *supra*. As noted *supra*, this plummeting trend holds true throughout the country. This alone clearly belies such claims that the past is prologue to the future. In fact, these actual figures prove that it certainly is not.

Now, let's put this into a context closer to the realities of attempting to use ARA to predict sexual re-offense. Imagine an auditorium in which 1,000 sex offenders of all ages are seated. Now imagine that ten experts thoroughly versed in ARA use as to sex offenders are surveying the sex-offender audience from the stage. Since the current average rate of recidivism is (very roughly) 3.2%, it is reasonable to assume that approximately 32 of this group of 1,000 sex offenders may reoffend. Ask each of these ten experts to identify the specific sex offenders who will reoffend. Each will respond that ARA does not provide any means to reach such a conclusion. If pressed to make specific predictions nonetheless, the aggregate rate of inaccuracy of these predictions would average 96.8% wrong [i.e., 100% minus 3.2%] — pure chance in action. Effectively, if 1,000 sex offenders were committed on the strength of this prediction, 968 of them would have been committed despite the fact that they never would have committed a sex crime again, simply to ensure commitment of the mere 32 who would have done so. Such large-scale deprivation of liberty upon nothing more than such guesswork is pure tyranny and is an insane waste of governmental fiscal resources. A tiny portion of the annual cost of commitment, with its total confinement mode of operation, could easily achieve perfect recidivism-prevention results through intense surveillance of those thought to represent the worst risk of re-offense. (See section immediately following.)

As a separate point limiting ARA utility, consider that the ARA choice of predictive scoring factors does not account for variance in sexual recidivism, leading to massive inaccuracy. *Melissa Hamilton*, in "Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws,"

83 *Temple L. Rev.* 697 (Spring, 2011), at 728, deriving the variance of the Static-99's correlation coefficient, determined that only 10% of the variance in sexual recidivism in the development sample used in the Static-99 is explained by any or all of the scoring factors of the Static-99. *Hamilton* observes, "... [T]his means that 90% of what helps influence sex-offense recidivism is based on other factors." Next, using the U.S. Dept. of Justice's sex-crime recidivism base rate (5.3%), and an "ROC" (receiver operator characteristic) rating of .70, *Hamilton* determined that, as to its predictive accuracy, the Static-99 will be wrong 9 times out of 10. (*Id.*, p. 731) (emphases supplied). Because the Static-99R uses the same rating factors as the Static-99, save for the effect of increasing age, it is reasonable to assume that its rate of erroneous prediction is about that same astronomical factor (far worse than a pure-chance guess). This confirms that making any predictions of future commission of crime is not just sheer guesswork, it is guesswork that is statistically doomed to inherent error in almost all cases. Given that incarceration under guise of civil commitment based on any guesswork is tyranny, permanent incarceration as claimed commitment through use of such inherently wildly incorrect guesses is an inexcusable atrocity.

E. Intensive Supervised Release/Conditional Release Restrictions, Community Notification, Sex Offender Registration, and Monitoring and Surveillance by Corrections Agents and Police, Taken Together, Have Proven Effective at Preventing Sexual Re-Offense. Proving That Public Safety Needs Do Not Support SOCC Laws.

For purposes of this section, it is useful to examine the Minnesota experience as an example of other sex offender legislation and programming as effectively obviating any need for SOCC. Intensive supervised release ("ISR") and conditional release ("CR") restrictions, monitoring, and surveillance, coupled with community notification and police surveillance and investigation, all applicable to recently released prisoners with past sex crimes have proven effective at preventing sexual re-offense, such that not one case of recidivistic sex crime while on ISR/CR has occurred to date. Public safety needs do not support SOCC commitment.

So intensely and conscientiously is close supervision of released sex offenders now performed that release supervision violations in Minnesota rose from 11% during 1990 to 56% during 2005. Excluding violations based on those dwindling instances of recidivism, the net increase in release revocations due to purely "technical" violations has been enormous.

When sex offenders are placed on ISR, (Continued on page 9)

they are continuously supervised by a team of three to five supervision agents, whose case loads are capped at 15 per state law. During all four phases of ISR, offenders are required to maintain steady employment, comply with random alcohol/drug testing, and are subjected to unannounced face-to-face contacts with their supervision agents at both their residence and place of work. Further, offenders must remain on ISR until they successfully complete all four phases of the program, or until they reach the expiration of their sentence.

Prior to committing their crimes, sex offenders frequently engage in behaviors such as consuming alcohol/drugs, viewing pornography, associating with minors, 'grooming' their victims, and so on. However, the increased length and intensity of supervision may not only deter offenders from engaging in this type of pre-offense behavior, it also increases the likelihood that supervising agents will detect this behavior if it does occur. The enhanced detection afforded by longer, more intensive supervision has led to a marked increase in supervised release revocations. But it may also have enabled supervision agents to revoke offenders before they fully relapse and have an opportunity to reoffend sexually.

For approximately the last 20 years, Minnesota sentencing law as to sex offenses now requires that, regardless of earlier end of sentence, all sex offenders must serve a ten-year period of conditional release, commencing, or recommencing *ab initio* on the date of last prison release (i.e., at the end of release revocation term, if any). This adds considerable extra importance to the aforesaid 5-year 'window of likelihood' if sex-crime recidivism occurs at all.

Two additional factors may well have contributed to reduction of sexual recidivism. First, "police investigation and prosecuting practices," have greatly enhanced and intensified over the last 20 years as to sex crimes – particularly as they are now so easy to connect to anyone with a sex-crime(s) record – serve as a powerful deterrent due to the high probability of detection and apprehension.

Second, community notification laws everywhere, including a very thorough provision in Minnesota, rating sex offenders by "risk level," and applying the most comprehensive community notification measures to the top-risk-level releases, serves, through such 'spotlighting,' to further deter sex crimes by releases. Buttressing this point of lack of necessity for commitment of sex offenders, "Duwe and Donnay (2008) reported that broad community notification, which is applied to the highest risk sex offenders, significantly reduces sexual recidivism." (G. Duwe & P.J. Freske, "Using Logistic Regression Modeling to Predict Sexual Recidivism: The Minnesota Sex Offender

Screening Tool – 3 (MnSOST-3)," *Sexual Abuse, A Jour. of Research and Treatment*, Vol. __, No. __, pp. 1-28, at p. 3 (2012).

The facts are that: (1) virtually all sex offenders are placed on ISR upon prison-release; and (2) no sex offender on ISR has ever committed a sex offense. Incidentally, a third fact is that such treatment is required of every ISR-placed sex offender. Treatment of sex offenders is also provided ubiquitously throughout Minnesota in non-detention settings. Treatment does not require detention.

ISR/CR restrictions, monitoring, and surveillance, coupled with community notification and police surveillance and investigation, have proven effective at preventing sexual re-offense, such that not one case of recidivistic sex crime while on ISR/CR has occurred to date. Public safety needs do not support SOCC commitment.

The Bigger Picture Under AI Prediction, No One Is Free.

Carlssa Velez, "If AI Is Predicting Your Future, Are You Still Free?", *Wired*, [Dec. 27, 2021; page unknown]

Text Excerpts:

"As you read these words, there are likely dozens of algorithms making predictions about you. ...Algorithmic predictions can determine whether you get a loan or a job or an apartment or insurance, and much more.

These predictive analytics are conquering more and more spheres of life. And yet no one has asked your permission to make such forecasts. No governmental agency is supervising them. No one is informing you about the prophecies that determine your fate. Even worse, a search through academic literature for the ethics of prediction shows it is an underexplored field of knowledge. As a society, we haven't thought through the ethical implications of making predictions about people – beings who are supposed to be infused with agency and free will.

Defying the odds is at the heart of what it means to be human. Our greatest heroes are those who defied their odds: Abraham Lincoln, Mahatma Gandhi, Marie Curie, Helen Keller, Rosa Parks, Nelson Mandela, and beyond. They all succeeded wildly beyond expectations. Every school teacher knows kids who have achieved more than was dealt in their cards. In addition to improving everyone's baseline, we want a society that allows and stimulates actions that defy the odds. Yet the more we use AI to categorize people, predict their future, and treat them accordingly, the more we narrow human agency, which will in turn



Constant surveillance of all

expose us to uncharted risks.

Human beings have been using prediction since before the Oracle of Delphi. Wars were waged on the basis of those predictions. In more recent decades, prediction has been used to inform practices such as setting insurance premiums. Those forecasts tended to be about large groups of people – for example, how many people out of 100,000 will crash their cars. The larger the pool, the more predictable and stable premiums are.

Today, prediction is mostly done through machine learning system that use statistics to fill in the blanks of the unknown. ...Algorithms that are applied to human behavior use historical data to infer our future: what we are going to buy, whether we are planning to change jobs, whether we are going to get sick, whether we are going to commit a crime or crash our car. Under such a model, insurance is no longer about pooling risk from large sets of people. Rather, predictions have become individualized, and you are increasingly paying your own way, according to your personal risk scores – which raises a new set of ethical concerns.

An important characteristic of predictions is that they do not describe reality. Forecasting is about the future, not the present, and the future is something that has yet to become real. A prediction is a guess, and all sorts of subjective assessments and biases regarding risk and values are built into it.

Institutions today, however, often try to pass off predictions as if they were a model of objective reality. And even when AI's forecasts are merely probabilistic, they are often interpreted as deterministic in practice – partly because human beings are bad at understanding probability and partly because the incentives around avoiding risk end up reinforcing the prediction...

The ways we are using predictions raise ethical issues that lead back to one of the

oldest debates in philosophy: ...[Has] whatever is going to happen ...been predetermined? ...The implication is that our feeling of free will is nothing but that: a feeling.. This view is called ...fatalism.

What is worrying about this argument ... is the idea that, if accurate forecasts are possible, (regardless of who makes them), then that which has been forecasted has already been determined. In the age of AI, this worry becomes all the more salient, since predictive analytics are constantly targeting people.

One major ethical problem is that by making forecasts about human behavior just like we make forecasts about the weather, we are treating people like things. Part of what it means to treat a person with respect is to acknowledge their agency and ability to change themselves and their circumstances. If we decide that we know what someone's future will be before it arrives, and treat them accordingly, we are not giving them the opportunity to act freely and defy the odds of that prediction.

A second, related ethical problem with predicting human behavior is that by treating people like things, we are creating self-fulfilling prophecies. Predictions are rarely neutral. More often than not, the act of prediction intervenes in the reality it purports to merely observe. For example, when Facebook predicts that a post will go viral, it maximizes exposure to that post, and lo and behold, the post goes viral. ...Your inability to get a job might be explained not by the algorithm's accuracy, but because the algorithm itself is recommending against companies hiring you and companies take its advice. Getting blacklisted by an algorithm can severely restrict your options in life.

...In the case of AI, if predictive analytics are partly creating the reality they purport to predict, then they are partly responsible for the negative trends we are experiencing in the digital age, from increasing inequality to polarization, misinformation, and harm to children and teenagers.

Ultimately, the extensive use of predictive analytics robs us of the opportunity to have an open future in which we can make a difference, and this can have a destructive impact on society at large.

Throughout history, we have come up with ways of living that challenge fatalism. We go to great lengths to educate our children, hoping that everything we invest will lead them to have better lives than they otherwise would. We make an effort to improve our habits in the hopes of enjoying better health. We praise good behavior to encourage more of it, and to acknowledge that people could have made worse choices. We punish wrongdoers, at least partly to dis-incentivize them and others from transgressing social norms, and partly to blame people who we think should have acted better.

(Continued on page 10)

We strive to structure our societies on the basis of merit.

None of those social practices that are so fundamental to our way of life would make any sense if we thought or behaved as if people's destinies were sealed. ... Imagine a world ... without any attempts to change the future: a world in which people live in absolute resignation to a prophecy. It's almost unthinkable....

...The desire to leave no potential data point uncollected with the objective of mapping out our future is incompatible with treating individuals as masters of their own lives.

We have to choose between treating human beings as mechanistic machines whose futures can and should be predicted (in which case it would be nonsensical to believe in meritocracy), or treating each other as agents (in which case making people the target of individual predictions is inappropriate)....

Predictions are not innocuous. The extensive use of predictive analytics can even change the way human beings think about themselves. There is value in believing in free will. Research in psychology has shown that undermining people's confidence in free will increases cheating, aggression, and conformity and decreases helpful behavior and positive feelings like gratitude and authenticity. The more we use predictive analytics on people, the more we conceptualize human beings as nothing more than the result of their circumstances, and the more people are likely to experience themselves as devoid of agency and powerless in the face of hardship. The less we allow people opportunities to defy the odds, the more we will be guilty of condemning them, and society, to the status quo.

By deciding the fate of human beings on the basis of predictive algorithms, we are turning people into robots. People's creativity in challenging probabilities has helped save entire nations. Think of Roosevelt and Churchill during World War II. They overcame unspeakable difficulties in their personal and professional lives and helped save the world from totalitarianism in the process. The ability to defy the odds is one of the greatest gifts of humanity, and we undermine it at our peril.

Secret COMPAS Algorithms Threaten the Rule of Law.

Frank Pasquale, "Secret Algorithms Threaten the Rule of Law," *MIT Technology Review*, June 1, 2017, <https://www.technologyreview.com/2017/06/01/151447/secret-algorithms-threaten-the-rule-of-law>, (<https://perma.cc/AYM5->

GSH3].

Text:

"Predicting and shaping what you will do next – whether as a shopper, worker, or voter – is big business for data-driven firms. But should their methods also inform judges and prosecutors? An ambitious program of predicting recidivism among convicts is bringing algorithmic risk assessments to American court-houses.

These assessments are an extension of a trend toward actuarial prediction instruments for recidivism risk. They may seem scientific, an injection of computational rationality into a criminal justice system riddled with discrimination and inefficiency. However, they are troubling for several reasons: Many are secretly computed; they deny due process and intelligible explanations to defendants; and they promote a crabbed and inhumane vision of the role of punishment in society.

Let's start with secrecy – a factor that has apparently alarmed the Supreme Court in the case of the firm Northpointe's COMPAS risk score. In *Loomis v. Wisconsin*, a judge rejected a plea deal and sentenced a defendant (Loomis) to a harsher punishment in part because a COMPAS risk score deemed him of higher than average risk of recidivating. Loomis appealed the sentence, arguing that neither he nor the judge could examine the formula for the risk assessment – it was a trade secret.

The State of Wisconsin countered that Northpointe required it to keep the algorithms confidential, to protect the firm's intellectual property. And the Wisconsin Supreme Court upheld Loomis's sentence, reasoning that the risk assessment was only one part of the rationale for the sentence. It wanted to continue to give judges the opportunity to take into account the COMPAS score as one part of their sentencing rationale, even if they had no idea how it was calculated.

Lawyers, academics, and activists are now questioning that reasoning. Judicial processes are, by and large, open to the public. Judges must give reasons for their most important actions, such as sentencing. When an algorithmic scoring process is kept secret, it is impossible to challenge key aspects of it. How is the algorithm weighting different data points, and why? Each of these inquiries is crucial to two core legal principles: due process, and the ability to meaningfully appeal an adverse decision.

Due process is an open-ended concept, but critical to legitimate legal systems. This basic constitutional principle gives defendants a right to understand what they are charged with, and what the evidence against them is. A secret risk assessment algorithm that offers a damning score is analogous to evidence offered by an anonymous expert, whom one cannot cross-examine. Any court

aware of foundational rule of law principles, as well as Fifth and Fourteenth Amendment principles of notice and explanation for decisions, would be very wary of permitting a state to base sentences (even if only in part) on a secret algorithm.

Two forms of automation bias also menace the right to a meaningful appeal. Judges are all too likely to assume that quantitative methods are superior to ordinary verbal reasoning, and to reduce the task at hand (sentencing) to an application of the quantitative data available about recidivism risk. Both responses undermine the complexity and humane judgment necessary to sentencing.

Even worse, when companies offer commercial rationales for keeping their 'secret sauce' out of the public eye, courts have been eager to protect the trade secrets of scoring firms. That tendency is troubling in private-sector contexts, since commercial torts may be committed with impunity thanks to the opacity of ranking and rating systems. Even in the context of voting, authorities have been sluggish about demanding software that is auditable and understandable by outsiders. Nevertheless, the case of criminal sentencing should be a bridge too far for conscientious judges -- and that probably explains the U.S. Supreme Court's interest in *Loomis*. Sending someone to jail thanks to the inexplicable, unchallengeable judgments of a secret computer program is too *Black Mirror* for even hardened defenders of corporate privileges.

Moreover, there are options between 'complete algorithmic secrecy' and 'complete public disclosure.' As I explained in 2010, 'qualified transparency' is a well-established method of enabling certain experts to assess protected trade secrets (including firms' code and data) in order to test a system's quality, validity, and reliability. Think of a special master in a court case, or Secure Compartmented Information facilities for intelligence agencies. At a bare minimum, governments should not use algorithms like the COMPAS score without some kind of external quality assurance enabled by qualified transparency.

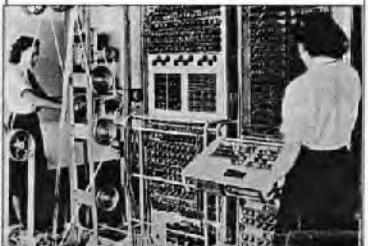
But secrecy is not the only problem here. Assume that algorithmic risk assessment eventually becomes more public, with fully transparent formulae and data. There are still serious concerns about the use of 'evidence-based sentencing,' as quantitative predictive analytics is often marketed in criminal justice contexts.

For example, legal scholar Sonja Starr has argued that what is really critical in the sentencing context is not just recidivism in itself, but the difference a longer prison term will make to the likelihood a convict will reoffend. Algorithmic risk assessment may eventually become very good at predicting reoffense, but what about a risk assessment of risk assess-

ment itself – that is, the danger that a longer sentence for a 'high-risk' offender may become a self-fulfilling prophecy, given the criminogenic environment of many prisons?

There is also value in narrative intelligibility in the ranking and rating of human beings. Companies are marketing analytics to predict not only the likelihood of criminal recidivism, but also the chances that any given person will be mentally ill, a bad employee, a failing student, a criminal, or a terrorist. Even if we can set aside the self-fulfilling prophecy concerns raised above, these assessments should be deployed only with utmost caution. Once used to advise police, DHS, teachers, or bosses, they are not mere opinions circulating in a free flow of ideas. Rather, they can have direct impact on persons' livelihoods, liberty, and education. If they cannot be explained in a narratively intelligible way, perhaps they should not be used at all without the direct consent of the person they are evaluating.

This opinion may not sit well with those who see artificial intelligence as the next step in human evolution. Robotist Hod Lipson memorably compared efforts to make advanced algorithmic information-processing understandable to humans to 'explaining Shakespeare to a dog.' But this loaded metaphor conceals more than it reveals. At least for now, humans are in charge of governments, and can demand explanations for decisions in natural language, not computer code. Failing to do so in the criminal context risks ceding inherently governmental and legal functions to an unaccountable computational elite.



We are Northpointe. We make COMPAS, which predicts your future. We refuse to tell you how we do so. This way you will never be able to prove whether our predictions have any accuracy at all. All that matters is that powerful people believe our predictions, and will make decisions based on them with potentially disastrous impacts on your future. In effect, we make your future. And there is nothing you can do about it.
