

"As we know, there are known knowns; there are things that we know that we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns, the ones we don't know we don't know."
 — Donald Rumsfeld, Feb. 2002 U.S. Dept. of Defense News Briefing

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- & Many more to come!

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THE MISTAKE NO ONE WILL FIX:

Locked Up Forever Post-Prison on a Paraphilic 'Disorder' Whose Only 'Diagnostic Element' Is the Crime for Which You Served Your Prison Time.

Michael B. First & Allen Frances, "Issues for DSM-V: Unintended Consequences of Small Changes: The Case of Paraphilias," 165(10) *The American Journal of Psychiatry* 124 (October 2008), <https://doi.org/10.1176/appi.ajp.2008.08030361>.

Text Excerpts: "[The Diagnostic and Statistical Manual of the American Psychiatric Association, version DSM-IV contained] one outright mistake: in criterion A of the paraphilia section. The unintended consequences following what we thought was a small wording change provide a cautionary tale for DSM-V. The mistake arose from the decision to add the following criterion to most disorders in DSM-IV: 'the disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.' This was a reminder that the symptom criteria alone are insufficient to define mental disorder. (1) In the paraphilia section, the new wording replaced DSM-III-R criterion B, which had set the significance threshold based on either acting on the urges or experiencing distress... [emphases added]. Furthermore, criterion A was amended (by adding 'behavior' along with 'fantasies' and 'urges') to emphasize that it is behavior that ...typically brings individuals to clinical attention.

The reworded definition resulted in two unanticipated problems. First, conservative religious groups mistakenly worried that the change meant DSM-IV did not recognize pedophilia as a mental disorder unless it caused distress (2-4). To eliminate this misinterpretation, the original DSM-III-R criterion B was reinstated in DSM-IV-TR for those paraphilias involving nonconsenting victims (i.e., pedophilia, voyeurism, exhibitionism, frotteurism, and sexual sadism)(5).

[This reinstatement of DSM-III's 'or behaviors' phrase] led some forensic evaluators to conclude that sexual offenders might qualify [under the DSM-IV-TR] as having a mental disorder based only on their having committed sexual offenses (e.g., rape). In many states with sexually violent predator statutes, the diagnosis of mental disorder is necessary to trigger indefinite civil psychiatric commitment for sexually violent offenders after their prison terms are completed. The constitutionality of these statutes hinges on the requirement that the sexual offenses are caused by a 'mental abnormality.' Although the mental abnormality mentioned in the statutes is defined by state legislature and is not equivalent to any DSM disorder, the courts have acknowledged the importance of DSM diagnoses in the determination of whether the statutorily defined mental health criteria are satisfied(6). The revised criterion A wording has sometimes been used to justify making a paraphilia diagnosis based solely on a history of repeated acts of sexual violence, which is then argued as satisfying the statutory mandate for the presence of a 'mental abnormality'(7, 8). This certainly was never our intent in DSM-IV [emphasis added]. Defining paraphilia based on acts alone blurs the distinction between mental disorder and ordinary criminality. Decisions regarding possible lifelong psychiatric commitment should not be made based on a misreading of a poorly worded DSM-IV criterion item.

We regret the confusion caused and have two recommendations: 1) although the contentious issue of sexually violent predator commitment cannot be resolved by a simple DSM wording change, we feel it is important to set the record straight and restore criterion A to its DSM-III-R

wording (i.e., remove the phrase 'or behaviors' in DSM-V (if not sooner); 2) [refrain from] tinkering with criteria [in future, since it cannot] outweigh the risks, both because of the potentially unforeseen consequences of rewording criteria and because of the disruptive nature of all changes."

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- (2) Medinger, A.: American Psychiatric Association decides pedophilia is no longer a disorder. *Exodus Global Alliance*, <http://exodus.to/content/view/181/56> [Google Scholar](#)
- (3) Medinger, A.: DSM-IV and Pedophilia: What did the APA do? *Exodus International*, <http://exodus.to/content/view/182/56> [Google Scholar](#)
- (4) Bowles, L.: *Pedophilia: good news, bad news.* *WorldNetDaily*, <http://worldnetdaily.com/mews/article.asp?ARTICLEID=12961> [Google Scholar](#)
- (5) First, M., Pincus, H: The DSM-IV text revision: rationale and potential impact on clinical practice. *Psychiatr Serv* 2002;53:288-292 [Google Scholar](#)
- (6) _____weakest links in psychodiagnosis. *J. Sexual Offender Civil Commitment: Science and the Law* 2005; 1:17-82 [Google Scholar](#)
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Rate in Recidivism Drop Doubled in 2000-2019!

The Accelerating Drops in Sex-Crime Recidivism the Anti-Sex Offender Extremists Never Mentioned

Patrick Lussier, Evan McCuish, & Elizabeth L. Jeglic, "Against All Odds: The Unexplained Sexual Recidivism Drop in the United States and Canada," 52 *Crime and Justice* [Galley proof pages used here] (2023), <https://doi.org/10.1086/727028>

Text Excerpts: [p. 2:] "The belief that sexual recidivism rates are high has been the foundation of more than 80 years of policy making aiming to prevent sexual offending. In reality, in Canada and the United States, these recidivism rates have been historically low and dropping for several decades. This international recidivism drop started during the 1970s but went largely unnoticed because its presence was buried in a

dense, complex, and fragmented body of literature. To make sense of this literature, which



includes more than 500 publications, a methodology consisting of a systematic review and meta-analysis was designed allowing examining recidivism rate trends over long periods. In fact, we have recently completed the largest and most exhaustive comparative and empirical analysis of recidivism rates by individuals identified as sex offenders. This essay presents a comparative historical analysis contrasting recidivism rates reported in Canadian and American studies and what we have learned about the possible impact of sex offender laws on sexual recidivism rates over an 80-year period. The study findings suggest that sex offender registration is not an effective

(Continued on page 2)

tive crime prevention tool. In fact, our analyses show that sex offender registration and public notification laws were enacted in a context during which sexual recidivism had been dropping for about two decades prior. The ongoing gap between policy making and research in the context of sexual offending and the risk of sexual recidivism is a central focus of this essay.

[p. 3:] ...[W]hat these somewhat distinct policy perspectives share in common is an assumption that in the absence of sex offender laws and specific intervention strategies, persons convicted for sexual offenses will eventually sexually reoffend (e.g., Laws, 1989; Laws, Hudson, & Ward 2000).

[p. 4:] This emphasis on the inevitability of SOR [is] ...not based on the justice system's own data and empirical evidence but rather on their concern regarding the negative and dramatic ramifications of instances of sexual recidivism, including public backlash against the justice system.

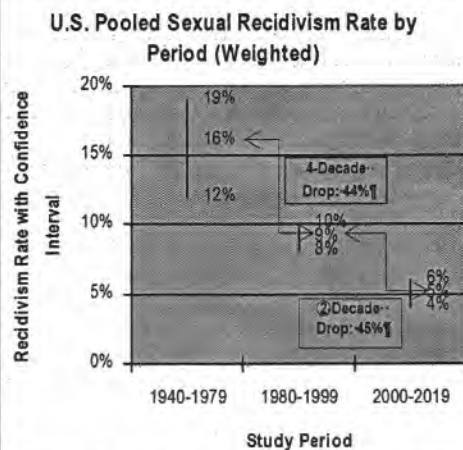
The current study examined SOR rates in the United States and Canada across eight decades marked by several political, social, cultural, legal, and correctional changes. During this period, more than 20,000 documents were published dealing directly or indirectly with the issue of SOR (e.g., clinical profile of recidivists, treatment perspectives, the clinical assessment of dangerousness; Lussier, McCuish, Proulx, et al. 2022). This dense literature, however, has not been subject to a comprehensive analysis that allows for an international comparison. Rather, researchers tend to focus on individual studies, on findings stemming from a single research team, or on a paradigm of research interest (e.g., actuarial risk assessment, treatment efficacy). Often, these research teams work from a single data set or from a single institution, raising questions about the generalizability of this work and its ability to be informative of the evolution of SOR rates.

...While criminologists regularly turn to police data and crime surveys to examine the evolution of crime problems over time, including evolution in rates of sexual offense incidents (e.g., Tonry 2014), there is no equivalent source of information for more specific problems such as sexual recidivism.

[pp. 4-5:] The current study fill this policy and research gap by providing a novel approach and methodology for the examination of the evolution of sexual recidivism rates. Against the backdrop of two waves of highly controversial sex offender laws, during which the United States and Canada opted for different paths, how have sexual recidivism rates evolved in each of these two countries? Based on a systematic review and meta-analysis of about 80 years of SOR research, the current study investigates the evolution of sexual recidivism rates for the two countries that have contrib-

uted the greatest number of published papers related to the scientific study of SOR (Lussier, Thivierge, et al. 2022). The current study demonstrates that, for both the United States and Canada, sexual recidivism rates are currently at a historical low and that they have significantly dropped. This drop is particularly significant considering the policy paths of the two countries over eight decades.

[p. 36:] For the United States, the weighted pooled sexual recidivism rate was 0.16 (95% CI: .12-.19) across studies conducted between 1940 and 1979, indicating that sexual recidivism occurred in about 4 out of every 25 cases. Comparatively speaking, the weighted pooled sexual recidivism rate dropped to .09 in studies conducted between 1980 and 1999 (95% CI: .08-.10) The lowest weighted pooled recidivism rate was observed during the 2000-2019 period (weighted pooled rate: .05; 95% CI: .04-.06). This corresponds to a recidivism drop of 68.8% from the 1940-79 to the 2000-2019 period. The confidence intervals for the weighted pooled sexual recidivism rate between the two periods (1940-79, 2000-2019) did not overlap, reinforcing the idea that there was a significant sexual recidivism drop for the United States. [see editorially-added chart, below, showing this increasing rate of reduction in recidivism as the period approaches the present:



In this chart, the figures at the high and low ends of the ranges shown are the bounds of the confidence intervals and the middle figure is the average of the pooled recidivism calculated by the authors. True to their statement, this chart shows that the drops between each of these historical periods were pronounced enough that in each case the later high-bound of that confidence interval was less than the low-bound of the immediately preceding period (e.g., the 10% high-bound of the 1980-1999 period was less than the 12% low-bound of the 1940-1979 period.)

[First, although this article's authors did not give it banner-headline status, this chart shows that the drop in the recidivism rate in the first two decades of the new millennium are at least as great as in the preceding four decades — effectively a doubling in the time-rate of this reduction in recidivism.

The policy importance of this widely ignored truth simply cannot be overstated.

Claims of increasing rates of re-offense by former sex offenders are utterly false. In fact, they are not just false, they are diametrically the opposite from the truth. The rate of sexual re-offense has not just been dropping, that drop has been accelerating like a lead ball in a vacuum tube quickly reaching for terminal velocity.

In this context, insistent obsession as a tenet of 'political correctness' on the populist hysteria that a tiny cadre of recidivistic sex offenders are responsible for most sex crimes is not just not the actual problem; it is a panic-based distraction from the real problem, which is the robbing of resources from programs of sex-crime prevention that are universal (not off-target in exclusive attention to recidivism) and which would be almost totally effective at eradicating sex crimes if only those programs received the funding they need. (on this, see the excerpt below from the incisive, insightful article by Prof. Eric S. Janus, "Preventing Sexual Violence: Alternatives to Worrying about Recidivism," *infra*, pages 6-7).

As a separate point,] ...contrary to the viewpoint that all perpetrators of sexual offenses are at a lifelong risk of sexual recidivism..., we observed that after approximately 12-13 years, weighted mean sexual [lifetime] sexual recidivism rates are no longer increasing. This aligns with commentaries by sexual offending scholars regarding the probability of desistance with long-term follow up periods (i.e., Hanson, 2018). [This throws into serious question why the 2021 revision of re-offense probability rates predicted by the Static 99R and -2002R include a 20-year prediction that is based on extrapolation from the 10-year period claimed to be based on actual observations in those predictive tools.]

[Considering whether treatment bears any effect on recidivism.] [i]t is telling that, from the first meta-analysis on the impact of sex offender treatment (i.e. Hall 1995) to the most recent (Schmucker & Losel 2015), sexual recidivism rates dropped for both treated and untreated offenders.²³

VI. Conclusion

...Our findings stress that the public image of the sex offender as a life-course persistent sexual predator does not fit the reality of 555 empirical studies on recidivism. Our findings show that only a minority of offenders sexually recidivate and that sexual recidivism rates have been dropping since the 1970s.... The drop started ...well before the implementation of sex offender registration and notification laws. In other words, registration and notification laws were implemented in a context where sexual recidivism rates already had been slowly but steadily dropping for about 20 years, which contrasted with the political discourse of the time (Lieb, Quinsey, and Berliner 1998; Wright 2017). The drop was stronger in Canada, where sex offender registries are not publicly available and do not include the same types of punitive measures included in the United States, such as public notification, residential restriction laws, and civil commitment laws. The Canadian drop occurred in a context in which treatment and rehabilitation were anchored in a risk-

need-responsivity model recognizing offenders' heterogeneity of risk and treatment/intervention needs. While prior meta-analytic studies reported that treatment was associated with a 25 percent reduction in sexual recidivism rates (Schmucker & Losel 2015), the sexual recidivism drop observed in the current study was over 40 percent for the United States and more than 60 percent for Canada, meaning that it is unlikely that the sexual recidivism crime drop is simply a matter of treatment effect.

...In all, this study suggests that one-size-fits-all policies aiming to reduce sexual recidivism rates are overwhelmingly applied to non-recidivists who may not need such extreme penal measures. Another important finding from this study is that it appears that research on sexual recidivism is slowing down and that researchers are relying on older data sets of persons sampled from eras that may no longer be relevant in contemporary contexts. This has critical implications for studies that rely on old data sets to justify the reliability and validity of actuarial risk assessment tools. As others have shown, (e.g., Neil, Sampson, and Nagan 2021), the era that people belong to has implications for the degree to which they are involved in the justice system. American and Canadian scholars relying on old data to inform policy may be getting their conclusions wrong even if their methodological approach is sound. Finally, the current study highlighted that a very significant policy-relevant phenomenon unfolded for about 30 years without being detected by researchers. Historically, research on sexual recidivism focused on individual-level factors predictive of sexual recidivism (i.e., who sexual recidivists are). We argue that future research should broaden the investigation to include social, legal, correctional, and methodological factors to better understand cohort and period effects and their impact on recidivism rates over time.

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Considering whether treatment bears any effect on recidivism, it is telling that, from the first meta-analysis on the impact of sex offender treatment to the most recent, sexual recidivism rates dropped for both treated and untreated offenders.

Profiteering from SOCC & Living Cost as a Parolee or Registered Person (Part 2 of 2)

Laura I. Appleman, "The Treatment-Industrial Complex: Alternative Corrections, Private Prison Companies, and Criminal Justice Debt," 55 *Harv. C.R.-C.L. L. Rev.* 1 (2020).

Text Excerpt:

[Part 2] [pp. 33:] 1. *Costs of Civil Registration*

"The state generally requires people convicted of sex offenses to register for a public sex-offender registry. Registry requirements can impose a great deal of criminal justice debt on sex offenders. States repeatedly require sex offenders to pay to be listed on the sex offender registry,³²⁵ and failing to register is a criminal offense in itself. Sex offenders may be required to remain on the registry for fifteen years or even for life, depending on the conviction.³²⁶ Caught between accumulating fees, additional fines, and the risk of reincarceration if they cannot make payments related to sex offender registration, many people become trapped in a vicious cycle of treatment, prison, and criminal justice debt. The treatment industrial complex is fatally easy to enter, but can be almost impossible to leave.

Individuals convicted of sex offenses frequently must pay for state-required treatment, polygraphs, and GPS monitoring.³²⁷ For people convicted of Level Three sex offense, GPS monitoring can be life-long and entail fees to private providers.³²⁸ Moreover, many states do not provide a waiver of the monitoring fee for low-income

individuals convicted of sex offenses.³²⁹

[pp. 33-34:] Even convictions for minor sex offenses can result in extremely expensive treatment. Seattle, Washington requires a \$900, ten-week course on toxic masculinity for men convicted of soliciting prostitution.³³⁰ The class, 'Stopping Sexual Exploitation,' is run by the Organization for Prostitution Survivors, a Seattle-based non-profit.³³¹ The ten-week course tries to reach men about 'the ...roots of prostitution: patriarchy, male privilege, and the barriers to healthy relationships.'³³² Similar men's accountability classes, required by the courts, are used in other Washington State cities such as Tacoma and Everett.³³³

[p. 34:] Colorado requires people convicted of sex offenses to pay a whole host of fees and fines. First, everyone who is convicted of a sex offense must pay for a psychosexual evaluation, which costs approximately \$1,000 to \$2,000.³³⁴ Next, people required to undergo treatment for committing sex offenses typically must attend five treatment sessions per month.³³⁵ Four of the treatments consist of group therapy, costing \$50 a session, and one is individual therapy, at \$75 a session.³³⁶ Therefore, just attending treatment will cost a defendant \$275 per month.³³⁷

Treatment plans can go on for months or even years, depending on the severity of the sex offense.³³⁸ Nationally, the average sex offender treatment program lasts about 18 months, according to Elizabeth LeTourneau, the president of the Association for the Treatment of Sexual Abusers.³³⁹ Although the Colorado Department of Probation does provide treatment financial assistance to some individuals convicted of sex offenses, every person must sign a contract agreeing to pay the costs in full.³⁴⁰ If they default on the payments, the individuals are not just in violation of the treatment contract but have violated their probation as well.³⁴¹

[pp. 34-35:] Treatment is just the beginning of fees for individuals convicted of sex offenses. In Colorado, some individuals also must pay a private 'tracker,' usually an off-duty police officer, who ensures that the person is where she claims she is going when she leaves the house.³⁴² These private services charge \$15 to \$30 an hour, paid by the defendant.³⁴³ In addition, some individuals convicted of sex offenses in Colorado must pay for two or more polygraphs per year, which cost approximately \$250 per test.³⁴⁴ Defendants considered sexually violent must register every quarter.³⁴⁵ Colorado also imposes a general surcharge ranging in cost from \$500 to \$3,000, depending on the class of felony.³⁴⁶ Sometimes, people convicted of sex offenses are also required to pay for room and board at a group home where they are ordered to live.³⁴⁷ In total, a Colorado resident convicted of a sex offense will likely pay approximately \$10,000 the first year they are charged and convicted, according to one treatment provider's estimate.³⁴⁸

[p. 35:] In 2018, Kentucky proposed a bill requiring all individuals convicted of sex offenses to pay for the cost of keeping a sex offender registry, roughly \$100 per person per year.³⁴⁹ Anyone failing to pay would be

fined up to \$250 for the first offense, and for the second offense, would be charged with a misdemeanor.³⁵⁰ Illinois has a similar fee structure, charging a \$100 initial fee and a \$100 annual fee, and West Virginia charges \$40 annually.³⁵¹ Residents of Jackson County, Indiana who have been convicted of sex offenses must pay \$50 annually and a \$5 fee every time they change address.³⁵² Georgia charges \$250 annually, a substantial expense for those living at or below the poverty line.³⁵³

In Wyoming, someone convicted of a sex offense must pay \$150 to initially register for the sex offender registry and, if they leave town, pay \$31.25 to 'de-register.'³⁵⁴ Each time a defendant enters a new town, she must pay the \$31.25 to re-register.³⁵⁵ Individuals must also report every 'life change,' such as new cars, new tattoos, or new employers, and pay to have each of these changes recorded.³⁵⁶ If people convicted of sex offenses fail to pay registration fees, they can face a misdemeanor charge punishable by up to \$750 and six months' jail time.³⁵⁷ Failing to report changes within three days is a felony, punishable by up to \$1,000 and five years in prison.³⁵⁸

[pp. 35-36:] Likewise, Louisiana imposes a complex set of requirements and fees on every newly released individual convicted of a sex offense, which can total up to \$1,300 in the first 30 days after release from prison.³⁵⁹ Along with a \$60 initial registration fee, defendants must obtain a new driver's license (\$32.25 to \$38.25) and state identification card (\$18 to \$24) within the first three days of their release.³⁶⁰ Louisiana's short timeline, complicated list of requirements, and associated fees make compliance extremely difficult for those individuals who are homeless, indigent, or near the poverty line.³⁶¹

In addition, individuals convicted of sex offenses in Louisiana must notify every residence within the legally required radius around their home by post; in urban areas, this can cost up to \$1,000.³⁶² They must also pay for two days of newspaper advertisements delineating their new address, which typically costs about \$200.³⁶³ Failure to comply with either the registration or notification requirements can result in prosecution for failure to properly register.³⁶⁴

[pp. 36-37:] All states have laws requiring sex offenders to update their registration after a change of residence.³⁶⁵ Failure to register in a timely manner can carry steep penalties.³⁶⁶ Under federal law, an individual convicted of a sex offense is supposed to register a change of address before a move.³⁶⁷ But people convicted of sex offenses often have great difficulty finding legal housing and thus experience severe housing instability.³⁶⁸ This is made worse by the restrictive housing laws some states impose on people on the registry. In Georgia, for example, a registered sex offender may not 'reside, be employed, or linger within 1000 feet of a school; child care facility; church; public or private park; recreation facility or playground; skating rink; neighborhood center; gymnasium; community swimming pool; or school bus stop.'³⁶⁹ Any violation of these restrictions is a felony

punishable by 10 to 30 years in prison.³⁷⁰ These types of restrictions 'effectively bar registered sex offenders from residing in some high density areas,' such as large towns or cities.³⁷¹ When people convicted of sex offenses are evicted, they may be in violation of federal law unless they manage to register a change of address before an eviction occurs.³⁷² Many states subject homeless people on the registry to even more stringent reporting requirements, increasing the attendant risk of prosecution and incarceration.³⁷³ Some states also have extremely rigid vacation reporting requirements, mandating that sex offenders re-register after they have been gone from their home state for as few as five days.³⁷⁴ Each registration or re-registration costs money.

In total, a Colorado resident convicted of a sex offense will likely pay approximately \$10,000 the first year they are charged and convicted.

[p. 37:] In addition to registration and notification fees, other states require sex offenders to pay to submit DNA samples to state and federal databases.³⁷⁵ For example, Arkansas charges \$250 for DNA processing, in addition to the \$250 initial registration fee.³⁷⁶ On top of this, people who become eligible to remove their name from the sex offender registry may have to pay to do so. Utah, for example, imposes a fee to apply for the certificate permitting the removal of one's name from the registry, and then a separate fee to actually issue the certificate.³⁷⁷

There is little reliable empirical evidence supporting claims that state sex offender registration laws are effective at reducing recidivism.³⁷⁸ In fact, the emerging consensus among experts is that registration laws may ultimately increase recidivism by 'exacerbating the risk factors' of those subject to such constant regulation.³⁷⁹ All of these fees, either piecemeal or in total, can make it impossible for people who have been convicted of sex offenses and served their sentences to support themselves and stay out of jail or prison.³⁸⁰ To successfully rehabilitate people who have been convicted of sex offenses, states should try to limit the type and number of fees imposed on sex offenders after their release."

Part 2 Notes:

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326 Catherine L. Carpenter & Amy E. Beverlin, "The Evolution of Unconstitutionality in Sex Offender Registration Laws," 63 *Hastings L.J.* 1071, 1087 (2012).

327 Another Reason Why Sex Offender Registration Fees Are a Bad Idea, *Fla. Action Comm.* (Jan. 17, 2018), <https://floridaactioncommittee.org/another-reason-why-sex-offender-registration-fees-are-a-bad-idea/>.

328 Rhonda Cook, Sex Offender Argues Mandatory Ankle Monitors Are Unconstitutional, *Atlanta J. Const.* (Dec. 5, 2016),

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<https://www.ajc.com/news/local/sex-offender-argues-mandatory-ankle-monitors-are-unconstitutional/>. The Georgia Supreme Court recently held that lifetime ankle monitoring for sex offenders is unconstitutional. See *Bill Rankin*, "Court Strikes Down Lifetime Electronic Monitoring of Sex Offenders," *Atlanta J.-Const.* (Mar. 4, 2019), 329 *Id.*

330 *Elizabeth Nolan Brown*, "The Truth About the Biggest U.S. Sex Trafficking Story of the Year," *Reason* (Oct. 5, 2017), <https://reason.com/2016/09/09/the-truth-about-us-sex-trafficking/>.

331 *Org. for Prostitution Survivors*, <http://seattleops.org/what-we-do/mens-accountability/>.

332 *Brooke Jarvis*, "Can We 'Cure' the Men Who Pay for Sex?," *GQ* (Feb. 2, 2017).

333 *Sara Lerner*, Seattle 'John School' Educates Men Who Pay for Sex, *KUOW* (June 4, 2013).

334 *Freakonomics*, *Making Sex Offenders Pay – and Pay and Pay and Pay* (Ep 208): Full Transcript (June 10, 2015), <http://freakonomics.com/2015/06/10/making-sex-offenders-pay-and-pay-and-pay-and-pay-full-transcript/>.

335-339 *Id.*

340 *Freakonomics*, *Making Sex Offenders Pay*, *supra* note 334.

341-343 *Id.*

344 *Id.* Wisconsin and Minnesota have similar requirements. See Wis. Stat. § 51.375(2)(a) (2019); Minn. Stat. Ann. 609.3456(a) (2019).

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346 Colo. Rev. Stat. § 18-21-103(1) (2019).

347 *Philip Cherner*, "Felony Sex Offender Sentencing," 33 *Colo. Law.* 11, 16 (2004).

348 *Freakonomics*, *Making Sex Offenders Pay*, *supra* note 334.

349 *James Mayse*, "Bill Would Create Annual Fee for State's Sex Offender Registry," *Ky. New Era* (Feb. 3, 2018), <http://www.kentuckynewera.com/news/ap/article/f8e9bc4e-0893-11e8-9a93-cfr1483aaf333.html>.

350 *Id.*

351 *Id.*

352 *Maira Ansari*, "Sex Offenders Will Soon Have to Pay to Be on Registry," *Wave 3 News* (Apr. 23, 2019), <http://www.wave3.com/2019/04/23/sex-offenders-will-soon-have-pay-be-registry/>.

353 *Justin DiCharia*, "The Plight of the Unpopular Poor: Sex Offender Registration and Notification Costs to Indigent Offenders in Louisiana," 79 *La. L. Rev.* 519, 533 (2018).

354 *Emily Mieux*, "Sex Offenders Now Pay the Cost of Supervision," *Jackson Hole News & Guide* (July 26, 2017), https://www.jhnewsandguide.com/news/cops_courts/article_67079980-6c69-5cbc-ad2a-5604c51955d3.html.

355-358 *Id.*

359 *DiCharia*, *supra* note 353, at 531.

360 *Id.*

361 *Id.* at 545.

362 *Id.* at 532.

363 *Id.*

364 *Id.*

365 *Catherine Wagner*, Note, "The Good Left Undone: How to Stop Sex Offender Laws from Causing Unnecessary Harm at the Expense of Effectiveness," 38 *Am. J. Crim. L.* 263, 281 (2011)

366 *Id.*

367 34 U.S.C.A. § 20913 (West 2017); see also *Off. of the Att'y Gen., U.S. Dept. of Just., The National Guidelines for Sex Offender Registration and Notification* (2007), at 30.

368 *Wagner*, *supra* note 356, at 286.

369 *Richard Tewksbury*, "Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions," 42 *Harv. C.R.-C.L. L. Rev.* 531, 531 (2007).

370 *Id.*

371 *Abigail E. Horn*, Note, "Wrongful Collateral Consequences," 87 *Geo. Wash. L. Rev.* 315, 333 (2019).

372 *Wagner*, *supra* note 356, at 282.

373 *Elizabeth Esser-Stuart*, "The Irons Are Always in the Background: The Unconstitutionality of Sex Offender Post-Release Laws as Applied to the Homeless," 96 *Tex. L. Rev.* 811, 816 (2018).

374 *Wagner*, *supra* note 356, at 282.

375 *David A. Makin, Andrea M. Walker, & Christopher M. Campbell*, "Paying to Be Punished: A Statutory Analysis of Sex Offender Registration Fees," 37 *Crim. Just. Ethics* 215, 227.

376 *Id.*

377 *Petition to Remove Name from Sex Offender and Kidnap Offender Registry* (May 31, 2019), Utah Courts, https://www.utcourts.gov/howto/criminallaw/petition_registry_removal.html.

378 *J.J. Prescott*, "Portmanteau Ascendant: Post-Release Regulations and Sex Offender Recidivism," 48 *Conn. L. Rev.* 1035, 1039-40 (2016).

379 *Id.* at 1040.

380 *DiCharia*, *supra* note 353, at 520, 522.

The emerging consensus among experts is that registration laws may ultimately increase recidivism by 'exacerbating the risk factors' of those subject to such constant regulation.

Algorithmic Risk Assessment – Judicial Gatekeeping on Scientific Validity (Part 4)

Melissa Hamilton, "Judicial Gatekeeping on Scientific Validity with Risk Assessment Tools," 38(3) *Behavioral Sciences & the Law* 226-245 (May-June 2020).

Part 4 -- Text Excerpts:

3.2 The area under the curve

[p. 235:] The AUC is an overall discrimination statistic that is derived from a statistical plotting of TPRs and TNRs (technically, 1 – TNR) across a risk tool's rating system.⁶² The AUC requires computing the TPR and TNR at every possible cut-point. Recall the 2 x 2 contingency table adopts a dichotomous prediction of higher versus lower risk.

Most tools allow for various such lines to be drawn. A tool with 10 risk levels could have nine different cut-points. The AUC is then a calculation consolidating into a single statistic the classification accuracy rates of all possible combinations of the TPRs and TNRs across a tool's available cut-points.

More specifically, the AUC represents the probability that a randomly selected recidivist receives a higher risk classification than a randomly selected non-recidivist.⁶³ An AUC of 0.5 indicates no better accuracy than chance and a 1.0 signified perfect discrimination, i.e., all recidivists are classified higher than all non-recidivists.⁶⁴

Risk assessment scholars frequently refer to AUCs of 0.56, 0.64, and 0.71 as the thresholds for small, medium, and large effect sizes, respectively.⁶⁵ An effect size refers to the degree of the relationship between two variables. Using this guidance, an AUC of 0.56 means that the recidivists are rated at higher risk than the non-recidivists in 56% of the cases. This 0.56 is better than chance, but only slightly so, which is why it is labeled a small effect size. The large effect size indicates significant strength; still, it means that the tool correctly discriminated 71% of the time, leaving a 29% discrimination error rate.

Notably, agreement on the strength of AUCs is not universal.⁶⁶ No scientific imperative dictates such judgment calls. A more conservative conceptualization is that AUCs between 0.60 and 0.69 are poor, 0.70-79 are fair, 0.80-0.89 are good, and >0.90 are excellent.⁶⁷

Despite its popularity among tool designers, the AUC has serious limitations and thus cannot present a holistic portrait of a tool's abilities.⁶⁸ Briefly, some (certainly not all) of the AUCs limitations will be outlined. First, the AUC does not distinguish the accuracy between true positives versus true negatives. Whether the accurate assessments are predominantly TP or TN is simply not picked up in the single statistic of the AUC. But these differences likely matter to judges who might prefer a tool with a better degree of accuracy for one or the other when assigning a sentence with severe consequences.

p. 236: Second, a large AUC can hide minute differences in scale. For example, the AUC could approach perfection even if no recidivists were ranked as 'high risk.'⁶⁹ Note that the statistic requires only that the recidivists receive higher risk scores, not that they actually qualify under any standard for 'high risk.' To illustrate, COMPAS uses levels 1-10 and then subdivides into risk groups of low risk (1-4), medium risk (5-7), and high risk (8-10). The AUC for this tool would actually reflect perfect accuracy (AUC = 1.0) where all recidivists were classified as level 2 and all non-recidivists as level 1, with very little distinction considering the scale ranges from 1 to 10. Indeed, in this hypothetical all of them fell into COMPAS's 'low risk' bin. The size of the risk scale differential between them is irrelevant; as long as the risk classification of the recidivism is even minimally greater, it will count positively toward the AUC. Such a tool may then have significant discriminative

ability via the AUC yet be practically unhelpful in a real-world setting, such as in sentencing proceedings.

Third, an AUC may be significant simply because the studied population is heterogeneous regarding the risk predictors contained in the tool.⁷⁰ For instance, a tool that relies heavily on age and criminal history will likely rate a larger AUC in a population with significant ranges in age and offending records than in a more homogeneous population on both measures.

Table 5 Examples of AUCs by Subgroups

AUC	
Subgroup	Estimate (95% CI)
Hispanics	0.64 (0.55-0.73)
Whites	0.68 (0.64-0.73)
Blacks	0.71 (0.68-0.74)
Other	0.81 (0.73-0.89)

Fourth, reporting of the AUC may mask variations in performance between groups. Most (known) validation studies provide AUC metrics on entire populations, rather than by subgroups. To illustrate, findings from the sample dataset with the COMPAS tool in Broward County indicate an overall AUC of 0.72, meaning the tool gave a higher-risk score to recidivists than to non-recidivists 72% of the time. However, when focused on racial/ethnic groupings (here, dividing the population into four groups), the tool's discriminatory ability ranged significantly, as indicated in Table 5.

Overall, the AUC statistics varied 17% between groups (0.64-0.81, suggesting that the tool's relative ranking ability was more or less accurate depending on racial/ethnic group. With confidence intervals applied, the range is even more pronounced, rating a recidivist higher than a non-recidivist, depending on race/ethnicity from 55% to 89% of the time.

Fifth, perhaps most importantly, being 'purely a retrospective discrimination index (i.e. distinguishing which reoffenders were previously determined to be high or low risk), the AUC does not deliver a forward-looking predictive estimate (i.e., forecasting which participants will actually go on to reoffend).'⁷¹ To wit, the AUC fails to provide any data on whether the instrument is well calibrated.⁷² Research has confirmed that a tool's discriminative ability may be equivalent across studies yet its calibrations vary substantially.⁷³ Consequently, any loose assertion about a tool being 'validated' based solely on a discrimination metric is unjustifiable.⁷⁴ Moreover, for sentencing decisions with significant consequences to individual freedom and public safety, the tool's forecasting calibration ability is arguably far more important to judges as end users.⁷⁵

pp. 236-37: In sum, an assertion about achieving a certain AUC level is far from a conclusive or holistic endorsement to support a claim that a tool is 'well validated.'

(Continued on page 5)

Scholars have warned that a significant AUC constitutes a 'trivial and unexceptional accomplishment'⁷⁶ and thus is 'not practically meaningful' to justify the tool's use in actual criminal justice decisions.⁷⁷ The current state of the risk assessment field in myopically reifying the AUC as the *sine qua non* of a tool's empirical validity constitutes a crucial impediment to judicial acceptance of an algorithmic risk tool in terms of scientific validity.

p. 237: Notwithstanding, a point of this essay is to encourage judges as gatekeepers to this potentially important source of information in sentencing to require more relevant support of a tool's accuracy than the AUC provides. The numbers to calculate the more relevant measures (e.g., PPV/NPV) are available. Researchers offering the AUC must have had access to the relevant numbers (i.e., TP, TN, FP, FN) to compute the AUC, which are also used to calculate PPV/NPV. Then perhaps even better metrics may be informative as briefly named before. Though such preferred statistics are rarely reported to date, hopefully they may rise in popularity if judges begin to demand them. Hence, for a tool's predictions to be admissible in the first instance, there should be confirmation that the tool excels at discriminative ability as well as being well calibrated. The degrees that qualify, though, are not standardized and thus are within judicial discretion.

Any loose assertion about a tool being 'validated' based solely on a discrimination metric is unjustifiable.

Actuarial Recidivism Risk Guessing – Bayes, Monahan, Chaos, Uncertainty, etc. (Part 4)

Robert A. Prentky, Howard E. Barbaree, & Eric S. Janus, eds., *Sexual Predators: Society, Risk, and the Law* (New York: Routledge, 2015).

[Part 4]

Text Excerpts:

p. 178: In science, as in all of life, a chain of events can reach a crisis point in which very small changes become magnified, producing outcomes far in excess of the original events. In the world of science, this phenomenon is occasionally referred to as the butterfly effect, a term originating with Edward Lorenz, a mathematician and meteorologist who developed mathematical models of weather using a set of differential equations. A serendipitous discovery that very small changes in input can rapidly produce enormous changes in output led Lorenz to discover the phenomenon of 'sensitive dependence on initial conditions,' referred to more colloquially as the butterfly effect. The term itself comes from the title of an academic paper that Professor Lorenz gave in 1972, entitled: 'Predictability: Does the Flap of a Butterfly's Wings in Brazil Set Off a Tornado in Texas?'

p. 179: ...James Gleick (1987) expressed in his marvelous book *Chaos*, 'Errors and uncertainties multiply, cascading upward through a chain of turbulent features, from dust devils and squalls to continent-size eddies that only satellites can see' (p. 20)....

Chaos Theory, with its many applications, from predicting weather to predicting the stock market, provides a model for attempting to understand an underlying order of highly complex systems (or patterns) that appear 'chaotic' (i.e., without order). Fundamental precepts of Chaos Theory can be successfully applied to the awesome complexity of human behavior, and perhaps provide some insight into the demands and challenges of predicting sequences of events leading to atypical, often low frequency criminal offenses. Highly imperfect prediction results from a simple A/B pattern: A (prior) to B (index) to C (predicted outcome). In classic Chaos Theory, criminal behavior is often both dynamic and nonlinear.

p. 180: Judgments of Risk Under Uncertainty

We augur judgments of risk against a backdrop of uncertainty....

As Hastie and Dawes (2010) commented, '[W]e are ...prone to illusions of consistency, reliability and certainty about the world inside our own heads. There can be little doubt that we think we are more logical, rational, and consistent than we really are.' (p. 325). ...In the realm of risk analysis, ...uncertainty must be regarded as the ever-present impediment to our reckoning....

...Uncertainty is an unconvertible fact for 'all forms of life' and 'at all levels of biological complexity' (p. 509). (Kahneman & Tversky, 1982). ...Uncertainty, simply stated, reflects the unavoidable condition of partial information about the likelihood or odds of some risk. When it comes to evaluating criminals, the extant information ...is not merely partial; it is of unknown quality.

p. 181: ...Silver (2012) noted that: "...Although climatologists might think carefully about uncertainty, there is uncertainty about how much uncertainty there is. (pp. 389-90, author's italics).

pp. 189-90: Rare Events Under Scrutiny in the Courtroom

...Extreme criminal 'events' are statistically negligible, but the perceived consequences of being 'wrong' are so profound we override all rational appreciation of the probability of the event. In so doing, predicting statistically rare (but extreme) criminal offenses end up, more often than not, false positives. Parenthetically, our use of the word *dread* was not hyperbole. Slovic (2000) introduced a factor that he referred to as 'dread risk.' The higher the score of a hazard on 'dread risk,' the higher its perceived risk, and 'the more people want to see its current risks reduced, and the more they want to see strict regulation employed to achieve the desired reduction in risk' (p. 226). Camerer & Kunreuther (1989) also noted that events that are perceived as

most risky are those that 'evoke dread' (p. 578).

p. 191: Lancaster (2011) provided comparisons of probabilistic outcomes (based on frequency estimates) for many events resulting in death or serious injury to children. He noted that there are 'about one hundred high-risk abductions of children by strangers every year, and about half end in murder' (p. 77). He then went on to compare these 100 abductions, or 50 child abduction/murders with child fatalities, resulting from: (a) disease or congenital illness (n = 36,180), (b) motor vehicle accidents (n = 7,981), (c) drowning (n = 1,158), (d) accidental suffocation or strangulation (n = 953), (e) fire (n = 606), (f) firearm accidents (n = 167), or (g) death at the hands of a family member (n = 1,500). (Nat'l Maternal and Child Health Center for Child Death Review, 'United States Child Mortality, 2002,' n.d., www.childdeathreview.org/Nat%20213%20data%20Webpage%202002_files/US2002.pdf; U.S. Department of Health and Human Services, Child Maltreatment Annual Reports: www.acf.hhs.gov/programs/cb/stats_research; and U.S. Department of Health and Human Services, Child Abuse and Neglect Fatalities: Statistics and Interventions, Child Welfare Information Gateway, April 30, 2010, www.childwelfare.gov/pubs/factsheets/fatality.cfm.)

Lancaster (2011) concluded that, 'In real terms, a child's risk of being killed by a sexually predatory stranger is comparable to his or her being struck by lightning (1 in 1,000,000 versus 1 in 1,200,000)' (p. 77). Or, according to these estimates, 30 times as many children are killed by family members as by stranger child predators. (Statistical Assessment Service, 'Phony numbers on child abductions,' STATS.org, Aug. 1, 2002, www.stats.org/stories/2002/phony_augp02.htm (accessed Oct/ 5, 2009); John D. Whitaker (June 1986), 'Evaluation of Acceptable Risk,' *Jour. Of the Operational Research Society*, 37(6), 542.)

p. 197: Heuristics

Representative Heuristic

Kahneman and Tversky hypothesized ...that event A will be judged more probable than event B if A appears more representative than B. The representative heuristic, in the simplest terms, is 'latching onto a single salient variable' while ignoring other important variables (Posner, 2010, p. 69).

Determining what is and what is not representative can be highly subjective. These subjective determinations are often reasonably accurate (i.e., some representative-based predictions of outcomes are in fact more likely than other outcomes). Kahneman and Tversky (1972) noted, however, that this is not always the case, 'because there are factors (e.g., the prior probabilities of outcomes and the reliability of the evidence) which affect the likelihood of outcomes but not their representativeness. Because these factors are ignored, intuitive predictions violate the statistical rules of prediction in systematic and fundamental ways.' (p. 238)

pp. 197-98: Davis and Follette (2002) noted that

'attorneys invite judges and juries to rely on the representativeness heuristic to decide their verdicts. Attorneys argue, 'This person has all the characteristics of a murderer/bad parent/thief, therefore (s)he must (will) be one!' It is in this sense that we use the term "intuitive profiling".' (p. 134)

Davis and Follette (2002) further clarified their use of 'intuitive profiling':

'The use of intuitive profiling to assess guilt relies on the following logic: "If persons who commit embezzlement are likely to be in debt, then persons who are in debt are likely to be embezzlers," or "If most A's are B's, then most B's are A's." Logically, of course, these conclusions are erroneous.' (p. 134)

One (of many) examples in the evaluation of sex offenders that readily come to mind is the relation of victim gender to risk among child molesters. Prevailing wisdom tells us, though the empirical evidence is somewhat inconclusive, that child molesters with same-sex (male) victims pose the greatest risk for re-offense while child molesters with opposite-sex (female) pose the lowest risk, with child molesters having mixed-gender victims falling somewhere in between. When evaluating a child molester with only boy victims, victim gender becomes representative of high risk....

One of the most indisputably high-risk child molesters that I (R.A. Prentky) ever encountered was a 63-year-old man with a lifelong record of sexually offending against girls. ...This man hardly required an evaluation. He exemplified what professionals – as well as lay people – would regard as the highest risk of all child molesters. Child molesters with a preference for opposite sex victims can be as recidivistic and dangerous as child molesters with a preference for same-sex victims.

p. 199: ...As Kahneman and Tversky (1972) long ago noted, 'The biasing effects of representativeness are not limited to naïve subjects. They are also found (Tversky and Kahneman, 1971) in the intuitive judgments of sophisticated psychologists' (p. 433)

When it comes to evaluating criminals, the extant information ...is not merely partial; it is of unknown quality.

pp. 200-01: Availability Heuristic

The availability heuristic was first described by Tversky and Kahneman (1973, 1974) as a method by which decision-makers 'assess the frequency of a class or the probability of an event by the ease with which instances or occurrences can be brought to mind' ((1974, p. 1127). The availability heuristic can simply be understood as the tendency to magnify the likelihood of events that are distantly removed. The more easily thoughts, images, and fantasies come to mind, the more 'probable' they are. That is, the more that something is a 'headline grabber' (Plous, 1993, p. 122), the more 'available' it will be. As such, airplane crashes are for amore

(Continued on page 6)

'available' than car crashes, despite the dramatic difference in frequency.

When we employ the availability heuristic, we are effectively assessing the degree of risk according to the possibilities that easily come to mind (Tversky and Kahneman, 1972, 1973). As Sunstein (2005) and numerous others have pointed out, the availability heuristic can lead to serious risk assessment errors as a result of combined fear and base rate neglect.

p. 201: ...[H]ow 'available' our thoughts are about risk-related possibilities is partly a function of our familiarity with those possibilities as well as the salience of those possibilities. All three constructs were sewn together by Plous (1993):

'(1) The more available an event is, the more frequent or probable it will seem; (2) the more vivid a piece of information is, the more easily recalled and convincing it will be; and (3) the more salient something is, the more likely it will be to appear causal.' (p. 178).

pp. 201-02: **Vividness**

'Vividness' is how 'imaginable' something is (e.g., the clarity of the image or the ease with which the image comes to mind). Vividness, 'a close cousin of availability' (Plous, 1993), can be a powerful tool in influencing opinion: 'The power of vivid information is widely appreciated by advertising executives, politicians, and many other 'professional persuaders.'

p. 202: In one of the earliest demonstrations of the potential power of vividness in the courtroom, Reyes, Thompson and Bower (1980) examined the influence of vivid vs. pallid information on mock jury decisions. In a controlled study, Reyes, Thomson, and Bower manipulated evidence in a drunk driving case such that the facts of the case were either vivid or more pallid. The side – either defense or prosecution – that used the vivid evidence prevailed in mock jury verdicts. Moreover, the advantage of vividness was even more pronounced when the verdicts were reported 48 hours after the evidence had been presented – when the vivid evidence would remain more clearly in the minds of the jurors than the pallid evidence.

Editor's Note: Part 5 will appear in the next tLP issue.

offenders is the answer to a question that mistakenly focuses on recidivistic violence, causing a larger problem. The solution is to broaden our focus to all sexual violence.

This article examines a suite of laws that have come to characterize our contemporary approach to sexual violence. These laws share several core characteristics. As observed above, their key focus and justification is recidivism prevention, specifically, reducing the rate at which individuals who have been previously convicted of a sex offense commit another sex offense upon release from punishment. The laws also share the claim that they are 'regulatory' and not 'punitive,' and therefore not subject to the normal constitutional constraints on punishment.⁵ This Article will refer to these laws as 'regulatory' laws or regime, or, for reasons that will become apparent, 'predator laws.'

Framing the central question about sexual violence in terms of managing the risk of recidivistic violence presupposes that recidivism is one of the central problems to be managed. It isn't. The alternative is to put recidivistic violence in its proper place, as a small part of the problem, and dismantle the regulatory regime that has been built on the wildly exaggerated myths about recidivism....

[pp. 821-22:] The past three decades have produced a massive and wide-reaching movement to incarcerate people convicted of sex offenses. In addition to classic criminal justice responses – steadily increasing sentences⁶ and lengthy periods of post confinement supervision⁷ – this space has seen an unprecedented and unique reliance on regulatory means to achieve confinement and incarceration. Such regulatory means include civil predictive confinement (more commonly referred to as Sexually Violent Predator laws or Sex Offender Civil Commitment),⁸ broad registration and public notification schemes,⁹ and a variety of behavioral restrictions limiting where persons convicted of a sex offense may reside and what online facilities they may use.¹⁰ The proliferation of these aggressive forms of non-penal, non-bricks-and-mortar incapacitation has shown remarkable resistance to a robust, empirical critique¹¹ and to a growing wave of penal reforms that have addressed other aspects of mass incarceration.¹²

There are sound reasons to conclude that these regulatory interventions fail to achieve the goal ostensibly set for them: a reduction in sexual violence.¹³ In fact, there is good evidence that these policies have perverse and counterproductive effects that impede and impair efforts to prevent sexual violence, such as distortion and misallocation of prevention resources, impairment of reintegration efforts,¹⁴ leading to increased recidivism and impaired law enforcement,¹⁵ harm to families and victims, and deterrence of reporting and prosecuting sex crimes.¹⁶ These policies are reactionary, interstitial, atheoretical, and antiempirical, and many critics identify these characteristics as reasons for the lack of efficacy and counter-productivity of the policies.¹⁷...

[p. 824:] At the center of our policies is the

notion of the 'sex offender' as serial recidivist predator, a distinct type of person lacking key capacities that mark full civic personhood. This Article explains the origins of this idea, and its implications, in particular its relationship to the deep flaws in current policies. It demonstrates the falsity of the idea and explains how this particular figure of the sex offender as serial predator gets its power and stickiness from the cultural impetus to support and defend patriarchal power. I end by showing that effective alternatives exist and argue that only the abolition of the regulatory measures will open the way for policies that are uninfected by their anti-feminist core.

A final introductory note concerns the nature of sexual violence, its prevention, and the criminal justice system. Imagine a series of events, beginning with a sexual assault, progressing through a report to authorities, the law enforcement investigation, prosecutorial charging decision, the judicial process, the correctional process, and finally the release back into the community. Recidivism, by definition, occurs at the very last stage. And the 'attrition' along the way is staggering. By a large margin, most victims of sexual assault do not report the assault to authorities.²³ And in those cases that are reported, the attrition is even steeper. According to a recent article in the *Atlantic*: 'Roughly 125,000 rapes are reported across the United States ... [b]ut in 49 out of every 50 rape cases, the alleged assailant goes free...'²⁴ A focus on recidivism means attention to the very smallest end of the funnel; it excludes nearly all sexual violence. This Article attempts to shed some light on the reasons for this otherwise puzzling misdirection of our attention.

III 'FRIGHTENING AND HIGH' The Sex Offender as 'Other'

[pp. 829-30:] This construction of the sex offender as the 'other' is most explicit in connection with the courts' justification of the use of civil commitment schemes to lock up people after they have served their sentences. In order to find constitutional justification for these predictive confinement schemes, the courts explicitly characterize the individuals the laws target as exhibiting a 'mental abnormality' sufficient to 'distinguish' them from 'dangerous but typical recidivist[s].'⁵³ But the widespread citation of the 'frightening and high' meme as justification for registration, notification and presence restrictions demonstrates that the abnormal psychological model pervades the popular and judicial understanding of all of the regulatory laws.⁵⁴ As Beth Heubner, Kimberly Kras, and Breanne Pleggenkuhle write:

Shaped by several stereotypes including 'the homogeneity of offending, unresponsiveness to treatment, and high rates of reoffending. [s]ociety applies a 'moral-deviate script' to individuals convicted of sexual offenses, which describes the perceived immorality underlying their behavior and serving as a label that cannot be shed. The 'sex offender' status is seen as a feature within the person rather than as a label affixed to him or her as a

characteristic.⁵⁵

The role that 'recidivism' plays in the origins and legitimization of the contemporary regulatory regime is highlighted by contrasting the mechanisms of past sex panics. These movements, and the laws they spawned, have always constructed their targets as the 'other,' but their focus was not so much on recidivism – the commission of another sex crime by a previously convicted individual – but rather the prediction and prevention of criminal activity by mentally defective individuals. The recidivism meme leads to the same kind of explanation for sexual violence, but without 'the racist and homophobic dispositions of the earlier panics.'⁵⁶

[p. 830:] For example, the sex crime panic that took place in Iowa in the 1960s was directed at closeted homosexual men who were plucked from their everyday lives and shuttled off to 'treatment centers.'⁵⁷ It was not recidivism that was targeted, but rather the mentally defective 'psychopath,' a term that was used as a 'code word for homosexual.'⁵⁸ Similarly, Molly Ladd-Taylor traces the origins of Minnesota Sex Psychopath law in 1939 to the goal of Progressive reformers to 'identify [] and contain[] would-be criminals before they committed a crime.'⁵⁹ The brutal murder that was the immediate catalyst for the passage of the Minnesota law led to a focus not on recidivists, but on 'morons, defectives, and the insane....' 'Pederasts, exhibitionists, masochists, auto-eroticists were gathered up and questioned.'⁶⁰ The popular press claimed 'that psychiatrists were nearly unanimous that almost all potential sex murderers could be identified and taken into custody for minor offenses before they launched their sex crimes careers.'⁶¹

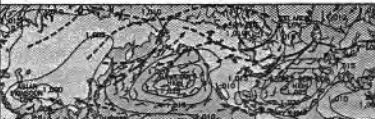
B. The Sex Offender as 'Serial Predator'

The 'frightening and high' meme also entails that most sexual violence is the work of a discrete group of recidivist 'serial predators.' After all, if those presently identified as sex offenders are 'almost certain' to reoffend upon release from prison, then most future sex offenses will be committed by those recidivists, and most future 'sex offenders' will be people who have been previously convicted of a sexual offense. Unless the number of reported sex offenses is (contra-factually) constantly growing, we would expect the 80% of offenders who recidivate to constitute about 80% of the offenders arrested and convicted of new offenses (also contra-factually).⁶²

[p. 831:] Put these two ideas together, and you have the foundations for modern sex-offender regulation: Policies designed to separate a discrete group of individuals who are inherently (psychologically, biologically) different-in-kind from the norm, and who are responsible for most of the sexual violence in our society. Therein lies both the moral and utilitarian justifications for placing 'sex offenders' in a reduced rights zone and relying principally on a policy of separation and exclusion to effectuate a prevention agenda.

These policy foundations reinforce an anti-feminist agenda with a dual pronged ap-

(Continued on page 7)



Predict something more certain –
like an exact hurricane track.

To Prevent Sexual Violence, Stop Obsessing on Recidivism.

Eric S. Janus, "Preventing Sexual Violence: Alternatives to Worrying about Recidivism," 103(2) *Marquette Law Review* 819-846 (2020).

Text Excerpts: [pp. 820-21:] "Our current system of long-term incarceration for sex

proach. The regulatory laws are emblazoned with the traditional notion that sexual violence is aberrant rather than systemic, perpetrated by abnormal men rather than men acting out, and protected by, the norms of the society. Simultaneously, these laws are branded as aggressive and innovative,⁶³ thus inculcating the broader society from the argument that its own norms allow sexual violence to flourish.

I develop these ideas in my 2006 book titled *Failure to Protect*,⁶⁴ where I argue that these laws also serve the deep and historical need for western liberal democracies to define full civic personhood ('we the people') by contrasting it with an outsider group whose rights need not be respected by the majority.⁶⁵ Rose Corrigan's 2006 article makes a similar point about the relationship between the regulatory approach and the protection of traditional norms for gender relations:

Existing research fails to grasp that Megan's Law is not solely an illustration of 'governing through crime' interchangeable with other new punitive measures. Crucial to the success of Megan's Law is its rejection of feminist challenges to social, cultural, economic, and legal institutions that structure gender, sexuality, violence, and the family. Megan's Law is a viable project precisely because it so successfully distorts progressive, feminist rhetoric and tactics for ends that further the coercive and discriminatory uses of state power.... Antirape activists argued that rape was the product of social conditions that normalized sexual violence; Megan's Law depicts sexually violent behavior as the product of individual mental defects and pathology.⁶⁶

A focus on recidivism means attention to the very smallest end of the funnel; it excludes nearly all sexual violence.

[pp.832-33:] IV. THE MYTH OF THE SERIAL PREDATOR

The 'Frightening and High' Myth Grossly Exaggerates Sexual Recidivism

The foundational myth of modern regulatory prevention policy holds that almost all people convicted of a sex offense will, when allowed back in society, commit another sex offense. In reality, the opposite appears to be true: almost all people convicted of a sex offense refrain from reoffending sexually. In a recent Bureau of Justice Statistics (BJS) study of sex offenders released from prisons, 92.3% of the individuals were not rearrested for a new sex offense in the nine-year follow up period.⁶⁸ Even that statistic is likely to overstate the rearrest rate for the entire class of sex offenders.⁶⁹ The BJS study was confined to individuals released from prison.⁷⁰ Thus, it does not include individuals who were convicted of a sex offense but not sent to prison.⁷¹ This non-prison group would include people sent to a local jail or placed on probation and is almost certainly less risky than the group sent to prison.⁷² So, the recidivism rate for the entire group of sex offenders is likely less than the 7.7% detected in the BJS study.⁷³

[pp. 834-35:] B. 'Sex Offenders' are Heterogeneous with Respect to the Risk of Re-

cidivism

...This heterogeneity is exhibited along other axes. Two of the most significant are age and years of offense-free living in the community. Robert Prentky, Howard Barbaree, and Eric Janus found that age-related 'reductions in recidivism among sex offenders are consistent across studies' and that the 'aging effect' is 'one of the most robust findings in the field of criminology.'⁸¹ Philip Witt, John Furlong, Sean Hiscox, an James Maynard report that 'The odds of being sexually reconvicted declined by about 0.02 [2%] each year of increasing age.'⁸²

[By using the term "odds," Witt et al. appear to be referring to survival analysis. However, this is an improper approach to calculating recidivism probability in cohorts of those in their senior years. Conceptually, this approach is inappropriate because it applies where it can be assumed that there necessarily will be events (here, acts of sexual recidivism), the only question being whether, a given cohort member is especially likely to be perpetrate such an act in any given year of advanced age.

However, the reality is that statistics of such events not only diminish year upon year in middle- and old-age; eventually (i.e., by no later than age 70) there are no more recidivist sex crimes committed by any member of that age-cohort, from which a statistic of incidence can be compiled.

Also, the survival technique does not apply because it cannot fit the data. That is, the undeniable diminution of recidivism among those of increasing age, especially obvious by age 60, is a curve of increasing steepness of diminution over all years from that point forward. This was specifically found in meta-analyses by Richard Wollert in "Low Base-Rates Limit Expert Certainty When Current Actuarials Are Used....," *12 Psychology, Public Policy and Law* 56-85, at 61 et seq. (2006) (finding 0% recidivism before age 70); Prentky, R.A., Janus, E.S., Barbaree, H.E., Schwartz, B.K. & Kafka, M.P. (2006). Sexually violent predators in the courtroom: Science on trial. *Psychology, Public Policy and Law*, 12, 357-393; Barbaree, H.E. et al., "The Development of Sexual Aggression through the Life Span: The Effect of Age on Sexual Arousal and Recidivism among Sex Offenders," 989 *Annals of the New York Academy of Sciences* 59-71 (2003); P. Lussier & J. Healey, "Rediscovering Quetelet, Again: The 'Aging' Offender and the Prediction of Reoffending in a Sample of Adult Sex Offenders," 26 *Justice Quarterly*, No. 4, p. 827, at 827 (2009) (finding 0% recidivism past age 60).

In contradiction, any survival analysis uses a diminishing cohort of those who, at any given age, have not yet reoffended since their last release from confinement. Because the size of this diminishing pool of former offenders continues to reduce with each such re-offense, the "2 percent" claimed by Witt et al. is 2% of that ever-shrinking pool (i.e., a diminishing actual number of reoffenders). In other words, this is not truly a 2% re-offense rate in the classical actuarial sense. Therefore, in

effect, a "2 percent" reduction by survival analysis approach results, not in a curve of increasing steepness as it moves toward complete extinction of recidivism, but instead in a curve flattening out toward some residual rate that will not be subject to further reduction no matter how old an aged offender gets. In common parlance, this is sheer poppycock.]

Karl Hanson, Andrew Harris, Elizabeth LeTourneau, Maaike Helmus, and David Thornton have reported on an even stronger relationship showing that the risk of sexual re-offense declines with time offense-free in the community: 'risk predictably declines over time[.]' and 'risk can be very low - so low, in fact, that it becomes indistinguishable from the rate of spontaneous sexual offenses for individuals with no history of sexual crime but who have a history of nonsexual crime.'⁸³ Each year in the community offense-free indicates a 12% decrease in the odds of reoffending, and this is true for offenders in all risk categories.⁸⁴ The clear implication from these findings is that sex offenders do not pose a special risk of sexual recidivism forever, and that there is a point in time when expending societal resources on special resources on special supervision of sex offenders is wasteful.

[pp. 835-36:] C. Recidivist Sexual Offending is a Small Sliver of All Sexual Offending

Multiple studies establish that recidivist violence is a tiny fraction of all sexual violence. Kelly Bonnar-Kidd reports that 96% of all arrests for sexual crimes in New York involved individuals without previous sex crime convictions.⁸⁵ ...In Pennsylvania, 'more than 96 percent of defendants charged with a sexual offense in 2016 had no criminal history of sexual violence.'⁸⁹ And a Minnesota study found that 93% of all sex offense convictions were of first-time offenders.⁹⁰

There are several consequences of this insight. First, it reinforces the point made above: that the serial predator model is false. If that model were true, we would see a high percentage of repeated sexual offender arrests and convictions. However, what we observe is that most convicted sex offenders are first-time sex offenders, dispelling this myth. Secondly, it suggests that policies that focus primarily on recidivist violence as a prevention strategy are destined to have, at best, a small impact on sexual offending. After all, if recidivist sexual violence constitutes only 4-7% of those arrested or convicted for sexual violence, and, as Rachel Lovell, Misty Luminais, Daniel Flannery, Laura Overman, Duoduo Huang, Tiffany Walker, and Dan Clark state, 'approximately 80% of rapes are unreported and of those that are reported, only 10% lead to a conviction,'⁹¹ even a large impact on recidivism will have only a small impact on sexual violence overall. We get the same result if we come at it slightly differently: The Rape, Abuse & Incest National Network reports that only 500 perpetrators out of every 100,000 sexual assaults will receive a felony conviction.⁹² According to the BJS recidivism statistics, forty (7.7% of 500) of those convicted will be rearrested

for a new sex crime.⁹³ Even if the regulatory laws were to cut that recidivism in half, the change in sexual assaults would be an imperceptible .02%. But, as the next section argues, there is little evidence that the regulatory laws have any significant impact on recidivism.

Age-related 'reductions in recidivism among sex offenders are consistent across studies' and ...the 'aging effect' is "one of the most robust findings in the field of criminology."

[pp. 836-37:] V. THE WEIGHT OF THE EVIDENCE ESTABLISHES THAT CURRENT POLICIES ARE GENERALLY INEFFECTIVE AND PROBABLY HAVE PERVERSE CONSEQUENCES.

The likely consequences of current policies have been thoroughly described in other sources.⁹⁴ We can summarize as follows: civil commitment programs are exceedingly expensive, have no demonstrable effect on the incidence of sexual violence, and a very small effect on recidivistic sexual violence.⁹⁵ The latter effect arises from the brute fact of incapacitation; the former most likely because the effect on recidivism is very small, and recidivism itself is a small fraction of sexual offending.⁹⁶ Largely unexplored is the resource-allocation consequences of civil commitment programs. Their cost nationwide is estimated to be in excess of half a billion dollars annually,⁹⁷ exceeding the amount budgeted (or requested) for all programs under the Violence Against Women Act nationally in fiscal year 2020.⁹⁸ [That figure is now vastly outstripped by total annual costs of sex offender commitment in the 20 states with such statutes and the federal system operated within the Federal Prison at Butner, NC. The current costs for the commitment programs in just the two states cited by Prentky (Minnesota and California) now add up to the \$500 million he cites as a national total. It is likely that, with the remaining states and the federal commitment program, the overall annual total is now approximately \$1 billion.]

There is strong evidence that these programs do not achieve their articulated goal of confining only the 'most dangerous.'⁹⁹ They over-commit initially and extend confinements unnecessarily.¹⁰⁰ These factors add to the likelihood that alternative uses for the billions spent over the years would have more effective prevention effects.¹⁰¹

[p. 838:] Presence and residence restrictions have repeatedly been shown to be ineffective or, worse, counterproductive in that they actually increase sexual reoffending.¹⁰² The fault likely lies in the false premise represented by the serial predator model. Offending against children is a function of social, not spatial, proximity.¹⁰³

[p. 839:] VI. THE REGULATORY REGIME IS BROADLY HARMFUL

By casting sex offenders as degraded others, the regulatory laws create a dangerous revitalization of a jurisprudence of difference, continuing a disgraceful thread of American jurisprudence of difference in

(Continued on page 8)

which one after another outgroups are excluded from full civic personhood.¹¹² Underlying these laws is the stereotype that membership in a particular 'class' of people signifies an inherent danger and degraded civic membership, justifying the creation of a zone of diminished rights. The sex offender laws, in short, provide legitimacy to this dangerous historical template.

[p. 841:] VII ALTERNATIVES

A. Some Specific Alternatives

1. Assault Prevention Training

...A strong example of this is the work of Canadian researcher Charlene Senn, a social psychologist at the University of Windsor and her colleagues ...who have conducted research on programs to reduce sexual assault on college campuses.¹¹⁸ They reported in the *New England Journal of Medicine* that they developed a program for college women and subjected it to rigorous study.¹¹⁹ They reported that, in the study's sample, the incidence of rape was reduced by 50% during the year following the program.¹²⁰ Rates of attempted rape and nonconsensual sexual contact were also reported to be 'significantly lower.'¹²¹ According to the authors: 'Only eight women would need to have participated in the program in order to stop a nonconsensual, nonpenetrative act, and only 22 women to avert one completed rape.'¹²² The authors report: 'most campuses use programs that have never been formally evaluated or have not proved to be effective in reducing the incidence of sexual assault.'¹²³

[p. 842:] 3. Circles of Support and Accountability

Circles of Support and Accountability (CoSA) is a program that assists offenders to reintegrate into society after release from prison.¹³¹

CoSA is predicated on the idea that no one, not even a sex offender, is 'disposable' in society. The program attempts to help core members successfully reenter society by providing them with social support as they try to meet their employment, housing, treatment, and other social needs. Through the regular meetings that occur among circle members, CoSA is designed to help core members forge friendships with the volunteers in their circles.... But given its goal of 'no more victims,' CoSA also emphasizes accountability by insisting that offenders accept responsibility for their actions.

VIII. CONCLUSION: DISMANTLING THE RECIDIVISM-FOCUSED SERIAL PREDATOR APPROACH

pp. 844-45: The main thesis is that our prevention would be more effective if it abandoned, or at least deemphasized the recidivism-based focus. More precisely, we should put recidivism in its proper place, which is a small part of the problem of sexual violence.

But what does that mean for the suite of policies that are so squarely based on the recidivism myth? What are the implications of the evidence that they represent poor resource allocation choices, with return on investments that are inferior to other options? That they most likely have perverse consequences that actually increase the

incidence of sexual assault? That they cause pain to hundreds of thousands of people, some of whom are former offenders, and many of whom are their families? That they may impair the reporting of sexual assault?

Civil commitment programs are exceedingly expensive, have no demonstrable effect on the incidence of sexual violence, and a very small effect on recidivistic sexual violence.

I propose that the proper answer to this question is abolition of these so-called regulatory laws, not their reform. The very core of these laws is harmful to the prevention effort, and to people. At their core, these laws are based on a model that is empirically false, and ethically corrupt: the idea that 'sex offenders' are different in kind, aberrational, and are thus in a 'reduced-rights' zone. They stand for an individualistic rather than societal solution. This core idea facilitates the harms that the #MeToo movement is exposing; it represents the myths that underlie the failures of the criminal justice system exhibited in the SAK crisis. In short, these laws give support to the anti-feminist gender hierarchy that protects abusers and demeans victims.

In contrast to abolition, mere reform would leave the core idea of these laws intact. And experience has shown that it is probably not possible to have a well-contained, limited version of these laws.¹⁴¹ Further, to the extent that individual assessment suggests that community supervision and behavioral restrictions are advisable for particular individuals as they are released from prison, the criminal justice system provides tools to impose those limits.¹⁴² The criminal system can certainly be excessive; but it is based on treating offenders as human beings who are accountable for their actions, rather than as 'others' who may be regulated like nuclear waste.

In the end, the predator laws are just morally wrong. As a justice of the Minnesota Supreme Court opined: "Today the target is people who are sexually dangerous. Which class of people, who are different from us and who we do not like, will it be tomorrow?"¹⁴³

Endnotes:

5 *Smith v. Doe*, 538 U.S. 84, 89, 92-93, 96 (2003); *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997) *Doe v. Miller*, 405 F.3d 700, 719 (8th Cir. 2005).

6 *Minn. Sentencing Guidelines Comm'n, Criminal Sexual Conduct Sentencing Practices: Criminal Sexual Conduct Offenses Sentenced in 2017*, at 12 (2019) (noting that in Minnesota, average pronounced prison sentences for First Degree Criminal Sexual Conduct increased from 75 months in 1988 to 190 months in 2017); *Kristen Budd & Scott A. Desmond*, "Sex Offenders and Sex Crime Recidivism: Investigating the Role of Sentence Length and Time Served," 58 *Int'l J. Offender Therapy & Comp. Criminology* 1481, 1482 (2014).

7 *Budd & Desmond*, *supra* note 6, at 1494.

8 *Eric S. Janus, Failure to Protect: Amer-*

ica's Sexual Predator: Laws and the Rise of the Preventive State 3 (2016) [hereinafter, *Janus, Failure to Protect*].

9 *Wayne A. Logan*, "Sex Offender Registration and Notification," in 4 *Reforming Criminal Justice: Punishment, Incarceration, and Release* 397, 397, 400 (Erik Luna, ed.).

10 *Jacob Hutt*, "Offline: Challenging Internet and Social Media Bans for Individuals on Supervision for Sex Offenses," 43 *N.Y.U. Rev. L. & Soc. Change* 663, 665 (2019); *Beth Schartzapel & Emily Kassie, Banished, Marshall Project* (Oct. 3, 2018), <https://www.themarshallproject.org/2018/10/03/banished> [<https://perma.cc/6W3S-VDDA>] (documenting connection between residency restrictions and homelessness among sex offenders).

11 *Eric S. Janus*, "Holding Our Sexual Violence Policy Accountable," in *Sexual Violence: Evidence Based Policy and Prevention* 285, 295-96 (Elizabeth L. Jeglic & Cynthia Calkins, eds, 2016).

12 *First Step Act of 2018* (federal incarceration reform excluding sex offenders).

13 Sexual violence, like all violent crime, has seen a decline. But, as argued below, the evidence that the aggressive regulatory laws have contributed to that decline is weak. And, there is good evidence that other approaches would be more effective and more cost effective. See *Grant Duwe*, "What Has Worked and What Has Not with Minnesota Sex Offenders: A Review of the Evidence," 21 *J. Sexual Aggression* 71, 82-84 (2015).

14 *Beth M. Huebner, Kimberly R. Kras, & Breanne Pleggenkuhle*, "Structural Discrimination and Social Stigma Among Individuals Incarcerated for Sexual Offenses: Reentry Across the Rural-Urban Continuum," 57 *Criminology* 715, 718-19 (2019).

15 *Janus, supra* note 11, at 288-89, 299-300.

16 *Duwe, supra* note 13, at 75.

17 *Janus, supra*, note 11, at 290-300; *Duwe, supra* note 13, at 83.

23 *Nat'l Sexual Violence Resource Ctr., Statistics About Sexual Violence 2* (2015), https://www.nsvrc.org/sites/default/files/publications-nsvrc-factsheet-media-packet-statistics-about-sexual-violence_0.pdf

24 *Barbara Bradley Hagerty*, "An Epidemic of Disbelief," *Atlantic*, Aug. 2019, at 74.

53 *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

54 *Huebner, Krass & Pleggenkuhle, supra* note 14 at 717 (arguing that the regulatory laws simultaneously "fuel" and "construct" the stigma of being a "sex offender").

55 *Id.*

56 *Roger N. Lancaster* argues that "the racist and homophobic dispositions of the earlier panics became more subtle and less visible, while progressive rhetoric became more pronounced." *Lancaster, Sex Panic and the Punitive State* 220 (2011).

57 *Neil Miller, Sex-Crime Panic: A Journey to the Paranoid Heart of the 1950s* xvii, 148, 150 (2002)

58 *Molly Ladd-Taylor*, "Ravished by Some Moron": The Eugenic Origins of the

Minnesota Psychopathic Personality Act of 1939,' 31 *J. Pol'y Hist.* 192, 1943 (2019).

59 *Id.* at 195-96.

60 *Id.* at 200.

61 *Id.* at 202.

62 I use the term "serial predator" to refer to a specific pattern of behavior: sexual reoffending after having been convicted of a previous sex offense. As the text below demonstrates, the percent of such recidivists is much lower than commonly believed. There are, to be sure, individuals who are serial rapists, in the sense that they commit two or more sexual assaults. There is research suggesting that "serial sex offending is quite common," in the sense that some offenders who are not apprehended commit an additional offense. See *Hagerty, supra* note 24, at 78 (reporting on the "sheer number of repeat offenders" revealed in the program to test warehoused Sexual Assault Kits). But other researchers warn against putting emphasis on serial rapists as perpetrators of campus assault, stating that:

Although a small group of men perpetrated rape across multiple college years, they constituted a significant minority of those who committed college rape and did not compose the group at highest risk of perpetrating rape when entering college. Exclusive emphasis on serial predation to guide risk identification, judicial response, and rape-prevention programs is misguided.

Kevin M. Swartout, Mary P. Koss et al., "Trajectory Analysis of the Campus Serial Rapist Assumption, 169 JAMA Pediatrics 1148, 1148 (2015).

63 *Janus, Failure to Protect, supra* note 8, at 3.

64 *Id.*

65 For further discussion, see *id.* at 5-6.

66 *Rose Corrigan*, "Making Meaning of Megan's Law," 31 *L. & Soc. Inquiry* 267, 275 (2006).

68 *Mariel Alper & Matthew R. Durose, Bureau of Justice Statistics, U.S. Dept. of Justice, Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up* (2005-14) 4 (2019), <https://www.bjs.gov/content/pub/pdf/rsorsp9yfu0514.pdf>.

69 Thanks to Professor Ira Ellman for developing this important point. See *Brief of Eighteen Scholars as Amici Curiae in Support of Petitioners* at 8, *Vasquez v. Foyx*, 895 F.3d 515 (7th Cir. 2018) (No. 18-386), cert. denied, 139 S. Ct. 797 (2019).

70 *Alper & Durose, supra* note 68, at 1, 71 *Id.*

72 *Brief of Eighteen Scholars as Amici Curiae in Support of Petitioners*, note 69, at 16.

73 *Id.* at 8.

81 *Robert A. Prentky, Howard E. Barba-ree & Eric Janus, Sexual Predators: Society, Risk, and the Law*, 112 (2015); see also *Tamara Rice Lave*, "Throwing Away the Key: Has the Adam Walsh Act Lowered the Threshold for Sexually Violent Predator Commitment Too Far?," 14 *U. Pa. J. Const. L.* 391, 397 (2011).

82 *Philip K. Witt, et al., "Age and Sex (Continued on page 9)*

Offense Recidivism, *Sex Offender Law Rep.* Feb/Mar. 2015, at 1, 28.

83 R. Karl Hanson, et al., "Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender," 24 *Psychol., Pub. Pol'y & L.* 48, 58 (2018).

84 *Id.* at 54.

85 Kelly K. Bonnar-Kidd, "Sexual Offender Laws and Prevention of Sexual Violence or Recidivism," 100 *Am. J. Pub. Health* 412, 414 (2010); see also Jeffrey C. Sandler, Naomi J. Freeman, & Kelly M. Socia, "Does a Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law," 14 *Psychol., Pub. Pol'y & L.* 284, 295 (2008) (showing that, in N.Y., 95% of sex offense arrestees between 1986 and 2006 were first-time sex offenders).

89 Joshua Vaughn, "Failure-to-Comply Arrests Reveal Flaws in Sex Offender Registries," *Appeal* (Aug. 1, 2018), <https://thappeal.org/skyrocketing-charges-for-failing-to-comply-with-sex-offender-registries-reveal-their-flaws/>.

90 Brian Collins, *Minn. Dept. of Corr., Presentation at the 2017 MnATSA Conference: Residency Restrictions: Sound Public Policy or Tinfoil Hats?* (April 21, 2017) (on file with the author).

91 Rachel Lovell, Misty Luminais, Daniel Flannery, Laura Overman, Duoduo Huang, Tiffany Walker, and Dan Clark, "Offending Patterns for Serial Sex Offenders Identified via the DNA Testing of Previously Unsubmitted Sexual Assault Kits," 52 *J. Crim. Just.* 68, 69 (2017), (citing *National Research Council, Estimating the Incidence of Rape and Sexual Assault* (2014)). Note that other sources provide different reporting rates for sexual assault, but there is widespread agreement that the reporting rates are well below half. See, e.g., *Nat'l Sexual Violence Resource Ctr.*, *supra* note 23, at 2 (stating that 37% of sexual assaults are reported, but only 12% of child sexual abuse, is reported to authorities); *The Criminal Justice System: Statistics, Rape, Abuse & Incest Nat'l Network*, <https://www.rainn.org/statistics/criminal-justice-system> (stating that 23% of sexual assaults are reported to police).

92 *Criminal Justice System, Statistics, supra* note 91.

93 Alper & Durose, *supra* note 68, at 5.

94 Deanna Cann & Deena A. Isom Scott, "Sex Offender Residence Restriction and Homelessness: A Critical Look at South Carolina," *Crim. J. Pol'y Rev.* 1, 10 (2019) ("[S]uch policies are repeatedly found to have extensive negative collateral consequences."); Jill S. Levenson & David A. D'Amora, "Social Policies Designed to Prevent Sexual Violence: The Emperor's New Clothes?," 18 *Crim. Just. Pol'y Rev.* 168, 180 (2007).

95 See Duwe, *supra* note 13, at 83; Jeffrey C. Sandler & Naomi Freeman, "Evaluation of New York State's Sex Offender Civil Management Assessment Process Recidivism Outcomes," 16 *Criminology & Pub. Pol'y* 913, 913 (2017) (finding a reduction in sexual rearrest rate of 2.6 percentage points).

96 Kelly M. Socia, "Sex Offender Civil Commitment Policies in Context," 16 *Criminology & Pub. Pol'y* 909, 910 (2017) ("Therefore, in terms of reducing sexual assault victimization rates for citizens, these programs will play only minor roles compared with broader, more comprehensive reentry programs.")

97 Andrew J. Harris, "Policy Implications of New York State's Sex Offender Civil Management Assessment Process," 16 *Criminology & Pub. Pol'y* 949, 950 (2017); Adam Deming, "Sex Offender Civil Commitment Programs: Current Practices, Characteristics, and Resident Demographics," 36 *J. Psychiatry & L.* 439, 442 (2008) (reporting that the total budgeted for SOCC programs in 2007 was \$447 million). The budget for the California program in 2019 was \$333 million. Barbara Koepfel, "Modern-Day Gulag in the Golden State," *Prison Legal News* (June 4, 2019).

98 *Nat'l Network to End Domestic Violence, Violence Against Women Act (VAWA) and Related Program Appropriations for Fiscal Years 17, 18, 19, and 20*, at 1 (2020), https://nnedv.org/wp-content/uploads/2020/01/Library_Policy_FY21_Approps_Chart_20Feb2020.pdf (stating that the President's FY21 proposed budget for all VAWA programs was \$498.50 million).

99 Janus, *supra* note 11, at 295.

100 *Id.*

101 Andrew J. Ahrendt & William T. O'Donohue, "Sexually Violent Predator Evaluations: Problems and Proposals," in *Sexually Violent Predators: A Clinical Science Handbook* 199, 210 (William T. O'Donohue & Daniel S. Bromberg eds., 2019). ("Research examining the effectiveness of SVP civil commitment on recidivism has resulted in findings supporting that the high cost of civil commitment and liberty deprivation is not worth the small benefit"; Bernard E. Harcourt, *Against Prediction: Profiling, Policing, and Punishing in the Actuarial Age* 32 (2007); Eric S. Janus, "Minnesota's Sex Offender Commitment Program: Would an Empirically-Based Prevention Policy Be More Effective?," 29 *Wm. Mitchell L. Rev.* 1083, 1101-02 (2003).

102 Cann & Scott, *supra* note 94, at 10-11 (citing studies that find "no impact" on recidivism or "increase the rates of sexual reoffending").

103 *Id.*; *Brief of Eighteen Scholars as Amici Curiae in Support of Petitioners, supra* note 69 at 8.

112 Janus, *Failure to Protect, supra* note 8, at 100.

118 Charlene Y. Senn, et al., "Efficacy of a Sexual Assault Resistance Program for University Women," 372 *New Eng. J. Med.* 2326, 2326-35 (2015).

119 *Id.* at 2326.

120 *Id.* at 2332.

121 *Id.* at 2326.

122 Katherine Mangan, "Sex-Assault Prevention Program Sees Results, and Raises Questions," *Chron. Higher Educ.* (June 12, 2015),

<https://www.chronicle.com/article/Sex-Assault-Prevention-Program/230861/?cid=at&utm>

[medium=en&utm_source=at](https://www.chronicle.com/article/Sex-Assault-Prevention-Program/230861/?cid=at&utm)

123 Senn, et al., *supra* note 118, at 2327.

131 Grant Duwe, *The Promise and Potential of Circles of Support and Accountability: A Sex Offender Reentry Program 3-4* (2018), <https://www.aei.org/wp-content/uploads/2018/02/The-Promise-and-Potential-of-Circles-of-Support-and-Accountability.pdf>.

141 Eric S. Janus, "Closing Pandora's Box: Sexual Predators and the Politics of Sexual Violence," 34 *Seton Hall L. Rev.* 1233, 1233 (2004).

142 *Id.* at 1253.

143 *In the Matter of Linehan*, 557 N.W.2d 171, 202 (Minn. 1996) (Page, J., dissenting).

Bringing the Endless Punishment of SOCC to an End



No Exit, No End.

Guy Hamilton-Smith, "The Endless Punishment of Civil Commitment," *The Appeal*, Sept. 4, 2018, <https://theappeal.org>

"Prosecutors can subject those convicted of sexual offenses – and sometimes, those with no conviction at all – to an indefinite period of civil punishment at the end of their criminal sentence.

In January [2018], Los Angeles County Superior Court Judge James Bianco ruled that after spending nearly two decades detained by the State of California without trial, George Vasquez was a free man.

Unlike the 536,000 people held pretrial in the criminal justice system in America, Vasquez, 44, was not being held because he was accused of a crime.

Instead, Vasquez was locked up for 17 years out of fear that he might commit a crime.

Shortly before Vasquez was released after six years in prison for sex crimes in 2000, California prosecutors invoked a little-known, lesser-understood practice called civil commitment.

Used in at least twenty states, civil commitment allows a prosecutor to subject those convicted sexual offenses (and sometimes, those with no conviction at all) to an indefinite period of civil punishment at the end of their criminal sentence. Civil commitment can mean years of additional detention under the guise of psychiatric treatment meant to reduce a person's risk of committing another crime, with an often-illusory promise of freedom.

Statutes that constrain the power of authorities to civilly commit people who have served their sentences are broad and am-

biguous. For example, the Kansas statutes targets 'any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in repeat acts of sexual violence.' Standards of proof are often lower than in the criminal system, and judges who decide these cases often side with prosecutors. While civil commitment is supposed to be reserved for people who are likely to commit additional offenses, a research study from a commitment facility in California suggests that rates of reoffending are far lower than would be believed – potentially imperiling the justification for civil commitment itself.

Through open records requests, *The Appeal* obtained and reviewed documents that showed the number of people held on similar 'probable cause' grounds and found that cases like Vasquez's were not rare. In California, there were 345 people trapped in civil, 'pretrial' detention for more than three years. More than a quarter of those have been held without trial since 2006 or earlier. In Florida, meanwhile, 89 of the 489 detainees at their civil commitment center are pretrial. Fourteen have been held for more than a decade; five for nearly 20 years. In Washington State, Jesse McReynolds spent nine years civilly detained on McNeil Island without trial before a judge ordered his release. Records from the Washington State Department of Social and Health Services indicate that McReynolds's case was also not an anomaly, and that multiple people have been civilly detained pending trial, sometimes for decades.

Civil commitment centers are also often the targets of civil rights lawsuits. McNeil Island detainees are embroiled in a lawsuit alleging that the drinking water provided to them is unfit for consumption and has resulted in unexplained deaths and high cancer rates at the facility. A trial on their claims is set for next year. In Texas' for-profit civil commitment facility, there are a host of reported problems, including medical care. A recent *Journal News* report outlined many problems in New York's civil commitment facility that are much like those in the nation's jails and prisons: rapes, beatings, illicit drug use.

Like the prison and jail system, which generally enjoys little scrutiny and broad immunity for its actions, civil commitment facilities exist largely outside of meaningful mechanisms for judicial review and accountability.

In 2017, the Supreme Court declined the opportunity to hear a challenge to Minnesota's civil commitment facility which was brought by a group of residents alleging that their detention violated their constitutional rights. In the facility's over 20 years of operation, it had fully released only one person. While a federal trial court found that the commitment program was unconstitutional, the Eight Circuit Court of Appeals reversed the decision and, in doing so, applied a legal standard that essentially foreclosed any finding of unlawfulness. The Supreme Court denied the petition for re-

(Continued on page 10)

view, leaving the Eighth Circuit opinion in place, and thus left little doubt of the wide discretion afforded government officials who run such programs.

Back in Los Angeles, county prosecutors filed an appeal to keep George Vasquez detained. The 2nd Circuit District Court of Appeal heard oral Arguments in Vasquez's case on July 17, and a final decision is expected sometime this year. But Vasquez is just one of hundreds of people in California – and across the country who, despite having done their time, still await their day in court."

The Epilog:

"L.A. County Board Approves \$4.5 Million Payout to Child Molester Held 17 Years," *City News Service*,

<https://www.foxla.com/news/l-a-county-board-approves-4-5-million-payout-to-child-molester-held-17-years> (retrieved: 8/5/20)

Text excerpts:

"The Los Angeles County Board of Supervisors Tuesday approved a \$4.5 million settlement payout to a convicted child molester who was held in a state hospital for 17 years awaiting trial on whether he could be committed as a sexually violent predator...."

On January 8, 2018, Los Angeles Superior Court Judge James Bianco ruled that Vasquez must be freed, citing 'oppressive' delays and a 'systematic breakdown of the public defender system.'

The District Attorney's Office fought the issue and lost on appeal, with a three-judge panel from California's 2nd District Court of Appeal rejecting the bid to overturn Bianco's decision.

"It may well be that there was strong evidence in the People's favor, but it was the government's burden to prove Vasquez was an SVP and Vasquez had a right to present evidence showing he did not pose a risk to the public. He was denied this right for 17 years,' the appellate court found. After Bianco's ruling and before the appeal had been settled, Vasquez filed a lawsuit against the Public Defender's Office alleging civil rights violations.

A summary corrective action plan presented to the Board of Supervisors said staff had been cut and attorneys felt they had insufficient resources to bring the case to trial...."

Editor's Closing Comment:

ENOUGH!

To all in so-called sex offender civil commitment (SOCC) and others concerned:

There really is no difference between Vasquez' plight and already-committed confinees like us under SOCC laws. We are held at least for the same multi-decade period, and, presumptively, for natural life without sentence.

No legitimate type of accepted psychological treatment takes more than a year or so. Treatment not achieving its goal in that period almost certainly will not succeed later – no matter how many years are added on. (Compare the 2011 Office of the Legislative Auditor report contrasting MSOP to short periods of sex offender treatment else-

where.) Psychologists recognize that subjecting one to involuntary treatment in confinement for several years or more is harmful to the participant's mind.

This is just a permanent employment plan by therapists and their administrator bosses – attractive to government agencies or contracted programs they work for as an excuse for what they really want to peddle to their constituencies: keeping sex offenders locked up. Extended detention claimed to be for treatment is just incarceration.

Treatment regimens lasting more than a decade – even two decades or more (typical in SOCC facilities) depart far from the realm of treatment, while decades of the lives of those detained slip away forever. This "misuse of psychiatry," as the American Psychiatric Association calls it, is purely political posturing.

The hysterical predictions of highly likely sexual reoffending claims upon which SOCC was created have been thoroughly debunked. Actually, those who have committed past sexual offenses are far less likely to later commit any crime than anyone convicted of any other type of crime – in fact, only 3.5% or less. It is impossible to know in advance who will be among this sliver-small recidivist percentage. Hence, predictions of recidivism by any given past sex offender will be wrong 96.5% of the time. This emphasizes the unbelievable unfairness of condemning one to decades of post-prison confinement on such a wild, unlikely guess.

Such hysterical claims of future dangerousness ignore natural human "desistance" from committing crimes. Merely the passage of time, natural maturation, and aging work this inexorable result. This is why even sex offenders released from prison without any treatment do not reoffend. Yet our commitment-captors always deny even this well-known phenomenon, as if we, contrary to all science, can somehow evade that natural progression of life.

Thus, our captors simply shrug off the fact that they regularly detain us until we die of old age. In MSOP, 103 have died this way so far – more than one out of every ten humans ever committed to MSOP, and nearly four times as many as have ever been fully discharged in nearly 30 years of MSOP operation.

In any case, the Supreme Court has long held that detaining people, not by prison sentence, simply for someone's opinion that they are likely recidivists flatly violates the U.S. Constitution. (*Foucha v. Louisiana*, 504 U.S. 71 [1992].) Under threat of otherwise never being released, we in SOCC remain held and subjected to futile, experimental treatment with no proven effect, long past the point of toxicity. In this circumstance then, our detention is exactly only due to such hysterical recidivism fears – the opinion of mere crystal-ball gazers. Detention out of such fear should never be allowed, any more than out of disgust or loathing by others, lest individual freedom be shrunk to an empty phrase.

To get around this constitutional bar on 'pre-crime' detention, commitment laws claim that some vague "disorder" or unde-

finied "abnormality" predisposes one to commit sexual crimes or makes it difficult to resist some claimed "urge" or "impulse" to commit a sex crime. Again, this claim is contrary to undisputed science

These laws were concocted by politicians without knowledge of science related to the field of sexual emotions and actions. Prosecutors have consistently relied on junk-science opinions by some hired-gun psychologist with equal disregard for applicable science that the commitment defendant would likely commit another sex crime after release from prison. And judges, operating from institutional bias and their own anger about such crimes, and mindful of their next re-election, have eagerly accepted such opinions without question.

Again, in the meantime, all of this has been debunked. Rape has been clarified simply as a crime, not an emotional disorder. See, e.g., *Allen Francis, MD*, "Going For Wins in Sexually Violent Predator Cases," *Psychiatric Times*, July 8, 2011, <http://www.psychiatrictimes.com/blog/cp-uchincrisis/content/article/10168/1900563>.

The closest general disorder, "antisocial personality disorder," has been confirmed as having no causative relation to rape.

Even sexual attraction to children has finally been shown to be just that. Modern research uniformly shows that pedophilic crimes are almost always preceded by a long period of decision-making and planning before the crime itself is perpetrated.

This is not a sudden, unrestrainable reflex of a disordered mind, but carefully cunning criminal planning. Our society only commits those whose actions are compelled reflexively without any ability to decide. Instead, people who perpetrate deliberately-decided and planned crimes (as bad as those decisions are) are arrested, convicted, and imprisoned.

And indeed, all SOCC victims were first imprisoned, whether correctly or sometimes falsely. In many cases we weren't even guilty of what we were convicted, or we were thought guilty of more than what actually transpired.

The need to preserve and emphasize the difference between commitment versus prosecution – is imperative. Letting these two legal categories blend will force everyone to live under the tyranny of a future "pre-crime" psychologically-prosecutive state. Under that regime – as our unfortunate experience shows – anyone can be whisked away on a sheer accusatory prediction of likely future crime.

So, we return to the initial point: There is no difference between Mr. Vasquez and all victims of so-called SOCC laws. Subjecting people to post-prison detention is a legal and moral wrong. For this, we deserve both liberation and compensation.

The 20 SOCC jurisdictions have subjected us to 'show trials' of re-condemnation of crimes we committed long ago. By this, we have been misused as embodiments of nightmarish panic-fears.

As if to punish the concept of such crimes, we, as involuntary poster-children of such concepts, have been locked away for additional decades beyond the end of prison

terms that themselves typically stretched on for decades.

We are isolated so entirely from society that even communicating with the outside world – or even just with each other – is deliberately and cruelly made extremely difficult – often banned entirely.

When we seek justice in court, the occasion is seized upon by prosecutorial forces of perpetual hate to again pillory us and pelt us in the media with still further character assassination. Those hatchet-wielders take advantage of the lack of any clear social memory of those crimes in our distant past by substituting nightmare-narratives, more cut off from truth and containing more vituperative vilification with every retelling.

We are repeatedly objectified. Society's awareness of our humanity has become lost. This objectification still continues relentlessly. We are simply too convenient a target. Our plight and our plea are Shakespearean: If you cut us, do we not bleed?

Our own government has ceaselessly reframed us as automatons of robotic predation. This is a grave moral and legal wrong that should never be tolerated, much less collaborated in. We have suffered long. Our government has been hijacked – driven by hordes of willful participants who have taken delight in creating and perpetuating our suffering. This has thus harmed us with all the power that government can wield. This has been done repeatedly and unceasingly, including, but certainly not limited to depriving us of our physical liberty.

We have been deprived of access to good people everywhere – who would be willing to judge us by our current actions, not by a historical frieze of misconduct in the distant past. By this we are deprived of our ability to prove ourselves and to make what we can of the rehabilitated remnants of our lives.

For this, our government owes us.

We should be made whole again, as we were before this fake-commitment. We should be freed – not sequentially over a period of years, but freed today! And we should be recompensed in full measure for all the harms we have suffered in this! We have been subjected to the outrageous deprivation of the post-sentence remainder of our lives. We have been misappropriated as targets of emotional denunciation of types of crimes for political gains by those who still continue to spin this bizarre web of hate that ensnares all.

Once, we were punished to the full extent of the law. Now, we are the very paradigm of political victims. And we should be accorded justice for this villainous victimization.

the Legal Pad

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