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Delineating Sexual Dangerousness

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ARTICLE

DELINEATING SEXUAL DANGEROUSNESS

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ABSTRACT

Only "dangerous" individuals may be indefinitely detained. Is a one percent chance of a future crime clear and convincing evidence of dangerousness? For sex offenders, fear and uncertainty in case law leave open this passage to limbo. This Article closes it.

The due process balancing test used to evaluate standards of proof provides the framework. This Article explains the relationship between the standard of proof and the definition of "dangerous" and argues that only an approach combining the two is consistent with the Constitution.

Applying decision theory with assumptions favoring the government, this Article calculates a minimum likelihood of recidivism for commitment. Of the twenty jurisdictions with sex offender commitment, just one requires something close to that constitutional floor. Thousands have been detained applying unconstitutional standards, and the vast majority remains so.

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No passion so effectually robs the mind of all its powers of acting and reasoning as fear.[1]

I. INTRODUCTION

In 2009, Charles Edward Allman was indefinitely detained as a dangerous sex offender.[2] His risk of recidivism within five years was estimated by an actuarial instrument as 21%, a figure that one expert adjusted downward to between 2.2% and 5.3% to reflect the overall sex offender recidivism rate in the jurisdiction.[3] The prosecutor argued to the jury:

> You are the judges. You are the gatekeepers. You decide what's acceptable, what is an acceptable risk to this community. And that's what you decide. Is it 90 percent? The law tells you it doesn't have to be over 50 percent. Is it five percent? Is it 10 percent? Is it one percent? You decide what makes it likely.[4]

Contrary to the prosecutor's argument, there is a minimum likelihood of recidivism. That minimum derives from the Due Process Clause.[5] This Article argues that the detention for five years of a dangerous sex offender is unconstitutional unless the

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1. EDMUND BURKE, A PHILOSOPHICAL INQUIRY INTO THE ORIGIN OF OUR IDEAS OF THE SUBLIME AND BEAUTIFUL 96 (George Bell & Sons 1889) (1757).

2. People v. Allman, No. D055968, 2010 WL 4461758, at *1 (Cal. Ct. App. Nov. 9, 2010).

3. *Id.* at *1, *3.

4. *Id.* at *6.

5. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."); Addington v. Texas, 441 U.S. 418, 425 (1979) ("This Court has repeatedly recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."); *infra* Part II.B (arguing that a minimum probability of recidivism is required by the Due Process Clause).

predicted probability of recidivism within five years is 75% or higher. Without such a constitutional floor, the requirement of dangerousness would be, as the prosecutor suggested, meaningless.

Sexual violence is a serious social problem: each year, an estimated 300,000 women are raped and 81,000 children are sexually abused.[6] Sexual violence is not a new problem, nor is the detention and treatment of sex offenders a new idea. In the 1930s, states began adopting the first generation of sex offender commitment statutes, commonly referred to as "sexual psychopath" laws.[7] Well over half of the states had adopted such laws by the late 1960s, but by 1990, they remained on the books in only a handful of states.[8] Policymakers had concluded that "sexual psychopaths" could be neither identified nor effectively treated.[9]

Things changed in 1990. That was the year Washington State adopted the first of the current generation of sex offender commitment laws, often referred to as "sexually violent predator" (or "SVP") laws.[10] The main innovation was detention *after* sex offenders had served their criminal sentences.[11] Nineteen other states and the federal government have followed suit, and thousands of individuals are now committed.[12] This change of direction was not driven by new statistics—overall, sex offenders appear *less* likely than other criminals to reoffend[13] and the

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6. *See* Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 AM. J. PUB. HEALTH 412, 412 (2010).

7. John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655, 659–60 (1992).

8. *Id.* at 660–61.

9. *Id.* at 662 (quoting SAMUEL JAN BRAKEL, JOHN PARRY, & BARBARA A. WEINER, THE MENTALLY DISABLED AND THE LAW 743 (3d ed. 1985)).

10. *See* HOWARD ZONANA ET AL., DANGEROUS SEX OFFENDERS: A TASK FORCE REPORT OF THE AMERICAN PSYCHIATRIC ASSOCIATION 24 (1999) (stating that "Washington was the first state to enact a law for the commitment of sexually violent predators"); Tamara Rice Lave, *Controlling Sexually Violent Predators: Continued Incarceration at What Cost?*, 14 NEW CRIM. L. REV. 213, 214–15 (2011).

11. Rice Lave, *supra* note 10, at 214.

12. *See id.* at 215 (19 other states); KATHY GOOKIN, WASH. STATE INST. FOR PUB. POLICY, COMPARISON OF STATE LAWS AUTHORIZING INVOLUNTARY COMMITMENT OF SEXUALLY VIOLENT PREDATORS: 2006 UPDATE, REVISED 1 (2007), *available at* http://www.wsipp.wa.gov/rptfiles/07-08-1101.pdf (reporting 4,534 persons held under SVP laws).

13. *See* PATRICK A. LANGAN, ERICA L. SCHMITT & MATTHEW R. DUROSE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 1–2 (2003) (explaining that the sex offender rearrest rate for any type of crime was 43%, whereas the overall rearrest rate for all released prisoners was 68% and 5.3% of released sex offenders were rearrested within three years for a sex crime); PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE

evidence of treatment effectiveness is equivocal[14]—rather, the motivation was a string of heart-wrenching cases and resulting outrage and fear.[15]

Fear created the policy, but can fear sustain it against constitutional challenge? Whether fear, apart from actual risk, is a sufficient basis to deprive an individual of liberty turns out to be a critical question in setting the minimum recidivism threshold to justify indefinite detention. Understanding why requires explanation.

In *Addington v. Texas*, the Court held that to justify traditional civil commitment of a mentally ill person, the state must prove dangerousness by clear and convincing evidence.[16] That is a heightened standard of proof, somewhere between preponderance ("more likely than not") and beyond a reasonable doubt.[17] Essentially every lower court since *Addington* has concluded that clear and convincing evidence is required for sex offender commitment as well.[18] However, Part II.A shows that the standard of proof in this context is still an open question.

Neither *Addington* nor any subsequent U.S. Supreme Court opinion has set a minimum level of dangerousness.[19] Commentators agree that dangerousness consists of four components of future harm: (a) magnitude, (b) probability,

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STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 9 tbl.10 (2002) (showing 13.4% of released robbers were rearrested for robbery within three years, 22.0% of assaulters for assault, 23.4% of burglars for burglary, 33.9% of larcenists for larceny, 11.5% of motor vehicle thieves for motor vehicle theft, 19.0% of defrauders for fraud, 41.2% of drug offenders for drug offenses); *see also* La Fond, *supra* note 7, at 667 ("[N]o clear evidence suggests that sex offenders as a group are more likely to reoffend than other criminals.").

14. *See infra* note 58.

15. La Fond, *supra* note 7, at 671–74; *see also* ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 7–8 (2006) (similar for Minnesota); David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET SOUND L. REV. 525 (1992) (retelling the horrible story of Earl Shriner's sexual mutilation of a seven-year-old boy two years after Shriner's release from prison, and the reaction, including passage of Washington's SVP law); Mari M. "Miki" Presley, *Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act: Replacing Criminal Justice with Civil Commitment*, 26 FLA. ST. U. L. REV. 487, 488 (1999) (similar for Florida).

16. Addington v. Texas, 441 U.S. 418, 432–33 (1979).

17. *Id.* at 431–33.

18. *See* Alexander Tsesis, *Due Process in Civil Commitments*, 68 WASH. & LEE L. REV. 253, 276 (2011) (stating that the "overwhelming majority" of states rely on *Addington* and require clear and convincing proof for civil commitments).

19. *See Addington*, 441 U.S. at 432–33 (requiring clear and convincing evidence to prove dangerousness and civilly commit a mentally ill person, but leaving undefined the minimum likelihood of recidivism required to prove dangerousness); *infra* Part II.B (examining the issue of likelihood of recidivism).

(c) frequency, and (d) imminence.[20] The goal of this Article is to explore the constitutional floor on the second component: probability of recidivism. (I make and defend assumptions regarding the other three components in the text.[21])

To recognize an implied minimum likelihood of recidivism, a deeper understanding of the relationship between standards of proof and recidivism thresholds is needed.[22] The bottom line is that only by factoring in both standards (and prediction error) can one evaluate the strength of the government's justification for commitment. And that is what *Addington*'s balancing test requires: weighing the private and public interests at stake.[23]

Return to fear. If fear gets independent weight in the balancing test, then there may be no effective floor on dangerousness. Passion trumps reason and liberty. But the *Addington* test defines the relevant parameters, which should exclude fear and which in turn can be quantified and weighed.[24] Applying decision theory, I estimate a minimum recidivism threshold of 75%. To be more precise, a sex offender can be committed for five years only if his likelihood of perpetrating a sexually violent crime within five years is 75% or higher. At each step in the analysis, I make assumptions favorable to the government in order to achieve a solid constitutional floor.

Do current sex offender commitment regimes require a likelihood of recidivism at or above the 75% threshold? With one exception (Illinois), the answer is no or probably no.[25] This means nineteen states and the federal government have detained thousands using unconstitutional standards. Illinois, which requires the probability of recidivism to be "much more likely than not," can serve as a model for other jurisdictions.[26]

In short, locking someone up to prevent a violent sex offense is unconstitutional absent strong evidence that he or she would otherwise commit such an offense. And fear should not count as

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20. Eric S. Janus & Paul E. Meehl, *Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings*, 3 PSYCHOL., PUB. POL'Y, & L. 33, 37 (1997) (citing Marie A. Bochnewich, Comment, *Prediction of Dangerousness and Washington's Sexually Violent Predator Statute*, 29 CAL. W. L. REV. 277, 298 (1992) and ALEXANDER D. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 576 (1974)).

21. *See infra* text accompanying notes 202, 205, 216.

22. *See infra* Part II.

23. *Addington*, 441 U.S. at 427.

24. *See id.* at 425, 430 (weighing the state and individual's interest in light of the incompatibility of psychological diagnoses and the beyond reasonable doubt standard); *infra* Part III.

25. *See infra* Part V.

26. 725 ILL. COMP. STAT. ANN. § 207/35(d)(1) (LexisNexis 2000).

evidence. The stakes could hardly be higher: the liberty and safety of thousands hang in the balance.

II. TWO OPEN QUESTIONS

The government must prove that a sex offender is dangerous in order to commit him.[27] One component of dangerousness is probability of recidivism. Like all fact questions, dangerousness must be proven to a particular degree of confidence, or standard of proof.[28] The standard of proof and threshold probability of recidivism, taken together, determine the effective risk level required to commit an individual. To illustrate: many sex offenders will qualify for commitment if the government is required to prove a 10% chance of recidivism by clear and convincing evidence; fewer if the standard of proof is raised to beyond a reasonable doubt; and many fewer still if the risk threshold is raised from 10% to 50%. The constitutional minimum standard of proof and recidivism threshold are unsettled.

A. *The Required Standard of Proof*

The conventional wisdom in lower courts is that the Due Process Clause requires that dangerousness for sex offender commitment must be proven by clear and convincing evidence.[29] This view derives from *Addington v. Texas*, and has surface appeal.[30] However, the requisite standard of proof remains an open question under U.S. Supreme Court precedent, and underappreciated older case law strongly suggests a higher standard.

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27. *See* Melissa Hamilton, *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws*, 83 TEMP. L. REV. 697, 703–04 (2011). Over 90% of sex offenders are male. *See* Keith Soothill, *Sex Offender Recidivism*, *in* 39 CRIME AND JUSTICE, A REVIEW OF RESEARCH 145, 162 (Michael Tonry ed., 2010).

28. *Addington*, 441 U.S. at 425–27.

29. *E.g.*, United States v. Carta, 592 F.3d 34, 42 (1st Cir. 2010); Aruanno v. Hayman, 384 F. App'x 144, 151 (3d Cir. 2010); United States v. Coho, No. 09-CV-754 WJ, 2009 WL 3156739, at *6 (D.N.M. Sept. 18, 2009); Jones v. Blake, No. 4:06 CV 402 ERW DDN, 2008 WL 4820788, at *4 (E.D. Mo. Nov. 5, 2008); United States v. Abregana, 574 F. Supp. 2d 1123, 1138 (D. Haw. 2008); United States v. Shields, 522 F. Supp. 2d 317, 331 (D. Mass. 2007); Westerheide v. State, 831 So. 2d 93, 109–10 (Fla. 2002); *In re* Detention of Samuelson, 727 N.E.2d 228, 237 (Ill. 2000); People v. Williams, 580 N.W.2d 438, 442 (Mich. Ct. App.), *appeal denied*, 589 N.W.2d 287 (Mich. 1998); State v. Ward, 369 N.W.2d 293, 295–96 (Minn. 1985); *In re* Van Orden, 271 S.W.3d 579, 585–86 (Mo. 2008) (en banc); *In re* A.C., 991 A.2d 884, 893 (Pa. Super. Ct. 2010); Shivaee v. Commonwealth, 613 S.E.2d 570, 578 (Va. 2005); John Kip Cornwell, *Protection and Treatment: The Permissible Civil Detention of Sexual Predators*, 53 WASH. & LEE L. REV. 1293, 1325–26 (1996). *But see In re* Van Orden, 271 S.W.3d at 592–94 (Teitelman, J., dissenting).

30. *Addington*, 441 U.S. at 432–33.

The Court has not addressed the standard of proof question directly in the sex offender commitment context. The statute involved in two of its recent SVP decisions—*Kansas v. Hendricks*[31] and *Kansas v. Crane*[32]—required proof beyond a reasonable doubt. And neither of these cases, nor the even more recent *United States v. Comstock* decision, included any analysis of the standard of proof.[33] Jurisdictions split equally between requiring clear and convincing evidence[34] and proof beyond a reasonable doubt.[35]

That explains why *Addington* is so important. *Addington* involved traditional civil commitment, the basic requirements of which are mental illness and a danger to self or others.[36] The Court squarely held that due process requires proof of dangerousness (and mental illness) by at least clear and convincing evidence.[37] The Court expressly rejected the lower preponderance standard and the higher standard of proof beyond a reasonable doubt.[38]

Obviously, *Addington* controls unless the distinction between mental illness civil commitment and sex offender civil commitment matters. Analysis of *Addington*'s reasoning is required to answer that question. *Addington* began by recognizing that the standard of proof functions to communicate the degree of confidence required for a result and

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31. Kansas v. Hendricks, 521 U.S. 346, 353 (1997).

32. *See* Kansas v. Crane, 534 U.S. 407, 416 (2002) (Scalia, J., dissenting) (citing KAN. STAT. ANN. § 59-29a02(a),(b) (2000)).

33. *See* United States v. Comstock, 130 S. Ct. 1949, 1954–56 (2010). For a critique of *Comstock* and reliance on *Addington* in this context, see Ryan K. Melcher, Note, *There Ain't No End for the "Wicked": Implications of and Recommendations for § 4248 of The Adam Walsh Act After* United States v. Comstock, 97 IOWA L. REV. 629, 652–56 (2012). For other procedural due process arguments against the federal sex offender commitment law, see Tamara Rice Lave, *Throwing Away the Key: Has The Adam Walsh Act Lowered the Threshold for Sexually Violent Predator Commitments Too Far?*, 14 U. PA. J. CONST. L. 391, 417–22 (2011).

34. 18 U.S.C. § 4248(d) (2006); FLA. STAT. ANN. § 394.917(1) (West 2011); MINN. STAT. ANN. § 253B.09(1)(A) (West 2007); MO. ANN. STAT. § 632.495(1) (Supp. 2012); NEB. REV. STAT. § 71-1209(1) (2009); N.H. REV. STAT. ANN. § 135-E:11(I) (LexisNexis 2012); N.J. STAT. ANN. § 30:4-27.32(a) (West 2008); N.Y. MENTAL HYG. LAW § 10.07(d) (McKinney 2011); N.D. CENT. CODE. § 25-03.3-13 (2002); VA. CODE ANN. § 37.2-908(C) (2011).

35. ARIZ. REV. STAT. ANN. § 36-3707(A) (2009); CAL. WELF. & INST. CODE § 6604 (West 2010); 725 ILL. COMP. STAT. ANN. § 207/35(d)(1) (LexisNexis 2000); IOWA CODE ANN. § 229A.7(5) (West 2006); KAN. STAT. ANN. § 59-29a07(a) (2005); MASS. GEN. LAWS ANN. ch. 123A, § 14(d) (West 2003); S.C. CODE ANN. § 44-48-100(A) (2002); TEX. HEALTH & SAFETY CODE ANN. § 841.062(a) (West 2010); WASH. REV. CODE ANN. § 71.09.060(1) (West 2008); WIS. STAT. ANN. § 980.05(3)(a) (West 2007).

36. Addington v. Texas, 441 U.S. 418, 420 (1979).

37. *Id.* at 433.

38. *Id.* at 425–31.

to allocate the risk of error between the parties.[39] The Court also noted that the standard of proof has at least symbolic value, "reflect[ing] the value society places on individual liberty."[40] Citing, *inter alia*, *Mathews v. Eldridge*, the Court explained that the choice of standard involves balancing "the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed."[41]

The preponderance standard was held to be not high enough given the individual's weighty interest in avoiding stigmatizing civil commitment.[42] But beyond a reasonable doubt was too heavy a burden for the state to shoulder.[43] The Court explained: "[E]ven though an erroneous confinement should be avoided in the first instance, the layers of professional review and observation of the patient's condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected."[44]

The Court also relied on a practical concern: "Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous."[45] On its own, this statement is puzzling.[46] If the Constitution requires proof beyond a reasonable doubt and the evidence cannot meet that standard, then this is an argument against civil commitment,

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39. *Id.* at 423 (citing *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

40. *Id.* at 425 (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971)).

41. *Id.* (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

42. *Id.* at 425–27.

43. *See id.* at 429.

44. *Id.* at 428–29. "One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma." *Id.*; *cf.* Fredrick E. Vars, *Illusory Consent: When an Incapacitated Patient Agrees to Treatment*, 87 OR. L. REV. 353, 355 (2008) ("Assent without capacity is not an expression of autonomy; it is at best an illusion of autonomy.").

45. *Addington*, 441 U.S. at 429; *accord* Andrew von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFF. L. REV. 717, 743 (1972). *But see* Minnesota *ex rel.* Pearson v. Probate Court of Ramsey Cnty., 309 U.S. 270, 274 (1940) ("These underlying conditions [including likelihood of doing harm], calling for evidence of past conduct pointing to probable consequences are as susceptible of proof as many of the criteria constantly applied in prosecutions for crime.").

46. One commentator has argued that this statement is exactly backwards. *See* William H. Abrashkin, Comment, *The Standard of Proof in Civil Commitment Proceedings in Massachusetts:* Superintendent of Worcester State Hospital v. Hagberg, 1 W. NEW ENG. L. REV. 71, 92 (1978).

not a reason to lower the proof standard.[47] However, later in the opinion, the Court more appropriately tied the point back to its balancing test: "Nor should the state be required to employ a standard of proof that may completely undercut its efforts to further the legitimate interests of both the state and the patient that are served by civil commitments."[48]

Does *Addington*'s essential reasoning apply with equal force to sex offender civil commitment? No. There are several important differences between mental illness and sex offender civil commitment. The impact of each on the balancing test will be assessed.

First, as bad as the stigma associated with mental illness surely is,[49] it is hard to imagine anything more stigmatizing than being labeled a "sexually violent predator."[50] On the other hand, many jurisdictions require a sex offense charge as a prerequisite for commitment,[51] so much of the stigmatization may already be done.[52] Still, on balance, this factor weighs slightly in favor of a higher standard of proof for sex offender civil commitment.

Second, review of sex offender detention is often annual, not "continuous," as the Court found in *Addington*.[53] Reliance on family and friends to police the process—questionable in the mental health context[54]—is arguably even less effective for

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47. *See* People v. Burnick, 535 P.2d 352, 368 (Cal. 1975) (en banc) ("The law . . . does not weaken the standard of proof merely because the evidence is weak."); *cf.* Alan M. Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277, 1305 (1973) ("[T]here is nothing about the nature of predictive judgments that supports the view that they require fewer safeguards than determinations of specific past acts.").

48. *Addington*, 441 U.S. at 430.

49. Jeffrey M. Barrett, Comment, *A State of Disorder: An Analysis of Mental-Health Parity in Wisconsin and a Suggestion for Future Legislation*, 2008 WIS. L. REV. 1159, 1162.

50. Neal v. Shimoda, 131 F.3d 818, 829 (9th Cir. 1997); La Fond, *supra* note 7, at 697; *cf. Burnick*, 535 P.2d at 362 ("When to [the] stigma [of mental illness] is added a charge of unlawful sexual behavior, the shame is complete.").

51. *E.g.*, KAN. STAT. ANN. § 59-29a02(a) (2005); TEX. HEALTH & SAFETY CODE ANN. § 841.003(b) (West 2010).

52. *See* Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 191–92 (1997) (noting that stigma from sex offender commitment "arguably much worse" than criminal conviction and often "cumulative").

53. *E.g.*, KAN. STAT. ANN. § 59-29a08(a) (2005); *In re* Van Orden, 271 S.W.3d 579, 586 (Mo. 2008) (en banc); *see also Addington*, 441 U.S. at 428–29.

54. *See* Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CALIF. L. REV. 54, 77 (1982) ("[W]here families and friends exist, they are usually only too glad to have the bothersome person removed from circulation.").

sex offenders.[55] Professor Eric Janus has demonstrated that error correction in this context is exceedingly rare.[56] This diminished opportunity to correct erroneous commitments tilts in favor of a higher standard for initial commitment.

Third, whereas few dispute that treatment for mental illness can be very effective,[57] even supporters admit that the evidence regarding treatment effectiveness for sex offenders is "not unequivocal."[58] Thus, it should hardly be surprising that the median length of stay for involuntarily committed mental patients is less than thirty days.[59] In contrast, the overwhelming majority of civilly committed sex offenders are

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55. *But see* United States v. Comstock, 627 F.3d 513, 521 (4th Cir. 2010) ("The statute challenged here [18 U.S.C. § 4248 (2006) (sex offender commitment)] offers the same sort of professional review and opportunity for correction of an erroneous commitment [as in civil commitment], similarly reducing the need for the rigorous reasonable doubt standard.").

56. Janus, *supra* note 52, at 195–206; *see also* La Fond, *supra* note 7, at 677 ("These cases of mistakes or inaccurate predictions of dangerousness, false-positives to social scientists, are simply locked away, out of sight and out of mind.").

57. *See generally* Philip A. Berger, *Medical Treatment of Mental Illness*, 200 SCIENCE 974 (1978). As to civil commitment in particular, see C. Katsakou & S. Priebe, *Outcomes of Involuntary Hospital Admission—A Review*, 114 ACTA PSYCHIATRICA SCANDINAVICA 232, 238 (2006) ("The evidence reviewed in this paper suggests that patients show significant clinical improvement after involuntary treatment . . . . The number of participants who retrospectively report positive views on . . . their perceived benefits from treatment in almost all studies is higher than those who explicitly express negative views."); *cf.* Thomas S. Szasz, *The Myth of Mental Illness*, 15 AM. PSYCHOLOGIST 113, 115 (1960), *available at* http://www.cyc-net.org/cyc-online/cycol-0904-mentalillness.html (questioning the effectiveness of medical action to solve psychosocial problems "defined and established on nonmedical grounds").

58. Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES OF SOC. ISSUES & PUB. POL'Y 137, 143 (2007); *see also* KURT BUMBY, U.S. DEP'T OF JUSTICE, CTR. FOR SEX OFFENDER MGMT., UNDERSTANDING TREATMENT FOR ADULTS AND JUVENILES WHO HAVE COMMITTED SEX OFFENSES 9–11 (2006), *available at* http://www.csom.org/CSOMResources/documents.html (summarizing competing views); Dennis M. Doren & Pamela M. Yates, *Effectiveness of Sex Offender Treatment for Psychopathic Sexual Offenders*, 52 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 234, 243 (2008) ("Whether psychopaths benefit from treatment cannot be conclusively stated based on research to date."); Marnie E. Rice & Grant T. Harris, *The Size and Sign of Treatment Effects in Sex Offender Therapy*, 989 ANNALS N.Y. ACAD. SCI. 428, 428 (2003) ("We conclude that the effectiveness of psychological treatment for sex offenders remains to be demonstrated."). *But cf.* R. Karl Hanson et al., *First Report of the Collaborative Outcome Data Project on the Effectiveness of Psychological Treatment for Sex Offenders*, 14 SEXUAL ABUSE: J. RES. & TREATMENT 169, 181 (2002) ("Averaged across all studies, the sexual offence recidivism rate was lower for the treatment groups (12.3%) than the comparison groups (16.8%, 38 studies, unweighted average)."); Friedrich Lösel & Martin Schmucker, *The Effectiveness of Treatment for Sexual Offenders: A Comprehensive Meta-Analysis*, 1 J. EXPERIMENTAL CRIMINOLOGY 117, 117 (2005), ("Treated offenders showed 6 percentage points or 37% less sexual recidivism than controls.").

59. *See* BRUCE J. WINICK, CIVIL COMMITMENT 2 n.9 (2005); Janus, *supra* note 52, at 183 ("In fact, standard civil commitments are generally quite short, especially when compared to police power commitments.").

still in detention.[60] These two related facts—less effective treatment and much longer detention—both weigh in favor of a higher standard of proof, the first by weakening the state's interest in detention and the second by multiplying the burden on individual liberty.

One similarity between mental illness and sex offender civil commitment must be conceded: both require proof of dangerousness, which the *Addington* Court worried could not be proven beyond a reasonable doubt.[61] As Part II will show, the Court's concern, in theory, can be addressed by setting a low dangerousness threshold—the government would have to meet a higher standard of proof, but *what* it must show would be less. In addition, *Addington* preceded the development of actuarial and other tools that can predict future dangerousness with a reasonable degree of accuracy.[62] Doctrinally, *Addington* also came before the Court's conclusion that "there is nothing inherently unattainable about a prediction of future criminal conduct."[63]

But the important point is that the Court cared about impossibility only because it believed the state's interest in detaining the mentally ill was weighty. Balancing the public and private interests is the touchstone. The state's interest in preventing sexual violence is almost certainly even stronger than the risks posed by most mentally ill individuals.[64] This factor alone tilts toward a lower standard of proof for sex

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60. *See* GOOKIN, *supra* note 12, at 1 (reporting that in 2006, 4,534 persons were held under SVP laws and 494 persons were discharged or released); *cf.* Aman Ahluwalia, *Civil Commitment of Sexually Violent Predators: The Search for a Limiting Principle*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 489, 495 (2006) (observing that longer periods of detention "amount to a larger deprivation of the liberty of the sex offender").

61. One commentator has argued that the fact that many jurisdictions require proof beyond a reasonable doubt for sex offender commitment negates that worry. Janus, *supra* note 52, at 206. The problem with this excellent argument is that *Addington* rejected it. *See* Addington v. Texas, 441 U.S. 418, 430–31 (1979) ("That some states have chosen—either legislatively or judicially—to adopt the criminal law standard gives no assurance that the more stringent standard of proof is needed or is even adaptable to the needs of all states." (footnote omitted)).

62. *See* Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 AM. CRIM. L. REV. 1443, 1454–55 (2003) (tracing the start of actuarial risk assessment to the early 1990s).

63. Schall v. Martin, 467 U.S. 253, 278 (1984).

64. *See* Janus & Meehl, *supra* note 20, at 39 n.38; *see also* TED R. MILLER, MARK A. COHEN & BRIAN WIERSEMA, U.S. DEP'T OF JUSTICE, NAT'L INST. JUSTICE, VICTIM COSTS AND CONSEQUENCES: A NEW LOOK 9 (1996) (estimating costs of $87,000 per victimization for rape and sexual assault and $24,000 for other assault with injury). Whether individual state statutes are tailored to that interest is unclear. Stealing underwear from an unoccupied house apparently can count as sexual violence in Kansas. *See* KAN. STAT. ANN. § 59-29a02(e)(13) (2005); State v. Patterson, 963 P.2d 436, 437, 440 (Kan. Ct. App. 1998).

offender civil commitment. If this factor outweighs the others set forth above, then the Court should perhaps set the floor lower than clear and convincing evidence. On the other hand, if the other factors predominate, a higher standard may be appropriate.[65]

There is older case law strongly suggesting that proof beyond a reasonable doubt may be required. In *Specht v. Patterson*, a defendant convicted of indecent liberties was sentenced not for that crime, but instead under an earlier generation sex offender act to an indeterminate sentence of one day to life.[66] In effect, that is very similar to the current generation of sex offender commitment laws.[67] The Colorado statute in *Specht* required a finding, above and beyond the factual predicate for conviction, that the defendant "constitute[d] a threat of bodily harm to members of the public, or [was] an habitual offender and mentally ill."[68] The defendant challenged the statute on due process grounds for lack of a hearing and for the allowance of hearsay evidence.[69]

The challenge was successful. Because the indeterminate sentence rested on a new finding of fact, the Court held, the defendant was "entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings."[70]

But is proof beyond a reasonable doubt one of these due process protections? *Specht* did not specifically mention the standard of proof.[71] And the U.S. Supreme Court did not squarely hold that due process required proof beyond a

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65. *Cf.* Daniel Share, *The Standard of Proof in Involuntary Civil Commitment Proceedings*, 1977 DETROIT C. L. REV. 209, 223 (same); Tsesis, *supra* note 18, at 259–66 (arguing that due process requires proof beyond a reasonable doubt of mental illness and dangerousness for civil commitment given liberty interest at stake).

66. Specht v. Patterson, 386 U.S. 605, 607 (1967).

67. *Compare* 725 ILL. COMP. STAT. ANN. § 207/40 (LexisNexis 2000), *with Specht*, 386 U.S. at 607.

68. *Specht*, 386 U.S. at 607 (quoting COLO. REV. STAT. ANN. § 39-19-1 (1963)).

69. *Id.* at 608.

70. *Id.* at 609 (quoting United States *ex rel.* Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966)).

71. One commentator has argued that the Colorado statute required only a preponderance. *Constitutional Law—Procedural Due Process—Pennsylvania Supreme Court Holds Sentence-Enhancement Provisions of "Megan's Law" Unconstitutional—* Commonwealth v. Williams, 733 A.2d 593 (Pa. 1999), cert. denied, 120 S. Ct. 792 (2000), 113 HARV. L. REV. 2140, 2143 n.43 (2000) [hereinafter *Recent Case*]. Presumably, that argument is based on the statutory language that authorized the indeterminate sentence if the trial court was "of the opinion" that the requirements were met. *Specht*, 386 U.S. at 607 (quoting COLO. REV. STAT. ANN. § 39-19-1 (1963)). But that language says nothing about the required strength of opinion, and the important point in any event is that the standard of proof was not argued or discussed. *See id.* at 607–11.

reasonable doubt in criminal proceedings until three years later in *In re Winship*.[72] This omission and timing have led some to conclude that *Specht* does not require proof beyond a reasonable doubt.[73]

The failure of *Specht* to discuss the standard of proof is a serious objection: *Specht* is therefore suggestive, not determinative.[74] The timing objection is less significant. The Court in *Winship* made clear that it was confirming[75] a long-existing due process requirement, not creating a new one: "The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation."[76] The Court cited nine opinions starting in 1881 in support of the proposition that "it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required."[77]

The "full panoply" language in *Specht* was originally penned by the Third Circuit.[78] At the time it was written, there is little question that it included proof beyond a reasonable

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72. *In re* Winship, 397 U.S. 358, 364 (1970).

73. *E.g.*, United States v. Schell, 692 F.2d 672, 676–79 (10th Cir. 1982) (discussing the beyond-a-reasonable-doubt standard for sentencing, not civil commitment); *Recent Case*, *supra* note 71, at 2143 (explaining that the *Specht* Court "simply did not consider the reasonable-doubt issue").

74. *See* Carol Veneziano & Louis Veneziano, *An Analysis of Legal Trends in the Disposition of Sex Crimes: Implications for Theory, Research, and Policy*, 15 J. PSYCHIATRY & L. 205, 210 (1987) ("A major procedural question left unanswered in *Specht* is whether sexual psychopath proceedings require proof beyond a reasonable doubt for commitment.").

75. Even skeptics use this word. *See Recent Case*, *supra* note 71, at 2143 (describing "*Winship*'s *confirmation* of the reasonable-doubt standard's constitutional status" (emphasis added)). Indeed, federal courts in Colorado had recognized before *Specht* that the beyond-a-reasonable-doubt standard was constitutionally required. Yates v. United States, 316 F.2d 718, 725 (10th Cir. 1963). Colorado found the same requirement in its state constitution before *Winship*. *See* People *ex rel.* Juhan v. Dist. Court for Jefferson Cnty., 439 P.2d 741, 745 (Colo. 1968) ("As thus interpreted by the judiciary over the years the due process clause of the state constitution includes the doctrine that the state must prove guilt beyond a reasonable doubt . . . .").

76. *Winship*, 397 U.S. at 361.

77. *Id.* at 362. A passage from one of the cited cases (pre-*Specht*) is sufficient to show that this line of argument is persuasive:

> Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.

Speiser v. Randall, 357 U.S. 513, 525–26 (1958).

78. Specht v. Patterson, 386 U.S. 605, 609 (1967) (quoting United States *ex rel.* Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966)).

doubt.[79] The Supreme Court of Pennsylvania has expressly rejected the timing argument.[80] The U.S. Supreme Court has had an opportunity to weigh in, but declined.[81] At least one justice has stated, based in part on *Winship*, that only proof beyond a reasonable doubt can justify a lengthy or indefinite deprivation of personal liberty.[82]

Lower court decisions after *Winship* and before *Addington* favor the higher standard with one possible exception.[83] A Seventh Circuit case is representative of the majority position requiring proof beyond a reasonable doubt:

> We recognize that society has a substantial interest in the protection of its members from dangerous deviant sexual behavior. But when the stakes are so great for the individual facing commitment, proof of sexual dangerousness must be sufficient to produce the highest recognized degree of certitude.[84]

Note that this is the same balancing test later followed in *Addington*.[85]

On the other hand, the Second Circuit held that "clear, unequivocal, and convincing evidence" sufficed because requiring proof beyond a reasonable doubt "would either prevent the application of such statutes except in the most extreme cases or invite hypocrisy on the part of judges or juries."[86] But the word "unequivocal" suggests a standard even higher than beyond a reasonable doubt, as *Addington*

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79. *See* United States *ex rel.* Marelia v. Burke, 197 F.2d 856, 858 (3d Cir. 1952) (concluding that the jury instruction, which stated that defendant "must be assumed 'innocent until proven guilty beyond a reasonable doubt'," would certainly satisfy "any constitutional obligation").

80. *See* Commonwealth v. Williams, 733 A.2d 593, 603 n.12 (Pa. 1999) ("We are not unaware that *Winship* was decided after *Specht*. Nevertheless, it is without question that the due process considerations articulated by the Court in *Winship* are part and parcel to the 'full panoply of relevant protections which due process guarantees in state criminal proceedings.'").

81. *See* McMillan v. Pennsylvania, 477 U.S. 79, 89 (1986).

82. Murel v. Balt. City Criminal Court, 407 U.S. 355, 365 (1972) (Douglas, J., dissenting from dismissal of writ of certiorari) (dangerousness was an element for indefinite detention of juvenile).

83. *See, e.g.*, United States *ex rel.* Stachulak v. Coughlin, 520 F.2d 931, 937 (7th Cir. 1975); Roxanne Lieb, Vernon Quinsey & Lucy Berliner, *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43, 63 (1998).

84. *Coughlin*, 520 F.2d at 937; *accord* People v. Burnick, 535 P.2d 352, 354 (Cal. 1975) (en banc); People v. Pembrock, 342 N.E.2d 28, 29 (Ill. 1976); *In re* Andrews, 334 N.E.2d 15, 26–28 (Mass. 1975).

85. Addington v. Texas, 441 U.S. 418, 431–33 (1979) ("[W]e turn to a middle level burden of proof that strikes a fair balance between the rights of the individual and the legitimate concerns of the state.").

86. Hollis v. Smith, 571 F.2d 685, 695 (2d Cir. 1978).

observed.[87] And the Second Circuit's concern that not enough people would meet a high standard, decoupled from balancing, is, as argued above, illegitimate.[88]

What elements of *Specht* survive *Addington*?[89] The key point of friction is that a broad reading of *Specht* and *Winship* would require proof of sex offender dangerousness beyond a reasonable doubt, which *Addington* declined to require for mental illness civil commitment. Prediction is difficult in both contexts, but that fact in isolation was not the reason *Addington* resisted the higher standard. Rather, it was because setting the bar too high had the potential to thwart the state's strong interests in detaining and treating the dangerous mentally ill. Ultimately, the standard of proof question boils down to balancing.[90]

B. The Minimum Probability of Recidivism

The Due Process Clause requires an affirmative finding of dangerousness for preventive detention.[91] What that means in the sex offender commitment case is unclear.[92] Again, my focus is on likelihood of recidivism, not other components of dangerousness (e.g., magnitude of the predicted harm).[93]

Notwithstanding three major U.S. Supreme Court cases addressing the constitutionality of sex offender commitment,

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87. *Addington*, 441 U.S. at 432 ("The term 'unequivocal,' taken by itself, means proof that admits of no doubt, a burden approximating, if not exceeding, that used in criminal cases." (footnote omitted)).

88. *See supra* notes 45–48 and accompanying text.

89. *Specht* has not been overruled by any other case, including Apprendi v. New Jersey, 530 U.S. 466 (2000). *See* Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1477–78 (2001).

90. This is another reason why criminal case law is not controlling. *See* Kansas v. Hendricks, 521 U.S. 346, 360–69 (1997) (rejecting the argument that a modern sex offender commitment scheme was a criminal proceeding); Medina v. California, 505 U.S. 437, 443 (1992) ("In our view, the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar [governing burden of proof and presumption of competency], are part of the criminal process."). *Hendricks* did not overrule *Specht* because nothing in *Specht* turned on the civil versus criminal distinction. *See* Specht v. Patterson, 386 U.S. 605, 608 (1967) ("These commitment proceedings whether denominated civil or criminal are subject . . . to the Due Process Clause.").

91. *See* Foucha v. Louisiana, 504 U.S. 71, 80–83 (1992); O'Connor v. Donaldson, 422 U.S. 563, 576 (1975).

92. David L. Faigman, *Making Moral Judgments Through Behavioural Science: The 'Substantial Lack of Volitional Control' Requirement in Civil Commitments*, 2 LAW, PROBABILITY & RISK 309, 315 (2003); *cf.* WINICK, *supra* note 59, at 45 ("[T]he Supreme Court has never clarified how likely the danger must be to the individual or to others that civil commitment is designed to prevent . . . ."); Grant H. Morris, *Defining Dangerousness: Risking a Dangerous Definition*, 10 J. CONTEMP. LEGAL ISSUES 61, 65 (1999) (same).

93. *See supra* text accompanying notes 20–21.

the minimum probability of harm has not been squarely decided. The first major case is *Hendricks*.[94] In rejecting a substantive due process challenge to the Kansas SVP statute, the Court emphasized that the statute required "a likelihood of [sexually violent behavior] in the future if the person is not incapacitated."[95] Then, as now, Kansas did not define how great that likelihood had to be.[96] This suggests that any likelihood may be enough, but the facts of the case do not support such a sweeping holding.[97] Essentially every sex offender has a greater-than-zero risk of recidivism. That may justify longer criminal sentences, but cannot be enough for indefinite civil commitment.[98]

The Supreme Court said nearly this five years later in *Crane*.[99] Although the Court did not directly address the likelihood of recidivism, it did so indirectly by holding that sex offender civil commitment requires "proof of serious difficulty in controlling behavior."[100] To be sure, a sex offender could be in perfect control of his behavior and still choose to reoffend. But reoffense is presumably much more likely for sex offenders with control problems. And society cares little about control for its own sake—the primary goal is to prevent sexual violence, not to treat volitional defects.[101] In sum, an overly broad reading of *Hendricks* would set no floor on likelihood of recidivism, but a functional interpretation of *Crane* rebuts that reading.

The latest installment in the SVP trilogy is *United States v. Comstock*.[102] The question decided was whether the federal government had the power under the Necessary and Proper Clause to enact its SVP statute.[103] The Court assumed, without

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94. *Hendricks*, 521 U.S. at 346.

95. *Id.* at 357–58.

96. *Cf.* KAN. STAT. ANN. § 59-29a02(c) (2005) (stating that "likely to engage in repeat acts of sexual violence" means "of such a degree as to pose a menace").

97. *See Hendricks*, 521 U.S. at 360 ("Hendricks even conceded that, when he becomes 'stressed out,' he cannot 'control the urge' to molest children.").

98. *See id.* at 358 (upholding Kansas SVP law in part because "it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness").

99. Kansas v. Crane, 534 U.S. 407, 412 (2002) ("We do not agree with the State, however, insofar as it seeks to claim that the Constitution permits commitment of the type of dangerous sexual offender considered in *Hendricks* without *any* lack-of-control determination.").

100. *Id.* at 413.

101. *See Hendricks*, 521 U.S. at 367 (suggesting that treatment may be "an ancillary purpose").

102. United States v. Comstock, 130 S. Ct. 1949 (2010).

103. *Id.* at 1956.

deciding, that the statute did not violate the Due Process Clause.[104] Even though due process is the most likely source of a minimum recidivism rate hurdle, the *Comstock* Court bolstered my reading of *Crane*: "Congress could have reasonably concluded that federal inmates who suffer from a mental illness that causes them to 'have serious difficulty in refraining from sexually violent conduct,' [18 U.S.C.] § 4247(a)(6), would pose an *especially high danger* to the public if released."[105] The link between serious lack of control and high risk of recidivism is now explicit.

State statutes and judicial opinions have set the probability of recidivism bar at different heights. Constitutional challenges to those bars have had mixed success. The California Supreme Court, in rejecting one sex offender's argument, said: "we do not discern that due process limits the involuntary civil commitment of dangerous mentally disordered offenders only to those persons who are more likely than not to reoffend."[106] The court distinguished prior California case law cited above requiring "highly likely" harm as directed solely to the standard of proof, not the dangerousness hurdle.[107]

In contrast, the State of Minnesota lost making the same argument as the sex offender in California, but the Minnesota Supreme Court in *In re Linehan* held that the "more likely than not" standard was too *low*: "The due process clauses of both the federal and state constitutions require that future harmful sexual conduct must be *highly likely* in order to commit a proposed patient under the [Sexually Dangerous Persons] Act."[108] The court grounded its holding squarely on *Addington*:

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104. *Id.*

105. *Id.* at 1961 (emphasis added) (quoting 18 U.S.C. § 4247(a)(6) (2006)).

106. People v. Ghilotti, 27 Cal. 4th 888, 924 (2002); *see also* People v. Roberge, 62 P.3d 97, 100–02 (Cal. 2003) (extending *Ghilotti*'s holding from screening to the trial—the final stage of the SVPA commitment process); *cf.* United States v. Hunt, 643 F. Supp. 2d 161, 177–80 (D. Mass. 2009) (similarly rejecting the "more likely than not" hurdle, but not on constitutional law grounds); Scott v. State, 895 N.E.2d 369, 375–76 (Ind. Ct. App. 2008) (rejecting the argument that "likely" requires a finding of more likely than not or to require something more than a 50% chance); Commonwealth v. Boucher, 780 N.E.2d 47, 50 (Mass. 2002) (explaining that "likely" does not implicate "the statistical probability inherent in the definition of 'more likely than not'").

107. *Ghilotti*, 27 Cal. 4th at 924 n.15.

108. *In re* Linehan, 557 N.W.2d 171, 180 (Minn. 1996) (emphasis added), *vacated sub nom.* Linehan v. Minnesota, 522 U.S. 1011 (1997), *reaffirmed*, 594 N.W.2d 867 (Minn. 1999); *accord* Cross v. Harris, 418 F.2d 1095, 1102 (D.C. Cir. 1969) (explaining that preventative detention requires a "high probability of serious harm"). *But see* Beasley v. Molett, 95 S.W.3d 590, 600 (Tex. App.—Beaumont 2002, pet. denied) ("[W]e see nothing . . . to lead to the Minnesota court's conclusion that the finding of future dangerous conduct must be 'highly likely,' as opposed to 'likely,' in order to meet due process requirements.").

> The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Addington*, 441 U.S. at 427 . . . . If the state were to require only a 10% probability of dangerousness (the fact to be demonstrated) and a clear and convincing evidence standard (say, a 75% degree of certainty), then the demand of due process that the citizen not share equally the risk of error would be undermined. *Addington*'s holding was partly motivated by substantive concerns about the preservation of individual liberty. *See Addington*, 441 U.S. at 427, 433 . . . . Hence, the error that due process seeks to avoid is a *false* prediction of future harmful conduct, and not only a prediction that is *less accurate* than the statutory standard prescribed by the legislature.[109]

In *In re Detention of Brooks*, the Court of Appeals of Washington (later affirmed by the Washington Supreme Court) distinguished *In re Linehan*.[110] It reasoned that because Washington required proof beyond a reasonable doubt, "the term 'likely' can be given its ordinary meaning [more probably than not] without the risk of falling below the constitutionally required minimum of clear and convincing evidence."[111] The Supreme Court of Iowa agreed in *In re Detention of Williams*, adding a balancing analysis: the sex offender's "interest in freedom from restraint is matched by the State's equally compelling interest in protecting society from a person prone to sexually assaulting children."[112]

To understand and evaluate these divergent opinions, one must first make sense of the relationship between standards of proof and probability of recidivism thresholds. It is to this task that the next Part is devoted.

III. THE RELATIONSHIP BETWEEN STANDARDS OF PROOF AND PROBABILITY THRESHOLDS

The relationship between standards of proof and recidivism risk thresholds has been described as "intricate and

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109. *In re Linehan*, 557 N.W.2d at 180 (emphasis added); *accord* Nicholas Scurich & Richard John, *The Normative Threshold for Psychiatric Civil Commitment*, 50 JURIMETRICS 425, 442–443 (2010) ("Because *Addington* incontrovertibly codified the CCE standard to govern civil commitment, and the CCE standard embodies a preference for false negatives relative to false positives, it mathematically follows that the posterior probability of violence must exceed 50% to constitutionally justify commitment.").

110. *In re* Detention of Brooks, 973 P.2d 486, 491 (Wash. Ct. App. 1999), *aff'd in relevant part*, 36 P.3d 1034, 1044–47 (Wash. 2001) (en banc).

111. *Id.*

112. *In re* Detention of Williams, 628 N.W.2d 447, 457–59 (Iowa 2001).

complex."[113] Other commentators claim that the two standards are independent: "We reject on logical grounds any tie between standard of proof and the level of prediction necessary to justify preventive detention or any lesser intrusion on the individual's liberty."[114] This section and the next will show that the two standards are constitutionally intertwined, even if logically distinct.[115]

A. *A Graphical Explanation of the Relationship*

Start with the minimum likelihood of future sexual violence. Five jurisdictions require a showing that such conduct is "more likely than not" (or greater than 50%).[116] The best evidence of recidivism comes from actuarial risk assessment instruments.[117] Such instruments assign points to various offender and offense attributes, sum the points, and provide estimated recidivism rates for different point totals.[118] Of course, actuarial instruments cannot predict the future. But, less obviously, neither can they assess an individual's risk with precision. Estimates of risk themselves come with error. For example, falling into the risk category nearest 50% using the most widely used instrument, the Static-99,[119] corresponds

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113. John Monahan & David B. Wexler, *A Definite Maybe: Proof and Probability in Civil Commitment*, 2 LAW & HUM. BEHAV. 37, 41 (1978).

114. Marc Miller & Norval Morris, *Predictions of Dangerousness: Ethical Concerns and Proposed Limits*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 393, 424 n.67 (1986).

115. For an excellent earlier explication of the relationship between the two standards using Bayesian methodology, see Janus & Meehl, *supra* note 20, at 41–44. My approach is more "frequentist." *See* David E. Adelman, *Scientific Activism and Restraint: The Interplay of Statistics, Judgment, and Procedure in Environmental Law*, 79 NOTRE DAME L. REV. 497, 505–09 (2004) (providing an explanation of the frequentist approach compared with the Bayesian approach).

116. IOWA CODE ANN. § 229A.2(4) (West 2006); MO. ANN. STAT. § 632.480(5) (West 2006); WASH. REV. CODE ANN. § 71.09.020(7) (West 2008); WIS. STAT. ANN. § 980.01(1m) (West 2007); *In re* G.H., 781 N.W.2d 438, 445 (Neb. 2010).

117. *See* Marcus T. Boccaccini et al., *Field Validity of the Static-99 and MnSOST-R Among Sex Offenders Evaluated for Civil Commitment as Sexually Violent Predators*, 15 PSYCHOL., PUB. POL'Y, & L. 278, 279 (2009) ("ARAIs designed to predict sexual reoffense (d = .67) clearly outperformed unstructured professional judgment (d = .42)."); Debra A. Pinals, Chad E. Tillbrook & Denise L. Mumley, *Violence Risk Assessment*, *in* SEX OFFENDERS: IDENTIFICATION, RISK ASSESSMENT, TREATMENT, AND LEGAL ISSUES 49, 54 (Fabian M. Saleh et al. eds., 2009). *But see* Thomas R. Litwack, *Actuarial Versus Clinical Assessments of Dangerousness*, 7 PSYCHOL., PUB. POL'Y, & L. 409, 414–16 (2001).

118. *See* Janus & Prentky, *supra* note 62, at 1454; Gina M. Vincent, Shannon M. Maney & Stephen D. Hart, *The Use of Actuarial Risk Assessment Instruments in Sex Offenders*, *in* SEX OFFENDERS: IDENTIFICATION, RISK ASSESSMENT, TREATMENT, AND LEGAL ISSUES, *supra* note 117, at 70, 72.

119. *See* Rebecca L. Jackson & Derek T. Hess, *Evaluation for Civil Commitment of Sex Offenders: A Survey of Experts*, 19 SEXUAL ABUSE: J. RES. & TREATMENT 425, 434, 438, 440 (2007); Jacqueline Waggoner, Richard Wollert & Elliot Cramer, *A Respecification*

to a 48.8% chance of violent recidivism within five years.[120] Roughly speaking, there is a 95% chance that the true rate is somewhere between 42.2% and 55.4%.[121] This so-called "confidence interval" reflects prediction error.[122] What is true for the instrument is true for any type or combination of evidence: the precise risk level of an individual is generally unknowable.[123]

The level of prediction error associated with the Static-99 is disputed. The figures given above come from the developers of the instrument.[124] One group containing perhaps the strongest critics of the Static-99 estimated a 95% confidence interval on an earlier version's 52% predicted recidivism rate of between 6% and 95%.[125] The true answer probably lies somewhere in between. An independent instrument has one predicted recidivism category estimating a 44% rate with a 95% confidence interval of 29% to 61%.[126]

With certain simplifying assumptions,[127] one can plot recidivism predictions of 50%—right at the "more likely than

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of Hanson's Updated Static-99 Experience Table that Controls for the Effects of Age on Sexual Recidivism Among Young Offenders, 7 LAW, PROBABILITY & RISK 305, 305–06 (2008).

120. *Static-99R Violent Recidivism Estimates*, STATIC-99 CLEARINGHOUSE, http://www.static99.org/pdfdocs/static-99RViolentRecidEstimates2010-04-29.pdf (last visited Feb. 1, 2013).

121. *Id.*

122. Again, I adopt frequentist terminology. The basic conclusions would most likely hold applying Bayesian techniques. *See* Adelman, *supra* note 115, at 505–09; M. J. Bayarri & J.O. Berger, *The Interplay of Bayesian and Frequentist Analysis*, 19 STAT. SCI. 58, 71 (2004) ("Bayesian and frequentist asymptotic answers are often (but not always) the same."); Gauri Sankar Datta et al., *Bayesian Prediction with Approximate Frequentist Validity*, 28 ANNALS OF STAT. 1414, 1414 (2000) ("It is . . . shown that, for any given prior, it may be possible to choose an interval whose Bayesian predictive and frequentist coverage probabilities are asymptotically matched."). *See generally* D.H. Kaye, *Apples and Oranges: Confidence Coefficients and the Burden of Persuasion*, 73 CORNELL L. REV. 54, 62 (1987); Nicholas Scurich & Richard S. John, *A Bayesian Approach to the Group Versus Individual Prediction Controversy in Actuarial Risk Assessment*, 36 LAW & HUM. BEHAV. 237, 239 (2012).

123. But at least with the instruments, one can estimate the error. *See* Janus & Prentky, *supra* note 62, at 1493–94.

124. *Static-99 Documents*, STATIC-99 CLEARINGHOUSE, http://www.static99.org/ (last visited Feb. 1, 2012).

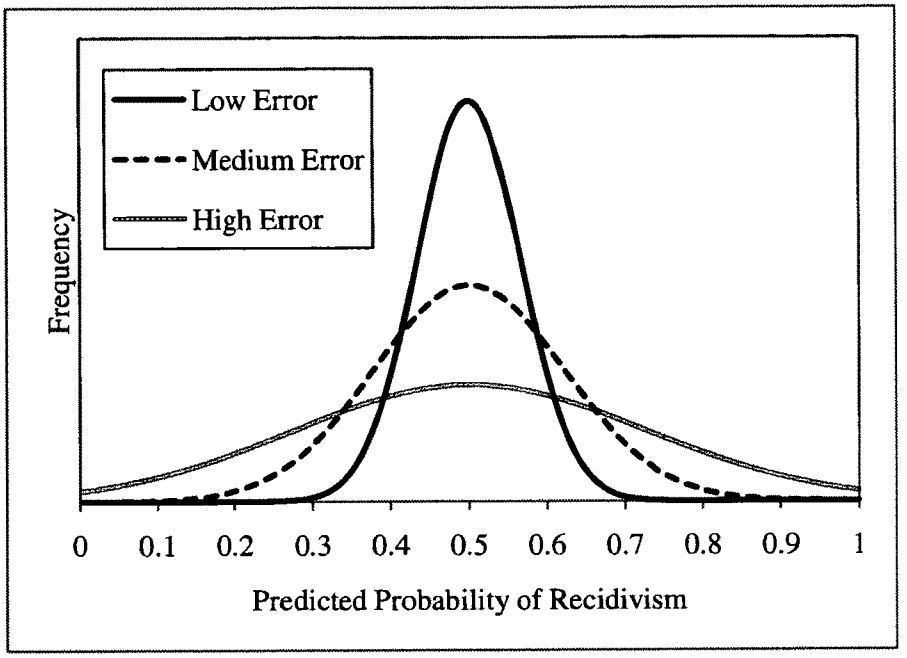
125. *See* Stephen D. Hart, Christine Michie & David J. Cooke, *Precision of Actuarial Risk Assessment Instruments: Evaluating the 'Margins of Error' of Group v. Individual Predictions of Violence*, 190 BRITISH J. PSYCHIATRY s60, s63–64 (2007).

126. Douglas Mossman, *Analyzing the Performance of Risk Assessment Instruments: A Response to Vrieze and Grove (2007)*, 32 LAW & HUM. BEHAV. 279, 287 tbl.2 (2007) (measuring probabilities of recidivism associated with the GEVALT scores).

127. The Figures assume a normal error distribution. For my argument, the only necessary assumption is that the estimated recidivism rate be "median-unbiased"—in other words, that the estimate is too low half the time and too high the other half.

not" threshold—under the three different error levels described below (Figure 1). Each line represents the frequency distribution of the actual recidivism rate.

Figure 1. Different Levels of Prediction Error



Tighter confidence intervals are reflected in narrower distributions around the prediction. In the tallest distribution (solid black line; lowest prediction error), one can be relatively confident that the true risk level is close to 50%. Not so for the flattest distribution (gray line; highest prediction error). However, the amount of prediction error does not matter if the standard of proof is merely preponderance (POE).[128] Half of the area lies above the 50% cut-off in all three distributions—in other words, it is "more likely than not" that the actual probability of recidivism is above 50%.

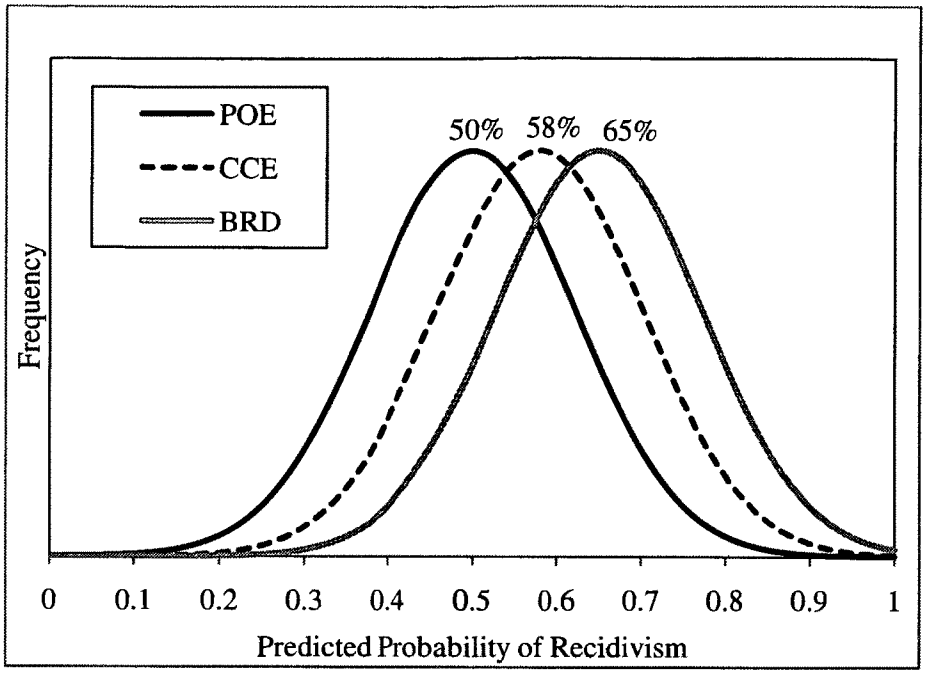
Heightened standards of proof complicate matters. Take the intermediate level of prediction error (Figure 1 dotted line), holding constant the "more likely than not" risk threshold. Assume that proof by clear and convincing evidence (CCE) requires 75% certainty and beyond a reasonable doubt (BRD) requires 90%. These were, in fact, the average values observed in a survey of judges.[129] The effective threshold rises with the

128. Fredrick E. Vars, *Rethinking the Indefinite Detention of Sex Offenders*, 44 CONN. L. REV. 161, 173 (2011).

129. C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or*

standard of proof: to 58% for clear and convincing evidence and 65% for beyond a reasonable doubt (Figure 2).[130] This happens because the heightened standards of proof in effect require that a greater percentage of the distribution exceed the 50% cut-off. For example, a prediction of 58% shifts the distribution to the right so that 75% of it exceeds 50% and therefore meets the CCE standard.

Figure 2. The Impact of Standard of Proof



What if one holds the heightened standard of proof constant and varies instead the prediction error? If the standard is proof beyond a reasonable doubt (90% certainty) that the sex offender is "more likely than not" to recidivate, then the lowest level of prediction error effectively requires a 58% predicted recidivism rate (Figure 3). The intermediate prediction error level generates the 66% figure already seen in the previous figure. And the

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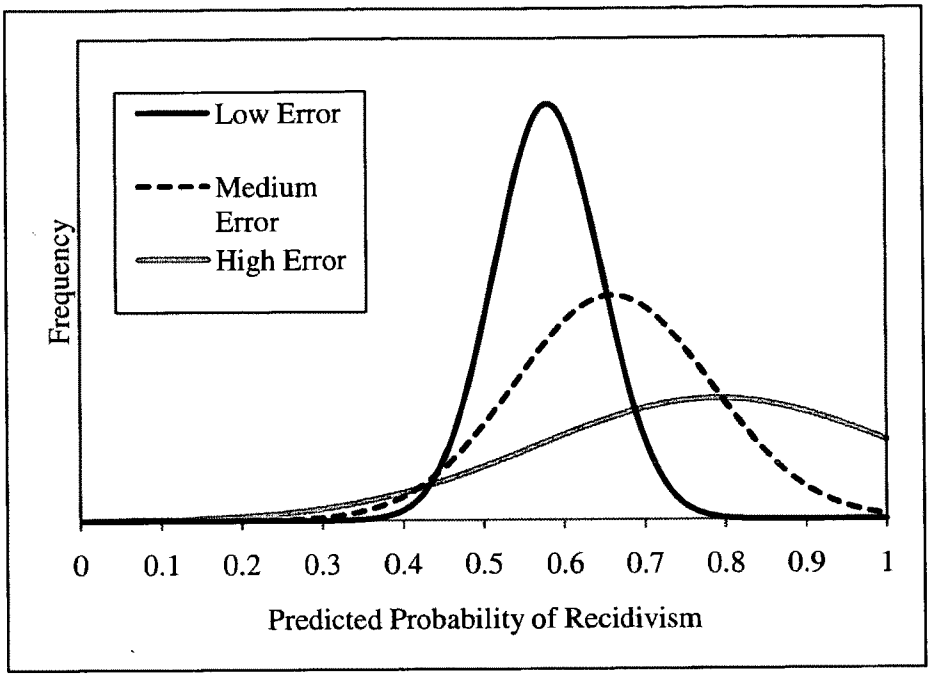
Constitutional Guarantees?, 35 VAND. L. REV. 1293, 1325 tbl.2, 1328 tbl.5 (1982) (survey of judges); *see also* Fredrick E. Vars, *Toward a General Theory of Standards of Proof*, 60 CATH. U. L. REV. 1, 7 (2010) (calculating mean, median, and mode for clear and convincing evidence based on the McCauliff surveys).

130. This illustrates and quantifies what others have observed. *See, e.g.*, Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 51 (2003) (defining dangerousness as "likely" and stating that this definition "has the effect of lowering the state's burden, because it only requires that the government demonstrate by the requisite standard (beyond a reasonable doubt, clear and convincing evidence, etc.) that the person is likely to offend").

highest error level effectively sets the threshold at a 79% likelihood of sexual violence. The greater the error, the higher the recidivism threshold must be for a given standard of proof. As the distribution flattens, it must be shifted further to the right to ensure that the required 90% of the distribution stay above 50%.

Figure 3. The Impact of Prediction Error (BRD)



One implication of the foregoing is that the *Brooks* and *Williams* cases discussed above may have gotten it right in holding constitutional their statute's requirement of proof beyond a reasonable doubt that recidivism was more likely than not.[131]

The effective threshold (79%) is above 75% applying the beyond a reasonable doubt standard with the greatest prediction error (gray line). Again, the assumption was that *Addington* requires clear and convincing evidence, which in turn requires a net predicted probability of recidivism of 75%. In contrast, unreported calculations generate a recidivism threshold of 65% for the clear and convincing evidence standard at this least reliable level of evidence. That is, of course, below 75%, which suggests that *Linehan* also reached the right result in striking down the combination of clear and

131. *In re* Detention of Williams, 628 N.W.3d 447, 457–59 (Iowa 2001); *In re* Detention of Brooks, 36 P.3d 1034, 1044–47 (Wash. 2001).

convincing evidence and a more-likely-than-not recidivism threshold.[132]

B. *The Logical Divide and Constitutional Connection*

How can anyone argue that standard of proof is independent of recidivism risk threshold? As shown above, they appear to be closely related. A hint of an answer is in *Williams*'s invocation of "the State's . . . compelling interest in protecting society from a person prone to sexually assaulting children."[133] Other courts describe the goal as "preventing future acts of sexual violence."[134] This is an important distinction.

The first framing, which has been called the "bifurcated proposal,"[135] effectively decouples the standard of proof from the recidivism threshold.[136] Any chance of recidivism can suffice,[137] and the standard of proof, as described above, just reflects confidence that the individual clears that bar.[138] This approach is tailored to reduce the risk and fear of sexual violence, not sexual violence directly.[139] An individual with a 1% chance of recidivism poses a risk and generates fear. On the other hand, the second framing, or "unitary approach," arguably requires an elevated risk level.[140] Locking up individuals with a 1% chance of recidivism does very little to prevent future acts of sexual violence.

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132. *In re* Linehan, 557 N.W.2d 171, 179–80 (Minn. 1996), *vacated sub nom.* Linehan v. Minnesota, 522 U.S. 1011 (1997).

133. *In re Detention of Williams*, 628 N.W.2d at 459.

134. State v. Post, 541 N.W.2d 115, 118 (Wis. 1995); *cf.* United States v. Salerno, 481 U.S. 739, 750 (1987) ("[T]he Government's general interest in preventing crime is compelling . . . .").

135. Janus & Meehl, *supra* note 20, at 42.

136. CHRISTOPHER SLOBOGIN, MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY 143–44 (2006) (describing the bifurcated approach as a "sleight[ ] of hand"); Janus & Meehl, *supra* note 20, at 42.

137. *Cf.* Scurich & John, *supra* note 109, at 444 (according to this approach, all sex offenders "have a 100% probability of being dangerous").

138. *See* Abrashkin, *supra* note 46, at 84 n.77. One commentator takes the bifurcated approach a step further. Deborah L. Morris, Note, *Constitutional Implications of the Involuntary Commitment of Sexually Violent Predators—A Due Process Analysis*, 82 CORNELL L. REV. 594, 628 (1997) ("A subsequent finding that a person committed a criminal act beyond a reasonable doubt, however, indicates a propensity toward dangerous behavior. Sexual predator laws, therefore, adequately satisfy the due process dangerousness requirement." (footnote omitted)).

139. *Cf.* JEAN FLOUD & WARREN YOUNG, DANGEROUSNESS AND CRIMINAL JUSTICE 49 (1982) (stating that the offender "being in the wrong by virtue of the risk he represents is what entitles us to consider imposing on him the risk of unnecessary measures to save the risk of harm to innocent victims").

140. *See* Janus & Meehl, *supra* note 20, at 43 (1997) (claiming that this standard advocates that sex offender commitment schemes commit only sex offenders who are 'likely' or even 'highly likely' to recidivate.").

Although a complete analysis of substantive due process is outside the scope of this Article,[141] a few comments along these lines will hopefully clarify the distinction between the two approaches. Freedom from physical restraint is clearly a fundamental liberty interest, so government deprivations of that interest must be narrowly tailored to a compelling interest.[142] Preventing sexual violence surely qualifies as a compelling state interest.[143] The unitary approach detains individuals whose risk of recidivism outweighs their liberty interest and is therefore narrowly tailored to prevent sexual violence.[144]

The bifurcated approach is narrowly tailored to reduce risk and fear. Some have suggested in other contexts that substantiated fear can be a compelling interest.[145] In any event, reducing the risk of sexual violence advances the compelling interest of preventing sexual violence, but if the recidivism threshold is low, many individuals will be committed who would not have recidivated. Whether overinclusiveness of this type violates the narrow-tailoring requirement is a difficult constitutional question.[146] If, as I argue, the standard of proof

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141. Eric Janus has argued that substantive due process "might forbid lifetime confinement of sex offenders for whom there is no reasonable likelihood of successful treatment." Eric S. Janus, *Treatment and the Civil Commitment of Sex Offenders, in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY 119, 127 (Bruce J. Winick & John Q. La Fond eds., 2003).

142. *See* Lawrence v. Texas, 539 U.S. 558, 593 (2003) ("[T]he Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest." (Scalia, J., dissenting) (emphasis omitted)); Youngberg v. Romeo, 457 U.S. 307, 315 (1982); Schall v. Martin, 467 U.S. 253, 288 (1984) (Marshall, J., dissenting) (recognizing that "freedom from physical restraint" is a fundamental liberty interest).

143. *See* United States v. Salerno, 481 U.S. 739, 749 (1987) ("The government's interest in preventing crime by arrestees is both legitimate and compelling.").

144. *Cf.* Marc Miller & Norval Morris, *Predictions of Dangerousness: Ethical Concerns and Proposed Limits*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 393, 413 (1986) (suggesting that a low risk of recidivism does not outweigh an individual's liberty interest).

145. *See* Equal Open Enrollment Ass'n v. Bd. of Educ., 937 F. Supp. 700, 706 & n.5 (N.D. Ohio 1996) (recognizing fear of school segregation as a potential compelling interest); Haff v. Cooke, 923 F. Supp. 1104, 1117 (E.D. Wis. 1996); State v. Mitchell, 485 N.W.2d 807, 818 (Wis. 1992) (Abrahamson, J., dissenting), *rev'd sub nom.* Wisconsin v. Mitchell, 508 U.S. 476 (1993). *But cf.* Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Fear of serious injury cannot alone justify suppression of free speech and assembly."), *overruled by* Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (holding that the First Amendment protects "mere advocacy" as "distinguished from incitement to imminent lawless action").

146. United States v. Weston, 255 F.3d 873, 883 (D.C. Cir. 2001) ("Even narrow tailoring in strict scrutiny analysis does not contemplate a perfect correspondence between the means chosen to accomplish a compelling governmental interest."); Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 TEX. L. REV. 517, 575–82 (2007) (explaining criteria for the narrow tailoring inquiry);

case law requires the unitary approach, it is a question we may not need to answer.

The first major case in this line is *Winship*, which, as noted above, confirmed that the Due Process Clause requires proof beyond a reasonable doubt in criminal cases.[147] Suppose New York decides that this high proof standard allows too many murderers to escape justice. A new crime is created, "murderish," the key element of which is that the defendant "more likely than not" committed murder. That element (like any others) would have to be proved beyond a reasonable doubt.[148] There is little question that the U.S. Supreme Court would strike down the statute as a transparent attempt to undercut *Winship*.[149]

Or is there? Case law under *Winship* has been anything but straightforward. The government must prove the elements of an offense beyond a reasonable doubt,[150] but not defenses[151] or sentencing factors.[152] The dividing lines are unclear.[153] I will not attempt to clarify them. Whether or not the Court would in fact strike down the "murderish" statute as inconsistent with *Winship*, it should. Otherwise, *Winship* is dead letter.[154]

One might attempt to distinguish sex offender commitment on the ground that dangerousness is forward looking and therefore necessarily probabilistic, whereas the hypothetical "murderish" is backward looking and either true

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Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1452–57 (2000); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1330 (2007) (suggesting that overinclusiveness might violate narrow tailoring).

147. *In re* Winship, 397 U.S. 358, 364 (1970).

148. *Id.* at 361.

149. Mullaney v. Wilbur, 421 U.S. 684, 699 (1975) ("*Winship* is concerned with substance rather than this kind of formalism."); *see also* Ronald Jay Allen, Mullaney v. Wilbur, *The Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269, 290 (1977) ("Thus, the Court indicated that it would not permit the states to undercut *Winship* with semantic gamesmanship.").

150. Dillon v. United States, 130 S. Ct. 2683, 2688 (2010).

151. *See* Clark v. Arizona, 548 U.S. 735, 769 (2006).

152. United States v. O'Brien, 130 S. Ct. 2169, 2174 (2010) (citing McMillan v. Pennsylvania, 477 U.S. 79, 91–92 (1986)).

153. *Clark*, 548 U.S. at 770–79 (holding that certain evidence of *mens rea* can be channeled into an insanity defense).

154. In addition, as noted above, civil and criminal standard of proof analysis has diverged since *Winship*. *See* Medina v. California, 505 U.S. 437, 443 (1992) ("In our view, the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar [governing burden of proof and presumption of competency], are part of the criminal process."). The "murderish" hypothetical is illustrative, not controlling.

or false.[155] This is a false distinction. A future event will either happen or not, and all evidence—both historical and predictive—is probabilistic.[156]

There is, however, a passage in *Addington* that can be read to support the distinction. In the course of rejecting the beyond a reasonable doubt standard for civil commitment, the Court distinguished criminal proceedings on the ground that "the basic issue is a straightforward factual question—did the accused commit the act alleged?"[157] In contrast, dangerousness assessments are "interpret[ive]," "subjective," "impression[istic]," and not "definite."[158]

This would seem to favor the bifurcated view, but context is critical. *Addington* drew this distinction to support its conclusion that proof beyond a reasonable doubt of dangerousness would probably be unattainable.[159] As the discussion above illustrates, that conclusion only makes sense if there is a minimum likelihood of recidivism. Setting the risk threshold low enough could ensure that many sex offenders clear the bar beyond a reasonable doubt.[160] So, properly read, this part of *Addington* supports both the questionable historical–predictive distinction *and* the unitary approach.

But other parts of *Addington* can be read to directly support the bifurcated approach. The first is the Court's description of the government interest: "to protect the community from the dangerous tendencies of some who are mentally ill."[161] A 1% chance of recidivism could be described as a "dangerous tendency." Along the same lines, the Court reasoned that "the State has no interest in confining individuals involuntarily . . . if they do not pose *some* danger to themselves or others."[162] But the closest *Addington* comes to a direct statement on the question is the following: "the substantive standards for civil commitment may vary from state to state."[163]

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155. *See* JEAN FLOUD & WARREN YOUNG, DANGEROUSNESS AND CRIMINAL JUSTICE 47–48 (1982) ("Predictive judgments are inherently uncertain in a way that judgments of past offenses are not.").

156. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 830 (8th ed. 2011); *see also In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) ("[A]ll the factfinder can acquire is a belief of what *probably* happened.").

157. Addington v. Texas, 441 U.S. 418, 429 (1979).

158. *Id.* at 429–30.

159. *See id.* at 429.

160. *See* Miller & Morris, *supra* note 114, at 423.

161. *Addington*, 441 U.S. at 426.

162. *Id.* (emphasis added).

163. *Id.* at 431.

In support of that last statement, *Addington* cites, *inter alia*, a pathmarking article by John Monahan and David Wexler.[164] On one cited page the article asks, and suggests an affirmative answer to, the key question: "Constitutionally, must the deprivation of commitment be measured and balanced in accordance with a formula that would take into account *both* standards of proof *and* standards of commitment [their term for recidivism risk threshold]?"[165] The article goes on to observe that *Addington*, then on appeal, was "poorly postured" because it concerned only the standard of proof.[166]

In sum, *Addington* did not expressly choose between the bifurcated and unitary approaches. Thus it left open a passage to limbo. But *Addington*'s balancing test, properly construed, should close that door. To prove that point, the next part will formalize the test.

IV. A FORMAL APPROACH TO BALANCING

According to the unitary approach, the possible outcomes of a sex offender commitment proceeding are depicted in Table 1.

Table 1. Commitment Outcomes Under Unitary Approach[167]

	Commitment	
Reoffends	*Yes*	*No*
Yes	True Positive (TP)	False Negative (FN)
No	False Positive (FP)	True Negative (TN)

The bifurcated approach divides outcomes differently.[168] Errors are measured not by reoffense, but by probability of

164. *Id.* (citing Monahan & Wexler, *supra* note 113, at 41–42).

165. Monahan & Wexler, *supra* note 113, at 41.

166. *Id.* at 41–42.

167. *Cf.* Janus & Meehl, *supra* note 20, at 38–39 & tbl.1 (examining risk contingency, erroneous commitment decisions, and prediction standards).

168. *Id.* at 38–40.

reoffense.[169] For example, a True Positive could be defined as committing someone with a 51% likelihood of recidivism, whether or not that person would actually have reoffended. Releasing someone with a 49% risk of recidivism is a True Negative, even if that person reoffends. Again, the bifurcated approach is tailored to reduce risk and fear; the unitary approach to reduce sexual violence.

Addington does not define what it means by "erroneous commitment,"[170] but its balancing test implicitly adopts the unitary approach.[171] One way to conceptualize the Supreme Court's civil standard of proof jurisprudence is: how strong must the evidence supporting the government interest be to justify a deprivation of the individual interest?[172] If it were just about strength of evidence and all government interests counted equally, then nothing would prevent the "murderish" hypothetical posed above.

To the contrary, *Addington* requires an express weighing of the government interest against the private interest.[173] The government plainly has less interest in committing sex offenders with a 1% chance of recidivism than those with a 75% chance. And the individual interest in avoiding imprisonment does not vary with the predicted risk of recidivism.[174] Fear unmoored from risk should not be a sufficient justification for indefinite detention.[175] To be sure, the unitary approach gives the standard of proof both a

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169. *See* Monahan & Wexler, *supra* note 113, at 38.

170. *See* Addington v. Texas, 441 U.S. 418, 425–29 (1979).

171. Some have argued that this balancing is a mistake. *See* Miller & Morris, *supra* note 114, at 424 ("[I]t is a mistake to decide the balance between the risk to the community and the restrictions on the individual in terms of the burden of proof.").

172. *See* Santosky v. Kramer, 455 U.S. 745, 754 (1982) (in selecting minimum proof standard, the Court balances "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure").

173. *See id.* at 755. At least one commentator implicitly disagrees. *See* Bochnewich, *supra* note 20, at 299 ("So long as the intrusion on an individual's rights is supported by a legitimate government interest, then it is simply a matter of policy where the line is drawn between the individual's rights, and those of society.").

174. *See Addington*, 441 U.S. at 427.

175. *See In re* Linehan, 557 N.W.2d 171, 197 (Minn. 1996) (Tomljanovich, J., dissenting) ("[A] state cannot incarcerate a person simply because it fears the person's future acts."), *vacated sub nom.* Linehan v. Minnesota, 522 U.S. 1011 (1997); *see also* O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) ("Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."); *cf.* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2658 (2011) ("But the fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech." (internal quotation marks omitted)).

procedural and substantive component,[176] but that is implicit in the Court's balancing test.[177]

The choice of 75% was not arbitrary. As discussed above,[178] that is the level of certainty typically associated with the clear and convincing evidence standard required by *Addington*. Notwithstanding *Addington*, however, Part I argued that neither the minimum standard of proof nor the minimum risk level have been established. The remainder of this section will attempt to quantify the minimum probability of recidivism for sex offender commitment.

The Court has generally engaged in ad hoc balancing and comparison to prior cases rather than systematic weighing of interests. Part I essentially applied the Court's case law approach and found it to be indeterminate. Justice Harlan suggested a more formal methodology in his concurrence to *Winship*, recommending a seminal article by John Kaplan.[179] The key equation for present purposes was clarified a year later by Alan Cullison.[180] The probability threshold that maximizes social welfare equals:

$$\frac{1}{\left(\frac{U_{TP} - U_{FN}}{U_{TN} - U_{FP}}\right) + 1}$$

where U is the total utility, or contribution to well being, of the outcome in the subscript.[181] The formula is not without critics, but

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176. *See* 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5122 (2d ed. 2010 Supp.) (describing "presumptions," including standards of proof, as "procedural rules, reflect[ing] substantive policies"); Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 291 n.439 (1987) ("The clear and convincing evidentiary burden is certainly a substantively oriented procedural rule."); *see also* Lindh v. Murphy, 521 U.S. 320, 327 (1997) ("[I]n its revisions of prior law to change standards of proof and persuasion in a way favorable to a State, the statute goes beyond 'mere' procedure to affect substantive entitlement to relief."); Stephen A. Saltzburg, *Sentencing Procedures: Where Does Responsibility Lie?*, 4 FED. SENT. R. 247, 250 (1992) ("[S]tandards of proof are more substantive than procedural."). *But see Santosky*, 455 U.S. at 757 (characterizing standards of proof as "procedural"); *but cf.* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 546 (3d ed. 2006) ("*Substantive due process*, as that phrase connotes, asks whether the government has an adequate reason for taking away a person's life, liberty, or property.").

177. *Addington*, 441 U.S. at 423; *In re Linehan*, 557 N.W.2d at 180; Janus & Meehl, *supra* note 20, at 43, offer additional functional arguments for the unitary approach.

178. *See supra* note 129 and accompanying text.

179. *In re* Winship, 397 U.S. 358, 370 n.2 (1970) (Harlan, J., concurring) (citing John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1071–77 (1968)).

180. *See* Alan D. Cullison, *Probability Analysis of Judicial Fact-Finding: A Preliminary Outline of the Subjective Approach*, 1 U. TOL. L. REV. 538, 564–71 (1969).

181. *See id.* at 564–66. The formula is one way to operationalize Christopher

even the most prominent of them, Laurence Tribe, excludes from the scope of his critique situations, like estimating the probability of recidivism, where mathematical methods are appropriate and unavoidable.[182]

The equation embodies the *Addington* balancing test. (U_{FP}) reflects the harm of erroneous commitment, which, given the generally short term of mental illness commitment, consists primarily of "stigma."[183] Conversely, a False Negative, the "release of a genuinely mentally ill person,"[184] inflicts both social and individual harm (U_{FN}). Correct commitments serve the government and individual interests in providing needed treatment (U_{TP}).[185] Finally, the government has a strong interest in preserving scarce resources for those in need: "the State has no interest in confining individuals involuntarily if they are not mentally ill" (U_{TN}). [186] *Addington* expressly considered each of the four utilities; the equation tells how best to balance them.

The bifurcated approach would require a more complicated formula. The utility of outcomes would depend on the risk levels of individuals. Locking up a high-risk individual reduces risk and fear more than locking up a low-risk individual. In effect, the probability threshold would figure into both sides of the equation.[187] This is another argument against the bifurcated approach: the Court's comparison of utilities clearly fails to include this additional layer of complexity.

Slobogin's proportionality principle. *See* SLOBOGIN, *supra* note 136, at 106 ("The *proportionality principle* requires that the degree of danger be roughly proportionate to the proposed government intervention."). Closely related is the famous Learned Hand formula, the application of which has been advocated in this context. Abhi Raghunathan, Note, *"Nothing Else But Mad": The Hidden Costs of Preventive Detention*, 100 GEO. L.J. 967, 993–95 (2012).

182. *See* Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1338–39, 1382–86 (1971); *see also* Scurich & John, *supra* note 109, at 432 ("Actuarial evidence, however, presents a unique situation because it is inherently statistical, so it might be exempt from many of the criticisms relevant to decision theory in the trial process."). Others have pointed out that the formula cannot select among preset standards of proof, as opposed to generating unconstrained probability thresholds. Vars, *supra* note 129, at 15–16; *see also* Ronald J. Allen, *The Restoration of* In re Winship*: A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30, 47 n.65 (1977).

183. Addington v. Texas, 441 U.S. 418, 426 (1979).

184. *Id.* at 429.

185. *Id.* at 426.

186. *Id.*; *accord* Goetz v. Crosson, 967 F.2d 29, 33–34 (2d Cir. 1992) (expressly considering four utilities in the *Addington/Mathews* balancing test).

187. Tribe identified this problem in the criminal context. Tribe, *supra* note 182, at 1382–83 & n.168.

How does one quantify the relevant utilities?[188] Of course, this assumes that quantification is possible, an assumption that some readers will reject. After all, how can one measure the harm from rape or child molestation?[189] My response is that while perfect measurement is impossible, imprecise measurement is better than no measurement. And without reducing to common terms the utilities of the outcomes, the required balancing test is impossible.[190]

As noted above, the efficacy of treatment for sex offenders has not been established[191] and "there is no reason that treatment could not be provided in prison,"[192] so I will assume that incapacitation is the only relevant government interest served by sex offender commitment. This also disregards any deterrent effect commitment might have. Deterrence is not the purpose of sex offender civil commitment.[193] Indeed, the central rationale is that deterrence of sex offenders is difficult, if not impossible.[194] This is evident in the Supreme Court's holding that a prerequisite for sex offender civil commitment is "serious difficulty in controlling behavior."[195]

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188. For a useful, nonquantified tabulation, see David L. Faigman, *Judges as "Amateur Scientists,"* 86 B.U. L. REV. 1207, 1214 tbl.2 (2006).

189. *See* John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 588 (2006) ("The values that *Mathews* calls on the courts to balance [in case of indefinite detention of suspected terrorists] seem obviously difficult—if not impossible—to measure against any common metric."); *cf.* Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1562–63 (2002) (criticizing cost-benefit analysis in the environmental context).

190. *Cf.* David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 652 (1994) ("Although constitutional values do not lend themselves to a simple calculus, they are amenable to comparison and rough measurement on a single scale."). Some have argued that balancing is an inappropriate mode of judicial decisionmaking. *E.g.*, Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987).

191. *See supra* note 58 and accompanying text.

192. Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 140 (1996); Christopher Slobogin, *Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases*, 48 SAN DIEGO L. REV. 1127, 1142–44 (2011).

193. *See, e.g.*, KAN. STAT. ANN. § 59-29a01 (2011) (stating that "care and treatment" through a separate involuntary civil commitment process is necessary to address the special needs of sexually violent predators); Kansas v. Hendricks, 521 U.S. 346, 361–63 (reasoning that the civil commitment statute at issue was not created to serve the criminal law objectives of retribution or deterrence because persons committed under the statute were "unlikely to be deterred").

194. *See* KAN. STAT. ANN. § 59-29a01 (2011) (discussing the Kansas legislature's findings that sexually violent predators are "an extremely dangerous group . . . who are likely to engage in repeat acts of sexual violence if not treated for their mental abnormality or personality disorder"); Slobogin, *supra* note 208 at 1142, 1144 (discussing sex offenders as a category of people "eligible for detention in a noncriminal system on the ground that they are undeterrable by criminal sanction").

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

The four utilities can be broken down into the following constituent costs. A True Positive includes at a minimum the government's cost of detention.[196] A False Positive includes both the government's cost of detention and the cost to the individual of false imprisonment.[197] A True Negative is costless.[198] A False Negative leads to repeat sexual violence.[199] I omit adjudication costs since they are incurred in each of the four outcomes and therefore cancel out in the equation.

Starting with the largest cost, a False Negative permits at least one act of sexual violence. That is what actuarial instruments have been designed to predict.[200] The costs of the three most serious sex crimes have been estimated as follows (in 2011 dollars): Rape-Murder, $4,576,614; Rape and Sexual Assault (Adult Victim), $135,430; and Sexual Assault (Child Victim), $154,110.[201] These costs can be weighted by their relative frequency.[202] Limiting the analysis to these most serious offenses—and excluding less serious, potential trigger crimes like exhibitionism and underwear theft[203]—tilts the scale toward the government and toward a lower predicted recidivism threshold. This conservative approach is appropriate because the goal of

196. *See* Faigman, *supra* note 188, at 1214 tbl.2 (listing the four utilities and their respective costs and outcomes).

197. *Id.*

198. *Id.*

199. *Id.*

200. *See* Pinals, Tillbrook, & Mumley, *supra* note 117, at 53.

201. TED R. MILLER, MARK A. COHEN, & BRIAN WIERSEMA, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, VICTIM COSTS AND CONSEQUENCES: A NEW LOOK 9 tbl.2 (1996), *available at* http://www.ncjrs.gov/App/Publications/Abstract.aspx?id=155282. These are the federal government's own numbers. *Id.* Using them is consistent with my approach of making every assumption in favor of the government. Inflation adjustments for 2011 were made with Consumer Price Index Inflation Calculator. *CPI Inflation Calculator*, U.S. BUREAU LAB. STATS., http://www.bls.gov/data/inflation_calculator.htm (Last visited Jan. 22, 2013).

202. Another approach would be to calculate separate thresholds depending on the seriousness of the offense. *See* Janus & Prentky, *supra* note 123, at 1494 (discussing courts' preference to evaluate the probability aspect of risk based on the severity of the predicted behavior); Larry Laudan & Harry D. Saunders, *Re-Thinking the Criminal Standard of Proof: Seeking Consensus about the Utilities of Trial Outcomes*, 7 INT'L COMM. EVID. 1, 1, 29 (2009) (questioning whether differing standards of proof are needed based on the severity of each crime). With the exception of rape-murder, which is extremely rare, the differences in cost among the three most serious offenses do not seem to justify this complication. *See* MILLER, COHEN, & WIERSEMA, *supra* note 201, at 3 (showing that between 1987–1990, rape-murder victims totaled 265, whereas sexual assault for adults and children totaled 1,133,000 and 185,000, respectively). I did not find cost estimates for less serious offenses. And, in any event, certainty of reoffense seems to me insufficient to justify the indefinite detention of noncontact sex offenders, as opposed to criminal sanctions after the fact.

203. *See supra* note 64.

this Article is to set as firm a constitutional floor as possible.[204] This limitation also determines the first component of dangerousness by assuming a very high magnitude of harm.[205]

Research shows that repeat sex crimes are underdetected, so I multiply crime costs by the ratio of detected and undetected crimes to detected crimes.[206] Doing so lowers the minimum standard of proof based on unobserved activity, which is arguably unfair.[207] But again, the guiding principle is to resolve any close calls in favor of the government. That said, the extent of underdetection is by definition unknown and hotly disputed.[208] It must be conceded that different assumptions on this point could substantially alter the resulting minimum risk threshold. Adjusting for underdetection reflects the third component of dangerousness: frequency of harm.[209]

It is expensive to incapacitate sex offenders, and this cost affects the utilities of both True and False Positives. "A good rule of thumb is that it costs about $100,000 per person to keep someone committed in an institution for a year as an SVP."[210] This estimate matches almost exactly the $94,017 mean

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204. *See* Mental Hygiene Legal Serv. v. Spitzer, No. 07 Civ. 2935(GEL), 2007 WL 4115936, at *26 (S.D.N.Y. Nov. 16, 2007) (stating that deference to the legislature is appropriate when engaging in *Mathews* balancing). *But see* Santosky v. Kramer, 455 U.S. 745, 754 (1982) ("Unlike the Court's right-to-counsel rulings, its decisions concerning constitutional burdens of proof have not turned on any presumption favoring any particular standard. To the contrary, the Court has engaged in a straight-forward consideration of the factors identified in *Eldridge* to determine whether a particular standard of proof in a particular proceeding satisfies due process.").

205. *See supra* text accompanying note 20.

206. A. Nicholas Groth, Robet E. Longo, & J. Bradley McFadin, *Undetected Recidivism Among Rapists and Child Molesters*, 28 CRIME & DELINQUENCY 450, 452 tbl.1, 454 tbl.2 (1982); *Murder Mysteries: Investigating America's Unsolved Homicides*, SCRIPPS HOWARD NEWS SERVICE, http://projects.scrippsnews.com/magazine/murder-mysteries/ (last visited Jan. 16, 2013) (in my calculations unsolved serves as a rough proxy for undetected homicides). Based on these two sources, I multiplied the predicted number of murders by 1.6, rapes by 2.9, and child molestation by 3.8.

207. *See* John Q. La Fond, *Washington's Sexually Violent Predator Statute: Law or Lottery? A Response to Professor Brooks*, 15 U. PUGET SOUND L. REV. 755, 775 (1992) ("But, even if it is true that sex crimes (like most other crimes) are underreported and that some sex offenders commit many sex crimes, these broad-brush claims do not establish that mental health professionals can accurately identify which, if any, offender will commit serious sex crimes.").

208. *See* Dawn J. Post, *Preventive Victimization: Assessing Future Dangerousness in Sexual Predators for Purposes of Indeterminate Civil Commitment*, 21 HAMLINE J. PUB. L. & POL'Y 177, 241 (1999) (reporting more severe under-detection); Mark R. Weinrott & Maureen Saylor, *Self-Report of Crimes Committed by Sex Offenders*, 6 J. INTERPERSONAL VIOLENCE 286, 291 (1991) (same).

209. *See* Janus & Meehl, *supra* note 20, at 37 (discussing the four components of dangerousness).

210. JOHN Q. LA FOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS 150 (2005).

calculated by a 2006 comprehensive review of jurisdictions.[211] The lowest annual cost per detainee was $41,176, in South Carolina.[212] It is unclear whether the state can provide constitutionally adequate conditions at this low level.[213] And these figures do not include construction or court costs.[214] Nonetheless, to further favor the government, I assume the minimum state expenditure level used by South Carolina, which is $45,943 in 2011 dollars.

As noted above, a False Positive carries another important cost: the erroneous deprivation of liberty. Although by no means a perfect analog, monetary awards for falsely imprisoned criminal defendants provide some indication of the value society places on freedom from physical restraint. Two recent law review articles compile award amounts, along with duration information, for seventeen falsely imprisoned individuals.[215] Of those, twelve were imprisoned for a year or more and were in the United States; the median award in 2011 dollars was $367,577 per year. The low award, which is the one I use, was $68,045 per year.[216]

The final assumption needed is the number of years the commitment lasts. Obviously, both the direct costs of imprisonment and the harm of false imprisonment rise with the duration. As noted above, the vast majority of detainees are still in custody, so it is impossible to estimate the average length of stay.[217] I use five years. First, five years is generally the shortest follow-up period used by actuarial instruments.[218] This is significant because actuarial instruments are the best evidence of recidivism risk. Sex offenders are (or should be) committed because the instrument estimates a risk of recidivism within five

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211. GOOKIN, *supra* note 12, at 5 exhibit 3.

212. *Id.* Actually, Texas was lower, but it is 100% outpatient. *Id.*

213. *See* Abby Goodnough & Monica Davey, *A Record of Failures at Center for Sex Offenders*, N.Y. TIMES, Mar. 5, 2007, at A16 (reporting on Florida, which spends just slightly more than South Carolina).

214. GOOKIN, *supra* note 12, at 6 exhibit 4.

215. Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 43–44 nn. 30, 32, & 49 n.63; Mordachai Halpert & Boaz Sangero, *From a Plane Crash to the Conviction of an Innocent Person: Why Forensic Science Evidence Should Be Inadmissible Unless It Has Been Developed as a Safety-Critical System*, 32 HAMLINE L. REV. 65, 89–90 & n.179 (2009).

216. These awards did not reflect the stigma of being labeled a "sexually violent predator," so using them further tilts the scale in favor of the government.

217. GOOKIN, *supra* note 12, at 1 (reporting 4,534 persons held under SVP laws and 494 discharged or released); John Q. La Fond, *The Costs of Enacting a Sexual Predator Law*, 4 PSYCHOL. PUB. POL'Y & L. 468, 498–99 (1998).

218. *See* Boccaccini et. al., *supra* note 117, at 300–01 (discussing use of the Static-99 to calculate recidivism rates and defining "recidivism" as "reoffense within 5 years").

years above the threshold.[219] Incapacitation must last for five years to eliminate that risk.[220] In effect, this puts an outer limit of five years on the imminence component of dangerousness.[221]

The second reason for selecting five years is the experience in Minnesota, one of the first jurisdictions to adopt a current-generation sex offender commitment statute.[222] "The Minnesota SVP program itself is designed to be completed in a minimum of four years."[223] However, most patients are unable to complete the program in the minimum period.[224] If one very optimistically assumes that a sizable fraction take only one additional year, then the median might be five years.

We are now ready to work back to the Kaplan-Cullison equation. U_{TP} equals the government's cost of detaining an individual for five years ($229,715[225]). U_{FP} is the same number, plus an award for a five-year erroneous deprivation of liberty ($569,938). A True Negative has no cost. The cost of a single act of sexual violence, adjusted to reflect underdetection ($415,445), is equal to U_{FN}. Plugging these values into the equation generates an optimal probability threshold of 75%.[226] This represents the minimum likelihood of future sexual violence within five years that should be required for a five-year commitment.

This result obviously hinges on the assumptions. Take, for example, duration: substituting three years for five would

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219. *See id.* at 279–80 (discussing the utility of actuarial risk assessment instruments (ARAIs) and how at least one state, Virginia, requires use of ARAIs and refers inmates who score above a certain threshold to undergo a subsequent clinical evaluation to determine whether the inmate should be civilly committed).

220. *Cf.* Jay Lechner, Note, *The 1999 Amendments to the Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act: A Dangerous Example of Reactionary Legislation*, 12 U. FLA. J.L. & PUB. POL'Y 147, 161 (2000) ("The Act fails to comply with traditional involuntary commitment precedent and provide that the risk of danger be substantial within the reasonably foreseeable future.").

221. *See supra* text accompanying note 20.

222. *See* Eric S. Janus, *Foreshadowing the Future of* Kansas v. Hendricks*: Lessons from Minnesota's Sex Offender Commitment Litigation*, 92 NW. U. L. REV. 1279, 1283 (1998) (describing Minnesota's original sex offender commitment law as "one of the first" when it was passed in 1939); *see also* ZONANA ET AL., *supra* note 10, at 11–12 (discussing the origin of laws for the commitment of sex offenders and describing Minnesota's version as "typical of the first generation of sex offender commitment laws").

223. Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 378 (2003).

224. *Id.* at 378 n.413.

225. All dollar figures in this paragraph are in 2011 dollars.

226. This supports Ron Allen and Larry Laudan's assertion that, on cost-benefit grounds, the threshold for preventive detention ought to be lower than the threshold for criminal conviction. Ronald J. Allen & Larry Laudan, *Deadly Dilemmas III: Some Kind Words for Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 781, 801–02 (2011).

generate a risk threshold of 55%.[227] Conversely, a seven-year detention would be constitutional only with a predicted recidivism rate at or above 89%. The critical point of this Article is not the exact number, but the novel methodology that should guide courts and policymakers into the right ballpark.

V. IMPLICATIONS

A. Assessing Current Standards

Committing an individual at a low risk level deprives him of liberty without due process of law. In particular, a standard of proof and risk threshold combination ought to satisfy due process if and only if the net probability of five-year recidivism is greater than 75%. Jurisdictions are all over the map on these two standards. Which of them, if any, passes constitutional muster?

The easiest jurisdictions to evaluate are those that require recidivism to be "more likely than not." This provides an anchor at 50%. Missouri[228] and Nebraska[229] overlay this threshold with the clear and convincing evidence standard. As *Linehan* correctly held, that combination is unconstitutional.[230] Even assuming the maximum prediction error, the net recidivism probability goes no higher than 65%.[231] *A fortiori*, the federal[232] and Florida[233] schemes—which couple a risk threshold below 50% with the clear and convincing standard—also violate due process.

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227. In a prior article I showed that an instrument as good as the Static-99 failed to identify even one individual with an expected three-year recidivism rate above the 50% level. Vars, *supra* note 128, at 191.

228. MO. ANN. STAT. § 632.480(5) (West 2006) ("more likely than not"); MO. ANN. STAT. § 632.495(1) (West Supp. 2012) ("clear and convincing evidence").

229. NEB. REV. STAT. § 71-1209(1) (2009) ("clear and convincing evidence"); *In re* G.H., 781 N.W.2d 438, 445 (Neb. 2010) ("more likely than not").

230. *In re* Linehan, 557 N.W.2d 171, 180 (Minn. 1996), *vacated sub nom.* Linehan v. Minnesota, 522 U.S. 1011 (1997), *reaffirmed*, 594 N.W.2d 867 (Minn. 1999).

231. *See supra* Figure 2 and accompanying text.

232. 18 U.S.C. § 4247(a)(6) (2006) ("serious difficulty refraining"); 18 U.S.C. § 4248(d) (2006) ("clear and convincing evidence"); United States v. Hunt, 643 F. Supp. 2d 161, 180 (D. Mass. 2009) ("[T]his court does not construe the 'serious difficulty' criterion for commitment to require proof of any statistical probability of re-offense."); *see* John Matthew Fabian, *To Catch a Predator, and then Commit Him for Life: Analyzing the Adam Walsh Act's Civil Commitment Scheme Under 18 U.S.C. § 4248*, CHAMPION, Feb. 2009, at 44, 44 ("Without a formal requirement of 'likely to reoffend,' it is possible that low-risk and non-contact sex offenders may be civilly committed indefinitely.").

233. FLA. STAT. ANN. § 394.917(1) (West 2011) ("clear and convincing evidence"); Hale v. State, 891 So. 2d 517, 520 (Fla. 2004).

Iowa,[234] Washington,[235] and Wisconsin[236] are also anchored at 50%, but require proof beyond a reasonable doubt. Here, the magnitude of prediction error is decisive (*see supra* Figure 3). Only at the highest level of error does the net likelihood of recidivism clear the 75% bar. These regimes are probably unconstitutional,[237] but because factfinders rely on evidence other than actuarial instruments, and that evidence has unknown prediction error, one cannot be sure.[238]

The systems in California and Massachusetts are even less likely to be constitutional. These two jurisdictions also require proof beyond a reasonable doubt, but the state supreme courts have expressly held that a recidivism risk below 50% can suffice.[239] If the threshold is below 40%, then the net risk would be below the requisite 75% even at the highest level of prediction error (again, *see supra* Figure 3).[240]

Ten other states have similarly nonquantified risk thresholds, although none of them has clearly stated that a probability less than 50% can suffice. These jurisdictions use words like "menace,"[241] "likely,"[242] and "highly likely."[243] None of

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234. IOWA CODE ANN. § 229A.2(4) (West 2006) ("more likely than not"); IOWA CODE ANN.§ 229A.7(5)(a) (West 2006) ("beyond a reasonable doubt").

235. WASH. REV. CODE ANN. § 71.09.020(7) (West 2008) ("more probably than not"); WASH. REV. CODE ANN. § 71.09.060(1) (West 2008) ("beyond a reasonable doubt").

236. WIS. STAT. ANN. § 980.01(1m) (West 2007) ("more likely than not"); WIS. STAT. ANN. § 980.05(3)(a) (West 2007) ("beyond a reasonable doubt").

237. *But cf.* Bochnewich, *supra* note 20, at 306 ("When such statutes are narrowly drawn to address only the worst of the worst offenders, as is the Washington Sexual Predator civil commitment scheme, then it seems to be morally responsible, as well as constitutionally permissible, for states to restrain the offender's liberty based upon predictions of future behavior.").

238. *See* Gary Gleb, Comment, *Washington's Sexually Violent Predator Law: The Need To Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings*, 39 UCLA L. REV. 213, 234–35 (1991) (stating that it is "uncertain" in practice whether Washington's higher proof standard protects against erroneous confinement).

239. CAL. WELF. & INST. CODE § 6604 (West 2010) ("beyond a reasonable doubt"); MASS. GEN. LAWS ANN. ch.123A, § 14(d) (West 2003) ("beyond a reasonable doubt"); People v. Ghilotti, 27 Cal. 4th 888, 916 (2002) (stating that "likely" "does not mean the risk of reoffense must be higher than 50 percent," but instead means the person "presents a *substantial danger*—that is, a *serious and well-founded risk*—of reoffending"); Commonwealth v. Boucher, 780 N.E.2d 47, 53 (Mass. 2002) (defining "likely" not as "more likely than not," but rather as "would reasonably be expected").

240. A 40% threshold would shift to the left by 10 percentage points the low-error gray distribution in Figure 3, thereby shifting the peak and effective threshold down from 79% to 69%.

241. KAN. STAT. ANN. § 59-29a02(c) (2005) ("menace"); S.C. CODE ANN. § 44-48-30(9) (2002) ("pose a menace"); Shivaee v. Commonwealth, 613 S.E.2d 570, 577 (Va. 2005) ("a menace to the health and safety of others"); *cf.* Hirabayashi v. United States, 320 U.S. 81, 99 (1943) ("menace") (justifying the internment of Japanese-Americans on the basis that the government could not quickly determine who "constituted a menace to the national defense and safety").

these terms has a fixed meaning,[244] so they are all, without clarifying interpretation, unconstitutional.[245]

Two cases from Arizona illustrate. In the first, the Arizona Supreme Court interpreted the statutory term "likely" to mean "highly probable."[246] A later appellate court decision considered a prosecutor's argument: "But if you were told that tomorrow you needed to board an airplane and that airplane has a 30 percent chance of crashing into the ground, is that highly probable to you?"[247] In dicta, the court disapproved of the statement because it "improperly invited the jurors to engage in a balancing test in assessing probability."[248]

In contrast, other courts have held that balancing is not only proper, but required:

> In assessing the risk of reoffending, it is for the fact finder to determine what is "likely." Such a determination must be made on a case-by-case basis, by analyzing a number of factors, including the seriousness of the threatened harm, the relative certainty of the anticipated harm, and the possibility of successful intervention to prevent that harm.[249]

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242. N.Y. MENTAL HYG. LAW § 10.03(e) (McKinney 2011) ("likely to be a danger to others") TEX. HEALTH & SAFETY CODE ANN. § 841.003(a)(2) (West 2010) ("likely"); *In re* B.V., 708 N.W.2d 877, 882 (N.D. 2006) (stating that defining "likely" as "of such a degree as to pose a threat to others . . . prevents a contest over percentage points and the results of other actuarial tools"); *see also* N.H. REV. STAT. ANN. § 135-E:2(VI) (LexisNexis 2012) ("potentially serious likelihood").

243. *In re* Leon G., 26 P.3d 481, 489 (Ariz. 2001) (en banc) ("highly probable"), *vacated sub nom.* Glick v. Arizona, 535 U.S. 982 (2002); *In re* Linehan, 594 N.W.2d 867, 876 (Minn. 1999) ("highly likely"); *In re* Commitment of W.Z., 801 A.2d 205, 218 (N.J. 2002) ("highly likely").

244. *See* Dorothy K. Kagehiro, *Defining the Standard of Proof in Jury Instructions*, 1 PSYCH. SCI. 194, 196, 197 tbl.1 (1990) (reporting that jury instructions "likely," "very likely," and "extremely likely" all elicited essentially the same verdicts); *see also* Janus & Prentky, *supra* note 61, at 1448–49; *cf.* Morse, *supra* note 54, at 72 (examining similar standards for mental health commitment).

245. This is not a vagueness argument, which has been rejected many times. *E.g.*, State v. Williams, 728 N.E.2d 342, 360–62 (Ohio 2000); *cf.* State of Minn. *ex rel.* Pearson v. Probate Court of Ramsey Cnty., 309 U.S. 270, 273–74 (1940) (holding that construction of term "likely" to require more than "strong sexual propensities" which therefore "destroys the contention that it is too vague and indefinite").

246. *In re Leon G.*, 26 P.3d at 488–89.

247. *In re* Commitment of Clay, No. 2 CA-MH 2009-0001-SP, 2010 WL 685747, at *3 (Ariz. Ct. App. Feb. 25, 2010).

248. *Id.*; *cf.* Laudan & Saunders, *supra* note 202, at 19 ("Ultimately, it is legislators who have to make the decision about what utilities to assign these outcomes, for they are the ones who bear the responsibility for setting the standard of proof. It manifestly should not be judges or jurors who are left to make such decisions."); J.P. McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 259 (1944) ("Legislation is not only a way, it is the only way out of the wilderness."). *But cf.* Kaplan, *supra* note 179, at 1091–92 (suggesting that jurors should balance the utilities).

249. Commonwealth v. Boucher, 780 N.E.2d 47, 49–50 (Mass. 2002) (citing Cross v. Harris, 418 F.2d 1095, 1100–01 (D.C. Cir. 1969)). Chief Judge Bazelon in *Cross* listed

Whether a legislature intended the word "likely" to carry so much baggage may be questioned, but the balancing approach seems intentional, and indeed unavoidable, with the term "menace."[250]

Perhaps always, but certainly if case-by-case balancing lowers the recidivism threshold below the constitutional minimum, the resulting commitment violates due process.[251] And that seems quite possible in the present context particularly when presented with a past conviction or charge, the prospect of future sexual violence will loom large in the minds of factfinders.[252] One study finds that the public believes 74% of sex offenders will commit another sex offense, even though the best estimates of the actual recidivism rate are around 20% or lower.[253] The Arizona prosecutor's analogy to a plane crash is objectionable not because it invokes balancing, but because it may be too powerful.

In sum, the sex offender commitment regimes in the nineteen jurisdictions discussed above are either clearly or

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slightly different factors: "the seriousness of the expected harm, the availability of inpatient and outpatient treatment for the individual concerned, and the expected length of confinement required for inpatient treatment." *Cross*, 418 F.2d at 1100. Judge Bazelon also attempted to set the recidivism threshold higher. *See id.* at 1097 ("[A] finding of 'dangerousness' must be based on a high probability of substantial injury.").

250. *See* Westerheide v. State, 831 So. 2d 93, 118 (Fla. 2002) (Pariente, J., concurring in part and dissenting in part) ("By focusing on whether the person 'poses a menace to the health and safety,' the jury is told it should consider the *consequence of reoffending*.").

251. The U.S. Supreme Court eschews altogether case-by-case balancing. *See* Santosky v. Kramer, 455 U.S. 745, 757 (1982) ("[T]he standard of proof . . . must be calibrated in advance."); *see also* Laudan & Saunders, *supra* note 202, at 33 n.31. The Court has rejected balancing in its Free Speech case law as well. Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969).

252. *See* Jason A. Cantone, *Rational Enough to Punish, but Too Irrational to Release: The Integrity of Sex Offender Civil Commitment*, 57 DRAKE L. REV. 693, 719 (2009) (explaining the concept of "representativeness heuristic" as the framing of the community's perception that most sex offenders are reoffenders); Christopher Slobogin, *Dangerousness and Expertise Redux*, 56 EMORY L.J. 275, 313–14 (2006) (same); La Fond, *supra* note 7, at 680 (explaining that people will "assign much greater weight to information contained in vivid narratives or case histories, even though the information is quite weak as evidence"). *See generally* Jonathan S. Masur, *Probability Thresholds*, 92 IOWA L. REV. 1293, 1341–43 (2007) (advocating probability thresholds in other contexts to mitigate the impact of bad heuristics); Christina Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 159–60. Heuristics may not be necessary for over-commitment. *See* Justin Engel, Comment, *Constitutional Limitations on the Expansion of Involuntary Civil Commitment for Violent and Dangerous Offenders*, 8 U. PA. J. CONST. L. 841, 863 (2006) ("As a practical matter, the factfinder is likely to credit past violence as evidence of present dangerousness . . . ."); La Fond, *supra* note 7, at 678 ("[J]uries are unwilling to take responsibility for releasing someone who might commit another crime. The burden of this decision is too heavy to ask of citizens.").

253. Levenson et al., *supra* note 58, at 149 tbl.2, 153 (explaining that best evidence suggests that recidivism rates among sex offenders range from "5 to 14% over 3- to 6-year follow-up periods . . . and 24% over 15-year follow-up periods. . . ."); LANGAN, SCHMITT, & DUROSE, *supra* note 13, at 1–2.

probably unconstitutional.[254] Only one state passes muster, as described in the next section.

B. A Better Alternative

The most straightforward way to implement the 75% threshold is simply to require it, with a standard of proof of preponderance or higher.[255] Preponderance is sufficient on the assumption that the prediction is median-unbiased (i.e., too low half the time and too high half the time). Look back at the first figure (Figure 1). At any level of prediction error, half of the distribution is above 50% and half below (by assumption). Adjust the threshold to 75% and the distributions would be centered there. The preponderance standard—which is generally defined to be more likely than not, or greater than 50%[256]—is the lowest proof standard required to ensure that net predicted recidivism matches or exceeds the 75% risk threshold.

Note that this proposal would arguably require weaker evidence of dangerousness than the clear and convincing standard set in *Addington*, which again has been estimated at 75%. The much higher cost of sexual violence outweighs the greater deprivation of liberty. Note too that this proposal does not rely on jurors' understanding the phrases "clear and convincing evidence" or "beyond a reasonable doubt." That is a significant advantage in light of research showing an inability to do so.[257]

This proposal is superficially similar to the argument by Roger Dworkin that burdens of persuasion should be eliminated because they do not aid the trier of fact, but rather mask substantive law decisions.[258] However, I do not advocate eliminating standards of proof—instead, I propose folding them into the underlying substantive issue when it is probabilistic and explicitly balancing the relevant interests as required by *Mathews*, *Addington*, and *Santosky*.

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254. *Cf.* Janus & Meehl, *supra* note 20, at 41 (concluding based on review of literature and experience in Minnesota that "the actual probability standards used by the courts do not reach the 75% mark").

255. I am not the first to advocate quantification, see *id.* at 60, but I am, to my knowledge, the first to calculate a precise figure and to argue that something near it is constitutionally required.

256. Union Pac. R.R. Co. v. State Bd. of Equalization, 231 Cal. App. 3d 983, 1000 (1991).

257. Kagehiro, *supra* note 244, at 194–97 ("[O]nly the quantified definitions consistently had their intended effect; the proportion of verdicts favoring the plaintiffs decreased significantly as the standard of proof became stricter.").

258. Roger B. Dworkin, *Easy Cases, Bad Law, and Burdens of Proof*, 25 VAND. L. REV. 1151, 1178 (1972).

Another interesting comparison is to David Simpson, Jr.'s treatment of civil commitment and dangerousness.[259] His recommendation is the converse of mine: lower the substantive dangerousness threshold and raise the standard of proof.[260] Simpson believes proof beyond a reasonable doubt would impress triers of fact with the seriousness of the decision.[261] To be sure, there may be symbolic value in a high standard of proof, but that value would likely disappear if it were known that the standard did not affect outcomes.[262] More fundamentally, the effect of the standard of proof depends on the magnitude of prediction error, which is difficult or impossible to know. Setting the substantive bar at the right height, with a relatively low standard of proof, avoids this uncertainty.

However, courts are unlikely to adopt a precise numerical value like the one I propose.[263] The last state, Illinois, has come closest:

> We determine that the phrase "substantially probable" in the Act also means "much more likely than not," a standard higher than or equal to the "likely" standard found constitutional in *Hendricks*. However, we emphasize that this definition cannot be reduced to a mere mathematical formula or statistical analysis. Instead the jury must consider all factors that either increase or decrease the risk of reoffending, and make a commonsense judgment as to whether a respondent falls within the class of individuals who present a danger to society sufficient to outweigh their interest in individual freedom.[264]

What the court giveth—a relatively precise (in this area, at least) and demanding mathematical threshold ("much more likely than not")—the court taketh away—a disavowal of mathematics and invitation to open-ended balancing.[265] Still, "much more likely than not" requires a substantial margin

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259. David T. Simpson, Jr., Note, *Involuntary Civil Commitment: The Dangerousness Standard and Its Problems*, 63 N.C. L. REV. 241 (1984).

260. *Id.* at 254.

261. *Id.* at 255.

262. Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1308 (1977).

263. *Cf.* Jack B. Weinstein & Ian Dewsbury, *Comment on the Meaning of 'Proof Beyond a Reasonable Doubt,'* 5 LAW, PROB. & RISK 167, 167 (2006) (stating that adoption of a quantified jury instruction on the meaning of proof beyond a reasonable doubt is "doubtful").

264. *In re* Detention of Hayes, 747 N.E.2d 444, 453 (Ill. App. Ct. 2001).

265. *Id.* At least one commentator has the opposite view. *See* Ross A. Brennan, Note, *Keeping the Dangerous Behind Bars: Redefining What a Sexually Violent Person Is in Illinois*, 45 VAL. U. L. REV. 551, 585 (2011) ("The judiciary's refusal to assign a specific number to 'substantially probable' is one of the SVPA's strengths.").

above 50%.[266] That would seem to be constitutionally sufficient.[267]

VI. CONCLUSION

A constitutional prerequisite to sex offender commitment is a finding of dangerousness. An elevated standard of proof is constitutionally required, but the minimum likelihood of harm is generally not fixed. This Article closes that gap, providing a very specific answer as to what due process requires: the risk of sexually violent recidivism within five years must be at least 75%.

Do any sex offenders clear that hurdle? The recidivism tables from the current version of the most popular instrument, the Static-99, include predicted five-year rates at or above 75% for three categories of offenders.[268] Thousands of sex offenders are presently committed.[269] It seems very unlikely that all of them would satisfy the 75% requirement.[270] Whether the requirement deduced here is "'strict' in theory and fatal in fact"[271] awaits further study.[272] In the end, perhaps the most that can be said is

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266. *Cf.* Eric G. Barber, Note, State v. Laxton*: How the Wisconsin Supreme Court Ignored the U.S. Supreme Court (and Why It May Have Gotten Away with It)*, 2003 WIS. L. REV. 977, 996–97 (examining the disagreement among experts in Wisconsin cases regarding the meaning of "much more likely than not" and "substantially probable"); James Franklin, *Case Comment*—United States v. Copeland, 369 F. Supp. 2d 275 (E.D.N.Y. 2005)*: Quantification of the 'Proof Beyond a Reasonable Doubt' Standard*, 5 LAW, PROB. & RISK 159, 165 (2006) (recommending "well above a probability of 0.8" as a definition for beyond a reasonable doubt).

267. Again, the efficacy of nonquantified standards of proof is doubtful, see Kagehiro, *supra* note 244, at 196, but the fact that Illinois requires proof beyond a reasonable doubt may bolster this conclusion. 725 ILL. COMP. STAT. ANN. § 207/35(d)(1) (LexisNexis 2000).

268. *Static-99R Violent Recidivism Estimates*, *supra* note 120. One wrinkle is that the Static-99 tables are based on any violent recidivism, not just sexual violence. Some have argued that violent recidivism is actually a better measure of sexual violence than sexually violent recidivism because the sexual component of a crime—e.g., sexual assault—is often omitted as too difficult to prove. Marnie E. Rice et al., *Violent Sex Offenses: How Are They Best Measured from Official Records?*, 30 LAW & HUM. BEHAV. 525, 526–27 (2006). But surely the category of violent crime is over-inclusive.

269. *See* GOOKIN, *supra* note 12, at 1, 4.

270. *See* Vars, *supra* note 128, at 188–89, 191.

271. *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

272. *See* von Hirsch, *supra* note 45, at 740 ("Even if this kind of cost-benefit thinking were appropriate, it is highly questionable whether the preventive confinement model could be justified in its terms—once the magnitude of the 'cost' of confining large numbers of false positives is fully taken into account."). Von Hirsch, it should be noted, would not wait for the numbers. *See id.* (preventive detention with false positives "is unacceptable in absolute terms because it violates the obligation of society to do *individual* justice"); *accord* Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 534, 557 (1986); Morse, *supra* note 192, at 135.

that the Constitution narrowly circumscribes sex offender civil commitment.

Even if courts do not adopt the unitary approach as a matter of constitutional law, the formal balancing method set forth in this Article should guide legislative and prosecutorial decisionmaking. Committing sex offenders with a five-year recidivism risk below 75% is generally not cost-benefit justified. Nor, the analysis suggests, would be committing noncontact sex offenders even if they are nearly certain to reoffend.

This Article has significance beyond sex offender commitment. Its most direct relevance is to pretrial detention and traditional mental illness civil commitment. More broadly, the Article elucidates the relationship between standards of proof and probabilistic thresholds to be proven. That relationship holds for any probabilistic element and is critical in assessing the interests served by any combination of the two standards, whether done by courts, jurors, legislators, or prosecutors. The Article applies decision theory to the Court's balancing test for determining the minimum constitutional standard of proof. Estimating the utilities needed for this approach may be even more difficult in other contexts,[273] but the framework is instructive nonetheless.

Fear of sex offenders, and uncertainty in case law, is their passage to limbo. The rational balancing of interests required by the Constitution would close that door to all but the very dangerous.

273. *But cf.* Vars, *supra* note 129, at 12 (estimating utilities in will contests); Laudan & Saunders, *supra* note 202, at 23 & n.24 (proposing hypothetical questions to elicit utilities in criminal cases).