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# Delineating Sexual Dangerousness

Fredrick E. Vars
*University of Alabama - School of Law*, fvars@law.ua.edu

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# DELINEATING SEXUAL DANGEROUSNESS

Fredrick E. Vars[†]

*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 20 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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[†]Associate Professor, University of Alabama School of Law. J.D., Yale; A.B., Princeton. Thanks to Ian Ayres, Shahar Dillbary, Heather Elliott, Bryan Fair, Caroline Harada, Ron Krotoszynski, Grace Lee, and Mike Pardo for comments on earlier drafts. Johnjerica Hodge, Mike Reeves, and the staff at the Alabama law library provided excellent research assistance.

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

*Introduction*

In 2009, Charles Edward Allman was indefinitely detained as a dangerous sex offender.[2] His risk of recidivism within 5 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 predicted probability of recidivism within five years is 69% 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 states had adopted such laws by the late 1960s, but they remained on

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[1] EDMUND BURKE, A PHILOSOPHICAL INQUIRY INTO THE ORIGIN OF OUR IDEAS OF THE SUBLIME AND BEAUTIFUL 96 (R. & J. Dodsley, 1761).
[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] 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 . . . .").
[6] Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence 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, 659-61 (1991-1992).

the books in only a handful of states by 1990.[8] Policy-makers 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. The main innovation was detention *after* sex offenders had served their criminal sentences. Eighteen other states and the federal government have followed suit, and thousands of individuals are now committed.[10] This change of direction was not driven by new statistics—overall, sex offenders appear *less* likely than other criminals to reoffend[11] and the evidence of treatment effectiveness is equivocal[12]—rather, the motivation was a string of heart-wrenching cases and resulting outrage and fear.[13]

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.[14] That is a heightened standard of proof, somewhere between preponderance ("more likely than not") and beyond a reasonable doubt. Essentially every lower court since *Addington* has concluded that clear and convincing evidence is required for sex offender commitment as well. However,

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[8] *Id.* at 660, 661.

[9] *Id.* at 662 (quoting SAMUEL JAN BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW 743 (3d ed. 1985)).

[10] *See* Kathy Gookin, *Comparison of State Laws Authorizing Involuntary Commitment of Sexually Violent Predators: 2006 Update, Revised*, Washington State Institute for Public Policy Doc. No. 07-08-1101 (Aug. 2007) (reporting 4,534 persons held under SVP laws).

[11] *See* Patrick A. Langan, Erica L. Schmitt, & Matthew R. Durose, Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994*, at 1, 2 (2003) (sex offender rearrest rate for any type of crime was 43%, whereas the overall rearrest rate for all released prisoners was 68%; 5.3% of released sex offenders were rearrested within 3 years for a sex crime); Patrick A. Langan & David J. Levin, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994*, at 9 (2002) (13.4% of released robbers were rearrested for robbery within 3 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.").

[12] *See infra* note 46.

[13] *Id.* at 671-73; *see also* 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).

[14] Addington v. Texas, 441 U.S. 418 (1979).

Section I(A) shows that the standard of proof in this context is still an open question.

Neither *Addington* nor any subsequent United States Supreme Court opinion has set a minimum level of dangerousness (Section I(B)). Commentators agree that dangerousness consists of four components of future harm: (a) magnitude, (b) probability, (c) frequency, and (d) imminence.[15] 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.[16])

To recognize an implied minimum likelihood of recidivism, a deeper understanding of the relationship between standards of proof and recidivism thresholds (Section II) is needed. 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—weighing the private and public interests at stake—requires.

Back 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 (Section III). Applying decision theory, I estimate a minimum recidivism threshold of 69%. 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 69% 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 69% threshold? With one exception (Illinois), the answer is no or probably no (Sections IV). This means 18 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.

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

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[15] 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 (1974)).

[16] *See infra* text accompanying notes 172, 175, 185.

## I. TWO OPEN QUESTIONS

The government must prove that a sex offender is dangerous in order to commit him.[17] 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. 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.[18] This view derives from *Addington v. Texas*,[19] and has surface appeal. However, the requisite standard of proof remains an open question under United States Supreme Court precedent, and underappreciated older case law strongly suggests a higher standard.

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*[20] and *Kansas v. Crane*[21]—required proof beyond

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[17] Over 90% of sex offenders are male. Keith Soothill, *Sex Offender Recidivism*, 39 CRIME & JUST. 145, 162 (2010).

[18] *E.g.*, United States v. Carta, 592 F.3d 34, 42 (1st Cir. 2010); Aruanno v. Hayman, 384 F. Appx. 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); United States v. Abregana, 574 F. Supp. 2d 1123, 1138 (D. Haw. 2008); Jones v. Blake, No. 4:06 CV 402 ERW DDN, 2008 WL 4820788, at *4 (E.D. Mo. Nov. 5, 2008); United States v. Shields, 522 F. Supp. 2d 317, 331 (D. Mass. 2007); Westerheide v. State, 831 So. 2d 93, 109-110 (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. App. 1998); State v. Ward, 369 N.W.2d 293, 295-96 (Minn. 1985); In re Van Orden, 271 S.W.3d 579, 585 (Mo. 2008) (en banc); In re A.C. 991 A.2d 884, 893 (Pa. Super. Ct. 2010); Shivaee v. Com., 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 579, 592-94 (Mo. 2008) (Teitelman, J., dissenting).

[19] 441 U.S. 418 (1979).

[20] 521 U.S. 346, 353 (1997).

a reasonable doubt. And neither of these cases, nor the even more recent *United States v. Comstock* decision,[22] included any analysis of the standard of proof. Jurisdictions split equally between requiring clear and convincing evidence[23] and proof beyond a reasonable doubt.[24]

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.[25] The Court squarely held that Due Process requires proof of dangerousness (and mental illness) by at least clear and convincing evidence.[26] The Court expressly rejected the lower preponderance standard and higher standard of proof beyond a reasonable doubt.[27]

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 to allocate the risk of error between the parties.[28] The Court also noted that the standard of proof has at least symbolic value, reflecting the value society places on individual liberty.[29] 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."[30]

The preponderance standard was held to be not high enough given the individual's weighty interest in avoiding stigmatizing civil commitment.[31] But beyond a reasonable doubt was too heavy a burden for the state to shoulder. The Court explained: "[E]ven though an erroneous confinement should be avoided in

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[21] 534 U.S. 407, 416 (2002) (Scalia, dissenting).
[22] 130 S. Ct. 1949 (2010).
[23] 18 U.S.C.A § 4248(d); FLA. STAT. § 394.917(1); MINN. STAT. ANN. § 253B.09(1)(A); MO. STAT. ANN. § 632.495(1); NEB. REV. STAT. § 71-1209(1); N.H. REV. STAT. § 135-E:11(I); N.J. STAT. ANN. § 30:4-27.32(a); N.Y. MENTAL HYG. LAW § 10.07(d); N.D. STAT. ANN. § 25-03.3-13; VA. CODE ANN. § 37.2-908(C).
[24] ARIZ. REV. STAT. § 36-3707(A); CAL. WELFARE & INST. CODE § 6604; 725 ILL. COMP. STAT. § 207/35(d)(1); IOWA CODE ANN. § 229A.7(5)(a); KAN. STAT. ANN. § 59-29a07(a); MASS. GEN. L. ANN. Ch.123A, § 14(d); S.C. Stat. § 44-48-100(A); TEX. HEALTH & SAFETY CODE ANN. § 841.062(a); WASH. STAT. ANN. § 71.09.060(1); WIS. STAT. ANN. § 980.05(3)(a).
[25] *Addington*, 441 U.S. at 420.
[26] *Id.* at 433.
[27] *Id.* at 425-31.
[28] *Id.* at 423.
[29] *Id.* at 425 (alterations, internal quotation marks, and citation omitted).
[30] *Id.* at 425 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)).
[31] *Id.* at 425-27.

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."[32]

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."[33] On its own, this statement is puzzling.[34] If the Constitution requires proof beyond a reasonable doubt and the evidence cannot meet that standard, then this is an argument against civil commitment, not a reason to lower the proof standard.[35] 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."[36]

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.

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[32] *Id.* at 428-29; *see also id.* at 429 ("One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma."); *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.").

[33] *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 (1971-1972). *But see* State of Minnesota *ex rel.* Pearson v. Probate Court of Ramsey County, 309 U.S. 270, 274 (U.S. 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.").

[34] 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 (1978-79).

[35] *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.").

[36] *Addington*, 441 U.S. at 430.

First, as bad as the stigma associated with mental illness surely is,[37] it is hard to imagine anything more stigmatizing than being labeled a "sexually violent predator."[38] On the other hand, many jurisdictions require a sex offense charge as a prerequisite for commitment,[39] so much of the stigmatization may already be done.[40] 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,[41] not "continuous" as the Court found in *Addington*. Reliance on family and friends to police the process—questionable in the mental health context[42]—is arguably even less effective for sex offenders.[43] Professor Eric Janus has demonstrated that error correction in this context is exceedingly rare.[44] 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,[45] the evidence regarding treatment effectiveness for sex offenders is

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[37] 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.

[38] Neal v. Shimoda, 131 F.3d 818, 829 (9th Cir. 1997); La Fond, *supra* note 7, at 697. *Cf.* People v. Burnick, 535 P.2d 352, 362 (Cal. 1975) (en banc) ("When to [the] stigma [of mental illness] is added a charge of unlawful sexual behavior, the shame is complete.").

[39] *E.g.*, KAN. STAT. ANN. § 59-29a02(a).

[40] *See* Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 191-92 (1996-1997) (stigma from sex offender commitment "arguably much worse" than criminal conviction and often "cumulative").

[41] *E.g.*, KAN. STAT. ANN. § 59-29a08; In re Van Orden, 271 S.W.3d 579, 586 (Mo. 2008).

[42] Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CAL. 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.").

[43] *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."), *cert. denied*, 2011 WL 844967 (U.S. Jun 20, 2011).

[44] Janus, *supra* note 40, 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.").

[45] *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

"not unequivocal," even supporters admit.[46] Thus, it should hardly be surprising that the median length of stay for involuntarily committed mental patients is less than 30 days.[47] In contrast, the overwhelming majority of civilly committed sex offenders are still in detention.[48] 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.[49] As Section II

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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 (visited 2/15/12).

[46] Jill Levenson et al., *Public Perceptions About Sex Offenders and Community Protect Policies*, 7 ANALYSES OF SOCIAL ISSUES AND PUBLIC POL'Y 1,7 (2007); *see also* 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."); Kurt Bumby, Center for Sex Offender Management, U.S. Dep't of Justice, *Understanding Treatment for Adults and Juveniles Who Have Committed Sex Offenses* 9-11 (Nov. 2006), *available at* http://www.csom.org/CSOMResources/documents.html (visited 2/15/12) (summarizing competing views); Marnie E. Rice & Grant T. Harris, *The Size and Sign of Treatment Effects in Sex Offender Therapy*, 989 ANN. N.Y. ACAD. SCI. 428, 428 (2003) ("We conclude that the effectiveness of psychological treatment for sex offenders remains to be demonstrated."). *But cf.* 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."); 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: A JOURNAL OF RESEARCH & 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).").

[47] BRUCE J. WINICK, CIVIL COMMITMENT 2-3 n.9 (2005); *see also* Janus, *supra* note 40, at 183 ("In fact, standard civil commitments are generally quite short, especially when compared to police power commitments.").

[48] Gookin, *supra* note 10 (reporting 4,534 persons held under SVP laws and 494 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").

[49] 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 40, at 206. The problem with this excellent argument is that *Addington* rejected it. *See Addington*, 441 U.S. at 430-31 ("That some states have chosen-either legislatively or

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 (again, see below). Doctrinally, *Addington* also came before the Court's conclusion that "there is nothing inherently unattainable about a prediction of future criminal conduct."[50]

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.[51] This factor alone tilts toward a lower standard of proof for sex 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.[52]

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.[53] In effect, that is very similar to the current generation of sex offender commitment laws. 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."[54] The

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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.").

[50] Schall v. Martin, 467 U.S. 253, 278 (1984).

[51] Janus & Meehl, *supra* note 15, at 39 n.38; *see also* Ted R. Miller, Mark A. Cohen, & Brian Wiersema, *Victim Costs and Consequences: A New Look*, Nat'l Inst. Justice (Jan. 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* State v. Patterson, 963 P.2d 436, 440 (Kan. Ct. App. 1998); KAN. STAT. ANN. § 59-29a02(e)(13).

[52] *Cf.* Alexander Tsesis, *Due Process in Civil Commitments*, 68 WASH. & LEE L. REV. 253 (2011) (arguing that due process requires proof beyond a reasonable doubt of mental illness and dangerousness for civil commitment given liberty interest at stake); Daniel Share, *The Standard of Proof in Involuntary Civil Commitment Proceedings*, 1977 DETROIT COLLEGE L. REV. 209 (same).

[53] Specht v. Patterson, 386 U.S. 605, 607 (1967).

[54] *Id.* at 607 (quoting COLO. REV. STAT. ANN. § 39-19-1 (1963)).

defendant challenged the statute on due process grounds for lack of a hearing and for the allowance of hearsay evidence.[55]

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."[56]

But is proof beyond a reasonable doubt one of these due process protections? *Specht* did not specifically mention the standard of proof.[57] And the United States Supreme Court did not squarely hold that due process required proof beyond a reasonable doubt in criminal proceedings until four years later, in *In re Winship*.[58] This omission and timing have led some to conclude that *Specht* does not require proof beyond a reasonable doubt.[59]

The failure of *Specht* to discuss the standard of proof is a serious objection: *Specht* is therefore suggestive, not determinative.[60] The timing objection is less significant. The Court in *Winship* made clear that it was confirming[61] 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

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[55] *Id.* at 608.

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

[57] One commentator has argued that the Colorado statute required only a preponderance. *Recent Case--Constitutional Law--Procedural Due Process*, 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.

[58] *In re* Winship, 397 U.S. 358 (1970).

[59] *E.g.*, United States v. Schell, 692 F.2d 672, 676-79 (10th Cir. 1982) (sentencing, not civil commitment); *Recent Case*, *supra* note 57, at 2143 (same).

[60] *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.").

[61] Even skeptics use this word. *See Recent Case*, *supra* note 57, 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. District Court for Jefferson County, 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 . . . .").

at least from our early years as a Nation."[62] 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."[63]

The "full panoply" language in *Specht* was originally penned by the Third Circuit.[64] At the time it was written, there is little question that it included proof beyond a reasonable doubt.[65] The Supreme Court of Pennsylvania has expressly rejected the timing argument.[66] The United States Supreme Court has had an opportunity to weigh in, but declined.[67] At least one justice stated, based in part on *Winship*, that only proof beyond a reasonable doubt can justify a lengthy or indefinite deprivation of personal liberty.[68]

Lower court decisions after *Winship* and before *Addington* favor the higher standard[69] with one possible exception. 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

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[62] *Winship*, 397 U.S. at 361.

[63] *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).

[64] *Specht*, 386 U.S. at 609 (quoting United States *ex rel.* Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966)).

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

[66] *See* Commonwealth v. Williams, 733 A.2d 593, 603 (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.'").

[67] McMillan v. Pennsylvania, 477 U.S. 79, 89 (1986).

[68] Murel v. Baltimore 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).

[69] *See* Roxanne Lieb, Vernon Quinsey, & Lucy Berliner, *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43, 63 (1998).

> dangerousness must be sufficient to produce the highest recognized degree of certitude.[70]

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

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."[71] But the word "unequivocal" suggests a standard even higher than beyond a reasonable doubt, as *Addington* observed.[72] And the Second Circuit's concern that not enough people would meet a high standard, decoupled from balancing, is, as argued above,[73] illegitimate.

What elements of *Specht* survive *Addington*?[74] 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.[75]

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[70] United States *ex rel.* Stachulak v. Coughlin, 520 F.2d 931, 937 (7th Cir. 1975). *Accord* People v. Burnick, 535 P.2d 352 (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).

[71] Hollis v. Smith, 571 F.2d 685, 695 (2d Cir. 1978).

[72] *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.").

[73] *See supra* notes 33-36 and accompanying text.

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

[75] This is another reason why criminal case law is not controlling. *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."); Kansas v. Hendricks, 521 U.S. 346, 360-69 (1997) (rejecting argument that modern sex offender commitment scheme was criminal). *Hendricks* did not overrule *Specht* because nothing in *Specht* turned on the civil versus criminal distinction. *See Specht*, 386 U.S. at 608 ("These commitment proceedings whether denominated civil or criminal are subject . . . to the Due Process Clause.").

### *B. The Minimum Probability of Recidivism*

The Due Process Clause requires an affirmative finding of dangerousness for preventive detention.[76] What that means in the sex offender commitment case is unclear.[77] Again, my focus is on likelihood of recidivism, not other components of dangerousness (*e.g.*, magnitude of the predicted harm).[78]

Notwithstanding three major United States Supreme Court cases addressing the constitutionality of sex offender commitment, the minimum probability of harm has not been squarely decided. The first major case is *Hendricks*.[79] 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."[80] Then, as now, Kansas did not define how great that likelihood had to be.[81] This suggests that any likelihood may be enough, but the facts of the case do not support such a sweeping holding.[82] 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.[83]

The Supreme Court said nearly this five years later in *Crane*.[84] Although the Court did not directly address the likelihood or recidivism, it did so indirectly by holding that sex offender civil commitment requires "proof of serious difficulty in controlling behavior."[85] 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

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[76] Foucha v. Louisiana, 504 U.S. 71, 82 (1992); O'Connor v. Donaldson, 422 U.S. 563, 576 (1975).

[77] David L. Faigman, *Making Moral Judgments Through Behavioral Science: The 'Substantial Lack of Volitional Control' Requirement in Civil Commitments*, 2 L., PROBABILITY & RISK 309, 315 (2003). *Cf.* WINICK, *supra* note 47, 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).

[78] *See supra* text accompanying notes 15-16.

[79] *Hendricks*, 521 U.S. at 346.

[80] *Id.* at 357.

[81] KAN. STAT. ANN. § 59-29a02(c) ("menace").

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

[83] *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").

[84] *Crane*, 534 U.S. at 412.

[85] *Id.* at 413.

control for its own sake—the primary goal is to prevent sexual violence, not to treat volitional defects.[86] 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 *Comstock*.[87] The question decided was whether the federal government had the power under the Necessary and Proper Clause to enact its SVP statute.[88] The Court assumed without deciding that the statute did not violate the Due Process Clause.[89] 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."[90] 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."[91] 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.[92]

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

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[86] *Hendricks*, 521 U.S. at 367 (suggesting that treatment may be "an ancillary purpose").
[87] *Comstock*, 130 S. Ct. at 1949.
[88] *Id.* at 1956.
[89] *Id.*
[90] *Id.* at 1961 (emphasis added).
[91] People v. Superior Court (Ghilotti), 44 P.3d 949, 973 (Cal. 2002); *see also* People v. Roberge, 62 P.3d 97 (Cal. 2003) (extending *Ghilotti* holding from screening to merits). *Cf.* United States v. Hunt, 643 F. Supp. 2d 161, 180 (D. Mass. 2009) (similarly rejecting "more likely than not" hurdle, but not on constitutional law grounds); Scott v. State, 895 N.E.2d 369, 375-76 (Ind. App. 2008) (same); Commonwealth v. Boucher, 780 N.E.2d 47 (Mass. 2002) (same).
[92] *Ghilotti*, 44 P.3d at 973 n.15 (distinguishing People v. Burnick, 535 P.2d 352 (Cal. 1975) (en banc)).

Dangerous Persons] Act."[93] The court grounded its holding squarely on *Addington*:

> "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.[94]

In *In re Detention of Brooks*, the Court of Appeals of Washington (later affirmed by the Washington Supreme Court) distinguished *Linehan*.[95] 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."[96] The Supreme Court of Iowa agreed in *In re Detention of Williams*, adding 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."[97]

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 Section is devoted.

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[93] 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) (constitution requires "high probability of serious harm"). *But see* Beasley v. Molett, 95 S.W.3d 590, 600 (Tex. Crim. App. 2002).

[94] *In re Linehan*, 557 N.W.2d at 180; *accord* Nicholas Scurich & Richard John, *The Normative Threshold for Psychiatric Civil Commitment*, 50 JURIMETRICS J. 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.").

[95] 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).

[96] *Id.*

[97] In re Detention of Williams, 628 N.W.2d 447, 457-59 (Iowa 2001).

## II. 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 complex."[98] 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."[99] This Section and the next will show that the two standards are constitutionally intertwined, even if logically distinct.[100]

### *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%).[101] The best evidence of recidivism comes from actuarial risk assessment instruments.[102] Such instruments assign points to various offender and offense attributes, sum the points, and provide estimated recidivism rates for different point totals. 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,[103]

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

[99] 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 (1985-87).

[100] For an excellent earlier explication of the relationship between the two standards using Bayesian methodology, see Janus & Meehl, *supra* note 15, at 41-44. My approach is more "frequentist." "Confidence interval," Wikipedia, at http://en.wikipedia.org/wiki/Confidence_interval (visited 2/15/12).

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

[102] Debra A. Pinals, Chad E. Tillbrook, & Denise L. Mumley, *Violent Risk Assessment*, in SEX OFFENDERS: INDENTIFICATION, RISK ASSESSMENT, TREATMENT, AND LEGAL ISSUES 54 (Fabian M. Saleh et al. eds., 2009); 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. __, __ (2009) ("ARAIs designed to predict sexual reoffense (d = .67) clearly outperformed unstructured professional judgment (d = .42)."). *But see* Thomas R. Litwack, *Actuarial Versus Clinical Assessments of Dangerousness*, 7 PSYCHOL., PUB. POL'Y & L. 409 (2001).

[103] Jacqueline Waggoner, Richard Wollert, & Elliot Cramer, *A Respecification of Hanson's Updated Static-99 Experience Table That Controls for the Effects of Age on Sexual Recidivism Among Young Offenders*, 7 L., PROBABILITY & RISK 305, 305-06

corresponds to a 48.8% chance of violent recidivism within 5 years.[104] Roughly speaking, there is a 95% chance that the true rate is somewhere between 42.2% and 55.4%.[105] This so-called "confidence interval" reflects prediction error.[106] 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.[107]

The level of prediction error associated with the Static-99 is disputed. The figures given above come from the developers of the instrument. 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%.[108] 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%.[109]

With certain simplifying assumptions,[110] one can plot recidivism predictions of 50%—right at the "more likely than not" threshold—under the three different error levels described above (Figure 1). Each line represents the frequency distribution of the actual recidivism rate.

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(2008); Rebecca L. Jackson & Derek T. Hess, *Evaluation for Civil Commitment of Sex Offenders: A Survey of Experts*, 19 SEX ABUSE 425, 434, 438, 440 (2007).

[104] Static-99R Samples for Violent Recidivism Tables, tbl.5, at http://www.static99.org/ (downloaded 6/22/11) ("Routine Corrections").

[105] *Id.*

[106] Again, I adopt frequentist terminology. The basic conclusions would most likely hold applying Bayesian techniques. *See* M.J. Bayarri & J.O. Berger, *The Interplay of Bayesian and Frequentist Analysis*, 19 STATISTICAL SCIENCE 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 STATISTICS 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* Nicholas Scurich & Richard S. John, *A Bayesian Approach to the Group Versus Individual Prediction Controversy in Actuarial Risk Assessment*, __ LAW & HUMAN BEHAV. ___ (2011); D.H. Kaye, *Apples and Oranges: Confidence Coefficients and the Burden of Persuasion*, 73 CORNELL L. REV. 54, 62 (1987).

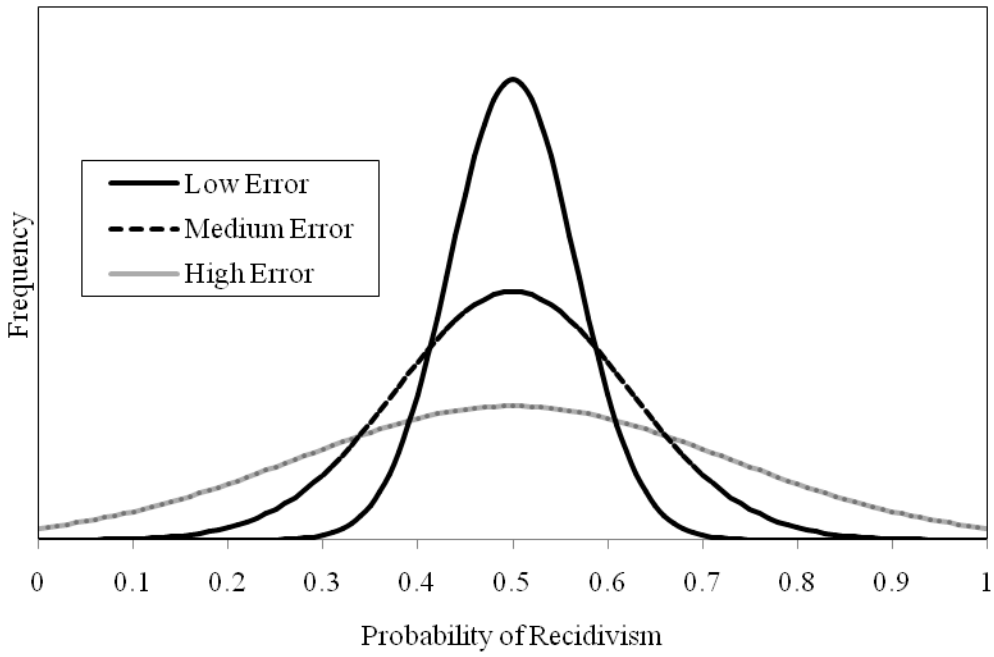
[107] But at least with the instruments, one can estimate the error. Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 AM. CRIM. L. REV. 1443, 1493 (2003).

[108] 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 (Supp. 49) BRITISH J. PSYCHIATRY s60, s62 tbl.2 (2007).

[109] Douglas Mossman, *Analyzing the Performance of Risk Assessment Instruments: A Response to Vrieze and Grove (2007)*, 32 LAW & HUMAN BEHAV. 279, 287 tbl.2 (2007).

[110] 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.

**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").[111] 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%.

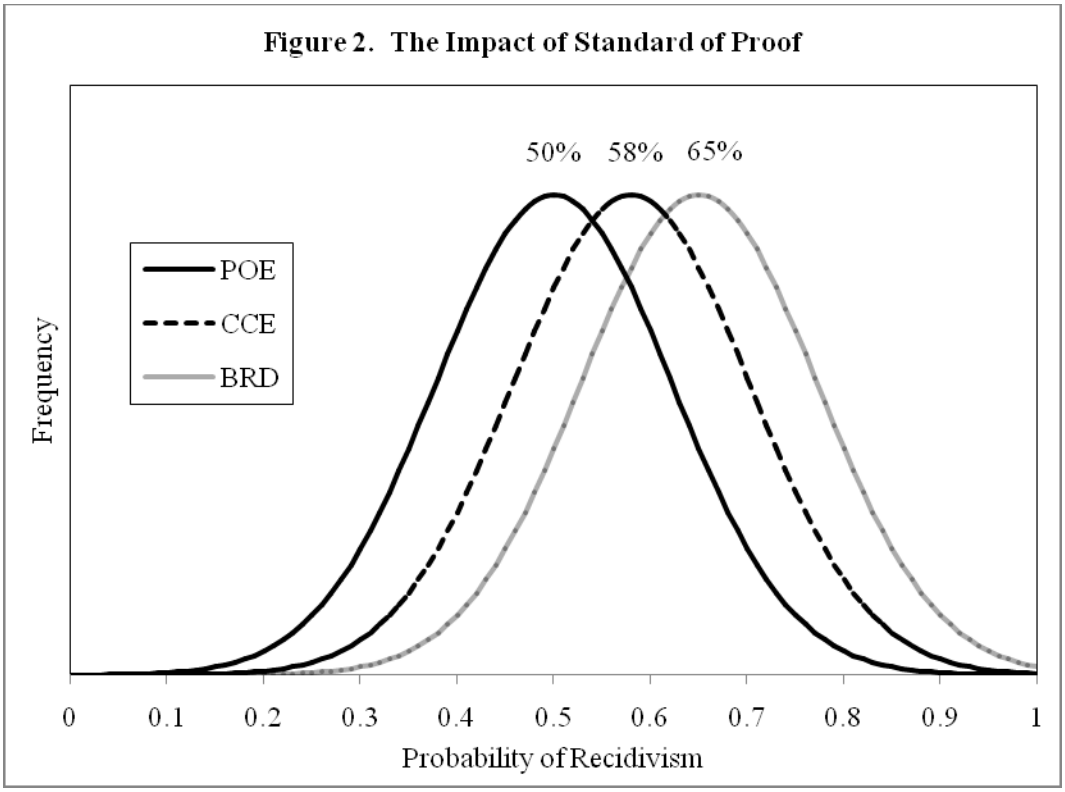
Heightened standards of proof complicate matters. Take the intermediate level of prediction error (Figure 1 dotted line), holding constant the "more likely than not" risk threshold. Assume that proof by clear and convincing evidence ("CCE") requires 75% certainty and beyond a reasonable doubt ("BRD") requires 90%. (These were, in fact, the average values observed in a survey of judges.[112]) The effective threshold rises with the standard of proof: to 58% for clear and

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

[112] C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence or 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 CATHOLIC UNIV. L. REV. 1, 7 (2010) (calculating mean, median, and mode for clear and convincing evidence based on McCauliff, *supra*).

convincing evidence and 66% for beyond a reasonable doubt (Figure 2).[113] 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.

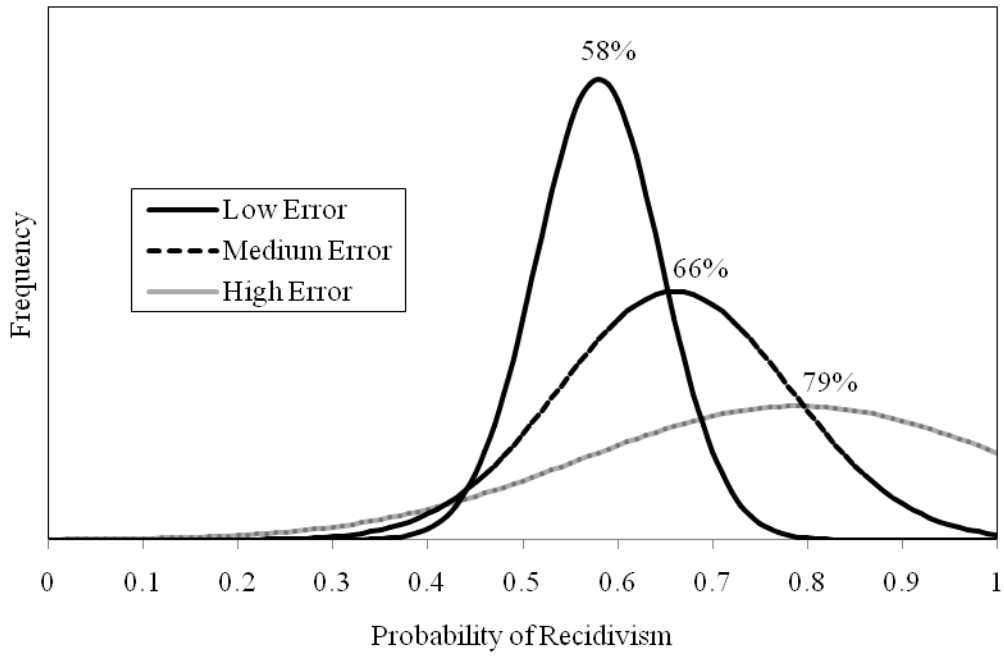
**Figure 2. The Impact of Standard of Proof**




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 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%.

[113] This illustrates and quantifies what others have observed. *See, e.g.*, Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 52 (2003) (Defining dangerousness as "likely" "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.").

**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. 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, calculations not depicted graphically 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 convincing evidence and a more-likely-than-not recidivism threshold.

### *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*' invocation of "the State's . . . compelling interest in protecting society from a person prone to sexually assaulting children."[114] Other

[114] In re Detention of Williams, 628 N.W.2d 447, 459 (Iowa 2001).

courts describe the goal as "preventing future acts of sexual violence."[115] This is an important distinction.

The first framing, which has been called the "bifurcated proposal,"[116] effectively decouples the standard of proof from the recidivism threshold.[117] Any chance of recidivism can suffice,[118] and the standard of proof, as described above, just reflects confidence that the individual clears that bar.[119] This approach is tailored to reduce the risk and fear of sexual violence, not sexual violence directly. 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. Locking up individuals with a 1% chance of recidivism does very little to prevent future acts of sexual violence.

Although a complete analysis of substantive due process is outside the scope of this article,[120] 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.[121] Preventing sexual violence surely qualifies as a compelling state interest.[122] The unitary approach detains

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[115] State v. Post, 541 N.W.2d 115, 118 (Wis. 1995). *Cf.* United States v. Salerno, 481 U.S. 739, 750 (1987) ("the Government's general interest in preventing crime is compelling").

[116] Janus & Meehl, *supra* note 15, at 42.

[117] *See* 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").

[118] *See* Scurich & John, *supra* note 94, at 444 (according to this approach, all sex offenders "have a 100% probability of being dangerous").

[119] Abrashkin, *supra* note 34, 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.").

[120] 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 127 (Bruce J. Winick & John Q. LaFond eds., 2003).

[121] *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."); Schall v. Martin, 467 U.S. 253, 289 (1984) (Marshall, J., dissenting) (recognizing that "freedom from physical restraint" is a fundamental liberty interest).

[122] *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.").

individuals whose risk of recidivism outweighs their liberty interest and is therefore narrowly tailored to prevent sexual violence.

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.[123] 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 over-inclusiveness of this type violates the narrow-tailoring requirement is a difficult constitutional question.[124] If, as I argue, the standard of proof 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.[125] 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. There is little question that the United States Supreme Court would strike down the statute as a transparent attempt to undercut *Winship*.[126]

Or is there? Case law under *Winship* has been anything but straightforward. The government must prove the elements of an offense beyond a reasonable

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[123] *See* Equal Open Enrollment Ass'n v. Bd. of Educ., 937 F. Supp. 700, 706 (N.D. Ohio 1996); 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 on other grounds*, Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (holding that First Amendment protects "mere advocacy" as "distinguished from incitement to imminent lawless action").

[124] Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1330 (2007) (suggesting that over-inclusiveness might violate narrow tailoring); Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring after* Grutter *and* Gratz, 85 TEX. L. REV. 517, 575-82 (2007) (similar, explaining criteria); 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) (similar); 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.").

[125] *Winship*, 397 U.S. at 358.

[126] 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 (1976-77) ("Thus, the Court indicated that it would not permit the states to undercut *Winship* with semantic gamesmanship.").

doubt,[127] but not defenses[128] or sentencing factors.[129] The dividing lines are unclear.[130] 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.[131]

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 or false.[132] This is a false distinction. A future event will either happen or not, and all evidence—both historical and predictive—is probabilistic.[133]

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?"[134] In contrast, dangerousness assessments are "interpret[ive]," "subjective," "impression[istic]," and not "definite."[135]

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.[136] 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.[137] So,

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[127] Dillon v. United States, 130 S. Ct. 2683, 2688 (2010).
[128] Clark v. Arizona, 548 U.S. 735, 769 (2006).
[129] United States v. O'Brien, 130 S. Ct. 2169, 2174 (2010) (citing McMillan v. Pennsylvania, 477 U.S. 79, 91-92 (1986)).
[130] Clark v. Arizona 548 U.S. 735, 770-79 (2006) (holding that certain evidence of *mens rea* can be channeled into insanity defense).
[131] 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.
[132] *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.").
[133] 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.").
[134] *Addington*, 441 U.S. at 429.
[135] *Id.* at 429-30.
[136] *Id.* at 429.
[137] Miller & Morris, *supra* note 99, at 423.

proper 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."[138] 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."[139] 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."[140]

In support of that last statement, *Addington* cites, *inter alia*, a pathmarking article by John Monahan and David Wexler.[141] 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]?"[142] The article goes on to observe that *Addington*, then on appeal, was "poorly postured" because it concerned only the standard of proof.[143]

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 Section will formalize the test.

## III. A FORMAL APPROACH TO BALANCING

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

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[138] *Addington*, 441 U.S. at 426.
[139] *Id.* (emphasis added).
[140] *Id.* at 431.
[141] *Id.* (citing Monahan & Wexler, *supra* note 98, at 41-42).
[142] Monahan & Wexler, *supra* note 98, at 41.
[143] *Id.* at 41-42.

**Table 1. Commitment Outcomes under Unitary Approach**[144]

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

The bifurcated approach divides outcomes differently. Errors are measured not by reoffense, but by probability of reoffense. 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 (Table 2). 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.[145]

*Addington* does not define what it means by "erroneous commitment,"[146] but its balancing test implicitly adopts the unitary approach.[147] 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?[148] 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.[149] The government plainly has less interest in

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[144] *See* Janus & Meehl, *supra* note 15, at 39 tbl.1.
[145] FLOUD & YOUNG, *supra* note 132, at 49.
[146] *Addington*, 441 U.S. at 428, 429.
[147] Some have argued that this balancing is a mistake. *See* Miller & Morris, *supra* note 99, 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.").
[148] *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").
[149] *Id.* At least one commentator implicitly disagrees. *See* Bochnewich, *supra* note 15, 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.").

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. Fear unmoored from risk should not be a sufficient justification for indefinite detention.[150] To be sure, the unitary approach gives the standard of proof both a procedural and substantive component,[151] but that is implicit in the Court's balancing test.[152]

The choice of 75% was not arbitrary. As discussed above,[153] that is the level of certainty typically associated with the clear and convincing evidence standard required by *Addington*. Notwithstanding *Addington*, however, Section 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. Section 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.[154] The key equation for present

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[150] *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."); *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., No. 10-779, 2011 WL 2472796, at *16 (U.S. June 23, 2011) ("But the fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech.") (internal quotation marks and citation omitted).

[151] *See* 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5122 (2d ed. 2010 update) (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, 302 (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 (Apr. 1, 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: PRINCIPLES AND POLICIES 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.").

[152] In re Linehan, 557 N.W.2d 171, 180 (Minn. 1996). Janus and Meehl, *supra* note 15, at 43, offer additional functional arguments for the unitary approach.

[153] *See supra* note 112 and accompanying text.

[154] *Winship*, 397 U.S. at 370 n.2 (Harlan, J., concurring) (citing John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1071-1077 (1968)).

purposes was clarified a year later by Alan Cullison.[155] 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.[156] The formula is not without critics, but 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.[157]

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."[158] Conversely, a False Negative, the "release of a genuinely mentally ill person,"[159] inflicts both social and individual harm ($U_{FN}$). Correct commitments serve the government and individual interests in providing needed treatment ($U_{TP}$).[160] 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"[161] ($U_{TN}$). *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

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[155] 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).

[156] The formula is one way to operationalize Christopher Slobogin's proportionality principle. *See* SLOBOGIN, *supra* note 117, at 106 ("The *proportionality principle* requires that the degree of danger be roughly proportionate to the proposed government intervention.").

[157] Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1338 (1971); *see also* Scurich & John, *supra* note 94, 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 112, at 15-16; 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 (1977-78).

[158] *Addington*, 441 U.S. at 426.

[159] *Id.* at 429.

[160] *Id.*

[161] *Id.* at 426. *Accord* Goetz v. Crosson, 967 F.2d 29, 33-34 (2d Cir. 1992) (Winter, J.) (expressly considering four utilities in *Addington*/*Mathews* balancing).

individual. In effect, the probability threshold would figure into both sides of the equation.[162] This is another argument against the bifurcated approach: the Court's comparison of utilities clearly fails to include this additional layer of complexity.

How does one quantify the relevant utilities?[163] 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?[164] 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.[165]

As noted above, the efficacy of treatment for sex offenders has not been established[166] and "there is no reason that treatment could not be provided in prison,"[167] 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.[168] Indeed, the central rationale is that deterrence of sex offenders is difficult, if not impossible.[169] This is evident in the Supreme Court's holding that a prerequisite for sex offender civil commitment is "serious difficulty in controlling behavior."[170]

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. A False Positive includes both the government's cost of detention and the cost to the individual of false imprisonment. A True Negative is costless. A False Negative

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[162] Tribe identified this problem in the criminal context. Tribe, *supra* note 157, at 1382-83 & n.168.

[163] For a useful, non-quantified tabulation, see David L. Faigman, *Judges as "Amateur Scientists,"* 86 B.U. L. REV. 1207, 1214 tbl.2 (2006).

[164] *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 (2002) (criticizing cost-benefit analysis in the environmental context).

[165] *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 decision-making. *E.g.*, Paul W. Kahn, *The Court, The Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987).

[166] *See supra* note 46.

[167] Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 140 (1996).

[168] *E.g.*, KAN. STAT. ANN. § 59-29a01 (2012).

[169] *Id.*

[170] Kansas v. Crane, 534 U.S. 407, 413 (2002).

leads to repeat sexual violence. I omit adjudication costs since they are incurred in each of the four outcomes and therefore cancel out in the equation.

Starting with the biggest cost, a False Negative permits at least one act of sexual violence. That is what actuarial instruments have been designed to predict. The costs of the three most serious sex crimes have been estimated as follows (in 2011 dollars): Rape-Murder, $4,803,939; Rape and Sexual Assault (Adult Victim), $157,729; and Sexual Assault (Child Victim), $176,494.[171] These costs can be weighted by their relative frequency.[172] Limiting the analysis to these most serious offenses—and excluding less serious, potential trigger crimes like exhibitionism and underwear theft[173]—tilts the scale toward the government and toward a lower predicted recidivism threshold. This conservative approach is appropriate because the goal of this article is to set as firm a constitutional floor as possible.[174] This limitation also determines the first component of dangerousness by assuming a very high magnitude of harm.[175]

Research shows that repeat sex crimes are under-detected, so I multiply crime costs by the ratio of detected and undetected crimes to detected crimes.[176] Doing

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[171] Ted R. Miller, Mark A. Cohen, & Brian Wiersema, *Victim Costs and Consequences: A New Look* 9 tbl.2 (Jan. 1996), http://www.ncjrs.gov/App/Publications/Abstract.aspx?id=155282. These are the federal government's own numbers. Using them is consistent with my approach of making every assumption in favor of the government. Inflation adjustments were made with http://www.bls.gov/data/inflation_calculator.htm.

[172] Another approach would be to calculate separate thresholds depending on the seriousness of the offense. *See* Janus & Prentky, *supra* note 107, at 1494; *see also* 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 (2009). 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. 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 non-contact sex offenders, as opposed to criminal sanctions after the fact.

[173] *See supra* note 51.

[174] *See* Mental Hygeine 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.").

[175] *See supra* text accompanying note 15.

[176] 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*, available at http://www.scrippsnews.com/projects/murder-mysteries/ (accessed 6/23/11). Based on

so lowers the minimum standard of proof based on unobserved activity, which is arguably unfair.[177] But again, the guiding principle is to resolve any close calls in favor of the government. That said, the extent of under-detection is by definition unknown and hotly disputed.[178] It must be conceded that different assumptions on this point could substantially alter the resulting minimum risk threshold. Adjusting for under-detection reflects the third component of dangerousness: frequency of harm.[179]

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."[180] This estimate matches almost exactly the $94,017 mean calculated by a 2006 comprehensive review of jurisdictions.[181] The lowest annual cost per detainee was $41,176, in South Carolina.[182] It is unclear whether the state can provide constitutionally adequate conditions at this low level.[183] And these figures do not include construction or court costs. Nonetheless, to further favor the government, I assume the minimum expenditure level, which is $46,152 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 17 falsely

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these two sources, I multiplied the predicted number of murders by 1.6, rapes by 2.9, and child molestation by 3.8.

[177] *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 (1991-1992) ("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.").

[178] *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).

[179] *See supra* text accompanying note 15.

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

[181] Gookin, *supra* note 10, at 5 exh.3.

[182] *Id.* Actually, Texas was lower, but it is 100% outpatient.

[183] *See* Abby Goodnough & Monica Davey, *A Record of Failures at Center for Sex Offenders*, N.Y. TIMES, Mar. 5, 2007, at A1 (reporting on Florida, which spends just slightly more than South Carolina).

imprisoned individuals.[184] Of those, 12 were imprisoned for a year or more and were in the United States; the median award in 2011 dollars was $367,243 per year. The low award, which is the one I use, was $68,355 per year.[185]

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.[186] I use five years. First, five years is generally the shortest follow-up period used by actuarial instruments. 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 years above the threshold. Incapacitation must last for five years to eliminate that risk.[187] In effect, this puts an outer limit of five years on the imminence component of dangerousness.[188]

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. "The Minnesota SVP program itself is designed to be completed in a minimum of four years."[189] However, "most patients are unable to complete the program in the minimum period."[190] 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 ($230,761[191]). $U_{FP}$ is the same number, plus an award for a five-year erroneous deprivation of liberty ($482,099). A True Negative has no cost. The cost of a single act of sexual

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[184] Mordechai 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); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 43-44 nn. 30, 32, & 49 n.63.

[185] 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.

[186] John Q. La Fond, *The Costs of Enacting a Sexual Predator Law*, 4 PSYCHOL. PUB. POL'Y & L. 468, 498-99 (1998).

[187] *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.").

[188] *See supra* text accompanying note 15.

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

[190] *Id.* at 378 n.413.

[191] All dollar figures in this paragraph are in 2011 dollars.

violence, adjusted to reflect under-detection ($572,535), is equal to $U_{FN}$. Plugging these values into the equation generates an optimal probability threshold of 69%.[192] 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 generate a risk threshold of 50%.[193] Conversely, a seven-year detention would be constitutional only with a predicted recidivism rate at or above 83%. The critical point of this article is not the exact number, but the novel methodology that should guide courts and policy-makers into the right ballpark.

## IV. 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 69%. 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[194] and Nebraska[195] overlay this threshold with the clear and convincing evidence standard. As *Linehan* correctly held, that combination is unconstitutional. Even assuming the maximum prediction error, the net recidivism probability goes no higher than 65%.[196] *A fortiori*, the federal[197] and Florida[198] schemes—which

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[192] 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, 802 (2011).

[193] 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 111.

[194] MO. STAT. ANN. § 632.480(5) ("more likely than not"); *id.* § 632.495(1) ("clear and convincing evidence").

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

[196] *See supra* Figure 2 and accompanying text.

[197] 18 U.S.C.A. § 4247 ("serious difficulty refraining"); United States v. Hunt, 643 F. Supp. 2d 161, 180 (D. Mass 2009) ("this court does not construe the 'serious difficulty' criterion for commitment to require proof of any statistical probability of reoffense"); 18 U.S.C.A § 4248(d) ("clear and convincing evidence"). *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—Part One*, 33-FEB CHAMPION 44, 44

couple a risk threshold below 50% with the clear and convincing standard—also violate due process.

Iowa,[199] Washington,[200] and Wisconsin[201] 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 69% bar. These regimes are probably unconstitutional,[202] but because factfinders rely on evidence other than actuarial instruments, and that evidence has unknown prediction error, one cannot be sure.[203]

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.[204] If the threshold is below 40%, then the net risk would be below the requisite 69% even at the highest level of prediction error (again, *see supra* Figure 3).[205]

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(2009) ("Without a formal requirement of 'likely to reoffend,' it is possible that low-risk and non-contact sex offenders may be civilly committed indefinitely.").

[198] Hale v. State, 891 So. 2d 517, 520 (Fla. 2004); FLA. STAT. § 394.917(1) ("clear and convincing evidence").

[199] IOWA CODE ANN. § 229A.2(4) ("more likely than not"); *id.* § 229A.7(5)(a) ("beyond a reasonable doubt").

[200] WASH. STAT. ANN. § 71.09.020(7) ("more probably than not"); *id.* § 71.09.060(1) ("beyond a reasonable doubt").

[201] WIS. STAT. ANN. § 980.01(1m) ("more likely than not"); *id.* § 980.05(3)(a) ("beyond a reasonable doubt").

[202] *But cf.* Bochnewich, *supra* note 15, 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.").

[203] *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).

[204] People v. Superior Court (Ghilotti), 44 P.3d 949, 968 (Cal. 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"); CAL. WELFARE & INST. CODE § 6604 ("beyond a reasonable doubt"); 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"); MASS. GEN. L. ANN. Ch.123A, § 14(d) ("beyond a reasonable doubt").

[205] 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%.

Ten other states have similarly non-quantified risk thresholds, although none of them has clearly stated that a probability less than 50% can suffice. These jurisdictions use words like "menace,"[206] "likely,"[207] and "highly likely."[208] None of these terms has a fixed meaning,[209] so they are all, without clarifying interpretation, unconstitutional.[210]

Two cases from Arizona illustrate. In the first, the Arizona Supreme Court interpreted the statutory term "likely" to mean "highly probable."[211] 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?"[212] In dicta, the court disapproved of the statement because it "improperly invited the jurors to engage in a balancing test in assessing probability."[213]

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

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[206] Shivaee v. Commonwealth, 613 S.E.2d 570, 577 (Va. 2005) ("a menace to the health and safety of others"); KAN. STAT. ANN. § 59-29a02(c) ("menace"); S.C. STAT. § 44-48-30(9) ("pose a menace"). *Cf.* Hirabayashi v. United States, 320 U.S. 81, 99 (1943) ("menace").

[207] N.Y. MENTAL HYG. LAW §10.03(e) ("likely to be a danger to others"); 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"); TEX. HEALTH & SAFETY CODE ANN. § 841.003(a)(2) ("likely"); *see also* N.H. REV. STAT. § 135-E:2(VI) ("potentially serious likelihood").

[208] In re Leon G., 26 P.3d 481, 489 (Ariz. 2001) (en banc) ("highly probable"), *vacated on other grounds 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").

[209] *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 107, at 1448; *cf.* Morse, *supra* note 42, at 72.

[210] This is not a vagueness argument, which has been rejected many times. *E.g.*, State v. Williams, 728 N.E.2d 342, 361 (Ohio 2000); *cf.* State of Minnesota *ex rel.* Pearson v. Probate Court of Ramsey County, 309 U.S. 270, 273-74 (1940) (holding that construction of term "likely" to require more than "strong sexual propensities" "destroys the contention that it is too vague and indefinite").

[211] In re Leon G., 26 P.3d 481, 488-89 (Ariz. 2001).

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

[213] *Id.*; *cf.* Laudan & Saunders, *supra* note 172, 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 CAL. 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 154, at 1092 (suggesting that jurors should balance the utilities).

> 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.[214]

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."[215]

Perhaps always, but certainly if case-by-case balancing lowers the recidivism threshold below the constitutional minimum, the resulting commitment violates due process.[216] 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.[217] One study finds that the public believes 74% of sex offenders will commit another sex offense, even

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[214] 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 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." 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.").

[215] *See* Westerheide v. State, 831 So. 2d 93, 118 (Fla. 2002) (Pariente, J., dissenting) ("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*.").

[216] The United States 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 172, at 33 n.31.

The Court has rejected balancing in its Free Speech case law as well. Brandenburg v. Ohio, 395 U.S. 444 (1969).

[217] *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) ("representativeness heuristic"); Christopher Slobogin, *Dangerousness and Expertise Redux*, 56 EMORY L.J. 275, 313-14 (2006) (same); La Fond, *supra* note 7, at 680 (similar). *See generally* Jonathan S. Masur, *Probability Thresholds*, 92 IOWA L. REV. 1293 (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.

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.").

though the best estimates of the actual recidivism rate are around 20% or lower.[218] 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 19 jurisdictions discussed above are either clearly or probably unconstitutional.[219] Only one state passes muster, as described in the next section.

### *B. A Better Alternative*

The most straightforward way to implement the 69% threshold is simply to require it, with a standard of proof of preponderance or higher.[220] 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 69% and the distributions would be centered there. The preponderance standard—which is generally defined to be more likely than not, or greater than 50%[221]—is the lowest proof standard required to ensure that net predicted recidivism matches or exceeds the 69% 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.[222]

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

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[218] Levenson et al., *supra* note 46, at 13 tbl.2, 17; Langan, Schmitt, & Durose, *supra* note 11, at 1, 2.

[219] *Cf.* Janus & Meehl, *supra* note 15, 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").

[220] 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.

[221] Union Pacific Railroad Co. v. State Bd. of Equalization, 231 Cal. App. 3d 983, 1000, 282 Cal. Rptr. 745, 755 (Cal. Ct. App. 1991).

[222] Kagehiro, *supra* note 209, at 196 ("[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.").

fact, but rather mask substantive law decisions.[223] 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*.

Another interesting comparison is to David Simpson, Jr.'s treatment of civil commitment and dangerousness.[224] His recommendation is the converse of mine: lower the substantive dangerousness threshold and raise the standard of proof.[225] Simpson believes proof beyond a reasonable doubt would impress triers of fact with the seriousness of the decision.[226] 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.[227] 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.[228] 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.[229]

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

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[223] Roger B. Dworkin, *Easy Cases, Bad Law, and Burdens of Proof*, 25 VAND. L. REV. 1151, 1178 (1972).
[224] David T. Simpson, Jr., Note, *Involuntary Civil Commitment: The Dangerousness Standard and its Problems*, 63 N.C. L. REV. 241 (1984).
[225] *Id.* at 254.
[226] *Id.* at 255.
[227] Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1308 (1977).
[228] *Cf.* Jack B. Weinstein & Ian Dewsbury, *Comment on the Meaning of 'Proof Beyond a Reasonable Doubt,'* 5 L., PROBABILITY & RISK 167, 167 (2006) (stating that adoption of a quantified jury instruction on the meaning of proof beyond a reasonable doubt is "doubtful").
[229] In re Detention of Hayes, 747 N.E.2d 444, 453 (Ill. App. Ct. 2001).

disavowal of mathematics and invitation to open-ended balancing.[230] Still, "much more likely than not" requires a substantial margin above 50%.[231] That would seem to be constitutionally sufficient.[232]

*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 69%.

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 69% for three categories of offenders.[233] Thousands of sex offenders are presently committed.[234] It seems very unlikely that all of them would satisfy the 69% requirement.[235] Whether the requirement deduced here is "'strict' in theory and fatal in fact"[236] awaits further study.[237] In the end, perhaps

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[230] 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, 582 (2011) ("The judiciary's refusal to assign a specific number to 'substantially probable' is one of the SVPA's strengths.").

[231] *See* 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 L., PROBABILITY & RISK 159, 165 (2006) (recommending "well above a probability of 0.8" as a definition for beyond a reasonable doubt).

[232] Again, the efficacy of non-quantified standards of proof is doubtful, *see* Kagehiro, *supra* note 209, at 196, but the fact that Illinois requires proof beyond a reasonable doubt may bolster this conclusion. 725 ILL. COMP. STAT. § 207/35(d)(1).

[233] Static-99R Samples for Violent Recidivism Tables, tbls.7, 8, at http://www.static99.org/ (downloaded 6/22/11).

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 & HUMAN BEHAV. 525 (2006). But surely the category of violent crime is over-inclusive.

[234] *See* Gookin, *supra* note 10.

[235] *See* Vars, *supra* note 111.

[236] 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).

[237] *See* von Hirsch, *supra* note 33, 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

the most that can be said is 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 decision-making. Committing sex offenders with a five-year recidivism risk below 69% is generally not cost-benefit justified. Nor, the analysis suggests, would be committing non-contact 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,[238] 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.

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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* Morse, *supra* note 167, at 135; Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 534, 557 (1986-87).

[238] *But cf.* Vars, *supra* note 112, at 12 (estimating utilities in will contests); Laudan & Saunders, *supra* note 172, at 23 & n.24 (proposing hypothetical questions to elicit utilities in criminal cases).