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A Study of the Efficacy of the Sexually Violent Predator Act in Florida

Daniel Montaldi

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A STUDY OF THE EFFICACY OF THE SEXUALLY VIOLENT PREDATOR ACT IN FLORIDA

Daniel Montaldi, PhD[†]

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I. INTRODUCTION

Until recently, the Florida Sexually Violent Predator (SVP) Act¹ directed the Department of Children and Families (DCF) to

1. FLA. STAT. ANN. §§ 394.910–932 (West, Westlaw through ch. 255 (End) of the 2014 2d Reg. Sess. and Sp. “A” Sess. of the 23d Leg.). The SVP Act is also known as the Jimmy Ryce Act. The family of the victim of the crime that inspired

“implement a long-term study to determine the overall efficacy of the provisions of this part.”² The following is a first step toward a comprehensive study. This Article is a policy analysis based primarily on sexual recidivism data from samples of sex offenders recommended for commitment but later released. The majority were recommended but never committed. A subset consists of formerly committed offenders. Recidivism data are essential for evaluating the accuracy of commitment eligibility determinations (risk assessment in particular), for comparing the efficacy of inpatient versus outpatient treatment, for assessing the efficacy of treatment (if any at all), and for estimating the number of possible offenses prevented by a commitment policy. The last, in particular, is important for evaluating cost effectiveness.

Recidivism data for a large sample of Florida sex offenders recommended for commitment have not been published before now. To the author’s knowledge, no sample of SVP-relevant offenders of this size (710 offenders) has ever been studied. These are sex offenders determined to be commitment eligible by a team of sex offender specialists in the mental health field. Given their long release times (five to fourteen years for many), recidivism rates for these offenders allow us to examine the accuracy of contemporary risk assessment methods. This is crucial for studying the accuracy of commitment eligibility determinations.

Some data were first gathered for a Florida Legislature Office of Program Policy Analysis and Government Accountability (OPPAGA) study conducted in late 2011, which examined offenders recommended for commitment but granted a form

the Act has requested that references to the Act focus on its purpose.

2. Quarterly Reports, ch. 2014-19, sec. 109, § 394.931, 2014 Fla. Sess. Law Serv. (West) (removing the quoted language from the statute). Through 2013, the study is mentioned in the last sentence of the Act, without elaboration. This sentence does not appear in the 2014 revisions made to the SVP Act. *See* FLA. STAT. ANN. § 394.931 (Westlaw). These revisions were made during this past legislative session after the publication of a newspaper story criticizing the SVP program. *See* Sally Kestin & Dana Williams, *Sex Predators Unleashed*, SUN SENTINEL, Aug. 18, 2013, available at LEXIS; discussion *infra* Part III.A; *infra* Appendix. The last two sentences of section 394.931 of the current Act now read: “The Department of Corrections shall compile recidivism data on those referred, detained, or committed to the department. The data shall be included in the Department of Corrections’ annual report.” FLA. STAT. ANN. § 394.931 (Westlaw). Apparently, DCF is no longer required to conduct a long-term study of the efficacy of the provisions of the Act.

of conditional release by the courts (per stipulation or settlement agreements). The 2011 data are contained in an unpublished memorandum.³ This OPPAGA study inspired a more comprehensive study by the Florida Sexually Violent Predator Program (SVPP) that was conducted in 2012.⁴ Additional relevant data about offenders processed by SVPP are contained in the SVPP database and are not published. These data sets will be discussed at various points in this paper.⁵ Florida sex crime data come from *Total Forcible Sex Offenses by Type and Rate for Florida, 1971–2013*.⁶ For purposes of comparison, sexual recidivism data from a 2012 Adam Walsh study of Florida sex offenders (and offenders in three other states), as well as sex crime and sexual recidivism data from other states, are examined.⁷ Commitment-related census data and budget

3. Research Memorandum from the Fla. Legislature Office of Program Policy Analysis and Gov't Accountability, Conditional Release of Sexually Violent Predators Through Stipulated Agreements (Oct. 21, 2011) [hereinafter OPPAGA Memo] (unpublished memorandum) (on file with author). Interested readers are invited to send a written public records request for the memorandum to: OPPAGA, 111 West Madison Street, Room 312, Tallahassee, FL 32399-1475.

4. Fla. Sexually Violent Predator Program, SVPP Recidivism Study Raw Data (Aug. 31, 2014) [hereinafter SVPP Data] (unpublished data set through the study completion date of February 28, 2013) (on file with the Florida Department of Children and Families). Interested readers are invited to request a copy of the SVPP Data by sending a public records request to: Sexually Violent Predator Program, Department of Children and Families, Bldg. 6, 3rd floor, 1317 Winewood Blvd., Tallahassee, FL 32399-0700. The request may be made in the form of a letter specifying that this is a public records request. For information on Florida's Sunshine Law, see generally BRECHNER CTR. FOR FREEDOM OF INFO., FLORIDA GOVERNMENT IN THE SUNSHINE: A CITIZEN'S GUIDE (1998).

5. SVPP Data, *supra* note 4.

6. FLA. DEP'T OF LAW ENFORCEMENT, FLORIDA STATEWIDE REPORTED SEX OFFENSES 1971–2013 (2014) [hereinafter 1971–2013 REPORTED SEX OFFENSES]; *see also* FLA. DEP'T OF LAW ENFORCEMENT, CRIME IN FLORIDA: JANUARY–DECEMBER 2013 (2014) [hereinafter 2013 FLA. CRIME REPORT]. Also utilized are data on declining crime rates nationwide since the early 1990s. *See* JENNIFER L. TRUMAN & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS BULLETIN NO. NCJ 247648, CRIMINAL VICTIMIZATION, 2013 (2014). For the percentage of all sexual assaults reported to police in 2007, *see* MICHAEL R. RAND, BUREAU OF JUSTICE STATISTICS BULLETIN NO. NCJ 224390, CRIMINAL VICTIMIZATION, 2007, at 6 (2008).

7. *See, e.g., infra* Part III.A.1. *Compare Hearing Before the Healthy Families H. Subcomm.*, 2014 Legis. Sess., at 33:45 (Fla. 2014), available at http://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2014011023&committeeID=2717 (presentation from the Florida Office of Economic and Demographic Research), and KRISTEN M. ZGOBA ET AL., A MULTI-STATE RECIDIVISM STUDY USING STATIC-99R AND STATIC-2002 RISK SCORES AND TIER GUIDELINES FROM THE ADAM

data for the Florida SVPP are also utilized.⁸ Finally, data on lengthening the duration of criminal sentences⁹ are relevant to

WALSH ACT 20–21 (2012) (presenting sexual recidivism rates and average Static-99R scores for Florida and other states studied), *with* ROBERT BARNOSKI, WASH. STATE INST. FOR PUB. POLICY, *SEX OFFENDER SENTENCING IN WASHINGTON STATE: RECIDIVISM RATES* (2005) (presenting sexual recidivism data in Washington), *and* IVAN KUZYSK, CONN. OFFICE OF POLICY AND MGMT., CRIMINAL JUSTICE POLICY & PLANNING DIV., *RECIDIVISM AMONG SEX OFFENDERS IN CONNECTICUT* 8–16 (2012) (presenting sexual recidivism data in Connecticut), *and* CHERYL MILLOY, WASH. STATE INST. FOR PUB. POLICY, *SIX-YEAR FOLLOW-UP OF 135 RELEASED SEX OFFENDERS RECOMMENDED FOR COMMITMENT UNDER WASHINGTON’S SEXUALLY VIOLENT PREDATOR LAW, WHERE NO PETITION WAS FILED* 4–8 (2007) (presenting data on sex offenders released in Washington), *and* MINN. DEP’T OF CORR., *SEX OFFENDER RECIDIVISM IN MINNESOTA* 20–25 (2007), *available at* <http://www.doc.state.mn.us/pages/files/large-files/Publications/04-07SexOffenderReport-Recidivism.pdf> (presenting sexual recidivism data for Minnesota), *and* Marcus T. Boccaccini et al., *Field Validity of the Static-99 and MnSOST-R Among Sex Offenders Evaluated for Civil Commitment as Sexually Violent Predators*, 15 *PSYCHOL. PUB. POL’Y & L.* 278, 291 (2009) (presenting sexual recidivism data in Texas), *and* Denis L. Zavodny et al., *Sexual-Recidivism Base Rates Relevant to SVP Assessments*, GREG DECLUE (Aug. 4, 2012), <http://gregdeclue.myakkatech.com/Sexual%20Recidivism%20Rates.pdf> (presenting sexual recidivism data for California and other states).

In January 2014, Florida had a civil confinement census of 647, and the state’s most recent census data indicate a population of 19,552,860. *See* THE PROF’L STAFF OF THE COMM. ON APPROPRIATIONS, THE FLA. SENATE, *BILL ANALYSIS AND FISCAL IMPACT STATEMENT, S.B. 524, 2014 Reg. Sess.*, at 6 (2014) [hereinafter *COMM. ON APPROPRIATIONS*], *available at* <http://www.flsenate.gov/Session/Bill/2014/0524/Analyses/2014s0524.pre.ap.PDF> (pre-meeting analysis document); *State & County Quick Facts: Florida*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/12000.html> (last revised Jul. 8, 2014) (presenting census data from 2013). To the author’s knowledge, the only state with a higher SVP civil commitment census is California. This author has not found a specific figure for California. Its state population census in 2013 was 38,332,521. *See id.*

The Adam Walsh Act (AWA) was inspired by the terrible sexual murder of a child by that name. AWA was passed by Congress in 2006 and established stringent registration requirements for sex offenders based on a standardized, offense-based classification system (that was not based on Static or other actuarial categories). *See generally* Lori McPherson, NDAA/APRI Nat’l Ctr. for Prosecution of Child Abuse, *Practitioner’s Guide to the Adam Walsh Act*, OFF. JUST. PROGRAMS (2007), http://ojp.gov/smart/pdfs/practitioner_guide_awa.pdf.

8. *See generally* COMM. ON APPROPRIATIONS, *supra* note 7, at 6 (using the same census figures); THE PROF’L STAFF OF THE COMM. ON CHILDREN, FAMILIES, AND ELDER AFFAIRS, THE FLA. SENATE, *BILL ANALYSIS AND FISCAL IMPACT STATEMENT, FLA. S.160–522, 2014 Reg. Sess.*, at 12 (2014) [hereinafter *COMM. ON CHILDREN, FAMILY AND ELDER AFFAIRS*], *available at* <http://static.lobbytools.com/bills/2014/pdf/AS0522A1473.pdf> (using confinement census data to discuss the financial considerations of state sex offender programs).

some observations about an emerging dilemma confronting history-based risk assessment methodology.

This Article has four parts outside of this introduction: background information and conceptual issues,¹⁰ selection efficacy assessing accuracy of eligibility determinations,¹¹ policy efficacy,¹² and conclusions.¹³ Each part has several subsections.

Essential to a policy discussion of Florida's SVP program is a sufficient conceptual background. Part II of this Article reviews the statutory processes and competing value assessments involved in identifying candidates for commitment, including balancing the danger of overlooking certain sexual predators with the prospect of over-confinement.¹⁴ This contextual background is rounded out with a critical discussion of the efficacy of current criteria used to identify and commit sex offenders¹⁵ in light of emerging data.¹⁶

This Article continues in Part III with a discussion of sex offender candidate selection. Part III begins with an evaluation of how well commitment-eligible sex offenders are being identified by comparing sex offender recidivism rates in other states¹⁷ and considering the significance of a low recidivism rate in such an evaluation.¹⁸ This is followed by an analysis of how well *non*-eligible sex offenders are being identified.¹⁹ This analysis looks at empirical data of recidivism rates and risk assessments to deduce how well Florida's best practices function under the Florida SVPP in this identification process.²⁰ In light of Florida's experience, Part III concludes with recommendations for states like Minnesota that are considering expanding their sex offender programs.²¹ Part IV

9. See generally PEW CTR. ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS (2012), available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2012/PewTimeServedreportpdf.pdf (supplying data on average increases in the length of prison sentences from 1990 through 2012).

10. See *infra* Part II.

11. See *infra* Part III.

12. See *infra* Part IV.

13. See *infra* Part V.

14. See *infra* Part II.A–B.

15. See *infra* Part II.C.

16. See *infra* Part II.D–E.

17. See *infra* Part III.A.1.

18. See *infra* Part III.A.2.

19. See *infra* Part III.B.

20. See *infra* Part III.B.1–11.

21. See *infra* Part III.B.12–13.

explores policy considerations for such states considering a civil commitment program.²² Following this author's conclusions²³ is an explanatory Appendix to aid in data comprehension.²⁴

II. BACKGROUND INFORMATION AND CONCEPTUAL ISSUES

On January 1, 1999, the Involuntary Civil Commitment of Sexually Violent Predators Act (Act) went into effect in the State of Florida.²⁵ Part V of the Act falls under the Public Health (title XXIX) and Mental Health (chapter 394) sections of the Florida Statutes. The Act designates DCF as the state agency responsible for establishing and maintaining SVPP.²⁶ Located in Tallahassee, SVPP is responsible for making commitment-related recommendations to state attorneys and for overseeing the operation of the Florida Civil Commitment Center (FCCC) in Arcadia.²⁷ The SVPP receives and processes all referrals of cases for commitment consideration (mostly from the Department of Corrections), prepares files for screening by soliciting additional information from law enforcement agencies, conducts a first-level screening evaluation to determine which individuals have a significant chance of meeting criteria, and then arranges for psychologists in private practice on contract with DCF to conduct face-to-face evaluations of selected cases. Evaluation reports are reviewed by a multidisciplinary team composed of six psychologists.²⁸ The multidisciplinary team makes final determinations about which persons meet commitment criteria. A letter is then sent to the relevant assistant state attorney (ASA) with a recommendation to file, or not file, a petition for commitment.

22. *See infra* Part IV.

23. *See infra* Part V.

24. *See infra* Appendix.

25. Act of May 26, 1999, ch. 99-222, 1999 Fla. Laws 1372.

26. FLA. STAT. ANN. § 394.917, subdiv. 2 (West, Westlaw through ch. 255 (End) of the 2014 2d Reg. Sess. and Sp. "A" Sess. of the 23d Leg.).

27. DCF is responsible for oversight and contract monitoring for the FCCC, which is operated by a private contractor. SVPP provides SVP- and sex offender-specific training conferences to contract practitioners on a yearly basis.

28. The evaluator or evaluators for a particular case are considered members of the team for that case. They do not attend multidisciplinary team meetings, as their opinions and supporting arguments are already indicated in the evaluation reports.

In Florida, a “sexually violent predator” is defined as someone who “[h]as been convicted of a sexually violent offense; and [s]uffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.”²⁹ Previous conviction for sexual violence, mental

29. FLA. STAT. ANN. § 394.912, subdiv. 10 (Westlaw). In this author’s experience, few mental health professionals, attorneys, or judges have any sense of the significance of the word “makes” in the definition of a sexually violent predator. In statutory language, mental abnormality *makes likely* the repetition of sexually violent behavior. Although rarely understood, the phrase, “makes the person likely” is essentially the legal meaning of mental abnormality rather than a logically distinct element. The Supreme Court discusses this idea in *Kansas v. Hendricks*, 521 U.S. 346, 358–59 (1997) and *Kansas v. Crane*, 534 U.S. 407, 407–08 (2002). See also *In re Leon G.*, 59 P.3d 779, 786–87 (Ariz. 2002) (discussing the statutory construction and meaning of the phrase “makes likely”).

In order for a mental condition to have SVP legal relevance it must impair capacity for behavioral control such that the person is unable to (consistently) conform his behavior to the law, even if he wanted and tried to do so. Impairment need not be absolute (it need not be as extreme as “irresistible impulse”), but it must at least cause the person to have “serious difficulty” controlling his behavior. This level of impairment allows sufficient control to avoid any particular offense (e.g., if police are nearby), but not enough to bring an end to one’s sexual criminal pattern. Someone unable to end such a pattern (unable to consistently respond to deterrence-related incentives) is someone who is necessarily dangerous (“made likely” to continue violent behavior). Mental abnormality is a mental condition causing this kind of difficulty. It is thus more than a condition that generates urges to engage in crime (i.e., the intense, recurrent fantasies or urges noted in diagnostic criteria for clinically defined paraphilia or sexual deviance disorder). All violent criminals, especially violent recidivists (whom the United States Supreme Court calls “dangerous but typical recidivist[s]”) have ongoing motivation to commit crimes. *Crane*, 534 U.S. at 413. This does not make them inappropriate for (exclusive) management by means of a deterrence-based system (the criminal justice system) designed to protect the public from crime.

Involuntary hospitalization is only for those who are impaired with respect to resisting such impulses in order to remain lawful. This is why clinical diagnoses are not by themselves sufficient to constitute mental abnormality. In this author’s experience, mental health professionals rarely, if ever, understand this point. See Daniel F. Montaldi, *A Philosophy of SVP: One Approach to Identifying Sexually Violent Predators*, in CIVIC RESEARCH INST., *THE SEXUAL PREDATOR, LEGAL, ADMINISTRATIVE, ASSESSMENT, AND TREATMENT CONCERNS* 4-7 to -11 (Anita Schlank, ed., 2014) [hereinafter Montaldi, *Philosophy of SVP*] (describing how relationships between SVP and clinical concepts are treated extensively); see also Daniel F. Montaldi, *The Logic of Sexually Violent Predator Status in the United States of America*, SEXUAL-OFFENDER-TREATMENT.ORG (2007), <http://www.sexual-offender-treatment.org/57.html>.

abnormality or personality disorder, and the “likely” element are the three criteria for commitment. In the legislative findings and intent section of the statute, lawmakers describe the population these criteria are intended to address. In that section, the legislature finds that there is a “small but extremely dangerous number” of predatory sex offenders for whom the likelihood of “repeat acts” of sexual violence is “high.”³⁰ These individuals have “antisocial features” that render them not appropriate for short-term treatment.³¹ In the next section, lawmakers state that sexual predators are not appropriate for Baker Act, or non-SVP, commitment.³² Less restrictive alternatives to full confinement are “not applicable” to sexually violent predators.³³

An offender is generally determined to meet the first criterion (conviction for sexual violence) by the referring agency (most

30. FLA. STAT. ANN. § 394.910 (Westlaw).

31. *Id.* (Westlaw). Non-SVP commitment options are addressed in *id.* ch. 394, pt. I (Westlaw).

32. *Id.* § 394.910 (Westlaw).

33. The description of the population that lawmakers regard as sexually violent predators, found in the findings and intent section of the statute, is generally ignored by mental health professionals and other parties in the commitment process. *Id.* (Westlaw). A common view, expressed to this author on more than one occasion, is that this section is no more than an “introduction” to the law. This perspective—a kind of statutory literalism—directs evaluators to just attend to commitment criteria (i.e., the statutory definition of a sexually violent person found in the definitions section of the statute). *Id.* § 394.912 (Westlaw). Does the offender being evaluated meet these criteria? It is assumed that the empirical/statistical methods and clinical concepts of the mental health profession can answer this question directly, without further legal context. It is at least arguable that statutory literalism reflects a serious misunderstanding of legal language and its purpose. Evaluators are not only ignoring the central idea supporting mental abnormality (“serious difficulty”)—they are also ignoring the descriptive facts lawmakers give in the findings that justify commitment. The SVP prototype being described is clearly not just any sex offender who qualifies for a clinical paraphilia diagnosis and a high actuarial score. The former can be minimally based on as few as two sex offenses if the evaluator treats diagnostic criteria as cookbook rules or sufficient conditions (which is not uncommon practice). A high actuarial score can be earned with some additional non-sexual violent criminal history, absence of long-term relationships, one unrelated victim, and young age. Many general criminals will meet these conditions, exactly the “typical recidivist” deemed by the Supreme Court as not appropriate for hospitalization-based forms of crime control. The ramifications of neglecting legislative descriptions (and key legal concepts) for rendering sexual violent predator determinations insufficiently selective will be clear from the research discussed in this Article.

referrals come from the Department of Corrections). The multidisciplinary team makes final determinations about which offenders meet the second criterion (mental abnormality or personality disorder), and the third criterion (likely to engage in sexual violence if not confined). Given the purpose of the law, the third criterion receives the most emphasis, making risk assessment the primary element of a commitment evaluation. Evaluating the efficacy of risk assessments is the primary focus of this discussion.³⁴

SVPP is not involved in commitment-related decision making after the recommendation phase, such as whether a case is taken to trial or whether a settlement agreement is reached. ASAs and the courts make these decisions. Petitions may not be filed without an affirmative recommendation by SVPP.³⁵ SVPP is not involved in annual reviews of committed persons or release decisions. ASAs and defense attorneys contract directly with psychologists in private practice to conduct annual review evaluations.³⁶

34. Mental abnormality is defined by Florida statute. *Id.* § 394.912, subdiv. 5 (Westlaw). Personality disorder is not defined as it is in at least some other states. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 123A, § 1 (West, Westlaw through ch. 379 of the 2014 2d Ann. Sess.); WASH. REV. CODE ANN. § 71.09.020, subdiv. 9 (West, Westlaw through 2014 Legis.). Technically, it is “mental abnormality or personality disorder” that makes someone likely to continue sexual violence. So it is possible for a sexually violent predator to lack mental abnormality. However, it is rare in Florida for experts to determine that someone meets criteria with only a personality disorder diagnosis (coupled with high actuarial risk). This is because most offenders deemed to meet criteria receive a clinical diagnosis of antisocial personality disorder, which, given its very broad behavioristic criteria, will apply to most anyone with an extensive criminal history (especially typical recidivists). Lawmakers refer to “antisocial features,” but mostly to distinguish this population from persons subject to the Baker Act (non-SVP commitment) where criteria exclude antisocial personality. Mental abnormality is the key construct in the second criterion. It is common for mental health professionals to see a clinical paraphilia (now “paraphilic disorder”) diagnosis as enough to constitute mental abnormality. Hereafter, “mental abnormality” alone is used when referring to the second criterion.

35. In the early years, some of the commitment recommendations did not elicit petitions and some petitions were filed without commitment recommendations. But since these years, ASAs must have an affirmative commitment recommendation to file a petition.

36. Many of these psychologists are also on contract with DCF/SVPP for initial commitment evaluations. DCF/SVPP is not involved in the other contracted activities of these practitioners.

A. *Studying the Efficacy of a Sex Offender Commitment Law*

The Act does not provide details about what is meant by “efficacy” or explain how the provisions of the Act are to be examined. What questions did lawmakers want answered by such a study? Beyond legislative intent, there are larger issues of how a sex offender commitment law should be evaluated in order to be maximally informative to principled policymakers in a free society.

Efficacy can have different meanings in the context of sex offender civil commitment laws. One obvious meaning is the effectiveness of SVP commitment in protecting the public from the sexual crimes that committed persons would have otherwise perpetrated. Of course, a study would not be necessary simply to confirm that persons kept away from society do not commit crimes in society.³⁷ A serious policy analysis would examine whether commitment has had a measurable impact on statewide sexual crime rates. It would also consider how effectively commitment-eligible persons are being identified and committed, as well as how securely they are being controlled once rendered subject to commitment proceedings. Finally, the policy analyst would examine how well mandated services (e.g., treatment) are being provided to committed persons. Given the main purpose of the Act, lawmakers would be most concerned with impact on crime rates.

It is reasonable to think that lawmakers did not think any significant number of offenders fitting the description of “a small but extremely dangerous number”³⁸ would ever be released once committed, or that any significant number would not be taken to trial and committed if they had been recommended for commitment. So lawmakers would probably not have intended the DCF to study recidivism rates for formerly committed sex offenders or offenders recommended for commitment but not committed (the primary focus of the SVPP recidivism study).

However, recidivism data for these offenders are crucial for assessing the accuracy of the risk assessments and commitment determinations that have supported multidisciplinary team recommendations. Among the provisions of the Act to be studied are ones that task mental health professionals with making

37. SVPP data provide some basis for estimating how many crimes this might be.

38. FLA. STAT. ANN. § 394.910 (Westlaw).

commitment recommendations based on psychological evaluations, which include risk assessments. Recidivism data from offenders considered for commitment but later released constitute the only way a policy analyst can tell how well commitment-eligible persons are being identified and recommended. Offenders recommended for commitment were recommended because they were determined to meet the “likely” criterion. Only by studying those who ended up not committed (hence released) can the analyst know whether they were in fact likely to reoffend at the time of evaluation. Assuming a statistically descriptive interpretation of “likely” (i.e., likely to become a new reoffender), a group of offenders likely to reoffend would be expected to eventually generate a sexual recidivism rate of over 50% (i.e., over 50% of the offenders in the group became reoffenders) if they are released and followed over a long period of time. A group of offenders determined to be “not likely” would be expected to generate a rate below 50%; hopefully, the rate will be well below. In the case of offenders recommended for commitment but released without commitment, did the percentage of reoffenders approach or exceed 50%? For offenders not recommended, was their reoffender percentage below 50%?

Risk assessment accuracy is thus not just a matter of identifying predators or persons who meet commitment criteria. It is also a matter of identifying non-predators or persons who do not meet criteria. Universal commitment for all sex offenders at end-of-sentence would eliminate any chance of a missed predator. It would also remove the need for evaluation and risk assessment, as well as the need for the second and third criteria for commitment.³⁹ The fact that evaluations *are* required means that lawmakers intended the recommendation process to be selective. So, some risk of missing predators is already inherent to the process. The fact that there are more criteria than just previous conviction for a sexual offense means that not every documented sex offender is eligible. Unless one assumes that no non-eligible sex offenders reoffend after release, the fact that sexual recidivism will continue to occur even with commitment is also inherent to the process. The fact that there are commitment criteria at all entails that someone may be committed if, but *only if*, he or she meets criteria. The

39. The first criterion simply requires that a person be a documented sex offender.

policy analyst must therefore look at both the criteria-related sensitivity and specificity of the eligibility determination process (i.e., how well criteria-determined eligible and ineligible persons are being identified).

B. Competing Values: Not Missing Predators Versus Avoiding Unnecessary Confinements

Understandably, lawmakers would have cared mostly about accurate identification of all persons who meet criteria for commitment, so that every sex offender who needs further confinement is committed. The primary goal would be no missed predators. Lawmakers would have cared less about how successful SVPP experts were in avoiding unnecessary commitments or misidentifying non-eligible persons as predators (commitment-eligible persons).

The risk of missed predators and the risk of ineligible persons being civilly confined cannot be simultaneously minimized. The very existence of an SVP law gives social value priority to the public safety benefits of confining predators. This means the acceptance of some risk of unnecessary commitments or persons unnecessarily deprived of physical liberty without being charged with a new crime. On the other hand, if avoiding unnecessary liberty loss were considered to be the priority value, then it would not be possible to have a process that commits anyone, given some chance of erroneous commitments. Minimizing the chance of unnecessary civil confinements means some risk of predators being released and creating victims who would not otherwise have been victimized by a predator (i.e., victimized by someone who would meet commitment criteria if a commitment process existed). The risk of being victimized by offenders who would not meet criteria even if commitment existed would remain the same either way.⁴⁰ Presumably, if both values were considered to be exactly equal in importance, the decision could go either way, perhaps settled by some random process.

The comparative importance of not missing predators versus avoiding unnecessary commitments is not the same for the actual operation of a commitment recommendation process, once it is established. Experts responsible for the process of determining

40. A later section will address the issue of offenders who will reoffend but do not meet commitment criteria prior to re-offense. *See infra* Part II.D.

commitment eligibility must treat both as extremely important. Identifying those persons who meet the criteria fulfills the purpose of the law. Identifying persons who do not meet the criteria facilitates due process in compliance with the law. Legally, it would make no sense to require the state to prove that someone is dangerous if the expert whose opinion is part of this proof did not bear a similar (clinical) burden of proof in supporting the opinion that someone is dangerous.⁴¹

Additionally, professional ethics require evaluators to use methods appropriate to the task. This implies methods that are as accurate as possible.⁴² If experts use methods they know to have poor accuracy (sensitivity or specificity), then they cannot be sincere in indicating reasonable certainty in opinions based on application of those methods. This is not to say that experts may never err on the side of an affirmative opinion in a close call case. It is to say that they may not err as standard practice, or deliberately utilize wide-net methods for the sake of never missing a predator. Ethically, the first duty of the mental health professional is to do no harm. Expressing shaky opinions in support of commitment, or utilizing methods once it becomes known that they produce many false positives (i.e., ineligible persons misidentified as eligible), constitutes a willingness to tolerate more than the rare unnecessary commitment. This is doing harm to the people receiving clinical services (evaluation) for the sake of what is anticipated to be somebody else's wellbeing.

41. To this point this author has heard the response, "The process protects the rights of persons subject to the Act because there is due process and they have defense attorneys." The idea is that the state's methods can be loose, even grossly inaccurate with regard to specificity, as long as the defense has an opportunity to challenge them in court. This response is sometimes paired with the claim that SVPP should continue using flawed methodology until the legislature gives "permission" to use a more accurate method. Readers can speculate about the likelihood of such permission and judge for themselves the relevant ethics. On the issue of rights protection, a growing body of research is showing the extended due process protections are undermined by using juries as fact-finders in commitment cases. Jurors are prone to commit an offender, before hearing any supporting evidence that he or she meets criteria, simply on the basis of the fact he or she is the subject of commitment proceedings. See Nicholas Scurich & Daniel A. Krauss, *The Presumption of Dangerousness in Sexually Violent Predator Commitment Proceedings*, 13 L. PROBABILITY & RISK 91, 99 (2014).

42. AM. PSYCHOLOGICAL ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT § 9 (2010).

No legislature has stated a finding that public safety justifies toleration of unnecessary commitments. No high court has ever considered and upheld a commitment law where it was presented with evidence that the evaluation methods the state was using were likely to generate more false positives than true positives (i.e., more ineligible persons misidentified as eligible than eligible persons accurately identified). Giving high importance to specificity is not allowing the rights of sex offenders to trump community protection. Instead, it is simply ensuring that commitment recommendations are restricted to just those persons from whom the community needs protection.⁴³

The attitude of “better too many [committed] than too few” is difficult to avoid when thinking about terrible crimes and people who, at least during the years of their offending, were frightful criminals.⁴⁴ But this attitude turns Blackstone’s famous ratio on its

43. Some would argue that sexual recidivism base rates are so low that (assuming base rates indicate probabilities) the empirically grounded evaluator cannot have reasonable certainty that any offender is associated with a recidivism probability high enough to meet any quantitative interpretation of the “likely” standard. See, e.g., Scott I. Vrieze & William M. Grove, *Predicting Sex Offender Recidivism: I. Correcting for Item Overselection and Accuracy Overestimation in Scale Development. II. Sampling-Induced Attenuation of Predictive Validity Over Base-Rate Information.*, 32 LAW & HUM. BEHAV. 266, 275 (2007). It is certainly possible for principled practitioners to adopt this position. It is also possible to take the position that professional ethics preclude the participation of mental health professionals in any process that generates commitment affirmative opinions. However, for practitioners choosing to participate in a commitment recommendation process, it is not possible to adopt these positions and also fulfill their mandate. Their stance would have to be that ethical requirements are met if affirmative opinions are not made without compelling support, precluding any wide-net approach.

This author has heard the claim from state officials that perhaps mental health professionals should not administer SVP programs, given their “ethics.” Left unexplained was how a non-psychologist administrator would produce more commitment recommendations from psychologist employees if the latter continued to act on their ethics.

44. In his study of revolutionary Russia, Orlando Figes describes an extreme form of preventive thinking in the Soviet Union of the late 1930s:

Stalin was prepared to arrest thousands of innocent people to catch just one spy. As he calculated, if only 5 per cent of those arrested turned out to be truly enemies, “that would be a good result.” According to Khrushchev, who was then the Moscow Party boss, Stalin “used to say that if a report [denunciation] was ten per cent true, we should regard the entire report as fact.” Everybody in the NKVD knew

head, a particularly problematic perspective for a free society acting to prevent crimes only anticipated.⁴⁵

C. *Different Approaches to Assessing Accuracy of Risk Assessments*

How is it possible to analyze the accuracy of SVP-related risk assessments? There are two approaches. The first one is better than the second one. The first approach examines sexual recidivism rates for offenders deemed “likely” to reoffend and offenders deemed “not likely,” to see if the former rate is high enough (greater than 50%) and the latter rate low enough (below 50%). In contrast, the second approach simply treats every sexual recidivist in the group of offenders deemed “not likely” to be a predator who was erroneously not recommended for commitment ahead of time. Similarly, every non-recidivist in the “likely” group is a non-predator who was mistaken for a predator. The first approach is superior because likelihood (risk) determinations are

that holding back from their quota of arrests would get them into trouble for lack of vigilance. “*Better too far than not far enough*,” Yezhov warned his operatives. If “an extra thousand people will be shot, that is not such a big deal.”

See ORLANDO FIGES, *REVOLUTIONARY RUSSIA 1891–1991: A HISTORY* 194 (2014) (emphasis added).

The point is not that a well-managed commitment process striving to identify dangerous offenders, and not misidentify other offenders, is necessarily on a slippery slope toward totalitarianism. Whether or not SVP laws are ultimately justifiable, it is only fair to note that sex offender civil commitment facilities are vastly more humane than Soviet facilities holding political prisoners in the 1930s, and unlike political prisoners, committed persons can potentially benefit from the treatment opportunities being offered. In theory (and in some states, occasionally in practice), a committed resident can advance in treatment to the point where he can eventually obtain full discharge. It is also true that, at least in years past, sex offenders now being committed *were* dangerous, and did heinous acts at one time, even if many are no longer dangerous after their last long sentence is completed. The same cannot be said of most victims of political terror and oppression. The point is only that a similar kind of thinking can be involved in both contexts, albeit much different in degree, to the detriment of other values.

45. Blackstone’s ratio from English common law (the basis of American jurisprudence) expresses a hierarchy of values, captured in the saying: “Better ten guilty persons escape than one innocent man suffer.” See 4 WILLIAM BLACKSTONE, *COMMENTARIES* *358. The point of this ratio is not to give a quantitative measure of value (or an exchange rate), but to provide a dramatic illustration of fundamental values in the criminal law of a rights-based society. This order of values exemplified in the ratio grounds a host of procedural rules and legal protections for defendants in criminal cases.

not predictions of eventual outcomes. These are subtle points, so it is helpful to look at each approach in more detail.

The first approach divides released offenders into two groups. One group consists of offenders who were determined to meet the “likely” criterion for commitment. In Florida, a sexually violent predator is someone who is likely to engage in acts of sexual violence if not confined (or more precisely, a documented sex offender with a mental condition that makes the person likely to continue sexual offending if not placed in a secure facility for long-term control, care, and treatment). Offenders determined by experts using risk assessment methods to be likely to have a new sexual offense if not committed (but who were released by the courts without commitment) would constitute the “likely” group. A second group would be composed of offenders who were determined to not meet the “likely” standard. This is the “not likely” group. These offenders are the type that would be released at end-of-sentence because they would not be recommended for commitment. Given the intent of lawmakers to commit a “small but extremely dangerous number”⁴⁶ of sexual predators, the “not likely” group will vastly outnumber the “likely” group.

Throughout the years of SVP commitment in Florida, SVPP and its evaluators commonly interpreted “likely” to mean “more likely than not” and gave it a quantitative interpretation (i.e., likelihood greater than 50%). It was also common practice in Florida to interpret the sexual recidivism rates on the actuarial tables for risk assessment instruments such as the Static-99⁴⁷ as

46. FLA. STAT. ANN. § 394.910 (West, Westlaw through ch. 255 (End) of the 2014 2d Reg. Sess. and Spec. “A” Sess. of the 23d Leg.).

47. An actuarial risk assessment instrument is a list of generally unchanging (static) characteristics of sex offenders statistically associated with sexual recidivism according to recidivism studies. The characteristics are mostly facts about sexual and other criminal history, victim type, sentencing occasions, and so forth, as well as some limited details about social history (e.g., any history of lasting intimate relationships) and some demographic information (e.g., age). Offenders are scored according to how many of these characteristics they possess. An actuarial table consists of sexual recidivism rates observed (or predicted) for samples of offenders with a given score or scoring in a given range. Each score or score range is associated with one sample considered to be “normative.” There is one rate for each sample. See ANDREW HARRIS ET AL., *STATIC-99 CODING RULES REVISED 2003* app. 6, at 69 (2003); see also AMY PHENIX ET AL., *STATIC-99R & STATIC-2002R: EVALUATORS’ WORKBOOK 5–8* (2012). Actuarial tables are contained in these manuals.

probabilities (or likelihoods) of offenders committing a new sexual offense after their most recent release.⁴⁸ The high-risk sample for the Static-99 consisted of 129 offenders (with scores of 6 or more). The sex offense reconviction rate associated with this sample is listed as 0.52. This means that an estimated 67 offenders would have been reconvicted within fifteen years of release had they all been released at the same time and followed for fifteen years ($0.52 \times 129 = 67$).⁴⁹ Fifteen years is the longest follow-up period for the Static-99. Interpreting this rate as a probability yields a 0.52 probability of reconviction for new sexual offenses, or 52% likelihood. This likelihood is higher than 50%, so it was common to consider offenders falling into this category as meeting the “likely” standard.

This interpretation is assumed for purposes of the present discussion. How might one assess the accuracy of risk assessments that placed offenders into the “likely” group? It is first important to look at a group of such offenders who were released instead of committed and see if the sex offense reconviction rate was in fact higher than 50%. No offender recommended for commitment in Florida would be qualified for release for fifteen years by the end of the SVPP study in February 2013. The ten-year rate for the high-risk sample on the Static-99 is 45%. The five-year rate is 39%. The average release time of offenders in the SVPP study has yet to be calculated but is likely to be six to seven years (many have been

48. This author treats probabilities as decimal values when quantified (e.g., 0.52). Likelihoods will be treated as percentages (e.g., 52%). $Likelihood = probability \times 100\%$. For purposes of this discussion, the terms will be treated as interchangeable in basic meaning: both indicate degree of possibility.

49. Technically, rates for the Static-99 come from what is called survival analysis, which is used when the offenders in a sample were not all released at the same time. R. Karl Hanson & David Thornton, *Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales*, 24 LAW & HUM. BEHAV. 119, 125 (2000). The sample of 129 offenders did not consist of 129 offenders released at the same time and followed, as a group, for another fifteen years. *Id.* at 128. Their release times varied, which means different periods of time spent in the community with the opportunity to reoffend. *Id.* at 125. The 67 figure does not, therefore, necessarily reflect the exact number of reconvicted offenders found in this sample. In a sense, we might say that the 67 figure reflects the number of reconvicted offenders we would expect to find in a group of offenders with a 0.52 probability (52% likelihood) of reconviction, based on actual observation of a group of offenders with scores in the “high” range (6 or more), at least some of whom survived in the community for fifteen years (without a new sex offense conviction).

released ten or more years). It is reasonable to use the five-year rate for comparison. A group of offenders in the “likely” category would be expected to have at least a 39% sexual reconviction rate within five years of release. If the group in fact displays this rate, or a higher rate, then the risk assessments placing offenders into this group were accurate. This does not mean every single assessment was accurate, but the aggregate result would indicate a reasonable degree of accuracy in determining which offenders meet the “likely” standard.

What does this mean for assessing the accuracy of those risk assessments that placed offenders into the “not likely” group? These are offenders that, collectively, are supposed to have a likelihood quantity lower than 50% (or just at 50%). The next step is to look at a group of “not likely” offenders who were released to see if their reconviction rate is indeed below 50% (or below 39% for five years release time). Preferably, this rate would be as far below 50% as possible.

It is not reasonable to expect the rate to be zero. Tens of thousands of sex offenders will not meet the “likely” standard. The majority of sex offenders approaching end-of-sentence (when they are referred for commitment consideration in Florida) have only one known sex offense in their histories (87% of the 3000 or so offenders referred for commitment consideration in fiscal year 2012–13).⁵⁰ In Florida, this would not be enough documented sexual criminal history to support a paraphilia diagnosis and a high actuarial score. So, they are released at end-of-sentence. For any group of released sex offenders not physically incapacitated immediately upon release, there will be offenders who offend again. If the number of released offenders is in the tens of thousands, even a small percentage reoffending will mean hundreds of reoffenders who did not meet commitment criteria ahead of time. Some reoffenders may well be offenders who did meet criteria ahead of time based on what their mental condition really was, and for some there may have been sufficient documented sexual criminal history in the file for evaluators to potentially make this determination with reasonable confidence. But the majority of reoffenders will not fall into this category. Society would prefer that the recidivist percentage for the “not likely” group be as low as is realistic to expect.

50. SVPP Data, *supra* note 4.

The second approach to assessing the accuracy of SVP-related risk assessments is to look at the group of offenders who were determined not to meet commitment criteria, the “not likely” group, and see how many offenders had a new sex offense. The reoffenders are then considered to be missed predators or offenders who did meet commitment criteria but were not accurately identified as such. Given that no process is perfect and consistently accurate prediction in individual cases is not possible, if the number of reoffenders is a small percentage of the group, then this is the best we can expect. As it turns out, this percentage is 2%–4% in Florida (to be discussed later in this Article).

However, this approach assumes that an eligible offender wrongly determined to be non-eligible is anyone who later reoffends. This ignores the fact that the vast majority of sex offenders referred for commitment consideration do not meet the second and third criteria at time of commitment consideration because there is not enough documented sexual criminal history to support a paraphilia diagnosis and a high actuarial score. So they are released at end-of-sentence. And, as noted, in any group of released sex offenders not physically incapacitated immediately upon release, there will be offenders who offend again. The number of missed predators is therefore a minority fraction of the 2%–4%.

This raises an issue that is difficult for the non-expert (and probably many experts) to grasp. It is counterintuitive. It is the fact that most sex offenders who will sexually reoffend after release would not have met commitment criteria prior to release.

D. Most Sex Offenders Who Reoffend Do Not Meet Commitment Criteria Prior to Reoffending

Many do not meet commitment criteria, even after reoffending. Non-experts seldom understand this point because it is counterintuitive. For many years it has been standard practice in Florida (and likely nationwide) to require a “high” range (or at least “high moderate”) actuarial score to conclude that an offender meets the “likely” criterion for commitment. Exceptions exist, but they are exceptions, not the rule. Based on this, actuarial tables for risk assessment instruments provide data that make clear the fact that most offenders who will obtain new sex offense charges or convictions after release will not earn “high” or even “high

moderate” scores based on their known criminal history prior to release.

The actuarial table for the Static-99 provides a useful example. It was the risk assessment instrument used in Florida (evaluators could use additional instruments if desired). Listed reconviction rates on the Static-99 come from a sample of offenders released during an era (1950s to early 1980s) in which recidivism rates were higher than those found in recent years.⁵¹ As noted, experts commonly consider offenders falling in the “high risk” category on the Static-99 (scores of 6 or higher with the highest possible score being 12) as meeting the “likely” criterion for commitment. This is because only this category on the original instrument is associated with a reconviction rate exceeding 50%.

From a total sample size of 1086 offenders used to norm the instrument, 129 offenders fell into the “high risk” normative sample (or subsample). Given that the five-year rate listed was 0.52, this means that we can expect there would have been sixty-seven reconvicted offenders (0.52×129) had the entire sample been

51. The fact that rates were higher in past decades can be seen by comparing rates listed on the actuarial table for the original Static-99 to the rates on tables for the Static-99R. The former are higher. For example, the ten-year rate for offenders with scores of 6 or more for the Static-99 is 45%. The ten-year rate for offenders with a score of 6 in the non-routine sample is 33.4%. See HARRIS ET AL., *supra* note 47, app. 6, at 69; see also PHENIX ET AL., *supra* note 47, at 5–8. The most dramatic evidence, however, is found in the data from the OPPAGA and SVPP studies, soon to be discussed *infra* Part III.B. Rates for offenders in these studies, most of whom scored at least a 5 on the Static, are much lower than rates listed for both the Static-99 and the 99R. For example, the OPPAGA study found a 3.6% sex offense reconviction rate for 140 offenders recommended for commitment but granted a form of conditional release pursuant to settlement agreements. Offenders with settlement agreements (at the time of this study) had an average Static-99 score of 5.91 (average release time at least five years). This means that most offenders had scores of at least 6. On the Static-99, the five-year reconviction rate for a sample of offenders with scores of 6 or more is 39%. Further evidence of higher rates in past decades is the overall decline in sexual and violent offense rates since the early 1990s. For example, since 1993 the rate of violent crime (a category that includes sexual crime) has declined 72%, from 79.8 to 23.2 victimizations per 1000 people age twelve or older. See TRUMAN & LANGTON, *supra* note 6, at 1.

released at the same time and followed for fifteen years.⁵² Because the sample is small, this number comprises a relatively high percentage of the total membership of the high-risk subgroup. For years it was standard practice for experts to interpret rates as probabilities (or more precisely, proportions were treated as probabilities, and percentages were treated as likelihoods). A reconvicted offender percentage of 52% tips above 50%. Treating the percentage as likelihood, this means that offenders in the high-risk category for the Static-99 would have a 52% likelihood of becoming reconvicted offenders. This likelihood would be treated as sufficient for “more likely than not” and thus high enough to reach the “likely” threshold.

In contrast, a total of 957 offenders fell into the lower score subgroups. This is a much larger comparison group. In contrast to the high-risk sample, where only 67 reoffenders were enough to produce a greater than 50% likelihood, there would have to be 500 or more reoffenders for a similar likelihood to be generated for the group of 957 offenders. As it is, a total of 205 offenders in this group (scores 0–5) are expected to be reconvicted for post-release sexual offenses. This is obviously a larger number of reconvicted offenders than the number of reconvicted offenders in the high-risk sample. But it comprises a much smaller percentage of the

52. The number of reconvicted offenders in other subsamples (lower scores) can be calculated in the same way. The number comes from multiplying the rate listed on the experience table for a particular sample of offenders by the total number in the sample. The below calculations are based on the Static-99 table:

Offenders Sample Size	Score	Reconviction Rate	Reconvicted Offenders
89	0	0.16	14
150	1	0.07	11
204	2	0.16	33
206	3	0.19	39
190	4	0.36	68
100	5	0.4	40
129	6 or higher ("High Risk" Classification)	0.52	67
1068	TOTALS		272

See HARRIS ET AL., *supra* note 47, app. 6, at 69.

relevant group ($205 / 957 = 0.214$ (21.4%)), and a likelihood well below 50%.

This means that out of a grand total of 272 reconvicted offenders in a sample of 1086 offenders, 205 would not be associated with a likelihood of conviction high enough to meet the “likely” standard (when interpreted quantitatively).⁵³ The 205 reoffenders in the lower score group comprise 75% of the reconvicted offenders in the sample. For the whole sample, 25% (272) were reconvicted for a new sex offense within fifteen years of release. If the same percentage characterized a sample of 31,626 offenders considered for commitment in Florida since 1999, there would be 7921 reconvicted offenders in the sample. Only 1949 of the 7921 (25%) would meet the “likely” standard prior to reconviction. Fortunately, sexual recidivism has decreased substantially since the development of the original Static. As it is, less than a third of this number (562 reconvicted offenders) had not received commitment recommendations ahead of time in Florida.

Data on statewide-reported sexual crimes and referrals for commitment consideration support the same point about most reoffenders not having been commitment-eligible ahead of time. In fact, most sexual offenses of any kind (whether first-time offenses or instances of recidivism) likely come from persons who do not meet commitment criteria prior to committing those crimes. This is in part because most sexual offenses probably come from persons not yet known to authorities to *be* sex offenders (i.e., they have yet to have a first arrest or conviction). Given the first criterion for commitment (previous conviction for a sexual offense), none of these individuals would be referred for commitment consideration or could meet criteria even if referred.

The following should be considered: in fiscal year 2012–13, approximately 3000 sex offenders approaching end-of-sentence in

53. Even if offenders with “high-moderate” scores (4–5) are included within the “likely” group, the number of reconvicted offenders not meeting this criterion is still substantial (97). Specifically, a total of 68 reconvicted offenders were in the subgroup comprised of offenders with a score of 4 (36% of 190 offenders) and 40 reconvicted offenders were in the subgroup with a score of 5 (40% of 100 offenders). When these reoffenders (108) are added to the reoffenders in the high-score subgroup (67), this constitutes 175 reconvicted offenders, which leaves 97 reconvicted offenders (in the score range of 0–3) who would not meet threshold. Rates for scores of 0–3 are far below 50%.

Florida were referred for commitment consideration. Of these, 87% were offenders with just one prior sex-related conviction. An additional 11% consisted of offenders with two convictions.⁵⁴ For the most part (but not always) these 98% are the offenders who earn less-than-high scores on the Static (99/99R). Most do not meet clinical criteria for a paraphilia diagnosis, which requires at least two known offenses. Only 2% of offenders had two or more sex-related convictions, which, for Florida SVPP, is generally (although not always) needed for a well-supported paraphilia diagnosis (to meet the mental abnormality criterion) and a high actuarial score (to meet the “likely” criterion).

If all 60 persons (2% of offenders with two or more sex-related convictions) were recommended, this leaves 2940 offenders not recommended. According to the Adam Walsh study, 5.2% of all sex offenders released from prison will have a new sex-related charge within five years. This rate comes from a group of offenders with an average Static-99R score of 2, which would not generally be sufficient to meet the “likely” criterion. Using the number of offenders referred for commitment for one year, the number referred for consideration for a five-year period would be approximately 15,000.⁵⁵ Approximately 14,700 offenders would not be recommended for commitment (5×2940). Using the 5.2% rate, 764 of these offenders would be expected to have at least a new sex-related charge (not all within the same five-year period, but on average, over time). Over a five-year period, approximately 300 offenders would be referred for commitment, with at least three convictions. Assuming all would be recommended and assuming all would have reoffended if released, the number of reoffenders not eligible for commitment is over twice the number of offenders who were eligible.

Considering sex offending in general, there are reasons to think that the amount of new sexual offenses coming from already documented sex offenders is a small fraction of all sexual offenses leading to arrest (even less of all that is reported or all that occurs,

54. SVPP Data, *supra* note 4.

55. Even if all offenders with at least two convictions are committed (13%, or approximately 390 out of 3000 offenders for one year), this would do nothing to prevent the sexual recidivism coming from the remaining 2610 offenders (87%), about 5% of whom (130 offenders) would be expected to reoffend. SVPP Data, *supra* note 4.

reported or not).⁵⁶ A study of sex offenses in New York looked at all sex offenses resulting in arrest for the period of 1986 to 2006.⁵⁷ There were over 170,000 sexual offense arrests for 160,000 unique sex offenders.⁵⁸ Approximately 96% of all arrests for rapes and 94% of all arrests for child molestation involved first-time sex offenders,⁵⁹ that is, offenders arrested for the first time, having no previous arrests or convictions for sexual offenses. Absent prior conviction, these offenders would not have been on the sex offender registry for New York. Had they been Florida sex offenders, these individuals would not have been referred for commitment consideration, given that they would not have met the first criterion (at least one conviction for a sexually violent offense). This means that at least 94%–96% of sexual crimes could not have been prevented by commitment, and the percentage is even higher given that only a small fraction of all sex offenders referred for commitment consideration end up committed.

Florida data make the same point. For example, in 2013, the year in which the total number of reported sex offenses in Florida was at a historic low, 9863 sexual crimes were reported.⁶⁰ Over a five-year period, assuming stable rates, there would be a total of 49,315 reported sex offenses. If all of this offending were coming from the 764 reoffenders not eligible for commitment this would be at least 65 new offenses from every one of them, which is highly unlikely. It is much more likely that many, if not most, reported

56. As widely recognized, reported sexual crime comprises a minority of all sexual crime. Nationwide, 34.8% of rapes and sexual assaults were reported to the police in 2013. TRUMAN & LANGTON, *supra* note 6, at 7. This is an increase from 2012 (28.2% reported) and 2004 (29.3%). Sex crime rates are decreasing nationwide. *Id.* In 2013, per 1000 persons age twelve or older, 23.2 individuals were victims of rape and sexual assault crimes. *Id.* at 14. This is a decrease from 2012 (26.1) and 2004 (27.8). *Id.* Although reported sexual crime continues to be but a fraction of all sexual crime, sexual crime rates appear to be decreasing with no evidence of a decrease in reporting.

57. Jeffrey C. Sandler et al., *Does a Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 PSYCHOL. PUB. POL'Y & L. 284, 288 (2008).

58. *Id.*

59. *Id.* at 290.

60. See 1971–2013 REPORTED SEX OFFENSES, *supra* note 6, at 1–2. In 2013, the FBI implemented a new definition of “rape.” *Id.* at 2. This renders 2013 data somewhat difficult to compare to other years. See *UCR Program Changes Definition of Rape*, FBI (Mar. 2012), <http://www.fbi.gov/about-us/cjis/cjis-link/march-2012/ucr-program-changes-definition-of-rape>.

sexual offenses comes from perpetrators who have yet to have a first arrest or conviction for sexual offenses, so they would not have been sex offenders coming out of prison referred for commitment consideration.

As it is, many of the 60 offenders with three or more sex-related convictions were of an age when risk decreases or were persons in poor health, which also decreases risk. Others were individuals with long periods of intensive sex offender-specific probation after release, and no history suggesting unmanageability with close monitoring by probation officers. These would have been factors counting against recommendation in Florida.⁶¹

Despite this, the sexual recidivism rate in Florida for offenders not recommended for commitment is low by any realistic standard of appraising rates associated with crime control measures, at 2%-4% (with an average release time of six to seven years). For a group of offenders who had been determined to be "not likely," this percentage is far below 50%, as would be expected had offenders determined to not meet the "likely" criterion been accurately assessed.

At most, commitment will prevent only that amount of sexual recidivism that comes from offenders who have enough documented sexual criminal history (usually multiple convictions) to earn a paraphilia diagnosis and occupy higher risk/score actuarial categories. It will not prevent sexual recidivism by sex offenders with less history, which comprise the vast majority of all sex offenders and the majority of sexual reoffenders.⁶²

61. This is not to say that only offenders with three or more sex-related convictions meet criteria or that SVPP in Florida used three convictions as a necessary condition. Much variety exists in the backgrounds of offenders where sufficient evidence exists to determine eligibility for commitment (e.g., some offenders with one to two convictions had cases where credible evidence was available indicating other offenses; other offenders with just one conviction had charges on other occasions; and so forth). Sometimes an offender is known to have had many offenses and victims before finally receiving his or her first (and only) conviction. The point is simply that, as a group, offenders for whom there is enough evidence for experts to have reasonable certainty that they meet criteria are often, though not always, individuals with more than two sex-related convictions (among other factors).

62. Hindsight bias can seem compelling. If someone reoffends it would seem only commonsense that the person was likely to reoffend at least at some point in time prior to the re-offense. If the person was likely (at any prior time), then the person met commitment criteria (before the re-offense). The person's mental condition would seem to be a mental abnormality just by virtue of creating the

With this in mind, the next step is to evaluate the accuracy of the SVP risk assessments in identifying commitment-eligible offenders. If the group of all offenders who were not determined to meet the “likely” criterion (since implementation of the Act in 1999) show a sexual recidivism rate at or above 50% (at or above 39% for five years release time), then a significant number of eligible persons were misidentified as non-eligible. The further below 50% (or 39% for five years) this rate is, the better. If the rate is significantly below threshold, and especially if it is far below, then it is reasonable to conclude that the SVPP experts did reasonably well identifying commitment-eligible sex offenders and recommending them for commitment.

Before looking in detail at recidivism data, an important issue should be addressed. This author has on multiple occasions heard claims to the effect that “recidivism research is not a valid means of evaluating the accuracy of commitment eligibility determinations or the effectiveness of commitment programs.” The reason is that “those sex offenders are reoffending; they are just not getting caught.” This is basically an attack on the use of proxy indicators in criminal behavior research.

This author has heard similar claims from experts in Florida accustomed to making commitment determinations on the basis of the high actuarial rates listed for the Static-99, but frustrated by the lower rates on revised Static-99R and even lower rates found in research studies like the ones to be discussed here. The position appears to be that actuarial instruments that are based on recidivism research utilizing proxy indicators are useful when they provide rates high enough for easy and seemingly judgment-free, objective “likely” determinations. But when actuarial rates are not this high, they “underestimate risk” and require “adjustment” to reflect the “true” probability of reoffending. Comparable reasoning

internal psychological conditions allowing this likelihood. Although true at some level, the problem of predicting when someone will, at some future date, *become likely* to commit a crime is exactly the same as the problem of predicting the crime itself. And barring an extreme form of determinism with respect to behavior and events, it does not follow that a reoffender was likely to reoffend all along, even years ahead of time, much less that an evaluator had sufficient evidence to detect this likelihood at the time of commitment consideration. Many common criminals, generally aggressive and impulsive across domains, will become likely to do a sexually violent act in a short period of time just prior to the act, much like they become likely to do other opportunistic crimes.

can be heard (in this author's experience) within state agencies: if recidivism data showed high rates, this would support more action to protect the public. If data showed low rates, this means the measures were invalid.

E. Are Proxy Indicators Misleading?

Empirical research is necessarily reliant on proxy indicators to observe natural phenomena not directly (or continuously) observable. Clearly, there are sexual offenses that do not elicit arrests; many are not even reported. This means that arrests and convictions are not a good proxy indicator of how many sex offenses there are, or the number of new offenses by persons with previous offenses.

However, arrests and convictions can be good indicators of how many (new) *reoffenders* there are when the offenders being studied are individuals who have already demonstrated a conspicuous failure to maintain a pattern of offending without acquiring charges or convictions. These are the offenders who are providing empirical indication of lacking skill in evading (at least eventual) detection. The recidivism studies to be discussed examined sex offenders recommended for commitment but released (mostly) without commitment. These are offenders who, typically, had enough sexual criminal history to meet clinical diagnostic criteria for a sexual deviance disorder (paraphilia) and earn a high actuarial score. In general, this would have required multiple convictions for sex-related offending.

If an offender already has detected sexual offenses—multiple detections in fact—what logical or empirical reason is there to think that he would *now*, after his most recent release, learn to offend without detection? After all, his past failures to escape detection (for many of these offenders) occurred during decades in which it was easier to offend without detection. Until the 1990s there were fewer sex offender restrictions, less use of sex offender specific intensive probation, less severe sanctions (i.e., shorter prison terms), and less public awareness. Even if there are some such individuals, what reason exists to think that their number is so high that rates would be significantly higher if they were accounted for?

Recidivism research is, more precisely, *recidivist* research, or research into how many offenders recidivate, or recidivate yet again, after their most recent release. It is informative for risk

assessment, because the risk being assessed in a psychosexual evaluation is risk of becoming a (new) sexual reoffender. It is not the risk of a new offense occurring at all, perpetrated by anyone. Given their histories, the offenders studied by OPPAGA (and SVPP) represent exactly those sex offenders expected to be detected as a new recidivist by means of a proxy indicator (a new charge or conviction) if they continue their pattern of repetitive sexual offenses. They may well have new offenses that escape detection. But it only takes the detection of one offense to make it possible to observe an individual's status as a (new) sexual recidivist. Their status is now known, whether they have one hundred new offenses or just one.

If a group of offenders with multiple past charges/convictions is found to have a low rate of offenders observed to have become recidivists (by means of obtaining a new charge/conviction), then the most parsimonious explanation for why the rate is low is that the vast majority of these individuals did not sexually reoffend.

What about the offenders not recommended for commitment? These offenders would typically have had much less prior sexual criminal history. They would have to have had at least one previous sex offense-related conviction to meet the first criterion for commitment (and therefore to be referred for commitment consideration). But a great many offenders referred for commitment consideration have just one known sex offense conviction. Compared to offenders with multiple convictions, it is reasonable to think the one-to-two-conviction group has proportionally more offenders who offend infrequently or just once, as opposed to being driven by sexual disturbance to offend repeatedly. Because they offend less frequently, they are relatively more likely than the repeat offenders to have just one new offense if they reoffend at all and escape detection. For this reason, samples of offenders with lower scores are apt to see their recidivism rates increase the most if undetected reoffenders were included with the reoffenders who obtained a new charge or conviction. But they are also, as a group, the least prone to continue sexual offending. This is consistent with a decline in reported sexual crime in Florida of almost 50% between 1993 and 2012, from 101 reported sex crimes per 100,000 state residents to 53.⁶³ Altogether, there is no reason to think that the number of

63. 1971–2013 REPORTED SEX OFFENSES, *supra* note 6.

undetected reoffenders in this group is large, such that their reconviction or new charge rate would increase significantly if undetected reoffenders were included.⁶⁴

Finally, this author has also heard the claim that the average sex offender has “hundreds” of victims. In a similar vein, one Australian parliamentarian described sex offenders as “beings of a subhuman category . . . [they are] . . . the least rehabilitatable people”⁶⁵ Urban legends about typical sex offenders being prolific predators stem in part from misinterpretation of polygraph studies, now decades old, where a few outlier offenders reported extremely high numbers. This elevates the mean or average number for the group despite the fact that most offenders reported far fewer victims. In one study, the average number of victims for non-incest pedophile offenders with female victims was reported to be 20 victims. The average number for offenders with male victims was 150! In contrast, the median numbers for these offenders were 1.3 and 4.4 victims.⁶⁶ A group victim average in the hundreds (when most offenders in the sample had far fewer) is easily distorted to imply that *each* sex offender, or the typical offender, has a large number of victims.

64. Common beliefs about sexual crime are often the exact opposite of the truth. It is perhaps counterintuitive, but the sex offenders most likely to offend without getting caught (perhaps ever) are those, as a group, with the *fewest* offenses and *least* entrenched sexual drive to offend. This is because, all else being equal, less frequent offending carries less risk of (eventual) detection than more frequent offending. This is why it is *low* score actuarial categories where risk of actual recidivism is, relatively speaking, more likely to be underestimated by using rates of observed recidivism as a proxy indicator. In absolute terms, however, the degree of underestimation is still not likely to be much. See generally David Finkelhor & Lisa Jones, *Why Have Child Maltreatment and Child Victimization Declined?*, 62 J. SOC. ISSUES 685 (2006). The report shows a 49% decline in child sexual abuse from 1990 to 2004. *Id.* at 685.

65. Kelly Richards, *Misperceptions About Child Sex Offenders*, 429 TRENDS & ISSUES CRIME & CRIM. JUST. 1, 4 (2011) (quoting SA, Parliamentary Debates, House of Representatives, 29 June 2010, 533 (Ann Bressington) (Austl.)).

66. Gene G. Abel et al., *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 J. INTERPERSONAL VIOLENCE 3, 17 (1987). These averages were reported in ANNA C. SALTER, PREDATORS: PEDOPHILES, RAPISTS & OTHER SEX OFFENDERS: WHO THEY ARE, HOW THEY OPERATE, AND HOW WE CAN PROTECT OURSELVES AND OUR CHILDREN 11 (2004). See also Richards, *supra* note 65, at 4–5 (discussing the misperception that sex offenders have high recidivism rates and other myths). The difference between an average and a median can be seen in the following example: Consider the series of five numbers (1, 2, 3, 4, 100). The average is 22 ($1 + 2 + 3 + 4 + 100 = 110$; $110 / 5 = 22$). The median is 3, which is the middle number in the series.

In sum, although it is true that proxy indicators detect only a fraction of all the sexual offenses that occur (mostly because the majority of sexual offending comes from persons not yet arrested a first time), they are likely to detect most if not all of those offenders who become recidivists once again, after multiple previous detections. In other words, although charges and convictions will *detect* relatively few first time sex offenders, they are likely to *miss* relatively few offenders recommended for commitment, if the latter offend again.

III. SELECTION EFFICACY

A. *How Well Are Commitment-Eligible Persons Being Identified?*

SVPP has yet to complete its study of offenders not recommended for commitment. Data on felony sex offense reconviction rates for offenders selected for face-to-face evaluation but not recommended are discussed at a later point (for purposes of a different kind of comparison). However, a newspaper series published in August 2013 reported relevant data on all offenders ever considered for commitment since 1999. On August 18, 2013, the *Sun Sentinel* published *Sex Predators Unleashed* by Sally Kestin and Dana Williams.⁶⁷ The authors conducted a survey of sexual recidivism data for all sex offenders referred for commitment consideration but later released.⁶⁸ The survey evaluated data obtained from the Florida Department of Law Enforcement.⁶⁹

The story cited raw total numbers of offenders found to have new sex-related convictions or charges after being released without a commitment recommendation.⁷⁰ It did not discuss the relevance of sample size in the main body of the story or the importance of recidivism rates in assessing accuracy in risk assessment. But rates can be calculated from reported data, supplemented by data from the SVPP database. Rates tell a much different story than raw sums.⁷¹

67. Kestin & Williams, *supra* note 2.

68. *Id.*

69. *Id.*

70. *Id.*

71. See *infra* Appendix (addressing how the story deals with the issue of sample size).

According to the SVPP database, a total of 31,626 offenders have been referred for commitment consideration between 1999 and the summer of 2013 (when the newspaper series was published).⁷² A total of 1532 offenders (4.8%) were recommended for commitment.⁷³ A total of 30,094 were not recommended.⁷⁴ The average release time for this group has not been calculated, but it is likely to be six to seven years, making it comparable to (much smaller) samples of released offenders examined in other studies.

The series reported that a total of 594 offenders out of the grand total obtained a new conviction for sexual offenses after release.⁷⁵ A total of 1384 offenders obtained new sex-related charges (which includes the 594 with convictions).⁷⁶ Using the sample size cited above, this is a sex offense reconviction rate (the percentage of offenders who were reconvicted) of 1.88% ($594 / 31,626 \times 100$). The new sex-related charge rate (the percentage of offenders obtaining at least a new charge) using the above-cited sample size calculates to 4.38% ($1384 / 31,626 \times 100$). The series reported a total of 121 of the 594 reconvicted offenders committed another rape (0.4% of the 31,626).⁷⁷ A total of 14 individuals (0.04%) murdered the victim.⁷⁸

These figures include both recommended and non-recommended offenders. As noted, 1532 offenders out of the 31,626 were recommended for commitment between 1999 and 2013.⁷⁹ This leaves 30,094 offenders considered but not recommended.⁸⁰ As will be discussed,⁸¹ the SVPP study, which examined released offenders who had been recommended (710), found a total of 32 offenders who had obtained a new sex offense conviction after release.⁸² A total of 71 offenders had obtained at least a new sex-related charge.⁸³ The remaining 562 reconvicted offenders and 1313 offenders with a new charge come from the

72. SVPP Data, *supra* note 4.

73. *Id.*

74. *Id.*

75. Kestin & Williams, *supra* note 2.

76. SVPP Data, *supra* note 4.

77. Kestin & Williams, *supra* note 2.

78. *Id.*

79. *See supra* text accompanying notes 72–73.

80. *See supra* text accompanying note 74.

81. *See infra* Part III.B.6.

82. SVPP Data, *supra* note 4.

83. *Id.*

30,094 offenders not recommended.⁸⁴ Given the very large samples and much smaller reoffender totals, the reconviction rate (4.36%) and new charge rate (1.88%) for non-recommended offenders are scarcely different from those for the entire sample.

1. *Comparison to Sexual Recidivism Rates in Other States*

These rates are similar to rates for average (non-committed) sex offenders in Florida found in other studies, as well as the rates found in other states. If a significant number of sexual predators had been missed over the years (eligible offenders misidentified as ineligible), it would be reasonable to expect that the release of these atypical, dangerous offenders would have resulted in a Florida recidivism rate higher than in other states, especially states with a proportionally higher number of sex offenders civilly confined after the end of their sentence (e.g., Minnesota).⁸⁵ In fact,

84. *Id.*

85. According to a recent survey of SVP programs conducted by the Sex Offender Civil Commitment Programs Network (SOCCPN), Minnesota commits a higher percentage of its sex offenders (and population generally) than any other state with an SVP program responding to the survey. Jennifer E. Schneider et al., *SOCCPN Annual Survey of Sex Offender Civil Commitment Programs 2014*, SEX OFFENDER CIV. COMMITMENT PROGRAMS NETWORK 6 (Oct. 27, 2014), http://soccpn.org/images/SOCCPN_Annual_Survey_2014_revised.pdf. Seventeen programs responded to the survey, *id.* at 7, out of the twenty states with SVP laws; the twenty-first program is federal. This survey is cited in the recently released review of the Minnesota SVP program (Minnesota Sex Offender Program, or MSOP) conducted by an expert panel (the Panel) appointed by a federal judge. Rule 706 Expert Report and Recommendations *passim*, *Karsjens v. Minn. Dep't of Human Servs.*, No. 0:11-CV-03659 (D. Minn. Nov. 17, 2014). "On December 6, 2013 the Court appointed Dr. Naomi J. Freeman, Dr. Michael H. Miner, Ms. Deborah J. McCulloch and Dr. Robin J. Wilson as experts pursuant to Rule 706 of the Federal Rules of Evidence." *Id.* at 1. According to the Panel, Minnesota currently has 721 civilly committed individuals, a number that is substantially higher, per capita, than the census for any other state with a sex offender-specific civil commitment law. *Id.* at 74–75. According to the 2014 SOCCPN survey, Minnesota's civil commitment rate, per million state residents, is 128.6 persons. Schneider et al., *supra*, at 6. The next highest state, North Dakota, has a commitment rate of 77.8 persons per million state residents. *Id.* California and New York both have a commitment rate of 15 persons per million state residents. *Id.* Florida civilly confines 29 persons per million (through its SVP statute). *Id.* Wisconsin has a commitment rate of 53.7 persons per million. *Id.* Minnesota's rate is 4.4 times that of Florida.

"[M]ost SOCC states recommend 3% to 4% of all cases reviewed for civil commitment consideration, with 1% to 2% ultimately being civilly committed.

the 2%–4% Florida rate is comparable, if not lower than, rates for average sex offenders released from prison without commitment in other states.

A 2012 Adam Walsh study of average sex offenders released from prison in four states, including Florida, found a 5.2% sexual recidivism rate (new charges) for a random sample of Florida sex offenders released for five years. A sample of average sex offenders released for ten years was found to have a 13.7% rate. Five- and ten-year rates for other states are reported to be 7% and 12.9% for Minnesota, 3.5% and 8.32% for New Jersey, and 4.1% and 7% for South Carolina.⁸⁶ The samples are much smaller (250–500) than the group examined by the *Florida Sun Sentinel*; however, rates are comparable or higher than the 2%–4% discussed.

Other studies have found similar results: A sample of 746 Connecticut offenders was found to have a 3.6% sexual recidivism rate within five years of release.⁸⁷ A sample of unsupervised sex offenders in Texas had a 5.5% rate of obtaining new sex-related charges or convictions within five years of release.⁸⁸ The supervised offenders in this sample (3.4% of the total) had a 2% rate.⁸⁹ A sample of sex offenders in Washington was found to have a 2.7% sex offense reconviction rate within five years of release.⁹⁰ A sample of sex offenders released from prison in Minnesota had a 10% sex-related reconviction rate and a 12% new-charge rate (average release time of 8.4 years).⁹¹ These rates are in line with Florida rates, if not higher.

However, assessment data from Minnesota indicate that 9% of cases screened are referred to the County Attorney for civil commitment” Rule 706 Expert Report and Recommendations, *supra*, at 75. The Panel noted that county attorneys in Minnesota have the ability to file civil commitment petitions for cases not referred to them, which means that the percentage might be higher. *See id.* According to the Panel, both the per capita rates and the screening and commitment numbers support the Panel’s observation that there are individuals currently committed in Minnesota who likely do not meet commitment criteria. *Id.* The Panel interprets these numbers as emphasizing issues with the SVP screening and assessment process in Minnesota, as well as the standards for commitment in that state. *Id.*

86. Sexual recidivism rates for each state studied are presented in ZGOBA ET AL., *supra* note 7, at 20–21. For average Static-99R scores, see *id.* at 21.

87. KUZYSK, *supra* note 7, at 4.

88. Boccaccini et al., *supra* note 7, at 301.

89. *Id.*

90. BARNOSKI, *supra* note 7, at 2.

91. MINN. DEP’T OF CORR., *supra* note 7, at 20.

2. *What a Low Sexual Recidivism Rate Means for How Well Experts Identified Predators*

What does a 2%–4% sexual recidivism rate for the over 30,000 offenders not recommended for commitment mean for accuracy in identifying offenders in the “likely” group?

Given that most offenders who reoffend will *not* meet commitment criteria ahead of time, it follows that only a small fraction of offenders with new sex offense convictions or charges would have had enough sexual criminal history to meet criteria ahead of time. These would be the commitment-eligible offenders who were missed or misidentified as non-eligible. Thus, instead of 2%–4% of offenders in the over 30,000 offenders considered to be missed predators (according to one approach to evaluating SVP risk assessment accuracy), the actual number of genuinely eligible offenders missed comprised a *minority fraction* of the *already small fraction* (2%–4%) of all offenders considered for commitment (likely less than 1%).

It should be noted that just as there are criteria-ineligible offenders in the sample of all offenders considered for commitment who did reoffend, it is possible there were commitment-eligible offenders not identified as such who did *not* reoffend. So it should not be assumed, necessarily, that offenders who did not reoffend are persons who did not meet commitment criteria ahead of time. But given the description of commitment-eligible offenders provided by lawmakers,⁹² and the kind of mental condition referred to by the second and third criteria for commitment, the number of genuinely eligible offenders who were likely to refrain from offending if released is likely to be small. Commitment-eligible offenders are also supposed to be not only motivated to continue offending, but impaired by disorder to the point where they would have great difficulty not offending, even if they tried. It is hard to imagine more than a few among the “small but extremely dangerous number”⁹³ of predators exerting enough willpower to stop offending entirely, even if they could make such a

92. See FLA. STAT. ANN. §§ 394.912, .917 (West, Westlaw through ch. 255 (End) of the 2014 2d Reg. Sess. and Spec. “A” Sess. of the 23d Leg.) (providing a definition of a sexually violent predator and that upon a court determination that a person is a sexually violent predator, the “person shall be committed to the custody of the Department of Children and Families”).

93. *Id.* § 394.910 (Westlaw).

decision effectively. The number of offenders is a reasonably fair estimate of the number of offenders who were not eligible for commitment ahead of time.

The same cannot be said about offenders who do not meet criteria but do reoffend. Most offenders belong to a peer group for which commitment criteria are not met. Most reoffenders are located in this group. On the reasonable assumption that very few persons who *do* meet criteria would *not* be reoffenders if released, it is very likely that the number of reoffenders who were predators, but not identified, is a minority fraction of the 594 reconvicted offenders and 1838 offenders with new charges, or a fraction of the 2%–4%.

A large group of “not likely” offenders showing a 2%–4% sexual recidivism rate is strong evidence of a high level of accuracy in identifying commitment-eligible sex offenders. Such a rate is far below 50% and even 39% (for five years release time).⁹⁴ Failure to identify an offender who actually did meet criteria—the outcome being a released predator—is highly undesirable, as that offender is likely to harm a new victim or victims. From a policy perspective, however, a rate this low is likely to be as good as it gets in the real world, especially considering the fact that risk assessment is probabilistic and approximate at best, rather than a precise method of consistently accurate prediction.

In contrast, there was poor accuracy in identifying those persons who did not meet commitment criteria. The next section discusses data showing this to be true.

B. *How Well Are Non-Eligible Persons Being Identified?*

1. *The OPPAGA Study of Offenders with Settlement Agreements*

The SVPP study was inspired in part by the unexpected findings by OPPAGA researchers studying recidivism by offenders recommended for commitment but granted conditional release by the courts.⁹⁵ SVPP worked closely with OPPAGA on the project. The OPPAGA study examined all offenders ever granted

94. See *supra* Part II.C. (discussing that in the study, researchers would look at a group of “not likely” offenders who were released to see if their reconviction rate is indeed below 50% (or below 39% for five years release time), and noting that it is preferred that this rate be as far below 50% as possible).

95. OPPAGA Memo, *supra* note 3.

conditional release pursuant to a settlement agreement in the State of Florida who had at least one year of release time by October 2011 (140 offenders).⁹⁶ Average release time for this sample is unknown but likely to be at least five years.⁹⁷

2. *Settlement Agreements in Florida*

The fact that any offenders recommended for commitment in Florida have obtained conditional release agreements might seem odd given legislative findings that persons subject to the Act are not appropriate for less restrictive alternative strategies. Generally, when the courts find someone to be a sexually violent predator, a commitment order is entered which directs the person to be transferred into DCF custody for confinement at the Florida Civil Commitment Center (FCCC) at end-of-sentence. Sexually violent predators are defined as persons likely to reoffend “if not confined.”⁹⁸ A person who is dangerous if left free but not if he is supervised is not a sexually violent predator in Florida, and thus not subject to civil measures of control. The introduction of a formal Less Restrictive Alternatives option into the Florida SVP Act would require the removal of this phrase from the key definition.

At the same time, the Act is a mental health law and therefore civil rather than criminal. As a result, many Florida courts have recognized agreements between the state and attorneys representing offenders recommended for commitment. These are agreements that the offender will be allowed release on several conditions. One condition is that he must attend and complete outpatient sex offender treatment in the community (at his expense). The terms and conditions of settlement agreements resemble probation plans with the exception of no community-based structure (e.g., probation officer and GPS) unless the offender already has probation. They are a kind of “probation lite.”

In most of these cases, the ASA has filed a petition for commitment based on the SVPP recommendation. The court has made a probable cause finding and the offender is transferred to

96. *Id.* at 1–2.

97. Five years is a reasonable assumption given that 45% of the members of a larger sample of persons with settlement agreements, examined by SVPP in 2012, had release times in excess of five years, up to fourteen years. SVPP Data, *supra* note 4.

98. FLA. STAT. ANN. § 394.912 (Westlaw).

the FCCC as a pre-trial detainee. However, the ASA may have limited confidence that a jury trial will result in a commitment finding. This is not because the ASA considers the offender no longer dangerous or disagrees with SVPP's recommendation. The reasons are more logistical and related to the mechanics of winning a commitment verdict in the face of intense challenge by the defense. The reasons for cases not moving forward (e.g., witnesses are not available) have no clear relationship to risk. ASAs do not conduct additional, more selective, or more accurate risk assessment beyond what SVPP has done.⁹⁹

Although possible, no empirical or logical reason exists to assume that offenders recommended for commitment by SVPP but able to get a settlement agreement are, collectively, at significantly lower risk than other offenders recommended by experts using the same methods, including those who were committed (or who remain committed). Offenders with settlement agreements therefore provide a window into the issue of whether persons deemed by experts to be too dangerous for release are in fact this dangerous.¹⁰⁰

99. On occasion, ASAs might arrange for one more evaluation to be conducted when they are ready to decide to take a case forward, sometimes years after the SVPP recommendation. These are often filed reviews only. However, these evaluators use the same methods and standards as those utilized by SVPP. They are often also on contract with DCF to conduct initial commitment evaluations.

100. If the court approves the agreement, the offender (generally) stipulates to being a sexually violent predator and the judge enters a commitment order. The order is then "held in abeyance" or suspended (rendered temporarily inactive). This allows the offender an opportunity to comply with the terms and conditions of his agreement when released. If the agreement is violated, the court may activate the order and commit the offender to FCCC without the state having to go to trial. Some agreements are weaker. The offender does not stipulate to more than the fact that the offender was deemed commitment eligible (by SVPP) or that an evaluator has the opinion the offender meets criteria. No commitment order is entered because there is no finding of SVP status. The commitment *process* is suspended. If the offender violates the agreement the state may (or may not) resume the process of attempting to get a commitment finding.

For those judges open to such agreements (not all are), the statutory prohibition of conditional release is apparently seen as pertaining to persons subject to *active* commitment orders. Persons "subject to the Act" are apparently treated as including persons with probable cause findings only, absent approved agreements (i.e., the typical pre-trial detainee), as well as individuals subject to active commitment orders. If challenged about releasing predators, those judges and state attorneys open to these agreements might argue that offenders with

Florida DCF and SVPP are not involved in settlement agreements and do not conduct evaluations of suitability for conditional release. The SVPP multidisciplinary team had determined all of these individuals to be unsuitable for any form of release; thus, the recommendation for civil confinement.¹⁰¹

It is important to keep in mind that although the offenders in this study were considered to be sexually violent predators by SVPP experts (and OPPAGA refers to them as sexually violent predators), they were not proven to meet commitment criteria in any case the state presented before a jury, where the state's evidence was subjected to challenge by the defense.

3. OPPAGA Findings

Researchers found that out of 140 offenders with settlement agreements and at least one but up to ten years of release time, a total of 5 individuals (3.6%) had obtained a new sex offense conviction after release. No offender was found to have only a new sex-related conviction. An additional 3 individuals had a new non-sexual violence-related conviction (e.g., robbery, assault).¹⁰²

A total of 23 additional offenders had obtained a new charge of some kind.¹⁰³ Eighteen offenders had their agreements revoked, mostly for having obtained a new criminal conviction or charge, but some for having failed to comply with release conditions (e.g., not attending treatment or having unauthorized proximity contact

settlement agreements are only at the probable cause stage of the process. No one has yet proven these individuals are sexually violent predators. The stipulation to being a sexually violent predator is essentially an agreement allowing the court to treat the offender *as* a predator if the agreement is violated.

As will become clear, the OPPAGA data provide strong support for the claim that in fact these judges and ASAs have been mostly right in their decisions. They may have been entirely right, as it cannot be assumed that every reoffender was, ahead of time, a sexually driven predator who truly met criteria for commitment.

101. When the offender does not have probation, the ASA is the only monitor, dependent on regular treatment progress reports and periodic checks on criminal databases, to see if an offender has obtained a new charge of any kind.

102. New offense and revocation data (sexual and non-sexual) for the OPPAGA sample are presented in a section of the OPPAGA Memo, *supra* note 3, at 5–6, entitled “Have Sexually Violent Predators With Stipulated Agreements Committed New Crimes?” Offense data are current through September 22, 2011. *Id.* at 6.

103. *Id.* at 5–6.

with minors).¹⁰⁴ Most offenders in the sample showed no apparent indication of having returned to confinement for any reason.¹⁰⁵ The vast majority of offenders in this group gave no indication of having new sexual offenses after release, or new offenses of any kind.¹⁰⁶

This is an astonishing finding. How could the number of reoffenders be so low for a group of “likely” offenders?

4. *What Do OPPAGA Findings Mean for the Accuracy of Actuarial Risk Assessments?*

Only 5 sexual reoffenders out of 140 offenders determined by experts to be extremely dangerous can only mean that few of these individuals were in fact dangerous when assessed. Every offender with a settlement agreement had been seen as too dangerous for *any* form of release, even the most intensively supervised. Yet the vast majority proved to be manageable, most with little supervision.

This raises the issue of risk assessment methods and the validity of actuarial instruments as measures of absolute risk, that is, the absolute (non-comparative, stand-alone) likelihood of more offending. SVPP experts in Florida, and nationwide, have been heavily reliant on the Static-99 (and later 99R) for making “likely” determinations. Actuarial assessment is the basis for considering risk assessment to be empirical or scientific (hence objective) as opposed to being purely subjective (as with “unguided” clinical judgment).

Decades of research have found statistical or mechanical (mathematical) methods superior to unguided clinical judgment in differentiating persons with bad outcomes (e.g., reconviction) from persons without bad outcomes.¹⁰⁷ At the same time, although this research supports the use of actuarial/statistical methods, it leaves open the question of *exactly how* these methods are to be used. Should they be used to make claims about the absolute risk of an individual offender? This has been common practice in SVP evaluations for many years, and it is why evaluators have thought their “likely” determinations are grounded in science. Or should

104. *Id.*

105. *Id.*

106. *See id.*

107. *See generally* William M. Grove et al., *Clinical Versus Mechanical Prediction: A Meta-Analysis*, 12 PSYCHOL. ASSESSMENT 19 (2000).

actuarial instruments be used to rank order categories or groups of offenders according to relative risk for purposes of rational allocation of risk management resources (which does not require an individualized reoffense probability or absolute risk estimation attached to each offender)? An argument can be made that the methodology of this research produces findings supportive of the latter only (i.e., category rank ordering according to relative risk).¹⁰⁸

For SVPP, the OPPAGA findings illustrated the consequences of interpreting comparative prediction research as supporting the treatment of actuarial reconviction rates as absolute likelihoods that could be applied to individual cases. Even if rates could be treated as likelihoods, the OPPAGA rate showed that the listed rates on the actuarial table for the Static-99 were grossly inflated, at least in Florida, for sex offenders released since 1999.¹⁰⁹ Furthermore, rates for the revised Static-99R are also unreliable.¹¹⁰ The next issue to consider is actuarial accuracy.

The average Static-99 score for offenders with settlement agreements around this time (late 2011) was 5.91.¹¹¹ Most of these offenders would have scored in the “high risk” range (6 or more). According to listed reconviction rates for the Static-99 high-risk sample, the OPPAGA sample would have been expected to have a sex offense–related reconviction rate of 39% within five years of release, which is the release period most appropriate for comparison.¹¹² In other words, 39% of offenders with similar scores can be expected to become reconvicted offenders within five years if not confined.¹¹³ If the actuarial table for the Static-99 had been a

108. For a detailed discussion of probability as it relates to sex offenders, see generally 5 MICHAEL P. BEDNARZ ET AL., *THE SEXUAL PREDATOR: LEGAL, ADMINISTRATIVE, ASSESSMENT, AND TREATMENT CONCERNS 1* (Anita Schlink ed., 2014).

109. Compare HARRIS ET AL., *supra* note 47, app. 6, at 69 (predicted sexual recidivism for high-risk offenders at least 39), with OPPAGA Memo, *supra* note 3, at 5 (4% are repeat sexual offenders).

110. Brian R. Abbott, *The Utility of Assessing “External Risk Factors” When Selecting Static-99R Reference Group*, OPEN ACCESS J. FORENSIC PSYCHOL. 102 (2013), http://www.forensicpsychologyunbound.ws/OAJFP/Volume_5_2013_files/Abbott%202013.pdf.

111. SVPP Data, *supra* note 4.

112. HARRIS ET AL., *supra* note 47, app. 6, at 69.

113. *Id.* The rate increases from a modest 6% to 7% every five years, to 45% at ten years, and 52% at fifteen years. *Id.*

valid measure of absolute risk for sex offenders in Florida finishing prison sentences after 1999, the percentage of OPPAGA offenders expected to have a new sex-related conviction if released would be more than a third (at least), which would be more than 40 offenders. The actual number of felony sex offenders was 5.¹¹⁴

The inflation effect is stark even if the comparison analysis is more finely tuned. The Static-99R, or the revision made to the original instrument in light of more recent research, provides an interesting comparison. The 99R came out in 2009 and lists lower rates per score than the original Static-99.¹¹⁵ An interesting question is whether rates for the revised instrument are still inflated, regardless of reference group.

The SVPP began using the 99R at that time. Part of the reason for the revision was the instability (variability) in rates per score being observed by the instrument's developers in samples released more recently than the samples used to develop the original instrument. Additionally, more recent research was showing that advancing age had a more significant effect on decreasing rates (risk) than had been previously realized.¹¹⁶ The revised Static better accounted for this age effect, as well as listing rates per score for different reference groups rather than for just one.¹¹⁷

It is common practice to treat offenders selected for full SVP evaluation as most similar to the offenders who made up the High

114. OPPAGA Memo, *supra* note 3, at 5.

115. See ZGOBA ET AL., *supra* note 7, at 26.

116. Jay P. Singh et al., *Rates of Sexual Recidivism in High Risk Sex Offenders: A Meta-Analysis of 10,422 Participants*, SEXUAL-OFFENDER-TREATMENT.ORG (2012), <http://www.sexual-offender-treatment.org/108.html>.

117. In contrast to Static-99 reconviction rates, which were observed in one sample of offenders with scores in the same range, rates for the Static-99R are predicted based on a logistic regression analysis of offenders with different scores grouped together. See PHENIX ET AL., *supra* note 47, at 5–11. The STATIC-99R & STATIC-2002R: EVALUATORS' WORKBOOK contains a bibliography of relevant studies. *Id.* at 45–49. In contrast to the original Static-99, which had just one reference group and one actuarial table, the Static-99R has four reference groups and thus four actuarial tables. For example, predicted rates for the “High Risk/Need Group” come from samples of offenders deemed higher risk overall than the samples used to obtain rates for the other reference groups. This means that the predicted rate listed for High Risk/Need Group offenders with a score of 6 is higher than predicted rates for offenders in other reference groups who have a score of 6. Unlike the Static-99, evaluators using the 99R must first decide which reference group contained offenders most similar to the offender being assessed. Only then will evaluators know which actuarial table to use.

Risk/Need Group from the Static-99R. This is because they were selected for additional evaluation by virtue of appearing to be at higher than average risk on the first screening. Certainly, post-evaluation, offenders who are recommended for commitment comprise a group thought to be high risk. The High Risk/Need Group is associated with the highest rates recorded for the Static-99R.

What does the OPPAGA rate mean for the Static-99R? First, there is the issue of how to adjust scores. Most offenders with settlement agreements were assessed with the Static-99. Given its better accounting for age, older offenders will often score lower on the 99R than on the original Static-99. Many offenders in the OPPAGA sample were in the age range of forties and fifties at time of assessment. Static-99 scores were not translated into 99R scores for the OPPAGA study. However, it is reasonable to assume that the OPPAGA sample would have an average 99R score of about one point lower than the Static-99 (5.91). A larger sample of offenders with settlement agreements examined in the SVPP study had an average 99R score of 5.¹¹⁸ High Risk/Need Group individuals with 99R scores of 5 would be expected to have predicted five-year rates of 25.2%. This is seven times the OPPAGA rate.

Analysis should also take into account that offenders with settlement agreements spent at least some time in civil confinement as detainees prior to conditional release. This means that their release date (from any form of confinement) is later than the date used for scoring the instrument at the time of commitment consideration (date of prison release). Scores have not yet been recalculated to account for this date change, so precision is not yet possible. A generous assumption would be that the average Static-99R score (5) would be lessened by an additional point, accounting for additional increased age. This means that a group of offenders with an average Static-99 score of 5.91 might have an average Static-99R score of 4 (or 3.91), if date of release from prison is changed to date of release from FCCC. The predicted rate for High Risk/Need Group offenders with a score of 4 is 20.1%. This is still more than five times the OPPAGA rate.

The reference group with the lowest predicted rates on the Static-99R is the Routine Group, or average sex offenders released from prison. Routine Group offenders with a score of 4 are

118. SVPP Data, *supra* note 4.

predicted to have rates of 8.7%. This is still significantly higher than the OPPAGA rate (3.6%). Assuming an average score of 4 after adjusting for Static-99R versus Static-99 scores and date of release from civil confinement versus end of prison sentence, *OPPAGA offenders are most similar to Routine Group offenders with a score of 1 (3.8%)*.

Rate differences of this magnitude and consistency are not likely to be chance or random phenomena, regardless of which version of the Static-99 is used (and which reference group). Even the low end of the 95% confidence interval for Routine Group offenders with a score of 4 (6.2%–12.2%) exceeds the OPPAGA rate.¹¹⁹

Of course, individuals with settlement agreements have some conditions attached to release (and about half had probation officers for at least a while after release), which may not have been true of the offenders in the original (and other) Static-99 samples. However, the loosely structured release conditions of the OPPAGA offenders would not seem to explain such a vast difference in rates. And these offenders were supposedly an unusually dangerous group, such that they would be expected to produce more reoffenders than what would be expected from their actuarial score taken in isolation. Instead, the rate is much lower, with most offenders in the sample giving no indication of having been returned to confinement.

The OPPAGA findings also have relevance for the issue of relative risk, and whether the Static-99R might also have problems as a rank order device. It is helpful to do a comparison of typical Florida sex offenders released from prison at the end of a sentence.¹²⁰ The OPPAGA sexual recidivism rate was 3.6% for a group of supposedly atypical sex offenders with an average Static-99R score of 4 (average release time of about five years). The Florida offenders followed in the Adam Walsh study had a 5.2% rate and an average Static-99R score of 1.97. In other words, the two groups are very similar despite different actuarial scores.¹²¹ For

119. For actuarial rates for the Static-99 (and rates with confidence intervals for the Static-99R), see HARRIS ET AL., *supra* note 47, app. 6, at 69. See also PHENIX ET AL., *supra* note 47, at 5–8.

120. See ZGOBA ET AL., *supra* note 7, at 1. For sexual recidivism rates for each state studied, see *id.* at 20–21. For average Static-99R scores, see *id.* at 21.

121. It is not known how many of these offenders had probation to serve after release. A minority probably did, given they are sex offenders.

an instrument to function as a gauge of relative risk, higher scores should correspond with significantly higher rates (even if rates per score vary across samples). The score range here (2 to 4) is not large, but at least some rate difference should be associated with this difference in score. Problems are suggested even with respect to gauging relative risk.¹²²

The OPPAGA findings from late 2011 provided the first evidence that both the observed rates used to norm the Static-99 and predicted rates for the revised Static-99R are grossly inflated for use with a recent sample of sex offenders local to Florida. This is consistent with recent meta-analytical studies showing that rates for especially higher risk actuarial categories vary widely across samples, to the point where no empirical basis exists for treating rates as absolute probabilities (or measures of absolute risk).¹²³

In this author's opinion, the larger meaning to be found in comparing the OPPAGA and Adam Walsh study rates is this: the Florida SVPP, consisting of well-trained and dedicated experts using nationally accepted best practices in risk assessment and diagnostic evaluation, has not been able to distinguish a small group of unusually dangerous sex offenders from average sex

122. By 2012, the developers of the Static were urging caution for evaluators using the Static-99R to assess absolute risk, unless the evaluator had local norms (i.e., rates per score based on the specific area and/or population of sex offenders from which the person being evaluated comes). However, the developers appear to have no reservations about the use of these instruments for assessing relative risk. According to the developers, in contrast to the rate instability that they found in their samples, there was more stability in the rank order of rates (i.e., samples of higher scoring offenders consistently exhibited relatively higher rates than samples of lower scoring offenders). The developers also recommend that decisions concerning the density of external risk factors are also based on structured, empirically validated risk tools. See generally Leslie Helmus et al., *Absolute Recidivism Rates Predicted by Static-99R and Static-2002R Sex Offender Risk Assessment Tools Vary Across Samples: A Meta-Analysis*, 39 CRIM. JUST. & BEHAV. 1148 (2012), available at [http://www.static99.org/pdfdocs/Research-HelmusEtAl\(2012\)ActuarialBaseRateVariability-2013-10-25.pdf](http://www.static99.org/pdfdocs/Research-HelmusEtAl(2012)ActuarialBaseRateVariability-2013-10-25.pdf). Problems raised by utilizing risk factors external to an actuarial instrument for decision making about how to use an actuarial instrument are discussed generally in Abbott, *supra* note 110.

123. See Singh et al., *supra* note 116. See generally SEENA FAZEL ET AL., USE OF RISK ASSESSMENT INSTRUMENTS TO PREDICT VIOLENCE AND ANTISOCIAL BEHAVIOUR IN 73 SAMPLES INVOLVING 24,827 PEOPLE: SYSTEMATIC REVIEW AND META-ANALYSIS 1 (2012), available at <http://www.bmj.com/content/bmj/345/bmj.e4692.full.pdf>. As noted above, the developers of the Static are urging caution about using its rates to assess absolute risk. See generally Helmus et al., *supra* note 122. They recommend using rates as a gauge of relative risk. See generally *id.*

offenders coming out of prison. It seems unlikely that a lower rate would have been found if offenders had been chosen randomly for recommendation and then given conditional release.

5. *SVP Program Adjustments After the OPPAGA Study*

After the OPPAGA study, the SVPP multidisciplinary team believed it was no longer possible to have reasonable, professional certainty in Static rates as a decisive, or even primary, consideration in determining whether offenders met the “likely” criterion. For the SVPP multidisciplinary team, this meant that, at most (and even this was problematic), Static rates would support qualitative statements about relative category/group risk. These would be statements like the following: Offenders with higher scores are, all else equal, relatively more likely to be reconvicted than offenders with lower scores. Unfortunately for any purely mechanical approach to “likely” determinations, estimation of relative risk does not have direct bearing on the absolute question of whether a particular individual is more likely than not to continue committing sexual offenses.

After becoming aware of the OPPAGA findings, the multidisciplinary team began giving more balanced consideration to a range of factors, mostly clinical, as well as actuarial, in determining whether offenders met the “likely” criterion. A higher score on the Static-99R meant that relatively less clinical evidence might be required to make the case for a “likely” determination than if the score was lower (given that higher scoring offenders were relatively more likely to be dangerous), but no actuarial score and associated rate could settle the issue. The team also gave more attention to the description of a sexually violent predator provided by lawmakers.

At no point did the team ever adopt as a policy a reduction in the number of offenders recommended for commitment. Just as they had always been, cases were considered individually, on their own merits. What changed was a loss of confidence in actuarial rates as a dominant factor in “likely” determinations. Without the Static as a measure of absolute risk, case analysis was forced into greater complexity and nuance. Case consideration became more, rather than less, individualized, while still considering all risk factors supported by empirical research. This meant that experts would have much more difficulty (especially for a team of six psychologists with one vote each) achieving reasonable professional

certainty about which offenders were likely to continue offending if not confined. The cumulative result of more difficult decisions was fewer cases being recommended for commitment.

At the same time, the multidisciplinary team believed that for those cases that were recommended, at least the clinical case for recommendation was now much stronger than in previous years. Compared to past years, when only 47% of recommended cases were taken to trial and then commitment,¹²⁴ the team believed that cases would now become more likely to go to trial and result in successful commitment.

Greater selectivity in eligibility determinations does increase the chance (at least somewhat) that an offender who will reoffend will not be committed. But it also increases the chances that an offender, carefully determined to be dangerous, will have a case strong enough to earn commitment at trial. The community is protected by the commitment of genuinely dangerous persons, not by high numbers of questionable recommendations based on inflated actuarial rates.¹²⁵

6. *The SVPP Recidivism Study*

The OPPAGA findings made it clear that the time was right for SVPP to initiate the study mandated by statute. SVPP began the study in 2012 and used the end of February 2013 as a cut-off date. Offenders released by that date would be included in the study. Individuals released thereafter would be studied at a later point. The SVPP study examined a much larger sample than that used by the OPPAGA, one that contained not only offenders with settlement agreements but also offenders recommended for commitment but discharged unconditionally. SVPP also studied formerly committed offenders.

Statistical analysis of descriptive rate data has not been completed.¹²⁶ Researchers are working on this as well as obtaining data on recidivism since 2013 and offenders released since then. As

124. SVPP Data, *supra* note 4.

125. In other words, even if it were correct to interpret actuarial rates as absolute likelihoods or probabilities relevant to sex offense reconviction, whether applicable to offenders in groups or as individual cases, the OPPAGA data show that the rates currently listed for the Static-99/99R would not be accurate. *See* OPPAGA Memo, *supra* note 3.

126. For example, the rates listed here are raw descriptive rates. Survival analysis has yet to be conducted.

such, this present discussion should be considered preliminary. However, in recidivism research, rate data tell the story. Rates are now known for a large sample of offenders. As will be discussed, rates for subsets of recommended offenders are generally at or below 10% and differences in rates across subsets are small.¹²⁷ This provides strongly suggestive evidence, or at least evidence that supports a number of conclusions about the efficacy of risk assessment methods and SVP commitment in general, in a large state. Given that these methods are used in every state with an SVP law, and Florida sex offenders are little different from sex offenders in other states, Florida findings have significant ramifications for SVP policies in any state.¹²⁸

7. *The SVPP Sample*

The SVPP sample consisted of offenders recommended for commitment but released from inception of the Act in 1999 to the end of February 2013 (710 offenders).¹²⁹ Most offenders in the study (610) were recommended but released without commitment (and without treatment), either from prison at end-of-sentence (no petition filed) or from the FCCC as detainees not taken to trial (a few went to trial but were not committed by the jury).¹³⁰ The remainder (100 offenders) were both recommended and committed, but later released at annual review after a court found that they no longer met criteria for commitment.¹³¹ Most of these individuals would have had years of inpatient treatment before discharge. A total of 39 individuals out of the 100 formerly committed offenders had reached the final phase of treatment prior to release (Phase IV), with 16 offenders having achieved

127. See *infra* Part III.B.11.

128. Rates are especially close for Florida and Minnesota offenders studied by Adam Walsh researchers. See ZGOBA ET AL., *supra* note 7, at 20–21 (noting Florida's rates for five- and ten-year release times as 5.2% and 13.7% respectively, while Minnesota's comparable rates are 7% and 12.9%). For sexual recidivism rates for each state studied, see *id.* at 20–21. For average Static-99R scores, see *id.* at 21.

129. SVPP Data, *supra* note 4. An additional 52 recommended offenders from this period have been found since the end of the study. *Id.* Of these, 2 obtained a new sex-related charge or conviction. *Id.* New rates have yet to be calculated, but rates are not likely to change substantially with so few additional reoffenders.

130. *Id.* According to the SVPP Database, approximately 90% of cases taken to trial result in commitment. *Id.*

131. *Id.*

Maximum Therapeutic Benefit (MTB) as determined by the FCCC treatment program.¹³²

For the entire sample of recommended offenders later released, 170 offenders were released between ten and fourteen years ago.¹³³ A total of 251 offenders were released between five and ten years ago.¹³⁴ A total of 134 offenders were released between three and five years ago.¹³⁵ Finally, 155 offenders were released within the past three years (prior to February 2013).¹³⁶ Precise breakdowns of release times by subset of recommended offenders have yet to be calculated. Most of the formerly committed offenders are included within the offenders released within the past three years.

The majority of offenders in the sample (466 out of 710, or 66%) gave no indication of having spent even a month and a day back in prison for any new offense, including non-sexual offenses and probation violations.¹³⁷ As noted with the OPPAGA sample, this cuts against the hypothesis that low rates are merely the result of

132. *Id.* The determination that someone has achieved MTB status is not the same thing as concluding that someone no longer meets criteria for commitment (NLM). *Morel v. Wilkins*, 84 So. 3d 226, 234 (Fla. 2012). FCCC evaluators address treatment progress only, not NLM issues. Those issues are left for evaluators hired by the state and the defense at the annual review. An MTB determination means only that the individual has progressed as far as can be reasonably expected of someone participating in a comprehensive treatment program in a secure facility where no opportunities exist to observe the treatment participant applying treatment knowledge and concepts in real-life settings. *Id.* Speaking from this author's experience as the Director of the SVP facility in Arizona, such opportunities exist when a treatment program is able to integrate a gradual community reintegration component into its more advanced phases. This was done in Arizona when this author was there.

133. SVPP Data, *supra* note 4. The relevant release date for this study is the date the offender was released from the most recent period of confinement during which he was recommended for commitment. *Id.* Some offenders were returned to prison after that date, for various reasons, and may have additional, more recent release dates. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* The Department of Corrections is responsible for probation supervision in Florida. *Introduction to Community Corrections*, FLA. DEP'T CORR., <http://www.dc.state.fl.us/facilities/comcor/index.html> (last visited Nov. 21, 2014). Confinement sanctions for probation violations are therefore served in prison, even for periods of less than one year.

large numbers of offenders quickly ending up back in confinement for long periods.¹³⁸

There are four subsets of offenders recommended for commitment but later released by the courts:

- (1) The first subset comprises offenders recommended for commitment but released directly from prison at end-of-sentence (83 offenders). These are individuals for whom a petition for commitment was not filed. Without a petition, a court cannot find probable cause to believe that the person is a sexually violent predator. Without a probable cause finding, a court will not enter an order directing the offender's transfer to the FCCC at the end of his sentence. Most of these releases occurred during the very early years of the Act. Within a few years, ASAs filed petitions whenever the SVPP recommended that a petition be filed. These offenders would not have received sex offender-specific inpatient treatment or, for the most part, have been required to attend outpatient treatment.
- (2) The second subset encompasses offenders recommended for commitment and sent to the FCCC as pre-trial detainees (366 offenders). ASAs filed commitment petitions for these individuals, and courts found probable cause that these individuals were sexually violent predators. They were then transferred to FCCC as pre-trial detainees at the end of their sentences. At a later point, the ASAs for these cases made the decision not to take them to trial and the cases were dropped. The courts would have granted full discharge (release without conditions). Few if any of these individuals would have participated in sex offender-specific treatment.¹³⁹
- (3) The third subset includes offenders recommended for commitment but granted conditional release by the courts pursuant to settlement agreements (161, a number that includes the 140 offenders in the OPPAGA sample). Most of these individuals were detainees when they entered into agreements. These offenders would have been required to

138. See OPPAGA Memo, *supra* note 3.

139. FCCC does offer some general treatment programming to detainees focusing on criminal thinking and lifestyle. Some of the released detainees would have participated in this programming. A very small number of detainees (less than ten) were allowed to participate in full sex offender treatment in the early years of the Act.

participate in outpatient sex offender treatment with a community-based private provider (and sometimes substance abuse) at the offender's expense. How many did so, and how many completed a treatment program, is unknown.¹⁴⁰ Based on the OPPAGA sample, about half of these offenders would have had some time on probation after release.¹⁴¹ Some would have had sex offender-specific probation.

- (4) The fourth subset includes offenders who were committed but later found by a court to no longer meet criteria for commitment (100 offenders).¹⁴² These individuals would, for the most part, have been granted full discharge (with a small number having conditions attached to release pursuant to a settlement agreement). Typically, these individuals would have participated in years of inpatient sex offender-specific treatment at the state's expense.

Recommended offenders released directly from prison have the longest release times: 86% released five to fourteen years and 7% released three years or less.¹⁴³ They were the youngest at release (average age forty-two) and had the highest average Static-99R score (5.3).¹⁴⁴

Discharged detainees have the next longest release times: 66% released five to fourteen years; 17% released three years or less.¹⁴⁵ They were somewhat older at release (average age forty-five) and had the next highest average Static-99R score (5.1).¹⁴⁶

Offenders with settlement agreements have somewhat less time in the community on average: 45% released five to fourteen years and 21% released three years or less.¹⁴⁷ They were somewhat older

140. Offenders on conditional release who complete an outpatient program may petition the court for full discharge. LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 24 SEATTLE U. L. REV. 373, 422 & n.275 (2000). Only a few offenders with settlement agreements appear to have been discharged (as of February 2013).

141. See OPPAGA Memo, *supra* note 3.

142. SVPP Data, *supra* note 4. As of February 2013, this number would be approaching 120, if not higher. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

than detainees at release (forty-six) and have somewhat lower average Static-99R scores (5.0).¹⁴⁸

Formerly committed offenders have, on average, the least amount of time in the community since release: 27% released over five years and 51% released zero to three years.¹⁴⁹ They were also the oldest at release (average age fifty) and had the lowest average Static-99R score (4.5).¹⁵⁰ This group would be expected to have the lowest sexual recidivism rate just based on these factors, without taking treatment into account.

8. SVPP Findings

A total of 71 out of 710 offenders in the original sample (10%) obtained a new sex-related charge (with victim) after release from the period of incarceration during which they were considered for commitment.¹⁵¹ Of these 71 offenders, 32 had a new felony sex offense conviction (4.5%).¹⁵² An additional 9 offenders had a new conviction for a sexually motivated offense related to a non-sexual charge, for a total of 41 offenders with a new felony conviction for a crime with sexual elements (5.8%).¹⁵³

A total of 19 offenders had felony charges either pending or acquitted.¹⁵⁴ Five other offenders had sex-related misdemeanor convictions, and an additional 6 offenders had sex-related misdemeanor charges.¹⁵⁵

For the 25 offenders with charges only, charges were dropped or “*nolle prossed*” (not prosecuted) for 10 offenders.¹⁵⁶ Two

148. *Id.*

149. *Id.*

150. *Id.* Most of these offenders would have scored in the high-risk range on the original Static-99R. *Id.* The lower Static-99R scores are likely the result of these offenders being older at the time of evaluation, and the revised Static-99R being better able to account for the age effect on risk (i.e., negative correlation of age and recidivism rates). *Id.* Similarly, it is likely that recommended offenders released from prison had higher Static-99R scores because they were younger at release. *Id.*

151. *Id.* An additional offender had obtained a new charge for possession of child pornography. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

offenders had charges not filed, and 5 offenders were acquitted.¹⁵⁷ Charges are pending for 8 offenders.¹⁵⁸

Reoffenders (71) were somewhat younger on average (41.6 vs. 46.3) than the non-reoffenders in the group (699), and they had a somewhat higher average score (5.7 vs. 5.0) on the Static-99R,¹⁵⁹ perhaps because of their younger age. However, because sample sizes are so different, differences in age and score may not be as pronounced as they appear, or as clinically meaningful.

9. *Florida Rates for Recommended Offenders Comparable to Rates in Other States*

SVPP rates are similar to those found in other states for offenders recommended for commitment but released instead of committed. For a sample of Texas offenders where an evaluator recommended commitment, 7.5% of unsupervised offenders had a new sex-related charge or conviction.¹⁶⁰ The rate was 0.8% for supervised offenders (average release time: 4.77 years).¹⁶¹ In California, 6.5% of offenders (6 out of 93) for whom two evaluators

157. *Id.*

158. *Id.* As noted, an additional 52 recommended offenders (for a grand total of 762) were later identified from this time period, but their effect on rates has yet to be (completely) calculated. *Id.* Of these additional offenders, 2 individuals were found to have new sex-related charges or convictions. *Id.*

The Florida Office of Economic and Demographic Research (EDR) reviewed a subset of offenders recommended for commitment but released (478) before recidivism data were presented to a legislative subcommittee in January 2014. *Hearing Before the Healthy Families H. Subcomm., supra* note 7. Like OPPAGA, EDR provides policy research to the Florida Legislature. *Id.* Some of the 52 offenders noted above may have been included, as well as some offenders released after the follow-up period used for the SVPP study. *Id.* The reconviction rate found by EDR is close to that found by SVPP and virtually identical to the OPPAGA rate for offenders with settlement agreements: a total of 18 individuals were found to have gone back to prison for new sex offenses (3.8% felony reconviction rate). *Id.* Eight of these offenders (1.7% of the sample) reoffended within a year of release, 2 within two years (0.4%), and 1 within three years (0.2%). *Id.* Seven offenders (1.5%) reoffended after three years in the community. *Id.*

159. SVPP Data, *supra* note 4.

160. Zavodny et al., *supra* note 7. Texas data are reported in Boccaccini et al., *supra* note 7, at 291. The unusually low rate for supervised offenders may be the result of more offenders having intensive sex offender-specific probation (in contrast to the kind of unstructured release with conditions common for Florida offenders with settlement agreements). See Zavodny et al., *supra* note 7.

161. Zavodny et al., *supra* note 7.

had recommended commitment were found to have a new charge or conviction (average release time: 4.7 years).¹⁶²

The State of Washington is an outlier for having a significantly higher rate; of 135 offenders released who had been recommended for commitment by at least one evaluator, 34 had a new sex-related charge or conviction within six years of release (25.2%).¹⁶³ But even here, a sample of offenders that experts thought to be too dangerous to be in the community had a clear majority (75%) giving no indication of having reoffended even after several years of freedom.

10. Breakdown of SVPP Findings

The highest rates were associated with the group of offenders recommended for commitment who were released at end-of-sentence. The percentage of these offenders who obtained a new conviction for a felony sex offense was 10.8%.¹⁶⁴ The percentage with at least a new felony sex-related charge was 15.7%.¹⁶⁵ For any sex charge, including dismissed misdemeanor charges, the rate was 16.9%.¹⁶⁶ Again, these offenders had the longest period of time in the community (ten or more years for many), the highest average Static-99R score (5.3) and the youngest average age at release (forty-two).¹⁶⁷ The number of offenders in this subset (83) is also significantly smaller than for subsets of other offenders recommended for commitment but released without being committed.¹⁶⁸

A total of 366 offenders fell into the category of offenders recommended for commitment but granted full discharge by the courts ("recommended but not committed," or RNC offenders).¹⁶⁹ The percentage of RNC offenders with a new felony sex offense conviction after release was found to be 6.6%.¹⁷⁰ The rate was 8.7% for RNC offenders with at least a new sex-related felony charge.¹⁷¹

162. *Id.*

163. Washington data are reported in MILLOY, *supra* note 7, at 3.

164. SVPP Data, *supra* note 4.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

The rate was 10.7% for RNC offenders with any sex-related charge at all (including offenders with acquittals or dropped charges, felony or misdemeanor).¹⁷²

The detainee subset of the SVPP sample is of considerable size, much larger than samples of offenders in other states who were thought to meet commitment criteria but released without commitment. It is useful for exploring the issue of possible rate (risk) inflation in the predicted rates listed for the Static-99 line of risk assessment instruments.

Most of these offenders were assessed years ago when the Static-99 was being used. For offenders with Static-99 scores only, Static-99R scores were calculated. The average Static-99R score for RNC offenders is 5.1. As noted, compared to the original instrument, the revised Static better accounts for the inverse relationship between age and recidivism rate. Older offenders will, therefore, earn somewhat lower scores on the 99R. Many, if not most, RNC offenders assessed during the era of widespread use of the Static were recommended for commitment based on scores of 6. Some offenders assessed in the very early years of the Act were evaluated with other instruments, such as Rapid Risk Assessment for Sex Offense Recidivism (RRASOR) or Sex Offender Risk Appraisal Guide (SORAG).

Reconviction rates of 7%–9% are far below listed rates (observed reconviction rates) for the Static-99. The lowest reconviction rate listed for the original Static-99 for offenders with a score of 6 is 39% (for five years of release time).¹⁷³ Even for a score of 5, the reconviction rate is 33% for five-year follow up.¹⁷⁴ As noted, these rates come from a sample of offenders released during a period now decades past, when sexual offense and sexual recidivism base rates were much higher than now.

Rates for RNC offenders are also well below even those listed for the revised Static-99R. The Static-99R lists predicted rather than observed rates per score.¹⁷⁵ As noted earlier, offenders selected for

172. *Id.*

173. HARRIS ET AL., *supra* note 47, app. 6.

174. *Id.*

175. The developers used logistic regression analysis, which can be useful when subsamples of offenders with higher scores are too small for meaningful observation of rates by score. This issue and related issues with the Static are discussed in Brian R. Abbott, *Applicability of the New Static-99 Experience Tables in Sexually Violent Predator Risk Assessments*, SEXUAL-OFFENDER-TREATMENT.ORG (2009),

full commitment evaluation, and especially offenders thought to meet criteria after evaluation, are commonly thought by evaluators to be most similar to the High Risk/Need Group for the 99R. Rates per score for this group are the highest listed for any reference group.¹⁷⁶

As with the OPPAGA findings, SVPP rates clearly indicate that offenders recommended for commitment in Florida do not resemble the offenders in the samples used by the instrument's developers to obtain rates for the High Risk/Need Group. Most RNC offenders were released more than five years ago; many have been released ten or more years. Their average release time has not yet been calculated but is likely to be six to seven years. Assuming a conservative five-year follow-up period, offenders most similar to those in the High Risk/Need Group with a score of 5 are predicted to have 25.2% obtaining a new conviction or charge for sexual offenses within this period. This is well above the observed 7%–9% rate for RNC offenders. Even under the generous assumption that the average 99R score would decrease by a full point if the score depended on age at release from FCCC—reducing the average from 5 to 4—the predicted rate for High Risk/Need Group offenders with a score of 4 (20.1%) is still above the RNC observed rate. The 95% confidence interval for this score is 17.4%–23.1%. The low end of this interval is still well above what was found for RNC offenders.

As with the OPPAGA sample, to the extent that any reference group is similar, offenders in the Routine Group for the 99R—average sex offenders—are the most similar to offenders in SVPP. Rates listed for the Routine Group are the lowest for any reference group on the Static-99R (only five-year rates). Even these may be too high compared to SVPP rates. Offenders recommended for commitment but released from prison appear to be the most similar to the offenders in samples for norming the Routine Group.

For Routine Group offenders with a score of 5, the predicted new conviction or new charge rate is 11.4% with a 95% confidence interval of 8.2%–15.6%. For Routine Group offenders with a score of 4, the predicted rate is 8.7% (confidence interval 6.1%–12.2%).

http://www.sexual-offender-treatment.org/1-2009_03.html.

176. PHENIX ET AL., *supra* note 47, at 5–8.

The RNC rate falls within the confidence interval for offenders with a score of 4 (only barely within the interval for a score of 5).¹⁷⁷

However, empirical reason exists to think that even Routine Group norms are inflated. A recent analysis was conducted on 304 offenders from the SVPP sample who had been assessed with the Static-99R. Using predicted rates for the High Risk/Needs Group, 86 of these 304 offenders would be expected to have become detected sexual recidivists within five years of release (i.e., obtaining a new sex-related charge or conviction for sexual offenses after release). Using predicted rates for the Preselected for Treatment Needs Group, 56 of these offenders would be expected to have become detected sexual recidivists within five years. Using predicted rates for the Non-Routine Group, 68 detected sexual recidivists would be expected.¹⁷⁸

Finally, using predicted rates for the Routine Group (which, again, consists of average sex offenders released from prison and corresponds with the lowest rates listed for the Static-99R), 41 detected sexual recidivists would be expected.¹⁷⁹

For 304 offenders thought by experts to be atypical, especially dangerous sex offenders, only 28 offenders (9% of the sample)

177. Although the rates listed on the actuarial tables for the Static-99R are commonly interpreted as describing offenders with convictions or charges, an argument can be made that the most accurate interpretation of 99R rates, given the characteristics of the samples used to develop those tables, is rates of new conviction. See Brian Abbott, *Throwing the Baby Out With the Bath Water: Is It Time for Clinical Judgment to Supplement Actuarial Risk Assessment?*, 39 J. AM. ACAD. PSYCHIATRY & L. 222, 222–30 (2011). Dr. Abbott reports, from his examination of the samples, that 60% of the recidivism estimates (predicted rates) listed on the actuarial tables for the Static-99R are based on sex offense convictions as proxies for sexual recidivism. The remaining 40% are based on charges. *Id.* at 224. If 99R rates are interpreted as predicted rates of offenders obtaining either a new conviction *or* a new charge, then the above noted group of offenders recommended for commitment, with scores averaging about 5 would be similar to offenders in the Routine Group with about the same score. If 99R rates are best interpreted as sex-related reconviction rates then the above noted group of offenders is most similar to Routine Group offenders with a score less than 5.

178. GREG DECLUE, A. K. RICE, MARKUS T. BOCCACCINI & DANIEL F. MONTALDI, FLORIDA'S RELEASED "SEXUALLY VIOLENT PREDATORS" ARE NOT "HIGH RISK" (forthcoming 2015). For contact information for the primary author, see <http://gregdeclue.myakkatech.com/>. The Preselected for Treatment Needs Group is the Static-99R reference group with the next highest predicted rates per score. This reference group is based on samples of sex offenders either in treatment or intended for treatment.

179. *Id.*

were found to have obtained a new sex-related charge or conviction within five years of release.¹⁸⁰ This is 32% fewer detected sexual recidivists than what would be expected for sex offenders if they in fact resemble the offenders in the Routine Group samples used to develop actuarial tables for the Static-99R.¹⁸¹

As emphasized before, commitment-eligible offenders are not supposed to be just any sex offender. Indeed, they are not just any sex offender falling into a high-risk actuarial category. They are supposed to be even more dangerous because they have a mental condition so severe that it impairs their ability to resist acting on sexual urges. These are supposed to be the “small but extremely dangerous number”¹⁸² of violent predators that stand out from even the “dangerous but typical recidivist[s]” who the United States Supreme Court considers to be capable of ending their sexual criminal pattern but who choose not to.¹⁸³ The sexually violent predator is considered to be even less capable of stopping (i.e., less able to utilize volition or emotion based psychological resources to respond to deterrence incentives and restrain sexual behavior that is illegal) than the average violent criminal. This is because the commitment-eligible sex offender supposedly experiences “serious difficulty” controlling behavior—rendering him dangerous “beyond control.”¹⁸⁴ So it is reasonable to think that if released offenders recommended for commitment were in fact as experts had thought them to be (based on actuarial risk assessment with the Static-99R and clinical evaluation of mental disorders), this exceptionally dangerous group would have more sexual recidivists than what would even be expected of a group of offenders with the same Static-99R score.

In fact, a group of sex offenders considered so “out of control” and dangerous that they were deemed to meet commitment criteria and were recommended for commitment in Florida turned out to have almost a third *fewer* sexual recidivists than what would have been expected of *typical* sex offenders, according to the Static-99R.

180. SVPP Data, *supra* note 4.

181. *Id.*

182. FLA. STAT. ANN. § 394.910 (West, Westlaw through ch. 255 (End) of the 2014 2d Reg. Sess. and Spec. “A” Sess. of the 23d Leg.).

183. *Kansas v. Crane*, 534 U.S. 407, 407–08 (2002).

184. See *supra* text accompanying note 29 (discussing SVP-relevant mental abnormality, impairment, and relevant Supreme Court opinions).

This is confirmed by comparison to samples of typical sex offenders across multiple states. SVPP prison releases, many of whom have been released from ten to fourteen years, were all deemed highly dangerous and recommended for commitment; yet, they were found to have only a 15.7% new felony sex charge rate.¹⁸⁵ The Adam Walsh rate for average Florida sex offenders released from prison (average Static-99R score of 1.97) was 13.7% for offenders released ten years. The prison rate is only somewhat higher than the Adam Walsh rate for offenders, many released for a longer period of time.¹⁸⁶

The RNC rate (for recommended offenders released from detainee status from civil confinement; six to seven years release time) is three percentage points higher than the five-year rate for the Adam Walsh offenders (8% vs. 5%). This might indicate somewhat higher risk when taking into account that offenders in the RNC group are an older group (RNC average age: forty-five; Adam Walsh offenders, all states: thirty-seven).¹⁸⁷ On the other hand, the RNC group contains many offenders released over five years, up to fourteen years.¹⁸⁸ Longer release time is associated with higher risk.¹⁸⁹ The ten-year rate for Florida sex offenders in the Adam Walsh study is six percentage points above the RNC rate (14% vs. 8%).¹⁹⁰

11. Small Rate Differences Unlikely to Reflect Clinically Meaningful Differences in Risk: A Summary of Results So Far

Small differences in recidivism percentages, when the percentages compared are mostly 10% or less, mean that the offender groups being compared are overwhelmingly made up of individuals giving no indication of new sexual offenses.¹⁹¹

185. SVPP Data, *supra* note 4.

186. ZGOBA ET AL., *supra* note 7, at 20.

187. The average age for offenders (across states) studied by the Adam Walsh researchers is thirty-seven. No average age is reported for Florida offenders specifically. *See id.* at 21. RNC offenders were older at release (average age forty-five). SVPP Data, *supra* note 4.

188. SVPP Data, *supra* note 4.

189. *Id.*

190. *Id.*; *see* ZGOBA ET AL., *supra* note 7, at 20.

191. Most offenders who reoffend do so within a few years of release, especially offenders in higher risk categories. Most RNC offenders have been released this long or more. *See* R. Karl Hanson et al., *High-Risk Sex Offenders May*

Therefore, these small differences in recidivism percentages suggest that the groups being compared are little different in risk-related characteristics (clinically meaningful differences) even if rate differences reach statistical significance.

Altogether, these comparisons provide support for the opinion that, at least for sex offenders in Florida, even offenders considered to be high risk are in fact most similar to, and may be at even lower risk than, offenders in the Routine Group for the Static-99R.¹⁹² No justification exists for comparing offenders considered special with respect to risk, or any other group of sex offenders released after 1999, to the High Risk/Needs Group. This argument is not simply the claim that no empirically validated basis has ever existed for choosing between reference groups, an important point made by other authors.¹⁹³ It is the claim that now an empirical basis exists for using the Routine Group, and not any other reference group, if the Static-99R is used at all. And even the rates for the Routine Group are inflated, at least for sex offenders in Florida.

Rates for the Routine Group do not approach 50%, or even 39% (for a follow-up period of five years).¹⁹⁴ The only score coming close is 9 (associated with a 37.2% predicted rate for five years). In this author's experience, few if any sex offenders score this high.¹⁹⁵ No empirical justification exists for using actuarial rates from the Static as a primary basis for the opinion that an offender meets the "likely" criterion for commitment, at least not in Florida.

At a higher level, these data give support for the claim that offenders who were recommended for commitment in Florida were, in fact, little different risk-wise from offenders not recommended. Neither group was high risk when they were evaluated for commitment consideration.¹⁹⁶ That neither group was high risk gives support to the claim that contemporary risk

Not Be High Risk Forever, 29 J. INTERPERSONAL VIOLENCE 2792, 2805 (2014) (concluding that the recidivism rate of released offenders was reduced by half for every five-year period offenders remained offense-free while living in the community).

192. See *supra* Part III.B.10.

193. See, e.g., Abbott, *supra* note 110, at 104 ("It is simply unknown whether risk factors external to the Static-99R even explain the differences in base rates among the RC, PTN, and PHRN reference groups.")

194. SVPP Data, *supra* note 4.

195. See PHENIX ET AL., *supra* note 47, at 5–8, for actuarial tables with rates for the Routine Group and other reference groups.

196. SVPP Data, *supra* note 4.

assessment and clinical evaluation methods are not capable of distinguishing commitment-eligible sex offenders from average sex offenders with respect to SVP commitment criteria as they are now formulated (at least not in Florida). Given no reason to think that Florida sex offenders are, in general, significantly different from sex offenders anywhere else in the United States, this claim is likely to apply in all states with sex offender-specific civil commitment laws.¹⁹⁷

12. *A Message to Minnesota: Comparing Full Confinement to Conditional Release—Inpatient Versus Outpatient Treatment*

Of particular relevance to commitment programs like Minnesota's that are considering how to expand Less Restrictive Alternative programming is the comparison of offenders recommended for commitment but granted conditional release to offenders once committed but later released as no longer meeting criteria for commitment. In Florida, offenders with settlement agreements are required to attend outpatient sex offender treatment in the community at their expense.¹⁹⁸ Formerly committed offenders have usually participated in years of intensive inpatient treatment programming at the state's expense.¹⁹⁹

If the offenders recommended for civil confinement rather than (any form of) release are really too dangerous for even

197. See generally John L. Schwab, *Due Process and the "Worst of the Worst": Mental Competence in Sexually Violent Predator Civil Commitment Proceedings*, 112 COLUM. L. REV. 912, 916 n.31 (2012) (citing Adam Deming, *Sex Offender Civil Commitment Programs: Current Practices, Characteristics, and Resident Demographics*, 36 J. PSYCHIATRY & L. 439, 441 (2008)) ("Those states are Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin.").

198. See FLA. STAT. ANN. § 394.928 (West, Westlaw through ch. 255 (End) of the 2014 2d Reg. Sess. and Spec. "A" Sess. of the 23d Leg.) ("In recognition of the fact that persons committed under this part may have sources of income . . . each person so committed shall . . . pay from such income and assets, except where such income is exempt by state or federal law, all or a fair portion of the person's daily subsistence and treatment costs, based upon the person's ability to pay, the liability or potential liability of the person to the victim or the guardian or the estate of the victim, and the needs of his or her dependents.").

199. See *id.* § 394.929 (Westlaw) ("The Department of Children and Families is responsible for all costs relating to the evaluation and treatment of persons committed to the department's custody as sexually violent predators.").

intensive community management, then conditional release should fail as a sexual crime control measure. The recidivism rate for offenders recommended for commitment but released pursuant to settlement agreements would be high.²⁰⁰ If intensive inpatient treatment in a secure facility were in fact the only possible effective treatment intervention for offenders recommended for commitment, then offenders with years of inpatient treatment would show much less sexual recidivism.²⁰¹

Rates were indeed low for formerly committed offenders. SVPP found a felony sex offense reconviction rate of 3% for a group of 100 offenders that had been recommended and committed but later released by the courts as no longer meeting commitment criteria (the NLM group).²⁰² If offenders with felony charges were included, this percentage increased to 4% (NLM offenders).²⁰³ If NLM offenders with any sex-related charge after release were included, the rate was 7%.²⁰⁴

Almost identical rates were found for offenders with settlement agreements. A 3.1% felony sex reconviction rate was found for a group of 161 offenders with conditional release per agreement (the settlement agreement group or SA group).²⁰⁵ When SA offenders who obtained a new felony charge were included, the rate was 6.8%.²⁰⁶ The rate remained the same when all offenders with any sex charge were included.²⁰⁷

Risk-wise, formerly committed offenders, after years of inpatient treatment in a secure facility, appear to be about the same at time of release as offenders recommended for commitment but granted release on the condition that they attend outpatient treatment.²⁰⁸ This finding is especially surprising given that offenders with settlement agreements included a greater percentage of offenders released for many years (45% SA offenders vs. 27% NLM offenders released five or more years) and they were somewhat younger at time of release (forty-six for SA vs.

200. Cf. SVPP Data, *supra* note 4.

201. Cf. *id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

fifty for NLM).²⁰⁹ The SA group also contained proportionally more offenders with high actuarial scores (average 99R score for SA = 5.0; NLM = 4.5).²¹⁰

These data give strong suggestion that if there is any difference in treatment, outpatient treatment might be superior. Certainly it is less expensive for taxpayers. At this point, no evidence shows that state expenditure on inpatient treatment in a secure civil facility is achieving its intended purpose.

13. Treatment Shows No Clear Effect at All

Even more importantly, neither inpatient nor outpatient treatment appears to have had much, if any, effect in reducing recidivism when NLM offenders and SA offenders are compared to the released detainees (no treatment). As noted, of the 366 discharged detainees in the group, 6.6% of offenders obtained new felony convictions and 8.7% obtained felony charges.²¹¹ These rates are only a few percentage points above NLM and SA rates, even though the detainee offender group has, on average, spent more time in the community (66% of the detainees were released over five years).²¹²

Some might interpret this difference in rates (6.6% vs. 3% for offenders with new convictions; 8.7% vs. 4% for offenders with new felony charges)²¹³ as supporting the claim that inpatient treatment reduced the rate in half, compared to no treatment. Given that experts determined that both groups of offenders met commitment criteria based on the same risk assessment and diagnostic methods, these groups should have been approximately similar in risk at time of transfer to FCCC.²¹⁴ If the rate for offenders released after treatment is half the rate of offenders released without treatment, it might appear that treatment had an effect.

However, given the longer time since release, younger age, and higher actuarial scores, detainees would be expected to have a higher rate anyway. With rate differences so small, and the rates of

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *See id.*

both groups already well below 10%, it is reasonable to think that when formerly committed offenders have been in the community as long as detainees now have, the difference between the rate at that time and the current rate of detainees will be even smaller, if not absent.²¹⁵

When discharged detainees are compared to offenders on conditional release, the difference in rates for offenders obtaining any sex charge is very small (within two percentage points).²¹⁶ Offenders with settlement agreements have been released longer than formerly committed offenders, and those offenders were somewhat younger at release (albeit not as long, and not as young, as detainees).²¹⁷ The point above applies here as well.

At this point in time, no form of treatment—inpatient or outpatient—shows a clearly measurable effect in reducing risk for offenders recommended for commitment in Florida. However, a lack of efficacy does not mean that treatment programming has been poorly designed or administered. It seems more likely that rates for untreated offenders, even those thought by experts to be especially high risk, are *already so low* that no intervention short of physical incapacitation can reduce rates further, at least not significantly. A kind of statistical “floor” effect in sexual recidivism may be occurring.

Released offenders recommended for commitment (based on full evaluation) can also be compared to offenders evaluated but not recommended. As noted, data are still being gathered for the second group (which is large, more than 1200). But felony sex offense reconviction rates are known. Offenders selected for full evaluation typically have more than one sex offense-related conviction in their history, as opposed to the average offender not recommended for commitment, as discussed earlier.²¹⁸ Static (99/99R) data for this group have yet to be gathered, and the average age at release is not yet known. However, it can be said that this specific group of offenders would have a higher average actuarial score than most sex offenders referred for commitment

215. The rate for formerly committed offenders might even exceed the SA rate by this point.

216. SVPP Data, *supra* note 4.

217. *Id.*

218. *See supra* Part III.B.9.

consideration, although (often) not as high as offenders recommended for commitment.²¹⁹

The felony sex offense reconviction rate for offenders who received full evaluation but who were not recommended for commitment was 3% for those released between five and ten years ago.²²⁰ The rate was 4% for evaluated offenders released over ten years.²²¹ The rates are little different than rates for groups of recommended offenders, or rates for offenders referred for commitment consideration but not recommended, considered as a whole (2%–4%).²²²

This minute difference is further indication that experts applying nationally recognized best practices in risk assessment and clinical evaluation for diagnoses were not able to “narrow the field” to a significantly higher risk group.²²³ Despite experts’ best efforts to be selective, a group of offenders distinguished as being in need of evaluation and a final group assessed to be the most dangerous, differ only somewhat (within a few percentage points) from sex offenders left undifferentiated (after vast differences in sample sizes are taken into account, e.g., 30,000 vs. 1200 vs. 366). With regard to the risk-related characteristics of representative offenders in each group, such differences are unlikely to be clinically meaningful: *the overwhelming majority of offenders in all groups give no indication of continued sexual offending.*

Very serious problems exist in evaluation methods and technologies when sexual recidivism rates for offenders determined to be “likely” to continue sexual violence if released differ only slightly from offenders determined to not meet this standard.

14. Other SVPP Findings

At this point, there appears to be no discernible risk-reducing effect coming from progressing in treatment or completing it. For those committed offenders eventually discharged who had reached an advanced stage of inpatient treatment (thirty-nine Phase IV

219. SVPP Data, *supra* note 4.

220. *Id.*

221. *Id.*

222. *Id.*

223. This latter group includes all offenders referred and reviewed by SVPP, but not selected for evaluation (which results in no recommendation for commitment), as well as offenders reviewed and evaluated but not recommended when the multidisciplinary team gave these cases a final review.

offenders), two individuals (2.6%) obtained new sex-related felony charges.²²⁴ Both individuals had been determined to have achieved maximum therapeutic benefit prior to discharge (two out of sixteen, or 12.5%). Samples are small and need to be larger before generalizations become conclusive. But at least so far, no effect is yet detectible.

The SVPP data suggest that the inverse association between age and recidivism rates—the age effect—is yet to be adequately accounted for, even with the revision of actuarial instruments. Differences between age groups for offenders in the SVPP sample are striking. For offenders in the eighteen- to twenty-nine-year-old group when recommended for commitment (seventy-five), two offenders (2%) obtained new charges for rape. One of these offenders was convicted (1.3%). No offender in this group obtained a new charge for a child-related offense. It should be kept in mind that relatively few young adult offenders will have sufficient sexual criminal history to be recommended for commitment. Rates increase for older offenders up to age forty-nine (most offenders recommended for commitment are in their forties). For offenders thirty to thirty-nine years old when recommended (147), twelve offenders obtained new charges for rape (8%), with ten of those convicted (7%). Of the five offenders who obtained new charges for a child contact offense (3%), three were convicted (2%). For offenders forty to forty-nine years old (245), eleven obtained a new charge for rape (4%), with eight convicted (3%).

Despite generally low rates for recommended offenders in general, rates are even lower for offenders who were older than fifty at the time of recommendation, especially with regard to new offenses of physical violence. For offenders age fifty to fifty-nine when evaluated (149), *only one* (< 1%) obtained a new charge for rape (no convictions). Four individuals obtained a new child contact related charge with all four (3%) convicted.

The most dramatic difference comes from offenders who were age sixty or older at time of recommendation (ninety-three). Out of this group, *no one* obtained a new charge or conviction for either rape or child molestation (0%).²²⁵ Static scores per age group have

224. SVPP Data, *supra* note 4. All reported data in this section of this Article come from SVPP Data, *id.*, and individual footnotes are omitted.

225. Only one offender older than sixty obtained a new sex-related charge. The offender had a dropped misdemeanor charge for unwanted sexual touch of the upper body of a girlfriend, age sixty or older. His diagnosis was pedophilia. *Id.*

yet to be calculated. But given these offenders were thought to meet commitment criteria, most offenders, including offenders who were age sixty or older when evaluated, would have had high or high-moderate range scores.

SVPP has investigated each new sexual offense committed by offenders recommended for commitment and later released. This investigation uncovered some additional unexpected facts. For example, the percentage of offenders having new offenses against a stranger, a victim profile commonly associated with predators, is very low. The percentage of offenders using a high degree of physical violence, another predator trait (at least for rapists), is also very low.

A total of forty out of seventy-one offenders with new charges or convictions were charged with an offense against an adult or teenage victim. Of these, thirty-three offenders had contact-related charges. Of the seventy-one total offenders, sixteen had charges or convictions for rape or attempted rape against a stranger victim (2.3% of the 710 total offenders). Twelve of these individuals engaged in physical violence and four additional offenders threatened violence (2.2%). Five victims were teenagers age fifteen to seventeen. The average age of reoffenders was forty-two.

Ten offenders had rape-related charges or convictions against known victims. Nine offenders used physical violence and one offender threatened violence. Four were engaged in domestic violence at the time. Two victims were teenagers. The average age of reoffenders was forty-two. The victims of two reoffenders were murdered (one stranger victim and one known victim), which is 0.3% of the sample. No other description of these reoffenders is yet available.

A total of 26 out of 710 offenders (3.7%) had charges or convictions related to child molestation. Twenty of these offenders had contact offenses. Eight offenders engaged in penetration of the victim (1.1% of the 710). Four offenders had a child victim who was a stranger (0.6%). This is remarkable given that sex offenders with SVP status are commonly thought to be predators against strangers. One offense involved possible physical violence. The average age of these offenders was 47.5.

Some findings were more expected. Offenders with new charges or convictions (seventy-one) were somewhat younger on average than the non-reoffenders (699) in the group (average age of 41.6 vs. 46.3). Offenders with new charges or convictions also

had a somewhat higher average score on the Static-99R (5.7 vs. 5.0), but probably due to younger age. Because sample sizes are so different, differences in age and score may not be as pronounced as they appear.

IV. POLICY EFFICACY

By statute, the long-term study that DCF is required to conduct is intended to assess the overall efficacy of the provisions of the SVP Act.²²⁶ Many elements are involved in a full study and more work needs to be done on just the recidivism portion. However, some preliminary conclusions are possible. Data now exist for estimating the likely impact civil commitment has had on sexual crime in Florida. These data open a window into issues of cost effectiveness.

A. *The Effect of Commitment on Statewide Sexual Crime Rates*

As noted earlier, it seems reasonable to assume that lawmakers did not expect any significant number of persons found to meet commitment criteria to ever be released for no longer meeting criteria.²²⁷ Nor did they probably expect that any significant number of persons recommended for commitment by SVPP would not be taken to trial and committed.²²⁸ So lawmakers probably did not intend a study of the efficacy of the Act to be an examination of recidivism by persons subject to the Act. They probably intended the study to be, among other things, an examination of the impact of commitment on statewide sexual crime rates. If commitment has had a significant effect in preventing sexual offenses, then it seems

226. FLA. STAT. ANN. § 394.931 (West, Westlaw through ch. 255 (End) of the 2014 2d Reg. Sess. and Sp. "A" Sess. of the 23d Leg.).

227. *Id.* § 394.910 (Westlaw) ("The Legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different from the traditional treatment modalities for people appropriate for commitment under the Baker Act. It is therefore the intent of the Legislature to create a civil commitment procedure for the long-term care and treatment of sexually violent predators."); *see supra* text accompanying notes 29–33.

228. *Id.* § 394.911 (Westlaw) ("The Legislature intends that persons who are subject to the civil commitment procedure for sexually violent predators under this part be subject to the procedures established in this part and not to the provisions of part I of this chapter.").

reasonable to expect a measurable decrease in statewide sexual crime rates that can be tied to commitment.

A decrease in sexual offending and reoffending has indeed occurred in Florida and nationwide.²²⁹ However, no evidence suggests the decrease is the result of sex offender-specific civil commitment. As will be discussed in a moment, this decrease results from the exceeding of the rate of decline (i.e., the rate at which annual rates of reported sexual crime declined) for any six-year period subsequent to the Act by that of the six years *prior* to the Act. Whatever effect civil commitment has had on preventing sexual crime, it is much smaller than lawmakers likely expected.²³⁰ In fact, the effect is too small to have had any empirically measurable effect on statewide sex crime rates or totals. The following data tell the story.

First, some general background: the number of reported sex crimes in Florida was highest for the year 1993.²³¹ That year, 13,752 sex offenses were reported to authorities.²³² The number of reported sex crimes was at its lowest for the year 2013 (9863).²³³ The total combined number of rapes and attempted rapes showed a small decrease from 2011, with a total of 5273, to 2012, when the total was 5254.²³⁴ The year 2012 showed the lowest recorded total for rape-related crimes.²³⁵

The magnitude of this decrease can be appreciated by looking at annual rates (i.e., the number of reported crimes per unit of resident population). By 2013, the rate of reported forcible sex offenses was at a historic low with 51.2 reported sex offenses per 100,000 Florida residents.²³⁶ This is approximately half the 1993 rate (101.1).²³⁷

229. 1971–2013 REPORTED SEX OFFENSES, *supra* note 6; *Over 60 Percent Decline in Sexual Violence Against Females from 1995 to 2010*, BUREAU JUST. STAT. (Mar. 7, 2013), <http://www.bjs.gov/content/pub/press/fvsv9410pr.cfm>.

230. See FLA. STAT. ANN. § 394.910 (Westlaw) (“The Legislature further finds that the likelihood of sexually violent predators engaging in repeat acts of predatory sexual violence is high.”).

231. 1971–2013 REPORTED SEX OFFENSES, *supra* note 6.

232. *Id.*

233. *Id.*

234. *Id.*

235. See *id.* The rape-related number increased in 2013 because the FBI changed its definition of rape, resulting in 6740 reported offenses. See *id.*

236. *Id.*

237. *Id.*

By 2012, the sum total of reported rapes and attempted rapes was at a historic low (5254), which also had the lowest rate of reported rapes and attempted rapes (27.5 per 100,000 residents),²³⁸ compared to a historic high in 1980 (56.7).²³⁹ The 1992–93 rates were almost as high (54.2, and 53.4, respectively).²⁴⁰ Again, because of the change in definition for rape, it is difficult to compare 2013 data to previous years.²⁴¹ For all years in which reported sex crime totals are recorded (1989–2013), the total exceeds 10,000 except for 2010, 2011, and 2013 (9885, 9880, and 9863, respectively).²⁴²

Given that sexual crime had already been on the decline years before sex offender civil commitment was established in Florida, if commitment has had a significant impact on reducing sexual crime, then it should at least roughly coincide with, or precede, greater decline. However, no such coinciding happened. Over the first six years before the Act (1993–99) the rate declined from 101 to 82.1, a decrease of 19 reported sex crimes per 100,000 residents.²⁴³ Rates continued to decline through the first years of the Act (1999–2005) but the magnitude of decline decreased.²⁴⁴ Reported sexual crimes decreased from 82.1 in 1999 to 68.3 in 2005,²⁴⁵ a cumulative decrease of 13.8 reported crimes per 100,000 residents. There was a greater decrease from 2005 to 2011 (15.6 reported crimes for every 100,000 residents).²⁴⁶ Nonetheless, the decrease from 2005 to 2011 still represents that fewer crimes—though not by far—were reported than during the six years before any sex offender was committed.²⁴⁷

Whatever effect commitment has had on preventing sexual recidivism that would have otherwise occurred, such an effect is too small to show up in rate trends.²⁴⁸ SVPP data show why the impact

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. 2013 FLA. CRIME REPORT, *supra* note 6; FLA. DEP'T OF LAW ENFORCEMENT, CRIME IN FLORIDA: JANUARY–DECEMBER 2010 (2011) [hereinafter 2010 FLA. CRIME REPORT]; FLA. DEP'T OF LAW ENFORCEMENT, CRIME IN FLORIDA: JANUARY–DECEMBER 2011 (2012) [hereinafter 2011 FLA. CRIME REPORT].

243. 1971–2013 Reported Sex Offenses, *supra* note 6, at 1.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. To the point that reported sex crime data do not (by definition) indicate

of civil commitment on statewide sexual offenses is so small. These data allow an empirically based estimation of the number of sex offenses prevented by commitment.

Since inception of the Act, a total of 67 out of 610 offenders recommended for commitment but not committed obtained at least one new sex-related charge (including dropped charges and misdemeanor charges),²⁴⁹ which represents an 11% sexual recidivism rate.²⁵⁰ These are offenses not prevented even with a commitment law. However, these offenses give some idea of how many offenses have been prevented by civilly confining offenders who are still confined.

As of January 2014, a total of 647 individuals were civilly confined at or near the end of the SVPP study (567 committed).²⁵¹ These individuals were assessed and recommended by experts using the exact same risk assessment and clinical evaluation methods used for recommended persons later released. As discussed earlier, no systemic reason exists for believing that offenders currently in civil confinement constitute a significantly higher risk group at the time they were assessed than other offenders recommended for confinement. Cases going forward to trial and successful commitment may have had more plentiful evidence (and available witnesses) than those that did not. But, SVPP considered the evidence sufficient for all cases where it recommended filing a commitment petition. More evidence in support of a conclusion about risk is not, just as such, evidence of more risk. So while it is possible that the offenders currently in civil confinement were (or are) more dangerous, no clear basis exists, empirical or logical, to treat this possibility as a probability.

anything specific about unreported crime, the same could be said of 1993 data as is said about current data. As noted earlier, no evidence supports the claim that unreported sexual crime has increased or that the public is less inclined to report sexual crime now than twenty or more years ago. In fact, evidence across domains makes the opposite much more likely. See generally Finkelhor & Jones, *supra* note 64.

249. SVPP Data, *supra* note 4.

250. See *id.*

251. For FCCC census and SVPP budget data, see generally COMM. ON APPROPRIATIONS, *supra* note 7, at 6; COMM. ON CHILDREN, FAMILIES AND ELDER AFFAIRS, *supra* note 8; and THE PROF'L STAFF OF THE COMM. ON JUDICIARY, THE FLA. SENATE, BILL ANALYSIS & FISCAL IMPACT STATEMENT, S. 522, 2014 Reg. Sess., at 12 (2014) [hereinafter COMM. ON JUDICIARY], available at <http://static.lobbytools.com/bills/2014/pdf/AS05221484.pdf>.

It is therefore reasonable to use the sexual recidivism rate of the released group of offenders recommended for commitment (11%) as an estimate of what the rate would be had all recommended offenders been released. Applying this rate to the 647 still confined offenders, approximately 71 more offenders would be expected to have had a new sex-related charge or conviction (0.11×647). Adding these to the 71 reoffenders in the 710 offenders in the sample yields a total of 142 offenders either reoffending or expected to have reoffended had no one been committed.

Finally, a total of 100 offenders in the SVPP study were committed and later released by the courts as no longer meeting criteria.²⁵² A total of 4 individuals from this group have obtained a new sex charge.²⁵³ These were also offenses not prevented even with commitment. The 11% figure is a reasonable indication of what would have happened had these offenders never been committed. This would be 11 individuals, or 7 more than the 4 already observed. Adding this 7 to the 142 above results in a grand total of 149 offenders who either reoffended or would have reoffended had no one been committed.

Of course some offenses are never detected, or they are reported to authorities but do not result in an arrest or charge. Additionally, even detained offenders spent some time in a secure civil facility not otherwise spent in the community, time that could have resulted in some unknown number of additional offenses. Empirically, there is no way to be precise about estimates of unobserved new offenses prevented by commitment.

To provide a margin of error, we might assume that still confined and formerly committed offenders would have had, on average, five times as many new offenses as they would have had new arrests (had they not been committed). This is an assumption, and a generous one. It has no apparent empirical basis. It is also reasonable to assume for the moment that all of these offenses would have been reported, and just not resulted in arrests. This assumption allows comparison to reported crime totals. Such a comparison makes a total of 745 offenses prevented (5 new offenses per person for 149 offenders). Further, this computation allows for the possibility that *some* offenders would have been

252. SVPP Data, *supra* note 4.

253. *Id.*

prolific had they not been committed, having considerably more new offenses; whereas other offenders would have had no new offenses that did not result in a new conviction or arrest.²⁵⁴

The SVP Act has been in effect fourteen years.²⁵⁵ A total of 745 prevented offenses amounts to 53 sex offenses prevented for each year of the Act. In 2013 the total number of reported forcible sex crimes in Florida was 9863.²⁵⁶ The highest total (13,752) was seen in 1993.²⁵⁷ Without the Act, the number of reported sex crimes in 2013 was estimated to have been 9916 if there had been no commitment (9863 + 53 prevented offenses). The number of prevented offenses was 0.53% of what the total would have been that year without commitment ($53 / 9916 \times 100 = 0.53$). Using the total for 1993, this percentage would be slightly less ($53 / 13,752 \times 100 = 0.39$). These are very small percentages.

Another way to estimate the number of sex offenses prevented is to take the highest observed rate of offenders obtaining new sex-related charges. The group of 83 offenders recommended for commitment but released from prison (because petitions were not filed) displayed the highest rate of any subset of sex offenders SVPP examined.²⁵⁸ This group had 16.9% of its members eventually obtaining any new sex-related charge.²⁵⁹

Applying this rate to the entire group of offenders recommended for commitment but either released without commitment (610),²⁶⁰ released after commitment (100),²⁶¹ or still confined (647),²⁶² yields a total of 229 offenders who would have sexually reoffended had no one been committed ($1357 \times 16.9\% = 229$). Assume that these offenders would have had an average of 5

254. For further discussion of this issue, see Abel et al., *supra* note 66, at 3–25. The misperception that sex offenders have high recidivism rates and other myths are discussed in Richards, *supra* note 65.

255. Act approved May 26, 1999, ch. 99-222, §§ 394.910–.930, 1999 Fla. Laws 1372 (codified as amended at FLA. STAT. ANN. §§ 394.910–.932 (West, Westlaw through ch. 255 (End) of the 2014 2d Reg. Sess. and Sp. “A” Sess. of the 23d Leg.)).

256. See 1971–2013 REPORTED SEX OFFENSES, *supra* note 6, at 2.

257. *Id.* at 1.

258. See SVPP Data *supra* note 4.

259. See *supra* note 166 and accompanying text.

260. See *supra* note 130 and accompanying text.

261. See *supra* note 131 and accompanying text.

262. COMM. ON APPROPRIATIONS, *supra* note 7, at 6.

new offenses, for a total of 1145 offenses prevented. This is 82 prevented offenses per year for fourteen years.

Using the 2013 total mentioned above (9863), if these offenses had been reported, this means there would have been 9945 reported offenses without the Act ($9863 + 82$). The number of prevented offenses (potentially reported) is 0.8% of what the total number of reported sex offenses would have been, using the 2013 total ($82 / 9945 \times 100 = 0.8$). It is about 0.6% using the 1993 total ($13,752 + 82 = 13,834$; $82 / 13,834 \times 100 = 0.6$). Again, the percentages are very small.

Based on these estimates, commitment has prevented *less than 1%* of all reported sex offending that would have otherwise occurred. A percentage this small would seem to account for why there is no discernible effect of sex offender civil commitment on statewide sex crime rates.

There is no way to know the annual number of all sex offenses in Florida, both reported and unreported. It would be a higher figure than the number of reported offenses. Multiplying by five,²⁶³ the number of expected reoffenders provides an estimate of total number of prevented offenses, reported or not. Using an annual figure for all sex offenses that is higher than the annual number of reported offenses means that the annual number of prevented offenses would be an even smaller percentage of the yearly total.

B. *Is Sex Offender Civil Commitment Worth the Cost?*

It is difficult to estimate the cost to Florida of all SVP-related commitment processes. State budget figures for the SVP program do not include the expense of trials and evaluators hired directly by ASAs and defense counsel.²⁶⁴ Costs can be in the tens of thousands of dollars per trial (and annual review evaluations and hearings thereafter).²⁶⁵ Program expenses varied considerably over the years, increasing to \$30.9 million by January 2013.²⁶⁶

263. See *supra* Part IV.A.

264. See COMM. ON JUDICIARY, *supra* note 251, at 12–13 (stating that the budget valuation was based on the cost to house and evaluate sexually violent predators).

265. See *id.* at 12–13, 15 (indicating that the judicial costs are: \$250,000 annually for a judge; \$1486 to prosecute each case; \$8566 to defend each case; and \$4765 for witnesses, depositions, and transcripts).

266. See *id.* at 13.

It is reasonable to use \$31 million as an estimated annual cost. Program budgets were lower in the early years of the Act but this figure does not include judicial and circuit/county trial costs. It is a reasonably conservative overall estimate.²⁶⁷ This yields a grand total estimate for fourteen years of \$434 million for sex offender-specific civil commitment since 1999 through January 2013.

The \$434 million figure means that \$2,912,752 was spent for each one of the 149 potential sex offenses that commitment prevented (i.e., offenses that would have obtained at least a new charge had they happened), or \$582,550 per prevented offense if we assume 745 prevented offenses, or \$379,039 per prevented offenses if we assume 1145 prevented offenses.²⁶⁸

This is considerable expense per prevented offense, especially in light of the fact that this money could have been spent on expanding criminal justice management structures, affecting a vastly larger number of sex offenders. Commitment affects hundreds at most. Sex offender-specific probation can potentially affect tens of thousands. Most reoffenders come from the huge group of average sex offenders. There is no obvious reason why the number of offenses prevented by commitment is larger than the number that could have been prevented by expanding probation-related resources (and prison-based treatment programming). It may well have been fewer. Many more offenders would have been affected, at a vastly lower cost per offender.

No doubt the reader has heard it said, “Sparing one child (or adult victim) is worth any expense.” Preventing people from suffering terrible crimes is certainly worth public expense and a significant investment by the taxpayer. Most citizens are willing to bear a serious tax burden for crime control, especially for the control of sexual crime. But, if it is true that sparing a sexual victim is worth any expense then, logically, it would apply to each and

267. Cost in Florida is low for SVP programs. This author does not have up-to-date costs for other states; however, a comparison of state costs completed by the Washington State Institute for Public Policy indicated that costs in 2006 were reported as \$41,845 in Florida and \$141,255 in Minnesota. WASH. STATE INST. FOR PUB. POLICY, COMPARISON OF STATE LAWS AUTHORIZING INVOLUNTARY COMMITMENT OF SEXUALLY VIOLENT PREDATORS: 2006 UPDATE, REVISED 5 (2007). The average across state SVP programs is reported to be \$97,000 in 2006. *Id.* at 1. Average annual SVP program cost is reported to be \$40.5 million. *Id.*

268. For other states, cost per prevented offense is likely to be much higher because of higher spending on civil commitment. *See supra* note 267 (referring to other states' costs for SVP programs).

every one of 9863 reported sexual crimes in 2013, or 13,752 in 1993, if these crimes could have been prevented. Using the low estimate of cost per prevented sex offense, this would mean a total of \$6,066,666,666 for 2013, or \$8,444,209,320 in 1993.²⁶⁹ This is just for the control of sexual crime, not the vast array of non-sexual crimes, including other kinds of violent crime. For those sincere in making such claims, expressions of concern and indignation should be paired with brutal honesty about cost and equally passionate calls for greatly increased taxation and diversion of public resources from other social goods. Such calls have not been forthcoming.

V. CONCLUSIONS

More research and analysis are needed. This Article is only a first step toward a comprehensive policy analysis of an SVP commitment law and program in a large state. However, findings from the OPPAGA²⁷⁰ and SVPP²⁷¹ studies, together with state crime data, offer support for a number of claims about SVP commitment and related processes. While these claims certainly call for further investigation and replication, they are consistent with available data and can be made with reasonable confidence.

A. *Conclusions About Eligibility Determinations*

Mental health experts in a large state, applying nationally accepted best practices in risk assessment and clinical evaluation, have been largely successful in identifying and recommending for commitment those sex offenders referred for commitment consideration who met commitment criteria. The data suggest strongly that compared to the more than 31,000 sex offenders reviewed by SVPP since 1999, there were relatively few cases of offenders not recommended for commitment where sufficient evidence may have existed to allow reasonable certainty that the offender did in fact meet criteria. Contrary to media claims that the commitment process in Florida is broken,²⁷² a realistic policy analysis supports the opposite conclusion: the sexual recidivism

269. See 1971–2013 REPORTED SEX OFFENSES, *supra* note 6.

270. See *supra* Part III.B.3.

271. See *supra* Part III.B.8.

272. See Kestin & Williams, *supra* note 2.

rate for sex offenders determined not to meet criteria in Florida and not recommended for commitment is in fact very low (2%–4%)²⁷³ and comparable to, if not lower than, rates for non-recommended sex offenders in other states, including Minnesota, which may have the nation’s most inclusive commitment process.²⁷⁴ Commitment criteria were written to apply to only a “small but extremely dangerous number” of predatory sex offenders.²⁷⁵ This means that criteria will, at most, apply to only a minority of all sex offenders approaching end-of-sentence. This leaves tens of thousands of sex offenders who will not meet criteria (30,000+ in Florida). It is not realistic to expect that the sexual recidivism rate will be zero if so many sex offenders are released from prison. As it is, a 2%–4% rate for this huge group is probably as low as current risk assessment and clinical evaluation methods allow.

No doubt there have been at least some offenders who had limited sexual criminal history, not enough for SVPP to assign a paraphilia diagnosis and high actuarial score, but who did meet commitment criteria by virtue of having a disorder so impairing to their capacity for self-control that they were indeed made dangerous beyond control.²⁷⁶ These offenders may have been near the beginning of a predatory career. However, mental health professionals would not have known this, given limited documented background for these offenders. Dangerous offenders are rarely self-disclosing. Even if one assumes that all such offenders had one prior physically violent sexual crime, many offenders with similarly limited histories do not have another documented sex offense. To this author’s knowledge, no method currently exists that permits the identification of the minority of sex offenders who will reoffend who have a prior physically violent sex offense from the majority with the same record who will not have another known sex offense.²⁷⁷ These facts, combined with the fact that non-recommended offenders as a group produced a very

273. See *supra* Part II.D.

274. See *supra* note 85 and accompanying text.

275. FLA. STAT. ANN. § 394.910 (West, Westlaw through ch. 255 (End) of the 2014 2d Reg. Sess. and Sp. “A” Sess. of the 23d Leg.).

276. See *Kansas v. Crane*, 534 U.S. 407, 411–12 (2002) (holding that for civil commitment there must be a lack of control determination but it does not need to be an absolute or complete lack of control).

277. This minority is tiny for offenders who murder.

low sexual recidivism rate, suggest that few offenders who met criteria despite limited history were missed.

Also to be considered is a claim that no media outlet or politician seems likely to emphasize given public opinion about sex offenders. It is a claim that civil libertarians would emphasize, as well as advocates of government power limited by individual rights.

In contrast to a good record of identifying sex offenders in need of commitment, conscientious and dedicated mental health experts in Florida, using nationally accepted best practices in risk assessment and clinical evaluation, did far less well in limiting recommendations to *just* those sex offenders who genuinely met criteria for SVP civil commitment.²⁷⁸ In fact, experts had virtually no success at all in distinguishing a group of especially dangerous and disordered sex offenders from typical sex offenders.²⁷⁹ Sexual recidivism rates for offenders deemed to be special were in fact little different than rates for offenders thought not to be special.²⁸⁰ For every offender appropriately recommended for commitment, multiple offenders were recommended unnecessarily.²⁸¹

B. Risk Assessment Methodology

This gross disproportion of unnecessary versus justified recommendations suggests some conclusions about the specific methods used in Florida since 1999, which probably were (and likely still are) largely the same methods used by experts in all states with SVP laws. Actuarial risk assessment with the Static-99 and -99R, even when integrated with other risk-related considerations, did not enable experts to isolate a group of offenders “likely” to continue sexual offending if not confined on any plausible interpretation of “likely.”²⁸² Actual observed rates for recently studied sex offenders in Florida, released since 1999 are far below the listed observed rates for the Static-99 as well as the predicted rates for the Static-99R.²⁸³ Actuarial rates for the Static are significantly inflated for Florida sex offenders and are not an accurate gauge of absolute risk with respect to offenders obtaining

278. See SVPP Data, *supra* note 4.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. See *supra* Part III.B.4.

new sex-related charges or convictions after release.²⁸⁴ Given no reason to think that Florida sex offenders are much different from sex offenders in other states, or that Florida laws and restrictions throughout the past fourteen years were much different from what was becoming a trend in many states (Florida may now be among the most restrictive), the Static pair of instruments (99 and 99R) is not likely to be useful for measuring absolute risk for sex offenders anywhere in the United States.²⁸⁵ Their findings (actuarial category placement and identification of an associated recidivism rate) have no direct bearing on whether or not someone meets the “likely” standard.

With sexual recidivism rates as low as they are for sex offenders in Florida, even for offenders deemed special, it is not likely that *any* actuarial instrument currently available can be used as a valid gauge of absolute risk. No instrument of which the author is aware has a score category associated with even one sample of sex offenders released well into the nationwide decline in sexual offense/recidivism base rates (since 1993 but especially since 1999) showing an *observed* sexual recidivism rate anywhere close to 50%.²⁸⁶ As most offenders who reoffend do so within a few years of release,²⁸⁷ if rates for these offenders are not already 30%–40%, they are not likely to go up much further. Certainly no sample of Florida sex offenders released since 1999 is showing a rate this high, not by far. The data suggest that the future lies with designing new instruments, not with revising actuarial tables for current instruments to reflect “local norms.”²⁸⁸

284. See *supra* Part III.B.4.

285. In other states the Static-99R may function better as a relative rank order device (relative risk). In Florida, the instrument is problematic even as a gauge of relative risk.

286. This is assuming it is correct to interpret group rates from samples of offenders released many years ago as having probabilistic significance for individual cases and gauging potential for new offenses throughout many future years. Reasons exist to reject this assumption. See Montaldi, *Philosophy of SVP*, *supra* note 29, at 4-21 to -30.

287. Hanson et al., *supra* note 191.

288. This is assuming that actuarial approaches to risk assessment in general, or specifically for purposes of SVP determinations, have a future.

C. *The Current Dilemma of History-Based Risk Assessment*

It is this author's opinion that what recent data are revealing about the Static-99R is not a weakness of the Static in particular. It is likely to reflect a more general dilemma for any history-based actuarial risk assessment instrument. No instrument is likely to function as intended for sex offenders released after 1999.

A core premise of actuarial risk assessment is that more extensive sexual criminal history in representative offenders in a group (along with a few other factors) corresponds with higher rates of offenders becoming detected reoffenders. It was believed that the criminal histories of offenders permitted them to be sorted into categories differing significantly in the rates or percentages of offenders in those categories who would be reconvicted at least one more time for new sex offenses after release. Different rates mean different risk. For years this was borne out by research. Samples of offenders released during the period of the 1950s through the early 1980s showed this pattern (largely the developmental sample for the original Static). The premise makes intuitive sense. Controlling for age, a group of sex offenders with more sexual criminal history is more likely to be composed of offenders with sexual deviance disorders and dispositions to sexually offend than a group of sex offenders with less history, the latter being mostly impulsive or generally aggressive opportunists. More history means a higher actuarial score. So, higher scores were associated with higher rates. Rates decades ago were fairly high (compared to now). This allowed sex offenders to be sorted into meaningfully different categories according to a statistical interpretation of risk. It also allowed the highest risk category to be associated with a rate that seemed directly comparable to a quantitative rendering of the "likely" criterion for commitment.

It would seem that more recent data, such as those for Florida sex offenders released since 1999, have undermined this premise. Released offenders who were recommended for commitment have, for the most part, extensive histories. But their sexual recidivism rates are low, virtually as low as rates for offenders without much history. Why?

It is impossible to know at this point, but speculation is reasonable. In this author's opinion, the reason, at least in part, is an interaction between longer sentences and a still underestimated age effect.

Criminal sentences have increased in many states over the past two-and-a-half decades. In Florida, the average time served for violent offenses (including child molestation and rape) has increased 137% between 1990 and 2009.²⁸⁹ Decades ago, when sentences for sexual and violent offenses were shorter, offenders could have multiple convictions and still be at a relatively young age at their most recent release. They were still in their sexual criminal prime, so to speak, even after their third completed sentence. An argument could be made that this era was also one where sexual reoffending was easier (less restrictions, etc.). Because they were more likely to be disordered, offenders with more history produced fairly high sexual recidivism rates (i.e., high percentages of offenders becoming reoffenders), and rates substantially higher than those for offenders with less history, who were more likely to be impulsive opportunists.²⁹⁰

History-based actuarial instruments were never able to distinguish between offenders with little history (regardless of age) who were prone to accumulate more history (i.e., reoffend) and the majority of offenders with little history who were not so prone.²⁹¹ Nor could history-based instruments distinguish between older offenders with substantial history still prone to offend and older offenders with the same amount of history who were no longer prone. But these made up a minority of offenders. Many, if not most, sex offenders were still in their prime as they approached release for their most recent conviction (i.e., intact sex drive, adequate health). Those offenders who were prone to keep offending were more likely to have more history than those not prone to keep offending.

As the length of sentences increased, however, offenders coming out of prison after, for example, a third sex-related conviction (the commitment-eligible group based on history) came out considerably older than offenders who came out in previous years after three convictions, a time when sentences were much shorter. They had enough history to earn (largely static) paraphilia

289. Data on lengthening sentences since 1990 are discussed in *Time Served: The High Cost, Low Return of Longer Prison Terms*, PEW CENTER ON STATES (June 6, 2012), www.bridgemi.com/wp-content/uploads/2012/06/PSPP_Time-Served-Report_embargoed_June_6_2012.pdf.

290. Whether or not actuarial scoring criteria accounted for disorder directly, the presence of disorder was indicated by history as a proxy.

291. See *supra* Part II.D.

diagnoses and high actuarial scores, but they were past their prime. Offenders coming out who were still in their prime lacked much history, often having just served their first sentence, which was lengthy. Groups of offenders with substantial history thus began to show rates almost as low as those for groups of offenders with less history, undermining the power of history to discriminate categories of offenders according to recidivism rates.

This means two things: instruments not yet properly accounting for age will have higher scoring categories (by virtue of history) showing much lower recidivism rates and rates not much different from rates for lower scoring categories. No rate will be anywhere near 50%. In contrast, instruments properly accounting for age will now have few offenders getting higher scores at all, either because they lack history or they are too old. Rates for lower scores will be low and almost all offenders will fall into low score categories. Age may be cancelling out history as a risk discriminator.

One more observation seems relevant. It is about criminal history and our emotions and value judgments. With its heavy history basis, actuarial risk at one time appeared to coincide with just how bad someone's life had been. More criminal history meant a higher score and also a shockingly worse life. It is this author's opinion that it has always been difficult for experts (much less non-experts) to steer that fine line between seeing history as evidence of current danger, thus warranting commitment, and seeing it as evidence that someone deserves lifetime confinement (commitment). But especially when criminal history is far in the past, even "bad" people may not be currently dangerous. Recent data are showing this. No doubt history-dominated evaluations will continue to be done. Juries at least will continue hearing the message of a "bad guy" deserving commitment. This is the inherently punitive element of forced hospitalization for criminal offenders that the Supreme Court did not consider.

If history (as documented in a criminal record) is indeed becoming unreliable for assessing current risk or danger, such a state of affairs seriously undermines the ability of mental health professionals to do assessments of absolute risk with currently available methodology. The stakes are high, both for missing predators and possibly confining for life people who are no longer dangerous and not charged with new crimes. The ethical issues are grave for any profession devoted to not doing harm to persons

subject to its practices. The legal and constitutional issues for due process are also grave.

D. A Lesson for Minnesota: Conditional Release and Treatment Efficacy for Persons Considered to Be Sexually Violent Predators

Some conclusions are suggested concerning treatment efficacy for sex offenders subject to SVP proceedings. These claims have direct relevance for states such as Minnesota considering the expansion of Less Restrictive Alternative programming, as well as for states like Florida, which currently lack formal conditional release options.

Recidivism data for sex offenders recommended for commitment in Florida but granted conditional release pursuant to (extra-statutory) settlement agreements offer strong support for Less Restrictive Alternative programming. Indeed, they suggest that the majority of offenders who have been found to meet criteria for civil confinement are manageable on some form of conditional release. At least in Florida, intensive inpatient treatment in a secure setting is showing no advantage over outpatient treatment in the community. Recidivism rates for committed offenders released after inpatient treatment are about the same as rates for offenders with settlement agreements requiring participation in outpatient treatment. The former has cost the state a great deal of money over the years while the latter has been at the offender's expense. This is not to say that some state support for outpatient treatment would not have been desirable. It is just to say that no evidence is showing that greater cost has produced better results. Finally, no evidence indicates that completion of inpatient treatment in a secure civil facility has any risk-reductive advantage over treatment participation.

This does not mean that inpatient sex offender treatment programming is poorly designed or administered. With rates as low as they are, even for untreated offenders, it is unlikely that any intervention can significantly lower rates any further. This may reflect a kind of statistical floor effect. Any group of released sex offenders will have some percentage of offenders going on to offend again. It is not realistic to expect any treatment program to produce a zero recidivism rate.

The data support an even stronger conclusion, albeit one that bears further study. Data so far provide little if any evidence of a treatment effect at all for offenders considered by mental health

experts to be sexually violent predators, whether inpatient or outpatient. Detainees granted full discharges with no expected treatment have sexual recidivism rates about as low as offenders with settlement agreements and formerly committed offenders. Rates were slightly lower for the last group, but they possess features unrelated to treatment that would account for their lower rate (e.g., significantly less time in the community and older age at release).

These claims do not imply that sex offender treatment programming, whether inpatient or outpatient, is poorly designed or administered. If that were true then it would be reasonable to expect a differently designed or administered program to produce rates significantly below rates that are already low. But this is not realistic. Again, there is a statistical floor effect. Any group of released sex offenders will have some percentage of offenders going on to offend again. No treatment program will produce a zero recidivism rate.

E. The Effect of Commitment on Crime Rates: Is It Worth the Money?

This leads us to the issue of whether SVP commitment programs are the best way to accomplish the legitimate public policy goal of protecting the community from sexual crime. Given the problems with risk assessment, should the state have a crime prevention program so heavily reliant on mental health professionals attempting to gauge absolute risk in individual cases? Was commitment a good way to expend crime prevention resources?

Even if policymakers tolerate numerous unnecessary commitments for every necessary one (until the constitutional challenge sure to come), a preliminary analysis of commitment in Florida gives no support for the belief that sex offender-specific commitment has been cost effective. There has been no measurable impact on statewide sexual crime rates. Rates were already declining prior to commitment, at an even greater rate of decline.

Commitment probably has achieved the indefinite confinement for most of the very dangerous sex offenders who were referred for commitment consideration. Their potential victims were spared. This is an extremely good thing, wherever one stands with respect to commitment laws.

However, from a policy perspective, the issue is whether the money spent on preventing sexual crime through civil confinement has produced better results than if the same or less money had been spent on other measures. It is at least conceivable that the same money could be spent strengthening already existing criminal justice structures such as sex offender-specific probation and prison-based treatment programming. Criminal justice structures (e.g., sex offender-specific probation) affect vastly more sex offenders than commitment, at much lower cost per offender. Risk assessment in a criminal justice context could have been limited to broad group-wise sorting of offenders into rank ordered categories (relative risk), permitting focused targeting of community-based resources on groups otherwise expected to have higher recidivism rates. As discussed, at least in Florida, the most widely used actuarial instruments (Static) are not unproblematic even for relative risk. But attempts to sort offenders by groups into different levels of community-based structures are far less problematic than making individualized opinions about absolute risk that potentially lead to many unnecessary and potentially lifetime confinements.

There is no way to know with any certainty how many sexual crimes would have been prevented had the money spent on commitment (or some of that money) been spent in an alternative manner while still targeted on sex offenders. Perhaps few would have been prevented, given how low rates are even without much intervention. Throwing money at what was already becoming a bad-outcome floor effect may have had little measurable impact. What can be said is that the number of offenses prevented by commitment is fewer than what lawmakers probably expected. No basis whatsoever exists for thinking that commitment has prevented “thousands” of sexual crimes. Given how low this number probably is, no evidence to date suggests that commitment has prevented *more* sexual offenses than what would have been possible with different policies. *It may have prevented fewer.*

Summary claims are preliminary, but empirically supported at this point. No empirical or scientific basis exists for the opinion that the Florida SVP Act has been efficacious. Whatever its popularity, involuntary hospitalization continues to be the most expensive way to manage sex offenders, and with little discernible advantage.

F. *Ethical Concerns*

A summary claim is also possible concerning the kind of efficacy that is relevant to due process and the professional ethics of mental health experts. There is now an empirical basis for the opinion that commitment eligibility determinations based on longstanding risk assessment and clinical evaluation practices generate a high number of unnecessary commitments, exceeding the number of necessary commitments many times over. For mental health professionals, the data are sending a clear message. Current risk assessment and clinical evaluation practices applied to commitment eligibility determinations may have helped spare some people—who would not have been saved by a commitment-alternative approach—the great harm of sexual violence. But they have also helped facilitate great harm done to the lives and liberty of many persons who were no longer dangerous. Many will say that if assessments had been based on clinical judgment alone, without the acknowledgment of research (i.e., without actuarial methods), they would have harmed even more people no longer dangerous. That may be true. But harm was done nonetheless, and in more than rare instances. Experts did not have this knowledge at the time they were doing commitment evaluations and making final determinations about recommendation for commitment. Now they do.

APPENDIX

Data on all offenders referred to SVPP for commitment consideration (up to the summer of 2013) are discussed in a report by the *Florida Sun Sentinel*.²⁹² The report alleged that the commitment process (and perhaps sex offender laws in general) is “broken” in Florida because “hundreds” of rapists and other sex offenders who went on to have new offenses were released instead of committed. The report used conviction/charge data from the Florida Department of Law Enforcement.

In the main body of the story, the authors do not discuss the total sample size from which their reconviction and new charge data come. Nor do they discuss the significance of rates in understanding the significance of recidivism data; they just give raw total numbers of offenders with new charges and convictions and

292. Kestin & Williams, *supra* note 2.

describe these as too many. No analysis was given to the issue of whether these individuals had sufficient sexual criminal history to warrant high actuarial scores and paraphilia diagnoses (eligibility criteria).

Sample size is discussed briefly in a section readers can access through a link on the web version of the story. In this section the authors describe how they conducted their study. There it is stated that the sample was around 31,000 offenders. However, the authors minimize the significance of such a large sample size to what percentage of the sample consists of the reoffenders. They imply that the true size of the sample, for purposes of thinking about meaningful percentages, is much smaller.

First, the authors report that 10,000 of the 31,000 offenders in the sample were returned to prison and therefore had limited opportunity to sexually reoffend after release (after the period of incarceration during which they were considered for commitment). They say that 1800 of these offenders were never released. Second, the authors report that 4800 offenders from the sample had died, were deported, or moved to another state. Finally, they report that 5500 offenders have unknown addresses or locations; 130 are fugitives. A total of 7600 were known to be living in Florida.

These facts have less relevance than the authors suppose.

It may be that 10,000 offenders were returned to prison at some point after being released from the period of incarceration during which they were considered for commitment. It is also true that their time in the community is therefore "limited." But so is the time of any released offender who will die eventually. The issue is whether any empirical or logical basis exists for assuming that release time for these offenders is *so sharply* limited that they should not be included in a sample used to study recidivism. Obviously, if an offender is released and then rearrested that same day for a non-sexual offense that returns him to prison for life, he has not had enough time in the community to meaningfully examine his recidivism potential (or for it to impact that of a sample). He has not had a meaningful opportunity to reoffend. The same is not true of the offender who returns to prison five years after release.

But the authors cite no data on how long these offenders were in prison or how much time they spent in the community before returning to prison. The average release time of the sample is not known but is likely to be six to seven years at least. Some have been

released fourteen years and others less than a year. Many were released from the incarceration during which they were considered for commitment for as long as ten years. In Florida, an offender on probation can be returned to prison for a period of months for a probation violation. SVPP found that 466 out of 710 offenders (66%) recommended for commitment had not returned to prison for even as brief a period as a month and a day. Jail time is unknown but is usually less than a year. Offenders not recommended are likely to be similar, if even less prone to go back to prison (given their typically less extensive criminal histories). Offenders spending limited periods in prison, or spending years in the community before returning to prison, should remain in the sample. At this point, no good reason exists for excluding any significant percentage of the 10,000 from the sample.

The authors state that 1800 offenders were never released but they are not clear about what this means. Does this mean they were never released (again) after returning to prison? Then the question is, how many years did they spend in the community before going back to prison? Or, do the authors mean that these offenders were not released from the period of prison incarceration during which they were considered for commitment? If the former is true, then if someone was in the community several years before returning to prison he should not be excluded from the sample. Whether or not he is ever released again is irrelevant.

What about the 4800 offenders who died, were deported, or moved to another state? The authors cite no data indicating how long offenders were in the community prior to death, deportation, or moving to another state. Obviously, someone who dies after several years in the community should not be excluded in the sample. The same is true for persons deported or who moved to another state. For offenders recommended for commitment, SVPP examined Department of Corrections websites in other states when at least an out-of-state address was listed for the offender's intended residence prior to release. No additional reoffenders were found. It is not yet known but it seems likely, based on what was found for recommended offenders, that the percentage of non-recommended offenders who reoffended *only* in another state or country is small. Without these details, no good reason exists for excluding any sizable percentage of the 4800 from the sample.

Then there are the 5500 offenders whose whereabouts are not known (including the 130 fugitives). No reason exists to use

unknown address as a reason for excluding these offenders from the sample. Unknown residence for an offender does not mean that a new offense by that offender would not bring a charge or conviction that would allow him to be detected in a recidivism study. Indeed, both his location and his recidivism status would now be known. The same is true for fugitives.

Suppose we err on the extreme conservative side. If we exclude from a sample of 31,000 offenders the 10,000 returning to prison (which includes the 1800 never released), the 4800 who died or were deported or moved out of state, and the 5500 offenders with unknown whereabouts (which would include the 130 fugitives), this would leave a sample of 10,700 offenders. Given the sex-related reconviction and new charge data cited by the authors, the reconviction rate would then be 5.6% ($594 / 10,700 \times 100$) and the new charge rate would be 12.9% ($1384 / 10,700 \times 100$).

The latter rate is remarkably close to the new charge rate found in the Adam Walsh study for a sample of randomly selected, typical sex offenders in Florida released from prison (which means they were not recommended for commitment). The Adam Walsh rate was 13.7% for Florida sex offenders released ten years.²⁹³

Finally, this rate is little different from the ten-year rate for a random sample of Minnesota sex offenders (12.9%). Minnesota has one of the nation's most draconian commitment laws.²⁹⁴

In sum, even if all the authors' assumptions are granted and the sample of offenders not recommended for commitment is greatly reduced in size, the resulting sexual recidivism rate is still typical for average sex offenders in Florida and other states. Civil commitment criteria were intended to apply to sex offenders who are not average. No evidence indicates that Florida's SVPP failed to recommend for commitment a significant number of sex offenders whose case files contained sufficient evidence that they met criteria at the time of review.

293. ZGOBA ET AL., *supra* note 7, at 20–21.

294. *See supra* note 85 and accompanying text.