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MANAGING THE RISK OF VIOLENT RECIDIVISM: LESSONS FROM LEGAL RESPONSES TO SEXUAL OFFENSES

MICHAEL O'HEAR*

ABSTRACT

Over the course of a generation, American legislatures have quietly adopted an intricate web of measures intended to reduce the risk that individuals who have been convicted of violent crimes will commit new violent crimes. These measures include, for instance, sentencing and corrections laws that categorically target “violent offenses” and “violent offenders” for harsher treatment, prohibitions on pretrial diversion opportunities, employment restrictions, and long-term offender registration requirements. Such measures parallel a generally similar but more closely studied set of laws that aim to reduce sexual recidivism.

This Article provides an overview of the literature on sexual-recidivism measures, especially sexual offender registration and notification and civil commitment for sexually violent predators, and considers lessons that may be drawn for the improved management of violent-recidivism risk. Existing violent-recidivism measures suffer from the same basic structural flaw that has plagued most existing sexual offender registration and notification laws—that is, a reliance on convictions per se as an automatic trigger for legal requirements or disabilities. This inevitably subjects many low-risk individuals to legal controls that are only suitable for higher-risk individuals—a wasteful and potentially counterproductive form of overbreadth. By contrast, sexually violent predator civil commitment is based on individualized determinations of risk. This basic approach, with various refinements and adaptations, points to a more promising strategy for addressing the risk of violent recidivism.

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INTRODUCTION

Through a series of ad hoc measures adopted piecemeal over a generation, American legislatures have quietly constructed a distinct legal regime for responding to crimes that are classified as “violent.”¹ In comparison to most other offenders, individuals who have been convicted of violent crimes are apt to find themselves treated in a categorically different and harsher manner when it comes to sentencing,² parole,³ community supervision,⁴ opportunities in subsequent cases for pretrial release and diversion,⁵ occupational licensing,⁶ expunction of convictions,⁷ and many other matters of consequence.⁸

Thus, for instance, a statute in Illinois excludes defendants who have a current or prior conviction for a violent offense from “second chance probation,” which otherwise offers the possibility of dismissal of the underlying charge if the defendant successfully completes probation.⁹ A Wisconsin statute imposes a mandatory minimum prison term of three years for the crime of unlawful possession of a firearm if the defendant has a prior conviction for a violent felony.¹⁰ In Maryland, prisoners with a violent-crime conviction must wait twice as long as other prisoners before becoming eligible for parole.¹¹ Kentucky prohibits individuals with a violent-crime conviction from working in the childcare field.¹² Literally hundreds of additional illustrations could be supplied from across the country.¹³

To a great extent, this large body of legislation reflects public and policymaker concern over the residual risk of violent recidivism (“VR”).¹⁴ By

¹ For a systematic taxonomy of the special measures adopted for violent crime, see generally Michael O’Hear, *Third-Class Citizenship: The Escalating Legal Consequences of Committing a “Violent” Crime*, 109 J. CRIM. L. & CRIMINOLOGY 165 (2019).

² See *id.* at 195-202.

³ See *id.* at 203-06.

⁴ See *id.* at 207-08.

⁵ See *id.* at 189-93.

⁶ See *id.* at 212-17.

⁷ See *id.* at 217-20.

⁸ See, e.g., *id.* at 220-23.

⁹ 730 ILL. COMP. STAT. ANN. 5/5-6-3.4(a-1) (West 2018) (“A defendant is not eligible for this probation if the offense he or she pleads guilty to, or is found guilty of, is a violent offense, or he or she has previously been convicted of a violent offense.”).

¹⁰ WIS. STAT. ANN. § 941.29(4m)(a) (West 2019).

¹¹ More specifically, Maryland inmates with a violent conviction must serve at least one-half of their sentences before becoming eligible for parole consideration, MD. CODE ANN., CORR. SERVS. § 7-301(c)(1)(i) (West 2019), in contrast to the normal one-quarter rule, *id.* § 7-301(a)(2).

¹² KY. REV. STAT. ANN. § 17.165(6) (West 2019).

¹³ For more examples, see *infra* Part II (noting that research uncovered about 600 categorical statutory consequences for charge or conviction that states classify as violent).

¹⁴ See, e.g., FLA. STAT. ANN. § 948.12 (West 2019) (“It is the finding of the Legislature that the population of violent offenders released from state prison into the community poses

residual risk, I mean the risk of violent reoffense that remains notwithstanding the imposition of a conventionally determined and administered criminal sentence. Of course, some degree of residual risk is unavoidable in most cases. While the number of sentences of life without the possibility of parole (“LWOP”) has been on the rise in recent years, the proportion of prisoners serving such sentences remains just a fraction of 1%,¹⁵ and there seems to be no political movement to expand LWOP eligibility much beyond its current bounds. Sooner or later, almost all prisoners gain release—even those who have been convicted of violent crimes.¹⁶ And release inherently involves at least *some* risk of reoffense in the community, including violent reoffense.¹⁷

However, even though some VR risk may be unavoidable, that reality does not necessarily mean policymakers will be satisfied with the precise nature and extent of the risk that exists under conventional criminal-justice rules and practices. Consider, for instance, the consternation that can occur when a notorious offender reaches his or her mandatory parole release date.¹⁸ In such scenarios, when the existing rules do not seem adequate to manage the threat of VR, a legislature may be motivated to change the rules.¹⁹

At least since the time of the infamous Willie Horton television ad in 1988, the specter of the violent recidivist has haunted criminal-justice policymakers.²⁰

the greatest threat to the public safety of the groups of offenders under community supervision.”).

¹⁵ MICHAEL O’HEAR, *THE FAILED PROMISE OF SENTENCING REFORM* 8 (2017).

¹⁶ See DANIELLE KAEBLE, U.S. DOJ, *TIME SERVED IN STATE PRISON*, 2016, at 3 (2018), <https://www.bjs.gov/content/pub/pdf/tssp16.pdf> [<https://perma.cc/7G4J-8QXF>] (“More than 7 in 10 violent offenders [72%] released in 2016 served less than five years in state prison . . .”).

¹⁷ To be sure, there is also some VR risk even while the offender remains in prison. See MARGARET E. NOONAN, U.S. DOJ, *MORTALITY IN STATE PRISONS, 2001-2014—STATISTICAL TABLES 4* (2016), <https://www.bjs.gov/content/pub/pdf/msp0114st.pdf> [<https://perma.cc/JGK2-3TGA>] (indicating that 845 state prisoners were homicide victims between 2001 and 2014, including, but not limited to, those who were killed by fellow inmates). However, legislatures have seemed far more focused on controlling VR risk after prison than in prison.

¹⁸ For instance, when Gerald Turner, a high-profile Wisconsin inmate who had been convicted and sentenced in 1975 for the killing of a nine-year-old girl, reached his mandatory parole date in the 1990s, state politicians were quick to express alarm and demand changes in state law. See, e.g., *Gov Talks Tough on Sentencing*, CAP. TIMES, Jan. 31, 1998, at 1A (quoting state legislator as saying that “we should be watching him for the rest of his life to protect the public from a dangerous child murderer and rapist”).

¹⁹ The Turner case proved just such an occasion in Wisconsin, motivating passage of the state’s civil-commitment law, which was even named the “Turner Law.” *Id.* The Turner case was also invoked prominently in support of Wisconsin’s 1998 “truth-in-sentencing” law, *id.*, which entirely eliminated the possibility of parole release for offenses committed on or after the statute’s effective date. See Michael O’Hear, *Wisconsin Sentencing in the Walker Era: Mass Incarceration as the New Normal*, 30 FED. SENT’G REP. 125, 126 (2017) (commenting on passage of Wisconsin’s truth-in-sentencing law).

²⁰ While serving time for murder in Massachusetts, Willie Horton was granted a short-term furlough from prison. He absconded and later stabbed a man and sexually assaulted the

Of particular political importance has been the perception that discretionary actors in the system—sentencing judges, parole officials, and others—are naïve or insensitive to the VR threat, just as the prison officials who furloughed Willie Horton seemed to have been. This perception has motivated the adoption of a host of mandatory minimums; parole-eligibility restrictions; and similar discretion-diminishing measures, many of which particularly target those individuals who have been convicted of violent offenses and who are thus seen to present the greatest risk of future violent offending.²¹

Taken together, the statutory special measures in a jurisdiction that categorically target violent offenses and offenders might be characterized as its VR control regime. Although such regimes, framed in this manner, have received almost no scholarly attention,²² they have become commonplace in the United States and undoubtedly contribute to the extraordinarily high number of individuals with violent-crime convictions who are currently under criminal-justice supervision.²³

man's wife. O'HEAR, *supra* note 15, at 13-14. When Massachusetts governor Michael Dukakis ran as the Democratic nominee for President in 1988, his early lead over Republican George H.W. Bush evaporated in the wake of a controversial television attack ad that sought to tie Dukakis to Horton. *Id.* Survey research confirmed the devastating impact of the Horton ad, which seemed to demonstrate—if this had not been clear already—that politicians seeking national office must cultivate a tough-on-crime persona. *Id.* at 14.

²¹ See *id.* at 3-6 (discussing widespread adoption of discretion-diminishing reforms in late twentieth century).

²² To be sure, some specific aspects of VR control regimes have received considerable attention. Two bodies of scholarship that overlap with this project are especially noteworthy: First, numerous authors have critically assessed recidivism laws, which require longer sentences for repeat offenders, as in a “three strikes and you are out” statute. See, e.g., FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 16 (2003). Many but not all recidivism laws particularly target repeat offenders who have been convicted of violent crimes. See, e.g., ARIZ. REV. STAT. ANN. § 13-706(B) (2019) (providing for sentence enhancement for individuals with three convictions for “violent or aggravated” felonies). Second, a growing body of research catalogs and critiques the so-called “collateral” consequences of criminal convictions. See, e.g., MARGARET COLGATE LOVE, JENNY ROBERTS & CECELIA KLINGELE, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY AND PRACTICE 2 (2016). These are adverse legal consequences, such as categorical bars to working in certain fields or obtaining certain kinds of public benefits, that follow from a conviction but are not formally part of the sentence. Many collateral consequences apply broadly to any felony conviction, but some are expressly limited to convictions for violent crimes. See, e.g., ARIZ. REV. STAT. ANN. § 36-594(3) (authorizing denial, suspension, or revocation of license for home for developmentally disabled if “employee, applicant, licensee or adult household member” has been convicted of “violence related offense”).

²³ Most prisoners in the United States are serving time for violence-related reasons. At the end of 2015, for instance, 54.5% of state prisoners were serving sentences for a crime classified as violent by the Federal Bureau of Justice Statistics (“BJS”), chiefly murder (13.7%), sexual assault (12.5%), robbery (13.2%), and assault (10.5%). E. ANN CARSON, U.S. DOJ, PRISONERS IN 2016, at 18 tbl.12 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>

While scholars have paid little heed to the system of special measures that has emerged to deal with *violent* recidivism, they have devoted a great deal of attention to the somewhat overlapping control regime for *sexual* recidivism (“SR”).²⁴ The heightened attention follows, no doubt, from legislatures’ increased boldness in designing special measures for sexual offenders, including such headline-grabbing, constitutionally suspect innovations as sexual offender registration and notification (“SORN”) laws²⁵ and sexually violent predator (“SVP”) laws that authorize indefinite civil commitment,²⁶ residency restrictions,²⁷ and even chemical castration.²⁸ In general, scholars have been quite critical of such innovations both on fairness and efficacy grounds.²⁹

[<https://perma.cc/8WC3-A6NG>]. To be sure, the federal system is far more focused on drugs than are state systems, and only 7.7% of federal prisoners are serving time for an offense classified as violent. *Id.* at 20 tbl.14. However, because the federal system accounts for fewer than 13% of prisoners, *id.* at 3 tbl.1, the overall national picture does not change much when the federal numbers are added.

Even these figures, though, likely substantially understate the importance of violence as a driver of mass incarceration. For one thing, the BJS uses a relatively narrow definition of what counts as “violent.” If burglaries (accounting for 9.7% of state prisoners), weapons offenses (3.9%), and DUIs (1.9%) were included, then the violent share of the prison population would rise to 70%. *Id.* at 18 tbl.12. Perhaps more important, although harder to quantify, is the number of prisoners whose current offense of conviction is nonviolent but whose sentence is nonetheless driven in some important way by violence-related considerations. For instance, a prior conviction for a violent offense may loom large in determining the sentence for the current nonviolent offense, or the defendant may be strongly suspected of uncharged violent conduct. Indeed, “pretextual prosecutions” likely account for a good share of the imprisonment that is nominally for drug crime. For a variety of reasons, police and prosecutors often find it more convenient to target violent street gangs using drug charges, even though the overriding law enforcement interest in these cases may lie in the suppression of violence. *See* WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 267-74 (2011).

Individuals convicted of violent crime constitute a smaller but still quite substantial share of those who are subject to criminal-justice supervision in the community—30% of parolees and 20% of probationers, as measured by the BJS. DANIELLE KAEBLE, U.S. DOJ, *PROBATION AND PAROLE IN THE UNITED STATES*, 2016, at 17, 24 (2018), <https://www.bjs.gov/content/pub/pdf/ppus16.pdf> [<https://perma.cc/DB58-KA22>].

²⁴ These sets of laws overlap because some sexual offenses, such as rape, are also often regarded as violent offenses.

²⁵ *See infra* Section I.A.

²⁶ *See infra* Section I.B.

²⁷ MICHAEL O’HEAR, *PRISONS AND PUNISHMENT IN AMERICA: EXAMINING THE FACTS* 151-52 (2018) (doubting that residence restrictions are effective based on existing research).

²⁸ Michael Petrunik, Lisa Murphy & J. Paul Fedoroff, *American and Canadian Approaches to Sex Offenders: A Study of the Politics of Dangerousness*, 21 *FED. SENT’G REP.* 111, 115 (2008).

²⁹ *See, e.g.,* J.J. Prescott, *Portmanteau Ascendant: Post-Release Regulations and Sex Offender Recidivism*, 48 *CONN. L. REV.* 1035, 1040 (2016) (noting “scholarly consensus” on ineffectiveness of SORN laws).

Although there has been little appreciation to date of the importance of VR control regimes, this neglect may end soon. Ongoing efforts to roll back mass incarceration in the United States³⁰ will inevitably come to focus on those who have been convicted of violent crimes because it is these individuals who predominate in the national prison population—constituting perhaps two-thirds or more of inmates, depending on the criteria that are used.³¹ Attention to this offender group, in turn, will demand some rethinking of VR-related laws.

Despite the contribution of VR special measures to historically high incarceration rates, a wholesale abandonment of all efforts to manage residual VR risk seems infeasible as a matter of politics and perhaps injudicious as a matter of policy. Fortunately, if our aim is to refine and improve rather than simply abandon our VR control strategies, the abundant research on sexual-offender laws provides many helpful lessons—a number of dos and don'ts that should be observed in designing any recidivism control regime.

Most fundamentally, the SR laws highlight a crucial distinction between measures that are triggered automatically and categorically by convictions for particular offenses and measures whose imposition is based on individualized determinations of risk. SORN laws exemplify the former, offense-based approach, while SVP civil-commitment laws exemplify the latter, individualized approach. SORN laws have proven a great disappointment, and their shortcomings seem to highlight inherent difficulties with the offense-based approach.³² SVP laws have also been dogged by controversy but, on the whole, seem to have been implemented in a more restrained, better-targeted fashion. That said, a close evaluation of the SVP experience suggests a number of lessons that could improve the way that the individualized approach is implemented in the VR context. Appropriately adjusted, the civil-commitment model offers a better approach to the management of VR risk than does the current hodgepodge of offense-based special measures.

In developing these points, this Article proceeds as follows. Part I describes in more detail the research on and criticisms of SR special measures, particularly SORN and SVP civil commitment. Part II surveys the current web of VR special measures in the United States. Part III articulates key criticisms of the existing regime in the areas of both efficacy and fairness, highlighting parallels between current VR special measures and SORN laws. Part IV then proposes that the offense-based system of VR special measures be replaced with a new, individualized approach that mirrors SVP civil commitment in some but not all respects.

³⁰ American imprisonment and jailing rates quintupled between 1972 and 2007 and, despite some reduction over the past decade, remain more than four times higher than their historic norms. O'HEAR, *supra* note 27, at 166-67. Since 2000, many states have adopted policy changes intended to reduce incarceration rates. Michael O'Hear & Darren Wheelock, *Imprisonment Inertia and Public Attitudes Toward "Truth in Sentencing,"* 2015 BYU L. REV. 257, 257. Public opinion polls indicate that there is strong public support for such reforms. *Id.* at 285.

³¹ See CARSON, *supra* note 23, at 18 tbl.12.

³² See *infra* Section I.A.

I. MANAGING THE RESIDUAL RISK OF SEXUAL RECIDIVISM

Legislatures in the United States have adopted many types of special measures intended to address the residual risk of SR. This Part first considers offense-based approaches and then the individualized mechanism of SVP civil commitment.

A. *Offense-Based Approaches*

The offense-based SR special measures are varied. For instance, some states require longer sentences when a person is convicted a second or subsequent time for an offense classified as “sexual.”³³ Other states prohibit certain kinds of employment for sexual offenders in the hope that they will have less opportunity to assault children or other vulnerable individuals.³⁴ Another strategy is to restrict pretrial release when a person with a prior sexual conviction faces new charges.³⁵ In the same spirit, some states limit the ability of sexual offenders to take advantage of prison release opportunities that are otherwise generally available.³⁶ Additionally, sexual offenders may face harsher responses when they violate the terms of probation or parole release.³⁷

Yet the best-known and most carefully studied offense-based approach has undoubtedly been SORN, which is the focus of the remainder of this Section. Proliferating rapidly over the 1990s, all fifty states and the District of Columbia adopted SORN laws by 1999.³⁸ Although the technical details vary considerably

³³ See, e.g., LA. STAT. ANN. § 15:529.1(A)(2)(a) (2019) (“If the second felony and the prior felony are sex offenses . . . the person shall be sentenced to imprisonment at hard labor for a determinate term not less than two-thirds of the longest possible sentence for the conviction and not more than three times the longest possible sentence prescribed for a first conviction, without benefit of probation, parole, or suspension of sentence.”).

³⁴ See, e.g., ARK. CODE ANN. § 20-38-105(c)(3) (2019) (“For purposes of . . . employment with a childcare facility or church-exempt childcare facility, a conviction or plea of guilty or nolo contendere for any offense that involves . . . a sexual act, whether or not the record of the offense is expunged, pardoned, or otherwise sealed, may result in permanent disqualification . . .”).

³⁵ See, e.g., WASH. REV. CODE § 10.21.015(2) (2019) (“A pretrial release program may not agree to supervise, or accept into its custody, an offender who is currently awaiting trial for a . . . sex offense . . . who has been convicted of one or more . . . sex offenses in the ten years before the date of the current offense . . .”).

³⁶ See, e.g., S.C. CODE ANN. § 24-13-125 (Supp. 2017) (“A person is eligible for work release if the person is sentenced for [various listed offenses], the *crime did not involve any criminal sexual conduct* . . . and the person is within three years of release from imprisonment.” (emphasis added)).

³⁷ See, e.g., LA. CODE CRIM. PROC. ANN. art. 900(A)(6)(b) (2019) (establishing caps on length of incarceration following revocation for “any defendant who has been placed on probation by the court for the conviction of an offense other than a crime of violence . . . or of a sex offense” (emphasis added)).

³⁸ Wayne A. Logan, *Sex Offender Registration and Notification*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 397, 404 (Erik Luna ed., 2017).

by state, the laws share a basic structure that includes certain standard features. As Professor Wayne Logan helpfully summarizes,

In a nutshell, SORN laws require that convicted sex offenders provide government authorities a variety of identifying information (e.g., photos, home and work addresses, vehicle descriptions, e-mail or Internet identifiers, and descriptions of identifying body marks, such as scars and tattoos). Individuals must thereafter verify the accuracy of the information on at least an annual basis, for a minimum of 10 years and perhaps their lifetimes, and update it in the event of any changes, facing felony prosecution if they fail to do so. State (and sometimes local) governments then provide this information to the public by means of community meetings, informational flyers, newspaper notices, and most commonly today, by public websites, with software often pinpointing the location of registrants.³⁹

In general, SORN requirements are triggered by convictions for certain offenses, not by individualized risk determinations—this is why they are categorized here as “offense-based.” About one-third of states maintain “single-tier” systems in which all or almost all individuals who have been convicted of designated offenses are subjected to identical requirements.⁴⁰ For instance, Florida mandates lifetime registration for all offenders covered by its law and puts information regarding all of these individuals on its community notification website.⁴¹ The remaining two-thirds of states divide registered offenders into two or more tiers, with different registration and/or notification provisions applicable to each tier.⁴² Lower-tier registrants may benefit from rules that require less frequent reporting to law-enforcement agencies, involve shorter registration periods, and result in less widespread community notification.⁴³ Although tiered systems are nominally risk based, with higher-risk offenders theoretically assigned to higher tiers, only about one-third of states use actuarial risk-assessment instruments for this purpose.⁴⁴ The great majority of states instead rely solely on the offense of conviction and/or number of convictions as a crude proxy for risk⁴⁵—these states, in other words, operate SORN systems that still embody the “offense-based” approach.

SORN laws tend to be broadly inclusive, sweeping large numbers of individuals into the registration and notification regime. Although a reliable,

³⁹ *Id.* at 397-98 (footnote omitted).

⁴⁰ Kristen M. Zgoba et al., *The Adam Walsh Act: An Examination of Sex Offender Risk Classification Systems*, 28 *SEXUAL ABUSE* 722, 724 (2016).

⁴¹ Wayne A. Logan, *Challenging the Punitiveness of “New-Generation” SORN Laws*, 21 *NEW CRIM. L. REV.* 426, 436 (2018).

⁴² Zgoba et al., *supra* note 40, at 724-25.

⁴³ See, e.g., *id.* at 724-25 (discussing Minnesota, New Jersey, and federal laws).

⁴⁴ *Id.* at 724.

⁴⁵ *Id.* (noting that 70% of tiered-system states use conviction offense to determine risk and 45% use number of convictions).

precise figure is not available, some scholars credibly estimate that there are upwards of 600,000 registrants in the United States today.⁴⁶

Proponents of SORN laws cite at least three ways that such laws may reduce sexual offending:⁴⁷ First, police can use registry information in order to more quickly identify and apprehend registrants when they commit new crimes. Second, community notification may help vulnerable individuals to take protective measures. For instance, when a registered offender moves into a neighborhood, informed parents are able to warn their children to avoid that person. Finally, the stigma of registration and notification may deter prospective sexual offenders.

Notwithstanding these theoretical benefits, a substantial body of empirical research casts doubt on SORN's efficacy. For instance, one recently published study assessed the experience of Harris County, Texas (Houston).⁴⁸ Based on a review of data from 1977 to 2012, the researchers sought to determine whether there was any impact on offense rates from the initial implementation of Texas's registration law in 1991 or subsequent expansions in 1997 and 2005.⁴⁹ They found no statistically significant reduction in case filings for sexual offenses after any of these legal developments. Nor did they find any indication of beneficial effects when they looked more specifically at sexual offenses against children, repeat offending, or first-time offending.⁵⁰

⁴⁶ Michelle A. Cubellis, Scott M. Walfield & Andrew J. Harris, *Collateral Consequences and Effectiveness of Sex Offender Registration and Notification: Law Enforcement Perspectives*, 62 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 1080, 1082-83 (2018). This estimate excludes those who have been deported from the United States or who are currently incarcerated. An even higher number is often cited based on the biannual survey of sexual offender registries that is performed by the National Center for Missing and Exploited Children ("NCMEC"). The NCMEC reported that as of 2016, there were nearly 900,000 registered sexual offenders in the United States. *Map of Registered Sex Offenders in the United States*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, https://api.missingkids.org/en_US/documents/Sex_Offenders_Map.pdf [<https://perma.cc/8RP5-5VRS>] (last visited Dec. 31, 2019) (reporting 861,837 registered sex offenders according to 2016 Census Bureau data). However, this figure may overstate the actual number. For instance, researchers who examined registry data from five states found that about 18% of registered individuals were registered in more than one state, which suggests that the NCMEC figure may reflect a substantial degree of double-counting. Alissa R. Ackerman, Jill S. Levenson & Andrew J. Harris, *How Many Sex Offenders Really Live Among Us? Adjusted Counts and Population Rates in Five US States*, 35 J. CRIME & JUST. 464, 471 (2012). The NCMEC figure likely also includes a number of individuals who have been deported or who are deceased or incarcerated. *Id.*

⁴⁷ O'HEAR, *supra* note 27, at 150.

⁴⁸ Jeff A. Bouffard & LaQuana N. Askew, *Time-Series Analyses of the Impact of Sex Offender Registration and Notification Law Implementation and Subsequent Modifications on Rates of Sexual Offenses*, 65 CRIME & DELINQ. 1483, 1494-95 (2019).

⁴⁹ *Id.* at 1495.

⁵⁰ *Id.* at 1503-04.

Despite employing different methodologies, covering different time periods, and focusing on different jurisdictions, most other studies have similarly found no statistically significant crime-reduction benefits from SORN laws.⁵¹ Notably, two of the comparatively small number of studies showing a positive impact focused on Minnesota and Washington.⁵² Both states use tiered classification systems based on individualized risk-assessment.⁵³ In short, neither state's SORN law can be characterized as purely offense-based.

The largest multistate study to date, undertaken by Professors J.J. Prescott and Jonah Rockoff, uncovered a curious dichotomy.⁵⁴ Many states implemented registration requirements prior to implementing broad community notification, which permits researchers to disaggregate the impact of these two aspects of SORN laws. In their analysis of fifteen states, Prescott and Rockoff found that registration seemed to have a beneficial effect on the reduction of sexual offending, but notification had a *negative* effect.⁵⁵ Their results suggest that it may be helpful to provide law-enforcement agencies with more complete and up-to-date information regarding the sexual offenders who reside in their jurisdictions, but that the stigma associated with broader community notification may have a net negative impact on public safety by socially isolating offenders and impairing their ability to reintegrate into the community.

Despite the mixed results of his own study, Prescott, in a later article, observed that most research has been even less favorable to SORN laws.⁵⁶ Indeed, he noted that “a scholarly consensus has emerged—something very rare indeed—that these laws fail on their own terms.”⁵⁷

Why has SORN had such disappointing results? At the heart of the problem lie two sets of mistaken beliefs: First, SORN laws seem to be premised on erroneous perceptions of the nature, severity, and duration of the risk presented by individuals who have been convicted of sexual offenses. Survey research indicates that most Americans view registered sexual offenders “as a one-size-fits-all category that contain[s] individuals who [are] universally high-risk for

⁵¹ See Logan, *supra* note 38, at 406 (citing studies).

⁵² Zgoba et al., *supra* note 40, at 726.

⁵³ *Id.*

⁵⁴ J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161, 195-96 (2011).

⁵⁵ *Id.* at 192 (reporting that registration laws decreased frequency of reported sex offenses while notification laws increased frequency of reported sex offenses in average-sized registry). A separate study that focused on only South Carolina found a similar dichotomy, with crime-reduction benefits associated with the state's initial adoption of SORN but no further benefits from the subsequent adoption of internet-based notification. Elizabeth J. Letourneau et al., *Effects of South Carolina's Sex Offender Registration and Notification Policy on Deterrence of Adult Sex Crimes*, 37 CRIM. JUST. & BEHAV. 537, 547-48 (2010).

⁵⁶ Prescott, *supra* note 29, at 1039-40.

⁵⁷ *Id.* at 1040.

future offenses.”⁵⁸ For instance, public-opinion researchers find that most survey respondents believe that a majority of registered offenders are pedophiles and had victims who were strangers to them—both of which are mistaken perceptions.⁵⁹ While some sexual offenders do indeed present serious long-term threats to public safety, research provides a more complicated and perhaps somewhat less terrifying picture of sexual offenders than is suggested by popular mythology:

- Sexual offenders do not have especially high recidivism rates compared with other offenders.⁶⁰
- When they do reoffend, the new crime is only rarely sexual.⁶¹
- The great majority of sexual offenses are committed by individuals who have no prior conviction for a sexual offense.⁶²

⁵⁸ Kelly M. Socia & Andrew J. Harris, *Evaluating Public Perceptions of the Risk Presented by Registered Sex Offenders: Evidence of Crime Control Theater?*, 22 PSYCHOL. PUB. POL’Y & L. 375, 382 (2016) (describing study results on public beliefs and perception of risks posed by sex offenders).

⁵⁹ *Id.*

⁶⁰ See MATTHEW R. DUROSE, ALEXIA D. COOPER & HOWARD N. SNYDER, U.S. DOJ, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010—SUPPLEMENTAL TABLES: MOST SERIOUS COMMITMENT OFFENSE AND TYPES OF POST-RELEASE ARREST CHARGES OF PRISONERS RELEASED IN 30 STATES IN 2005, at 3 tbl.2 (2016), https://www.bjs.gov/content/pub/pdf/rprts05p0510_st.pdf [<https://perma.cc/3AEB-4AD9>] (showing that 60.1% of inmates released from prison in 2005 for sexual assault sentences were rearrested within five years; figures for property and drug offenders were 82.1% and 76.9%, respectively).

⁶¹ See *id.* (showing that only 5.6% of inmates released from prison in 2005 for sexual assault sentences were rearrested for sexual assault within five years; 51.4% were rearrested for public order offenses, 17.9% for property offenses, and 13.0% for drug offenses). A more recent nine-year follow-up report found similar patterns. See MARIEL ALPER & MATTHEW R. DUROSE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM STATE PRISON: A 9-YEAR FOLLOW-UP (2005-14), at 4 tbl.2 (2019), <https://www.bjs.gov/content/pub/pdf/rsorsp9yfu0514.pdf> [<https://perma.cc/V6CG-JAFF>] (showing that only 7.7% of inmates released from prison in 2005 for sexual assault sentences were rearrested for sexual assault within nine years; 58.9% were rearrested for public order offenses, 24.2% for property offenses, and 18.5% for drug offenses).

⁶² See, e.g., Bouffard & Askew, *supra* note 48, at 1504 (“[O]ur results also show that as many as 70% of the sexual offenses [in Harris County, Texas] were committed by individuals who had not previously been arrested for [a sexual offense], at least in this particular jurisdiction.”); Jill S. Levenson & Kristen M. Zgoba, *Community Protection Policies and Repeat Sexual Offenses in Florida*, 60 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 1140, 1147 (2016) (finding, based on analysis of Florida data from 1990 to 2010, that “on average, each year, 6.5% of the sex crime arrests were [of] an individual with a previous conviction for a felony sex crime”).

- The great majority of sexual offenses are committed by a person who was known to the victim, not a predatory stranger.⁶³
- As with other types of offenders, the recidivism risk of sexual offenders tends to diminish with age.⁶⁴
- Sexual offenders individually determined to be low risk are no more likely than other offenders to commit a sexual offense after release from incarceration.⁶⁵
- Within about eight to thirteen years after release, even those sexual offenders individually determined to present mid-level risks are no more likely than other offenders to commit a sexual offense.⁶⁶

In short, it appears that SORN laws are sweeping into their coverage large numbers of individuals who are highly unlikely to commit a new sexual offense, either because they were low risk from the start or because they have aged out of the riskiest phase of their lives.

Such overbreadth should be troubling insofar as it indicates a misdirection of scarce law-enforcement resources. Even more concerning, though, may be the tendency of SORN to *increase* risk. This brings us to the second set of mistaken beliefs—that merely sharing information about sexual offenders is a “do no harm” sort of intervention. Unfortunately, the research increasingly shows that SORN can indeed be quite harmful in ways that are prone to generate perverse consequences for public safety.⁶⁷ In particular, registration and community notification contribute to unemployment and homelessness and otherwise impair family and other positive social relationships—consequences that are known to be recidivism risk factors.⁶⁸ A sexual offender’s recidivism risk is not inherently high, but it can increase if the enhanced stigma resulting from SORN leads to social isolation and an inability to establish a stable, productive life after incarceration.⁶⁹

⁶³ See MICHAEL PLANTY ET AL., U.S. DOJ, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010, at 4 tbl.3 (2013), <https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf> [<https://perma.cc/5J58-HGC3>] (showing that 78% of female sexual assault victims between 2005 and 2010 reported that their attacker was not a stranger).

⁶⁴ Robert A. Prentky et al., *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 PSYCHOL. PUB. POL’Y & L. 357, 377 (2006) (estimating that risk of sexual reoffense can be expected to drop by about 2% each year after age forty).

⁶⁵ R. Karl Hanson et al., *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 PSYCHOL. PUB. POL’Y & L. 48, 57 (2018).

⁶⁶ *Id.*

⁶⁷ Logan, *supra* note 38, at 398.

⁶⁸ *Id.* (finding that SORN “exacerbates known recidivism risk factors by impeding the ability of registrants to maintain stable social relationships and secure employment and adequate housing”).

⁶⁹ See Prescott, *supra* note 29, at 1057 (“[T]he accompanying notoriety may simultaneously produce a lonely, poor, and idle ex-offender with no permanent connection to

The concerns are especially great with respect to juvenile sexual offenders, at least some of whom face registration requirements under the laws of thirty-eight states.⁷⁰ The recidivism risks of these offenders tend to be particularly low,⁷¹ but the negative effects of registration and notification on their education and social relationships tend to be particularly high.⁷²

B. *Individualized Approaches*

The SORN research highlights the core difficulty with using an offense-based approach to managing residual SR risk: individuals who are not high risk are easily swept up into the risk-control system and may actually become more likely to reoffend as a result.⁷³ However, a contrasting, individualized approach has also been used with sexual offenders—SVP civil commitment.

Adopted by twenty states and the federal government, modern civil-commitment laws permit the continued confinement of a sexual offender beyond his or her term of imprisonment under a specified set of conditions that normally include the following: (1) the individual has a history of sexual offending, (2) the individual has a mental disorder or abnormality, (3) there is an impairment in the individual's ability to control his or her behavior, and (4) there is a likelihood of future sexual offending.⁷⁴ Civil-commitment laws do not raise precisely the same concerns as SORN laws, but their implementation has hardly been free of controversy. The difficulties lie in three areas.

any community. Sociological evidence suggests that unemployment, poverty, loneliness, and residency in a disorganized community are factors that tend to increase recidivism risk.” (footnote omitted)). Nor is the potential for increased recidivism risk the only perverse consequence of SORN laws. Registration and notification may also be counterproductive to public safety to the extent that these requirements promote vigilante actions against registered individuals, *see* Richard G. Wright, *From Wetterling to Walsh: The Growth of Federalization in Sex Offender Policy*, 21 FED. SENT’G REP. 124, 130 (2008) (noting that there are numerous documented instances of “murders, assaults, and acts of vandalism and arson against registered offenders and their property”), and reinforce popular misperceptions about sexual assault and divert public attention from threats within households and intimate relationships.

⁷⁰ Logan, *supra* note 38, at 404-05.

⁷¹ *See* Wesley G. Jennings & Nicholas M. Perez, *Sex Offending: Empirical Evidence and Policy and Practice*, in *VIOLENT OFFENDERS: THEORY, RESEARCH, POLICY, AND PRACTICE* 257, 261 (Matt Delisi & Peter J. Conis eds., 3d ed. 2018) (“[E]stimates [from recent studies] suggest that 0-10% of the juveniles who commit a sex offense as a youth will go on to continue (and repeat) this same sex offending behavior in adulthood, at least as documented from official criminal records.”); Elizabeth J. Letourneau et al., *Effects of Juvenile Sex Offender Registration on Adolescent Well-Being: An Empirical Examination*, 24 PSYCHOL. PUB. POL’Y & L. 105, 115 (2016) (“[M]ore than 97% of children adjudicated for a sexual offense do not reoffend sexually within 5 years.”).

⁷² Logan, *supra* note 38, at 409-10.

⁷³ *Id.*

⁷⁴ Jefferson Knighton et al., *How Likely Is “Likely to Reoffend” in Sex Offender Civil Commitment Trials?*, 38 LAW & HUM. BEHAV. 293, 293 (2014).

1. Entrance Decisions

SVP laws suffer from imprecision in the standards used to trigger extended confinement. To be sure, civil-commitment decisions are aided by increasingly sophisticated, empirically based risk-assessment (“RA”) instruments, which have some demonstrated ability to predict the likelihood that a given person will reoffend.⁷⁵ For instance, the Static-99 tool, which has been widely used with sexual offenders, gives individuals a score based on ten factors, including number of prior convictions, age, and victim characteristics.⁷⁶ Users can then ascertain the recidivism rate of other offenders who have had the same score in the past.⁷⁷ Researchers have confirmed in multiple studies involving different sexual offender populations that higher scores on this and similar instruments are indeed correlated with higher rates of repeat offending.⁷⁸

At the same time, these scientific aspects of RA are considered within a legal decision-making process that leaves much room for discretion, politics, and subjective value judgments. In the end, for civil commitment, it is a lay jury or judge that determines whether the requisite dangerousness threshold is met. Although states vary in how precisely the legal standard is defined,⁷⁹ in most states civil commitment turns on whether the offender is “likely” to reoffend sexually, with no particular probability specified.⁸⁰ In such states, judges and jurors are essentially free to decide on a case-by-case basis “how safe is safe,” creating a possibility that highly risk-averse decision-makers might order the confinement of offenders whose likelihood of reoffense is relatively low.

A study of jurors in Texas highlights the difficulties of unclear standards. The researchers submitted questionnaires to individuals who actually served on civil-commitment juries in 2009 and 2010 in order to ascertain their interpretation of Texas’s civil-commitment standard—“likely to engage in a predatory act of

⁷⁵ R. Karl Hanson & Kelly E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessment for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 PSYCHOL. ASSESSMENT 1, 1 (2009) (“In high-stakes evaluations, such as civil commitment procedures, most evaluators now consider structured risk tools to be essential.”).

⁷⁶ *Id.* (“Static-99 . . . is by far the most commonly used risk tool with adult sexual offenders It contains 10 items covering static, historical factors, such as the number of prior offenses, victim characteristics (unrelated, strangers, males), and the offender’s age.” (citations omitted)).

⁷⁷ *Id.* (“The scores on each of the items are summed to create a total score, and the total score is associated with the observed recidivism rates”).

⁷⁸ *See id.* at 6 (showing average predictive accuracy of several instruments). For instance, one study found a sexual recidivism rate of 5-6% for individuals who were determined to be low risk (score of zero or one); 9-12% for medium-low risk (two or three); 26-33% for medium-high risk (four or five); and 39% for high risk (six or higher). Patrick Lussier & Jay Healey, *Rediscovering Quetelet, Again: The “Aging” Offender and the Prediction of Reoffending in a Sample of Adult Sex Offenders*, 26 JUST. Q. 827, 836 n.2 (2009).

⁷⁹ *See* Knighton et al., *supra* note 74, at 294 (identifying four different approaches used by different states).

⁸⁰ *See id.* at 295-96 (listing controlling legal standards in all civil-commitment states).

sexual violence.”⁸¹ More than 90% of the jurors returned their questionnaires, with the majority indicating that even very low recidivism risks would satisfy the legal standard.⁸² For instance, nearly 54% of the jurors said that even a 1% chance of recidivism would be sufficient to support indefinite civil commitment.⁸³ Similarly, nearly 82% of the jurors felt that a 15% risk of reoffense would suffice.⁸⁴ As the researchers observed, “[I]t appears that most jurors would find the vast majority of sexual offenders eligible for civil commitment However, if most jurors find most sexual offenders eligible for civil commitment, the civil-commitment laws no longer serve their original purpose of intervening with only the most high-risk offenders.”⁸⁵

On the other hand, while the imprecision of the legal criteria and the general fear and loathing of sexual offenders practically invite arbitrary and excessive use of civil commitment, there seems to be considerable selectivity in practice, with only about 5400 individuals held in this status at present.⁸⁶ The figure is vastly overshadowed not only by the approximately 600,000 individuals on sexual offender registries but also by the 161,900 serving time in state prisons for sexual assault.⁸⁷

One important practical constraint on the overuse of civil commitment has doubtlessly been the procedural burdens of accomplishing a commitment. Even though commitment does not trigger the full panoply of constitutional criminal procedure rights, a defendant is still entitled to robust due-process protections.⁸⁸ Thus, state laws commonly recognize a right to appointment of counsel for

⁸¹ *Id.* at 298-99.

⁸² *Id.* at 299-300.

⁸³ *Id.* at 300.

⁸⁴ *Id.*

⁸⁵ *Id.* at 302. Imprecision also affects a second key requirement for civil commitment—the presence of a mental abnormality or disorder. For instance, one common diagnosis in civil-commitment proceedings is “paraphilia not otherwise specified [NOS]—nonconsent.” See Prentky et al., *supra* note 64, at 366. This diagnosis purports to cover individuals who are sexually aroused by the resistance of a prospective sexual partner, which might indicate a predisposition to commit rape. See *id.* (describing various paraphilias, which “are fantasies, urges, and behaviors that reflect atypical, nonnormative, or deviant expressions of sexual gratification”). However, there is little research to support the validity of this diagnosis or establish criteria for its application. *Id.* Critics characterize it as a “wastebasket” diagnosis, so amorphous that it could be applied to “all sexual offenders with multiple offenses (spanning at least 6 months).” *Id.* at 367.

⁸⁶ Andrew J. Harris, *Policy Implications of New York’s Sex Offender Civil Management Assessment Process*, 16 CRIMINOLOGY & PUB. POL’Y 949, 950 (2017) (“Across the United States, approximately 5,355 individuals were held in state facilities under the terms of sex offender civil commitment statutes as of 2016.” (citation omitted)).

⁸⁷ CARSON, *supra* note 23, at 19.

⁸⁸ See *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (“We have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards.”).

defendants and contemplate a trial-like adversarial hearing.⁸⁹ Prosecutorial agencies are unlikely to initiate such a process lightly. Moreover, the high cost of holding a person in civil commitment—estimated to average more than \$100,000 per person per year⁹⁰—also serves to discourage arbitrary use of the process.

A recent study in New York suggests that official decision-makers in that state are indeed utilizing individualized RA appropriately to focus civil-commitment resources on relatively high-risk offenders.⁹¹ More specifically, when researchers studied the recidivism of individuals screened out at each stage of New York's multistage, multiagency commitment process, they found steadily higher sexual rearrest rates,⁹² suggesting that the process was working as intended to remove more of the relatively low-risk offenders from the potential commitment pool each step of the way. Similar conclusions have been reached in studies of New Jersey⁹³ and Florida.⁹⁴

2. Exit Decisions

While the evidence suggests that civil-commitment programs may at the outset do a better job than SORN laws of targeting high-risk individuals, serious concerns remain about the back end of civil commitment.⁹⁵ Simply put, once in, it has proven extremely difficult in many states for individuals ever to get out.

Civil commitment is nominally intended to provide treatment to the confined sexual offenders and return them to the community as soon as it safe to do so.⁹⁶

⁸⁹ See, e.g., Lucy Massopust & Raina Borrelli, "A Perfect Storm": Minnesota's Sex Offender Program—More than Twenty Years Without Successful Reintegration, 41 WM. MITCHELL L. REV. 706, 721-29 (2015) (summarizing civil-commitment process in Minnesota, New York, and Wisconsin).

⁹⁰ Harris, *supra* note 86, at 950; see also Karsjens v. Jesson, 109 F. Supp. 3d 1139, 1151 (D. Minn. 2015) ("As of July 1, 2014, the cost of confining committed individuals at [a Minnesota civil-commitment facility] was approximately \$124,465 per resident per year. This cost is at least three times the cost of incarcerating an inmate at a Minnesota correctional facility."), *rev'd on other grounds sub nom.* Karsjens v. Piper, 845 F.3d 394 (8th Cir. 2017).

⁹¹ See Jeffrey C. Sandler & Naomi J. Freeman, *Evaluation of New York State's Sex Offender Civil Management Assessment Process Recidivism Outcomes*, 16 CRIMINOLOGY & PUB. POL'Y 913, 914 (2017).

⁹² *Id.* at 927.

⁹³ CYNTHIA CALKINS MERCADO ET AL., SEX OFFENDER MANAGEMENT, TREATMENT, AND CIVIL COMMITMENT: AN EVIDENCE BASED ANALYSIS AIMED AT REDUCING SEXUAL VIOLENCE 5-7 (2011).

⁹⁴ Jill S. Levenson, *Sexual Predator Civil Commitment: A Comparison of Selected and Released Offenders*, 48 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 638, 643-44 (2004).

⁹⁵ See CALKINS MERCADO ET AL., *supra* note 93, at 5-7; Levenson, *supra* note 94, at 643-44; Sandler & Freeman, *supra* note 91, at 914.

⁹⁶ See Harris, *supra* note 86, at 950 ("Although the U.S. Supreme Court has repeatedly affirmed [SVP civil commitment's] underlying constitutionality, these rulings have been based on the premise that states will furnish a therapeutic environment, offer services to

SVP statutes thus provide specific mechanisms by which an individual may obtain release,⁹⁷ and indeed many SVP statutes require the state to engage in a regular review process to ensure that the considerations that originally justified commitment remain present.⁹⁸

Yet in practice, many states have returned very few civilly committed individuals to the community.⁹⁹ For instance, over the first two decades of Minnesota's SVP law, the state did not permit any of the 700 committed individuals to return home—even though more than thirty of them were in their seventies or older.¹⁰⁰ Similarly, over the first fifteen years of its program, Missouri released only seven of 250 committed individuals.¹⁰¹

Such figures do not seem consistent with the ideal of individualized, risk-based decision-making, which should account for changes in an individual's risk. In particular, sexual-offender risk normally decreases with age.¹⁰² Overall, it has been estimated that a person's risk of sexual reoffense can be expected to drop by about 2% each year after age forty.¹⁰³ These aging dynamics are especially important to bear in mind in the present context since those who are in civil commitment tend to be an older offender group—after all, they are normally not considered for this status until they have reached the end of a prison term that was imposed for a serious offense.¹⁰⁴ Thus, taking age into account, we might expect that many civilly committed individuals would “graduate” from the highest risk categories within a few years of admission. Yet release from confinement remains an elusive goal for most. Whatever the data reveal about an individual's actual likelihood of reoffense, the political dynamics are such that decision-makers tend to be quite risk averse when it comes to returning to

address the mental conditions that formed the basis of the initial commitment, and provide viable pathways toward eventual release.” (citations omitted)).

⁹⁷ See, e.g., Massopust & Borrelli, *supra* note 89, at 732-43 (describing processes in Minnesota, New York, and Wisconsin).

⁹⁸ See, e.g., *id.* at 744-45 (summarizing annual reexamination processes in New York and Wisconsin).

⁹⁹ Eric S. Janus, *Beyond Strict Scrutiny: Forbidden Purpose and the “Civil Commitment” Power*, 21 NEW CRIM. L. REV. 345, 347 (2018).

¹⁰⁰ Monica Davey, *A New Look at Sex Offenders and Lockups that Never End*, N.Y. TIMES, Oct. 30, 2015, at A1.

¹⁰¹ *Id.*

¹⁰² For all violent offenses, prevalence rates peak in the teen years and then tail off in adulthood. Prentky et al., *supra* note 64, at 375-76. With respect to sexual offending in particular, much research points to steadily declining sexual desire and activity in middle age and thereafter, *id.* at 376, which likely complements the normal tendency for individuals to desist from crime as they age.

¹⁰³ *Id.* at 377 (“[T]he most conservative adjustment would use a hazard rate of .98, indicating a reduction in recidivism risk of approximately 2% per year after age 40.”).

¹⁰⁴ *Id.* at 375 (“[L]egislation tends to be applied to older sex offenders because such legislation is generally applied to higher risk offenders after they have achieved a lengthy criminal record and because such legislation is most often applied after the offender has served a lengthy criminal record.”).

the community a person bearing the “sexual predator” label that typically accompanies civil commitment.¹⁰⁵

3. Warehousing

Ideally, a civil-commitment program that aims for rehabilitation and reintegration would deliver individualized treatment to offenders in the least restrictive possible setting. In practice, however, civil commitment often means little more than simple warehousing. The criticisms focus on two overlapping concerns: (1) poor design and administration of treatment and (2) a dearth of community-based alternatives to full-time institutionalization.

Although research on the efficacy of sexual-offender treatment has thus far yielded mixed results,¹⁰⁶ there are good grounds to think that well-designed, appropriately individualized programs can help such offenders to avoid recidivism. After all, a substantial body of research now supports the efficacy of the risk-needs-responsivity (“RNR”) treatment model for offenders generally,¹⁰⁷ and there is no clear line in practice that differentiates sexual from nonsexual offenders.¹⁰⁸ It would thus be surprising if treatment approaches that have been shown to be helpful with other offenders were entirely useless with those who have been convicted of sexual crimes.¹⁰⁹ And indeed, a few studies—while not

¹⁰⁵ See *id.* at 360 (“The high political salience of sexual predator policy combines with the real harm caused by sexual violence to elevate concern for false negative judgments over concern about false positives.”).

¹⁰⁶ See GRANT T. HARRIS ET AL., *VIOLENT OFFENDERS: APPRAISING AND MANAGING RISK* 113 (3d ed. 2015) (“[T]he available evidence [is] too weak to reject the null hypothesis that treatments for adult sex offenders have failed to cause reductions in recidivism.”).

¹⁰⁷ See, e.g., Susan Turner & Joan Petersilia, *Putting Science to Work: How the Principles of Risk, Need, and Responsivity Apply to Reentry*, in *USING SOCIAL SCIENCE TO REDUCE VIOLENT OFFENDING* 179, 184-86 (Joel A. Dvoskin et al. eds., 2011) (summarizing studies). The RNR model is based on three principles: “(a) risk—direct intensive services to those at higher risk of recidivism, (b) need—target criminogenic needs or strong risk factors for recidivism, and (c) responsivity—provide services in a way that is responsive to an offender’s learning styles and abilities.” *Id.* at 181.

¹⁰⁸ See Jennings & Perez, *supra* note 71, at 263 (“[S]ex offender specialization research has largely reported that sex offenders do not represent a homogenous group of offenders who tend to only commit sex offenses.”).

¹⁰⁹ Consistent with this intuition, a 2009 meta-analysis of twenty-three studies of the effectiveness of various sexual-offender treatment programs found that the programs adhering to the RNR model had the most robust effects. R. Karl Hanson et al., *The Principles of Effective Correctional Treatment Also Apply to Sexual Offenders: A Meta-Analysis*, 36 CRIM. JUST. & BEHAV. 865, 884 (2009) (“Once adherence to the RNR principles was considered, there was relatively little residual variability. For studies that adhered to none of the principles, the effects were consistently low; for studies adhering to all three, the effects were consistently large.”).

without their limitations—have found positive results when the RNR model has been used with sexual offenders.¹¹⁰

While there are grounds for optimism regarding the *potential* of treatment, the actual rehabilitative efforts of civil-commitment programs have been subject to substantial criticism. For instance, consider the program in Minnesota, which has the nation’s highest per capita rate of civil commitment.¹¹¹ In a 2015 ruling on the program’s constitutionality, a federal district judge found the following:

- “The evidence clearly establishes that hopelessness pervades the environment at the Minnesota Sex Offender Program (the ‘MSOP’) and that there is an emotional climate of despair among the facilities’ residents”¹¹²
- “[V]irtually every offender enters the treatment program” at the same phase, without regard to the offender’s individually determined needs.¹¹³
- The criteria used to determine whether an offender is ready to progress to the next phase of treatment are applied inconsistently by MSOP clinicians.¹¹⁴
- “The lack of clear guidelines for treatment completion or projected time lines for phase progression impedes a committed individual’s motivation to participate in treatment for purposes of reintegration into the community.”¹¹⁵

¹¹⁰ See, e.g., Martin Schmucker & Friedrich Lösel, *The Effects of Sexual Offender Treatment on Recidivism: An International Meta-Analysis of Sound Quality Evaluations*, 11 J. EXPERIMENTAL CRIMINOLOGY 597, 624-25 (2015) (summarizing results of two RNR studies); Jill D. Stinson, Judith V. Becker & Lee Ann McVay, *Treatment Progress and Behavior Following 2 Years of Inpatient Sex Offender Treatment: A Pilot Investigation of Safe Offender Strategies*, 29 SEXUAL ABUSE 3, 24-25 (2017) (concluding that treatment “did have a positive impact . . . [and] targeted self-regulatory ability in these participants, utilizing a manualized, skills-based treatment and strongly emphasizing the needs and responsivity components of the Risk-Needs-Responsivity model”).

¹¹¹ Massopust & Borrelli, *supra* note 89, at 708-09 (“According to this recent survey, Minnesota commits 130.2 sex offenders per million people, whereas the next highest respondent state, Kansas, commits only 84.6 sex offenders per million people.”).

¹¹² *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1151 (D. Minn. 2015), *rev’d on other grounds sub nom.* *Karsjens v. Piper*, 845 F.3d 394 (8th Cir. 2017).

¹¹³ *Id.* at 1154 (“There are no reports or assessments conducted at the time of admission to determine what phase of treatment a committed individual should be placed in at the MSOP. . . . The MSOP does not have a practice of considering past participation in sex offender treatment when placing committed individuals into assigned treatment phases or when attempting to individualize treatment.”).

¹¹⁴ *Id.* at 1156 (“[A] former MSOP Clinical Supervisor, credibly testified that she frequently saw individuals’ scores on the Matrix factors fluctuate, due to changes in staffing, and that she was concerned by the lack of inter-rater reliability of the Matrix factors.”).

¹¹⁵ *Id.* at 1156-57.

- “Clinical staffing shortages and turnover at the MSOP have hindered the ability of the MSOP to provide treatment as designed and have impeded treatment progression of committed individuals at the MSOP.”¹¹⁶

Deficiencies in the Minnesota program reflect, at least to some extent, a more fundamental and generalized ambiguity in the role of civil-commitment treatment providers. One group of critics has characterized the problem this way:

The staff . . . are often confused about their role. Is it their job to make an honest attempt to treat these individuals in the most effective way possible, thus enhancing their chances of release? Or alternatively, is it their first responsibility to help ensure that their charges continue to remain committed as SVPs? . . . Are therapists clinical babysitters hired to dress up the program or are they functional change agents?¹¹⁷

Another impediment to effective rehabilitation has been the overwhelming reliance of most programs on full-time institutionalization.¹¹⁸ The research on sexual-offender treatment has found better outcomes with community-based (outpatient) treatment than prison-based (inpatient) treatment.¹¹⁹ This is not surprising. “Effective treatment not only requires that participants acquire a number of skills by which to manage their sexual deviance but also that they be given the opportunity to practice these skills in realistic situations.”¹²⁰ The artificial social environment of the institution is hardly conducive to realistic practice and may, in fact, function in counterproductive ways by surrounding the offender with potentially negative influences (i.e., the other offenders in the program). Time in the community provides better opportunities for developing and strengthening positive social relationships.

There are, to be sure, legitimate public-safety concerns regarding the release of high-risk offenders into the community. If we assume that civil-commitment programs are doing a good job of targeting those offenders who, at least at the outset, actually do present unusually high recidivism risks, then conventional, loosely supervised parole-type release will generally not be appropriate. However, there are a range of intermediate options between conventional parole and continuous, full-time institutionalization—options that might plausibly permit the attainment of some of the benefits of community-based supervision and treatment.

¹¹⁶ *Id.* at 1158.

¹¹⁷ Prentky et al., *supra* note 64, at 381.

¹¹⁸ Recent estimates suggest that the institutionalized civil-commitment population is about ten times larger than the community-supervised population. Harris, *supra* note 86, at 950.

¹¹⁹ Schmucker & Lösel, *supra* note 110, at 621 (“[T]here was a tendency that outpatient treatment fared better than treatment in prisons. The difference in favor of community programs is in agreement with the general research on ‘what works’ in correctional treatment.” (citations omitted)).

¹²⁰ Prentky et al., *supra* note 64, at 381.

The three basic “intermediate” models are the halfway house, home detention, and intensive supervision. The halfway house is a community-based institution in which offenders are required to reside but which permits a certain amount of coming and going, for instance, to an approved place of employment.¹²¹ Home detention provides greater freedom as to place of residence but restricts movement outside the home to certain approved places and hours.¹²² Intensive supervision is more akin to conventional parole, but agents keep closer tabs on the offender, for instance, through more frequent home visits or drug tests.¹²³

In recent years, through the advent of relatively inexpensive GPS tracking technology, it has become possible to administer such intermediate options in ways that are more protective of public safety.¹²⁴ Affixed with an anklet or bracelet, the offender’s movements can be recorded and monitored in real time. Thus, for instance, if an offender on home detention strays from his or her residence at an unapproved hour, agents can be notified immediately, and the offender can be located and apprehended promptly. There has been particular interest in the use of GPS tracking with sexual offenders because of the ability of the technology to facilitate the enforcement of sensitive “exclusion zones,” such as playgrounds and schools.¹²⁵ More generally, the use of GPS tracking in conjunction with an intermediate supervision option provides an opportunity for sexual offenders to begin the process of reintegration and to further their treatment in a community-based setting while minimizing the likelihood that the offender will encounter particularly dangerous temptations or triggers.

GPS technology is fast becoming a routine part of criminal-justice supervision. Between 2005 and 2015 alone, the number of offenders monitored in this way grew from 53,000 to more than 125,000.¹²⁶ Thus far, the research

¹²¹ NEIL P. COHEN ET AL., *CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS* 735-36 (5th ed. 2019) (describing halfway house as “relatively small residential facility where offenders live when not at work or in a therapeutic or educational program”).

¹²² *Id.* at 734-35.

¹²³ O’HEAR, *supra* note 27, at 51-52 (“Rather than meeting with a [parole officer] once or twice a month, an offender on [intensive supervision] might have that many or more required meetings *per week*.”).

¹²⁴ *Id.* at 51 (“GPS monitoring is much more adaptable to enforcing restrictions on where an offender can go outside the home, which has contributed to a rapid increase in [electronic monitoring] use, including use for purposes other than enforcing home confinement.”).

¹²⁵ Deeanna M. Button, Matthew DeMichele & Brian K. Payne, *Using Electronic Monitoring to Supervise Sex Offenders: Legislative Patterns and Implications for Community Corrections Officers*, 20 CRIM. JUST. POL’Y REV. 414, 417 (2009) (“Specific to sex offender supervision is that mapping technology is incorporated with GPS systems to create inclusion and exclusion zones. . . . [E]xclusion[] zones are areas [in] which an offender is prohibited. This technology allows for detecting if a sex offender entered a park, playground, or other area children are known to congregate.”).

¹²⁶ PEW CHARITABLE TRUSTS, *USE OF ELECTRONIC OFFENDER-TRACKING DEVICES EXPANDS SHARPLY* 3 (2016), https://www.pewtrusts.org/-/media/assets/2016/10/use_of_electronic_offender_tracking_devices_expands_sharply.pdf [<https://perma.cc/D3RZ-VDYG>] (“The number of accused and convicted criminal offenders monitored with electronic tracking

suggests that the technology does help to keep offenders out of trouble.¹²⁷ Indeed, at least one study that focused on sexual offenders specifically found reduced recidivism rates with GPS tracking in comparison with conventional parole.¹²⁸

In principle, community-based civil commitment could be implemented either as a transitional step after institutionalization or as an initial placement. In practice, however, some states preclude a community-based initial placement and require a period of full-time institutionalization after civil commitment has been ordered.¹²⁹ This seems an unnecessary and ill-advised limitation. The ideal of individualized treatment, coupled with the research indicating that the prospects for rehabilitative success tend to be higher with community-based interventions, suggest that intermediate options should at least be available for consideration even when civil commitment is first ordered.

C. *Lessons*

The voluminous research and critical commentary on SORN and SVP civil commitment suggest a number of lessons regarding the management of residual recidivism risk:

- The fact that a person has been convicted of a particular offense at some point in time does not, in itself, reliably indicate that the person is likely to commit other offenses in the future; thus, purely offense-based approaches to managing residual risk tend to sweep in many relatively low-risk individuals, as exemplified by SORN laws.¹³⁰
- Juvenile offenses are particularly poor predictors of adult crime.¹³¹

devices in the United States increased 140 percent between 2005 and 2015, from approximately 53,000 to more than 125,000.”).

¹²⁷ O’HEAR, *supra* note 27, at 51 (“[A] recent Florida study found that offenders on [electronic monitoring] were 30 percent less likely to be revoked than a similar group of offenders . . . without [electronic monitoring]. The same study also found that GPS-based [electronic monitoring] had a higher success rate than the radio frequency technology.”).

¹²⁸ Jason Rydberg, *Civil Commitment and Risk Assessment in Perspective*, 16 CRIMINOLOGY & PUB. POL’Y 937, 942 (2017) (“For instance, consider a GPS monitoring program for sex offenders, a popular policy response to this group, and in this case, it produces a sizable reduction in recidivism relative to traditional parole supervision.” (citations omitted)). *But cf.* Button, DeMichele & Payne, *supra* note 125, at 418 (“In spite of the fact that there has been a push for the electronic monitoring of sex offenders, there is little scientific research documenting the effectiveness of electronic monitoring devices, especially for sex offenders.”).

¹²⁹ See, e.g., Harris, *supra* note 86, at 952 (“New York’s sex offender civil management policy is also distinctive in its inclusion of both institutional and community-based (i.e., ‘outpatient’) dispositions for its civilly managed population.”); Massopust & Borrelli, *supra* note 89, at 744 (noting absence of front-end diversion options in Minnesota and Wisconsin).

¹³⁰ See *supra* note 58 and accompanying text.

¹³¹ See *supra* note 71.

- Since risk tends to diminish with age, lifetime or other very long-term control measures are normally unwarranted.¹³²
- High-risk individuals are most reliably identified through decision-making processes that make use of standardized, actuarial RA instruments taking into account not only the number and seriousness of an individual's convictions but also age at the time of offense, current age, crime-free time in the community, and other empirically validated risk factors.¹³³
- Control measures that serve to isolate and stigmatize individuals may perversely *increase* risk.¹³⁴
- Although empirically derived RA instruments can reliably inform decision-makers about a given individual's risk level, there is no purely scientific answer to the fundamental question of "how safe is safe?"; without clear, rigorous standards in the law, lay jurors and politically accountable decision-makers are apt to be quite risk averse and may choose to impose control measures on individuals who do not present especially high levels of risk.¹³⁵
- However, if control measures require an individualized, adversarial process that includes substantial due-process protections for the individual, the state has a countervailing incentive to be selective in seeking control measures and may be more likely to focus controls on the individuals who present the highest risk.¹³⁶
- Likewise, if there is a mandate to treat individuals in the control regime, the associated expenses for the state further incentivize restraint and selectivity.¹³⁷
- Although no rehabilitative programming can guarantee 100% success in eliminating recidivism risk, a substantial body of evidence suggests that a well-designed treatment regimen following the RNR model can help to reduce risk.¹³⁸
- Treatment is more likely to be effective if administered in a community-based setting than in a prison-type setting.¹³⁹

¹³² See *supra* note 64 and accompanying text.

¹³³ See *supra* notes 76-78 and accompanying text.

¹³⁴ See *supra* notes 68-69 and accompanying text.

¹³⁵ See *supra* notes 76-80 and accompanying text.

¹³⁶ See *supra* notes 88-94 and accompanying text.

¹³⁷ See *supra* notes 97-98, 118, and accompanying text.

¹³⁸ See *supra* note 107 and accompanying text.

¹³⁹ See *supra* note 119 and accompanying text.

- GPS tracking technology provides increased hope that even some relatively high-risk offenders can be safely supervised in intermediate, community-based supervision options.¹⁴⁰

We will consider how these lessons may be applied to violent offenders in Part IV. First, however, let us consider the current legal landscape for the management of residual VR risk.

II. MANAGING THE RESIDUAL RISK OF VIOLENT RECIDIVISM

In a recent article, I comprehensively surveyed the full range of categorical statutory consequences for a charge or conviction for a crime that is classified as “violent.”¹⁴¹ My research uncovered about 600 such consequences in state laws across the country. Most seem directed, in whole or in part, at residual VR risk. This Part provides a summary overview of these special measures.

Many special measures pertain to sentencing, altering the normal parameters for the judge’s decision as to some or all defendants who have been convicted of a violent crime. For instance, in about two dozen states, such defendants are categorically excluded from one or more sentencing alternatives to conventional incarceration.¹⁴² Additionally, a comparable number of states have adopted sentence enhancement statutes that increase the length of the otherwise-controlling minimum or maximum prison term.¹⁴³

Other special measures pertain to corrections rules and processes. For instance, twenty-five states delay or eliminate eligibility for parole or other mechanisms for early release from prison.¹⁴⁴ Moreover, when the inmate with a

¹⁴⁰ See *supra* notes 121-28 and accompanying text.

¹⁴¹ O’Hear, *supra* note 1, at 185-89.

¹⁴² *Id.* at 195; see, e.g., COLO. REV. STAT. § 17-27.8-101(1) (2019) (excluding defendants convicted of violent felony from possibility of sentencing to home detention in lieu of incarceration); GA. CODE ANN. § 17-10-1(g)(4) (2019) (excluding defendants convicted of violent felony from work-release sentencing option).

¹⁴³ O’Hear, *supra* note 1, at 198. For instance, in New York, a felony drug offender with a prior felony conviction faces higher minimum and maximum terms if the prior was classified as violent. The precise sentencing impact of the prior violent felony depends on the severity of the current drug conviction. For instance, if the current conviction is for a Class B felony, then a prior violent felony results in a sentencing range of six to fifteen years. N.Y. PENAL LAW § 70.70(4)(b)(i) (McKinney 2019). By contrast, if the prior felony was nonviolent, then the applicable range would be only two to twelve years. *Id.* § 70.70(3)(b)(i). Additionally, if the prior felony was nonviolent, the sentencing judge would be permitted to impose a sentence of probation or parole supervision. *Id.* § 70.70(3)(c)-(d).

¹⁴⁴ O’Hear, *supra* note 1, at 203. For instance, Louisiana reduces the amount of credit that an inmate can earn for good behavior if the inmate has a violent crime conviction: the standard rate in Louisiana is “thirty days for every thirty days in actual custody,” but the amount for first-time violent offenders is only three days for every seventeen. LA. STAT. ANN. § 15:571.3(A)(1) (2019). Similarly, Minnesota excludes inmates with a violent-crime conviction in the past ten years from an opportunity for early release for a controlled-

violence conviction is finally released, he or she is apt to encounter special terms and conditions of supervision in the community—seventeen states have special measures in this area.¹⁴⁵

Still other special measures continue to affect the person who has been convicted of a violent crime even after completion of the sentence. For instance, thirty-four states have adopted special employment restrictions.¹⁴⁶ Meanwhile, twenty-one states establish longer waiting periods or, in some cases, flat-out prohibitions for individuals with violent-crime convictions seeking relief from the stigma of conviction through established processes for expungement, sealing, issuance of a certificate of rehabilitation, and/or executive pardon.¹⁴⁷ Indeed, states not only exclude such individuals from generally available opportunities for leaving stigma behind, but increasingly they also amplify long-term stigma by adopting SORN-like registration and notification schemes for violent offenders.¹⁴⁸

Stigma-related special measures may be especially noteworthy with respect to juvenile offenders, for the longstanding view in American law was that young offenders should be prosecuted in dedicated juvenile courts that maintain confidentiality in their proceedings.¹⁴⁹ However, over the past generation, two

substance offense based on the completion of a drug treatment in program. MINN. STAT. § 244.0513 subdiv. 2(6) (2019).

¹⁴⁵ O’Hear, *supra* note 1, at 207-08. For instance, Washington excludes violent offenders from the possibility of early discharge from supervision based on good behavior. WASH. REV. CODE § 9.94A.637(4) (2019). Similarly, as a general matter, California specifies that supervision cannot be revoked based on certain drug-related violations but excludes from this protection those parolees who have violent felony convictions. CAL. PENAL CODE § 3063.1(a), (b)(1) (West 2019).

¹⁴⁶ O’Hear, *supra* note 1, at 212-17; *see, e.g.*, DEL. CODE ANN. tit. 16, § 6712(b)(2)(b)(1) (2019) (excluding individuals convicted of “serious crime of violence against a person” from working as ambulance attendants or emergency medical technicians); 53 PA. CONS. STAT. § 57B02(c)(10)(iii)(C)(II) (2019) (prohibiting individuals with violent-crime conviction from working as taxi drivers).

¹⁴⁷ O’Hear, *supra* note 1, at 217-18; *see, e.g.*, ARK. CODE ANN. § 16-90-1408(a)(5) (2019) (indicating that record of violent felony conviction cannot be sealed); CONN. GEN. STAT. ANN. § 54-124a(j)(2) (West 2019) (establishing expedited pardons review process for applicants who were convicted of *nonviolent* crime); NEV. REV. STAT. ANN. § 179.245(1)(a) (West 2019) (requiring person convicted of violent crime to wait at least ten years before sealing).

¹⁴⁸ O’Hear, *supra* note 1, at 217-20; *see, e.g.*, IND. CODE § 11-8-8-19(a) (2019) (establishing general ten-year registration period for individuals who qualify as “violent offenders”); MONT. CODE ANN. § 41-5-1513(1)(c) (2019) (authorizing court to order delinquent youth to register as violent offender); *id.* § 46-23-504(1) (requiring “violent offender” to register within certain time limitations); WASH. REV. CODE § 9.41.330(3)(c) (2019) (requiring registration as part of sentence when person found not guilty by reason of insanity or convicted of felony firearm offense committed in conjunction with “serious violent offense”).

¹⁴⁹ *See* Judith G. McMullen, *Invisible Stripes: The Problem of Youth Criminal Records*, 27 S. CAL. REV. L. & SOC. JUST. 1, 9 (2018) (“[T]he proceedings were not open to the public

distinct trends have greatly increased public access to information about youth violence cases. First, several states have adopted laws that either *require*¹⁵⁰ or *permit*¹⁵¹ the prosecution of certain violence charges against juveniles in regular adult court. Second, even if the case remains in juvenile court, if the charge is for an offense classified as “violent,” the confidentiality protections may be much less than they traditionally were—or even nonexistent.¹⁵²

In sum, while the specifics vary a great deal from state to state, the great majority of states are attempting to address perceived VR risks through one or more of the following strategies:

- More incarceration for individuals who have been convicted of violent crimes;
- Longer and more intensive supervision of such individuals in the community;
- Employment restrictions that are intended to reduce opportunities for future violent offense; and
- Relatively easy public access to information about past violence convictions and juvenile adjudications, presumably so that members of the public may take precautions against the offenders.

One final point regarding the current legal landscape merits attention: the absence of any single, widely accepted definition of what counts as a “violent crime” for the purpose of triggering special measures. States have adopted a variety of competing statutory definitions. Broadly speaking, the various definitions are structured in one of three ways: (1) *laundry-list definitions*, which identify some specific set of crimes that are deemed violent (e.g., murder, rape,

and the records were sealed, so as to preclude stigmatization of children and adolescents for behavior stemming from their immaturity.”).

¹⁵⁰ For instance, in Arizona, prosecutors *must* charge as an adult those juveniles over the age of fourteen who are accused of committing a violent felony. ARIZ. REV. STAT. ANN. § 13-501(A)(5) (2019).

¹⁵¹ For instance, in Colorado, the juvenile court *may* enter an order certifying a twelve- or thirteen-year-old to be held for adult proceedings if the juvenile is alleged to have committed a crime of violence. COLO. REV. STAT. § 19-2-518(1)(a)(I)(A) (2019). Similarly, Wyoming prosecutors are authorized to choose a juvenile or adult court in cases in which a juvenile aged fourteen or older is charged with a violent felony. WYO. STAT. ANN. § 14-6-203(f)(iv) (West 2019).

¹⁵² See, e.g., CAL. WELF. & INST. CODE § 827.6 (West 2019) (establishing distinct rules for release of information regarding “minor alleged to have committed a violent offense”); COLO. REV. STAT. § 19-1-304(5)-(5.5) (requiring notification of allegations of “crime of violence” to be given to juvenile’s school district and, in some circumstances, school principal and permitting public release of certain information about these cases); LA. CHILD. CODE ANN. art. 879(B)(1) (2018) (“All proceedings in a juvenile delinquency case involving a crime of violence . . . shall be open to the public.”).

robbery);¹⁵³ (2) *qualitative definitions*, which specify some set of general characteristics that a crime must have in order to be classified as violent (e.g., “any criminal act that results in death or physical injury or any criminal use of a deadly weapon or dangerous instrument”);¹⁵⁴ or (3) *hybrid definitions*, which combine a laundry list with a qualitative residual clause that may sweep in additional, unlisted offenses.¹⁵⁵

However definitions are structured, a survey of state law reveals several important fault lines that divide jurisdictions and even different statutory schemes within a single jurisdiction:

- Whether burglary and larceny are considered violent;¹⁵⁶
- Whether (and which) drug offenses are considered violent;¹⁵⁷
- Whether (and which) noncontact sexual offenses are considered violent;¹⁵⁸
- Whether the definition is limited to felonies or extends also to some misdemeanors;¹⁵⁹ and
- Whether the definition includes juvenile adjudications in addition to adult convictions.¹⁶⁰

While there seems to be a certain core group of offenses that are almost always treated as violent—that is, those, like murder and armed robbery, that involve the intentional or threatened infliction of serious physical injury—there is considerable variation and ambiguity outside that core.

¹⁵³ O’Hear, *supra* note 1, at 171 (“[M]any statutory violence definitions take the form of a list of specific offenses, often with statutory cross-references so that there can be no doubt about which offenses the legislature meant to classify as violent.”).

¹⁵⁴ ARIZ. REV. STAT. ANN. § 13-901.03 (2019).

¹⁵⁵ O’Hear, *supra* note 1, at 178 (“Hybrid statutes combine a laundry list with qualitative provisions. Structured in this way, a statutory definition can ensure that certain specific offenses of particular concern are treated as ‘crimes of violence,’ while preserving flexibility for the inclusion of additional unlisted offenses of a similar character.”).

¹⁵⁶ *Id.* at 179 (“[T]here is the question of physicality, that is, whether the harm in view must be to a person’s body—in the form of physical injury . . . or whether harm to a property interest suffices (e.g., larceny or expansive versions of burglary or extortion).”).

¹⁵⁷ *Id.* (“[T]here is the question of intentionality, that is, whether an offense must include a conscious intent to injure in order to count as ‘violent,’ or whether it is enough that the offense conduct actually did injure or at least created a risk of injury (e.g., drug distribution, escape, carrying a concealed weapon).”).

¹⁵⁸ Noncontact sexual offenses include, for instance, exhibitionism and distribution of child pornography. *Id.* at 175.

¹⁵⁹ *Id.* at 180 (“While most CVCs require a felony-level offense, a sizeable minority can be triggered by just a misdemeanor.”).

¹⁶⁰ *Id.* at 181-82 (discussing how some jurisdictions treat juvenile violent crime adjudications as equivalent to adult violent crime convictions).

III. THE CASE AGAINST OFFENSE-BASED APPROACHES TO MANAGING RESIDUAL RISK OF VIOLENT RECIDIVISM

The essential flaw of the existing network of VR special measures echoes that of SORN laws: the special measures are triggered by convictions *per se* and not by an individualized determination of current risk. To be sure, criminal history, depending on its age and other considerations, may *sometimes* serve as a reliable indicator of future offending. However, the past does not inevitably dictate the future. Recidivism-risk controls are more efficiently targeted if their application takes into account certain considerations—that is, beyond the simple fact (or number) of prior convictions—that are known to bear on risk. Crudely targeted control measures are especially concerning to the extent that they perversely tend to *increase* the likelihood of reoffense of otherwise low-risk individuals. Additionally, current VR special measures also raise a distinct set of fairness issues.

A. *Overbreadth*

Like SORN laws, VR special measures are premised on a mistaken belief that those individuals who have been convicted of a particular type of crime (sexual in the former case, violent in the latter) categorically present a heightened threat to public safety.¹⁶¹ However, empirical research does not support this assumption as to violent offenders any more than as to sexual offenders. Consider the data on prisoner recidivism. In one leading study, the U.S. Department of Justice's Bureau of Justice Statistics ("BJS") tracked the performance of prisoners released in thirty states in 2005.¹⁶² Dividing the prisoners into four categories (violent, property, drug, and public order), the BJS found that those who had been convicted of violent crimes actually had the *lowest* rates of reconviction for a new offense.¹⁶³

Of course, not all new offenses are equally concerning. If offenders tend to specialize in certain types of crime, then we might still want to undertake special

¹⁶¹ See, e.g., FLA. STAT. ANN. § 948.12 (West 2019) ("It is the finding of the Legislature that the population of violent offenders released from state prison into the community poses the greatest threat to the public safety of the groups of offenders under community supervision.").

¹⁶² MATTHEW R. DUROSE, ALEXIA D. COOPER & HOWARD N. SNYDER, U.S. DOJ, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 (2014), <https://bjs.gov/content/pub/pdf/rprts05p0510.pdf> [<https://perma.cc/N4P7-8MHT>].

¹⁶³ *Id.* at 15 (indicating that five-year reconviction rate was 48.0% for violent offenders, 61.2% for property offenders, 56.3% for drug offenders, and 54.2% for public order offenders). In addition to reconviction, the BJS study also reported results for four other measures of recidivism. *Id.* at 8, 15 (reporting results for arrest, adjudication, incarceration, and imprisonment). Violent offenders had the lowest repeat-offending rate using each of these measures. *Id.* at 15. A more recent nine-year follow-up report also found that violent offenders had the lowest recidivism rate. See ALPER & DUROSE, *supra* note 61, at 4 tbl.2 (indicating that nine-year rearrest rate was 78.1% for violent offenders, 87.8% for property offenders, 83.7% for drug offenders, and 81.8% for public order offenders).

measures in order to address the recidivism risks of those who have been convicted of violent crimes. Yet the BJS data reveal little evidence of specialization. For instance, among the prisoners convicted of violent crimes who recidivated, public-order offenses were far more common than fresh violent offenses.¹⁶⁴ Indeed, violent recidivism was almost as common among the prisoners convicted of property and public-order offenses as it was among those convicted of violence.¹⁶⁵ Based on this data, there seems little reason to single out past violent offenders for special measures intended to prevent future violent offending.

We should not be surprised by the apparent lack of specialization among those who have been convicted of crimes classified as violent: even if confined to what I have described as the “core” set of violent crimes—murder, armed robbery, forcible sexual assault, and so forth—this offender category encompasses widely varying conduct performed by widely varying individuals in widely varying circumstances. This reality follows necessarily from the expansive nature of American substantive criminal law.

Consider, for instance, three bedrock features of the law—pervasive doctrines that tend to vary only quite modestly from state to state. First, there is the broad liability of accomplices for the offenses committed by others in furtherance of a shared target offense. In general, liability extends to any consequence of the intended conduct that is found to be “natural and probable,” whether or not the consequence was actually intended or even subjectively contemplated by the defendant.¹⁶⁶ The rule can lead, for instance, to a murder conviction for a secondary participant in a robbery or burglary that ends in a fatal struggle between the primary participant and a resistant victim.¹⁶⁷

Second, the law makes little allowance for people with diminished capacity. The so-called insanity defense constitutes the basic mechanism for distinguishing those defendants who were fully capable of understanding the nature and likely consequences of their actions from those who were not.

¹⁶⁴ DUROSE, COOPER & SNYDER, *supra* note 60, at 3 tbl.2 (indicating that 55.3% of violent offenders reoffended by committing public order offense and 33.1% by committing another violent offense).

¹⁶⁵ *See id.* (indicating that 33.1% of those who had served time for violent offense were rearrested for new violent offense, as compared to 29.2% of those who served time for public order offense and 28.5% of those who served time for property offense); *see also* ALPER & DUROSE, *supra* note 61, at 4 tbl.2 (indicating that, over nine-year period, 43.4% of those who had served time for violent offense were rearrested for new violent offense, as compared to 39.8% of those who served time for public order offense and 40.3% of those who served time for property offense).

¹⁶⁶ WAYNE R. LAFAYE, CRIMINAL LAW § 13.3(b) (5th ed. 2010) (“The established rule, as it is usually stated by courts and commentators, is that accomplice liability extends to acts of the principal in the first degree which were a ‘natural and probable consequence’ of the criminal scheme the accomplice encouraged or aided.”).

¹⁶⁷ *See id.*

However, this defense is subject to various well-known limitations that deprive it of much practical significance.¹⁶⁸

A particularly notable, capacity-related concern is age. As a growing body of psychological and neurological research makes clear, important aspects of brain development continue throughout the teen years and even into the twenties,¹⁶⁹ which has important implications for both the dangerousness and the moral culpability of youthful offenders. Indeed, researchers have found that violent acts are fairly common among youth but that most young people desist from violence as they age into adulthood.¹⁷⁰ Yet if the youthful offender is prosecuted in adult court—a practice that grew more common in the late twentieth century¹⁷¹—the liability standards make no age-related distinctions.¹⁷²

¹⁶⁸ First, the defense requires the presence of a “mental disease or defect,” which is typically held to exclude a variety of capacity-diminishing but transient conditions, such as intoxication, withdrawal symptoms, and the emotional responses to a highly provocative or distressing situation. *Id.* § 7.2(b)(1). Additionally, the defense requires a very high degree of mental incapacitation. In the words of one leading commentator, “As a practical matter, the defendant will have to be out of touch with reality to succeed with the insanity defense, but many defendants who are concededly delusional at the time of the crime may be convicted because their reasoning about the crime was nonetheless not sufficiently impaired.” Stephen Morse, *Mental Disorder and Criminal Justice*, in 1 REFORMING CRIMINAL JUSTICE: INTRODUCTION AND CRIMINALIZATION 251, 290 (Erik Luna ed., 2017).

¹⁶⁹ Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 PSYCHOL. PUB. POL’Y & L. 410, 413-15 (2017). One scholar summarizes the key research findings this way:

Youths differ from adults in risk perception, appreciation of consequences, impulsivity and self-control, sensation-seeking, and compliance with peers. The regions of the brain that control reward-seeking and emotional arousal develop earlier than those that regulate executive functions and impulse control. Adolescents underestimate the amount and likelihood of risks, emphasize immediate outcomes, focus on anticipated gains rather than possible losses to a greater extent than adults, and consider fewer options. . . . Researchers attribute youths’ impetuous decisions to a heightened appetite for emotional arousal and intense experiences, which peaks around 16 or 17.

Barry C. Feld, *Juvenile Justice*, in 1 REFORMING CRIMINAL JUSTICE: INTRODUCTION AND CRIMINALIZATION, *supra* note 168, at 329, 385-86 (footnotes omitted).

¹⁷⁰ See Barbara A. Oudekerk & N. Dickon Repucci, *Reducing Recidivism and Violence Among Offending Youth*, in USING SOCIAL SCIENCE TO REDUCE VIOLENT OFFENDING, *supra* note 107, at 199, 200 (citing studies). For instance, one study of thousands of young people found that 41.3% of seventh- through twelfth-grade students had engaged in fighting or other forms of violence in the previous year but that the figure declined to 12% among those aged eighteen to twenty-six. *Id.* (discussing results reported in K.R. Williams, L. Tuthill & S. Lio, *A Portrait of Juvenile Offending in the United States*, in TREATING THE JUVENILE OFFENDER 15 (R.D. Hoge, N.G. Guerra & P. Boxer eds., 2008)).

¹⁷¹ O’HEAR, *supra* note 27, at 135-36 (discussing shift throughout twentieth century in United States that led to more children being prosecuted as adults).

¹⁷² To be sure, in certain limited circumstances, youth must be considered as a matter of constitutional law for sentencing purposes. *E.g.*, *Miller v. Alabama*, 567 U.S. 460, 479 (2012) (“[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile homicide offenders.”).

Third, American criminal law also makes little allowance for situationally dependent conduct. Put differently, for purposes of guilt determination, the law normally fails to distinguish between individuals who engaged in significantly premeditated criminal conduct and those who acted more spontaneously as a result of an unusual provocation, opportunity, or stressor.¹⁷³

As a result of these three features, a single offense label—“murder,” “manslaughter,” “robbery,” etc.—can paper over a tremendous diversity in conduct, actors, and circumstances. Thus, if the goal is to target high-risk offenders for incapacitation or other special controls, it is misguided to equate present dangerousness with one (or, for that matter, even two or three) prior convictions for a given set of offenses.

Better options are available. As with sexual offenders, a large and growing body of research validates the use of actuarial RA instruments with violent offenders. These tools are based on an analysis of actual patterns of recidivism in large numbers of cases, which permits the construction of multifaceted algorithms. For instance, a leading tool for assessing violent recidivism risk is the Violence Risk Appraisal Guide (“VRAG”). Psychological researchers developed the first iteration of the VRAG based on an analysis of about fifty variables and more than 600 offenders.¹⁷⁴ Using multiple regression analysis to identify the variables with the greatest predictive power, the researchers ultimately created a twelve-item instrument that includes not only criminal history but also several psychosocial and other variables.¹⁷⁵ Subsequent research

¹⁷³ The most important exception is probably the affirmative defense that is recognized for self-protection. However, this defense is subject to a variety of important limitations, including that the defendant’s use of force must have been reasonable under the circumstances. *LAFAVE*, *supra* note 166, § 10.4(a). To be sure, the lack of premeditation can function as a sort of defense to first-degree murder, *id.* § 14.7, while the existence of a provocation may save a defendant from murder liability altogether, *id.* § 15.2. However, these “defenses” simply reduce the severity of the crime for which the defendant can be convicted; they do not prevent conviction altogether.

We might note a few additional possible defenses that are theoretically available but rarely invoked with much success. Involuntary intoxication may serve as a defense in limited circumstances of extreme impairment analogous to that which is necessary for the insanity defense. *Id.* § 9.5. Voluntary intoxication may sometimes serve as a defense to the extent that it means that the defendant did not possess a required state of mind for the offense charged, although some jurisdictions even further restrict the defense’s availability. *Id.* § 9.5(a). Duress may be available as a defense if the defendant reasonably believed that her actions were necessary in order to avoid imminent death or serious bodily injury. *Id.* § 9.7. Entrapment may be available as a defense to criminal conduct that was induced by law enforcement; additional requirements vary by jurisdiction. *Id.* § 9.8. Necessity may serve as a defense if the defendant’s criminal conduct was intended to prevent an even greater harm. *Id.* § 10.1. Finally, defense of others and defense of property may be available as affirmative defenses in circumstances that are analogous to those required for the self-protection defense. *Id.* §§ 10.5-6.

¹⁷⁴ *HARRIS ET AL.*, *supra* note 106, at 125.

¹⁷⁵ *Id.* at 126-27. For the full VRAG instrument, see *id.* at 285-86. A more easily administrable version of the VRAG has since been developed. *Id.* at 142-43. Although simpler

has confirmed that higher VRAG scores are indeed correlated with violent recidivism.¹⁷⁶ The development and content of such instruments highlight the crudeness of the RA approach that is implicitly embodied in existing VR special measures.

B. *Potential for Increased Risk*

VR special measures undoubtedly subject many low-risk offenders to additional, unwarranted restrictions on liberty and life opportunities. This should raise fairness concerns—more about this in the next Section—but, even assuming that we find it ethically acceptable to sacrifice individual liberty in this manner in the interest of collective security, there are additional concerns that some special measures may perversely tend to *increase* the risk of some offenders. On balance, it is possible that current special measures may actually undermine, rather than advance, the cause of collective security.

Again, some of the argument echoes criticisms that have been made of SORN laws. In particular, limiting offenders' access to employment post-incarceration and increasing the stigma of convictions amplifies socioeconomic disadvantage and cuts off opportunities for offenders to develop positive social relationships. Such consequences likely increase risk.¹⁷⁷ Additionally, measures that result in more incarceration may also be counterproductive—research increasingly points to the likelihood that time behind bars is criminogenic for many individuals.¹⁷⁸

in some respects, the VRAG-Revised (or VRAG-R) remains a twelve-item instrument that includes several psychosocial variables, such as whether the offender lived with both biological parents up to age sixteen and whether the offender has a history of alcohol or drug problems. For the full instrument, see *id.* at 295-98.

¹⁷⁶ *Id.* at 135.

¹⁷⁷ Unemployment and homelessness are known to be recidivism risk factors for returning prisoners. Susan Turner, *Reentry*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE, *supra* note 38, at 341, 350, 355; see also Collateral Consequences Resource Center, *Michigan Set-Asides Found to Increase Wages and Reduce Recidivism*, 30 FED. SENT'G REP. 361, 361 (2018) (reporting that “[p]reliminary results of an empirical study [in Michigan] show that setting aside an individual’s record of conviction is associated with ‘a significant increase in employment and average wages’” and that similar results were found for California).

There is also another way in which employment restrictions may create harm. Because old convictions have little predictive value as to future recidivism, some individuals who are disqualified from working with vulnerable populations actually pose *less* risk than some other individuals who lack a disqualifying conviction and who might be hired in their stead. See Samuel E. DeWitt et al., *Redeemed Compared to Whom? Comparing the Distributional Properties of Arrest Risk Across Populations of Provisional Employees with and Without a Criminal Record*, 16 CRIMINOLOGY & PUB. POL’Y 963, 980 (2017) (comparing arrest risk of healthcare workers with and without criminal records).

¹⁷⁸ COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 193-95 (2014) (“A number of recent empirical studies, literature reviews, and meta-analyses report the potentially ‘criminogenic’

Thus, to the extent that special measures are leading to the incarceration of low- and medium-risk individuals who could have been safely supervised in the community, these laws may be causing some of the individuals to become greater threats to public safety. Recall, too, that some measures involve the categorical exclusion of those with violence convictions from community-based treatment programs that could help to reduce risk.¹⁷⁹ These laws further increase the likelihood that the current regime may have an overall negative impact on public safety.¹⁸⁰

C. Fairness

VR special measures raise two types of fairness concerns: (1) lack of fair notice of adverse consequences and (2) disproportionately severe outcomes.

1. Fair Notice

Notice problems may exist at two different levels. First, defendants may be required to make important plea-bargaining decisions without knowing or even being able to reasonably ascertain the full set of legal consequences of pleading guilty to a particular offense. For instance, a defendant might unknowingly agree to plead guilty to an offense that carries a career-wrecking special measure or

effects of imprisonment on individuals . . .”). For those offenders who are incarcerated, the evidence is mixed as to the impact of marginal increases in the length of incarceration, but a few studies suggest that such increases do tend to increase risk. *See* JAMES AUSTIN ET AL., BRENNAN CTR. FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 35-36 (2016) (summarizing research).

¹⁷⁹ O’Hear, *supra* note 1, at 191-93 (discussing exclusionary laws); *see also* Dale McNiel & Renée L. Binder, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 164 AM. J. PSYCHIATRY 1395, 1401 (2007) (reporting results of study in San Francisco finding that “mental health court participants showed a longer time without any new charges or new charges for violent crimes compared with similar individuals who did not participate in the program”). As noted in Part I, there is considerable research to support the potential of RNR-based treatment with offenders generally. To be sure, relatively little of this research has focused specifically on violent offenders. Much of the extant literature on treatment for violent offenders distinguishes between “adolescent-limited” and “lifelong-persistent” offenders. *See* HARRIS ET AL., *supra* note 106, at 226. Most offenders are in the former category, described as those who “start offending in their teenage years and desist before their 30s.” *Id.* Treatment benefits have been most fully documented for adolescent-limited offenders. *Id.* at 227. To date, there has been less demonstration of success with the smaller number of offenders in “lifelong-persistent” category, which partly reflects the relatively smaller amount of research done on this part of the offender population. *Id.* at 226. However, as some commentators have observed, “Absence of evidence [of treatment benefits] is not necessarily evidence of absence . . .” *Id.* at 227.

¹⁸⁰ Note, too, that increased incarceration sucks money from corrections budgets that might instead be directed to chronically underfunded rehabilitative programming and contributes to prison overcrowding, which in itself also tends to undercut the availability and effectiveness of institution-based programming. *See* O’HEAR, *supra* note 27, at 75-76 (discussing research on effects of overcrowding); *id.* at 86-87 (discussing concerns regarding quantity and quality of prison-based programming).

that is subject to early-release rules that are much less favorable than assumed. With full knowledge, the same defendant might have taken his or her chances with a trial. Conversely, a defendant might unwittingly turn down a plea deal that would include the dismissal of a charge triggering special measures and then suffer unanticipated adverse consequences after being convicted of that charge at trial.

To be sure, we normally rely on defense counsel to fill in such knowledge gaps regarding the costs and benefits of a plea deal. However—even apart from the normal risk that an overstretched, undertrained, court-appointed attorney will fail to provide clear, accurate legal advice to a client¹⁸¹—there are a number of particular concerns relating to VR special measures, beginning with the vagueness of so many statutory definitions of “violent crime.” Qualitative definitions and residual clauses are rife with key terms like “physical injury,”¹⁸² “deadly weapon,”¹⁸³ “dangerous instrument,”¹⁸⁴ “physical force,”¹⁸⁵ and “comparable serious felony involving violence”¹⁸⁶ that are at least fuzzy around the margins.¹⁸⁷ Indeed, one residual clause in a federal special-measures statute generated so much litigation and uncertainty that the Supreme Court declared it unconstitutional.¹⁸⁸ Laundry-list definitions, for their part, may avoid the vagueness pitfall, but they still raise serious notice concerns to the extent that they embrace unexpected offenses that lie well outside core understandings of violence.¹⁸⁹ How much can a busy lawyer really be blamed for failing to check whether a routine property or drug offense appears in an obscure statutory definition of “violent crime?”¹⁹⁰ And of course, when a special measure is

¹⁸¹ See Eve Brensike Primus, *Defense Counsel and Public Defense*, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 121, 121, 123-25, 127-28 (Erik Luna ed., 2017) (reviewing various deficiencies with quality of indigent representation in United States).

¹⁸² E.g., ARK. CODE ANN. § 5-42-203(4) (2019).

¹⁸³ E.g., ARIZ. REV. STAT. ANN. § 13-901.03.B (2019).

¹⁸⁴ E.g., *id.*

¹⁸⁵ E.g., CAL. PENAL CODE § 423.1(a) (West 2019).

¹⁸⁶ E.g., ARK. CODE ANN. § 5-4-501(c)(2)(B).

¹⁸⁷ See, e.g., *United States v. Swallow*, 891 F.3d 1203, 1204-05 (9th Cir. 2018) (considering whether tennis shoes can be a “dangerous weapon”).

¹⁸⁸ See *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) (determining that residual clause of Armed Career Criminal Act violates constitutional vagueness doctrine).

¹⁸⁹ See *supra* notes 153-60 and accompanying text (contrasting qualitative and laundry-list definitions and noting range of offenses that appear on some laundry lists).

¹⁹⁰ The Sixth Amendment right to effective assistance of counsel may provide relief in some circumstances for defendants who have made poor plea-bargaining decisions as a result of incorrect or incomplete lawyerly advice, but this right is limited in some important respects. For one thing, the traditional rule was that defense counsel need only inform the client of the “direct consequences” of a criminal conviction—that is, the sentencing exposure in the case at hand. *Padilla v. Kentucky*, 559 U.S. 356, 375-76 (2010) (Alito, J., concurring in judgment) (“Until today, the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences

adopted only *after* the defendant is convicted and then applied retroactively to the defendant, no amount of lawyerly diligence during plea bargaining could have fully informed the defendant of those future legal consequences of his or her conviction.¹⁹¹

Second, in addition to plea-bargaining decisions, there may also be notice concerns as to primary conduct—that is, the conduct that gives rise to criminal liability. To be sure, it may be hard to see any unfairness when a person knowingly engages in serious criminal misconduct, such as an armed robbery or unprovoked shooting, and then ends up suffering somewhat worse consequences than were reasonably foreseeable. However, special measures can also apply to much less serious offenses as to which the conventional penalties are not normally severe, including, for instance, misdemeanors and certain routine property offenses.¹⁹² VR special measures may thus result in far more draconian consequences for the commission of these crimes than anyone would have anticipated before acting.

2. Proportionality

Proportionality in punishment—that is, making the punishment fit the crime—has long been recognized as a core objective for the criminal-justice

of a criminal conviction.”). Though the Supreme Court recently recognized an exception for deportation consequences, *id.* at 374 (majority opinion) (“[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation.”), this remains a limited exception of uncertain practical value. *See, e.g.,* Nora V. Demleitner, *Structuring Relief for Sex Offenders from Registration and Notification Requirements: Learning from Foreign Jurisdictions and from the Model Penal Code: Sentencing*, 30 FED. SENT’G REP. 317, 319 (2018) (noting that courts have rejected arguments that notice of SORN laws is constitutionally required); Lilia S. Stantcheva, Note, *Padilla v. Kentucky: How Much Advice Is Enough?*, 89 N.Y.U. L. REV. 1836, 1839 (2014) (“Some lower courts have considered vague advice [regarding deportation risk]—either from the defense attorney or from other sources—to qualify as effective, even in cases where *Padilla* requires more specific advice.”).

Another difficulty for defendants seeking Sixth Amendment relief, even as to poor advice regarding *direct* consequences, is the requirement that the defendant establish that he or she was prejudiced by the advice. *See* Lafler v. Cooper, 566 U.S. 156, 163 (2012) (“[A] defendant must ‘show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ In the context of pleas, a defendant must show the outcome of the plea process would have been different with competent advice.” (citation omitted) (quoting *United States v. Strickland*, 466 U.S. 668, 694 (1984))).

¹⁹¹ The *Ex Post Facto* Clause imposes few constraints on the retroactivity of some types of special measures. *See, e.g.,* Smith v. Doe, 538 U.S. 84, 105-06 (2003) (upholding SORN law against *Ex Post Facto* challenge because not punitive); *Monge v. California*, 524 U.S. 721, 728 (1998) (“An enhanced sentence imposed on a persistent offender thus ‘is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes’ but as ‘a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.’” (quoting *Gryger v. Burke*, 334 U.S. 728, 732 (1948))).

¹⁹² O’Hear, *supra* note 1, at 171-76, 180-81 (describing range of crimes to which special measures are applied).

system,¹⁹³ but VR special measures operate contrary to this goal by imposing the same consequences in an indiscriminate fashion on a wide array of dissimilar offenses. Proportionality is achieved by ensuring that the relative severity of punishment for different offenses corresponds to the relative severity (i.e., moral blameworthiness) of the offense.¹⁹⁴ Thus, all else being equal, murder sentences should be longer than aggravated assault sentences, aggravated assault sentences longer than simple assault sentences, and so forth.¹⁹⁵ Yet special measures tend to have a leveling effect, diminishing or potentially even erasing the practical differences in the severity of sanctions for quite different offenses.¹⁹⁶ For instance, one federal special measure involves a mandatory minimum fifteen-year prison sentence for the crime of unlawful possession of a firearm when the defendant has three prior violence convictions¹⁹⁷—a sentence that is equivalent to the median sentence imposed in federal court for the far more severe crime of *murder*.¹⁹⁸ In general, the broader the definition of “violent crime” and the more severe the consequences that flow from it, the more likely it is that proportionality will be undermined.¹⁹⁹

¹⁹³ See, e.g., Russell L. Christopher, *Detering Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 892 (2002) (“[T]hat punishment should be in some way proportional to the crime is an intuition (like the wrong of punishing the innocent) that is so widely shared as to make its attack unpersuasive.”).

¹⁹⁴ Most contemporary punishment theorists favor this sort of “ordinal” formulation of proportionality. See Michael M. O’Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247, 1255-56 (2011) (“Among retributivists, the conceptual difficulties in implementing proportionality have to some extent been addressed by a shift in focus from *cardinal* to *ordinal* proportionality. Ordinal proportionality is oriented to system-wide practices and demands that relatively more serious offenses be punished with greater severity than less serious offenses.” (footnote omitted)).

¹⁹⁵ The qualifier here (“all else being equal”) is meant to hold constant the sorts of variables like role, capacity, and premeditation that—as noted in Section III.A above—can meaningfully differentiate individuals who have been formally convicted of the same offense.

¹⁹⁶ To be sure, some of the consequences of a violent crime might be formally categorized by courts or legislatures as “nonpunitive” collateral consequences. If a special measure is not “punishment” for an offense, then arguably it would lie outside the proportionality mandate. However, formal legal classifications do not necessarily control how a consequence will be perceived by an offender, his or her family, or the wider public. See Demleitner, *supra* note 190, at 320 (“Offenders—and the public—perceive [sexual offender] notification, but not registration, requirements as punitive and designed to shame the offender. This perception runs counter to the legal classification of registration and notification as nonpunitive civil measures . . .”).

¹⁹⁷ 18 U.S.C. § 924(e)(1) (2018) (imposing imprisonment of at least fifteen years on person who has three previous convictions for violent felony or serious drug offense).

¹⁹⁸ U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS S-32 tbl.13 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB_Full.pdf [https://perma.cc/8ZLB-B3ET] (reporting median sentence for murder as 180 months).

¹⁹⁹ To some extent, judges may be able to alleviate disproportionalities by taking collateral consequences into account in their sentencing decisions; however, judges may not necessarily

Importantly, disproportionate outcomes may be produced even in cases in which no special measure is formally triggered. This may happen when a prosecutor uses the threat of special measures to obtain greater plea-bargaining leverage.²⁰⁰ For instance, a prosecutor may charge a defendant with a “violent crime” that triggers draconian consequences and then offer to drop that charge if the defendant pleads guilty to a different offense that is not classified as “violent.” Such pressures could result in the defendant agreeing to a plea deal

know about all of the relevant consequences or think it appropriate to consider their impact. *See* Demleitner, *supra* note 190, at 319 (“If an offender is convicted of a sex crime, some judges factor the impact of sex offender registration and notification statutes into the sentence, as an aspect of the overall punishment imposed; others do not. That disparity may lead to substantial sentence inequities.” (footnote omitted)).

²⁰⁰ Similar concerns have also been raised about prosecutorial use of SORN laws in plea bargaining. *Id.* at 319 (“[S]ex offender registration and notification statutes are highly publicized and part of public consciousness. To avoid the sex offender label, with its resulting collateral sanctions, those charged therefore attempt to plead to non-sexual offenses.”); *see also* Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1226 (2016) (“Prosecutors seek a higher criminal penalty in exchange for avoiding a collateral consequence.”).

that results in a disproportionately severe sentence²⁰¹ or even a wrongful conviction—the most extreme form of disproportionality.²⁰²

²⁰¹ To some extent, the concerns may be mitigated if prosecutors utilize the special measures “hammer” in consistent ways across cases. However, given the highly discretionary and mostly opaque and unaccountable nature of plea bargaining, *see, e.g.*, STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 31-32 (2012) (discussing “back-room” plea deals and prosecutors’ ability to exercise power “free of effective oversight”), there is little basis for confidence that prosecutors will always scrupulously resist the natural human tendency toward favoritism on the basis of race, ethnicity, age, class, sex, personal relationships, or even simple whims, *see, e.g.*, Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 B.C. L. REV. 1187, 1191 (2018) (finding that prosecutors in Dane County, Wisconsin, were 25% more likely to reduce charges of white defendants than those of black defendants); Don Stemen & Gipsy Escobar, *Whither the Prosecutor? Prosecutor and County Effects on Guilty Plea Outcomes in Wisconsin*, 36 JUST. Q. 1166, 1182 (2018) (finding, in statewide study of plea bargaining in Wisconsin, that “defendants of Color are 12% less likely to receive a plea to a lesser charge”). Even in the more transparent and accountable realm of judicial sentencing, many researchers have identified unwarranted disparities in the treatment of defendants who are similarly situated in all legally relevant ways. *See, e.g.*, Ozkan Eren & Naci Mocan, *Emotional Judges and Unlucky Juveniles*, AM. ECON. J., July 2018, at 171, 173 (finding longer sentences in one state in week after unexpected loss by locally popular college football team). Indeed, even in the relatively tightly controlled world of federal sentencing prior to 2005, researchers found small but statistically significant judge-to-judge disparities. PAUL J. HOFFER ET AL., U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 97 (2004), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/table_of_contents.pdf [<https://perma.cc/PC6R-UGGW>] (reviewing research in variation between sentences imposed by judges before and after implementation of federal sentencing guidelines).

It should also be noted that differences in the quality of defense lawyers may also be a source of unwarranted disparities in plea-bargaining outcomes. *See, e.g.*, Stemen & Escobar, *supra*, at 1187 (“The presence of a state public defender decreases the odds of case dismissal, decreases the odds of a guilty plea to a lesser charge, and decreases the odds of a noncustodial sentence . . .”).

²⁰² It is sometimes hard for laypeople to accept the idea that an innocent person would ever plead guilty. However, the real-world dynamics of plea bargaining can amplify prosecutorial pressure in a variety of powerful ways. Eighty percent of defendants are indigent, and court-appointed lawyers are notoriously short on time and resources to investigate and develop potential defenses. *See, e.g.*, Primus, *supra* note 181, at 121, 123-25, 127-28 (reviewing various deficiencies with quality of indigent representation in United States). Innocent defendants might with good reason question their ability to prevail at trial with such representation. Indeed, rather than attempting to persuade their clients otherwise, many defense lawyers have compelling incentives to discourage their clients from going to trial; inadequate public defense funding means that most cases must be disposed of quickly through a prompt guilty plea. *See id.* at 125 (finding that assigned defense attorneys with low per case caps on compensation “have no financial incentive to go to trial, do legal research or to investigate. They are better off pleading out a case, getting the fee, and getting a new client”). It should also be appreciated that the decision-making processes of many defendants may be

3. Why Fairness Matters

Special measures can give rise to both procedural unfairness (e.g., unfair notice and coercive prosecutorial plea-bargaining tactics) and substantive unfairness (e.g., wrongful convictions, excessive sentences, and other disproportionately severe outcomes). Unfairness should be a concern in and of itself to policymakers. However, even if this alone is insufficient, there are other, more instrumental reasons why fairness matters. As a considerable body of social psychology research has shown, fairness goes to the perceived legitimacy of the criminal justice system, and legitimacy, in turn, may be crucial to the maintenance of law and order.

On the whole, people obey the law not so much as a result of fear of formal punishment but more because they have internalized the value of abiding by the law.²⁰³ Such internalization is closely connected to perceptions that the law and legal authorities have legitimacy.²⁰⁴ But legitimacy is not something that is

affected by mental illness, immaturity, addiction, or cognitive disability. *See, e.g.,* JENNIFER BRONSON & MARCUS BERZOFKY, U.S. DOJ, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011-2012, at 1 (2017), <https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf> [<https://perma.cc/KYH9-D3T8>] (finding that only 36% of jail inmates surveyed either had not received a mental health disorder diagnosis or did not have indicators of serious psychological distress). Some research indicates that false guilty pleas may be common among mentally ill people who have been convicted of crimes. *See* Allison D. Redlich, Alicia Summers & Steven Hoover, *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 LAW & HUM. BEHAV. 79, 89 (2010) (finding that 37% of mentally ill offenders surveyed had made false guilty plea). Moreover, defendants with prior convictions—even though innocent this time around—may appreciate that their records could undermine their credibility with a jury. Although prior convictions are not normally admissible to prove that a defendant has a propensity to commit crimes, *see* FED. R. EVID. 404(b)(1), they are typically allowed for impeachment purposes when a defendant provides testimony, *see* FED. R. EVID. 609(a)(1), which may be a practical necessity in some cases for the innocent defendant to be able to present a meritorious defense.

Whatever the cause, there is no shortage of anecdotal evidence that innocent defendants do sometimes plead guilty. For a discussion of illustrative cases, *see, for example,* John H. Blume & Rebecca K. Helm, Essay, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 158-61 (2014). Indeed, about 18% of recorded exonerations have come in guilty-plea cases. Jenia I. Turner, *Plea Bargaining*, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES, *supra* note 181, at 73, 83.

²⁰³ Paul M. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468-69 (1997) (“More than because of the threat of legal punishment, people obey the law (1) because they fear the disapproval of their social group if they violate the law, and (2) because they generally see themselves as moral beings who want to do the right thing as they perceive it. In social science these two factors are referred to as (1) compliance produced by normative social influence, and (2) behavior produced by internalized moral standards and rules.”).

²⁰⁴ *See* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003) (“[T]o the degree that people do regard the police and courts as legitimate, they are more willing to accept the directives and decisions of the police and courts, and the likelihood of defiance, hostility, and resistance is diminished.”).

automatic for a legal system. Rather, perceptions of legitimacy are shaped, at least in part, by perceptions that the system is just, in both the procedural sense and the substantive sense of the term.²⁰⁵ The psychological research indicates that legal decision-making is regarded as *procedurally* just to the extent that it exhibits various attributes of fair process, including providing individuals with a meaningful opportunity to be heard by a decision-maker who is seen as neutral and caring.²⁰⁶ There is some rather obvious tension between these procedural ideals and the reality of harsh special measures being utilized in a heavy-handed fashion to pressure a defendant into a guilty plea or being applied automatically without any apparent process at all. *Substantive* justice, for its part, turns on basic ideas of desert and proportionality.²⁰⁷ Thus, when the consequences of convictions are seen as harshly disproportionate, as may happen through the application or threatened application of VR special measures, there may also be costs to the legal system's legitimacy.²⁰⁸ Ironically, then, by virtue of legitimacy-related dynamics, special measures may serve in some respects to *increase* disorder and violence.²⁰⁹

²⁰⁵ See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 64-68, 161-63 (1990) (discussing importance of perceptions that content of law reflects moral beliefs and that law was adopted in procedurally fair manner for compliance).

²⁰⁶ Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 420-21 (2008) (asserting that perception of fairness of decision depends on whether process provided person with opportunity to tell his or her side of the story, whether authorities were perceived as unbiased, and whether authorities were seen as benevolent).

²⁰⁷ See Robinson & Darley, *supra* note 203, at 477 ("The criminal law must earn a reputation for (1) punishing those who deserve it under rules perceived as just, (2) protecting from punishment those who do not deserve it, and (3) where punishment is deserved, imposing the amount of punishment deserved, no more, no less.").

²⁰⁸ See *id.* at 478 ("The point is that every deviation from a desert distribution [of punishment] can incrementally undercut the criminal law's moral credibility, which in turn can undercut its ability to help in the creation and internalization of norms and its power to gain compliance by its moral authority.").

²⁰⁹ Note that the negative impact of perceived unfairness may extend beyond the law-abidingness of the immediate recipient of unfairness. First, some individuals who witness unfair treatment, such as the family members of violent offenders, may themselves become more likely to offend. *Cf.* COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, *supra* note 178, at 272 (discussing research that finds association between paternal incarceration and rates of delinquency and arrest among their male children, holding other variables constant). Second, perceptions of unfair treatment may undermine law-enforcement effectiveness by reducing citizens' willingness to cooperate with police and prosecutors. See, e.g., Bret D. Asbury, *Anti-Snitching Norms and Community Loyalty*, 89 OR. L. REV. 1257, 1301-02 (2011) (explaining "stop snitching" movement in poor communities of color by reference to experience of police misconduct in these communities); Paul Butler, *Race-Based Jury Nullification: Black Power in the Criminal Justice System*, in CRIMINAL LAW CONVERSATIONS 561, 561, 566-67 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009) (noting phenomenon of black jurors refusing to convict black defendants without regard to strength of evidence of guilt and defending this practice in light of unfair treatment of blacks in criminal justice system).

IV. IMPLEMENTING THE INDIVIDUALIZED APPROACH

Offense-based approaches to managing residual recidivism risk, as in SORN laws and existing VR special measures, are inherently flawed. In lieu of the offense-based approach, existing VR special measures should be replaced with a new VR control regime that more narrowly targets those offenders who are individually determined to be dangerous, taking into account more than just the fact or number of prior convictions. Such a new approach could be modeled in some respects on existing civil-commitment laws for sexual offenders but should also reflect an appreciation of the difficulties that some states have experienced with civil commitment. This Part first suggests some principles that ought to guide the development of a new individualized system and then responds to a number of potential objections to the proposed reform. To be clear, the new regime proposed here is intended to *replace* all existing offense-based measures and not simply to be layered on top of the current system.

A. Guiding Principles

1. No Special Measures Should Be Imposed in the Absence of a Court's Finding that a Person Presents a Risk of Violent Recidivism that Cannot Be Adequately Addressed Through the Safeguards Otherwise Available

The civil-commitment experience demonstrates the practicability of court-based processes to identify individuals who present abnormally high risks of reoffense.²¹⁰ The main alternative to the court-based approach to individualization would seem to be an administrative process, presumably within the executive branch of government. However, courts are likely to be seen as more legitimate because of their relatively greater political insulation, traditions of due process, and transparency.²¹¹ An administrative process would likely be more efficient, but efficiency may be a double-edged sword in this setting. Recall that the procedural burdens of court-based SVP civil commitment seem to constrain its overuse.²¹² As with sexual offenders, public fear and

²¹⁰ Courts already play a similar risk-assessment role in other contexts, too, as in the processes relating to pretrial detention, *see, e.g.*, 18 U.S.C. § 3142(e)(1) (2018) (“If . . . the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the *safety of any other person and the community*, such judicial officer shall order the detention of the person before trial.” (emphasis added)), and implementation of the insanity defense, *see, e.g.*, WIS. STAT. ANN. § 971.17(3)(a) (West 2019) (“An order for commitment [of a person found not guilty by reason of insanity] shall specify either institutional care or conditional release. The court shall order institutional care if it finds by clear and convincing evidence that conditional release of the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage.”).

²¹¹ As noted *supra* Section III.C.3, legitimacy may ultimately affect the crime-fighting efficacy of a VR special measure.

²¹² *See supra* text accompanying notes 87-89.

loathing of violent offenders might tend to push executive agencies into an excessive reliance on special measures if they could be imposed without substantial transaction costs.²¹³

Consistent with the interest in legitimacy and a desire to avoid imposing special measures in a kneejerk fashion, basic and familiar due-process protections should be afforded to the defendant in connection with dangerousness determinations, such as the rights to have a court-appointed lawyer, to cross-examine witnesses, to testify, and to appeal adverse rulings.²¹⁴

It is an interesting and uncertain question whether the defendant should have a right to a jury trial. On the one hand, juries are sometimes seen as a vital component of due process, at least symbolically if not substantively.²¹⁵ On the other hand, there are concerns that lay jurors are ill-equipped to handle scientific evidence regarding risk—concerns that may find some validation in the research on civil-commitment jurors.²¹⁶ More generally, a substantial literature explores the relative advantages and disadvantages of jury decision-making, but broad, categorical conclusions seem elusive.²¹⁷ To the extent that civil commitment

²¹³ See *supra* text accompanying notes 60-72 (describing mistaken public perceptions of sexual offenders and overbreadth of SORN laws).

²¹⁴ Such due-process protections are generally available in the civil-commitment context. Mark Noferi, *Making Civil Detention “Civil,” and Examining the Emerging U.S. Civil Detention Paradigm*, 27 J. C.R. & ECON. DEV. 533, 565-66 (2014) (describing procedural protections—such as counsel for indigent, evidentiary hearings, etc.—available in various jurisdictions to people facing civil-commitment determinations).

²¹⁵ See, e.g., *Blakely v. Washington*, 542 U.S. 296, 313 (2004) (“There is not one shred of doubt . . . about the Framers’ paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. . . . [E]very defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment.”).

²¹⁶ See Knighton et al., *supra* note 74, at 300 (“Overall, jurors perceived even very low recidivism rates as suggesting that an offender would be likely to reoffend.”). Research also casts doubt on the ability of jurors to distinguish the “preponderance of the evidence” standard of proof from the higher standards (“clear and convincing” and “beyond a reasonable doubt”) that are typically used in civil-commitment cases. Fredrick E. Vars, *Delineating Sexual Dangerousness*, 50 HOUS. L. REV. 855, 895 (2013). If a jury were to be used for VR special measures, consideration should be given to the lessons of a growing body of research on the most effective ways for experts to communicate information about risk to laypersons. See Lauren C. Coaker & Michael E. Lester, *Communicating Violence Risk During Testimony: Do Different Formats Lead to Different Perceptions Among Jurors?*, 25 PSYCHOL. PUB. POL’Y & L. 92, 93-94 (2019) (summarizing prior research). For instance, one recent study found that participants tended to provide higher estimates of violence risk when presented with ordinal categories alone (e.g., “high” versus “medium” or “low” risk) than when also given the absolute percent likelihood of future violence based on actuarial analysis (e.g., 10% likelihood of violence). *Id.* at 101.

²¹⁷ See, e.g., Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1145 (2005) (“Our conclusion must be a modest one, for the evidence paints a mixed picture. Both judges and juries have advantages and disadvantages as reliable re-creators of past events.”).

serves as a model for the process recommended here, it may be worth noting that most civil-commitment states do provide for jury decision-making.²¹⁸ There are, of course, potential constitutional constraints in this regard, although courts have generally rejected a constitutional right to jury trial for civil commitment.²¹⁹

I have admittedly left matters a bit vague in characterizing what exactly the state must prove: “Person presents a risk of violent recidivism that cannot be adequately addressed through the safeguards that are otherwise available.” Phrased thusly, the standard seems to turn on that perennial conundrum: “How safe is safe?” More specificity would be desirable, but existing civil-commitment laws seem notably unhelpful as a model. These laws reflect a wide variety of different approaches, many of which are quite vague themselves. A handful of states use a 50% risk cutoff; a person may not be civilly committed unless the finder of fact determines that it is more likely than not that the person will commit sexual offenses in the future.²²⁰ At least three other states have expressly determined that a risk below 50% will suffice but have not quantified how low the risk may be.²²¹ Ten additional states have yet to decide whether a risk of under 50% would qualify.²²² The case law in some of the nonquantification states expressly invites finders of fact to engage in a case-by-case balancing of multiple factors to decide how safe is safe²²³—an approach that seems bound to produce inconsistent outcomes and the commitment of at least some relatively low-risk individuals.

In fairness, it is easy to see why judges and legislators in most states have shied away from a clearly quantified standard. On the one hand, there is quite appropriately some constitutional squeamishness about limiting the liberty of individuals based on a suspicion of what they *will* do in the future, as opposed to what they have already done in the past. On the other hand, it seems callous to future victims (and, for politically accountable officials, a threat to career longevity) to turn a blind eye to *any* risk of future violence. Even for those offenders who present a mere 1% VR risk—a very low figure in the realm of offender dangerousness—one might still expect a terrible and seemingly *preventable* victimization resulting once every one hundred cases or so in which special measures are not imposed. We confront weighty but ultimately incommensurable values on both sides of the cost-benefit equation. In the end,

²¹⁸ Noferi, *supra* note 214, at 565 (discussing procedural safeguards of civil commitment).

²¹⁹ *See id.* at 565 n.220 (citing cases).

²²⁰ *See Vars, supra* note 216, at 891-92 (identifying Iowa, Missouri, Nebraska, Washington, and Wisconsin as states in this category).

²²¹ *See id.* (identifying California, Florida, and Massachusetts as states in this category, as well as the federal system).

²²² *Id.* at 892 (“Ten other states have similarly nonquantified risk thresholds, although none of them has clearly stated that a probability less than 50% can suffice.”).

²²³ *Id.* at 893 (discussing how some courts have held that a balancing test is required).

the rough-and-ready “more likely than not” (more than 50%) standard may seem the best way to show respect for the importance of both sets of values.²²⁴

Whatever else may be said about the risk cutoff, there is at least one benchmark that should be recognized: a person should not be subject to special measures unless his or her VR risk is substantially higher than that of the average offender on conventional parole supervision. Such a standard should help to protect the control regime from the perception and reality of arbitrariness; it should not seem a random or biased process by which some individuals are subjected to special measures while others presenting equal or greater risk are not. Moreover, to the extent that special measures entail an additional investment of state supervision and treatment resources, those resources would presumably better be expended on enhanced supervision and programming for the existing parolee population than on individuals who already present a lower risk than most of that population.²²⁵

The question of risk cutoff is sometimes conflated with the related but conceptually distinct question of what the burden of persuasion should be. From a constitutional standpoint, the Supreme Court has indicated that civil commitment requires a burden of persuasion greater than a simple preponderance.²²⁶ In practice, civil-commitment states are split between those that use the high standard of beyond a reasonable doubt (“BRD”) and those that use the intermediate standard of clear and convincing evidence (“CCE”).²²⁷ Either standard could be used with any given risk cutoff (e.g., the state might have to prove BRD that a person presents at least a 10% risk of re-offense, or the state might have to prove by CCE that a person presents at least a 70% risk of reoffense). In principle, the choice between the demanding BRD standard and the lower CCE standard requires the same basic social policy choice as does the

²²⁴ For civil commitment of sexual offenders, Professor Frederick Vars has offered a thoughtful, nuanced argument in favor of a 75% risk cutoff. *Id.* at 895. However, as any such quantification must be, his rests on a variety of questionable valuations of the pertinent factors. *See, e.g., id.* at 889 (calculating annual value of lost liberty when person is civilly committed based on assessment of damage awards in seventeen cases of false imprisonment). Moreover, his approach assumes that civilly committed individuals are institutionalized. *See id.* at 888-89 (discussing costs of institutionalization). By contrast, the proposal here would establish a presumption against custodial commitments. *See infra* Section IV.A.3. The variety of different special measures that might be imposed to address residual violent recidivism risk would make it far more difficult to perform the sort of quantified cost-benefit balancing that Vars employed in his article.

²²⁵ As we have seen, it is a core tenet of the leading RNR model that interventions should focus on higher-risk individuals. Turner & Petersilia, *supra* note 107, at 181-82.

²²⁶ *Addington v. Texas*, 441 U.S. 418, 427 (1979) (“The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. We conclude that the individual’s interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.”).

²²⁷ Vars, *supra* note 216, at 891-92.

risk cutoff—either way, one is concerned with the distribution of the costs of error. A high risk cutoff and a high burden of proof mean that there will be relatively few false *positives*—that is, individuals who would not have reoffended and who are unnecessarily subject to special measures. Conversely, a low risk cutoff and a low burden of proof will lead to relatively few false *negatives*—that is, individuals who are not subject to special measures and who do reoffend. Logic dictates no clear answer to the question of how to balance the potential for false positives against the potential for false negatives. When it comes to choosing burden of proof, though, there may be some (cold) comfort in appreciating that real-world jurors may not be able to differentiate between the BRD standard and the CCE standard.²²⁸ The decision, in short, may matter far less than legal practitioners assume.

At least one additional aspect of the hearing merits consideration here—the timing. Two possibilities suggest themselves: (1) either at or around the time of sentencing or (2) at a later date while the sentence is being served. SVP civil commitment takes the latter approach, with the commitment process typically initiated when release from prison would otherwise be imminent.²²⁹ This approach also seems preferable for VR measures. This will help to ensure that additional restrictions on liberty are based on up-to-date information bearing on risk. By contrast, at the time of sentencing, the judge is not in a good position to know what danger the offender will pose at the conclusion of a potentially quite lengthy prison term, during which time the offender will certainly age, possibly acquire education or job skills, possibly obtain treatment for addiction or mental illness, and so forth. Additionally, a later hearing that is procedurally decoupled from the determination of guilt and sentencing should greatly diminish the risk that the threat of special measures is utilized inappropriately by prosecutors for plea-bargaining leverage.

2. The Decision-Making Process Should Involve an Appropriately Validated, Actuarial Risk-Assessment Instrument; the Defendant Should Be Scored by a Neutral, Court-Appointed Evaluator, with the Results Shared with Both Sides Prior to the Hearing

The science of offender RA has advanced considerably over the past generation, and any process focused on the control of risk ought to make use of the best tools now available.²³⁰ As discussed in earlier sections, standardized,

²²⁸ See *id.* at 895.

²²⁹ See, e.g., WIS. STAT. ANN. § 980.015(2) (West 2019) (requiring agency with custody over person meeting criteria for SVP civil commitment to provide notice to Wisconsin Department of Justice and district attorney “as soon as possible beginning 90 days prior to” person’s release from imprisonment or other form of custody); *id.* § 980.02(1m) (“A petition [for civil commitment] filed under this section shall be filed before the person is released or discharged.”).

²³⁰ See D.A. (Don) Andrews, *The Risk-Need-Responsivity (RNR) Model of Correctional Assessment and Treatment*, in USING SOCIAL SCIENCE TO REDUCE VIOLENT OFFENDING, *supra* note 107, at 127, 142 (“The field of risk/need assessment has recently advanced significantly.

actuarial RA instruments, like the Static-99 and VRAG, are based on the analysis of large numbers of offenders over time, permitting the identification of variables that are associated with recidivism in statistically significant ways.²³¹ Depending on how many and which variables are present as to a given offender, the instrument indicates the likelihood that the person will reoffend over a given period of time.²³² Criminal-justice officials across the United States are becoming increasingly familiar with such tools, which are being used in decisions relating to pretrial detention, bail, diversion, sentencing, parole, and community supervision.²³³

To be sure, no one claims perfection for any extant RA instrument. For instance, leading instruments seem to do a substantially better job of identifying low-risk offenders than high-risk offenders, which suggests that false positives may not be uncommon,²³⁴ and there are widely varying calculations of the confidence intervals that should be associated with specific risk estimates.²³⁵ The point is not that risk is always best assessed *exclusively* on an actuarial basis but rather that risk assessment will normally be more accurate when it is at least informed by an appropriately validated actuarial instrument.²³⁶ An extraordinary volume of research has now been conducted on RA instruments,²³⁷ and the evidence that “structured” RA (i.e., RA aided by a standardized instrument) can

Now, evidence is emerging that agencies that conduct systematic assessments and act in accordance with the findings of the assessment have greater crime *reduction* potential than other agencies.”).

²³¹ See *supra* Sections I.B.1, III.A.

²³² The results can be communicated in a number of different ways, including as a percent-likelihood that the defendant will reoffend or in terms of broad categories like high, medium, or low risk. See HARRIS ET AL., *supra* note 106, at 184-86 (discussing research on different approaches).

²³³ Edward E. Rhine, Joan Petersilia & Kevin R. Reitz, *The Future of Parole Release*, 46 CRIME & JUST. 279, 300-01 (2017) (discussing use of actuarial risk-assessment tools); see also Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 809 (2014) (noting that at least twenty states have begun to utilize RA in sentencing process).

²³⁴ See, e.g., Rhine, Petersilia & Reitz, *supra* note 233, at 300 (“[T]he most widely used and researched Level of Service Inventory-Revised (LSI-R) instrument produces estimated 30 percent false-positive error rates for high-risk offenders, meaning that many offenders who are predicted to fail (on various outcomes) do not. Predicting low recidivism risk is more accurate (error rates of just 2-3 percent).” (citation omitted)).

²³⁵ Vars, *supra* note 216, at 873-74.

²³⁶ As to validation, a leading scholar advises, “If an instrument’s proponent cannot provide cross-validated and replicated evidence of its predictive validity, reject that instrument. Indeed, avoid the instrument, if a proponent cannot provide access to at least two prospective validity studies composed of at least two independent samples of offenders.” Andrews, *supra* note 230, at 141.

²³⁷ See Jay P. Singh, Commentary, *Five Opportunities for Innovation in Violence Risk Assessment Research*, 1 J. THREAT ASSESSMENT & MGMT. 179, 179 (2014) (noting existence of “over 40 systematic reviews and meta-analyses on the topic, and an average of 17 new risk assessment articles being published each month” (citations omitted)).

produce more accurate risk estimates than unstructured RA can produce has been characterized as “overwhelming.”²³⁸

The use of an RA instrument may seem to leave the official finder of fact (judge or jury) with nothing much to do besides rubber-stamp the instrument’s output. However, a decision that is *informed* by actuarial RA need not necessarily be *controlled* by it. A particular offender might have some salient characteristic that is not taken into account by whatever RA instrument is utilized; the special-measures hearing might then include evidence and argument on that characteristic, which might lead the finder of fact to conclude that the offender’s actual risk is either greater or less than what the instrument indicates.²³⁹ For instance, RA instruments vary in whether they take into account so-called “dynamic” risk factors that can change over time, such as the presence of a substance-abuse disorder.²⁴⁰ If assessed using a wholly static instrument, a defendant who has successfully completed drug treatment in prison might present evidence to that effect at his or her special-measures hearing; with the aid of appropriate expert testimony, the fact-finder might then decide that the defendant’s risk is less than what the instrument indicated.²⁴¹

²³⁸ Sarah J. Desmarais, Kiersten L. Johnson & Jay P. Singh, *Performance of Recidivism Risk Assessment Instruments in U.S. Correctional Settings*, 13 PSYCHOL. SERVICES 206, 206 (2016) (“There is overwhelming evidence that risk assessments completed using structured approaches produce estimates that are more reliable and more accurate than unstructured risk assessments.” (citations omitted)); see also HARRIS ET AL., *supra* note 106, at 172 (“Three quarters of a century’s research has severely shaken confidence in clinical judgment, in absolute terms and in comparison with actuarial methods.”). For a brief discussion of the features of human judgment that tend to undermine the accuracy of unstructured risk estimates, see *id.* at 172-73. See also *id.* at 178-80 (summarizing research on predictive performance of actuarial methods versus unstructured clinical judgment). This is not to say that the use of RA instruments is free of controversy. For a succinct summary of and response to the major objections, see Nicholas Scurich, John Monahan & Richard S. John, *Innumeracy and Unpacking: Bridging the Nomothetic/Idiographic Divide in Violence Risk Assessment*, 36 LAW & HUM. BEHAV. 548, 548-49 (2012). For a more detailed rebuttal of objections, see HARRIS ET AL., *supra* note 106, at 197-219 (offering “twenty arguments against actuarial violence risk appraisal”). One particular objection—racial impact—is taken up below in Section IV.B.2.

²³⁹ Scholars are divided on the question of whether purely actuarial approaches are more accurate than “structured” decision-making processes in which the decision-maker has research-based guidance but also has the freedom to deviate from what that guidance indicates. See HARRIS ET AL., *supra* note 106, at 184 (“We acknowledge a scholarly division of opinion on this point . . .”).

²⁴⁰ Christopher Slobogin, *Principles of Risk Assessment: Sentencing and Policing*, 15 OHIO ST. J. CRIM. L. 583, 586 (2018).

²⁴¹ There is, to be sure, a robust debate among researchers as to whether dynamic factors add anything to static factors as a ground for predicting recidivism. See Turner & Petersilia, *supra* note 107, at 184.

The special-measures hearing might also consider the quality of the RA instrument that was utilized,²⁴² whether the instrument has been validated with an appropriate offender population,²⁴³ whether the validation study or studies focused on appropriate outcomes,²⁴⁴ and whether the underlying facts on which the RA score was based were accurately found.²⁴⁵ Even beyond whatever accuracy-enhancing benefits may come from permitting the litigation of such points, there are also procedural-justice and legitimacy advantages to giving the defendant a meaningful opportunity to air objections to his or her RA results in court.²⁴⁶

²⁴² See Desmarais, Johnson & Singh, *supra* note 238, at 216 (“[F]indings of our review suggest that some instruments may perform better in predicting particular outcomes compared with others.”). Note, too, that the available research may not permit a thorough evaluation of the instrument’s quality. See, e.g., *id.* (“Perhaps one our [sic] most striking findings, only two of the 53 studies [of RA instruments] reported on the interrater reliability of the risk assessments.”). Arguably, if a thorough evaluation of the instrument is not possible, the RA results should be discounted or even disregarded by the finder of fact. Similarly, fact-finders should be wary of RA instruments that employ confidential algorithms—a particular point of controversy as to the COMPAS instrument used in some jurisdictions. See *State v. Loomis*, 2016 WI 68, ¶ 51, 371 Wis. 2d 235, 258, 881 N.W.2d 749, 761 (“Northpointe, Inc., the developer of COMPAS, considers COMPAS a proprietary instrument and a trade secret. Accordingly, it does not disclose how the risk scores are determined or how the factors are weighed.”).

²⁴³ See Slobogin, *supra* note 240, at 589 (“[T]he RAI [RA instrument] should be normed on a population that matches the target of the intervention. The VRAG was originally normed in Canada, which made its use problematic in the U.S. until it was validated on more diverse U.S. populations.”).

²⁴⁴ See Andrews, *supra* note 230, at 142 (“Evaluate whether the outcome measures employed in the validation study are of direct interest to the intended sites of application. For example, are general recidivism, violent recidivism, sexual recidivism, and/or in-program misconduct reports of most interest?”). For present purposes, RA instruments should be validated as to *violent* recidivism—and better still, given the stakes, to major acts of violence. See Slobogin, *supra* note 240, at 587 (“[T]he outcome measure in the original validation research for the VRAG included a simple assault. A risk of that type of violence is an insufficient basis by itself to justify incarceration or sentence enhancement.”).

²⁴⁵ While some common RA factors are normally straightforward in application, such as the offender’s criminal history, others may more commonly present grounds for dispute. For instance, the VRAG includes factors like “elementary school maladjustment” and “history of alcohol problems.” See HARRIS ET AL., *supra* note 106, at 285 (reprinting VRAG instrument).

²⁴⁶ As discussed above in Section III.C.3, the perceived legitimacy of the process may ultimately affect its success in reducing recidivism. In light of these considerations, it is probably desirable to allow defendants to litigate dynamic factors even though the science is not clear as to the predictive benefits of taking dynamic factors into account. See *supra* note 241. Professor Christopher Slobogin has made a similar point. See Slobogin, *supra* note 240, at 593 (“To minimize further any affront to dignity associated with RAIs [RA instruments], risk assessment should be based as much as possible on dynamic or ‘causal risk factors,’ such as drug abuse or impulsivity These are risk factors that can be changed through intervention and thus focus on traits that the person can do something about.”). Of course, if the science shifts conclusively against dynamic factors—or in favor of a purely actuarial

In the end, it may be best to conceptualize the results of an appropriately validated RA instrument as presumptively accurate but subject to rebuttal at the special-measures hearing. Moreover, in light of the much greater tendency of RA instruments to generate false positives than false negatives, it seems sensible to have asymmetric burdens for the defendant and the state. It should be very difficult—perhaps even categorically prohibited—for the state to prove that the defendant’s actual risk is greater than the instrument indicates, but it should be comparatively easy for the defendant to prove that his or her risk is lower.

To be clear, if individualized RA is the touchstone, then no particular offense in and of itself is sufficient either to rule in or rule out special measures for any given offender. However, it may be appropriate to consider one categorical bar for special measures: juvenile-only offenders. As noted earlier, juvenile offenses tend to be poor indicators of adult risk.²⁴⁷ Moreover, the same capacity limitations and other considerations that diminish the long-term predictive value of youth crime also diminish culpability²⁴⁸ and thus raise greater proportionality objections to the imposition of special measures. While such matters could be weighed on a case-by-case basis, a bright-line rule may provide greater accuracy and efficiency. As the Supreme Court has observed in an analogous situation, “The case-by-case approach . . . must . . . be confined by some boundaries.”²⁴⁹ In ruling on Eighth Amendment grounds that LWOP sentences cannot be imposed for juvenile nonhomicide offenses, the Court found that an “unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course” and noted the “special difficulties encountered by counsel in juvenile representation”²⁵⁰—considerations that might also taint a special-measures hearing.²⁵¹

approach, *see supra* note 239—then difficult trade-offs between accuracy and procedural justice might have to be contemplated.

²⁴⁷ *See supra* Section III.A (describing how crimes committed as juvenile are poor predictors for adult crime risk).

²⁴⁸ *See* *Graham v. Florida*, 560 U.S. 48, 68 (2010) (“[B]ecause juveniles have lessened culpability they are less deserving of the most severe punishments. As compared to adults, juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility’; they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’; and their characters are ‘not as well formed.’ . . . Accordingly, ‘juvenile offenders cannot with reliability be classified among the worst offenders.’ A juvenile is not absolved of responsibility for his actions, but his transgression ‘is not as morally reprehensible as that of an adult.’” (citations omitted) (first quoting *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005); then quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988))).

²⁴⁹ *Id.* at 77.

²⁵⁰ *Id.* at 78 (quoting *Roper*, 543 U.S. at 573).

²⁵¹ The optimal age cutoff is not certain. While most states have adopted eighteen as the demarcation point between juvenile and adult offenders, two decades of research have now made clear that brain development and maturation tend to continue well into a person’s twenties. LAEL CHESTER & VINCENT SCHIRALDI, PUBLIC SAFETY AND EMERGING ADULTS IN CONNECTICUT: PROVIDING EFFECTIVE AND DEVELOPMENTALLY APPROPRIATE RESPONSES FOR

3. If the Residual-Risk Standard Is Satisfied, Special Measures Should Be Individualized and No More Restrictive than Necessary; There Should Be a Presumption Against Full-Time Institutional Confinement as a Special Measure

As discussed above, one of the major criticisms of SVP civil commitment has been its overreliance on full-time institutional confinement as a one-size-fits-all response to the threat of sexual recidivism.²⁵² Other methods of structuring supervision, such as intermittent confinement in a halfway house or home detention with GPS monitoring, offer better rehabilitative prospects and—as lesser deprivations of liberty—may reduce the inherent tension between special measures and the proportionality ideal.²⁵³

Special measures should be individualized by the court in much the same way that probation conditions are (or in theory should be).²⁵⁴ In the spirit of the RNR treatment model, the court should take into account each individual's particular risk, needs, and responsiveness to interventions. Of potential assistance in this regard, a new generation of RA instruments is moving beyond the mere generation of risk scores and into case management, providing individualized, evidence-based guidance on service planning and delivery.²⁵⁵

For offenders who are not committed to full-time institutional detention, the court's goal should be to maximize the individual's liberty insofar as that is consistent with public safety. If nighttime home detention is adequate to address

YOUTH UNDER AGE 21, at 9-10 (2016), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/public_safety_and_emerging_adults_in_connecticut.pdf [<https://perma.cc/PT2G-N82C>] (“Neurological research over the last two decades has found that brain development continues into early adulthood (mid-20s or beyond) and that adolescents are particularly prone to risky behavior, a proclivity that naturally declines with maturity.”)

²⁵² See *supra* Section I.B.3 (discussing criticism of “warehousing” approach).

²⁵³ Indeed, in the not-so-distant future, emerging technologies may create a world in which almost all individuals can be safely supervised in the community. See Mirko Bagaric, Dan Hunter & Gabrielle Wolf, *Technological Incarceration and the End of the Prison Crisis*, 108 J. CRIM. L. & CRIMINOLOGY 73, 78-79 (2018) (proposing system of “technological incarceration” in the community that combines GPS tracking; remote, real-time monitoring through video and other sensors; and remote-controlled, Taser-type electronic immobilization devices).

²⁵⁴ See Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1034-35 (2013) (“Some conditions that attach to community supervision impose restrictions that are tied to the offender’s known risks, such as prohibitions on weapons for violent offenders, drug use for those with substance abuse related convictions, and socializing with codefendants or convicted felons for those whose criminal activity has been influenced by their gang affiliations.”); *id.* at 1061 (arguing that “courts and community corrections officials should ensure that all discretionary conditions imposed on offenders relate directly to their risk of criminal reoffense”).

²⁵⁵ Andrews, *supra* note 230, at 142 (discussing next generation of risk assessment integrating with case management “by structuring assessment, service planning, and service delivery from intake through case closure”).

the individual's risk, then he or she should be given the right to come and go during the day. If an individual's history of violence is tied to alcohol abuse, then a prohibition on drinking would likely be appropriate but should not be applied automatically.²⁵⁶ Likewise, restrictions on social and intimate relationships, field of work, and place of residence should be individually determined. Indeed, each restriction imposed by the court ought to be specifically justified on the record. The court should also be required to consider the possibility that restrictions will prove counterproductive to public safety by impeding the individual's ability to develop positive social relationships, obtain stable employment, and generally reintegrate successfully into society.²⁵⁷

As with pretrial detention—which is intended to serve a similar crime-prevention purpose—full-time institutional detention should not be ordered as a special measure unless the court finds “that no condition or combination of conditions will reasonably assure . . . the safety of any other person and the community.”²⁵⁸ Moreover, if detention is used as a special measure, policymakers should take care to differentiate the conditions from those of conventional incarceration. As Professors Paul Robinson and John Darley have observed:

The conditions of confinement upon commitment under the criminal justice system are conditions of punishment. Yet, the justification for confinement under an incapacitation strategy is not punishment but prevention, akin to the system of preventive detention that we use for those with infectious diseases or mental illness that is likely to lead to violent behavior. Systems of preventative detention are morally ambiguous, but certainly we are most comfortable with them when they involve detention conditions that are not punitive in nature²⁵⁹

For SVP civil commitment, many individuals are held in conventional prisons, but there is a welcome trend toward the use of separate facilities²⁶⁰ and

²⁵⁶ Professor Cecelia Klingele makes a similar point as to conventional community supervision. Klingele, *supra* note 254, at 1061 (discussing how boilerplate conditions “may be relevant to public safety concerns in some cases, [but] in many others they have no nexus to the individual’s criminal propensities and may serve as an impediment to the successful completion of supervision”).

²⁵⁷ Of course, restrictions must be enforceable, including through the sanction of incarceration. In the analogous area of probation and parole conditions, though, there has been growing concern in recent years over the excessive use of revocation and incarceration as a sanction for minor violations. *Id.* at 1047. In response, some states have been experimenting with new mechanisms intended to restrain this sort of sanctioning. *Id.* at 1047-52. To the extent that such reforms prove successful, it may be desirable to replicate them in the enforcement of special measures.

²⁵⁸ 18 U.S.C. § 3142(e)(1) (2018) (outlining when detention is appropriate).

²⁵⁹ Robinson & Darley, *supra* note 203, at 467.

²⁶⁰ See Noferi, *supra* note 214, at 562 (describing trend toward separate facilities in several states).

conditions that may be somewhat less harsh than the norm for American incarceration.²⁶¹ Special-measures detention ought to follow this trend.

4. The Duration of Special Measures Should Be Strictly Limited

Another recurring criticism of SVP civil commitment has been that very few individuals ever “graduate” from full-time institutionalization into a lesser (or no) form of commitment, even though risk normally diminishes with age.²⁶² This harsh reality can create a sense of hopelessness among inmates²⁶³ and diminish their motivation to participate in treatment,²⁶⁴ among other problems.

SVP statutes do provide for regular review of civilly committed individuals²⁶⁵ and a process by which they can petition for release from institutionalization or discharge from commitment entirely.²⁶⁶ Similar mechanisms should also be part of the VR special-measures regime. However, based on the SVP experience, these safeguards may not be sufficient to ensure that measures are reliably eased when they are no longer necessary.

A bright-line time limit may be a helpful supplement to overcome inertia and excessive risk aversion in the management of a stigmatized offender group. Such a time limit might also better incentivize the state to provide adequate programming resources and reasonable plans for progression through treatment and incremental restorations of liberty. By contrast, the existing, unlimited SVP systems may create perverse incentives for the state insofar as a committed person’s record of progress in treatment may be used against the state when the person petitions for release. Although any specific maximum duration would to some extent be arbitrary, a sensible figure might be fifteen years—a number that roughly corresponds to the time period in which a prior record generally ceases to be a useful predictor of future crime.²⁶⁷ Of course, the fifteen-year clock might be reset if the person is convicted of a new violent crime in the interim.

²⁶¹ See *id.* at 563 (“[S]ome SVP commitment facilities have already incorporated less restrictive conditions of confinement, albeit with a secure perimeter. . . . [I]n newer facilities, residents typically do not wear uniforms and possess freedom of movement inside the fence. Facility staff are not ‘guards.’” (footnote omitted)).

²⁶² See *supra* Section I.B.2 (discussing impact of age on risk).

²⁶³ *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1151 (D. Minn. 2015), *rev’d on other grounds sub nom.* *Karsjens v. Piper*, 845 F.3d 394 (8th Cir. 2017) (discussing environment of hopelessness in Minnesota Sex Offender Program).

²⁶⁴ *Id.* at 1156-57 (“The lack of clear guidelines for treatment completion or projected time lines for phase progression impedes a committed individual’s motivation to participate in treatment for purposes of reintegration into the community.”).

²⁶⁵ See, e.g., Massopust & Borrelli, *supra* note 89, at 730-32 (describing required periodic review in New York and Wisconsin). But see *id.* at 730 (noting absence of required review in Minnesota).

²⁶⁶ See, e.g., *id.* at 732-43 (describing rules and standards for petitions in Minnesota, New York, and Wisconsin).

²⁶⁷ PHILIP J. COOK & KRISTIN A. GOSS, *THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW* 148 (2014) (describing “point of redemption” as time when “ex-con is no more likely to be arrested than the average member of the community” and research that finds this time

5. Treatment Should Be Made Available to All Who Might Benefit from It

VR special measures should be forward-looking and preventative, not backward-looking and punitive. Consequently, there is at least arguably an ethical and/or constitutional imperative for the state to alleviate—to the extent possible—the underlying conditions that necessitate special measures.²⁶⁸ Fortunately, research increasingly provides support for the potential of treatment to reduce risk. Although most available research on the RNR model evaluates its impact on recidivism in general, some studies suggest that adherence to the model is also beneficial specifically as to violent recidivism.²⁶⁹ It is unsurprising that what works in reducing recidivism generally is also helpful for VR; after all, “specialization in particular types of crime is very unusual and the predictors of violent and nonviolent crime are very similar.”²⁷⁰

While treatment can reduce risk, there are sometimes concerns regarding both the offender’s willingness to engage seriously with the therapeutic program and the state’s willingness to devote resources to make effective programming available. An offender may be more motivated if—as suggested in the previous subsection—there are genuine opportunities to obtain relief from special measures, particularly if the court is required to consider the offender’s participation in treatment when deciding whether relief is warranted. A state’s motivation may be increased if there is a definite time limit on special measures. Even more effective might be a legal presumption in favor of relief from special measures if the state fails to provide treatment to a person who requests it and would likely benefit from it.

B. Responses to Objections

1. Repeal of Existing Special Measures Would Undermine Deterrence of Violent Crime

In theory, VR special measures might plausibly reduce violent crime through two distinct mechanisms: (1) by reducing opportunity to offend and (2) through deterrence. Analysis thus far has focused on the prevention of VR by reducing opportunities for repeat offending, as by extending incarceration, imposing

to be “11-15 years for violent offenders”). In light of this research, it has also been proposed that gun restrictions based on a criminal record be lifted after fifteen years. *Id.* (“Thus there is a scientific basis for considering convicted felons who have lived in the community for 15 years without an arrest to be good bets for restoration of gun rights.”).

²⁶⁸ See Robinson & Darley, *supra* note 203, at 467 (observing that “[s]ystems of preventative detention are morally ambiguous” and arguing that “we are most comfortable with them when they . . . involve ‘treatment’ efforts that attempt to remove the elements in the individual that cause the presumed dangerousness”); Jeslyn A. Miller, Comment, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CALIF. L. REV. 2093, 2103-08 (2010) (arguing that there is a constitutional right to treatment).

²⁶⁹ Andrews, *supra* note 230, at 136 (“Although there are few primary studies on violent offending and sexual offending per se, the pattern of findings is supportive of RNR adherence.”).

²⁷⁰ *Id.* at 127.

greater restrictions on what the offender can do in the community, and ensuring public access to information about the offender so that members of the public can take precautions of their own. The basic argument of this Article is that the opportunity-reduction strategy would be more effectively and fairly pursued through individualized RA than through the current offense-based approach. Even granting that point, however, skeptics might object that the repeal of existing measures, with their broader reach and possibly more certain application, could undermine the second plausible crime-reduction mechanism—deterrence.

Deterrence operates not by removing opportunities to offend but by increasing the expected cost of offending. VR special measures may provide general or specific deterrence. Specific deterrence discourages repeat offending by those who have already been convicted of a violent crime. General deterrence involves a more broadly targeted penal threat that might discourage even first-timers. For instance, the fear of being placed on a public registry of violent offenders could potentially cause a person without any criminal history to think twice before drawing a knife or throwing a punch.

There are, however, several practical constraints on punishment's ability to deter. For one thing, a consequence cannot deter if the prospective offender is not aware of it. Yet public knowledge of the law tends to be quite limited.²⁷¹ A particular concern in this context may be the inconsistent, uncertain, and often counterintuitive statutory definitions of "violent crime"²⁷²—even a person who wants to determine his or her exposure to VR special measures might have difficulty doing so.

Furthermore, a consequence cannot deter if the prospective offender expects to get away with his or her intended crime. Indeed, the odds of apprehension for many offenses are rather low. Consider, for instance, the officially reported "clearance rates" by police departments. In 2016, police made arrests as to only 36.5% of reported rapes, 29.6% of reported robberies, and 13.1% of reported burglaries.²⁷³ But even those figures greatly exaggerate the actual risks of apprehension because many crimes are not reported to the police. Survey research indicates that only about 44% of violent crimes are reported.²⁷⁴ Some more specific offense types are reported even less frequently, with rape reported

²⁷¹ See, e.g., John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, *The Ex Ante Function of Criminal Law*, 35 LAW & SOC'Y REV. 165, 175 (2001) (reporting results of empirical study indicating that most Wisconsinites are unaware of state's law on duty to assist and that majorities in other states are also wrong about their states' laws regarding duty to retreat and duty to report whereabouts of known felon).

²⁷² See *supra* Section III.C.1 (describing how different statutes describe violent crime in confusing ways).

²⁷³ CRIMINAL JUSTICE INFO. SERVS. DIV., FBI, CRIME IN THE UNITED STATES, 2016, at tbl.17 (2017), <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-17> [<https://perma.cc/6UNS-FRKC>].

²⁷⁴ RACHEL E. MORGAN & GRACE KENA, U.S. DOJ, CRIMINAL VICTIMIZATION, 2016: REVISED, at 7 tbl.4 (2018), <https://www.bjs.gov/content/pub/pdf/cv16.pdf> [<https://perma.cc/BE3D-B4LT>] (showing 43.9% violent crime victimization reported to police).

only 23.2% of the time and simple assault only 39.3% of the time.²⁷⁵ Additionally, even if a crime is reported and an arrest is made, that does not necessarily mean a charge and conviction will follow. Comprehensive national statistics are not available, but data collected from large urban counties indicate that only about two-thirds of the defendants who are charged with a felony are actually convicted of either a felony or a misdemeanor.²⁷⁶ For violent offenses, slightly fewer than one-half of felony defendants are ultimately convicted of a felony.²⁷⁷ Taking all of these data points into account, a rational, well-informed, prospective offender might deeply discount any potential legal consequences.

But does rationality even fairly describe the mental state in which most crimes are committed? The whole deterrence model assumes that prospective offenders engage in some degree of rational cost-benefit analysis. However, many people who commit crimes are in a state of impaired rationality—intensely angry or scared, suffering from a serious mental illness, intoxicated, or dealing with the pangs of withdrawal. About one-third of state prison inmates reported being under the influence of controlled substances at the time of their offense, while about one-sixth indicated that they committed their offense in order to obtain funds for drugs.²⁷⁸ Recall, too, that research shows that individuals in their teens and early twenties tend to act more impulsively and to give greater weight than older individuals to immediate gratification as opposed to the potential negative future consequences of their actions.²⁷⁹ These phenomena cast doubt on the capacity of legal regimes to achieve widespread deterrence of violent crime. Not surprisingly, then, empirical studies on the deterrent effects of incarceration tend to find small or no societal benefits from marginal increases to sentence severity.²⁸⁰

²⁷⁵ *Id.*

²⁷⁶ BRIAN A. REAVES, U.S. DOJ, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 24 tbl.21 (2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf> [<https://perma.cc/3QHG-EAW7>] (noting that 66% of felony defendants in the seventy-five largest counties were convicted of either a felony or misdemeanor).

²⁷⁷ *Id.* (noting that 49% of violent felony defendants in seventy-five largest counties were convicted of felony).

²⁷⁸ COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, *supra* note 178, at 134 (“Also playing a role are personality traits and the pervasive influence of drugs and alcohol: in one study, 32 percent of state prison inmates reported being high on drugs at the time of their crime, and 17 percent committed their crime to get money to buy drugs.”).

²⁷⁹ *See supra* note 169 (discussing how people in their teens and early twenties act impulsively).

²⁸⁰ For instance, one study of California’s three-strikes law concluded that law’s draconian penalties were associated with a 20% decline in the arrest rate of individuals who already had two strikes (a specific-deterrence effect). COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, *supra* note 178, at 137. However, given the high cost of all of the additional incarceration resulting from the sentence enhancement, it is doubtful whether the law as a whole is cost-benefit justified. *Id.* at 138. From one jurisdiction that increased sentences for certain gun crimes to another jurisdiction that provided tougher punishments for young offenders in adult courts as opposed to juvenile courts, studies have found no

After reviewing the existing research, one group of scholars suggested that large deterrence benefits most likely occur when there is an increase to previously short sentences.²⁸¹ By contrast, “the deterrent return to increasing already long sentences is modest at best.”²⁸² Thus, when considering the potential deterrence benefits of special measures, it may be important to bear in mind the severity of the punishments for violent offenses even in the absence of special measures. Indeed, during the “tough-on-crime” era of the late twentieth century, the legal consequence of *all* crime tended to increase sharply through a wide variety of policy changes that were not categorically focused on violent offenses, including, for instance, enhanced maximum sentences, enhanced minimum sentences, more aggressive prosecutorial approaches to charging and plea bargaining, and restricted eligibility for parole and other opportunities for early release from prison.²⁸³ Thus, individuals who commit serious violent crimes today may already face decades of prison time based just on the standard sentencing range associated with their offenses.²⁸⁴ In this context, it is doubtful that adding a few extra years of sentencing exposure or new post-incarceration consequences through VR special measures can achieve much further deterrence benefit.

statistically significant deterrent effects for marginal increases in sentence severity. *Id.* at 137-38.

²⁸¹ *Id.* at 139 (finding that incremental increases in short sentences have material deterrent effects).

²⁸² *Id.*

²⁸³ See, e.g., O’HEAR, *supra* note 15, at 3-13 (providing overview of tough-on-crime policy changes made in United States in late twentieth century).

²⁸⁴ By way of illustration, consider a routine sort of robbery perpetrated in my home state of Wisconsin with the aid of a firearm by a meth addict who has a prior felony conviction. In 1993, the defendant would have faced maximum sentences of twenty years for armed robbery, WIS. STAT. ANN. §§ 939.50, 943.32(2) (1992) (classifying armed robbery as Class B felony and establishing twenty-year maximum for Class B felonies); two years for unlawful possession of a firearm, *id.* §§ 939.50, 941.29(2) (classifying unlawful possession of firearm as Class E felony and establishing two-year maximum for Class E felonies); and one year for meth possession, *id.* § 161.41(2r)(a)—or twenty-three years in all.

Today, by contrast, after multiple rounds of legislative sentence increases, the defendant would face forty years for armed robbery, *id.* §§ 939.50, 943.32(2) (2013-2014) (classifying armed robbery as Class C felony and establishing forty-year maximum for Class C felonies); ten years for unlawful possession of a firearm, *id.* §§ 939.50, 941.29(2) (classifying unlawful possession of firearm as Class G felony and establishing ten-year maximum for Class G felonies); and 3.5 years for meth possession, *id.* §§ 939.50, 961.41(3g)(g) (classifying possession of methamphetamine as Class I felony and establishing 3.5 years as maximum for Class I felonies)—or 53.5 years in all, an increase of 132%.

²⁸⁴ For instance, if the threat of 53.5 years behind bars is not enough to deter our hypothetical robber, it is hard to imagine that any plausible VR special measure would alter his or her calculus.

2. Because Leading RA Instruments Generate Racially Disparate Outcomes, the Proposed Reform Might Exacerbate Racial Disparities in the Criminal-Justice System

Although increasingly embraced by the legal community, RA instruments are not without controversy. The most prominent criticisms are that the seemingly race-neutral risk factors used by leading instruments actually smuggle racial disparities into the RA process, leading to disproportionately negative outcomes for African Americans. For instance, when investigative journalists with ProPublica examined the risk scores from one instrument and the rearrest records of 7000 individuals in Broward County, Florida, they found that black defendants were almost twice as likely as white defendants to end up as a false positive—that is, to receive a high risk score but not reoffend.²⁸⁵ Conversely, white defendants were more likely to fall into the false *negative* category.²⁸⁶

Professor Bernard Harcourt, a leading academic critic of RA, highlights the importance of criminal history in the calculation of risk scores.²⁸⁷ Although leading RA instruments use criminal history in more nuanced ways than existing VR special measures, criminal history nonetheless plays an important role in RA. Harcourt charges,

Unfortunately, reliance on criminal history has proven devastating to African American communities and can only continue to have disproportionate impacts in the future. The reason is that the continuously increasing racial disproportionality in the prison population necessarily entails that the prediction instruments, focused as they are on prior criminality, are going to hit hardest the African American communities.²⁸⁸

Despite such claims, there is no scholarly consensus that RA instruments do, in fact, unfairly disadvantage African Americans.²⁸⁹ For instance, in one study of an instrument used in the federal system, researchers found that, among those offenders who were classified as high risk, blacks and whites had similar rates of rearrest for any crime (62% black, 66% white) and for violence more specifically (23% black, 19% white).²⁹⁰ The researchers concluded: “[R]isk

²⁸⁵ Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/E6HY-NWQ2>] (“The formula was particularly likely to falsely flag black defendants as future criminals, wrongly labeling them this way at almost twice the rate as white defendants.”).

²⁸⁶ *Id.*

²⁸⁷ Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT’G REP. 237, 238 (2015) (“Risk, today, is predominantly tied to prior criminal history, and prior criminality has become a proxy for race.”).

²⁸⁸ *Id.* at 240.

²⁸⁹ See Jennifer L. Skeem & Christopher T. Lowenkamp, *Risk, Race, and Recidivism: Predictive Bias and Disparate Impact*, 54 CRIMINOLOGY 680, 681 (2016) (“Validated risk assessment instruments differ in their purpose and in the risk factors they include—and little is known about their association with race.” (citation omitted)).

²⁹⁰ *Id.* at 691.

assessment is not ‘race assessment.’ . . . The instrument strongly predicts rearrest for both Black and White offenders. Regardless of group membership, a [score on the federal instrument] has essentially the same meaning, that is, the same probability of recidivism.”²⁹¹

More fundamentally, in response to the racial disparity objection, it is important to appreciate that the present proposal is *not* meant to substitute an RA-based system for an existing system that does not account for criminal history. To the contrary, the existing special-measures regime relies more or less exclusively on convictions—and is hence prey to the racial bias that can infect criminal-history analysis. If anything, a new regime that analyzes criminal history as just one factor—albeit a very important one—in determining whether special measures should be imposed seems *less* likely to propagate the unwarranted racial disparities of the past into future racial disparities.

That said, the long-term legitimacy of a new RA-based system may ultimately depend on avoiding both the perception and the reality of racial bias. To that end, those who design and administer such a system should heed some expert advice offered to parole boards that utilize RA instruments:

Each parole board should scrutinize its risk assessment tools through the lens of race, identifying how each factor differentially affects racial minorities. Researchers can then determine whether removal of the race-tainted variables reduces predictive accuracy, and by how much. This might include selecting items with the smallest racial gaps or replacing potentially biased criteria with more race-neutral ones. . . . With such data in hand, parole boards can then consider whether the improved accuracy is worth the sacrificed fairness (the “equity versus accuracy” debate).²⁹²

3. Other Fairness Problems Would Remain with the New System

Racial disparities are but one component of a broader set of fairness issues that ought to be considered when discussing VR special measures. As noted in Part III, the current system suffers from substantial fair-notice problems, turning on vague statutory definitions and obscure lists of triggering offenses.²⁹³ By the time a person learns that he or she is subject to a special measure, it may be too late to avoid the unwelcome legal consequences. By contrast, under the current proposal, no special measure would be imposed without a prior hearing at which the person could explain to a neutral decision-maker why the special measure is unnecessary. In that sense, fair-notice concerns under the proposed system should be far less than under the current system.

As to proportionality, it must be conceded that any system that imposes legal disadvantages on a person on the basis of preventing future crime, as opposed to establishing accountability for past offenses, is likely to produce some outcomes that seem excessively harsh relative to the crime committed. At the same time,

²⁹¹ *Id.* at 700.

²⁹² Rhine, Petersilia & Reitz, *supra* note 233, at 305 (footnote omitted).

²⁹³ See *supra* Section III.C.1 (surveying fair-notice issues).

it is plausible that the proposed system may result in fewer instances of disproportionality. After all, because special measures would no longer follow automatically from convictions but would instead require separate, affirmative acts by the state and a trial-like hearing, there are sure to be many fewer individuals subjected to these disadvantages—much like the many fewer individuals subject to SVP civil commitment as compared to SORN laws.²⁹⁴ Proportionality concerns may be further alleviated by observing the guidelines highlighted in Section IV.A, especially those guidelines relating to minimizing the intensity and duration of special measures and to providing rehabilitative treatment to those who wish it.

However, the clearest fairness advantage of the proposed system may lie in the decoupling of special measures from plea bargaining. While the current system practically invites prosecutors to use special measures as a source of leverage—giving them more power to extract guilty pleas as to unwarranted or excessively harsh charges—a system requiring an entirely separate proceeding many months or years later would likely have little impact on plea-bargaining dynamics. The insulation of plea bargaining—a process that is normally left in the hands of local prosecutors—could be further assured by requiring the concurrence of appropriate state-level agencies before special-measures proceedings may commence, as, for instance, New York does with SVP civil commitment.²⁹⁵

4. Repeal of Existing Special Measures Is Not Politically Feasible

Repeal of existing special measures would undoubtedly be a tough political endeavor. Busy prosecutors and judges tend to resist reforms that involve change to existing practices—and all the more so when changes reduce prosecutorial plea-bargaining leverage—while elected officials, including governors and legislators, must always be wary of the risk that someone who catches a break under the new regime will turn out to be another Willie Horton.²⁹⁶ It is particularly politically risky to support reform that appears favorable to those who have been convicted of violent crimes—an especially feared and disliked component of the offender population.²⁹⁷

²⁹⁴ See *supra* Section I.B.1 (discussing how individuals are placed into SVP civil commitment).

²⁹⁵ See Massopust & Borrelli, *supra* note 89, at 720-21 (noting that New York requires approval of panel appointed by Commissioner of Mental Health and that final decision on filing of petition lies with Attorney General's Office).

²⁹⁶ For prominent examples of resistance to the repeal of tough-on-crime measures, one might note the long, slow, and (to date) only partially successful efforts to address the excesses of federal mandatory minimums for crack cocaine and the California three-strikes law. See O'HEAR, *supra* note 15, at 102-03, 121-24, 129-33, 173-74, 176-77, 186-88.

²⁹⁷ See, e.g., DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 34, 124-25 (2007) (discussing employer surveys finding that between 60% and 70% of employers would not knowingly hire ex-offender and that employers indicate that they are especially resistant to hiring individuals with violent or property crime conviction).

Yet in a sense, what is proposed here is simply a natural—perhaps even inevitable—next step in the national criminal-justice reform movement that has slowly gathered steam since the early 2000s. Over the past two decades, it has become increasingly clear that America’s historically unprecedented experiment with mass incarceration is economically—if not also ethically—unsustainable, prompting most states to adopt reforms intended to reverse imprisonment growth.²⁹⁸ Even some prominent political conservatives, who are traditionally tough on crime, have become outspoken proponents of such changes.²⁹⁹ Typically, reforms have targeted “nonviolent” offenders for alternatives to incarceration,³⁰⁰ with the proffered objective of ensuring adequate prison space for the more dangerous “violent” inmates.³⁰¹ Yet this reform strategy has hardly

but are more open if the conviction is for drug offense); Megan Denver, Justin T. Pickett & Shawn D. Bushway, *The Language of Stigmatization and the Mark of Violence: Experimental Evidence on the Social Construction and Use of Criminal Record Stigma*, 55 CRIMINOLOGY 664, 676-77 (2017) (reporting results of nationally representative survey of adults showing that public thinks violent offenders have higher recidivism risk than drug or property offenders and is more supportive of excluding violent offenders from employment than excluding nonviolent offenders from employment).

²⁹⁸ O’HEAR, *supra* note 15, at xiv (“[S]tate after state has adopted a dizzying array of reforms: repealing or softening minimum sentences, diverting drug-involved offenders from prison treatment, liberalizing opportunities for parole release, creating more effective probation supervision to encourage sentencing judges to keep offenders in the community, granting release to prisoners who were disabled or elderly, and on and on.”).

²⁹⁹ The organization “Right on Crime” has emerged as a leading conservative voice in favor of reform. Its supporters include former Republican governors and presidential hopefuls Jeb Bush, Mike Huckabee, and Rick Perry; former Republican Speaker of the House Newt Gingrich; former Republican U.S. Attorney General Edwin Meese, III; former Republican U.S. Education Secretary and “drug czar” William Bennett; influential anti-tax crusader Grover Norquist; and leading “family values” activists like Gary Bauer, Tony Perkins, and Ralph Reed. *Right on Crime Signatories*, RIGHT ON CRIME, <http://rightoncrime.com/right-on-crime-signatories/> [<https://perma.cc/VK2A-YSCH>] (last visited Dec. 20, 2019).

³⁰⁰ O’HEAR, *supra* note 15, at 198 (“For all of their diversity, the basic thrust of the post-2000 reforms might be boiled down to simply this: *nonviolent* offenders should be either diverted from prison entirely or moved out of prison more quickly once there.”); *see, e.g., id.* at 89-90 (noting tendency of “justice reinvestment” reforms to include carve-outs for violent and sexual offenders accompanied or followed by targeted sentence enhancement provisions). Louisiana’s 2017 reform process is a good illustration of the political dynamics reform. After nine months of study, a legislatively created task force proposed a wide-ranging reform package, including expanded diversion and early release opportunities, reductions in probation and parole lengths, and the elimination of some collateral consequences. Lorelei Laird, *Rallying for Reform*, A.B.A. J., Dec. 2017, at 46, 50 (discussing how prison reform was possible with bipartisan support). Although the package had bipartisan support, opposition from the politically powerful district attorneys’ association led to some significant modifications, including the deletion of most provisions that would have benefited violent offenders. *Id.* at 50-51. It was only with these modifications that the package was ultimately adopted. *Id.* at 51.

³⁰¹ *See, e.g.,* O’HEAR, *supra* note 15, at 187 (discussing argument made in favor of California’s Proposition 36, which softened state’s three-strikes law).

achieved dramatic changes in national imprisonment rates³⁰²—nor could it, given the prevalence of individuals who have been convicted of violent crimes in our prison population.³⁰³ Simply put, the overarching objective of incarcerating the most dangerous individuals cannot be meaningfully advanced until reforms shift from an offense-focused approach (distinguishing among offenders based on the crimes for which they are convicted) to a risk-focused approach (distinguishing among offenders based on their current, objectively determined risk level). Such a shift is precisely what is proposed here.

CONCLUSION

Through most of the twentieth century, the basic response of American lawmakers to the threat of criminal recidivism was to cast a wide liability net and leave it to the professionals working in the system—police, prosecutors, sentencing judges, parole boards, and corrections officials—to screen out the low-risk offenders and then neutralize the dangerous ones by relying on their training, experience, and instincts.³⁰⁴ By the end of the twentieth century, however, lawmakers had lost much of their confidence in the professionals, at least when it came to managing the threat of sexual and violent recidivism. There followed waves of new legislation intended to prevent sexual and violent offenders from committing new crimes. But in crafting that legislation, lawmakers faced a dilemma: How exactly should the target populations of “sexual offender” and “violent offender” be defined? Lawmakers mostly fell back on the existing system of substantive and procedural criminal law, making certain kinds of convictions the triggering event for special measures. Previously conceptualized as the entry point into a system of discretionary risk-management, convictions now became per se grounds for longer prison terms, closer and longer periods of supervision in the community, lifetime employment restrictions, and so forth.

For the most part, authorities employed the same basic approach to both sexual offenders and violent offenders. However, the uniquely expensive and

³⁰² *Id.* at xiv-xv.

³⁰³ See *supra* note 23 (surveying number of violent offenders in prisons).

³⁰⁴ Consider, for instance, the highly discretionary recidivism risk-management system contemplated by the American Law Institute’s influential *Model Penal Code* (“MPC”)—an embodiment of mid twentieth-century expert opinion on criminal law. See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 *NEW CRIM. L. REV.* 319, 320-25 (2007) (discussing genesis and influence of MPC). Under the MPC in its originally adopted form, the judge has broad authority to sentence a defendant to probation, with incarceration disfavored unless the court is “of the opinion that [the defendant’s] imprisonment is necessary for protection of the public.” *MODEL PENAL CODE* § 7.01(1) (AM. LAW INST. 1962). If ordering incarceration, the judge also has wider discretion in determining the minimum amount of time that must be served, *id.* § 6.06, and how long the defendant should be given as a special extended term, *id.* § 6.07. The latter normally requires a finding that “an extended term is necessary for the protection of the public.” *Id.* § 7.03(1)-(3). The judge’s discretion in determining the minimum time to be served behind bars is matched by the comparable discretion of the parole board in determining whether the defendant will be released after the minimum has been satisfied. *Id.* § 305.9.

constitutionally problematic measure of indefinite civil commitment for sexual offenders demanded a more discriminating process, featuring individualized risk-assessment, an adversarial hearing, a mechanism for seeking release, and at least a gesture in the direction of rehabilitative treatment. Such features necessarily lead to greater restraint in the application of special measures. Such restraint, in turn, is in greater accord with what social science tells us about both SR and VR risk: most individuals who are convicted of one major sexual or violent offense will not commit another after their release from prison; for most offenders, risk declines with age; and incarceration and other interventions can prove counterproductive when imposed on low-risk individuals.

To be sure, SVP civil commitment has had its own difficulties, in some states far more so than in others. Nonetheless, with due regard for the demonstrated pitfalls, SVP civil commitment could, in broad outline, serve as a model for VR special measures. There are good reasons to think that such an approach would be both fairer and more effective than the current system of VR special measures.

When VR special measures were originally adopted in the late twentieth century, the offense-based approach might have been justified in light of the absence of satisfactory alternatives. Today, with advances in the science of offender risk assessment and management and with actuarial RA instruments now routinely utilized for many other purposes throughout the criminal-justice system, there is no excuse for perpetuating the continued use of convictions standing alone as a crude proxy for offenders' actual risk of violent recidivism.