ASSESSING THE *REAL* RISK OF SEXUALLY VIOLENT PREDATORS: DOCTOR PADILLA'S DANGEROUS DATA

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ABSTRACT

This Article uses internal memoranda and emails to describe the efforts of the California Department of Mental Health to suppress a serious and well-designed study that showed just 6.5% of untreated sexually violent predators were arrested for a new sex crime within 4.8 years of release from a locked mental facility. The Article begins by historically situating sexually violent predator laws and then explains the constitutionally critical role that prospective sexual dangerousness plays in justifying these laws. The Article next explains how the U.S. Supreme Court and the highest state courts have allowed these laws to exist without requiring any proof of actual danger. It then describes the California study and reconciles its findings with those of a well-known Washington study by explaining the preventive effects of increasing age. Finally, the Article explains how these results undermine the justification for indeterminate lifetime commitment of sex offenders.

INTRODUCTION

This Article on sexually violent predator (SVP) laws will partake in two traditional modes of legal scholarship: constitutional doctrinal analysis and the application of empirical research to those doctrines. But it is also a narrative of legal and political events that help capture what we consider our legal system's egregious mishandling of the SVP issue, and, as we will elaborate below, the narrative will center on one great unresolved mystery: why a crucial piece of empirical research that could have corrected the system's misapprehension of the dangers of SVPs was suppressed.

In the late 1980s, citizens from the state of Washington were galvanized by horrific crimes committed by repeat sex offenders.[1] The legislature responded to the mounting pressure by passing the first SVP law in 1990.[2] The law ordered the

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1. Barry Siegel, *Column One: Locking up 'Sexual Predators': A Public Outcry in Washington State Targeted Repeat Violent Sex Criminals. A New Preventative Law Would Keep Them in Jail Indefinitely*, L.A. TIMES (May 10, 1990), http://articles.latimes.com/1990-05-10/news/mn-1433_1_sexual-predator.

2. Michael G. Petrunik, *Managing Unacceptable Risk: Sex Offenders, Community Response, and Social Policy in the United States and Canada*, 46 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 483, 492 (2002).

indefinite commitment of persons deemed to be sexually violent predators[3] after they had completed their maximum prison term. To qualify, a person must have been convicted (or found not guilty by reason of insanity) of at least one prior crime of sexual violence and must currently suffer from a mental abnormality or personality disorder that makes him likely to engage in future predatory acts of sexual violence.[4] Currently, twenty states[5] and the federal government[6] have laws calling for the involuntary civil commitment of SVPs. As of 2016, there were 5,355 persons committed as SVPs across the country with an additional 1,001 detained pending commitment.[7]

SVP laws allow the state to use civil law to lock people away in what constitutes the functional equivalent of punishment. They are forced to reside in a secure facility with armed guards.[8] In Kansas, for instance, SVPs are housed in a maximum-security facility operated by the Department of Corrections, and they share dining, shower, and recreation facilities with the general inmate population. SVPs are not free to leave and are subject to important limitations regarding diet, visitors, and activities. Most significantly, they have no idea when, or if, they will ever be released.[9]

Because SVP laws are specifically targeted at those who have served their maximum prison sentence, the classification of these laws as civil or criminal is critical. The Fifth and Fourteenth Amendments bar the state from punishing a person twice for the same crime, and so if the law were criminal, it would constitute an impermissible second punishment.[10] If the law is civil, however, the state may continue

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3. *See* WASH. REV. CODE §§ 71.09.020(18), 71.09.040 (2017).

4. ROXANNE LIEB, WASH. STATE INST. FOR PUB. POLICY, WASHINGTON'S SEXUALLY VIOLENT PREDATOR LAW: LEGISLATIVE HISTORY AND COMPARISONS WITH OTHER STATES 2 (1996).

5. Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin. For a detailed discussion of each of these statutes including date of passage and procedural protections, *see* Tamara Rice Lave, *Throwing Away the Key: Has the Adam Walsh Act Lowered the Threshold for Sexually Violent Predator Commitments Too Far?*, 14 U. PA. J. CONST. L. 391, 409–17 (2011).

6. 18 U.S.C. §§ 4247–4248(a) (2012). The Adam Walsh Act was passed by both houses of Congress and signed by the President in 2006. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587.

7. JENNIFER E. SCHNEIDER ET AL., SOCCPN ANNUAL SURVEY OF SEX OFFENDER CIVIL COMMITMENT PROGRAMS (2016), at 8 [hereinafter SOCCPN 2016 ANNUAL SURVEY].

8. *See* ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL VIOLENT PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 21–22 (2006). For a representative look at a treating hospital, see *DSH Coalinga—Security*, CAL. DEP'T ST. HOSPITALS, http://www.dsh.ca.gov/Coalinga/Security.aspx (describing the "state-of-the-art security system" that surrounds the hospital and lists security measures such as random shakedowns, metal detectors, and uniforms of inmates and noting "all patients are constantly and directly supervised").

9. Kansas v. Hendricks, 521 U.S. 346, 363 (1997). The Court stated:

> Hendricks focuses on his confinement's potentially indefinite duration as evidence of the State's punitive intent. That focus, however, is misplaced. Far from any punitive objective, the confinement's duration is instead linked to the stated purpose of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others.

Id.; *see also* JANUS, *supra* note 8, at 22.

10. *Ex parte* Lange, 85 U.S. 163, 168 (1873). The Court stated:

to hold a person indefinitely because the prohibition on double jeopardy does not apply.[11]

In *Kansas v. Hendricks*, the United States Supreme Court upheld the constitutionality of Kansas's SVP law. The majority began its analysis in *Kansas v. Hendricks* by noting that in narrow circumstances "an individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context."[12] To justify such a commitment, the state must prove that a person is dangerous and suffers from mental illness or a mental abnormality:

> A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment . . . [C]ivil commitment statutes [have been] sustained when they have coupled proof of dangerousness with the proof of some additional factor, such as a "mental illness" or "mental abnormality." . . . These added statutory requirements serve to limit involuntary civil commitment to those who suffer from a volitional impairment rendering them dangerous beyond their control.[13]

The Court accepted as true the legislature's empirical claims about SVPs: they are "extremely dangerous"[14]; their "likelihood of engaging in repeat acts of predatory sexual violence is high"[15]; "the prognosis for rehabilitating [them] in a prison setting is poor,"[16] and their treatment needs are "very long term."[17] The Court did not offer *any* proof for these assertions, and even though there was a wide body of research studying the recidivism rate of sex offenders, *none* of it was cited. Perhaps the Court omitted this analysis because dangerousness was not a contested issue in the *Hendricks* case. During his trial, Hendricks admitted that he was an uncured pedophile who could not control his desire to molest children.[18] Whatever the reason, the fact remains that in upholding Kansas's SVP law, the Court *never* asked for proof of the central justifying premise for the law—*that an identifiable group of sex offenders is highly likely to commit new predatory sex crimes if released into the community*.

If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And . . . there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

Id.

11. *Hendricks*, 521 U.S. at 369–70 (acknowledging *Baxstrom v. Herold*, 383 U.S. 107 (1966), as the case where the Court "expressly recognized that civil commitment could follow the expiration of a prison term without offending double jeopardy principles").

12. *Id.* at 356.

13. *Id.* at 358 (citations omitted).

14. *Id.* at 351.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 355.

The Court's holding in *Hendricks* has been criticized for a number of reasons.[19] One such criticism focuses on the distinction between civil and criminal law, and whether the SVP law is actually criminal which would make it an unconstitutional second punishment. Rollman argued that various factors show the law is really criminal, including "the fact that implementation of the Act is delayed until the 'anticipated release' of a prisoner, thereby lessening the effect of any treatment while simultaneously maximizing punishment."[20] Campbell criticized the majority for allowing states to "[m]erely redefine any [punitive] measure . . . as 'regulation,' and magically, the Constitution no longer prohibits its imposition."[21] Janus argued that by inappropriately blurring the line between punishment and civil commitment, SVP laws undermine the Constitution's due process protections.[22] Carlsmith, Monahan, and Evans conducted experiments to determine how the law should be classified and found that civil commitment of sexually violent predators was primarily motivated by retributive goals, thus demonstrating that it is impermissibly criminal in effect.

Others have focused attention on the nebulous quality of a "mental abnormality." Morse argued that "the term 'mental abnormality' is circularly defined . . . collaps[ing] all badness into madness,"[23] and Winick contended that the definition of mental abnormality is so broad that it can apply to any behavior.[24] In 1999, the American Psychiatric Association created a task force to evaluate SVP laws and concluded, "sexual predator commitment laws represent a serious assault on the integrity of psychiatry, particularly with regard to defining mental illness and the clinical conditions for compulsory treatment."[25]

Still another line of critique focuses on the use of actuarial instruments to prove dangerousness. Harcourt criticized the actuarial nature of SVP laws for treating offenders as objects,[26] while Wollert[27] and Lave[28] contended that we simply do not have the ability to accurately predict future dangerousness. This means that due to

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19. *See generally* ROBERT A. PRENTKY ET AL., SEXUAL PREDATORS: SOCIETY, RISK, AND THE LAW (2015).

20. Eli M. Rollman, *"Mental Illness": A Sexually Violent Predator is Punished Twice for One Crime*, 88 J. CRIM. L. & CRIMINOLOGY 985, 1013 (1998).

21. Andrew D. Campbell, Note, Kansas v. Hendricks*: Absent a Clear Meaning of Punishment, States Are Permitted to Violate Double Jeopardy Clause* 30 LOY. U. CHI. L.J. 87, 87, 124–29 (1998) (quoting United States v. Salerno, 481 U.S. 739, 760 (1987) (Marshall, J., dissenting)).

22. JANUS, *supra* note 8.

23. Stephen J. Morse, *Fear of Danger, Flight From Culpability*, 4 PSYCHOL. PUB. POL'Y & L. 250, 261 (1998).

24. *See* Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 505, 525–30 (1998).

25. AM. PSYCHIATRIC ASS'N, DANGEROUS SEX OFFENDERS: A TASK FORCE REPORT OF THE AMERICAN PSYCHIATRIC ASSOCIATION 173 (1999).

26. *See* BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE (2007).

27. *See* Richard Wollert, *Low Base Rates Limit Expert Certainty When Current Actuarials Are Used to Identify Sexually Violent Predators: An Application of Bayes's Theorem*, 12 PSYCHOL. PUB. POL'Y & L. 56, 72 (2006).

28. *See* Tamara Rice Lave, *Controlling Sexually Violent Predators: Continued Incarceration at What Cost?* 14 NEW CRIM. L. REV. 213, 217 (2011).

the low base rate of recidivism, we are locking away people who would not reoffend if released. Monahan, on the other hand, observed that actuarial instruments (unlike clinicians) have significantly improved over the past twenty years in predicting future violence.[29] However, Monahan agreed that if SVP laws were criminal, then instruments should not be permitted to consider factors that a person has no control over, like their gender.[30] This would in effect prohibit the state from "using the very risk factors that scientifically permit high-risk classifications to be made."[31]

Others have explicitly questioned the laws' empirical justification. Lave and McCrary used panel data on U.S. states for the last few decades to examine the impact of SVP laws on the incidence of sex-related homicide, forcible rape, nonfatal child sexual abuse, and gonorrhea, a common proxy for the prevalence of sexual abuse.[32] They found that SVP laws had *no* discernible impact on the incidence of sex crimes or gonorrhea, the exact opposite of what would be expected if SVP laws were locking away violent sex offenders. In a related inquiry, Ellman and Ellman[33] showed how the Supreme Court relied on misleading and unsubstantiated statements about sex offender danger in upholding what would otherwise be an unconstitutional second punishment[34] or an unconstitutional ex post facto law.[35] Although Justice Kennedy described sex offender recidivism as "frightening and high,"[36] Ellman and Ellman pointed to multiple studies that have shown the opposite to be true.[37]

We expand on these criticisms by telling the story of a serious and well-designed study, the Padilla study, which the California Department of Mental Health quashed after the study showed that untreated sex offenders with all of the risk factors of committed SVPs had just a 6.5% rate of contact sex crimes during an almost five-year exposure in the community.[38] Such a low recidivism rate undermines the state's authority to confine these persons under the rationale that they are too

29. John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm among Prisoners, Predators, and Patients* 92 VA. L. REV. 391, 405–06 (2006); *see also* John Monahan & Jennifer L. Skeem, *The Evolution of Violence Risk Assessment*, 19 CNS SPECTRUMS 419, 423 (2014) (writing that, although such instruments are useful in predicting individual risk and may continue to improve, "'the contingencies of life' will place an upper limit on what can be achieved in many risk assessment contexts").

30. Monahan, *supra* note 29, at 434.

31. *Id*. at 433.

32. Tamara Rice Lave & Justin McCrary, *Do Sexually Violent Predator Laws Violate Double Jeopardy or Substantive Due Process: An Empirical Inquiry*, 78 BROOK. L. REV. 1391, 1396 (2013).

33. Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 495–97, 499 (2015).

34. McKune v. Lile, 536 U.S. 24, 29, 35–38 (2002).

35. *See* Smith v. Doe, 538 U.S. 84, 103–04 (2003).

36. *See McKune*, 536 U.S. at 34; *see also Smith*, 538 U.S. at 103.

37. Ellman & Ellman, *supra* note 33, at 501–05 (internal citations omitted).

38. *See* Deposition of Jesus Padilla at 57–58, 67–68, People v. Tighe, No. MH100903(Cal. Sup. Nov. 23, 2009) (on file with authors) [hereinafter Padilla Deposition]. For a discussion of the recidivism rate for other types of offenders, see *infra* notes 102–07 and accompanying text.

dangerous to be released. Our Article is part investigative report, part empirical study, part traditional doctrinal argument, and a pinch of old-fashioned who-done-it. It involves an unusual array of research, including data files obtained only after an extended FOIA fight with the California Department of State Hospitals, internal memoranda and emails from Atascadero State Hospital, twenty-five-year-old Kansas legislative records copied from microfiche, and information obtained directly from SVP states.

The Article proceeds as follows. Section I provides a brief comparison of two separate generations of sex offender civil commitment systems. Section II outlines the specific elements of prospective sexual danger that provide the only constitutionally permissible justification for civil commitment, the characteristics these systems assume SVPs have. It then compares the assumptions these systems make with the empirical data available on sex offenders generally and the almost complete absence of data assessing the risk of persons with the criminal histories, record of institutional confinement, and advanced age of those committed to, and retained by, civil confinement systems. Section III describes the Padilla study and California's efforts to suppress it. Section IV turns to other data sources to corroborate Padilla's findings and addresses the Washington State Institute study that apparently finds a higher recidivism rate and is frequently cited for highlighting the risk posed by released SVPs. Section V concludes by discussing the constitutional and public policy implications of this ARTICLE.

I. A BRIEF HISTORY OF POST-PENAL CIVIL COMMITMENT

Special civil commitment laws that confine convicted sexual offenders after their release from prison were passed in two waves a half-century apart.[39] The first came in the 1930s and 1940s—so-called "sexual psychopath" laws—which were passed in twenty-six states and the District of Columbia and provided for a mix of compulsory treatment and secure confinement for protracted periods of time.[40] The era of their passage was an optimistic period for belief in what was later termed "the rehabilitative ideal," and the legislation assumed that successful treatment in an institutional setting could cure the risk generating condition and render the former sexual psychopath no longer a danger to the community. A 1948 article in the *Saturday Evening Post* revealed the tenor of the times. After describing the kidnapping and brutal murder of a six-year-old girl, David Wittels wrote:

> The Chicago City Council voted to add 1000 policemen to the force. That was laudable, but it would have done better to hire 500 policemen and 50 psychiatrists, even if it meant paying for the training of young medical students for the jobs. Fifty psychiatrists, backed by sensible laws, could do more to halt crime waves in a city like Chicago than 5000 extra policemen could.[41]

39. *See* Tamara Rice Lave, *Only Yesterday: The Rise and Fall of Twentieth Century Sexual Psychopath Laws*, 69 LA. L. REV 549, 549 (2009).

40. *Id.*

41. David G. Wittels, *What Can We Do About Sex Crimes*, SATURDAY EVENING POST, Dec. 11, 1948, at 30.

A. The Demise of Sexual Psychopath Laws

The sexual psychopath model was intended to be a collaboration of medicine, psychology, and law, but the performance of the laws and the institutions they created was a failure of both medicine and justice. The incarceration in these "civil" prisons was protracted and far from therapeutic. When Professor Norval Morris reviewed the records of the Illinois Menard Correctional Center, he discovered eighteen men who had been illegally detained for a quarter century.[42] Paul Tappan's 1950 report for the state of New Jersey was perhaps the most damning. It challenged the central justification for the laws, that sex offenders had a high recidivism rate,[43] and demonstrated that prosecutors were using the statutes in otherwise weak cases to lock away nuisance offenders for indefinite periods of time.[44] Tappan also shattered once and for all the illusion that sexual psychopath laws were concerned with helping people get better:

> The states that have passed special laws on the sex deviate do not attempt treatment! The "patients" are kept in bare custodial confinement. This point is central to the atrocious policy of those jurisdictions that commit non-criminals and minor deviates for indefinite periods to mental hospitals where no therapy is offered . . . The point should be stressed that commitment of a sex deviate to a state mental hospital *does not imply clinical treatment*. These institutions lack the space, the personnel, the treatment methods, or even the desire to handle deviated sex offenders who are non-psychotic.[45]

Soon the medical community started to distance itself from these laws. Benjamin Karpman wrote in his 1954 book, *The Sexual Offender,* "[t]he term 'sexual psychopath' and 'sexual psychopathy' have no legitimate place in psychiatric nosology or dynamic classification."[46] In 1977, the Group for the Advancement of Psychiatry concluded that the sexual psychopath laws had not met their goals and should be overturned:

> First and foremost, sex psychopath and sexual offender statutes can best be described as approaches that have failed. . . . The mere assumption that such a heterogeneous legal classification ["sex psychopath" or "sex offender"] could define treatability and make people amenable to treatment is not only fallacious; it is startling . . . [i]f the assessment of the statute in terms of achieving certain goals, for whatever reasons, leads to the conclusion that an experiment has not been successful, it should be halted.[47]

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42. Albert W. Alschuler, *In Memoriam: Norval Morris (1923-2004)*, 72 U. CHI. L. REV. 455, 465 (2005).

43. PAUL W. TAPPAN, THE HABITUAL SEX OFFENDER: REPORT AND RECOMMENDATIONS OF THE COMMISSION ON THE HABITUAL SEX OFFENDER 24 (1950).

44. *Id.* at 30.

45. *Id.* at 15–16 (emphasis original).

46. Benjamin Karpman, *The Sexual Psychopath*, 42 J. CRIM. L. & CRIMINOLOGY 184, 185 (1951).

47. AM. PSYCHIATRIC ASS'N, *supra* note 25, at 14.

By the mid-1970s, the reputation of these facilities and the laws that created them was dismal and the consensus for reforming sexual psychopath laws was repeal and repudiation.

The disrepute of sexual psychopath laws was also part of a larger decline in confidence in medical models of crime causation and medical cures for repetitive criminal activity. Professor Francis Allen, who had coined the term "the rehabilitative ideal" in the 1950s, observed and analyzed the changing mood of professionals and the public in one of his later books, *The Decline of the Rehabilitative Ideal*.[48] By the 1990s, the critical era for passage of what we shall call the second generation of sexually violent predator laws, what had been the rehabilitative ideal and medical models of criminal behavior had little standing in scientific and policy communities.

The second wave of civil commitment laws for sex offenders began in Washington State in 1990.[49] It was almost certainly motivated by the same "war on crime" ideology that characterized much of the penal legislation of the early 1990s. Like the "Three Strikes and You're Out" law in California,[50] states enacted SVP laws in response to high profile sex crimes by repeat offenders. However, SVP laws were unique among legislation of the period in that they allowed politicians to show they were tough on crime with a population of offenders so universally reviled that there was no risk of political backlash for perceived excessive or unfair incarceration. When it came to sex offenders, especially those who offended against a child, the only risk a politician faced was not being severe enough.

While the terminology of the legislation turned from psychology to legalism, from "sexual psychopath" to "sexually violent predator," the indeterminate structure, medical personnel, and treatment rationale in the new generation of laws was similar to the older SVP regimes. Since the targets of these new laws had already served prison sentences, the only permissible basis for continuing to restrain them was their future sexual danger which the laws hypothesized was linked to psychological or personality conditions. Could these dangerous people be fixed? Did the people who drafted these new laws believe medical treatment could cure sexual danger?

Almost certainly they did not. The real agenda of the prosecutors and politicians who drafted the second generation of laws was incapacitation; the "cure" for sexual dangerousness in 1990 was permanent confinement. But if that was the central objective of the new systems, why did they use medical terms and personnel?

They had to. Because the new incarceration only started after subjects had completed serving their prison terms, any further confinement that could be regarded as punishment would constitute double jeopardy and violate the Constitution.[51] If the

48. FRANCIS ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 1–2 (1981).

49. *See* WASH. REV. CODE § 71.09 (1991).

50. *See* FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 5–6 (2001).

51. "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And . . . there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence." *Ex parte* Lange, 85 U.S. 163, 168 (1873).

additional confinement were classified as civil, however, the prohibition on double jeopardy would not apply.[52] In *Foucha v Louisiana*, the Supreme Court laid out the blueprint for civil commitment.[53] Proof of future dangerousness was not enough to withstand constitutional scrutiny; the person must also be mentally ill.[54]

Thus, the medical treatment rationale of the old sexual psychopath regime provided a convenient precedent for justifying confinement as non-punitive and continuing its duration as long as the subjects' mental illness and sexual danger to the community had not been cured. But using this cover story required that those committed actually be mentally ill, which was a problem since most sex offenders are not. It also required calling the institution a hospital and staffing it with professionals who specialized in the clinical treatment of sexual offenders in an era when public confidence in clinical cures for sex offending was non-existent.

It is an understatement to say that the medical establishment was skeptical about the pretense of medical motives for this new wave of civil commitment laws. Here is the judgment issued in 1999 by a task force of the American Psychiatric Association:

> In the opinion of the task force, sexual predator commitment laws represent a serious assault on the integrity of psychiatry, particularly with regard to defining mental illness and the clinical conditions for compulsory treatment. Moreover, by bending civil commitment to serve essentially non-medical purposes, statutes threaten to undermine the legitimacy of the medical model of commitment.[55]

The battle lines for this second generation of civil commitment laws constituted a sharply different matter than the sexual psychopath laws of the earlier era. Organized medical science labeled the new enterprise essentially fraudulent as evidenced by the amicus brief filed by the American Psychiatric Association, which criticized the new sexually violent predator laws for locking up people who were not mentally ill.[56] But the United States Supreme Court held that the Kansas version of the new laws did not violate the Constitution despite the uncertain link between any clear clinical diagnosis of mental illness and the propensity to commit sex crimes. In an opinion authored by Justice Thomas, the Supreme Court wrote: "the term mental illness is devoid of talismanic significance" thereby leaving legislatures free to define the term however they want.[57]

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52. Kansas v. Hendricks, 521 U.S. 346, 369–70 (1997) ("[The Court] expressly recognized that civil commitment could follow the expiration of a prison term without offending double jeopardy principles.") (citing Baxstrom v. Herold, 383 U.S. 107 (1966)).

53. Foucha v. Louisiana, 504 U.S. 71, 82 (1992).

54. *Id*. at 82–83.

55. AM. PSYCHIATRIC ASS'N, *supra* note 25, at 174.

56. Amicus Brief for the Am. Psychiatric Ass'n, *Hendricks*, 521 U.S. 346 (Nos. 95-–649, 95–9075).

57. *Hendricks*, 521 U.S. at 359.

II. THE PAUCITY OF PROSPECTIVE DANGEROUSNESS DATA

The fact that SVP confinement comes after punishment is complete significantly limits the state's power to confine. In the era of *Ewing v. California*,[58] state penal codes can, if they choose, impose lifelong incarceration on offenders convicted of glorified misdemeanors. That means the punitive power of state criminal law has few limits on the duration of punitive confinement, and states have used this power to dramatically increase sentences for sex crimes over the past thirty years, especially when the victim is a child.[59] This increase in sentences occurred despite broad public support for lowering incarceration rates in the United States.[60] For example, existing plans to reduce the number of persons in prison—like the realignment plan in California—explicitly exclude sex offenders from any kind of early release.[61] The state's power to punish is immense, but once the punitive rationale has been removed, it is only mental illness plus the prospect of future danger that can provide a constitutionally permissible justification for compulsory treatment or confinement.[62-63]

A. How Dangerous Is Dangerous Enough?

But how substantial must the risk of future sexual danger be to justify commitment and confinement?[64] The majority opinion in *Hendricks* stated that the

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58. Ewing v. California, 538 U.S. 11, 15–16 (2003).

59. *See* TRACY VELÁZQUEZ, VERA INST. OF JUSTICE, THE PURSUIT OF SAFETY: SEX OFFENDER POLICY IN THE UNITED STATES 3–4 (2008); NAT'L CONFERENCE OF STATE LEGISLATURES, SIGNIFICANT STATE LEGISLATION 1996-2004 ON SEX OFFENDERS SENTENCING (2006); Jazmine Ulloa, *California Toughens Laws Against Rape after Brown Signs Bills Inspired by Brock Turner Case*, L.A. TIMES (Sept. 30, 2016), http://www.latimes.com/politics/essential/la-pol-sac-essential-politics-updates-california-expands-punishment-for-rape-1475260488-htmlstory.html.

60. MELLMAN GROUP & PUB. OPINION STRATEGIES, NATIONAL SURVEY KEY FINDINGS—FEDERAL SENTENCING & PRISONS 1 (2016). The report found that:

> Americans are ready and willing to change the way the federal justice system deals with drug offenders, phase out mandatory minimum sentences for a variety of offenses, allow people in federal prison to earn time off their prison terms by participating in programs proven to reduce recidivism, and make other reforms that would reduce a federal prison population they see as too large, too expensive, and too often incarcerating the wrong people.

Id.

61. J. RICHARD COUZENS & TRICIA A. BIGELOW, FELONY SENTENCING AFTER REALIGNMENT 7, 48–49 (2017).

62. *Hendricks*, 521 U.S. at 358 ("A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality'.").

63. Even though *Hendricks* clearly requires both mental illness and future dangerousness, the only factor that actually matters is future danger. *See* PRENTKY ET AL., *supra* note 19, at 41. The authors state:

> Though the constitutional underpinnings of SVP laws appear to put the "mental disorder" and "dangerousness" prongs on equal footing, in reality it is fair to say that most of the focus in the implementation of these laws falls on dangerousness. The mental disorder prong has little or no role in determining who is committed and who is not.

Id.

64. For a look at how SVP states define "likely to reoffend," see Jefferson C. Knighton et al., *How Likely Is "Likely to Reoffend" in Sex Offender Civil Commitment Trials*? 38 LAW & HUM. BEHAV. 293, 293 (2014). See also infra Appendix 1.

person's "mental abnormality" or "personality disorder" must make it "difficult if not impossible for the person to control his behavior"[65] and later described the law as being akin to those that provided for the "forcible civil detainment of people who are *unable* to control their behavior."[66] In *Kansas v. Crane*, the Court realized that the "unable to control" standard would pose too high a burden for the state, but it rejected Kansas's position that a person could be committed as an SVP "without *any* lack-of-control determination."[67] Instead, the Court held that the "mental abnormality" or "personality disorder" must make it "difficult, if not impossible, for the person to control his dangerous behavior."[68] To ensure that the confinement remained civil and not criminal, the Court stated that the SVP must be distinguishable from other sex offenders: "[T]he severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case."[69]

SVP states for the most part have translated this rather ambiguous language to require that the person's risk of reoffending is "likely" should they be released into the community.[70] Some states further interpret "likely" in probabilistic terms such as, "highly probable,"[71] "more probably than not,"[72] "substantially probable,"[73] and "more likely than not."[74] Others define "likely" to mean that the person's propensity to engage in repeat acts of sexual violence would "pose a menace to the health and safety of others."[75] The state has the burden of proving this risk of reoffending by a constitutional minimum of "clear and convincing evidence,"[76] and nine states require that this risk be proved "beyond a reasonable doubt."[77]

B. Are SVPs Actually That Dangerous?

Since future danger is *critical* to the constitutionality of SVP commitment, one might have expected the Supreme Court to require proof that the class of individuals being committed was actually dangerous. After all, the Court was not just determining

65. *Hendricks*, 521 U.S. at 358 (citing KAN. STAT. ANN. § 59-29a02(b) (1994)).
66. *Id.* at 357 (emphasis added).
67. Kansas v. Crane, 534 U.S. 407, 412 (2002).
68. *Id.* at 410 (quoting *Hendricks*, 521 U.S. at 358).
69. *Id.* at 413.
70. *See infra* Appendix 1.
71. *In re* Leon G., 59 P.3d 779, 782 (Ariz. 2002) (en banc).
72. *See* WASH. REV. CODE § 71.09.020(7) (2017).
73. *In re* Commitment of Dodge, 989 N.E.2d 1159, 1167 (Ill. App. Ct. 2013).
74. *See* IOWA CODE § 229A.2 (2017); Underwood v. State, 519 S.W. 3d 861, 871 (Mo. Ct. App. 2017).
75. FLA. STAT. § 394.912(4) (2017); KAN. STAT. ANN. § 59–29a02(b) (2012); *see also* NEB. REV. STAT. § 83-174.01(2) (2012); S.C. CODE ANN. § 44-48-30(9) (2017); VA. CODE ANN. § 37.2–900 (2017).
76. According to the U.S. Supreme Court, the burden of proof that the state must meet is "clear and convincing evidence," not the more stringent standard of "beyond a reasonable doubt." Foucha v. Louisiana, 504 U.S. 71, 75–76 (1992).
77. These nine states are: Arizona, California, Illinois, Iowa, Kansas, Massachusetts, Missouri, South Carolina, Texas, Washington and Wisconsin. *See* Lave, *supra* note 5, at 413 (internal citations omitted).

whether Mr. Hendricks was dangerous; rather, it was passing judgment on SVP programs in many American states. Despite the importance of the issue, the Justices simply took as true the statement in the preamble to Kansas's SVP law: "The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high."[78] If the Court had asked what the basis was for this conclusion, they would have been sorely disappointed. We searched the legislative minutes for the 1994 Kansas law and found *no* citations to data on prospective danger.

1. A Dearth of Data on SVP Danger in Kansas Law

In July 2016, we contacted the reference librarian for the State of Kansas to request the legislative history of Kansas's 1994 Sexually Violent Predator Act (S. B. 525, otherwise known as Stephanie's Law), which was passed in response to the high profile rape and murder of a young college student named Stephanie Schmidt by a convicted sex offender.[79] The legislative record contained information about the man who murdered Schmidt, but there was no indication of data presented about the post-release danger of sex offenders as a class. For example, one three-page fragment of an article on self-reported career histories of sex offenders was reproduced twice in the records, but it did not cover the post-release records of offenders.[80] This omission matters because SVP legislation is premised on the idea that persons will continue to reoffend even after they have been formally held accountable by the state for a sexually predatory crime. In addition, although two witnesses made factual assertions about multiple victim career offenders, they did not provide support for their testimony. On February 22, 1994, Kansas Attorney General Carla Stovall testified that "an FBI study of serial rapists showed an average of 20 rapes each in their history,"[81] but she provided no reference to the source and no indication of how this information would impact the population covered by S.B. 525. Representative Gary Haulmark—a member of the Ad Hoc Sexual Offender Task Force created in the wake of Schmidt's murder that recommended S.B. 525 to the legislature—testified that "our task force saw statistic after statistic which indicated that these people will reoffend 50% to 90% of the time if allowed the opportunity."[82] Like Stovall, Haulmark did not reference any specific study.

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78. *See* Kansas v. Hendricks, 521 U.S. 346, 351 (1997). As Appendix 2 shows, courts across the country have upheld SVP laws without requiring any proof that the class of persons being committed pose a risk of committing violent sex crimes if they were released.

79. *See* 1994 Kan. H. Judiciary Comm., Minutes on S.B. 525; 1994 Kan. S. Judiciary Comm. Minutes on S.B. 525, (Feb. 22, 1994); 1994 Kan. S. Judiciary Comm. Minutes on S.B. 525 (Feb. 23, 1994); 1994 Kan. H. Judiciary Comm. Minutes on S.B. 525 (Feb. 24, 1994); 1994 Kan. H. Judiciary Comm. Minutes on S.B. 525 (Feb. 25, 1994. The librarian was able to provide some basic legislative history, but most of what we needed was on microfilm. We hired a for-fee service recommended by the librarian to copy all the testimony and attachments to minutes for the hearings related to the bill. We received and reviewed all the documents electronically.

80. *See* 1994 Kan. H. Judiciary Comm. Minutes on S.B. 525; 1994 Kan. S. Judiciary Comm. Minutes on S.B. 525, at 14–6, 14–7, 14–8, I–6, I–7 (Feb. 23, 1995) (on file with authors).

81. Carla Stovall, Feb. 22, 1994, p. 5,416 (on file with authors).

82. Rep. Gary Haulmark, Testimony in Support of S.B. 525, 1994 Kan. H. Judiciary Attachment 3 (Mar. 21, 1994) (on file with authors).

Nor was there any data presented by the Kansas Department of Corrections on sex offender recidivism. Although a former member of the state's Parole Commission testified in favor of the bill, he did not provide any data to support his position. Indeed, no prison release follow-ups of any class of sex offender were requested by the legislative committees considering S.B. 525, much less actually submitted to the House or Senate committees.[83] The release and parole data could have shown the danger posed by Kansas's sex offenders. Instead, the legislature defined a class of offenders without ever asking correctional or parole authorities how many such offenders leave the state's prisons every year or how they perform in the community after release.

2. What Do Existing Studies Show?

It may not have occurred to the justices to require proof of sex offender danger when it seems so intuitively obvious. After all, a 2010 national opinion poll developed by the Center for Sex Offender Management found that seventy-two percent of respondents believed that at least half, if not most, of convicted sex offenders would commit additional sex crimes in the future. Of these, thirty-three percent believed that more than seventy-five percent of convicted sex offenders would reoffend.[84] Politicians across the political spectrum proclaim that sex offenders cannot control themselves,[85] and Congress changed the Federal Rules of Evidence to allow propensity evidence in sex cases under the theory that sex offenders (especially child molesters) are especially likely to reoffend.[86] The Supreme Court appears to have accepted this alleged common wisdom, asserting in *Smith v. Doe* that sex offenders have a "high rate of recidivism."[87] In 2002, Justice Kennedy penned the opinion for a four person plurality in *McKune v. Lile*, writing that the recidivism rate "of untreated offenders has been estimated to be as high as 80%."[88]

If the Supreme Court had inquired, they would have seen that contrary to popular belief, most sex offenders do not recidivate. In 1989, the United States Department of Justice (DOJ) released a study that analyzed the recidivism rate of rapists released from prison in 1983.[89] It found that just 7.7% of rapists were rearrested for rape within three years of release.[90] nine years later, in 1998, Hanson and Bussière conducted a meta-analysis of sixty-one studies from six different

83. 1994 Kan. H. Judiciary Comm. Minutes on S.B. 52; 1994 Kan. S. Judiciary Comm. Minutes on S.B. 525 (on file with authors).

84. CTR. FOR SEX OFFENDER MGMT., EXPLORING PUBLIC AWARENESS AND ATTITUDES ABOUT SEX OFFENDER MANAGEMENT: FINDINGS FROM A NATIONAL PUBLIC OPINION POLL 3 (2010).

85. *See* Tamara Rice Lave, *Inevitable Recidivism—The Origin and Centrality of an Urban Legend*, 34 INT'L J. L. & PSYCHIATRY 186, 187–88 (2011).

86. Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CIN. L. REV. 795, 808–11 (2013).

87. Smith v. Doe, 538 U.S. 84, 103 (2003).

88. McKune v. Lile, 536 U.S. 24, 33 (2002).

89. ALLEN J. BECK & BERNARD E. SHIPLEY, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1983, at 6 (1989).

90. *Id.*

countries including the United States.[91] They found that over an average follow-up period of four to five years, the sex offense recidivism rate was 13.4%.[92]

These numbers are strikingly lower than the eighty percent figure claimed by Justice Kennedy in *McKune v. Lile*.[93] Yet these lower recidivism rates are consistent with those of more recent studies. A 2016 DOJ study found that just 5.6% of sex offenders were rearrested for rape or sexual assault within five years of release from prison.[94] In 2009, Hanson and Morton-Bourgnon conducted a meta-analysis of twenty-one sex offender studies, and they found an overall sexual recidivism rate of 11.5%.[95] In 2007, using arrest data from 1990–1997 collected by the Illinois State Police,[96] Sample and Bray found that fewer than four percent of convicted child molesters were rearrested for any sex offense within one, three, or five years after their release from custody.[97] They also found that approximately seven percent of convicted rapists were rearrested for any sex offense within five years after release.[98] In 2003, the DOJ studied the recidivism of 9,691 sex offenders released from prison in fifteen states across the country.[99] Although they found that sex offenders were four times more likely to be rearrested for a sex crime than other types of offenders,[100] the vast majority of sex offenders did not sexually recidivate. Indeed, just 5.3% were rearrested for a new sex crime within three years of release from prison.[101]

To give these numbers some context, it helps to look more generally at recidivism. In the 2016 DOJ study cited above, analysts found that 67.8% of the 404,638 state prisoners released in 2005 were arrested within three years, and 76.6% were arrested within five years of release.[102] Interestingly, the 2003 DOJ study found that sex offenders were much less likely to be rearrested than non-sex offenders.[103] Analysts found that forty-three percent of sex offenders were rearrested for a new crime within three years of release from prison as opposed to sixty-eight percent of

91. R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 350 (1998).

92. *Id.* at 357.

93. *McKune*, 536 U.S. at 33.

94. MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 244205, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, 1 tbl.2 (2016).

95. R. Karl Hanson & Kelley E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 PSYCHOL. ASSESSMENT 1, 3–4, 6 (2009) (evaluating accuracy of prediction models). The recidivism rate is higher if other types of crimes are included. For prior sex-crime perpetrators, the sexual or violent recidivism rate is 19.5%. It is 33.2% if all types of crimes are considered. *Id.*

96. Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Different? An Examination of Rearrest Patterns*, 17 CRIM. JUST. POL'Y REV. 83, 88 (2006).

97. *Id.* at 95.

98. *Id.*

99. PATRICK A. LANGAN ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 198281, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 1 (2003) [hereinafter 2003 DOJ STUDY].

100. *Id.*

101. *Id.*

102. DUROSE ET AL., *supra* note 94, at 1.

103. *Id.*

released non-sex offenders who were rearrested for a new crime during that same period.[104]

Ironically, the 2003 DOJ study found that sex offenders were among the *least* likely to be rearrested for the same crime. Bureau of Justice Statisticians Langan and Levin found that 2.5% of rapists were rearrested for rape within three years of release from prison,[105] and the DOJ found that 3.3% of child molesters were arrested for another sex crime against a child during that same period.[106] In contrast, during that same three year period, Langan and Levin found that 13.4% of robbers were rearrested for robbery; twenty-two percent of assailants were rearrested for assault; 23.4% of burglars were rearrested for burglary; 33.9% of thieves were rearrested for larceny/theft; 11.5% of car thieves were rearrested for the same; and 41.2% of drug offenders were rearrested for a drug crime. The only released offenders who had a lower specialized recidivism rate than rapists and child molesters were those who had been convicted of homicide. Just 1.2% of offenders were rearrested for homicide within three years after release from prison.[107]

Other studies have found significantly higher sex offender recidivism rates, but no study comes close to the eighty percent number pronounced by Justice Kennedy. Hanson, Scott, and Steffy studied the long-term recidivism of 191 child molesters released between 1958 and 1974 from a maximum-security provincial correctional institution in Ontario, Canada.[108] Their recidivism rate, as defined by conviction for a new sex crime over a fifteen- to thirty-year period, was 35.1%.[109] As another example, Rice, Harris, and Quinsey followed fifty-four rapists (defined as anyone who had sexually assaulted or attempted to sexually assault a female age fourteen or older)[110] released from a maximum-security psychiatric hospital in Canada.[111] Their average age was thirty, which as will be discussed later, is markedly younger than that of committed SVPs.[112] The average follow-up period was forty-six months, and recidivism, defined as conviction for a new sex crime, was twenty-eight percent.[113] These results are significantly higher than the 2003 and 2016 DOJ studies, but we think there are important reasons to discount them. First, both

104. *See* 2003 DOJ STUDY, *supra* note 97, at 2.

105. PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, NCJ 193427, RECIDIVISM OF PRISONERS RELEASED IN 1994 9 (2002).

106. *Id.* at 1.

107. *Id.* at 9.

108. R. Karl Hanson et al., *A Comparison of Child Molesters and Non-Sexual Criminals: Risk Predictors and Long-Term Recidivism*, 32 J. RES. CRIME & DELINQ. 325, 327 (1995).

109. *Id.* at 332. For an in-depth discussion of the differences between these two studies, *see* Lave, *supra* note 28, at 245–47.

110. Marnie E. Rice et al., *A Follow-Up of Rapists Assessed in a Maximum-Security Psychiatric Facility*, 5 J. INTERPERSONAL VIOLENCE 435, 437 (1990). This study utilized a broader definition of rape than would be employed under U.S. criminal law.

111. *Id.*

112. *Id.* at 439. The average age at the time of release for those who reoffended and those who did not was 29.9, but the standard deviation for those who did not recidivate was 10.2 and for those who did was 29.9. *Id.* at 439.

113. *Id.* at 442.

studies looked at offenders who were released many years ago in Canada. Second, the sample sizes are significantly smaller than that studied by the DOJ, with sample sizes of 191 and 54 as opposed to 9,691 and 20,422.

Even if the 2003 and 2016 DOJ studies are a more accurate account of the risk posed by U.S. sex offenders, they may not be relevant for SVPs. The whole premise behind sexually violent predator legislation is that SVPs are different. They supposedly have a mental abnormality that makes them high risk for committing new sex offenses, which means the low recidivism rates found by the DOJ may not be useful in assessing how dangerous they are. What we really need to study is the behavior in community settings of persons who share the special characteristics of the SVP population. Enter the Padilla Study.

III. THE PADILLA STUDY

In 2000, Dr. Jesus Padilla was hired as a clinical psychologist at Atascadero State Hospital.[114] The institution held all committed California SVPs from the inception of the program in 1995 until September 2005 when they were moved to a new facility. Two years after arriving at Atascadero, Padilla became a member of the SVP Design Team,[115] the group responsible for devising the treatment program for SVPs.[116] Padilla soon began working with another team member—a social worker named Kabe Russell—on a long-range study of how SVPs who had completed treatment fared in the community as compared with SVPs who had not. The study was approved through the established chain of command at the Atascadero facility.[117] Until the study was abruptly terminated in 2007, Padilla and Russell were in constant contact with administrators from Atascadero and the Department of Mental Health (DMH), arranging for necessary data and providing updates of their progress.[118]

A. Study Design and Findings

The gold standard for testing clinical treatment is the random assignment of persons eligible for treatment into test and control groups without the subjects or those

114. Padilla Deposition, *supra* note 38, at ll. 22–23 (on file with authors).

115. *See* Direct Examination of Jesus Padilla, Tr., Mar. 11, 2011, San Diego, CA at 1219, l. 12 (on file with authors).

116. Padilla Deposition, *supra* note 38, at 30, ll. 24–25 (on file with authors).

117. The study was actually approved two times. Melvin Hunter, the Executive Director of Atascadero State Hospital, approved the study on Mar. 9, 2004. *See* E-mail from Melvin Hunter to Christine Mathiesen, Jesus Padilla, Kabe Russell, and Karen Dubiel, cc Dave Bourne, Gary Renzaglia, Jeanne Garcia and Linda Wilkes (Mar. 9, 2004, 08:25:13 AM) (on file with authors). On July 21, 2004, Padilla and Russell formally requested to expand their study to individuals who had been released from ASH earlier in the SVP commitment process. *See* Memorandum from Jesus Padilla and Kabe Russell to Silva Blount (July 21, 2004) (on file with authors) [hereinafter Memorandum to Blount]. That request was formally approved on July 20, 2004. *See* Memorandum from Silva Blount to Jesus Padilla and Kabe Russell (signed and approved by Diane Inrem, Chief, SVP Design Team (July 20, 2004), Christine Mathiesen, Dir., EOS (July 26, 2004), Dave Bourne, Clinical Admin. (July 27, 2004), and Melvin Hunter, Exec. Dir., Atascadero State Hosp. (July 28, 2004)) (on file with authors).

118. *See* internal memoranda and emails on file with authors.

who treated them knowing whether they were treatment or controls. A few things complicated this testing protocol for SVPs. To begin with, "blind" treatment was impossible for sustained clinical interventions in an SVP institution, and random assignment into non-custodial non-treatment groups would never be approved because prosecutors and judges would not tolerate the risk of community exposure with or without treatment. Furthermore, committing but not treating a control group would be unconstitutional.[119]

In addition, although it would have been better to study how treated and untreated SVPs fared in the community during the same time period, this proved impossible. Padilla knew that:

> [G]iven the political situation for SVPs in California . . . it was going to be many, many years before a sufficient number of the treated individuals were in the community completely free from supervision (and) you can't really compare them until they are off supervision because supervision is really a great deterrent.[120]

However, Padilla was still able to study released, untreated SVPs because at the time, California was the only state in the country that limited SVP commitment to two-year periods.[121] This meant that every two years the state had to go through the entire SVP commitment process again for each offender: filing a motion with the court within a certain time period, having two mental health providers determine the person had a currently diagnosed mental disorder that made him a danger if released, convincing a judge there was probable cause to hold that person, and then persuading a jury beyond a reasonable doubt that the person was an SVP.[122] The recommitment process meant that there were multiple opportunities for people to fall out of the system.

Padilla collected detailed data on each individual who was released without treatment including their age, criminal history, and where the subject went after leaving the program's control.[123] Padilla accessed criminal records by inputting a person's unique California Identification and Index (CII) number into the California Law Enforcement Telecommunications System

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119. Not providing treatment to someone who has already served his prison sentence may reveal that the law is punitive and thus unconstitutional. *See* Kansas v. Hendricks, 521 U.S. 346, 382 (1997) (Breyer, J., dissenting) ("The Allen Court, looking behind the statute's 'civil commitment' label, found the statute civil—in important part because the State had 'provided for the treatment of those it commits.'"). Not providing treatment to someone who can't be treated however would not seem to have that same problem. *See id.* at 366 ("While we have upheld state civil commitment statutes that aim both to incapacitate and to treat . . . we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others.").

120. *See* Padilla Deposition, *supra* note 38 at 32 ll. 15–23.

121. *See* Ballot Pamp., Gen. Elec. (Nov. 7, 2006), text of Prop. 83, 127 ("California is the only state, of the number of states that have enacted laws allowing involuntary civil commitments for persons identified as sexually violent predators, which does not provide for indeterminate commitments.").

122. *See* CAL. WELF. & INST. CODE §§ 6600–04 (West 2017).

123. *See* Padilla Deposition, *supra* note 38.

(CLETS).[124] Although Atascadero could get criminal records on currently committed SVPs, it could not access records on persons who had been released. Since the data was necessary to conduct the study, a point person at DMH was appointed to provide it to Padilla and Russell.[125] The fact that DMH went out of its way to provide the criminal record data to Padilla and Russell is especially ironic since they would later be accused of accessing it illegally.[126]

But Padilla did not just rely on recidivism data provided in the CLETS database; he also went to the Megan's Law website to see if the SVPs were properly registered.[127] Then, he contacted the prosecutors in the counties where the SVPs were released to see if they had been rearrested.[128] Padilla subtracted any time that the subjects spent in custody, which meant that the arrest rate was only based on periods of being at risk in community settings.[129] Padilla explained that:

> there are times when people are not in the community, not available to commit an offense, because they have suffered parole violations or some other reason; they have had other minor crimes for which they went to jail and were there for a while. So we had to subtract that time from the actual time at risk.[130]

Padilla also collected data where available on each individual's Static-99 score.[131] The Static-99 is an actuarial instrument that uses an individual's characteristics, such as age, marital status, sex of victims, and number of prior offenses to predict re-offending.[132] The Static-99 is still the most commonly used instrument in SVP commitment hearings.[133]

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124. *See* Memorandum from Jesus Padilla and Kabe Russell to Silva Blount, Subject: Program Evaluation Data Request (July 21, 2004) (on file with authors); Jesus Padilla, Timeline Relevant to Recidivism Study (Jan. 30, 2007) (on file with authors) [hereinafter Padilla, Timeline]; *see also* Padilla Testimony at 1224 ll. 4–13, People v. McKee, No. MH97752 (Cal. Super. Ct. Mar. 11, 2011) (on file with authors) [hereinafter *McKee* Padilla Testimony].

125. *See* Padilla, Timeline, *supra* note 124.

126. *See* text surrounding *infra* notes 146–49.

127. Padilla Testimony at 47 ll. 2–6.

128. *Id*. at 34 ll. 10–25.

129. *Id*. at 32 ll. 21–24.

130. *Id*. at 32 ll. 17–22.

131. *See* Memorandum from Jesus Padilla and Kabe Russell to Janice Marques 1 (Jan. 5, 2004) (on file with authors) [hereinafter Memorandum to Marques].

132. R. KARL HANSON & DAVID THORNTON, STATIC 99: IMPROVING ACTUARIAL RISK ASSESSMENTS FOR SEX OFFENDERS 1999-2002 AT 1-3; https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/sttc-mprvng-actrl/sttc-mprvng-actrl-eng.pdf.

133. Brian Abbott & Karen Franklin, *Static-99: A Bumpy Developmental Path*, NEWS: FORENSIC PSYCHOL., CRIMINOLOGY & PSYCHOL.-L. (Apr. 19, 2015), http://forensicpsychologist.blogspot.com/2015/04/static-99-yet-more-bumps-on-rocky.html. See also SOPHIE G. REEVES ET AL., The Predictive Validity of the Static-99, Static-99R, and Static-2002/R: Which One to Use? SEXUAL ABUSE 1, 2 (2017). There are four versions of the instrument: Static-99, Static-99R, Static-2002, and Static-2002R. The Static-99 uses ten items to assess a person's risk, including number of prior sexual offenses and any stranger victims. REEVES ET AL. at 3. The Static-99R is identical to the Static-99 except it has revised age weights, which will be described in footnote 248 infra. REEVES ET AL. at 8. The Static-2002 uses fourteen items to assess a person's risk; eight are identical to those used in the Static-99. Id. at 8. The Static-2002R is identical to the Static-2002 except it uses revised age

A total of 121 persons left Atascadero without significant exposure to its treatment program. Of these 121 persons, Padilla was able to obtain clear records of extensive time in the community and detailed criminal record information for 93, with an average documented time of 4.71 years living in community settings. As Table 1, below, shows, just 6.5% were arrested for a contact sex crime, which equates to an average annual rate of 1.27% per year. This was despite the fact that their average Static-99 score was a six, which the scoring manual equates to a high risk of recidivating.[134]

Table 1. California Non-Treated SVP Controls, Five-Year Prevalence for Offending, Ninety-Three Untreated SVP Candidates.[135]

Any Sex Offense 6.5% (N = 6)
Any Other Arrest 30% (N = 28)
100% (N = 93)

A person with a score of six on the Static-99 was estimated as having a 36% chance of being convicted of a new sexually violent offense within five years of release, a 44% chance of being convicted of a new sexually violent offense within ten years of release, and a 53% chance of being convicted of a new sexually violent offense within fifteen years of release.[136] That means that the released SVPs performed much better than expected based on their Static-99 score. The difference is that much more striking considering that Padilla used arrests to measure recidivism, and the creators of the Static-99 used convictions. Since many arrests do not end up in a conviction, the disparity would have been even greater if they had both used arrests as their basis of measurement.

There were three elements of the Padilla design that made it a plausible indication of community risk levels for SVPs if not confined. First, those who were almost committed but then released were "highly similar" to committed SVPs.[137] Not only

weights, similar to what is used in the Static-99R. Id. Each instrument has moderate accuracy in predicting sexual recidivism, and using multiple instruments does not increase predictive accuracy. Id. at 17-18.

134. According to the scoring manual for the Static-99, a score of six is equal to a high risk of reoffending. *See* L. HELMUS ET AL., STATIC-99R: REVISED AGE WEIGHTS (2009), http://www.static99.org/pdfdocs/static-99randage20091005.pdf.

135. *See* ANDREW HARRIS ET AL., STATIC-99 CODING RULES REVISED-2003 77 app. 10 (2003), http://www.static99.org/pdfdocs/static-99-coding-rules_e.pdf. Originally, the coding manual for the Static-99 recommended that risk be conveyed as a numerical percentage. SEE HARRIS ET AL. at 71. In 2009, coding rules were changed to recommend that risk instead be conveyed as a category ranging from low to high. SEE LESLIE HELMUS ET AL., Reporting Static-99 in Light of New Research on Recidivism Norms, The Forum 21 (1) Winter 2009, 38, 43. The individuals whom Padilla and Russell studied were evaluated using the Static-99 before this change from percentages to categories was made, and so we will use the published risk associated with this instrument.

136. See Memorandum from Jesus Padilla to Jim McEntee, October 10, 2008 (on file with authors).

137. Memorandum to Marques, *supra* note 131 (on file with authors).

were they the same average age, but they also had the same average Static-99 score of six.[138] Second, the subjects also all had at least two or more sexually violent predatory offenses. In addition, all of them had been found to be an SVP by two or more DMH mental health providers based on having a currently diagnosed mental disorder that caused them to be at risk for committing a sexually violent offense.[139] Last, the research team did not exclude any member of the group of 121 for whom they had reliable data.[140] The numbers were probably too small for Dr. Padilla's ambitions to serve as controls for a sustained study of differential treatment effects. But we know of no other careful follow up on community risk of a recently released untreated population so close to the profile of locked-up SVPs.

C. DMH's Efforts to Quash the Study

In 2006, a public defender fighting his client's SVP commitment heard about the study and subpoenaed Padilla to appear in court. DMH tried unsuccessfully to quash the subpoena[141] on the grounds that the information was privileged and protected by HIPAA.[142] The judge ordered Padilla to testify, but instructed him to provide only summary information.[143] Padilla explained under oath that untreated subjects who had all of the risk factors of the sexually violent predators committed in California had just a 6.5% sexual recidivism rate after almost five years without formal supervision in the community.[144]

After Padilla's testimony, the study was halted in midcourse.[145] Jon de Morales, the new head of the Sex Offender Commitment Program (replacing someone who had supported the study), accused Padilla and Russell of illegally accessing criminal history from the CELTS.[146] Padilla showed Morales all the documentation demonstrating that they had authorization to obtain this data, but it made no difference to Morales.[147] DMH appointed an independent investigator, and on May 7, 2007, after a six-month investigation, Padilla and Russell were cleared of all wrongdoing.[148] The investigation determined that there was no violation of a CLETS policy, practice, or procedure, and allowed the Atascadero staff whose access to CLETS had been suspended to resume access.[149]

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138. California data on file with authors.

139. *See* Memorandum to Blount, *supra* note 117; *see also* McKee Padilla Testimony. at 1231—32.

140. *See* Memorandum from Jesus Padilla to Jim McEntee (Oct. 10, 2006) (on file with authors).

141. *See* Dep't of Mental Health, Notice of Compliance with Court Order RE: Motion to Quash Subpoena, California v. Miller, CR 105735, July 15, 2008 (on file with authors).

142. *See McKee* Padilla Testimony, *supra* note 124, at 1275 ll. 7–12.

143. *Id.* at 1275 ll. 6–15.

144. *See* Padilla Deposition, *supra* note 38, at 57–58, 67–68.

145. *See McKee* Padilla Testimony, *supra* note 124, at 1228 ll. 8–27.

146. *See* Padilla Deposition *supra* note 38 , at 37 ll.

147. *Id.* at 38 ll. 7–12.

148. Email from James Rostron to Melvin Hunter (May 7, 2007, 09:19:56 AM), forwarded from Robert Knapp to Jesus Padilla (May 7, 2007,10:34:37 AM) (on file with authors).

149. *Id.*

On June 5, 2007, Atascadero Chief Executive Melvin Hunter (who had approved and supported the Padilla study) "abruptly retired" without offering any reason why.[150] Hunter was replaced by none other than Jon De Morales. On June 8, Morales sent Padilla a memorandum stating that his research project had been terminated and that he was not authorized to use the previously gathered data for publication, research, testimony, or any other purpose.[151] The data was never returned, and the physical boxes of documents were destroyed.[152] Padilla was forced to turn over his electronic copy when he left Atascadero later that summer to become a member of the SVP Evaluators Panel.[153]

Despite this setback, Padilla and Russell attempted to continue the study. They were told that because they were doing basic research and not program evaluation, they would have to reapply.[154] They submitted a new proposal to Atascadero, but were told to go through DMH.[155] They sent the proposal to DMH, but DMH said they could not evaluate the proposal because they did not have a human subjects committee.[156] They then sent the proposal to the Health and Human Services committee which oversaw DMH.[157] Padilla received a call from the Head of Human Subjects who told him that it was program evaluation and not basic research.[158] They then went back to DMH, but DMH said they had to go through Atascadero.[159] They were now eighteen months into the process, and it took Atascadero a few more months to respond.[160] Finally, on March 13, 2008, Morales sent them a memorandum informing them that they could not conduct the recidivism study because they would need "legislation or approval from the Department of Mental Health" to access the CLETS, and "[n]either ASH nor DMH would permit 'volunteers' to conduct this research."[161]

At this point, Padilla gave up trying to complete the study. He explained why during a 2009 deposition:

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150. Stephen Curran, *ASH Executive Director Abruptly Retires Today*, TRIBUNE (June 6, 2007), http://www.sanluisobispo.com/news/article39104976.html.

151. Memorandum from Jon De Morales to Jesus Padilla (June 8, 2007) (on file with authors). Interestingly, in July 2017, one of us (Lave) contacted the Department of State Hospitals to find out when Jon De Morales became Director of Atascadero State Hospital. According to DSH's official records, Jon De Morales became the Interim Executive Director of Atascadero State Hospital on August 24, 2007, and he stayed in that position until October 30, 2009. DSH also stated via email that Melvin Hunter began transitioning out of his position as Executive Director of Atascadero on August 24, 2007 and formally left on September 14, 2007. DSH had no explanation for why Morales was identifying himself as Executive Director of Atascadero State Hospital more than two months before he became Interim Director. *See* Emails from Department of State Hospitals (July 27–July 31, 2007) (on file with authors).

152. Padilla Deposition, *supra* note 38, at 43 ll. 15–18.

153. *Id*. at 43 ll. 18–24; *see also* Email from Jesus Padilla to Brenda Epperly-Ellis (June 6, 2007, 09:17 AM) (on file with authors).

154. *See* Padilla Deposition, *supra* note 38, at 43 ll. 4–10.

155. *Id*. at 46 ll. 10–11.

156. *Id*. at 13–14.

157. *Id*. at 45 ll. 22–25.

158. *Id*. at 45 ll. 2–4.

159. *Id*. at 45 ll. 17–18.

160. *Id*. at 45 ll. 19–21.

161. Memorandum from Jon De Morales to Jesus Padilla and Kabe Russell (Mar. 13, 2008) (on file with authors).

> So the next step is to go to (Governor) Jerry Brown and say: Please, you guys need to do this research. We need it. You can't not do it. You can't just hide your head in the sand and—you know. So that's where it ended. I got tired of pursuing it. . . . It's too —it's too hard to fight the system, you know. It's too hard to get them to do this.[162]

The authors of this article heard about the study from a former public defender who is now a Superior Court judge in San Diego. We emailed Dr. Padilla[163] and arranged a telephone call to discuss the study.[164] Dr. Padilla was very responsive and gave us a detailed account of what had happened. We then submitted a FOIA request to the newly created Department of State Hospitals (DSH),[165] but we were told that they were "unable to verify any study on recidivism conducted by Jesus Padilla, PhD."[166] We shared DSH's response with Dr. Padilla,[167] and he sent us a packet of documents pertaining to the study including internal memoranda, emails, and the signatory page granting approval for the study.[168] We cite to many of these documents in this article.

It was not until we sent a copy of Padilla's 2004 research proposal with signed approvals from multiple administrators—including Melvin Hunter, the Executive Director of Atascadero State Hospital—that DSH agreed to continue looking into our original request.[169] It still took months of fighting before we received the underlying data, and when we showed Dr. Padilla what we had received, he told us that the Excel files had been tampered with.[170] We had hoped that Dr. Padilla would be able to help us repair the files so that we would be able to work with them, but he died of stomach cancer in 2013.[171] We then contacted Kabe Russell by telephone, but he told us that he did not remember the files well enough to discuss and would not look at them.[172]

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162. Padilla Deposition, *supra* note 38, at 42, 68.

163. *See* Email from Tamara Lave to Jesus Padilla (Sept.19, 2011, 06:41 AM) (on file with authors).

164. *See* Email from Jesus Padilla to Tamara Lave (Sept. 19, 2011, 11:39 AM) (on file with authors).

165. On July 1, 2012 DMH became the Department of State Hospitals. *California's Department of Mental Health Transition to the New Department of State Hospitals*, CAL. DEP'T STATE HOSPS., http://www.dsh.ca.gov/Publications/Transition_and_Reorg.aspx (last visited Mar. 12, 2018).

166. *See* Letter from Alice Lee, Staff Counsel, Cal. Dep't of Mental Health (Oct. 18, 2011) (on file with authors).

167. *See* Email from Tamara Lave to Jesus Padilla (Oct. 26, 2011, 02:56 PM) (on file with authors).

168. *See* Email from Jesus Padilla to Tamara Lave (Nov. 27, 2011, 12:17 PM) (on file with authors).

169. *See* Letter from Franklin Zimring and Tamara Rice Lave to Alice Lee, Staff Counsel, Cal. Dep't of Mental Health (Dec. 12, 2011) (on file with authors)*; see* Letter from Alice Lee to Franklin Zimring (Feb. 17, 2012) (on file with authors).

170. Interview with Jesus Padilla, Ph.D. (June 25, 2012); Interview with Jesus Padilla Ph.D. (July 11, 2013); *see also* Notes taken by Brian R. Abbott, Ph.D. from telephone consultation with Jesus Padilla (Dec. 4, 2008) at 5 ("An attorney, Todd Melnik, subpoenaed DMH to provide him with the excel spreadsheets that contained all of Dr. Padilla's data. DMH provided Mr. Melnik pdf files containing excel spreadsheet information. Dr. Padilla reviewed the pdf files Mr. Melnik obtained from DMH and found DMH had carved up spreadsheet and placed into files that were essentially useless. Also, the data sent by DMH to Mr. Melnik was incomplete.") (on file with authors).

171. *See* Email from Tamara Lave to Jesus Padilla (July 8, 2013, 03:06 PM) (on file with authors); Email from Jesus Padilla to Tamara Lave (July 10, 2013, 1:05 PM) (on file with authors); Email from Tamara Lave to Jesus Padillla (July 22, 2013, 04:15 PM) (on file with authors); Email from Tamara Lave to Jesus Padilla (July 24, 2013, 05:08 PM) (on file with authors); Email from Jesus Padilla to Tamara Lave, (July 25, 2013, 11:35 PM) (on file with authors); Email from Tamara Lave to Jesus Padilla, (Aug. 6, 2013, 2:09 PM) (on file with authors); Email from Jesus Padilla to Tamara Lave, (Aug. 6, 2013, 8:13 PM); Notes by Tamara Lave, (Dec. 17, 2013) (on file with authors).

172. *See* notes by Tamara Lave, (Mar. 17, 2014) (on file with authors).

We have no way of knowing the real reason why California halted the Padilla study and then tried to bury it. Although our FOIA request asked why the study was terminated, we never received an answer. The only explanation we have comes from Jon De Morales's June 8, 2007 memorandum in which he writes, "to conduct research of this type, one would need to follow Special Order 288 and gain separate approval from the DOJ to have access to criminal Offender records."[173] We are dubious of this explanation for two reasons. First, we reviewed Special Order No. 228, and it does not say anything about the special approval Morales claimed was necessary.[174] Second, just one month before, the independent investigation had determined that Padilla and Russell did nothing wrong in accessing these records, even without the special approval supposedly necessary.

However, we can theorize as to why the study was terminated. To begin with, it is certainly true that the recidivism results were much lower than anyone anticipated. In 2004, immediately after the study was approved, Kabe Russell wrote then Director Hunter: "I'm hopeful that this data will confirm the importance of providing supervision and treatment for this high-risk group of patients."[175] Later, looking back on the study, Padilla testified: "we were surprised by the recidivism rates. We expected the recidivism rates to be thirty-seven, thiry-eight percent. Much higher [which] would be consistent with . . . what the Static 99 [score] was showing."[176] Although the numbers were lower than expected, Padilla and Russell did not shy away from completing the study, and neither did Director Hunter. Even after a preliminary analysis showed that just 4% of untreated SVPs were rearrested for a new sex crime,[177] Hunter approved Padilla's request to expand the study to include more people.[178]

Unfortunately, not everyone shared this same thirst for knowledge. Perhaps higher-ups at DMH had not initially paid attention to the study because they did not expect the results. Once Padilla testified, DMH may have realized the study had to be stopped because it threatened the legitimacy of the entire SVP program. As explained earlier, the only constitutionally acceptable rationale for SVP commitment is that offenders are so dangerous that they must be locked away, and this study showed otherwise. If the SVP law were to be declared unconstitutional, it would threaten the $147.3 million annual budget DMH (and now Department of State Hospitals) receives for the civil commitment program. People have done far worse than bury a study for a hundred million dollars.

173. Memorandum from Jon De Morales, *supra* note 151.

174. *See* Cal. Dep't of Mental Health Special Order No. 228 (July 15, 1995).

175. Email from Kabe Russell to Melvin Hunter (Mar. 9, 2004, 09:03:48 AM).

176. *McKee* Padilla Testimony, *supra* note 124.

177. *See* Memorandum to Melvin Hunter from Jesus Padilla and Kabe Russell (July 14, 2004) (on file with authors).

178. *See* Memorandum to Silva Blount from Jesus Padilla and Kabe Russell (July 21, 2004) (on file with authors).

IV. ARE THE PADILLA RESULTS ACCURATE?

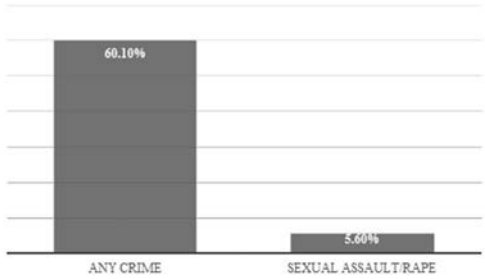
Although we had hoped to replicate Padilla's findings, this proved impossible due to the damaged data files.[179] That left us to try and find other ways to test the accuracy of the data.

A. General Data on Sex Offender Recidivism

Although the Padilla results may seem surprising, they are actually consistent with other studies of sex offender recidivism. The largest U.S. follow-up study of released sex offenders was published by the DOJ in 2016.[180] It analyzed the recidivism of 20,422 persons released from prison in 2005 from thirty states after conviction for rape or sexual assault.[181] Recidivism was defined as re-arrest for a new crime, and the follow-up period was five years.[182] Figure 1 reports that 60.1% were rearrested for any offense, but just 5.6% were rearrested for rape or sexual assault.[183]

Unfortunately, the DOJ researchers did not provide demographic data about the sex offenders in their published report. In March 2017, we contacted Matthew Durose, the chief author of the 2016 study, to ask for more detailed demographics on the released sex offenders. Durose indicated that he would be unable to provide that information at this time because it was still being analyzed. Since the 2003 DOJ study provides more fine-grained analysis, we will turn to it now.

Figure 1. Five Year Rearrest Rate for 20,422 Sex Offenders Released from Prison, 30 U.S. States (2016).



179. Although DSH sent us an Excel version of the data, it had been internally divided. Because they had removed names and any other identifying information, we had no way of following individuals from one Excel sheet to the next. In addition, there were more individuals in the dataset than in the original study. We knew that some of them had been dropped due to death or insufficient information, but we couldn't determine who those individuals were. Exacerbating things further was the fact that some files appeared to have been distorted. Padilla's memorandum provided information about those few released SVPs who had recidivated, and so we should have been able to identify them in the Excel spread sheet, however, we were unable to do so.

180. DUROSE ET AL., *supra* note 94.

181. *Id.* at tbl. 1.

182. *Id.* at tbl. 2.

183. *Id.*

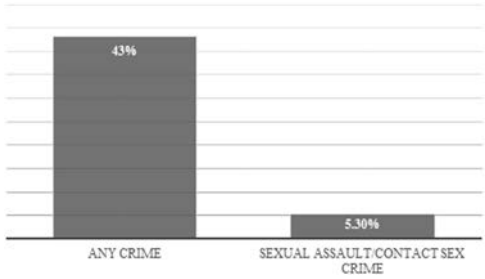
In 2003, the DOJ published what was then the largest study of American sex offenders.[184] Figure 2 reports the rate of re-arrests noted for all 9,691 men released from prison in 1994 from fifteen states after conviction for a sex crime. Just as with the 2016 study, the measure of possible recidivism is re-arrest rather than reconviction, a much looser standard than proven guilt.[185-186]

The overall arrest rate for released sex offenders was just over 40% in three years, lower than the re-arrest frequencies for other types of incarcerated offenders.[187] Additionally, the overwhelming majority of re-arrests were not for sexual offenses. For every 100 offenders placed on a Megan's Law list to warn the public of sexual danger, ninety-five showed no indication of repeat sexual offenses in a three-year follow up.

1. Relevance of DOJ Studies for SVPs

One obvious problem with relying on the 2003 and 2016 DOJ studies to assess the accuracy of the Padilla study is that released SVPs may be more dangerous than released sex offenders. For that reason, it is critical to determine to what extent the targets of SVP legislation differ from other sex offenders.[188] Our research demonstrated that there are two important respects in which persons confined as sexually violent predators differ from other sex offenders sentenced to, or released from, prison:

Figure 2. Three Year Rearrest Rate for Sex Offenders Released from Prison, 15 U.S. States (2003).



Source: U.S. Dep't of Just.

184. 2003 DOJ STUDY, *supra* note 99, at 1.

185. *See id.*

186. *Id.* at 1–2.

187. *Id.* at 2.

188. To answer that question, one of us wrote to each SVP state and requested information on SVP commitments. Each state required more than one contact to provide information, and typically there were several exchanges. Some states required requests in writing, and California mandated a formal FOIA request. Since no state was willing to provide the criminal history of those committed, one of us read each of the SVP statutes to learn how much prior sexual misconduct was required.

(1) The SVP population has longer records of sex offense convictions than other sex offenders. (It should be noted, however, that no state currently requires that a person have committed multiple crimes in order to qualify as a sexually violent predator. Indeed, the laws specifically state that one conviction for a qualifying offense is enough. The federal government does not even require that the qualifying offense stem from a conviction.)
(2) SVPs are much older than other sex offenders.

Of these distinctive attributes of the SVP population, one is associated with higher sex crime re-arrests,[189] and the other is associated with lower re-arrests.[190] The 2003 DOJ study reported that if a released sex offender was being punished for his first sex crime arrest, his re-arrest rate for a sex offense in three years was 4.2%.[191] However, released sex offenders with multiple priors were re-arrested at nearly double that rate, 8.3%.[192]

So a longer record does have some impact on prospective risk in this population—an 8.3% probability instead of 4.2% probability.[193] But older age at release in the 2003 DOJ report cuts the re-arrest rate for sex crimes almost in half, with 3.3% of the forty-five-and-over persons released re-arrested for a sex crime versus 5.8% for the three youngest groups.[194] Length of confinement in the DOJ report was not associated with any trend in re-arrest for sex crimes, with the four lowest sentence categories averaging a 4.5% sex crime re-arrest rate as did the four highest of the eight-time served category.[195]

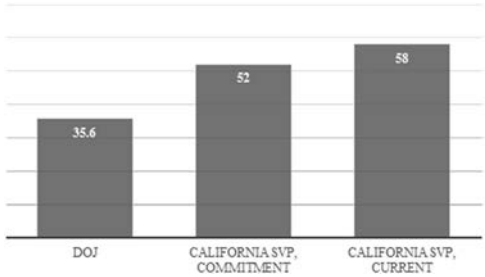
Figure 3 compares the ages of persons released from prison for sex crimes in the DOJ study with the average age on entry to the California SVP program and the current average age of a confined SVP.[196] At that time there were 1,334 individuals committed as SVPs in California.

B. Comparison with Other Studies

A better way to measure the empirical merit of Dr. Padilla's sample of ninety-three SVP candidates is to compare this study to other similar data sets in the United States. The problem, as McReynolds and Sanders pointed out, is that "by the nature of the laws themselves, almost all of those offenders who get civilly confined are never in the community" because "only a small percentage of those sex offenders who have been civilly confined have been

189. *See* Monahan, *supra* note 29, at 423–24 ("Criminologists have repeatedly demonstrated that prior violence and criminality are strongly associated with future violence and criminality. Indeed, no risk factor has been more thoroughly studied and none have generated more reliable results.").
190. Increased age is associated with lower recidivism. *See infra* notes 193–97.
191. 2003 DOJ STUDY, *supra* note 99, at 28.
192. *Id.*
193. *Id.* at 28 tbl. 30.
194. *Id.* at 25 tbl. 25.
195. *Id.* at 26 tbl. 26.
196. We computed the age as of May 13, 2014, which was the date that the Department of Hospitals generated the data.

Figure 3. The Median Age of Released Sex Offenders in 15 States and California SVPs.



Source: U.S. Dep't of Just. and Cal. Dep't of State Hosps.[197]
2003 DOJ STUDY, *supra* note 99, at 32; California data on file with authors.

released."[198] As a result, "it is difficult to determine whether those offenders who become civilly confined are in fact the most likely to sexually recidivate."[199]

Wilson, Looman, Abracen, and Pake were able to study the recidivism of thirty-one SVPs who were released into the community after completing treatment in Florida.[200] Their average Static-99 score (5.86) was about the same as that in the Padilla study (6), but the mean age at release (45.72) was lower than in the Padilla study (50).[201] Wilson et al. found that 3.2% (1/31) of the SVPs committed a new sexual offense within 2.54 years of release from the Florida Civil Commitment Center.[202] These recidivism rates were "considerably below" the 26.2% projected by the Static-99.[203] "This suggests," Wilson et al. wrote, "that, even though these two programs may provide treatment to offenders substantively meeting the 'high-risk/needs' standard, the attendant actuarial normative data may not apply."[204] In other words, the offenders may meet the criteria associated with being high risk, but the risk of reoffending associated with that criteria may not apply to them.

Other researchers have looked at persons who were similar from a risk perspective to committed SVPs,[205] including those who were referred for SVP evaluation but not

198. *See* Larkin S. McReynolds & Jeffrey C. Sandler, *Evaluating New York State's Sex Offender Management and Treatment Act: A Matched Historical Cohort Analysis*, 23 CRIM. JUST. POL'Y REV. 164, 168 (2012).

199. *Id.*

200. Robin J. Wilson et al., *Comparing Sexual Offenders at the Regional Treatment Centre (Ontario) and the Florida Civil Commitment Center*, 57 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 377, 390 (2012).

201. *See id.* at 385.

202. I*d.* at 385.

203. *Id.* at 390.

204. *Id.* (citation omitted).

205. *See* McReynolds & Sandler, *supra* note 198, at 177 (created a matched historical cohort of offenders by matching offenders who were almost committed under the Sex Offender Management and Treatment Act to

ultimately committed. Mercado, Jeglic, Markus, Hanson, and Levenson studied 102 "nearly committed" SVPs in New Jersey.[206] These persons were independently evaluated and recommended for commitment by two mental health providers, but for assorted reasons were not ultimately referred for commitment by the Attorney General.[207] Ten-and-a-half percent were convicted of a new sex offense during the average 6.5-year follow-up.[208] The authors concluded:

> Even among this highest risk group . . . detected rates of sexual recidivism were still quite low. Given the exceptionally high cost of SVP commitment and the fact that most new sexual offenses are not committed by known offenders, policymakers should be encouraged to better balance estimated crime prevention associated with SVP commitment with that of primary prevention techniques that may cast a wider net in terms of reducing sexual violence in the community.[209]

Duwe studied SVPs who were almost committed in Minnesota.[210] By state law, the Department of Corrections is required to refer high-risk offenders to counties for civil commitment review.[211] Duwe found that of the 161 persons who were referred for civil commitment but not ultimately committed, just 6.5% were reconvicted of a new sex crime within four years of release.[212] Duwe wrote, "What is worth emphasizing, however, is that although referred (but not committed) offenders were more likely to reoffend sexually than the non-referred offenders, their overall rate of reoffending (6.5%) was still low."[213]

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offenders who were released from prison before SOMTA and finding that 11.6% were rearrested for a new sex crime within five years of release from prison); *see also* Jeffrey Abracen & Jan Looman, *Evaluation of Civil Commitment Criteria in a High Risk Sample of Sexual Offenders*, 1 J. SEXUAL OFFENDER CIV. COMMITMENT: SCI. & L. 124, 131, 135 (2006) (studied 188 persons released from Regional Centre for Sex Offender Treatment program who had been diagnosed with a mental disorder and had scored at least five on the Static-99; mean age 35.1; found that 13.3% were convicted for a new sexual offense within a 4.8-year period; "[t]he results of the present study fail to support the validity of the criteria commonly used in SVP assessments . . . recidivism rates were well below the standard set by SVP commitment criteria").

206. CYNTHIA CALKINS MERCADO ET AL., SEX OFFENDER MANAGEMENT, TREATMENT, AND CIVIL COMMITMENT: AN EVIDENCE BASED ANALYSIS AIMED AT REDUCING SEXUAL VIOLENCE 61 (2013), http://www.ncdsv.org/images/SO-management-treatment-and-civil-commitment_9-2013.pdf. Unfortunately, these authors did not include data on the age or Static-99 score of the almost committed.

207. *Id.*

208. *Id.*

209. *Id.* at 6.

210. Grant Duwe, *To What Extent Does Civil Commitment Reduce Sexual Recidivism? Estimating the Selective Incapacitation Effects in Minnesota*, 42 J. CRIM. JUST. 193, 194 (2014).

211. *Id.* at 194.

212. *Id.* at 196–197.

213. *Id.* at 197.

The Washington State Institute for Public Policy has published the most influential studies of risk posed by committed SVPs,[214] but that may be because until 2012 there were no other published studies.[215]

The Institute followed a group of 135 SVP-eligible persons released from prison who did not get civil commitment.[216] These subjects were followed in communities for a total of six years, and research showed a much higher rate of sex

Exhibit 1[217] **Most Serious New Offense.**

Type of Offense	Number of Offenders	Percentage of Offenders
Felony		
Sex	31	23%
Violent (not sex)	14	10%
Violent Total	**45**	**33%**
Non-Violent	22	16%
Felony Total	**67**	**50%**
Misdemeanor		
Sex	3	2%
Violent (not sex)	5	4%
Non-Violent	13	10%
Misdemeanor Total	**21**	**16%**
Failure to Register	5	4%
Total Recidivism	93	69%

Source: Milloy, *Six Year Follow-Up* (2007)

214. *See* CHERYL MILLOY, WASH. STATE INST. FOR PUB. POL'Y, SIX-YEAR FOLLOW-UP OF 135 RELEASED SEX OFFENDERS RECOMMENDED FOR COMMITMENT UNDER WASHINGTON'S SEXUALLY VIOLENT PREDATOR LAW, WHERE NO PETITION WAS FILED 1 (June 2007) [hereinafter MILLOY, SIX YEAR FOLLOW-UP 2007], http://www.wsipp.wa.gov/ReportFile/985/Wsipp_Six-Year-Follow-Up-of-135-Released-Sex-Offenders-Recommended-for-Commitment-Under-Washington-s-Sexually-Violent-Predator-Law-Where-No-Petition-Was-Filed_Full-Report.pdf; CHERYL MILLOY, WASH. STATE INST. FOR PUB. POL'Y, SIX YEAR FOLLOW-UP OF RELEASED SEX OFFENDERS RECOMMENDED FOR COMMITMENT UNDER WASHINGTON'S SEXUALLY VIOLENT PREDATOR LAW, WHERE NO PETITION WAS FILED 1 (2003) [hereinafter MILLOY, SIX YEAR FOLLOW-UP 2003], http://www.wsipp.wa.gov/ReportFile/844/Wsipp_Six-Year-Follow-Up-of-Released-Sex-Offenders-Recommended-for-Commitment-Under-Washingtons-Sexually-Violent-Predator-Law-Where-No-Petition-Was-Filed_Full-Report.pdf. *See generally* DONNA SCHRAM & CHERYL DARLING MILLOY, WASH. STATE INST. FOR PUB. POL'Y, SEXUALLY VIOLENT PREDATORS AND CIVIL COMMITMENT: A STUDY OF THE CHARACTERISTICS AND RECIDIVISM OF SEX OFFENDERS CONSIDERED FOR CIVIL COMMITMENT BUT FOR WHOM PROCEEDINGS WERE DECLINED 1 (1998), http://www.wsipp.wa.gov/ReportFile/1278/Wsipp_Sexually-Violent-Predators-and-Civil-Commitment_Full-Report.pdf.

215. *See* McReynolds & Sandler, *supra* note 198, at 168 ("The only three studies on the public safety impact of sex offender civil commitment published to date . . . were conducted by the Washington State Institute for Public Policy.")

216. *See* MILLOY, SIX YEAR FOLLOW-UP 2007, *supra* note 214, at 1.

217. *Id.* at 3.

offending recidivism than the five-year follow up reported by Padilla or that of the other studies described above. Washington State reported 33% of the released SVP candidates were later convicted of a sex offense felony; an additional 2% were convicted of a misdemeanor sex offense, and almost 70% of the group was convicted of some offense. What the authors called Exhibit 1 is reproduced here.

This data was presented as evidence that the SVP classification was a highly significant predictor of future danger:

> [T]he distinctiveness of the select subpopulation of sex offenders in the current study is clearly illustrated by a comparison of this group's recidivism rates to those of an overall population of released Washington State sex offenders. The offenders who were referred for possible civil commitment have a much higher pattern of recidivism . . . .[218]

The difference in results between the Padilla and Washington State study is particularly striking considering the study designs. The Washington State study had an identical six-year follow up period for each person.[219] The Padilla study, by contrast, followed all offenders from the time they were released, which for some was as early as 1996.[220] Even though the study was halted in 2007, Padilla was still able to follow some offenders for eleven years. Furthermore, in contrast to Washington State, Padilla subtracted any time that subjects spent in custody from the duration of the follow-up period, which meant that the arrest rate was only based on periods of being at risk in community settings.[221] In addition, unlike the Washington State study,[222] Padilla did not just rely on recidivism data provided in government databases. He contacted the prosecutors in the counties where SVPs were released to see if they had been rearrested.[223] With more time in the community to reoffend and more ways of detecting it, we would have expected to see higher rates of reoffending in Padilla's study, not lower.

1. Reconciling the Data Conflict

The most significant difference in results between the Padilla and the Washington State Institute studies is the estimate of the prevalence of sex offending, as this is the central justification for SVP commitment. In just under five years of street time, 6.5% of the Padilla group was arrested for a contact sex crime, or an average of 1.27% per year. In contrast, the reported rate of sex crime convictions was twenty-five percent over six years in Washington or an average of 4.2% per

217. *Id.* at 3.
218. *Id.* at 8.
219. *Id.* at 1.
220. *See* Memorandum to Jim McEntee (Oct. 10, 2008) (on file with authors); Excel Data File on file with authors.
221. *See* Padilla Deposition, *supra* note 38, at 50 l. 10, 52 l. 20.
222. *See* MILLOY, SIX YEAR FOLLOW-UP 2007, *supra* note 214, at 3.
223. *See* Padilla Deposition, *supra* note 38, at 50 l. 10, 52 l. 20.

year.[224] Although the prevalence rates in both studies are far below the 50% to 90% prospective dangerousness estimate put forth by the Kansas legislature in justifying its SVP law, they are still very different. How can these results be reconciled?

Age is a key difference between the groups studied by Padilla and Washington State that can explain the significant difference in recidivism rates. The Washington group is much younger on average than the SVP population in California, and the effect of age on sex crime risk is huge in the Washington data.

Here is the age-specific sex offense risk published in detail for the first time in 2007 by the Washington authors in their third report on the project. Only average age of release was published in the 1998 study,[225] and the 2003 study contained no age information at all.[226]

Table 2. Washington Sex Offense Recidivism by Age at Inclusion in Risk Group

Age	Conviction of Sex Felony	Number of Persons
18–29	39%	(N = 28)
30–39	18%	(N = 57)
40–49	29%	(N = 34)
50+	0	(N = 16)
TOTAL	23% (31)	(N= 135)

Source: Milloy, *Six Year Follow-Up* (2007)[227]

The 33% aggregate rate for sex felony combines age groups with radically different risks of sexual recidivism, ranging from 39% to 0%. In the Washington study, no offenders who were fifty or older when released had *any* later reconvictions.[228] The reason this extremely low risk group does not have more impact on

224. *See* MILLOY, SIX YEAR FOLLOW-UP 2007, *supra* note 214, at 3. The authors use an average to emphasize the difference between the two studies. The authors acknowledge, however, that recidivism is most likely to occur the first year after release, dropping every year after that. As Harris and Hanson explained, "For all crimes (and almost all behaviours) the likelihood that the behaviour will reappear decreases the longer the person has abstained from that behaviour. The recidivism rate within the first two years after release from prison is much higher than the recidivism rate between years 10 and 12 after release from prison." ANDREW J.R. HARRIS & R. KARL HANSON, PUB. SAFETY & EMERGENCY PREPAREDNESS CANA, SEX OFFENDER RECIDIVISM: A SIMPLE QUESTION 1 (2004), https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/sx-ffndr-rcdvsm/sx-ffndr-rcdvsm-eng.pdf. Harris and Hanson found that the rate of recidivism in the populations they studied decreased by half every five years. *Id.* at 9.

225. SCHRAM & MILLOY, *supra* note 214, at 4.

226. *See* MILLOY, SIX YEAR FOLLOW-UP 2003, *supra* note 214.

227. MILLOY, SIX YEAR FOLLOW-UP 2007, *supra* note 214, at 6–7.

228. *Id.* at 7.

the aggregate is because the Washington group is a very young one—63% of the SVP-eligible offenders in this group were under forty, and only 12% were over fifty. Because there were so many more high-risk young offenders than low risk older ones, the overall recidivism rate was skewed higher.

In contrast, the California group of SVPs that Padilla studied was almost certainly vastly older. Padilla testified that the average age of the subjects was "about fifty."[229] We were unable to get more specific information about Padilla's dataset because he was barred from discussing his findings in detail, and as noted earlier, the excel files we received from the Department of State Hospitals had been tampered with. Fortunately, we were able to obtain commitment data from the Department of State Hospitals on the 1,334 currently committed SVPs in California. The median and average age at commitment was the same: fifty-two. The median and average age of the currently committed was fifty-eight.[230] Therefore, we can be confident that the population that Padilla studied was much older than that studied by the Washington State Institute.

Once age is accounted for, the California data is perfectly consistent with the Washington data, and California risks are the correct estimates for the current California SVP population. Rather than serving as a basis for confining all these older SVPs, the Washington data suggests they will pose a low risk of sexually offending if they are released into the community.

The irony is that Padilla and Russell were specifically interested in looking at the impact of age on recidivism when they designed their study. "We know that the FBI crime data shows that men over 50 have a very low recidivism rate," Russell wrote,[231] "[w]hat we don't know is whether that same trend holds for high risk offenders such as SVPs."[232] The much higher average age in their ninety-three-person group (and in California's SVP lock ups) provides a good test of the sexual dangerousness of older SVPs. The aggregate rate at 6.5% is much more representative of the risks of sexual recidivism posed by the usually older SVP populations.

B. Other Studies on Age and Recidivism

Importantly, Padilla's findings are consistent with other studies that examined the impact of age on sex offending. In 2002, Hanson used data from ten follow-up studies of adult male sex offenders ages eighteen to seventy and above (combined sample of 4,673) to study the relationship between age and sexual recidivism. He found that, "[i]n the total sample, the recidivism rate declined steadily with age," and "[t]he association was linear."[233] Similarly, Prentky and Lee

227. MILLOY, SIX YEAR FOLLOW-UP 2007, *supra* note 214, at 6–7.

229. *See* Padilla Deposition, *supra* note 38, at 63, l. 19.

230. Data on file with authors.

231. Email from Kabe Russell to mlispcomb@flacc.om, cc. Diane Inrem, Jesus Padilla, rbriody@flacc.com, (Mar. 3, 2004, 03:49:23 PM) (on file with authors).

232. *Id.*

233. R. Karl Hanson, *Recidivism and Age: Follow-Up Data from 4,673 Sexual Offenders*, 17 J. INTERPERSONAL VIOLENCE 1046, 1053 (2002).

studied the age effect on a cohort of 136 rapists and 115 child molesters with multiple priors who had been civilly committed to a Massachusetts prison and then released in 1959 and followed for twenty-five years.[234] They found that with rapists, recidivism dropped linearly as a function of age. With child molesters they found that recidivism increased from age twenty to age forty and then declined slightly at age fifty and significantly at age sixty.[235] Other researchers have reported similar results.[236]

IV. WHY THE PADILLA STUDY MATTERS

It would be hard to ignore a study showing that the vast majority of recently released individuals committed under the current SVP regime did not recidivate. The range of sexual danger found in the Padilla study is not substantial enough to justify permanent confinement, and this finding threatens the entire SVP apparatus. If SVPs are no different than the "dangerous but typical recidivist convicted in an ordinary criminal case,"[237] then the state has no constitutionally permissible reason to continue locking them away.

And make no mistake; if SVP laws were to be declared unconstitutional, it would have a tremendous financial impact on the institutions used to house and treat SVPs. In 2006, the total civil commitment budget across the country totaled $454.7 million, with SVP states spending an average of $94,017 per year on each

234. Robert Alan Prentky & Austin F.S. Lee, *Effect of Age-at-Release on Long Term Sexual Re-offense Rates in Civilly Committed Sexual Offenders*, 19 SEXUAL ABUSE: J. RES. & TREATMENT 43, 45–47 (2007). Prentky and Lee's sample was small and included offenders with a higher base rate of recidivism than those drawn from the general prison population.

> Although this latter consideration must be regarded as a limitation in terms of generalizability, it may also be seen as a strength of the study. Presumably, using a higher risk sample is a more severe test of the age-crime hypothesis, providing confirmatory support for the rapists and "amplifying" or exaggerating the quadratic blip in Hanson's (2002) data for child molesters.

Id. at 58.

235. *Id*. at 53.

236. *See* Howard E. Barbaree et al., *Aging Versus Stable Enduring Traits as Explanatory Constructs in Sex Offender Recidivism: Partitioning Actuarial Prediction into Conceptually Meaningful Components*, 36 CRIM. JUST. & BEHAV. 443, 443, 459, 463 (2009) ("A large body of evidence has recently accumulated indicating that recidivism in sex offenders decreases with the age of the offender at the time of his release . . . ."); Patrick Lussier et al., *Criminal Trajectories of Adult Sex Offenders and the Age Effect: Examining the Dynamic Aspect of Offending in Adulthood*, 20 INT'L CRIM. JUST. REV. 147, 164 (2010) (offering "several explanations as to why older sex offenders represent a lower risk of recidivism"); 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, 838–40 (2009) (finding that the risk of recidivism decreases with age); John Monahan et al., *Age, Risk Assessment, and Sanctioning: Overestimating the Old, Underestimating the Young*, 41 LAW & HUM. BEHAV. 191, 197 (2017) (After finding that the Post Conviction Risk Assessment Instrument (PCRA) overestimates recidivism risk among older offenders, the authors argue that all instruments should better take age into account); Richard Wollert et al., *Recent Research (N = 9,305) Underscores the Importance of Using Age-Stratified Actuarial Tables in Sex Offender Risk Assessments*, 22 SEXUAL ABUSE: J. RES. AND TREATMENT 471, 471, 484 (2010) (concluding that "evaluators should report recidivism estimates from age stratified tables when they are assessing sexual recidivism risk, particularly when evaluating the aging sex offender").

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

committed SVP.[238] California's civil commitment budget was the highest at $147.3 million,[239] and it has grown to at least $288.8 million per year.[240]

The implications of the Padilla findings extend beyond California. As noted above, an important protective factor against recidivism is advanced age, and the group Padilla studied is similar in age to currently committed SVPs across the country. According to the 2016 SOCCPN report, the age range of residents across programs was nineteen to eighty-five, and the average age was fifty-two, with a standard deviation of 6.96.[241] This average includes Pennsylvania, which only has an SVP civil commitment program for juveniles.[242] The average age of residents in Pennsylvania's program is twenty-five.[243] With Pennsylvania subtracted, the average age of SVPs across programs was fifty-three.[244]

In addition, we have gathered some age-specific information from several SVP states. Table 3 shows the median age at admission and the median age of all incarcerated SVPs for six states, including Washington.

Table 3. Median Age of Incarcerated SVPs.

	Median Age at Admission	Median Age of Currently Confined
Arizona	44	48
Iowa	49	52
Missouri	46	51
New Jersey	42	48
Washington	41	48
Wisconsin	40	47

Source: Data from SVP States (on file with authors).

238. *See* KATHY GOOKIN, WASH. STATE INST. FOR PUB. POL'Y, COMPARISON OF STATE LAWS AUTHORIZING INVOLUNTARY COMMITMENT OF SEXUALLY VIOLENT PREDATORS: 2006 UPDATE, REVISED 5 (2007), http://www.wsipp.wa.gov/ReportFile/899/Wsipp_Involuntary-Commitment-of-Sexually-Violent-Predators-Comparing-State-Laws_Full-Report.pdf.

239. *Id.*

240. According to the California Sex Offender Management Board, the in-patient cost to the state of treating SVPs is about $200,000 per person. CAL. SEX OFFENDER MGMT. BD., ANNUAL REPORT 2016 39 (2016), http://www.casomb.org/docs/2016_CASOMB_Annual_Report-FINAL.PDF. After serving a FOIA request on the Department of State Hospitals, we were provided with an Excel file giving us information about the currently committed SVPs in California. According to that information, there were 1,334 SVPS committed as of May 13, 2014. Confining 1,334 SVPs at a cost of $200,000 per person would cost $266.8 million per year.

241. SOCCPN 2016 ANNUAL SURVEY, *supra* note 7, at 19.

242. Under Pennsylvania's program, a determination is made as to whether a juvenile can be released into the community upon turning 21 or whether he should be committed to the state's inpatient civil commitment program. *Frequently Asked Questions*, PA. SEXUAL OFFENDERS ASSESSMENT BD., http://www.soab.pa.gov/FortheCommunity/FAQs/Pages/default.aspx (last visited Mar. 12, 2018).

243. SOCCPN 2016 ANNUAL SURVEY, *supra* note 7, at 19.

244. Email from Jennifer Schneider, Principle Author, (July 11, 2017) (on file with author).

In all six states, the average SVP was forty or older when admitted to the program, and the median age of these prospectively dangerous persons was forty-eight, within two years of the category that demonstrated no risk in the Washington study. A majority of the California, Missouri, and Iowa SVPs were over fifty. In Washington, even with the second youngest age at admission of those states we were able to gather data from, the average age in the state program **was** forty-eight. Almost half of the Washington program population **was** in the group with no recorded sex re-arrests in the Washington study.

Even more remarkable is that the Padilla subjects had two characteristics that should have placed them at *higher* risk of reoffending than currently committed SVPs. First, California law at the time required that a person have two or more sexually violent predatory prior offenses in order to be committed as an SVP. Now every state, including California, requires just one. This difference matters because increased criminal history is correlated with higher risk of recidivating. In addition, the average Static-99 score of currently committed SVPs across the country is actually *lower* than in Padilla's sample. According to the Static 99 and 2016 SOCCPN annual report, the average Static-99 score across programs was 4.69,[245] which is below the average score from Padilla's study. According to the scoring manual for the Static-99R, a score of five would actually place those individuals at moderate-high risk of reoffending.[246] As previously noted, the average score in the Padilla study was six, which equates to a high risk of reoffending. That means that SVPs across the country would be expected to do even better than Padilla's sample if released into the community.

CONCLUSION

SVP laws are premised on the fact that they are incapacitating dangerous sex offenders who would be committing sexually violent crimes if released into the community. The only other possible justification—that these individuals deserve to be punished because they committed reprehensible crimes—would violate

245. 2016 SOCCPN ANNUAL SURVEY, *supra* note 7, at 27.

246. HELMUS ET AL., *supra* note 134. The creators of the instrument recommend that evaluators switch from the Static-99 to the Static-99R. Regardless of which instrument they choose, they should use the coding rules for the Static-99R. However, the age weights are different between the two instruments. AMY PHENIX ET. AL., Static-99R Coding Rules, Revised-2016 at 4. http://static99.org/pdfdocs/Coding_manual_2016_InPRESS.pdf. The Static-99 instrument was criticized for failing to adequately take into account how advancing age lowers the risk of recidivism. See REEVES ET AL. supra note 133 at 4 (internal citations omitted). In 2009, HELMUS ET AL. modified the Static-99 to try and address this problem. The Static-99 asks evaluators to score someone on whether they are older or younger than 25, but the Static-99R breaks age into four sub-categories. Evaluators are instructed to add one point to a person's risk score if they are between the ages of 18-34.9, add zero points if they are between the ages of 35-49.9, subtract one point if they are between the ages of 40-59.9, and subtract three points if they are over the age of 60. See HELMUS ET AL., supra note 134 at Static-99R Coding Form. The Static-99R does not address the problems raised by this article for two major reasons. First, many evaluators have not switched from the Static-99 to the Static–99R. Even if they have switched, the Static-99R has only been in existence since 2009, and so many SVPs could only have been committed using the Static-99. Second, the Static-99R has been criticized within the research literature on a number of serious grounds, which calls into question its accuracy in predicting risk. See REEVES ET AL., supra note 133 at 4.

the Constitution's double jeopardy prohibition.[247] Thus, prevention is not merely the most important objective of SVP strategy; it is the *only* legitimate legal objective.

Despite the critical importance of dangerousness, the Supreme Court upheld the constitutionality of Kansas's SVP law without requiring any actual proof that SVPs would commit predatory sex crimes if released. If the justices had looked for empirical proof instead of simply deferring to the assertions of the Kansas legislature, they would have seen that sex offenders actually have a low recidivism rate. Indeed, the DOJ has published three major studies—in 1997, 2003, and 2016—that have all shown that the vast majority of convicted sex offenders do not recidivate once released from prison. Of particular note is the 2016 DOJ study, which found just 5.6% of 20,422 convicted sex offenders were rearrested for rape or sexual assault within five years of release from prison.[248]

And yet sexually violent predator laws are necessarily premised on the idea that SVPs are different than run-of-the-mill sex offenders, which means the DOJ studies may be irrelevant in assessing their danger. What we really need then are studies that look specifically at how released SVPs perform in the community, but conducting such a study is difficult because most SVPs are never released. Indeed, we know of only two studies that have examined how released SVPs fare in the community. The Padilla study was shut down after it showed a 6.5% recidivism rate for 4.8 years at risk in the community. The Washington State Institute study, which initially appeared to support the notion that SVPs are extremely dangerous, ended up being consistent with the Padilla results once attention was focused on the offenders' age.

Padilla's study and the statistics in Table 2 from the Washington study undermine any theory of fixed levels of sexual violence risk. The men in Washington who were fifty or older when eligible for SVP status had historical records of prior sex offending that were almost certainly as long as the younger group. When had they become so low risk that no member of the population re-offended? It can't have been that a treatment program succeeded, because they weren't treated. Age alone seems to have diminished the propensity to sexually offend. If so, the notion of fixed and immutable danger requires reconsideration.

Even though most of the SVPs that California locks up are over fifty now, it is unlikely that they will ever be released. Like all other SVP states, California now makes commitment indeterminate[249]—in effect presuming that the risk a person poses at the age of forty remains the same when he is fifty, sixty, or even ninety. The Padilla study demonstrates why states should be required at the very least to prove recidivism danger at regular intervals, as California used to do. Putting the burden on the committed person to prove he is no longer dangerous is not a legitimate alternative. The politics of crime and fear of sex offenders mean that someone like Mr. Hendricks, who is now eighty-three-years-old and confined to a wheelchair, will never prevail.

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247. *See* Jones v. United States, 463 U.S. 354, 374 (1983) (Brennan, J., dissenting).

248. See DUROSE ET AL., *supra* note 94, at tbl. 2.

249. DEIRDRE M. D'ORAZIO ET AL., CAL. COAL. ON SEXUAL OFFENDING, THE CALIFORNIA SEXUALLY VIOLENT PREDATOR STATUTE: HISTORY, DESCRIPTION, & AREAS FOR IMPROVEMENT 17 (2009), https://ccoso.org/sites/default/files/CCOSO%20SVP%20Paper.pdf.

The ironic result of allowing state governments to make up their own theories of prospective sexual danger and never to test their hunches goes beyond the wasteful and unjust incarceration of elderly men with histories of sex offenses. Detailed and careful empirical study could provide much better evidence of the age and other characteristics of persons who have significant offending risks. For that reason, we urge the Bureau of Justice Statistics to resurrect and continue the Padilla study with what would now be a significant follow-up period. Until such research is conducted, we will never know whether the true legacy of *Kansas v. Hendricks* includes not just unjust confinement but also an allocation of limited resources with no focus on populations of maximum danger. Justice and community safety demand the truth.

APPENDIX 1

SVP Danger Requirement – All States and Federal Government

State	Statute	Standard for SVP commitment	Definition
Arizona	Ariz. Rev. Stat. Ann. §§ 36-3701(7)(a), (b) (West 2017)	7. "Sexually violent person" means a person to whom both of the following apply: (a) Has ever been convicted of or found guilty but insane of a sexually violent offense or was charged with a sexually violent offense and was determined incompetent to stand trial. (b) Has a mental disorder that makes the person likely to engage in acts of sexual violence.	Term "likely" in Sexually Violent Persons (SVP) Act's requirement that an SVP must exhibit "a mental disorder that makes the person likely to engage in acts of sexual violence" means more than probable or highly probable. *In re Leon G.*, 59 P.3d 779, 786–87 (Ariz. 2002).
California	Cal. Welf. & Inst. Code §§ 6600(a)(1) (West 2014)	(a)(1) "Sexually violent predator" means a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.	Under the Sexually Violent Predator Act (SVPA), a person is "likely" to engage in sexually violent criminal behavior, i.e., reoffend, if he or she presents a substantial danger, that is, a serious and well-founded risk, that he or she will commit such crimes if free in the community. People v. McKee, 223 P.3d 566 (Cal. 2010), at 571.
D.C.	D.C. Code Ann. §§ 22-3803 (West 1994)	(1) The term "sexual psychopath" means a person, not insane, who by a course of repeated misconduct in sexual matters has evidenced such lack of power to control his or her sexual impulses as to be dangerous to other	"Likely" is not defined. The following was found in the notes of decision: Habeas corpus petitioner, who was under hospital commitment as a sexual psychopath, was not entitled to release on the ground that he was not

Continued

State	Statute	Standard for SVP commitment	Definition
		persons because he or she is likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his or her desire.	mentally ill, as psychiatric testimony established that petitioner was still a sexual psychopath who was likely to be of danger to others if permitted to return to society. D.C. C.E. § 22-3503(1). *Clatterbuck v. Harris*, 295 F. Supp. 84, 85 (D.D. C. 1968). No case law clarifies definition of 'likely'
Federal	18 U.S.C. § 4247(5), (6) (2012)	Definitions from Adam Walsh Act. "(5) 'sexually dangerous person' means a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others."	"(6) '(S)exually dangerous to others' with respect to a person, means that the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." "While "likely" indicates more than a mere propensity or possibility, it is not bound to the statistical probability inherent in a definition such as "more likely than not," and the terms are not interchangeable. To conclude that "likely" amounts to a quantifiable probability, absent a more specific statutory expression of such a quantity, is to require mathematical precision from a term that, by its plain meaning, demands

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State	Statute	Standard for SVP commitment	Definition
			contextual, not statistical, analysis." *Commonwealth v. Boucher*, 880 N.E.2d 47, 50 (Mass. 2002).
Florida	Fla. Stat. Ann. § 394.912 (West 2016)	(10) "Sexually violent predator" means any person who: (a) Has been convicted of a sexually violent offense; and (b) Suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.	(4) "Likely to engage in acts of sexual violence" means the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others.
Illinois	725 Ill. Comp. Stat. Ann. 207/5 (West 2013)	(f) "Sexually violent person" means a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of a sexually violent offense by reason of insanity and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence.	"Likely" is not defined within the statute. The following came from the Notes of Decision: Term "substantially probable," as used in statute defining a sexually violent person, in part, as a person who suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence, means "much more likely than not." *In re Commitment of Dodge*, 989 N.E.2d 1159 (Ill. App. 1st Dist. 2013). The term "substantially probable," for purposes of the statute defining a sexually violent person,

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State	Statute	Standard for SVP commitment	Definition
			in part, as a person who suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence, means "much more likely than not" rather than "practically certain."[5] The statute relating to involuntary commitment of a sexually violent person, by requiring a finding beyond a reasonable doubt that the individual is dangerous because he or she suffers from mental disorder that makes it substantially probable that he or she will engage in further acts of sexual abuse, sufficiently narrows the persons eligible for confinement to satisfy the constitutional requirement of serious difficulty in controlling behavior. *In re Commitment of Curtner*, 972 N.E.2d 351 (Ill. App. Ct. 4th Dist. 2012); *In re Detention of Hayes*, 747 N.E.2d 444 (Ill. App. 2d Dist. 2001). "We determine that the phrase 'substantially probable' in the Act also means 'much more likely than not,' a standard higher than or equal to the 'likely' standard found constitutional

Continued

State	Statute	Standard for SVP commitment	Definition
			in *Hendricks*. However, we emphasize that this definition cannot be reduced to a mere mathematical formula or statistical analysis." *People v. Hayes (In re Hayes)*, 747 N.E.2d 444, 453 (Ill. App. 2d Dist. 2001).
Iowa	Iowa Code Ann. § 229A.12 (West 2014)	"Sexually violent predator" means a person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality which makes the person likely to engage in predatory acts constituting sexually violent offenses, if not confined in a secure facility."	"Likely to engage in predatory acts of sexual violence" means that the person more likely than not will engage in acts of a sexually violent nature. If a person is not confined at the time that a petition is filed, a person is "likely to engage in predatory acts of sexual violence" only if the person commits a recent overt act.
Kansas	Kan. Stat. Ann. § 59-29a02. (West 2014)	K.S.A. 59-29a02. Commitment of sexually violent predators; definitions. (a) "Sexually violent predator" means any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence. (b) "Mental abnormality" means a congenital or acquired condition affecting the emotional or	(c) "Likely to engage in repeat acts of sexual violence" means the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others.

Continued

State	Statute	Standard for SVP commitment	Definition
		volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.	
Massachusetts	Mass. Gen. Laws ch. 123A, §§ 1 (West 2010)	"Sexually dangerous person", any person who has been (i) convicted of or adjudicated as a delinquent juvenile or youthful offender by reason of a sexual offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility; (ii) charged with a sexual offense and was determined to be incompetent to stand trial and who suffers from a mental abnormality or personality disorder which makes such person likely to engage in sexual offenses if not confined to a secure facility; or (iii) previously adjudicated as such by a court of the commonwealth and whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by either violence against any victim, or aggression against any	"Likely" is not explicitly defined in the statute. The cases in the notes of decision repeatedly refer to the definition as "likely to engage in sexual offenses if not confined". Nothing in Jury Instructions. "While likely indicates more than a mere propensity or possibility, it is not bound to the statistical probability inherent in a definition such as "more likely than not," and the terms are not interchangeable. To conclude that likely amounts to a quantifiable probability, absent a more specific statutory expression of such a quantity, is to require mathematical precision from a term that, by its plain meaning, demands contextual, not statistical, analysis." *Commonwealth v. Boucher*, 880 N.E.2d 47, 50 (Mass. 2002).

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State	Statute	Standard for SVP commitment	Definition
		victim under the age of 16 years, and who, as a result, is likely to attack or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires.	
Minnesota	Minn. Stat. Ann. § 253D.02 (West 2013) "Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities"	This standard of commitment came from the notes of decision. Commitment pursuant to the sexual psychopathic personality statute requires there be (1) a habitual course of misconduct in sexual matters, (2) an utter lack of power to control sexual impulses so that (3) it is likely the person will attack or otherwise inflict injury, loss, pain, or other evil on the objects of their uncontrolled and uncontrollable desire. In re Preston, App.2001, 629 N.W.2d 104, 110 (Minn. 2001). A "sexually dangerous person" is defined as a person who has engaged in a course of harmful sexual conduct, has manifested a sexual, personality, or other mental disorder or dysfunction, and as a result, is likely to engage in acts of harmful sexual conduct.	From the notes of decision: In a commitment action under the sexual psychopathic personality statute, where utter uncontrollability of sexual impulses is found, the district court, in predicting serious danger to the public, should consider six factors: (1) the offender's relevant demographic characteristics, (2) the offender's history of violent behavior (with special attention to recency, severity, and frequency of violent acts), (3) the base rate statistics for violent behavior among individuals of this offender's background, (4) the sources of stress in the environment, (5) the similarity of the present or future context to those contexts in which the person has used violence in the past, and (6) the person's record with respect to sex therapy programs. *In re Preston*, 629 N.W.2d 104 (Minn. App. 2001). No jury instructions.

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State	Statute	Standard for SVP commitment	Definition
			"We now clarify that the SDP Act allows civil commitment of sexually dangerous persons who have engaged in a prior course of sexually harmful behavior and whose present disorder or dysfunction does not allow them to adequately control their sexual impulses, making it highly likely that they will engage in harmful sexual acts in the future." *In re Linehan*, 594 N. W.2d 867, 876 (Minn. 1999).
Missouri	Mo. Ann. Stat. §§ 632.480-.513 (2015)	(5) "Sexually violent predator", any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility and who: (a) Has pled guilty or been found guilty in this state or any other jurisdiction, or been found not guilty by reason of mental disease or defect pursuant to section 552.030, of a sexually violent offense; or (b) Has been committed as a criminal sexual psychopath pursuant to section 632.475 and statutes in effect before August 13, 1980.	"Likely" is not defined separately in the statute. With regard to the phrase "more likely than not" in the statute defining a sexually violent predator as any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility, there is no numerical correlation, it is left to the common sense of the trier of fact, and it is not a matter of whether the actuarials say the person is more than 50 percent likely to reoffend. *Underwood v. State*, 519 S.W.3d 861, 877 (Mo. App. W. Dist. 2017). (2) "Mental

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State	Statute	Standard for SVP commitment	Definition
			abnormality", a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others; The court or jury shall determine whether, by clear and convincing evidence, the person is a sexually violent predator. The person also must be found to suffer from "a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility." "Although the instructions used below required findings that "the respondent is more likely than not to engage in predatory acts of sexual violence if he is not confined," this is not enough because they did not require the juries to "distinguish the dangerous sexual offender whose mental illness, abnormality or disorder subjects him to civil commitment from the dangerous but typical recidivist" *Thomas v. State (In re Thomas)*, 74

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State	Statute	Standard for SVP commitment	Definition
			S.W.3d 789, 792 (Mo. 2002).
Nebraska	Neb. Rev. Stat. Ann. § 71-1201 to -1226	The statute cross references the terms defined in section 83-174.01. Dangerous sex offender; terms, defined (1) Dangerous sex offender means (a) a person who suffers from a mental illness which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of one or more sex offenses, and who is substantially unable to control his or her criminal behavior or (b) a person with a personality disorder which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of two or more sex offenses, and who is substantially unable to control his or her criminal behavior;	(2) Likely to engage in repeat acts of sexual violence means the person's propensity to commit sex offenses resulting in serious harm to others is of such a degree as to pose a menace to the health and safety of the public;
New Hampshire	N.H. Rev. Stat. Ann. § 135-E:1–E:2 (2010).	XII. "Sexually violent predator" means any person who: (a) Has been convicted of a sexually violent offense; and (b) Suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-	VI. "Likely to engage in acts of sexual violence" means the person's propensity to commit acts of sexual violence is of such a degree that the person has serious difficulty in controlling his or her behavior as to pose a potentially serious likelihood of danger to others.

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State	Statute	Standard for SVP commitment	Definition
		term control, care, and treatment.	
New Jersey	N.J. Stat. Ann. §§ 30:4-27.26 (West 1999).	"Sexually violent predator" means a person who has been convicted, adjudicated delinquent or found not guilty by reason of insanity for commission of a sexually violent offense, or has been charged with a sexually violent offense but found to be incompetent to stand trial, and suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for control, care and treatment.	"Likely to engage in acts of sexual violence" means the propensity of a person to commit acts of sexual violence is of such a degree as to pose a threat to the health and safety of others.
New York	N.Y. Mental Hyg. Law §§ 10.01-.17 (McKinney 200167)	(e) "Dangerous sex offender requiring confinement" means a person who is a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility. (q) "Sex offender requiring civil management" means a detained sex offender who suffers from a mental abnormality. A	Likely is not defined in the statute. But, the following can be found in the "trial" portion of the statute: Section 10.07: If the court finds by clear and convincing evidence that the respondent has a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the respondent is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility, then the court shall find the respondent to be a

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State	Statute	Standard for SVP commitment	Definition
		sex offender requiring civil management can, as determined by procedures set forth in this article, be either (1) a dangerous sex offender requiring confinement or (2) a sex offender requiring strict and intensive supervision. (r) "Sex offender requiring strict and intensive supervision" means a detained sex offender who suffers from a mental abnormality but is not a dangerous sex offender requiring confinement.	dangerous sex offender requiring confinement. This definition applies to New York County only; there is no binding statewide case law that clarifies. "It is not enough to find that it is 'more likely than not' that the Respondent meets the requisite criteria. This Court must be satisfied that it is 'highly probable' that the Respondent will commit the kinds of 'hands-on' sexual crime which qualifies as a 'sex offense'." *State v. P.H.*, 929 N.Y.S.2d 203, 2011 1884732, at *24 (N.Y. Supp. Ct. 2011).
North Dakota	N.D. Cent. Code Ann. §§ 25-03.3-01–24 (West 2013)	"Sexually dangerous individual" means an individual who is shown to have engaged in sexually predatory conduct and who has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that makes that individual likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others. It is a rebuttable presumption that sexually predatory conduct creates a danger to the physical	The phrase "likely to engage in further acts of sexually predatory conduct," for the purposes of adjudicating a sex offender as a sexually dangerous person means that the offender's propensity towards sexual violence is of such a degree as to pose a threat to others. N. D. Cent. Code Ann. § 25–03.3–13 (West 2013). NDCC 25-03.3-13. *In re B.V.*, 708 N.W.2d 877 (N.D. 2006).

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State	Statute	Standard for SVP commitment	Definition
		or mental health or safety of the victim of the conduct. For these purposes, intellectual disability is not a sexual disorder, personality disorder, or other mental disorder or dysfunction.	
Pennsylvania	42 Pa. Cons. Stat. Ann. § 9799.12	"Sexually violent predator." An individual determined to be a sexually violent predator under section 9795.4 (relating to assessments) prior to the effective date of this subchapter or an individual convicted of an offense specified in:[. . .] or (9) who, on or after the effective date of this subchapter, is determined to be a sexually violent predator under section 9799.24 (relating to assessments) due to a mental abnormality or personality disorder that makes the individual likely to engage in predatory sexually violent offenses. The term includes an individual determined to be a sexually violent predator or similar designation where the determination occurred in another jurisdiction, a foreign country or by court martial following a judicial or administrative determination pursuant to	Likely is not defined within the statute. "Mental abnormality." A congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons. Nothing in the jury instructions.

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State	Statute	Standard for SVP commitment	Definition
		a process similar to that under section 9799.24. In addition, the term shall include any person convicted between January 23, 2005, and December 19, 2012, of any offense set forth in section 9799.13(3.1) (relating to applicability) determined by a court to be a sexually violent predator due to a mental abnormality or personality disorder that made the person likely to engage in predatory sexually violent offenses, which person shall be deemed a sexually violent predator under this subchapter.	
South Carolina	S.C. Code Ann. § 44-48-30 (West 2012)	(1) "Sexually violent predator" means a person who: (a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. (3) "Mental abnormality" means a mental condition affecting a person's emotional or volitional capacity that predisposes the person to commit sexually violent offenses.	(9) "Likely to engage in acts of sexual violence" means the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others.

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State	Statute	Standard for SVP commitment	Definition
Texas	Tex. Health & Safety Code Ann. § 841.003 (West 2015)	a) A person is a sexually violent predator for the purposes of this chapter if the person: (1) is a repeat sexually violent offender; and (2) suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence.	"Likely" is not defined, but behavior abnormality is defined as: " Behavioral abnormality" means a congenital or acquired condition that, by affecting a person's emotional or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person. Tex. Health & Safety Code Ann. § 841.002 (West 2015) A secondary source confirms there is no case clarifying a definition for "likely" in Texas. No jury instructions.
Virginia	VA Code Ann. § 37.2-900 to -920 (West 2009)	""Sexually violent predator" means any person who (i) has been convicted of a sexually violent offense, or has been charged with a sexually violent offense and is unrestorably incompetent to stand trial pursuant to § 19.2-169.3; and (ii) because of a mental abnormality or personality disorder, finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts."	"Likely" is not defined within the statute. However, mental abnormality or personality disorder is defined as: "Mental abnormality" or "personality disorder" means a congenital or acquired condition that affects a person's emotional or volitional capacity and renders the person so likely to commit sexually violent offenses that he constitutes a menace to the health and safety of others." Nothing in Jury Instructions. "It is not necessary for an

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State	Statute	Standard for SVP commitment	Definition
			expert to state with specificity that the respondent will likely engage in sexually violent acts in the future; rather, the determination whether the respondent is likely to engage in sexually violent acts" as defined in Code § 37.2-900 "by clear and convincing evidence is an issue of fact to be determined by the court or jury upon consideration of the whole record." *DeMille v. Commonwealth*, 720 S. E.2d 69, 74 (Va. 2012).
Washington	Wash. Rev. Code Ann. §71.09.020 (7) (West 2015)	"Likely to engage in predatory acts of sexual violence if not confined in a secure facility"	"(T)he person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition."
Wisconsin	Wis. Stat. Ann. § 980.01–980.14 (West 2016)	980.01(7) "Sexually violent person" means a person who has been convicted of a sexually violent offense . . . and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence.	980.01(1m) "Likely" means more likely than not.

APPENDIX 2

Analysis of Evidence for SVP Dangerousness cited by State Supreme Courts in Upholding Laws

State	Case	Mention	Data on sex offenders generally	Data on released SVPs
Arizona[250]	*State v. Erhlich*, 59 P.3d 779, 787 (Ariz. 2002) *In re Leon G.*, 59 P.3d 779 (Ariz. 2002) (same as above case)	"(T)he legislature noted that, for a 'small but extremely dangerous group of sexually violent predators,' the 'likelihood of the sex offenders engaging in repeat acts of predatory sexual violence is *high*.'" (787)	No	No
California[251]	*Hubbart v. Superior Court*, 969 P.2d 584 (Cal. 1999)	"In recent years, lawmakers across the country have perceived a link between certain diagnosable mental disorders and violent sexual behavior that is criminal in nature."(587) "In describing the underlying purpose, the Legislature	No	No

250. ARIZ. REV. STAT. ANN. § 36-3701(6)(a) (2017).

251. CAL. PENAL CODE § 288(a) (West 2017); CAL. WELF. & INS. CODE § 6601(b) (West 2017).

Continued

State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		expressed concern over a select group of criminal offenders who are extremely dangerous as the result of mental impairment, and who are likely to continue committing acts of sexual violence even after they have been punished for such crimes."(587) "An uncodified statement accompanying the Act reads, in full, as follows: "The Legislature finds and declares that a small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders can be identified while they are incarcerated. These persons are not safe to		

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State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		be at large and if released represent a danger to the health and safety of others in that they are likely to engage in acts of sexual violence . . . . The Legislature further finds and declares that while these individuals have been duly punished for their criminal acts, they are, if adjudicated sexually violent predators, a continuing threat to society. The continuing danger posed by these individuals and the continuing basis for their judicial commitment is a currently diagnosed mental disorder which predisposes them to engage in sexually violent		

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State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		behavior."(587, n.5) "The Kansas Legislature found that sexually violent predators were highly likely to reoffend, and that confinement and treatment was necessary to reduce the 'risk' such individuals pose to society."(594) (citing *Hendricks*, 521 U.S. at 351)		
Florida[252]	*Westerheide v. Florida*, 831 So. 2d 93 (Fla. 2002)	"The Legislature concluded that the existing involuntary commitment procedures under the Baker Act are inadequate to treat 'a small but extremely dangerous number of sexually violent predators.' § 394.01- Fla. Stat. (2001)	No	No

252. FLA. STAT. § 800.04 (2017).

Continued

State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		The Legislature further recognized that 'the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different from [those for individuals who are committed] under the Baker Act.'"(99) "The Supreme Court noted the following factors as evidence that the act was not punitive: the State "disavowed any punitive intent'; limited confinement to a small segment of particularly dangerous individuals . . . ." (100) "Further, the		

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State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		affirmative restraint of 'a small but extremely dangerous number of sexually violent predators' who 'pose [a risk] to society' because they are 'likely to engage in criminal, sexually violent behavior,' 394.910, Fla. Stat. (2001), is a 'classic example of nonpunitive detention.'" (100) (citing *Hendricks*, 521 U.S. at 363). "The Legislature has the final word on declarations of public policy, and the courts are bound to give great weight to legislative determinations of facts. Further, legislative determinations of		

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State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		public purpose and facts are presumed correct and entitled to deference, unless clearly erroneous." (Citations omitted" (101) "The Legislature has determined that these individuals pose a risk to society because there is a high likelihood that they will engage in repeat acts of predatory sexual violence."(102)		
Iowa[253]	*In re Ewoldt*, 634 N. W.2d 622 (Iowa 2001)	"As the State urges, the legislature has recognized that 'the treatment needs of [sexually violent predators] are very long-term.'"(624)	No	No

253. IOWA CODE ANN. § 229A.2(11)(b)(4), (d) (West 2017); *id*. at § 725.3.

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State	Case	Mention	Data on sex offenders generally	Data on released SVPs
Kansas[254]	In re Care & Treatment of Hendricks, 912 P.2d 129 (Kan. 1996) *rev'd sub nom. Kansas v. Hendricks*, 521 U.S. 346 (1997).	"The Act is a product of the 1994 legislative session . . . The legislature's stated reasons for enacting a comprehensive scheme for commitment of sexually violent predators appear in K.S. A. 59-29a01: 'The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons defined in K.S. A. 59-2901 et	No	No

254. KAN. STAT. ANN. § 59-29a02 e(6) (2015);

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State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		seq. . . . The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high."(250)		
Illinois[255]	*In re Samuelson*, 727 N.E.2d 228 (Ill. 2000). *In re Varner*, 759 N. E.2d 560 (Ill. 2001), *vacated*, 537 U.S. 802 (2002).		No	No
Massachusetts[256]	*Commonwealth v. Bruno*, 735 N.E.2d 1222 (Mass. 2000).	"These particular features of the temporary commitment scheme reflect the Legislature's concern with protecting the public from harm by persons who are soon to be released and who are likely to be sexually dangerous." (1233)	No	No

255. 725 ILL. COMP. STAT. ANN. 207/5 (West 2018); 720 ILL. COMP. STAT. ANN. 5/11-6 (West 2018).
256. MASS. GEN. LAWS ANN. ch. 6, § 178C (LexisNexis 2017); *id.* at ch. 272, § 35A.

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State	Case	Mention	Data on sex offenders generally	Data on released SVPs
Minnesota[257]	*In re Blodgett*, 510 N. W.2d 910 (Minn. 1994) NOTE: Sexual psychopath case	"Here the compelling government interest is the protection of members of the public from persons who have an uncontrollable impulse to sexually assault." (914) ". . . the argument ignores the fact that the sexual predator poses a danger that is unlike any other." (917)	No	No
	In re Linehan, 594 N. W.2d 867 (Minn. 1999)	"We then reviewed adequate grounds for civil commitment of mentally disordered and dangerous persons, and concluded that the SDP Act was enacted to protect the public from sexual predators with mental	No	No

257. MINN. STAT. ANN. § 253B.02 (West 2018); *id*. at § 609.345.

Continued

State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		disorders 'who retain enough control to 'plan, wait, and delay the indulgence of their maladies until represented with a higher probability of success.'" (875)		
Missouri[258]	*In re Norton*, 123 S. W.3d 170 (Mo. 2003)	"The State has a compelling interest in protecting the public from crime. This interest justifies the differential treatment of those persons adjudicated as sexually violent predators when, as determined by the legislature, such mental abnormality makes them distinctively dangerous because of the substantial probability that they will	No	No

258. MO. ANN. STAT. § 632.480 (West 2017); *id.* § 566.068.

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State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		commit future crimes of sexual violence if not confined in a secure facility." (174)		
Nebraska	*J.R. v. Mental Health Bd.*, 762 N.W.2d 305 (Neb. 2009)	"The explicit purpose of SOCA is to protect the public from sex offenders who continue to pose a threat of harm to others."(319) "Mentally ill sex offenders are different from mentally ill persons who are not sex offenders due to the sexual nature of their crimes. Sex offenders are generally more dangerous to others than are the mentally ill, because of the high probability of recidivism and the unique nature of their crimes. The Legislature has defined a	No	No

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State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		dangerous sex offender as one who is substantially unable to control his or her desire or urge to commit sex offenses. Dangerous sex offenders pose a greater harm to society because of their inability to control their behavior, which invariably results in harm to others." (323).		
New Hampshire[259]	*State v. Ploof*, 34 A.3d 563 (N.H. 2011)	"In enacting RSA chapter 135-E, the legislature explicitly found that sexually violent predators have special treatment needs and present unique risks to society. As the statute provides, 'a small but extremely dangerous	No	No

259. N.H. REV. STAT. ANN. § 135-E:2(XI) (2017).

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State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		number of sexually violent predators exist who have antisocial personality features which are unamenable to existing mental illness treatment modalities, and those features render them likely to engage in criminal, sexually violent behavior.'"(577)		
New Jersey[260]	*In re W.Z.*, 801 A.2d 205 (N.J. 2002)	"In enacting the SVPA, the Legislature found that '[c]ertain individuals who commit sex offenses suffer from mental abnormalities or personality disorders which make them likely to engage in repeat acts of predatory	No	No

260. N.J. STAT. ANN. § 30:4-27.26 (West 2017); *id.* § 2C:14-3; *id.* § 2C:14-2.

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State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		sexual violence if not treated.'"(211)		
New York[261]	*State of New York v. Robert V.*, 929 N.Y. S.2d 203, 2011 WL 13644522011, at *2.	"Determining that some sex offenders have mental abnormalities that predispose them to engage in repeated sex offenses, the Legislature enacted SOMTA which provides that a person who is determined to be a detailed sex offender with a mental abnormality, as those terms are defined in . . . would be subject to civil management after that person had served his or her criminal sentence." (4) "New York is one of 18 other states and the	Yes	No

261. N.Y. CORRECT. LAW § 168-a(3)(a)(i) (McKinney 2018); N.Y. PENAL LAW § 130.65 (McKinney 2018).

Continued

State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		District of Columbia and the federal government to have enacted civil confinement statutes such as SOMTA with the intent of addressing 'a compelling need . . . to protect residents of this state from sex criminal whose recidivism is predictable and uncontrollable.'"(7-8) "According to the legislative history of SOMTA, there is a high rate of recidivism among certain sex offenders and certain sex offenders suffer from a mental abnormality that prevents them from controlling their sexual offending behavior . . . . Unfortunately, despite these		

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State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		legislative decrees, there is scant empirical evidence to support the bases asserted by the Legislature in enacting SOMTA. With respect to the rate of recidivism of sex offenders, numerous studies have found that the recidivism rate for sex offenders in the United States is quite low . . . . Indeed, sex offenders apparently re-offend at lower rates than non-sex offenders . . . . Notwithstanding the erroneous and unsupported foundations upon which the legislature premised SOMTA, in a 5-4 decision in 1997 in Kansas v.		

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State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		Hendricks, the Supreme Court deferred to these same legislative misconceptions in upholding the constitutionality of a comparable statutory scheme . . . . Despite the weak bases on which the Kansas legislature and, subsequently, the New York legislature, built its sex offenders civil management statute, the Supreme Court has deferred to these legislative findings in upholding the constitutionality of its statutory scheme. As set forth further below, this Court is constrained to follow the precedent established by the Supreme Court."(8-12).		

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State	Case	Mention	Data on sex offenders generally	Data on released SVPs
North Dakota[262]	*In re G.R.H.*, 711 N. W.2d 587 (N.D. 2006)	"North Dakota law defines a 'sexually dangerous individual' as an individual who has engaged in sexually predatory conduct and has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental order or dysfunction that makes the individual likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others."(594)	No	No

262. N.D. CENT. CODE ANN. § 25-03.3-01(7), (9)(a)(4), (9)(a)(7) (2017).

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State	Case	Mention	Data on sex offenders generally	Data on released SVPs
Pennsylvania[263]	*Commonwealth v. Lee*, 935 A.2d 865 (Pa. 2007)	"We begin our analysis by reviewing the legislative findings that the General Assembly furnished in support of its enactment of Megan's Law: 'These sexually violent predators pose a high risk of engaging in further offenses even after being released form incarceration or commitments and that protection of the public from this type of offender is a paramount governmental interest.'" (880)	No	No
South Carolina[264]	*In re McCracken*, 551 S.E.2d 235 (S.C. 2001) *In re Matthews*, 550 S. E.2d 311 (S.C. 2001) *State v. Gaster*, 564 S. E.2d 87 (S.C. 2002)	"Likewise, the South Carolina Act permits involuntary confinement based upon the determination the person	No	No

263. 18 PA. STAT. AND CONS. STAT. ANN. § 3126(a)(7)-(8) (West 2018).
264. S.C. CODE ANN. § 44-48-30 (2012); *id.* § 16-15-120.

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State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		currently suffers from both a mental abnormality or personality disorder and is likely to engage in acts of sexual violence."(*Gaster*, 564 S. E.2d at 90).		
Texas[265]	*In re Fisher*, 164 S. W.3d 637 (Tex. 2004)	"In 1999, the Legislature enacted the Civil Commitment of Sexually Violent Predators Act . . . In so doing, the Legislature found that: '[A] small but extremely dangerous group of sexually violent predators exists, and . . . . those predators have a behavioral abnormality that is not amenable to traditional	No	No

265. TEX. HEALTH & SAFETY CODE ANN. § 841.002(8) (West 2014); TEX. PENAL CODE ANN. § 21.11 (West 2014).

Continued

State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		mental illness treatment modalities and that makes the predators likely to engage in repeated acts of sexual violence." (639)		
United States	*Kansas v. Hendricks*, 521 U.S. 346 (1997)	"In the Act's preamble, the legislature explained: '[A] small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [general involuntary civil commitment statute] . . . . In contrast to persons appropriate for civil commitment under the [general involuntary civil commitment statute],	No	No

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State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		sexually violent predators generally have anti-social personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure . . . is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually		

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State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the [general involuntary civil commitment statute]. '"(351) "Those persons committed under the Act are, by definition, suffering from a "mental abnormality" or a "personality disorder" that prevents them from exercising adequate control over their behavior."(362) "Where the State has		

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State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		"disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent."(368-9)		

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State	Case	Mention	Data on sex offenders generally	Data on released SVPs
	Kansas v. Crane, 534 U.S. 407 (2002)	"We agree that *Hendricks* limited its discussion to volitional disabilities. And that fact is not surprising. The case involved an individual suffering from pedophilia – a mental abnormality that critically involves what a lay person might describe as a lack of control. Hendricks himself stated that he could not "'control the urge'"to molest children. 521 U.S. at 360. In addition, our cases suggest that civil commitment of dangerous sexual offenders will normally involve individuals who find it particularly difficult to control their behavior – in the general	No	No

Continued

State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		sense described above. Cf. *Seling* v. *Young*, 531 U. S. 250, 256, 148 L. Ed. 2d 734, 121 S. Ct. 727 (2001); Abel & Rouleau, Male Sex Offenders, in Handbook of Outpatient Treatment of Adults: Nonpsychotic Mental Disorders 271 (M. Thase, B. Edelstein, & M. Hersen eds. 1990) (sex offenders' "compulsive, repetitive, driven behavior . . . appears to fit the criteria of an emotional or psychiatric illness"). And it is often appropriate to say of such individuals, in ordinary English, that they are "unable to control their		

Continued

State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		dangerous-ness."(414-15)		
	United States v. Comstock, 560 U.S. 126 (2010)	"Congress could have reasonably concluded that federal inmates who suffer from a mental illness that causes them to "have serious difficulty in refraining from sexually violent conduct," § 4247 (a)(6), would pose an especially high danger to the public if released." (127) Cf. H. R. Rep. No. 109-218, at 22-23.		
Virginia[266]	*Shivaee v. Commonwealth*, 613 S.E.2d 570 (Va. 2005)		No	No

266. VA. CODE ANN. §§ 9.1-902(E)(1), 18.2-63 (2017).

Continued

State	Case	Mention	Data on sex offenders generally	Data on released SVPs
Washington[267]	*In re Young*, 857 P.2d 989 (Wash. 1993)	"The Legislature enacted extensive findings. Among those, the Legislature stated: 'In contrast to persons appropriate for civil commitment under chapter 71.05 RCW, sexually violent predators have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. . .The legislature further finds that the prognosis for curing sexually violent predators is poor, the treatment needs of this populations are very long	No	No

267. WASH. REV. CODE ANN. §§ 71.09.020 (West 2017); *id.* § 9A.44.076–.100.

Continued

State	Case	Mention	Data on sex offenders generally	Data on released SVPs
		term, and the treatment modalities for this population are very different than the traditional treatment modalities. . .'"(992–93)		
Wisconsin[268]	*State v. Post*, 641 N. W.2d 115 (Wis. 1995) *In re Laxon*, 647 N. W.2d 784 (Wis. 2002)	"The purposes of commitment under chapter 980 have already been identified as the protection of the community and the treatment of persons suffering from disorders that predispose them to commit sexually violent acts." (126)	No	No

268. WIS. STAT. ANN. §§ 980.01(6)(a) (West 2017); *id.* §§ 948.02, 948.07.