Sex Offender Post-Sentence Commitment Analysis

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[1] Clinton, H. (1996). *It Takes a Village: And Other Lessons Children Teach Us.* Simon & Schuster (Sept. 12, 1996). Retrieved from

Abstract

Sexual violence has plagued the world since the beginning of time, and as Governments organized taking an active role and responsibility in the protection of its people, laws criminalizing sex crimes have become more and more comprehensive with the goal of providing increased protection. Despite these attempts, convicted sex offenders continue to recidivate sexually even with programming and treatment efforts, albeit at a low rate. Sex crime rates have generally fallen throughout the country both in states with strict sex offender rules, and in states with less restrictions. The post-sentence indefinite commitment and confinement of those whom the state classifies as sexually violent is one such program whose goal is to reduce sexual recidivism by offering a seemingly more robust treatment program before reintegration. The program costs taxpayers millions of dollars per year and has yet to show that it is achieving its goal of protecting the public by reducing sex offenders' sexual recidivism. Though the Constitutional implications are grave, there is little program oversight, and the practice as a whole using its current model is doing little to reduce sex crimes. This research is concerned with the cost-benefit analysis of the program to inform stakeholders where money may be better spent.

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I. Introduction

A. Statement of the Problem

Millions of dollars are spent nationally on the involuntary, post-sentence commitment of sex offenders (Washington, 2005). Yet little is known about whether this practice achieves its intended purpose of reducing sex crime rates by lowering sex offenders' prevalence of sexual recidivism. Though sexually violent person (SVP) post-sentence commitment laws have been in existence throughout the United States since the 1990s, many states' with SVP programs sex offense rates have actually increased, while the national sex offense recidivism rate has declined, begging the question whether SVP laws are worth this high cost, or if this money may be better spent elsewhere (Shreenivasan, Hoffman, Cahan, Azizian, & Weinberger, 2020). Because those subject to commitment are indefinitely (often for life) confined in a prison-like environment *after* serving his court-ordered sentence, the Constitutional implications of double jeopardy and due process are grave, though the practice has withstood legal challenges throughout the past three decades, to include before the Supreme Court (Washington, 2005; Montaldi, 2015; Sandler & Freeman, 2017).

Today twenty states and the District of Columbia have active SVP laws with a current approximate total of 6,300 SVPs involuntarily and indefinitely committed throughout the country; these states spend on average, $174,000 annually per SVP with little to no program success, an astounding and consistently rising annual total of $940,000,000 (Jones, Glynn, & Peterson, 2015; Tollman, 2018). Non-SVP states spend an average of $15,000 per offender to treat and manage the country's remaining roughly 850,000 sex offenders (Buffler & Johnson, 2020). If the legitimate legislative goal of SVP commitments is to protect the community by reducing sexual recidivism, and the practice is not achieving this goal, how then has the program managed to exist for the past 30 years despite its heavy price tag on the wallet and on SVP liberty interests; why is the SVP program/process not regularly and critically evaluated to monitor its cost-benefit analysis?

Though the involuntary commitment of sex offenders began in the 1970's, during that period, the commitment was *in lieu* of a prison sentence and only reserved for severe "sexual psychopaths," thereby reducing the policy's Constitutional implications (Washington, 2005). During the deinstitutionalization of hospitalized mentally ill patients during the 1970s and 1980s, sex offenders were released into the community with little to no mental health treatment, the result of which led to, at a minimum, an appearance of higher rates of sexual recidivism. (Cocozza & Melick, 1979). Post-sentence commitments began two decades later, where at one point, twenty-five states were participants (Washington, 2005). Since the 1990s, five states' Supreme courts have ruled their respective SVP laws unconstitutional on various grounds of double jeopardy and due process concerns. In those states, along with other non-SVP states, sex offenders often receive longer prison terms, and are offered extensive treatment while in a correctional setting prior to their release to lower the risk of re-offense (Bonnar-Kidd, 2010). Throughout the three decades of SVP practice, data shows that as a whole, sexual recidivism in most non-SVP states is lower than states with SVP commitments (Montaldi, 2017; Sandler & Freeman, 2017; BJS, 2003, 2020).

This research will provide an overview of SVP laws, the process, and their implications on sex offenders and the community. It will then analyze sexual recidivism and prevalence of new victimizations both in states with SVP laws, and those without. Because states without SVP commitments require sex offender treatment, just as the states requiring commitment, part of the research will analyze the effectiveness of treatment under commitment compared with treatment offered during initial incarceration. After analyzing the data and information, this research will inform the audience whether sexual predator laws make communities safer from further acts of sexual violence and whether program changes are necessary.

B. Purpose of Study

Though the enactment of SVP laws nationwide may have been well intentioned (in direct response to the public's fear of sexual victimization based on dramatized media coverage of the extremely rare

kidnapping and assault of young children), legislators owe their constituents accountability of answering the question whether SVP laws make us safer by reducing sexual recidivism. Using this research to inform stakeholders about the cost-benefit analysis of SVP laws can impact the policy's effectiveness and longevity. If program changes are required to protect the community from sex crimes, an informed policy maker can do just that. The intended outcome of this research is that a clearer picture of the effectiveness of SVP laws emerge to ensure the high cost to taxpayers, and to those committed, is worthwhile: that it is making our communities safer by reducing sex offense rates and sexual recidivism, and if not, make recommendations for program or legislative change to get back to the initial legislative intent behind the SVP practice.

C. Significance of Study

This research is intended for criminal justice stakeholders to include law enforcement, judges and court staff, and other elected officials who make policy that can impact legislation. Many criminal justice programs exist today and have throughout the years that have had little to no oversight nor critical evaluation to help determine if they are worth keeping. Just because a law exists does not mean that it works in achieving the intent of its proponent. A review of national data on sexual recidivism reveals that sex offense rates in states with SVP laws have actually steadily increased throughout its years of SVP practice, while rates in states without such a practice have decreased. (B.J.S., 2003, 2020).

Millions of dollars are spent annually in America on SVP commitments, yet the program does not appear to be achieving its intended purpose of reducing sexual recidivism. Of the limited program effectiveness studies that have been performed, the SVP process –in its current form– is not effective, and is instead indefinitely warehousing sex offenders, many of which pose little risk to the community. Understanding the legal implications to SVPs and its intersection with an honest program evaluation will educate policy makers to determine what changes are necessary to ensure program legitimacy in actually achieving its goals.

This research will look to Uniform Crime Reports (UCR) data to critically analyze sex offense rates during the period predating the 1990s, and in the years since. It will look to national statistics, as well as state-specific information on sex crime rates specifically, in states with and without SVP laws. A review of scholarly journals analyzing sex offenders' sexual recidivism will be conducted to explore what programming has been successful in reducing recidivism. States' Departments of Health Services data on SVP commitment outcome statistics will be explored along with treatment models and will compared with Department of Corrections data on sex offender (non-SVP) treatment programs and recidivism rates. The research will focus on scholarly journal articles that have been published in the area of SVP commitment program effectiveness. Scholarly forensic psychology articles discussing the validity of sex offender actuarial instruments and other risk of recidivism tools, to explore what impact, if any, they have on a state's success in lowering sex offense recidivism, will be critically evaluated.

This research will begin by providing an overview of the SVP commitment process, and discuss the legislative intent, along with addressing what was going on in America when this trend began. It will discuss the legal implications of the Constitutionality of SVP laws, and what courts have decided –to include the U.S. Supreme Court— when litigants have challenged its legitimacy. It will then explore national sex offense rates from before its enactment, and after, looking at data from both states with and without SVP laws during the same time frames. Sex offense rates will be explored generally, and more specifically, sex offender sexual recidivism in states with and without SVP commitments. It will examine the states' process for determining high risk of re-offense, or who will be classified as SVP, and whether the process produces reliable results. If SVP laws are successful in reducing sex offense recidivism, it should be evident when analyzing this data, except, as outlined below, this data seems to show the contrary.

D. Methods

Because of the limitations on available data about released SVPs' sexual recidivism rates –due to the overwhelming number of SVPs kept in confinement and not released— this research will be

supplemented by governmental data of sex crime rates as a whole throughout the country. This analysis will include data on states never having SVP laws, states currently engaging in SVP commitments, and states that once had SVP laws, but no longer do. The evaluation research method will be utilized, looking to publicly available government data, as its primary source. Secondary sources, specifically scholarly journals and publications will be reviewed for information relating to SVP effectiveness at achieving its intended purpose of reducing sex crime rates. A benefit to utilizing this method is that it may reveal unintended consequences of SVP policy that detracts from the cost-benefit analysis of the program. SVP laws, due to their Constitutional implications, are highly controversial, so this research will be useful to inform both proponents and those opposed to the policy. Highlighting the validity of sex offender actuarial instruments, as the primary basis for classification of sex offenders, is important, because research shows that its use is riddled with inconsistent and inaccurate assessments of risk. Additionally, comparing SVP treatment models with non-SVP sex offender treatment is necessary: if the SVP treatment is truly more effective, why is it not offered to sex offenders during their sentences rather than after? Are SVP commitment laws just a ruse to keep those who society thinks are scary, regardless of risk of re-offense, locked up with the key thrown away?

Section II. Literature Review

A. Overview of SVP Legislation

On October 22, 1989 in Minnesota, an 11-year old boy began heading home from a convenience store on his bicycle with friends: his parents would never see him again. During this bike ride, the boy was abducted by Danny Heinrich, taken into the woods, brutally sexually assaulted, and shot to death; (Wootson, 2016). Around the same time in Washington, a young woman was walking to her car in a parking garage, and was abducted, sexually assaulted, and murdered by a convicted sexual psychopath who was out of jail on work release privileges (Satterberg, 2010). Shortly thereafter, a 7-year old Washington boy was kidnapped, sexually assaulted, and mutilated by a sex offender who was recently released from prison. These cases were widely publicized, and as if they weren't horrific enough, media

accounts of the offenses exaggerated and added even more graphic information making the offenses seem even worse, giving the public the impression/fear that these offenses are common and require an immediate and extreme overhaul of the way we manage sex offenders (Cucolo & Perlin, 2013). These cases occurred on the heels of a time where mental health hospitals throughout the country were closing their doors and threatening the release of mentally ill sex offenders (Washington, 1994). In response, sex offender legislation throughout the country ensued, the pioneer state being Washington (Washington, 1994, 2005). This legislation included the birth of the post-sentence commitment of sex offenders (SVP) (Washington, 1994, 2005). Ironically at the time of the SVP enactments, sex crime rates were on the decline nationwide (Przbylski, 2015; UCR, 1990-1995). But the media's portrayal and repeated nature of coverage gave the public the perception that these offenses were commonplace, and that the community was in need of more drastic measures for protection from sex offenders (Cucolo & Oerlin, 2013).

SVP laws allow states to indefinitely commit –and confine—those who the state *predicts* are at high risk for reoffending, for purposes of treatment, after the confinement portion of their sentence has already been served (Yung, 2013; Washington 2005; Montaldi, 2015). This practice is in contrast to the country's handling of mentally ill sex offenders prior to 1990, where offenders were sent to hospitals for mental health treatment in *lieu* of prison. There are currently roughly 6,300 people civilly committed under SVP laws throughout the country (Jones R., Glynn C., & Peterson, R., 2015; Tolman, 2018). It is estimated that states spend $100,000-150,000 per SVP per year on commitment (Tolman, 2018). Though a lot of research has been conducted about the reliability of actuarial instruments used to predict high risk of reoffending, an SVP selection practice, little research exists that evaluates the effectiveness of SVP practice in achieving the legislative intent: public protection by reducing sexual recidivism (Wrighten, Al-Barwani, Moran, McKee, and Dwyer, 2015). SVP laws have been in existence for three decades throughout the country, with billions of tax-payer dollars spent, with very little legislative oversight or accountability (Sandler & Freeman, 2017).

In 1990, Washington was the first state to enact SVP laws, and at its height, twenty-five states had SVP practices (Washington, 1996 and 2005). To date, however, only twenty states (District of Columbia, Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin) and the federal government indefinitely commit sex offenders they classify as high-risk post sentence, with five states having ruled their respective SVP laws unconstitutional on due process and double jeopardy grounds (Jones, Glynn, and Peterson, 2015; Tolman, 2018). Legal challenges in the remaining states are brought regularly by SVP Respondents, due to the daunting and seemingly never-ending restrictions on liberty and fundamental due process, with various levels of state and federal courts deciding Constitutionality in wildly different ways (Tolman, 2018).

B. The Process

Though each of the remaining twenty SVP states' legal requirements for SVP commitments vary slightly, the general requirements for commitment are: 1) the individual must have been convicted of an act of sexual violence[2] at some point, and is nearing the end of his prison sentence, and 2) have a current diagnosed psychiatric condition making it more likely than not that he will commit future acts of sexual violence if released (Washington, 2005).[3] When offenders whom the state believes meets this criteria is nearing the end of a prison sentence, the state serves the offender with its SVP commitment intent, triggering statutory due process rights, which vary throughout the country (Felthouse & Ko, 2018). Prospective SVPs have their cases heard at a commitment trial, where the central issue is the mental illness component, and the scientific opinion (prediction) of forensic psychologist experts using actuarial

[2] Violence is not defined by most of the states' statutes, but encompasses physical violence with hands-on sex crimes, as well as sex crimes not requiring any physical contact such as indecent exposure and window peeping. (See Wis. Stat. § 980). The lack of clarifying definition within the statutes is one of controversies of SVP practice.

[3] In Wisconsin, and several other states, a sexual paraphilia is not required. Any disorder, as described in the DSM V is sufficient. (See Wis. Stat. § 980).

measurement scales which claim to predict the likelihood of sexual re-offense, only those alleged to be high-risk offenders being eligible for SVP commitment.

Scholars have uniformly criticized the use of actuarials to determine sex offender risk of sexual recidivism, because research shows that the use of different actuarials, and even different practitioners' use of the same actuarial, produce wildly different results (Barbaree, Langton, & Peacock, 2006). Each of the commonly relied upon actuarial scales, have been criticized as being unreliable, yet states continue to rely almost solely on this information to determine who will be deemed an SVP, and who will not (Harris, Rice, Quinsey, Lalumiére, and Lang, 2015). Specifically, countless studies have shown that SVP's classified by the state as high-risk of sexual re-offense were not accurately categorized, often placing low-medium risk offenders into the high-risk category, resulting in erroneous and unnecessary SVP commitments (Wollert, 2006). A review of the literature relating to sex offender actuarial instruments shows that there have been ample studies about their reliability to accurately categorize offenders as high risk, versus some lower category; research overwhelmingly shows actuarial instruments to be poor predictors of sexual recidivism, but more accurate relating to general (non-sexual) criminal recidivism. This same review shows that some of the instruments produce more reliable results when supplemented by a multidisciplinary method of individualizing the evaluation, specifically looking to the details of the offense, and risk-lowering supports that the offender has in the community (Sandler & Freeman, 2017).

Once a sex offender is classified as an SVP and placed on commitment, he is confined indefinitely[4] in a secure treatment facility operated by the state (Washington, 2005). An SVP earns release by making progress in treatment, which is expected to lower his risk of reoffending, or from recovering from the predisposing mental health diagnosis. Those recovering are discharged from commitment, while those who make progress in treatment, are placed on supervised release (Wis. Stat. § 980; Washington,

[4] All but one (California) of the twenty SVP states allow for the *indefinite* confinement and commitment of SVPs. California limits the commitment period to two years, however at the end of this period, CA can once again petition for recommitment. In all other states, it is up to the SVP to petition the court to prove he no longer meets the criteria for SVP commitment (Felthouse & Ko, 2018).

2005). Current literature does not compare the effectiveness of correctional treatment with the treatment provided during SVP commitment, making it unclear whether SVP commitments, because of its unique treatment result in lower rates of sexual recidivism upon release than standard correctional sex offender treatment. Though this study's focus is not specifically on effectiveness of treatment, further research in this area is critically important for a full evaluation of the effectiveness of the SVP program. Literature is highly controversial in the area of SVP treatment, about half of the research showing it inadequate, making release from confinement not only nearly impossible, but also the rare release of treated SVPs not resulting in dramatically lower rates of sexual recidivism (Miller, 2010). Interestingly, research where findings are that current SVP treatment models are effective at reducing risk of sexual re-offense, all appear to have been funded by current SVP states and federal government agencies. Whether sex offender treatment, as a whole, is successful in reducing sexual recidivism, is a topic still the subject of debate, though most studies show that newer well-designed multidisciplinary treatment models have produced very small, but statistically significant reductions (Przybylski, 2015). These studies, however, do not distinguish SVP versus non-SVP treatment models, which is essential for a proper SVP program analysis.

C. Legal Controversy

Because SVP commitments result in the *indefinite* confinement of convicted sex offenders *after* they have served the confinement-portion of their sentences, often resulting in decades, if not a lifetime of confinement, Constitutional implications are evident. The United States Supreme Court ruled that SVP commitments are Constitutionally permissible, because they are "necessary and proper" to allow state governments the authority to protect its people from sexual harm (Yung, C., 2013, citing *Kansas v. Hendricks,* 521 U.S. 346 (1997). However, SVP statutes must be narrowly tailored and provide the least restrictive means necessary to achieve its purpose: commitments must be for treatment to reduce risk, not for punishment. SVP laws have been heavily litigated throughout the United States since their inception. Most recently, in 2015, the Federal Court ruled Minnesota's SVP law to be unconstitutional. Since

Minnesota began the practice in 1995, 715 offenders have been subjected to SVP commitments, and only three have been provisionally (supervised) released –in total (Sepic & Cox, 2015). The court ruled the indefinite nature of the commitments was a violation of the double jeopardy and due process clauses of the Constitution, and that the limited treatment offered was a ruse for the state's actual practice of indefinite confinement with no real possibility of release, equating the practice to purely punishment. Five states (including Minnesota), since the birth of SVP post-sentence commitments, have declared their states' SVP policy unconstitutional on similar grounds (Harris, et al., 2015). However in the 20 remaining SVP states, sex offender commitments have been challenged, and upheld over the past three decades.

i. Double Jeopardy

The Fifth and Fourteenth Amendments of the United States Constitution protects Americans from being punished twice for the same crime (Double Jeopardy Clause). Because SVP commitments are served after an offender has finished his entire court-ordered sentence, and because commitments allow for actual confinement analogous to a prison setting, many policy makers and offenders argue that SVP laws violate this basic Constitutional prohibition. In *Kansas v. Hendricks*, the U.S. Supreme Court held that Kansas's SVP statute does not subject Kansas SVPs to double jeopardy, because the commitment is for treatment purposes, and though the least restrictive means for protection of the public is the goal, confinement is sometimes necessary to protect the public from the potential of sexual violence (Lave & McCrary, 2013). However, this reasoning is the subject of great scrutiny, as treatment models are left up to the states with little to no program evaluation nor oversight, resulting in the almost blanket lifetime confinement of SVPs nationwide (Yung, 2013). Some states' supreme Courts have seen through this logic, like Minnesota, and have subsequently ruled their respective SVP laws Unconstitutional, as the phrase "for treatment purposes" must actually mean offenders are being treated, that treatment is working, and everyone has the same goal of release (Felthouse & Ko, 2018). What is actually happening in SVP states is that SVPs are being warehoused, and for all intents and purposes, punished, for the second time for the same crime, with no hope of release.

ii. Substantive Due Process Considerations

Before the Government can take away a person's fundamental right to liberty, the Due Process Clause requires that certain safeguards are in place, providing offenders with due process both substantively, and procedurally (Zolfo, 2018). Courts upholding the Constitutionality of SVP laws have said time and time again that because states are (arguably) defining a very small segment of the population --mentally ill sex offenders with high risk of sexual re-offense-- and because SVP laws are enacted under a state's inherent police powers to protect its people from dangerous behavior, SVP practices are Constitutionally permissible (Lave & McCrary, 2013). This would be good reasoning *if* the state truly was targeting *only* that population. Literature is vast surrounding the problems with the use of actuarial instruments to predict sex offenders' risk of sexual recidivism. As mentioned above, low risk offenders are sometimes erroneously labeled as high risk, and then labeled SVP, while some rare truly risky offenders slip through the cracks. Because states are not accurately identifying with certainty those who pose the danger, the laws are impacting a larger group, depriving lower risk offenders of due process.

SVP commitments require a clinical diagnosis of a mental illness, some states requiring sexual-specific paraphilia, while others only requiring *any* clinical diagnoses, regardless of that condition's propensity, or symptom of sexual violence. Therefore, it is not clear how states not requiring a sexual paraphilia diagnosis ensure that its SVP practice only targets those whose psychiatric condition predisposes him to a high risk of sexual re-offense, it is this mental illness component of dangerousness the courts have relied upon when upholding the Constitutionality of SVP practice, as conditions are treatable (Lave & McCrary, 2013). Failure of the legislature and the judiciary to ensure that we are truly limiting indefinite commitments to those with a condition that makes them actually sexually dangerous, flies in the very face of due process: the government can only restrict the fundamental right to freedom with legislation if that legislation is narrowly tailored and rationally related to advancing a compelling state interest (Gaines, 2004).

In American jurisprudence, the burden of proving a case is almost always on the plaintiff, and in the case of SVP commitments, on the state, that the prospective offender meets all of the statutory requirements necessary for commitment (Gaines, 2004; Felthouse & Ko, 2018). The SVP commitment process is riddled with burden shifting, which leaves an accused, who has little to no resources, at the mercy of the state: from the very beginning, doctors paid by the state will diagnose an offender with condition qualifying him/her for SVP status, leaving only those with means to hire another expert that might offer a different, or a more precise evaluation (Gaines, 2004). This leaves offenders to have to prove to a jury that they are not mentally ill and/or do not pose a danger for future acts of sexual violence.

In some SVP states, jury trials can be requested by either the state or the offender meaning that if the prosecution wants a jury, a jury there will be (Zolfo, 2018). There are plenty of strategic and substantive reasons why an offender might want to choose trial by judge alone, rather than to a jury: often, the underlying sexual offenses –that have already been litigated at the criminal trial level—have very bad and inflammatory facts; facts that are so bad that they cause the common person to forget everything else, and just assume dangerousness, and propensity for danger, despite evidence to the contrary, resulting in erroneous commitments, commitments premised on cases not proven to the standard of beyond a reasonable doubt (Gaines, 2004). Judges are more desensitized to bad facts and can arguably offer more objectivity when determining whether an offender meets the criteria for commitment. Being forced into a jury trial raises due process implications.

Lastly, because SVP treatment models are forever changing, and their effectiveness in reducing recidivism rarely evaluated, the game keeps changing mid match with SVPs: progress in treatment is often impeded by the state changing the rules, making criteria for release elusive (Zolfo, 2018). This elusiveness challenges the Constitutionality of SVP practice, as the parameters for treatment's relation to achieving the state's purpose of community safety are not as clear as Courts have been promised they are.

D. Sexual Recidivism Rate Comparison

Because SVP laws can result in lifelong confinement, exceeding the statutory maximum punishment for most sex offenses, understanding the program's effectiveness in reducing sexual recidivism is paramount. Prior to the enactment of post-sentence sex offender commitment laws in 1990, the national sex offense recidivism rate was 3.5% within the first three years of prison release (B.J.S., 2003). This rate was (is) substantially lower than the recidivism of any other crime (B.J.S., 2003). Wisconsin's rate during this same time period, prior to the enactment of Chapter 980 (Wisconsin's SVP law) was similar at 3.8% (WI DOC, 2003). Wisconsin's recidivism rate for other offenses was an astounding 43% within the first three years of release (WI DOC, 2003). The rate of violent crime recidivism nationally, and in Wisconsin has seen a steady decline since the 1990s: Wisconsin's violent offense recidivism rates have reduced somewhat steadily from 36.1% in 1990 nearing 26.2% by 2017, crimes where the offenders were not subject to post-sentence commitments (WI DOC, 2003). However, post Chapter 980 enactment, Wisconsin has seen an increase in sex offense recidivism. In 2019, Wisconsin's sex offense recidivism rate was 8.8% amongst registered sex offenders (WI Dept. Just., 2020). This rate includes the rate of re-offense amongst all sex offenders, not just those subject to commitment.

Sandler, and Freeman (2017) conducted an extensive review of sex offenders' sexual recidivism throughout the country and found:

> Recidivism rates and risk factors related to sex offender recidivism have been extensively reviewed and reported in the literature, with the results of numerous studies indicating that the overall sexual recidivism rate is relatively low, ranging between 7% and 15% at a 5-year follow-up (Hanson and Bussie`re, 1998; Hanson, Harris, Helmus, and Thornton, 2014; Harris and Hanson, 2004; Helmus, Hanson, Thornton, Babchishin, and Harris, 2012). Research results have also shown that rates for sexual recidivism can be reduced, dropping to between 5.4% and 10.9% after successful completion of *correctional* (emphasis added) treatment (Hanson, Bourgon, Helmus, and Hodgson, 2009; Hanson et al., 2002; McGrath, Cumming, Livingston, and Hoke, 2003). In its detailed analysis of 15 states, the Bureau of Justice Statistics found that 5.3% of the 9,691 sex offenders released in 1994 were rearrested for a new sexual offense within 3 years of being released

> (Langan, Schmitt, and Durose, 2003), compared with rearrest rates of 73.8% for property offenders and of 66.7% for drug offenders (Langan and Levin, 2002) (Sandler, and Freeman, 2017, pp. 915-916).

Interestingly in Minnesota, the sexual recidivism rate was close to 9% from 2006-2010 during a portion of its SVP commitment tenure (MN DOC, 2010). Since its SVP law was ruled unconstitutional in 2015, its sexual recidivism rate has gone down to 4.9% and continues to decline (MN DOC, 2017). Minnesota has conducted significant studies of its sex offender correctional treatment since 2015 and has found its current program to result in significant decreases in sex offender sexual recidivism. Literature reports that in non-SVP states more time and effort is spent on evaluating sex offender correctional treatment, the results of which lead to periodic changes of treatment models, resulting in reduced recidivism, and reduced periods of confinement.

Because so few SVPs are released from commitment, there has been very little research about the effectiveness of SVP treatment, and its impact on recidivism, making program evaluation very difficult. Florida released 140 sex offenders from commitment from 1995-2011, and 5 were rearrested for a sex offense (3.6%) (Montaldi, 2015). This rate was only .4% lower than its overall sexual recidivism rate. Does this potentially statistically insignificant decrease justify the grave Constitutional implications of the SVP practice? It is imperative that states with SVP laws continue to research recidivism rates of its released SVP offenders, and that future research reevaluate this policy.

It is important to note that recidivism rates do not reflect the actual rate of re-offense: not all sex crimes are reported to the police (Przbylski, 2015). The Bureau of Justice Statistics (BJS), and U.S. Department of Justice through the use of the National Crime Victimization Survey, estimate that only 39% of sex offenses are reported to the police (Catalano, 2005). However, studies of recidivism rate trends acknowledge when there has been systematic decline, it must be assumed that the rate of actual re-offense, including unreported sex offenses, are also declining. Nationally, sex crime recidivism rates in SVP states are affected only in minimally statistically insignificant amounts (Przbylski, 2015).

E. Existing SVP Program Studies

Most of the literature available that claims to evaluate SVP program effectiveness is sponsored by the state whose program is being evaluated (WI DHS 2016; Washington, 2005) Of this literature, all claim that SVP commitments achieve their purpose by reducing sex offenders' sexual recidivism. Of the program evaluation literature that is not state-funded, research shows SVP commitments in their current form do little to have any effect on recidivism, and instead costs the country millions of wasted dollars each year (Sandler & Freeman 2017). Instead, a multidisciplinary model with individually tailored treatment programs, and focusing on community supports and educational and vocational rehabilitation with shorter periods of commitment, have shown to produce the best results (Sandler & Freeman, 2017). Of all the court cases addressing the legality of SVP commitments, ongoing program evaluation for effectiveness did not seem to be a concern, but rather the blind faith that the state will see to it that the programs continue to live up to their hype. The Government Accountability Office has addressed SVP commitments, conducting a study of the effectiveness of SVP treatment, finding results to be inconclusive (GAO, 2002).

A thorough program evaluation is necessary to determine if the SVP practice works, and if not, what changes are necessary to reestablish its legitimacy.

Section III. SVP Program Evaluation

A. Sexually "Violent" Offense

To qualify for SVP commitment in each of the twenty SVP states, though the statutory wording varies from state to state, the common theme is that the offender must have been convicted of a sexually "violent "offense, or an offense that was motivated by sex ("index offense") (Washington, 2005). Statutes across SVP states lack clear definition of what actually constitutes violence. There is no requirement that the Government make a showing of current violence, so, depending upon how long ago the conviction was, in most cases, the last act of violence the subject displayed was years, even decades earlier

(Weinberger, Sreenivasan, Azizian, and Garrick, 2018). The obvious qualifying offenses are penetrative sexual assaults of children or adults, which are rare with current incident victimization rate of 2.7 per 1,000 (B.J.S., 2019). The not so obvious offenses that are sometimes qualifying are lewd acts, or the exposure of ones' genitals to the public, with no physical violence required, the high schooler that engages in a sexual relationship with his 15 year-old girlfriend, and her parents find out, or the robbery where the offender happens to steal women's underwear; he might have an underwear fetish, but pose no danger of committing a sexual offense (Tolman, 2018). Another not so obvious fact is that the sexually "violent" offense need not be the current offense the offender is in prison for, while facing commitment, but rather that he has had a "sexually-violent "offense at some point, offenses occurring prior to SVP enactment also qualifying (Hoppe, et al. 2020). (Sex offenders selected for commitment in the early 1990's had even stronger due process violation arguments, because when their qualifying index offenses occurred, they were not on notice of the possibility of SVP commitment –it didn't exist. Notice of potential consequences is fundamental in America's system of justice).

In SVP commitment proceedings, regardless of the type of index offense qualifying an offender for potential commitment, the Government must prove, in most cases to a jury, the underlying facts of this conviction –again-- causing all of the dirty and scary facts, facts that have already proven to be true, to be heard by people with limited to no experience with criminality. It is a common human experience to judge a person's potential dangerous based on bad things they have done, ignoring the science and current information on the issue of potential sexual re-offense. The Federal Rules of Evidence, and the rules of evidence in every state generally prohibit the government in criminal cases from discussing facts of previous offenses at a jury trial. The idea is that the Government must prove the facts of the current offense without giving the jury the opportunity to have improperly-clouded judgment; the jurist proponents of these rules well understood that being able to discuss salacious facts from a previous offense might taint the jury into believing that because the offender did x on such and such occasion, that regardless of what the evidence now shows, he must have acted in conformity during the current offense.

Allowing evidence of a previously litigated crime(s) to come into evidence in a subsequent case (SVP commitment trials) shifts the burden to the offender to try to prove that despite the bad facts surrounding his conviction, regardless of how long ago the offense may have occurred, he has learned his lesson and does not pose a risk of re-offense, an uphill battle. This dramatic departure from the cloth of the reliability of admissible evidence creates an unwritten presumption of dangerousness that the offender must overcome to avoid SVP commitment (Scurich & Krauss, 2014). The presumption of dangerousness is created by this otherwise inadmissible evidence of other bad acts being admitted, but also by the public's (jurors') misconception of danger, and likelihood of re-offense based on the medias' dramatized nature and over coverage of the rare violent sex offense (Cuculo & Perlin, 2013).

B. Mental Health Diagnosis Requirement

The key component that saved SVP practice from being ruled unconstitutional by the United States Supreme Court, is that the legislative intent is to provide community protection by offering treatment to "dangerous" and mentally ill sex offenders. As mentioned above, because it is not Constitutionally permissible to be punished twice for the same crime, despite SVP confinement in a prison-like environment for an indefinite period of time, the mere fact that its purpose is to offer effective treatment prior to release, was enough to satisfy the court that SVP practice does not run afoul of Double Jeopardy. To require treatment raises the implication that something is wrong and can be fixed or is responsive to treatment in a risk-lowering way. Whether SVP treatment achieves this intended purpose is the subject of much debate, largely because of the 63,000 people nationwide that have been committed as SVPs, only roughly 500 have been released, less than 10%, a rate that has remained fairly constant since the program's inception (Scurich & Krauss, 2014; Goodwin, 2007).

To qualify as an SVP in each of the twenty states that engage in SVP commitments, a person must not only have a conviction for a sexually violent offense, or an offense motivated by sex, but also have a mental disorder, which is not well defined in SVP statutes. (Hoppe, Meyer, Orio, Vogler, and Armstrong, 2020). Many states only require that an offender have *any* mental disorder contained within

the Diagnostic and Statistical Manual (current edition during the time of commitment proceeding). The Government need only to somehow tie that disorder to a prediction that the offender is more likely than not (50.1%) to reoffend sexually if not subjected to SVP commitment (Hoppe, et al., 2020; Sreenivasan, 2020; Tolman, 2018). Personality disorders, depression, anxiety, and sometimes, cannabis disorders are some examples of disorders that can qualify a person for SVP commitment in most SVP states (Hope., et al., 2020). As long as the government can show that this disorder affects the offenders "volitional capacity which predisposes the person to commit sexually-violent offenses," it seems, any disorder will do (Kan. Stat. Ann. § 59-29a02(b) (2020).[5] Often, clinicians hired by the state to evaluate prospective SVPs for the existence of a qualifying mental condition will rely on specific case facts from the offender's index offense, no matter how old, when determining a diagnosis, not taking into account that the index offense might have been precipitated by circumstances (divorce, use of substances at time of offense, etc.), rather than on a current compulsion, due to mental illness, to commit a sexually violent offense (Weinberger, et al., 2018). The Government's institutional failure to link a mental health diagnosis in SVP practice to a current risk of sexual re-offense is another cause for concern amongst mental health practitioners, as it results in the continued institutionalization of those that don't pose any more risk than the "average" person struggling with mental illness. (Hope, et al., 2020).

The failure of SVP proponents to adopt more specific definitions as to which mental disorders or abnormalities make a person more at risk for committing a sexually violent offense has been the source of controversy since the SVP commitment inception. The American Psychiatry Association has long criticized what it calls the Government's misuse of the profession of psychiatry to achieve higher rates of commitment, saying "sexual predator commitment laws represent a serious assault on the integrity of psychiatry…psychiatry must vigorously oppose these statutes in order to preserve the moral authority of the profession and to ensure continuing societal confidence in the medical model of civil commitment."

[5] Most SVP states have modeled their SVP statutes and definitions of mental abnormality after Kansas's SVP law that was upheld by the U.S. Supreme Court in *Kansas v. Krane*, 534 U.S. 407, 412 (2002).

(Schwartz, 2000, pp. 123-124). Mental health professionals throughout the country oppose SVP commitments in their present form, indicating that it is the Government's way to warehouse any criminal that poses a risk, regardless of whether that risk is sexual recidivism versus some other type of offense (Sreenivasan, et al., 2020). It is estimated that 60-80% of the entire prison population suffers from some sort of personality disorder, so including this condition as qualifying for SVP commitment widens the proverbial SVP net capturing those that don't pose any more danger than the average criminal being released from prison (Hoppe, et al., 2020).

Using Wisconsin as an example, of all of those committed as SVPs from 1994-2016, 54.1% had the "sexual re-offense predisposing" diagnosis of antisocial personality disorder (Whitaker, 2017). 7.1% had alcohol abuse disorder, and 3.4% suffered from intellectual developmental disorder (Whitaker, 2017). Though numerous other conditions can qualify a person for SVP commitment, the fact that an alcoholic, that may have had a twenty-year old conviction for touching his 15-year-old girlfriend's breasts when he was 18, could qualify for commitment, should shock the conscience. To make matters worse, in Wisconsin, the standard of proof for the dangerousness requirement was "substantially likely," meaning closer to 100%, from 1994 through 2002; if the Government could not prove that it was substantially likely that the offender, because of his mental condition would reoffend sexually, he would not get committed. In 2002, the standard changed to "more likely than not," meaning, greater than 50% causing an influx of new commitments, a wider casted net (Whitaker, 2015). The same trends have been seen throughout the SVP states (Weinberger, et al., 2018). Regardless of these standards, SVP states have wildly different diagnoses qualifying an offender for commitment, despite the universal nature of psychological science and its intersection with prediction of risk.

C. Risk of Re-Offense

After the Government has determined a potential SVP offender has the requisite index offense conviction, along with essentially any mental health diagnosis that one can make the stretch predisposes

an offender to the risk of sexual re-offense, the Government goes through a sometimes forum-shopping event looking for forensic psychologists that will opine (guess) that the person poses enough of a risk to meet the legal standard necessary for commitment. In SVP practice, the use of actuarial instruments along with clinical interviews is the standard practice to predict likelihood of sexual re-offense (Hoppe, et al., 2020; Wrighten, et al., 2015). Though this research's primary focus is not on the use of actuarials (the study of the controversy of the use of actuarials would uncover material for an entire thesis on its own), a brief overview of the practice and the controversy is necessary for a proper program analysis. Actuarial use is a departure from what was a clinical judgement only method, where whether an individual was classified as SVP was nothing more than chance, or the individual judgement of one psychiatrist meeting with the offender often on only one occasion (Perillo, et al., 2020; Berlin, Galbreath, Geary, and McGlone, 2003).

Actuarials are tools that insurance companies use to determine risk, slightly better than guesswork, and in the SVP world, they are instruments that were developed by studying small groups of sex offenders, tracking their personal characteristics, and whether the offender was deemed later on to present a low, medium, or high risk to sexually reoffend given those characteristics (Perillo, et al., 2020). Clinicians throughout SVP states deploy these actuarial assessments during a prospective SVP clinical evaluation. There are multiple actuarials utilized throughout SVP states that have been changed throughout the years, primarily when it is discovered that those classified as high or low risk, later do not act in conformity (Craig and Beech, 2008; Berlin, et al., 2003). Some common ones are the MNSOST-R (Minnesota Sex Offender Screening Tool Revised), Static 99-R, and Static-99 (Berlin, et al., 2003).

Amongst all of the actuarials, points are assessed if an offender portrays certain subjective characteristics (i.e. current age, whether offender is married, what level education, age at time of index offense, whether victim was a stranger, lack of a previous long-term relationship, etc) then, depending on the scale, and depending on the clinicians interpretation of the offender's history, the clinician gives the offender a numerical score. This score is then placed into the instruments' pre-studied (albeit with small

sample sizes) risk category groups of low, medium, and high risk of sexual re-offense. Those scoring in the mid to high range are slotted for commitment (or recommitment) proceedings (Craig & Beech, 2010; Rice, et al., 2015). In some cases, when an offender does not score high enough, and the index offense was either especially violent and/or drew enough media attention that the public is watching, the Government seeks out another forensic evaluation hoping for a higher score, opting for commitment once it is received (Rice, et al, 2015). It is common for two evaluators to score the same offender in polar opposite risk group categories; one might not consider the high school girlfriend as a previous long-term relationship, or may improperly classify a victim as a stranger, thereby giving the offender an erroneous higher score (Craig & Beech, 2010; Rice, et al., 2015). The other glaring issue with the use of all of the actuarials is that the foundation of the instruments were built on limited, and small populations of sex offenders, not consistently replicated overtime with different groups and populations. Because the scale is skewed, and produces inconsistent results, placing an individual offender into one of the potentially erroneously labeled "medium or high risk" groups, is dangerous, as it assumes that the offender poses the same risk as the average within the group, even when it has been shown time and time again to be an inconsistent prediction of risk. (Rice, et al., 2015).

The result of this unfortunate practice is that more and more offenders are labeled high risk, and are subjected to SVP commitment, when the risk might not be present at all. The opposite is also true, which should give stakeholders pause.

D. Treatment Model

Once an offender's fate turns to that of an SVP and is committed by the Government, treatment in confinement is expected, and required for release consideration.[6] The problem is, what exactly is SVP

[6] An SVP has two avenues for release: for supervised release, one must make "substantial progress in treatment" according to the institution, which is said to reduce the offender's risk of sexual recidivism; for a discharge from commitment, the SVP must show that 1) he no longer suffers from a predisposing mental condition, and/or 2) despite the mental condition, his risk has been reduced (age scoring, for example, on actuarials shows that after 40, the risk for that category reduces the SVP into a low risk category, an no longer appropriate for commitment. (Wis. Stat. § 980; Washington, 2005).

treatment? Who is responsible for monitoring its effectiveness? If SVPs are rarely released from confinement, is the treatment being provided effective and capable of lowering a sex offenders' risk of sexual re-offense? How is effectiveness in treatment measured? If it is not effective and does not –in most cases—result in release, how are SVP commitments not a violation of the Double Jeopardy Clause? This cyclical reasoning is what keeps 6,300 people committed and confined throughout the United States with very limited release rates, and for most, a lifetime behind bars (Hoppe, et al., 2020). Using Wisconsin as an example, which averages 367 confined SVPs at any given time, only releasing an average of 5.6% or just 228 since SVP's inception (1994 through June of 2020) and 19+ new SVP referrals per year (Whitaker, 2017; 2019; Plant, 2021). Treatment and care costs Wisconsin 58.6 million dollars, or $209,000 per SVP per year (Plant, 2021). The cost for treatment for non-SVP sex offenders who are serving their initial sentence averages $36,000, and then reduces to roughly to $9,600 for continued sex offender treatment upon their release (Mercado, Jegglic, and Markus, 2013). SVP costs are high and unsustainable, producing little to no success in keeping communities safer by reducing sexual recidivism.

Research into SVP treatment is scant, and whether the treatment actually reduces risk is not well known, because too few are actually released, and treatment models throughout the states keep changing (Hoppe, et al., 2020). Sex offender treatment in general has been ripe with controversy, and a majority of literature seems to suggest that it does little to reduce sexual recidivism. (Mercado, et al., 2013). However, a growing body of research seems to suggest that sex offenders do well with cognitive behavioral therapy ("CBT"), or helping to change the way the offender actually thinks about their sexual impulses, changing patterns with empathy, arousal reconditioning, and discussing relapse prevention (Mercado, et al., 2013). A Minnesota study of sex offender CBT showed a reduction in sexual recidivism of 27% post 9 years of release, albeit a small sample size (n=1,164) (Mercado, et at., 2013). CBT can be offered to SVPs, and non-SVP sexual offenders, and is becoming a more common treatment model amongst both populations. The rate of confinement release of non-SVP sex offenders is close to 100%, versus the 9% average release rate from SVP commitments nation-wide. Prospective SVPs undergoing

CBT during their initial period of confinement, if the treatment is truly effective, should also reap risk-lowering benefits. However, those selected for commitment who almost always have had no violent acts, nor sexual re-offenses for years since their index offense with no current evidence of violence, never get a chance to "prove" that the correctional sex offender treatment they received in prison has worked, and their chance of reoffending has been substantially reduced. Instead, the SVPs are funneled into another confined setting and given similar treatment models indefinitely, seemingly, to no avail.

In Wisconsin, as previously mentioned, one path to SVP freedom is through supervised release, for those that have made "significant progress in treatment." (Wis. Stat. § 980). Since 1994, 89 of the 228 released SVPs had their supervised release revoked, and only 4 for sexual re-offense (2.5%) (Plant, 2021). As mentioned above, Wisconsin's current overall sexual recidivism rate is 8.8%, with a 3.6% rate prior to the enactment of SVP laws. Because SVPs receive sex offender treatment both in prison and also under commitment, it is impossible to determine if the reduction in sexual recidivism, if any, is a result of the prison sentence, the prison sex offender treatment, the commitment itself, the SVP treatment during commitment, or some combination of all or some of these factors, or whether the person was improperly labeled as high risk, and thus erroneously committed, but would otherwise have been among the 95% national average of non-SVP sex offenders that would have been released from prison and not sexually reoffended. Most –but not all—SVP states require periodic reevaluation of SVPs to ensure that they still meet the minimal criteria for commitment, and/or whether progress in treatment can be shown to effectuate supervised release, with the burden on the SVP (Hoppe, et al., 2020). In Wisconsin, these "paper" reevaluations occur annually and consist of a state-funded doctor's opinion whether the SVP still suffers from a predisposing mental health condition, and whether, despite being in treatment, the SVP continues to pose a medium to high risk of sexual re-offense using the actuarial method outlined above, often not recommending discharge from commitment nor supervised release.

SVP confinement facilities throughout the country utilize their own versions of what constitutes an acceptable SVP treatment program, and similarly, what constitutes progress in treatment, treatment

models varying from state to state. Sex offender treatment programs have changed vastly since SVP's inception, and those SVPs in confinement at the time of the changes must adapt his plan to earn release, often resulting in losing years of progress under a previous plan (Svreenivasan, et al., 2020). In essence, the ball keeps moving further and further down an indefinitely-sized field, with no end in sight. Choosing not to participate in treatment bumps an offender up in risk categories on the actuarial instruments, leaving the SVP in a pickle. What's worse, is that states' circuit courts manage the docket of SVP commitments, rather than some higher state or federal level review board, and have no oversight function about whether treatment is in fact achieving its purpose of reducing sexual recidivism, justifying its legitimacy. Though some states' fiscal bureaus publish research on how much is spent on commitments from year to year, these publications have not connected the dots from the cost of treatment to the actual benefit to society. It is unknown whether any federal agency has been tasked with oversight of the SVP process to ensure that its result is not the lifetime warehousing of Americans with no legitimate purpose (GAO, 2002).

These outlined problems with the treatment process and validity should give policy makers and members of the judiciary who constantly approve SVP commitments with little insight into whether the process is working pause. It is essential for the SVP process to maintain (achieve) Constitutionality, that the treatment process be monitored and adapted to ensure it is actually providing a benefit, and that this benefit outweighs the monetary and societal cost.

E. Sexual Recidivism Rate Comparison

Because this research is concerned with the cost-benefit analysis of the SVP program, any potential benefit of safety to the community can only be measured by looking to the country's sex crime rates before, during, and post SVP commitment practices. Prior to the enactment of post-sentence sex offender commitment laws in 1990, the national sex offense recidivism was 3.5% within the first three years of prison release (B.J.S., 2003). This rate was (is) substantially lower than the recidivism of any other crime (B.J.S., 2003, 2019). In 2005, the Bureau of Justice Statistics launched a study of 381, 83

newly released prisoners, and followed them for a nine-year period: at nine years, 83.3% of all prisoners had committed a new crime (2.6% were sex offenses) (B.J.S., 2019). Of those that were convicted of violent non-sex related crimes, 43.4% went on to commit a new (non-sexual) violent crime, and 4% were rearrested after having committed a sex crime (B.J.S., 2019). Of those released in 2005 for a sex offense, 28.1% were rearrested within that nine-year period for a violent (non-sex related) offense, and 7% recidivated sexually (B.J.S., 2019).

Wisconsin's sex crime rate prior to the enactment of Chapter 980 (Wisconsin's SVP law) was 3.8% (WI DOC, 2003). Wisconsin's recidivism rate for other offenses was an astounding 43% within the first three years of release, albeit on par with the national average (Wis. DOC, 2003). The rate of violent crime recidivism nationally including Wisconsin has seen a steady decline since the 1990s: Wisconsin's violent offense recidivism rates have reduced from 36.1% in 1990 to 26.2% by 2017 where post-sentence commitment was neither an option nor contemplated by legislators (Wis. DOC, 2003). However, post Chapter 980 enactment, Wisconsin has seen an increase in sex offense recidivism. In 2019, where Wisconsin was 25 years into its SVP practice, Wisconsin's sex offense recidivism rate rose to 8.8% amongst registered sex offenders (Wis. Dept. Just., 2020). Also during 2019, Wisconsin released just 18 of its 364 committed SVPs with no available data on their recidivism (Plant, 2021). Since 2014, Wisconsin's sex crime rate has been steadily increasing. There have been no substantial SVP program changes to account for this change, meaning the release rate of SVPs did not increase, nor did the number of commitments decrease.

In Michigan, where its SVP law was ruled Unconstitutional in 2010 (SVP practice existing from 1996-2010) sex crime rates decreased soon after SVP commitments ceased. In 1996, there were 4,493 reports of sex offenses, 5,186 in 1998, 5,438 in 2002, 5,344 in 2006, and 5,556 in 2010 (MI, 2021). Since 2010, Michigan's sex crime rates have declined, despite its increase in other crimes. (Michigan, 2021). The current Michigan sex offense rate is 5.6%, with 4,002 sex offenses reported in 2019, and an expected even lower rate for 2020, though the data is not yet available (Michigan, 2021).

In 2016, Washington's sex crime rate was 6.2%, despite its robust SVP practice (Washington, 2016). Looking at data archives, Washington had 3,081 sex crimes reported in 1990, and 2,659 in 2000 (Washington, 1990). By 2010, Washington's sex crime rate remained similar, with 2,586 sex offenses reported (Washington, 2010). By 2018, its sex crime rate jumped to 6.6% (Washington, 2018). Washington, as the Pioneer state, has been engaging in SVP commitments since 1990.

Nationally, the largest recent study of adult sex offenders' (n=9,691) sexual recidivism which was published by the U.S. Department of Justice, showed a rate of 5.3% at 3 years post release, a rate that has been on the decline since this 2015 study (Przybylski, 2015). Of these offenders, many received correctional sex offender treatment during the confinement portion of their sentences and /or treatment in the community. These treatment plans are substantially similar to SVP treatment programs throughout the country, which are said by their creators to reduce sexual recidivism by 27% (Macado, et al., 2013). Sandler, and Freeman (2017) conducted an extensive review of sex offenders' sexual recidivism:

> Recidivism rates and risk factors related to sex offender recidivism have been extensively reviewed and reported in the literature, with the results of numerous studies indicating that the overall sexual recidivism rate is relatively low, ranging between 7% and 15% at a 5-year follow-up (Hanson and Bussie`re, 1998; Hanson, Harris, Helmus, and Thornton, 2014; Harris and Hanson, 2004; Helmus, Hanson, Thornton, Babchishin, and Harris, 2012). Research results have also shown that rates for sexual recidivism can be reduced, dropping to between 5.4% and 10.9% after successful completion of correctional treatment (Hanson, Bourgon, Helmus, and Hodgson, 2009; Hanson et al., 2002; McGrath, Cumming, Livingston, and Hoke, 2003). In its detailed analysis of 15 states, the Bureau of Justice Statistics found that 5.3% of the 9,691 sex offenders released in 1994 were rearrested for a new sexual offense within 3 years of being released (Langan, Schmitt, and Durose, 2003), compared with rearrest rates of 73.8% for property offenders and of 66.7% for drug offenders (Langan and Levin, 2002) (Sandler, and Freeman, 2017, pp. 915-916).

Interestingly in Minnesota, the sexual recidivism rate was close to 9% from 2006-2010 during its SVP commitment tenure (MN DOC, 2010). Since its SVP law was ruled unconstitutional in 2015, its sexual recidivism rate has gone down to 4.9%, and continues to decline (MN DOC, 2017). Minnesota has conducted significant studies of its sex offender correctional treatment since 2015 and has found its current program to result in significant decreases in sex offender sexual recidivism.

Despite its SVP practice, Florida has seen a dramatic increase in its sex crime rates since 2010 from 6,882 to 8436 in 2018 (Florida, 2021). Because so few SVPs are released from commitment in Florida, and nationally, there has been very little research about the effectiveness of SVP treatment in conjunction with commitment, and its impact on recidivism, making program evaluation very difficult. For example, Florida has only released 140 of its 1,348 sex offenders from commitment from 1995-2011, and 5 were rearrested for a sex offense (3.6%) (Montaldi, 2015). This rate was only .4% lower than its overall sexual recidivism rate including non-SVP sex offenders. The same is true analyzing the data across each of the SVP states.

Looking to sex crime rates nationally, and within each state is important for a critical evaluation of the validity of SVP practice. If the program was successful at only committing those who pose the highest risk of re-offense, and treatment was actually effective at reducing sexual recidivism, shouldn't states with SVP commitments see a recidivism decrease, especially since almost all SVPs continue to be locked up? If treatment being offered to SVPs is different from the standard sex offender treatment, shouldn't we see a higher rate of success with released SVPs? If SVP treatment is truly better at reducing sexual recidivism, why isn't the whole program offered to sex offenders during their initial sentence period? Though many of these questions are without answers, they are highlighted here to give criminal justice stakeholders pause when determining whether SVP commitments are worth their heavy price tags of both money and the substantial infringement on liberty.

Section IV. Recommended Changes

It should be clear by now that SVP practice as it currently exists is not reducing sex crimes throughout the country. And yet, the Government continues to detain indefinitely the pawns of this never-ending match. As more and more resources are poured into SVP programs throughout the practicing states, the less money that is available for the bulk of sex offenders, resulting in a decline in available treatment, and an increased risk of recidivism (Janus, 2004). As mentioned above, though the number of sex offenders "selected" as SVPs is small compared to sex offenders as a whole, the majority of

correctional funding is spent on SVP commitments rather than on sex offender correctional and outpatient treatment for those in need that are soon to be or have been released. Like all criminals, some sex offenders also recidivate if left unrehabilitated. Having no or limited sex offender treatment available results in an increase in recidivism and victimization, and the perception that more people should be classified as SVPs, thereby throwing even more money into a program that has shown little to no success at achieving its purpose. The cyclical justification created is responsible for the longevity of this multimillion dollar, failing program with limited oversight or change.

A. Reluctance to Change and the Multidisciplinary Approach

Because there has been little research about whether SVP programs achieve their intended purpose of protecting the community by reducing sex offenders' sexual recidivism, there are also limited ideas from scholars in the fields of psychology and criminal justice on how to make improvements. However, courts and legislators have consistently taken notice of the failing SVP model, ordering program changes, that quickly revert back due to political pressure from the media. For years, Minnesota was the "gold standard" SVP program in the United States, because its tiered focus treatment model gave the perception that SVPs could ultimately be released with reduced sexual recidivism rates just by making it through the program (Janus, 2004). The reality was, however, that like other SVP states, within 10 years of its enactment, SVP commitment rates were skyrocketing, with little to no releases, resulting in a large increase of confined SVPs and skyrocketing costs which were eventually noticed by Congress. Because money speaks, Minnesota implemented changes to their sex offender programing, and began offering the tiered treatment to sex offenders in prison with the hope of having the same affect reducing the "need" for additional SVP commitments (Janus, 2004). During the same timeframe, the state consulted with experts in the field of sexual psychology and forensic pathology who opined that SVPs can be managed in the community with individualized treatment plans. Prior to this happening, the media got a hold of the information and spun the story as the state was irresponsibly forever releasing sexual psychopaths, terrifying the public; most recommended program changes were not implemented (Janus,

2004). Minnesota's program has been fairly stagnant since, however interestingly, in 2015, Minnesota's Supreme Court declared its SVP statute –as is—unconstitutional and ordered a task force be established to oversee program changes that pass Constitutional muster, ensuring that the SVP program is actually achieving its purpose. The state appealed these orders, with a federal judge reversing judgment, and the U.S. Supreme Court declining to hear the matter. Minnesota has not made notable program changes, nor has it shown that its program is achieving its purpose (MIN, 2020).

Wisconsin's SVP history is similar to Minnesota's, except in the early 2000's, Wisconsin's legislature liberalized the criteria for SVP supervised release due primarily to the increase in funding required to maintain the SVP program as is, which resulted in 39 releases at once, more than had been released since the program's inception (Janus, 2004). Of those 39, 14 were revoked from release and returned to commitment confinement due to minimal rule violations, none of which were new sex offenses. Once again, the media got a hold of this data, and its coverage resulted in the legislature once again tightening the release restrictions. Wisconsin's SVP statute has undergone minimal change since the 2007 amendment which made release from commitment more difficult.[7]

In 2017, New York conducted a study and found that a multidisciplinary oversight board is critical to ensure that constant evaluation of its SVP program takes place so that money isn't being spent on a failing program that teeters on the edge of Constitutionality at an astronomical price (Sandler & Freeman, 2017). New York's method of selecting those that pose a high risk of sexual re-offense is more reliable than relying solely on the use of actuarial scoring. New York begins the SVP screening with actuarial measurements. They then follow up those that score in the high category with a clinical evaluation that has a team of experts in the areas of reintegration, psychology, public safety, social work, and vocational rehabilitation. When the team meets with the prospective SVP, the team determines, based on the individual's strengths and weaknesses (education, social support, finances, etc.), if services can be

[7] Wis. Stat. § 980 (2007, 2013, 2017).

offered in the community to supplement the offender's weak areas which reflect an increased risk if left unchecked (Sandler & Freeman, 2017). The study analyzed the sexual re-offense rates of those that were screened out from the SVP process using the multidisciplinary approach, with those that were screened out previously with the use of actuarials and a short clinical interview only: New York got it wrong 7% of the time (*n*=6,494*)* basing sexual recidivism on actuarial scores, as 7% of those screened out were rearrested for a new sexual offense within 10 years of release. Only 3.2% of those screened out using the multidisciplinary approach committed new sex crimes after release (*n*=6994) (Sandler & Freeman, 2017).

New York has been engaging in this more robust screening process since 2014, the data suggesting that what they are doing is working to reduce sexual recidivism. In 2005, New York studied 19,827 sex offenders that had been released from prison, showing that 8% were rearrested for a new sex crime within eight years of their release (NY DPCA, 2006). By 2018, that rate dropped to being on par with the national average at 5.2%. Despite engaging in SVP practice, New York's sex crime rate is extremely high (33.7% in 2017, lowering to 32.1% by 2020), though the number has seen a slight decrease in the past two years (NY, 2021). This rate can be attributed, in part, to the fact that the state is still rebounding from having pumped so much money into its SVP program, that the large majority of sex offenders (who are not SVPs) are released with little to no treatment or resources (NY, 2021). However, as suggested by the above date, the majority of sex offenses reported to the police were committed by those without previous sex crime convictions. It appears that the threat of punishment, and potential SVP classification is doing little to deter New Yorkers contemplating sex crimes.

Working with the population the Government has control over, sex offenders, the ability to make more accurate predictions as to who truly poses a risk of sexual re-offense is essential to restoring the credibility of SVP commitments, and the assurances that their purpose actually achieve its goal of community protection. Additionally, with New York's more accurate way of predicting this risk, its Government is able to ramp up treatment efforts on the front end and increase community support for those who are nearing release. Lowering sex offender's sexual recidivism will result in a decrease in the

sex crime rate, therefore rehabilitative, and individualized treatment plans are essential. The only way to individualize what each offender will need to be successful is to engage in this robust, multidisciplinary approach.

Despite New York's success, and research with its SVP program and sex offender evaluations of risk, other states have been reluctant to come on board. It is critical for states to unify to see what is working and what is not and to implement changes necessary to achieve their common goal of reducing sexual recidivism, and hopefully, sex crime rates as a whole.

B. Legislative Oversight and Accountability

In addition to this multidisciplinary approach, legislative oversight and requiring accountability of States to only engage in SVP practices that work at reducing sexual recidivism is paramount to ensuring that we do not go another 30 years imprisoning people for no legitimate purpose. The Government Accountability Office (GAO) has the responsibility of oversight of federal programs to ensure programs funded with federal dollars are actually achieving their intended purpose (GAO, 2021). The GAO has a running list of "high risk" programs that cost exorbitant amounts of money with little to no return on the investment at achieving the programs' intended purpose, and run the risk of fraud, waste, and abuse contrary to federal law. Of the programs that are on the list, 5 got worse while under evaluation, and did not implement recommended changes, causing the GAO to take more extreme action to get top leadership attention (GAO, 2021). Even though federal dollars provided to the states for community protection are used for state SVP programs, because the SVP commitment process is a state function, there is no current GAO oversight, nor is there a national agency that monitors the practice. Because an exorbitant amount of federal money is being spend on a failed program, and because the U.S. Supreme Court has ruled generally on the Constitutionality on SVP practice, a quasi-federal/state committee should be considered. This committee can, much like the GAO, monitor and regularly critically evaluate SVP practice throughout the United States, and make suggested changes. Of course, if the recommended changes are not implemented, this committee can publish data and research to "get the attention" of state leaders,

legislators, and the judiciary. The GAO has had success in this area, so a committee not tied to politics, that offers neutral, and unbiased information is equally critically to ensure that the research and program evaluations remain based in evidence, with no thought to reelection, nor fear of media scrutiny.

Aside from periodic legislative fiscal reviews of SVP statistics and program trends, and the rare independent academic review, most SVP states lack an oversight panel. Therefore, at the present time, in almost every SVP state, no one has the affirmative duty ensure the program is legitimately achieving its goals and is a good use of taxpayers' money. States are not currently required to rely on experts in the field to monitor evaluation criteria and to see to it that SVP statutes are narrowly-tailored to ensure only the truly dangerous are committed. They are generally do not require state run SVP facilities to demonstrate that the treatment being offered is actually doing its job at reducing sexual recidivism, and that releases are occurring. The sole reason SVP statutes have been upheld as not to violate the double jeopardy clause is that its purpose is for treatment and not punishment, and that SVP statutes are in fact only committing the small population of those that pose a high risk of re-offense. The very definition of treatment is providing some type of therapy to a treatable condition that reduces symptoms related to the condition. If, as research suggests, SVP states overwhelmingly have under producing SVP treatment programs that have not shown to reduce recidivism, then the practice is a ruse for the underlying intent of pure punishment. Additionally, as outlined above, it is clear that the way states measure risk is flawed and unreliable, so the practice is not only committing those that pose a high risk. An oversight committee will hold states fiscally and morally responsible to only engage in SVP practices if its programming was successful in reducing recidivism, and that its method of evaluation of risk was substantially reliable. The fact that millions of dollars are spent annually on SVP commitments, and there is little public or Governmental concern that this money appears to be essentially wasted is a fact that must be brought into the light.

Developing this oversight committee that enforces one unified standard across the country during its evaluations and recommendations will take evaluation out of the state's hands for a neutral and

completely detached critical look into its programs. It is easy to get tunnel vision and to develop cognitive biases when looking at oneself. This change would eliminate that concern. Having this committee, based on the well-established GAO model, conduct regular program analyses would ensure that if the SVP program was not achieving its intended purpose, that the attention of our nation's top leaders would be drawn, and changes would inevitably be made so that our communities are getting safer, while protecting the Constitutional rights of even the most undesirable of persons; yes the Constitution applies no matter your path.

C. One Standard with Definitiveness

Because it is clear that SVP states have no intention of ceasing the practice anytime soon, one glaring deficiency and area for improvement is that each of the states' SVP statutes vary from state to state, but nearly all lack clear and unequivocal definitions of key phrases which make up the commitment criteria: to qualify as an SVP, one must have a conviction for a sex offense, or an offense motivated by sex. Even in states that enumerate the qualifying sex offenses, there is a catch all that basically says any violent offense with a sexual flavor can qualify a person for commitment. This gray area captures numerous people who may never have harmed a person at all, as explained above. Because SVP practice has been upheld by the U.S. Supreme Court, it should be this Court that lays out the specific parameters at to what qualifies as a sexually violent offenses for purposes of SVP commitment. One law, one standard. No ambiguity.

Each SVP state requires some form of a mental abnormality for SVP commitment, which as explained above can be something as common as alcohol abuse disorder in some states, where others are more restrictive as to what diagnoses are qualifying so that only those that have a condition that predisposes them to commit acts of sexual violence are even considered for SVP commitment. Relying on experts in the field of psychology to define and narrow the scope of these qualifying conditions on a national level, subject to constant evaluation and peer review, will improve the likelihood of someone who is not predisposed to sexual violence who happens to have an unrelated condition from being

committed unnecessarily. There must be a requirement linking this mental abnormality to risk of sexual re-offense, otherwise, all we are evaluating is general criminality risk. We do not have commitment practices for all high-risk offenders, despite the over 75% recidivism rate of all other offenses. If sexual re-offense is all we are concerned with, SVP practice must only capture those that pose a high risk of *sexual* re-offense. Requiring this link from the mental condition to the risk has to be mandated, because, as required by the Supreme Court, it is not Double Jeopardy when the purpose is treatment of this mental condition that results in the reduction of sexual re-offense. If the mental condition is not linked to risk, we are "treating" a condition, while the risk factors (of general criminality) remain high, giving the impression that the treatment is not working. It is comparing apples to oranges.

Lastly, the third controversial phrase essential in all SVP commitment statutes is the person's likelihood to reoffend sexually, a prediction. As mentioned earlier, some states have a preponderance of evidence standard, meaning 51% likely based on the use of actuarial instruments, where others require a "substantial likelihood," bringing the probability closer to the 90% range. Because of the grave Constitutional implications on liberty and double jeopardy, and the purpose of SVP commitments, substantially likely should be the standard, at a minimum, if not proof beyond a reasonable doubt, the same standard as criminal matters. If we truly are only interested in confining –for purposes of treatment to reduce sexual recidivism—the most dangerous who actually pose a risk more than the average criminal, why wouldn't it be mandatory that the standard of proof be the requirement. One federal standard is necessary to ensure SVP states are truly only trying to protect the community, rather than pacify the media, and ensure reelection.

Clear and unequivocal definitions, based on science, rooted in Constitutionality is the first step towards ensuring SVP commitment program legitimacy. Implementing only those risk measurements that have proven to capture reliably only those that pose a high risk of sexual re-offense must be required. Having an oversight committee to ensure that these practices are living up to their hype and are a proper use of Government funding is the only way for states to take a step back and to actually make change,

when they know that for the first time, someone is watching. The fact that these things are not occurring, despite this 30-year endeavor, should be troubling to the criminal justice practitioner.

Section V. Conclusion

A. Limitations

Sexual recidivism data on released SVPs is scant, as the rate of release is practically non existent, so understanding if SVP commitments –by themselves-- actually reduce risk is impossible at this juncture. There are many intervening factors that might contribute to any appearance of a reduction of sexual recidivism, including the fact that sex offenders in prison are provided treatment and services designed to lower risk of reoffense. Additionally, because of the problems with how SVP risk is measured, and the unreliability in only committing those who pose a high risk, means that many are committed that posed little to no risk from the beginning. If a low risk person improperly labeled as high risk, is released from SVP commitment, and does not reoffend sexually, it cannot be assumed that it was because of his commitment. Implementing the above-suggested changes, and continuing to study SVP offenders well into their release is necessary to determine if SVP commitments are reducing sexual recidivism.

B. Summary and Conclusions

Admittedly, the nature of this research appears on its surface to convey that there is no risk to the public releasing sex offenders into the community after prison, and that there is no legitimate need for SVP commitments. Though sexual crimes have the second lowest recidivism rates (second only to homicide), like other offenses, there is a risk to the community, a risk that the public deserves protection from. There are real victims of sexual offenses that suffer devastating trauma, trauma that criminal justice stakeholders have an obligation to help prevent. However, what is the real risk of sexual recidivism? If SVP treatment is more successful than correctional sex offender treatment, why is it not offered earlier on in the process right after conviction? Why aren’t all levels of the criminal justice system bothered by the

fact that America is spending billions to make the community safer from sex crimes, but that it isn't working?

The purpose of this research was to highlight that despite its hefty price tag, the SVP program is doing little to reduce sexual violence, even though it has been in existence for the past 30 years, and to suggest program changes that offer results in ensuring protection of the public, and the protection of offenders' Constitutional rights. Unfortunately, with the nature of America's political system, politicians must be concerned with elections, and appeasing to popular public opinions, even if those opinions are not based in fact. Allowing SVP practice to exist with little to no program oversight, or accountability, or even the slightest requirement that those who are responsible for the program's longevity actually know if it is working is irresponsible both fiscally and morally. Informed policy makers can educate the public and the media and have an intelligent discussion about the practice, the risks, and what is required to overhaul the program and why change is critically important to provide protection and resources.

Most of the public gets its information about crime from the media, so educating the media, regardless of whatever inflammatory response is possible, is critically important to try to change the narrative provided to the public in the area of sex crimes, treatment, and public protection. A unified response from the agency appointed and required to oversee SVP practices about how the taxpayers' money is actually being spent, along with in-depth program statistics on recidivism, prediction of risk, and treatment models is necessary to evaluate the legitimacy of the program, and to ensure that if it is not working, changes are mandated, and mandated swiftly. It is easy to forget about the effect of a program or policy on an offender, no matter how unpleasant, however, if there is little to no public benefit to the SVP program, we should be outraged that the Government has, for the past 30 years warehoused Americans with no real purpose or common goal, hiding behind the guise of protection and treatment.

It is critical that members of the legislature, judiciary, and executive branches be educated about SVP practices, statistics, and program outcomes. Once this occurs, a multidisciplinary approach to program overhaul, or abolition is critical to achieving the goal of public protection from sex crimes. If one

purchased any item that didn't work, it would be returned for a refund or a different product that worked as it was intended/promised; one would not continue to buy the same defective product over and over again for 30 years with no questions asked using someone else's money. As ridiculous as this seems, this is exactly what occurs in SVP practice every day.

Once stakeholders are properly informed, an intelligent discussion can occur about the effectiveness of SVP treatment, what works, and what doesn't, relying on experts in the field and looking to other states who have had statistically significant success with lowering sexual recidivism using out of the ordinary treatment models, like Minnesota, for example. From SVPs' program inception, having the largest and most respected scholarly journal of psychiatry publish articles opposing SVP practice and over-reaching use of psychiatry (mental health diagnoses) to warehouse people should have been a huge wake up call to criminal justice practitioners around the country. Just as the criminal justice professional would scoff at someone not in the field attempting to dictate how public safety should work, it should go without saying that relying on experienced forensic psychologists to help with understanding who is at substantial risk of sexual re-offense because of a particular mental health condition, and who poses little to none is necessary for risk evaluation and ultimately, community protection. Clearly defining what narrowly-tailored population, based on science, poses the greatest risk of sexual re-offense must be accomplished and standardized throughout the country. The current lack of clear and unequivocal SVP definitions, broad range of diagnoses qualifying one for commitment despite there being no link connecting the diagnosis to the prediction of risk of dangerousness, and stark contrast from state-to-state leads to inconsistent and unreliable results. When so much is at stake for the community –and the offender—clarity is paramount.

Additionally, the use of actuarial instruments to predict risk, when viewed in a vacuum is not a reliable indicator of future risk. It is critical that there be a federal standard individualizing the measurement of risk, just as New York does, to see which categories of potential risk can be reduced with community support and services, in lieu of commitment. The oversight committee ought to ensure that

whatever measurement of risk policy is developed that 100% of those placed on commitment and those that are not are studied to make sure that the prediction tools are substantially correct at capturing who poses the highest risk that cannot be properly managed effectively in the community.

We all deserve protection from sex crimes and rely on those we elect and appoint to keep us safe. Requiring the standards mentioned above is a unified effort that must be demanded by us all. Silence is complacency, complicity.

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