

RESEARCH THAT MATTERS

CIVIL COMMITMENT OF PEOPLE CONVICTED OF SEX OFFENSES in the United States

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EXECUTIVE SUMMARY

In the 1990s and 2000s, federal lawmakers and legislators in 20 states and the District of Columbia passed laws that allow for the detention of certain sex offenders designated as a “Sexually Violent Person” or, in some states, as a “Sexually Violent Predator” (SVP). These statutes allow for the confinement of individuals convicted of certain sexual offenses beyond the term of their criminal court-ordered incarceration (in juvenile detention, jail, or prison).¹

This report explores the important implications SVP laws have for Black and sexual minority communities. We begin by providing an overview and historical context of SVP laws. We then use empirical evidence garnered from states where data could be gathered through Freedom of Information Act (FOIA) requests or through collecting data available to the public on the internet. Using these data we (a) estimate the total population of civil committed sex offenders in the United States, (b) assess disparities in administration of SVP detentions by looking at rates of civil commitment detention for Black and Hispanic versus White sexual offenders, and (c) assess disparities by victim’s sex to assess sexuality related disparities in civil detentions.

The data analyzed in this report suggests:

- **Thousands of people are in civil commitment in the United States.** There are over 6,300 people detained in the 20 state and federal civil commitment programs.
- **In most states, Black men were vastly overrepresented among the population of civilly committed persons.** Based on data from 13 states with reliable data, Black residents faced a rate of SVP detention more than twice that of White residents: 7.72 per 100,000 Black residents as compared with 3.11 per 100,000 White residents aged sixteen or older.
- **Sexual minority men are disproportionately detained in sex offense civil commitment facilities.** In the two states with reliable data about the sex of the victim, New York and Texas, men who had victims who were male were 2 to 3 times as likely to be civilly committed than men with only female victims. This trend was consistent for Black men, White men, and Hispanic men. These patterns suggest that gay/bisexual and other men who have sex with men (MSM) are seen as more violent, more dangerous or mentally ill, and more deserving commitment under SVP statutes as compared with heterosexuals.

¹ David DeMatteo et al., *A National Survey of United States Sexually Violent Person Legislation: Policy, Procedures, and Practice*, 14 INT’L J. FORENSIC MENTAL HEALTH 245, 245 (2015).

INTRODUCTION

Unlike incarceration ordered under the criminal law, “Sexually Violent Person” or “Sexually Violent Predator” (SVP) civil detentions are indefinite in nature, meaning that they are not bound by any time limitations. Courts can extend SVP confinement for decades, even for life. To commit a person under SVP statutes, courts must find that they suffer from a “mental abnormality”—a term that has no medical meaning—or, in some states, a personality disorder. These terms are typically not clearly defined in the statutes.

Because of the imprecise and broad language used in these statutes, the American Psychiatric Association issued a report in 1999 in opposition to involuntary SVP civil commitment.² In that report, the authors wrote that “sexual predator commitment laws represent a serious assault on the integrity of psychiatry.”³ They concluded that “[p]sychiatry 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.”⁴

Critics have opposed these laws on the basis that they violate double jeopardy protections afforded by the United States Constitution. They argue that civil commitment is essentially a double punishment for the same underlying offense. Courts have generally rejected this argument, ruling that, because SVP civil detainees are being medically treated rather than punished, they are not afforded the same protections guaranteed to criminal defendants.⁵

Researchers and advocates for SVP have raised three key concerns with SVP laws that prompted this investigation. First, critics have raised concerns that the evaluation instrument used to screen potential SVP civil commitment candidates may be intrinsically biased against gay and bisexual men and men who have sex with men (MSM). “STATIC-99” and “STATIC-99R” instruments are used to evaluate the dangerousness of an offender along a series of ten measures—higher scores can designate a person SVP and provide a basis for recommending civil commitment.⁶ One of the ten measures used on these instruments asks whether the offender had “any male victims.” If a man was convicted of a sex crime with a male victim, he is assigned one point; if not, he is assigned zero points. In addition to normalizing violence against women, this a priori assigns gay, bisexual, and MSM, who are more likely to have a male victim, a higher score, marking them as more dangerous than men who have female victims regardless of any other characteristics of the offense.

Second, critics have also noted the potential misuse of paraphilic disorders, a group of psychiatric diagnoses related to “atypical sexual interest.” This category is extremely broad and includes pedophilic disorder as well as consensual sexual “kinky” behaviors such as sexual masochism and

² AMERICAN PSYCHIATRIC ASSOCIATION, DANGEROUS SEX OFFENDERS: A TASK FORCE REPORT OF THE AMERICAN PSYCHIATRIC ASSOCIATION [pin cite] (1999).

³ *Id.* at 173.

⁴ *Id.*

⁵ *Kansas v. Hendricks*, 512 U.S. 346, 367 (1997).

⁶ Stefan Vogler, *Constituting the “Sexually Violent Predator”: Law, Forensic Psychology, and the Adjudication of Risk*, 23 THEORETICAL CRIMINOLOGY 509 (2018)

sadism.⁷ The critique is that such diagnoses can be used a justification for civil commitment for a wide range of offenders.⁸ Paraphilic disorders diagnoses are so broad that they could be used to characterize as mentally ill many practitioners of kink, bondage, sadomasochism, or any sexual practice perceived to be deviant.⁹ This may have important implications for gay and bisexual men and MSM, whose sexual cultures may be viewed as kinky or otherwise nonnormative due to stigma and prejudice.¹⁰

Third, racist ideologies have denigrated and stigmatized Black sexualities for centuries. Racist ideologies portray Black people as over-sexualized and less refined than White people to justify their oppression. Racism and homophobia also intersect. As Hill Collins argues, “[i]n the United States, the assumption that racism and heterosexism constitute two separate systems of oppression masks how each relies upon the other for meaning.”¹¹ These systems of oppression can also impact judgement about both Black and LGBTQ people.

HISTORICAL CONTEXT: THE EARLY “SEXUAL PSYCHOPATH” LAWS, 1930s–1980s

Modern SVP laws do not represent the first attempt in American history to use civil commitment to confine people accused of sex offenses. Between 1935 and 1955, lawmakers in 26 states and D.C. passed a similar set of statutes, usually using the language of the “sexual psychopath” or “mentally disordered sex offender.”¹²

Like today’s SVP laws, sexual psychopath laws allowed for the indefinite confinement of persons labeled as “sexual psychopaths”—a term that also did not refer to a specific psychological or sexual condition verified by psychiatrists. Lawmakers invented the category to include persons accused of a wide range of sex offenses, including rape, sodomy (anal and oral sex, same- or different-sex), indecent exposure, exhibitionism, or sex between adults and children or teenagers.¹³

Historians argue that the economic impact of the Great Depression partially explains the rise of sexual psychopath laws.¹⁴ In a period of such significant economic unrest, contemporary critics blamed the decline of the White male breadwinner on the rise of “deviant” male sexuality—particularly homosexuals.

⁷ AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (5th ed. 2013).

⁸ Thomas K. Zander, *Commentary: Inventing Diagnosis for Civil Commitment of Rapists*, 36 *J. AM. ACAD. PSYCHIATRY & L.* 459, 464.

⁹ Patrick Singy, *How to Be a Pervert: A Modest Philosophical Critique of the Diagnostic and Statistical Manual of Mental Disorders*, 43 *REVISTA DE ESTUDIOS SOCIALES* 139, 144 (2012).

¹⁰ Rusi Jaspal.

¹¹ Patricia Hill Collins, *BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM*, 88 (2004)

¹² Tamara Rice Lave, *Only Yesterday: The Rise and Fall of Twentieth Century Sexual Psychopath Laws*, 69 *LA. L. REV.* 549, 549 (2009).

¹³ COMMITTEE ON PSYCHIATRY AND LAW, *GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE 30s TO THE 80s* 840 (1977), <https://perma.cc/GGN8-ZXHZ>. Marie-Amelie George, *The Harmless Psychopath: Legal Debates Promoting the Decriminalization of Sodomy in the United States*, 24 *J. HIST. SEXUALITY* 225, 233 (2015). Edwin H. Sutherland, *The Sexual Psychopath Laws*, 40 *J. CRIM. L. & CRIMINOLOGY* 543, 544 (1950).

¹⁴ Estelle B. Freedman, *“Uncontrolled Desires”: The Response to the Sexual Psychopath, 1920–1960*, 74 *J. AM. HIST.* 83, 89 (1987).

Sexual psychopath laws were often condemned by experts at the time for being overly broad in nature. However, liberal politicians viewed civil commitment favorably because it treated the problem of sex offending as a medical problem. Many on the left believed that a medical solution would be a more humane alternative to criminalization.

In practice, the state-run medical facilities housing sexual psychopath programs more closely resembled conventional jails and prisons than hospitals. Little to no treatment was offered. Moreover, some facilities experimented with controversial practices such as chemical castration.¹⁵

A 1953 report on California's sexual psychopath law found that the 86% of "mentally disordered sex offenders" held under the program were White.¹⁶ White men who had had sexual contact with a child or teenager of any gender accounted for 92% of the cases in the study; 30% of those cases involved sex between White men and underage boys, suggesting that police disproportionately targeted male same-sex sexual incidents involving minors. That same report also found that 11% of detainees were Hispanic, despite making up only 2% of the state's population.¹⁷ Black men represented only 3% of all convicted sexual psychopaths, usually committed based on rape accusations. Instead of commitment, Black men often faced elevated rates of criminalization and harsh punishment. To this point, while Black men made up just 4.4% of California's population at the time, 10% of all convicted sex offenders and 14.6% of convicted rapists in the state were Black men.¹⁸

Although the law did not only apply to homosexuals specifically, gay/bisexual men and MSM may have borne the greatest brunt of its application. Police, prosecutors, and judges enforced sexual psychopath laws disproportionately against men who had same-sex sex and men who were suspected of being gay/bisexual and MSM. Transgender and gender-nonconforming people of color were often targeted as well. For example, in San Bernardino, California, Perfecto Martinez was sent to the Atascadero State Hospital in 1948 after Martinez was arrested for wearing female clothing in public.¹⁹

Designation as sexual psychopath did not require a sex offense conviction. Indeed, about ten percent of the people who were deemed to be sexual psychopaths during the early 1950s in Indiana were implicated for crimes that were not sexual, including burglary, breaking and entering, arson, and petty larceny.²⁰ In addition, in a 1954 case in Sioux City, Iowa, twenty men were baselessly committed as sexual psychopaths in the wake of the brutal murder of two children of which they were not accused.²¹

¹⁵ Regina Kunzel, *Sex Panic, Psychiatry, and the Expansion of the Carceral State*, in *THE WAR ON SEX* 229, (David M. Halperin & Trevor Hoppe eds., 2017). Tamara R. Lave, *Only Yesterday: The Rise and Fall of Twentieth Century Sexual Psychopath Laws*, 69 *LA. L. REVIEW* (2009).

¹⁶ LANGLEY PORTER NEUROPSYCHIATRIC INSTITUTE, *FINAL REPORT ON CALIFORNIA SEXUAL DEVIATION RESEARCH* (1954), 101–102, 139.

¹⁷ *Final Report on California Sexual Deviation Research*, 139.

¹⁸ *Final Report on California Sexual Deviation Research*, 139, 101–102.

¹⁹ *In re Martinez*, 130 Cal. App. 2d 239, 240 (1955).

²⁰ Elias S. Cohen, *Administration of the Criminal Sexual Psychopath Statute in Indiana*, 32 *IND. L.J.* 450, 454 (1957).

²¹ NEIL MILLER, *SEX-CRIME PANIC: A JOURNEY TO THE PARANOID HEART OF THE 1950s* (2002).

Beginning in the 1960s, two social movements played critical roles in advocating for the repeal and disuse of sexual psychopath laws. First, LGBTQ activists challenged the discriminatory use of sexual psychopath laws against queer people.²² Second, anti-psychiatry movement advocates called for an end to the overuse of involuntary psychiatric commitment for people with mental illnesses and disabilities in general.²³ Advocates argued that the overcrowded and unsanitary living conditions in inpatient treatment facilities violated detainees' civil and human rights.²⁴ As a result of these advocacy efforts, states implemented new due process protections for people with mental illnesses and disabilities, including the right to a trial with legal representation to contest their commitment.²⁵ This dramatic turn away from involuntary civil commitment is known as deinstitutionalization. Many psychiatric hospitals closed as involuntary commitments plummeted from a high of over 500,000 in 1950 to about 30,000 by the 1990s.²⁶

By 1989, 13 states and the District of Columbia still had sexual psychopath laws on the books. However, these statutes have largely fallen into disuse.²⁷ Illinois appears to be the only state that continues to actively use a law from this previous era.²⁸

SVP STATUTES IN THE UNITED STATES AND SELECTED CASE LAW

Sexually Violent Person (SVP) laws (sometimes referred to as Sexually Violent Predator laws) are similar to older Sexual Psychopath statutes in that they legalize the civil confinement of people who are deemed sexually dangerous and likely to reoffend.²⁹ However, they differ in one important way. Under older Sexual Psychopath laws, one need not have been charged or convicted of a sex offense to have been committed under the law. Under most modern SVP statutes, state attorneys general can only petition to commit someone convicted of a sex offense who is soon to be released from jail, prison, or juvenile detention. The laws usually authorize post-incarceration confinement in a psychiatric facility.³⁰ Twenty states, the District of Columbia, and the federal government have enacted some kind of SVP statute (Table 1).³¹ Here we address several important questions about SVP law in the United States.

²² Rob Cole, *Atascadero Reformer Denies Aversion Used*, [vol #] *ADVOCATE* 16, [pin cite] (1972).

²³ Regina Kunzel, *Sex Panic, Psychiatry, and the Expansion of the Carceral State*, in *THE WAR ON SEX* 229, (David M. Halperin & Trevor Hoppe eds., 2017).

²⁴ Fakhoury & Priebe 2007.

²⁵ Stuart A. Anfang & Paul S. Appelbaum, *Civil Commitment—The American Experience*, 43 *ISR. J. PSYCHIATRY & RELATED SCI.* 209, 210-12 (2006).

²⁶ Sara West, Susan Hatters-Friedman & John P. Shand, *Civil Commitment*, in [vol #] *WILEY ENCYCLOPEDIA OF FORENSIC SCIENCE* [pg #], [pin cite] (Allan Jamieson, Andre Moenssens eds., 2012).

²⁷ Gary Gleb, *Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings*, 39 *UCLA L. REV.* 213, 215 (1991).

²⁸ Ross A. Brennan, *Keeping the Dangerous Behind Bars: Redefining What a Sexually Violent Person Is in Illinois*, 45 *VAL. U. L. REV.* 551, 558 (2011).

²⁹ David DeMatteo et al., *A National Survey of United States Sexually Violent Person Legislation: Policy, Procedures, and Practice*, 14 *INT'L J. FORENSIC MENTAL HEALTH*, 245, 245 (2015).

³⁰ *Id.*

³¹ *Id.*

Table 1. SVP Statutes in the United States

JURISDICTION	STATUTE
Federal	18 U.S.C.A. § 4248
Arizona	ARIZ. REV. STAT. ANN. § 36-3701
California	Cal. Welf. & Inst. Code § 6600
District of Columbia (DC)	D.C. CODE § 22-3803
Florida	Fla. Stat. Ann. § 394.910
Illinois	725 Ill. Compiled Stat. 207/1
Iowa	IOWA CODE ANN. § 229A.2
Kansas	Kan. Stat. Ann. § 59-29a02
Massachusetts	MASS. GEN. LAWS ANN. Ch. 123A § 1
Minnesota	Minn. Stat. Ann. § 253D.02
Missouri	Mo. Ann. Stat. § 632.480
Nebraska	NEB. REV. STAT. § 71-1203
New Hampshire	N.H. REV. STAT. ANN. § 135-E
New Jersey	N.J. STAT. ANN. § 30:4-27.26
New York	N.Y. MENTAL HYGIENE. LAW § 10.03
North Dakota	N.D. Cent. Code Ann. § 25-03.3
Pennsylvania	42 PA. CONS. STAT. ANN. § 6402
South Carolina	S.C. CODE ANN. § 44-48-30
Texas	TEX. HEALTH & SAFETY CODE ANN. § 841.002
Virginia	VA. CODE ANN. § 37.2-900
Washington	WASH. REV. CODE ANN. § 71.09.020
Wisconsin	WIS. STAT. ANN. § 980.01

What Does the State Need to Prove to Commit Someone?: Typically, three elements must be proven by the state in order to confine a person under most SVP laws: (a) the defendant must have been charged with a sexual offense; (b) the defendant must have a “mental disorder” or “abnormality”; (c) the defendant is likely to commit sexually violent acts in the future.³²

What is a “Mental Abnormality”?: Statutory definitions of mental abnormality are important in determining whether the SVP statute is constitutional. The statute must include a provision for a “lack of control” on the part of the individual being committed.³³ This is why most jurisdictions include in their definition of mental abnormality (or condition/disorder) that the abnormality predisposes a person to commit sexual offenses with an inability to refrain.³⁴ Many states model their definition of mental abnormality after Kansas’ SVP statute, which has been upheld by the Supreme Court.³⁵ Kansas defines mental abnormality as “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.”³⁶ Other states use more clinical

³² *Id.*

³³ *Kansas v. Crane*, 534 U.S. 407, 412 (2002).

³⁴ DeMatteo, *supra* note 1, at 250.

³⁵ *Id.* at 249.

³⁶ KAN. STAT. ANN. § 59-29a02(b) (2019).

definitions.³⁷ A major critique is that state definitions of mental abnormality are too vague or circular to be useful in narrowing the class targeted by SVP laws.³⁸

What is a “Personality Disorder”?: Most states also include personality disorders in their SVP laws.³⁹ Two states (AZ, VA) include personality disorders in their definition of mental abnormality.⁴⁰ Ten states (FL, IA, KS, MA, MN, NH, NJ, PA, SC, WA) require that the individual being committed has either a mental abnormality or personality disorder.⁴¹ The criteria for some personality disorders are quite broad. For example, estimates suggest that between 40% and 80% of all imprisoned males would meet the criteria for Antisocial Personality Disorder. Critics have therefore raised concerns that the inclusion of personality disorders in SVP criteria significantly widens the class of persons targeted.⁴²

How Do States Define a “Likelihood of Engaging in Sexual Violence”? For SVP commitment to be constitutional, the individual must be likely to reoffend and therefore pose a danger to the public.⁴³ To define a “likelihood” of reoffending, some states (IA, MO, WA, WI) have a “more likely than not” standard.⁴⁴ Some states use broader language, and some statutes are silent and rely on case law.⁴⁵ Generally, statutes allow for fairly arbitrary determinations by the judge or jury of what “likely” means.⁴⁶ Even defining “likely” as “more likely than not” is not particularly helpful in narrowing the class of individuals targeted by SVP laws, since it is not easily determinable what counts as more than a 50% chance of reoffending.⁴⁷

What is the Burden of Proof for Commitment and Release? Different jurisdictions have different levels of proof needed to civilly commit someone. Ten states (FL, MO, MN, NE, NH, NJ, NY, ND, PA, VA) and the federal statute use a “clear and convincing” standard, meaning that the evidence must show that it is more probable than not that the individual meets the necessary standards to be committed.⁴⁸ Ten states (AZ, CA, IL, IA, KS, MA, SC, TX, WA, WI) use the highest standard of “beyond a reasonable doubt,” meaning that there must be no reasonable doubt the individual meets the standards necessary to be committed.⁴⁹ It is unclear how the standard of proof actually impacts the decision-making of jurors.⁵⁰

Can Juveniles Be Committed Under SVP Laws? The majority of state statutes, as well as the federal statute, are silent as to whether juveniles may be civilly committed under their SVP laws.⁵¹ However,

³⁷ DeMatteo, *supra* note 1, at 253.

³⁸ *Id.*

³⁹ *Id.* at 250.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 253.

⁴³ *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997).

⁴⁴ DeMatteo, *supra* note 1, at 251.

⁴⁵ *Id.*

⁴⁶ *Id.* at 253.

⁴⁷ *Id.* at 253.

⁴⁸ *Id.* at 251.

⁴⁹ *Id.*

⁵⁰ *Id.* at 254.

⁵¹ *Id.* at 252.

some state statutes (PA, IL, MA, WI) explicitly allow for SVP commitment of juveniles.⁵²

How Do States Show Probable Cause? Most states require a hearing to determine whether there is probable cause to believe that a person is sexually violent, but some jurisdictions (PA, TX, Fed. Gov.) are silent on probable cause.⁵³

Who Decides if a Person Should be Designated as an SVP—a Judge or a Jury? Under most SVP statutes, civil commitment proceedings are initiated when a State/County Attorney and/or the Attorney General files a petition for SVP commitment—typically after written notice from the agency with jurisdiction over the individual (often the state Department of Corrections). Most states require a pre-trial hearing in order to determine whether there is probable cause to believe that the individual is sexually violent.⁵⁴ This usually means that if a judge determines that there is probable cause to believe the individual is sexually violent, that individual will remain in custody until a trial to determine whether the individual will be civilly committed is held. The majority of jurisdictions allow either party, or the judge, to request a jury trial as an alternative to the judge making the determination as to whether SVP standards are met.⁵⁵ North Dakota and Minnesota explicitly deny a jury trial.⁵⁶

Do States Psychologically Evaluate Potential SVP Detainees? Some states require testing as a method for screening individuals for SVP consideration.⁵⁷ For example, Virginia requires that a Static-99 be completed for sexual offenders before they are released from prison, and if certain scores are met the individual is referred to determine whether they meet SVP definitions.⁵⁸ Some states use testing in determining whether an individual meets the requirements for mental abnormality.⁵⁹ For example, Texas requires “testing for psychopathy” but does not specify which test.⁶⁰

What is the STATIC-99 or STATIC-99R? Static-99 was developed in 1999 and quickly became the default actuarial risk assessment tool used on sex offenders.⁶¹ Although early studies indicated it was a better predictor of recidivism than other similar tools, even the most optimistic studies put the Static-99’s accuracy at only about 70%.⁶² Notably, selection of the variables for the Static-99 was not guided by any theory, but rather on the basis of observed correlations with recidivism. Hanson

⁵² *Id.*

⁵³ *Id.* at 252.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 254.

⁵⁸ *Id.* at 252-53.

⁵⁹ *Id.* at 254.

⁶⁰ *Id.*

⁶¹ R. Karl Hanson & David Thornton, *Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales*, 24 L. & HUM. BEHAV. 119, 122 (2000).

⁶² Howard E. Barbaree, Michael C. Seto, Calvin M. Langton & Edward J. Peacock, *Evaluating the Predictive Accuracy of Six Risk Assessment Instruments for Adult Sex Offenders*, 28 CRIM. JUST. & BEHAV. 490, 493-94 (2001). Some studies have suggested that other instruments may be more accurate, but these tools require more information and a higher administrative burden than the Static-99 and have not been widely adopted. See Grant T. Harris, Marnie E. Rice, Vernon L. Quinsey, Martin L. Lalumière, Douglas Boer & Carol Lang, *A Multisite Comparison of Actuarial Risk Instruments for Sex Offenders*, 15 PSYCHOL. ASSESSMENT 413, 420-23 (2003).

has acknowledged this possible shortcoming, writing that, “[n]one of the items were intended to measure psychologically meaningful constructs; they were selected purely on the basis of empirical relationships with recidivism and ease of administration.”⁶³ In 2008-2009, both the Static-99 and a revised 2002 version were re-normed using new and much larger samples of offenders, including four samples from the United States. Then, in 2012, both the Static-99 and 2002 became the Static-99R and Static-2002R (for “revised”) with changes to the weighting of the age variable that allowed risk scores to decrease as offenders aged, in line with data suggesting that the likelihood of sexual recidivism significantly decreases with age. However, even as it has been revised, the instrument continues to assign a point to offenders with a history of male victims—thus resulting in higher scores for gay/bisexual men and MSM.

Have Courts Evaluated the Constitutionality of SVP Detention? The Supreme Court and lower courts have consistently upheld SVP laws. In *Kansas v. Hendricks*, the Supreme Court ruled that Kansas’ statute was constitutional.⁶⁴ The Court explained that the right to freedom from physical restraint under the Constitution’s Due Process Clause is not an absolute right.⁶⁵ States may protect the public from dangerous people through civil commitment, as long as constitutional procedures and standards are followed.⁶⁶ State SVP statutes must couple a proof of future dangerousness with proof of “personality disorder” or “mental abnormality” that makes it difficult for an individual to control their behavior.⁶⁷ In *Kansas v. Crane*, the Court clarified that the Constitution requires a determination that the individual lacks control over their actions, but a complete lack of control is not necessary.⁶⁸ In *Hendricks*, the Court also held that Kansas’ SVP commitment proceedings did not involve “double jeopardy,” which refers to an individual’s constitutional right to not be prosecuted twice for the same offense.⁶⁹ This is because SVP proceedings are civil as opposed to criminal in nature.⁷⁰

⁶³ R. Karl Hanson & Kelly E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 *PSYCHOL. ASSESSMENT* 1, 1 (2009).

⁶⁴ *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997).

⁶⁵ *Id.* at 356.

⁶⁶ *Id.* at 356-57.

⁶⁷ *Id.* at 358.

⁶⁸ *Kansas v. Crane*, 534 U.S. 407, 412-13 (2002).

⁶⁹ *Hendricks*, 521 U.S. at 370.

⁷⁰ *Id.*

FINDINGS

Total Population of People in Civil Commitment

Table 2 shows the reported number of persons being held in civil commitment facilities in 20 states and in the federal civil commitment facility. These numbers include detainees who have been formally civilly committed as well as those who are being detained and are awaiting trial or adjudication. Cells without data indicate there was no number available for that year in that facility.

All 20 state programs reported reliable numbers for 2016, 2017, and 2018. The total number of detained persons in state facilities was stable over these years, increasing slightly from 6,322 persons in 2016 to 6,351 persons in 2018. Comparable figures for the federal program during those years were not available. However, in 2019 the federal program reported a census of 49 detainees in response to our FOIA request.

Table 2. Reported number of persons involuntarily detained under sex offense civil commitment laws, 20 states and federal program

	2016	2017	2018	2019
Federal	--	--	--	49*
Arizona	99*	97*	105*	--
California	940	945	949	--
Florida	618	588	654	--
Illinois	564*	564*	565*	566*
Iowa	124	138	140	129*
Kansas	264	262	260	--
Massachusetts	213	192	184	141*
Minnesota	722	716	741	--
Missouri	256	240	248	--
Nebraska	170	158	150	--
New Hampshire	--	1	--	--
New Jersey	517	486	476	468*
New York	356	362	380	--
North Dakota	53	42	41	--
Pennsylvania	51	54	52	59*
South Carolina	184	189	195	205*
Texas	230	264	294	318*
Virginia	309*	332*	378*	388*
Washington	282	223	218	--
Wisconsin	370	338	321	371*
Jurisdictions Reporting	19	20	19	11
Total	6322	6191	6351	2694

Notes: Cells marked with an asterisk (*) indicate the data were received via FOIA requests made on behalf of the authors. The remaining, unmarked data points were retrieved from the corresponding annual SOCCPN presentation. Blank cells (--) indicate that data was not provided or not available.

EMPIRICAL EVIDENCE FOR RACE/ETHNIC AND SEXUALITY DISPARITIES IN CIVIL COMMITMENT

DATA SOURCES AND METHODS

This report details findings from an analysis of data from three sources:

1. Data requested from state and federal agencies that oversee civil commitment programs

The data requested from state and federal agencies was received as a result of fifty-eight requests under the Freedom of Information Act (and similar, “FOIA”-like state public records laws) to state agencies in twenty-two states (and the federal government) with SVP programs, sent on behalf of the authors. These FOIA requests sought the following information about detainees under the program: their admission and release date, if applicable; demographic characteristics; criminal record; and clinical characteristics such as any medical diagnoses. We also sought any complaints made by detainees about the SVP treatments or facility.

In response to these FOIA requests, most states provided minimal or no information about their programs on the grounds that doing so would violate medical privacy protections. There were exceptions to this that allow us to go into much greater detail to describe populations housed in civil commitment facilities in certain states.

2. Data scraped from online state sex offender registries and departments of corrections websites

The authors hired a computer scientist to write and execute “web scraping” computer programs to harvest data from public websites. For example, every state maintains a public sex offender registry that includes information about registered offenders who were convicted of offenses requiring public registration. Some state agencies include information on these websites that identifies offenders currently residing in civil commitment facilities.

3. Secondary data compiled annually by the Sex Offender Civil Commitment Programs Network (SOCCPN)

The authors compiled annual presentations made by the Sex Offender Civil Commitment Programs Network (SOCCPN), which reports their findings from annual surveys they conduct of state civil commitment programs. These census figures are self-reported by the controlling agency and include both people detained and who are awaiting trial, and those who have already been adjudicated and committed. These figures do not include anyone who has been conditionally released into the community under a probation-like supervision program.

4. Census data

The numbers of adult residents aged 16 or older by state and race are drawn from the 2017 1-year estimates from the American Community Survey (ACS) provided by the U.S. Census Bureau.

Race/Ethnicity

Table 3 shows the rates of SVP detention for Black, White, and Hispanic residents. These figures were only available for 13 states. These data show that with few exceptions, Black residents are at an increased risk of SVP detention. Overall, across all 13 states analyzed, Black residents faced a rate of SVP detention more than twice that of White residents: 7.72 per 100,000 Black residents as compared with 3.11 per 100,000 White residents aged sixteen or older.

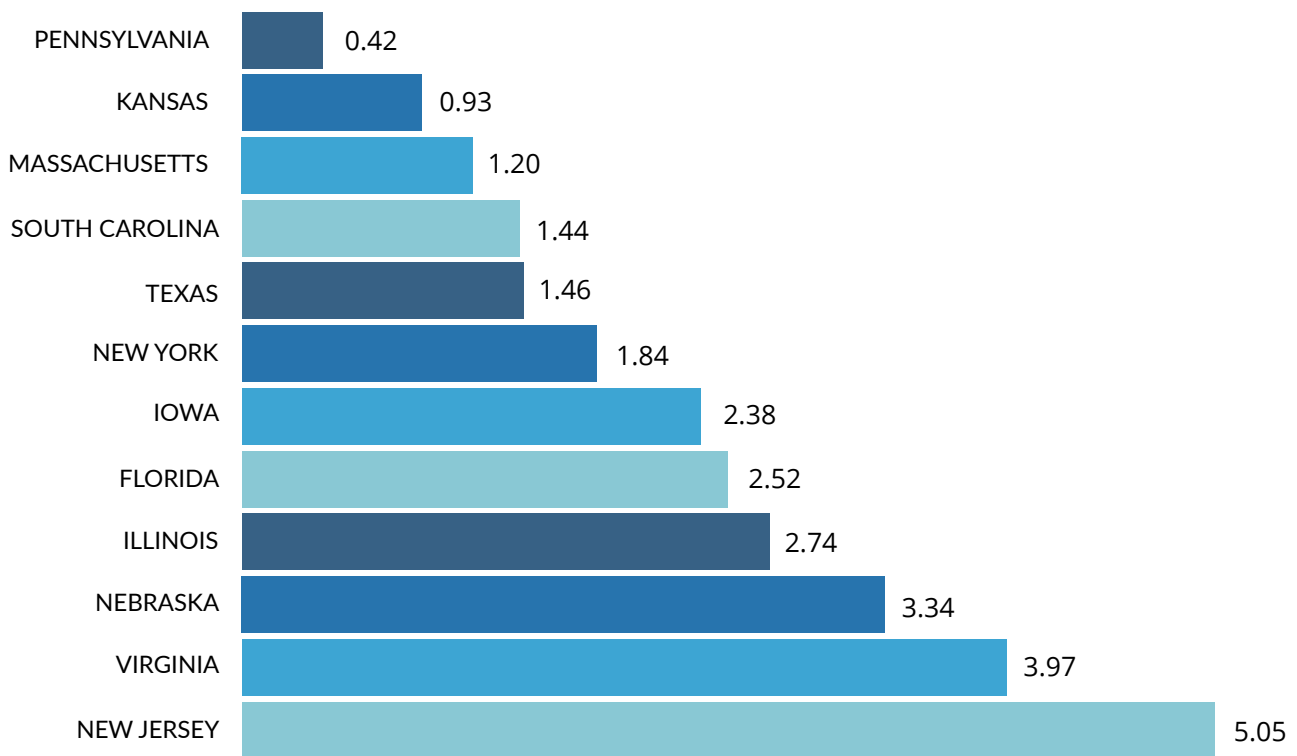
Table 3. Rates of SVP detentions per 100,000 residents 16 years of age or older, by race in 13 states

	BLACK			NON-HISPANIC WHITE			HISPANIC		
	Number Detained	Adult Residents	Detention Rate	Number Detained	Adult Residents	Detention Rate	Number Detained	Adult Residents	Detention Rate
Florida	207	2,660,323	7.78	310	10,027,154	3.09	30	4,082,972	0.73
Illinois	207	1,463,918	14.14	339	6,590,816	5.14	18	1,474,085	1.22
Iowa	11	96,688	11.38	106	2,217,906	4.78	2	117,458	1.70
Kansas	11	144,948	7.59	149	1,826,560	8.16	9	215,726	4.17
Massachusetts	13	430,814	3.02	107	4,270,526	2.51	11	504,676	2.18
Nebraska	18	76,099	23.65	88	1,243,852	7.07	NR	-	-
New Jersey	213	962,005	22.14	183	4,171,927	4.39	36	1,173,727	3.07
New York	101	2,406,651	4.20	212	9,280,305	2.28	27	2,218,749	1.22
North Dakota	0	19,632	-	29	524,346	5.53	1	16,675	6.00
Pennsylvania	3	1,150,345	0.26	51	8,300,668	0.61	2	552,839	0.36
South Carolina	66	1,085,614	6.08	116	2,746,051	4.22	NR	-	-
Texas	72	2,762,699	2.61	180	10,077,008	1.79	66	7,754,322	0.85
Virginia	207	1,355,123	15.26	172	4,471,031	3.85	NR	-	-
Total	1129	14,614,859	7.72	2042	65,748,150	3.11	202	18,111,229	1.12

Note: Adult resident figures are based on the 2017 1-year American Community Survey (ACS) estimates of persons aged 16 or older provided by the U.S. Census Bureau.

Figure 1 illustrates the Black to White ratio of rates of SVP detention shown in Table 3. (North Dakota is not included in this figure because they did not report any Black detainees in their SVP program). They are visually organized from smallest to largest (left to right). Ratios of less than 1 indicate Whites faced elevated risks of detention as compared to Black residents. This was true in only two states, Pennsylvania and Kansas. In the remaining ten states, Black residents faced elevated rates of detention. In New Jersey, Black residents were five times as likely to be civilly committed as their White counterparts.

Figure 1. Black to White ratios of rates of SVP civil commitment detention per 100,000 adult residents, aged 16 and older, 12 states



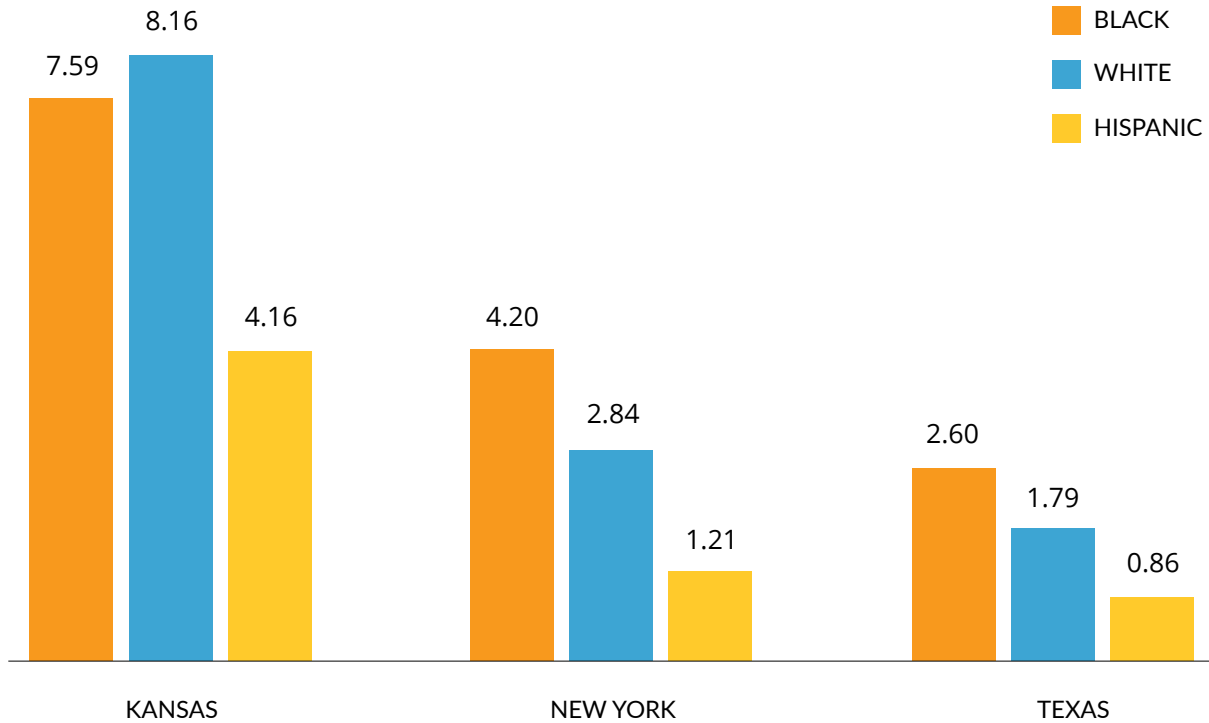
Note: A ratio of 1 indicates that Black and White people have the same rate of commitment, ratios greater than 1 indicate that Black residents faced elevated ratios of detention as compared with White residents.

These data do not identify the causes driving these racial disparities. However, much of the elevated risk of detention is probably not specific to SVP civil commitment. Instead, it is likely to reflect the general heightened rate of policing and incarceration of Black Americans and the stigmatization of Black sexuality.

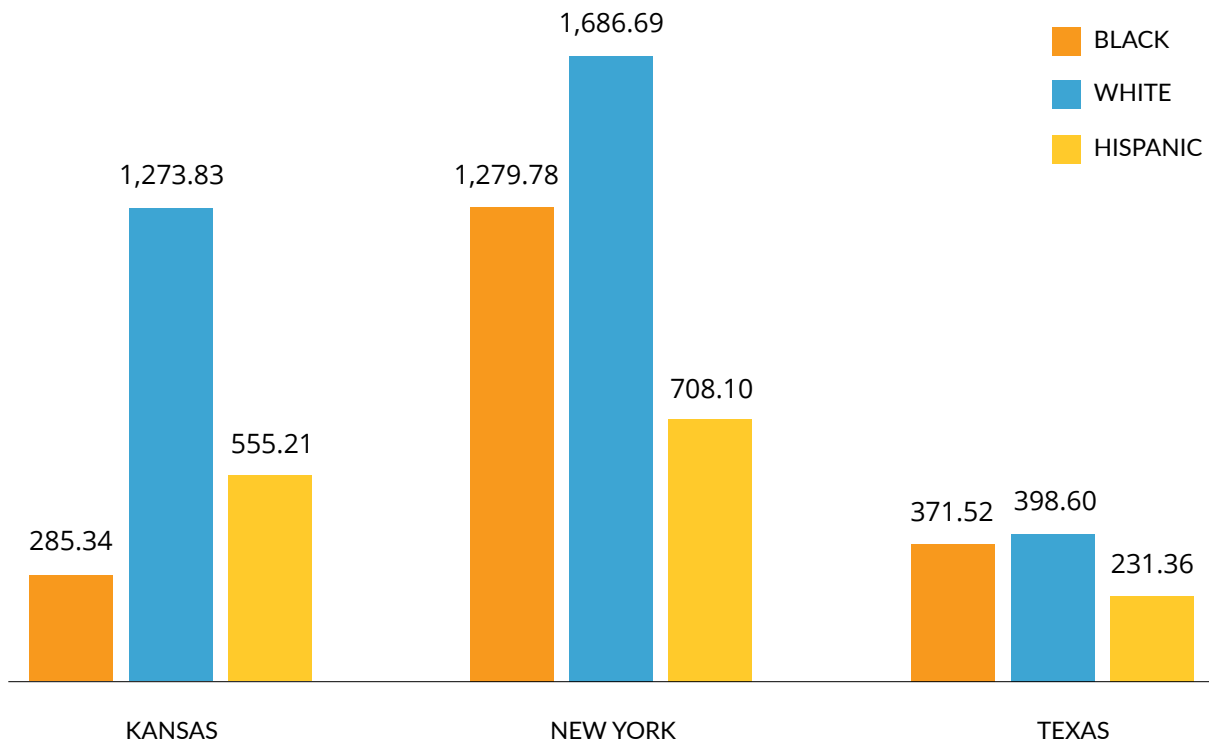
To get a sense of the source of this over-representation of Black offenders in civil commitment, Figure 2 compares rates of civil commitment per 100,000 adults in the state to rates of civil commitment per 100,000 publicly registered sex offenders. This comparison is useful for evaluating whether the racial disparities are unique to the civil commitment process or if they reflect broader trends in the criminal justice system.

Figure 2. Rates of SVP civil commitment (a) per 100,000 adult residents and (b) per 100,000 publicly registered sex offenders in Kansas, New York, and Texas, by race

a. Rate per 100,000 state residents 16 and older



b. Rate per 100,000 publicly registered sex offenders



This analysis was only possible for three states that reported both race and Hispanic origin in their public sex offender registry: Kansas, New York, and Texas. (Other states coded most Hispanic people instead as White, therefore, any rates calculated for White people in those states would be artificially inflated).

The results show that, in all three states, Whites were observed to have higher rates of civil commitment than expected given their rate of sex offender registration. However, as these results are limited to three states, they are inconclusive. More research is necessary to evaluate what drivers may be behind the racial disparities observed in this report.

Sexual Minorities

Using criminological data to interpret sexual orientation is not straightforward. Information on how an offender would describe their sexuality (e.g., gay, straight, bisexual) is not systematically collected by any state or federal corrections agency. Therefore, for the purposes of this analysis, we use victim sex to categorize sexual orientation. This is not an ideal solution, but it is the only data point systematically collected in some states that could provide insight into whether civil commitment is disproportionately impacting sexual minorities.

Among the 20 states with a civil commitment program, victim sex is only systematically reported on the public sex offender registries in New York and Texas. In both states, no women were identified as civil commitment detainees. Therefore, we assess rates of civil commitment among male detainees who had male (or both male and female) victims and compare those against male detainees with only female victims. The findings reveal a pattern that suggests that sexual minority men are at an increased risk of civil commitment as compared to their heterosexual counterparts.

Figure 3 illustrates the differences between registered sex offenders and SVP detainees in New York and Figure 4 illustrates this in Texas. As shown, authorities in New York reported that 12.9% of registered sex offenders had a male victim—either only male victims or both male and female victims. However, male detainees with male victims made up 33.5% of civilly committed persons—more than 2.5 times their representation among sex offenders (Figure 3a).

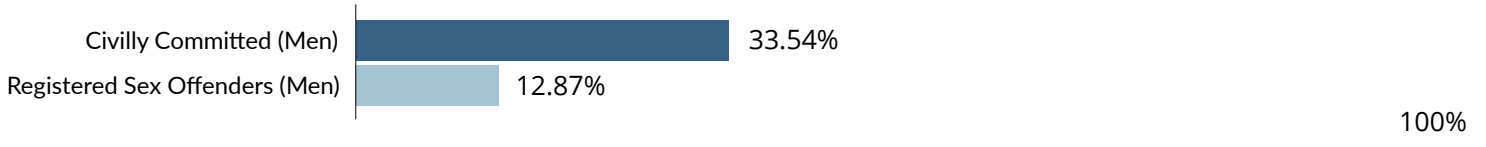
In Texas, the data reveal a similar pattern. Authorities report that 9.4% of registered sex offenders in that state had a male victim. However, male offenders with a same-sex victim made up 32.4% of the civilly committed population, a proportion that is more than 3 times greater (Figure 4a).

We also analyzed rates of civil commitment per 100,000 registered sex offenders, by race and by victim sex. As these figures show, the trend of overrepresentation among men who have sex with men is consistent across all racial categories in both Texas and New York (Figures 3b and 4b).

In Table 4, we report the rates of civil commitment per 100,000 registered sex offenders for men with male or male/female victims as compared to men with only female victims. We also report the rate ratio for each group, which reflects the increased rate of civil commitment faced by men with male victims in each category. As this table shows, men with male or male/female victims faced a rate of civil commitment that was between 2.5 and 6.3 times greater than men with only female victims, depending on their state and racial group.

These patterns suggest that gay/bisexual and other MSM are seen as more violent, more dangerous or mentally ill, and more deserving commitment under SVP statutes as compared with heterosexuals.

Figure 3a. Proportion of men with male victims among civilly committed SVP and among all registered male sex offenders in New York State



Note: These figures only include cases for which victim sex was reported. Cases for which victim sex was not reported or missing are excluded (n=2,700 of New York registered sex offenders; n=28 of New York civilly committed persons; n=5,909 Texas registered sex offenders; and, n=3 Texas civilly committed persons).

Figure 3b. Proportion of men with male victims among civilly committed SVP and among all registered male sex offenders in New York State, by race

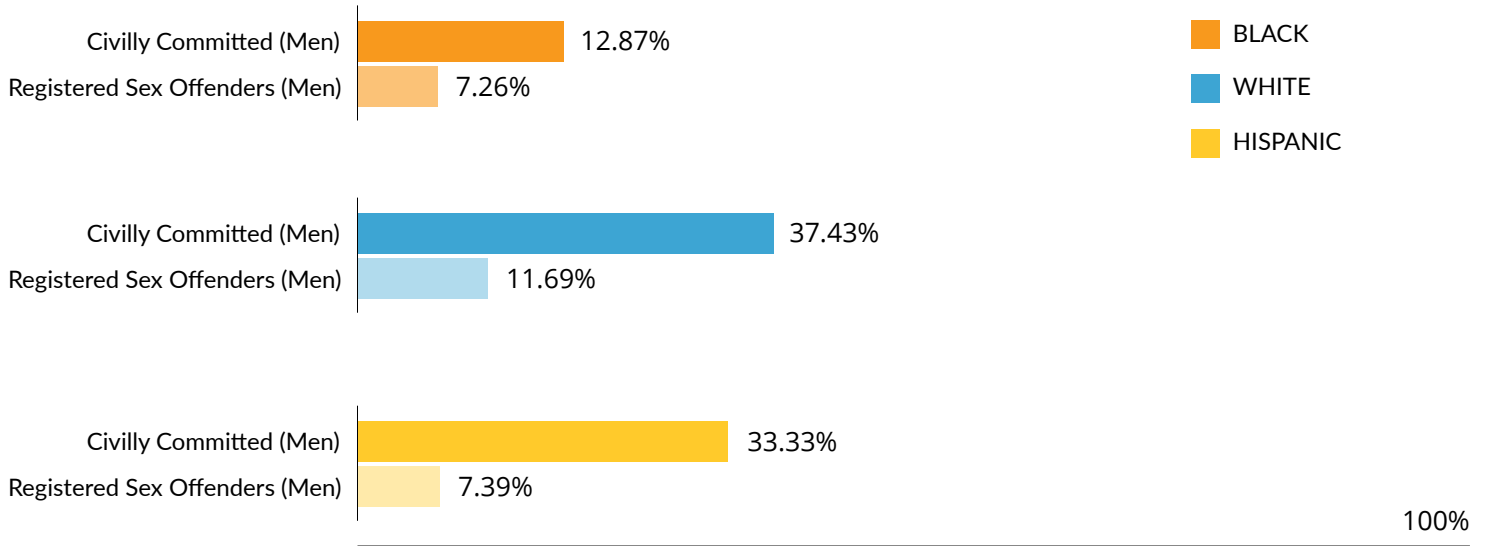


Figure 4a. Proportion of men with male victims among civilly committed SVP and among all registered male sex offenders in Texas

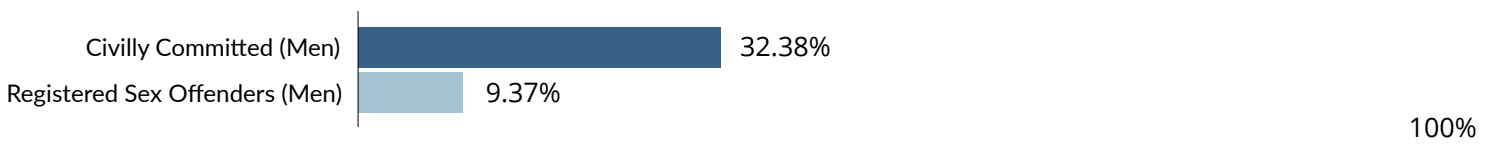


Figure 4b. Proportion of men with male victims among civilly committed SVP and among all registered male sex offenders in Texas, by race

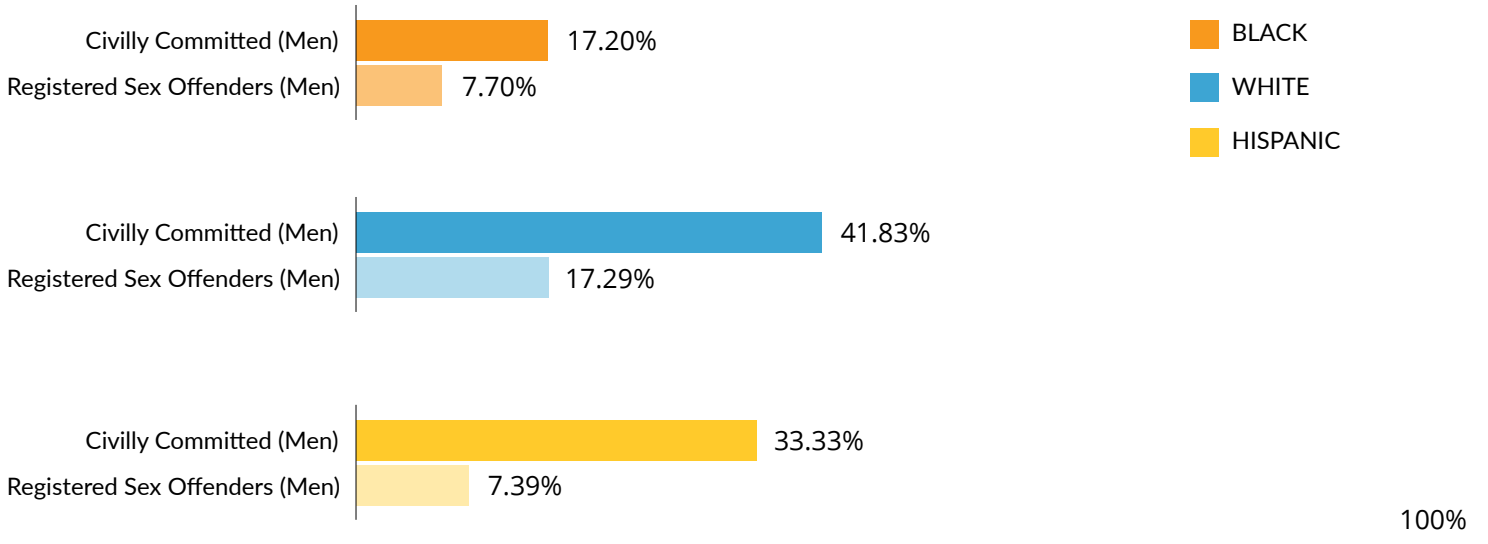


Table 4. Numbers of SVP detainees, rates of SVP detention per 100,000 publicly registered sex offenders, and rate ratios, by race and victim sex, New York and Texas

	TEXAS		NEW YORK STATE	
	Number of SVP Detainees	Rate per 100,000	Number of SVP Detainees	Rate per 100,000
Black Men				
Any Male Victims	13	982	16	2930
Only Female Victims	57	337	77	1178
Rate Ratio <i>Any male victim: Only female victims</i>	2.9		2.5	
Non-Hispanic White Men				
Any Male Victims	67	1435	82	4435
Only Female Victims	112	317	114	1289
Rate Ratio <i>Any male victim: Only female victims</i>	4.5		3.4	
Hispanic Men				
Male or Male/Female Victims	22	1104	9	2564
Only Female Victims	44	176	16	514
Rate Ratio <i>Any male victim: Only female victims</i>	6.3		5.0	

Note: Rates shown in this figure are rounded to the nearest whole number for ease of review. Rate ratios are rounded to the nearest tenth-percent. Cases in which victim sex was unknown are excluded.

CONCLUSION AND POLICY RECOMMENDATIONS

This report documents race/ethnicity and sexuality disparities in the application of sex offense civil commitment statutes in select jurisdictions in the United States.

In most states, Black men were overrepresented among the population of civilly committed persons. This may reflect patterns of over representation of Black men and women in the criminal justice system. It may also, in part, reflect factors intrinsic to the civil commitment process.

This report also demonstrates that in New York and Texas, the two states for which data were available, sexual minority men are disproportionately detained in sex offense civil commitment facilities. We believe these findings are unlikely to be unique to the only two states for which data were available but data for more states would be required to establish that this pattern is consistent across other states. Our analyses were limited by the data that we could use.

We urge the federal government Department of Justice and states to collect data on people in civil commitment, including data on sexual orientation and gender identity of inmates, and to release to this important data to the public.

We also urge the federal government, states, and other independent researchers to assess the various factors that contribute to higher rates of commitment among Black and sexual minority men.

I. It is possible that risk evaluators are more likely to view Black men and/or MSM as a greater threat. Evidence of evaluator bias could take several forms:

1. Disproportionately high risk scores for Black men: It is possible that risk evaluators give Black detainees higher overall scores than they do to White defendants due to the application of stigma and stereotypes, as has been shown in many police and other interactions.⁷¹
2. In terms of sexuality, the STATIC-99R and STATIC-2002R instruments both necessarily assign higher scores to MSM detainees as compared to potential heterosexual detainees. Federal government, states and independent researchers should conduct internal audits to consider revising the STATIC-99, STATIC-99R, and STATIC-2002R instruments to mitigate racial and/or sexuality-related bias.
3. Differential assignment into “routine” or “high risk/need” groups: Once a detainee is scored, evaluators then estimate their likelihood of recidivism. To do this, risk evaluators using the STATIC-99R or STATIC-2002R instruments must first place them into a “routine” or “high risk/needs” group.⁷² Two people with the same base score could be evaluated to have very different rates of recidivism depending on which group they are placed in. For example, a person assigned a score of 3 and evaluated using the “routine” scoring sheet would be predicted to have a 6.8% risk of recidivism after 5 years. However, if the evaluator instead uses the “high

⁷¹ John Paul Wilson, Kurt Hugenberg, & Nicholas O. Rule, *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 *JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY* 59 (2017). Joshua Correll, Bernd Wittenbrink, Bernadette Park, Charles M. Judd, Arina Goyle, *Dangerous Enough: Moderating Racial Bias with Contextual Threat Cues*, 47 *JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY* 184 (2011).

⁷² AMY PHENIX, L. MAAIKE HELMUS, AND R. KARL HANSON. *STATIC-99R & STATIC-2002R EVALUATORS' WORKBOOK* (2016).

risk/needs” scoring sheet, they would be predicted to have a 13.8% chance of recidivism—almost double the “routine” score. Federal government, states and independent researchers should conduct internal audits to determine whether this determination is tainted by racial and/or sexuality-related bias.

II. It is possible that there are also legal mechanisms at play. This could include:

1. Jury bias by defendant’s race/ethnicity: Because of the indefinite nature of SVP civil commitment, a significant proportion of detainees exercise their right to jury trial. Racial/ethnic bias among juries could explain high rates of commitment.⁷³
2. Jury bias by defendant’s sexual orientation: Jury bias against gay/bisexual men is likely to be especially prominent in cases involving same-sex victims because of erroneous public perception that gay/bisexual men are more often pedophiles. Because of this, jurors may be more likely to find a respondent to be a sexually violent predator in cases involving defendants with same-sex victims.⁷⁴
3. Selection bias: In most states, potential SVP detainees must already be in state custody (e.g., local jail, state or federal prison, or juvenile detention) in order to be petitioned for civil commitment. Therefore, people who are arrested but quickly post bail and/or who secure a noncarceral sentence such as probation may be at an advantage as compared to those who cannot post bail and/or who are sentenced to a term of incarceration. Race and economic status play a role in these critical junctures of the criminal justice process.

State programs should consider what forms of bias may be behind the disparities identified in this report. The STATIC-99 may very well be a structural driver of inequality, leading gay men and other men who have sex with men to automatically be considered higher risk and thus more deserving of confinement.

States should consider whether it is prudent to discontinue or modify the use of the STATIC-99 and STATIC-99R instruments. They should consider removing the question related to victim sex.

⁷³ Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 269 (2015).

⁷⁴ Tisha R. A. Wiley & Bette L. Bottoms, *Effects of Defendant Sexual Orientation on Juror’s Perceptions of Child Sexual Assault*, 33 LAW HUM BEHAV 46 (2009).

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