The presumption of dangerousness in sexually violent predator commitment proceedings

NICHOLAS SCURICH†

Department of Psychology & Social Behavior and Department of Criminology, Law & Society, University of California, Irvine, CA 92697, USA

AND

DANIEL A. KRAUSS

Department of Psychology, Claremont McKenna College, Claremont, CA 91711, USA

[Received on 8 August 2013; revised on 22 October 2013; accepted on 28 October 2013]

Twenty states, the District of Columbia, and the federal government have adopted sexually violent predator (SVP) Laws, which permit the post-incarceration confinement of persons who: (1) have a previous conviction or charge for a sexual offence; (2) suffer from a mental abnormality; and (3) are likely to engage in future acts of sexual aggression. Although most who are convicted of a sexual offence will not be subject to SVP commitment, a burgeoning body of research indicates that commitment is highly likely once the decision is placed in the hands of the jury. The high rate of commitment suggests that there might be a presumption of dangerousness in these proceedings, possibly stemming from the previous conviction requirement. This potential explanation was tested in the current experiment. Jury-eligible participants (n = 190) were provided with varying degrees of information pertaining to the SVP commitment criteria. Some participants were told only that a person had been referred for an SVP commitment proceeding, whereas others were given information relevant to some or all three of the legal criteria. The rate of commitment did not vary as a function of the information provided. The mere fact that a respondent had been referred for an SVP proceeding was sufficient for a majority of participants to authorize commitment. We then calculated participants' implicit operationalization of the 'likely to offend' criterion. On average, participants require the risk of recidivism to exceed 31% (range 20–40%) to effectuate commitment. These findings raise concerns about whether the constitutionally required due process occurs in SVP commitment proceedings.

Keywords: juror decision making; risk assessment; decision thresholds; sex offenders.

In the 1990s, in response to a number of high-profile sexual offences perpetrated by repeat offenders and large-scale public belief that an especially dangerous group of sexual offenders were continuing to recidivate at a high rate, Washington State passed the first sexual violent predator (SVP) law. These laws permit the post-incarceration confinement of individuals who: (1) have a previous conviction or charge for a sexual offence; (2) suffer from a mental abnormality; and (3) are likely to engage in future acts of sexual aggression (Miller et al., 2005; Krauss et al., 2012). The length of SVP commitment is indeterminate with individuals being released only when they no longer suffer from a mental

†Corresponding author. Email: nscurich@uci.edu

© The Author [2014]. Published by Oxford University Press. All rights reserved
abnormality or are no longer dangerous. By 2006, 20 states, the District of Columbia, and the federal government enacted SVP laws, and over 4500 individuals have been committed as SVPs, with less than 500 having been released once they were confined (Gookin, 2007).

In 1997, the U.S. Supreme Court upheld the constitutionality of Kansas’ SVP law against claims that it failed to provide ‘substantive’ due process, since the term ‘mental abnormality’ was not recognized by any professional nomenclature. It was also claimed that Kansas’ SVP law violated the Constitution’s Double Jeopardy and Ex Post Facto clauses because it imposed additional punishment for already-sentenced crimes and provided additional legal consequences after the acts had been committed (Kansas v. Hendricks, 1997). The Court quickly disposed of the due process claim; an 8-to-1 majority held that state legislatures were not bound by any official nosology in defining their statutory provisions. The analysis of the latter two claims was less straightforward. Ultimately, a 5-person majority held that Kansas’ SVP law did not violate Double Jeopardy or Ex Post lawmaking because the laws were civil, not criminal in nature, and thus these constitutional claims are inapplicable because the statute did not impose criminal punishment.

Revisiting the issue in 2002, the Court made clear that the continued constitutionality of SVP laws requires not only evidence that the individual suffers from a mental abnormality and is dangerous, but also that the offender has serious difficulty in controlling his behaviour (Kansas v. Crane, 2002). The Court noted that ‘if a person can control his behavior, then civil commitment potentially becomes a ‘mechanism for retribution or general deterrence’—functions properly those of criminal law, not civil commitment (Faigman et al., 2012, p. 197)’. Moreover, without all these elements, SVP laws would not sufficiently ‘... distinguish the dangerous sexual offender whose serious mental illness, abnormality or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary case (Crane, p. 417)’.

The Court clearly held that these laws were constitutionally valid only if they affected a circumspect group of individuals who were distinctly different than common criminals (Faigman et al., 2012). Unfortunately, it is not clear that the Court’s pronouncements are being met. For example, Boccaccinni et al. (in press) examined 26 SVP commitment proceedings in Texas from 17 August 2008 to 30 June 2010, and noted that, ‘All but one of the hearings ended in commitment, with the other ending in a hung jury (that respondent was eventually committed in a subsequent hearing) . . . . At the time this study began, only one SVP hearing [in Texas] had ever ended with the jury unanimously agreeing that the respondent did not qualify for commitment. (p. 3)’.

There are several potential explanations for the uniform commitment rate. Perhaps Texas is extremely selective in whom it refers for commitment proceedings, and, as a result, only the most dangerous offenders come before a jury. Indeed, research suggests that the general public believes over 75% of sexual offenders will recidivate (Levenson et al., 2007). If Texas SVP jurors believe that the recidivism rate among sexual offenders is similarly high, then a high rate of commitment would be expected. It is also possible that jurors do not attend to the legal criteria. As hypothesized by one group of renowned legal scholars, ‘We suspect that, in fact, only one criterion is doing all the work in these cases, and that is prior conviction of a sexual offence. If so, this raises substantial constitutional concerns (Faigman et al., 2012, p. 189, FN 13)’. Relatedly, it is possible that jurors begin their consideration of the case with a presumption that the respondent is dangerous and thus, ipso facto, satisfies the commitment criteria. This latter possibility speaks to an intricate interaction between the burden of production and the standard of proof, which collectively are referred to as ‘the presumption of innocence’ in criminal trials.
1. Presumptions and standards of proof

In a criminal trial, a defendant is presumed innocent until proven guilty beyond a reasonable doubt. This well-known maxim enforces the due process clause of the Constitution (applied to federal government by the fifth Amendment and the states by the 14th Amendment). Due process essentially means the process one is due before liberty may be deprived (Slobogin, 2006a). The maxim has two essential components: the burden of production and the standard of proof. The ‘innocent until proven guilty’ clause implies that the state bears the burden of producing evidence of guilt, and that a not guilty verdict should result if it fails to do so. The ‘beyond a reasonable doubt’ clause specifies the degree to which the state must prove the facts in question if it is to prevail.

Jurists have long grappled with what it means to be ‘presumed innocent’. One interpretation is that jurors should begin their consideration of the case as a ‘blank slate’ with respect to the defendant’s guilt, and they should elide any inferences stemming from the defendant’s indictment (Coffin v. Taylor, 1895). In short, they should assume the defendant is no more likely to be guilty than any other member of society (Kaye and Balding, 1995; cf. Friedman, 1997; 2000). This conceptualization has direct implications for the vitality of the reasonable doubt rule. If jurors initially believe that a defendant is likely to be guilty, it will not take much evidence to satisfy the reasonable doubt requirement. However, if jurors initially believe it is highly unlikely that the defendant is guilty, then a conviction will require a considerable amount of evidence, which is consistent criminal law jurisprudence (In Re Winship, 1970).

Recall that the U.S. Supreme Court upheld the constitutionality of SVP commitment on the basis that the laws are civil, not criminal, in nature. In theory, the due process afforded to a particular adjudication corresponds to the degree of liberty intrusion that is sought (e.g. imprisonment involves greater due process than a less substantial liberty interest such as a monetary fine; Slobogin, 2006b). Because the proceedings are not theoretically punitive, aspects of due process requirements are relaxed in civil proceedings. For instance, traditional civil commitment requires proof of dangerousness by clear and convincing evidence—a less demanding standard than beyond a reasonable doubt—in order to justify commitment (Addington v. Texas, 1979). Confusingly, however, a slight majority of states require that the elements of SVP statutes be proven beyond a reasonable doubt (Woodworth and Kadane, 2004), the standard mandated in all criminal trials (In Re Winship, 1970).

The burden of production in civil proceedings has been explicitly discussed much less, though the U.S. Supreme Court has suggested the onus falls on the government: ‘the individual’s interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by [clear and convincing] proof (Addington v. Texas, 1979, p. 427, emphasis added).’ This seems to imply that there is a ‘presumption of not dangerous’ in civil proceedings, in so far as the state, not the individual, is theoretically required to produce evidence of dangerousness (but see Slobogin, 2006b).

2. The present study

Whether due process requirements are being enforced is partially an empirical question. In the criminal law context, empirical research finds that jurors do not treat defendants as exchangeable members of society in terms of their guilt before evidence is presented. Indeed, research suggests that jurors begin their consideration of a criminal case with the belief that the defendant is equally likely—or more than likely—to be guilty than not guilty (Martin and Schum, 1987; Vidmar, 1997). Research also suggests that jurors do not require more proof when the standard is beyond a reasonable doubt compared to clear
and convincing evidence (Kagehiro and Stanton, 1985; Kagehiro, 1990). Neither of these issues has been examined within the context of civil commitment, and specifically within the context of SVP commitment. The current experiment fills this void by testing the hypothesis that jurors begin their consideration of an SVP commitment case with a presumption that the respondent satisfies all legal criteria. This would occur if the introduction of information pertaining to the legal criteria has no incremental effect on verdicts. Examining whether verdicts are a function of information provided also speaks to whether jurors are truly treating the SVP legal criteria as separate and distinct elements, or if they are simply basing their decisions on one particular element of the statute as Faigman et al. (2012) suspect.

3. Method
3.1 Participants
One-hundred-ninety jury-eligible U.S. citizens participated in this experiment. The sample was composed of 56% \(n = 108\) males. The median age was 31 years with an interquartile range of 18 and range of 18–67. Twenty-two per cent \(n = 42\) considered themselves politically conservative, 23% \(n = 44\) considered themselves politically moderate and 55% \(n = 104\) considered themselves politically liberal.

Participants were recruited through Amazon Mechanical Turk (AMT). AMT is a proprietary website on which tasks are posted that require human judgement, such as questionnaires and surveys. Potential participants log onto the website, read the postings and determine whether they are interested in participating in a particular task. If so, they are compensated for their participation. The posting can specify eligibility requirements to participate. Our task required participants to be at least 18 years old, a citizen of the USA, and have no felony convictions.

3.2 Procedure and design
Participants completed an anonymous online questionnaire that described an SVP commitment proceeding. The facts of the case were adapted from an actual appellate case in Minnesota (In Re Lueck, 2010) and materials used in previous research (Scurich and Krauss, 2013). An excerpt of the materials appears in Appendix A. After reading about the case, participants were given judicial instructions, and asked whether they would commit the respondent as an SVP. Participants also indicated the likelihood that the respondent would recidivate within the next 5 years if released into the community (0–100%). An attention-check question was included to ensure that participants paid attention to the materials; those who failed to correctly answer the question \(n = 8\) were removed from all analyses reported herein (Oppenheimer et al., 2009).

Participants were randomly assigned to one of four experimental conditions, which varied in the amount of information that was presented. The first condition (herein ‘charged’) simply told participants that the California Department of Mental Health conducted an administrative review of the respondent, and subsequently referred the case to the local district attorney to initiate SVP commitment proceedings. The second condition (herein ‘previous conviction’) included the information from the ‘charged’ condition plus information pertaining to the respondent’s previous convictions for child molestation. The third condition (herein ‘mental abnormality’) contained all of the information previously described, plus the testimony of a court appointed psychologist who diagnosed the respondent as a pedophile. The fourth condition (herein ‘dangerousness’) contained all of the information...
previously described as well as testimony bearing on the respondent’s risk. Based on the results of the Static-99 and a clinical examination, the respondent’s risk of recidivism was described as ‘moderate’.

The cascaded design was utilized to test whether jurors attend to each element of the commitment criteria. This approach allows one to assess the impact of each condition sequentially. It should be noted, however, that the design does not allow one to test the effects of every possible combination of the elements. For example, it is possible that ‘mental abnormality’ could have a different effect when paired only with ‘dangerousness’ and without ‘previous conviction’. While acknowledging this possibility, we believe that the cascaded design is defensible on ecological validity grounds. ‘Previous conviction’ would appear de facto since a previous conviction is logically necessary to initiate SVP commitment proceedings (i.e. currently incarcerated sex offenders are referred for commitment); thus, the issue is whether it is possible to be ‘dangerousness’ without suffering from a ‘mental abnormality’ in an SVP commitment. This possibility almost never occurs in ecology (Krauss and Scurich, 2013), and we have no hypothesis regarding any differential effect the various combinations would have. Nevertheless, this caveat to the experimental design should be acknowledged.

4. Results

We first examined participants’ verdict. Table 1 contains the percentage of participants voting to commit as well as the mean subjective estimates of recidivism in each experimental condition.

In general, the commitment rate was quite high with 85% of participants voting to commit the respondent as an SVP. A logistic regression with verdict as the dependent variable and experimental condition as the independent variable failed to detect any differences between the experimental conditions ($\chi^2 (4, N = 190) = 3.91, p = 0.272$). This indicates that commitment verdicts were not a function of the information provided. Participants in the ‘charged’ condition were no less likely to commit the respondent than participants in the ‘dangerousness’ condition.

We next examined participants’ subjective estimates of the likelihood that the respondent will recidivate. For all statistical analyses, logarithmic transformations of the likelihood estimates were

<table>
<thead>
<tr>
<th>Condition</th>
<th>n</th>
<th>Percent of voting to commit</th>
<th>Likelihood of recidivism</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charged</td>
<td>49</td>
<td>77.6 [65.4, 90.0]</td>
<td>59% [52.0, 66.4]</td>
</tr>
<tr>
<td>Previous conviction</td>
<td>46</td>
<td>91.3 [82.8, 99.7]</td>
<td>88.5% [84.4, 92.6]</td>
</tr>
<tr>
<td>Mental abnormality</td>
<td>49</td>
<td>87.8 [78.2, 97.3]</td>
<td>78.3% [71.5, 85.1]</td>
</tr>
<tr>
<td>Dangerousness</td>
<td>46</td>
<td>87.0 [76.8, 97.1]</td>
<td>73.6% [70.0, 80.3]</td>
</tr>
</tbody>
</table>

Note that [] indicate 95% confidence intervals.

---

1 This is ultimately an empirical question, but for several reasons we believe it is reasonable to assume that it is true. First, a diagnosis of ‘mental abnormality’ is almost circularly satisfied based on a previous conviction for a sex crime alone. Second, most risk assessment instruments consider ‘mental abnormality’ as a risk factor. Thus, ‘mental abnormality’ would be indirectly implicated in the ‘previous conviction’ + ‘dangerousness’ condition, and therefore it would be artificial to disentangle the two.

2 The difference between the ‘charged’ condition and the ‘previous conviction’ condition trended towards but was not statistically different ($p = 0.075$).
used in order to account for skewness in the data (Mosteller and Tukey, 1977). A one-way ANOVA detected a significant effect $F(3, 190) = 14.91$, $p < 0.001$ between the experimental conditions. Participants thought it was more likely than not (mean = 59%) that the respondent would recidivate based solely on the fact that the case was referred for a commitment proceeding. The mean estimate increased to 88.5% among participants in the ‘previous conviction’ condition who learned of the respondent’s previous conviction. The mean estimate dropped to 78.3% when participants learned of the respondent’s pedophilia diagnosis in the ‘mental abnormality’ condition, and the estimate dropped to 73.6% when participants were provided with the risk assessment indicating moderate risk, as in the ‘dangerousness’ condition.

A Bonferroni comparison indicated that both the ‘previous conviction’ and the ‘mental abnormality’ conditions were significantly different than the ‘charged’ condition ($p < 0.001$, $p < 0.05$, respectively). Thus, participants considered the respondent more likely to recidivate when they learned of his previous conviction and mental abnormality. There was not a difference in the likelihood ratings between the ‘previous conviction’ group and the ‘mental abnormality’ group ($p = 0.294$). In other words, learning that the respondent has a mental abnormality did not increase participants’ estimates that he would recidivate over and above knowing that he had a previous conviction. Additionally, there was not a significant different between the ‘mental abnormality’ and ‘dangerousness conditions’ ($p = 1.0$). The risk assessment indicating moderate risk did not decrease participants’ estimates of the respondent’s risk compared to when no risk estimate was provided.

### 4.1 Implicit thresholds for commitment

All SVP statues require that the respondent is ‘likely to reoffend’, or some variant such as ‘highly likely’ or ‘more likely than not’ (see Sreenivasan et al., 2003). Only one state has quantified what this term means substantively. Washington State has interpreted ‘more likely than not’ as requiring a risk of recidivism that exceeds 50% (Brooks v. Franklin, 2001, p. 1046). While some states have explicitly forbid quantification (e.g. Massachusetts, Commonwealth v. Boucher, 2002), virtually all states relegate the interpretation of ‘likely to reoffend’ to the fact finder. That is, the jury determines whether the respondent’s likelihood of recidivism suffices to authorize commitment. But what likelihood of re-offence do jurors consider sufficiently likely?

A study by Monahan and Silver (2003) asked judges what degree of risk justified psychiatric civil commitment. Judges, on average, considered a 26% chance of violence sufficiently dangerous to justify involuntary psychiatric hospitalization. Some judges even considered a 1% risk sufficiently dangerous, though there was a considerable amount of variability even within this homogenous group. A recent study by Knighton et al. (in press) asked a sample of jurors ($n = 151$) in Texas who just adjudicated an SVP commitment proceeding what level of risk corresponded to the ‘likely to reoffend’ criterion. Over half of the jurors indicated that 1% chance of recidivism sufficed for commitment. Notably, all of the jurors considered a 50% chance of recidivism sufficiently likely to justify commitment.

One major issue with examining how jurors operationalize ‘likely to reoffend’ is methodological in nature. The potential problem with directly asking jurors, ‘What level of risk is commensurate with “likely to reoffend”? ’ is the potential discordance between the reported and de facto values. That is, the values jurors report as their threshold might bear little semblance to their actual threshold. This could occur for a variety of reasons, including poor introspective abilities (Nisbett and Wilson, 1977) or social desirability effects (see Underwood, 1977). Following Kaye et al. (2007), we describe an
approach that allows one to infer jurors’ implicit threshold that is associated with the ‘likely to reoffend’ criterion.

The implicit threshold can be described as a threshold \( t \), which, if the subjective estimate of recidivism \( r \) exceeds, will result in a commitment \( c \). A commitment verdict implies that \( r > t \). The willingness to commit is the conditional probability of a vote to commit \( (c = 1) \) given the subjective estimate of recidivism \( (r) \), or \( p(c = 1 | r) \). In plain English, this states the likelihood that a juror would commit conditional on her subjective estimate of recidivism.

This conditional probability can be estimated from a logistic regression. Logistic regression is appropriate because the relation between \( c \) and \( s \) is not linear. Rather, the relation tends to follow the logistic curve where the portion of commitment decisions is quite small when \( r \) is close to zero and quite large when \( r \) is close to one. The actual shape of the logistic curve is based on empirical data; specifically, on the distribution between subjective estimates of recidivism and commitment decisions. The curve is derived from conducting a logistic regression, which takes on the following form:

\[
\ln\left(\frac{p}{1-p}\right) = \alpha + \beta r
\]

According to equation (1), \( 0 \leq r \leq 1 \) and \( 0 < p < 1 \) (since \( p \) is undefined at 0 or 1), and the natural logarithm of the odds of voting to convict is linear in \( r \). The logistic regression provides a maximum likelihood estimate of \( \alpha \) and \( \beta \).

The log-odds indicate the willingness to commit—as a continuous variable. However, we are interested in a point estimate, specifically the point where a participant is equipoise between commitment and release. When \( p = 0.5 \), the log-odds are zero, indicating that a commitment is equally likely as a release decision. The relevant query is determining what subjective estimate of recidivism \( (r) \) corresponds to this level of willingness. This can be determined by substituting \( p = 0.5 \) into the previous equation, which reduces the log-odds to zero, and solving for \( r \):

\[
r_{1/2} = -\frac{\alpha}{\beta}
\]

The implicit threshold \( r_{1/2} \) indicates the subjective estimate of recidivism \( (r) \) at which a commitment is equally likely as release.

Four separate logistic regressions were conducted, one for each experimental condition. Table 2 contains the parameter estimates derived from the logistic regressions as well as the calculated implicit threshold.

<table>
<thead>
<tr>
<th>Condition</th>
<th>( \alpha )</th>
<th>( \beta )</th>
<th>Threshold (%)</th>
<th>Disutility function</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charged</td>
<td>3.26 (1.38)</td>
<td>0.091 (0.029)</td>
<td>36</td>
<td>1.8:1</td>
</tr>
<tr>
<td>Previous conviction</td>
<td>0.735 (2.66)</td>
<td>0.036 (0.032)</td>
<td>20</td>
<td>4:1</td>
</tr>
<tr>
<td>Mental abnormality</td>
<td>0.27 (1.21)</td>
<td>0.047 (0.018)</td>
<td>27</td>
<td>2.7:1</td>
</tr>
<tr>
<td>Dangerousness</td>
<td>3.81 (1.80)</td>
<td>0.095 (0.030)</td>
<td>40</td>
<td>1.5:1</td>
</tr>
</tbody>
</table>

Note that parentheses indicate 1 S.E.
Several observations are noteworthy. First, the implicit thresholds span a range from 20 to 40% with a mean of 31%. This indicates that, on average, jurors are on the fence between commitment and release when their estimate of recidivism is 31%. A commitment decision is more likely when the estimate of recidivism is greater than 31% and lower when the recidivism is less than 31%. Notably, none of the thresholds are greater than 50%.

Second, the thresholds vary among experimental condition. This suggests that participants used different thresholds depending on the information they received. For instance, participants in the ‘charged’ condition had a threshold of 36% whereas participants in the ‘previous conviction’ condition had a threshold of 20%. The latter participants apparently tolerate less risk than the former participants. Interestingly, participants in the ‘dangerousness’ condition had the most stringent threshold, which was 40%.

These differences can be interpreted as reflecting different underlying disutility functions about the relative costs of a false positive (i.e. erroneously committing an individual; FP) and a false negative (i.e. erroneously releasing an individual; FN). As described by Ceci and Friedman (2000), disutility functions can be translated into a decision threshold (and vice versa) with equation (3):

\[ O_r > \frac{FP}{FN} \]  

\( O_r \) is the odds of recidivism (to convert probability \( p \) to odds: \( p/(1-p) \)). The ratio on the right is the decision threshold, which is the ratio of the FPs to FNs. The equation holds that the odds of recidivism must exceed the disutility ratio in order to commit. For example, Blackstone’s maxim that 10 erroneous acquittals (FN) are equal in cost to 1 to one erroneous conviction (FP) implies a decision threshold of 10:1, or about 91% (to convert from odds to probability, take the first term (i.e. 10) and divide it by the sum of the first and second terms (i.e. 10+1): 10/11 = 91). Thus, under Blackstone’s rule, a juror should convict if, and only if, her confidence in the defendant’s guilt exceeds the threshold of 91%; otherwise she should vote to acquit. Of course, whether jurors believe the disutility trade-off should be 10:1 in favour of false negatives is a different question. Data collected by Arkes and Mellers (2002) suggest that students have a disutility ratio for criminal convictions that is close to equipoise.

The previous analysis determined participants’ implicit decision thresholds, which were expressed in probabilistic terms. Following the rule for converting probabilities to odds, we can infer the disutility function that a given threshold implies. For instance, if we assume the decision threshold is 91%, it is easy to show that this implies a ratio of 10FN:1FP (0.91/0.09 = 10:1). Using this same logic, we calculated the disutility functions underlying participant’s implicit thresholds. These are contained in the rightmost column of Table 2. Note that all the ratios are expressed in terms of the disutility of a false negative relative to a false positive because participants unanimously considered a false negative more costly than a false positive, the opposite of Blackstone’s rule. The largest ratio was for the ‘previous conviction’ condition. Participants in this group considered four false negatives equal in cost to one false positive. Hence, their threshold for commitment was low (20%) to ensure that erroneous releases occurred infrequently, at the expense of erroneously committing relatively more individuals. In general, participants considered false negatives about two times worse than a false positive.

\(^3\)For the purposes of this analysis, we make the common assumption that the relative utilities of the correct outcomes (i.e. true positives and true negatives, or correctly committing an individual and correctly releasing an individual, respectively) are equal (e.g. Lempert, 1977).
5. Discussion

The findings suggest that, on average, not much evidence is required to obtain an SVP commitment verdict. Indeed, roughly three out of four jurors voted to commit the respondent as an SVP before any evidence was adduced. Furthermore, these same jurors believed that there was a 59% chance that the respondent would recidivate based solely on the fact he was referred for a commitment proceeding. These estimates are remarkably similar to those found in community surveys that examine public perceptions of sexual offenders (e.g. Levenson et al., 2007). The implicit threshold analysis revealed that jurors are not willing to tolerate much risk when it comes to the risk of sexual recidivism, as evidenced by their preference of false positives relative to false negatives. Such risk aversion could be the manifestation of jurors’ latent desire to impose additional punishment on sex offenders (Cairns and Koehler, in press; Carlsmith et al., 2007). Jurors’ high estimates of recidivism coupled with their low implicit threshold for commitment carries the implication that the majority of SVP respondents are foredoomed once the decision to pursue commitment is made by the district attorney.

This conclusion is consistent with a much earlier study of mentally disordered sex offenders (MDSO) in San Diego County California conducted by Konecni et al. (1980). In investigating the system level variables that led to an eventual MDSO decision through an intense naturalistic examination of the entire proceedings, they found that the diagnosis of sexual deviancy by a psychiatrist at an initial stage in the hearing process was responsible for most of the eventual decisions, and that the judge, attorneys and trial had little to do with decision-making once that initial assessment had been made.

These findings are also consistent with other, more contemporary research that has examined jury decision making in SVP cases. Boccaccini et al.’s (in press; see also Boccaccini et al., 2008) observational studies find commitment rates in actual SVP cases in Texas near unity. A similarly high rate of commitment (84%) was observed in a laboratory experiment (Scurich and Krauss, 2013). The latter experiment probed the psychological underpinnings of SVP commitment decisions, and found that participants engaged in a form of cognitive self-deception that facilitated a commitment verdict, even when the evidence was incongruent with this outcome. This was achieved by opportunistically interpreting the proffered evidence. The present findings add an additional layer of understanding, which is that jurors not only engage in self-deception to facilitate a commitment verdict but they also start their consideration of the case with a perception of recidivism that the respondent is more likely than not to recidivate.

The present findings support the use of formal vetting processes for SVP commitment case referrals. For example, the state of Virginia requires that the Static-99 be administered to all prisoners who were convicted of a sexually violent offence and are scheduled to be released within 10 months. If the prisoner receives a score of 5 or higher, the case is referred for further consideration of commitment; if the score is below this threshold, and there are no countervailing factors present, the prisoner will be released when his sentence expires (Virginia Code Ann. §37.2-900ff (2013)). The threshold score of 5 was legislatively enacted based in part on the study by Monahan and Silver (2003). California has a similar process in which soon-to-be-released sexual offenders undergo administrative and clinical reviews before the case is referred to the district attorney, though the criteria for referral are not well-specified and no actuarial risk estimate is required.

Vetting processes are likely to reduce the number of erroneous (i.e. false positive) commitment decisions. SVP commitment imposes huge financial burdens on the state. It costs the state of California approximately $150,000 a year to confine just a single individual (D’Orazio et al., 2012),
and this cost is likely to continue for years, given that very few SVPs are ever released. Since jurors have a propensity for committing respondents, vetting processes can help to ensure that only sex offenders with an elevated risk are committed by limiting the number and nature of the respondents who come before a jury. Further research should examine the vetting processes, especially when the criteria for referral are not formally delineated. Policy makers should confront the issue as well, and establish a set of criteria for referrals that reflect a consideration of the various stakeholders’ preferences and values.

Learning that a person has been referred for an SVP commitment proceeding appears to engender a presumption of dangerousness. This is potentially a rational inference for jurors to make. To the extent that current vetting processes have any validity, the assumption that the department of mental health selects and refers relatively dangerous individuals for commitment proceedings is probably accurate.4 However, it is not clear whether this is a legally permissible inference for jurors to make. In criminal law, it is plainly incongruent with the presumption of innocence to use the fact that a defendant is on trial as evidence of guilt (e.g. Bell v. Wolfish, 1979). This policy exists in order to ensure that the beyond a reasonable doubt rule is not undercut by jurors assuming that a defendant is likely to be guilty, which could effectively require the defendant to disprove his guilt (or, conversely, prove his innocence). Whether, and to what extent, this principle would apply to ‘civil proceedings’ has been largely unaddressed in the legal literature. One interpretation of the present results is that the inference based upon the respondent’s referral for commitment, while potentially rational, should be legally impermissible, since it contributes to a perception of the respondent that effectively preempts the commitment decision.

As with any laboratory simulation, there are several caveats to the current experiment. Participants read excerpted summaries of an SVP proceeding and rendered verdicts without deliberation. They were also aware that their decisions were hypothetical in nature and that no person would actually be committed as a result. The results of the implicit threshold analysis should be considered approximations, given the margins error associated with the parameter estimates, and the implied disutility ratios are based on an assumption about the utility of the correct outcomes that should be verified empirically. Consequently, the findings should be accepted cautiously until replicated with a different sample of participants and different stimuli. But the findings should not be dismissed outright. Although enhancing the ecological validity might change the size of the observed effects, there is no reason to believe that the effects would change direction, a point that is generally supported by empirical research (Bornstein, 1999).

6. Concluding thoughts

The situation is apparently less sanguine than hypothesized by Faigman et al. (2012). It is not the previous conviction that is doing all the work, rather it is the mere fact that commitment proceedings have been brought that suffices for commitment. Nonetheless, the same constitutional concerns apply.

4 It is important to note that this study did not ask participants to estimate the likelihood that a randomly selected sexual offender would recidivate within 5 years. Rather, the study asked participants (in the charged condition) to estimate the likelihood that the respondent—who has been referred for commitment—would recidivate within that time frame. The former would speak to what participants think about the base rate of recidivism among sex offenders as a group, which could be compared to empirical recidivism estimates (e.g. Hanson and Bussière’s (1998) meta-analysis found an overall recidivism rate of ~15%). Differences between the former and latter would suggest that participants are using the fact that a respondent has been selected and referred for commitment as probative evidence of risk. There are no empirical estimates, of which we are aware, of the rate of recidivism among sexual offenders who are referred for commitment.
In particular, the legal statutes were predicated—and approved by the U.S. Supreme Court—on the assumption that SVP commitment would apply only to a subset of dangerous sex offenders. The findings suggest that a majority of people who are referred for a proceeding will be committed on that basis alone, without any individuating information or evidence. And nearly all SVP respondents who have a previous sexual offence (at least for child molestation) are committed. It is difficult to reconcile these findings with the premise that such laws would apply only to a select group of sexual aggressors. Moreover, because jurors begin their consideration of the case with an assumption that a respondent is dangerous, the legal criteria that are supposed to discern SVPs from run-of-the-mill sex offenders are rendered largely superfluous.

Appendix A

California law provides that a person may be involuntarily committed to the custody of the California Department of Health Services if that person is found beyond a reasonable doubt to be a sexually violent person. A sexually violent person means a person to whom all of the following apply: (1) the person must have engaged in a course of harmful sexual conduct; (2) has manifested a sexual, personality, or other mental disorder or dysfunction; and (3) as a result, is likely to engage in future acts of harmful sexual conduct. The State must prove all of these elements beyond a reasonable doubt or you must find that he is not a sexually violent person.

A.1 Charged

Before an SVP commitment proceeding begins, the California Department of Mental Health conducts an administrative review and a clinical screening to examine whether a person might satisfy the legal criteria for SVP commitment. The Department then makes a recommendation about the person’s eligibility for commitment. If the recommendation is affirmative, the case is referred to the local district attorney for further consideration. If the district attorney accepts the recommendation, he or she will then formally petition the court and initiate the commitment proceeding.

In this particular case, the California Department of Mental Health recommended that Robert Hanson would satisfy the legal criteria for SVP commitment. The district attorney concurred, and initiated proceedings to have Robert Hanson committed as a Sexually Violent Person.

A.2 Previous charges

You will now hear information about the respondent, Robert Hansen.

Respondent Hansen is 39 years old and was born in Los Angeles. He has four children of his own and last saw them in 1999.

In 1991, when he was 19, he sexually assaulted a 15 year-old girl. While the first time they had sex he did not know her age, the respondent continued to have sex with her after learning her age. He was aware that it was illegal. The girl’s mother notified the authorities and the respondent was arrested. He subsequently pled guilty and received a 60-day jail sentence and a $755 fine.

Before pleading guilty, the respondent began dating another girl who was 14 years old, a fact of which the respondent was aware. When she became pregnant, the authorities arrested the respondent and charged him with third-degree criminal sexual conduct. He pled guilty and the judge suspended his sentence. The respondent married the girl with her mother’s consent, and the couple eventually had three children.
The respondent and his wife lived at her mother’s house when he began molesting his 4-year-old stepdaughter. The respondent also began molesting his own daughter, who was 3 years old. The abuse last approximately 3 years.

He was eventually charged with first- and second-degree criminal sexual conduct, to which he pled not guilty. A jury convicted him of both charges and sentenced him to 10 years in prison. He is set to be released from prison in December.

A.3 Mental abnormality

The court appointed a forensic psychologist, Dr Nichols, who has a PhD in clinical psychology, and has conducted over 200 sex offender evaluations for the court. He spent approximately 6 hours over 2 days interviewing the respondent.

Dr Nichols concluded that respondent Hanson suffers from the mental disorder pedophilia. According to the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM), a diagnosis of pedophilia requires: (1) recurrent, intense sexually arousing fantasies about a prepubescent child; (2) the person has acted on these urges; (3) the person is at least 16 years old.

Dr Nichols confidently stated that all these factors applied to respondent Hanson. He noted that Hanson had a history of attraction to prepubescent children. While the 14- and 15-year-old victims may have been undergoing puberty, Dr Nichols noted that the 3- and 4-year old victims were not. Furthermore, Dr Nichols noted that Hanson was convicted of engaging in sexual activity with young children and that he was over 16 years old when this occurred.

A.4 Dangerousness

In order to determine whether it is likely that respondent Hanson will reoffend, Dr Nichols used the Static-99, an actuarial (statistical) tool that is commonly used in SVP commitment proceedings. In the same way that insurance companies use actuarial tools to assess driving risk, researchers have developed actuarial tools that can assess the risk of sexual re-offence. These tools rely on risk factors with an empirically established relation to sexual offending, such as age at release, relationship to prior victims and prior involvement with the criminal justice system. The Static-99 uses 10 risk variables, which are scored by the examiner based on whether the variable is present. The total score for all 10 variables is then summed. The summed scores lead to classification in one of three possible risk groups: low; moderate; or high.

Dr Nichols testified that the Static-99 placed respondent Hanson in the moderate risk group. Dr Nichols believed this to be an accurate estimate, and noted that Hanson’s age and the fact his victims were relatives decrease the likelihood of re-offence compared to other child molesters.

REFERENCES


Coffin v. Taylor, 156 U.S. 432 (U.S. Supreme Ct. 1895).


In Re Lueck, 2010 WL 37744394 (Minn. App. 2010).


