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Sexual Predator Laws: Clarifying the Relationship between Mental Health Laws and Due Process Protections

Maureen F. Larsen

University of Nebraska College of Law

Robert F. Schopp

University of Nebraska–Lincoln and University of Nebraska College of Law, rschopp1@unl.edu

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Maureen F. Larsen* & Robert F. Schopp**

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I. INTRODUCTION

In May of 1987, Earl K. Shriner's ten-year sentence for kidnapping and assaulting two teenage girls was ending. Shriner was intellectually disabled and had a long history of killing, sexual assaulting, and kidnapping.¹ Prior to his release from a Washington prison, prison of-

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* J.D., University of Nebraska College of Law, 2019.

** Robert J. Kutak Professor of Law, Professor of Psychology, Professor of Philosophy at the University of Nebraska.

1. Roxanne Lieb, *Washington's Sexually Violent Predator Law: Legislative History and Comparison with Other States*, WASH. ST. INST. FOR PUB. POL'Y (1996), http://www.wsipp.wa.gov/ReportFile/1244/Wsipp_Washingtons-Sexually-Violent-Preda

officials learned that Shriner planned to torture and kill children after his release. Officials attempted to prevent his release and detain him under Washington's general civil commitment laws; however, the law required a recent overt act to establish dangerousness.² Unable to show a requisite act, Shriner was released. Two years later, he raped and cut off the penis of a seven-year-old boy in Tacoma, Washington.³

One year earlier, a woman had been kidnapped and murdered by Gene Raymond Kane, an inmate that had been placed on work release after serving thirteen years for attacks on two women.⁴ Kane had been rejected from the state mental hospital's sexual pathology program because he had been determined "too dangerous to handle."⁵ Public outrage led the governor of Washington to establish a Community Protection Task Force to recommend statutory changes.⁶ Before the task force could make recommendations, another offender, Wesley Allen Dodd, was arrested while attempting to abduct a six-year-old boy from a movie theatre in Washington.⁷ Dodd subsequently confessed to killing two boys that were riding their bikes in a park and to kidnapping and brutally murdering a four-year-old boy who was playing outside a school.⁸

The task force proposed a bill that included a civil commitment statute authorizing the state to confine and treat a specific group of sex offenders after their criminal sentence had been completed, and the statute unanimously passed both houses of the legislature.⁹ The constitutionality of the statute was challenged on the grounds that it violated the Constitution's double jeopardy and *ex post facto* protections.¹⁰ Upholding the statute, the Washington Supreme Court concluded that it did not violate constitutional protections because the statute was civil and not criminal in nature.¹¹ However, a federal dis-

tor-Law-Legislative-History-and-Comparisons-With-Other-States_Full-Report.pdf [https://perma.unl.edu/KF8Y-RABB].

2. *Id.* at 1.

3. Associated Press, *Tacoma Sex Offender Faces Latest Charges in Mutilation of Boy*, SPOKESMAN-REVIEW, MAY 23, 1989, B2.

4. Barry Siegel, *Locking Up "Sexual Predators": A Public Outcry in Washington State Targeted Repeat Violent Sex Criminals: A New Preventive Law Would Keep Them in Jail Indefinitely*, L.A. TIMES (May 10, 1990), http://articles.latimes.com/1990-05-10/news/mn-1433_1_sexual-predator [https://perma.unl.edu/VL6B-QNGR].

5. *Id.*

6. Lieb, *supra* note 1, at 1.

7. *Id.*

8. Carol M. Ostrom & Jack Broom, *Westley Dodd: A Long, Steady Slide into Dark Desperation*, SEATTLE TIMES (Jan. 3, 1993), <http://community.seattletimes.nwsource.com/archive/?date=19930103&slug=1677933> [https://perma.unl.edu/5CBX-GG59].

9. Lieb, *supra* note 1, at 1.

10. *In re Young*, 857 P.2d 989 (Wash. 1993).

11. *Id.*

strict court ruled that the statute violated (1) substantive due process by permitting indefinite confinement without the requirement of mental illness, (2) the *ex post facto* clause because the law was punitive and retrospectively applied, and (3) the double jeopardy clause because the offender had already been convicted and incarcerated for the criminal conduct.¹² The case was being appealed in the Ninth Circuit Court of Appeals when the U.S. Supreme Court upheld a similar statute in *Kansas v. Hendricks*.¹³

After a sex offender's criminal sentence has been served, sexually violent predator (SVP) laws permit post-incarceration confinement if the offender is determined to be likely to commit future sexual crimes.¹⁴ The earliest "sexual psychopath" laws were enacted in the 1930s, and these laws confined sex offenders in prisons. Michigan enacted the first such law in 1937; however, it was quickly determined to be unconstitutional.¹⁵ Currently, at least twenty states have SVP statutes, and most require the state to satisfy three elements: (1) the offender was convicted of or charged with a sexual offense, (2) the offender has a mental disorder or abnormality, and (3) the offender is likely to engage in further sexually violent conduct.¹⁶ Following *Hendricks*, the constitutionality and application of SVP statutes continues to be controversial.

This Article will first explore the justification used in SVP legislation. Second, it will discuss the Supreme Court's interpretation of criminal punishment as civil commitment. Third, it will illustrate how the lack of measurable standards makes SVP statutes unworkable. And finally, this Article will suggest that states replace SVP legislation with criminal statutes for those offenders that are criminally culpable and use general civil commitment laws for offenders that are exculpable by reason of severe mental illness.

II. THE JUSTIFICATION FOR SVP LEGISLATION

A. Police Power and *Parens Patriae*

The Fourteenth Amendment's due process clause includes the right to be free from bodily restraint.¹⁷ This liberty interest is implicated in involuntary civil commitments, so a commitment must be justified as necessary to balance "the liberty of the individual" against

12. *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995).

13. 521 U.S. 346 (1997).

14. See generally Frederick J. Hacker & Marcel Flynn, *The Sexual Psychopath Act in Practice: A Critical Discussion*, 43 CALIF. L. REV. 766 (1955).

15. 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, 245-66 (2015).

16. *Id.*

17. *Youngberg v. Romeo*, 457 U.S. 307 (1982).

“the demands of an organized society.”¹⁸ Involuntary civil commitment is justified on two grounds: a state’s police power and *parens patriae* authority.¹⁹ A state has police power to protect the public from harm. In *Jacobsen v. Commonwealth of Massachusetts*, the Supreme Court held that a Massachusetts statute requiring vaccination against smallpox was a constitutional use of the state’s police power.²⁰ The Court described a state’s police power as that which “must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”²¹ Under this power, an individual may be confined to protect the public from harm or the threat of injury to personal property.²² Police power is most often employed in the criminal justice system to incarcerate convicted offenders.²³ While this power may be used to punish and incapacitate convicted offenders, generally police power cannot be used to prevent future crimes because “[e]vidence of propensity can be considered relatively unreliable and more difficult for a defendant to rebut”²⁴ However, the Court has held that civil commitment may be used to confine persons with mental disorders based on a prediction of dangerousness using a state’s police power and *parens patriae* authority.²⁵

Parens patriae means “parent of the country.”²⁶ Under the doctrine of *parens patriae*, the government has a duty to take care of those who cannot care for themselves. This doctrine arose from common law and has been explained by the Court as being

derived from the English constitutional system. As the system developed from its feudal beginnings, the King retained certain duties and powers, which were referred to as the “royal prerogative” These powers and duties were said to be exercised by the King in his capacity as guardian of persons under legal disabilities to act for themselves. For example, Blackstone refers to the sovereign or his representative as “the general guardian of all infants, idiots, and lunatics.” Under this doctrine, the government has a duty to care for those who cannot care for themselves.²⁷

18. *Id.* at 320 (quoting *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting)).

19. *See* *United States v. Comstock*, 650 U.S. 126, 164 (2010) (recognizing that States have enacted civil-commitment laws under their *parens patriae* and general police powers).

20. 197 U.S. 11 (1905).

21. *Id.* at 25.

22. *Addington v. Texas*, 441 U.S. 418 (1979); *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

23. *See generally* *Torres v. Lynch*, 136 S. Ct. 1619 (2016) (discussing the authority of the states to define and enforce criminal laws).

24. *Powell v. Texas*, 392 U.S. 524, 532 (1968).

25. *Addington*, 441 U.S. at 426.

26. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex. rel., Barez*, 458 U.S. 592 (1982).

27. *Hawaii v. Standard Oil*, 405 U.S. 251, 258 (1972).

This doctrine is often invoked with juveniles and incompetent persons.²⁸ For example, in *Schall v. Martin*, the Court explained that “[c]hildren, by definition, are not assumed to have the capacity to take care of themselves.”²⁹ They are assumed to be the subject of the control of their parents, and if parental control falters, the state must play its part as *parens patriae*.³⁰ A state may also use its *parens patriae* authority to appoint guardians to make decisions and manage the affairs of incompetent persons.³¹ Ideally, when a state acts as a substitute decision-maker under its *parens patriae* power, it should make determinations the way an individual would if he or she were fully competent.³² In *O'Connor v. Donaldson*, Chief Justice Burger explained that when exercising *parens patriae* power, “[a]t a minimum, a particular scheme for the protection of the mentally ill must rest upon a legislative determination that is compatible with the best interests of the affected class and that its members are unable to act for themselves.”³³

The authority under *parens patriae* presumes that the individual to which it is applied does not have the capacity to manage his or her own affairs. If an individual is dangerous but does not lack this capacity, states may not commit the individual under the doctrine of *parens patriae* alone. The state’s police power is also insufficient because “a finding of dangerousness alone is ordinarily not sufficient ground on which to justify indefinite involuntary commitment.”³⁴ A state’s authority under general involuntary commitment statutes requires *parens patriae* or police power.³⁵ In *Addington v. Texas*, the Supreme Court described this authority when it stated: “The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorder to care for themselves; the state also has the authority under its police power to protect the community from the dangerous tendencies of some whom who are mentally ill.”³⁶ Thus, in order to justify an individual’s confinement, the individual must be both mentally ill and dangerous, either to himself/herself or to others.

28. See *Alfred A. Snapp & Son, Inc.*, 458 U.S. 592 (providing a summary of case law involving the doctrine of *parens patriae*).

29. 467 U.S. 253 (1984).

30. *Id.* at 265.

31. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 370–71 (3d ed. 2007).

32. *Civil Commitment of the Mentally Ill: Developments in the Law*, 87 HARV. L. REV. 1190 (1974).

33. 422 U.S. 563 (1975) (Burger, J., concurring).

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

35. *Addington v. Texas*, 441 U.S. 418, 426 (1979).

36. *Id.*

B. The Constitutionality of Civil Confinement

While SVP laws authorize civil commitment, they differ from general commitment laws because SVP laws are typically used to confine a criminal offender after his or her prison sentence. Because the offender has already been convicted and served his or her sentence, due process issues arise, but the U.S. Supreme Court has consistently upheld the constitutionality of current SVP laws. For example, in *Hendricks*, the Court upheld Kansas's Sexually Violent Predator Act after the Kansas legislature had enacted the statute to address the problem of sexual offender recidivism.³⁷ The statute provided procedures for the civil commitment of "any person who had been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or a personality disorder which makes the person likely to engage in the predatory acts of sexual violence."³⁸ "Mental abnormality" was defined by the statute 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."³⁹ In the Act's preamble, the Kansas legislature laid out the reasons for this statute, stating:

[A] small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to [Kansas's general involuntary civil commitment statute] In contrast to persons appropriate for civil commitment under the [general involuntary civil commitment statute], sexually violent predators generally have anti-social personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure . . . is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the [general involuntary civil commitment statute].⁴⁰

Leroy Hendricks was convicted of taking indecent liberties with two thirteen-year-old boys and, after serving almost ten years, he was scheduled to be released to a halfway house.⁴¹ Prior to his release, the State of Kansas filed a petition under its Sexually Violent Predator Act seeking civil commitment.⁴² Hendricks moved to dismiss the

37. *Hendricks*, 521 U.S. at 358.

38. KAN. STAT. ANN. § 59-29a02 (1994).

39. *Id.*

40. § 59-20a01.

41. *Hendricks*, 521 U.S. at 354–55.

42. *Id.* at 346.

State's petition on the grounds that the Act was unconstitutional.⁴³ The trial court reserved ruling on whether the Act violated the U.S. Constitution; however, it found that there was probable cause to support a finding that Hendricks was a sexually violent predator and ordered him to be evaluated at a state hospital.⁴⁴ At a jury trial on the issue of whether he was a sexual predator, evidence was introduced demonstrating Hendricks's diagnosis of pedophilia and his long history of sexually abusing children.⁴⁵ Hendricks agreed that he was a pedophile and stated that the only way to prevent him from sexually abusing children was for him "to die."⁴⁶ The jury ordered him committed after it unanimously found Hendricks was a predator.⁴⁷ On appeal, Hendricks claimed, *inter alia*, that the Kansas statute constituted an *ex post facto* law and double jeopardy, thus violating his right to due process.⁴⁸ The Kansas Supreme Court held that the Act violated due process because, under *Addington*, a civil commitment required a determination that a person is (1) mentally ill and (2) a danger to himself or others.⁴⁹ The court noted that Hendricks's pedophilia was a mental abnormality—not a mental illness.⁵⁰

The U.S. Supreme Court reversed.⁵¹ The Court ruled that the Act's definition of "mental abnormality" satisfied due process requirements because it required proof of "past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated."⁵² The Court explained that while dangerousness alone is generally insufficient for involuntary commitment, it had upheld statutes that required a proof of dangerousness with "some additional factor, such as a 'mental illness' or 'mental abnormality.'"⁵³ The Court concluded that pedophilia was a serious mental disorder, as classified by the American Psychiatric Association (APA) and that this condition, along with Hendricks's lack of volitional control over his dangerousness, satisfied due process requirements.⁵⁴

The Court also rejected Hendricks's claims that the Act violated the Constitution's protections against *ex post facto* laws and double jeopardy. The Court held that the Act did not violate the *ex post facto*

43. *Id.* at 354.

44. *Id.*

45. *Id.* at 350.

46. *Id.*

47. *Id.* at 355.

48. *Id.*

49. *In re Hendricks*, 912 P.2d 129 (Kan. 1996).

50. *Id.*

51. *Hendricks*, 521 U.S. at 371.

52. *Id.* at 358.

53. *Id.* (citing *Heller v. Doe*, 509 U.S. 312 (1993) ("Previous instances of violent behavior are an important indicator of future violent tendencies.")).

54. *Id.* at 360.

clause because the clause only applied to penal statutes and the Act did not impose punishment.⁵⁵ The Court also held that the Act did not violate double jeopardy protections because it was not a criminal proceeding as evidenced by both its purpose of protecting the public from harm and by its placement in Kansas's civil code.⁵⁶ Finally, the Court concluded that the law was not established "to punish past misdeeds, but primarily to show the accused's mental condition and to predict future behavior" and that it did "not implicate either of the two primary objectives of criminal punishment: retribution or deterrence."⁵⁷ In short, the Court's holding permitted a person to be civilly committed if that person *currently* suffers from a "mental abnormality" or "personality disorder" and there is a likelihood that the person will engage in *future* conduct that is dangerous to the public. In upholding the Kansas statute as constitutional, the Court reasoned that "some additional factor" satisfied due process.⁵⁸ This factor may include a mental abnormality or personality disorder, including a lack of volitional control.⁵⁹ With its determination that the statute was civil in nature, the Court allowed states to bypass the criminal justice system's due process protections and permitted an individual to be convicted, sentenced, incarcerated, and then subsequently committed and confined again—indefinitely.

Pre-Hendricks, the Court had consistently held that a civil commitment required both (1) mental illness and (2) dangerousness.⁶⁰ The Court had explained that the purpose of commitment "is to treat the individual's mental illness and protect him and society from his potential dangerousness."⁶¹ However, when an individual is no longer dangerous or is no longer insane, he must be released⁶² because due process requires that "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."⁶³ Another context in which civil commitments are used is after an insanity acquittal. The Supreme Court has held that when a criminal defendant is found not guilty by reason of insanity, both requirements are satisfied and the defendant may be automatically committed.⁶⁴ In that context, the defendant's mental illness exempts him

55. *Id.* at 370.

56. *Id.*

57. *Id.* at 360–61.

58. *Id.* at 358.

59. *Id.*

60. *See generally* *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Jones v. United States*, 463 U.S. 354 (1983); *Vitek v. Jones*, 445 U.S. 480 (1980); *Addington v. Texas*, 441 U.S. 418 (1979); *Jackson v. Indiana*, 406 U.S. 715 (1972).

61. *Jones v. United States*, 463 U.S. 354, 368 (1983).

62. *Id.*

63. *Jackson*, 406 U.S. at 738.

64. *Jones*, 463 U.S. at 355 ("The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness.").

from criminal responsibility for his conduct, but he may be committed because he both is mentally ill and dangerous.⁶⁵

In *Foucha v. Louisiana*,⁶⁶ the Supreme Court held 5–4 that when an individual committed as a result of an insanity acquittal is later determined not “mentally ill,” the individual must be released, even if that individual is still dangerous. Four years after being acquitted by reason of insanity, doctors testified that Foucha’s offense was likely the result of a drug-induced psychosis and that he no longer showed signs of mental illness; however, he had an antisocial personality which was not a mental disease and not treatable.⁶⁷ After a bench trial, the court ruled that Foucha was dangerous to himself and others and held that Foucha’s commitment could continue.⁶⁸ The Supreme Court reversed, holding that Foucha must be released because the basis for his confinement no longer existed. The Court stated:

A State, pursuant to its police power, may imprison convicted criminals for the purposes of deterrence and retribution. But there are constitutional limitations on the conduct that a State may criminalize. . . . Here, the State has no such punitive interest. As Foucha was not convicted, he may not be punished. Here, Louisiana has by reason of his acquittal exempted Foucha from criminal responsibility⁶⁹

The Court held that Foucha’s continued confinement was impermissible because a person may not be confined by civil commitment without a determination that he is both mentally ill and dangerous.⁷⁰ Foucha was diagnosed with antisocial personality disorder “for which there is no effective treatment,” and ordered him released because he was determined to no longer be “mentally ill.”⁷¹ The Court rejected the state’s argument that Foucha could be indefinitely confined because his antisocial personality sometimes led to aggressive conduct, stating “[t]his rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct.”⁷² This holding cannot be reconciled with the Court’s holding in *Hendricks*.

In *Hendricks*, the Court employed this very rationale in holding that Kansas’s law was constitutional. The Court permitted Hendricks’s indefinite confinement because he was found to have a “mental abnormality” or “personality disorder” that makes it difficult, if not impossible, for the person to control his dangerous behavior.⁷³

65. *Id.*

66. *Foucha v. Louisiana*, 504 U.S. 71 (1992).

67. *Id.*

68. *Id.* at 75.

69. *Id.* at 80 (internal citations omitted).

70. *Id.* at 82.

71. *Id.* at 77.

72. *Id.* at 82.

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

The Court's determination that pedophilia was a "mental abnormality" that renders one unable to control behavior ultimately justified commitment based on the classification of pedophilia alone.

III. A LACK OF MEASURABLE STANDARDS MAKE SVP STATUTES UNWORKABLE

A. The Court's Vague Mental Illness Standard

The Supreme Court has consistently held that involuntary civil commitment requires both a mental illness and future dangerousness.⁷⁴ Schopp defines legal mental illness as a "psychological impairment that renders a person incapable of meeting some legally relevant standard of adequate functioning and thus renders that person ineligible for a specified legal status and the rights or liabilities associated with that status."⁷⁵ In *Hendricks*, the Court not only held that a "mental abnormality" satisfied the requirement of "mental illness," it also held that a "lack of volitional control" was sufficient for "mental abnormality."⁷⁶ Volition is defined as the ability to make a choice or determine something.⁷⁷ The Court stated that Hendricks's "admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings."⁷⁸ The Court's reasoning lacks consistency.

To be criminally responsible requires a voluntary act by the offender.⁷⁹ If Hendricks was unable to control his conduct, he could not be criminally responsible for the conduct, and he would be ineligible for punishment. The Court was clearly using facts from Hendricks's offense while ignoring the fact that he had been dealt with through criminal proceedings where he was convicted and sentenced. Morse described the ultimate result of this holding when stating:

[T]he criminal justice system blamed and punished him for yielding to his allegedly uncontrollable urges; the sexual predator commitment system in effect excused him, found him non-responsible, because it committed him on the ground that he could not control precisely the same urges and related conduct

74. See *supra* note 60.

75. Robert F. Schopp, *Civil Commitment and Sexual Predators: Competence and Condemnation*, 4 PSYCHOL. PUB. POL'Y & L. 323, 339-40 (1998).

76. *Hendricks*, 521 U.S. at 360.

77. *Volition*, BLACK'S LAW DICTIONARY (10th ed. 2014).

78. *Hendricks*, 521 U.S. at 360.

79. See MODEL PENAL CODE § 2.01 explanatory note (AM. LAW INST., 1962) ("[T]he fundamental predicate for all criminal liability, that the guilt of the defendant be based upon conduct, and that the conduct include a voluntary act or an omission to perform an act of which the defendant was physically capable."); ROBERT F. SCHOPP, *AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY* (1991) (stating that criminal responsibility requires both a voluntary act and the ability to engage in practical reasoning).

that led to the ten-year prison sentence for sexual molestation that preceded his commitment.⁸⁰

The Court determined that Hendricks lacked “volitional control”;⁸¹ however, the criminal prohibition and punishment of predatory sexual assaults requires an offender to have some degree of control over his or her conduct.⁸² The nature of predatory sexual assaults requires that an offender restrain from such acts in public to avoid immediate detection. This restraint demonstrates the ability to choose when and where to engage in the offensive conduct. Offenders like Hendricks must engage in planning and strategy to establish circumstances where he would have the opportunity to assault his victims. Pedophilia may be a mental disorder or character trait that makes it difficult to refrain from molesting children, but an offender acts intentionally when yielding to his desire to do so. A predatory sexual offender’s ability to deliberate about whether to commit an act is evidence that the offender can engage in practical reasoning.⁸³ Presumably, Hendricks was able to choose not to engage in child molestation under certain circumstances, and if an offender can make a deliberate choice to engage in conduct or to not engage in conduct, the offender does not lack volitional control.⁸⁴

In a subsequent case challenging Kansas’s statute, the Supreme Court further relaxed its mental illness requirement. In *Kansas v. Crane*,⁸⁵ the Supreme Court clarified that its ruling in *Hendricks* did not require a “total or complete lack of control,” but a “mental abnormality” or “personality disorder” that makes it “difficult, if not impossible, for the [dangerous] person to control his dangerous behavior.”⁸⁶ In discussing whether an “emotional impairment” would be sufficient for civil commitment, the Court stated that while most cases would involve persons that were unable to control their urges as Hendricks had been, other sex offenders with emotional or psychiatric illnesses that involved “compulsive, repetitive, or driven behavior” may also be determined to be “unable to control their dangerousness.”⁸⁷

The Court noted that it had not narrowly defined “lack of control” because states had “considerable leeway” in defining mental abnormality and personality disorder.⁸⁸ More importantly, the Court recognized that it could not set precise rules in this area because of the

80. Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1054 (2002).

81. *Hendricks*, 521 U.S. at 360.

82. SCHOPP, *supra* note 79, at 193.

83. *See id.*

84. *Id.*

85. 534 U.S. 407 (2002).

86. *Id.* (quoting *Hendricks*, 521 U.S. at 358).

87. *Id.*

88. *Id.* at 413–14.

struggle with merging psychiatry and the law.⁸⁹ The Court articulated this struggle when stating “the science of psychiatry which informs, but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law.”⁹⁰ The Court highlighted psychiatry’s inability to clearly distinguish between “a defective understanding or appreciation” and an “ability to control . . . behavior,” and left open the possibility that an “emotional” impairment would constitute the requisite “mental abnormality.”⁹¹ Recognizing that it had not “distinguished for constitutional purposes among volitional, emotional, and cognitive impairments,” the Court attempted to establish some limit when it indicated that “there must be proof of serious difficulty in controlling behavior.”⁹²

Arguably, the Court’s holding in *Crane* permits involuntary commitment on a finding of dangerousness alone. Many normal citizens would state that they lack self-control or that they have lost control at a specific time.⁹³ This standard’s vagueness gives courts little direction for determining whether a person cannot control his or her behavior and, as a result, permits states to find a “mental abnormality” with any failure to refrain from conduct. Justice Scalia’s dissent articulated this struggle, calling the decision “a remarkable feat of jurisprudential jujitsu” and blaming the Court for leaving the law “in such a state of utter indeterminacy.”⁹⁴

I suspect that the reason the Court avoids any elaboration is that elaboration which passes the laugh test is impossible. How is one to frame for a jury the degree of “inability to control” which, in the particular case, “the nature of the psychiatric diagnosis, and the severity of the mental abnormality” require? Will it be a percentage (“Ladies and gentlemen of the jury, you may commit Mr. Crane under the SVPA only if you find, beyond a reasonable doubt, that he is 42% unable to control his penchant for sexual violence”)? Or a frequency ratio (“Ladies and gentlemen of the jury, you may commit Mr. Crane under the SVPA only if you find, beyond a reasonable doubt, that he is unable to control his penchant for sexual violence 3 times out of 10”)? Or merely an adverb (“Ladies and gentlemen of the jury, you may commit Mr. Crane under the SVPA only if you find, beyond a reasonable doubt, that he is appreciably- or moderately, or substantially, or almost totally-unable to control his penchant for sexual violence”)? None of these seems to me satisfactory.⁹⁵

Morse argues for an abandonment of volitional impairments as legal criteria because the standard imposes “almost no limit on commit-

89. *Id.* at 413.

90. *Id.* at 407–08.

91. *Id.* at 415.

92. *Id.* at 412, 414–15.

93. Morse, *supra* note 80.

94. *Crane*, 534 U.S. at 423–24 (Scalia, J., dissenting).

95. *Id.*

ment.”⁹⁶ To distinguish a desire and a reflexive bodily movement, Morse analogizes strong desires to the full bladder.

Assume that an agent needs to urinate, but is unable to find an appropriate place to do so. As time passes and the bladder continues to fill, the desire to urinate will become increasingly powerful and unpleasant. At some point, however, the person’s bladder will empty because the pressure on the urethral (urinary) sphincter will mechanically force it to open; he or she will no longer be able to “hold it in,” no matter what the cost might be for doing so. For example, suppose the agent is threatened with death for permitting his bladder to empty. The agent will surely exercise control for a very lengthy period, but all agents will finally empty their bladders because, ultimately, voiding will be a product of literally uncontrollable mechanism. The sphincter “fails” because the physical pressure on it is too great.

Strong desires are allegedly analogous to the full bladder. Increasing desire is analogized to increasing pressure on the sphincter, and we are supposed to conclude that people are no more responsible for yielding to some desires than they are for emptying their bladders. But desires are not physical forces, actions are not mechanisms, and people are not sphincters. There are no “desire units” that will finally mechanistically force the “action switch” to flip if enough “desire units” are added.⁹⁷

The Court requires “proof of serious difficulty in controlling behavior,”⁹⁸ yet courts are unable to objectively examine an individual’s ability to control or resist his or her desires. Hence, volitional impairments should not be used to satisfy the legal requirement of mental illness.

The APA has also recommended that the volitional element not be used in the context of the insanity defense, stating that “a mental disorder which can potentially lead to exculpation ‘should usually be of the severity (if not the quality) of conditions that psychiatrists diagnose as psychoses.’”⁹⁹ Another medical organization, the Association for the Treatment of Sexual Abusers, called the volitional impairment standard “meaningless and unworkable.”¹⁰⁰ The American Bar Association has also recommended that the volitional test not be used because of the difficulty, if not impossibility, of distinguishing between an “irresistible impulse” and an “impulse that cannot be resisted.”¹⁰¹

The use of a volitional standard is not the only conflict between the APA and the courts. There has also been considerable struggle in the

96. Morse, *supra* note 80.

97. *Id.* at 1057.

98. *See Crane*, 534 U.S. at 414–15.

99. Am. Psychiatric Ass’n Insanity Def. Work Group, *Statement on the Insanity Defense*, reprinted in 140 AM. J. PSYCHIATRY 681–88 (1983).

100. Brief for the Association for the Treatment of Sexual Abusers as Amicus Curiae Supporting Petitioner, *Kansas v. Crane*, 534 U.S. 407 (2002) (No. 00-957), 2001 WL 670067, at *2.

101. AM. BAR ASS’N, ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 339–42 (1984); *see also* Christopher Slogobin, *The American Bar Association’s Criminal Justice Mental Health Standards: Revisions for the Twenty-First Century*, 41 HASTINGS CONST. L.Q. (Dec. 13, 2016).

use of the APA's Diagnostic and Statistical Manual of Mental Disorders (DSM) for legal conclusions. The DSM is a diagnostic tool published by the APA that is primarily used by the medical community.¹⁰² The DSM is also used extensively in legal proceedings, arguably because the Supreme Court has failed to establish sufficient legal standards or definitions of mental illness or mental abnormalities. In *Hendricks*, the Court stated that the "mental abnormality" requirement was satisfied because Hendricks's pedophilia was listed as a "mental disorder" in the DSM.¹⁰³ In *Crane*, however, the Court recognized that "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law."¹⁰⁴ The APA explicitly warned against using its standards for SVP commitment when stating that the DSM's

comprehensive classification schemes are not restricted to identifying those persons who warrant involuntary treatment, let alone confinement. Nor are they designed to identify those subject to various legal standards, such as those for involuntary confinement. Thus, the authors of DSM-IV caution that "[i]n most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a 'mental disorder,' 'mental disability,' 'mental disease,' or 'mental defect.'"¹⁰⁵

In *Clark v. Arizona*,¹⁰⁶ the Supreme Court itself warned against using the DSM as evidence of a mental disease, recognizing that "dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis."¹⁰⁷

In the context of SVP commitments, the failure to construct a sufficient legal standard and the resulting reliance on the DSM causes mental abnormalities to be defined by the offender's conduct. For example, the current DSM-V defines pedophilic disorder as "a paraphilia involving intense and recurrent sexual urges towards and fantasies about prepubescent children that have either been acted upon or which cause the person with the attraction distress or interpersonal difficulty."¹⁰⁸ The classification itself includes an inherent danger that a person with the disorder will act on his urges and sexually as-

102. Cia Bearden, *The Reality of the DSM in the Legal Arena: A Proposition for Curtailing Undesired Consequences of an Imperfect Tool*, 13 Hous. J. Health L. & Pol'y 79 (2012).

103. *Kansas v. Hendricks*, 541 U.S. 346, 372 (1997).

104. *Crane*, 534 U.S. at 413.

105. Brief for the American Psychiatric Association as Amicus Curiae in Support of Leroy Hendricks, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (No. 95-1649), 1996 WL 469200, at *23.

106. 548 U.S. 735 (2006).

107. *Id.* at 774.

108. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) [hereinafter DSM-V].

sault children.¹⁰⁹ In using the DSM's classification of pedophilia, the classification *is* the legal justification for commitment: the offense of child molestation leads to a classification of pedophilia, and the classification satisfies both the "mental abnormality" and dangerousness requirements. Thus, the convicting offense of child molestation may itself be sufficient for indefinite confinement.

SVP statutes protect society by permitting the indefinite confinement of pedophiles, but this raises the question of whether civil commitment would be justified in other contexts as well. For example, kleptomania is a mental disorder defined in the DSM-V as a "[r]ecurrent failure to resist urges to steal objects that are not needed for personal use or for their monetary value."¹¹⁰ The Supreme Court has held that an individual's conviction for a criminal act satisfies the dangerousness requirement even if it is a non-violent crime against property.¹¹¹ Following this reasoning, the definition of kleptomania satisfies both the "mental abnormality" and the "dangerousness" prongs for civil commitment. When mental health laws are permissibly exploited for one class of individuals, there is an inherent danger that these laws may be more broadly applied to other individuals as well.

B. The Danger of Predicting Dangerousness

Along with a showing of "mental illness," civil commitment requires a determination that an individual is dangerous. This requires a finding that an individual will likely engage in future conduct that is dangerous to the public or the individual.¹¹² An individual is dangerous if the probability and severity of his or her potential reoffending are high enough to justify commitment,¹¹³ but there is a risk of recidivism with all individuals convicted of a crime. In 2014, the Department of Justice reported that 67.8% of all released state prisoners were arrested for a new crime within three years and 76.6% were arrested within five years.¹¹⁴ In a similar study of sex offenders, only 3.5% were reconvicted of a sex crime within three years.¹¹⁵ Because

109. *Id.*

110. *Id.*

111. *Jones v. United States*, 463 U.S. 354, 364–65 (1983).

112. *See Kansas v. Hendricks*, 521 U.S. 346, 360–61 (1997).

113. Aletha M. Claussen-Schulz, Marc W. Pearce & Robert F. Schopp, *Dangerousness, Risk Assessment, and Capital Sentencing*, 10 *PSYCHOL. PUB. POL'Y & L.* 471 (2004).

114. MATTHEW R. DUROSE, ALEXIA D. COOPER & HOWARD N. SNYDER, *BUREAU JUST. STATS., NCJ244205, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010* (2014).

115. PATRICK A. LANGAN, ERICA L. SCHMITT & MATTHEW R. DUROSE, *BUREAU OF JUST. STATS., NCJ198281, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994* (2003).

sex offenders have a significantly lower risk of reoffending than non-sex offenders, the severity of harm likely with sexual offenses is used to justify commitment. However, in a longitudinal study published by the Department of Justice, only 1.3% of rapists and 2.5% of child molesters were rearrested for molesting a child after release.¹¹⁶ The vast majority of sex crimes against children that were committed by released prisoners were by prisoners that had not been convicted of prior sexual offenses.¹¹⁷ While 83% of these crimes were committed by individuals that did not have a prior conviction for a sex crime, individuals with a prior sexual offense accounted for only 17%.¹¹⁸

Because sex offenders have a very low probability of reoffending, the threshold of risk sufficient for commitment must necessarily be low. The Court has held that while criminal convictions require proof beyond a reasonable doubt, an offender may be committed under an SVP statute using a clear and convincing standard.¹¹⁹ At least half of the states with SVP laws use this less stringent standard.¹²⁰ The language of SVP statutes also makes a determination of dangerousness easily attainable. Most states define “sexually violent predator” as a person who suffers from a mental abnormality or personality disorder which makes the person likely to engage in acts of sexual violence.¹²¹ Statutory definitions of “likely” include such language as “substantially probable,”¹²² “more likely than not,”¹²³ and “the person’s propensity to commit acts of sexual violence is of such a degree as to pose a threat to the health and safety of others.”¹²⁴ It is also significant that only two states require a recent overt act to establish a finding of dangerousness.¹²⁵

The use of estimated risk raises genuine questions regarding reliability. Estimates of dangerousness are made using opinion testimony

116. *Id.* at 31.

117. *Id.*

118. *Id.*

119. *Addington v. Texas*, 441 U.S. 418, 428 (1979).

120. *DeMatteo et al.*, *supra* note 15.

121. *Id.*

122. 725 ILL. COMP. STAT. ANN. 207/5(f) (2012).

123. IOWA CODE ANN. § 229A.2(4) (2017); MO. REV. STAT. ANN. § 632.480(5) (2017); WASH. REV. CODE ANN. § 71.09.020(7) (2015); WIS. STAT. ANN. § 980.01(1m) (2015).

124. FLA. STAT. ANN. § 394.912(4) (2016); KAN. STAT. ANN. § 59-29(a02(3)); N.J. STAT. § 30:4-27.26; S.C. CODE § 44-48-30(9) (2013); *see also* NEB. REV. STAT. § 83-174.01(2) (2009) (defining likely to mean “the person’s propensity to commit sex offenses resulting in serious harm to others is of such a degree as to pose a menace to the health and safety of the public”); N.H. REV. STAT. ANN. § 135-E:2(VI) (2015) (defining likely to mean “the person’s propensity to commit acts of sexual violence is of such a degree that the person has serious difficulty in controlling his or her behavior as to pose a potentially serious likelihood of danger to others”).

125. *See* IOWA CODE ANN. § 229A.2(4); WASH. REV. CODE ANN. § 71.09.020(7).

by mental health professionals and actuarial testing.¹²⁶ Mental health professionals are asked to assess an individual's level of risk; however, there is considerable evidence that these estimates are not reliable. In *Barefoot v. Estelle*,¹²⁷ the Supreme Court addressed the issue of whether mental health expert testimony regarding a defendant's future dangerousness was constitutional in the context of capital punishment. Under Texas law, a sentence of death required the jury to find "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."¹²⁸ Both the defendant and the APA argued that the expert testimony used to predict the defendant's future risk was unreliable.¹²⁹ The Court rejected the APA's argument that psychiatrists were not experts in assessing future risk, stating that the adversarial system would be able to discover reliability issues.¹³⁰ The Court further noted that the APA had argued that psychiatrists predicting future dangerousness were wrong "only most of the time," and not all of the time.¹³¹

Under the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹³² evidence of future dangerousness must be the product of reliable principles and methods to ensure scientific validity.¹³³ Estimates of dangerousness by mental health professionals have not been shown to be reliable, but they are still used in SVP commitment proceedings.¹³⁴ Several studies show that these estimates are no more accurate than chance.¹³⁵ When discussing the ability of psychiatrists and psychologists to predict future dangerousness, Schopp and Quattrocchi observed:

Unfortunately, a rather large and consistent body of empirical evidence indicates that the standards of the profession include no ability to accurately predict dangerous behavior. Not only have psychologists and psychiatrists been unable to predict dangerousness to a degree of accuracy which would justify

126. *Addington v. Texas*, 441 U.S. 418, 429 (1979) ("Whether the individual is mentally ill and dangerous to either himself or others . . . turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists.").

127. 463 U.S. 880 (1983).

128. *Id.* at 884.

129. *Id.* at 898–99.

130. *Id.* at 899.

131. *Id.* at 901.

132. 509 U.S. 579 (1993).

133. *Id.*

134. *See, e.g., In re Graham*, 837 N.W.2d 382, 385 (N.D. 2013) (stating that State law requires the State to prove by clear and convincing evidence that the individual is sexually dangerous).

135. *See Barefoot*, 463 U.S. at 918 (Blackmun J., dissenting); THOMAS W. CAMPBELL, *ASSESSING SEX OFFENDERS: PROBLEMS AND PITFALLS* 94–97 (2004) (citing research showing violence prediction error rates ranging from fifty-four percent to ninety-four percent).

infringing on a client's rights, they have been unable to predict any more accurately than have nonprofessionals.¹³⁶

Schopp and Quattrocchi have also stated that even if dangerousness was able to be accurately predicted, clinicians should not do so.¹³⁷ "Clinicians who predict dangerousness distort the meaning of 'dangerousness' in the statute by misrepresenting it as an empirical prediction, obscuring the normative component and misdirecting the temporal focus from the present to the future."¹³⁸ While subjective expert opinion testimony is still employed in SVP commitments, other objective actuarial tools are more generally used in assessing future risk.¹³⁹

Actuarial tools use statistics taken from groups to predict an individual's likelihood of engaging in certain behaviors.¹⁴⁰ When a group of individuals have a known history, an individual's relative risk assessment is based on the traits that the individual has in common with the group.¹⁴¹ In the context of SVP commitments, the most commonly used instrument is the STATIC-99 which measures ten factors that have been shown to relate to recidivism.¹⁴² These factors include the number of prior sex offenses; the number of prior sentencing dates; if the offender has any convictions for non-contact sex offenses; prior nonsexual violence; any unrelated victims; any victims that were strangers; any victims that were male; the offender's current age; and whether the offender has lived with a significant other for at least two years.¹⁴³ The STATIC-99 has been criticized as not identifying offenders that are at high-risk for recidivism, having risks of scoring errors, and failing to take into account significant differences between different types of sex offenders.¹⁴⁴ In *Crane*, the Supreme Court stated that SVP commitment requires that an offender's estimated future dangerousness "must be sufficient to distinguish the dangerous sexual offender . . . from the dangerous but typical recidivist convicted in an

136. Robert F. Schopp & Michael R. Quattrocchi, *Tarasoff, The Doctrine of Special Relationships, and the Psychotherapist's Duty to Warn*, C.L. FAC. PUB. 12, 23 (1984).

137. Robert F. Schopp & Michael R. Quattrocchi, *Predicting the Present: Expert Testimony and Civil Commitment*, 13 BEHAV. SCI. & L. 159 (1995).

138. *Id.*

139. See *In re R.S.*, 801 A.2d 219, 221 (N.J. 2002); *In re Thorell*, 72 P.3d 708, 713 (Wash. 2003) (permitting the use of Screening Scale for Pedophilic Interests (SSPI) as an actuarial instrument to assess an offender's risk of recidivism).

140. John A. Fennel, *Punishment by Another Name: The Inherent Overreaching in Sexually Dangerous Person Commitments*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 37, 52 (2009).

141. *Id.*

142. *Id.* at 54.

143. R. Karl Hanson & David Thornton, *Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales*, 24 L. & HUM. BEHAV. 119, 120 (2000).

144. CAMPBELL, *supra* note 135.

ordinary criminal case.”¹⁴⁵ The tools currently used to estimate dangerousness clearly do not meet this standard.

The threshold used in estimating dangerousness dichotomizes an offender’s risk of future sexual violence by classifying individuals as either dangerous or not dangerous.¹⁴⁶ The use of this dangerous/not dangerous threshold generally focuses only on an offender’s risk factors and does not include a more thorough analysis weighing both the likelihood and the degree of future harm.¹⁴⁷ In addition, the current use of risk assessment in SVP commitments does not include an analysis of certain “protective” factors that may mitigate the future risk of harm.¹⁴⁸ Protective factors may be personal or situational and are defined as “any characteristic of a person, his or her environment or situation which reduces risk of future violent behavior.”¹⁴⁹ Such factors include social support, positive attitudes towards authority, work, financial management, and motivation for treatment.¹⁵⁰ While the existence of such protective factors has been shown to reduce an offender’s risk of future sexual violence,¹⁵¹ these factors are generally not used when determining requisite dangerousness.¹⁵² Forensic practice scholar Richard Rogers calls these risk-only evaluations “inherently inaccurate” and argues that these assessments “represent implicitly biased evaluations with grave, often negative consequences to forensic populations.”¹⁵³

Without reliable standards, the problem then becomes how the risk of dangerousness can be estimated. Unfortunately, judges are forced to rely on inaccurate assessments and subjective determinations. Research has demonstrated that judges most often rely on categorical estimates of risk (high vs. low) rather than percentages or statistical probabilities.¹⁵⁴ Forty years ago, Stephen J. Morse, writing on mental health, warned against using categorical estimates because of the lack of agreed-upon scientific meaning in legal prediction crite-

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

146. Michael R. Quattrocchi & Robert F. Schopp, *Tarasaurus Rex: A Standard of Care That Could Not Adapt*, 11 PSYCHOL. PUB. POL’Y & L. 109, 111 (2005).

147. *Id.*

148. Charlotte E. Rennie & Mairead C. Dolan, *The Significance of Protective Factors in the Assessment of Risk*, 20 CRIM. BEHAV. & MENTAL HEALTH 8–22 (2010).

149. Michiel de Vries Robbé et al., *Protective Factors for Violence Risk: The Value for Clinical Practice*, 3 PSYCHOL. 1259–63 (2012).

150. *Id.*

151. *Id.*; Stephen J. Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527 (1978).

152. Richard Rogers, *The Uncritical Acceptance of Risk Assessment in Forensic Practice*, 25 L. & HUM. BEHAV. 595–605 (2000).

153. *Id.*

154. Nicholas Scurich & Richard S. John, *The Effect of Framing Actuarial Risk Probabilities on Involuntary Civil Commitment Decisions*, 35 L. & HUM. BEHAV. 83 (2011).

ria,¹⁵⁵ yet these standards are still being used. Morse articulated that the terms such as “likely” and “harm” are both nonscientific and vague and that the use of such predictive criteria in mental health law requires “an honest and rigorous assessment of the accuracy of behavioral predictions.”¹⁵⁶

While clinical and actuarial predictions of dangerousness do not sufficiently predict dangerousness, future technical advances may. Looney suggests that neuroimaging technology may be able to predict criminal behavior and future dangerousness in sex offenders.¹⁵⁷ Recognizing that studies show that violent persons and convicted criminals have abnormalities in their prefrontal cortexes and other brain dysfunctions, Looney suggests that neuroimaging may be used to find evidence of these abnormalities.¹⁵⁸ While neuroscience and neuroimaging have been used to suggest a person is not guilty by reason of insanity, he asserts that these techniques may also prove useful in predicting future dangerousness.¹⁵⁹ At the current time, however, there are no sufficiently reliable methods for predicting dangerousness.

Because of the Supreme Court’s vague “mental abnormality” standard¹⁶⁰ and the lower courts’ inability to accurately assess dangerousness, there is a strong argument that SVP laws are invalid. Due process provides that a law is void for vagueness if it does not give fair warning and if it allows for arbitrary and discriminatory application.¹⁶¹ The Supreme Court has held that the void-for-vagueness doctrine applies to both civil and criminal actions where the “exaction of obedience to a rule or standard . . . was so vague and indefinite as really to be no rule or standard at all.”¹⁶² The lack of an objective legal standard for the requisite “mental abnormality” and the reliance on inaccurate assessments of dangerousness fails to sufficiently define what characteristics are sufficient for commitment under SVP statutes. Offenders may be arbitrarily committed based on ambiguous definitions and unreliable predictions of future risk. Because SVP laws lack sufficiently defined characteristics and measurable standards, these statutes are unconstitutionally vague.

155. Morse, *supra* note 151, at 561.

156. *Id.* at 592.

157. J.W. Looney, *Neuroscience’s New Techniques for Evaluating Future Dangerousness: Are We Returning to Lombroso’s Biological Criminality?*, 32 U. ARK. LITTLE ROCK L. REV. 301, 307 (2010).

158. *Id.*

159. *Id.* at 303–07.

160. *See supra* section III.A.

161. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

162. *A.B. Small Co. v. Am. Sugar Refining Co.*, 267 U.S. 233, 239 (1925).

IV. CLARIFYING THE NATURE OF SVP STATUTES

The purpose of the criminal justice system is to prevent harm.¹⁶³ Harm is prevented by punishing individuals that have harmed or by using the threat of punishment to deter those that would commit harm.¹⁶⁴ The Supreme Court's holdings that SVP statutes are civil in nature belies the fact that these statutes are being used as punishment. The punitive nature of SVP statutes is evidenced by both their purpose and effect. Hart has articulated that the difference between criminal and civil actions is moral condemnation and that "[i]t is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment."¹⁶⁵ The imposition of "unpleasant physical consequences" constitutes punishment if there is a "community condemnation of [the] anti-social conduct."¹⁶⁶ SVP commitments restrict an individual's liberty by confinement in a prison, institution, mental hospital, or other similar facility. An offender is condemned both in his criminal adjudication and again by his commitment as a sexual predator.

A. Maintaining Sex Offender Culpability

Because SVP statutes require a finding of mental abnormality, it could be argued that civil commitment mitigates the expression of moral outrage by labeling an individual as mentally ill. In most contexts, labeling an offender as manifesting a mental illness or abnormality or determining that an individual is unable to control his or her offensive behavior identifies that person as less responsible or blameworthy. Should a determination that a sex offender has a mental abnormality such as pedophilia lessen that offender's blameworthiness? The answer is no. Child molestation is a heinous crime with devastating consequences, and mental disorders such as pedophilia do not render the offender less responsible. Should the finding of mental abnormality mitigate society's condemnation of sex offenders? The answer to this question is no. In most contexts, a finding that a person is mentally ill is a measure that justifies commitment and renders that person less culpable for his conduct. In contrast, SVP statutes distort the judgment of blameworthiness by blurring the lines between criminal and mental health laws. SVP statutes do not diminish the culpability of offenders because (1) most states require a conviction, and (2) there is inherent condemnation contained in the language of the statutes.

163. WAYNE R. LAFAVE, *CRIMINAL LAW* § 1.2 (5th ed. 2010).

164. *Id.*

165. Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 405 (1958) (quoting George K. Gardner, *Bailey v. Richardson and the Constitution of the United States*, 33 B.U. L. REV. 176, 193 (1953)).

166. *Id.*

The majority of SVP laws require a determination that an individual is a sexually violent *predator*.¹⁶⁷ “Predator” is defined as “one who preys, destroys, or devours.”¹⁶⁸ This statutory language clearly constitutes moral outrage for committed individuals and minimizes any dilution of culpability that may occur. Furthermore, this language likely stigmatizes the offender in such a way that his commitment makes him even *more* reprehensible than if he had simply been convicted. This further supports the argument that SVP statutes are punitive.

An objective analysis of SVP laws leads to the conclusion that these statutes constitute punishment, but the Court has consistently held the statutes are not punitive by interpreting them as civil in nature. In *Kennedy v. Mendoza-Martinez*,¹⁶⁹ the Court set forth seven factors used in determining whether a statute is civil or punitive in nature.

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned¹⁷⁰

The Court said that each factor was relevant and “may often point in differing directions.”¹⁷¹

Applying these factors to SVP laws leads to the conclusion that the statutes are punitive in nature. First, predator confinement involves significant restraint. Individuals are often housed in prisons or similar environments, and such confinement has historically been regarded as punishment. Second, many state statutes have a requirement that an individual be convicted of one or more sexual offenses to be eligible for civil commitment.¹⁷² In *Hendricks*, the Court used the fact that Kansas’s SVP Act did not require a conviction in its determination that the statute was civil in nature.¹⁷³ However, many states do require a conviction¹⁷⁴ and thus, only apply SVP laws after a finding of scienter. Third, while the Court has consistently stated that

167. See, e.g., FLA. STAT. ANN. § 394.912(5); IOWA CODE ANN. § 229A.10(1); KAN. STAT. ANN. § 59-29a02(a); N.H. REV. STAT. ANN. § 135-E:2(XII)(b); N.J. STAT. ANN. § 30:4-27.26; WASH. REV. CODE ANN. § 71.09.020(9).

168. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2016).

169. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

170. *Id.*

171. *Id.* at 169.

172. See *In re J.R.*, 277 Neb. 362, 762 N.W.2d 305 (2009) (holding that a prerequisite of Nebraska’s SVP statute is a criminal conviction for a sex offense).

173. See *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997).

174. See, e.g., FLA. STAT. ANN. § 394.912(5); NEB. REV. STAT. § 83-174.01(1)(b); WASH. REV. CODE ANN. § 71.09.020(9).

SVP laws do not promote retribution and deterrence,¹⁷⁵ this view is difficult to defend. While a discussion of criminal justice theories is beyond the scope of this Article, it would be fair to conclude that the threat of indefinite confinement would deter predators from engaging in sexually violent conduct or at a minimum, these statutes may be intended to deter individuals. In *Hendricks*, the Court stated that the persons committed are “by definition suffering from a ‘mental abnormality’ or a ‘personality disorder’ that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement.”¹⁷⁶ However, statistics show that the number of sexual assaults reported has declined more than thirty percent since SVP statutes were enacted.¹⁷⁷ With respect to retribution, locking up sexually violent predators indefinitely would certainly be “an expression of society’s moral outrage at particularly offensive conduct.”¹⁷⁸ Fourth, the behaviors involved in a predator’s underlying criminal offense constitute crimes and, therefore, support a finding that SVP statutes are punitive. Finally, SVP statutes have alternative purposes of treatment of the offender and the protection of society; however, the Court has stated that treatment is not required in civil commitments because the state has an interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions.¹⁷⁹ Applying the factors outlined in *Kennedy v. Mendoza-Martinez* supports the conclusion that SVP statutes are punitive.

The Court has said that a statute “would be criminal if it was sufficiently punitive ‘either in purpose or effect.’”¹⁸⁰ While the Court held that Kansas’s SVP statute was not intended to be punitive,¹⁸¹ its legislative history conclusively shows that it was. In support of the statute, the Kansas Attorney General testified:

Most new laws against criminal conduct tend to provide punishment after the victimization has occurred. Senate Bill 525 will act prospectively and be preventative of criminal conduct and not just punitive. You have a rare opportunity to pass a law that will keep dangerous sex offenders confined past their scheduled prison sentence. As I am convinced none of them should ever be

175. *See Seling v. Young*, 531 U.S. 250 (2001); *Hendricks*, 521 U.S. 346; *Allen v. Illinois*, 478 U.S. 364 (1986); *Jones v. United States*, 463 U.S. 354 (1983).

176. *Hendricks*, 521 U.S. at 362–63.

177. JANE WISEMAN, INCIDENCE AND PREVALENCE OF SEXUAL OFFENDING (PART I), SEX OFFENDER MANAGEMENT ASSESSMENT AND PLANNING INITIATIVE (2015) (reporting that the number of sexual assault victimizations in the United States dropped by more than thirty percent between 2002 and 2011).

178. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

179. *Hendricks*, 521 U.S. at 366.

180. *Seling*, 531 U.S. at 269.

181. *Hendricks*, 521 U.S. at 347.

released, I believe you, as legislators, have an obligation to enact laws that will protect our citizens though incapacitation of dangerous offenders.¹⁸²

An objective reading of this legislative history demonstrates that the statute was not civil in nature because its express purpose was to keep predators incarcerated after their criminal sentence was over to prevent future crimes. In *United States v. Melendez-Carrion*, the Second Circuit Court of Appeals determined that a statute permitting preventative detention constituted punishment because the detention period was not limited and could last up to one year, and the confinement could not be “characterized as mild.”¹⁸³ In recognizing that the purpose of the statute was to protect the community from future crimes, the court stated:

The difficulty arises from the undeniable fact that incarceration to protect society from a person’s future criminal conduct is regulatory in a sense but at the same time also achieves one of the classic purposes of punishment—incapacitation. . . . Here, the single effect relied on by the Government, prevention of future crime, is evidence of both a regulatory and a penal purpose. As the Supreme Court has observed, “One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.”¹⁸⁴

Although a statute may be civil on its face, its purpose and effect may constitute punishment. The Court, however, has refused to analyze the actual conditions of confinement to determine whether SVP statutes are ultimately being used as punishment. In *Seling v. Young*, petitioner Young challenged his confinement under Washington’s SVP statute, arguing that the statute was punitive “as applied” to him and, therefore, violated the double jeopardy and *ex post facto* clauses in the Constitution.¹⁸⁵ Young alleged that the conditions of his confinement were punitive because he was subject to more restrictive confinement than non-SVP committed persons and some state prisoners.¹⁸⁶ Young was confined within a Department of Corrections facility, and he asserted that the conditions and restrictions of his confinement were not reasonably related to a legitimate non-punitive goal and were incompatible with treatment.¹⁸⁷ The Court rejected his claim, stating “the question whether an Act is civil or punitive in nature is initially one of statutory construction,”¹⁸⁸ and by assuming that Washington’s SVP statute was civil in nature, it could not consider whether the act was punitive “as-applied” to the petitioner.¹⁸⁹ The Court explained that

182. Brief for the American Psychiatric Association as Amicus Curiae in Support of Leroy Hendricks at 13–14, *Hendricks*, 521 U.S. 346 (Nos. 95-1649, 95-9075).

183. 790 F.2d 984, 999 (2d Cir. 1986).

184. *Id.* (quoting *United States v. Brown*, 381 U.S. 437, 458 (1965)).

185. 531 U.S. at 250.

186. *Id.* at 259.

187. *Id.* at 259–60 (citing *Allen v. Illinois*, 478 U.S. 364, 368 (1986)).

188. *Id.* at 261.

189. *Id.* at 260.

“[a] court will reject the legislature’s manifest intent only where a party challenging the Act provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State’s intention.”¹⁹⁰ The Court stated

an as-applied analysis would prove unworkable. Such an analysis would never conclusively resolve whether a particular scheme is punitive and would thereby prevent a final determination of the scheme’s validity under the Double Jeopardy and *Ex Post Facto* Clauses. . . . Unlike a fine, confinement is not a fixed event. As petitioner notes it extends over time under conditions that are subject to change. The particular features of confinement may affect how a confinement scheme is evaluated to determine whether it is civil rather than punitive, but it remains no less true that the query must be answered definitively. The civil nature of a confinement scheme cannot be altered based merely on vagaries in the implementation of the authorizing statute.¹⁹¹

Yet, the Court has previously examined confinement conditions when determining the purpose and effect of statutes.¹⁹² Moreover, the Court has also held that if a prisoner provides “the clearest proof that ‘the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention’ that the proceeding be civil, it must be considered criminal”¹⁹³ The effect of this holding is that in the context of SVP commitments, the actual confinement and treatment of the individuals may not be analyzed to determine if the statute is being applied punitively. Thus, the effect and purpose of an offender’s confinement may be punitive as long as the statute is civil on its face.

B. The Exclusion of Juveniles from SVP Commitment

The refusal of states to apply SVP statutes to juvenile offenders further belies the notion that these statutes are civil in nature. Statistics show that juveniles are responsible for a significant number of sexual offenses and have a higher risk of sexual recidivism.¹⁹⁴ Research also shows that sex offender registration has little, if any, deterrent effect on these offenders.¹⁹⁵ While juveniles may be committed under SVP statutes in some states, some explicitly exempt juveniles

190. *Id.* at 261 (citing *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

191. *Id.* at 263 (internal citations omitted).

192. *Id.* at 275 (Stevens, J., dissenting); see *Hendricks*, 521 U.S. at 361; *Schall v. Martin*, 467 U.S. 253, 269–71 (1984).

193. *Allen v. Illinois*, 478 U.S. 364, 369 (1986) (quoting *United States v. Ward*, 448 U.S. 242, 248–49 (1980)).

194. See Amanda M. Fanniff et al., *Juveniles Adjudicated for Sexual Offenses: Fallacies, Facts, and Faulty Policy*, 88 *TEMP. L. REV.* 789, 789–802 (2016) (stating that juveniles represented 15.56% of forcible rape arrests and 16.97% of other sexual offense arrests in 2014).

195. *Id.*; see also Christopher Lobanov-Rstovsky, *Registration and Notification for Juveniles Who Commit Sexual Offenses*, U.S. DEP’T OF JUST. (2015) (reporting research that demonstrated juvenile sexual recidivism rates of 14% after a five-year follow up period, 20% after a ten-year follow up period and 20% after a fifteen-year follow up period).

from SVP commitment.¹⁹⁶ Other states have determined the statutes' applicability to juveniles with case law.¹⁹⁷ States that exempt juveniles from SVP commitment may do so because of a reduced culpability standard for juveniles. The concept of juveniles being less blameworthy has been discussed in many Supreme Court cases.¹⁹⁸ In *Thompson v. Oklahoma*, the Court held that capital punishment for individuals that were under sixteen years of age at the time of their offense was unconstitutional.¹⁹⁹ The Court acknowledged that the principles of retribution and deterrence were less served by punishing juveniles because of their reduced culpability and because the likelihood that a teenage offender engages in "the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent."²⁰⁰

In *Roper v. Simmons*,²⁰¹ the Court held that imposing the death penalty on offenders that were under eighteen years of age at the time of their offense constituted cruel and unusual punishment because juveniles have an "underdeveloped sense of responsibility."²⁰² The Court recognized juveniles are more reckless and irresponsible than adults, and these qualities "often result in impetuous and ill-considered actions and decisions."²⁰³ The Court also noted that because the character of a juvenile is "more transitory, less fixed," "as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside."²⁰⁴ For these reasons, SVP laws would be *more* applicable to juvenile offenders than adult offenders. Because juveniles are less blameworthy, SVP commitment allows states to protect society by confining youthful offenders until they mature. Because an offender cannot be confined if he or she is no longer dangerous, juvenile offenders must be released if their adolescent recklessness

196. Compare FLA. STAT. ANN. § 394.912 (explicitly banning individuals under eighteen years of age from SVP commitment), with MASS. GEN. LAWS ANN. ch. 123A, § 1 (permitting SVP commitment for persons adjudicated as a delinquent juvenile or youthful offender), and WIS. STAT. ANN. § 980.04 (expressly permitting SVP commitment for juvenile offenders); see also DeMatteo et al., *supra* note 15.

197. Compare *In re Geltz*, 840 N.W.2d 273 (Iowa 2013) (holding that a juvenile could not be committed under Iowa's SVP laws because the legislature had expressly stated that juvenile adjudications are not convictions), with *In re Belcher*, 189 Wash. 2d 280 (2017) (holding that SVP commitment based on acts that occurred while the offender was a juvenile did not violate the offender's right to due process).

198. See *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

199. 487 U.S. 815 (1988).

200. *Id.* at 837.

201. 543 U.S. 551 (2005).

202. *Id.* at 569.

203. *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

204. *Id.* at 570 (quoting *Johnson*, 509 U.S. at 368).

subsidies. Research also shows that juvenile sex offenders respond more positively to treatment than adults, making a goal of rehabilitation more realistic.²⁰⁵

While juveniles are less blameworthy than adults, “[t]he harm suffered by the victim of a crime is not dependent upon the age of the perpetrator.”²⁰⁶ States also have a greater interest in committing juveniles than adults under the doctrine of *parens patriae* because “children, by definition, are not assumed to have the capacity to take care of themselves.”²⁰⁷ Because children lack the capacity to care for themselves, “the juvenile’s liberty interest may, in appropriate circumstances, be subordinated to the State’s *parens patriae* interest in preserving and promoting the welfare of the child.”²⁰⁸ Although states have both the duty to protect children under the *parens patriae* doctrine and the authority to protect society by using their police power, some choose to exempt juveniles from SVP commitments because of their reduced culpability.²⁰⁹ This exemption is evidence that the statutes are, in fact, punitive.

V. THE UTILIZATION OF MENTAL HEALTH LAWS FOR PREVENTIVE INCARCERATION

SVP statutes allow states to confine individuals having characteristics of dangerousness through preventative incarceration. While preventative incarceration has at times been permitted, it has only been in certain limited circumstances such as temporary pretrial confinement and while awaiting a criminal proceeding.²¹⁰ Some commentators believe preventative confinement is justified as punishment within the

205. Fanniff et al., *supra* note 194, at 789–802

206. *Schall v. Martin*, 467 U.S. 253, 264–65 (1984).

207. *See id.* at 265.

208. *Id.*

209. *See In re Geltz*, 840 N.W.2d 273 (Iowa 2013) (holding that the statute’s use of “conviction” demonstrated the legislature’s intent to exclude juveniles that had been adjudicated as sex offenders); *State v. J.M.*, 824 So. 2d 105, 110 (Fla. 2002) (holding that a juvenile adjudicated as delinquent does not trigger the sexual predator status provisions of the Predator Act because “upon a plain reading of the controlling statutes, it is apparent that an adjudication of delinquency does not fall under the definition of a felony criminal conviction required under the Act”); *see also* George Steptoe & Antoine Goldet, *Why Some Young Sex Offenders Are Held Indefinitely*, MARSHALL PROJECT (Jan. 1, 2016), <https://www.themarshallproject.org/2016/01/27/why-some-young-sex-offenders-are-held-indefinitely#.KQhcunt1f> [<https://perma.unl.edu/6GRAM-UE5Q>] (noting that of the twenty states with SVP commitment statutes, thirteen of those states permit civil commitments for individuals who committed their sexual offenses as juveniles).

210. *United States v. Salerno*, 481 U.S. 739 (1987) (permitting temporary preventative confinement); *Schall*, 467 U.S. at 261 (permitting preventative detention of juvenile while awaiting next court date); *Cty. of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (permitting detention prior to the suspect’s arraignment).

criminal justice system.²¹¹ Husak has suggested that the mere possession of characteristics that predict future dangerousness may be morally wrongful and justify preventive detention if dangerousness was able to be accurately predicted.²¹² Husak asserts that many criminal offenses, such as drug possession and drunk driving, are “risk-prevention” crimes that are enacted to prevent harm from occurring.²¹³ If the state has the police power to punish inchoate or anticipatory offenses, Husak argues that a state may use preventive detention as punishment by constructing statutes to punish future dangerousness.²¹⁴

While the government has a substantial interest in protecting society, this interest does not make preventative detention any less punitive. “One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.”²¹⁵ Social policies like the prevention of harm and the punishing of offensive conduct support the result, but the means by which these goals are met blur the lines between mental health law and the criminal justice system. If a competent individual commits a violent sex offense, the state uses its primary police power to confine the individual through the criminal justice system. This primary police power may only be invoked if the individual has the capacity to be held morally responsible for his or her offensive conduct.²¹⁶ If a person cannot be held morally responsible for his or her conduct, a state may civilly commit the individual using its secondary police power as an alternative to the criminal justice system.²¹⁷ By first punishing an offender, then committing him, these powers are not being used alternatively; they are being used consecutively. This use is insupportable because the justification for the secondary police power commitment is necessarily absent when an individual has already been adjudicated for the conduct in the criminal justice system. Schopp articulated the manifest defect that is present in SVP commitments when stating that the statutes

undermine the moral force of several related components of the legal institutions through which the state exercises the police power. These statutes undermine the moral force of mental health law by misusing the system to constrain those not properly subject to it and by falsely suggesting that these people suffer impairment of the capacities of practical reasoning that qualify them for retributive competence. They also undermine the moral force of the

211. See Douglas Husak, *Lifting the Cloak: Preventive Detention as Punishment*, 48 SAN DIEGO L. REV. 1173 (2011).

212. *Id.*

213. *Id.* at 1176.

214. *Id.* at 1186.

215. *United States v. Brown*, 381 U.S. 437, 458 (1965).

216. SCHOPP, *supra* note 79.

217. *Id.*

criminal law by misrepresenting as ineligible to participate in that system those who have already been punished in that system.²¹⁸

The line between civil commitment and criminal justice should be easily distinguishable. Those who are culpable should be adjudicated with criminal proceedings, and civil commitment should be reserved for those individuals whose mental illness excuses them from culpability. Under its police power, a state should be able to use either civil commitment or the criminal justice system but not both. Robinson asserts that “[i]t would be better to expand civil commitment to include seriously dangerous offenders who are excluded from criminal liability as blameless for any reason than to divert the criminal justice system from its traditional requirement of moral blame.”²¹⁹ While states have a substantial interest in protecting society from violent sexual predators, the danger exists that the lack of clear lines between mental health law and the criminal justice system may permit states to bypass constitutional protections in other contexts as well.

VI. STRICT MANDATORY MINIMUMS AND RECIDIVIST LAWS AS ALTERNATIVES TO SVP COMMITMENT

Civil commitment is justified in the context of insanity acquittals because individuals that are held to be not guilty because of insanity cannot be punished because their mental illness makes them not criminally responsible. When a person is dangerous, but not criminally responsible, there is a “gap” in the criminal justice system. The criminal justice system does not allow the criminal confinement of dangerous persons who are not morally responsible for their conduct and civil commitments are a necessary use of police power to fill this gap. For sex offenders, no such gap exists. Offenders that are culpable are convicted, punished, and incapacitated with criminal incarceration; those that are not culpable due to mental illness may be committed under general civil commitment laws. In the early 1990s when current SVP laws were first being enacted, the average convicted sex offender served three and a half years of an eight-year sentence, and the average child molester was released after serving almost three years of a seven-year sentence.²²⁰ Any existing gap is due to the failure of legislators to enact laws that effectively incarcerate violent sexual predators.

SVP statutes should be replaced with strict mandatory minimum sentences and recidivist laws. Under the Eighth Amendment, punish-

218. ROBERT F. SCHOPP, COMPETENCE, CONDEMNATION, AND COMMITMENT: AN INTEGRATED THEORY OF MENTAL HEALTH LAW 186 (Am. Psychol. Ass’n, 2001).

219. Paul H. Robinson, *Forward: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 716 (1993).

220. U.S. DEP’T OF JUST., *Recidivism of Sex Offenders Released from Prison in 1994*, BUREAU OF JUST. STAT. 7 (2003).

ment is “cruel and unusual” only when it is “grossly disproportionate to the crime.”²²¹ To show that a sentence is excessive, an individual must challenge the term of the sentence “given all the circumstances in a particular case” or that the entire class of sentences is disproportionate given the “nature of the offense” or the “characteristics of the offender.”²²² The standard used in determining whether a sentence is disproportionate relies on “objective indicia of society’s standards.”²²³ While capital punishment has been ruled unconstitutional for crimes that do not result in the death of a victim,²²⁴ the Supreme Court has only two times held that a non-capital sentence imposed on an adult was unconstitutionally disproportionate. The first was the imposition of fifteen years of the painful punishment “Cadena temporal” in 1910,²²⁵ and the other involved a life sentence without parole for “uttering a ‘no account’ check for \$100.”²²⁶

Legislatures have the authority to enact laws that incapacitate sex offenders with criminal incarceration without the use of civil commitment as shown by criminal statutes that impose a sentence of life imprisonment for certain sex crimes. For example, Minnesota law permits a mandatory life sentence without release for egregious first-time and repeat offenders.²²⁷ In a child molestation case, the Sixth Circuit Court of Appeals held that a mandatory thirty-year sentence was not grossly disproportionate for an offender that digitally penetrated the child and rubbed his penis on the victim’s body.²²⁸ The Eleventh Circuit also upheld a lengthy thirty-year mandatory minimum for a defendant convicted of knowingly crossing a state line with the intent to engage in a sexual act with a person under the age of twelve and using a computer to knowingly attempt to entice a person under the age of eighteen to engage in criminal sexual activity.²²⁹

In cases involving repeat offenders, recidivist sentencing statutes may incapacitate convicted sex offenders with sentences up to life imprisonment. The Oregon Court of Appeals upheld a life sentence without the possibility of release or parole for a seventy-one-year-old defendant that was convicted of rubbing an eight-year-old girl’s buttocks in a public library.²³⁰ The defendant had two prior convictions

221. *Graham v. Florida*, 560 U.S. 48, 60 (2010).

222. *Id.* at 59.

223. *Id.* at 60.

224. *See Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding that the death penalty is unconstitutional for rape of a child if it does not result in the death of the victim); *Coker v. Georgia*, 433 U.S. 584 (1977) (holding that the death penalty is an excessive punishment for the offense of sexual assault).

225. *Weems v. United States*, 217 U.S. 349 (1910).

226. *Solem v. Helm*, 463 U.S. 277, 281 (1983).

227. MINN. STAT. ANN. § 609.3455.

228. *United States v. LaFond*, 692 Fed. App’x. 242 (2017) (unpublished).

229. *United States v. Farley*, 607 F.3d 1294 (11th Cir. 2010).

230. *State v. Sokell*, 273 Or. App. 654 (2015).

for sexually touching or attempting to sexually touch a child for touching the breast of a twelve-year-old girl at a store and for rubbing a seven-year-old girl under her dress, but over her swimming suit. The Iowa Supreme court upheld an offender's life sentence without release for a second conviction of sexual abuse stating that "Iowa is anything but an 'outlier' when it comes to the severe treatment of repeat sexual offenders who target children, use force, or prey on the incapacitated."²³¹ Similarly, the Sixth Circuit affirmed a sixty-five-year sentence with lifetime supervision after release for coercing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct, and for possession of child pornography stating that the "heinous nature of his crimes demonstrated the seriousness of the offense."²³² The defendant had previously been convicted of statutory rape, and the sentencing court concluded that, based on his current offenses and prior conviction, the defendant "could not conform his conduct to societal norms and is a substantial threat to the community and particularly to children."²³³

The court's statement acknowledging that the defendant "could not conform his conduct"²³⁴ is significant. In *Hendricks*, the Court justified Hendricks's commitment with his inability to control his conduct, but the Sixth Circuit used this trait as evidence of the defendant's need for a more severe criminal sentence. The Sixth Circuit's view of repeated crimes as recidivism is superior because had the defendant truly not been able to conform, his conduct would not have been voluntary, and he could not have been morally responsible for the offense. The Supreme Court's statement that Hendricks's inability to control his conduct satisfied the mental illness requirement is incompatible with the fact that he had been convicted for the offense. This distinction is central to the integrity of the process; the inability to control would undermine the justification of conviction and punishment. The Supreme Court fails to distinguish between the inability to cease experiencing the desire and the inability to direct one's conduct according to desire. In so far as the risk presented by the offender justifies an extended sentence, the sentencing statutes should be modified to allow for an extended incarceration. If an offender is convicted of a sexual offense, he necessarily has the ability to control his conduct. Subsequent sex crimes should be treated as recidivism—not mental illness—and sentenced under criminal statutes.

231. *State v. Oliver*, 812 N.W.2d 636, 641–43 (Iowa 2012).

232. *United States v. Vowell*, 516 F.3d 503, 512–13 (6th Cir. 2008).

233. *Id.*; see also *State v. Berger*, 212 Ariz. 473 (2006); *Adaway v. State*, 902 So. 2d 746, 747 (Fla. 2005); *People v. Huddleston*, 212 Ill. 2d 107 (2004); *State v. Bell*, 754 P.2d 55, 57–60 (Utah 1988); *Daniel v. State*, 78 P.3d 205, 214–16 (Wyo. 2003).

234. *Vowell*, 516 F. 3d at 512.

VII. CONCLUSION

Earl Shriner's ten-year prison term for assaulting two teenage girls was inadequate. Shriner had a long history of violent behavior and sexual assaults, and he could have been effectively incapacitated with stricter criminal statutes. Rather than enacting and enforcing stricter criminal statutes, Washington used mental health laws to extend the confinements of its violent sexual offenders. Other states followed, bootstrapping civil commitments to criminal sentences for violent sexual offenses. While SVP statutes are undeniably effective in protecting the public by incapacitating violent sexual offenders, this protection requires states to exploit mental health laws and bypass the due process protections contained in the criminal justice system. Society may applaud the use of civil commitment in the context of sexual predators, but the blurring of the lines between criminal and mental health laws is cause for great concern.

The criminal justice system provides for the incapacitation of sex offenders and the protection of society with an appropriate use of police power. While civil commitment is necessary for individuals that are exculpated due to mental illness, sex offenders that are culpable for their offenses should be punished only under criminal statutes. While states and the Court have defended SVP statutes by calling them civil, this Article has demonstrated that the statutes are, in fact, punitive in nature. Offenders are being convicted, sentenced, incarcerated and then subsequently committed and confined again—often for the same offense.

Sex offenses are heinous crimes. Deservedly, these crimes inspire fear and moral outrage, and society must be protected from violent predators. Nevertheless, the boundaries between mental health laws and the criminal justice system must be preserved. The only appropriate pathway to incapacitate culpable sex offenders while safeguarding due process protections is through harsh criminal sentencing strategies.