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THE \$62 MILLION QUESTION: IS VIRGINIA'S NEW CENTER TO HOUSE SEXUALLY VIOLENT PREDATORS MONEY WELL SPENT?

I. INTRODUCTION

On February 26, 2008, Virginia opened a state-of-the-art, \$62 million facility to house some of the Commonwealth's most reviled criminals.¹ The Virginia Center for Behavioral Rehabilitation, formerly located in Petersburg, houses about sixty sexual predators, all of whom were expected to move into the new facility in the week following its formal opening.²

Among the sixty-one sexual predators lodged in Virginia is Aubrey Layne, a forty-year-old Norfolk resident who, at fourteen, was hospitalized for molesting a four-year-old girl.³ In his twenties, Layne was found guilty of two sexual offenses against children under the age of ten: fondling and forcible sodomy.⁴ In his thirties, Layne again victimized a child, this time an eleven-year-old Norfolk boy, and was convicted of taking indecent liberties with the child.⁵

Thomas Lambert, a fifty-two-year-old Norfolk native, will also make the move with Aubrey Layne.⁶ Lambert has a similarly extensive list of sexual offenses—at seven years of age, Lambert

1. Frank Green, *Center for Sex Offenders Opens*, RICH. TIMES-DISPATCH, Feb. 27, 2008, at B2, available at 2008 WLNR 4090120 [hereinafter Green, *Center for Sex Offenders Opens*]; see also Press Release, Commonwealth of Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services, Virginia Center for Behavioral Rehabilitation to Hold Ribbon Cutting, Open House for New Facility (Feb. 22, 2008), available at <http://www.dmhmrzas.virginia.gov/PressReleases/content/080221VCBROpening.pdf>.

2. Green, *Center for Sex Offenders Opens*, *supra* note 1.

3. Warren Fiske, *Sex Offenders and the Law: Too Dangerous to Be Released?*, VIRGINIAN-PILOT, Nov. 11, 2007, at A1, available at <http://hamptonroads.com/print/423911> [hereinafter Fiske, *Sex Offenders and the Law*].

4. *Id.*

5. *Id.*

6. *Id.*

was committed to a state hospital for pulling down a girl's pants; as a teenager, he forced four girls to strip at knifepoint; in his twenties, he was convicted of the rapes of two Norfolk women; and in his thirties, he was convicted of the molestation of a Richmond woman.⁷

No one contends that Aubrey Layne or Thomas Lambert is anything other than a chronic sexual predator.⁸ But Virginia's solution for dealing with recidivistic offenders such as Layne or Lambert is lacking: the Commonwealth's hefty investment in the new facility in Nottoway County to house these predators is misguided spending.

This comment examines Virginia's current civil commitment statute for sexual predators and attempts to identify areas where Virginia should concentrate its limited resources in order to address more adequately the ever-increasing problem of what to do with sex offenders. Part II briefly describes why sex offenders present law enforcement with unique problems in prevention and deterrence. Part III details the history of civil commitment legislation. Part IV examines Supreme Court of the United States jurisprudence regarding the constitutionality of sex offender civil commitment statutes. Part V examines the Virginia Sexually Violent Predator Act. Part VI briefly considers current violent sexual predator legislation in other states, using Washington and Texas as examples. Part VII provides analysis and criticism of the current Virginia statute. Part VIII recommends ways in which Virginia might reform the current law. Part IX concludes the comment.

II. SEX OFFENDERS

American society pillories the sex offender.⁹ Sex offenders pose a unique public policy problem. They incite public fear and hatred unlike any other group of offenders, yet the absence of a clear sex offender "profile" creates much difficulty for law enforcement officials in preventing and deterring these crimes.¹⁰ Current rules

7. *Id.*

8. *See id.*

9. Steven I. Friedland, *On Treatment, Punishment, and the Civil Commitment of Sex Offenders*, 70 U. COLO. L. REV. 73, 76 (1999).

10. *See id.* at 81.

applying to incarceration and treatment of sex offenders reveal a common theme: “[T]here is a ‘special depravity’ associated with sexually related crimes, to the extent that sex offenders are perceived as ‘especially vile and loathsome people who really do not deserve to be treated like defendants in other crimes.’”¹¹

In the face of a “pressing political and public safety imperative” to deal with recidivist sex offenders, many states have developed sexually violent predator (“SVP”) laws.¹² SVP laws “incapacitat[e] patently dangerous sex offenders beyond the legally mandated end of their criminal sentence.”¹³ Some experts believe that with behavioral treatment and medication, it is possible to minimize or eliminate sex offender behaviors.¹⁴ Other experts believe, however, that long term treatment for this population does not exist, and, therefore, the only effective method of deterrence and prevention is complete removal of sex offenders from the community.¹⁵

III. HISTORY OF CIVIL COMMITMENT LEGISLATION

Society’s treatment of hot-button social issues evokes for many scholars “the pendulum effect”:¹⁶ the law surrounding a particular issue is prone to fluctuations in which the law of previous generations once again becomes popular and is adopted as “reformist jurisprudence.”¹⁷ The law surrounding the traditional civil commitment of the mentally ill, and the civil commitment of sexual offenders, aptly demonstrates such a pendulum swing.

11. *Id.* (quoting Richard I. Lanyon, *Scientific Status of the Concept of Continuing Emotional Propensity for Sexually Aberrant Acts*, 25 J. AM. ACAD. PSYCHIATRY L. 59, 60 (1997)).

12. Robert A. Prentky et al., *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 PSYCHOL. PUB. POL’Y & L. 357, 357–58 (2006).

13. *Id.* at 358

14. Friedland, *supra* note 9, at 82.

15. *Id.*

16. Samuel Jan Brakel & James L. Cavanaugh, Jr., *Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States*, 30 N.M. L. REV. 69, 69 (2000).

17. *Id.*

A. *Traditional Civil Commitment*

Civil commitment became a legal tool in 1880.¹⁸ Then, common law allowed for the lawful restraint of a person “incapable of controlling his own actions, whose being at large endangers the safety of others.”¹⁹ Any person whose mental condition threatened public safety was subject to civil commitment.²⁰

The theories of police power and *parens patriae* undergird support for traditional civil commitment of the mentally disabled.²¹ The theory of police power proclaims a state’s duty to protect its citizens from dangerous persons, and the theory of *parens patriae* asserts the state’s parental role to care for those incapable of caring for themselves.²² Courts commonly rely on both theories to justify a decision to impose civil commitment.²³

In the 1840s, under these theories of police power and *parens patriae*, the first institutions to commit people with mental disabilities began operating.²⁴ Proponents of the institutions hoped to cure insanity; however, by the 1860s it became apparent that many committed persons were incurable, and the attempted treatments unsuccessful.²⁵ Commitment thus fell out of favor until the end of the 19th century, when the eugenics movement ascended in popularity.²⁶ As a result of the eugenics movement, many mentally disabled people were committed.²⁷ The eugenics movement hit the downswing of its popularity in the 1930s and

18. VA. STATE CRIME COMM’N, SEX OFFENDER TASK FORCE REPORT 58 (2005), available at http://vscc.state.va.us/reports/sex_offender_Task_Force_Report.pdf.

19. *Id.*

20. *Id.*

21. Sarah E. Spierling, *Lock Them Up and Throw Away the Key: How Washington’s Violent Sexual Predator Law Will Shape the Future Balance Between Punishment and Prevention*, 9 J.L. & POL’Y 879, 887 (2001).

22. *Id.*; see also Ronnie Hall, *In the Shadowlands: Fisher and the Outpatient Civil Commitment of “Sexually Violent Predators” in Texas*, 13 TEX. WESLEYAN L. REV. 175, 177–78 (2006).

23. Hall, *supra* note 22, at 178; see also *Foucha v. Louisiana*, 504 U.S. 71, 80, 96 (1992) (noting both police power and the theory of *parens patriae* as justifications for civil commitment).

24. Spierling, *supra* note 21, at 887.

25. *Id.*

26. *Id.* (citing ROBERT M. LEVY & LEONARD S. RUBENSTEIN, *THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES* 18 (1996) (“The eugenicists’ solution called for the use of involuntary commitment laws to enforce the strict segregation of mentally retarded people from society at large, in order to prevent them from propogating”)).

27. Spierling, *supra* note 21, at 887–88.

1940s, however, and once again civil commitment was no longer in vogue.²⁸

The judiciary found little occasion to apply involuntary commitment procedures until the early 1970s,²⁹ when, in 1975, the Supreme Court of the United States clarified the limits of civil commitment.³⁰ Although a factor in the court's decision, a simple finding of mental illness cannot justify custodial confinement.³¹ If the state also proves dangerousness, however, commitment is appropriate.³²

B. *Civil Commitment of Sex Offenders*

Involuntary confinement of sex offenders mimics the pendulum swing of traditional civil commitment for the mentally disabled. Prior to the late 1930s, sex offenders were unremarkable as criminals.³³ People who committed crimes of a sexual nature were dealt with like all other offenders; blame and punishment were assigned via criminal conviction and incarceration.³⁴

In the 1930s, however, a series of brutal child murders that appeared to have sexual motivations prompted FBI Director J. Edgar Hoover to declare the "degeneracy" of sex crimes . . . 'be placed under the spotlight.'³⁵ Under pressure from citizens, state legislators sought to pass laws addressing the "perceived wave of sex crimes."³⁶ Legislation was designed to confine "sexual psychopaths," 'sexually dangerous persons,' and 'sex offenders'³⁷ after their incarceration, while such offenders were believed to be too dangerous for release.³⁸ These laws were based on the ration-

28. *Id.* at 888.

29. *Id.*

30. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

31. *Id.* at 575.

32. *See Foucha v. Louisiana*, 504 U.S. 71, 86 (1992).

33. Brakel & Cavanaugh, *supra* note 16, at 70.

34. *Id.*

35. Roxanne Lieb et al., *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43, 53 (1998) (quoting J. Edgar Hoover, *How Safe is Your Daughter*, AM. MAG., 1947, at 32)

36. Hall, *supra* note 22, at 180; *see also* Raquel Blacher, Note, *Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 897-901 (1995) (discussing the catalysts for "sex psychopath" laws).

37. John Kip Cornwell, *Protection and Treatment: The Permissible Civil Detention of Sexual Predators*, 53 WASH. AND LEE L. REV. 1293, 1296 (1996).

38. *See id.* at 1297. "The sexual psychopath was depicted as someone neither criminal

ale that society would benefit and the state could protect the public's safety if dangerous sex offenders were liberated only when cured.³⁹

Michigan was the first to enact a "sex psychopath" statute in 1937.⁴⁰ By 1939, three other states had passed similarly targeted laws.⁴¹ By 1960, the majority of states had sexual predator legislation designed to remove the offender from the community and treat the underlying mental condition.⁴² The sexual psychopath laws so popular during this time period were rarely implemented, however,⁴³ and by the 1980s, as a result of civil rights concerns and the apparent failure to establish successful sex offender treatment programs, the number of states with sexual predator legislation had been cut in half.⁴⁴

In the 1990s, states revisited and reinstated modern versions of these sex psychopath laws.⁴⁵ The renewed interest in such statutes resulted in large part from the highly publicized case of Earl Shriver, who, in 1989, raped, choked, mutilated, and left for dead a seven-year-old boy.⁴⁶ Although Shriver had an extensive prior

nor legally insane who, for the individual's and society's best interests, required special considerations." Lieb et al., *supra* note 35, at 55.

39. Lieb et al., *supra* note 35, at 56.

40. Blacher, *supra* note 36, at 897. Michigan's statute was later found unconstitutional. See *People v. Frontczak*, 281 N.W. 534, 535-37 (Mich. 1938) (finding Act No. 196, Public Acts 1937, unconstitutional as enacted).

41. Lieb et al., *supra* note 35, at 55 (pointing out that Illinois passed its law in 1938 and California and Minnesota passed such statutes in 1939); see also CAL. WELF. & INST. CODE §§ 5500-09 (1939) (current version at CAL. WELF. & INST. CODE § 6604 (West Supp. 2008)); 725 ILL. COMP. STAT. ANN. 205/0.01-12 (West 2002 & Supp. 2007); MINN. STAT. ANN. §§ 526.09-526.115 (1939) (current version at MINN. STAT. ANN. §§ 253B.02, 253B.185 (West 2006)).

42. Cornwell, *supra* note 37, at 1297; John Matthew Fabian, *The Risky Business of Conducting Risk Assessments for Those Already Civilly Committed as Sexually Violent Predators*, 32 WM. MITCHELL L. REV. 81, 88, 89 (2005). State statutes varied. Some required a finding of criminal guilt before civil commitment, whereas some did not, and states used varied terms to describe the mental condition required of the offender. Cornwell, *supra* note 37, at 1296-97 (citing Note, *The Plight of the Sexual Psychopath: A Legislative Blunder and Judicial Acquiescence*, 41 NOTRE DAME LAW. 527, 529 (1965-66)). All statutes, though, required that the offender suffer from a personality disorder that caused him to act out sexually in ways that violated both the law and social norms. *Id.* at 1297 (citing Note, *supra*). Most statutes permitted involuntary detention until the committed sex offender no longer created a threat to society. *Id.* at 1297 (citing Alan H. Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 215, 218 (1960-61)).

43. Fabian, *supra* note 42, at 89.

44. Cornwell, *supra* note 37, at 1297.

45. *Id.* at 1298.

46. Marc W. Pearce, *Civilly Committing Criminals: An Analysis of the Expressive*

criminal history that included sexual offenses,⁴⁷ the State of Washington had been unsuccessful in petitioning for his civil commitment under the existing law.⁴⁸ It was only two years after his release from prison that Shriner brutally attacked the seven-year-old boy.⁴⁹

Washington quickly enacted legislation targeting sexually violent predators like Shriner—offenders “who belong to a ‘small but extremely dangerous group of sexually violent predators’ who are not amenable to commitment under the state’s standard procedure.”⁵⁰ The legislation was designed to keep them confined even after their prison sentences ended.⁵¹ The State found new legislation necessary for two reasons: first, the existing involuntary treatment act did not reach the types of mental disorders apparently afflicting sexually violent predators; and second, sexual offenders serving prison terms were denied access to potential victims, and therefore could not have committed a “recent overt act” as required under the standard civil commitment statute, frustrating the state’s ability to seek civil commitment.⁵² Washington’s SVP statute, therefore, was intended to close this perceived

Function of Nebraska’s “Dangerous Sex Offender” Commitment Procedure, 85 NEB. L. REV. 575, 580 (2007) (citing David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET SOUND L. REV. 525, 525-38 (1992); Kate Shatzkin, *Shriner Guilty: Jury Convicts Him in Attack on Boy*, SEATTLE TIMES, Feb. 7, 1990, at A1; *System Fails to Halt Sex Offender*, NEW ORLEANS TIMES-PICAYUNE, May 24, 1989, at A6).

47. In 1977, Shriner was convicted of assaults on two sixteen-year-old girls and sentenced to ten years in prison. Pearce, *supra* note 46, at 580. Just before his release in 1987, Shriner’s diaries and drawings depicting his “intent to rape, torture, and kill children” were discovered. *Id.* (quoting David Foster, *Many Favor Tougher Policy on Sex Offenders: Mutilation Case Fuels Outrage, Questions About Rehabilitation*, AKRON BEACON J., Feb. 18, 1990, at A11, available at www.ohio.com/archives (select “Beacon Journal”; search for “Many Favor Tougher Policy on Sex Offenders”). Indications of Shriner’s intent to reoffend had prompted the state to seek commitment nearing the end of his prison sentence. *Id.*

48. *Id.*

49. *See id.*

50. *Id.* at 581–82 (quoting WASH. REV. CODE ANN. § 71.09.010 (West 2002) (emphasis in original omitted)).

51. *See* Community Protection Act, 1990 Wash. Sess. Laws 12, 91. The Community Protection Act was the “first revised sexual predator law passed in the United States.” Fabian, *supra* note 42, at 89. The Act increased the length of sentences for sex offenders, implemented the nation’s first modern community notification law targeting sex offenders, and established a new civil commitment procedure for certain sex offenders. *See* 1990 Wash. Sess. Laws 96–97.

52. Pearce, *supra* note 46, at 582 (discussing the Washington statute).

gap in the traditional civil commitment act to allow for the commitment of sexually violent predators.⁵³

Other states quickly followed Washington's lead and enacted their own SVP acts. Between 1994 and 1995, Wisconsin, Kansas, Iowa, Minnesota, California, and Arizona implemented SVP statutes.⁵⁴ Today, twenty states have statutes allowing for the civil commitment of sex offenders.⁵⁵

IV. SUPREME COURT JURISPRUDENCE

The enactment of numerous state statutes permitting the civil commitment of sex offenders—*after* such offenders have served their time in prison—has drawn sharp criticism. Opponents of such laws argue that it is a violation of both the Due Process Clause of the Fourteenth Amendment and the Double Jeopardy Clause of the Fifth Amendment to civilly commit such persons.⁵⁶ The Supreme Court, however, has upheld the constitutionality of SVP acts.

53. *Id.* at 582–83.

54. Cornwell, *supra* note 37, at 1299.

55. See Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, § 1, at 1, available at <http://www.nytimes.com/2007/03/04/us/04civil.html> [hereinafter Davey & Goodnough, *Doubts Rise*] (profiling nineteen states with civil commitment acts for sex offenders). At the time Davey & Goodnough's article was written, New York was considering sex offender civil commitment legislation. Currently, twenty states, including New York, provide for civil commitment of sex offenders. See ARIZ. REV. STAT. ANN. §§ 36-3707 to -3717 (2003 & Supp. 2007); CAL. WELF. & INST. CODE § 6604 (West Supp. 2008); FLA. STAT. ANN. §§ 394.910–932 (West 2006 & Supp. 2008); 725 ILL. COMP. STAT. ANN. 205/0.01–/12 (West 2002 & Supp. 2007); IOWA CODE ANN. §§ 229A.1–16 (West 2006); KAN. STAT. ANN. §§ 59-29a07 to -29a21 (2005 & Supp. 2006); MASS. ANN. LAWS ch. 123A, §§ 1–16 (LexisNexis 2003); MINN. STAT. ANN. §§ 253B.02–.23 (West 2007); MO. ANN. STAT. §§ 632.480–.513 (West 2006); NEB. REV. STAT. §§ 71-1201 to -1226 (Supp. 2006); N.H. REV. STAT. ANN. §§ 135-E:1 to :23 (Supp. 2007); N.J. STAT. ANN. §§ 30:4-27.24 to .38 (West 2008); N.Y. MENTAL HYG. LAW §§ 10.01–.07 (Consol. Supp. 2007); N.D. CENT. CODE §§ 25-03.3-01 to -24 (2002 & Supp. 2007); 42 PA. CONS. STAT. ANN. §§ 6401–6409 (West Supp. 2007); S.C. CODE ANN. §§ 44-48-20 to -170 (2002 & Supp. 2007); TEX. HEALTH & SAFETY CODE ANN. §§ 841.001–.150 (Vernon 2003 & Supp. 2007); VA. CODE ANN. §§ 37.2-900 to -920 (2005 & Supp. 2007); WASH. REV. CODE ANN. §§ 71.09.010–.902 (West 2002 & Supp. 2008); WIS. STAT. ANN. §§ 980.01–.14 (West 2007).

56. See Fiske, *Sex Offenders and the Law*, *supra* note 3; Charles Oliver, *Sex Crime and Punishment* [sic], REASON, Mar. 1993, <http://www.reason.com/news/show/29351.html> (discussing the potential effects of civil commitment laws).

A. *Kansas v. Hendricks*

The first major constitutional challenge to the civil commitment of sexually violent predators came in *Kansas v. Hendricks*.⁵⁷ In 1994, the Kansas legislature enacted its SVP Act (“the Act”) to address the problem of repeat sexual offenders.⁵⁸ The Act provided for the civil commitment of persons with mental abnormalities or personality disorders who were likely to commit “predatory acts of sexual violence.”⁵⁹

Hendricks had been previously convicted of numerous sexual offenses against children and was diagnosed as a pedophile.⁶⁰ He challenged the trial court’s finding that pedophilia met the requirement of a “mental abnormality” so as to make him eligible for civil commitment.⁶¹ Hendricks argued that his liberty interests were violated because a mental abnormality did not equate to a conclusion that he was “mentally ill.”⁶² The Kansas Supreme Court agreed, finding that substantive due process required clear and convincing evidence that the person was mentally ill and a danger to himself or others.⁶³

The Supreme Court of the United States found that the Act’s definition of “mental abnormality” satisfied substantive due process, and stated that involuntary civil commitment is permissible for those who, because they lack the ability to control their behavior, threaten public safety.⁶⁴ The Court noted that “[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment”; but, “proof of dangerousness . . . [and] some additional factor, such as a ‘mental illness’ or ‘mental abnormality’ . . . serve[s] to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control.”⁶⁵

57. 521 U.S. 346, 350 (1997).

58. *Id.* at 350.

59. *Id.* (quoting KAN. STAT. ANN. § 59-29a01 et seq. (1994)).

60. *Id.* at 354.

61. *Id.* at 355–56.

62. Pearce, *supra* note 46, at 596 (quoting *In re Hendricks*, 912 P.2d 129, 133 (Kan. 1996)).

63. *Hendricks*, 521 U.S. at 356.

64. *Id.* at 356–57.

65. *Id.* at 358.

The Court also rejected Hendricks' claims that the Act violated the Double Jeopardy and Ex Post Facto Clauses of the United States Constitution.⁶⁶ In addition to recognizing the Kansas legislature's intent to create a civil statute,⁶⁷ the Court determined that the statute did not purport to promote the concepts of retribution and deterrence, which are the twin aims of criminal punishment.⁶⁸ Consequently, lacking a penal facet, the Act did not violate the Double Jeopardy and Ex Post Facto Clauses.⁶⁹ Therefore, the Court reversed the Kansas Supreme Court's decision and declared Kansas's SVP statute constitutional.⁷⁰

B. *Kansas v. Crane*

In a second case from Kansas, *Kansas v. Crane*, the Supreme Court of the United States again considered the constitutionality of Kansas's SVP Act.⁷¹ In *Crane*, Kansas sought to civilly commit a convicted sexual offender who suffered from exhibitionism and antisocial personality disorder.⁷² The trial court ordered Crane's civil commitment, but the Kansas Supreme Court reversed, holding that the Supreme Court's ruling in *Hendricks* required that the defendant be unable to control his behavior.⁷³ The State of Kansas sought clarification from the Supreme Court, arguing that *Hendricks* did not "requir[e] the State *always* to prove that a dangerous individual is *completely* unable to control his behavior."⁷⁴ Instead, Kansas claimed, the State only had to prove that Crane had *difficulty* controlling his behavior.⁷⁵

The Supreme Court agreed with the State and vacated the judgment of the Kansas Supreme Court.⁷⁶ The Court reasoned that *Hendricks* specified not that a mental abnormality or personality disorder must make an offender *unable* to control his be-

66. *Id.* at 369 ("Our conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks' double jeopardy and *ex post facto* claims.").

67. *Id.* at 361.

68. *Id.* at 361-62.

69. *See id.* at 371; Pearce, *supra* note 46, at 600.

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

71. 534 U.S. 407, 409 (2002).

72. *Id.* at 411.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 415.

havior, but that the condition or disorder must make it *difficult* for the person to check his predatory behavior.⁷⁷ “Difficult” indicates that lack of control is not absolute. “Insistence upon absolute lack of control would risk barring the civil commitment of highly dangerous persons suffering severe mental abnormalities.”⁷⁸ The Court reasoned that because there is no method by which to demonstrate with any certainty whether an offender has difficulty controlling his behavior, some “proof of serious difficulty in controlling behavior” is “sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.”⁷⁹

V. CURRENT STATE CIVIL COMMITMENT STATUTES

Many states have statutes permitting post-incarceration civil commitment of sexually violent predators that suffer from a mental abnormality and have difficulty controlling their behavior. Statutes vary from state to state, but most share several common, critical features intended to strike a balance between society’s interest in civil commitment as a form of public protection and the liberty interests of the offenders in confinement. Those features are individualized treatment plans, less restrictive alternatives, frequent reevaluation, and a right to petition for release.⁸⁰ The following is a brief discussion of SVP civil commitment statutes in Washington and Texas.

A. Washington

Washington enacted the first modern civil commitment statute for sexually violent predators.⁸¹ The preamble indicates that the statute allows for what “is intended to be a short-term civil commitment system” for “a small but extremely dangerous group of sexually violent predators . . . who do not have a mental disease or defect that renders them appropriate for the existing involun-

77. *Id.* at 411.

78. *Id.* at 412.

79. *Id.* at 413.

80. Edward P. Ra, *The Civil Confinement of Sexual Predators: A Delicate Balance*, 22 ST. JOHN’S J. LEGAL COMMENT. 335, 364–70 (2007).

81. Fabian, *supra* note 42, at 89.

tary treatment act.”⁸² Washington defines a “sexually violent predator” as “any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.”⁸³

The state procedure to civilly commit a sex offender begins when “the prosecuting attorney of the county where the person was convicted or charged or the attorney general . . . file[s] a petition alleging that the person is a ‘sexually violent predator’ and stat[es] sufficient facts to support such allegation.”⁸⁴ Once a petition has been filed, a judge determines whether there is probable cause to believe the person named in the petition is a sexually violent predator.⁸⁵

After the probable cause determination, the court must hold a trial⁸⁶ to determine if the person is, beyond a reasonable doubt,⁸⁷ a sexually violent predator.⁸⁸ At trial, the person has the right to counsel, the right to retain experts or professionals,⁸⁹ and the right to a trial by jury.⁹⁰

If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services . . . for control, care, and treat-

82. WASH. REV. CODE ANN. § 71.09.010 (West 2002).

83. *Id.* § 71.09.020(16) (West Supp. 2008).

84. *Id.* § 71.09.030 (West 2002); see Pearce, *supra* note 46, at 583. The prosecuting attorney in the county where the person was charged or convicted or the attorney general may file such a petition when it appears that: a person previously

convicted of a sexually violent offense is about to be released . . . ; a person found to have committed a sexually violent offense as a juvenile is about to be released . . . ; a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released . . . ; a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released . . . ; [or when] a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act [] and it appears that the person may be a sexually violent predator

WASH. REV. CODE § 71.09.030 (West 2002).

85. WASH. REV. CODE ANN. § 71.09.040(1).

86. *Id.* § 71.09.050(1).

87. *Id.* § 71.09.060(1) (West Supp. 2008).

88. *Id.* § 71.09.050(1) (West 2002).

89. *Id.* § 71.09.050(2).

90. *Id.* § 71.09.050(3).

ment until such time as: (a) The person's condition has so changed that the person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative . . . is in the best interest of the person and conditions can be imposed that would adequately protect the community.⁹¹

Washington's statute includes safeguards for the liberty of those committed under the statute. A person committed under this statute will be reviewed annually to ensure that he or she still meets the commitment criteria;⁹² a committed person has "the right to adequate care and individualized treatment";⁹³ the professional in charge of the facility to which an individual is committed must take precautions to maintain properly the committed person's personal property;⁹⁴ and persons committed retain all rights presently available to them, among those the right to petition for a writ of habeas corpus.⁹⁵ Further, in lieu of full commitment, the court also may consider less restrictive alternatives.⁹⁶

Washington's is considered an exemplary SVP statute because it incorporates (and specifies in the statute) individualized treatment plans, less restrictive alternatives, frequent reevaluation, and the right to petition for release.⁹⁷

B. *Texas*

The Texas SVP law mirrors Washington's statutory approach. Both provide for the commitment and treatment of "a small but extremely dangerous group of sexually violent predators . . . [who have] a behavioral abnormality that is not amenable to traditional mental illness treatment modalities and that makes the predators likely to engage in repeated predatory acts of sexual violence."⁹⁸ Unique to Texas, however, is that the state provides

91. *Id.* § 71.09.060(1) (West Supp. 2008).

92. *Id.* § 71.09.70 (West 2002).

93. *Id.* § 71.09.080(2).

94. *Id.* § 71.09.080(3).

95. *Id.* § 71.09.080(4).

96. *Id.* § 71.09.092.

97. *Ra*, *supra* note 80, at 370–71.

98. TEX. HEALTH & SAFETY CODE ANN. § 841.001 (Vernon 2003); *see supra* notes 81–96 and accompanying text. Under Texas law, a "sexually violent predator" is one who "(1) is a repeat sexually violent offender; and (2) suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence." *Id.* § 841.003(a). A "sexually violent predator" is also a person who:

not for inpatient treatment of sexually violent predators, but for outpatient commitment.⁹⁹ Further, Texas enforces criminal penalties should an offender violate any requirements of his outpatient commitment.¹⁰⁰

The process for civil commitment in Texas begins before a person's anticipated release date, when the Texas Department of Criminal Justice refers persons eligible for commitment to a multidisciplinary team.¹⁰¹ Either the Texas Department of Criminal Justice or the Texas Department of Mental Health and Mental Retardation must then assess the person to determine if he or she "suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence."¹⁰² If the assessing team believes the person suffers from such a behavioral abnormality, notice of the assessment is given to the attorney representing the state.¹⁰³

Once the state's attorney receives such notice, the attorney may file a petition stating facts sufficient to support an allegation that the person is a sexually violent predator.¹⁰⁴ No probable cause hearing is held. After the filing of a petition, a judge conducts a trial¹⁰⁵ to determine whether, beyond a reasonable doubt,¹⁰⁶ the person is a sexually violent predator.

is convicted of more than one sexually violent offense and a sentence is imposed for at least one of the offenses; or . . . [one who] is convicted of a sexually violent offense, regardless of whether the sentence for the offense was ever imposed or whether the sentence was probated; . . . [one who] enters a plea of guilty or nolo contendere for a sexually violent offense in return for a grant of deferred adjudication; [one who] is adjudged not guilty by reason of insanity of a sexually violent offense; or [one who] is adjudicated by a juvenile court of a sexually violent offense; . . . [one who] is convicted, but only if the sentence for the offense is imposed; or [one who] is adjudged not guilty by reason of insanity.

Id. § 841.003(a)–(b).

99. Hall, *supra* note 22, at 186. See TEX. HEALTH & SAFETY CODE ANN. § 841.081 (Vernon Supp. 2007).

100. *Id.* § 841.085.

101. *Id.* § 841.021(a); see *id.* § 841.022(a) (listing required persons of multidisciplinary review team).

102. *Id.* § 841.023(a).

103. *Id.* § 841.023(b).

104. *Id.* § 841.041(a). Texas restricts the filing of these petitions to a specific jurisdiction. State's attorneys must file petitions in a Montgomery County district court, excluding family district court. *Id.*

105. *Id.* § 841.061(a).

106. *Id.* § 841.062(a) (Vernon 2003).

At trial, the person sought to be committed has the right to request a jury,¹⁰⁷ to be examined by experts,¹⁰⁸ to appear at the trial,¹⁰⁹ to present evidence,¹¹⁰ to cross-examine a witness who testifies against him,¹¹¹ and to view and copy all petitions and reports in the court file.¹¹²

If either the judge or a jury concludes that an offender is a sexually violent predator, the person is committed “for outpatient treatment and supervision.”¹¹³ The judge imposes on the person to be committed specific requirements necessary to ensure compliance with outpatient commitment as well as to safeguard the community.¹¹⁴ A committed person’s violation of a requirement

107. *Id.* § 841.061(b) (Vernon Supp. 2007).

108. *Id.* § 841.061(c).

109. *Id.* § 841.061(d)(1).

110. *Id.* § 841.061(d)(2).

111. *Id.* § 841.061(d)(3).

112. *Id.* § 841.061(d)(4).

113. *Id.* § 841.081(a) (Vernon 2003).

114. *Id.* § 841.082(a).

The requirements shall include: (1) requiring the person to reside in a Texas residential facility under contract with the council or at another location or facility approved by the council; (2) prohibiting the person’s contact with a victim or potential victim of the person; (3) prohibiting the person’s possession or use of alcohol, inhalants, or a controlled substance; (4) requiring the person’s participation in and compliance with a specific course of treatment; (5) requiring the person to: (A) submit to tracking under a particular type of tracking service and to any other appropriate supervision; and (B) refrain from tampering with, altering, modifying, obstructing, or manipulating the tracking equipment; (6) prohibiting the person from changing the person’s residence without prior authorization from the judge and from leaving the state without that prior authorization; (7) if determined appropriate by the judge, establishing a child safety zone in the same manner as a child safety zone is established by a judge under Section 13B, Article 42.12, Code of Criminal Procedure, and requiring the person to comply with requirements related to the safety zone; (8) requiring the person to notify the case manager immediately but in any event within 24 hours of any change in the person’s status that affects proper treatment and supervision, including a change in the person’s physical health or job status and including any incarceration of the person; and (9) any other requirements determined necessary by the judge. (b) A tracking service to which a person is required to submit under Subsection (a)(5) must: (1) track the person’s location in real time; (2) be able to provide a real-time report of the person’s location to the case manager at the case manager’s request; and (3) periodically provide a cumulative report of the person’s location to the case manager. (c) The judge shall provide a copy of the requirements imposed under Subsection (a) to the person and to the council. The council shall provide a copy of those requirements to the case manager and to the service providers. (d) The court retains jurisdiction of the case with respect to a civil commitment proceeding conducted under Subchapters F and G. (e) The requirements imposed under Subsection (a) may be modified at any time after notice to each affected party to the proceedings

imposed by this statute results in a criminal penalty.¹¹⁵ A person committed under this statute is afforded many procedural safeguards, much as are committed persons in Washington.¹¹⁶ A committed person receives biennial examination,¹¹⁷ and may petition for release from commitment at any time.¹¹⁸ Further, because Texas utilizes only outpatient treatment, it, by default, considers less restrictive alternatives for persons committed under the statute.¹¹⁹

VI. THE VIRGINIA SEXUALLY VIOLENT PREDATOR ACT

A. Background

Virginia passed civil commitment legislation in 1999, but it was not until 2003—when the Commonwealth was faced with the pending release of Richard Ausley, a notorious pedophile—that the legislature authorized money to finance the legislation.¹²⁰

On January 10, 1973, Richard “Peewee” Ausley lured thirteen-year-old Martin Andrews into his van with the promise of payment if Andrews would help him move some furniture.¹²¹ Ausley kidnapped Andrews, taking him deep into the woods in Suffolk, where, for seven days, he held the boy captive in an underground plywood hunting box.¹²² Ausley repeatedly raped and beat Andrews.¹²³ On the seventh day, Ausley chained Andrews in the box and left him for dead.¹²⁴ On the morning of the eighth day, four

and a hearing.

Id. § 841.082(a)–(e) (Vernon Supp. 2007). This is a “contractual” restraint. Hall, *supra* note 22, at 190.

115. TEX. HEALTH & SAFETY CODE ANN. § 841.085(a).

116. See *supra* notes 92–97 and accompanying text.

117. TEX. HEALTH & SAFETY CODE ANN. §§ 841.101(a), 841.102(a) (Vernon 2003).

118. *Id.* §§ 841.122 (right to petition), 841.123 (petition procedures).

119. See *id.* § 841.121(a).

120. Fiske, *Sex Offenders and the Law*, *supra* note 3.

121. Warren Fiske, *Martin Andrews: From Victim to Victor*, VIRGINIAN-PILOT, Apr. 25, 2005, at A1, available at <http://content.hamptonroads.com/story.cfm?story=103485&ran=198655>.

122. *Id.*

123. *Id.*

124. *Id.*

local hunters discovered Martin Andrews, eyes blacked, teeth broken, and nose smashed.¹²⁵

Ausley was sentenced to forty-one years in prison for his brutal attack on Andrews.¹²⁶ In 2002, however, Andrews received a jarring phone call: Richard Ausley was scheduled to be released from prison the following April.¹²⁷ Ausley's impending release spurred Andrews to action, and he began to lobby hard for Virginia to properly fund the civil commitment act it had passed in 1999.¹²⁸ His efforts paid off—lawmakers appropriated \$2.7 million to start a thirty-six-bed civil commitment center in Petersburg.¹²⁹ It opened in 2003.¹³⁰

B. *The Virginia Statute*

Virginia's Sexually Violent Predator Act ("SVPA") defines a "sexually violent predator" as "any person who (i) has been convicted of a sexually violent offense or has been charged with a sexually violent offense . . . and (ii) because of a mental abnormality or personality disorder, finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts."¹³¹

The SVPA provides that the Director of the Department of Corrections maintain a database of all prisoners convicted of a sexually violent offense.¹³² The Director consults the database each month to identify all such prisoners who are within ten months of release from prison.¹³³ Once the Director identifies those sexual offenders nearing release, the Director must order an assessment of the prisoner.¹³⁴

Virginia authorizes the use of the Static-99 actuarial test as the assessment tool for screening prisoners.¹³⁵ Prisoners are eligi-

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. VA. CODE ANN. § 37.2-900 (2005).

132. *Id.* § 37.2-903(B).

133. *Id.* § 37.2-903(C).

134. *Id.* § 37.2-903(E) (Supp. 2007).

135. *Id.* § 37.2-903(C). Static-99 was developed by R. Karl Hanson, a senior research

ble for commitment if they receive a score of five or more on the Static-99, or a score of four on the Static-99 if the sexually violent offense mandating the prisoner's evaluation was an aggravated sexual battery where the victim was under the age of thirteen and suffered physical bodily injury,¹³⁶ or if the offense was rape,¹³⁷ forcible sodomy,¹³⁸ or object sexual penetration¹³⁹ where the victim was under the age of thirteen.¹⁴⁰ Upon receipt of the names of prisoners receiving a score of four or five on the Static-99 test, the Director forwards the names to the Commitment Review Committee ("CRC").¹⁴¹

The CRC, established by the Director of the Department of Corrections, consists of seven members: three from the Department of Corrections appointed by the Director; three from the Department of Corrections appointed by the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services, at least one of whom is a Virginia-licensed psychologist or psychiatrist "skilled in the diagnosis of mental abnormalities and personality disorders associated with violent sex offenders"; and one assistant or deputy attorney general.¹⁴² Once the CRC receives prisoners' names from the Director, it must conduct assessments of those prisoners for possible civil commitment and forward its recommendation to the Attorney General.¹⁴³ The CRC recommends that the prisoner or defendant "(i) be committed as a sexually violent predator . . . ; (ii) not be committed, but be placed in a conditional release program as a less restrictive alternative; or (iii) not be committed because he does not meet the definition of a sexually violent predator."¹⁴⁴

If the CRC recommends commitment, the Attorney General has ninety days to file a petition for civil commitment in the circuit court where the inmate was last convicted of a sexual of-

officer for Canada's Department of Public Safety and Emergency Preparedness. Fiske, *Sex Offenders and the Law*, *supra* note 3.

136. VA. CODE ANN. § 18.2-67.3.

137. *Id.* § 18.2-61 (2004).

138. *Id.* § 18.2-67.1.

139. *Id.* § 18.2-67.2.

140. *Id.* § 37.2-903(C) (Supp. 2007).

141. *Id.* § 37.2-903(E).

142. *Id.* § 37.2-902 (2005); *see also* Commonwealth v. Miller, 643 S.E.2d 208, 213-15 (Va. 2007) (discussing qualifications of a psychologist or psychiatrist).

143. VA. CODE ANN. § 37.2-904(A) (2005).

144. *Id.* § 37.2-904(C).

fense.¹⁴⁵ Once a petition for civil commitment is filed, the circuit court then holds a hearing to determine if there is probable cause to find that the prisoner is a sexually violent predator.¹⁴⁶

If the judge finds probable cause to believe the prisoner is a sexually violent predator, a trial is held. Despite statutory language declaring that “all proceedings conducted hereunder are civil proceedings,”¹⁴⁷ a trial to determine whether a prisoner is a sexually violent predator appears quasi-criminal in nature: the prisoner has the right to an expert¹⁴⁸ and the right to a trial by jury.¹⁴⁹ The standard of proof, however, is not “beyond a reasonable doubt”; instead, the Attorney General must prove only “by clear and convincing evidence” that the prisoner is a sexually violent offender.¹⁵⁰

Any person ordered committed under the SVPA is placed in the custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services for “control, care, and treatment until such time as the person’s mental abnormality or personality disorder has so changed that the person will not present an undue risk to public safety.”¹⁵¹ Once a person is committed to the Department, the Department must propose and monitor the offender’s compliance with a specific course of treatment.¹⁵²

Virginia provides committed persons the procedural safeguard of a periodic review to determine the person’s need for secure, inpatient treatment.¹⁵³ Such a review is conducted annually for the first five years and biennially thereafter.¹⁵⁴ A committed person may only petition for release in the years in which a review is not required by statute.¹⁵⁵

145. *Id.* § 37.2-905(A) (Supp. 2007).

146. *Id.* § 37.2-906(A).

147. *Id.* § 37.2-908(H).

148. *Id.* § 37.2-907(A).

149. *Id.* § 37.2-908(B).

150. *Id.* § 37.2-908(C).

151. *Id.* § 37.2-909(A).

152. *Id.* § 37.2-908(F).

153. *Id.* § 37.2-910(A).

154. *Id.*

155. *Id.* § 37.2-911(A).

C. *Legal Challenges to the Virginia SVPA: Shivaee v. Commonwealth*

Although many critics argue that civil commitment is a criminal proceeding “cloaked with civil procedural requirements,”¹⁵⁶ and “just a way to keep people locked up indefinitely after they have served out their prison sentences,”¹⁵⁷ Virginia’s SVPA has survived constitutional challenge.

In June of 2005, the Supreme Court of Virginia considered the constitutionality of civil commitment for sexually violent predators in *Shivaee v. Commonwealth*.¹⁵⁸ The court ruled that, in light of the Supreme Court’s decisions in *Hendricks* and *Crane*, Virginia’s statute allowing for civil commitment of violent sex offenders “comports with all constitutional requirements of due process and is not unconstitutional.”¹⁵⁹

Two men confined under Virginia’s SVPA, Rahmatollah Shivaee and Orlando Lawarren Butler, challenged the law on various grounds, including constitutional issues.¹⁶⁰ In 1996, Shivaee was convicted of four counts of aggravated sexual battery and one count of indecent liberties, all against female victims under the age of thirteen.¹⁶¹ In 1997, Shivaee was again convicted of a sexual offense—this time, forcible sodomy of a boy less than thirteen years old.¹⁶² In lieu of his release, which was scheduled for September 17, 2003, the Attorney General petitioned for his commitment.¹⁶³

Shivaee filed a motion to dismiss the petition for commitment on the grounds that it violated both the Fourteenth Amendment of the United States Constitution and Article I, Section II of the Constitution of Virginia.¹⁶⁴ The court denied the motion, and tried

156. Mike Allen, *Sex Crimes Carry Threat of Extended Detention*, ROANOKE TIMES, May 13, 2007, at A1, available at 2007 WLNR 9141042.

157. Holly A. Heyser, *Virginia Sex Offenders: Lock Them Up and Throw Away the Key? The General Assembly Is Poised to Pass a Law to Let the State Incarcerate Violent Sex Offenders for the Crimes They Might Commit*, VIRGINIAN-PILOT, Feb. 16, 1999, at A1, available at 1999 WLNR 2274862.

158. 613 S.E.2d 570 (Va. 2005).

159. *Id.* at 576, 579.

160. *See id.* at 579.

161. *Id.* at 573.

162. *Id.*

163. *Id.*

164. *Id.*

Shivae to determine whether he met the criteria for a sexually violent predator.¹⁶⁵

At trial, Shivae's social worker testified that Shivae did not complete the Sex Offender Residential Treatment ("SORT") Program while incarcerated, he admitted only to some inappropriate touching, and he denied most of his illegal interactions with children.¹⁶⁶ Testimony from both the Commonwealth's expert and Shivae's expert revealed that Shivae suffered from pedophilia.¹⁶⁷ The experts differed only in their recommendations for treatment—the Commonwealth's expert recommended inpatient treatment, and Shivae's expert recommended outpatient treatment.¹⁶⁸ Based on this evidence, the trial court found Shivae to be a sexually violent predator and ordered his civil commitment.¹⁶⁹

Like Shivae, Orlando Butler also was convicted of aggravated sexual battery.¹⁷⁰ He was sentenced to ten years of incarceration with seven years suspended.¹⁷¹ As his release date approached, the Attorney General petitioned for civil commitment.¹⁷² After a finding of probable cause that Butler was a sexually violent predator, the court set a trial date.¹⁷³ Like Shivae, Butler filed a motion to dismiss on the grounds that the Virginia SVPA violated both the Fourteenth Amendment of the United States Constitution and Article I, Section II of the Constitution of Virginia.¹⁷⁴ The trial court denied the motion, and Butler was determined to be a sexually violent predator in need of civil commitment.¹⁷⁵ The Supreme Court of Virginia combined Shivae's and Butler's appeals to consider the constitutionality of the statute confining them to civil commitment.¹⁷⁶

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 574.

174. *Id.*

175. *Id.*

176. *Id.* at 570, 572.

The court found that “[t]he SVPA survives constitutional scrutiny because it satisfies the criteria most recently stated by the Supreme Court [of the United States] in *Crane*.”¹⁷⁷ The Virginia SVPA meets the *Crane* criteria because “there are proper procedures and evidentiary safeguards” in place; the statute requires “a finding of dangerousness either to one’s self or to others”; and “proof of dangerousness and lack of control is linked to the condition of the person.”¹⁷⁸

The court rejected Shivaee and Butler’s claim that the statute is unconstitutional because it requires only “proof that a person ‘finds it difficult’ to control his behavior and fails to require ‘serious difficulty,’ a term used in *Crane*.”¹⁷⁹ The court found that the Supreme Court’s decision in *Crane* left leeway for the states to define the mental abnormalities that make a person eligible for commitment because “‘inability to control behavior’ will not be demonstrable with mathematical precision.”¹⁸⁰ The purpose of the “proof requirements is ‘to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the . . . typical recidivist convicted in an ordinary criminal case.’”¹⁸¹ The court found that Virginia’s statute met this objective.¹⁸²

The Supreme Court of Virginia also rejected arguments that the SVPA violated constitutional protections against double jeopardy or ex post facto laws.¹⁸³ The court unequivocally declared the statute civil, relying primarily on its placement within the civil code, and the fact that it implicates neither retribution nor deterrence, the twin aims of a criminal statute.¹⁸⁴ Thus, the court stated, “[T]he SVPA is a non-punitive, civil commitment statute and as such does not violate the guarantees against double jeopardy or ex post facto lawmaking.”¹⁸⁵

Further, the court found that the adoption of a standard of “clear and convincing evidence” is appropriate in a civil proceed-

177. *Id.* at 576; see *Kansas v. Crane*, 534 U.S. 407, 411–14 (2002).

178. *Shivaee*, 613 S.E.2d at 576.

179. *Id.*

180. *Id.* at 577 (quoting *Crane*, 534 U.S. at 413).

181. *Id.* (quoting *Crane*, 534 U.S. at 413).

182. *Id.*

183. *Id.*

184. *Id.* at 577–78.

185. *Id.* at 578.

ing.¹⁸⁶ States may adopt the “beyond a reasonable doubt” standard in an effort to afford individuals greater protection against the “possibility of an erroneous deprivation of liberty,”¹⁸⁷ but the Virginia General Assembly’s adoption of the “clear and convincing evidence” standard comports with due process.¹⁸⁸

VII. ANALYSIS AND CRITICISM OF THE VIRGINIA SVPA

A. *What Virginia Does Well*

The Virginia SVPA, modeled after a parallel Wisconsin statute,¹⁸⁹ strives to achieve an appropriate balance between the rights of the committed person and the right of the Commonwealth to protect its citizens.¹⁹⁰

Virginia affords sexually violent predators a number of procedural protections. A sex offender on trial to determine whether he is a sexually violent predator, and therefore eligible for confinement, is afforded many of the trappings of a criminal trial: representation by counsel, adequate notice of the proceedings, the right to remain silent or to testify, the right to be present during a hearing or trial, the right to present evidence and to cross-examine witnesses, the right to view and copy all petitions and reports in the court file, the right to assistance by experts, and the right to a trial by jury.¹⁹¹

Virginia also provides committed offenders intensive treatment. The Virginia Center for Behavioral Rehabilitation (“VCBR”) staff “operates within a psychosocial rehabilitation

186. *Id.*

187. John P. Zanini, *Considering Hendricks v. Kansas for Massachusetts: Can the Commonwealth Constitutionally Detain Dangerous Persons Who Are Not Mentally Ill?*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 453 (1997) (discussing Massachusetts’ sexual offender civil commitment statute).

188. *Shivae*, 613 S.E.2d at 578.

189. Telephone interview with Adam Austin, Public Relations, Va. Ctr. for Behavioral Rehabilitation, in Petersburg, Va. (Jan. 8, 2008); see also WIS. STAT. ANN. § 980.01–980.14 (West 2007).

190. VA. CODE ANN. § 37.2-900 (Cum. Supp. 2007).

191. VA. CODE ANN. § 37.2-901, -907(A), -908(B) (Cum. Supp. 2007); see also VA. STATE CRIME COMM’N, *supra* note 18, at 61–62; Angela Axselle & Jill Ryan, *Civil Commitment of Sexually Violent Predators in Virginia*, THE JOURNAL (Va. Probation & Parole Ass’n), Mar. 2007, http://www.govppa.org/newsletter/07_march/index_files/Page538.htm.

model that emphasizes that every interaction between staff and residents is potentially therapeutic.”¹⁹² Residents work with therapists to plan their treatment—bringing offenders into the planning process is designed to reduce risk so that residents may be conditionally released to, and function safely within, the community.¹⁹³

B. *Room for Improvement*

Despite these procedural protections, the promise of intensive treatment, and constitutional clearance, the Virginia SVPA is not free from criticism. The SVPA blurs the lines between civil and criminal law and decimates the state legislature’s budget.

1. The Lines Between Civil and Criminal Are Blurred

Virginia prisons are run by the Department of Corrections, whereas the facility housing Virginia’s sexually violent predators is operated by the Department of Mental Health, Mental Retardation and Substance Abuse Services.¹⁹⁴ “The distinctions [between the two] often seem blurry.”¹⁹⁵

Although persons committed to the VCBR are officially called “residents” rather than inmates,¹⁹⁶ these individuals are permitted little more than basic comforts and necessities upon their arrival at the center: indeed, it is more like a prison setting.¹⁹⁷ The facility’s chief psychologist, Mario Dennis, claims that offenders have a much better lifestyle in civil commitment than in prison: “When not in therapy, residents are allowed to roam the yards and common areas. They are not required to wear uniforms, and they have a library with books and appropriate videos.”¹⁹⁸ Residents, however, do not begin with such privileges. They must pro-

192. Mario J.P. Dennis, *The Virginia Center for Behavioral Rehabilitation*, THE JOURNAL (Va. Probation & Parole Ass’n), Mar. 2007, http://www.govppa.org/newsletter/07_march/index_files/Page538.htm.

193. *Id.*

194. Fiske, *Sex Offenders and the Law*, *supra* note 3.

195. *Id.* “There is a blurring . . . of the distinctions between traditional civil commitment and criminal sentencing because a sexually dangerous person has been convicted of a crime after a traditional criminal trial, and thus has been held fully responsible as an individual for his or her acts and choices.” Zanini, *supra* note 187, at 452.

196. Fiske, *Sex Offenders and the Law*, *supra* note 3.

197. Telephone interview with Adam Austin, *supra* note 189.

198. Fiske, *Sex Offenders and the Law*, *supra* note 3.

gress in their therapy in order to earn privileges, such as television and the ability to shop in the center's commissary.¹⁹⁹

Critics argue that if "residents" are locked in a prison-like facility without the ability to come and go and without proper treatment, civil commitment is not a civil remedy; "it is nothing more than a jail with a fancy name."²⁰⁰ Indeed, some defense attorneys claim to treat civil commitment cases like death penalty cases because clients assume that once they are committed as sexually violent predators, they will never be released.²⁰¹ The clients are correct—with few releases nationwide, commitment amounts to a life sentence *after* offenders have served their full prison sentences.²⁰²

That the Virginia SVPA is modeled after Wisconsin's sexually violent predator laws²⁰³ further evidences a blurring of civil and criminal law. Wisconsin's statutes allowing for civil confinement of sexually violent predators are located in the criminal code.²⁰⁴ New SVP laws typically contain a preamble of legislative findings acknowledging the law's purpose and, in some cases, highlighting some "conceptual weaknesses."²⁰⁵ Clarification of a legislature's intent—is this a civil law, or criminal?—is often found in the law's preamble. The Virginia SVPA, however, like its Wisconsin model, lacks a preamble or statement of legislative findings elucidating the intent of the law.²⁰⁶

Perhaps an absence of legislative findings or preamble reflects uncertainty in the goals of passing this type of statute. Even those who operate facilities housing sexually violent predators have expressed confusion about the proper role of such facilities—

199. Telephone interview with Adam Austin, *supra* note 189.

200. Laurence Hammack, *Committed to Treatment*, ROANOKE TIMES, June 5, 2005, at A1, available at 2005 WLNR 9022697. Some residents claim the only therapy received is a daily ninety-minute group session. *Id.*

201. Frank Green, *Offender Program Has Many Critics; Will Its Use in Va. Cause a New Furor?*, RICH. TIMES-DISPATCH, Mar. 31, 2003, at B1, available at 2003 WLNR 2113801 [hereinafter Green, *New Furor*].

202. *Id.* "It is a maximum-security prison disguised as a so-called treatment center." Fiske, *Sex Offenders and the Law*, *supra* note 3 (quoting a letter written to the newspaper by James Jenkins, a resident of the center).

203. Telephone interview with Adam Austin, *supra* note 189.

204. See WIS. STAT. ANN. §§ 980.01–.14 (West 2007).

205. Brakel & Cavanaugh, *supra* note 16, at 77.

206. Compare VA. CODE ANN. § 37.2-900 (Cum. Supp. 2007) with WIS. STAT. ANN. § 980.01 (West 2007).

“Is it a prison? Is it a mental health center?”²⁰⁷ Should Richard Ausley be kept locked up because he is a “bad” guy, a criminal who will attack again? Or is Richard Ausley “mad”—an offender who suffers a mental abnormality and cannot control his behavior? A statement of the purpose of the law would have clarified the legislature’s intent.²⁰⁸

2. Ballooning Costs

In addition to blurring the line between civil and criminal, the Virginia SVPA is a constant drain on the Commonwealth’s pockets. “The cost of [civil commitment] programs is virtually unchecked and growing”²⁰⁹ The VCBR does not keep a running tally of the cost per year to Virginia taxpayers to confine each sex offender.²¹⁰ Estimates, however, indicate that it costs \$140,000 per resident per year to confine sexual offenders to the current Petersburg facility—six times the average cost per inmate per year in a Virginia prison.²¹¹ “Commitments are starting to add up,” and with “next-to-no releases anywhere, including in states with mature systems, one can expect dramatic growth” in the total number of committed sex offenders in the years to come.²¹² In fact, the new Nottoway County facility may be filled in as few as three years.²¹³

Such ballooning costs of Virginia’s civil commitment program are a problem of the legislature’s own making. The implementation of a new, comprehensive screening test for those eligible for civil commitment, the Static-99,²¹⁴ “will vastly increase the num-

207. Abby Goodnough & Monica Davey, *A Record of Failure at a Center for Sex Offenders*, N.Y. TIMES, Mar. 5, 2007, at A1, available at <http://www.nytimes.com/2007/03/05/us/05civil.html>.

208. See, e.g., 2007-1 N.Y. Consol. Laws Adv. Legis. Serv. 139 (Lexis Nexis) (to be codified at N.Y. MENTAL HYG. LAW § 10.01(a)-(g)) (preamble expressly clarifies legislature’s intent).

209. Davey & Goodnough, *Doubts Rise*, *supra* note 55.

210. Telephone interview with Adam Austin, *supra* note 189.

211. *A Profile of Civil Commitment Around the Country*, N.Y. TIMES, Mar. 3, 2007, http://www.nytimes.com/imagepages/2007/03/03/us/20070304_CIVIL_GRAPHIC.html. The average cost per inmate per year in prison is \$23,123. *Id.*; see also Fiske, *Sex Offenders and the Law*, *supra* note 3.

212. Brakel & Cavanaugh, *supra* note 16, at 81–82.

213. Fiske, *Sex Offenders and the Law*, *supra* note 3.

214. See VA. CODE ANN. § 37.2-903(C) (Cum. Supp. 2007).

ber of sex offenders referred for civil commitment.”²¹⁵ The Static-99 is considered a better assessment tool than the Rapid Risk Assessment for Sexual Offender Recidivism, the test previously used by Virginia prisons to identify offenders eligible for commitment.²¹⁶ The Static-99 scoring method, however, likely renders many more offenders eligible for commitment, and by choosing this screening test, the legislature handicapped itself: it was forced to borrow \$62 million to build the 300-bed Nottoway County facility because a smaller, \$33 million, 100-bed treatment center, would not be large enough to house all the offenders eligible for commitment under the Static-99 test.²¹⁷

Moreover, that \$140,000 per-resident, per-year figure represents an institution running at full capacity. Virginia currently has about sixty committed sexually violent predators.²¹⁸ The recently opened Nottoway County facility, which will house up to 300 offenders and employ a staff of 350 when all phases of construction are complete,²¹⁹ is not running at capacity. “[T]he number of offenders committed to the program has been lower than initially thought”:²²⁰ the program simply has not grown as quickly as the legislature expected.²²¹ In fact, *last year’s* projection for the total number of committed sexually violent predators was 113.²²² As there are only about sixty men currently in the facility, the Center evidently fell far short of that projection. At best, the Center projects to have 113 committed offenders by the summer of 2008.²²³ In all actuality, therefore, Virginia will continue to lose money on this facility until it eventually operates at capacity.

215. Candace Rondeaux, *Va. Faces Ballooning Cost to Confine Sex Offenders*, WASH. POST, Apr. 2, 2006, at C1.

216. Frank Green, *Where is This Man? Should This Child Molester and Cop Killer Have Been Released?*, RICH. TIMES-DISPATCH, Apr. 16, 2006, at A1, available at 2006 WLNR 6547343.

217. Rondeaux, *supra* note 215.

218. Green, *Center for Sex Offenders Opens*, *supra* note 1.

219. *Id.*

220. Frank Green, *Funds Sought for Sex-Convict Center; Unit Also Needs New Home; Residents of Dinwiddie Want It Out*, RICH. TIMES-DISPATCH, Jan. 10, 2005, at A1, available at 2005 WLNR 402542 [hereinafter Green, *Funds Sought*].

221. *Id.*

222. Telephone interview with Adam Austin, *supra* note 189.

223. See Fiske, *Sex Offenders and the Law*, *supra* note 3.

VIII. RECOMMENDATIONS

The Virginia SVPA is a simple solution to the fearsome public policy problem of sexual predation: lock them up and throw away the key. “Better safe than sorry will be the understandable motto”²²⁴ as the state continues to civilly commit offenders. But the costs of a “better safe than sorry” approach can quickly “spiral out of control,” which has been the experience of other states with civil commitment laws;²²⁵ therefore, Virginia must be wary of this potential pitfall and should consider changes to the law to avoid such a problem.

A. *Reform the Law*

Perhaps the most clear-cut solution to the problem of ever-increasing costs of civil commitment is to eliminate civil commitment statutes entirely and enhance criminal sanctions and treatment within the current criminal system.²²⁶ Because civil commitment statutes are expensive, challenge the mental health system, and have not proven to accurately predict recidivism or successfully treat sex offenders,²²⁷ their elimination would be a cost-effective solution.

No state that has adopted a sex offender civil commitment statute, however, has ended the program.²²⁸ Ending the program would be politically impractical—a public policy “black hole.”²²⁹ Moreover, ending civil commitment is unlikely in Virginia, where proponents of the law feel strongly that sex offenders are the “worst of the worst,”²³⁰ and “[t]he money spent on civil commitment is worth it when you consider the alternative . . . [:] ‘the number of victims that these individuals would have if you put

224. Brakel & Cavanaugh, *supra* note 16, at 92.

225. Rondeaux, *supra* note 215.

226. See Jeremiah W. White, Note, *Is Iowa’s Sexual Predator Statute “Civil”? The Civil Commitment of Sexually Violent Predators After Kansas v. Crane*, 89 IOWA L. REV. 739, 768–69 (2004) (offering a proposal for the Iowa legislature to “make civil commitments and criminal punishments for the same sexual offenses mutually exclusive”).

227. See *id.* at 773.

228. Green, *Funds Sought*, *supra* note 220.

229. *Id.* (quoting John Q. LaFond, a professor at University of Missouri-Kansas City School of Law and an expert on the civil commitment of violent sex offenders).

230. Fiske, *Sex Offenders and the Law*, *supra* note 3 (quoting Virginia Senator Kenneth Stolle, R-Virginia Beach).

them back on the street”²³¹ Therefore, because ending civil commitment is not a politically viable option, Virginia should reform the current law.

1. Make Civil Commitments and Criminal Punishments for the Same Sexual Offenses Mutually Exclusive

Virginia law provides that a “sexually violent predator” has a “mental abnormality” or “personality disorder” that causes him difficulty controlling his predatory behavior, which then leads to the commission of sexually violent acts.²³² A “mental abnormality” or “personality disorder” is defined as a “condition that affects a person’s emotional or volitional capacity and renders the person so likely to commit sexually violent offenses that he constitutes a menace to the health and safety of others.”²³³ Experts say that violent sexual predation, however, is not itself a mental disorder; it is criminal conduct.²³⁴ Therefore, Virginia must distinguish clearly between sexual offenders who truly have difficulty controlling their behavior—those offenders who lack the free will to control themselves—and those who have some control and are thus fit for criminal punishment. The Virginia legislature must make civil commitments and criminal punishments for the same sexual offenses mutually exclusive.²³⁵ In other words, “society must decide whether sexually violent predators are mad or bad.”²³⁶

Revised legislation should require a prosecutor, prior to formally charging a sexually violent offense, to request an initial hearing to civilly commit the individual for the recent criminal act.²³⁷ Should the prosecutor fail to request this initial hearing for civil commitment prior to indictment on a criminal charge, the

231. Hammack, *supra* note 200 (quoting Virginia House of Delegates Majority Leader Morgan Griffith, R-Salem).

232. VA. CODE ANN. § 37.2-900 (Cum. Supp. 2007).

233. *Id.*

234. Oliver, *supra* note 56 (discussing the Washington State Psychiatric Association’s amicus brief arguing that Washington’s civil commitment statute must be overturned).

235. See White, *supra* note 226, at 768–69 (offering a proposal for the Iowa legislature to “make civil commitments and criminal punishment for the same sexual offenses mutually exclusive”).

236. Stephen J. Morse, *Fear of Danger, Flight from Culpability*, 4 PSYCHOL. PUB. POL’Y & L. 250, 259 (1998).

237. See White, *supra* note 226, at 769.

State waives the possibility of commitment, and civil commitment for that particular crime is now impossible.²³⁸

Once the initial hearing is requested, the process should continue with review by a multidisciplinary team to determine if the person is a “sexual civilly committable person.”²³⁹ “Sexual civilly committable persons” differ from sexual predators. They are

individuals, who are necessarily appropriate for civil commitment, in lieu of facing a criminal charge with a sexually violent offense, after being determined by a jury, by clear and convincing evidence, to have a mental illness, disease, defect, or abnormality that produces a substantial and serious inability to control sexual impulses and behavior, thereby rendering criminal sentencing and punishment inappropriate and unnecessary.²⁴⁰

The multidisciplinary team may recommend the person for trial to determine whether the person is a “sexual civilly committable person.”²⁴¹

If a civil jury determines that the person is a “sexual civilly committable person,” the person should be remanded to the custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services for “care, control, and treatment.”²⁴² This is a fitting sentence for someone who, as the victim of a mental condition, is not criminally responsible. Criminal punishment via incarceration for a “mad” person is inappropriate.²⁴³

Alternatively, sexually violent predators who are found not to have difficulty controlling their behavior—those who are “bad”—may be convicted.²⁴⁴ These persons may be charged with a sexually violent crime under certain circumstances: if the prosecuting attorney fails to request a hearing for a sexual civil commitment prior to a formal charge, if the team reviewing the offender declines to recommend a commitment, or if the civil jury “finds the person is not a sexual civilly committable person.”²⁴⁵ This aligns with “the theories of retribution and deterrence because the sex-

238. *See id.*

239. *Id.*

240. *Id.*

241. *Id.* at 769–70.

242. *Id.*

243. *See id.* at 770–71.

244. *See id.* at 771.

245. *Id.* at 772.

ual predator has the free will to control his behavior, and hence, deserves punishment, which may deter future recidivism.”²⁴⁶

2. Invoke the Criminal Law

Some critics argue that sexual predator commitment laws are really no more than “an emotional reaction to the too-lenient sentences levied on sexual criminals.”²⁴⁷ If, indeed, civil commitment laws are designed in response to these “emotional reactions,” then mandatory terms of criminal incarceration—aligned with the criminal system’s objectives of retribution and deterrence²⁴⁸—would adequately address public concerns. In criminal sentencing, “the aphorism that past behavior is the best predictor of future behavior has long been accepted by the legislature and the courts.”²⁴⁹ Therefore, longer criminal sentences for sexual offenses would ensure that offenders serve their time, and is an apt response to the perceived threat to public safety posed by sex offenders.²⁵⁰ For example, a life sentence upon conviction of a third sexually violent offense properly utilizes the criminal law to comply with the Commonwealth’s desire to preserve a strict legislative stance against sexually violent predators.²⁵¹

Virginia has recently made steps in this direction. In 2006, the General Assembly mandated longer minimum sentences for offenders convicted of sex crimes against children under the age of thirteen.²⁵² Twice-convicted pedophiles now face mandatory life sentences.²⁵³ In conjunction with former Governor George Allen’s “Truth-in-Sentencing” initiative,²⁵⁴ the Commonwealth is making a strong effort to better use the criminal law. Virginia, however, should continue to increase punishment for sex offenders in order to satisfy public demand for retribution and deterrence.

246. *Id.*

247. Oliver, *supra* note 56.

248. See White, *supra* note 226, at 772.

249. Zanini, *supra* note 187, at 455.

250. Morse, *supra* note 236, at 264.

251. See White, *supra* note 226, at 773.

252. VA. CODE ANN. § 37.2-903(C) (Cum. Supp. 2007).

253. *Id.*

254. “Truth-in-Sentencing” increases prison terms for violent and repeat offenders and ensures that inmates serve, at a minimum, 85% of the sentence imposed. BRIAN J. OSTROM ET AL., NAT’L CTR. FOR STATE CTS., TRUTH-IN-SENTENCING IN VIRGINIA 4 (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/187677.pdf>.

B. *Invest Resources in Treatment; Consider More Alternative Treatments*

Without such changes to the existing law, Virginia's civil commitment program will continue to grow rapidly. Some legislators say that even the new facility in Nottoway County may be filled in as few as three years.²⁵⁵ New facilities, larger staffs, larger budget allocations—essentially, throwing money at the problem—will not resolve the issue; instead, it will only create a “fiscal black hole.”²⁵⁶ Virginia should invest resources on the front end and consider more alternative treatments to control spending and reduce the overall number of sex offenders committed to the Department of Mental Health.

1. Invest in Treatment

To date, no offenders have been discharged from Virginia's civil commitment program.²⁵⁷ In fact, the VCBR's chief psychologist has never even recommended a “resident” for release.²⁵⁸ Often, people have no hope that hard-core sex offenders can be rehabilitated; they believe that “once you check into this facility, you won't be checking out—at least not in a vertical position.”²⁵⁹

Such statements belie the Commonwealth's attitude that sex offenders are treatable and call into question Virginia's commitment to meaningful treatment in the VCBR facility. If sex offenders are

‘as sick as the attorney general contends, then we as a society have an obligation to spend money on the front end on treatment and detection of potential re-offenders, rather than spending money on the back end after their sentences and warehousing them until they die of old age.’²⁶⁰

255. Fiske, *Sex Offenders and the Law*, *supra* note 3.

256. See Green, *New Furor*, *supra* note 201.

257. Fiske, *Sex Offenders and the Law*, *supra* note 3.

258. *Id.*

259. Hammack, *supra* note 200 (quoting William Petty, Commonwealth's Attorney, Lynchburg, Va.); see also Kathryn Orth, *Ground Broken for Center to Confine Sex Offenders*, RICH. TIMES-DISPATCH, July 21, 2006, at B8 (“Sexually violent predators are ‘lost souls.’”).

260. Rondeaux, *supra* note 215 (quoting Leigh Drewry, attorney for Lorenzo Townes, who was civilly committed under Virginia law). See generally *Townes v. Commonwealth*, 609 S.E.2d 1 (Va. 2005).

Virginia's \$62 million investment in a new facility to house its sexual predators is, therefore, misguided spending: the Commonwealth should reinvest its resources in identifying offenders with an illness and treating them before they reoffend. The Commonwealth should devote more research and funding to developing a risk assessment tool to predict accurately recidivism, to the studying effects of drug-related therapy, and to analyzing the efficacy of different therapeutic models.

2. Develop a Risk Assessment Tool to Accurately Predict Recidivism

Risk of recidivism varies amongst sex offenders.²⁶¹ Estimating recidivism rates can be difficult because many sexual offenses go unreported,²⁶² but the Static-99 test shows moderate predictive accuracy for sexual recidivism and violent recidivism.²⁶³ This test has its shortcomings, however. It is meant to estimate long-term recidivism, and because it only takes into account static factors, such as prior offenses and age of the offender at the time of the offense, it cannot be used to select offenders who will benefit from treatment, to measure change, or to identify whether sex offenders will reoffend.²⁶⁴

Further, Static-99, as with most other sex offender assessment tools, was developed for and normed on adult male sex offenders.²⁶⁵ Risk assessment tools for female offenders have not yet been developed.²⁶⁶ Although some risk factors are as relevant for females as they are for males, assessment measures are not framed around female offenders and may not adequately capture how risk factors interact.²⁶⁷ The Commonwealth must further re-

261. Jennifer M. Connor, *Seling v. Young: Constitutionally Protected but Unjust Civil Commitment for Sexually Violent Predators*, 18 J. CONTEMP. HEALTH L. & POL'Y 511, 531 (2002).

262. VA. STATE CRIME COMM'N, *supra* note 18, at 8.

263. R. KARL HANSON & DAVID THORNTON, *STATIC 99: IMPROVING ACTUARIAL RISK ASSESSMENTS FOR SEX OFFENDERS 17* (1999), available at http://ww2.ps-sp.gc.ca/publications/corrections/199902_e.pdf. The development of and nuances between actuarial tools merit further discussion, but are beyond the scope of this comment.

264. *Id.* at 18, app. I.

265. *See id.* at app. I; CTR. FOR SEX OFFENDER MGMT., *FEMALE SEX OFFENDERS 8* (2007), available at http://www.csom.org/pubs/female_sex_offenders_brief.pdf.

266. CTR. FOR SEX OFFENDER MGMT., *supra* note 265, at 9.

267. *Id.*

search and develop risk assessment tools to adequately address all offenders.

3. Efficacy of Therapeutic Models

Therapists can take many different approaches to the treatment of sex offenders.²⁶⁸ Aversion therapy, orgasmic reconditioning, cognitive restructuring, social skills training, and phallometric studies are among the methods used to evaluate and treat sex offenders.²⁶⁹ Some offenders are treated using “relapse prevention,” which has similarities to Alcoholics Anonymous programs.²⁷⁰ This particular approach requires offenders to admit their misconduct and unlawful activities, and to approach treatment as a daily “struggle with temptation.”²⁷¹ “Yet there is no convincing evidence that the approach works, or that others do either.”²⁷²

Virginia must invest in further research to examine the efficacy of certain therapeutic models and consider that some offenders—or perhaps certain types of offenders—respond more favorably to different therapeutic techniques. Because effective treatment often is elusive, “[r]egardless of the structure of the treatment program, the duration of the treatment program, the nature of the treatment program . . . what we basically have is living experiments.”²⁷³ Investment in research to determine the types of offenders who respond best to certain therapeutic models will transform these living experiments into true treatment programs.

4. Consider Less Restrictive Alternatives

Virginia should also consider less restrictive alternatives for more offenders, namely, outpatient treatment rather than civil commitment. The Texas SVP statute, which authorizes a program based entirely on outpatient treatment, is an example of adequate

268. See Connor, *supra* note 261, at 533.

269. *Id.*

270. Abby Goodnough & Monica Davey, *For Sex Offenders, a Dispute over Therapy's Benefits*, N.Y. TIMES, Mar. 6, 2007, at A1, available at <http://www.nytimes.com/2007/03/06/us/06civil.html>.

271. *Id.*

272. *Id.*

273. *Id.*

less-restrictive alternatives for sexual offenders.²⁷⁴ Texas's outpatient program, instituted primarily for fiscal reasons, is considered successful because it has saved the state money.²⁷⁵

Virginia also may find success—fiscal, at least—by transitioning from inpatient to outpatient therapy for certain sex offenders. Certainly outpatient treatment would require a number of different support services and monitoring procedures for each offender. By releasing some offenders back into the community with appropriate supervision and services, though, Virginia can then properly spend funds to identify and treat sex offenders before they reoffend, providing “security and treatment for 10 times as many low-risk offenders as offenders that are civilly committed.”²⁷⁶

IX. CONCLUSION

The Virginia SVPA comes within the parameters established by the Supreme Court of the United States. It strives to provide safeguards to protect the liberty interests of persons convicted under the statute. The new facility housing the VCBR, however, is not money well-spent. As the costs of civil commitment threaten both the state budget and offenders' constitutional rights,²⁷⁷ the Virginia legislature should consider reforming the current law to make better use of its limited resources. The Virginia legislature should clarify the intent of the law and consider revising the SVPA to make civil commitment and criminal punishment for the same sexual offense mutually exclusive. The leg-

274. See *supra* Part V.B.

275. Hall, *supra* note 22, at 189.

276. Rondeaux, *supra* note 215. In addition to some fiscal success, Virginia may find some success in treating sex offenders and preventing them from reoffending by offering individualized outpatient services. Cf. KARL W. DENNIS & IRA S. LOURIE, EVERYTHING IS NORMAL UNTIL PROVEN OTHERWISE (2006) (arguing for the reform of the foster care system by utilizing “wraparound services,” or putting various child- and family-specific programs in place in the home rather than removing children to residential institutions to treat behavioral and emotional problems). There is nothing “magical about putting young people who have the same issues together in the same program Even worse, we put all the sex offenders together, and we *know* what *they* have learned from each other!” *Id.* at 8. Home is a better environment for providing services to children than a residential institution. *Id.* at 2. After removing children from residential institutions, the authors saw great success with some very difficult cases by creating highly individualized treatment programs within families and communities. See *id.* at 9.

277. Hammack, *supra* note 200.

islature should also consider transitioning more offenders to outpatient, less-restrictive therapeutic alternatives.

Finally, the Commonwealth must invest its resources on the front end to identify and treat offenders with a problem before they recidivate. Investing in treatment and in proper tools to identify sexually violent predators, and researching differing methods of therapy will allow Virginia to treat the problem before these offenders are permanently warehoused in the Virginia Center for Behavioral Rehabilitation.

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