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# Dangerous Diagnoses, Risky Assumptions, and the Failed Experiment of "Sexually Violent Predator" Commitment

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## DANGEROUS DIAGNOSES, RISKY ASSUMPTIONS, AND THE FAILED EXPERIMENT OF “SEXUALLY VIOLENT PREDATOR” COMMITMENT

DEIRDRE M. SMITH\*

*In its 1997 opinion, Kansas v. Hendricks, the U.S. Supreme Court upheld a law that reflected a new model of civil commitment. The targets of this new commitment law were dubbed “Sexually Violent Predators” (SVPs), and the Court upheld indefinite detention of these individuals on the assumption that there is a psychiatrically distinct class of individuals who, unlike typical recidivists, have a mental condition that impairs their ability to refrain from violent sexual behavior. And, more specifically, the Court assumed that the justice system could reliably identify the true “predators,” those for whom this unusual and extraordinary deprivation of liberty is appropriate and legitimate, with the aid of testimony from mental health professionals.*

*This Article evaluates those assumptions and concludes that, because they were seriously flawed, the due process rationale used to uphold the SVP laws is invalid. The “Sexually Violent Predator” is a political and moral construct, not a medical classification. The implementation of SVP laws has resulted in dangerous distortions of both psychiatric expertise and*

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*important legal principles, and such distortions reveal an urgent need to re-examine the Supreme Court's core rationale in upholding the SVP commitment experiment.*

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*I. Introduction*

In 1990, the state of Washington was consumed by news of a highly publicized, violent sexual crime committed against a young child by an offender with prior convictions for violence against children.<sup>1</sup> In response to public outcry, the Washington legislature enacted a statute allowing the state to continue to detain certain sex offenders after they had completed their criminal sentences.<sup>2</sup> The targets of these new laws were dubbed “Sexually Violent Predators” (SVPs), a label intended to connote a subclass of sex offenders who run a high risk of recidivism after their release due to the presence of a mental abnormality or personality disorder.<sup>3</sup> Soon thereafter, a few other states, including Kansas, enacted their own commitment laws modeled closely after Washington’s.<sup>4</sup> The first person committed under Kansas’s law, Leroy Hendricks, challenged the constitutionality of his indefinite detention on due process, *ex post facto*, and double jeopardy grounds in a case that reached the U.S. Supreme Court.<sup>5</sup> In its 1997 opinion *Kansas v. Hendricks*, the Court upheld this new commitment model.<sup>6</sup> In the wake of that case, other states (a total of twenty to date) and the federal government enacted SVP laws.<sup>7</sup> Since 1990, the

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1. *See infra* notes 58-64 and accompanying text.  
 2. WASH. REV. CODE ANN. §§ 71.09.010 to .09.903 (West 2014); *see infra* notes 78-84 and accompanying text.  
 3. *See infra* notes 63-79 and accompanying text.  
 4. *See, e.g.*, KAN. STAT. ANN. §§ 59-29a01 to 29a24 (West 2008); WIS. STAT. §§ 980.01 to .14 (2013).  
 5. *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997).  
 6. *Id.* at 371.  
 7. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified at 42 U.S.C. § 16901 (2012)). ARIZ. REV. STAT. ANN. §§ 36-3701 to -3717 (2009); CAL. WELF. & INST. CODE §§ 6600-6609.3 (West 2010); D.C. CODE §§ 22-3803 to 3811 (2013); FLA. STAT. ANN. §§ 394.910-.932 (West 2011); 725 ILL. COMP. STAT. ANN. 207/1 to /99 (West 2006); IOWA CODE ANN. §§ 229a.1 to .16 (West 2014); KAN. STAT. ANN. §§ 59-29a01 to -29a24 (West 2008); MASS. GEN. LAWS ch. 123a, §§ 1-16 (West 2003); 2007 MINN. STAT. ANN. § 253d.01 to .36 (West & Supp. 2009); MO. ANN. STAT. §§ 632.480-.513 (West 2014); NEB. REV. STAT. ANN. §§ 71-1201 to -1226 (West 2009); N.H. REV. STAT. ANN. §§ 135-E:1 to :24 (2015); N.J. STAT. ANN. §§ 30:4-27.24 to .38 (West 2008); N.Y. MENTAL HYG. LAW §§ 10.01-.17 (McKinney 2006 & Supp. 2011); N.D. CENT. CODE §§ 25-03.3-01 to -24 (2014); S.C. CODE ANN. §§ 44-48-10 to -170 (2002 & Supp. 2008); VA. CODE

federal government and the states have committed several thousand people under SVP laws, the vast majority of whom remain in indefinite detention.<sup>8</sup>

The core rationale in *Hendricks*, as well as the follow-up case, *Kansas v. Crane*,<sup>9</sup> is that indefinite preventive detention is consistent with substantive due process principles where a mental disorder limits the committed individual's ability to control his behavior.<sup>10</sup> Although a finding of such mental disorder is, consequently, a constitutional prerequisite for these indefinite commitments, the Court also conferred broad discretion on legislatures regarding how states could satisfy this requirement.<sup>11</sup> The Court based its opinions regarding SVP laws on the assumption that there is a medically distinct class of individuals who are not "typical recidivists" but who have mental conditions that impair their ability to refrain from violent sexual behavior and for whom this unusual and extraordinary deprivation of liberty is appropriate and legitimate.<sup>12</sup> More specifically, the Court assumed that the justice system could reliably distinguish between the two groups and, with the aid of mental health professionals, could identify the true "predators."<sup>13</sup>

In this Article, I evaluate the extent to which those assumptions were correct, both at the time of the SVP laws' enactment and as they have been implemented. First, I consider psychiatry's own views of the relationship between mental pathology and sexual violence and the field's ability to predict such violence.<sup>14</sup> Second, I review key features of psychiatric

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ANN. §§ 37.2-900 to -920 (2013); WASH. REV. CODE ANN. §§ 71.09.010 to .903 (West 2014); WIS. STAT. ANN. §§ 980.01 to .14 (2013).

8. See *infra* notes 193-196 and accompanying text.

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

10. *Crane*, 534 U.S. at 412-13; *Hendricks*, 521 U.S. at 357-58.

11. *Hendricks*, 521 U.S. at 358-59.

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

13. See *id.* at 413-14, 416-17.

14. I will generally use the term "psychiatry" to refer to the professional field concerned with the identification of mental illness in the Sexually Violent Predator (SVP) context because it is closely associated with the overall development of mental pathology classification and nosology, such as through the *Diagnostic and Statistical Manuals of Mental Disorders* (DSM) published by the American Psychiatric Association. I refer to "psychology" in the context of research regarding human behavior. Parties in court proceedings often present expert evidence through the testimony of forensic or clinical psychologists. See GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 23-24 (3d ed. 2007); Roy B. Lacoursiere, *Evaluating Offenders Under a Sexually Violent Predator Law: The Practical Practice*, in *PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY* 75-77 (Bruce J. Winick & John A. La Fond eds., 2003).

expertise offered by prosecutors to support SVP commitment and analyze how courts have used this expertise when deciding whom to commit under SVP laws. Ultimately, these examinations reveal that the assumptions upon which the Court based the *Hendricks-Crane* rationale were erroneous.

The Court's most consequential error was its failure to acknowledge that the category of the "Sexually Violent Predator" is a political and moral construct, not a medical classification. Mainstream psychiatry has never claimed an ability to accurately predict who is at risk of committing acts of sexual violence and has never conceptualized sexual aggression as the product of volitional impairment.<sup>15</sup> Indeed, the American Psychiatric Association (APA), the leading professional organization in American psychiatry, and other voices from within the mental health profession have vociferously opposed SVP laws since their enactment precisely because of the role assigned to psychiatric expertise to identify those who should be committed.<sup>16</sup>

The controversies regarding admission of expert testimony in individual SVP cases reveal the troubling consequences of the Supreme Court's failure to heed the APA's warnings. Trial courts permit prosecution experts to offer diagnoses and predictions of risk in support of these commitments notwithstanding the fact that such testimony often strays far from current scientific understanding of the relationship between acts of sexual violence and psychopathology.<sup>17</sup> In so doing, courts distort and disregard key values in our justice system, such as limiting the admission of expert testimony to that based on scientifically sound methodology and reliable facts and data.<sup>18</sup> Rulings in such cases have become even more dubious in the years since the SVP laws' initial development, as the debate regarding the medical basis of SVP commitment has only intensified. The controversy reveals the unsteady foundation upon which the medical and, by extension, constitutional premise of SVP was based.<sup>19</sup>

The SVP laws generally,<sup>20</sup> and the *Hendricks* opinion specifically,<sup>21</sup> have been the target of extensive criticism from scholars as well as from legal

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15. *See infra* notes 323-336 and accompanying text.

16. *See infra* notes 178-201 and accompanying text.

17. *See infra* notes 455-489 and accompanying text.

18. *See infra* notes 578-605 and accompanying text.

19. *See infra* notes 567-597 and accompanying text.

20. ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 61-66 (2006); Aman Ahluwalia, *Civil Commitment of Sexually Violent Predators: The Search for a Limiting Principle*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 489, *passim* (2006); Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1076-77 (2002).

and mental health professionals. While some have focused upon specific problems in the implementation of SVP laws, including experts' reliance upon controversial diagnoses or their use of actuarial instruments to assess risk, many in both groups—scholars and mental health professionals—have argued that the laws are inherently flawed policy.<sup>22</sup> Although critical of the SVP laws, these commentators generally assume that, in light of the *Hendricks* opinion, the question of the laws' constitutionality is now a settled matter.<sup>23</sup> However, these and related criticisms, combined with a review of how the laws have actually operated, demonstrate that this assumption of constitutionality is itself questionable.

This Article analyzes the SVP laws as a legislative experiment in preventive detention endorsed by the Supreme Court in *Hendricks* and *Crane* through a rationale based upon a set of hypotheses and assumptions regarding psychiatry and psychiatric testimony. This analysis reveals that such hypotheses and assumptions are dubious. As an initial matter, the rationale first developed in *Hendricks* was strictly theoretical: the Court was evaluating a new statutory model for indefinite preventive detention and Leroy Hendricks was among the first people to challenge it.<sup>24</sup> The Supreme Court expected mental health professionals to help courts and fact finders discriminate between the typical recidivist and the truly ill, thereby ensuring that the new laws did not reach too far.<sup>25</sup> These expectations stemmed largely from courts' longstanding reliance on psychiatric expertise to help answer difficult questions about the mental status of persons appearing before them. However, the actual use of such expertise in SVP proceedings reveals that such faith in psychiatry was, in fact, misplaced.

Commentators have noted that the use of certain diagnoses in SVP proceedings runs counter to the APA's *Diagnostic and Statistical Manual*

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21. Michael L. Perlin, "There's No Success Like Failure/and Failure's No Success at All": Exposing the Pretextuality of *Kansas v. Hendricks*, 92 NW. U. L. REV. 1247, 1248-49 (1998).

22. See, e.g., Melissa Hamilton, *Adjudicating Sex Crimes As Mental Disease*, 33 PACE L. REV. 536, *passim* (2013).

23. See, e.g., John Q. La Fond, *Sexually Violent Predator Laws and the Liberal State: An Ominous Threat to Individual Liberty*, 31 INT'L. J. L. & PSYCHIATRY 158, 162-63 (2008); Shoba Sreenivasan et al., *Normative Versus Consequential Ethics in Sexually Violent Predator Laws: An Ethics Conundrum for Psychiatry*, 38 J. AM. ACAD. PSYCHIATRY & L. 386, 388 (2010).

24. *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997).

25. See *infra* notes 175-183 and accompanying text.

of *Mental Disorders* (DSM) system of psychiatric classification.<sup>26</sup> But the problems with the psychiatric evidence offered in these cases are far broader than occasional misclassification and, in fact, stem from limitations inherent to the field of psychiatry generally. Justifying SVP preventive detention based on the notion that psychiatric testimony will ensure that such detention adheres to due process principles reflects a fundamental misunderstanding of psychiatric evaluation and diagnosis.

The problems seen in the use of expert evidence in these proceedings cannot be avoided through technical fixes. Indeed, they reveal that there are no means to implement SVP laws consistent with notions of due process and individual liberty. A sexual predator is a legal classification that depends on medical line-drawing to be constitutionally sound. But because there is no concept in psychiatry resembling a “sexual predator,” the implications of this incongruence go to the essential question of the constitutionality of the SVP laws. Written opinions reveal that courts base SVP commitments largely on the respondents’ criminal records<sup>27</sup> because the expert opinions themselves are based on little else.<sup>28</sup> As a result, expert opinions in SVP cases are not in fact “medical” but moral. And because such conclusions are essentially normative ones, courts are improperly delegating commitment decisions to psychiatric professionals, which flies in the face of both legal principles and psychiatric practice. This is not merely a problem of labels and professional realms; this experiment has resulted in the indefinite detention of thousands of people at an enormous monetary cost to governments and an enormous personal cost to those committed and their families.

## *II. The Supreme Court Sanctions the “Sexually Violent Predator” Experiment*

The notion of the “sexual predator” originated in the early 1990s amid intense and widespread public concern about sexual abuse of children.<sup>29</sup> Fear and hatred of those who committed such crimes fueled a view of them

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26. Hamilton, *supra* note 22, at 23-29; Robert A. Prentky et al., *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 PSYCHOL. PUB. POL’Y & L. 357, 367-68 (2006).

27. Court opinions refer to those individuals who are the targets of SVP commitment petitions primarily as “respondents” and occasionally as “defendants”; I will primarily use the former term.

28. *See infra* notes 449-479 and accompanying text.

29. ROGER N. LANCASTER, *SEX PANIC AND THE PUNITIVE STATE* 78 (2011); Amy Adler, *To Catch a Predator*, 21 COLUM. J. GENDER & L. 130, 130-31 (2012).

as “the ultimate other.”<sup>30</sup> In the wake of media reports of a spate of high-profile sexual crimes against children, some state legislatures passed measures in an attempt to control offenders. Legislatures passed the new laws based on the assumption that these criminals had unusually high recidivism rates and posed a special risk to the public.<sup>31</sup> They were sick, the laws’ supporters reasoned, with a condition that rendered them resistant to typical forms of deterrence.<sup>32</sup> Policymakers concluded that these unique attributes—combined with the particularized harm resulting from sexual abuse—warranted unique measures.<sup>33</sup> Legislatures enacted new or enhanced laws addressing punishments for the possession and viewing of child pornography.<sup>34</sup> They created registries and notification requirements.<sup>35</sup> And, at the extreme end of the spectrum, they established programs for the indefinite detention via civil commitment of individuals identified as SVPs.<sup>36</sup>

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30. Perlin, *supra* note 21, at 1248.

31. Adler, *supra* note 29, at 130-32.

32. *See id.*

33. *See infra* notes 71-80 and accompanying text.

34. CHARLES PATRICK EWING, JUSTICE PERVERTED: SEX OFFENDER LAW, PSYCHOLOGY, AND PUBLIC POLICY 119 (2011); *see, e.g.*, CONN. GEN. STAT. ANN. § 53a-196d (West); PA. CONS. STAT. ANN. tit. 18, § 6312 (West).

35. JANUS, *supra* note 20, at 66-73.

36. Both the laws and common parlance use a range of terms to describe those who commit, or are at risk of committing, multiple crimes of sexual violence. I will use the abbreviation “SVP” throughout the article to describe such category of classification as this was the one used by Washington in the first such law and it is the most commonly used by other states. *See* ARIZ. REV. STAT. ANN. § 36-3701(7) (2009) (“Sexually violent person”); CAL. WELF. & INST. CODE § 6600(a)(1) (West 2010) (“Sexually violent predator”); D.C. CODE § 22-3803(1) (2013) (“[S]exual psychopath”); FLA. STAT. ANN. § 394.912(10) (West 2011) (“Sexually violent predator”); 725 ILL. COMP. STAT. 207/5(f) (West 2006) (“Sexually violent person”); IOWA CODE ANN. § 229A.2(12) (West 2014) (“Sexually violent predator”); KAN. STAT. ANN. § 59-29a02(a) (West 2008) (“Sexually violent predator”); MASS. GEN. LAWS ch. 123A, § 1 (West 2003) (“Sexually dangerous person”); 2007 MINN. STAT. § 253D.02(16) (West & Supp. 2009) (“[S]exually dangerous persons” or persons with a “[s]exual psychopathic personality”); MO. ANN. STAT. § 632.480(5) (West 2014) (“Sexually violent predators”); NEB. REV. STAT. ANN. § 71-1203(5) (West 2009) (“[D]angerous sex offender”); N.H. REV. STAT. ANN. § 135-E:2(12) (2015) (“Sexually violent predator”); N.J. STAT. ANN. § 30:4-27.26 (West 2008) (“[S]exually violent predator”); N.Y. MENTAL HYG. LAW § 10.03(q)-(r) (McKinney 2006 & Supp. 2011) (“Sex offender requiring civil management” or “strict and intensive” supervision); N.D. CENT. CODE § 25-03.3-01(8) (2014) (“Sexually dangerous individual”); S.C. CODE ANN. § 44-48-30(1) (2002 & Supp. 2008) (“Sexually violent predator”); VA. CODE ANN. § 37.2-900 (2013) (“Sexually violent predator”); WASH. REV. CODE ANN. § 71.09.020(18) (West 2014) (“Sexually violent predator”).

The first SVP commitment law was enacted by the state of Washington against the backdrop of the mid-twentieth century's "sexual psychopath" laws and the heightened attention to the problem of repeated acts of sexual violence committed by certain individuals, notwithstanding efforts to control, punish, and deter their behavior through the criminal justice system.<sup>37</sup> But once the U.S. Supreme Court sanctioned Washington's new form of commitment in *Hendricks*, the model spread, and there are now several well-established SVP commitment programs across the country, which continue to indefinitely detain thousands of people.<sup>38</sup>

#### A. *The Origins of SVP Commitment*

##### 1. *Rise and Fall of Sexual Psychopath Laws*

The SVP laws conceived in the early 1990s were not the first laws targeting sex offenders. States enacted the first generation of laws permitting the detention of sex offenders between the 1930s and 1960s, although these laws differed significantly from contemporary SVP laws.<sup>39</sup> While these earlier laws were in place, mainstream psychiatry explained that "sexual psychopaths" were ill, which placed them in the realm of medicine in terms of both identification and care.<sup>40</sup> These earlier laws assured the administration of treatment, rather than detention alone, and thus they were open-ended in terms of the length of hospitalization.<sup>41</sup> Courts could order the hospitalization and treatment of men charged with sex crimes, rather than sentencing them to prison, with the hope that treatment would prevent recidivism.<sup>42</sup>

The U.S. Supreme Court upheld this form of commitment in 1940,<sup>43</sup> but the laws eventually faced widespread criticism.<sup>44</sup> A growing number of

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37. *See infra* notes 39-54 and accompanying text.

38. *See infra* notes 205-217 and accompanying text.

39. AM. PSYCHIATRIC ASS'N, DANGEROUS SEX OFFENDERS: A TASK FORCE REPORT OF THE AMERICAN PSYCHIATRIC ASSOCIATION 11-12, 18 (1999) [hereinafter APA, DANGEROUS SEX OFFENDERS].

40. *Id.* at 11.

41. EWING, *supra* note 34, at 7.

42. APA, DANGEROUS SEX OFFENDERS, *supra* note 39, at 13.

43. *Minn. ex rel. Pearson v. Probate Court of Ramsey Cnty.*, 309 U.S. 270, 274 (1940).

The Minnesota statute upheld in that case required

proof of a 'habitual course of misconduct in sexual matters' on the part of the persons against whom a proceeding under the statute is directed, which has shown 'an utter lack of power to control their sexual impulses', and hence that they 'are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire.'

commentators within psychiatry attacked the “sexual psychopath” legal classification, as there was no agreed-upon definition or basis to attach this label to any individual.<sup>45</sup> Moreover, it became clear that many of these hospitalized men were not mentally ill and received little, if any, treatment in these hospitals.<sup>46</sup> The laws were little more than extended detention on a preventive basis.<sup>47</sup>

Most of these laws were either repealed or no longer used by the early 1980s,<sup>48</sup> but the final nail in the coffin for the remaining laws came from the psychiatric establishment.<sup>49</sup> The Group for the Advancement of Psychiatry (GAP)<sup>50</sup> Committee on Forensic Psychiatry concluded in a 1977 report that there was little real prospect for effective treatment of sexual offenders and that the “discrepancy between the promises in sex statutes and performances have rarely been resolved.”<sup>51</sup> “In retrospect,” the GAP Committee reported, “we view the sex psychopath statutes as social experiments that have failed and that lack redeeming social value. These experiments have been carried out by the joint participation of the psychiatric and legal professions with varying degrees of acquiescence by the general public.”<sup>52</sup> The GAP Committee acknowledged the “unjustified optimism” at the time of the laws’ enactment regarding the “effectiveness of clinical approaches in identifying and predicting” those who posed a risk of engaging in sexual violence.<sup>53</sup> The profession could not separate out the

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*Id.* at 274 (citations omitted). The Supreme Court reasoned that there was no violation of due process because such “underlying conditions, calling for evidence of past conduct pointing to probable consequences are as susceptible of proof as many of the criteria constantly applied in prosecutions for crime.” *Id.*

44. See EWING, *supra* note 34, at 8; Tamara Rice Lave, *Only Yesterday: The Rise and Fall of Twentieth Century Sexual Psychopath Laws*, 69 LA. L. REV. 549, 579-89 (2009).

45. EWING, *supra* note 34, at 8; Lave, *supra* note 44, at 581-82. See generally GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE 30S TO THE 80S 839-44 (1977) [hereinafter GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION].

46. EWING, *supra* note 34, at 8.

47. *Id.*

48. APA, DANGEROUS SEX OFFENDERS, *supra* note 42, at 13-15.

49. EWING, *supra* note 34, at 9.

50. The GAP identifies itself as the “think tank” for American psychiatry. *Psychiatry Think Tank*, GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, <http://ourgap.org/think-tank.aspx> (last visited Mar. 29, 2015).

51. GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION, *supra* note 45, at 935.

52. *Id.* at 840.

53. *Id.* at 853-54.

mentally ill sex offenders from the others, and there was little psychiatry could provide in the way of treatment once the men were committed. The report went on to starkly and unambiguously state:

The notion is naive and confusing that a hybrid amalgam of law and psychiatry can validly label a person a “sex psychopath” or “sex offender” and then treat him in a manner consistent with a guarantee of community safety. The mere assumption that such a heterogeneous legal classification could define treatability and make people amenable to treatment is not only fallacious; it is startling.<sup>54</sup>

Remarkably, however, only a short time after the sexual psychopath laws were discarded, the states resurrected them in a new, more extreme form of experiment, one also “carried out by the joint participation of the psychiatric and legal professions”—this time completely disregarding the psychiatric profession’s own conclusions.

## 2. *The New Experiment: Washington’s Model SVP Law*

Under public pressure following a set of horrific and highly publicized sexual violence cases committed by previously incarcerated offenders, state legislatures, led by Washington in 1989, dusted off the early sexual psychopath laws’ basic concepts but transformed them in several important respects.<sup>55</sup> Most notably, the commitment of convicted offenders would occur not as an *alternative* to a prison sentence—as was the case for most of the earlier sexual psychopath laws—but as an additional period of indefinite detention *after* the offender completed his criminal sentence.<sup>56</sup>

Some commentators have noted that states enacted the current generation of SVP laws in response to the rise of determinate sentencing, which gave states less control over release dates for those convicted of crimes, including sex crimes, and the public perception that sentences for sex crimes were too short.<sup>57</sup> Indeed, the first SVP law’s enactment in Washington State involved precisely that scenario. Earl Shriner, a man with

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54. *Id.* at 935.

55. EWING, *supra* note 34, at 9-10.

56. *Id.* at 10.

57. APA, DANGEROUS SEX OFFENDERS, *supra* note 42, at 34; La Fond, *supra* note 23, at 160. “[D]eterminate sentencing” laws, which often included sentencing guidelines, required courts to fix the period of incarceration for “offenders and removed the flexibility of incarcerating sex offenders until they were no longer considered dangerous (which, very often, was never).” Ahluwalia, *supra* note 20, at 490.

a record of crimes against young people and who was officially described as “mildly retarded,” was released from prison in 1998 after completing his sentence for kidnapping two girls.<sup>58</sup> Several months after his release, and while other charges against him were pending, prosecutors charged Shriner with raping and mutilating a young boy, apparently at random, in Tacoma.<sup>59</sup>

The public outrage was immediate, widespread, and intense. An editorial in the *Seattle Post-Intelligencer* summed up the belief, shared by many, that the criminal justice system had failed Shriner’s latest young victim:

This case makes clear that a class of criminal exists that is beyond reach of rehabilitation because of mental deficiencies . . . .

. . . .

. . . . The legal system needs to be changed to make it possible to remove the criminally insane from society, quickly and permanently. In such obvious cases as this, the law should err, if it errs at all, on the side of protecting the innocent.<sup>60</sup>

Within days of Shriner’s arrest, Washington Governor Booth Gardner called for the development of legislation to prevent people like Shriner from “fall[ing] through the cracks.”<sup>61</sup> Specifically, he asserted: “[T]here should be a way to involuntarily commit people who have a profile of an individual that is a known risk with a high degree of probability that they would commit this type of crime.”<sup>62</sup> Less than a week after the crime, Gardner created a task force to study the Shriner case and draft legislation to address “gaps that exist between civil and criminal commitments,

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58. David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET SOUND L. REV. 525, 526-27, 542 n.10 (1992). This article is an invaluable glimpse into the development of the Washington SVP law, which served as the model for all current laws. It was written soon after the law’s enactment by David Boerner, a former prosecutor and law professor who was the lead drafter of the law (and who proposed the basic framework), and it provides a frank and personal account of his thinking during the events leading to the enactment of the law.

59. *Id.* at 525-27.

60. *Id.* at 529.

61. *Id.* at 530.

62. *Id.* The arrest of Shriner occurred six months after the murder in Seattle of Diane Ballasiotes. *Id.* A convicted sex offender participating in a work-release program was charged (and eventually convicted) of her murder. *Id.* at 534.

particularly regarding predatory offenders”—gaps that had presumably permitted Shriner the opportunity to commit his most recent crime.<sup>63</sup>

The fact that the state had previously been unsuccessful in its attempt to commit Shriner highlighted the limitations of using the standard involuntary hospitalization statutes to “quickly and permanently” remove the dangerous mentally ill from society.<sup>64</sup> In terms of their purpose and outcome, such laws were indeed a poor fit for the goal of detaining criminally violent men like Shriner for an extended period of time, or at least until they no longer posed a high risk of committing sexually violent acts.

The central objective of contemporary involuntary hospitalization laws is to provide a means of addressing the acute medical needs of a person suffering from severe mental illness, such as schizophrenia or bipolar disorder, by administering treatment, usually in the form of psychotropic medications such as antipsychotics or mood stabilizers.<sup>65</sup> A series of U.S. Supreme Court and lower court opinions in the 1960s and 1970s clarified the constitutional limitations on such a deprivation of liberty.<sup>66</sup> According to these opinions, involuntary hospitalization must be based upon a showing that the person posed a danger to himself or others (demonstrated through a recent overt act) and that the hospitalization would end as soon as the acute danger had passed.<sup>67</sup> Additionally, involuntary hospitalization can occur only when there is a crisis, as evidenced by either threats to others or, more commonly, an inability to care for one’s basic needs.<sup>68</sup> If this threshold showing is met, a court will order treatment in a secure community hospital or state hospital, with a maximum length of

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63. *Id.* at 534-35. Other reasons given for the enactment of the SVP laws include a rising perspective that government has a critical role to prevent harm to its citizens. Eric S. Janus, *Sexual Predator Commitment Laws: Lessons for Law and the Behavioral Sciences*, 18 BEHAV. SCI. & L. 5, 8 (2000). They also reflect the influence of the “victims’ rights” movement. Michael M. O’Hear, *Perpetual Panic*, 21 FED. SENT’G REP. 69, 74 (2008). Finally, such laws were seen as an example of the growing success of feminists to reform the legal responses to sexual violence. LANCASTER, *supra* note 29, at 14.

64. Boerner, *supra* note 58, at 533. Washington’s sexual psychopath law, which had been the subject of controversy regarding its scope and implementation, was repealed in 1984. *Id.* at 551-52.

65. La Fond, *supra* note 23, at 160-61.

66. MELTON ET AL., *supra* note 14, at 327-34.

67. *See, e.g.*, O’Connor v. Donaldson, 422 U.S. 563, 574-77 (1975); Lessard v. Schmidt, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), *vacated on other grounds*, Schmidt v. Lessard, 414 U.S. 473 (1974).

68. O’Connor, 422 U.S. at 574-77; Lessard, 349 F. Supp. at 1093-94.

hospitalization set by statute.<sup>69</sup> As a result of reforms brought about by the “deinstitutionalization” movement that ended the long-term warehousing of the mentally ill, the average length of hospitalization is now measured in days.<sup>70</sup>

In light of these developments in mental health law, the Washington legislature noted in its findings that 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 civil commitment under the “existing involuntary treatment” law.<sup>71</sup> As the legislature saw it, the problem with existing involuntary commitment law was that the state could not meet the overt act requirement when seeking commitment of a person already serving a sentence because that person would not “have access to potential victims.”<sup>72</sup> The legislature acknowledged that the target for the new SVP legislation was not those with “classic mental illness” as understood and used in traditional commitment laws.<sup>73</sup> Instead, the Washington lawmakers were concerned about a different set of people: those convicted of a sex crime who, because of some severe mental disorder, posed a high risk of recidivism.

The social problem posed by these individuals’ existence could not be addressed by short-term hospitalization and the administration of medication because such measures would presumably do nothing to prevent recurring criminal conduct. Only long-term removal from society—and, thus, separation from potential victims—would reduce the risk of future

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69. MELTON ET AL., *supra* note 14, at 344-45; *see, e.g.*, ME. REV. STAT. ANN. tit. 34-B, § 3864(7) (2010) (limiting term of first period of involuntary hospitalization to four months).

70. Indeed, many states are moving in the direction of adopting involuntary *outpatient* treatment laws, where the medication is administered without full-time hospitalization. Nisha C. Wagle et al., *Outpatient Civil Commitment Laws: An Overview*, 26 MENTAL & PHYSICAL DISABILITY L. REP. 179, *passim* (2002). It should be noted that recurring hospitalizations are not uncommon. *See id.* at 179.

71. WASH. REV. CODE ANN. § 71.09.010 (West 2014).

72. *Id.*; *see also* Black v. Voss, 557 F. Supp. 2d 1100, 1109-10 (C.D. Cal. 2008) (rejecting habeas corpus petition of person committed under California SVP law and noting that the statute has no overt act requirement to establish dangerousness under SVP commitment).

73. WASH. REV. CODE ANN. § 71.09.010. The reference to “classic mental illness” arose in the public testimony of Professor Boerner, the lead drafter of the law. Young v. Weston, 898 F. Supp. 744, 750 n.3 (W.D. Wash. 1995). One scholar has argued that this “new generation” of SVP laws is the product of a confluence of two criminal justice trends: (1) a blurring of the civil-criminal distinction; and (2) increased use of “risk assessment,” particularly through actuarial instruments and conclusions based upon what groups of individuals do (what he dubbed “actuarial justice”). Ahluwalia, *supra* note 20, at 491.

acts of sexual violence. In contrast to the targets of typical involuntary commitment proceedings, those to be detained under the SVP laws were not the severely mentally ill struggling to live in society, such as those who were homeless or dependent on family members for care. Instead, the SVP laws targeted people who were incarcerated or otherwise detained because they had committed or been charged with a sexual offense and were about to be released.<sup>74</sup> Rather than seeking to detain someone at large, lawmakers wanted to prevent a return of such persons to society. Perhaps for these reasons, the SVP measures might have seemed less extreme than those entitling a police officer to pick someone off of the street and bring him to an emergency room against his will.<sup>75</sup>

Another distinguishing feature of the new SVPs laws is that the commitment is *indefinite*, and the committed person must petition for review of his commitment.<sup>76</sup> The Washington legislature reasoned that the statute could not include any set time frame for detention because “the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different” from those appropriate for individuals confined under the general commitment laws.<sup>77</sup> With no clear treatment protocol for persons classified as “predators,”<sup>78</sup> the treatment-oriented laws for standard commitment of the mentally ill were a poor fit for SVP commitment for this reason as well.

Their legislative history reveals that SVP laws were based upon two critical and commonly-held assumptions about those who commit sex crimes: first, they are criminals who “specialize” in a particular type of crime; and, second, they have a particularly high rate of recidivism because of a mental pathology—a compulsion of some sort—that leads to repeated acts of sexual violence.<sup>79</sup> Such specialization and compulsion rendered these men “predators” and, the reasoning went, because their sexually violent conduct resulted from a mental disorder, mental health professionals

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74. WASH. REV. CODE ANN. § 71.09.030(1).

75. See, e.g., MELTON ET AL., *supra* note 14, at 344 (explaining typical emergency involuntary commitment procedure).

76. La Fond, *supra* note 23, at 161, 164.

77. WASH. REV. CODE ANN. § 71.09.010.

78. The state of Washington conceded in one of the first legal challenges to these statutes that the treatment prospects for detainees was “poor” and therefore “prolonged incarceration is to be expected.” *Young v. Weston*, 898 F. Supp. 744, 749 (W.D. Wash. 1995).

79. Leonore M. J. Simon, *An Examination of the Assumptions of Specialization, Mental Disorder, and Dangerousness in Sex Offenders*, 18 BEHAV. SCI. & L. 275, 275-76 (2000).

could identify those offenders likely to engage in such conduct in the future.<sup>80</sup>

It follows, then, that SVP laws were also based on a third crucial, though less obvious, assumption: the role that psychiatric diagnosis could play in ensuring such laws would not have an overbroad reach. The significance of this assumption is apparent from the following statement by the California legislature, made when it enacted its SVP law in 1995:

The Legislature finds and declares that a small but extremely dangerous group of sexually violent predators *that have diagnosable mental disorders can be identified while they are incarcerated*. These persons are not safe to be at large and if released represent a danger to the health and safety of others in that they are likely to engage in acts of sexual violence.<sup>81</sup>

However, none of the crucial assumptions about so-called sexually violent predators has a footing in scientific or clinical findings, as discussed further in Part III.A below.<sup>82</sup> At the time the rise of SVP laws occurred, data already indicated that the significant majority of sex crimes were in fact committed not by stereotypical “predators” who stalked, lured, and pounced on random hapless victims, but, rather, and particularly in the case of the sexual assault of children, by family members and acquaintances of the victims.<sup>83</sup> Similarly, studies indicated that, contrary to popular belief,<sup>84</sup> sexual offenders did not have unusually high levels of recidivism<sup>85</sup> or specialization with regard to victims.<sup>86</sup> Rare as they were, however, crimes such as Earl Shriener’s were so compelling that many members of the public

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80. *Id.* at 280.

81. S.B. 1143, 1995 Leg. (Cal. 1995) (emphasis added).

82. *See infra* notes 265-398 and accompanying text.

83. HOWARD N. SNYDER, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10-11 (2000), available at <http://www.bjs.gov/content/pub/pdf/saycrle.pdf>. For a general discussion on these statistics, see EWING, *supra* note 34, at xvi-xvii.

84. Tamara Rice Lave, *Inevitable Recidivism—The Origin and Centrality of an Urban Legend*, 34 INTL. J. OF L. & PSYCH. 186, 187-89 (2011); Paul Good & Jules Burstein, *A Modern Day Witch Hunt: The Troubling Role of Psychologists in Sexual Predator Laws*, 28 AM. J. FORENSIC. PSYCH. 23, 40 (2010) (noting significant number of erroneous statements about rates of sex offender recidivism in the media, including statements to the effect that such rates more than 75% or near 100%).

85. PATRICK A. LANGAN, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 1-2 (2003), available at <http://www.bjs.gov/content/pub/pdf/rsorp94.pdf>.

86. Simon, *supra* note 79, at 281-84.

were persuaded that children were at a high risk of random victimization unless the state acted quickly to protect them.

Washington's "Community Protection Act of 1990" provided the model for the new incarnation of sexual psychopath laws, not least in giving legal status to a new term, "sexually violent predator," which spread quickly through common parlance. Governor Gardner's use of the phrase "predatory acts" in a press statement soon after Earl Shriner's arrest struck a chord with former prosecutor and law professor David Boerner, the new law's lead drafter. Boerner saw it as a way to specify the class of individuals to be reached by this unique form of indefinite detention.<sup>87</sup> He defined the term "predatory acts" as those "directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization," and he recommended that only those who engaged in such acts would be eligible for commitment.<sup>88</sup> Because one who commits such "predatory acts" is a "predator," that category of persons, along with a putative medical diagnosis and rationale for detention, was built directly into the statute. A "sexually violent predator" was, therefore, defined by Washington's new law 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.*"<sup>89</sup>

Thus, Washington's SVP law set out four prerequisites to civil commitment: (1) a history of criminal sexual conduct, resulting in either a conviction or a charge (i.e. a predicate offense); (2) the presence of a mental disorder, personality disorder, or mental abnormality of some kind at the time the commitment was under consideration; (3) a likelihood of engaging in sexual criminal behavior in the future; and (4) a causal link between the disorder or abnormality and the risk.<sup>90</sup> These essential requirements, although often phrased somewhat differently, can be found in all SVP laws.<sup>91</sup>

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87. Boerner, *supra* note 58, at 569.

88. *Id.* at 569 (quoting WASH. REV. CODE § 71.09.020(3) (Supp. 1990)).

89. WASH. REV. CODE ANN. § 71.09.020(18) (West 2014) (emphasis added).

90. *Id.*; Janus, *supra* note 63, at 9.

91. Prentky et al., *supra* note 26, at 358; EWING, *supra* note 34, at 21; *see, e.g.*, CAL. WELF. & INST. CODE § 6600(a)(1) (West 2010) ("Sexually violent predator" means a person who has been convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior."); FLA. STAT. ANN. § 394.912(10) (West 2010) ("Sexually violent predator" means any person

The procedure established under the Washington SVP statute provides that proceedings for indefinite detention can be initiated at the conclusion of a period of incarceration for a sex crime committed as an adult or juvenile.<sup>92</sup> They can also be initiated after a person charged with such a crime has been found not competent to stand trial or is acquitted on the basis of a finding of insanity.<sup>93</sup> Or they can be initiated after a person previously convicted of a sexual offense commits a “recent overt act.”<sup>94</sup> After a probable cause hearing, the court may order the individual to be held in state custody and to be evaluated by “experts” hired by the state.<sup>95</sup>

The commitment trial must occur within forty-five days of the filing of the petition, and either side may request a jury.<sup>96</sup> At the trial, the person is entitled to counsel and court-appointed experts to assist with his defense.<sup>97</sup> If the fact finder concludes that the state has demonstrated beyond a reasonable doubt that the person is “a sexually violent predator,” the person is committed to a “secure facility . . . for control, care, and treatment” until the mental abnormality or personality disorder “has so changed that the person no longer meets the definition of a sexually violent predator.”<sup>98</sup>

#### *B. Legal Challenges to the New SVP Laws*

Preventive detention is very limited in American law because it is seen as antithetical to fundamental liberty interests and the presumption of innocence. In each instance of preventive detention—even where an individual apparently poses a threat to public safety—there are generally

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who: (a) Has been convicted of a sexually violent offense; and (b) Suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.”); 2007 MINN. STAT. § 253D.02(16) (West & Supp. 2009) (“Sexually dangerous person. (a) A ‘sexually dangerous person’ means a person who: (1) has engaged in a course of harmful sexual conduct as defined in subdivision 8; (2) has manifested a sexual, personality, or other mental disorder or dysfunction; and (3) as a result, is likely to engage in acts of harmful sexual conduct as defined in subdivision 8. (b) For purposes of this provision, it is not necessary to prove that the person has an inability to control the person’s sexual impulses.”).

92. WASH. REV. CODE ANN. § 71.09.030(1).

93. *Id.*

94. *Id.*

95. *Id.* §§ 71.09.040 to .050.

96. *Id.* § 71.09.050.

97. *Id.* § 71.09.040.

98. *Id.* § 71.09.060(1). The statute now provides that a person may also be conditionally released to a less restrictive alternative so long as conditions are imposed to protect the community. *Id.*; see also *Young v. Weston*, 898 F. Supp. 744, 747 (W.D. Wash. 1995) (summarizing key requirements of SVP law).

strict limitations on when detention can be imposed and when it must end. For example, courts permit pretrial detention of criminal defendants only where there is probable cause to believe they committed a crime and only to the extent necessary to secure their appearance at trial (thus, defendants are usually given the opportunity to post bail and be released).<sup>99</sup> The only exceptions to our reluctance to impose long-term preventive detention target individuals belonging to two of the American public's most feared and despised groups: enemy combatants seized on the battlefield in foreign countries and sex offenders.<sup>100</sup>

### *1. Background of the Hendricks-Crane Litigation*

As Washington's SVP law, and those modeled after it, presented a new and extreme form of preventive detention, critics immediately challenged the laws' constitutionality on a range of grounds, including the violation of the right to substantive due process, the prohibitions against *ex post facto* laws, and double jeopardy. Andre Young, one of the first men committed under the Washington's SVP law, challenged the constitutionality of the law in both state<sup>101</sup> and federal<sup>102</sup> courts. The Washington Supreme Court upheld the law while the federal district court held it was unconstitutional.<sup>103</sup> These differing outcomes were among the first in a series of sharply divided judicial responses to the new law and to the similar SVP laws enacted by the Kansas<sup>104</sup> and Wisconsin<sup>105</sup> legislatures soon thereafter.

The focus of the substantive due process challenges stemmed from the same theories used to limit the reach of other forms of involuntary commitment and preventive detention: that using state power to deprive a person of liberty outside of the realm of criminal punishment runs afoul of

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99. *United States v. Salerno*, 481 U.S. 739, 752 (1987).

100. See Daniel M. Filler, *Terrorism, Panic, and Pedophilia*, 10 VA. J. SOC. POL'Y & L. 345 (2003) (noting the "surprising prevalence of rhetorical links between terrorism and pedophilia" and the risk to civil liberties posed by detention policies resulting from the associated "panic"); Norman J. Finkel, *Moral Monsters and Patriot Acts: Rights and Duties in the Worst of Times*, 12 PSYCHOL. PUB. POL'Y & L. 242, 243 (2006); Good & Burstein, *supra* note 84, at 42; Christopher Slobogin, *Preventive Detention in Europe, the United States, and Australia passim* (Vanderbilt Pub. Law Research, Working Paper No. 12-27, June 27, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2094358](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2094358).

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

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

103. *Id.* at 754; *In re Young*, 857 P.2d at 1018.

104. KAN. STAT. ANN. § 59-29a01 to -29a24 (West 2008).

105. WIS. STAT. ANN. § 980.1 to .14 (2013).

core values enshrined in the due process clause. The Supreme Court has acknowledged: “[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions ‘regardless of the fairness of the procedures used to implement them.’”<sup>106</sup> Such guarantee against excessive government interference applies with particular import in the context of involuntary detention, the Court has noted, because “[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”<sup>107</sup> Accordingly, a court must subject such detention, even if sought pursuant to statute, to a rigorous review and invalidate it if it does not fall under one of the few narrow exceptions to the broad general prohibition of preventive detention.<sup>108</sup>

When applying these principles to their review of the new SVP laws, the Washington and Wisconsin Supreme Courts were sharply divided—the published opinions were fractured and featured vehement dissents.<sup>109</sup> Most of the debates about whether the laws were consistent with the “substantive component” of due process focused on the states’ open acknowledgment that the targets of the new laws were people who did not have a mental illness that could subject them to commitment under standard civil commitment laws and the fact that, in lieu of serious mental illness, the laws used terminology such as “mental abnormality” and “personality disorder.”<sup>110</sup> Justice Shirley Abrahamson of the Wisconsin Supreme Court found the nebulous language of “mental abnormality” in the Wisconsin law to be especially troubling.<sup>111</sup> That term, she observed, does not translate to any well-settled or understood concept in psychiatry.<sup>112</sup>

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106. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

107. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

108. *Id.* at 81-86; *see also* *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (holding that involuntary commitment of those who “are dangerous to no one and can live safely in freedom” is a violation of due process principles); *cf.* *United States v. Salerno*, 481 U.S. 739, 749-50 (1987) (upholding pretrial detention under limited circumstances where the government’s interest was compelling).

109. *State v. Post*, 541 N.W.2d 115 (Wis. 1995); *In re Young*, 857 P.2d 989 (Wash. 1993), *superseded by statute as stated in In re Thorell*, 72 P.3d 708 (2003).

110. *See, e.g., Young v. Weston*, 898 F. Supp. 744, 749-50 (W.D. Wash. 1995) (“The essential component missing from the Sexually Violent Predator Statute is the requirement that the detainee be mentally ill.”).

111. *Post*, 541 N.W.2d at 142-45 (Abrahamson, J., dissenting).

112. *Id.* at 145; La Fond, *supra* note 23, at 161.

For the courts reviewing the constitutionality of the first SVP laws, a key source of guidance was the then-recent opinion of the U.S. Supreme Court in *Foucha v. Louisiana*.<sup>113</sup> The Court held that a state could not continue to detain an “insanity acquittee” who no longer had a mental illness on the basis of medical opinions that he had an “antisocial personality” and would be a danger if released.<sup>114</sup> The Court rejected Louisiana’s argument that the state could continue “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.”<sup>115</sup> The Court ruled that, in the absence of a mental illness, Louisiana’s detention of Foucha was contrary to fundamental notions of due process.<sup>116</sup> It noted:

The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, *with only narrow exceptions and aside from permissible confinements for mental illness*, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.<sup>117</sup>

Many concluded from this language that, in *Foucha*, the Court had made clear that “dangerousness” alone was not a sufficient basis for preventive detention and that an indispensable constitutional requirement for such

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113. 504 U.S. 71 (1992).

114. *Id.* at 78-80. An “insanity acquittee” is a criminal defendant who has been acquitted of a charged crime on the basis of a finding that he was “insane” at the time of the crime. *See id.* at 73.

115. *Id.* at 82. The Court’s holding here flowed explicitly from its earlier ruling in *Addington v. Texas* that

to commit an individual to a mental institution in a civil proceeding, the State is required by the Due Process Clause to prove by clear and convincing evidence the two statutory preconditions to commitment: that the person sought to be committed is mentally ill and that he requires hospitalization for his own welfare and protection of others.

*Id.* at 75-76 (citing *Addington v. Texas*, 441 U.S. 418 (1979)).

116. *Id.* at 83.

117. *Id.* at 82-83 (emphasis added). The Court noted that other forms of preventive detention were narrowly tailored to a specific legitimate need and a finite duration, such as pretrial detention in limited circumstances, which was upheld in *United States v. Salerno*. *Id.* at 81, 83.

detention was a finding, by clear and convincing evidence, of “mental illness.”<sup>118</sup>

In 1994, two years after *Foucha*, Kansas enacted the “Sexually Violent Predator Act.”<sup>119</sup> Modeled closely on the Washington law, it required a finding of mental abnormality or personality disorder as a prerequisite to commitment.<sup>120</sup> As defined by the Kansas statute, a “[m]ental abnormality” is “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.”<sup>121</sup> The law did not have a requirement for a finding of “mental illness.”<sup>122</sup>

Leroy Hendricks, who was serving a sentence for sexual victimization of children, was the first person Kansas committed under its new SVP law pursuant to a jury’s determination.<sup>123</sup> If the State selected him for the first petition under the law on the assumption that his case would be the first challenge to the new law, and therefore subject to close scrutiny, the State chose well; Hendricks had a long history of sexual offenses against children and therefore exemplified the seemingly undeterrable “predator” the law’s drafters had in mind.<sup>124</sup>

At trial, the State called as its expert witness Dr. Charles Befort, the chief psychologist at Larned State Hospital.<sup>125</sup> Befort, who had evaluated Hendricks, testified that he had concluded it was “likely that Hendricks would engage in predatory acts of sexual violence or sexual activity with children if permitted to do so.”<sup>126</sup> Befort based his opinion, as he stated, on his view that “‘behavior is a good predictor of future behavior,’ [on] his

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118. See, e.g., *Young v. Weston*, 898 F. Supp. 744, 750-51 (W.D. Wash. 1995) (striking down Washington’s SVP law on the basis that it violated the holding in *Foucha* that a state may not indefinitely detain a person who is not found to have a mental illness); see also Ahluwalia, *supra* note 20, at 500-03.

119. S.B. 525, 1994 Leg., ch. 316 (Kan. 1994) (codified at KAN. STAT. ANN. §§ 59-29a01 to 29a24 (West 2008)).

120. KAN. STAT. ANN. § 59-29a02.

121. *Id.* § 59-29a02(b).

122. *In re Hendricks*, 912 P.2d 129, 138 (Kan. 1996), *rev’d*, *Kansas v. Hendricks*, 521 U.S. 346 (1997).

123. *Hendricks*, 521 U.S. at 350.

124. *Id.* at 353-55.

125. *In re Hendricks*, 912 P.2d at 131. The State also called Hendricks himself as a witness after the court ruled that, because the proceedings were civil rather than criminal, Hendricks had no right to invoke the privilege against self-incrimination. *Id.* at 130-31; see also *Allen v. Illinois*, 478 U.S. 364, 372-73 (1986).

126. *In re Hendricks*, 912 P.2d at 131.

professional knowledge that pedophiles tend to repeat their behavior, and [on] Hendricks's poor understanding of his behavior."<sup>127</sup> Befort concluded that Hendricks was not mentally ill and did not have "a personality disorder," but that "as [Befort] interpreted the Act, pedophilia was a mental abnormality."<sup>128</sup> The psychiatrist who testified on behalf of Hendricks challenged Befort's testimony regarding the tendency of pedophiles to recidivate, observing that, "based on current knowledge, 'a psychiatrist or psychologist cannot predict whether an individual is more likely than not to engage in a future act of sexual predation.'"<sup>129</sup> The jury found that Hendricks was a "sexually violent predator" and, under the new Kansas statute, the court committed him to Larned State Hospital.<sup>130</sup>

In reviewing Hendricks's appeal, the majority opinion of the Kansas Supreme Court noted that the Kansas had modeled its law on that of Washington (including adopting Washington's legislative "findings") and that the latter was already facing constitutional challenges.<sup>131</sup> Hendricks's attorneys based their substantive due process argument on the key holding in *Foucha* that mental *illness* was an indispensable requirement for indefinite detention on the basis of dangerousness and that the Kansas law's "mental abnormality or personality disorder" standard fell short of that requirement.<sup>132</sup> The Kansas Supreme Court agreed, holding that Kansas's SVP law was invalid under *both Foucha* and an earlier civil commitment opinion, *Addington v. Texas*, since the law did not require a showing of an "illness."<sup>133</sup> In so ruling, the majority found the reasoning of the federal district court's decision in *Young v. Weston* striking down the Washington SVP law to be more persuasive than the Washington Supreme Court's opinion upholding the law.<sup>134</sup> The term "mental abnormality," it concluded, was not equivalent to "mental illness."<sup>135</sup> The Kansas Supreme Court based this conclusion in part upon the testimony of the State's own expert witness, who had testified that the term was not a diagnosis but rather "a

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127. *Id.*

128. *Id.* Befort conceded in his testimony that the statute's definition of "mental abnormality" was "circular in that certain behavior defines the condition which is used to predict the behavior." *Id.* at 138.

129. *Id.* at 131.

130. *Id.*

131. *Id.* at 131-32.

132. *Id.* at 133-34.

133. *Id.* at 138.

134. *Id.* at 136-38.

135. *Id.* at 138.

phrase used by clinicians to discuss abnormality or deviance.”<sup>136</sup> The majority also contrasted that description with the definition of “mental illness” found in the Kansas standard involuntary commitment statute.<sup>137</sup>

## 2. *The Supreme Court Upholds the SVP Model of Commitment*

Once these questions reached the United States Supreme Court, they received a quite different reception by the five-justice majority. In *Kansas v. Hendricks*, the Court reversed the Kansas Supreme Court and upheld the state’s SVP law.<sup>138</sup> On the question of whether Kansas’s definition of SVP satisfied the “mental illness” element in *Foucha*, the parties took significantly different positions. The State noted in its brief that in the line of cases requiring “mental illness” as a matter of substantive due process the Supreme Court had never defined the term.<sup>139</sup> This was understandable, the State argued, since there is no universally accepted definition of the term. What was more important for constitutional purposes, it claimed, was that “mental health professionals [can] give the definition content by identifying specific mental disorders that may or may not satisfy the definition.”<sup>140</sup> In *Hendricks*’s case, the State’s argument continued, the commitment satisfied constitutional requirements because the respondent had a mental disorder of “pedophilia,” as defined by the DSM.<sup>141</sup> *Hendricks*’s attorneys countered that the “mental abnormality” language in the Kansas statute, when examined closely, was nothing more than “pseudoclinical terminology” useful for “after-invented rationalizations.”<sup>142</sup> Indeed, the Kansas legislature used the language specifically to empower the state to detain people who did *not* have a “mental illness,” since those with such illnesses could be committed under the standard commitment statute.<sup>143</sup>

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136. *Id.* at 137.

137. *Id.* (citing KAN. STAT. ANN. § 59-2902(h) (repealed 1996)) (defining a person with “mental illness” as one who: “(1) [i]s suffering from a severe mental disorder to the extent that such person is in need of treatment; (2) lacks capacity to make an informed decision concerning treatment; and (3) is likely to cause harm to self or others”).

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

139. Brief for Petitioner at 39, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (No. 95-1649), 1996 WL 435941.

140. *Id.* at 40.

141. *Id.* at 41.

142. Brief for Respondent at 21-22, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (Nos. 95-1649, 95-9075), 1996 WL 528985.

143. *Id.* at 22.

Justice Clarence Thomas, who had dissented in *Foucha* five years earlier,<sup>144</sup> wrote the majority opinion reversing the Kansas Supreme Court and upholding the SVP law under all three constitutional challenges Hendricks's attorneys raised: that the law violated his rights under the due process clause, under prohibitions of ex post facto laws, and under the double jeopardy clause.<sup>145</sup> With respect to the substantive due process analysis, the focus of this Article, Justice Thomas stated that the Court has long recognized the importance of the state's authority to detain, through civil proceedings, those "who are unable to control their behavior and who thereby pose a danger to the public health and safety."<sup>146</sup> The Court has upheld civil commitment of this sub-population, he explained, so long as states follow proper procedures and standards.<sup>147</sup> Prior cases clearly established that dangerousness alone would not satisfy due process requirements; it was only when commitment statutes coupled a dangerousness requirement with "proof of some additional factor, such as a 'mental illness' or 'mental abnormality'" that the laws would not impermissibly infringe on a person's liberty interests.<sup>148</sup> There must be a "link," therefore, between an individual's potential to commit future violence and "the existence of a 'mental abnormality' or 'personality disorder' that makes it difficult, if not impossible, for the person to control his dangerous behavior."<sup>149</sup> Under this framework, Justice Thomas reasoned, the Kansas SVP law satisfied these essential due process requirements. The law limited the potential class of individuals subject to commitment to those with either a "mental abnormality" or "personality disorder," which, he wrote, sufficiently "narrow[ed] the class of persons eligible for confinement to those who are unable to control their dangerousness."<sup>150</sup>

Thus, Justice Thomas dispensed with the specific finding of "mental illness" as a prerequisite to involuntary civil commitment that *Foucha* and *Addington* suggested, opting instead for a broader finding of any form of "mental abnormality." The term "mental illness," he explained, has no "talismanic significance."<sup>151</sup> Rather, the critical factor to satisfy substantive

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144. *Foucha v. Louisiana*, 504 U.S. 71, 120-24 (1997) (Thomas, J., dissenting).

145. *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997).

146. *Id.* at 357.

147. *Id.* at 358-59.

148. *Id.* at 358.

149. *Id.*

150. *Id.*

151. *Id.* at 358-59.

due process is “limit[ing] involuntary civil confinement to those who suffer from a *volitional impairment* rendering them dangerous beyond their control.”<sup>152</sup> He stated that the Court had never required states to adopt particular medical terms for involuntary commitment statutes.<sup>153</sup> Legislatures, he said, are not required to adopt terms that “mirror those advanced by the medical profession.”<sup>154</sup> Since Hendricks’s “pedophilia” diagnosis met the statute’s mental abnormality requirement, and Hendricks had conceded in his own testimony that he lacked control over his urges, Hendricks’s “condition” easily met the constitutional requirements for commitment.<sup>155</sup> Justice Thomas acknowledged that the record on appeal included evidence of extensive controversy within the psychiatric field regarding whether pedophilia was a mental illness; nonetheless, he indicated that the debates in fact support the conclusion that legislatures should be provided the “widest latitude in drafting” SVP laws.<sup>156</sup> Justice Thomas then considered Hendricks’s remaining constitutional arguments that the law violated the *ex post facto* and double jeopardy prohibitions in the Constitution and—based on the categorization of SVP commitment as a civil, not criminal, proceeding—rejected them.<sup>157</sup>

Justice Kennedy joined the majority in *Hendricks* but wrote separately to underscore that the Kansas SVP law could not be used for retribution, only for treatment.<sup>158</sup> He noted some concern with the real potential for Hendricks and others to be detained for life, given that “medical knowledge” did not hold great promise for treatment of pedophilia.<sup>159</sup> He acknowledged that the Court was permitting states to proceed into uncharted waters with these laws and noted that, in its implementation, the SVP model could fall short of constitutional requirements.<sup>160</sup> He cautioned: “[I]f it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.”<sup>161</sup> As Kennedy’s concurrence makes clear, the *Hendricks* opinion endorsed pure preventive detention—

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152. *Id.* at 358 (emphasis added).

153. *Id.* at 359.

154. *Id.*

155. *Id.* at 360.

156. *Id.* at 360 n.3.

157. *Id.* at 361-71. See generally Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261 (1998).

158. *Hendricks*, 521 U.S. at 371-73 (Kennedy, J., concurring).

159. *Id.* at 372.

160. *Id.* at 373.

161. *Id.*

with protection of the community from the committed person its sole benefit—as consistent with substantive due process.

Justice Breyer wrote for the four-justice minority and dissented only with respect to the majority’s analysis of the ex post facto clause argument. He largely agreed with the majority’s substantive due process conclusion but adopted a slightly different analysis. Characterizing pedophilia as a “serious mental disorder,” Justice Breyer concluded that Hendricks’s condition was essentially akin to the well-established “irresistible impulse” concept in criminal and preventive detention law.<sup>162</sup> The medical evidence at the hearing (as well as Hendricks’s own admission), he wrote, clearly established Hendricks’s inability to control his conduct, which brought him squarely within the scope of the statute’s limited reach.<sup>163</sup> The debate within psychiatry regarding the limits of mental illness, he observed, can serve to inform a state legislature’s course of action and does not mean that the legislature may not act at all.<sup>164</sup>

Five years later, in *Kansas v. Crane*, the Court revisited the Kansas statute and clarified its volition-oriented requirement.<sup>165</sup> In an opinion by Justice Breyer, the Court held that the volitional requirement was a substantive and meaningful limitation on a state’s power to commit under the law.<sup>166</sup> It also held that a finding that a person may be detained under the SVP law does not require a determination that the person entirely lacks *any* control over his behavior, since it is unlikely that the state could ever meet such standard.<sup>167</sup> A person’s “inability to control [his] behavior” is not, Justice Breyer wrote, a standard subject to a requirement of “mathematical precision.”<sup>168</sup> Rather, a state must merely provide

proof of [the respondent’s] serious difficulty in controlling behavior. And this, when viewed in light of . . . *the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself*, must be sufficient to distinguish [between] the dangerous sexual offender whose serious mental illness, abnormality, or

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162. *Id.* at 375-76 (Breyer, J., concurring).

163. *Id.* at 376.

164. *Id.* at 375. Justice Breyer’s analysis of the substantive due process issue was joined by Justices Stevens and Souter. *Id.* at 373. Justice Ginsberg, who did not author an opinion, joined only those parts of Breyer’s dissent on the ex post facto analysis, and not his due process analysis. *Id.*

165. 534 U.S. 407 (2002).

166. *Id.* at 412-13.

167. *Id.* at 411-12.

168. *Id.* at 413.

disorder subjects him to civil commitment[, and] the dangerous but typical recidivist convicted in an ordinary criminal case.<sup>169</sup>

Significantly, the *Crane* majority commented on the role of courts in setting standards in cases in which the deprivation of a liberty interest turns on a finding of a particular mental condition or impairment. The Court acknowledged that its reading of *Hendricks* “provides a less precise constitutional standard than would those more definite rules for which the parties have argued.”<sup>170</sup> The Court concluded, however, that “the Constitution’s safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules.”<sup>171</sup> The Court explained this reasoning as follows:

For one thing, the States retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment. For another, 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.<sup>172</sup>

In sharp contrast to the majority’s optimism that the Court’s SVP rulings provided sufficient clarity to the states, Justice Scalia argued in dissent that the majority’s interpretation of the “volitional impairment” requirement had gutted the core holding of *Hendricks* and created an unworkable framework for implementing SVP laws.<sup>173</sup> Although his critique was based on a view that states should have *more* leeway in enforcing civil commitments, he accurately identified some of key problems with the Court’s analysis that rendered it a poor foundation for ensuring the limited reach of these laws.

### *3. The Core Assumptions Underlying the Stated Rationales of Hendricks and Crane*

As the *Crane* opinion makes clear, the Supreme Court upheld the SVP experiment based on a number of core assumptions about how courts determine whether an individual should be subject to indefinite detention. The Court saw an indispensable role for the psychiatric community in informing the determinations of courts and fact-finders and in supplying

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169. *Id.* (emphasis added).

170. *Id.*

171. *Id.*

172. *Id.* (citations omitted).

173. *Id.* at 415-25 (Scalia, J., dissenting).

proof of volitional impairment.<sup>174</sup> One federal appeals court later characterized *Crane*'s constitutional requirement of separating "inability to control from unwillingness to control" as a means "to separate *the sick person from the vicious and amoral one*," in order "to prevent fear of recidivism from leading to indefinite preventive detention."<sup>175</sup> In *Hendricks* and *Crane*, the Court rationalized this unusual form of preventive detention by reframing SVP commitment so that it seems more consonant with other commitment laws.<sup>176</sup> The essential component of all involuntary commitments is the presence of a pathology that limits the person's ability to regulate his or her behavior. By using nebulous terms such as "impairment," "abnormality," or "condition," and by restricting detention only to those who presumably already have impaired free will,<sup>177</sup> the Court suggests that we are not truly depriving persons of their "liberty." Thus in *Hendricks*, the Court wrote: "The precommitment requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements of . . . other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are *unable to control their dangerousness*."<sup>178</sup>

Without this requirement, the indefinite detention permitted under SVP statutes would amount to no more than punishment, thereby implicating all of the constitutional protections afforded to those subjected to punishment, including prohibitions on *ex post facto* laws and double jeopardy.<sup>179</sup> As one commentator observed, "*Hendricks* teaches that the role of the mental disorder element is to limit civil commitment and prevent it from swallowing the criminal law."<sup>180</sup>

Therefore, the constitutionality of SVP laws and their consistency with core U.S. values hang entirely on the finding of a mental condition so

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174. *Id.* at 414-15.

175. *Varner v. Monohan*, 460 F.3d 861, 864 (7th Cir. 2006) (emphasis added).

176. *Kansas v. Hendricks*, 521 U.S. 346, 358-59 (1997); *Crane*, 534 U.S. 407, 415 (2001).

177. David L. Faigman, *Making Moral Judgments Through Behavioural Science: The 'Substantial Lack of Volitional Control' Requirement in Civil Commitments*, 2 L. PROBABILITY & RISK 309, 314 (2003). Faigman criticizes the "volitional impairment" requirement of *Hendricks-Crane* on the basis that "there is no empirical/scientific basis for determining when an act was (or, much less, will be) a product of 'free will'. Free will is a normative construct that has no corresponding operational definition that can be tested." *Id.* at 319.

178. *Hendricks*, 521 U.S. at 358 (emphasis added).

179. Faigman, *supra* note 177, at 314.

180. Janus, *supra* note 63, at 13.

severe that it deprives a person of the ability to exercise volition. But *how* would this identification—of those who are unable to control their behavior specifically due to mental impairment—be made? If trial courts could not make this finding accurately, they would run the risk of detaining unimpaired citizens based only on a perceived risk. The Court was evidently confident that trial courts could turn to the expertise of psychiatrists and other mental health professionals to identify when such pathology was present and, moreover, that these experts could distinguish with sufficient precision someone volitionally impaired from the “dangerous but typical recidivist.”<sup>181</sup> Depending on “the nature of the [respondent’s] psychiatric diagnosis, and the severity of the mental abnormality,” the Court assumed these professionals could identify the key features to consider in assessing whether someone is a true predator.<sup>182</sup>

Confidence in the ability of psychiatrists to draw such distinctions grew at the same time that courts were giving psychiatry an increasingly prominent role in legal proceedings. An important factor here was the appearance of the third edition of the DSM, which the APA published in 1980. This edition (DSM-III), which shed most Freudian concepts from its nosology, or classification of mental disorders, and instead focused on a biological basis for classifying such conditions, quickly became a courtroom fixture.<sup>183</sup> Its science-and-research orientation, in contrast to the psychoanalysis-inspired prior editions, suggested a new and more reliable role for psychiatrists helping courts make scientifically informed findings and to unlock the minds of litigants.<sup>184</sup>

Psychiatric evidence, including diagnostic assessment, became ubiquitous in legal proceedings. Members of the legal community grew accustomed to seeing mental health professionals offer opinions on a range of legal questions—from parenting ability to the extent and causes of psychological injuries to insanity, commitment, and sentencing.<sup>185</sup> These

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181. Faigman, *supra* note 177, at 314.

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

183. EDWARD SHORTER, *A HISTORY OF PSYCHIATRY: FROM THE ERA OF THE ASYLUM TO THE AGE OF PROZAC* 301-304 (1998); ALLAN YOUNG, *THE HARMONY OF ILLUSIONS: INVENTING POST-TRAUMATIC STRESS DISORDER* 100 (1995).

184. Deirdre M. Smith, *Diagnosing Liability: The Legal History of Posttraumatic Stress Disorder*, 84 *TEMP. L. REV.* 1, 25-26, 34 (2011).

185. See CHRISTOPHER SLOBOGIN, *PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS* 3 (2007); RALPH SLOVENKO, *PSYCHIATRY IN LAW/LAW IN PSYCHIATRY* xi-xii (2002). See generally MELTON ET AL., *supra* note 14 (reviewing the role of expert mental health opinions in a wide range of civil and criminal law settings).

experts now play a critical role in many cases, informing fact-finders on some of the most difficult and consequential decisions, including whether a person should be held criminally responsible or whether a particular parent is fit to raise a child.<sup>186</sup>

On the urging of prosecutors, courts have expanded the scope of psychiatric evidence from assessments of past and present mental states to testimony predicting *future* conduct.<sup>187</sup> Courts have become protective of their continued ability to admit and consider such testimony.<sup>188</sup>

In a crucial decision, *Barefoot v. Estelle*, the Supreme Court upheld the admissibility of expert testimony on future dangerousness in the sentencing phase of a death penalty case.<sup>189</sup> The State of Texas offered the testimony of two psychiatrists who opined, in response to hypotheticals regarding the defendant, that the defendant “would probably commit further acts of violence and represent a continuing threat to society.”<sup>190</sup> Despite the dissent’s argument that research had shown that psychiatrists’ predictions of future violent conduct are accurate in only one out of three cases, the Court’s majority declined to require exclusion of such predictions at sentencing hearings.<sup>191</sup> Significantly, the APA sided with the defendant in its amicus brief, noting that psychiatrists have no expertise at predicting dangerousness and are no better at doing so than anyone else.<sup>192</sup>

One of the *Barefoot* majority’s rationales in rejecting this argument was that excluding prediction testimony in this context would limit use of psychiatric testimony in other contexts, including that of involuntary commitment: “Acceptance of petitioner’s position that expert testimony about future dangerousness is far too unreliable to be admissible would immediately call into question those other contexts in which predictions of future behavior are constantly made.”<sup>193</sup> The majority contended that the tools of the adversarial process, such as cross-examination and contrary expert opinion, would be a sufficient check on the reliability of predictions.<sup>194</sup> Thus, the Supreme Court paved the way for psychiatric

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186. MELTON ET AL., *supra* note 14, at vii-viii.

187. SLOBOGIN, *supra* note 185, at 99-100, 108-09.

188. *Id.* at 28-29, 32-33.

189. *Barefoot v. Estelle*, 463 U.S. 880, 906 (1983), *superseded in part by statute as stated in Slack v. McDaniel*, 529 U.S. 473 (2000).

190. *Id.* at 884.

191. *Id.* at 898-903.

192. *Id.* at 920 (Blackmun, J., dissenting).

193. *Id.* at 898.

194. *Id.* at 898-99. Ten years later, Justice Blackmun authored the majority opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, and he noted that limitations of such tools

predictions of future dangerousness to have a central role in SVP proceedings.

Perhaps in light of the outcome in *Barefoot* and the GAP report's strong rejection of the sexual psychopath laws,<sup>195</sup> the psychiatric establishment was quick to distance itself from the SVP laws from the initial development of the model. In 1995, the Washington State Psychiatric Association submitted an amicus brief in the *Young v. Weston* litigation, indicating that nothing in the state's SVP statute restricted its reach to those whom psychiatrists identified as mentally ill.<sup>196</sup> Rather, in limiting its application to "sexually violent predators," the law established nothing more than an "unacceptable tautology."<sup>197</sup>

The APA made similar arguments in the amicus brief it submitted to the U.S. Supreme Court in support of Hendricks's position. There, the APA argued that legislatures should not be free to define "mental illness"; otherwise, it warned, "the limits on deprivations of liberty to protect the public safety would quickly disappear."<sup>198</sup> The APA also argued that the definition of mental illness for involuntary commitment purposes should not be tied to the diagnoses contained in the DSM.<sup>199</sup> As the APA explained, the DSM's "classification schemes are developed . . . to serve diagnostic and statistical functions, forming a common (and always imperfect) language for gathering clinical data and for communication among mental health professionals."<sup>200</sup> The APA's elaboration of this argument is striking:

[DSM diagnoses are not] 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

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on preventing unreliable expert testimony from being given undue weight by a fact finder and therefore imposing on trial judges the responsibility of being a gatekeeper to exclude such unreliable testimony from being admitted. 509 U.S. 579, 589-95 (1993).

195. *See supra* notes 50-54 and accompanying text.

196. 898 F. Supp. 744, 750 (W.D. Wash. 1995).

197. *Id.*

198. Brief for the American Psychiatric Association as Amicus Curiae Supporting Respondent at 21, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (Nos. 95-1649, 95-9075), 1996 WL 469200, at \*21.

199. *Id.* at 22-23.

200. *Id.* at 22.

disease,' or 'mental defect.'" The authors further caution that "a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder." Not all individuals who come within a DSM-IV category suffer an impairment that diminishes their autonomy, much less one justifying involuntary confinement for the individual's own good.<sup>201</sup>

The Supreme Court majority implicitly rejected the psychiatric establishment's strong words of caution. Instead, it upheld a model law that drew a line ostensibly based upon the identification of a mental disorder but couched in language completely alien to the field that oversees such identifications. To save the law, the Court conferred upon that field a central role in ensuring the constitutionality of the future application of such laws, thereby sanctioning an extreme use of preventative detention based upon an unworkable procedure.

### *C. The Spread of SVP Laws and Their Impact*

The drafters of the original SVP law in the state of Washington apparently thought the imposition of indefinite commitment would be limited to exceptional cases like those of Earl Shriver or Leroy Hendricks, where the risk of recidivism seemed unquestionably high due to seemingly obvious indications of future violence.<sup>202</sup> However, the number of individuals committed under SVP laws in Washington and elsewhere suggests that states have applied the laws much more broadly than anticipated by the drafters.<sup>203</sup> At the same time, the laws have not, in fact, made communities safer.<sup>204</sup>

After the Court upheld the constitutionality of SVP laws in *Hendricks*, several states followed the lead of Washington and Kansas. Today, a total of twenty states have adopted SVP laws.<sup>205</sup> Additionally, Congress adopted

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201. *Id.* at 23 (emphasis added) (internal citations omitted).

202. Boerner, *supra* note 58, at 566.

203. DEIRDRE D'ORAZIO ET AL., SOCCPN ANNUAL SURVEY OF SEX OFFENDER CIVIL COMMITMENT PROGRAMS 5-6 (2013), available at [http://soccpn.org/images/SOCCPN\\_survey\\_presentation\\_2013\\_in\\_pdf.pdf](http://soccpn.org/images/SOCCPN_survey_presentation_2013_in_pdf.pdf).

204. Tamara Rice Lave & Justin McCrary, *Do Sexually Violent Predator Laws Violate Double Jeopardy and Substantive Due Process: An Empirical Inquiry?*, 78 BROOK. L. REV. 1391, 1392 (2013).

205. ARIZ. REV. STAT. ANN. §§ 36-3701 to 3717 (2009); CAL. WELF. & INST. CODE §§ 6600-6609.3 (West 2010); D.C. CODE §§ 22-3803 to -3811 (2013); FLA. STAT. ANN. §§ 394.910-.932 (West 2010); 725 ILL. COMP. STAT. 207/1-99 (West 2006); IOWA CODE ANN. §§

an SVP commitment scheme as part of the Adam Walsh Child Protection and Safety Act.<sup>206</sup> The federal law applies to those incarcerated by the U.S. Bureau of Prisons, so it involves a somewhat different set of potential respondents, since, other than crimes committed in “Indian Country,” most sexual abuse and assault cases are prosecuted in state courts.<sup>207</sup> However, one class of offender prevalent in federal prisons is those serving sentences for child pornography convictions.<sup>208</sup> In some instances, a pornography charge serves as a predicate offense,<sup>209</sup> or even the sole predicate offense,<sup>210</sup> for an SVP commitment under the Adam Walsh Act.<sup>211</sup> The law faced immediate challenge on the grounds that, by enacting a federal civil commitment program, Congress had acted outside of its “enumerated powers”;<sup>212</sup> the Supreme Court resolved this question of Congress’s

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229a.1 to .16 (West 2014); KAN. STAT. ANN. §§ 59-29a01 to -29a22 (West 2008); MASS. GEN. LAWS ch. 123a, §§ 1-16 (West 2003 & Supp. 2009); 2007 MINN. STAT. ANN. § 253d.01 to .36 (West & Supp. 2009); MO. ANN. STAT. §§ 632.480 to .513 (West 2014); NEB. REV. STAT. ANN. §§ 71-1201 to -1226 (West 2009); N.H. REV. STAT. ANN. §§ 135-E:1 to :24 (2015); N.J. STAT. ANN. §§ 30:4-27.24 to .38 (West 2008); N.Y. MENTAL HYG. LAW §§ 10.01-.17 (McKinney 2006 & Supp. 2011); N.D. CENT. CODE §§ 25-03.3-01 to -24 (2014); S.C. CODE ANN. §§ 44-48-10 to -170 (2002 & Supp. 2008); VA. CODE ANN. §§ 37.2-900 to -920 (2013); WASH. REV. CODE ANN. §§ 71.09.010-.903 (West 2009); WIS. STAT. ANN. §§ 980.01-.14 (West 2013).

206. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified at 42 U.S.C. § 16901 (2012)).

207. One commentator has raised concerns about the large number of Native Americans who have been subject to commitment under the federal law. Karen Franklin, *Appellate Court Rejects “Past As Prelude” Myth*, IN THE NEWS (Feb. 12, 2014), <http://forensicpsychologist.blogspot.com/2014/02/appellate-court-debunks-past-as-prelude.html>.

208. U.S. SENTENCING COMM’N, FEDERAL CHILD PORNOGRAPHY OFFENSES i-ii (2012), available at [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full-Report\\_to\\_Congress.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full-Report_to_Congress.pdf).

209. See, e.g., *United States v. Timms*, 664 F.3d 436, *passim* (4th Cir. 2012); *United States v. Wetmore*, 766 F. Supp. 2d 319, *passim* (D. Mass. 2011), *aff’d*, 700 F.3d 570 (1st Cir. 2012).

210. See, e.g., *United States v. Volungus*, 730 F.3d 40, 43-46 (1st Cir. 2013).

211. The Walsh Act provides that a federal prisoner can be “certified” as an SVP under the statute without a judicial determination. See *United States v. Broncheau*, 645 F.3d 676, 690-93 (4th Cir. 2011). The Court of Appeals for the Fourth Circuit has held that such determination must be subject to review “within a reasonable period of time” and failure to provide access to such determination may constitute a deprivation of due process. *Id.* at 687.

212. *United States v. Comstock*, 560 U.S. 126, 133-49 (2010), *reversing* *United States v. Comstock*, 507 F. Supp. 2d 522 (E.D.N.C. 2007); see also *Volungus*, 595 F.3d 1, *passim* (1st Cir. 2010); *United States v. Tom*, 565 F.3d 497, *passim* (8th Cir. 2009).

authority when it upheld the Act in the 2010 opinion *United States v. Comstock*.<sup>213</sup>

As New York was about to implement its own SVP law in 2007, the *New York Times* published a three-part series examining the SVP commitment programs already in place across the country.<sup>214</sup> The series' authors made several findings that suggest the operation of SVP programs falls far short of their promise. Notably, although nearly 3000 people had been committed under the nineteen state SVP laws then in effect, (1) the programs were not committing the most violent and dangerous offenders because they released rapists while committing exhibitionists; (2) the treatment programs were largely ineffective in rehabilitating offenders; (3) few of those committed were ever released, resulting in effectively permanent detention; and (4) few states have developed adequate programs for monitoring those who are released.<sup>215</sup> In spite of these problematic findings, commitment programs continue to expand.<sup>216</sup> A 2013 survey of eighteen state-based SVP programs found that 4779 individuals are presently committed, with an additional 861 in detention awaiting the outcome of SVP proceedings.<sup>217</sup>

The expanding reach of SVP programs originates, in part, in the fact that states can, and do, base SVP commitment petitions on a wide range of predicate offenses.<sup>218</sup> In many states, such as those following the Washington model, SVP laws permit indefinite commitment based on juvenile offenses, on offenses for which the person was acquitted on the basis of insanity, or on uncharged conduct.<sup>219</sup> In Minnesota, for example, more than 7% of those committed under that state's SVP program had never been convicted of an adult crime prior to their commitment.<sup>220</sup>

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213. 560 U.S. at 149-50.

214. Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, <http://www.nytimes.com/2007/03/04/us/04civil.html?pagewanted=all>.

215. *Id.*

216. *Id.*

217. D'ORAZIO ET AL., *supra* note 203, at 7.

218. See Melissa Wangenheim, Note, *'To Catch a Predator,' Are We Casting Our Nets Too Far?: Constitutional Concerns Regarding the Civil Commitment of Sex Offenders*, 62 RUTGERS L. REV. 559, 580-84 (2010).

219. WASH. REV. CODE ANN. § 71.09.030 (West 2009).

220. Chris Serres, *Minnesota Sex Offenders: Are They Really the 'Worst of the Worst'?*, STAR TRIB. (Minneapolis) (Dec. 2, 2013, 10:38 AM), <http://www.startribune.com/local/233945281.html> (profiling the case of a developmentally disabled man who was committed at the age of nineteen for acts of child molestation that he committed before the age of fourteen). Courts in several other states, by contrast, have held that a sex offense committed

Moreover, given the broadly worded statutory requirements for prior convictions or criminal offenses, courts have based indefinite commitments for sexually violent predators on sexual offenses that do not involve any physical contact with a victim, such as exhibitionism, indecent conduct, or possession of pornography.<sup>221</sup>

The high number of individuals committed under SVP statutes also suggests that it may be difficult, though not impossible, for a respondent to prevail in an SVP trial.<sup>222</sup> The state enjoys several advantages in the conduct of such trials. The Supreme Court's holding in *Hendricks* that SVP schemes are civil rather than criminal in nature has had significant implications for the procedural rights of respondents in SVP proceedings.<sup>223</sup> Respondents in SVP proceedings are not afforded the same Fifth and Sixth Amendment protections required in criminal trials with respect to burdens of proof,<sup>224</sup> competency,<sup>225</sup> effective assistance of counsel,<sup>226</sup> self-incrimination,<sup>227</sup> and confronting witnesses.<sup>228</sup>

The promise of treatment under SVP statutes is tied to the mental-abnormality rationale of all forms of involuntary commitment. However,

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as a juvenile cannot be a predicate crime for an SVP commitment. *See, e.g., In re Geltz*, 840 N.W.2d 273, 279-80 (Iowa 2013) (reviewing case law on question).

221. *See, e.g., United States v. Volungus*, 730 F.3d 40, 43-44 (1st Cir. 2013) (possession of child pornography and charges associated with online communication with a law enforcement agent posing as an underage girl). Commitments have also been based on attempted sexual abuse or assault, where there was no actual physical contact with a victim. *See, e.g., Reinhardt v. Kopcow*, No. 13-cv-2513-WJM-KMT, 2014 WL 4375931, at \*3 (D. Colo. Sept. 4, 2014) (attempted sexual assault); *United States v. Perez*, 752 F.3d 398, 401 (4th Cir. 2014) (transportation of a minor in foreign commerce with intent to engage in criminal sexual activity).

222. I have not located any empirical studies of rates of success of SVP commitment petitions.

223. Tamara Rice Lave, *Throwing Away the Key: Has the Adam Walsh Act Lowered the Threshold for Sexually Violent Predator Commitments Too Far?*, 14 U. PA. J. OF CONST. L. 391, 399 (2011).

224. *See infra* notes 403-411 and accompanying text. Several SVP laws, including Kansas and Washington's, require proof beyond a reasonable doubt. KAN. STAT. ANN. § 59-29a07 (West 2008); WASH. REV. CODE ANN. § 71.09.060 (West 2009).

225. *See, e.g., In re Morgan*, 253 P.3d 394, 403 (Wash. Ct. App. 2011); *In re Luttrell*, 2008 WI App 93, ¶ 11, 312 Wis. 2d 695, 754 N.W.2d 249, 253 (Wis. Ct. App. 2008).

226. *See* Heather Cucolo & Michael Perlin, "Far from the Turbulent Space": Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators 20-25 (Jan. 24, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2384899](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2384899). However, all laws provide for some access to counsel.

227. *Allen v. Illinois*, 478 U.S. 364, 373 (1986).

228. *See, e.g., United States v. Abregana*, 574 F. Supp. 2d 1123, 1140 (D. Haw. 2008).

the treatment outcomes from SVP programs have been uneven. Scores of those committed as SVPs receive little to no treatment whatsoever, and some states have been involved in protracted litigation regarding access to treatment.<sup>229</sup> One such case was brought by Andre Young, who challenged Washington's law.<sup>230</sup> By the time his case reached the U.S. Supreme Court, the Court had already decided the *Hendricks* case.<sup>231</sup> In dismissing Young's challenge based upon an as-applied theory, the Court noted in dictum that, if a person is detained for the purpose of incapacitation and treatment, then "due process requires that the conditions and duration of confinement under the Act bear some reasonable relation to the purpose for which persons are committed."<sup>232</sup> Such language has provided no guidance to lower courts evaluating right-to-treatment claims.<sup>233</sup> Most state SVP laws do not offer immunity for disclosure of criminal conduct, so the threat of self-incrimination during treatment is real.<sup>234</sup> Furthermore, social scientists have yet to reach anything approaching a consensus on whether the various kinds of inpatient treatment programs administered to SVPs prevent recidivism.<sup>235</sup>

The burden on an SVP respondent, once committed, to obtain release from detention is considerable. Proving that one's "condition" has changed so as to make one no longer fit the definition of "sexually violent

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229. See, e.g., *Seling v. Young*, 531 U.S. 250, 265 (2001); *Hydrick v. Hunter*, 500 F.3d 978, 983 (9th Cir. 2007), *vacated on other grounds*, 556 U.S. 1256 (2009); *Karsjens v. Jesson*, 6 F. Supp. 3d 916, 922 (D. Minn. 2014).

230. *Young v. Weston*, 898 F. Supp. 744, 745 (W.D. Wash. 1995).

231. *Young*, 531 U.S. at 258.

232. *Id.* at 265.

233. Even where some form of treatment is offered, many detainees refuse to participate in the treatment offered because a condition of such treatment is full disclosure (checked by polygraph tests) of all sexual offenses, including those which the detainee had previously denied under oath or for which the detainee was never charged or convicted, thus exposing him to potential further criminal liability or extended commitment. Jeslyn A. Miller, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CAL. L. REV. 2093, 2095 (2010); see also La Fond, *supra* note 23, at 167-69.

234. EWING, *supra* note 34, at 56. The Supreme Court has held that conditioning the constitutionally required treatment on such disclosure (and removing privileges and increasing the level of detention as a penalty for refusing treatment) does not run afoul of the Fifth Amendment's guarantee against compelled self-incrimination. *McKune v. Lile*, 536 U.S. 24, 46-48 (2002). Justice Kennedy concluded that the treatment program did not truly *compel* self-incrimination because the penalties imposed for refusing to participate in the treatment program were not severe and the state had a valid objective in encouraging rehabilitation and deterring future sexual offenses by leaving the possibility of future prosecution. *Id.* at 33-36.

235. EWING, *supra* note 34, at 52-55.

predator”<sup>236</sup> is difficult, particularly when one lacks opportunities either to demonstrate self-restraint or to receive effective treatment.<sup>237</sup> The respondent’s burden on a petition for release requires evidence that both predicts the future and proves a negative—a nearly insurmountable task. As a result, thousands of people detained for lengthy periods have little likelihood of ever being released.<sup>238</sup> Surveys of release rates suggest that most individuals are committed for extended periods.<sup>239</sup> The *New York Times*’ 2007 study revealed that, of the nearly 3000 individuals who had been committed nationwide under SVP laws, only fifty had been released on an assessment by a clinician and state-appointed evaluator that they were “ready” for release.<sup>240</sup> This means that individuals who were among the first committed in the 1990s have been held in detention for twenty years or more. Because release is nearly impossible, there is now a growing and aging group of people living out their lives in detention.<sup>241</sup> The *Times* authors noted that Leroy Hendricks, who was seventy-two years old in

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236. See, e.g., WASH. REV. CODE ANN. § 71.09.060 (West 2009); *In re Lieberman*, 955 N.E.2d 118, 139 (Ill. App. Ct. 2011) (denying SVP respondent’s petition for release because he had not provided expert evidence that he “is no longer a sexually violent person or that it is not substantially probable that respondent will engage in future acts of sexual violence”); cf. *In re West*, 2011 WI 83, ¶ 96-102, 800 N.W.2d 929, 950-51 (Wis. 2011) (rejecting constitutional challenge to Wisconsin SVP statute’s assignment of burden of proof for release to respondent).

237. Prentky et al., *supra* note 26, at 380-81 (noting that many programs are grossly inadequate, while at the same time, a person’s lack of improvement in treatment is often used as a basis to extend their detention); see, e.g., *In re West*, 800 N.W.2d at 947-48 (holding that placing burden on committed person to prove by clear and convincing evidence that he is no longer a “sexual violent person” in order to be released from commitment does not violate due process).

238. La Fond, *supra* note 23, at 166-70; see also EWING, *supra* note 34, at 22.

239. Prentky et al., *supra* note 26, at 380. (“Those discharged or released range from 0 in North Dakota, New Jersey, and Iowa to 1 in Minnesota, 4 in Massachusetts, 6 in Missouri, and fewer than 20 in Washington, Kansas, Illinois, and Florida. The only states that have released a sufficient number of committed offenders to permit a follow-up are Arizona (221), California (67), and Wisconsin (56).”); cf. WASH. STATE INST. FOR PUB. POLICY, COMPARISON OF STATE LAWS AUTHORIZING INVOLUNTARY COMMITMENT OF SEXUALLY VIOLENT PREDATORS: 2006 UPDATE, REVISED 3 (2007), available at [www.wsipp.wa.gov/rptfiles/07-08-1101.pdf](http://www.wsipp.wa.gov/rptfiles/07-08-1101.pdf).

240. Davey & Goodnough, *supra* note 214. Another 115 people had been released because of “legal technicalities, court rulings, terminal illness or old age.” *Id.*

241. Several studies have noted that the risk of recidivism for sexual violence decreases significantly for those over the age of sixty. *United States v. Wilkinson*, 646 F. Supp. 2d 194, 208 (2009) (citing R. Karl Hanson, *Recidivism and Age: Follow-Up Data From 4,673 Sexual Offenders*, 17 J. INTERPERSONAL VIOLENCE 1046, 1059 (2002)).

2007, “spen[t] most days in a wheelchair or leaning on a cane, because of diabetes, circulation ailments[,] and the effects of a stroke” and that those who remained in detention included a 102-year-old man with poor hearing.<sup>242</sup>

Minnesota’s SVP program, established in 1993, provides perhaps the most extreme example of the challenges of obtaining release. Between the program’s enactment in 1993 and 2012, 635 people (nearly all men) were committed under that state’s SVP law.<sup>243</sup> Not one was released until 2012.<sup>244</sup> That state’s program has come under criticism for its failure to provide adequate treatment for detained offenders, as well as for its stringent release requirements.<sup>245</sup> In 2012, the British High Court refused to extradite to Minnesota a sex offender who faced possible SVP commitment on the basis that such commitment would constitute a “flagrant denial” of his human rights.<sup>246</sup> More recently, the U.S. District Court for the District of Minnesota held that the state’s “[SVP] statutes and sex offender program do not pass constitutional scrutiny.”<sup>247</sup> In its decision, the court stated: “The overwhelming evidence at trial established that Minnesota’s civil commitment scheme is a punitive system that segregates and indefinitely detains a class of potentially dangerous individuals without the safeguards of the criminal justice system.”<sup>248</sup> In short, as one commentator wrote in reference to the realities of SVP laws: “Involuntary commitment is both incarceration and exile.”<sup>249</sup>

Since so many who are committed under SVP laws remain in detention, these programs are becoming a significant fiscal burden on the states that have adopted them. Estimates of the cost to house each detainee range from

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242. Davey & Goodnough, *supra* note 214.

243. Rupa Shenoy, *Families of Sex Offenders Find Hope in Clarence Opheim’s Release*, MPRNEWS (Mar. 5, 2012), <http://minnesota.publicradio.org/display/web/2012/03/05/minnesota-sex-offender-program>.

244. Mary Lynn Smith & Dave Hage, *Minnesota Sex-Offender Lawsuit Takes Step Forward*, STAR TRIB. (July 25, 2012, 6:35 AM), <http://www.startribune.com/local/163607246.html>.

245. *Id.*

246. John Aston, *Court Blocks Shawn Sullivan’s U.S. Extradition*, INDEPENDENT, June 28, 2012, <http://www.independent.co.uk/news/uk/crime/court-blocks-shawn-sullivans-us-extradition-7896133.html>.

247. *Karsjens v. Jesson*, No. 11–3659, 2015 WL 3755870, at \*2 (D. Minn. June 17, 2015).

248. *Id.*

249. Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators”*, 93 MINN. L. REV. 670, 708 (2008).

\$94,000 to \$175,000 annually.<sup>250</sup> These figures do not include capital expenditures to build new facilities for SVP programs or the litigation costs associated with a state's petitions for commitment or a respondent's petition for release.<sup>251</sup> One study suggests that the cost of detaining a sex offender under an SVP law is four times more expensive than that of incarcerating a prisoner.<sup>252</sup>

Notwithstanding the failure of SVP programs to achieve their ostensible purposes and the extreme financial burden they impose on states prosecuting them, states continue to identify individuals for SVP commitment at the conclusion of their prison sentences.<sup>253</sup> Since the public has become accustomed to SVP detention as the standard course for those convicted of sex crimes, legislatures appear to have boxed themselves in. The likelihood of public outrage at the idea of releasing "sexual predators" or not permitting their further detention makes such options appear politically unfeasible. Indeed, a Florida newspaper criticized that state for not detaining *enough* people under its SVP program, and the legislature responded by loosening the commitment criteria even further.<sup>254</sup>

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250. EWING, *supra* note 34, at 57. The *Times* study noted that wheelchairs, walkers, and high blood pressure medication are among the growing costs for an increasing aging population of people in SVP detention. Davey & Goodnough, *supra* note 214. Florida's SVP detention center filled 229 prescriptions for arthritis medication one month, and 300 for blood pressure and other heart problems. *Id.*

251. EWING, *supra* note 34, at 57-59. The latter include costs of court-appointed counsel and expert witnesses, which are estimated to double those costs. Media reports have documented that the use of expert testimony for such proceedings constitutes a significant portion of expense for such programs. For example, one 2010 report found that the State of New York had spent \$3 million paying for experts for both the State and respondents since that state's SVP program was launched in 2007. Gary Craig, *Expert Opinion Among Civil Commitment's High Costs*, DEMOCRAT & CHRON. (Rochester, N.Y.), Dec. 29, 2010, [http://www.democratandchronicle.com/article/20101229/NEWS01/12290345?nclck\\_check=1](http://www.democratandchronicle.com/article/20101229/NEWS01/12290345?nclck_check=1); Sally Kestin & Dana Williams, *Experts Cash in on Predator Law*, SUN SENTINEL (Fort Lauderdale, Fla.), Dec. 22, 2013, <http://interactive.sun-sentinel.com/jimmy-ryce/witness.html>; Christine Willmsen, *State Wastes Millions Helping Sex Predators Avoid Lockup*, SEATTLE TIMES, Mar. 22, 2013, <http://www.seattletimes.com/seattle-news/state-wastes-millions-helping-sex-predators-avoid-lockup/>.

252. Davey & Goodnough, *supra* note 214.

253. *Id.*

254. In 2013, the *Sun Sentinel* released a series of articles, collectively titled "Sex Predators Unleashed," that was highly critical of how many convicted sex offenders were not being committed under that state's SVP law and calling on state lawmakers to make it easier to detain such offenders. Sally Kestin & Dana Williams, *Florida Sets Rapists and Child Molesters Free to Strike Again*, SUN SENTINEL (Fort Lauderdale, Fla.), Aug. 18, 2013, <http://interactive.sun-sentinel.com/jimmy-ryce/investigation.html>. A follow-up article in late

Despite their central objective of increasing public safety, SVP laws do *not* appear to have decreased the overall incidence of sexual violence in those states that have enacted such laws. It is difficult to empirically assess whether there are broad public safety benefits to SVP programs—that is, beyond ensuring that specific individuals have no access to anyone outside of the SVP detention facility—but some researchers have attempted to do so. In one recent study, researchers concluded: “SVP laws have had *no discernible impact* on the incidence of sex crimes.”<sup>255</sup> Further, by enacting SVP laws and implementing these expensive programs, policymakers are often shifting resources away from other, arguably more relevant and effective, programs, including those aimed at enhancing probation and community monitoring programs, preventing domestic violence and child abuse, and providing treatment to sex offenders during their incarceration.<sup>256</sup>

### *III. Distortions of Science and Law in SVP Commitment Proceedings*

As discussed in the prior section, the language in the *Hendricks* and *Crane* decisions confirming the constitutionality of SVP laws confers broad discretion on courts in their application of statutory terms to meet the due process requirement of mental abnormality. The Supreme Court reasoned in *Crane* that the science of psychiatry is “ever-advancing” and its “distinctions do not seek precisely to mirror those of the law.”<sup>257</sup> The Court also made clear that it was not going to establish specific principles to guide lower courts and legislatures, reasoning that “bright-line rules” are not always the best way to ensure “the Constitution’s safeguards of human liberty in the area of mental illness and the law.”<sup>258</sup> In effect, it invited policymakers and courts to experiment with their approaches to establishing eligibility for SVP commitment.

The *Hendricks-Crane* rationale assumes that however legislatures choose to precisely define the contours of each state’s SVP commitment laws, mental health professionals would reliably identify those whose medical

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December described the Florida Legislature’s response to the paper’s investigation as crafting a “comprehensive overhaul” of the state’s SVP law. Sally Keston & Dana Williams, *Investigation Spurs Reform of Sex Offender Laws*, SUN SENTINEL (Fort Lauderdale, Fla.), Dec. 29, 2013, [http://articles.sun-sentinel.com/2013-12-28/news/fl-sex-predator-changes-20131228\\_1-florida-senate-north-florida-sexually-violent-predator-program](http://articles.sun-sentinel.com/2013-12-28/news/fl-sex-predator-changes-20131228_1-florida-senate-north-florida-sexually-violent-predator-program).

255. Lave & McCrary, *supra* note 204, at 1392 (emphasis added).

256. *Id.* at 1426-27; Good & Burstein, *supra* note 84, at 38.

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

258. *Id.*

conditions put them at higher risk of committing sexual violence due to volitional impairment, thus ensuring that SVP commitment laws would not sweep too broadly.<sup>259</sup> By framing the standard for commitment in terms of mental disorder and making findings of volitional impairment from such disorders a constitutional requirement, legislatures and courts have assigned psychiatry a central role in the implementation of SVP laws by providing expert opinion on the likelihood of future sexual violence stemming from mental conditions in specific individuals.

In effect, the constitutionality of SVP laws was saved by the promise of psychiatry. The Court's rationale is valid, however, only if it is based on accurate assumptions about the contributions psychiatry can make to ensure SVP laws do not overreach. Justice Kennedy explicitly made that point in his *Hendricks* concurrence when he noted that if it turns out "mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified," then the constitutionality of the SVP scheme would again be called into question.<sup>260</sup> It follows that, if the very concept of a mental health predicate is highly imprecise, then the entire model of SVP laws similarly falls short of meeting due process requirements.

Using psychiatric evidence to determine who qualifies as an SVP raises two major problems. One is that sexual deviance has an uncertain place in the classification of psychopathology.<sup>261</sup> The other is that psychiatry does not operate in terms of predicting behavior.<sup>262</sup> It is a profession whose orientation is to identify the disordered primarily for the purposes of treating them—to relieve suffering and improve functioning. As noted earlier, the psychiatric profession never claimed that it had the knowledge or instruments to identify those at an especially high risk of committing acts of sexual violence,<sup>263</sup> and the past twenty-five years of SVP proceedings indicate that the Court's evident assumption that it could make that crucial identification was misplaced. The years since those opinions have, in fact, borne out the warnings of the APA in its *Hendricks* amicus brief.<sup>264</sup> It has become clear that the Supreme Court based its ruling regarding the class of "sexually violent predators" on a legal, rather than psychiatric, construct, and its assignment of the role of determining such classification to the field

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259. *See supra* notes 176-182 and accompanying text.

260. *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring).

261. *See infra* notes 282-338 and accompanying text.

262. *See infra* notes 339-370 and accompanying text.

263. *See supra* notes 192-201 and accompanying text.

264. *See supra* notes 198-201 and accompanying text.

of psychiatry involved a distorted view of that field with dire consequences for those targeted by the statutes.

This section first reviews the historical and current approaches within psychiatry to identifying disorders involving sexual arousal. Next it examines how such approaches became significantly distorted in SVP proceedings under the framework set forth in *Hendricks-Crane*. This section gives particular attention to the problem of relying on psychiatry to predict sexual violence. Finally, this section reviews some of the attempts to address these problems, primarily through proposed revisions to psychiatric diagnoses and use of alternative methods of prediction.

#### *A. Psychiatry's View of Diagnosing and Predicting Sexual Violence*

The holdings in *Hendricks* and *Crane* assigned psychiatric experts a central, indispensable role in the prosecution of SVP commitments. The State cannot obtain an order for detention without proving dangerousness, and such dangerousness must be couched in terms of abnormality, or a “mental disorder that has some medical legitimacy.”<sup>265</sup> When experts speak of mental pathology, particularly in courtrooms, they tend to do so in terms of diagnoses.<sup>266</sup> However, the diagnoses that, on their face, *appear* to identify those individuals who present the greatest threat of sexual dangerousness are not consistent with the conceptualization of mental abnormality or mental disorder evidently contemplated by the Court and the SVP statutes it has upheld.

##### *1. Role of Diagnosis and the DSM Generally in Psychiatric Assessment*

As an initial matter, even the broad concept of “mental disorder” does not enjoy a consensus definition within psychiatry. Beginning with the third edition, the DSM, the APA’s standardized nosology, has offered a definition for mental disorder, although the definition has varied over the years.<sup>267</sup> In one recent edition, the editors acknowledged that, in making a diagnosis, the line between disordered and non-disordered is elusive and variable: “The concept of mental disorder, like many other concepts in medicine and science, lacks a consistent operational definition that covers

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265. Eric S. Janus & Robert A. Prentky, *Sexual Predator Laws: A Two-Decade Retrospective*, 21 FED. SENT’G REP. 90, 93 (2008).

266. Hamilton, *supra* note 22, at 2-4; Prentky et al., *supra* note 26, at 364.

267. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 5-6 (3rd ed. 1980) [hereinafter DSM-III].

all situations.”<sup>268</sup> Recent editions of the DSM also feature cautionary language about using the manual’s diagnostic classifications in legal situations, where such line drawing has far greater implications than in clinical settings. The “Cautionary Statement for Forensic Use” in the most recent edition, published in 2013, advises: “When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood.”<sup>269</sup>

However, the Supreme Court clearly anticipated that experts testifying in SVP cases would frame their opinions, at least in part, in terms of a diagnosis. *Crane* referenced diagnosis specifically by noting that the sufficiency of the evidence offered by a state in support of an SVP commitment will take into account “the nature of *the psychiatric diagnosis*[] and the severity of the mental abnormality itself.”<sup>270</sup> And the *Hendricks* majority noted that the State had satisfied the “mental abnormality” requirement in *Hendricks*’s case because the respondent had a “disorder” listed in the DSM.<sup>271</sup> However, in neither opinion did the Court indicate the specific diagnoses that would be sufficient for purposes of a constitutionally permissible preventive detention. In the absence of any clear direction, uncertainties abound for those in both law and psychiatry. Indeed, it appears that virtually any diagnosis by a mental health professional could suffice to justify the indefinite commitment of someone as a sexually violent predator if a testifying expert links such condition to a risk of committing sexual violence.<sup>272</sup>

Criminal defendants often present psychiatric diagnoses in support of an insanity defense, but there are important differences between this setting and the civil commitment of SVPs. In the context of determining criminal responsibility, the diagnosis helps the factfinder reconstruct the defendant’s past frame of mind at a given moment in time.<sup>273</sup> This reconstruction is less dependent upon a specific label (e.g. schizophrenia) than on an overall

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268. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxx (4th ed. text rev. 2000) [hereinafter DSM-IV-TR].

269. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 25 (5th ed. 2013) [hereinafter DSM-5]. The DSM-IV-TR’s “cautionary statement” was quoted in the APA’s amicus brief to the Court in *Hendricks*. See *supra* note 201 and accompanying text.

270. *Kansas v. Crane*, 534 U.S. 407, 413 (2002) (emphasis added).

271. *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997).

272. Allan Frances et al., *Defining Mental Disorder When It Really Counts: DSM-IV-TR and SVP/SDP Statutes*, 36 J. AM. ACAD. OF PSYCHIATRY & L. 375, 379 (2008).

273. Stephen J. Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 561-64 (1978).

assessment of how the person's mind functioned at that particular moment.<sup>274</sup> More importantly, in insanity defense cases, it is usually the defendant himself who puts a diagnosis in evidence through his own expert testimony as part of a defense he raised.<sup>275</sup> Absent a defendant's choice to assert an insanity defense, there is no role for psychiatric testimony, including diagnoses, at trial. By contrast, in SVP proceedings, because a diagnosis of mental abnormality is required for due process reasons, it is the linchpin for the deprivation of liberty. It is how we rationalize preventive detention for a subset of the population. And if that is the case, then the specific diagnosis offered to meet that requirement must align with due process principles by, at a minimum, having a basis in medical knowledge.<sup>276</sup>

In *Hendricks*, the Court noted the lack of consensus among psychiatrists regarding where to draw the line between ill and not ill and also how to identify and characterize specific mental disorders.<sup>277</sup> This led the majority to conclude that legislatures, in drafting the laws, and judges, in reviewing the evidence and applying the laws in individual cases, should do the line-drawing.<sup>278</sup> But the lack of consensus<sup>279</sup> here should have instead signaled that the deciding factor in SVP commitments cannot be so variable and subjective. This is particularly true given the massive deprivation of liberty—indefinite preventive detention for terms far longer than in the standard involuntary hospitalization context—and because the respondent bears the burden to prove that he has sufficiently recovered from such “condition” to be released.<sup>280</sup> This reasoning also fails to account for the high degree of deference courts generally grant to mental health experts and the limited ability of courts and juries to assess the reliability of such experts' opinions.<sup>281</sup> The Court's rulings, when implemented in the context of the on-the-ground realities of trials, paved the way for scores of SVP

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274. In fact, Stephen Morse has argued that insanity opinions could be based entirely on the defendant's capacity at the moment of the crime using descriptive rather than diagnostic terms. *Id.* at 604-13.

275. JOHN PARRY, CRIMINAL MENTAL HEALTH AND DISABILITY LAW, EVIDENCE AND TESTIMONY 131 (2009).

276. *See* McGee v. Bartow, 593 F.3d 556, 577 (7th Cir. 2010).

277. *Kansas v. Hendricks*, 521 U.S. 346, 357-60 (1997).

278. *Id.* at 359-60.

279. The *Hendricks* Court was divided 5-4, with Justice Kennedy concurring. *Id.* at 350, 371, 373.

280. *See supra* notes 236-242 and accompanying text.

281. *See infra* notes 572-605 and accompanying text.

commitments to be based upon expert opinions with highly dubious scientific foundation.

*2. Origins of Lack of Consensus Regarding Relation of Pathology to Sexual Deviance*

In the case of SVP laws, mental health professionals are asked to make a very specific finding of dangerousness: the person must be at risk for committing *sexual* violence, not any kind of violence. Most civil commitment statutes have a blanket “harm to self or others” requirement,<sup>282</sup> which provides for a range of prognostication. The requirement of the specific risk in SVP laws leads many to assume there must be a specific diagnosis tied to that specific risk. Given this central role assigned to psychiatric diagnosis in SVP proceedings, we must consider carefully what psychiatry has to say about the underlying pathology of those who engage in sexual violence.

The history of pathologizing sexual attitudes and conduct is long, complicated, and inextricably caught up with cultural and ethical views—often tacit—that construct deviance and perversion in contrast with a presumed normality. As other scholars have set out this history in some detail,<sup>283</sup> I will only summarize some key developments here, particularly as they pertain to implications for the SVP statutory schemes. French philosopher Michel Foucault compellingly argued that much that is labeled as pathology is in fact nothing more than deviance from social norms predominant at a given time, including norms regarding sexuality and proper gender behavior.<sup>284</sup> Contemporary historians of psychiatry generally regard supposed pathological “conditions” as “constructions,” and often quite problematic ones.<sup>285</sup>

Although Western societies, particularly through religious and legal-political institutions, have long identified and condemned a range of sexual

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282. See *supra* notes 65-67 and accompanying text.

283. See, e.g., Andreas De Block & Pieter R. Adriaens, *Pathologizing Sexual Deviance: A History*, 50 J. OF SEX RES., 276, 277 (2013). See generally JESSE BERING, *PERV: THE SEXUAL DEVIANT IN ALL OF US* (2013).

284. De Block & Adriaens, *supra* note 283, at 277. See generally MICHEL FOUCAULT, *A HISTORY OF SEXUALITY, VOLUME 1: AN INTRODUCTION* (1990); MICHEL FOUCAULT, *A HISTORY OF SEXUALITY, VOLUME 2: THE USE OF PLEASURE* (1990).

285. De Block & Adriaens, *supra* note 283, at 277. (“[P]sychiatrists’ and sexologists’ descriptions of new pathologies or types of persons should not be considered as discoveries but rather as inventions or constructions.”).

behaviors as deviant,<sup>286</sup> the notion of such conduct as evidence of *mental illness* did not arise until the mid-nineteenth century with the increasing authority of psychiatry.<sup>287</sup> As new works about sexual deviance and perversion appeared in the European medical literature, the criminalization of specific sexual acts also became more widespread.<sup>288</sup> In time, some psychiatrists criticized the punishment of these behaviors and recommended treatment instead of punishment to eliminate these behaviors.<sup>289</sup>

The publication in 1886 of Austrian psychiatrist Richard von Krafft-Ebing's *Psychopathia Sexualis*, which set forth a medically detailed account of specific pathologies, is considered a watershed moment in the medicalization of sexual deviance.<sup>290</sup> The *Psychopathia Sexualis* differed from prior accounts because it argued that such conduct originated in an individual's personality, not anatomy.<sup>291</sup> Although the original work included extensive classification of pathological sexual feelings and behavior, it was only in later versions that Kraft-Ebbing discussed pedophilia and other forms of "paraphilia",<sup>292</sup> that is, sexual arousal not from heterosexual intercourse with adults but from non-standard sources, such as objects, animals, settings, and children.<sup>293</sup> Krafft-Ebing, himself a forensic psychiatrist, noted the implications of his research for criminal law, but he observed that classifying conduct as normal, perverted, or criminal was not a simple matter.<sup>294</sup>

Sigmund Freud, though clearly influenced by Krafft-Ebing's approach, took a somewhat different tack regarding sexual deviance versus normality. Most individuals, Freud maintained, are "polymorphously perverse" during childhood, and a range of sexual interest remains quite common among the population.<sup>295</sup> He wrote: "However infamous they may be, however sharply they may be contrasted with normal sexual activity, quiet consideration will show that some perverse trait or other is seldom absent from the sexual life

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286. *Id.* at 277-78. The word "perversion" originates from a broader term "used to denote an aberration or a deviation from a divine norm: any act that violated the laws of God was considered a perversion." *Id.* at 278.

287. *Id.*

288. *Id.* at 279.

289. *Id.*

290. *See id.* at 280.

291. *Id.*

292. *Id.* at 281.

293. *See id.* at 280-81.

294. *Id.* at 281.

295. *Id.* at 282.

of normal people.”<sup>296</sup> Accordingly, these desires signal dysfunction only when they are the source of compulsion, fixation, and exclusiveness such that they interfere with normative functioning.<sup>297</sup> While this psychoanalytic approach further blurred the lines between normal and pathological sexuality, Freud, like Krafft-Ebing, assumed that a precise distinction in fact existed,<sup>298</sup> and, in his later work, he maintained that most perversions originated from an unresolved castration anxiety and early sexual trauma.<sup>299</sup> As reviewed below, many elements of these early debates have resurfaced in contemporary American psychiatry, with significant implications for controversies regarding the extent to which psychopathology can be linked to sexual violence.

### 3. *The DSM and Paraphilias*

In the second half of the twentieth century, the DSM became the leading source of psychiatric classification. The APA published the first two editions, based primarily on psychoanalytic approaches, in 1952 and 1968.<sup>300</sup> They did refer to sexual disorders (the early editions lacked the diagnostic criteria seen in more recent editions), but these were placed within the personality disorders category, and the focus was on the relationship between the individual’s desires and predominant social norms.<sup>301</sup> The texts did not place sexual perversions clearly within the realm of mental illness but, rather, treated them as types of social deviance.<sup>302</sup>

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296. SIGMUND FREUD, THE COMPLETE INTRODUCTORY LECTURES ON PSYCHOANALYSIS 322 (James Strachey trans., 1966); *see also* SIGMUND FREUD, THREE ESSAYS ON SEXUALITY 26-27 (James Strachey trans., 1962) (noting that some “perversions” “are constituents which are rarely absent from the sexual life of healthy people” and this presents “insoluble difficulties as soon as we try to draw a sharp line to distinguish mere variations within the range of what is physiological from pathological symptoms”).

297. Jerome C. Wakefield, *DSM-5 Proposed Diagnostic Criteria for Sexual Paraphilias: Tensions Between Diagnostic Validity and Forensic Utility*, 34 INT’L. J.L. AND PSYCHIATRY 195, 199 (2011).

298. *Id.*

299. De Block & Adriaens, *supra* note 283, at 282; David P. Bryden & Maren M. Grier, *The Search For Rapists’ “Real” Motives*, 101 J. CRIM. L. & CRIMINOLOGY 171, 174-76 (2011).

300. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (1952) [hereinafter DSM-I]; AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (2d ed. 1968) [hereinafter DSM-II].

301. DSM-I, *supra* note 300, at 38-39; DSM-II, *supra* note 300, at 44-45; *see also* De Block & Adriaens, *supra* note 283, at 285-86.

302. De Block & Adriaens, *supra* note 283, at 286.

As remarked above, the DSM-III, published in 1980, was a significant departure from the earlier editions. This edition is most notable for its presentation of specific diagnostic criteria for each disorder.<sup>303</sup> The definitions and criteria it offered for disorders associated with sexual deviance, particularly for “pedophilia,” became increasingly embroiled in controversy and politics in subsequent editions. Starting with the DSM-III, the manual included a category called “paraphilias,” (or, as they are referred to in the current edition, DSM-5, “paraphilic disorders”) which are specific disorders associated with sexual attraction to people, things, or situations that are considered deviant or non-normal.<sup>304</sup> Under the category, the manual lists disorders such as pedophilia, exhibitionism, and sadomasochism. Each edition presented a slightly different list of disorders and a slightly different set of diagnostic criteria for each.<sup>305</sup> The central debate or tension pervading the development of these classifications was this: at what point does sexual attraction or desire signal or implicate psychopathology?<sup>306</sup>

Since the field of psychiatry is centrally concerned with identifying and treating those whose mental disorders cause personal distress and impair functioning, many (including Freud, as indicated above) have taken the position that only when a persistent form of sexual attraction leads to such distress or impairment is it appropriate to label it as a disorder.<sup>307</sup> Thus, the extent to which a subject’s sexual feelings deviated from social norms was less important for making the diagnosis of the presence of a “disorder” than the existence of distress or impairment of function for the subject himself or herself. This view stems in part from psychiatry’s wariness of classifying certain types of sexual attraction as disordered in light of the enormous controversy regarding the previous inclusion of homosexuality in the DSM’s list of sexual disorders.<sup>308</sup> The elimination of homosexuality from the list in 1973 led to a debate about whether and which other forms of

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303. SHORTER, *supra* note 183, at 300-02.

304. The DSM-III-R list of paraphilias included: Fetishism, Transvestism, Zoophilia, Pedophilia, Exhibitionism, Voyeurism, Sexual Masochism, and Sexual Sadism. DSM-III, *supra* note 267, at 268-75. For an excellent, detailed analysis and critique of the paraphilias and their use and implications in forensic settings, including SVP proceedings, see generally Hamilton, *supra* note 22.

305. Compare DSM-III, *supra* note 267, at 266-75, with AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 522-32 (4th ed. 1994) [hereinafter DSM-IV].

306. De Block & Adriaens, *supra* note 283, at 284-92.

307. *Id.* at 288-89; Wakefield, *supra* note 297, at 197, 200.

308. De Block & Adriaens, *supra* note 283, at 287-89.

sexual deviation should be included in the manual, particularly where such deviation did not cause any distress to the individual (the key rationale used for removing homosexuality).<sup>309</sup> The DSM-III included language in the forward noting a distinction between deviance and disorder<sup>310</sup> and the lead editor of the manual, Robert Spitzer, acknowledged that the term “disorder . . . always involves a value judgment.”<sup>311</sup>

This emphasis on personal distress and impaired functioning became more apparent with the publication of the DSM-IV in 1994. Under the diagnostic criteria for the paraphilias, conduct based upon these urges could be criminal, but not pathological, in the absence of distress or limited functioning.<sup>312</sup> With this revision, that edition further clarified that clinicians could not consider child sex offenders to be mentally ill unless their deviant behavior caused such distress or impairment.<sup>313</sup> This modification, however, which moved the notion of paraphilia away from the problematic normal-abnormal dichotomy,<sup>314</sup> elicited outrage among certain conservative groups who claimed that this would de-pathologize nondistressed pedophiles<sup>315</sup> and give an “ego-syntonic well-functioning

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309. *Id.* at 288-89.

310. DSM-III, *supra* note 304, at 6 (“When the disturbance is *limited* to a conflict between an individual and society, this may represent social deviance, which may or may not be commendable, but is not by itself a mental disorder.”).

311. De Block & Adriaens, *supra* note 283, at 288 (citations omitted) (internal quotation marks omitted).

312. *Id.* at 291. This change was part of a “system-wide effort” to incorporate “clinical significance criterion” to diagnoses throughout the DSM-IV. Michael B. First, *DSM-5 Proposals for Paraphilias: Suggestions for Reducing False Positives Related to Use of Behavioral Manifestations*, 39 ARCH. SEX. BEHAV. 1239, 1240 (2010).

313. DSM-IV, *supra* note 305, at 528. This modification was also consistent with revisions made throughout DSM-IV to ensure that only conditions that caused harm, one of the essential components for a clinically-significant medical “disorder,” were included. Wakefield, *supra* note 297, at 201-02.

314. Michael B. First & Robert L. Halon, *Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases*, 36 J. AM. ACAD. PSYCHIATRY & L. 443, 445 (2008). The edition retained the list of paraphilias, however, which now included: exhibitionism, fetishism, frotteurism, pedophilia, sexual sadism, sexual masochism, transvestic fetishism, and voyeurism. DSM-IV, *supra* note 313, at 569-75. Each paraphilia had its own diagnostic criteria.

315. Michael B. First & Allen Frances, *Issues for DSM-V: Unintended Consequences of Small Changes: The Case of Paraphilias*, 165 AM. J. PSYCHIATRY 1240, 1240 (2008). The specific protest cited by the authors apparently came from “Exodus International,” an anti-gay Christian organization. *Exodus International Shuts Down: Christian Ministry Apologizes to LGBT Community and Halts Operations*, HUFFINGTON POST (June 21, 2013, 8:19 AM),

paraphilic a free pass as far as disorder goes.”<sup>316</sup> Robert Spitzer later referred to the blowback as a “public relations disaster,”<sup>317</sup> and the APA reversed the amendment (referred to as a “misinterpretation” by the editors) for those paraphilias “involving nonconsenting victims” to allow a diagnosis of paraphilia based upon either the individual’s acting on paraphilic urges with said victims *or* experiencing distress caused by such urges.<sup>318</sup> In the “text revision” of DSM-IV six years later, the editors modified the criteria to make clear that acting on paraphilic urges could itself satisfy the “harm” requirement for the diagnosis of pathology, even if such activity was unaccompanied by “distress or interpersonal difficulty” for the person so diagnosed.<sup>319</sup>

Another significant change in the DSM-IV was to the “A Criterion” part of each paraphilia diagnosis to allow clinicians to base a diagnosis on “recurrent, intense sexually arousing fantasies, sexual urges, *or* behaviors.”<sup>320</sup> This revision was a technical adjustment required by changes in wording made in the other part of the diagnostic criteria for each paraphilia.<sup>321</sup> It was only in hindsight that the editors and other commentators noted that the use of “*or* behaviors” as a disjunctive, in combination with the amendment regarding the “harm” requirement, could allow prosecution experts in SVP cases to assign a diagnosis of mental abnormality to sexual offenders “based only on their having committed sexual offenses (e.g., rape).”<sup>322</sup> The DSM editors have asserted repeatedly

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[http://www.huffingtonpost.com/2013/06/20/exodus-international-shuts-down\\_n\\_3470911.html](http://www.huffingtonpost.com/2013/06/20/exodus-international-shuts-down_n_3470911.html).

316. Wakefield, *supra* note 297, at 202.

317. Robert Spitzer, *Sexual and Gender Disorders: Discussions of Questions for DSM-V, in SEXUAL AND GENDER DIAGNOSES OF THE DIAGNOSTIC AND STATISTICAL MANUAL (DSM): A REEVALUATION* 111, 115 (Dan Karasic & Jack Drescher eds., 2005).

318. DSM-IV-TR, *supra* note 268, at 566; First & Frances, *supra* note 315, at 1240.

319. DSM-IV-TR, *supra* note 268, at 566 (“The person has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.”).

320. DSM-IV, *supra* note 305, at 566 (emphasis added). The criteria for each paraphilias are divided into “A” and “B” sections, both of which must be satisfied in order to apply the diagnosis to an individual.

321. First, *supra* note 312, at 1240.

322. First & Frances, *supra* note 315, at 1240; Frances et al., *supra* note 272, at 380; Wakefield, *supra* note 297, at 201-02. As the DSM-IV’s lead editor, Allen Frances, noted recently: “This one stupid slip contributed to the unconstitutional preventive detention of thousands of sex offenders. I have no pity for criminals, but do have great concern when their constitutional rights are violated just because I made a dumb wording mistake.” Allen Frances, *DSM-5 Writing Mistakes Will Cause Great Confusion*, HUFFINGTON POST (June 11, 2013, 5:12 AM EDT), <http://www.huffingtonpost.com/allen-frances/dsm5-writing-mistakes->

that this broad reading of the A Criterion is inconsistent with the basic conceptualization of paraphilias in the DSM: criminal conduct alone, even if it appears to be based on an underlying paraphilia, *cannot* establish a diagnosis for such a paraphilia.<sup>323</sup> Given that the “core construct” of a paraphilia is the presence of “deviant arousal,” a clinical diagnosis must be based upon information beyond an instance of criminal conduct alone.<sup>324</sup> As Michael First, one of the DSM-IV editors, explained in a 2010 editorial: “A paraphilia is . . . fundamentally a disturbed internal mental process (i.e., a deviant focus of sexual arousal) which is conceptually distinguishable from its various clinical manifestations . . . .”<sup>325</sup> Since the best indicators of a sexual arousal pattern are a patient’s “self-reports” of fantasies, urges, and actions, obtained through a diagnostic interview, the criteria should not be interpreted in a way that would permit a clinician to “skip this crucial step” in the diagnostic process.<sup>326</sup> To base a diagnosis on a person’s acts alone, therefore, “conflate[s] the underlying phenomenology of a paraphilia with its clinical manifestations.”<sup>327</sup>

The paraphilias are not, strictly speaking, limited to the specific diagnostic labels, such as “pedophilia” and “exhibitionism,” set forth in the DSM. Beginning with the DSM-III the “paraphilias” category also included a catchall label: initially it was “Atypical Paraphilia,”<sup>328</sup> and then, beginning with the DSM-III-R, it was “Paraphilia Not Otherwise Specified.”<sup>329</sup> The purpose of this label was to acknowledge that the

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323. First & Halon, *supra* note 314, at 446-47 (“It had never been anticipated that any clinician would interpret the addition of ‘or behaviors’ in Criterion A as indicating that the deviant behavior, in the absence of evidence of the presence of fantasies and urges causing the behavior, would justify a diagnosis of a paraphilia.”).

324. *Id.* at 447-48. The authors indicate that such other information can be gleaned from interviews, questionnaires, a detailed history of the individual’s sexual behavior, use of pornography, and testing of physiological responses. *Id.*; see also Wakefield, *supra* note 297, at 198 (“[P]araphilias are disorders of sexual arousal and desire, not matters of behavior and action undertaken for other reasons . . .”).

325. First, *supra* note 312, at 1240.

326. *See id.*

327. *Id.*; see also Fred S. Berlin, *Pedophilia and DSM-5: The Importance of Clearly Defining the Nature of a Pedophilic Disorder*, 42 J. AM. ACAD. PSYCHIATRY & L. 404, 404 (2014) (“Many in society are likely to equate Pedophilia with child molestation. They are not the same.”).

328. DSM-III, *supra* note 304, at 275.

329. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 290 (3rd. ed. rev. 1987) [hereinafter DSM-III-R].

disorders specified in the category “paraphilia” did not represent the full range of nonconforming sexual interests, and it provided clinicians with a term to use for someone whose particular disorder (e.g. sexual interest in animals or in rubbing against strangers) did not meet the criteria for any specific disorder in the category.<sup>330</sup> Each edition of the DSM provided a non-exhaustive list of examples of such other conditions.<sup>331</sup> In successive editions the DSM editors removed some examples from the list, added others, and provided full criteria for some.<sup>332</sup> The historical variability of the “NOS”—Not Otherwise Specified—category of paraphilias is evident, and researchers have never studied its diagnostic validity.<sup>333</sup>

There are strong, conflicting opinions throughout psychiatry about the validity of the paraphilias and the implications of their use as a basis for SVP commitment.<sup>334</sup> The intersection of psychopathology with social norms and religious and moral judgments about sexuality and sexual behavior has rendered the paraphilias among the most controversial diagnoses in the DSM.<sup>335</sup> As noted above, the debate about the removal of homosexuality from the list of paraphilias had a profound impact on all later discussions of the inclusion, revision, or removal of diagnoses in that category. Several psychiatrists have continued to question whether there should be such a category at all. They have asked what justification there could be for classifying particular forms of sexual desire as disorders.<sup>336</sup> Scholars questioning the validity of the diagnosis of pedophilia as a mental disorder point to the wide variation, both historically and among states and countries today, regarding the minimum age of the sexual partner required to avoid prosecution for child sexual abuse.<sup>337</sup> These commentators are

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330. *Id.*; DSM-IV-TR, *supra* note 268, at 4.

331. The DSM-5 list under “Other Specified Paraphilic Disorders” includes the following examples: “*telephone scatologia* (obscene phone calls), *necrophilia* (corpses), *zoophilia* (animals), *coprophilia* (feces), *klismaphilia* (enemas), [and] *urophilia* (urine).” DSM-5, *supra* note 269, at 705.

332. For example, frotteurism (rubbing against strangers) was initially listed as an “atypical paraphilia” and zoophilia (sexual interest in animals) was removed from the list of specific conditions into the “Not Otherwise Specified” category. Compare DSM-III, *supra* note 304, at 270, 275, with DSM-IV-TR, *supra* note 268, at 570, 576.

333. Prentky et al., *supra* note 26, at 366-67.

334. See, e.g., Robert A. Prentky et al., *Commentary: Muddy Diagnostic Waters in the SVP Courtroom*, 36 J. AM. ACAD. PSYCHIATRY & L. 455, 456-58 (2008).

335. See Wakefield, *supra* note 297, at 195.

336. *Id.* at 195-96.

337. BERING, *supra* note 283, at 150-52.

particularly concerned that indefinite detention of individuals can hinge on such widely varying considerations.<sup>338</sup>

*4. Research Undermines Presumed Connections Between Mental Disorders and Sex Crimes*

Another controversial question is whether a condition such as pedophilia can serve as a *cause* of criminal behavior, in which case the presence of the condition could serve as a *predictor* of future criminal conduct including sexual abuse and rape. Although it might appear that paraphilias are the category of mental disorder most obviously associated with violent sexual behavior, they are far from an ideal fit. Several researchers have found that sexually violent criminal conduct, and specifically child sexual abuse and rape, does not in fact strongly correlate with the presence of a paraphilia.<sup>339</sup> While most SVP laws take a “one size fits all” approach to offenders, research indicates that sex offenders are a “markedly heterogeneous group of criminals.”<sup>340</sup> As one scholar notes, this “primary pathology attributed to sex offenders . . . is beginning to be discredited empirically.”<sup>341</sup>

These empirical findings were the basis of Dr. First’s foremost concern about clinicians basing dubious pedophilia diagnoses upon actions alone: that is, the risk of a significant number of “false positive” diagnoses.<sup>342</sup> Dr. First noted that sexually violent behavior can have a great number of underlying causes and that the paraphilias are limited to one specific kind of

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338. See, e.g., First & Halon, *supra* note 314, at 444; Frances et al., *supra* note 272, at 375-76; Wakefield, *supra* note 297, at 196-97.

339. Alan R. Felthous & Leonore Simon, *Introduction to This Issue: Sex Offenders Part One*, 18 BEHAV. SCI. & L. 1, 2 (2000) (noting that the consensus amongst clinicians who treat sex offenders is that “most sex offenders do not have a paraphilia”); First & Halon, *supra* note 314, at 446 (citing Neal W. Dunsieath et al., *Psychiatric and Legal Features of 113 Men Convicted of Sexual Offenses*, 65 J. CLIN. PSYCHIATRY 293 (2004)); Simon, *supra* note 79, at 294 (“[D]eviant sexual fantasies do not exist in the majority of sex offenders . . . .”); see also Prentky et al., *supra* note 26, at 367 (noting that studies have shown that “a substantial proportion of rapists do not meet the criteria for any paraphilia”).

340. Prentky et al., *supra* note 334, at 456.

341. Simon, *supra* note 79, at 284.

342. First, *supra* note 312, at 1240. Dr. First apparently gave a deposition in which he attempted to explain the DSM’s paraphilias language was being interpreted and used in a way not intended by the editors, resulting in misdiagnoses of individuals with a paraphilia. *In re Detention of McGary*, 231 P.3d 205, 208-09 (Wash. Ct. App. 2010). The transcript of this deposition was offered as evidence in a petition to terminate an SVP commitment based on a paraphilia diagnosis, but it was rejected by the trial court (which ruling was upheld on appeal) because Dr. First had not examined the petitioning individual. *Id.* at 209-10.

behavior: persistent, deviant sexual arousal.<sup>343</sup> Inappropriate sexual conduct, like exhibitionism or sexual contact with minors, could alternatively be caused by “a manifestation of disinhibition or poor impulse control related to substance intoxication, a manic episode, or personality change due to a dementing illness,” or by “opportunism in a person with antisocial personality disorder.”<sup>344</sup> As one example of such findings, Dr. First noted a study of child sex offenders in which only one-third had a pedophilic arousal response pattern.<sup>345</sup>

Diagnosing individuals with specific mental disorders based on their sexual offenses against other adults is even more problematic. A diagnosis of “sexual sadism” could apply to all those who derive specific erotic pleasure from another person’s suffering,<sup>346</sup> but it certainly does not apply to all rapists, even to those who commit multiple offenses.<sup>347</sup> At the time the DSM-III-R was adopted, the editorial committee debated including a new diagnosis, “paraphilic coercive disorder,” among the paraphilias.<sup>348</sup> This proposal immediately generated controversy. Not only was there “little systematic research on the usefulness, reliability, validity, or definition of the proposed disorder,” but also many commentators raised concerns about turning rape into a mental disorder.<sup>349</sup> The concern was not for the potential use of such a diagnostic category as a basis for preventive detention but rather to excuse criminal conduct.<sup>350</sup> Ultimately, the absence of sufficient

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343. First, *supra* note 312, at 1240.

344. *Id.*; see also Fabian M. Saleh et al., *The Management of Sex Offenders: Perspectives for Psychiatry*, 18 HARV. REV. PSYCHIATRY 359, 361 (2010) (noting the wide range of motivations and “environmental precipitants” related to sexual violence).

345. First, *supra* note 312, at 1240 (citing Michael C. Seto & Martin L. Lalumiere, *A Brief Screening Scale to Identify Pedophilic Interests Among Child Molesters*, 13 SEXUAL ABUSE 15 (2001)).

346. DSM-IV-TR, *supra* note 268, at 573 (“[T]he individual derives sexual excitement from the psychological or physical suffering (including humiliation) of the victim.”).

347. Simon, *supra* note 79, at 293.

348. Frances et al., *supra* note 272, at 380.

349. *Id.*

350. *Id.* Similarly, a diagnosis of pedophilia is specifically excluded from the Americans with Disabilities Act defining of “disability” out of concern that individuals might seek some kind of “accommodation” for such disorder. 42 U.S.C. § 12211(b)(1) (2012); Adrienne L. Hiegel, Note, *Sexual Exclusions: The Americans with Disabilities Act as a Moral Code*, 94 COLUM. L. REV. 1451, 1473-75 (1994). These are only a few examples of the inconsistent legal implications of having a mental disorder.

data to support the existence of a separate disorder led to the rejection of this proposal entirely.<sup>351</sup>

*5. The Absent Connection Between Psychiatric Assessment of Paraphilia and Determination of “Volitional Impairment”*

Of particular significance for SVP commitments is the fact that a diagnosis of pedophilia or other paraphilia, in addition to not being strongly correlated with acts of sexual violence, does not necessarily involve a lack of “volition” or form of compulsion, as required under the *Hendricks-Crane* analysis. As First and Halon write, a “diagnosis of a paraphilia does not imply that the person also has difficulty controlling his behavior.”<sup>352</sup> The defining feature of the paraphilias is a particular source of “deviant” sexual arousal (not conduct), and as noted above, many people with such sexual interests, urges, or fantasies never act on them.<sup>353</sup> As a result, some researchers “liken [a paraphilia] to an addiction, others to sexual orientation.”<sup>354</sup>

Indeed, the *DSM-IV-TR*’s introductory language makes clear that *none* of the diagnoses in the manual imply an assessment of volitional control:

[T]he fact that an individual’s presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual’s degree of control over the behaviors that may be associated with the disorder. Even when diminished control over one’s behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.<sup>355</sup>

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351. Frances et al., *supra* note 272, at 380. It was not even retained as potential diagnosis for future study, as is done with some rejected diagnoses. *Id.*

352. First & Halon, *supra* note 314, at 450.

353. *Id.*

354. Casey Schwartz, *What Science Reveals About Pedophilia*, DAILY BEAST (Dec. 7, 2011, 4:45 AM ET), <http://www.thedailybeast.com/articles/2011/12/06/what-science-reveals-about-pedophilia.html>.

355. *DSM-IV-TR*, *supra* note 268, at xxxiii. There is a category of disorders known as “Disruptive, Impulse-Control, and Conduct Disorders” such as kleptomania and pyromania. *DSM-5*, *supra* note 269, at 476-79. However, these are not associated with acts of sexual violence and therefore would not be appropriate predicates for an SVP commitment finding of mental abnormality that results in volitional impairment. Prentky et al., *supra* note 26, at 365.

This language reflects psychiatry's consistent attempts to stay clear of weighing in on questions of "volition." As one group of commentators noted: "Assessing volitionality is perhaps the most hopeless of all diagnostic quagmires."<sup>356</sup>

Psychiatrists have long rejected the notion that they have a special ability to predict future behavior, particularly dangerous conduct.<sup>357</sup> They have also been ambivalent about their ability to understand and identify volitional impairment, particularly in the criminal context.<sup>358</sup> Such concerns on the part of the psychiatric profession have led many states to eliminate volitional impairment (frequently referred to as "irresistible impulse") as a basis for the insanity defense.<sup>359</sup> As the APA famously cautioned regarding the limits of psychiatry: "The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk."<sup>360</sup> With respect to SVP laws, the Association for the Treatment of Sexual Abusers (a group of medical professionals) stated in its amicus brief to the Supreme Court in *Crane* that the concept of volitional impairment in SVP legal standards is "meaningless and unworkable."<sup>361</sup> Like the problematic "irresistible impulse" test for criminal responsibility, the ATSA argued, the notion of "volitional impairment," if it even exists, should similarly be rejected because of the inability of experts to identify it.<sup>362</sup>

Psychiatrists base their hesitation to make predictions in the SVP context in part on research undermining preconceptions about sex offender recidivism and its connection to psychopathology. Contrary to a common assumption, the recidivism rate among sex offenders for committing a future sex offense is actually quite low as compared with their propensity to relapse into other criminal behavior.<sup>363</sup> Sexual offenders often have

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356. Prentky et al., *supra* note 334, at 457.

357. Simon, *supra* note 79, at 302; *see also* JOHN MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* 6 (1981).

358. First & Halon, *supra* note 314, at 451; John Monahan, *The Scientific Status of Research on Clinical and Actuarial Predictions of Violence*, in *MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY* 300, 308-11 (David L. Faigman et al. eds., 1997).

359. MELTON ET AL., *supra* note 14, at 124.

360. Insanity Def. Work Group, *American Psychiatric Association Statement on the Insanity Defense*, 140 *AM. J. PSYCHIATRY* 681-85 (1983).

361. 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.

362. *Id.* at \*4-7.

363. Lave, *supra* note 84, at 191; Simon, *supra* note 79, at 302-06.

nonsexual criminal histories and may recidivate through other forms of criminal or antisocial behavior.<sup>364</sup> Research findings also call into doubt the assumption that the source of the behavior of sex offenders is a specific abnormality or condition.<sup>365</sup> As one psychiatrist noted: “The possibility of forfeiture of liberty based not on current behavior, but rather on prediction of potential for future offending, imposes a stark obligation on the evaluator to ‘get it right.’”<sup>366</sup> However, the consensus of the field is that such predictions cannot be done with “any precision.”<sup>367</sup>

Just as statistical analysis reveals the absence of a strong correlation between a paraphilia and sexual violence,<sup>368</sup> empirical studies also reveal that pedophilia—that is, the presence of intense sexual attraction to children—does not in itself indicate that a person is likely to engage in child sexual abuse.<sup>369</sup> Although commitments of several men under SVP laws (particularly in the federal system) have been based solely upon a prior conviction for possession of child pornography, it is far from clear that viewing child pornography is indicative of sexual dangerousness.<sup>370</sup>

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364. See Simon, *supra* note 79, at 283, 302.

365. See, e.g., CYNTHIA CALKINS MERCADO ET AL., SEX OFFENDER MANAGEMENT, TREATMENT, AND CIVIL COMMITMENT: AN EVIDENCE BASED ANALYSIS AIMED AT REDUCING SEXUAL VIOLENCE 6 (2011), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/243551.pdf> (noting that even among the highest risk groups of sex offenders, recidivism rates were “quite low” and most sex crimes were not committed by “known offenders”); see also Simon, *supra* note 79, at 284 (“Although some sex offenders are at high risk to reoffend, there is no clear empirical basis for assessing which sex offenders present the most immediate risk for reoffending. Also, there is no evidence that sex offenders are any more mentally disordered than general criminal offenders.”).

366. Saleh et al., *supra* note 344, at 366.

367. *Id.*

368. See *supra* notes 339-342 and accompanying text. One researcher has argued that paraphilias are “taxonomically useless” to identify those sex offenders who would qualify as SVPs. Hamilton, *supra* note 22, at 28.

369. See Prentky et al., *supra* note 26, at 366.

370. See Emily Bazelon, *Passive Pedophiles: Are Child Porn Viewers Less Dangerous than We Thought?*, SLATE (Apr. 25, 2013), [http://www.slate.com/articles/news\\_and\\_politics/crime/2013/04/child\\_pornography\\_viewers\\_how\\_dangerous\\_are\\_they.html](http://www.slate.com/articles/news_and_politics/crime/2013/04/child_pornography_viewers_how_dangerous_are_they.html); see also BERING, *supra* note 283, at 174-76 (providing an overview of research findings regarding the lack of strong correlation between viewing child pornography and engaging in child molestation). A 2013 study released by the U.S. Sentencing Commission found that one in three people convicted of possessing child pornography had engaged in acts classified as “criminal sexually dangerous behavior,” a category that includes “non-contact” crimes such as voyeurism and exhibitionism, and that the post-sentence sexual recidivism rate of the people so convicted was 7.4% (3.6% for “contact” offenses), which is lower than the rates for those specifically convicted of state sex crimes. U.S. SENTENCING COMM’N, FEDERAL CHILD

### 6. ASPD as Alternative Basis of Mental Disorder

Given that diagnoses of paraphilias do not appear, at least in the view of mainstream psychiatry, to be useful tools for identifying a mental disorder or abnormality that could be a predictor for a sex offender's future acts of sexual violence, the question arises as to whether some *other* diagnoses might fit that need. As Dr. First noted in the statement quoted above, many other diagnoses are, in fact, more strongly associated with sexual violence than the presence of a mental disorder.<sup>371</sup>

The diagnosis that is most obviously applicable to those who commit acts of sexual violence is Antisocial Personality Disorder (ASPD).<sup>372</sup> Indeed, ASPD is a diagnosis that, by definition, could apply to most people incarcerated in the United States.<sup>373</sup> ASPD is often characterized by a pattern of criminal behavior, including committing sex crimes against children and nonconsenting adults.<sup>374</sup> In the case of sexual offenders, then, a diagnosis of ASPD indicates that the acts of violence are indicative of a "pervasive pattern of disregard for, and violation of, the rights of others"<sup>375</sup> rather than the presence of a paraphilia.

There is disagreement within psychiatry about whether personality disorder diagnoses, particularly ASPD, can support SVP commitments, either standing alone or in conjunction with one or more paraphilias.<sup>376</sup>

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PORNOGRAPHY OFFENSES (REPORT TO CONGRESS) ix, xv (2012), available at [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full\\_Report\\_to\\_Congress.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf).

371. First, *supra* note 312, at 1240; see also *supra* notes 342-345 and accompanying text.

372. First & Halon, *supra* note 314, at 448.

373. Studies have estimated that anywhere from 40% to 80% of the male prison population would meet the ASPD diagnostic criteria. EWING, *supra* note 34, at 25; First & Halon, *supra* note 314, at 448-49; Thomas K. Zander, *Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis*, 1 J. SEXUAL OFFENDER CIVIL COMMITMENT: SCI. & L., 17, 53 (2005), available at [http://www.soccjournal.org/2005-06/zander\\_2005.pdf](http://www.soccjournal.org/2005-06/zander_2005.pdf).

374. Simon, *supra* note 79, at 294 (noting empirical findings indicate that "clinicians diagnose more convicted child molesters with antisocial personality disorder than with pedophilia").

375. DSM-IV-TR, *supra* note 268, at 701.

376. See, e.g., Dean R. Cauley, *The Diagnostic Issue of Antisocial Personality Disorder in Civil Commitment Proceedings: A Response to Declue*, 35 J. PSYCHIATRY & L. 475 (2007); Gregory DeClue, *Paraphilia NOS (nonconsenting) and Antisocial Personality Disorder*, 34 J. PSYCHIATRY & L. 495 (2006). A diagnosis of ASPD was usually inadequate for commitment under the old sexual psychopath laws, which focused on treatment of offenders, since those with ASPD are not generally regarded as being amenable to treatment;

Nothing in the Supreme Court's precedent precludes basing an SVP commitment on such a diagnosis alone; there is no requirement that a person have a "sexual" disorder of some kind.<sup>377</sup> The diagnosis of ASPD could apply to a great many rapists and child molesters, some of whom may also have paraphilias. Untangling such comorbidity, however, is not straightforward. As a result, it is exceedingly difficult for courts to identify whether the sexually offending behavior is merely criminal or also partly caused by a sexual pathology.<sup>378</sup> Consequently, it is difficult to separate the typical recidivist sexual offender from one who suffers from "volitional impairment," as required by *Crane*.

The Supreme Court has never had to consider whether an ASPD diagnosis, standing alone, would be constitutionally adequate for an SVP commitment, and courts are divided on this question, since many SVP laws refer to "personality disorder" as well as mental abnormality.<sup>379</sup> The Court's opinion in *Foucha* suggests that ASPD would not be enough for post-acquittal commitment since, in *Foucha*, the acquittee had an "antisocial personality."<sup>380</sup> ASPD, like other personality disorders, has never been regarded in criminal law as a *volitional* impairment sufficient to exempt an offender from criminal responsibility.<sup>381</sup> Indeed, to treat it as such would call into question the conviction and incarceration of most of this country's prison population.<sup>382</sup> Furthermore, because ASPD is associated with "typical" recidivism, SVP commitments based solely upon the disorder would extend this extraordinary deprivation of liberty to a far greater segment of the population than substantive due process principles permit.<sup>383</sup>

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rather, the ASPD is seen as a fixed personality feature. First & Halon, *supra* note 314, at 449.

377. Frances et al., *supra* note 272, at 381-82. And indeed, this means that an SVP commitment could theoretically be based upon a diagnosis of substance abuse, mood disorders, or schizophrenia if some causal link to sexually violent behavior could be made. *Id.*

378. *See id.*

379. EWING, *supra* note 34, at 25; *see also* United States v. Wilkinson, 646 F. Supp. 2d 194, 196 (D. Mass. 2009) (rejecting use of ASPD as sole predicate mental disorder); *In re Barnes*, 689 N.W.2d 455, 459-60 (Iowa 2004) (upholding commitment based upon ASPD diagnosis alone); *In re Adams*, 588 N.W.2d 336, 340 (Wisc. Ct. App. 1998) (same).

380. *Foucha v. Louisiana*, 504 U.S. 71, 78-79 (1992).

381. Kent A. Kiehl & Morris B. Hoffman, *The Criminal Psychopath: History, Neuroscience, Treatment, and Economics*, 51 JURIMETRICS 355, 368-69 (2011).

382. *See supra* note 373.

383. *See Kansas v. Crane*, 534 U.S. 407, 413 (2002). Despite many calls to revise the rather circular diagnostic criteria to address many of the resulting problems with its use, diagnostic criteria for ASPD were left unchanged by the editors of the DSM-5. *See, e.g.,*

### 7. *Psychiatry's Response to SVP Laws and Hendricks-Crane Rationale*

The Court's rationale in *Hendricks-Crane* assumes that there is a unique and distinctive pathology among dangerous sex offenders. As argued above, this assumption has no support in current medical thinking about either the mental condition of such offenders or the extent to which a mental health professional can identify those at particularly high risk of reoffending. In light of this unsettled connection between sexual violence and psychopathology and the absence of a reliable method for clinicians to predict future violence, the APA has repeatedly attempted to highlight the divergence between SVP laws and scientific understanding.

The passage of the initial SVP laws in the early 1990s led the APA to appoint a Task Force on Sexually Dangerous Offenders.<sup>384</sup> The report it released in 1999 (two years after the *Hendricks* opinion) was highly critical of such laws.<sup>385</sup> Members of the task force noted that that the "question of whether all or some sexual offenders are mentally ill is complicated and controversial"<sup>386</sup> and, similarly, that there was no consensus on the degree to which sex offenders have control over their behavior.<sup>387</sup> Certainly, some offenders have paraphilias, the report acknowledged, but it also noted that paraphilias occur fairly frequently in those who never commit sex offenses.<sup>388</sup> Personality and substance abuse disorders, it continued, are far more common in sex offenders than are paraphilias, and, significantly, these do not usually have "explanatory connection" to the offender's behavior.<sup>389</sup> In short, the task force report stated, "psychiatric nosology does

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Morton Hesse, *What Should Be Done with Antisocial Personality Disorder in the New Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V)?*, 8 BMC MEDICINE 1, 2-4 (2010), available at <http://www.biomedcentral.com/1741-7015/8/66>; see also DSM-5, *supra* note 269, at 659; Zander, *supra* note 373, at 50-57 (reviewing criticisms of ASPD's validity). However, the field trials leading to the release of DSM-5 revealed that the diagnosis has one of the lowest inter-rater reliability ratings (in the "questionable" range). Bret S. Stetka, *A Guide to DSM-5*, MEDSCAPE (May 21, 2013), [http://www.medscape.com/viewarticle/803884\\_2](http://www.medscape.com/viewarticle/803884_2). Some commentators argue that such results should preclude any use of the disorder in forensic settings. Karen Franklin, *DSM-5: Forensic Applications (Part II of II)*, IN THE NEWS: FORENSIC PSYCHOLOGY, CRIMINOLOGY, AND PSYCHOLOGY-LAW (May 30, 2013), <http://forensicpsychologist.blogspot.com/2013/05/dsm-5-forensic-applications-part-ii-of.html>.

384. APA, DANGEROUS SEX OFFENDERS, *supra* note 39, at vii.

385. *Id.* at viii, 172-76.

386. *Id.* at 4-5.

387. *Id.* at 5.

388. *Id.* at 44.

389. *Id.* at 9.

not contribute in a systematic way to clinical understanding or treatment of sex offenders.”<sup>390</sup> The language of the report’s conclusion was strong:

[S]exual predator commitment laws represent a serious assault on the integrity of psychiatry, particularly with regard to defining mental illness and the clinical conditions for compulsory treatment. Moreover, by bending civil commitment to serve essentially nonmedical purposes, sexual predator commitment statutes threaten to undermine the legitimacy of the medical model of commitment.

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. . . . [The SVP laws] establish a nonmedical definition of what purports to be a clinical condition without regard to scientific and clinical knowledge. In so doing, legislators have used psychiatric commitment to effect nonmedical societal ends that cannot be openly avowed. . . . [T]his represents an unacceptable misuse of psychiatry.<sup>391</sup>

The APA asserted the inability of psychiatrists to predict future violence in its brief in *Hendricks*, but it was not the first time for the organization to do so. In the 1983 case *Barefoot v. Estelle*, in which the Supreme Court upheld the admissibility of psychiatric evidence on the issue of future dangerousness in a death penalty case,<sup>392</sup> the APA had stated in its amicus brief that “[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession.”<sup>393</sup> As it did again years later in *Hendricks*, the Supreme Court rejected the cautions of the mental health profession and left in place laws and practices whose legitimacy hinges on the profession’s ability to predict future conduct.<sup>394</sup>

Although the APA is the world’s largest organization of professional psychiatrists and its official statements reflect the opinions of many in the profession,<sup>395</sup> there are dissenting views in psychiatry with respect to the role of psychopathology in sexual violence. Indeed, there are segments of

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390. *Id.*

391. *Id.* at 173-74 (emphasis added).

392. *Barefoot v. Estelle*, 463 U.S. 880, 896-99 (1983), *superseded by statute on other grounds*, 28 U.S.C. § 2253 (2012).

393. *Id.* at 920 (Blackmun, J., dissenting) (alteration in original) (quoting Brief for American Psychiatric Association as Amicus Curiae, at 12).

394. *Id.* at 899.

395. *About APA & Psychiatry*, AM. PSYCHIATRIC ASS’N, <http://www.psychiatry.org/about-apa--psychiatry> (last visited Feb. 6, 2015).

the mental health profession that support the SVP laws and provide the research and expert testimony supporting the commitment of individuals. I provide examples of their views and opinions in the two sections that follow.

Mental health professionals who support the SVP laws are primarily treatment providers who specialize in treating sex offenders, including those who work in state SVP programs, outside of the correctional or criminal setting.<sup>396</sup> As one researcher has noted, this context can distort treatment providers' views of such offenders, leading the providers to assume a degree of specialization in offenders' behavior that those treated experience "deviant sexual arousal, which, if not treated, will result in future sex crimes."<sup>397</sup> Because these treatment providers lack expertise in criminological research, the mental health policies they promote continue to be based on misplaced assumptions about those who commit sex crimes—in particular, the notion that such offenders are "mentally disordered, treatable, dangerous (if not treated), and at high risk to reoffend with another sex crime."<sup>398</sup>

It is not surprising that mental health professionals have differing views on SVP laws because of differences in their training, experience, and employment positions. The concern raised here, however, is with the existence of the debate itself, with its sharply divergent positions among those within the mental health field. Specifically, there is a vast discrepancy between, on the one hand, the standard nosology of the psychiatric profession and steadfast position of its primary organizations and, on the other hand, the role assumed for and assigned to psychiatry in the SVP laws. The SVP laws set up a complex relationship between mental health professionals and the legal system. And, as we will see in the section that follows, although courts have increasingly relied on psychiatric expertise in

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396. Simon, *supra* note 79, at 277. While three of five of the amicus briefs submitted in *Hendricks* on behalf of mental health associations supported striking down the law (the American Psychiatric Association, the Washington Psychiatric Association, and the National Mental Health Association), the two who supported the law were directly involved with the treatment of sex offenders, including the Menninger Foundation, which operated a psychiatric hospital in Kansas at the time, and which was joined on the brief by a series of "victims' rights" and law-and-order organizations such as the New York Chapter of Parents of Murdered Children, Protecting Our Children, People Against Violent Crime, and Victims Outreach, Inc. Felhouse & Simon, *supra* note 339, at 2. Apparently, significant portions of the majority opinion in *Hendricks* were drawn from the Menninger Foundation's amicus brief. *Id.*

397. Simon, *supra* note 79, at 279.

398. *Id.* at 278.

SVP proceedings to support individual commitments, much scientific understanding of the causes and prediction of violent sexual behavior has become, in the process, highly distorted.

*B. Pathologizing Predators in the Courtroom*

Both the state legislatures that developed the SVP laws and the Supreme Court in upholding them have always assumed that mental health professionals would play a central role in SVP proceedings. Their specific assumption was that these professionals would offer opinions regarding the risk of recidivism posed by particular individuals due to the presence of a mental abnormality or disorder that impaired their ability to refrain from committing acts of sexual violence. Indeed, courts and lawmakers have regarded these professional opinions as indispensable because laypersons are limited in their ability to identify mental conditions and to understand a condition's potential relationship to volitional impairment.<sup>399</sup> As discussed in the preceding section, however, there is scant scientific foundation for such assessments or predictions by mental health professionals, nor is there anything in psychiatric classification that corresponds to or otherwise supports the crucial SVP concept of the "sexual predator." These well-attested difficulties have not prevented state prosecutors from offering mental health expert testimony in support of SVP petitions; and most courts readily admit such testimony, even over strenuous objections from defense counsel, who often cite the controversies discussed above.<sup>400</sup> Maintaining the role of expert evidence to support commitments in SVP proceedings has required a distortion of psychiatric understanding. It has also required a severe compromise of core values and practices of our justice systems.<sup>401</sup>

One significant question in the implementation of SVP laws is what minimum degree of risk of future dangerousness can serve as a basis for indefinite detention.<sup>402</sup> The Supreme Court in *Addington v. Texas* held that a state may involuntarily commit a mentally ill individual using a "clear and

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399. *See* *Kansas v. Crane*, 534 U.S. 407, 413 (2002); Boerner, *supra* note 58, at 570.

400. *See infra* notes 413-604 and accompanying text.

401. Finkel, *supra* note 100, at 243 (explaining how "the worst of times," including the occurrence of horrible crimes, operates like a hydraulic pressure which can "distort clear concepts and bend established principles, as well as foreshorten perspective such that history's lessons no longer help frame current issues"); *see also* 2 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE § 11:23 (2011-2012 ed.).

402. *See* Jefferson C. Knighton et al., *How Likely Is "Likely to Reoffend" in Sex Offender Civil Commitment Trials?*, 38 LAW & HUM. BEHAV. 293, 293-98 (2014) (reviewing risk thresholds in SVP laws and their implementation).

convincing evidence” standard.<sup>403</sup> This is a lower threshold of proof than the “beyond a reasonable doubt” standard usually reserved for the criminal context.<sup>404</sup> One of the rationales of the lower threshold, notwithstanding the liberty interest at stake, is the relative imprecision of psychiatric evidence, which generally serves as the primary proof offered in support of such commitments.<sup>405</sup> The *Addington* Court explained the rationale for this reduced burden of proof in involuntary commitment cases:

Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists. Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.

. . . .

The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. . . . Psychiatric diagnosis . . . is to a large extent based on medical ‘impressions’ drawn from subjective analysis and filtered through the experience of the diagnostician.<sup>406</sup>

Understandably, some commentators have argued that the very fact that psychiatric diagnoses are imprecise and ambiguous suggests that *only* the “beyond a reasonable doubt” standard will adequately ensure fairness and due process in commitment proceedings.<sup>407</sup> However, the *Addington* Court held it constitutionally acceptable for states to use a lower standard of proof because of the limitations and objectives of involuntary hospitalization: such commitment, the Court maintained, was limited to people with severe mental illness who pose a danger to themselves or others, and employing a higher standard of proof could “erect an unreasonable barrier to needed medical treatment.”<sup>408</sup> Such reasoning, of course, has only limited application in the SVP context, where public safety, not treatment, is the

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403. *Addington v. Texas*, 441 U.S. 418, 427-33 (1979). See generally Alexander Tsesis, *Due Process in Civil Commitments*, 68 WASH. & LEE L. REV. 253 (2011).

404. *Addington*, 441 U.S. at 422.

405. *Id.* at 432-33.

406. *Id.* at 429-30.

407. Tsesis, *supra* note 403, at 282-300.

408. *Addington*, 441 U.S. at 432.

foremost objective. Nonetheless, the Supreme Court recently reiterated that the intermediate standard of proof in civil involuntary commitment proceedings meets due process requirements, even for indefinite commitment of SVPs.<sup>409</sup>

To date, no Supreme Court decision has clarified precisely how dangerous to himself or others a person must be to satisfy that standard for involuntary commitment. The concept of dangerousness is itself quite vague and subject to a range of conceptualizations and analyses.<sup>410</sup> For example, if a fact-finder is asked to conclude “beyond a reasonable doubt” that an individual is “likely” to commit future acts of sexual violence (the typical standard set by legislators in SVP laws), it is not clear whether the fact finder must have no reasonable doubt that there is at least a 35%, 50%, or 75% chance the defendant will reoffend.<sup>411</sup> The danger of securing involuntary commitments on such uncertain grounds only compounds the significant problems presented by evidence admitted to support the central determination in SVP proceedings: whether the offender is “a sexually violent predator.”

#### 1. *One Example of the Distortions: McGee v. Bartow*

The language in the Supreme Court’s opinions in *Hendricks* and *Crane* confers broad discretion on lawmakers to devise the specific terms used to meet the due process requirement of a mental condition for involuntary civil commitment.<sup>412</sup> The language also encouraged experimentation and diverse approaches by legislatures and courts in regard to the implementation of the SVP laws. A 2010 opinion of the Court of Appeals for the Seventh Circuit, *McGee v. Bartow*, demonstrates the troubling implications of the Supreme Court’s deference to lawmakers.<sup>413</sup>

Michael McGee was committed in Wisconsin courts under that state’s SVP statute, which was adopted in 1994 and modeled closely on

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409. *United States v. Comstock*, 560 U.S. 126, 129-30 (2010) (upholding the SVP provisions of the Adam Walsh Act against a range of constitutional challenges).

410. *See generally* Eric S. Janus & Paul E. Meehl, *Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings*, 3 PSYCHOL. PUB. POL’Y & L. 33 (1997); Knighton et al., *supra* note 402, at 293-98; Shoba Sreenivasan et al., *Expert Testimony in Sexually Violent Predator Commitments: Conceptualizing Legal Standards of “Mental Disorder” and “Likely to Reoffend”*, 31 J. AM. ACAD. PSYCHIATRY & L. 471, 477-78 (2003); Frederick E. Vars, *Delineating Sexual Dangerousness*, 50 HOUS. L. REV. 855, 860-72 (2013).

411. *See* Finkel, *supra* note 100, at 259.

412. *See supra* notes 138-173 and accompanying text.

413. *McGee v. Bartow*, 593 F.3d 556 (7th Cir. 2010).

Washington's.<sup>414</sup> Having exhausted his direct appeals for release through state courts, McGee then filed a petition for habeas corpus in the federal district court.<sup>415</sup> McGee had to meet a particularly high standard to prevail on his petition, namely, that his continued detention was in violation of federal law, including the U.S. Constitution, rather than simply in violation of the applicable state law.<sup>416</sup>

McGee's only criminal conviction and sentencing had been in 1987, when he was convicted of burglary and the sexual assault of a woman during the course of the burglary.<sup>417</sup> He served five years in prison and was released on parole.<sup>418</sup> In 1992, while on parole, he was accused of two more sexual assaults, had his parole revoked, and served out the remaining three years of his sentence.<sup>419</sup> Neither of the two subsequent allegations of sexual assault, one by a woman and another involving an adolescent male, led to a conviction.<sup>420</sup> The state then filed a petition to commit McGee under the Wisconsin SVP law.<sup>421</sup> He was committed in 1995 based on a jury verdict but released in 1999 when the commitment was reversed on a finding of ineffective assistance of counsel.<sup>422</sup> His attorney had failed to discover important evidence that could have undermined the credibility of the two accusers from the 1992 allegations.<sup>423</sup> A year later, in 2000, he was rearrested for failing a drug test and having contact with one of the alleged 1992 victims. The state sought to commit him again.<sup>424</sup>

At the bench trial during this second commitment hearing, the state based its case largely upon the testimony of two forensic psychologists.<sup>425</sup> One was a Department of Corrections psychologist, Dr. Caton Roberts, who opined that McGee had a "personality disorder NOS [Not Otherwise Specified] with antisocial features" and "was substantially probable to reoffend sexually if not detained and treated."<sup>426</sup> Roberts based his opinion, not on a clinical examination of McGee, but on "fifteen hours of review of

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414. *Id.* at 558.

415. *Id.*

416. *Id.* at 571-72.

417. *Id.* at 558-59.

418. *Id.* at 559.

419. *Id.* at 558-59.

420. *Id.* at 559.

421. *Id.*

422. *Id.*

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.* at 559-60.

Mr. McGee's record."<sup>427</sup> The second expert to testify was Dr. Cynthia Marsh, who diagnosed McGee with "[P]araphilia NOS-nonconsent" and Personality Disorder NOS with antisocial features.<sup>428</sup> Her diagnosis was also based only upon a review of records.<sup>429</sup> Specifically, Marsh testified that she based her diagnosis primarily on Mr. McGee's "history," including the contested 1992 allegations, and that she employed three actuarial risk-assessment tools.<sup>430</sup> From these, she concluded that McGee was "much more likely than not to reoffend in a sexually violent manner."<sup>431</sup>

McGee's attorneys argued on appeal that the diagnoses that served as the bases for satisfying the "mental illness" requirement were insufficient as a matter of due process.<sup>432</sup> Specifically, they alleged that the diagnoses used were not generally accepted as being either valid or reliable within psychiatry (as noted earlier, the paraphilia category "nonconsent" invoked by Marsh had in fact been explicitly rejected by the APA) and that the labels did not have any standardized diagnostic criteria.<sup>433</sup>

There was little case law upon which the Court of Appeals could evaluate such arguments. Accordingly, the Seventh Circuit panel devised a specific standard for evaluating the constitutional adequacy of a diagnosis used to commit an individual. To prove that use of a diagnosis violated due process principles, the panel held, a petitioner must demonstrate that the diagnosis was "devoid of content, or . . . near-universal in its rejection by mental health professionals."<sup>434</sup> The panel later restated the standard as being a determination of whether the diagnosis was "empty of scientific pedigree."<sup>435</sup>

In explaining the standard, the panel devoted a considerable amount of the opinion to reviewing the text of the DSM and noted the editors' cautions about using the manual in the forensic context, particularly by "untrained individuals" (most likely referring to lawyers and judges), to answer ultimate questions.<sup>436</sup> The panel also noted that, while nothing in Supreme Court precedent expressly requires a valid DSM diagnosis as a prerequisite to a SVP commitment, such diagnostic labels could be useful

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427. *Id.* at 559.

428. *Id.* at 560, 574.

429. *Id.* at 560.

430. *Id.*

431. *Id.*

432. *Id.* at 574.

433. *Id.*

434. *Id.* at 577.

435. *Id.* at 581.

436. *Id.* at 578.

tools when applied with “prudence and caution.”<sup>437</sup> However, the court did not explain what such prudence and caution involved or how its own application of the DSM’s text demonstrated such qualities. Indeed, the panel noted the broad discretion the *Hendricks* Court conferred to states to develop their own definitions of mental abnormality without referencing medical terminology.<sup>438</sup> The panel then concluded that neither the *absence* of a specific diagnosis from the DSM’s text nor the *existence* of robust controversy about the diagnosis among mental health professionals was a basis to disregard such a diagnostic label entirely.<sup>439</sup> Rather, the panel held, such facts bear only on the weight to be assigned to the label as part of the overall fact finding, not on its admissibility as evidence.<sup>440</sup> In short, a heated debate within the field regarding a diagnostic label’s validity and reliability is not enough to exclude it from serving as a basis for indefinite detention.

The *McGee* opinion illustrates many of the key problems with the role of psychiatric evidence in SVP proceedings and demonstrates the fundamental flaw in the Supreme Court’s assumption that such testimony would prevent SVP laws from sweeping too broadly. McGee’s primary challenge was to the state’s experts’ reliance on a set of diagnoses that were scientifically controversial and did not reflect any settled scientific understanding. The experts’ opinions in *McGee* reveal a range of additional concerns seen in other reported SVP cases, including basing opinions on inadmissible facts and data—such as uncharged alleged criminal conduct, rather than on clinical examinations—and using actuarial risk assessment tools.

An examination of prosecution experts’ opinions about the likelihood of future acts of sexual violence in SVP proceedings reveals that they are based largely upon the respondent’s past behavior (alleged as well as proven) rather than, as required by the *Hendricks-Crane* rationale, an individualized medical assessment.<sup>441</sup> This is because mental health professionals, in attempting to assess whether a person is likely to commit acts of sexual violence due to a volitional impairment stemming from a mental disorder, have little else but past behavior to go on in the absence of scientific guidance for making such an assessment, as explained in Part III.A. above. But, as a result, they predict future behavior based upon past behavior the same way we all do, and not upon any particular expertise.

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437. *Id.* at 579.

438. *Id.* at 576.

439. *Id.* at 580.

440. *Id.* at 581.

441. *See infra* notes 490-511 and accompanying text.

The perpetuation of these unreliable and misleading practices is facilitated by courts' reluctance to assert their role as "gatekeepers" with regard to such expert testimony.

## 2. *Misuse of Diagnostic Labels*

A core role of the diagnoses in SVP proceedings is to explain the basis for an expert's overall assessment that the respondent is likely to commit future acts of sexual violence. This stems from the statutory requirement, given central importance in the Supreme Court's due process analysis in *Hendricks* and *Crane*, that the defendant have an identifiable "mental disorder"<sup>442</sup> or "mental abnormality."<sup>443</sup> Although paraphilia diagnoses have a limited role in the clinical setting and, as stressed above, are highly controversial within the field of psychiatry generally, they enjoy broad acceptance in courts conducting SVP proceedings.<sup>444</sup> As other commentators have noted, there is an established history of presenting psychiatric evidence of specific forms of psychopathology in support of involuntary commitment—for example, schizophrenia and other disorders characterized by psychosis.<sup>445</sup> SVP commitment, by contrast, is generally based upon diagnoses, such as pedophilia and ASPD, that are "among the most controversial, and that have the most questionable validity, of all the mental disorders in the *DSM*."<sup>446</sup> As discussed above, the *DSM*'s language regarding paraphilias is itself the product of negotiation and public relations management, and is subject to a range of interpretations.

If used in a manner consistent with the *DSM* editors' intentions, the diagnosis of a "paraphilia" addresses only the (abnormal) circumstances that occasion sexual arousal; it does not indicate an impaired ability to refrain from acting on the desires involved. Because existing *DSM* diagnoses have limited use for identifying the reference of the forensic term "sexual predator," some experts testifying on behalf of states in SVP proceedings offer alternative presumptively "diagnostic" labels that either strain the *DSM* criteria's language beyond its intended clinical application or fall outside of the diagnostic scheme entirely.<sup>447</sup> In so doing, as in *McGee*, the experts essentially pathologize past criminal conduct.

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442. *McGee*, 593 F.3d at 573.

443. *Id.* at 580-81.

444. *See supra* notes 282-338 and accompanying text; *see infra* notes 450-489 and accompanying text.

445. *See, e.g., Zander, supra* note 373, at 18-19.

446. *Id.* at 72.

447. EWING, *supra* note 34, at 24.

The questionable nature of invoking such strained diagnoses in prosecuting SVP cases is compounded when the catchall “NOS” (not otherwise specified) categories are invoked or when forensic experts dispense altogether with the DSM’s criteria.<sup>448</sup> With regard to NOS diagnoses in SVP proceedings, one commenter has observed: “Paraphilia NOS is a ‘proxy’ for the rejected diagnosis of paraphilic coercive disorder, and has offered legislators and mental health professionals carte blanche to invent criteria by which to deprive sex offenders of their freedom after they have completed their sentences.”<sup>449</sup>

The psychiatric validity of SVP diagnoses is put in further doubt by their inconsistent use in courts. A survey of the reports of psychiatric experts in twenty-eight SVP cases conducted by Dr. Allan Frances, one of the editors of DSM-IV, found that, while government experts usually gave an initial diagnosis of Paraphilia-NOS, defense experts usually did not.<sup>450</sup> Dr. Frances concludes that the diagnosis was, in his word, “justified” in only two of those cases whereas, in the other twenty-six cases, the respondents’ “sexual offenses had been opportunistic crimes forming part of a pattern of generalized criminal behavior, very often facilitated by substance intoxication.”<sup>451</sup> Government evaluators, Dr. Frances observes, seemed to base the Paraphilia-NOS diagnosis not on an overall pattern of behavior suggestive of fundamental pathology but only or primarily on the fact of prior conviction for sexual crimes.<sup>452</sup> Several other studies of psychiatric reports have also noted strong geographic variation in the rates at which various diagnoses (for example, paraphilia-NOS as compared to pedophilia) are used to support SVP petitions.<sup>453</sup> Variability of this kind casts further

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448. *Id.*; see also Allan Frances & Michael B. First, *Paraphilia NOS, Nonconsent: Not Ready for the Courtroom*, 39 J. AM. ACAD. PSYCHIATRY & L. 555, 555-60 (2011). The initial idea behind the “Paraphilia NOS” label or diagnosis—which is used almost exclusively in SVP proceedings—has been credited to Dennis Doren, the lead forensic evaluator in Wisconsin’s SVP program. Good & Burstein, *supra* note 84, at 27-28.

449. Allan Frances, *DSM-5 Rejects Coercive Paraphilia*, PSYCH. TODAY (May 26, 2011), <https://www.psychologytoday.com/blog/dsm5-in-distress/201105/dsm-5-rejects-coercive-paraphilia>.

450. Allan Frances, *My Review of 28 Sexually Violent Predator Cases*, PSYCH. TODAY (Mar. 29, 2012), <http://www.psychologytoday.com/blog/dsm5-in-distress/201203/my-review-28-sexually-violent-predator-cases>.

451. *Id.*

452. *Id.*

453. See, e.g., Shan Jumper et al., *Diagnostic Profiles of Civilly Committed Sexual Offenders in Illinois and Other Reporting Jurisdictions: What We Know So Far*, 56 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 838, 845 (2012) (finding that pedophilia was diagnosed in persons targeted for commitment under Illinois’s law at a “significantly higher

doubt on the independent reliability, or scientifically objective validity, of such diagnoses and has further fueled the significant ethical concerns within psychiatry about the forensic use of Paraphilia-NOS diagnoses.<sup>454</sup>

As seen in *McGee*, even where a court is made aware that an examiner's use of a psychiatric diagnosis is patently inconsistent with the DSM's language and commentary within the psychiatric field, the court is unlikely to reject the use of the diagnosis as a basis for satisfying the mental disorder or abnormality requirement for SVP commitment.<sup>455</sup> The *McGee* court squarely acknowledged that there was "heated professional debate" about using the diagnostic label Paraphilia NOS Nonconsent<sup>456</sup> and that McGee's position that "the consensus professional view that [such] . . . diagnosis is

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rate" (59%) than those in proceedings in Minnesota, Texas, Wisconsin, and Florida, that Paraphilia-NOS was diagnosed in Illinois more frequently (51%) than in Wisconsin (37.5%), and that fifty-six percent of sex offenders in SVP proceedings in Arizona have been diagnosed with Paraphilia NOS and nearly two-thirds with Pedophilia). The jurisdictions included in the study were: Illinois, Texas, Florida, Wisconsin, Washington, California, Arizona, and Minnesota. The study included all persons targeted for commitment since the "vast majority" of those detained for commitment under the statute are eventually committed. *Id.* at 842; see also Richard W. Elwood et al., *Diagnostic and Risk Profiles of Men Detained Under Wisconsin's Sexually Violent Person Law*, 54 INT'L. J. OFFENDER THERAPY & COMP. CRIMINOLOGY 187, 193 (2010) (concluding that pedophilia was diagnosed in Wisconsin at a higher rate than in Florida but at a lower rate than in Washington or Arizona); Julia E. McLawsen et al., *Civily Committed Sex Offenders: A Description and Interstate Comparison of Populations*, 18 PSYCHOL. PUB. POL. & L. 453, 461 (2012) (analyzing diagnostic trends under Nebraska's SVP law).

454. See, e.g., Allen Frances, *Rape, Psychiatry, and Constitutional Rights: Hard Cases Make for Very Bad Law*, PSYCHOL. TODAY (June 28, 2010), <https://www.psychologytoday.com/blog/dsm5-in-distress/201006/rape-psychiatry-and-constitutional-rights> ("The most disturbing turbulence at the boundary between psychiatry and the law is the misuse of a makeshift psychiatric diagnosis ('Paraphilia Not Otherwise Specified, nonconsent') to justify the involuntary, indefinite psychiatric commitment of rapists. This is a disguised form of preventive detention (often for life), a violation of due process, and an abuse of psychiatry."); see also First & Halon, *supra* note 314, at 444 ("We contend that, during the process of adjudication of SVP commitment trials, profound and avoidable errors are made by some mental health professionals who invalidly diagnose paraphilia, assert that there is volitional impairment based solely on the fact that the offender has a paraphilia diagnosis, and thus wrongly claim that the statutorily defined SVP commitment criteria are adequately addressed by the clinical diagnoses."); Good & Burstein, *supra* note 84, at 24-28 (criticizing the use of "fictitious mental disorders" by forensic evaluators testifying in SVP proceedings); Prentky et al., *supra* note 26, at 369 ("Force-fitting a diagnosis or creating a new DSM diagnosis to justify commitment is clearly unethical for psychologists.").

455. See generally Hamilton, *supra* note 22, at 40-51.

456. *McGee v. Bartow*, 593 F.3d 556, 579-81 (7th Cir. 2010).

invalid” is “not without support in the professional literature.”<sup>457</sup> It even noted that the lack of diagnostic standards for the label “results in poor diagnostic reliability.”<sup>458</sup> Nevertheless, the court denied McGee’s claim that his commitment, based upon such contested diagnoses, amounted to a violation of his due process rights.<sup>459</sup> In denying his claim, the court concluded that the fact that the use of the label found *some* support in the medical literature took it outside the realm of a diagnosis “empty of scientific pedigree” or “near-universal” in rejection.<sup>460</sup>

Several courts have faced similar questions about the admissibility of opinions that include diagnostic labels attached to the catchall “Paraphilia NOS.” In addition to the Paraphilia NOS-nonconsent label seen in *McGee* and other cases,<sup>461</sup> another such label created and used almost exclusively by prosecution experts in SVP proceedings is “paraphilia NOS, hebephilia,” a term used to indicate sexual interest in adolescents.<sup>462</sup> “Pedophilia,” under the DSM’s criteria, can only be applied to those who have persistent sexual interest in children under the age of fourteen.<sup>463</sup> Like “nonconsent,” the term “hebephilia” appears nowhere in the DSM, and there is no disorder recognized in the manual for sexual interest in teens.<sup>464</sup> In *United States v. Carta*,<sup>465</sup> the Court of Appeals for the First Circuit reversed a district court’s denial of a commitment petition brought under the Adam Walsh Act. The district court had ruled that “Paraphilia NOS-Hebephilia,” which was one of the labels for the respondent’s mental abnormality offered in support of the government’s petition, was not generally recognized as a

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457. *Id.* at 580.

458. *Id.*

459. *Id.* at 581.

460. *Id.*

461. *See, e.g.,* *Brown v. Watters*, 599 F.3d 602, 606, 612 (7th Cir. 2010) (reaching same conclusion in appeal raising same due process claim as in *McGee* where state’s testifying expert admitted that the “clinical indicators” he used to arrive at the paraphilia NOS-Nonconsent diagnosis did not appear in the DSM and were not accepted by any professional organization).

462. For critical and detailed examinations of the development and use of this label in SVP proceedings, see generally Allen Frances & Michael B. First, *Hebephilia Is Not a Mental Disorder in DSM-IV-TR and Should Not Become One in DSM-5*, 39 J. AM. ACAD. PSYCH. & L. 78 (2011); Karen Franklin, *Hebephilia: Quintessence of Diagnostic Pretextuality*, 28 BEHAV. SCI. & L. 751 (2010).

463. DSM-5, *supra* note 269, at 697 (the disorder is now referred to as “Pedophilic Disorder”).

464. Franklin, *supra* note 462, at 760-61.

465. *United States v. Carta*, 592 F.3d 34, 44 (1st Cir. 2010).

serious mental illness that could support an involuntary commitment.<sup>466</sup> The disorder was characterized by the government's testifying expert as a "sexual preference for young teens . . . till about age seventeen."<sup>467</sup> In reversing such ruling, the appeals court acknowledged that the DSM contains no reference to hebephilia or a sexual interest in teens but reasoned that the specific diagnosis offered in support of the commitment in that case was simply "Paraphilia NOS," which *does* appear in the DSM, and that the government's expert had used the term "hebephilia" as a way to describe the object of the respondent's fixation, namely adolescents.<sup>468</sup> It also held that, in any event, the "serious mental illness" requirement of the SVP statute "is not limited to either the consensus of the medical community or to maladies identified in the DSM."<sup>469</sup>

Most courts, when presented with testimony from a government witness applying a label that purports to be an expansion on the catchall Paraphilia-NOS as central evidence of the respondent's "mental illness or abnormality," have admitted and based commitments on such evidence. They have done so even where the respondent's expert directly challenged

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466. *United States v. Carta*, 620 F. Supp. 2d 210, 217 (D. Mass. 2009), *rev'd and remanded by* 592 F.3d 34 (1st Cir. 2010).

467. *Id.* (internal quotation marks omitted). Another judge in the District of Massachusetts also excluded expert testimony based upon a "hebephilia" diagnosis. *See United States v. Shields*, No. 07-12056-PBS, 2008 WL 544940, at \*2 (D. Mass. Feb. 26, 2008) (ruling that "hebephilia" could not in itself serve as a serious mental disorder for purpose of commitment under the Adam Walsh Act and that there was insufficient evidence of the applicability of Paraphilia-NOS in that case). However, that same judge later admitted evidence of a hebephilia diagnosis, based upon the appeals court opinion in *Carta*. *See United States v. Wetmore*, 766 F. Supp. 2d 319, 331 (D. Mass. 2011) (basing commitment, in part, on expert testimony of "paraphilia not otherwise specified, characterized by hebephilia").

468. *Carta*, 592 F.3d at 41. On remand, *Carta* was committed after a seven-day trial. *United States v. Carta*, No. 07-12064-PBS, 2011 WL 2680734, at \*25 (D. Mass. July 7, 2011). The district court's ruling was affirmed on appeal. *United States v. Carta*, 690 F.3d 1, 8 (1st Cir. 2012).

469. *Carta*, 690 F.3d at 4; *see also United States v. Caporale*, 701 F.3d 128, 136-37 (4th Cir. 2012) (adopting reasoning in the First Circuit's 2010 *Carta* opinion). By contrast, while the court in *United States v. Neuhauser* admitted testimony that the respondent should be committed based upon a diagnosis of hebephilia, it later concluded that, in light of the fact that "a large number of clinical psychologists believe [it] is not a diagnosis at all, at least for forensic purposes," it was "inappropriate" to base a commitment upon such diagnosis. No. 5:07-HC-2101-BO, 2012 WL 174363, at \*2 (E.D.N.C. Jan. 20, 2012). The court also observed in its opinion: "It is important to note that Mr. Neuhauser's sexual orientation toward pubescent boys, which he openly admitted in his testimony is, standing alone, insufficient to justify his civil commitment under the Adam Walsh Act." *Id.* at \*3.

the scientific basis for using such a label and testified about the considerable controversy about it within psychiatry.<sup>470</sup> One New Jersey Superior Court opinion noted that the state's expert had acknowledged that the Paraphilia-NOS diagnosis is used by examiners "in order to code for rape or coercive or non-consent sex"; the commitment was nonetheless affirmed on appeal.<sup>471</sup> Some courts adopt the reasoning in *Carta*: the fact that "Paraphilia-NOS" itself is in the DSM (albeit without criteria established or confirmed by research or field trials) is sufficient to permit a prosecution expert to claim any form of persistent sexual interest *not* described in the DSM as appropriately falling under that catchall label.<sup>472</sup>

As noted earlier, some prosecutors have attempted to meet the "mental disorder or abnormality" requirement of an SVP statute with a diagnosis of Antisocial Personality Disorder (ASPD),<sup>473</sup> and respondents frequently challenge such use under the holding and analysis in *Foucha*.<sup>474</sup> For example, in *Brown v. Watters*, a federal court habeas case brought by a man committed under Wisconsin's SVP law, the respondent presented expert testimony to challenge the ASPD diagnosis used by the state's expert witness.<sup>475</sup> Specifically, his forensic psychiatrist testified that ASPD is a "circular diagnosis" that is "descriptive of many criminals, but doesn't really tell [an evaluator] much," and that "the psychiatric profession does not generally view individuals with ASPD 'as people who have serious difficulty in controlling their behavior.'"<sup>476</sup> The district and appeals courts concluded that, as with the controversies regarding paraphilias, a fact finder

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470. See, e.g., *In re Hutchcroft*, No. 11-1838, slip op. at \*2-3 (Iowa Ct. App. Oct. 31, 2012); *New York v. Shannon S.*, 980 N.E.2d 510, 512-15 (N.Y. 2012); *In re Lieberman*, 955 N.E.2d 118, 134-35 (Ill. App. Ct. 2011); *In re A.M.*, 2010 ND 163, ¶¶ 8-14, 787 N.W.2d 752, 756-58; see also *Lieberman v. Kirby*, No. 10 C 2570, 2011 WL 6131176, at \*6 (N.D. Ill. 2011); cf. *United States v. Abregana*, 574 F. Supp. 2d 1145, 1159 (D. Haw. 2008) (concluding that paraphilia NOS-hebephilia is a mental disorder but was not a "serious mental disorder" in the respondent's case for purposes of commitment under the Adam Walsh Act).

471. *In re D.X.B.*, 2006 WL 488641, slip op. at 4 (N.J. Super. Ct. App. Div. Mar. 2, 2006); see also *United States v. Graham*, 683 F. Supp. 2d 129, 141-46 (D. Mass. 2010) (noting that, notwithstanding the significant controversy regarding the validity of the diagnosis "Paraphilia NOS: nonconsent," it could be an appropriate diagnosis in some cases).

472. See, e.g., *Shannon S.*, 980 N.E.2d at 514; *In re Hutchcroft*, No. 11-1838, slip op. at \*3.

473. See *supra* notes 372-383 and accompanying text.

474. See, e.g., *Adams v. Bartow*, 330 F.3d 957, 961 (7th Cir. 2003).

475. *Brown v. Watters*, 599 F.3d 602, 614 (7th Cir. 2010).

476. *Id.* at 607 (alteration in original).

may consider such differing views when determining the weight to be assigned to the diagnosis, but the existence of debate within the psychiatric community does not itself provide a basis to exclude a diagnosis.<sup>477</sup>

Courts do differ, however, in their treatment of ASPD diagnoses as bases for SVP commitment. For example, a federal district court judge in Massachusetts rejected the use of ASPD as the predicate mental disorder in an SVP case brought under the Adam Walsh Act. In *United States v. Wilkinson*, the court denied the Government's petition (the respondent was nearing the end of a sixteen-year sentence for being a felon in possession of a firearm, and two of his sex crimes had occurred twenty-five years prior or longer) and concluded: "The government has not proven that Antisocial Personality Disorder alone ever causes a person to have serious difficulty in controlling his conduct. In essence, the evidence indicates that individuals with severe forms of that disorder may often make unlawful choices, but they are able to control their conduct."<sup>478</sup> Significantly here, the court had conducted a careful review of the literature regarding ASPD and SVP proceedings and concluded that there was little support for an SVP commitment on that diagnosis alone, without some additional finding of a sexual disorder indicating limited volitional control.<sup>479</sup> Indeed, given that studies estimate a large majority of the prison population at any given time could be diagnosed with ASPD, using ASPD as the sole predicate diagnosis would violate the limitations required in *Crane* that the individual subject to the SVP commitment not be a "typical recidivist" but someone with an identifiable pathology affecting volitional control of sexual violence.<sup>480</sup>

Where a government expert in an SVP proceeding bases an opinion on a DSM paraphilia diagnosis such as pedophilia, notwithstanding the DSM editors' clarifying statements to the contrary, he or she often bases such diagnoses largely upon a respondent's past criminal behavior or other

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477. *Id.* at 612-14. The Seventh Circuit also concluded that the respondent had misread the holding on *Foucha* and that in any event *Crane* provided the key authority on the question of the adequacy of a diagnosis in an SVP commitment proceeding. *Id.* at 613. Mr. Brown was also unsuccessful on his claim that the state should be judicially estopped from using ASPD as a basis for commitment where state law precludes a criminal defendant from using the diagnosis as a basis for an insanity defense. *Id.* at 615-16.

478. 646 F. Supp. 2d 194, 196 (D. Mass. 2009).

479. *Id.* at 202-08; accord *State v. Donald DD.*, 21 N.E.3d 239, 249-51 (N.Y. 2014) (holding that an SVP commitment may not be based solely upon a history of sexual crimes and a diagnosis of ASPD because the diagnosis "establishes only a general tendency toward criminality, and has no necessary relationship to a difficulty in controlling one's sexual behavior").

480. *Kansas v. Crane*, 534 U.S. 407, 413 (2002); Prentky et al., *supra* note 26, at 368.

conduct rather than (or even in the absence of) evidence of persistent, intense urges or fantasies.<sup>481</sup> In these situations, “legal criteria for a crime and the psychiatric criteria for mental disorder tend to converge,” which runs counter to the DSM editors’ caution that social deviance in itself should not be thought to constitute a mental disorder.<sup>482</sup> The editors of DSM-IV attempted to limit the forensic implications of the paraphilias by stating in an editorial that assigning a diagnosis based solely on a person’s criminal history was incorrect: “Defining paraphilia based on acts alone blurs the distinction between mental disorder and ordinary criminality. Decisions regarding possible lifelong psychiatric commitment should not be made based on a misreading of a poorly worded DSM-IV criterion item.”<sup>483</sup> As discussed below, the editors’ recommendation that this confusion be alleviated through text revisions in the DSM-5 went unheeded.<sup>484</sup>

Aside from the DSM editors’ cautionary statements, there is a significant additional reason to question testifying experts’ diagnostic impressions using labels such as ASPD or Paraphilia-NOS in SVP proceedings. The results of studies of “inter-rater reliability” (the likelihood that two experts will arrive at the same diagnosis when evaluating the same offender) in the SVP context are unsettling. A study of evaluators applying DSM criteria to those identified for commitment under Florida’s SVP law revealed a reliability level in the “poor” range; this result was consistent with earlier studies of SVP evaluators.<sup>485</sup> The author of the Florida study attributes the

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481. Prentky et al., *supra* note 26, at 368.

482. Wakefield, *supra* note 297, at 202. The practice of basing diagnoses of paraphilia solely on past criminal behavior has met with mixed responses from courts, generally depending upon the extent to which the defense expert convincingly explains the error in interpretation and application of the DSM criteria or upon whether or not the court, for whatever reasons, exercises discretion in following the DSM. *See, e.g.*, United States v. Springer, 715 F.3d 535, 546-47 (4th Cir. 2013) (affirming dismissal of SVP petition despite testimony of government experts that respondent had pedophilia based upon his prior sexual acts with children).

483. Michael B. First & Allen Frances, *Issues for DSM-V: Unintended Consequences of Small Changes: The Case of Paraphilias*, 165 AM. J. PSYCHIATRY 1240, 1240 (2008), available at [http://ajp.psychiatryonline.org/doi/abs/10.1176/appi.ajp.2008.08030361?url\\_ver=Z39.88-2003&rft\\_id=ori%3Arid%3Aacrossref.org&rft\\_dat=cr\\_pub%3Dpubmed](http://ajp.psychiatryonline.org/doi/abs/10.1176/appi.ajp.2008.08030361?url_ver=Z39.88-2003&rft_id=ori%3Arid%3Aacrossref.org&rft_dat=cr_pub%3Dpubmed); *see also* Frances, *DSM-5 Writing Mistakes Will Cause Great Confusion*, *supra* note 322 (noting that the use of “or” in the DSM-IV-TR B Criterion is his “greatest regret” about that edition because “[t]his one stupid slip contributed to the unconstitutional preventive detention of thousands of sex offenders”).

484. *See infra* notes 610-625 and accompanying text.

485. Jill S. Levenson, *Reliability of Sexually Violent Predator Civil Commitment Criteria in Florida*, 28 L. & HUMAN BEHAV. 357, 363-64 (2004).

findings both to “[e]valuator bias” and, more significantly, to the fact that “practitioners are faced with diagnostic criteria that contradict both empirical research and clinical conceptualization.”<sup>486</sup> Similarly, the authors of a 2013 study of 375 SVP evaluations conducted in New Jersey found low reliability, that is, only “poor to fair agreement” among clinicians as to the presence of the paraphilias and other disorders on which the commitments were based.<sup>487</sup> The authors remarked that such high levels of inconsistency are a “widespread issue” across states and diagnostic categories.<sup>488</sup> What one commentator calls the DSM’s “idiosyncrasies and shortcomings” have a significant impact on the reliability of expert opinion offered in SVP proceedings and, thereby, on the justification of the indefinite commitment of respondents.<sup>489</sup>

### 3. Basing Opinions on Records and Inadmissible Evidence

The opinions of the prosecution experts who testified in *McGee* were not derived from methods and sources of information generally associated with sound and reliable medical assessments. The experts testified as to their diagnostic opinions of Mr. McGee and their assessments of his volitional impairment solely on the basis of information compiled and furnished to them by government attorneys without ever having examined the respondent.<sup>490</sup> Such practices are common in SVP proceedings, often because the respondent refuses to be examined.<sup>491</sup> Government experts, in such cases, typically review criminal investigation reports and alleged victims’ statements<sup>492</sup> (including information that would be inadmissible in

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486. *Id.* at 366. Other studies have generally documented the extent to which diagnostic assessment by mental health professionals exhibits unconscious biases and the operation of other cognitive mechanisms that can lead to distorted opinions. *See generally* CAROL TAVRIS & ELLIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS 97-126 (2007).

487. Anthony D. Perillo et al., *Examining the Scope of Questionable Diagnostic Reliability in Sexually Violent Predator (SVP) Evaluations*, 37 INT’L. J. L. & PSYCHIATRY 190, 193-95 (2014).

488. *Id.* at 196.

489. Levenson, *supra* note 485, at 366.

490. *McGee v. Bartow*, 593 F.3d 556, 559-60 (7th Cir. 2010).

491. Colleen D. Duffy, *The Admissibility of Expert Opinion and the Bases of Expert Opinion in Sex Offender Civil Management Trials in New York*, 75 ALB. L. REV. 763, 774 (2012).

492. *See* Rebecca L. Jackson et al., *The Adequacy and Accuracy of Sexually Violent Predator Evaluations: Contextualized Risk Assessment in Clinical Practice*, 3 INT’L J. FORENSIC MENTAL HEALTH 115, 125 (2004).

a criminal proceeding<sup>493</sup>) and utilize these accounts of *conduct* to identify “symptoms.”<sup>494</sup> Other mental health professionals have condemned such practice by forensic psychiatrists as a specific violation of professional ethics.<sup>495</sup>

The *McGee* panel placed great stock in the DSM’s recognition of the role of “clinical judgment” in cases of mental disorder where precise DSM criteria are not met, such as when clinicians apply an “NOS” (i.e., not otherwise specified) label. One medical dictionary defines “clinical judgment” as “the application of information *based on actual observation* of a patient combined with subjective and objective data that lead to a conclusion.”<sup>496</sup> What the panel in *McGee* failed to note was that the two testifying forensic experts had in fact never had the opportunity to use their “clinical judgment” when arriving at their conclusions about McGee’s condition, including what they testified as to his diagnosis and volitional impairment, since they had never observed the “patient.” Rather, they had simply reviewed evidence acquired by others, namely, law enforcement officials, and had drawn their conclusions therefrom. Here again, the testimony of experts in *McGee* was hardly unique for SVP proceedings. A survey of evaluation methods by forensic experts in such proceedings found that “documentation” of that kind, that is, police reports, treatment records, and institutional records, were the most important sources they considered in assessing respondents for SVP commitment.<sup>497</sup>

Because of evidence rules, such as Federal Rule of Evidence 703, that permit an expert to base an opinion on inadmissible facts and data where others in the field reasonably rely on such sources, the use of inadmissible evidence to arrive at an opinion does not in itself generally lead to the exclusion of such opinion at trial.<sup>498</sup> The evidence rules can also, in some instances, permit such otherwise inadmissible facts and data themselves to be admitted to explain or support an opinion.<sup>499</sup> However, one appellate

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493. See, e.g., *State v. Mark S.*, 87 A.D. 3d 73, 78-79 (N.Y. App. Div. 2011); see also *Duffy*, *supra* note 491, at 763.

494. See *Hamilton*, *supra* note 22, at 576-77.

495. *Prentky et al.*, *supra* note 26, at 370.

496. *MOSBY’S MEDICAL DICTIONARY* 380 (9th ed. 2013) (emphasis added).

497. Rebecca L. Jackson & Derek T. Hess, *Evaluation for Civil Commitment of Sex Offenders: A Survey of Experts*, 19 *SEXUAL ABUSE* 425, 431 (2007).

498. FED. R. EVID. 703.

499. *Id.* (“[I]f the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.”). See generally *Duffy*,

court, applying principles of due process because the proceeding “may result in a serious deprivation of the defendant’s interest in liberty,” has specifically held that an expert witness for the state in an SVP proceeding could not base his or her opinion upon inadmissible hearsay even if it would otherwise be admissible under rules similar to FRE 703.<sup>500</sup> Rather, the court stated, “because hearsay can permeate the evidence used to commit a sex offender, a victim’s hearsay statements in police reports or presentence reports must have special indicia of reliability to satisfy due process” before they can serve as the basis for the expert’s opinion.<sup>501</sup>

In some SVP proceedings, the information about the respondent’s past criminal activity provided to expert witnesses, and even to the fact finder, is never tested through the adversarial process in a criminal trial. For example, in *McGee*, the predicate *conviction* on which the SVP petition against the respondent was based dated from 1987, more than twelve years before the trial on petition.<sup>502</sup> However, at the trial, the state also offered evidence of alleged conduct that was the basis of his probation violations, even though McGee had never been convicted for such conduct.<sup>503</sup> Other courts have also permitted evidence of uncharged alleged criminal conduct to be admitted and considered as part of SVP proceedings.<sup>504</sup> For example, a Washington appeals court affirmed the commitment of a man who had been convicted of three rapes where the trial court in his commitment hearing had admitted the testimony of a “criminal justice professor” who had concluded, based upon an analysis of uncharged crimes bearing the respondent’s modus operandi in a database, that the man *could have* committed an additional seventeen unsolved sexual assaults.<sup>505</sup>

Ironically, although courts permit experts to base opinions regarding dangerousness on criminal conduct alone, at least one court noted a *lack* of criminal conduct (specifically, violence against persons) is insufficient to demonstrate that a person does *not* pose a high risk of committing acts of

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*supra* note 491 (reviewing the application of the “professional reliability” exception to the hearsay rule in SVP proceedings in several states).

500. *In re A.M., Jr.*, 797 N.W.2d 233, 261 (Neb. 2011).

501. *Id.*; see also *Jenkins v. State*, 803 So. 2d 783, 786-87 (Fla. Dist. Ct. App. 2001) (holding that SVP commitment cannot be based upon hearsay evidence).

502. *McGee v Bartow*, 593 F.3d 556, 558-59 (7th Cir. 2010).

503. *Id.* at 559.

504. See, e.g., *In re Coe*, 250 P.3d 1056, 1067-68 (Wash. Ct. App. 2011); *In re Williams*, 253 P.3d 327, 337 (Kan. 2011); *Boyce v. Commonwealth of Virginia*, 691 S.E.2d 782, 785-86 (Va. 2010); *In re Miller*, 210 P.3d 625, 633 (Kan. 2009).

505. *In re Coe*, 250 P.3d at 1060-65.

violence in the future. In one recent SVP case, *United States v. Volungus*,<sup>506</sup> the primary predicate offense was possession of child pornography; there was no evidence that the defendant had actually molested any children.<sup>507</sup> The respondent acknowledged at his SVP trial that he was attracted to children, and the evidence showed that he was obsessed with child pornography.<sup>508</sup> At trial and on appeal, he challenged the Government's expert's conclusion that his diagnosis of pedophilia supported a finding that he posed a high risk for engaging in molestation.<sup>509</sup> Specifically, he argued (and offered expert testimony in support) that, despite his strong sexual attraction to children, he had in fact exercised control over acting on his urges by *not* committing acts of molestation.<sup>510</sup> The trial and appeals courts rejected such arguments and concluded that his pedophilia and pornography use were evidence of a "trajectory" that "would cause him serious difficulty in refraining from child molestation in the future."<sup>511</sup> Such inferences run counter to the research findings discussed earlier regarding the lack of any clear causal links between attraction to children and engaging in acts of sexual molestation against them.

The disturbing trends seen in the methods used by experts testifying on behalf of the government in SVP cases reflect that they have no scientific foundation on which to assess "volitional impairment," and therefore necessarily base their conclusions largely on the respondents' history of criminal behavior. Indeed, courts apply little scrutiny to an expert's assessment of the respondent's volitional impairment as such.<sup>512</sup> Where

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506. *United States v. Volungus*, 730 F.3d 40 (1st Cir. 2013).

507. *Id.* at 42-45. The respondent had been convicted ten years earlier of "attempted molestation" for having online contact with someone he thought was a fourteen-year old girl, but was in fact the fictional creation of an undercover FBI agent. *Id.* at 43.

508. *Id.* at 45-46.

509. *Id.*

510. *Id.* at 48-49.

511. *Id.* at 48. The appeals court conflated an "inability to control attraction," which is not sufficient to support an SVP commitment under *Hendricks-Crane*, and an inability to control one's behavior. *See id.* at 47-49. Those on a gluten-free diet may have an uncontrolled attraction to chocolate cake, yet manage to avoid eating it based on concerns about the adverse consequences of doing so.

512. For example, the New York Appellate Division upheld an SVP commitment against a challenge based on insufficient evidence where the state's expert opined that the respondent had difficulty controlling his behavior because he was aware that he "had a problem" with exposing himself to people yet continued to do so. *State v. Richard VV.*, 74 A.D.3d 1402, 1403-04 (N.Y. App. Div. 2010). Curiously, the forensic expert also considered the fact that the respondent met most of the diagnostic criteria for ASPD to be further indication that he was unable to control his behavior. *Id.* However, there is nothing in that

experts rely primarily upon law enforcement or prosecution files, such as witness statements or criminal histories, to render an opinion about volitional impairment, they engage in essentially the same process and use the same information as ordinary lay fact finders do when they evaluate evidence offered by the state at trial. This raises the question of what “helpful” opinion testimony such experts actually bring to the courtroom and, conversely, whether they are simply doing the fact finder’s job (albeit from an arguably biased perspective) under the guise of offering their “expertise.”<sup>513</sup>

Given the variability and unreliability of expert testimony in SVP proceedings, it is not surprising that, overall, mental health professionals’ predictions of recidivism by SVPs appear to be no more accurate than those made by laypersons on the basis of general knowledge. Empirical studies confirm what psychiatrists themselves have long stated to be the case: their predictions of recidivism by SVPs are little better than chance.<sup>514</sup> A 2004 study concluded that experts were accurate in predicting future sexual violence about one-half of the time.<sup>515</sup> This study also confirmed many other concerns about the reliability of expert opinion in SVP cases, such as the emotional impact of reviewing victims’ statements and other information in criminal records on the development of an evaluator’s opinion and the existence of an overall bias favoring “locking up” prior offenders regardless of the actual risk they pose.<sup>516</sup>

These findings are consistent with prior studies of clinical judgment that have long established that, due to the operation of a range of cognitive biases, such judgment, even by intelligent, ethical, and well-trained

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diagnosis that is associated with volitional impairment. *See also* Eric S. Janus, *Sex Offender Commitments: Debunking the Official Narrative and Revealing the Rules-in-Use*, 8 STAN. L. & POL’Y REV. 71, 83-84 (1997).

513. *See* FED. R. EVID. 702 (“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if . . . the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue . . .”).

514. Jackson et al., *supra* note 492, at 124; *see also* Erica Beecher-Monas & Edgar Garcia-Rill, *Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World*, 24 CARDOZO L. REV. 1845, 1869-71 (2003).

515. Jackson et al., *supra* note 492, at 124, 127.

516. *Id.* at 125. Another factor in the poor results was the fact that most of the terms in the applicable legal standards were not sufficiently “operationalized,” meaning that the specific terms are poorly defined (if they are defined at all). *Id.*

professionals, is significantly inaccurate.<sup>517</sup> For example, where a professional fails to grasp the complexity of the circumstances that can lead to various outcomes, the degree of confidence she feels in her conclusion, rather than being a measure of its accuracy, may indicate just the opposite.<sup>518</sup> Also, it appears that the very act of predicting the likelihood of a rare event, because it involves visualizing the possibility of that event, leads to overestimating the risk of its occurrence.<sup>519</sup> As psychologist Daniel Kahneman has observed: “Errors of prediction are inevitable because the world is unpredictable,” and yet “we resist our limited ability to predict the future.”<sup>520</sup> We are easily misled by both hindsight bias (i.e., we overestimate the extent to which we can identify causal relationships but base decisions on the assumption that we have identified them correctly) and by a “readiness to ascribe propensity to behavior” (i.e., we see behaviors that may be strongly affected by context as reflections of underlying inclinations).<sup>521</sup> Both of these general cognitive tendencies can influence the thinking of testifying experts, and both can influence the way fact finders weigh expert testimony in making SVP commitment determinations.

#### 4. Using Actuarial Tools

Expert opinion evidence offered by prosecutors in SVP cases is not always based on diagnostic assessment alone. The appeals court opinion in *McGee* notes that both of the State’s experts also used actuarial risk assessment (ARA) instruments to arrive at their conclusions about the respondent’s specific *degree* of risk of recidivism.<sup>522</sup> Because *McGee* did not challenge such use on appeal, the description of their testimony on the role of such tools is very limited.<sup>523</sup> Dr. Marsh testified regarding the scores she assigned to *McGee* under the three tools she used to arrive at her conclusion, and she indicated that “subjects with scores similar to Mr. *McGee*’s in each of these instruments reoffended at rates of between forty-

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517. DANIEL KAHNEMAN, THINKING, FAST AND SLOW, 238-42 (2011); TAVRIS & ARONSON, *supra* note 486, at 97-126.

518. KAHNEMAN, *supra* note 517, at 212.

519. *Id.* at 333.

520. *Id.* at 217-20.

521. *Id.* at 199-201.

522. *McGee v. Bartow*, 593 F.3d 556, 559-60 (7th Cir. 2010).

523. *Id.*

eight and fifty-four percent over a six- to fifteen-year period following release.”<sup>524</sup>

The *McGee* opinion does not specify which ARA tools were used or described in testimony by the testifying experts, but they were likely among those commonly used by forensic examiners offering evidence in support of SVP commitment. The appropriateness of the use of tools such as the “Static-99,” Rapid Risk Assessment for Sexual Offense Recidivism (RRASOR), or Sex Offender Risk Appraisal Guide (SORAG) as a basis for expert opinions in support of SVP commitment is an unsettled question in the courts.<sup>525</sup> Some forensic examiners have advocated greater use of ARA tools, which they characterize as especially objective, to address the problems of bias and low inter-rater reliability accompanying clinical judgment and diagnostic assessment described above.<sup>526</sup> A growing number of experts use risk-prediction actuarial tools to inform their opinions and to support their testimony about the risk of recidivism, the “final and most nebulous” part of the SVP analysis,<sup>527</sup> posed by a respondent. One study of evaluation methods found that the vast majority of forensic evaluators used one or more tools as part of the assessment process.<sup>528</sup> The guidelines issued by the Association for the Treatment of Sex Offenders require use of such tools, although no single tool has emerged as the preferred.<sup>529</sup>

These instruments are generally developed from studies of sex offenders that isolate a number of specific “factors,” including the number of sex offense convictions and characteristics of the individual’s victims (age, gender, and relationship to the individual), associated with those who recidivate.<sup>530</sup> Those factors are assembled into what are essentially checklists. Many of the instruments can be completed without evaluating the individual but simply from reviewing records, including court records. The results indicate what percentage of those individuals in the study who share the offender’s factors went on to commit new crimes (sometimes identified by arrests rather than convictions). After the factors are entered, the tool yields a score that places the individual in a risk range, such as

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524. *Id.* at 560.

525. Melissa Hamilton, *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws*, 83 TEMP. L. REV. 697, 721-25 (2011) (explaining how STATIC-99 and RRASOR were developed and are administered).

526. Prentky et al., *supra* note 26, at 372-73.

527. Jackson & Hess, *supra* note 497, at 428, 434 (noting that 95.1% of respondents used such instruments and 73.2% listed them as “essential” to the evaluation process).

528. *Id.* at 434.

529. *Id.* at 426.

530. EWING, *supra* note 34, at 36-38.

“high risk,” and may offer a percentage of likelihood of reoffending.<sup>531</sup> Thus, the tools are not psychological tests,<sup>532</sup> nor are they predictors of an individual’s *specific* likelihood to re-offend.<sup>533</sup> The expert witness testifies that the actuarial analysis of objective factors places the respondent at a specific level of risk of reoffending,<sup>534</sup> although such a conclusion is not keyed to any legal criteria.<sup>535</sup> The tools also shed no light on the questions of abnormality or volitional impairment.

Some commentators have advocated for the complete replacement of clinical judgment with the use of actuarial instruments, given results of studies suggesting this change would yield improved accuracy.<sup>536</sup> Noted behavioral psychologist Paul Meehl argued decades ago that clinical judgment is inferior to actuarial analysis,<sup>537</sup> and other researchers have replicated and reinforced his findings many times since his initial studies.<sup>538</sup> Empirical studies have shown that ARAs are specifically better predictors of recidivism than “clinical judgment” alone,<sup>539</sup> a standard that does not seem to be all that difficult given the exceptionally poor ability of forensic examiners to predict recidivism.<sup>540</sup>

However, as other commentators have stressed, there are reasons to approach the use of ARAs in SVP proceedings with considerable caution. The use of ARAs is highly controversial among legal and mental health professionals, and critics of ARAs have noted their limited effectiveness.<sup>541</sup>

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531. Jackson & Hess, *supra* note 497, at 439.

532. Indeed, one study of evaluation procedures noted how less frequently psychological testing is used in the SVP context as compared with other forensic evaluations, such as for insanity and competency. *Id.* at 437-38.

533. United States v. Hall, 664 F.3d 456, 464 (4th Cir. 2012).

534. See, e.g., Lieberman v. Kirby, No. 10 C 2570, 2011 WL 6131176, at \*3-6 (N.D. Ill. Dec. 8, 2011).

535. Jackson & Hess, *supra* note 497, at 439.

536. Beecher-Monas & Garcia-Rill, *supra* note 514, at 1871. See generally Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 AM. CRIM. L. REV. 1443 (2003).

537. PAUL E. MEEHL, CLINICAL VERSUS STATISTICAL PREDICTION: A THEORETICAL ANALYSIS AND A REVIEW OF THE EVIDENCE 94-95 (1954).

538. Janus & Prentky, *supra* note 536, at 1455.

539. Daniel A. Krauss et al., *Dangerously Misunderstood: Representative Jurors’ Reactions to Expert Testimony on Future Dangerousness in a Sexually Violent Predator Trial*, 18 PSYCHOL., PUB. POL’Y & L. 18, 20 (2012); Janus & Prentky, *supra* note 536, at 1455-58; Prentky et al, *supra* note 26, at 372.

540. Such findings are consistent with studies of accuracy of many different kinds of predication across disciplines. See generally KAHNEMAN, *supra* note 517, at 222.

541. Krauss et al., *supra* note 539, at 20; Saleh et al., *supra* note 344, at 366.

One of the biggest shortcomings of the Static-99 and similar instruments is that they assess risk based on a series of “static” factors that do not change (such as the age of first offense, characteristics of the victims etc.) over an offender’s lifetime.<sup>542</sup> They therefore may fail to account for dynamic factors such as life circumstances and participation in treatment, because the instruments are based on the assumption that one’s risk never changes, even if one makes choices to address the underlying propensity.<sup>543</sup> As a result, other than perhaps a decrease due to aging, a person’s score will not change significantly. A person’s score could be the same the day of release from incarceration and ten years later, even after leading an entirely law-abiding life during the interim.<sup>544</sup> Such an approach to risk assessment fails to take into account not only the passage of time, but also the events that occurred (or did not occur) during such time, thus rendering any such assessment severely liable to inaccuracy.<sup>545</sup> Some instruments do not even consider the mitigating effect of age on risk of recidivism.<sup>546</sup> A few scholars have advocated for a uniform use of “dynamic risk factors” before a final risk assessment is made using ARAs,<sup>547</sup> although research has not yet suggested how best to integrate such factors.<sup>548</sup>

The SVP laws and the call for risk assessment as the core question in the proceedings have spawned a cottage industry of developing new instruments, each of which promises to be more precise than those developed (and in use) before it.<sup>549</sup> However, no consensus in the field has emerged regarding which test is most applicable and appropriate in the SVP commitment setting,<sup>550</sup> or for predicting dangerousness generally,<sup>551</sup> and

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542. Tamara Rice Lave, *Controlling Sexually Violent Predators: Continued Incarceration at What Cost?*, 14 NEW CRIM. L. REV. 213, 240-45 (2011); see also Hamilton, *supra* note 525, at 724-25.

543. Krauss et al., *supra* note 539, at 20.

544. For an example of how the use of an ARA can have an impact on risk assessment of a person who commits a crime at a young age, see Nora Hertel, *Sex Offender Awaits Second Chance*, WISCONSIN WATCH (Feb. 4, 2014), <http://wisconsinwatch.org/2014/02/sex-offender-awaits-second-chance/>.

545. Prentky et al., *supra* note 26, at 378.

546. *Id.* at 375.

547. *Id.* at 383-85.

548. Good & Bursteiin, *supra* note 84, at 30.

549. Prentky et al., *supra* note 26, at 371-72; 2 FAIGMAN ET AL., *supra* note 401, § 11:28.

550. *Black v. Voss*, 557 F. Supp. 2d 1100, 1105-07 (C.D. Cal. 2008) (noting that respondent’s expert criticized the government’s experts for using the STATIC-99 test to assess risk for reoffending because that test addressed criminal activity, not sexual deviancy, and advocated use of the RRASOR test instead).

there are some sharp differences in opinion and approach among psychologists who have developed and used various instruments.<sup>552</sup> Many commonly used ARAs have been criticized for being unreliable. For example, the SVR-20 (at least as of 2000) used only broad categories of risk (high, medium, and low), and there were no inter-rater reliability rates for specific factors.<sup>553</sup> There is also no consensus what level of predictive validity is sufficient for the instruments to be considered a useful tool for predicting recidivism.<sup>554</sup>

ARAs, even at their best, can still be used poorly.<sup>555</sup> Although the instruments are ostensibly objective, the evaluators who administer them are not immune from common failings of human judgment and bias, and the concept of “risk” is itself a construct subject to different understandings.<sup>556</sup> A simple difference in how the outcome of a risk is presented, in terms of a probability versus a frequency, can affect how high a professional assesses the risk.<sup>557</sup> Also, the objective factuality of some of the individual factors considered in the instruments may not be as clear as initially assumed. For example, a factor such as participation in or compliance with treatment can be a complex question where there is limited access to treatment,<sup>558</sup> where the treatment is cursory, or where the treatment requires disclosure or other actions by the committed person that could lead to lengthier commitment in the absence of Fifth Amendment protections. The use of instruments or set “factors” can also lead to “cherry picking” the factors to be considered in the analysis, which can also lead to skewed results.<sup>559</sup> Some scholars suggest that experts’ practice of making individualized “adjustments” to scores may be little more than “dressing up

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551. M. Neil Browne & Ronda R. Harrison-Spoerl, *Putting Expert Testimony in Its Epistemological Place: What Predictions of Dangerousness in Court Can Teach Us*, 91 MARQ. L. REV. 1119, 1198-1204 (2008).

552. Prentky et al., *supra* note 26, at 373-80.

553. Terence W. Campbell, *Sexual Predator Evaluations and Phrenology: Considering Issues of Evidentiary Reliability*, 18 BEHAV. SCI. & L. 111, 120-21 (2000).

554. Good & Burstein, *supra* note 84, at 34.

555. Janus & Prentky, *supra* note 536, at 1493-97.

556. Beecher-Monas & Garcia-Rill, *supra* note 514, at 1871.

557. Risks phrased in the form of the probable occurrence of specific events are evidently less “vivid” than ones phrased in the form of a frequency. KAHNEMAN, *supra* note 517, at 330 (“Experienced forensic psychologists and psychiatrists are not immune to the effects of the format in which risks are expressed.”).

558. Prentky et al., *supra* note 26, at 379.

559. *Id.* at 378-79; Good & Burstein, *supra* note 84, at 30-31 (arguing that ARAs for SVPs may be “systematically biased”).

clinical judgment with actuarial science.”<sup>560</sup> Given such problems, several scholars have suggested that the use of ARAs by examiners in SVP proceedings is unethical.<sup>561</sup>

Testimony based upon ARA tools has received a mixed reaction in the courts. Some courts resist admitting opinions based on such tools more than they resist admitting those based solely upon diagnostic impressions.<sup>562</sup> In at least one case, a court rejected the forensic expert testimony because the ARA employed failed to take into account events in the respondent’s life that had transpired since the “factors” used in the assessment.<sup>563</sup> Some courts are uncertain about how much weight is appropriate to give to the specific scores from such tests. For example, in *In re Williams*, a Kansas appeals court reversed an SVP commitment because the government’s expert had testified that the respondent’s score, which was lower than a 50% chance of reoffending, was too low to sustain such a commitment.<sup>564</sup> The Kansas Supreme Court reversed that ruling, however, arguing that there was other evidence to support a finding that the respondent was likely to engage in acts of sexual violence.<sup>565</sup> Finally, some courts have excluded testimony based on ARA results altogether because of concerns about unfair prejudice.<sup>566</sup>

Despite the shortcomings of ARAs, many courts have embraced the tools, seeing them as akin to psychological tests or as amounting to an objective predictor of a particular offender’s individual likelihood of re-offending.<sup>567</sup> In *United States v. Shields*, for example, the Court of Appeals for the First Circuit upheld a commitment order based upon expert testimony employing ARA tools even though the Government’s experts conceded such tools were only “moderate” predictors of recidivism and that there were significant reliability problems with the results of the tools used in that particular case (including, among other things, that the results were

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560. Prentky et al., *supra* note 26, at 380.

561. Campbell, *supra* note 553, at 128.

562. Krauss et al., *supra* note 539, at 37; Daniel A. Krauss & Nicholas Scurich, *Risk Assessment in the Law: Legal Admissibility, Scientific Validity, and Some Disparities Between Research and Practice*, 31 BEHAV. SCI & L. 215, 225-27 (2013).

563. *Commonwealth of Virginia v. Squire*, 685 S.E.2d 631, 632-33 (Va. 2009) (affirming dismissal of SVP petition despite expert testimony that actuarial tests placed the respondent in the highest risk category).

564. *In re Williams*, 214 P.3d 1225, slip op. at \*3 (Kan. Ct. App. 2009), *rev’d*, 253 P.3d 327 (Kan. 2011).

565. *In re Williams*, 253 P.3d 327, 338 (Kan. 2011).

566. Janus & Prentky, *supra* note 536, at 1487-92.

567. EWING, *supra* note 34, at 40-44.

based on data obtained entirely outside of the U.S.).<sup>568</sup> The appeals court concluded that it should be left to the fact finder to decide the weight given to such evidence.<sup>569</sup>

#### 5. *Sparse Use of Daubert-Frye Analysis*

As Allan Frances has implored: “SVP courts must insist on good science.”<sup>570</sup> In the 1923 case of *Frye v. United States*, the U.S. District Court applied a new admissibility standard for expert testimony, which was later widely adopted by state courts: judges must consider a theory’s “general acceptance” in the relevant scientific community before allowing its admission.<sup>571</sup> The U.S. Supreme Court’s landmark opinion in *Daubert v. Merrill Dow Pharmaceuticals*<sup>572</sup> requires a trial court to act as a “gatekeeper” with regard to the scientific evidence presented; the court must make its own determination of reliability of such evidence, based in part on general acceptance as well as on the presence of other indicators of “good science.”<sup>573</sup> The controversial nature of psychiatric diagnoses discussed above, combined with the significant liberty interest at stake in SVP proceedings, suggest that trial courts in such proceedings should exercise particular vigilance in the “gatekeeping” role. However, the case law reveals a significant abdication of this responsibility by the courts.<sup>574</sup>

Legal scholars vary widely in their opinions of the type of gatekeeping scrutiny that courts *should* afford to expert testimony by mental health professionals generally, and this range of legal opinion has implications for SVP cases. At one extreme, some commentators argue that psychiatry has little to offer courts in such cases. For example, Samantha Godwin has labeled psychiatry a “pseudoscience” that lacks sufficient reliability to be

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568. *United States v. Shields*, 649 F.3d 78, 89 (1st Cir. 2011).

569. *Id.* at 89-90. In that case, the trial court used an advisory jury, which concluded that there was insufficient evidence of likelihood of the respondent reoffending. *Id.* at 84. However, the court ultimately concluded that the Government had met its burden. *Id.* at 85.

570. Prentky et al., *supra* note 26, at 386.

571. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), *superseded by* FED. R. EVID. 702.

572. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

573. *Id.* at 590-95. One instance in which a court noted that expert testimony fell short of the *Frye* test and therefore could not serve as a basis for an SVP commitment is one of the very few reported opinions involving a female respondent. *In re Coffel*, 117 S.W.3d 116, 129 (Mo. Ct. App. 2003).

574. Alexander Scherr, *Daubert & Danger: The “Fit” of Expert Predictions in Civil Commitments*, 55 HASTINGS L.J. 1, 2-3 (2003).

considered at all in involuntary commitment hearings.<sup>575</sup> Other scholars have suggested that, while there may be some utility for mental health testimony in a range of legal contexts, diagnoses themselves should not generally be admitted.<sup>576</sup> Still other scholars suggest that standards for admissibility of expert evidence should be relaxed for mental health testimony and that courts should use an “informed speculation” approach, particularly for evidence offered by a criminal defendant to excuse criminal conduct.<sup>577</sup>

Courts as well are divided on how to apply *Daubert* and *Frye* when deciding whether to admit expert psychiatric opinions as evidence in SVP proceedings. Indeed, the *Daubert* opinion was not cited at all by the *McGee* court, despite McGee’s direct attack on the scientific basis of the state’s experts. The Washington Supreme Court addressed the question of the applicability of *Frye* to the admissibility of expert testimony shortly after enactment of its SVP law. In *In re Young*, the court rejected the respondent’s argument that the court should not have allowed the state’s expert to base an opinion on a diagnostic label that did not appear in the DSM.<sup>578</sup> Quoting a law review article by Alexander Brooks, the court reasoned:

The fact that pathologically driven rape, for example, is not yet listed in the DSM–III–R does not invalidate such a diagnosis. . . . What is critical for our purposes is that psychiatric and

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575. Samantha Godwin, *Bad Science Makes Bad Law: How the Deference Afforded to Psychiatry Undermines Civil Liberties*, 10 SEATTLE J. SOC. JUST. 647, 647 (2012). The most significant deficiency Godwin identifies is the lack of validity of the “somatic reality” of psychiatric diagnoses, since they are based entirely on symptomatology, not scientific testing. *Id.* at 662.

576. Daniel W. Shuman, *Persistent Reexperiences in Psychiatry and Law: Current and Future Trends for the Role of PTSD in Litigation*, in POSTTRAUMATIC STRESS DISORDER IN LITIGATION: GUIDELINES FOR FORENSIC ASSESSMENT 1, 7 (Robert I. Simon ed., 2d ed. 2003) (“Both *Daubert* and the DSM make clear that it is not appropriate to assume that a psychiatric diagnosis is relevant to, let alone dispositive of, an issue in a case.”); Daniel W. Shuman, *Softened Science in the Courtroom: Forensic Implications of a Value-Laden Classification*, in DESCRIPTIONS AND PRESCRIPTIONS: VALUES, MENTAL DISORDERS, AND THE DSMs 217, 224-25 (John Z. Sadler ed., 2002); Morse, *supra* note 274, at 601-04; Smith, *supra* note 184, at 69.

577. See generally Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VAND. L. REV. 427, 427-50 (1980).

578. 857 P.2d 989, 1016-18 (Wash. 1993), *superseded on other grounds as stated in In re Thorell*, 72 P.3d 708 (Wash. 2003).

psychological clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM.<sup>579</sup>

Such “good faith” approaches to the admissibility of psychiatric evidence, however, should raise significant concerns in both the law and medical fields. One group of commentators noted that courts should be wary of the use of new or “stretched” diagnoses with “no empirical track record providing evidence for such a linkage.”<sup>580</sup> “Perhaps worse,” they caution, “we are conferring on unvalidated diagnoses the presumptive medical authority of the DSM.”<sup>581</sup>

On the other hand, and in accord with such recommended caution, some courts have urged trial courts to apply additional scrutiny to expert opinion evidence offered in support of SVP commitments. For example, an Illinois appeals court held that a novel diagnosis such as Paraphilia NOS-Hebephilia must be subject to a *Frye* hearing before it can be presented to a fact finder.<sup>582</sup> The analysis in *In re Detention of New* began with finding that expert testimony based on a diagnosis “presupposes a mental condition exists as a matter of scientific evidence.”<sup>583</sup> The court noted the considerable controversy over the “hebephilia” label and concluded that “[a] *Frye* hearing is appropriate to determine whether an emerging diagnosis is an actual illness or disorder.”<sup>584</sup> The court observed, strikingly, that “[j]ustice does not put the fact finder in the position of culling good science from bad.”<sup>585</sup> The court correctly noted that, above all, the reasoning of Justice Kennedy’s concurrence in *Hendricks* mandated a scrutiny of the science offered in support of an SVP commitment. Since SVP laws are ostensibly based upon a need for treatment, not retribution, the court reasoned that “if a respondent in an SVP proceeding does not

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579. *Id.* at 1001 (quoting Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Sexually Violent Predators*, 15 U. PUGET SOUND L. REV. 709, 733 (1992)) (alteration in original). More recently another Washington appeals court, in *In re Berry*, noted that many courts have held that the *Frye* rule has no application to the question of whether a diagnosis of Paraphilia-NOS may be admitted in an SVP proceeding. 248 P.3d 592, 595-96 (Wash. Ct. App. 2011).

580. Prentky et al., *supra* note 26, at 370.

581. *Id.*

582. *In re New*, 992 N.E.2d 519, 521, 528-31 (Ill. App. Ct. 2013).

583. *Id.* at 528.

584. *Id.* at 529.

585. *Id.*

suffer from an actual mental disorder, then there is nothing to cure, and commitment is pointless.”<sup>586</sup>

On balance, however, there is little question that, even in the era of *Daubert* and similar rules designed to ensure that only reliable expert testimony is admitted, clinical psychiatric testimony is rarely excluded.<sup>587</sup> By the time the Court decided *Daubert*, the role of psychiatric testimony was so embedded in legal decision-making that it was inconceivable to courts that they should scrutinize, much less reverse, this practice.<sup>588</sup> Indeed, as the Supreme Court noted in *Barefoot v. Estelle*: “The suggestion that no psychiatrist’s testimony may be presented with respect to a defendant’s future dangerousness is somewhat like asking us to disinvent the wheel.”<sup>589</sup>

The analysis in *McGee* is remarkable for how far it strays from the core principles set forth in the *Daubert* opinion. Presumably, the panel did not apply that standard because of the specific posture of the case. *McGee* was not a direct appeal challenging the lower court’s evidentiary rulings on such testimony.<sup>590</sup> Rather, because McGee’s attorneys brought a habeas petition, the court considered only whether there was a constitutional violation.<sup>591</sup> The evidence rules, and cases interpreting them such as *Daubert*, impose a more specific and therefore higher standard for admissibility than does the Constitution.<sup>592</sup> But courts routinely follow the lower standard when, as in the SVP context, they analyze admissibility to determine the constitutionality of an ongoing deprivation of someone’s liberty. *Barefoot*

586. *Id.* at 530.

587. Scherr, *supra* note 574, at 58-61.

588. Krauss et al., *supra* note 539, at 38; *see also* SLOBOGIN, *supra* note 187, at 28-29.

589. *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983), *superseded on other grounds by* 28 U.S.C. § 2253 (2012).

590. *McGee v. Bartow*, 593 F.3d 556, 560 (7th Cir. 2010). In any event there is no indication that McGee raised *Daubert*-based challenges in his original proceeding.

591. *Id.* at 561-62. As one court of appeals panel explained, federal courts’ review of claims of evidentiary errors is severely limited in the habeas context:

Habeas review does not ordinarily encompass garden-variety evidentiary rulings. As we have said: “The federal judiciary holds no roving commission to monitor case-by-case compliance with rules of evidence. . . .” In this case, petitioner’s objections to the trial court’s evidentiary rulings do not implicate errors of constitutional dimension and, therefore, are not “proper grist for the federal habeas mill.”

*Palmariello v. Superintendent of M.C.I. Norfolk*, 873 F.2d 491, 494 (1st Cir. 1989) (citations omitted).

592. Paul C. Giannelli, *The Supreme Court’s “Criminal” Daubert Cases*, 33 SETON HALL L. REV. 1071, 1072-76 (2003).

in particular, which upheld the use of psychiatric evidence about future dangerousness in the face of research suggesting the low reliability of such predictions, suggests a very low standard for admissibility of expert evidence.<sup>593</sup> Such lack of scrutiny of expert evidence is highly questionable where the state is offering the evidence to rationalize indefinite detention.

That most courts distinguish between the admissibility standards regarding expert testimony in the evidence rules and due process jurisprudence raise the question of whether the admission of expert testimony in a manner apparently inconsistent with *Daubert* can itself implicate due process. No court has addressed that question squarely, and that question was not before the Seventh Circuit in *McGee*. However, in cases where a person's constitutional rights to liberty are at stake, there clearly are due process implications for a court's role as gatekeeper regarding expert opinion.<sup>594</sup> Courts should take into account in their due process analyses that these invented or extended diagnoses or ARAs—employed almost exclusively in the SVP commitment (rather than clinical) context—would not pass either a *Daubert* or a *Frye* gatekeeping standard. Indeed, these made-for-trial expert opinions appear to be precisely the kind of testimony that the Ninth Circuit excluded in *Daubert*.<sup>595</sup>

As discussed below, the call to include some of these extended diagnoses in the DSM-5 was inextricably intertwined with arguments about the usefulness of such diagnoses in SVP proceedings. This fact should signal to courts that expert opinions in such proceedings do little more than use medicalized terminology to tell courts and juries what to conclude. Also, given mainstream psychiatry's consistent rejection of recidivism prediction and the lack of peer-reviewed research supporting it, there is a serious

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593. *Id.* at 1091-92. Giannelli also rejects the reasoning that the standard could be lower because it was an analysis under the constitution, not the rules of evidence; the “death is different” principle necessarily means that evidence offered in support of the death penalty should have to meet higher, not lower, standards of reliability. *Id.* at 1092.

594. The Supreme Court has not considered this issue, or the continuing validity of *Barefoot v. Estelle*, in light of *Daubert*. See *Brown v. Watters*, 599 F.3d 602, 616 (7th Cir. 2010) (rejecting argument of SVP respondent based on *Daubert-Frye* in an appeal of SVP commitment because “neither . . . purports to set a constitutional floor on the admissibility of scientific evidence”); Beecher-Monas & Garcia-Rill, *supra* note 514, at 1859; Giannelli, *supra* note 592, at 1091-92.

595. *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) (affirming exclusion of expert testimony that was based solely upon research conducted for purposes of litigation).

question whether any expert prediction of future dangerousness could pass a strict *Daubert* test.<sup>596</sup>

Although courts admit expert testimony regarding future dangerousness (whether based upon clinical judgment, ARAs, or both), they leave the determination of the weight to be assigned to such testimony to the fact finder, which is often a jury or, in some states, an elected judge.<sup>597</sup> There are two fundamental problems with this practice. First, it ignores the limited ability of laypersons to critically assess the opinions of expert witnesses, one of the core rationales for the *Daubert* “gatekeeping” requirement.<sup>598</sup> The ability to uncover and assess problems in reliability can be especially challenging for laypersons with respect to the often *ipse dixit* opinions<sup>599</sup> offered by mental health professionals.

The second problem concerns the nature of SVP proceedings and the specific task assigned to fact finders: determining whether a convicted sex offender should be permitted to be at large in society. It seems unlikely that a fact finder could render a decision on such a question without fear of repercussions if its conclusion that a respondent posed a low risk of committing future acts of sexual violence proved to be wrong.<sup>600</sup> SVP commitment is a decision that puts the fact finder between an offender and a potential “next victim.” There has been limited research on to what extent expert testimony about future risk influences jurors’ decision-making.<sup>601</sup>

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596. Beecher-Monas & Garcia-Rill, *supra* note 514, at 1857.

597. Minnesota, Washington, and Wisconsin, for example, elect trial court judges. MINN. CONST. art. 6, § 7; WASH. CONST. art. IV, § 5; WIS. CONST. art. VII, § 6. Even courts that reject the government expert’s opinion in an SVP proceeding generally do so under weight or “credibility” principles (after admitting the testimony) rather than excluding the opinion under either a *Daubert* (or rule 702) or due process analysis. *See, e.g.*, United States v. Wilkinson, 646 F. Supp. 2d 194, 201 (D. Mass. 2009).

598. *Daubert*, 509 U.S. at 595 (“Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.”).

599. *See* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (noting that an expert’s opinion is not sufficiently reliable to be admitted when it is “connected to existing data only by the *ipse dixit* of the expert”).

600. *Cf.* People v. Shazier, 151 Cal. Rptr. 3d 215, 224 (Ct. App. 2012), *rev’d and remanded*, 298 P.3d 178 (Cal. 2013) (vacating SVP commitment due to prosecutorial misconduct because, in part, prosecutor’s closing argument included references to the proximity of schools to where respondent would be living and asking jurors to consider what their friends’ and family members’ reactions would be if they denied the commitment).

601. Krauss et al., *supra* note 539, at 21. Florida courts specifically permit use of the term “sexually violent predator” in SVP commitment proceedings, notwithstanding concerns

Nonetheless, it is difficult to imagine how a jury of laypersons, after hearing an expert opine that based on an ARA instrument, a child rapist has a 33% chance of reoffending (i.e., raping another child) would not commit that person. Indeed, recent research of decision making by jurors in actual SVP trials reveals that many follow something along the lines of former Vice President Dick Cheney's "one percent doctrine" and conclude that, in such cases, *any* amount of risk, no matter how small, is too much to accept.<sup>602</sup> Judges are not immune from similar concerns about the implications of their rulings. One Circuit Judge on the Court of Appeals for the Fourth Circuit, dissenting from an opinion affirming a district court's denial of an SVP petition, wrote: "though we may never learn the consequences of a poor predictive judgment on our part, *I fear that some young child somewhere will experience them,*" and noted that there are "sad and scarring consequences of a guess gone awry."<sup>603</sup> This judge likely articulated the mental calculations made by many juries and jurists involved with these cases.<sup>604</sup>

This review of law and practice in SVP proceedings has demonstrated that the prevalent use of psychiatric evidence in such proceedings is a distortion of medical views of pathology of sexual violence—including appropriate diagnostic methods and prediction of future conduct—and also legal principles regarding the admissibility of expert opinion. This distortion includes cases where expert opinion is based on unreliable methodology or data that runs counter to predominant views of the

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raised by the defense bar that the term is "extremely inflammatory, prejudicial, and misleading" and would deprive respondents of due process. Standard Jury Instructions-Criminal Cases (99-2), 777 So. 2d 366, 367-68 (Fla. 2000). The committee developing the jury instructions agreed, however, that the term should not be overused to the extent that it becomes a "feature" of the trial. *Id.*

602. Knighton et al., *supra* note 402, at 300-02 (finding that many jurors in SVP proceedings "viewed even a 1% chance of reoffending as indicating that an offender is likely to reoffend"). Cheney stated: "If there's a 1% chance that Pakistani scientists are helping al-Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response." Ron Suskind, *The Untold Story of al-Qaeda's Plot to Attack the Subway*, TIME, June 26, 2006, at 27.

603. *United States v. Springer*, 715 F.3d 535, 548, 551 (4th Cir. 2013) (Wilkinson, J., dissenting) (emphasis added).

604. There have not been empirical studies of the rates of commitment in bench versus jury trials, but there are anecdotal press reports of jurors rejecting SVP commitment petitions. *See, e.g.,* Karen Franklin, *Another One Bites the Dust: Hollow SVP Prosecution No Match for Jurors' Common Sense*, IN THE NEWS (Oct 27, 2012), <http://forensicpsychologist.blogspot.com/2012/10/another-one-bites-dust-hollow-svp.html> (the blog author was one of the defense experts in that case).

psychiatric field and risks misuse by, or the misleading of, the fact finder.<sup>605</sup> These fundamental and extensive distortions of sound science and justice are the inevitable and unavoidable result of the courts' experiment with SVP laws. These distortions also demonstrate that many in the psychiatric field accurately predicted the dangers of SVP laws when the SVP experiment began.

### *C. Fixing the Science to Fit the Courtroom*

The opinions in *Hendricks* and *Crane* assumed that there was a "bright line separating an SVP/SDP mental disorder from ordinary criminal behavior."<sup>606</sup> Such line-drawing, however, "tests a no-man's land between psychiatry and the law."<sup>607</sup> Many scholars and commentators in the fields of both law and psychiatry believe that the forensic use of psychiatric evidence, and particularly diagnoses, is unscientific and grossly misleading. Accordingly, there have been many calls to fix the problem, sometimes by fixing the science.

Commentators who maintain that science does have something to offer in SVP proceedings tend to speak of the "disturbing frequency" with which "bad science" appears in those proceedings.<sup>608</sup> This conception of the problem in SVP cases suggests that there may be a role for "good" (or at least "better") science and, indeed, there have been many suggestions and proposals for ways to improve the forensic science evidence admitted. Proposed fixes could include changing the way clinical diagnoses are approached, changing the diagnoses themselves, and either supplementing or replacing the diagnostic assessments with the use of actuarial tools. However, none of these modifications would solve the core problem set up by the *Hendricks-Crane* rationale: in a highly adversarial context, with very high stakes for the individual and society, courts are asked to look to the conclusions of psychiatric examiners to answer a normative moral question.

#### *1. Addressing Problems with Diagnoses*

The nature of the problem concerning diagnostic labels in SVP proceedings differs significantly depending upon one's perspective. Some psychiatric commentators, such as Allan Frances, complain that experts testifying for the state misuse existing diagnoses such as Pedophilia or

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605. See Hamilton, *supra* note 22, at 556-72; see also Prentky et al., *supra* note 334, at 456.

606. Frances et al., *supra* note 272, at 383.

607. *Id.* at 383.

608. Prentky et al., *supra* note 26, at 361.

ASPD, or invent diagnoses such as Paraphilia NOS-Nonconsent, which have not been set forth in the DSM or otherwise been sanctioned by psychiatry.<sup>609</sup> Due to the “particularly high stakes for respondents,” these commentators are concerned about the potential for large numbers of “false positive” diagnoses.<sup>610</sup> Accordingly, there have been calls to revise DSM language to eliminate any potential for such behavior-based approach to diagnosis.<sup>611</sup>

Mental health professionals offering testimony for the states in SVP proceedings, by contrast, see the problem in terms of a failure of the DSM or the field of psychiatry to provide forensically usable categories.<sup>612</sup> Some of these experts believe the science fails to reflect the reality of mental conditions underlying acts of sexual violence.<sup>613</sup> They are concerned about ambiguities that lead to court challenges to their testimony or present potential barriers to fact finders receiving their opinions.<sup>614</sup> This group, therefore, advocated for revisions to the paraphilias in the DSM-5 so that there would be a clearer basis in the psychiatric nosology for identifying the mental disorders most commonly seen in SVPs.<sup>615</sup>

These commentators also noted the practical need for preserving the potential for an approach to assigning a paraphilia diagnosis based on prior

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609. See, e.g., First & Frances, *supra* note 315; Frances, et al., *supra* note 272; Frances & First, *supra* note 462; Allan Frances & Richard Wollert, *Sexual Sadism: Avoiding Its Misuse in Sexually Violent Predator Evaluations*, 40 J. AM. ACAD. PSYCHIATRY & L. 409, 409-16 (2012).

610. First, *supra* note 312, at 1239 (internal citations omitted).

611. *Id.* at 1242.

612. See, e.g., Ray Blanchard et al., *Pedophilia, Hebephilia, and the DSM-V*, 38 ARCHIVES SEXUAL BEHAV. 335, 347-49 (2009); John Matthew Fabian, *Diagnosing and Litigating Hebephilia in Sexually Violent Predator Civil Commitment Proceedings*, 39 J. AM. ACAD. PSYCHIATRY & L. 496, 497-501 (2011); John Matthew Fabian, *Paraphilias and Predators: The Ethical Application of Psychiatric Diagnoses in Partisan Sexually Violent Predator Civil Commitment Proceedings*, 11 J. FORENSIC PSYCHOL. PRAC. 82, 84-90 (2011); Raymond Knight & David Thornton, *Dialogue on Paraphilic Coercive Disorder: Moving Toward an Empirically Based Consensus*, 12 SEX OFFENDER L. REP. 33, 33-36 (2011); Robin J. Wilson, *Paraphilic Coercive Disorder: A Clinical and Historical Perspective*, 12 SEX OFFENDER L. REP. 35, 35-36 (2011).

613. See, e.g., Blanchard et al., *supra* note 612, at 347-49.

614. See, e.g., Fabian, *supra* note 612, at 501-04; Paul Stern, *Paraphilic Coercive Disorder in the DSM: The Right Diagnosis for the Right Reason*, 39 ARCHIVES SEXUAL BEHAV. 1443, 1444 (2010).

615. See, e.g., Ray Blanchard, *The DSM Diagnostic Criteria for Pedophilia*, 39 ARCHIVES SEXUAL BEHAV. 304, 313-15 (2009); David Thornton, *Evidence Regarding the Need for a Diagnostic Category for a Coercive Paraphilia*, 39 ARCHIVES SEXUAL BEHAV. 411, 416-17 (2010).

behavior as essential to those offering testimony in support of commitments.<sup>616</sup> Respondents are often uncooperative with evaluators,<sup>617</sup> or clinical evaluation may not be included in the diagnostic process.<sup>618</sup> However, most psychiatrists developing specific DSM diagnostic criteria assume that they will be used as part of clinical assessment, including patient interviews, in therapeutic, not forensic, settings.<sup>619</sup>

The array of views regarding the use and validity of DSM labels reflects the adversarial setting of SVP proceedings, and it should come as no surprise that the outcome of the debate over the proposed changes for DSM-5 resolved nothing and left the paraphilias essentially unchanged.<sup>620</sup> The proposals for change did, however, garner fierce debate and prompt a flood of papers and editorials while they were under consideration.<sup>621</sup> The varied commentaries brought to the surface many of the controversies about psychiatry's role in SVP commitments discussed above.

The outcome of the debate was a compromise that resulted in maintaining essentially the same approach of the DSM-IV-TR.<sup>622</sup> DSM-5

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616. See, e.g., Blanchard, *supra* note 615, at 306.

617. First, *supra* note 312, at 1240-41.

618. See Jackson & Hess, *supra* note 497, at 426 (noting that there are no standards for what must be included in a forensic evaluation of an SVP respondent).

619. See MELTON ET AL., *supra* note 14, at 43-44 (noting that, in the therapeutic context, the most important tool for diagnosis and assessment is “the clinical interview—a dialogue with the patient exploring present mental state, past experiences, and desires for the future”).

620. Michael B. First, *DSM-5 and Paraphilic Disorders*, 42 J. AM. ACAD. OF PSYCHIATRY & L. 191, 192 (2014).

621. *Id.* at 192, 199-200; see also Fred S. Berlin, *Commentary on Pedophilia Diagnostic Criteria in DSM-5*, 39 J. AM. ACAD. PSYCHIATRY & L. 242 (2011); John Matthew Fabian, *Diagnosing and Litigating Hebephilia in Sexually Violent Predator Civil Commitment Proceedings*, 39 J. AM. ACAD. PSYCHIATRY & L. 496 (2011); First, *supra* note 312, at 1239; First & Halon, *supra* note 314, at 451-52; Franklin, *supra* note 462, at 751; Raymond Knight, *Is a Diagnostic Category for Paraphilic Coercive Disorder Defensible?*, 39 ARCHIVES SEXUAL BEHAV. 419 (2009); Robert Prentky & Howard Barbaree, *Commentary: Hebephilia—A Would-be Paraphilia Caught in the Twilight Zone Between Prepubescence and Adulthood*, 39 J. AM. ACAD. PSYCHIATRY & L. 506, 506 (2011); Wakefield, *supra* note 297, at 205-06; Howard Zonana, *Sexual Disorders: New and Expanded Proposals for the DSM-5—Do We Need Them?*, 39 J. AM. ACAD. PSYCHIATRY & L. 245, 248-49 (2011).

622. DSM-5, *supra* note 269, at 697. Pedophilia is now “Pedophilic Disorder” but the diagnostic criteria themselves are unchanged. The category of “Paraphilia Not Otherwise Specified” has been replaced with “Other Specified Paraphilic Disorder” and has more extensive explanatory text than that in DSM-IV-TR. *Id.* at 705. There is also a new category for “Unspecified Paraphilic Disorder,” which is used in similar contexts as the “Other Specified” disorders but the “clinician chooses *not* to specify the reason that the criteria are not met for a specific paraphilic disorder,” such as where there is insufficient information for

simply maintained the tension between deviance and disorder with which psychiatry has been increasingly aware.<sup>623</sup> By making minimal changes to the paraphilias, the APA rejected many revisions proposed by those who support the state in SVP commitment proceedings, such as adding the categories hebephilia or paraphilic coercive disorder.<sup>624</sup> Allan Frances nonetheless remains concerned that the revised paraphilias section is “an ambiguous hodgepodge [which] will surely be misused in sexually violent predator hearings where every word is given legal spin.”<sup>625</sup> Michael First has cautioned that the DSM-5’s paraphilias language—in terms of both what was changed and what was not—may cause continued confusion and misuse in forensic settings, especially SVP commitment proceedings.<sup>626</sup>

The DSM-5’s editors evidently shared Frances’s concern to some extent (he was an editor of an earlier edition himself), but they also did not want to see the influence of the manual wane in legal settings. The new DSM’s “Cautionary Statement for Forensic Use” is longer than the previous one, more explicit in its explanation of the limited purpose for which the manual was devised (*i.e.*, assisting mental health professionals with assessment and treatment in clinical settings), and now has a clearer title.<sup>627</sup> But the statement begins with a sales pitch for its use in forensic contexts; it states that, “[w]hen used appropriately,” the “diagnoses and diagnostic information” in the manual can “assist legal decision makers” in involuntary commitment cases where the “presence of a mental disorder is the predicate.”<sup>628</sup> The manual may also, it states, “facilitate legal decision makers’ understanding of the relevant characteristics of mental disorders.”<sup>629</sup> Especially significantly here, it also suggests “diagnostic information about longitudinal course may improve decision making when

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a more specific diagnosis. *Id.* For a helpful discussion of all of the changes to the Paraphilias category in the DSM-5, see generally First, *supra* note 620.

623. First, *supra* note 620, at 195-200; see also *supra* notes 286-338 and accompanying text.

624. See *supra* notes 612-615 and accompanying text; see also AM. PSYCHIATRIC ASS’N, PARAPHILIC DISORDERS 1-2 (2013), available at <http://www.dsm5.org/Documents/Paraphilic%20Disorders%20Fact%20Sheet.pdf> (describing what revisions were finally accepted for publication in DSM-5).

625. Allan Frances, *DSM-5 Badly Flunks the Writing Test*, PSYCHIATRIC TIMES (June 11, 2013), <http://www.psychiatrictimes.com/blogs/dsm-5/dsm-5-badly-flunks-writing-test?cid=tw>.

626. First, *supra* note 620, at 195-200.

627. DSM-5, *supra* note 269, at 25. Previously the language was simply titled “Cautionary Statement.” DSM-IV-TR, *supra* note 313, at xxxvii.

628. DSM-5, *supra* note 269, at 25.

629. *Id.*

the legal issue concerns an individual's mental functioning at a past *or future* point in time."<sup>630</sup>

The new DSM statement also includes cautions about taking forensic use too far and, in places, the language appears to specifically address experts and judges involved in SVP proceedings. The statement cautions against the risk of misunderstanding arising from "the imperfect fit between the questions of ultimate concern to the law and the information contained in clinical diagnosis."<sup>631</sup> It also emphasizes that "in most situations" more information about the individual is "usually required beyond that contained" in the diagnosis.<sup>632</sup> The statement emphasizes that use of the manual for assessment by "insufficiently trained individuals is not advised," and it notes that "a diagnosis does not carry any necessary implications regarding . . . the individual's degree of control over behaviors that may be associated with the disorder."<sup>633</sup> Given, however, that similar cautionary language has been disregarded with some regularity in SVP proceedings (as discussed above), such warnings are likely to have little effect on the widespread use of psychiatric diagnoses in court settings, even in resolving factual questions regarding volitional impairment associated with mental abnormality.

## 2. Using Actuarial Tools as a Check on or to Replace Clinical Judgment

As noted above,<sup>634</sup> some legal scholars and some in the mental health profession have advocated use of ARA instruments either in addition to<sup>635</sup> or in place of diagnostic assessment and clinical judgment.<sup>636</sup> The appeal of such tools is obvious: they would permit testifying experts to offer more accurate predictions while avoiding the unsettled realm of psychiatric diagnoses. One recent empirical study suggested that jurors may give more weight to "less scientifically valid unstructured clinical expert testimony

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630. *Id.* (emphasis added).

631. *Id.*

632. *Id.*

633. *Id.*

634. *See supra* notes 526-540 and accompanying text.

635. Some researchers have proposed use of "Guided Clinical Risk Assessments," which use a number of factors that associated with recidivism but are not necessarily static, such as low self-esteem and "general psychological distress." Campbell, *supra* note 553, at 120. However, studies have not demonstrated these to be sufficiently reliable for forensic use. *Id.*

636. *See, e.g.,* Robin J. Wilson et al., *Pedophilia: An Evaluation of Diagnostic and Risk Prediction Methods*, 23 *SEXUAL ABUSE* 260, 271 (2010) (advocating exclusive use of ARAs in SVP prediction).

over more accurate actuarial assessment.”<sup>637</sup> However, in addition to ARAs’ problems with reliability (discussed in the previous section), there are fundamental conceptual and moral problems as well. The most significant problem with the use of ARAs in SVP proceedings is that these tools are designed only to assess the statistical risk of recidivism, not, as required by the *Hendricks-Crane* standard, the existence of volitional impairment.<sup>638</sup> Nor are ARAs designed to assess the presence of “mental disorder,” another core requirement of the SVP statutes and a component of their constitutional floor.<sup>639</sup> Moreover, because these instruments largely use information that can be gleaned simply from a review of a respondent’s records alone—without an interview—the forensic examiners employing them, like those who misuse paraphilia diagnoses as discussed above, are constructing a state of underlying volitional impairment based solely on a selective record of past actions.

Social scientists and others who advocate replacing clinical judgment with these tools to ensure more accurate assessments invoke studies showing superior prediction rates for those based on actuarial tools.<sup>640</sup> There is also, however, a general wariness about using statistics to predict individual human behavior and, as noted by many social scientists, a resistance to doing so. As Daniel Kahneman observes: “The debate about the virtues of clinical and statistical prediction has always had a moral dimension. . . . The aversion to algorithms making decisions that affect humans is rooted in the strong preference that many people have for the natural over the synthetic or artificial.”<sup>641</sup> Significantly, this aversion appears to be even stronger when the “decisions are consequential.”<sup>642</sup>

Although these emotional responses to the general use of actuarial tools to make predictions about human outcomes strike many researchers as irrational, the “moral dimension” of such reactions bears special consideration in the context of a legal proceeding such as SVP commitment. In his short story, *The Minority Report*, Phillip K. Dick evoked the specter of using “science” to determine what we will do in the

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637. Daniel A. Krauss et al., *Dangerously Misunderstood: Representative Jurors’ Reactions to Expert Testimony on Future Dangerousness in a Sexually Violent Predator Trial*, 18 PSYCHOL. PUB. POL’Y & L. 18, 33 (2012).

638. See *supra* notes 151-152 and 165-169 and accompanying text.

639. First & Halon, *supra* note 314, at 450-51.

640. See, e.g., MEEHL, *supra* note 537, at 94-95.

641. KAHNEMAN, *supra* note 517, at 228.

642. *Id.*

future and then detaining individual people as a result of such “precrime predictions” to paint a frightening dystopian picture.<sup>643</sup> Using statistically gathered numbers to assess the likelihood of individual human behavior—especially as the sole basis for an indefinite commitment—is patently inconsistent with a justice system that emphasizes individualized treatment rather than determinations based on group-based behavior, such as “guilt by association.”<sup>644</sup> Indeed, such “moral dimensions” have a central place in our legal system, and the fact that there is such discomfort at using actuarial methods to determine whether to remove someone from society indefinitely is indicative that such methods are out of place in SVP proceedings.

The sharpness of the debates regarding the use of psychiatric diagnostic assessments and ARA instruments in SVP proceedings, with strong but conflicting evidence on both sides, encourages a significant third perspective: the entire SVP commitment model, with the essential role it assigns to forensic assessment of the likelihood of recidivism, is inherently unworkable.<sup>645</sup> Because findings of mental abnormality and dangerousness are constitutionally required in such proceedings, the question of whether we can reliably assess the relevant pathology and risk directly implicates the committed persons’ liberty interests.<sup>646</sup> What these debates reveal is that

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643. See generally PHILIP K. DICK, *THE MINORITY REPORT AND OTHER CLASSIC STORIES* (Pantheon Books 2002).

644. Janus & Meehl, *supra* note 410, at 60-61; *cf.* *Reno v. Flores*, 507 U.S. 292, 345 (1993) (Stevens, J., dissenting) (“[T]he Due Process Clause establishes a powerful presumption against unnecessary official detention that is not based on an individualized evaluation of its justification.”). David Faigman recently examined the difficulty of offering expert opinion regarding an individual based upon research findings about a group: “In terms of scientific inference, reasoning from the group to an individual case presents considerable challenges and, simply put, is rarely a focus of the basic scientific enterprise. In the courtroom, *it is the enterprise.*” David L. Faigman et al., *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417, 420 (2014) (emphasis added).

645. See First, *supra* note 620, at 200 (“Paraphilic disorders, by virtue of their forensic import, exemplify the difficulty of integrating psychiatric concepts and concerns with those of the legal system and society in general.”).

646. Prentky et al., *supra* note 26, at 371; see also Janus & Prentky, *supra* note 536, at 1458. This is not to suggest that clinical judgment and ARAs are the only methods proposed for predicting risk of sexual violence. For example, legal scholar Adam Lamparello has advocated use of neuroscience to predict violent behavior. Adam Lamparello, *Using Cognitive Neuroscience to Predict Future Dangerousness*, 42 COLUM. HUM. RTS. L. REV. 481, 488-92 (2011). However, at this time, there have been no studies of the use evaluating brain activity through functional MRI imaging to predict such violence. Moreover, it is by no means clear that such technology will correct any of problems inherent in the SVP commitment model discussed herein. See generally Steven K. Erickson, *The Limits of*

neither approach—clinical judgment or actuarial instruments—is sufficiently reliable to ensure that SVP laws are not sweeping too broadly. The making of predictions generally, not the methodology used to make them, is the problem.

Given that all the proposed fixes to the invocation of psychiatric science in SVP proceedings fall short of addressing the fundamental problems seen in the case law, the question for legal scholars and analysts becomes whether the courtroom can be fixed to fit the existing science instead.<sup>647</sup> While some degree of judicial leniency regarding the admissibility of expert testimony by mental health professionals is arguably appropriate for many kinds of cases, especially when a personal injury plaintiff or a criminal defendant raises the issue of mental injury or disorder, there are compelling reasons to apply far more scrutiny to such evidence in SVP cases. One reason is certainly the high-stakes outcomes of such cases. Another no less significant concern is the power assigned by the laws to mental health professionals in order to meet the due process requirements in the *Hendricks-Crane* rationale.

A few rulings by courts suggest that a more assertive role by trial judges as gatekeepers could prevent due process violations in individual cases, and several legal scholars have made recommendations along these lines.<sup>648</sup> It remains true, however, that courts overwhelmingly admit suspect science in SVP trials and leave it to the fact finder to decide how much weight to give such expert opinion.<sup>649</sup> Most courts, like the *McGee* trial court, leave issues regarding the validity of the methods used—including use of the diagnostic labels and ARAs—entirely to the assessment of the fact finder. Lower courts' implementation of *Hendricks-Crane* has made clear that they are

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*Neurolaw*, 11 HOUS. J. HEALTH L. & POL'Y 303 (2012); Daniel S. Goldberg, *Against Reductionism in Law and Neuroscience*, 11 HOUS. J. HEALTH L. & POL'Y 321 (2012).

647. Samuel Jan Brakel, *Psychiatrists and Law*, PSYCHIATRIC TIMES (Nov. 19, 2010), <http://www.psychiatristimes.com/forensic-psychiatry/psychiatrists-and-law>.

648. Hamilton, *supra* note 22, at 52; Prentky et al., *supra* note 334, at 458; *see also* Vars, *supra* note 410, at 895-97 (arguing that due process requires that courts commit individuals only upon a finding that there is at least a 75% risk that the person will commit an act of sexual violence within the next five years).

649. *See, e.g.*, *McGee v. Bartow*, 593 F.3d 556, 581 (7th Cir. 2010) (holding that controversy over validity of a diagnosis is a “proper consideration for the factfinder in weighing the evidence that the defendant has the “mental disorder” required by statute”); *In re Det. of Lopez*, 166 Wash. App. 1012, 2012 WL 295462, at \*6 (Wash. Ct. App. 2012) (“The validity of [the state’s expert’s] diagnosis was a matter for the jury to evaluate.”); *In re Lieberman*, 929 N.E.2d 616, 632 (Ill. App. Ct. 2010), *vacated by* 237 Ill. 2d 557 (Ill. 2010); *see also* Hamilton, *supra* note 22, at 594.

uninterested in playing a more active role in screening out such expert testimony. As long as courts retain the current legal framework for evaluating the admissibility of such evidence, we should expect the same tendencies to prevail.

Indeed, were trial courts to assume the role of aggressive gatekeeper in SVP proceedings, such practice would fundamentally alter how, and whether, SVP laws were implemented. The irreconcilable conflict between the known limits of the science of psychiatry and the statutory requirements of the SVP laws could result in the exclusion of a significant amount of evidence offered in support of commitment and thereby reveal the inherent unworkability of the SVP commitment model. In other words, serious judicial gatekeeping in the SVP context would effectively nullify the laws. Trial courts are generally reluctant to undermine the objectives of elected legislators, especially when such policies have broad public support and, as here, have been upheld by the Supreme Court. Accordingly, it is unlikely that trial courts could be convinced to widely and consistently reject psychiatric evidence in SVP commitment proceedings.<sup>650</sup>

#### *IV. Revisiting the Hendricks-Crane Rationale*

The SVP commitment laws have no shortage of critics from within law, psychiatry, and other fields.<sup>651</sup> Many criticize the ways the laws are implemented; others argue that they reflect failed, flawed, and misplaced policies that merely score political points.<sup>652</sup> Still others insist that they are based on myths about sex offenders and unfounded assumptions about the potential for their treatment and rehabilitation.<sup>653</sup> Most of these criticisms,

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650. And of course, absent further action from the Supreme Court, *Barefoot v. Estelle* remains good law, at least in theory. The Court was recently presented with a petition for certiorari that could have provided an opportunity to revisit *Barefoot v. Estelle* and the standard for admissibility of expert psychiatric evidence on future dangerousness, but it declined to hear the case. *Coble v. Texas*, 330 S.W.3d 253 (Tex. Ct. App. 2010), *cert. denied*, 131 S. Ct. 3030 (2011). Accordingly, the Court appears uninterested in providing courts any further guidance on the admissibility of such evidence anytime soon.

651. *See, e.g.*, Cucolo & Perlin, *supra* note 226, at 5-17; *see also* JANUS, *supra* note 20, at 87-92 (arguing that the laws are antifeminist because they perpetuate a number of harmful myths about rape and child abuse, such as that such acts are largely committed by “predators” rather than relatives and acquaintances of the victims); LANCASTER, *supra* note 29, at 233-34 (tracing the “sex panic” underlying many modern sex offender laws to less overt expressions of homophobia and racism).

652. *See* Simon, *supra* note 79, at 281.

653. *Id.* Simon summed up her assessment of SVP laws as follows:

[T]hese legal policies and mental health practices targeting offenders who

however, do not directly address the constitutionality of the laws. Instead, in light of the *Hendricks-Crane* rulings, critics commonly assume that the question of their constitutionality has been settled.<sup>654</sup>

In this Article, my focus has been the validity of the rationale of the opinions that are thought to have settled that question. As discussed in Part II, that rationale, as delivered in the *Hendricks-Crane* holdings, presumes the integrity of using a mental-illness model for the deprivation of liberty permitted by SVP laws. By extension, the medical, and therefore legal, legitimacy of the prosecution of these laws depends on the testimony of mental health professionals weighing in on the question of respondents' pathology and volitional control. That testimony, however, is inherently problematic: it is unreliable at best and, at worst, hollow.

Since the crucial medical opinions offered in SVP proceedings regarding who is a "predator" with a "volitional impairment"—as distinct from a "typical recidivist"—are routinely based on conclusions drawn from reviewing the record of a respondent's prior acts of sexual violence, those opinions are, in effect, tautologies.<sup>655</sup> The term "sexual predator" has no psychiatric meaning; it is used simply to name a group of sexual offenders from whom we want to protect the public. It is like the term "weed," which has no botanical meaning but which we use simply to refer to plants of which we want to rid our gardens. In the absence of a scientific basis for determining whether or not a person is a "sexual predator," the task assigned to forensic experts in SVP proceedings is to make a normative determination; this delegation of moral decision-making to psychiatry is inconsistent with core notions of due process. Accordingly, the constitutionality of such laws is, in fact, far from settled.

Some judges have recognized the dangers and implications of attempting to align psychiatry with the problematic concept of a "sexually violent

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commit sex crimes thrive despite the absence of empirical evidence that sex offenders are distinguishable from other offenders; that sex offenders are any more mentally disordered (and treatable) and dangerous than other offenders; and that mental health professionals are competent to make predictions of dangerousness.

*Id.*

654. See, e.g., Janus & Prentky, *supra* note 536, at 90.

655. See also La Fond, *supra* note 23, at 162 ("The primary evidence for *all* of these elements—mental disorder, volitional impairment, and dangerousness—is the *same*; an offender's past history of committing sex crime(s). Simply put, a sex offender who has committed a qualifying sex crime thereby provides evidence that is legally sufficient to be committed as a SVP." (alteration in original)).

predator.” In a 2010 concurring opinion in an SVP appeal, Justice Richard Sanders of the Washington Supreme Court wrote:

[I]f the scientific community does not recognize such a condition [as Paraphilia NOS-Nonconsent], much less possess any methodology to identify individuals with such a condition, the statutory test [for SVP commitment] cannot be met.

. . . .

Without a scientifically recognized condition that compels a person to commit sex offenses, civil confinement also runs afoul of the constitution . . . .

. . . .

Where a person is deprived of his or her freedom based upon opinion testimony lacking scientific credibility, reliability, and accepted methodology, courts must step forward and announce with the courage of a small child that the Emperor wears no clothes.<sup>656</sup>

This is a remarkable acknowledgement—and call to action—regarding the fundamental problem with these laws. However, the entire opinion, including this concurrence, was later withdrawn upon a motion for reconsideration by the State.<sup>657</sup>

Courts appear to be stuck in a box of their own creation. As captured in *Minority Report*, the ability to predict future crime or violence holds tantalizing appeal for a society.<sup>658</sup> Even if we lack the technology available in the story, we are inclined to think that many instances of horrifying criminal violence could have been prevented if someone, especially some scientist, psychiatrist, or other expert, had recognized its likelihood and taken steps to prevent it. As scientists themselves have repeatedly told us, however, and as courts cannot fail to acknowledge,<sup>659</sup> our general presumption regarding the ability of scientists, and specifically of those in

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656. *State v. McCuiston*, 238 P.3d 1147, 1155 (Wash. 2010) (Sanders, J., concurring), *overruled by* 275 P.3d 1092 (Wash. 2012). The Washington Supreme Court ordered a hearing on a committed person’s petition for release. *Id.* at 1153.

657. *McCuiston*, 275 P.3d at 1097.

658. *See generally* DICK, *supra* note 643.

659. *See, e.g.*, *Barefoot v. Estelle*, 463 U.S. 880, 899 (1983); *United States v. Umana*, 707 F. Supp. 2d 621, 634 (W.D.N.C. 2010); *United States v. Taveras*, 424 F. Supp. 2d 446 (E.D. Tex. 2006); Lamparello, *supra* note 646, at 488-92.

the psychiatric profession, to predict future violence far exceeds their actual ability. However, despite these acknowledged limits—and the constitutional values at stake when they are disregarded—courts continue to uphold statutes based on just such mistaken assumptions. The SVP laws are not the only examples of this problem but perhaps the most stark and far-reaching ones. The Supreme Court has never identified a constitutionally acceptable error rate for predictions of future violence, although its pre-*Daubert* opinion in *Barefoot* suggested that a disturbingly high error rate would be acceptable.<sup>660</sup> Such a low standard for acceptability gives courts and legislators broad freedom to take significant legal actions based on an assessment of risk and to use psychiatry as a means to identify such risks. Courts have permitted legislators to effectively delegate a crucial normative question to the field of psychiatry and, in so doing, have disregarded the field's own disavowal of its ability to fulfill that role competently and ethically.

These objectionable and harmful patterns of delegation must be changed from within the law. Nearly forty years ago, the noted circuit court Judge David Bazelon cautioned courts about delegating “delicate questions of state intervention” to mental health professionals.<sup>661</sup> In comments that bear particularly on the questions examined in this Article, he explained:

[S]tate intervention involves a serious compromise of individual rights and hence a difficult balancing of power between the state and the individual, where the stakes are highest for human and personal rights. Courts have traditionally been the protector of individual rights against state power, and there is no reason why the particularly difficult problems in the area of state intervention are any different. We cannot delegate this responsibility to the medical professions. Those disciplines are, naturally enough, oriented toward helping people by treating them. Their value system assumes that disturbed or disturbing individuals need treatment, that medical disciplines can provide it, and that attempts to resist it are misguided or delusionary. The medical disciplines can no more judge the legitimacy of state intervention into the lives of disturbed or disturbing individuals

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660. Jackson et al., *supra* note 492, at 126.

661. David L. Bazelon, *Institutionalization, Deinstitutionalization and the Adversary Process*, 75 COLUM. L. REV. 897, 910 (1975).

than a prosecutor can judge the guilt of a person he has accused.<sup>662</sup>

The Supreme Court, in deciding *Kansas v. Hendricks*, did not heed Judge Bazelon's caution or give full consideration to the implications of drawing the line at mental abnormality. In light of what we have learned from the enforcement of these laws, it is clear that courts must revisit their validity.

The social implications of SVP laws bear some emphasis. By pathologizing and not merely condemning the rapist and molester, and by relying upon a psychiatric and not merely moral construction of sexual violence, these laws and their implementation fuel a stigmatizing view of mental illness more generally—the view, that is, that being labeled with a psychiatric diagnoses signals that one may be dangerously “out of control,” and therefore a threat to society. Indeed, language in *Hendricks* directly supports this view:

A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of *some additional factor, such as a 'mental illness' or 'mental abnormality.'* These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them *dangerous beyond their control.*<sup>663</sup>

Such reasoning links acts of violence and mental illness in a misleading and damaging way. Most sexual offenders do not have serious mental disorders, as discussed above. But the Court's longstanding pronouncement that illness can serve as a basis for detention encouraged lawmakers and courts to pathologize sex offenders to permit their removal from society in a manner inconsistent with notions of due process.<sup>664</sup> In this respect, SVP laws reflect the dual problematic trends of criminalizing the mentally ill and pathologizing criminals.

The use of paraphilias, that is, deviant sexual arousal, as the basis for most SVP commitments is particularly troubling given the controversy regarding whether the DSM should even list such conditions as disorders for clinical purposes. Some observers suggest that commitments made on

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662. *Id.*

663. *Kansas v. Hendricks*, 521 U.S. 346, 358-59 (1997) (emphasis added).

664. Janus, *supra* note 63, at 15.

this basis carry broad legal implications. Jerome Wakefield, for example, has flagged what he regards as “a dangerous slippery slope implicit in these legal developments.”<sup>665</sup> He reasoned:

A pluralistic society is based on respect for human difference and acceptance of the enormous range of normal variation in tastes and desires. If sexual peculiarities that are labeled disorders and are offensive to others can be the grounds for civil commitment on the basis of the harm they do to the public, then it is not clear why other peculiarities that may be labeled disorders and may be out of control of the afflicted individual — such as, say, depression or anxiety that detracts from the efficiency of others and thus harms them — need remain constitutionally immune to such provisions in the future.<sup>666</sup>

SVP commitment laws carry implications for the field of psychiatry as well. Many within the psychiatric field, conscious of their limited knowledge of the nature of sexual offenses and offenders, are exceedingly uncomfortable with the role assigned to them by the laws.<sup>667</sup> The task given to forensic experts in SVP proceedings can be even more challenging than the typical dangerousness prediction. Not only is the expert being asked to make an assessment of a person’s long-term risk for sexual violence, such determination must be made of someone who has been incarcerated, sometimes for a lengthy period of time, making prediction of his future behavior in public especially difficult.<sup>668</sup> Psychiatrists also note that danger-prediction as a predicate to detention strays far from the central role of psychiatry, which is to alleviate mental suffering and distress.<sup>669</sup> Employing a host-parasite metaphor, psychiatrist James L. Knoll warns that SVP laws put psychiatry at risk of becoming “co-opted by a political agenda.”<sup>670</sup> The prosecution of such an agenda through these laws, Knoll observes, would jeopardize the “autonomous functioning, and thus the reliability, of the

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665. Wakefield, *supra* note 297, at 197.

666. *Id.*

667. *See supra* notes 190-201, 342-370, and 384-398 and accompanying text.

668. Prentky et al., *supra* note 26, at 358.

669. Jerome C. Wakefield, *False Positives in Psychiatric Diagnosis: Implications for Human Freedom*, 31 THEORETICAL MED. BIOETHICS 5, 9 (2010) (“Treatment of disorder is the essential defining mission of psychiatry.”).

670. James L. Knoll, *The Political Diagnosis: Psychiatry in the Service of the Law*, PSYCHIATRIC TIMES (May 13, 2010), <http://www.psychiatrictimes.com/sexual-offenses/political-diagnosis-psychiatry-service-law>.

science,” and transform psychiatry into “a new organism entirely—one that serves the ends of the criminal justice system.”<sup>671</sup>

The constitutional infirmities of the SVP laws revealed in this Article serve as compelling reasons for their legislative repeal. Moreover, as noted earlier and certainly of significance to legislators, the laws are expensive and of questionable safety benefit to the public. States heeded the advice of the GAP report in the 1970s and repealed the “sexual psychopath” laws.<sup>672</sup> They should once again take seriously psychiatry’s disavowal of its ability to identify predators. At this time, however, there is no indication of any jurisdiction moving to repeal or significantly reform its SVP commitment laws.<sup>673</sup>

If state policymakers hesitate to change SVP laws out of fear of political backlash, a somewhat “quieter” option for states is to slow the rate of commitment under such laws and increase the rate of release of those committed previously. The State of Wisconsin is following this route presently. The state has committed nearly 500 individuals since enacting its SVP law in 1994.<sup>674</sup> It released only thirty-one individuals between 1994 and 2009, but released 114 in the four years between 2009 and 2013.<sup>675</sup> It took these steps in light of recent research suggesting that recidivism risks for “certain types of individuals” were lower “than previously thought.”<sup>676</sup> Those who were released received treatment and monitoring in their communities, and the legislature enacted new laws to expand the community-monitoring program.<sup>677</sup>

States could also consider programs that may obviate the need for commitment altogether, such as sentencing options for sexually violent crimes that leave questions of mental illness out of the equation.<sup>678</sup> For example, states could follow Maine’s example and adopt supervised release laws, which provide for an extended period of community supervision in

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671. *Id.*

672. *See supra* notes 49-54 and accompanying text.

673. Cucolo & Perlin, *supra* note 226, at 9-10.

674. Nora Hertel, *Wisconsin Freeing More Sex Offenders from Mental Lockup*, WIS. WATCH (Feb. 2, 2014), <http://wisconsinwatch.org/2014/02/wisconsin-freeing-more-sex-offenders-from-mental-lockup/>.

675. *Id.*

676. *Id.*

677. *Id.*

678. *See, e.g.*, John M. Fabian, *Kansas v. Hendricks, Crane and Beyond: “Mental Abnormality,” and “Sexual Dangerousness”: Volitional vs. Emotional Abnormality and the Debate Between Community Safety and Civil Liberties*, 29 WM. MITCHELL L. REV. 1367, 1418-20 (2003).

lieu of probation as part of a sentence for a sex offense.<sup>679</sup> Although Maine's law is aimed at preventing recidivism among sex offenders specifically, its use does not depend on a determination of a mental disorder but rather on whether the defendant is a "repeat sex offender" as defined under the law<sup>680</sup> in addition to a series of other factors.<sup>681</sup> Currently, few courts evaluating SVP petitions consider whether existing alternatives may minimize a risk of recidivism.<sup>682</sup> If more such programs were in place, their availability could provide an argument against commitment in individual cases.<sup>683</sup>

Regardless, however, of whether the states decide to follow such alternatives to SVP commitment proceedings, there is a central role and responsibility for the Supreme Court with respect to these laws. Given the demonstrably dubious basis of the *Hendricks-Crane* rationale in light of how that reasoning has played out in actual SVP commitments and the exceedingly serious implications of leaving the holding in place, the Court must revisit the constitutionality of the SVP laws.

While the Court is appropriately loathe to overrule itself, it can follow the example it set when it overruled *Bowers v. Hardwick*<sup>684</sup> in *Lawrence v. Texas*.<sup>685</sup> The justices noted in *Lawrence* that striking down the Texas sodomy law at issue in that case would place it squarely in conflict with the precedent it had set seventeen years earlier in *Bowers*, when it upheld Georgia's law; "[t]he doctrine of *stare decisis*," it cautioned, "is essential to the respect accorded to the judgments of the Court and to the stability of the law."<sup>686</sup> However, the Court also noted that this doctrine "is not an

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679. ME. REV. STAT. tit. 17-A, §§ 1231-1233 (2013); *State v. Cook*, 2011 ME 94 ¶ 24, 26 A.3d 834, 843-44. In the case at hand, the sentencing court imposed the following conditions of release: limiting contact with the victim and other children, undergoing evaluation and treatment, and community monitoring. *Id.* ¶ 18, 26 A.3d at 841.

680. ME. REV. STAT. tit. 17-A §§ 1231(2)(A), 1252(4-B)(A).

681. *Cook*, ¶¶ 27-29, 26 A.3d at 844-45.

682. One of the few courts to engage in this analysis is the district court of Massachusetts in *United States v. Wilkinson*, which considered the fact that the respondent was facing charges for a probation violation in state court as well as supervised release through the federal probation office. 646 F. Supp. 2d 194, 208 (D. Mass. 2009).

683. For a more thorough review of alternatives to current sex offender policy, including SVP commitment laws, see JANUS, *supra* note 20, at 113-29.

684. 478 U.S. 186 (1986).

685. 539 U.S. 558 (2003).

686. *Id.* at 577.

inexorable command; rather, it ‘is a principle of policy and not a mechanical formula of adherence to the latest decision.’”<sup>687</sup>

Significantly here, in applying these judicial principles to the constitutionality of sodomy laws, the Court noted the publication of several scholarly “criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*.”<sup>688</sup> Upon reexamination of those premises, the Court found that it had based the earlier opinion on erroneous, or at least overstated, historical grounds<sup>689</sup> and that “[t]he rationale of *Bowers* does not withstand careful analysis.”<sup>690</sup> Here, a comparable examination mandates that the Court acknowledge that its earlier opinions on SVP laws were based on erroneous medical grounds and that its core rationale “does not withstand careful analysis.”

#### V. Conclusion

The responsibility to make rationally informed policy rests, of course, with lawmakers. In many ways, it is hard to fault the drafters and supporters of the first SVP laws, particularly those acting in the immediate wake of almost inconceivably horrifying crimes such as Earl Shriver’s. But once a policy is enacted, even if it was based largely on immediate public outrage, fear, and avoidance of risk, it is nearly impossible to undo. The fear and sense of high risk, even if later understood by lawmakers themselves to be exaggerated, may still be potent among many segments of the public—often, as in the case of the “sexually violent predator,” stoked by myths and exploitative media representations, and reinforced by the existence of the laws themselves.<sup>691</sup> In light of this political reality, the courts have a significant role to play in the evaluation of the basis for laws enacted in response to specific outrage-evoking events.

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687. *Id.* (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

688. *Id.* at 567-68. The Court also noted that the *Bowers* opinion had not induced any “individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so.” *Id.* at 577.

689. *Id.* at 571 (“In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.”).

690. *Id.* at 577.

691. See John Douard & Eric S. Janus, *Beyond Myth: Designing Better Sexual Violence Prevention*, 34 INT’L. J.L. & PSYCHIATRY 135, 135 (2011) (“[L]aws [targeting sex offenders] have defined—or said another way, created—a new ‘kind’ of person—qualitatively different from normal people, constitutionally and essentially different. This is ‘the sex offender’ or, more bluntly, ‘the sex predator.’”).

The Earl Shriner case had particular characteristics that shaped the SVP laws. Shriner's prior involvement with the criminal justice system and the unsuccessful attempt to use the standard involuntary commitment procedures to keep him away from potential victims persuaded the public and the policymakers who served them that the state's laws contained a gaping omission. Reports of his crimes fed the widespread public perception that child sexual abuse is rampant and that our criminal justice system is powerless to control it. There was and remains a general belief that sex offenders have high rates of recidivism, are mentally ill, cannot control their impulses, and cannot be successfully treated or supervised in the community. With a previously convicted offender like Shriner, there seemed to be clear warning signs *right there*. Viewed retrospectively after his subsequent acts of violence, Shriner appeared to many observers clearly to be a sexual criminal who was all but certain to re-offend after his release. It also seemed that the state should have a mechanism to act on such signs to prevent the reoccurrence of such crimes by other convicted offenders—specifically, a law that would “lock them away” if experts identified signs indicating that the offenders posed a distinct risk of victimizing children and others.

Clarity of hindsight, however, is often taken for intrinsic predictability, and our general intuitions about risk—even the instructed intuitions of experts—are often grossly inaccurate.

In the public and legislative reactions to the Earl Shriner case, the mistakes were many and mutually reinforcing. The first mistake was to generalize improperly from the particular circumstances of Shriner's acts. While Shriner's crime against a random victim led an anxious public to conceive of the sex offender as a kind of “bogeyman,” always lying in wait, always ready to strike whatever innocent children were near, research has shown that sexual violence is generally highly circumstantial and contingent, that it occurs under a range of contextual and individual conditions, and that it most often involves victims who have prior family, social, or institutional relationships to the perpetrator.<sup>692</sup>

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692. LANCASTER, *supra* note 29, at 76-79. Similarly, the common perception of a sex offender or predator is one who lurks around schools, playgrounds, and candy stores waiting to lure trusting children into their cars or residences. Such stereotypes lead to community notification laws, sex offender registries, and restrictions on offenders' residence. In fact, the overwhelming number of cases of sexual abuse are committed by family members or “trusted” adults such as teachers, clergy, and coaches. *See, e.g.*, Cucolo & Perlin, *supra* note 226, at 25-27; LANCASTER, *supra* note 29, at 78.

The second key mistake was the assumption by the public and legislators that mental health experts could identify sexually violent individuals and prevent sexual violence through a process of legal commitment. As demonstrated in this Article, psychiatry lacks the knowledge and the instruments to identify who is most likely to commit future acts of sexual violence or to predict the likelihood of violence by a specific individual. The implementation of SVP laws has been likened by two forensic psychiatrists to the Salem Witch trials of the seventeenth century.<sup>693</sup> In an essay making the comparison, they argue that the suggestion that clinicians can identify the true predators among us creates a dangerous and false sense of security for the public.<sup>694</sup> Commitment of large numbers of sexual offenders under SVP laws does not enhance public safety. The laws reflect the public's fears and groundless beliefs, not the realities of either sexual violence or the capacities of mental health experts. SVP laws are dangerous, damaging, and unconstitutional, and the experiment must be shut down.

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693. Good & Burstein, *supra* note 84, at 24.

694. *Id.*