

Dangerous Diagnoses, Risky Assumptions, and the Failed Experiment of “Sexually Violent Predator” Commitment

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ABSTRACT

In the 1997 opinion, Kansas v. Hendricks, the U.S. Supreme Court upheld a law that presented a new model of civil commitment. The targets of these new commitment laws were dubbed “Sexually Violent Predators,” and the Court upheld this form of indefinite detention 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 the extent to which those assumptions were correct and concludes that they were seriously flawed and, therefore, the due process rationale used to uphold the SVP laws is invalid. The category of the “Sexually Violent Predator” is a political and moral construct, not a medical classification. The implementation of the laws has resulted in dangerous distortions of both psychiatric expertise and 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.

I. INTRODUCTION

In 1990, the state legislature of Washington, in response to calls for action after a highly-publicized violent sexual crime committed against a young child by an offender with prior convictions for violence against children, enacted a statute to enable the state to continue to detain sex offenders after they had completed their criminal sentences. The targets of these new laws were dubbed “Sexually Violent Predators,” a label intended to connote a sub-class of sex offenders who run a high risk of recidivism after their release due to the presence of a mental abnormality or personality disorder. Soon thereafter, a few other states, including Kansas, enacted their own commitment laws modeled closely on Washington’s. The first person committed under Kansas’s law, Leroy Hendricks, challenged the constitutionality of his indefinite detention under due process, *ex post facto*, and double jeopardy principles in a case that reached the United States Supreme Court. In the 1997 opinion in *Kansas v. Hendricks*,¹ the Court upheld this new model of commitment. In the wake of that case, other states (for a total of 20 to date) and the federal government enacted “Sexually Violent Predator” (SVP) laws as well. Since 1990, several thousand people have been committed under such laws, the vast majority of whom remain in indefinite detention.

The core rationale of the *Hendricks* opinion, as well as that of the follow-up opinion in *Kansas v. Crane*,² 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. 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. 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 a mental condition that impairs their ability to refrain from violent sexual behavior and for whom this unusual and extraordinary deprivation of liberty is appropriate and legitimate. And 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.”

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 of mental pathology to sexual violence and of the field’s ability to predict such violence.³ Second, I review the key features of the psychiatric expertise offered by prosecutors to support SVP commitment and analyze how courts have used

¹ *Kansas v. Hendricks*, 521 U.S. 346 (1997).

² *Kansas v. Crane*, 534 U.S. 407 (2002).

³ 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 published by the American Psychiatric Association. I refer to “psychology” in the context of research regarding human behavior and the like. Parties in court proceedings quite 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); BRUCE J. WINICK & JOHN Q. LA FOND, *PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY* 75–77 (2003).

such expertise to decide whom to commit under SVP laws. 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 that it can accurately predict who is at risk of committing acts of sexual violence and has never conceptualized sexual aggression as the product of volitional impairment. 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 by such laws to identify those who should be committed.

The controversies regarding admission of expert testimony in individual SVP cases reveal the troubling consequences of the Supreme Court's failure to heed the warnings of the APA. 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 of acts of sexual violence to psychopathology. In so doing, such courts distort or disregard key values in our justice system, such as limiting the admission of expert testimony to that based upon scientifically-sound methodology and reliable facts and data. 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, bringing to the surface the unsteady foundation upon which the medical and, by extension, constitutional premise of SVP was based.

The SVP laws generally⁴ and the *Hendricks* opinion specifically⁵ have been the target of extensive criticism from scholars as well as from legal and mental health professionals. While some have focused upon specific problems in the implementation of SVP laws, such as experts' reliance upon controversial diagnoses or their use of actuarial instruments to assess risk, many in both groups—scholars and mental health professionals—have pointed to the laws as inherently flawed policy.⁶ Although critical of the SVP laws, the scholars and medical professionals offering these analyses generally assume that, in light of the *Hendricks* opinion, the question of their constitutionality is now a settled matter. Taken together with a review of how the laws have actually operated, however, these and related criticisms can be seen to make that assumption of constitutionality itself questionable.

My approach in this Article is to analyze the SVP laws as a legislative experiment in preventive detention endorsed in the *Hendricks* and *Crane* opinions by the Supreme Court through a rationale based upon a set of dubious hypotheses and assumptions regarding psychiatry and psychiatric testimony. The rationale first developed in *Hendricks* was strictly theoretical: the

⁴ Aman Ahluwalia, *Civil Commitment of Sexually Violent Predators: The Search For A Limiting Principle*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 489, 520–23 (2006); ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 61–66 (2006); Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1076–77 (2003).

⁵ 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 (1998).

⁶ See, e.g., Melissa Hamilton, *Adjudicating Sex Crimes as Mental Disease*, 33 PACE L. REV. 536 (2013).

Court was evaluating a new statutory model for indefinite preventive detention and Leroy Hendricks was of the first people to challenge it. 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. These expectations stemmed largely from the longstanding use of psychiatric expertise by the courts 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.

Other commentators have noted that the use of certain diagnoses in SVP proceedings runs counter to the APA's *Diagnostic and Statistical Manual of Mental Disorders* ("DSM") system of psychiatric classification.⁷ What I demonstrate here, however, is that the problems with the psychiatric evidence offered in these cases are far broader than occasional misclassification and in fact stem from limitations inherent in the field of psychiatry itself. Rationalization of SVP preventive detention based on the conviction 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 do not admit of solution through specific fixes. Rather, 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 upon medical delineation to be constitutionally sound. But because there is no conceptualization 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 are basing SVP commitments largely upon the criminal records of the respondents⁸ because the expert opinions themselves are based upon little else. As a result, the opinions offered by experts in SVP cases are not in fact "medical" but moral. And because such conclusions are essentially normative ones, then we are improperly delegating such decisions to psychiatry, an action that flies in the face of both legal principles and psychiatric practice. This is not a mere problem of labels and professional realms; this experiment has resulted in the indefinite detention of thousands of people at an enormous monetary cost to the jurisdictions and an enormous personal cost to those committed as well as to their families.

II. THE SUPREME COURT SANCTIONS THE "SEXUALLY VIOLENT PREDATOR" EXPERIMENT

In the early 1990s, intense public awareness and concerns about sexual abuse of children, and widespread views of those who commit such as offenses as what has been called "the ultimate other,"⁹ gave rise to the notion of "the sexual predator."¹⁰ In the wake of media reports of a spate of high-profile sexual crimes against children, some state legislatures passed measures

⁷ Robert A. Prentky, et al., *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 PSYCHOL. PUB. POL'Y & L. 357, 358 (2006); Hamilton, *supra* note 6, at 23–29.

⁸ 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.

⁹ Perlin, *supra* note 5, at 1248.

¹⁰ Amy Adler, *To Catch a Predator*, 21 COLUM. J. GENDER & L. 130, 130–31 (2012); ROGER LANCASTER, SEX PANIC AND THE PUNITIVE STATE 78 (2011).

in an attempt to control these individuals. These new laws were based on the assumption that these criminals had unusually high rates of recidivism and posed a special risk to the public. They were sick, the laws' supporters reasoned, with a condition that rendered them resistant to typical forms of deterrence in the criminal justice system.¹¹ Policymakers concluded that these unique attributes, combined with the particularized harm resulting from sexual abuse, warranted unique measures. Legislatures enacted new or enhanced laws that addressed punishments for the possession and viewing of child pornography, created registries and notifications requirements, and at the extreme end, established programs for the indefinite detention via civil commitment of those identified as "sexually violent predators" ("SVPs").¹²

The first such SVP commitment law was enacted by the State of Washington against the backdrop of both the "sexual psychopath" laws of the mid-20th century and the heightened attention to the problem of sexual violence committed by those previously in the criminal justice system. Once this new form of commitment received the sanction of the U.S. Supreme Court in *Hendricks*, the model spread, and there are now several well-established SVP commitment programs across the country, through which thousands of people have been, and continue to be, detained indefinitely.

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 that targeted sex offenders. The first generation of laws permitting the detention of sex offenders were enacted between the 1930s and 1960s, although they had significant differences from contemporary SVP laws. During the time that 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. Since the laws assured the administration of treatment, rather than simple detention, they were open-ended in terms of the length of hospitalization.¹³ Men who were

¹¹ Adler, *supra* note 10, at 131–32.

¹² 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. §§ 36-3701–3717 ("Sexually Violent Persons"); CAL. WELF. & INST. CODE §§ 6600–6609.3 ("Sexually Violent Predators"); D.C. CODE §§ 22-3803–3811 ("sexual psychopath[s]"); FLA. STAT. ANN. § 394.910–932 ("Sexually Violent Predators"); IOWA CODE ANN. §§ 229A.1–16 ("Sexually Violent Predators"); 725 ILL. COMP. STAT. ANN. 207/1–99; KAN. STAT. ANN. §§ 59-29a01–29a22 ("Sexually Violent Predators"); MASS. GEN. LAWS ANN. ch. 123A, §§ 1–16 ("Sexually Dangerous Persons"); MINN. STAT. ANN. § 253B.185 ("sexually dangerous persons or persons with a sexual psychopathic personality"); MO. ANN. STAT. §§ 632.480–513 ("Sexually Violent Predators"); NEB. REV. STAT. §§ 71-1201–1226 ("dangerous sex offenders"); N.H. REV. STAT. ANN. §§ 135-E:1–24 ("Sexually Violent Predators"); N.J. STAT. ANN. §§ 30:4-27.24–.38 ("sexually violent predator[s]"); N.Y. MENTAL HYG. LAW §§ 10.01–17 ("Sex Offenders Requiring Civil Commitment or Supervision"); N.D. CENT. CODE §§ 25-03.3-01–24 ("Sexually dangerous individual[s]"); S.C. CODE ANN. §§ 44-48-10–170 ("Sexually Violent Predator[s]"); VA. CODE ANN. §§ 37.2-900–920 ("Sexually Violent Predators"); WASH. REV. CODE ANN. § 71.09.020 ("Sexually Violent Predator").

¹³ CHARLES PATRICK EWING, JUSTICE PERVERTED: SEX OFFENDER LAW, PSYCHOLOGY, AND PUBLIC POLICY 7 (2011).

charged with sex crimes could be sent for such treatment, rather than sentenced to prison, with the prospect that the treatment would prevent recidivism.¹⁴

The U.S. Supreme Court upheld this form of commitment in 1940,¹⁵ but the laws were eventually subjected to widespread criticism. The detainees were held much longer than had been expected, in part because of the reluctance of their treatment providers, who were not confident that their patients would not recidivate, to approve their release. A growing number of commentators within psychiatry attacked the legal classification of the “sexual psychopath,” as there was no agreed-upon definition or basis to attach the label to any individual. It was also clear that many of these hospitalized men were not mentally ill and that little if any treatment was being provided in these hospitals. The laws were revealed as little more than extended detention on a preventive basis.¹⁶ Most such laws were either repealed or no longer used by the early 1980s.¹⁷

The final nail in the coffin for the remaining laws came from a strong statement from within the psychiatric establishment.¹⁸ The Group for the Advancement of Psychiatry (GAP)¹⁹ Committee on Forensic Psychiatry concluded in a 1977 report that there was little true prospect for effective treatment of sexual offenders and that the “discrepancy between the promises in sex statutes and performance have rarely been resolved.”²⁰ “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.”²¹ The GAP Committee acknowledged that the “promises” made by psychiatry at the time the laws were enacted went unfulfilled. The profession could not separate out the mentally ill sex-offenders from the others, and there was little in the way of treatment that psychiatry could provide the men once they were committed. The report goes on to state starkly and unambiguously:

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

¹⁴ AMERICAN PSYCHIATRIC ASSOCIATION (“APA”), DANGEROUS SEX OFFENDERS 13 (1999).

¹⁵ State of Minn. ex rel. Pearson v. Probate Court of Ramsey Cnty., 309 U.S. 270, 274, 60 S. Ct. 523, 526 (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’.” The Supreme Court reasoned that there was no violation of due process since 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.* at 274, 526.

¹⁶ EWING, *supra* note 13, at 8.

¹⁷ APA, *supra* note 14, at 13-15.

¹⁸ EWING, *supra* note 13, at 9.

¹⁹ The GAP identifies itself as the “think tank” for American psychiatry. (<http://ourgap.org/mission.aspx>)

²⁰ GROUP FOR ADVANCEMENT OF PSYCHIATRY, PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE 30’S TO THE 80’S 935 (1977).

²¹ *Id.* at 840.

a heterogeneous legal classification could define treatability and make people amenable to treatment is not only fallacious, it is startling.²²

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

2. *Washington State Enacts First SVP Law and Creates a Model Statute*

Under public pressure following a set of horrific and highly publicized cases of sexual violence committed by offenders who had previously served time, state legislatures, led by Washington in 1989, dusted off the basic concept of these earlier sexual psychopath laws but transformed them in several important respects.²³ Most notably, in their new incarnation, the commitment of convicted offenders would occur not as an alternative sentence *in lieu* of a prison sentence after conviction, as was the case for most of the earlier sexual psychopath laws, but as an additional period of indefinite detention *after* a criminal sentence had been served.²⁴

Some commentators have noted that the current generation of SVP laws were enacted 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.²⁵ Indeed, the enactment of the first SVP law in Washington State involved precisely that scenario. Earl Shriner, a man with a history of repeated involvement in the criminal justice system in connection with crimes against young people and officially described as “mildly retarded,” was released from prison in 1998 after completing the term of his sentence for kidnapping two girls.²⁶ Several months after his release, and while other charges against him were pending, he was charged with raping and mutilating a young boy, apparently at random, in Tacoma.²⁷

The public outrage in response to this crime was immediate, widespread, and intense. An editorial in the *Seattle Post-Intelligencer* summed up the sense, shared by many, of how 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.”²⁸

²² *Id.* at 935.

²³ EWING, *supra* note 13, at 9–10.

²⁴ Ewing, *supra* note 13, at 10.

²⁵ APA, *supra* note 14, at 34; John Q. La Fond, *Sexually Violent Predator Laws and the Liberal State: An Ominous Threat To Individual Liberty*, 31 INTL. J. OF LAW & PSYCHIATRY 158, 160 (2008).

²⁶ David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET SOUND L. REV. 525, 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 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.

²⁷ Boerner, *supra* note 26, at 525–27.

²⁸ *Id.* at 529 (quoting *Editorial*, SEATTLE POST-INTELLIGENCER (May 24, 1989)) (emphasis added).

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.” Specifically, he stated: “[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.”²⁹ Soon thereafter and 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, particularly regarding predatory offenders,” gaps that had presumably permitted Shriner the opportunity to commit his most recent crime.³⁰

The fact that the state had previously unsuccessfully attempted to commit Shriner highlighted the limitations of the standard involuntary hospitalization statutes for, as it was said, “quickly and permanently” removing the dangerous mentally ill from society.³¹ In terms of their purpose and outcomes, such laws were indeed a poor fit for the goal of detaining criminally violent men like Shriner for an extended period of time or 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 to stabilize a person identified as having severe mental illness, such as schizophrenia or bipolar disorder, and to administer treatment, usually in the form of psychotropic medications such as anti-psychotics or mood stabilizers.³² A series of U.S. Supreme Court and lower court opinions in the 1960s and 1970s clarified the constitutional limitations on such deprivations of liberty. According to these opinions, such involuntary hospitalization must be based upon a showing that a person posed a danger to himself or others (as demonstrated through a recent overt act) and that the hospitalization would end as soon as the acute danger had passed.³³ Involuntary hospitalization can occur only when there is a crisis as demonstrated by either threats to others or, more commonly, an inability to care for one’s basic needs. If that threshold showing is met, a court will order treatment in a secure community hospital or state hospital, with a maximum length of hospitalization set by statute. As a result of reforms brought about by the court opinions in concert with the “deinstitutionalization” movement, which ended the long-term warehousing of the mentally ill, the average length of such hospitalizations is now measured in days.³⁴

²⁹ Boerner, *supra* note 26, at 530. The arrest of Shriner occurred six months after the murder in Seattle of Diane Ballasiotes. A convicted sex offender participating in a work-release program was charged (and eventually convicted) of her murder. *Id.* at 534.

³⁰ *Id.* at 534-35. Other reasons given for the rise of the law 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. LAW 5, 8 (2000), and the “victims’ rights” movement, Michael M. O’Hear, *Perpetual Panic*, 21 FED. SENTENCING REP. 69, 74 (2008). Also, such laws were seen as an example of the growing success of feminists to reform the legal responses to sexual violence. LANCASTER, *supra* note 10, at 14.

³¹ Boerner, *supra* note 26, at 533. Washington sexual psychopath law, which had been the subject of controversy regarding its scope and implementation, had been repealed in 1984. *Id.* at 551-52.

³² La Fond, *supra* note 25, at 160–61.

³³ See, e.g., O’Connor v. Donaldson, 422 U.S. 563 (1975); Lessard v. Schmidt, 349 F.Supp. 1078 (E.D. Wis. 1972).

³⁴ 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 (2002). It should be added that recurring hospitalizations are not uncommon.

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.³⁵ As the legislature saw it, the problem with existing involuntary commitment law was that the state would not be able to meet the recent “overt act” requirement of such law when seeking commitment of a person serving a sentence since such a person would not “have access to potential victims.”³⁶ The legislature acknowledged that the target for the new SVP legislation was not those who had “classic mental illness” as that was understood and used in traditional commitment laws.³⁷ 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 the existence of such people could not be addressed by a short-term hospitalization and the administration of medication, as such measures would presumably do nothing to prevent their recurring criminal conduct. Only their long-term removal from society and thus from potential victims would, it was thought, reduce the risk of future acts of sexual violence. Those to be detained under the SVP laws were, after all, not pathetic people sleeping under bridges or in their parents’ basements, as is often the case for involuntary commitment, but people who were incarcerated, out on bail, or under supervision of some kind because they had committed a violent sex crime. Rather than seeking, by such laws, to detain someone who was already at large, the lawmakers wanted to prevent a return of such persons to society. For these reasons, perhaps, the measures might have seemed less extreme than those that entitled a police officer to pick someone off of the street and bring him to an emergency room against his will.

Another notable distinguishing feature of the new SVPs laws is that the commitment is *indefinite*, with the committed person having the burden of petitioning for review of his commitment.³⁸ The Washington Legislature reasoned that no set time frame for detention could be included in the statute 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.³⁹ With no clear treatment protocol for persons now referred to as “predators,”⁴⁰ the treatment-oriented laws for standard commitment of the mentally ill were clearly a poor fit.

³⁵ WASH. REV. CODE § 71.09.010.

³⁶ *Id.* See also *Black v. Voss*, 557 F.Supp.2d 1100, 1109–10 (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).

³⁷ WASH. REV. CODE § 71.09.010. The reference to “classic mental illness” arose in the public testimony of Professor Boehner, 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 4, at 491.

³⁸ La Fond, *supra* note 25, at 161, 164.

³⁹ WASH. REV. CODE ANN. § 71.09.010.

As indicated by recorded legislative reasoning, SVP laws were based upon two critical and commonly-held assumptions about those who commit sex crimes: first, that they are criminals who “specialize” in a particular type of crime; and, second, that 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.⁴¹ Such specialization and compulsion rendered these men “predators” and, the reasoning went, since their sexually violent conduct resulted from a mental disorder, mental health professionals could identify those offenders likely to engage in such conduct in the future.

SVP laws were thus also based on a third crucial assumption, this one about the role that psychiatric diagnosis could play in ensuring that such laws would not have an overbroad reach. The significance of this assumption is clear from this statement of 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....”⁴²

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.⁴³ At the time the rise in 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,⁴⁴ by men who were family members and acquaintances of the victims.⁴⁵ Similarly, studies indicated that, contrary to popular belief,⁴⁶ sexual offenders did not have unusually high levels of recidivism⁴⁷ or specialization with regard to victims.⁴⁸ Rare as they were, however, crimes such as Shriner’s were so compelling that many members of the public were persuaded that children were at a high risk of random victimization unless the state acted quickly to protect them.

⁴⁰ The state of Washington conceded in one of the first legal challenges to these statutes, *Young v. Weston*, that the treatment prospects for detainees was “poor” and therefore “prolonged incarceration is to be expected.” *Young v. Weston*, 898 F. Supp. 744, 749 (D. Wash. 1995).

⁴¹ Lenore M. J. Simon, *An Examination of the Assumptions of Specialization, Mental Disorder, and Dangerousness in Sex Offenders*, 18 BEHAV. SCI. LAW. 275, 277 (2000).

⁴² 1995 Cal. Legis. Serv. 4611 (West) (emphasis added).

⁴³ See *infra* notes 185–290 and accompanying text.

⁴⁴ See OFFICE OF JUSTICE PROGRAMS BUREAU OF JUSTICE STATISTICS, “Sexual Assault of Young Children,” <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1147>.

⁴⁵ See OFFICE OF JUSTICE PROGRAMS BUREAU OF JUSTICE STATISTICS, “Criminal Victimization,” <http://www.bjs.gov/index.cfm?ty=pbse&sid=6>. See also EWING, *supra* note 13, at xvi–xvii for general discussion on these statistics

⁴⁶ Paul Good and Jules Burstein, *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%).

⁴⁷ OFFICE OF JUSTICE PROGRAMS BUREAU OF JUSTICE STATISTICS, “Recidivism Of Sex Offenders Released From Prison In 1994” <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1136>.

⁴⁸ See *infra* notes 239–233 and accompanying text.

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 the common parlance. Governor Gardner's use of the phrase "predatory acts" in a press statement soon after Shriner's arrest struck a chord with prosecutor and law professor David Boerner, the lead drafter of the new law. Boerner saw it as a way to specify the class of individuals to be reached by this unique form of indefinite detention.⁴⁹ 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.⁵⁰ Since 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 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.*"⁵¹

Thus Washington's SVP law set four prerequisites to civil commitment: (1) a history of criminal sexual conduct, resulting in either a conviction or a charge; (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.⁵² These essential requirements, although often phrased somewhat differently, can be found in all SVP laws.

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, 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, or after a person who has been previously convicted of a sexual offense commits a "recent overt act."⁵³ After a probable cause hearing, the person is evaluated in custody. The trial on the commitment must occur within 45 days of the filing of the petition.⁵⁴ The person is entitled to counsel and court-appointed experts to assist with his defense.⁵⁵ Either side may request a jury trial.⁵⁶ 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 care, control, and treatment" until the mental abnormality or personality disorder "has so changed that the person is safe to be at large."⁵⁷

B. Legal Challenges to the New SVP Laws

⁴⁹ Boerner, *supra* note 26, at 569.

⁵⁰ *Id.* at 569.

⁵¹ WASH. REV. CODE ANN. § 71.09.020 (West) (emphasis added).

⁵² *Id.*; Janus, *supra* note 30, at 9.

⁵³ WASH. REV. CODE ANN. § 71.09.030 (West)

⁵⁴ WASH. REV. CODE ANN. § 71.09.050 (West).

⁵⁵ WASH. REV. CODE ANN. § 71.09.040 (West)

⁵⁶ *Id.* § 71.09.050.

⁵⁷ *Id.* § 71.09.060(1). *See also* Young v. Weston, 898 F. Supp. 744, 747 (D. Wash. 1995) (summarizing key requirements of SVP law).

Preventive detention is very limited in American law because it is seen as antithetical to notions of liberty interest and the presumption of innocence. In each instance of preventive detention, even where an individual is seen as posing a threat to public safety, there are generally strict limitations on when it can be imposed and when it must be ended. For example, we permit the pretrial detention of criminal defendants only where there is probable cause to believe that they committed a crime and to the extent found necessary to secure their appearance at trial (thus defendants are usually given the opportunity to post bail and be released).⁵⁸ The two exceptions to our reluctance to impose long-term preventive detention target two of the groups probably most feared and despised by the American public: one is enemy combatants seized on the battlefield in foreign countries; the other is sex offenders.⁵⁹

1. *Background of the Hendricks-Crane Litigation*

The constitutionality of the Washington statute and of those SVP laws modeled after it was immediately subjected to legal challenges to its constitutionality on a range of grounds, including the violations of constitutional guarantees of substantive due process and the prohibitions of *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 state⁶⁰ and federal⁶¹ courts. The Washington Supreme Court upheld the law while the federal district court held that it was unconstitutional.⁶² These differing outcomes were among the first of a series of sharply dividing judicial responses to the new law and to the similar SVP laws enacted by the Kansas⁶³ and Wisconsin⁶⁴ legislatures soon thereafter.

The focus of the substantive due process challenges stemmed from the same theories that had been 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 core values established through 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.’”⁶⁵ Such guarantee against excessive government interference applies with particular import in the context of involuntary detention, the Court has noted, because “freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”⁶⁶ Accordingly, a court must subject such detention,

⁵⁸ U.S. v. Salerno, 481 U.S. 739, 752, 107 S. Ct. 2095, 2104 (1987).

⁵⁹ See 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 46, at 42; Christopher Slobogin, *Preventive Detention in Europe and the United States* (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2094358)

⁶⁰ In re Personal Restraint of Young, 122 Wash.2d 1, 857 P.2d 989 (1993).

⁶¹ Young v. Weston, 898 F. Supp. 744 (D. Wash. 1995).

⁶² *Id.* at 754; In re Personal Restraint of Young, 857 P.2d 989, 1018 (1993).

⁶³ KAN. STAT. ANN. § 59-29a01 *et seq.* (1994).

⁶⁴ WIS. STAT. ch. 980 (1993-94)

⁶⁵ Zinermon v. Burch, 494 U.S. 113, 125, 110 S. Ct. 975, 983, 108 L.Ed.2d 100 (1990).

⁶⁶ Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

even if imposed 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.⁶⁷

When applying these principles to their review of the new SVP laws, the holdings of the Washington and Wisconsin Supreme Courts included some fractured opinions and vehement dissents. 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 would 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.”⁶⁸ Justice Shirley Abrahamson of the Wisconsin Supreme Court was especially troubled by the nebulous language of “mental abnormality” in the Wisconsin law.⁶⁹ That term, she observed, does not translate to any well-settled or understood concept in psychiatry.⁷⁰

For the courts reviewing the constitutionality of the first SVP laws, a key source of guidance was a then-recent opinion of the U.S. Supreme Court in *Foucha v. Louisiana*.⁷¹ 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.⁷² 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.”⁷³ The Court ruled that, in the absence of a mental illness, Louisiana’s detention of Foucha was contrary to fundamental notions of due process. 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.⁷⁴

⁶⁷ *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).

⁶⁸ *See, e.g., Weston*, 898 F. Supp. At 749-50 (“The essential component missing from the Sexually Violent Predator Statute is the requirement that the detainee be mentally ill.”).

⁶⁹ *State v. Post*, *State v. Oldakowski*, 541 N.W.2d 115, 142–45 (Wisc.1995) (Abrahamson, J., dissenting).

⁷⁰ La Fond, *supra* note 25, at 161.

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

⁷² *Id.* at 80.

⁷³ *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)).

⁷⁴ *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 *Salerno*. *Id.* at 81, 83

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 detention was a finding of clear and convincing evidence of “mental illness.”

In 1994, two years after the opinion in *Foucha*, Kansas enacted the “Sexually Violent Predator Act.” Modeled closely on the Washington law, it required a finding of mental abnormality or personality disorder as a prerequisite to commitment.⁷⁵ As defined under the Kansas statute, a “mental 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.”⁷⁶ The law did not have a clear requirement for a finding of “mental illness.”

Leroy Hendricks, who was then presently serving a sentence for sexual victimization of children, was the first person to be committed under Kansas’s new SVP law pursuant to a jury’s determination.⁷⁷ 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 particular scrutiny, the State chose well; Hendricks he had a long history of multiple sexual offenses against children and therefore exemplified the seemingly undeterrable “predator” the drafters and public had in mind in enacting the law.

At trial, the State called as its expert witness Dr. Charles Befort, the chief psychologist at Larned State Hospital.⁷⁸ Befort, who had performed an evaluation of Hendricks, testified that he had concluded that it was “likely that Hendricks would engage in predatory acts of sexual violence or sexual activity with children if permitted to do so.”⁷⁹ Befort based his opinion, as he stated, on his view that “behavior is a good predictor of future behavior,” on his professional knowledge that pedophiles tend to repeat their behavior, and on Hendricks’ poor understanding of his behavior.⁸⁰ Befort concluded that Hendricks was not mentally ill and did not have “a personality disorder” but that “as he [Befort] interpreted the Act, pedophilia was a mental abnormality.”⁸¹ The psychiatrist who testified on behalf of Hendricks challenged Befort’s testimony regarding the tendency of pedophiles to recidivism, 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.’”⁸² The jury found that Hendricks was a “sexually violent predator” and, under the new Kansas statute, he was committed to Larned State Hospital.⁸³

⁷⁵ KAN. STAT. ANN. § 59-29a01– 59-29a24.

⁷⁶ *Id.* § 59-29a02(b)

⁷⁷ *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997).

⁷⁸ In *The Matter of Hendricks*, 912 P.2d 129, 131 (Kan. 1996). 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. *See Allen v. Illinois*, 478 U.S. 364, 373, 106 S. Ct. 2988, 2994 (1986).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *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.

⁸² *Id.*

⁸³ *Id.*

In reviewing Hendricks' appeal, the majority opinion of the Kansas Supreme Court noted that the Kansas SVP law had been modeled on that enacted by Washington (including adopting the same legislative "findings") and that the latter was already the subject of constitutional challenges.⁸⁴ 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. The Kansas Supreme Court agreed and held that Kansas's SVP law was invalid under *Foucha* (as well as an earlier civil commitment opinion, *Addington v. Texas*⁸⁵) since it did not require a showing of an "illness."⁸⁶ In so ruling, the majority found the reasoning of the federal district court in *Young v. Weston* striking down the Washington SVP law to be more persuasive than that of the Washington Supreme Court in its opinion upholding the law. The term "mental abnormality," it concluded, was not equivalent to "mental illness." 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 phrase used by clinicians to discuss abnormality or deviance."⁸⁷ The majority also contrasted that description with the definition of "mental illness" found in the Kansas standard involuntary commitment statute.⁸⁸

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 that, in *Kansas v. Hendricks*, ultimately overruled the Kansas Supreme Court and upheld the state's SVP law.⁸⁹ On the question of whether Kansas's definition of SVP satisfied the "mental illness" element in *Foucha*, the parties took significantly differing 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.⁹⁰ 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."⁹¹ In Hendricks' case, the State's argument continued, the respondent had a mental disorder of "pedophilia" as defined by the DSM, and therefore the constitutional requirement had been satisfied.⁹² Hendricks' 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."⁹³ Indeed, the Kansas legislature used the language specifically to empower the state to detain people who did

⁸⁴ *Id.* at 132.

⁸⁵ *Addington v. Texas*, 441 U.S. 418 (1979).

⁸⁶ *Id.* at 138.

⁸⁷ *Id.*

⁸⁸ *Id.* (citing KAN. STAT. ANN. 59-2902(h) (*since repealed*)) (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.")

⁸⁹ *Kansas v. Hendricks*, 521 U.S. 346 (1997).

⁹⁰ *Kansas v. Hendricks*, Brief of Petitioner at 39.

⁹¹ *Id.* at 40.

⁹² *Id.* at 41.

⁹³ *Kansas v. Hendricks*, Brief of Respondent at 21-22.

not have a “mental illness” since those with such illnesses could be committed under the standard commitment statute.⁹⁴

Justice Clarence Thomas, who had dissented in *Foucha* five years earlier,⁹⁵ wrote the majority opinion reversing the Kansas Supreme Court and upholding the SVP law under all three constitutional challenges raised by Hendricks’ attorneys: that the law violated his rights under the due process clause and under prohibitions of *ex post facto* laws and double jeopardy.⁹⁶ With respect to the substantive due process analysis, which is the focus of this Article, Justice Thomas noted 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.”⁹⁷ The Court has upheld civil commitment of this sub-population, he explained, so long as proper procedures and standards are followed. The prior cases clearly established that dangerousness alone would not satisfy due process requirements; it was only when commitment statutes coupled such a 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.⁹⁸ 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.”⁹⁹ Under this framework, Justice Thomas reasoned, the Kansas SVP law met these essential features to be consistent with notions of due process. The law limited the potential class subject to commitment to those with either a “mental abnormality” or “personality disorder,” which, he wrote, sufficiently “narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.”¹⁰⁰

Thus, Justice Thomas dispensed with the interpretation of *Foucha* and *Addington* as requiring a specific finding of mental *illness* (as opposed to a broader requirement of any form of “mental abnormality”) as a prerequisite to involuntary civil commitment. The term “mental illness,” he explained, has no “talismanic significance.”¹⁰¹ Rather, the critical factor to satisfy substantive due process is that such commitment laws “limit involuntary civil confinement to those who suffer from a *volitional impairment* rendering them dangerous beyond their control.”¹⁰² He noted that the Court had never required states to adopt particular medical terms for involuntary commitment statutes. Legislatures, he stated, are not required to adopt terms that “mirror those advanced by the medical profession.”¹⁰³ Since, in Hendricks’ case, his “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’ “condition” easily met the constitutional requirements for commitment.¹⁰⁴ Justice Thomas acknowledged that the record on appeal included evidence of extensive controversy within psychiatry regarding

⁹⁴ *Id.* at 22.

⁹⁵ *Foucha*, 504 U.S. at 102–124 (Thomas, J. dissenting).

⁹⁶ *Kansas v. Hendricks*, 521 U.S. 346 (1997).

⁹⁷ *Id.* at 357.

⁹⁸ *Id.* at 358.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 358.

¹⁰¹ *Hendricks*, 521 U.S. at 358–59.

¹⁰² *Id.* at 358 (emphasis added).

¹⁰³ *Id.* at 359.

¹⁰⁴ *Id.* at 360.

whether pedophilia was a mental illness; but he indicated that such debates only support the conclusion that legislatures should be provided the “widest latitude in drafting” SVP laws.¹⁰⁵ Justice Thomas then considered Hendricks’ remaining constitutional arguments that the law violated both 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.¹⁰⁶

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.¹⁰⁷ He noted some concern with the prospect that, given that “medical knowledge” at that time did not hold great promise for treatment of pedophilia, there was real potential for Hendricks and others to be detained for life.¹⁰⁸ He also acknowledged that the Court was permitting states to proceed into uncharted waters with these laws and that, “if 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.”¹⁰⁹ As Kennedy’s concurrence makes clear, the *Hendricks* opinion endorsed pure preventive detention, with benefits flowing only to the community presumably protected from the committed person, 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: Hendricks’ condition, he wrote (characterizing pedophilia as a “serious mental disorder”),¹¹⁰ was essentially akin to the well-established “irresistible impulse” concept in criminal and preventive detention law.¹¹¹ The medical evidence at the hearing (as well as Hendricks’ own admission), he wrote, clearly established Hendricks’ inability to control his conduct, which brought him squarely within the scope of the statute’s limited reach.¹¹² The debate within psychiatry regarding the limits of mental illness, he observed, can serve to inform a state legislature’s course of action, but does not mean it that may not set out to act at all.¹¹³

Five years later, in *Kansas v. Crane*, the Court revisited the Kansas statute in the appeal of a different respondent and clarified its volition-oriented requirement. In an opinion authored by Justice Breyer,¹¹⁴ the Court held that the volitional requirement was a substantive and meaningful limitation on a state’s power to commit under the law.¹¹⁵ It also held that a finding that a person may be detained under the SVP law does not require a finding that the person

¹⁰⁵ *Id.* at 360 n.3.

¹⁰⁶ *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).

¹⁰⁷ *Id.* at 371–73 (Kennedy, J. concurring).

¹⁰⁸ *Id.* at 372 (Kennedy, J., concurring).

¹⁰⁹ *Id.* at 373 (Kennedy, J., concurring).

¹¹⁰ *Id.* at 375 (Breyer, J. concurring).

¹¹¹ *Id.* at 375–76.

¹¹² *Id.* at 376.

¹¹³ *Id.* at 375. Justice Breyer’s analysis of the substantive due process issue was joined by Justices Stevens and Souter. 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.* at 373.

¹¹⁴ *Kansas v. Crane*, 534 U.S. 407 (2002).

¹¹⁵ *Id.* at 412–13.

entirely lacks *any* control over his behavior, since it is unlikely that the state could ever meet such standard.¹¹⁶ A person’s “inability to control his behavior” is not, Justice Breyer wrote, a standard subject to a requirement of “mathematical precision.”¹¹⁷ Rather, a state must provide “proof of [the respondent’s] serious difficulty in controlling [his] behavior.”¹¹⁸ And “this, when viewed in light of such features of the case as *the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself*, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.”¹¹⁹

Significantly, the *Crane* majority went on to comment on the role of courts in setting standards in these cases in which a deprivation of a liberty interest turns on a requirement of some kind of mental condition or impairment. The Court acknowledged that its reading of *Hendricks*’ requirements “provides a less precise constitutional standard than would those more definite rules for which the parties have argued.”¹²⁰ “But,” the Court reasoned, “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.” 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.¹²¹

Justice Scalia argued in dissent that the majority’s conceptualization of the “volitional impairment” requirement had gutted the core holding of *Hendricks* and creating an unworkable framework for implementation of SVP laws.¹²² Although his critique was based upon a view that states should have *more* leeway in such commitments, he accurately identified some of key problems with the Court’s analysis that rendered it a poor foundation for ensuring that the sweep of these laws would not be too broad

3. *Core Assumptions Revealed by the Stated Rationales of Hendricks and Crane*

As the *Crane* opinion makes clear, the Supreme Court upheld the SVP experiment under a number of core assumptions about how courts would determine that individuals were appropriately subject to indefinite detention. The Court saw an indispensable role for psychiatry both in informing the determinations of courts and fact-finders applying these laws and also in supplying the proof of volitional impairment. As one federal appeals court later put it: “*Crane* held that the Constitution requires findings that separate inability to control from unwillingness to control, that is, *to separate the sick person from the vicious and amoral one*. The Court

¹¹⁶ *Id.* at 411–12.

¹¹⁷ *Id.* at 413.

¹¹⁸ *Id.* at 413.

¹¹⁹ *Id.* at 413 (emphasis added).

¹²⁰ *Id.* at 413.

¹²¹ *Id.* at 413.

¹²² *Id.* at 416–25 (Scalia, J., dissenting).

thought this rule necessary to prevent fear of recidivism from leading to indefinite preventive detention.”¹²³

In *Hendricks* and *Crane*, the Court rationalizes this unusual form of preventive detention, one that looked very different from standard involuntary commitment, by reframing SVP commitment so that it seems not so very different from other commitment laws. The essential component of all involuntary commitments is the presence of pathology of a kind that limits one’s ability to regulate one’s behavior and choices. By using nebulous terms such as “impairment,” “abnormality,” or “condition,” and by restricting detention only to those who presumably already have impaired free will,¹²⁴ the majority opinions in these cases suggest that we are not really depriving such persons of their “liberty.” Thus in *Hendricks*, the Court writes:

The precommitment requirement of a ‘mental abnormality’ or personality defect 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*.¹²⁵

Without this requirement, SVP statutes would amount to no more than punishment, thus implicating all of the constitutional protections afforded to those subjected to punishment, including prohibitions on *ex post facto* laws and double jeopardy.¹²⁶ Without it, the indefinite detention sanctioned by SVP laws is wholly noxious to our views of liberty. 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.”¹²⁷

The constitutionality of the SVP laws and their place within our legal system as a procedure that is not inconsistent with core U.S. values hangs entirely, then, upon the finding of the presence of a mental illness so severe that it deprives one of the ability to exercise choice and volition. But *how* would this identification—of those who are unable to control their behavior specifically due to mental impairment—be made? If such a distinction could not be made accurately, trial courts would run the risk of detaining un-impaired citizens simply on the basis of a perceived or feared risk. The Court was evidently confident that such delineation could take place, specifically, that a trial court could turn to the expertise of psychiatrists and other mental health professionals to identify when such pathology was present and, moreover, that the identification could be made with sufficient precision to distinguish the volitionally impaired from the “dangerous but typical recidivist.”¹²⁸ Depending on “the nature of the [respondent’s] psychiatric diagnosis and the severity of [his] mental abnormality,”¹²⁹ such professionals, it was

¹²³ *Varner v. Monohan*, 460 F.3d 861, 864 (7th Cir.2006) (emphasis added).

¹²⁴ David L. Faigman, *Making Moral Judgments Through Behavioural Science: The ‘Substantial Lack of Volitional Control’ Requirement in Civil Commitments*, 2 LAW PROB. & RISK 309, 314 (2003). Faigman criticizes the “volitional impairment” requirement of *Hendricks-Crane* on the basis that “[T]here 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.

¹²⁵ *Kansas v. Hendricks*, 521 U.S. at 358 (emphasis added).

¹²⁶ Faigman, *supra* note 124, at 314.

¹²⁷ Janus, *supra* note 30, at 13.

¹²⁸ Faigman, *supra* note 124, at 314

¹²⁹ *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

assumed, would be able to identify the key features to be considered when assessing whether someone was a true predator.

Confidence in the ability of psychiatry to make such identifications and distinctions grew at the same time as psychiatry was being given an increasingly prominent role in legal proceedings. An important factor here was the appearance of the third edition of DSM, published in 1980 by the APA. This edition (DSM-III), which shed most Freudian concepts from its nosology and instead focused on a biological basis for classifying mental disorders, quickly became a fixture in courtrooms.¹³⁰ Its science-and-research orientation, in contrast to the psychoanalysis-inspired prior editions, suggested a new and more reliable role for psychiatrists to help courts make more scientifically informed findings and, as it were, unlock the minds of litigants.

Psychiatric evidence, including diagnostic assessment, became ubiquitous and routinized in a vast array of legal proceedings.¹³¹ Judges and others in the legal system were accustomed to seeing mental health professionals offer opinions on a range of legal questions from parenting and the extent and causes of psychological injuries to insanity, commitment, and sentencing. These experts played a critical role in many cases, informing fact-finders on some of the most difficult decisions, including whether a person was criminally responsible, and on decisions with some of the most serious implications, such as which parent should raise a child. On the urging of prosecutors, courts extended the role of psychiatric evidence from assessment of past and present mental states to testimony bearing on the prediction of *future* conduct, and courts became very protective of their continued ability to admit and consider such testimony.

In a crucial decision, *Barefoot v. Estelle* in 1983, the Supreme Court upheld the admissibility of expert testimony on future dangerousness in the sentencing phase of a death penalty case.¹³² The State of Texas offered the testimony of two psychiatrists who stated, in response to hypotheticals regarding the defendant, that the defendant “would probably commit further acts of violence and represent a continuing threat to society.”¹³³ The Court majority rejected the defendant’s arguments and Justice Blackmun’s dissenting opinion that, as established by research, psychiatrists, with an accuracy rate of only about 1 in 3, were poor in predicting future violent conduct.¹³⁴ Significantly here, the APA, in its amicus filing in *Barefoot*, sided with the defendant. Psychiatrists, it stated, have no expertise at predicting dangerousness and are really no better than anyone else in doing so.

One of the *Barefoot* majority’s rationales in rejecting these arguments was that exclusion of prediction testimony in this context would limit uses of such 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

¹³⁰ EDWARD SHORTER, A HISTORY OF PSYCHIATRY: FROM THE ERA OF THE ASYLUM TO THE AGE OF PROZAC 301–304 (1997); ALLAN YOUNG, THE HARMONY OF ILLUSIONS: INVENTING POST-TRAUMATIC STRESS DISORDER 100 (1995).

¹³¹ See generally DANIEL SHUMAN, PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE (3d ed. 2005).

¹³² *Barefoot v. Estelle*, 463 U.S. 880 (1983).

¹³³ *Id.* at 884.

¹³⁴ *Id.* at 898-903.

constantly made.”¹³⁵ The majority contended that the tools of the adversarial process, such as cross-examination and contrary expert opinion, would be sufficient check on the reliability of such predictions.¹³⁶ Thus the Supreme Court paved the way for psychiatrists testifying in SVP proceedings to have a central role in predicting dangerousness.

Perhaps in light of the outcome in *Barefoot*, and in contrast to the role played by psychiatrists at the time the sexual psychopath laws were passed in the first half of the 20th century, the psychiatric establishment was quick to distance itself from the SVP proposals right from the inception of the trend. 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 who were identified as mentally ill by psychiatry. Rather, in limiting the application of the law to “sexually violent predators,” it established nothing more than an “unacceptable tautology.”¹³⁷

The APA made similar arguments in the amicus brief it submitted in support of Hendricks’ position before the U.S. Supreme Court. There, the APA argued that legislatures should not be free to define “mental illness” freely; otherwise, it warned, “the limits on deprivations of liberty to protect the public safety would quickly disappear.”¹³⁸ The APA also argued that the definition of mental illness for involuntary commitment purposes should not be tied to the diagnoses contained in the Diagnostic and Statistical Manual. As they 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.”¹³⁹ The APA’s elaboration of this argument is striking:

[The diagnoses set forth in the DSM 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 disease,’ or ‘mental defect.’” DSM-IV at xxiii. 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.” *Id.* 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.¹⁴⁰

¹³⁵ *Id.* at 898.

¹³⁶ *Id.* at 898-99. Ten years later, Justice Blackmun authored the majority opinion in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and noted that limitations of such tools on preventing unreliable expert testimony from being given undue weight by a fact finder and therefor imposing on trial judges the responsibility of being a “gatekeeper” to exclude such unreliable testimony from being admitted.

¹³⁷ *Young v. Weston*, 898 F.Supp. 744, 750 (D. Wash. 1995) (quoting amicus brief of Washington Psychiatric Association).

¹³⁸ Brief for the American Psychiatric Association as Amicus Curiae in Support of Leroy Hendricks at 21, *Kansas v. Hendricks*, 521 U.S. 346 (1997).

¹³⁹ *Id.* at 22.

¹⁴⁰ *Id.* at 23 (emphasis added).

In upholding the Kansas statute and the central model of SVP laws, the Supreme Court majority rejected psychiatry's strong words of caution about a 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 and which, at the same time, conferred upon that field a central role in ensuring the constitutionality of the application of such laws in the future.

C. The Spread of SVP Laws and Their Impact

The drafters of the original SVP law in the state of Washington apparently thought that the imposition of such indefinite commitment would be limited to exceptional cases like those of Earl Shriener or Leroy Hendricks, where the risk of recidivism was unquestionably high and indications of committing future violence were obvious.¹⁴¹ However, the numbers who have been committed under such SVP laws, in Washington and elsewhere, suggest that they have been subject to much broader use than in such cases. At the same time, there are important indications that the laws have not operated as initially expected, with regard either to those committed under them or to the protection of society.

With the question of the constitutionality of SVP laws resolved by the Court's opinion in *Hendricks*, several other states followed the lead of Washington and Kansas. Today, a total of twenty states have adopted SVP laws.¹⁴² The U.S. Congress adopted an SVP commitment scheme as part of the "Adam Walsh Child Protection and Safety Act."¹⁴³ The federal law applies to those incarcerated by the U.S. Bureau of Prisons, so it involves a somewhat different set of respondents, since most sexual abuse and assault cases are prosecuted in state courts.¹⁴⁴ However, one class that is prevalent in federal prisons are those charged with possession of child pornography and, in some instances, a pornography charge serves as a predicate offense¹⁴⁵ or even the sole predicate offense¹⁴⁶ for an SVP commitment under the Adam Walsh Act.¹⁴⁷ The law was immediately challenged as being enacted outside of Congress's authority, and that

¹⁴¹ Boerner, *supra* note 26, at 566.

¹⁴² ARIZ. REV. STAT. ANN. §§ 36-3701–3717 (2009); CAL. WELF. & INST. CODE §§ 6600–6609.3 (West 1998 & Supp. 2009); D.C. CODE §§ 22-3803–3811 (2001); FLA. STAT. ANN. §§ 394.910–.932 (West 2006 & Supp. 2009); 725 ILL. COMP. STAT. ANN. 207/1–99 (West 2008); IOWA CODE ANN. §§ 229A.1–.16 (West 2006 & Supp. 2010); KAN. STAT. ANN. §§ 59-29A01–29A22 (2005 & Supp. 2009); MASS. GEN. LAWS ANN. CH. 123A, §§ 1–16 (West 2003 & Supp. 2009); MINN. STAT. ANN. § 253B.185 (West 2007 & Supp. 2009); MO. ANN. STAT. §§ 632.480–.513 (West 2006); NEB. REV. STAT. §§ 71-1201–1226 (2009); N.H. REV. STAT. ANN. §§ 135-E:1–24 (LexisNexis Supp. 2009); N.J. STAT. ANN. §§ 30:4-27.24–.38 (West 2008); N.Y. MENTAL HYG. LAW §§ 10.01–.17 (McKinney Supp. 2010); N.D. CENT. CODE §§ 25-03.3-01–24 (2002); S.C. CODE ANN. §§ 44-48-10–170 (2002 & Supp. 2008); VA. CODE ANN. §§ 37.2-900–920 (2005 & SUPP. 2009); WASH. REV. CODE ANN. §§ 71.09.010–.903 (West 2008 & SUPP. 2010); WIS. STAT. ANN. §§ 980.01–.14 (West 2007 & Supp. 2008).

¹⁴³ Pub. L. No. 109–248, 120 Stat. 587 (2006), *codified at* 18 U.S.C. §§ 4247–48.

¹⁴⁴ A notable exception is prosecution of crime committed in "Indian Country," and 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>)

¹⁴⁵ *See, e.g.*, U.S. v. Timms, 664 F.3d 436 (4th Cir. 2012); United States v. Wetmore, 766 F. Supp. 2d 319 (D. Mass. 2011) *aff'd*, 700 F.3d 570 (1st Cir. 2012) *cert. denied*, 133 S. Ct. 1652, 185 L. Ed. 2d 631 (U.S. 2013).

¹⁴⁶ *See, e.g.*, U.S. v. Volungus, 730 F.3d 40, 43–46 (1st Cir. 2013).

¹⁴⁷ The Walsh Act provides that a federal prisoner can be "certified" as an SVP under the statute without a judicial determination. The Court of Appeals for the Fourth Circuit has held that such determination must be subject to review "within a reasonable period of time"¹⁴⁷ and failure to provide access to such determination may constitute a deprivation of due process. U.S. v. Broncheau, 645 F.3d 676, 687 n.10 (4th Cir. 2011).

litigation was finally resolved when the Supreme Court upheld the law in *U.S. v. Comstock*, in 2010.¹⁴⁸

As New York State 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.¹⁴⁹ The series' authors made several findings that suggested that the operation of SVP programs are falling far short of their promise. Notably, although nearly 3,000 people had been committed under the 19 state SVP laws then in effect, (1) the programs are not committing the most violent and dangerous offenders, since some rapists are being released while exhibitionists are being committed; (2) the treatment programs are largely ineffective; (3) few of those committed are ever released; and (4) few states have developed effective programs for monitoring those men who are released.¹⁵⁰ In spite of these problematic findings, commitment programs continue to expand. More recently, a 2013 survey of 18 state-based SVP programs found that 4779 individuals are presently committed, with an additional 861 in detention awaiting the outcome of SVP proceedings.¹⁵¹

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. In many states, 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, all of which serve to further widen the pool of those potentially subject to the laws. In Minnesota, for example, more than 7% of those committed under that state's SVP program were never convicted of an adult crime prior to their commitment.¹⁵² Moreover, courts have interpreted most of the statutory requirements for prior convictions or criminal offenses quite broadly. Thus indefinite commitments as sexually violent predators have been based on sexual offenses that do not involve any physical contact with a victim, such as exhibitionism, indecent conduct, or possession of pornography.¹⁵³

The high number committed under SVP statutes also suggests that it may be difficult, although not impossible, for a respondent to prevail in an SVP trial.¹⁵⁴ The state enjoys several advantages in the conduct of such trials. The holding in *Hendricks* that the SVP schemes are civil rather than criminal in nature, and therefore do not implicate either the *ex post facto* or double jeopardy prohibitions, has had implications significant for shaping the implementation of the

¹⁴⁸ *United States v. Comstock*, 560 U.S. 126, 130 S. Ct. 1949 (2010).

¹⁴⁹ Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES (March 4, 2007).

¹⁵⁰ *Id.*

¹⁵¹ Deirdre D'Orazio, *SOCCPN [Sex Offender Civil Commitment Program Network] Annual Survey of Sex Offender Civil Commitment Programs 2013*

(http://www.soccpn.org/images/SOCCPN_survey_presentation_2013_in_pdf.pdf)

¹⁵² Chris Serres, *Minnesota Sex Offenders: Are They Really the 'Worst of the Worst'?* STAR TRIBUNE (Dec. 2, 2013) (<http://www.startribune.com/local/233945281.html>) (profiling the case of a developmentally disabled man who was committed at the age of 19 for acts of child molestation that he committed before the age of 14). Courts in several other states, by contrast, have held that a sex offense committed as a juvenile cannot be a predicate crime for an SVP commitment. *See In re Detention of Geltz*, 40 N.W.2d 273, 279–80 (Iowa 2013) (reviewing case law on question).

¹⁵³ *See, e.g., Comm. v. Sauve*, 53 N.E.2d 178 (Mass. 2011) (public masturbation in front of adult women).

Commitments have also been based on attempted sexual abuse or assault, where there was no actual physical contact with a victim.

¹⁵⁴ I have not located any empirical studies of rates of success of SVP commitment petitions.

law, and particularly the proceedings. Since, according to *Hendricks*, these are civil proceedings, the protections afforded to *criminal* defendants under the Sixth Amendment and elsewhere do not apply. These protections include rights with respect to burden of proof,¹⁵⁵ competency,¹⁵⁶ effective assistance of counsel,¹⁵⁷ self-incrimination,¹⁵⁸ and confronting witnesses.¹⁵⁹

The promise of treatment under SVP statutes is tied to the mental abnormality rationale of all forms of involuntary commitment. However, 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. One such case is that brought by Andre Young, who initiated the initial challenge to Washington's law. (By the time his case reached the U.S. Supreme Court, the Court had already decided the *Hendricks* case.) In dismissing Young's challenge based upon an "as applied" theory, the Court noted in *dictum* that, if a person is detained for purpose of "to incapacitate and treat," then it follows that "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."¹⁶⁰ However, such language has provided no real guidance to lower courts evaluating right-to-treatment claims.¹⁶¹ Most state SVP laws do not offer immunity from prosecution for disclosure of criminal conduct so the threat of self-incrimination is a real one.¹⁶² Further, social scientists have yet to reach anything approaching a consensus on the efficacy, in terms of preventing recidivism, of the various kinds of inpatient treatment programs administered to SVPs.¹⁶³

The burden on an SVP respondent, once committed, to obtain release from detention is considerable. Proving a decrease in risk of re-offending is difficult, particularly when one has

¹⁵⁵ See *infra* notes 292–298 and accompanying text. Several SVP laws, including Kansas and Washington's, require proof beyond a reasonable doubt.

¹⁵⁶ See, e.g., *In re Detention of Morgan*, 253 P.3d 394, 403 (Wash. Ct. App. 2011); *In re Commitment of Luttrell*, 754 N.W.2d 249 (Wis. Ct. App. 2008).

¹⁵⁷ See Michael Perlin & Heather Cucolo, "Far From the Turbulent Space": *Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators*, 20–25 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2384899). However, all laws provide for some access to counsel.

¹⁵⁸ *Allen v. Illinois*, 478 U.S. 364, 373, 106 S. Ct. 2988, 2994, 92 L. Ed. 2d 296 (1986).

¹⁵⁹ See, e.g., *United States v. Abregana*, 574 F. Supp. 2d 1123, 1140 (D. Haw. 2008).

¹⁶⁰ *Seling v. Young*, 531 U.S. 250, 265, 121 S.Ct. 727 (2001).

¹⁶¹ Ever 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 Miller, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CAL. L. REV. 2093, 2095 (2010); La Fond, *supra* note 25, at 167–69

¹⁶² EWING, *supra* note 13, 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 (2002). Justice Kennedy, writing on behalf of the same 5-4 majority that upheld the Kansas SVP law in *Hendricks* (check this) 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.

¹⁶³ EWING, *supra* note 13, at 52–55.

been denied opportunities either to demonstrate self-restraint or to receive effective treatment.¹⁶⁴ As a result, thousands of people who have been detained for lengthy periods of time have little likelihood of ever being released.¹⁶⁵ Surveys of release rates suggest that most individuals are committed for extended periods of time.¹⁶⁶ The *New York Times*' 2007 study revealed that, of the nearly 3,000 individuals who had been committed nationwide under SVP laws, only 50 had been released on the assessment by a clinician and state-appointed evaluator that they were "ready" for release.¹⁶⁷ The near impossibility of release means that there is a growing and aging group of people who are living out their lives in detention.¹⁶⁸ The *Times* authors noted that Leroy Hendricks, who was 72 years old in 2007, "spen[t] most days in a wheelchair or leaning on a cane, because of diabetes, circulation ailments and the effects of a stroke"¹⁶⁹ and that those who remained in detention included a 102-year-man with poor hearing.

Minnesota's SVP program, established in 1993, provides perhaps the most extreme example of the challenges of obtaining release. Between the program's enactment date and 2012, 635 people (nearly all men) were committed under that state's SVP law.¹⁷⁰ Not one was released until 2012.¹⁷¹ That state's program has come under criticism for its failure to provide adequate treatment for detained offenders as well as its stringent release requirements.¹⁷² In 2012 the British High Court refused to extradite a sex offender to Minnesota who faced possible SVP commitment on the basis that such commitment would constitute a "flagrant denial" of his human rights.¹⁷³ More recently, the U.S. District Court for District of Minnesota permitted a class action lawsuit brought on behalf of those committed in the state's program to go forward. In its decision, the court noted: "Given the prison-like conditions described by Plaintiffs, and the lack of treatment and essentially no-exit regime alleged in this case, it may well be that, with a fully developed record, the Court will find the totality of the MSOP system to be unacceptably

¹⁶⁴ Prentky et al., *supra* note 7, 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 Commitment of West, 800 N.W.2d 929, 947–48 (Wisc. 2011) (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).

¹⁶⁵ La Fond, *supra* note 25, at 166–70; EWING, *supra* note 13, at 22.

¹⁶⁶ Prentky et al., *supra* note 7, 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 (Lieb & Gookin, 2005). 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)."); WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, COMPARISON OF STATE LAWS AUTHORIZING INVOLUNTARY COMMITMENT OF SEXUALLY VIOLENT PREDATORS: 2006 UPDATE, REVISED (2007) available at www.wsipp.wa.gov/rptfiles/07-08-1101.pdf.

¹⁶⁷ Another 115 people had been released because of "legal technicalities, court rulings, terminal illness or old age." Davey & Goodnough, *supra* note 149.

¹⁶⁸ Several studies have noted that the risk of recidivism for sexual violence decreases significantly for those over the age of 60. U.S. 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)).

¹⁶⁹ Davey & Goodnough, *supra* note 149.

¹⁷⁰ Rupa Shenoy, *Families of Sex Offenders Find Hope in Clarence Opeim's Release*, MPRNews (Mar. 5, 2012) (<http://minnesota.publicradio.org/display/web/2012/03/05/minnesota-sex-offender-program>)

¹⁷¹ Mary Lynn Smith & Dave Hage, *Minnesota Sex-Offender Lawsuit Takes Step Forward*, STAR TRIBUNE (July 25, 2012) <http://www.startribune.com/local/163607246.html>.

¹⁷² *Id.*

¹⁷³ John Aston, *Court blocks Shawn Sullivan's U.S. Extradition*, THE INDEPENDENT (June 28, 2012).

and unconstitutionally punitive.”¹⁷⁴ In short, as one commentator puts it in reference to the realities of SVP laws: “Involuntary commitment is both incarceration and exile.”¹⁷⁵

Since so many that are committed under SVP laws remain in detention, these programs are becoming increasingly financially burdensome on the states that adopted them. Estimates of the cost to house each detainee range from \$94,000 to \$175,000 annually.¹⁷⁶ These figures do not including capital expenditures to build new facilities for SVP program or the costs of litigation for the initial petition or for requests for release.¹⁷⁷ One study suggests that the cost of detaining a sex offender is four times more expensive than incarcerating a prisoner.¹⁷⁸

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. 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 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.¹⁷⁹

It should be emphasized here that one consequence that SVP laws appear *not* to have had is decreasing the overall incidence of sexual violence in those states that have enacted such laws. It is difficult to assess empirically 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,

¹⁷⁴ Karsjens v. Jesson, 2014 WL 667971, *25 (Civil No. 11–3659 (DWF/JJK) D. Minn. Feb. 20 2014)

¹⁷⁵ 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).

¹⁷⁶ Davey & Goodnough, *supra* note 149. 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. Florida’s SVP detention center filled 229 prescriptions for arthritis medication one month, and 300 for blood pressure and other heart problems. *Id.*

¹⁷⁷ EWING, *supra* note 13, 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. See also Gary Craig, *Expert Opinion Among Civil Commitment’s High Costs*, ROCHESTER DEMOCRAT & CHRONICLE (Dec. 29, 2010)

(http://www.democratandchronicle.com/article/20101229/NEWS01/12290345?nclick_check=1); Sally Kestin and Dana Williams, *Experts Cash in on Predator Law*, SUN SENTINEL (Aug. 21, 2013) (<http://interactive.sun-sentinel.com/jimmy-ryce/witness.html>); Christine Willimsen, *State Wastes Millions Helping Sex Predators Avoid Lockup*, SEATTLE TIMES (Jan. 21, 2012).

¹⁷⁸ Davey & Goodnough, *supra* note 149.

¹⁷⁹ In 2013, the *South Florida 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 and Dana Williams, *Sex Predators Unleashed*, SO. FLA. SUN SENTINEL (Aug 18, 2013). A follow up article in late December described the Florida Legislature’s response to the paper’s investigation as crafting a “comprehensive overhaul” of the state’s SVP law. Sally Kestin and Dana Williams, *Investigation Spurs Reform Of Sex Offender Laws*, SO. FLA. SUN SENTINEL (Dec. 29, 2013).

researchers concluded that “SVP laws have had *no discernible impact* on the incidence of sex crimes.”¹⁸⁰ It may be added that, by enacting SVP laws and prosecuting these expensive programs, policymakers are often shifting resources away from other arguably more relevant and effective programs, including those aimed at providing probation officers, preventing domestic violence and child abuse, and treating sex offenders.¹⁸¹

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 progressively 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.”¹⁸² It also made clear that it was not going to establish specific principles to guide lower courts and legislatures, reasoning that “the Constitution’s safeguards of human liberty in the area of mental illness and the law are not always best enforced through bright-line rules.”¹⁸³ 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 chose to precisely define the contours of each state’s SVP commitment laws, mental health professionals would reliably identify those whose medical conditions put them at higher risk of committing sexual violence due to volitional impairment, thus ensuring that such laws would not sweep too broadly. By framing the standards for commitment in terms of mental disorder and making findings of volitional impairment from such disorders a constitutional requirement, the legislatures and court have assigned psychiatry a central role in the implementation of SVP laws: providing expert opinion on the likelihood future sexual violence stemming from mental conditions in specific individuals.

In effect, the constitutionality of the new scheme of SVP laws was saved by the promise of psychiatry. The Court’s rationale is valid, however, only if it is based upon accurate assumptions about the contributions psychiatry could make to ensure that the SVP laws did not overreach. Justice Kennedy made that point explicitly in his *Hendricks* concurrence when he noted that, if it turns out that “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.¹⁸⁴ It follows that, if the very concept of a mental health predicate is highly imprecise, then the entire model of SVP law similarly falls short of meeting due process requirements

Two major problems are involved here. One is that the place of sexual deviance is unclear in the classification of psychopathology. The other is that psychiatry does not operate in

¹⁸⁰ Tamara Rice Lave & Justin McCrary, *Do Sexually Violent Predator Laws Violate Double Jeopardy and Substantive Due Process: An Empirical Inquiry*, 78 BROOKLYN L. REV. 1391, 1392 (2013) (emphasis added).

¹⁸¹ *Id.* at 1426–27; Good & Burstein, *supra* note 46, at 38.

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

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 373 (Kennedy, J., concurring).

terms of predicting behavior. It is a profession whose orientation is to identify the disordered primarily for the purposes of treating them—for relieving their suffering and improving their 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. and the past 24 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. What has become clear is that the Supreme Court based its ruling regarding the class of “sexually violent predators” on a legal, not psychiatric, construct, and its assignment of the role of determining such classification to the field of psychiatry involved a distorted view of that field with dire consequences for those targeted by the statutes.

This section will first review the historical and current approaches within psychiatry to identifying disorders involving sexual arousal. Next it will examine how such approaches became significantly distorted in SVP proceedings under the framework set forth in *Hendricks-Crane*. Particular attention will be given to the problem of reliance on psychiatry to predict sexual violence. Finally, this section will review some the attempted fixes to this imperfect fit between psychiatry and law in regard to prediction, 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.”¹⁸⁵ When experts speak of mental pathology, particularly in courtrooms, they tend to do so in terms of diagnoses. However, the diagnoses that, on their face, appear to identify those individuals who present the greatest threat of sexual dangerousness are not in accord with the conceptualization of mental abnormality or mental disorder evidently contemplated in the Court’s opinions and the SVP statutes they 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 *Diagnostic and Statistical Manual of Mental Disorders* (“DSM”), the APA’s standardized nosology, has offered a definition for this term, although such definition has varied over the years. 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 all situations.”¹⁸⁶ Recent editions of the DSM also feature cautionary language about using the

¹⁸⁵ Eric S. Janus & Robert A. Prentky, *Sexual Predator Laws: A Two-Decade Retrospective*, 21 FED. SENTENCING REP. 90, 93 (2008).

¹⁸⁶ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. text Rev. 2000) (“DSM-IV-TR”) at xxx.

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 description are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood."¹⁸⁷

However, the Supreme Court clearly anticipated that experts testifying in SVP cases would frame their opinions, at least in part, in terms of diagnosis. *Crane* referenced diagnosis specifically: "[W]hen viewed in light of such features of the case as the nature of *the psychiatric diagnosis*, and the severity of the mental abnormality itself, [the proof] must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case."¹⁸⁸ And the *Hendricks* majority noted that the "mental abnormality" requirement was met in *Hendricks*' case because the respondent had a "disorder" listed in the DSM.¹⁸⁹ However, in neither opinion did the Court indicate the full range of or kind of diagnoses that would be sufficient for purposes of a constitutionally permissible preventive detention. In the absence of such direction, uncertainties abound for those in both law and psychiatry. Indeed, it appears that virtually any diagnosis attached by a single mental health professional could suffice to justify indefinite commitment of someone as a sexually violent predator.¹⁹⁰

Psychiatric diagnoses have often been presented in insanity defense cases, but there are important differences between these settings. In the context of determining criminal responsibility, the diagnosis is one element of the reconstruction of a past frame of mind at a given moment in time. The reconstruction is less dependent upon a specific label than on an overall assessment of how the person's mind was working (or not) at such moment.¹⁹¹ 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. Absent a defendant's choice to assert such defense, there is no role for psychiatric testimony, including diagnoses, at trial. By contrast, in SVP proceedings, because the diagnosis of mental abnormality is the basis for adhering to due process protections, 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 diagnosis itself must align with due process principles in court proceedings.

In *Hendricks*, the Court noted the lack of consensus among psychiatrists regarding where the line between ill and not-ill, and also the lines among the specific illnesses, can be drawn. This led the majority to conclude that legislatures, in framing the laws, and judges reviewing the evidence in individual cases, should do the line-drawing. But the lack of consensus here should

¹⁸⁷ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 25 (5th ed. 2013) ("DSM-5"). The DSM-IV-TR's "cautionary statement" was quoted in the APA's amicus brief to the Court in *Hendricks*, as noted *supra* note 140 and accompanying text.

¹⁸⁸ *Kansas v. Crane*, 534 U.S. 407, 413 (2002) (emphasis added).

¹⁸⁹ *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997).

¹⁹⁰ Allan Frances, et al., *Defining Mental Disorder When It Really Counts: DSM-IV-TR and SVP/SDP Statutes*, 36 J. OF THE AM. ACAD. OF PSYCHIATRY AND LAW 375, 379 (2008).

¹⁹¹ 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. Stephen Morse, *Crazy Behavior, Morals & Science: An Analysis of Mental Health Law*, 51 S. Cal. L. Rev. 527, 604-13 (1978).

have signaled to the courts that, for such a massive deprivation of liberty as an indefinite preventive detention (for terms far longer than in the standard involuntary hospitalization context), and especially where the burden is on the respondent to petition for release and show that he has become well enough to be at large, the deciding factor should not be so variable and subjective. Such reasoning also failed 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 expert's opinions. The Court's rulings, when implemented in the context of the on-the-ground realities of trials, paved the way for scores of SVP 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, which provides for a range of prognostication. The requirement of the specific risk in SVP laws leads many to assume there must be the 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. Other scholars have set out this history in some detail,¹⁹² and 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 has been labeled pathology is in fact nothing more than deviance from social norms predominant at a given time, including norms regarding sexuality and proper gender behavior.¹⁹³ Contemporary historians of psychiatry generally regard supposed pathological "conditions" as "constructions," and often quite problematic ones.¹⁹⁴

Although Western societies, particularly through religious¹⁹⁵ and legal-political institutions, had long identified and condemned a range of sexual behaviors as deviant, the notion of such conduct as evidence of *mental illness* did not arise until the mid-19th century with the increasing authority of psychiatry.¹⁹⁶ As new works about sexual deviance and perversion appeared in the European medical literature, the criminalization of specific sexual acts also

¹⁹² See, e.g., Andreas De Block & Pieter R. Adriaens, *Pathologizing Sexual Deviance: A History*, 50 J. of SEX RESEARCH, 276, 277 (2013). See generally JESSE BERING, *PERV: THE SEXUAL DEVIANT IN ALL OF US* (2013).

¹⁹³ De Block & Adriaens, *supra* note 192, at 277.

¹⁹⁴ *Id.* ("[P]sychiatrists' and sexologists' descriptions of new pathologies or types of persons should not be considered as discoveries but rather as inventions or constructions.")

¹⁹⁵ 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.

¹⁹⁶ *Id.*

became more widespread.¹⁹⁷ In time, some psychiatrists were led to criticize the punishment of such behaviors and to recommend that they be eliminated through treatment instead.¹⁹⁸

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.¹⁹⁹ The *Psychopathia Sexualis* differed from prior accounts in its focus on the psychological origins of such conduct, based in an individual's personality, rather than on its origins in an individual's anatomy.²⁰⁰ 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," that is, sexual arousal not from heterosexual intercourse with adults but from non-standard sources, such as objects, animals, contexts, and children. 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.²⁰¹

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.²⁰² 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 of normal people."²⁰³ Accordingly, these desires signal dysfunction only when they are the source of compulsion, fixation, and exclusiveness such that they interfere with normative functioning.²⁰⁴ While this psychoanalytic approach further blurred the lines between normal and pathological sexuality, Freud, like Krafft-Ebing, assumed that such a distinction in fact existed²⁰⁵ and, in his later work, maintained that most perversions originated from an unresolved castration anxiety and early sexual trauma.²⁰⁶ 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*

¹⁹⁷ *Id.* at 279.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 280; BERING, *supra* note 192, at 11.

²⁰⁰ De Block & Adriaens, *supra* note 192, at 280.

²⁰¹ *Id.* at 281.

²⁰² *Id.* at 282 (citing SIGMUND FREUD, THREE ESSAYS ON SEXUALITY 57 (1962)).

²⁰³ SIGMUND FREUD, 16 INTRODUCTORY LECTURES ON PSYCHOANALYSIS 322 (116-17). [check cite] See also SIGMUND FREUD, THREE ESSAYS ON SEXUALITY 26–27 (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.").

²⁰⁴ Jerome C. Wakefield, *DSM-5 Proposed Diagnostic Criteria For Sexual Paraphilias: Tensions Between Diagnostic Validity and Forensic Utility*, 34 INTL. J. OF L. AND PSYCHIATRY 195, 199 (2011).

²⁰⁵ *Id.*

²⁰⁶ *Id.* See also David Bryden and Maran M. Grier, *The Search For Rapists' "Real" Motives*, 101 J. CRIM. L. & CRIMINOLOGY 171, 174–76 (2011).

In the second half of the 20th century, the DSM became the leading source of psychiatric classification. The first two editions, based primarily on psychoanalytic approaches, were published in 1952 and 1968. 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.²⁰⁷ The texts did not place sexual perversions clearly within the realm of mental illness but, rather, treated them as types of social deviance.²⁰⁸

As remarked above, the DSM-III, published in 1980, was a significant departure from the earlier editions. What was most notable in this edition was its presentation of specific diagnostic criteria for each disorder.²⁰⁹ 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”²¹⁰ (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. 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. 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?

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 it is only when persistent form of sexual attraction leads to such distress or impairment is it appropriate to label it as a disorder.²¹¹ Thus the extent to which a subject’s sexual feelings deviated from social norms were 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. The elimination of homosexuality from the list in 1973 led to a debate about whether and which other forms of 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). The DSM-III included language in the forward noting a distinction

²⁰⁷ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 38–39 (1952); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 302 (2d. Ed. 1968); De Block & Adriaens, *supra* note 192, at 285-86.

²⁰⁸ De Block & Adriaens, *supra* note 192, at 286.

²⁰⁹ SHORTER, *supra* note 130, at 300-302.

²¹⁰ 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 6. The DSM-III-R list of paraphilias included: Fetishism, Transvestism, Zoophilia, Pedophilia, Exhibitionism, Voyeurism, Sexual Masochism, and Sexual Sadism. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 268-75 (3rd ed. 1980) (“DSM-III”).

²¹¹ DeBlock & Adriaens, *supra* note 192, at 288-89; Wakefield, *supra* note 204, at 197, 200.

between deviance and disorder²¹² and the lead editor of the manual, Robert Spitzer, acknowledged that the term “disorder” “always involves a value judgment.”²¹³

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, in the absence of distress or limited functioning, conduct based upon such urges could be criminal but not pathological.²¹⁴ With this revision, that edition further clarified that child sex offenders could not be considered mentally ill unless their deviant behavior caused such distress or impairment.²¹⁵ This modification, however, which moved the notion of paraphilia away from the problematic normal-abnormal dichotomy,²¹⁶ elicited outrage among certain conservative groups who claimed that this would de-pathologize non-distressed pedophiles²¹⁷ and give an “ego-syntonic well-functioning paraphilic a free pass as far as disorder goes.”²¹⁸ Robert Spitzer later referred to the blowback as a “public relations disaster,” and the amendment (referred to as a “misinterpretation” by the editors) was reversed for those paraphilias “involving nonconsenting victims” to allow a diagnosis of paraphilia based upon either the individual’s acting on paraphilic urges with such victims *or* experiencing distress caused by such urges.²¹⁹ 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.²²⁰

Another significant change in the DSM-IV was to the “A Criterion” in the paraphilia diagnoses, this one allowing clinicians to base a diagnosis on “recurrent, intense sexually arousing fantasies, sexual urges, *or behaviors*.”²²¹ This revision was a technical adjustment required by changes in wording made in other section of the diagnostic criteria for paraphilia.²²²

²¹² DSM-III, *supra* note 210, 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.”).

²¹³ DeBlock & Adriaens, *supra* note 192, at 288.

²¹⁴ *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).

²¹⁵ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 528 (4th ed. 1994) 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 204, at 201–202.

²¹⁶ Michael B. First & Robert L. Halon, *Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases*, 36 J. OF THE AM. ACAD. OF PSYCHIATRY AND 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 215, at 569–75. Each paraphilia had its own diagnostic criteria.

²¹⁷ 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. See <http://exodusinternational.org/about-us/mission-doctrine/>.

²¹⁸ Wakefield, *supra* note 204, at 201.

²¹⁹ DSM-IV-TR, *supra* note 186, at 566; First & Frances, *supra* note 217, at 1240.

²²⁰ DSM-IV-TR, *supra* note 186, at 566 (“The person has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.”).

²²¹ DSM-IV, *supra* note 215, at 566 (emphasis added).

²²² First, *supra* note 214, at 1240.

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 serve prosecutors in SVP cases as a basis for assigning the diagnosis of mental abnormality to sexual offenders “based only on their having committed sexual offenses (e.g., rape).”²²³ The DSM editors have asserted repeatedly that such a 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.²²⁴ 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.²²⁵ As one of the DSM-IV editors, Michael First, 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.”²²⁶ Since the best indicators of a pattern of 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.²²⁷ To base a diagnosis on a person’s acts alone, therefore, “conflate[s] the underlying phenomenology of a paraphilia with its clinical manifestations.”²²⁸

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”²²⁹ and then, beginning with the DSM-III-R, it was “Paraphilia Not Otherwise Specified.”²³⁰ The purpose of this label was to acknowledge that the 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 (such as a sexual interest in animals or in rubbing against strangers) was not among the ones listed. Each edition of the DSM provided a non-exhaustive list of examples of such other conditions.²³¹ Some were removed from the list in

²²³ First & Frances, *supra* note 217, at 1240; Frances et al., *supra* note 190, at 380; Wakefield, *supra* note 204, at 201. 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) (http://www.huffingtonpost.com/allen-frances/dsm5-writing-mistakes-wil_b_3419747.html).

²²⁴ First & Halon, *supra* note 216, 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.”).

²²⁵ *Id.* 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.* at 447–48. *See also* Wakefield, *supra* note 204, at 198 (“[P]araphilias are disorders of sexual arousal and desire, not matters of behavior and action undertaken for other reasons.”).

²²⁶ First, *supra* note 214, at 1240.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ DSM-III, *supra* note 210, at 275.

²³⁰ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3rd. ed. Rev’d 1987) at 290.

²³¹ 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 187, at 705.

successive editions and provided full criteria; and some were added to the list.²³² The historical variability of the “NOS”—Not Otherwise Specified—category of paraphilias is evident, and its diagnostic validity has never been subjected to research.²³³

There are strong opinions throughout psychiatry about the validity of entire category of paraphilias and the implications of their use as a basis for SVP commitment.²³⁴ Because of the obvious intersection with issues regarding the significance of social norms and of religious and moral judgments about sexuality and sexual behavior, the paraphilias have always been among the most controversial diagnoses in the DSM.²³⁵ 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 within the psychiatric profession 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.²³⁶ Scholars questioning the validity of the diagnosis of pedophilia as a pathology 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.²³⁷ The fact that such widely variable considerations are often the basis for the indefinite detention of individuals is of particular concern to these commentators.

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

No less problematic than the lack of agreement around the proper basis upon which to assign diagnoses of paraphilia in SVP cases is the lack of consensus about whether the presence of a condition such as pedophilia could serve as a cause of past acts or the extent to which such a condition could serve as a predictor of future criminal conduct including sexual abuse and rape. Although it might appear that paraphilias are the type 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.²³⁸ While most SVP laws take a “one size fits all” approach to offenders, research indicates that sex offenders are a “markedly

²³² 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 210, at 270, 275 with DSM-IV-TR, *supra* note 186, at 570, 576.

²³³ Prentky et al., *supra* note 7, at 366.

²³⁴ See, e.g., Robert A. Prentky et al., *Commentary: Muddy Diagnostic Waters in the SVP Courtroom*, 36 J. AM. ACAD. PSYCHIATRY AND THE LAW 455, 456–58 (2008).

²³⁵ Wakefield, *supra* note 204, at 195.

²³⁶ *Id.* at 195–96.

²³⁷ BERING, *supra* note 192, at 150–52.

²³⁸ First & Halon, *supra* note 216, at 446 (citing N. Dunsieith, et al.: *Psychiatric and Legal Features of 113 Men Convicted of Sexual Offenses*, 65 J CLIN. PSYCHIATRY 293–300 (2004)); Alan Felhouse & Lenore Simon, *Introduction to this Issue: Sex Offenders Part One*, 18 BEH. SCI. & THE LAW 1, 2 (2000) (noting that the consensus of clinicians who treat sex offenders is that “most sex offenders do not have a paraphilia”); Simon, *supra* note 41, at 294 (“deviant sexual fantasies do not exist in the majority of sex offenders.”) See also Prentky et al., *supra* note 7, at 366 (noting that studies have shown that “a substantial proportion of rapists do not meet the criteria for any paraphilia”).

heterogeneous group of criminals,”²³⁹ As one scholar notes, this “primary pathology attributed to sex offenders ... is beginning to be discredited empirically.”²⁴⁰

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.²⁴¹ 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 behavior: persistent, deviant sexual arousal. Inappropriate sexual conduct, such as 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,” and also by “opportunism in a person with antisocial personality disorder.”²⁴² 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.²⁴³

The pathology of those who commit sexual offenses against other adults is even more indeterminate with regard to specific diagnosis. A diagnosis of “sexual sadism” could apply to all those who derive specific erotic pleasure from another person’s suffering,²⁴⁴ but it certainly does not apply to all rapists, even to those who commit multiple offenses.²⁴⁵ At the time the DSM-III-R was adopted, the editorial committee debated including a new diagnosis, “paraphilic coercive disorder,” among the paraphilias.²⁴⁶ This proposal immediately generated controversy. Not only was there “little systematic research on the usefulness, reliability, validity, or definition of the proposed disorder,” but many raised concerns about turning rape into a mental disorder.²⁴⁷ 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.²⁴⁸ Ultimately, the absence of sufficient data to support the existence of such a separate disorder led to the rejection of this proposal entirely.²⁴⁹

²³⁹ Prentky et al, *supra* note 234, at 456.

²⁴⁰ Simon, *supra* note 41, at 284.

²⁴¹ First, *supra* note 214, 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 misdiagnose of individuals with a paraphilia. 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 was upheld on appeal) because Dr. First had not examined the petitioning individual. In re Detention of McGary, 231 P.3d 205, 208–210 (Wash. Ct. App. 2010).

²⁴² First, *supra* note 214, at 1240. See also Fabian M. Saleh, et al., *The Management of Sex Offenders: Perspectives for Psychiatry*, HARV. REV. PSYCH. 359, 361 (Nov/Dec 2010) (noting the a wide range of motivations and “environmental precipitants” related to sexual violence).

²⁴³ First, *supra* note 214, at 1240 (citing M.C. Seto & M.L. Lalumiere, *A Brief Screening Scale to Identify Pedophilic Interests Among Child Molesters*, 13 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT, 15–25 (2001)).

²⁴⁴ DSM-IV-TR, *supra* note 186, at 573 (“the individual derives sexual excitement from the psychological or physical suffering (including humiliation) of the victim”).

²⁴⁵ Simon, *supra* note 41, at 293.

²⁴⁶ Frances et al., *supra* note 190, at 380.

²⁴⁷ *Id.*

²⁴⁸ *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. s 12211(b)(1); 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.

²⁴⁹ It was not even retained as potential diagnosis for future study, as is done with some rejected diagnoses. *Id.*

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

Of particular significance for SVP commitments is the fact 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 has difficulty controlling his behavior.”²⁵⁰ The defining feature of each of the paraphilias is a particular source of sexual *arousal* (labeled as deviant), and, as noted above, a great many people with such sexual interests, urges or fantasies never act on them.²⁵¹ As a result, some researchers “liken it [a paraphilia] to an addiction, others to sexual orientation.”²⁵²

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.²⁵³

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.”²⁵⁴

The psychiatric field has long rejected the notion that it has a special ability to predict future behavior and particularly dangerous conduct.²⁵⁵ It has also been ambivalent about its ability to understand and to identify volitional impairment, particularly in the criminal context.²⁵⁶ 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. As the APA famously noted in its caution about the limits of psychiatry in this regard: “[T]he line between an irresistible impulse and an impulse not resisted is probably no sharper

²⁵⁰ First & Halon, *supra* note 216, at 450.

²⁵¹ *Id.*

²⁵² Casey Schwartz, *What Science Reveals about Pedophilia*, THE DAILY BEAST (Dec. 2, 2011).

²⁵³ DSM-IV-TR, *supra* note 186, 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 187, at 476–79, but they 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 7, at 365.

²⁵⁴ Prentky et al., *supra* note 234, at 457.

²⁵⁵ Simon, *supra* note 41, at 302; JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR (1981) [pin cite]

²⁵⁶ First & Halon, *supra* note 216, at 451; John Monahan, *Clinical and Actuarial Predictions of Violence*, in MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 300 (D. Faigman et al. eds., 1997).

than that between twilight and dusk.”²⁵⁷ With regard to SVP laws, the Association for the Treatment of Sexual Abusers (a group of medical professionals), in its amicus brief to the Supreme Court in *Crane*, stated that the concept of volitional impairment in SVP legal standards is “meaningless and unworkable”²⁵⁸ Like the “irresistible impulse” test for criminal responsibility, the notion of “volitional impairment,” if it even exists, should similarly be rejected because of the inability of experts to identify it.

The hesitation of psychiatrists to make predictions in the SVP context is based in part on specific relevant research findings. Contrary to a common assumption, the recidivism rate among sex offenders for committing a future sex offense is actually quite low as compared with many other crimes.²⁵⁹ Indeed, a failed prediction of future sex offense is more likely to yield a false positive than a false negative. Research findings also call into doubt the assumption that the source of the behavior of sex offenders is a specific abnormality or condition.²⁶⁰ Sexual offenses are often committed by those with criminal histories for other offenses, and convicted sex offenders may recidivate through other forms of criminal or antisocial behavior.²⁶¹ 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.’”²⁶² However, the consensus of the field is that such predictions cannot be done with “any precision.”²⁶³

Just as statistical analysis reveals the absence of a strong correlation between a paraphilia and sexual violence,²⁶⁴ 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.²⁶⁵ 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.²⁶⁶

²⁵⁷ American Psychiatric Association, *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681–8 (1983).

²⁵⁸ Brief of Association for the Treatment of Sexual Abusers as Amicus Curiae at 3, *Kansas v. Crane*, 534 U.S. 407 (2002).

²⁵⁹ Simon, *supra* note 41, at 302-306.

²⁶⁰ See, e.g. Cynthia Calkins Mercado, *Sex Offender Management, Treatment, And Civil Commitment: An Evidence Based Analysis Aimed At Reducing Sexual Violence, Report issued to Research Report Submitted to the National Institute of Justice* (Jan 2011) (<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 41, 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.”)

²⁶¹ Simon, *supra* note 41, at 284.

²⁶² Saleh et al, *supra* note 242, at 366.

²⁶³ *Id.*

²⁶⁴ See *supra* notes 238–233 and accompanying text. One researcher has argued that paraphilias are “taxonomically useless” to identify those sex offenders who would qualify as SVPs.

²⁶⁵ Prentky et al., *supra* note 7, at 367.

²⁶⁶ See Emily Bazelon, *Passive Pedophiles: Are Child Porn Viewers Less Dangerous Than We Thought?* SLATE (Apr. 25, 2013); BERING, *supra* note 192, 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 [confirm] 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.²⁶⁷

The diagnosis that is most obviously applicable to those who commit acts of sexual violence is Antisocial Personality Disorder (ASPD).²⁶⁸ Indeed, ASPD is a diagnosis that, by definition, could apply to most people incarcerated in the United States.²⁶⁹ ASPD is often characterized by a pattern of criminal behavior, including committing sex crimes against children and nonconsenting adults.²⁷⁰ In the case of sexual offenders, then, what is indicated by a diagnosis of ASPD is that the acts of violence are indicative not so much of a paraphilia as of a “pervasive pattern of disregard for and violation of the rights of others.”²⁷¹

There is dispute within psychiatry about whether personality disorders, particularly ASPD, are true mental disorders or illnesses, and whether a diagnosis of such a disorder should be offered in support of SVP commitments, either standing alone or on conjunction with one or more paraphilias.²⁷² Nothing in the Supreme Court's precedent precludes basing an SVP on such a diagnosis alone; there is no requirement that a person have a “sexual” disorder of some kind.²⁷³ The diagnosis of ASPD could apply to a great many rapists and child molesters, some of whom may also have paraphilias; but untangling such comorbidity is not straightforward. As a result, it

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 COMMISSION, FEDERAL CHILD PORNOGRAPHY OFFENSES (REPORT TO CONGRESS) x, xv (Dec. 2012) (available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/index.cfm)

²⁶⁷ *Id.*

²⁶⁸ First & Halon, *supra* note 216, at 448.

²⁶⁹ Studies have estimated that anywhere from 40% to 80% of the male prison population would meet the diagnostic criteria. EWING, *supra* note 13, at 25; Thomas K. Zander, *Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis*, 1 J. OF SEXUAL OFFENDER CIVIL COMMITMENT: SCIENCE AND THE LAW, 17, 53 (2005); First & Halon, *supra* note 216, at 443-454

²⁷⁰ Simon, *supra* note 41, at 294 (noting that empirical findings indicate that “clinicians diagnose more convicted child molesters with antisocial personality disorder than with pedophilia.”).

²⁷¹ DSM-IV-TR, *supra* note 186, at 701. 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; rather, the ASPD is seen as a fixed personality feature. First & Halon, *supra* note 216, at 449.

²⁷² See, e.g., Dean R. Cauley, *The Diagnostic Issue of Antisocial Personality Disorder in Civil Commitment Proceedings: A Response To Declue*, 35 J. PSYCHIATRY & LAW 475 (2007); Gregory DeClue, *Paraphilia NOS (non-consenting) and Antisocial Personality Disorder*, 34 J. OF PSYCHIATRY & LAW 495 (2006).

²⁷³ 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. Frances, et al., *supra* note 190, at 382.

is exceedingly difficult for courts to identify whether the sexually offending behavior is merely criminal²⁷⁴ and therefore to draw that critical constitutional line required in *Crane* of separating the typical recidivist sexual offender from the one who has “volitional impairment.”

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.²⁷⁵ The Court’s opinion in *Foucha* suggests that ASPD would not be enough for post-acquittal form of commitment since, in that particular case, the acquitee had an “antisocial personality.”²⁷⁶ ASPD, like other personality disorders, has never been regarded in the criminal law as a *volitional* impairment sufficient to exempt an offender from criminal responsibility. Indeed, to treat it as such would call into question the conviction and incarceration of most of this country’s prison population. Such disorder likely contributes to much “typical” recidivism, and therefore a commitment based upon ASPD alone would be constitutionally suspect since it would extend this extraordinary deprivation of liberty to a far greater segment of the population than substantive due process principles would permit.²⁷⁷

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, the assumption has no footing in current medical thinking either about the mental condition of such offenders or about 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 American Psychiatric Association has repeatedly attempted to draw attention to the divergence between the 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. The report it released in 1999 (two years after the *Hendricks* opinion) was highly critical of such laws.²⁷⁸ Members of the Task Force noted that the “question of whether all or some sexual offenders are mentally ill is complicated and controversial”²⁷⁹ and, similarly, that there was no consensus on the degree to which sex offenders have control over their behavior.²⁸⁰ Certainly some offenders have paraphilias, the

²⁷⁴ Frances, et al., *supra* note 190, at 381.

²⁷⁵ EWING, *supra* note 13, at 25.

²⁷⁶ *Foucha v. Louisiana*, 504 U.S. 71, 78(1992).

²⁷⁷ Despite many calls to revise the rather circular diagnostic criteria to address many of the resulting problems with its use, it was left unchanged by the editors of the DSM-5. DSM-5, *supra* note 187, at 659. 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 agreement” range). Bret S. Stetka & Christoph U. Correll, *A Guide to DSM-5: Field Trial Results*, MEDSCAPE PSYCHIATRY (May 21, 2013) (http://www.medscape.com/viewarticle/803884_2). Such results have led some commentators to 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 (May 30, 2013).

<http://forensicpsychologist.blogspot.com/2013/05/dsm-5-forensic-applications-part-ii-of.html>

²⁷⁸ APA, *supra* note 14, at vii.

²⁷⁹ APA, *supra* note 14, at 5, 7.

²⁸⁰ *Id.* at 5.

report acknowledged, but it also noted that paraphilias occur fairly frequently in those who never commit sex offenses.²⁸¹ Personality and substance abuse disorders, it continues, are far more common in sex offenders than are paraphilias, and, significantly, the latter conditions do not usually have “explanatory connection” to the offender’s behavior.²⁸² In short, the Task Force Report stated, “psychiatric nosology does not contribute in a systematic way to clinical understanding or treatment of sex offenders.”²⁸³ 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.

...

[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.... *This represents a misuse of psychiatry.*²⁸⁴

The inability of psychiatrists to predict future violence was also a key point asserted by the APA in its brief in *Hendricks*, but it was not the first time the organization made that point. 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,²⁸⁵ the APA had stated in its amicus brief in the case that “[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession.”²⁸⁶ This was only one of multiple occasions on which the Supreme Court has rejected the cautions of the mental health profession and left in place laws and practices whose legitimacy hinges on the field’s use of pathology to predict future conduct.

Although the APA is the world’s largest organization of professional psychiatrists and its official statements are significant,²⁸⁷ there are dissenting views in psychiatry with respect to the role of psychopathology in sexual violence. Indeed, there are segments of the mental health profession that support the SVP laws and provide the research and expert testimony to support the commitment of individuals. I provide several 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 sex offenders, including those in state SVP programs, but who do not work in

²⁸¹ APA, *supra* note 14, at 44.

²⁸² *Id.* at 9.

²⁸³ *Id.* at 9.

²⁸⁴ *Id.* at 173–174 (emphasis added).

²⁸⁵ *Barefoot v. Estelle*, 463 U.S. 880, 896–99 (1983).

²⁸⁶ *Barefoot*, 463 U.S. at 920 (Blackmun, J., dissenting) (quoting Brief for American Psychiatric Association as *Amicus Curiae* at 12).

²⁸⁷ <http://www.psychiatry.org/about-apa--psychiatry>

the correctional or criminal setting.²⁸⁸ As one researcher has noted, this context can distort treatment-providers' views of such offenders: it tends to support a view of specialization in offenders' behavior and also an assumption that the individuals treated experience "deviant sexual arousal, which, if not treated, will result in future sex crimes."²⁸⁹ Because of a lack of foundation in criminological research, mental-health policy decisions made by such treatment providers regarding such offenders also lack such foundation and continue to be based upon misplaced assumptions about those who commit sex crimes: in particular, the assumption that such offenders are "mentally disordered, treatable, dangerous (if not treated), and at high risk to reoffend with another sex crime."²⁹⁰

It is not surprising that mental-health professionals' views on SVP law are influenced by their professional perspectives, including their employment relationships. My concern here, however, is with the existence of the debate itself: specifically, with the sharply divergent positions among those professionals and with the 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 professions and the legal system. And, as we will see in the section that follows, while psychiatric expertise has been increasingly brought into 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 always assumed that mental health professionals would play a central role in SVP proceedings, offering opinions regarding the risk of recidivism posed by specific individuals due to the presence of a mental abnormality or disorder of some kind that impaired their ability to refrain from committing acts of sexual violence. Indeed, such professional opinions have been seen as indispensable since laypersons lack the competence either to identify mental conditions or to assess volitional impairments. As discussed in the preceding section, however, there is scant scientific foundation for such assessments or predictions by mental health professionals themselves, 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. Maintaining

²⁸⁸ Simon, *supra* note 41, 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 238, at 2. Apparently, significant portions of the majority opinion in *Hendricks* was drawn from the Menninger Foundation's amicus brief. *Id.*

²⁸⁹ *Id.* at 277, 279, 281.

²⁹⁰ *Id.* at 278.

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.²⁹¹

One of several areas of continued psychiatric uncertainty and legal strain in the implementation of SVP laws is the degree of risk of future dangerousness that can serve as a basis for indefinite detention. The Supreme Court in *Addington v. Texas* held that a state may involuntarily commit a mentally ill individual using a “clear and convincing evidence” standard.²⁹² This is a lower threshold of proof than the “beyond a reasonable doubt” standard usually reserved for the criminal context. 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. The Court’s opinion states:

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.²⁹³

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.²⁹⁴ However, the Court also reasoned in this case that permitting states to use a lower standard of proof is constitutionally acceptable because of the defined limitations and objectives of involuntary hospitalization: such commitment, if maintained, is limited to people with severe mental illness who pose a danger to themselves or others, and employing higher standard of proof could “erect an unreasonable barrier to needed medical treatment.”²⁹⁵ Such reasoning, of course, has only limited application in the SVP context, where public safety, rather than the treatment, is the 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.²⁹⁶

²⁹¹ Finkel, *supra* note 59, 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”); David L. Faigman et al., 2 MOD. SCI. EVIDENCE § 11:23 (2011-2012 Edition).

²⁹² *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).

²⁹³ *Addington*, 441 U.S. at 429 (emphasis in original).

²⁹⁴ Tsesis, *supra* note 292, at 282–300.

²⁹⁵ *Id.* at 432.

²⁹⁶ *U.S. v. Comstock*, 130 S. Ct. 1949, 1954 (2010), in which the Court upheld the SVP provisions of the Adam Walsh Act law against a range of constitutional challenges.

To date, no 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.²⁹⁷ 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 in most SVP laws), it is not clear whether the fact finder must have no reasonable doubt that there is at least a 35%, a 50%, or a 75% chance the defendant will reoffend.²⁹⁸ The dangers of securing involuntary commitments on such uncertain grounds serve only to compound the significant problems presented by the evidence admitted to support the central determination in SVP proceedings, that is, that 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 progressively broad discretion on lawmakers to devise the specific terms used to meet the due process requirement of a mental condition for involuntary civil commitment.²⁹⁹ 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 implications of the Supreme Court’s approaches and deference.³⁰⁰

Michael McGee was committed in Wisconsin courts under that state’s SVP statute, which was adopted in 1994 and modeled closely on Washington’s. Having exhausted his direct appeals for release through state courts, McGee then filed a petition for habeas corpus in the federal district court.³⁰¹ Because this was a habeas case, it had to meet a particularly high standard, 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.³⁰²

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. He served 5 years in prison and was released on parole. 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.³⁰³ Neither of the two subsequent allegations of sexual assault, one by a woman and another involving an adolescent male, led to a conviction.³⁰⁴ The state then filed a petition to commit McGee under the Wisconsin SVP law. He was committed in 1995 based on a jury verdict but released in 1999 when the commitment was reversed on a finding of ineffective

²⁹⁷ See generally Frederick E. Vars, *Delineating Sexual Dangerousness*, 50 HOUSTON L. REV. 855, 860–73 (2013); 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 LAW 471, 477–78, (2003); 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).

²⁹⁸ See Finkel, *supra* note 59, at 259.

²⁹⁹ See *supra* notes 89–122 and accompanying text.

³⁰⁰ *McGee v. Bartow*, 593 F3d 556 (7th Cir 2010).

³⁰¹ *Id.* at 558.

³⁰² *Id.* at 571–72.

³⁰³ *Id.* at 558–59.

³⁰⁴ *Id.*

assistance of counsel: his attorney had failed to discover important evidence that could have undermined the credibility of the two accusers from the 1992 allegations.³⁰⁵ A year later, in 2000, he was rearrested for failing a drug test and having contact with one of the 1992 alleged victims. The state sought to commit him again.³⁰⁶

At the bench trial during this second commitment hearing, the state's case was based largely upon the testimony of two forensic psychologists. One was Department of Corrections psychologist, Dr. Caton Roberts, who offered his opinion that McGee had a "personality disorder NOS [Not Otherwise Specified] with antisocial features" and a "substantial probability to reoffend sexually if not detained and treated." Roberts' opinion was based not on a clinical examination of McGee but on fifteen hours of review of McGee's "record."³⁰⁷ The second expert to testify was Dr. Cynthia Marsh, who diagnosed McGee with "Paraphilia NOS- nonconsent" and Personality Disorder NOS with antisocial features.³⁰⁸ Her diagnosis was also based only upon a review of records. 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. From these, she concluded that McGee was "much more likely than not to reoffend in a sexually violent manner."³⁰⁹

McGee's attorneys claimed on appeal that the diagnoses that served as the bases for satisfying the "mental illness" requirement were insufficient as a matter of due process. 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.³¹⁰

There was little case law upon which the Court of Appeals could evaluate such arguments. Accordingly, the Seventh Circuit 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."³¹¹ The panel later re-stated the standard as being a determination of whether the diagnosis was "empty of scientific pedigree."³¹²

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 use of the manual in the forensic context, particularly by "untrained professionals" (*i.e.* lawyers and judges), to answer ultimate questions.³¹³ 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

³⁰⁵ *Id.* at 559.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 559–60.

³⁰⁸ *Id.* at 560, 572.

³⁰⁹ *Id.* at 560.

³¹⁰ *Id.* at 574.

³¹¹ *Id.* at 577.

³¹² *Id.* at 581.

³¹³ *Id.* at 578.

diagnostic labels could be useful tools when applied with “prudence and caution.”³¹⁴ However, the court did not explain either what such prudence and caution involved or how its own application of the text demonstrated such qualities. Indeed, what the panel concluded, based upon language in *Hendricks* regarding the broad discretion conferred to states to develop their own conceptualizations of mental abnormality without being tied to medical terminology, was that neither the *absence* of a diagnosis from the DSM nor the *existence* of robust controversy about the category among mental health professionals was a basis to disregard such a diagnostic label entirely. Rather, it stated, 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.³¹⁵ 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, thereby, demonstrates the fundamental flaw in the Supreme Court’s assumption that such testimony would ensure that SVP laws would not sweep 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. Other aspects of the experts’ opinions in *McGee* reveal a range of additional concerns seen more generally in 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.

Examination of the foundations of prosecution experts’ opinion of 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. 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. But this means that they predict future behavior based upon past behavior the same way we all do, and not upon any particular form of expertise. The perpetuation of these unreliable and misleading practices is facilitated by courts’ reluctance to assert their roles as “gatekeepers” with regard to just 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” or “mental abnormality.”³¹⁶ Although paraphilia diagnoses have a limited role in the clinical setting and, as stressed and discussed above, are highly controversial within the field of psychiatry, they enjoy broad acceptance by courts in SVP proceedings. As other commentators

³¹⁴ *Id.* at 579

³¹⁵ *Id.* at 580–81.

³¹⁶ *Id.* at 581.

have noted, while 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—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*.”³¹⁷ As we saw from the earlier discussion, 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 their intended clinical application or fall outside of the diagnostic scheme entirely.³¹⁸ In so doing, as in *McGee*, the experts essentially pathologize past criminal conduct.

The questionable nature of the invocation of 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.³¹⁹ 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.”³²⁰

The psychiatric validity of SVP diagnoses is put in further doubt by the asymmetrical pattern of their invocation in courts. A survey of the reports of psychiatric experts in 28 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.³²¹ Frances concludes that the diagnosis was, in his word, “justified” in only 2 of those cases whereas, in the other 26 cases, the respondents’ “sexual offenses had been opportunistic crimes forming part of a pattern of generalized criminal behavior, very often facilitated by substance intoxication.”³²² Government evaluators, 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. Several other studies of psychiatric reports have also noted strong geographic variation in the rates at which

³¹⁷ Zander, *supra* note 269, at 72.

³¹⁸ EWING, *supra* note 13, at 24.

³¹⁹ *Id.* 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 46, at 27-28 (referring to DENNIS M. DOREN, *EVALUATING SEX OFFENDERS: A MANUAL FOR CIVIL COMMITMENTS AND BEYOND* (2002)).

³²⁰ Allan Frances, *DSM-5 Rejects Coercive Paraphilia: Once Again Confirming That Rape Is Not A Mental Disorder*, *PSYCHIATRIC TIMES* (May 12, 2011) (<http://www.psychiatrytimes.com/sexual-disorders/dsm-5-rejects-coercive-paraphilia-once-again-confirming-rape-not-mental-disorder>).

³²¹ Allan Frances, *My Review of 28 Sexually Violent Predator Cases*, *PsychologyToday.com* (March 29, 2012) (<http://www.psychologytoday.com/blog/dsm5-in-distress/201203/my-review-28-sexually-violent-predator-cases>)

³²² *Id.*

various diagnoses (for example, paraphilia-NOS as compared to pedophilia) are used to support SVP petitions.³²³ Variability of these kinds casts further doubt on the independent reliability, or scientifically objective validity, of such diagnoses and have further fueled the significant ethical concern within psychiatry about the forensic use of Paraphilia-NOS diagnoses.³²⁴

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 with 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.³²⁵ The *McGee* court squarely acknowledged that there was "heated professional debate" about use of the diagnostic label Paraphilia NOS Nonconsent³²⁶ and that McGee's position that "the consensus professional view that [such] diagnosis is invalid" is "not without support in the professional literature."³²⁷ It even noted that the lack of diagnostic standards for the label "results in poor diagnostic reliability."³²⁸ Nevertheless, the court denied McGee's claim that his commitment, based upon such contested diagnoses, amounted to a violation of his due process rights. In denying his claim, the court concluded that the fact that the use of the label did find *some* support in the medical literature took it outside of the realm of a diagnosis "empty of scientific pedigree" or "near-universal" in rejection.³²⁹

³²³ 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 INTL. J. OF OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY 838 (2012) (finding that revealed that pedophilia was diagnosed in persons targeted for commitment under Illinois's law at a "significantly higher rate" (59%) than those in proceedings in Minnesota, Texas, Wisconsin, and Florida, and Paraphilia-NOS was diagnosed in Illinois more frequently (51%) than in Wisconsin (37.5%), and 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 841. See also Richard W. Elwood, et al., *Diagnostic and Risk Profiles of Men Detained Under Wisconsin's Sexually Violent Person Law*, 54 INTL. J. OFFENDER THER. COMP CRIMINOL. 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., *Civilly Committed Sex Offenders: A Description and Interstate Comparison of Populations*, 18 PSYCH, PUB. POL. & L. 453, 461 (2012) (analyzing diagnostic trends under Nebraska's SVP law).

³²⁴ See, e.g., Allen Frances, *Rape, Psychiatry, and Constitutional Rights—Hard Cases Make For Very Bad Law*, PSYCHIATRIC TIMES (Sept. 1, 2010) (arguing that "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 Good & Burstein, *supra* note 46, at 24–28 (criticizing the use of "fictitious mental disorders" by forensic evaluators testifying in SVP proceedings); Prentky et al., *supra* note 7, at 369 ("Force-fitting a diagnosis or creating a new DSM diagnosis to justify commitment is clearly unethical for psychologists."); First & Halon, *supra* note 216, 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.").

³²⁵ See generally Hamilton, *supra* note 7, at 40–51.

³²⁶ *McGee v Bartow*, 593 F3d 556, 591 (7th Cir 2010).

³²⁷ *Id.* at 580.

³²⁸ *Id.*

³²⁹ *Id.* at 581.

Several courts have been faced with 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,³³⁰ 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.³³¹ “Pedophilia,” under the DSM’s criteria, can only be applied to those who have persistent sexual interest in children under the age of 14. Like “nonconsent,” the term “hebephilia” appears nowhere in the DSM, and there is no disorder recognized in the manual for sexual interest in teens.³³² In *U.S. v. Carta*,³³³ 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 serious mental illness that could support an involuntary commitment.³³⁴ The disorder was characterized by the government’s testifying expert as a “sexual preference for ‘young teens ... ‘till about age seventeen.’”³³⁵ 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.³³⁶ 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.”³³⁷

³³⁰ See e.g., *Brown v. Watters*, 599 F.3d 602, 607, 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).

³³¹ For a critical and detailed examination of the development and use of this label in SVP proceedings see Karen Franklin, *Hebephilia: Quintessence of Diagnostic Pretextuality*, 28 BEHAV. SCI. & L. 751 (2010).

³³² *Id.* at 751, 760–61.

³³³ *U.S. v. Carta*, 592 F.3d 34 (1st Cir. 2010).

³³⁴ *U.S. v. Carta*, 620 F.Supp.2d 210, 217 (D. Mass. 2009).

³³⁵ *Id.* Another judge in the District of Massachusetts also excluded expert testimony based upon a “hebephilia” diagnosis. *U.S. v. Shields*, No. 07-12056, 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*. *United States v. Wetmore*, 766 F. Supp. 2d 319, 332 (D. Mass. 2011) (basing commitment, in part, on expert testimony of “paraphilia not otherwise specified, characterized by hebephilia”) *aff’d*, 700 F.3d 570 (1st Cir. 2012) *cert. denied*, 133 S. Ct. 1652, 185 L. Ed. 2d 631 (U.S. 2013).

³³⁶ *U.S. v. Carta*, 592 F.3d 34, 41 (1st Cir. 2010). On remand, *Carta* was committed after a seven-day trial, No. 07–12064–PBS, 2011 WL 2680734 (D. Mass. July 7, 2011), and that ruling was affirmed on appeal. *U.S. v. Carta*, 690 F.3d 1 (1st Cir. 2012).

³³⁷ *Carta*, 592 F.3d at 39–40. By contrast, while the court in *U.S. v. Neuhauser*, 2012 WL 174363 *2 (E.D. N.C. 2012), 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 is not a diagnosis at all, at least for forensic purposes,” it was “inappropriate” to base a commitment upon such diagnosis. 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 *4

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 the scientific basis for use of such label and testified about the considerable controversy about it within psychiatry.³³⁸ 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.³³⁹ Most such courts adopt the reasoning of that in *Carta*: the fact that "Paraphilia NOS" itself is in the DSM (albeit without criteria established or confirmed by research or field trials) is apparently 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.³⁴⁰

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),³⁴¹ and respondents frequently challenge such use under the holding and analysis in *Foucha*.³⁴² 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.³⁴³ 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.'"³⁴⁴ The district and appeals courts concluded that, as with the controversies regarding paraphilias, a fact finder 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.³⁴⁵

³³⁸ See, e.g., *New York v Shannon S.*, 980 N.E.2d 510, [need pin cite for reporter] (N.Y. 2012); *In re Det. of Hutchcroft*, 824 N.W.2d 562 (table), slip op. at ** 2–3 (Iowa Ct. App. 2012); *In re Detention of Lieberman*, 955 N.E.2d 118, 134–35 (Ill. Ct. App. 2011); *In re A.M.*, 787 N.W.2d 752 (2010). See, e.g., *Lieberman v. Kirby*, 2011 WL 6131176 (N.D. Ill. 2011). cf. *U.S. v. Abregana*, 574 F.Supp.2d 1145, 1159 (D. Hawaii 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).

³³⁹ *In re Civil Commitment of D.X.B.*, 2006 WL 488641 (N.J. Ct. App. 2006) slip op. at 4. See also *U.S. 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).

³⁴⁰ See, e.g., *Shannon S.*, 980 N.E.2d 510, [need pin cite for reporter] (N.Y. 2012); *In re Det. of Hutchcroft*, 824 N.W.2d 562 (table), slip op. at *3.

³⁴¹ See *supra* notes 268–277 and accompanying text.

³⁴² See, e.g., *Adams v. Bartow*, 330 F.3d 957, 959 (7th Cir. 2003); *Linehan v. Milczark*, 315 F.3d 920, 928 (8th Cir. 2003).

³⁴³ *Brown v. Watters*, 599 F.3d 602, 612 (7th Cir. 2010).

³⁴⁴ *Id.* at 607.

³⁴⁵ *Id.* at 613–14. The 7th 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.

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 *In re Wilkinson*, the court denied the Government’s petition (the respondent was nearing the end of a 16 year sentence for being a felon in possession of a firearm, and two of the sex crimes had occurred 25 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.”³⁴⁶ 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*.³⁴⁷ Indeed, given that studies estimate that a large majority of the prison population at any given time could be diagnosed with ASPD, using it as the sole predicate diagnosis would violate the limitations required in *Crane*, *that is*, that the individual subject to the SVP commitment not be a mere recidivist but someone with an identifiable pathology affecting volitional control of sexual violence.³⁴⁸

Where a government expert in an SVP proceeding bases an opinion upon a DSM paraphilia diagnosis such as pedophilia, it is often the case that, notwithstanding the DSM editors’ clarifying statements to the contrary, the diagnoses are based largely upon a respondent’s past criminal behavior or other conduct rather than (or even in the absence of) evidence of persistent, intense urges or fantasies.³⁴⁹ 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.³⁵⁰ 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.”³⁵¹ As discussed below, the editors’ recommendation that this confusion be alleviated through text revisions in the DSM-5 went unheeded.³⁵²

³⁴⁶ U.S. v. Wilkinson, 646 F.Supp.2d 194, 196 (D. Mass 2009).

³⁴⁷ *Id.* at 202–207.

³⁴⁸ Prentky et al., *supra* note 7, at 368.

³⁴⁹ *Id.*

³⁵⁰ Wakefield, *supra* note 204, 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.*, U.S. 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).

³⁵¹ *Id.* *See also* Allan Frances, *DSM-5 Writing Mistakes Will Cause Great Confusion*, HUFFINGTON POST (June 11, 2013) (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.”).

³⁵² *See infra* notes 462–468 and accompanying text.

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 extent to which 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.³⁵³ The author of the Florida study attributes the findings both to "evaluator bias" and, more significantly, to the fact that "practitioners are faced with diagnostic criteria that contradict both empirical research and clinical conceptualization."³⁵⁴ Similarly, the authors of a 2013 study of 350 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.³⁵⁵ The authors remarked that such high levels of inconsistency are a "widespread issue" across states and diagnostic categories.³⁵⁶ 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.³⁵⁷

3. *Basing Opinions on Records and Inadmissible Evidence*

It is clear from the court's description in *McGee* that the opinions of the prosecution experts were not derived from methods and sources of information generally associated with sound and reliable medical assessments. The experts were permitted to testify 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 and without ever having examined the respondent. Such practices are common in SVP proceedings, often because the respondent refuses to be examined. Government experts, in such cases, typically review criminal investigation reports and alleged victims' statements³⁵⁸ (including information that would be inadmissible in a criminal proceeding³⁵⁹) and utilize these accounts of *conduct* to identify "symptoms."³⁶⁰ Such practice by forensic psychiatrists has been condemned by other mental health professionals as a specific violation of professional ethics.³⁶¹

³⁵³ Jill S. Levenson, *Reliability of Sexually Violent Predator Civil Commitment Criteria in Florida*, 28 LAW AND HUMAN BEHAVIOR, 357, 363–64 (2004).

³⁵⁴ *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).

³⁵⁵ Anthony D. Perillo et al., *Examining The Scope Of Questionable Diagnostic Reliability In Sexually Violent Predator(SVP) Evaluations*, 37 INTL. J. OF LAW AND PSYCHIATRY 190, 193–94 (2014).

³⁵⁶ *Id.* at 196.

³⁵⁷ Levenson, *supra* note 353, at 366.

³⁵⁸ Rebecca L. Jackson, et al., *The Adequacy and Accuracy of Sexually Violent Predator Evaluations: Contextualized Risk Assessment in Clinical Practice*, 3 Intl J. of Forensic Mental Health 115, 125 (2004).

³⁵⁹ See, e.g., *State v. Mark S.*, 87 A.D.3d 73, 78–79 (N.Y. Ct. App. 2011). See also 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, 763 (2012).

³⁶⁰ See Hamilton, *supra* note 7, at 50.

³⁶¹ Prentky et al., *supra* note 7, at 370.

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. "Clinical judgment" is defined in one medical dictionary as "the application of information *based on actual observation* of a patient combined with subjective and objective data that lead to a conclusion."³⁶² 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.³⁶³

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.³⁶⁴ Such evidence rules can also, in some instances, permit such otherwise inadmissible facts and data themselves to be admitted to explain or support an opinion.³⁶⁵ However, one appellate 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 cannot base his or her opinion upon inadmissible hearsay even if it would otherwise be admissible under rules similar to FRE 703.³⁶⁶ 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.³⁶⁷

In some SVP proceedings, the information about the respondent's past criminal activity provided to the expert witnesses, and even to the fact finder, had never been 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. 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 charged or convicted for such conduct. Other courts as well have permitted evidence of

³⁶² MOSBY'S MEDICAL DICTIONARY 380 (9th ed. 2013) (emphasis added).

³⁶³ Rebecca L. Jackson & Derek T. Hess, *Evaluation for Civil Commitment of Sex Offenders: A Survey of Experts*, 19 SEX ABUSE 425, 431 (2007).

³⁶⁴ FED. R. EVID. 703.

³⁶⁵ *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, *supra* note (reviewing the application of the "professional reliability" exception to the hearsay rule in SVP proceedings in several states).

³⁶⁶ *In re Interest of A.M., Jr.*, 797 N.W.2d 233, 261 (Neb. 2011) *cert. denied*, 132 S. Ct. 341, 181 L. Ed. 2d 214 (U.S. 2011).

³⁶⁷ *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).

uncharged but alleged criminal conduct to be admitted and considered as part of SVP proceedings.³⁶⁸ Thus 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 17 unsolved sexual assaults.³⁶⁹

Ironically, although courts permit experts to base opinions regarding dangerousness on criminal conduct alone, at least one court made a point of noting that 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 violence in the future. In one recent SVP case, *U.S. v. Volungus*,³⁷⁰ the primary predicate offense was possession of child pornography; there was no evidence that the defendant had actually molested any children.³⁷¹ The respondent acknowledged at his SVP trial that he was attracted to children and the evidence showed that he was obsessed with child pornography. 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. 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.³⁷² 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.”³⁷³ 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 expert testifying on behalf of the government in SVP cases reflect the fact that mental health professionals 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.³⁷⁴ Where

³⁶⁸ See, e.g., *In re Detention of Coe*, 250 P.3d 1056, 1067–68 (Wash. Ct. App. 2011); *In re Williams*, 253 P.3d 327, 337 (Kan. 2011); *Boyce v. Com.*, 691 S.E.2d 782, 785–86 (Va. 2010); *In re Care & Treatment of Miller*, 210 P.3d 625, 633 (Kan. 2009).

³⁶⁹ *In re Detention of Coe*, 250 P.3d 1056, 1060–65 (Wash. Ct. App. 2011).

³⁷⁰ *U.S. v. Volungus*, 730 F.3d 40 (1st. Cir. 2013).

³⁷¹ *Id.* at 42–45. The respondent had been convicted 10 years earlier of “attempted molestation” for having online contact with someone he thought was a 14-year old girl, but was in fact the fictional creation of a undercover FBI agent. *Id.* at 42–43.

³⁷² *Id.* at 48–49.

³⁷³ *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. Those on a gluten-free diet may have an uncontrolled attraction to chocolate cake, yet manage to avoid eating it out of concerns of adverse consequences of doing so.

³⁷⁴ 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.*, 903 N.Y.S.2d 184, 186 (2010). Curiously, the forensic expert also considered the fact that the respondent met most of the diagnostic criteria for ASPD as further indication that he was unable to control his behavior, *id.*, although there is nothing in that diagnosis that is associated with volitional impairment. See also Eric

experts rely primarily upon law enforcement or prosecution files, including information such as witness statements and criminal history, to render an opinion about volitional impairment, they are engaging in the essentially same process and using the same information to reach a conclusion as ordinary lay fact finders do when they receive and evaluate evidence offered by the state at a trial. This raises the question of what “helpful” opinion testimony such experts are really bringing 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.”³⁷⁵

Given the variability and unreliability of expert testimony stressed here, 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.³⁷⁶ A 2004 study concluded that experts were accurate in predicting future sexual violence about one-half of the time.³⁷⁷ 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 towards “locking up” prior offenders regardless of what is otherwise reasonably determined as actual risk.³⁷⁸

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 professionals, is significantly inaccurate.³⁷⁹ 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.³⁸⁰ 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.³⁸¹ 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.”³⁸² 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

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).

³⁷⁵ 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;...”).

³⁷⁶ Jackson, et al., *supra* note 358, at 124; 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, 1869–70 (2003).

³⁷⁷ Jackson, et al., *supra* note 358, at 124, 127.

³⁷⁸ *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.*

³⁷⁹ DANIEL KAHNEMAN, THINKING, FAST AND SLOW, 238–42 (2011); TAVRIS, ET AL., *supra* note 354, at 97-126.

³⁸⁰ KAHNEMAN, *supra* note 379, at 212.

³⁸¹ *Id.* at 333.

³⁸² *Id.* at 217–220.

underlying inclinations).³⁸³ 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 upon 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. Because McGee did not challenge such use on appeal, the description of their testimony on the role of such tools is very limited.³⁸⁴ 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-eight and fifty-four percent over a six- to fifteen-year period following release."³⁸⁵

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. 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.³⁸⁶ 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,³⁸⁷ 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.³⁸⁸ 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.³⁸⁹

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.³⁹⁰ 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

³⁸³ *Id.* at 199–201.

³⁸⁴ *McGee v Bartow*, 593 F3d 556, 559-60 (7th Cir 2010).

³⁸⁵ *Id.* at 560.

³⁸⁶ Prentky et al, *supra* note 7, at 372–72.

³⁸⁷ Jackson & Hess, *supra* note 363, at 428 (noting that 95.1% of respondents used such instruments and 75% listed them as "essential" to the evaluation process).

³⁸⁸ *Id.* at 434.

³⁸⁹ *Id.* at 426.

³⁹⁰ EWING, *supra* note 13, at 36–37.

arrests rather than convictions). After the factors are entered, the tool yields a score that places the individual in a risk range, such as “high risk,” and perhaps offers a percentage of likelihood of reoffending.³⁹¹ Thus, the tools are not psychological tests,³⁹² nor are they predictors of an individual’s *specific* likelihood to re-offend.³⁹³ The expert witness testifies that the actuarial analysis of objective factors places the respondent at a specific level of risk of reoffending,³⁹⁴ although such conclusion is not keyed to any legal criteria.³⁹⁵ 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 such practice would yield improved accuracy.³⁹⁶ Noted behavioral psychologist Paul Meehl argued decades ago that clinical judgment is inferior to actuarial analysis,³⁹⁷ and his findings have been replicated and reinforced many times since his initial studies.³⁹⁸ Empirical studies have shown that ARAs are specifically better predictors of recidivism than “clinical judgment” alone,³⁹⁹ a standard that does not seem to be all that difficult given the exceptionally poor ability of forensic examiners to predict recidivism.⁴⁰⁰

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 several limitations of the effectiveness have been noted.⁴⁰¹ One of the biggest shortcomings of the Static-99 and similar instruments is that they assess risk based upon 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. They therefore may fail to take into account for dynamic factors such as life circumstances and participation in treatment, because they are based upon the assumption that one’s risk never changes, even if one makes choices to address the underlying propensity.⁴⁰² 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 10 year later, even after leading an entirely law-abiding life

³⁹¹ Jackson & Hess, *supra* note 363, at 439.

³⁹² 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. Jackson & Hess, *supra* note 363, at 437.

³⁹³ U.S. v. Hall, 664 F.3d 456, 464 (2012).

³⁹⁴ See, e.g., Lieberman v. Kirby, 2011 WL 6131176 (N.D. Ill. 2011).

³⁹⁵ Jackson & Hess, *supra* note 363, at 439.

³⁹⁶ Beecher-Monas & Garcia-Rill, *supra* note 376, 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).

³⁹⁷ PAUL MEEHL, CLINICAL VERSUS STATISTICAL PREDICTION: A THEORETICAL ANALYSIS AND A REVIEW OF THE EVIDENCE 94-95 (1954).

³⁹⁸ Janus & Prentky, *supra* note 396, at 1455.

³⁹⁹ Daniel A. Krauss, et al., *Dangerously Misunderstood: Representative Jurors' Reactions to Expert Testimony on Future Dangerousness in a Sexually Violent Predator Trial*. 18 PSYCHOLOGY, PUBLIC POLICY & LAW 18, 20 (2012); Prentky et al, *supra* note 7, at 372; Janus & Prentky, *supra* note 396, at 1455–58.

⁴⁰⁰ Such findings are consistent with studies of accuracy of many different kinds of predication across disciplines. See generally KAHNEMAN, *supra* note 379, at 222.

⁴⁰¹ Saleh, et al., *supra* note 242, at 366; Krauss et al., *supra* note 399, at 20.

⁴⁰² Krauss et al., *supra* note 399, at 20.

during the interim.⁴⁰³ 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.⁴⁰⁴ Some instruments do not even consider the mitigating effect of age on risk of recidivism.⁴⁰⁵ A few scholars have advocated for a uniform use of “dynamic risk factors” before a final risk assessment is made using ARAs,⁴⁰⁶ although research has not yet suggested how best to integrate such factors.⁴⁰⁷

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.⁴⁰⁸ However, no consensus in the field has emerged regarding which test is most applicable and appropriate in the SVP commitment setting,⁴⁰⁹ or for predicting dangerousness generally,⁴¹⁰ and there are some sharp differences in opinion and approach among psychologists who have developed and used various instruments.⁴¹¹ 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.⁴¹² There is also no consensus what level of predictive validity is sufficient for the instruments to be considered a useful tool for predicting recidivism.⁴¹³

ARAs, even at their best, can still be used well or poorly.⁴¹⁴ Although the instruments are said to be 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 variable understandings.⁴¹⁵ 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.⁴¹⁶ 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

⁴⁰³ 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) (available at <http://www.wisconsinwatch.org/2014/02/04/sex-offender-awaits-second-chance/>)

⁴⁰⁴ Prentky et al., *supra* note 7, at 378.

⁴⁰⁵ *Id.* at 375.

⁴⁰⁶ *Id.* at 383–85.

⁴⁰⁷ Good & Burstein, *supra* note 46, at 30.

⁴⁰⁸ Prentky et al., *supra* note 7, at 371–72; Faigman, *supra* note 291, at § 11:28.

⁴⁰⁹ *Black v. Voss*, 557 F.Supp.2d 1100, 1105–1107 (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 Rapid Risk Assessment of Sexual Offense Recidivism (“RRASOR”) test instead).

⁴¹⁰ M. Neil Brown & 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).

⁴¹¹ Prentky et al., *supra* note 7, at 373–80.

⁴¹² Terence W. Campbell, *Sexual Predator Evaluations and Phrenology: Considering Issues of Evidentiary Reliability*, 18 Behav. Sci. Law 111, 120–21 (2000).

⁴¹³ Good & Burstein, *supra* note 46, at 34.

⁴¹⁴ Janus & Prentky, *supra* note 396, at 1493–97.

⁴¹⁵ Beecher-Monas & Garcia-Rill, *supra* note 376, at 1871.

⁴¹⁶ Risks phrased in the form of the probable occurrence of specific event are evidently less “vivid” than one phrased in the form of a frequency. KAHNEMAN, *supra* note 379, at 330 (“Experienced forensic psychologists and psychiatrists are not immune to the effects of the format in which risks are expressed.”).

treatment can be a complex question where there is limited access to treatment,⁴¹⁷ 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.⁴¹⁸ Some scholars suggest that experts’ practice of making individualized “adjustments” to scores may little more than “dressing up clinical judgment with actuarial science.”⁴¹⁹ Given such problems, several scholars have suggested that the use of ARAs by examiners in SVP proceedings is unethical.⁴²⁰

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.⁴²¹ 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.⁴²² 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.⁴²³ 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.⁴²⁴ Finally, some courts have excluded testimony based on ARA results altogether because of concerns about unfair prejudice.⁴²⁵

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.⁴²⁶ In *U.S. 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 (which, among other things, were based on data obtained entirely outside of the U.S.).⁴²⁷ The appeals court concluded that the weight to be given to such evidence should be left to the fact finder.⁴²⁸

⁴¹⁷ Prentky et al., *supra* note 7, at 379.

⁴¹⁸ *Id.* at 378–79; Good & Burstein, *supra* note 46, at 30–31 (arguing that ARAs for SVPs may be “systematically biased”).

⁴¹⁹ Prentky et al., *supra* note 7, at 380.

⁴²⁰ Campbell, *supra* note 412, at 128.

⁴²¹ Krauss, et al., *supra* note 399, at 37.

⁴²² *Com. v. Squire*, 685 S.E.2d 631, 62–33 (Va. 2009) (affirming dismissal of SVP petition despite expert testimony that actuarial tests placed the respondent in the highest risk category).

⁴²³ *In re Care & Treatment of Williams*, No. 99, 235, 2009 WL 2762455, at *3 (Kan.App.2009).

⁴²⁴ *In re Williams*, 253 P.3d 327 (Kan. 2011).

⁴²⁵ Janus & Prentky, *supra* note 396, at 1487–92.

⁴²⁶ EWING, *supra* note 13, at 40–44.

⁴²⁷ *U.S. v. Shields*, 649 F.3d 78, (1st Cir 2011)

⁴²⁸ *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. However, the court ultimately concluded that the Government had met its burden. *Id.* at 85.

5. *Sparse Use of Daubert-Frye Analysis*

Allan Frances has implored: “SVP courts must insist on good science.”⁴²⁹ The key holding in 1923 U.S. District Court case of *Frye v. U.S.*, which was widely adopted by state courts, required judges to consider a theory’s “general acceptance” in the relevant scientific community before allowing its admission.⁴³⁰ The U.S. Supreme Court’s landmark opinion in *Daubert v. Merrill Dow Pharmaceuticals*⁴³¹ requires the court to act as a “gatekeeper” with regard to the scientific evidence presented; that is, to make its own determination of reliability of such evidence, based in part upon such general acceptance as well as on the presence of other indicators of “good science.”⁴³² 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 assigned to them by these opinions and by the court rules and opinions following their lead. However, the case law suggests a significant abdication of this responsibility by the courts.

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 considered at all in involuntary commitment hearings.⁴³³ 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.⁴³⁴ Still other scholars suggest that standards for admissibility of expert evidence should be relaxed for mental health testimony, that courts should use an “informed speculation” approach, particularly for evidence offered by a criminal defendant to excuse criminal conduct.⁴³⁵

Courts as well are divided on the role of the underlying principles and rationales of cases such as *Daubert* and *Frye* in settling these issues of admissibility of expert psychiatric opinion as

⁴²⁹ Prentky et al., *supra* note 7, at 386.

⁴³⁰ *Frye v. United States*, 293 F. 1013, 1014 (D.D.C. 1923).

⁴³¹ *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

⁴³² 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)

⁴³³ Samantha Godwin, *Bad Science Makes Bad Law: How The Deference Afforded To Psychiatry Undermines Civil Liberties*, 10 SEATTLE J. FOR 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.

⁴³⁴ Deirdre M. Smith, *Diagnosing Liability: The Legal History of Posttraumatic Stress Disorder*, 84 Temple L. Rev. 1, 69 (2011); 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, *Crazy Behavior*, *supra* note 191 at 601-04.

⁴³⁵ Richard Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427 (1980).

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 state’s expert should not have been permitted to base an opinion upon a diagnostic label that did not appear in the DSM.⁴³⁶ 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 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.”⁴³⁷

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.”⁴³⁸ “Perhaps worse,” they caution, “we are conferring on unvalidated diagnoses the presumptive medical authority of the DSM.”⁴³⁹

On the other hand, and in better 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 offered to a fact finder.⁴⁴⁰ The analysis in *In re Detention of New* began with finding that expert testimony based upon a diagnosis “presupposes a mental condition exists as a matter of scientific evidence.”⁴⁴¹ 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.” The court observed, strikingly, that “[j]ustice does not put the fact finder in the position of culling good science from bad.”⁴⁴² 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, “if a respondent in an SVP proceeding does not suffer from an actual mental disorder, then there is nothing to cure, and commitment is pointless.”⁴⁴³

⁴³⁶ *In re Pers. Restraint of Young*, 857 P.2d 989 (Wash. 1993)

⁴³⁷ *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 (1991–92)). More recently another Washington appeals court, in *In re Detention of 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. *In re Detention of Berry*, 248 P.3d 592, 595–96 (Wash. Ct. App. 2011).

⁴³⁸ Prentky, et al., *supra* note 7, at 370.

⁴³⁹ *Id.*

⁴⁴⁰ *In re Detention of New*, 992 N.E.2d 519, 5287–31 (Ill Ct. App. 2013), appeal allowed by 2 N.E.3d 1045 (Ill. 2013).

⁴⁴¹ *Id.* at 528.

⁴⁴² *Id.* at 529.

⁴⁴³ *Id.* at 530.

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 under such approaches. By the time of the *Daubert* opinion, the role of psychiatric testimony was so embedded in legal decision-making that it was inconceivable to courts that they should scrutinize or might reverse such practice.⁴⁴⁴ 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.”⁴⁴⁵

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 and there is no indication that McGee raised *Daubert*-like challenges in his original proceeding. Rather, because his attorneys brought a habeas petition, the court considered only whether there was a constitutional violation. The evidence rules, and cases interpreting them such as *Daubert*, impose a more specific and therefore a higher standard for admissibility than does the Constitution.⁴⁴⁶ 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* 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.⁴⁴⁷ Such lack of scrutiny of expert evidence is highly questionable where the state is offering such 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 the approach required under *Daubert* can itself implicate due process. No court has addressed that question squarely, and the Seventh Circuit was not asked to do so in *McGee*. However, in cases where a person’s constitutional rights to liberty are so directly implicated, there clearly are due process implications for a court’s role as gatekeeper regarding expert opinion.⁴⁴⁸ 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

⁴⁴⁴ Krauss et al, *supra* note 399, at 38; CHRISTOPHER SLOBOGIN, PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS 29 (2006).

⁴⁴⁵ *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983).

⁴⁴⁶ Paul Giannelli, *The Supreme Court’s Criminal “Daubert” Cases*, 33 SETON HALL L. REV. 1071, 1072–76 (2003).

⁴⁴⁷ *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.

⁴⁴⁸ 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 for the admissibility of scientific evidence.”); Giannelli, *supra* note 446, at 1091–92; Beecher-Monas & Garcia-Rill, *supra* note 376, at 1859.

opinions appear to be precisely the kind of testimony that the Ninth Circuit excluded in *Daubert*.⁴⁴⁹

As discussed below, the call to include some of these extended diagnoses in the DSM-5 is 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 the consistent rejection from mainstream psychiatry and lack of peer-reviewed research supporting a methodology of prediction, there is serious question as to whether any expert prediction of future dangerousness could pass a strict *Daubert* test.⁴⁵⁰

While 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.⁴⁵¹ There are two fundamental problems with the reasoning behind such practice. First, it ignores the limited ability of laypersons to assess critically the opinions of expert witnesses, one of the core rationales for the *Daubert* “gatekeeping” requirement.⁴⁵² The ability to uncover and assess problems in reliability can be especially challenging for laypersons with respect to the often “ipse dixit” opinions⁴⁵³ 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 question without a fear of repercussions if a conclusion that a respondent had low risk of committing future acts of sexual violence was wrong.⁴⁵⁴ SVP commitment is a decision that puts the fact finder between an offender and a potential “next victim.” There has been little research on the question of the extent to which jurors are influenced in their decision-making by expert testimony on future risk.⁴⁵⁵ Nonetheless, it is difficult to imagine how a jury of laypersons, upon

⁴⁴⁹ *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).

⁴⁵⁰ *Beecher-Monas & Garcia-Rill*, *supra* note 376, at 1857.

⁴⁵¹ Wisconsin, Minnesota, and Washington, for example, elect trial court judges. 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.*, *U.S. v. Wilkinson*, 646 F.Supp.2d 194, 201 (D. Mass. 2009).

⁴⁵² *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.”) (quoting Hon. Jack B. Weinstein, *Rule 702 of the Fed. Rules of Evidence Is Sound; It Should Not be Amended*, 138 F.R.D. 631, 632 (1991)).

⁴⁵³ *See General Electric 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 the existing data only by the *ipse dixit* of the expert”).

⁴⁵⁴ *Cf People v. Shazier*, 212 Cal. App. 4th 520, 531, 151 Cal. Rptr. 3d 215, 224 (2012) (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), review granted and opinion superseded, 298 P.3d 178 (Cal. 2013).

⁴⁵⁵ *Krauss et al.*, *supra* note 399, at 21. Florida courts specifically permit use of the term “sexually violent predator” in SVP commitment proceedings, notwithstanding concerns raised by the defense bar that the term is “extremely

hearing an expert opine on the basis of an ARA instrument that a child rapist has a 33% chance of reoffending (*i.e.* raping another child) would not commit that person. Many people would likely follow thinking along the lines of former Vice President Dick Cheney’s “one percent doctrine” and conclude that, in such cases, *any* amount of risk is too much to accept.⁴⁵⁶ 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.”⁴⁵⁷ This judge likely articulated the mental calculations made by many juries and jurists involved with these cases.⁴⁵⁸

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 both medical views of pathology of sexual violence—including appropriate diagnostic methods and prediction of future conduct—and also of legal principles regarding the admissibility of expert opinion, including cases where such opinion is based upon unreliable methodology or upon data that runs counter to predominant views of the field and poses risk of misuse by, or misleading of, fact finder.⁴⁵⁹ These fundamental and extensive distortions of both sound science and just law are the inevitable and unavoidable result of the courts’ experiment with SVP laws. These distortions also demonstrate the accuracy of warnings issued at the outset of the SVP experiment by many in the field of psychiatry of the dangers presented by the laws themselves.

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.” Such line-drawing, however, “tests a no-man’s land between psychiatry and the law.”⁴⁶⁰ 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.

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.*

⁴⁵⁶ 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, *One Percent Doctrine: The Untold Story of al-Qaeda’s Plot to Attack the Subway*, TIME [pin cite needed] (June 16, 2006).

⁴⁵⁷ U.S. v. Springer, 715 F.3d 535, 551(4th Cir. 2013) (Wilkinson, J. dissenting) (emphasis added).

⁴⁵⁸ 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) (the blog author was one of the defense experts in that case) <http://forensicpsychologist.blogspot.com/2012/10/another-one-bites-dust-hollow-svp.html>

⁴⁵⁹ Hamilton, *supra* note 6, at 50; *see also* Prentky et al., *supra* note 234, at 456.

⁴⁶⁰ Frances, et al., *supra* note 190, at 383.

Commentators who maintain that science does have something to offer in SVP proceedings tend to speak of the “disturbing frequency” of the “bad science” that appears in such proceedings.⁴⁶¹ This conception of the problem of the use of psychiatric testimony 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 nature of the forensic science evidence admitted in such proceedings. The proposed fixes 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 erase the core problem set up by the *Hendricks-Crane* rationale: that, 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 moral, normative question.

1. *Addressing Problems with Diagnoses*

The specific nature of “problem” of diagnostic labels in SVP proceedings differs depending upon one’s perspective. Some psychiatric commentators, such as Allan Frances, complain that experts testifying for the states misuse existing diagnoses such as Pedophilia or ASPD, or invent diagnoses such as Paraphilia NOS – Nonconsent, which have not been set forth in the DSM or otherwise been sanctioned by psychiatry. Due to the “uniquely negative outcome, namely inappropriate and potentially indefinite civil commitment to a secure forensic psychiatric facility,” these commentators are concerned about the potential for large numbers of “false positive” diagnoses.⁴⁶² Accordingly, there were calls to revise DSM language to eliminate any potential for such behavior-based approach to diagnosis.⁴⁶³

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. Some of these experts regard the science as failing to reflect the reality of mental conditions underlying acts of sexual violence. They are concerned about ambiguities that lead to court challenges to their testimony and/or present potential barriers to fact finders receiving their opinions. 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. Preserving the potential for an approach to assigning a paraphilia diagnosis based on prior behavior was essential to those offering testimony in support of commitments. Respondents are often uncooperative with evaluators⁴⁶⁴ or, for any number of other reasons, clinical evaluation may be impossible or not involved in the diagnostic process. Most DSM diagnoses, however, are based upon the assumption that they will be used in therapeutic, not forensic, settings and that many of the criteria will be determined through a clinical interview.⁴⁶⁵

⁴⁶¹ Prentky et al., *supra* note 7, at 361.

⁴⁶² First, *supra* note 214, at 1239 (internal citations omitted).

⁴⁶³ *Id.* at 1242.

⁴⁶⁴ First, *supra* note 214, at 1240–41.

⁴⁶⁵ See GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATION FOR THE COURTS 43-44 (2007) (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.”).

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 resolved nothing and left the paraphilias essentially unchanged. The proposals for change did, however, garner fierce debate and a flood of papers and editorials appeared while they were under consideration.⁴⁶⁶ The varied commentaries brought to the surface many of controversies about psychiatry's role in these commitments discussed above.

The outcome of the debate was a compromise that resulted in maintaining essentially the same approach of the DSM-IV-TR.⁴⁶⁷ The publication simply maintained the tension between deviance and disorder with which psychiatry has been increasingly aware. By making minimal changes to the paraphilias listed in the DSM-IV, 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. Although many of the proposals to include new diagnoses were rejected, Allan Frances remains concerned that the revised paraphilias section are “an ambiguous hodgepodge [which] will surely be misused in sexually violent predator hearings where every word is given legal spin.”⁴⁶⁸

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, including 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 clinicians with assessment and treatment in clinical settings), and now has a clearer title.⁴⁶⁹ But the statement begins with a sales pitch for its use in forensic contexts. For example, 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 a predicate.”⁴⁷⁰ The manual may also, it states, “facilitate legal decision makers' understanding of the relevant characteristics of mental disorders.” Especially significantly here, it also suggests that “diagnostic information about

⁴⁶⁶ See, e.g., Howard Zonada, *Sexual Disorders: New and Expanded Proposals for the DSM-5—Do We Need Them?* 39 J AM. ACAD. PSYCHIATRY L. 245 (2011); 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); 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. 242 (2011); First, *supra* note 214, at 1239; First & Halon, *supra* note 216, at 451-52; Franklin, *supra* note 331; Wakefield, *supra* note 204, at 205-206.

⁴⁶⁷ DSM-5, *supra* note 187, 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. *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 a more specific diagnosis. *Id.*

⁴⁶⁸ Allan Frances, *DSM-5 Badly Flunks the Writing Test*, PSYCHIATRIC TIMES (June 13, 2013)

(<http://www.psychiatrytimes.com/blogs/dsm-5/dsm-5-badly-flunks-writing-test?cid=tw>)

⁴⁶⁹ DSM-5, *supra* note 187, at 25. Previously the language was simply titled “Cautionary Statement.” DSM-IV, *supra* note 215, at xxxvii.

⁴⁷⁰ DSM-5, *supra* note 187, at 25.

longitudinal course may improve decision making when the legal issue concerns an individual's mental functioning at a past *or future* point in time."⁴⁷¹

The new DSM statement does subsequently lay out cautions about taking such forensic use too far and, in places, the language appears to be addressed specifically to the experts and judges involved in SVP proceedings. Thus the statement cautions that foremost is the risk of misunderstanding "because of the imperfect fit between the questions of ultimate concern to the law and the information contained in clinical diagnosis."⁴⁷² It also emphasizes that "in most situations" more information about the individual is "usually required beyond that contained" in the diagnosis. Use of the manual for assessment by "insufficiently trained individuals is not advised" it states, 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."⁴⁷³ Given, however, that similar cautionary language has been disregarded with some regularity in SVP proceedings (as discussed above), such cautions are likely to have little effect on the widespread use of psychiatric diagnoses in court settings, even to resolve factual questions regarding volitional impairment associated with mental abnormality.

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

Some legal scholars and some in the mental health profession have advocated use of ARA instruments either in addition to⁴⁷⁴ or in place of diagnostic assessment and clinical judgment,⁴⁷⁵ as noted above.⁴⁷⁶ 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. However, in addition to problems with reliability of such tools (discussed in the immediately prior 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 risk of recidivism, not, as required by the *Hendricks-Crane* standard, the existence of volitional impairment. 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.⁴⁷⁷ 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 condition of underlying volitional impairment based solely upon a selective record of past actions.

⁴⁷¹ *Id.* (emphasis added).

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ 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. However, studies have not demonstrated these to be sufficiently reliable for forensic use. Campbell, *supra* note 412, at 120.

⁴⁷⁵ See, e.g., Robin Wilson, et al., *Pedophilia: An Evaluation of Diagnostic and Risk Prediction Methods*, 23 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT, 260, 271 (advocating exclusive use of ARAs in SVP prediction).

⁴⁷⁶ See *supra* notes 386–400 and accompanying text.

⁴⁷⁷ First & Halon, *supra* note 216, at 450–51.

There are studies showing that prediction rates based on actuarial tools are better than those based on clinical judgment, and such studies are invoked by various social scientists and others who advocate replacing clinical judgment with such tools, in order to ensure more accurate assessments.⁴⁷⁸ 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. Thus 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.”⁴⁷⁹ Significantly, this aversion appears to be even stronger when the “decisions are consequential.”⁴⁸⁰

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 Phillip K. Dick’s short story, *The Minority Report*, the specter of using “science” to determine what we will do in the future and then detaining individual people as a result of such “precrime predictions” was evoked to paint a frightening dystopian picture.⁴⁸¹ 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.”⁴⁸² 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/or ARA instruments in SVP proceedings, with strong but conflicting evidence on both sides, encourages a significant third perspective; that is, the view that the entire SVP commitment model, with the essential role it assigns to forensic assessment of the likelihood of recidivism, is inherently unworkable. Since 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 has direct implications for the committed persons’ liberty interests.⁴⁸³ What these debates reveal is that neither approach—clinical judgment or actuarial

⁴⁷⁸ See, e.g., MEEHL, *supra* note 397.

⁴⁷⁹ KAHNEMAN, *supra* note 379, at 228.

⁴⁸⁰ *Id.*

⁴⁸¹ PHILIP K. DICK, *THE MINORITY REPORT* (1956).

⁴⁸² Janus & Meehl, *supra* note 297, at 60–61. Cf. *Reno v. Flores*, 507 U.S. 292, 345 (1993) (noting that “the Due Process Clause establishes a powerful presumption against unnecessary official detention that is not based on an individualized evaluation of its justification”) (Stevens, J., dissenting). 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 not a regular part 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* (Oct 2013) <http://ssrn.com/abstract=2298909> forthcoming 81 U. CHI. L. REV. ____ (2014) (emphasis added) [need final pin cite].

⁴⁸³ Prentky et al., *supra* note 7, at 371; Janus & Prentky, *supra* note 396, 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

instruments—is sufficiently reliable to ensure that the SVP laws are not sweeping too broadly. The making of predictions itself, 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.⁴⁸⁴ 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 is certainly the high-stakes outcomes of such cases. No less significant is the central role assigned by the laws themselves to mental health professionals in preserving due process under 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.⁴⁸⁵ It remains true, however, that courts overwhelmingly admit the suspect science and leave it to the fact finder to decide how much weight to give such expert opinion. Most courts, like the *McGee* trial court, leave the issues of the validity of the methods used to arrive at expert opinions—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 uninterested playing a more active role in screening out such expert testimony. If the current legal framework is retained, we should expect that the same tendencies will continue to prevail.

Indeed, much would be at stake were trials courts to assume the role of aggressive gatekeeper in SVP proceedings. 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

scholar Adam Lampaello has advocated use of neuroscience to predict violent behavior. Adam Lampaello, *Using Cognitive Neuroscience To Predict Future Dangerousness*, 42 COLUM. HUM. RTS. L. REV. 481 (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. Steven Erickson, *The Limits of 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).

⁴⁸⁴ Samuel Brakel and Allan Frances debated this point in *Psychiatrists and Law*, *Psychiatric Times* (Nov. 19, 2010) (<http://www.psychiatristimes.com/forensic-psychiatry/psychiatrists-and-law>).

⁴⁸⁵ Hamilton, *supra* note 6, at 52; Prentky et al., *supra* note 234, at 458. See also Vars, *supra* note 297, 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).

unlikely that trial courts could be convinced to widely and consistently reject psychiatric evidence in SVP commitment proceedings.⁴⁸⁶

IV. REVISITING THE HENDRICKS-CRANE RATIONALE

The SVP commitment laws have no shortage of critics from within law, psychiatry, and other fields.⁴⁸⁷ Many criticize the ways the laws are implemented; others argue that they reflect failed, flawed, and misplaced policies that score political points or that they are based on myths about sex offenders and unfounded assumptions about the potential for their treatment and rehabilitation.⁴⁸⁸ Most of these criticisms, however, though well taken in themselves, do not directly address the constitutionality of the laws. Rather, in light of the *Hendricks-Crane* rulings, critics commonly assume that the question of their constitutionality has been settled.

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* holding, is based upon the integrity of using a mental-illness model for the deprivation of liberty permitted in SVP laws. By extension, the medical, and therefore legal, legitimacy of the prosecution of these laws depends upon the testimony of mental health professionals weighing in on the question of respondents' pathology and volitional control. That testimony, however, is inherently problematic: 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.⁴⁸⁹ 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

⁴⁸⁶ 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. State of Texas*, 330 S.W.3d 253 (Texas Ct. App. 2010), *cert denied*. ___ U.S. ___, 131 S. Ct. 3030 (2011). Accordingly, the Court appears uninterested in providing courts any further guidance on the admissibility of such evidence anytime soon.

⁴⁸⁷ See, e.g., Cucolo & Perlin, *supra* note 157, at 5–17; JANUS, *supra* note 4, 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 10, at 233–34 (tracing the "sex panic" underlying many modern sex offender laws to less overt expressions of homophobia and racism).

⁴⁸⁸ See Simon, *supra* note 41, at 281. Simon summed up her assessment of SVP laws as follows: "[T]hese legal policies and mental health practices targeting offenders who 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.*

⁴⁸⁹ See also La Fond, *supra* note 25, 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.").

basis for determining whether or not a person is a “sexual predator,” the task that has been assigned to prosecution forensic experts in SVP proceedings is to make a normative determination, and, thereby, results in a delegation to psychiatry inconsistent with core notions of due process. Accordingly, the question of the constitutionality of such laws is in fact far from settled.

The dangers and implications of attempting to align psychiatry with the problematic concept of a “sexually violent predator” has been recognized by some judges. In a 2010 concurring opinion in an SVP appeal, Justice Richard Sanders 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.⁴⁹⁰

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 consideration by the State.⁴⁹¹

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. 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,⁴⁹² our general presumption regarding the ability of scientists, and specifically of those in the psychiatric profession, to predict future violence far exceeds their actual ability. Despite these acknowledged limits, however, and the constitutional values at stake when they are disregarded, courts continue to uphold statutes based upon just such mistaken assumptions. The SVP schemes 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 quite high error rate would be acceptable.⁴⁹³ Such a low standard for acceptability gives courts and legislators broad freedom to take significant legal actions based upon an assessment of risk and to use psychiatry as a means to identify such risks. Courts have permitted legislators to

⁴⁹⁰ The Washington Supreme Court ordered a hearing on a committed person’s petition for release. *State v. McCuiston*, 238 P.3d 1147, 1155 (Wash. 2010) (Sanders, J., concurring), *opinion withdrawn upon reconsideration* May 20, 2011, as noted in *State v. McCuiston*, 275 P.3d 1092, 1097 (Wash. 2012).

⁴⁹¹ *State v. McCuiston*, 275 P.3d 1092, 1097 (Wash. 2012).

⁴⁹² *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). Adam Lamparello, *Using Cognitive Neuroscience to Predict Future Dangerousness*, 42 COLUM. HUM. RTS. L. REV. 481, 488–92 (2011).

⁴⁹³ Jackson, et al., *supra* note 358, at 126.

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. 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 than a prosecutor can judge the guilt of a person he has accused.⁴⁹⁴

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 prosecution 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*.⁴⁹⁵

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

⁴⁹⁴ David L. Bazelon, *Institutionalization, Deinstitutionalization and the Adversary Process*, 75 COLUM. L. REV. 897, 910 (1975).

⁴⁹⁵ *Kansas v. Hendricks*, 521 U.S. 346, 346–47 (1997) (emphasis added).

manner inconsistent with notions of due process.⁴⁹⁶ 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 such conditions should even be listed as disorders for clinical purposes. Some observers suggest that commitments made on such basis carry broad legal implications. Jerome Wakefield, for example, has flagged what he regards as “a dangerous slippery slope implicit in these legal developments.”⁴⁹⁷ 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.⁴⁹⁸

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. The task given to forensic experts in SVP proceedings can be even more challenging than the typical dangerousness predication. Not only is the expert being asked to make an assessment of a person’s long-term risk for sexual violence, but 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.⁴⁹⁹ 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.⁵⁰⁰ 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.” The prosecution of such an agenda through these laws, Knoll observes, would jeopardize the “autonomous functioning, and thus the reliability, of the science,” and transform psychiatry into “a new organism entirely—one that serves the ends of the criminal justice system.”⁵⁰¹

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. They should once again take seriously psychiatry’s disavowal of its ability to identify predators. At

⁴⁹⁶ Janus, *supra* note 30, at 15.

⁴⁹⁷ Wakefield, *supra* note 204, at 197.

⁴⁹⁸ *Id.*

⁴⁹⁹ Prentky, et al., *supra* note 7, at 358.

⁵⁰⁰ Jerome C. Wakefield, *False Positives in Psychiatric Diagnosis: Implications for Human Freedom*, 31 THEOR. MED. BIOETH. 5, 9 (2010) (“Treatment of disorder is the essential defining mission of psychiatry.”).

⁵⁰¹ James L. Knoll IV, *The Political Diagnosis: Psychiatry in the Service of the Law*, PSYCHIATRIC TIMES (May 13, 2010) (<http://www.psychiatrytimes.com/sexual-offenses/content/article/10168/1568318>)

this time, however, there is no indication of any jurisdictions moving to repeal or significantly reform its SVP commitment laws.⁵⁰²

If state policymakers hesitate to change the 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. This is the route presently being followed by the State of Wisconsin. The state has committed nearly 500 individuals since the state enacted its SVP law in 1994.⁵⁰³ It released only 31 between 1994 and 2009, but released 114 in the 4 years between 2009 and 2013. It took such steps in light of recent research suggested that recidivism risks for “certain types of individuals” were lower “than previously thought.”⁵⁰⁴ Those who were released received treatment and monitoring in the community, and the legislature enacted new laws to expand the community-monitoring program.⁵⁰⁵

States could also consider programs that frequently obviate the need for commitment altogether, such as sentencing options for sexually violent crimes that leave questions of mental illness out of the equation.⁵⁰⁶ For example, states could adopt supervised release laws, such as Maine’s, which provides for an extended period of community supervision in lieu of probation as part of a sentence for a sex offense.⁵⁰⁷ Although Maine’s law was aimed at preventing recidivism among sex offenders specifically, its use depends not upon a determination of a mental disorder but upon whether the defendant is a “repeat sex offender” as defined under the law⁵⁰⁸ and the application of a series of other factors.⁵⁰⁹ Currently, few courts evaluating SVP petitions consider whether there are existing alternatives that may minimize a risk of recidivism.⁵¹⁰ If more such programs were in place, it could provide an argument against commitment in individual cases.

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 how that reasoning has played out in actual SVP commitments and the multiple, exceedingly serious implications of leaving the holding in place, the Court must revisit the constitutionality of the SVP laws.

⁵⁰² Cucolo & Perlin, *supra* note 157, at 9–10.

⁵⁰³ Nora Hertel, *Wisconsin Freeing More Sex Offenders From Mental Lockup*, WISCONSIN WATCH (Feb. 2, 2014),

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.*

⁵⁰⁶ See, e.g., John 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).

⁵⁰⁷ 17-A M.R.S. §§ 1231-1233. *State v. Cook*, 2011 ME 94 ¶ 24, 26 A.3d 834, 843–44. The sentencing court may impose any of a number of conditions of such release, including limiting contact with the victim and other children, undergoing evaluation and treatment, and community monitoring.

⁵⁰⁸ 17-A M.R.S. §§ 1231(2)(A), 1252(4-B)(A).

⁵⁰⁹ *State v. Cook*, 2011 ME 94 at ¶¶ 27-29, 26 A.3d at 844–45.

⁵¹⁰ One of the few courts to engage in this analysis is the district court of Massachusetts in *U.S. v. Wilkinson*, 646 F.Supp.2d 194 (2009), 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. *Id.* at 208.

While the Court is appropriately loathe to overrule itself, it can follow the example it set when it overruled *Bowers v Hardwick*⁵¹¹ with *Lawrence v Texas*.⁵¹² 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 and that “[t]he doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of the law.”⁵¹³ As they concluded, however, such doctrine “is not an inexorable command; rather, it ‘is a principle of policy and not a mechanical formula of adherence to the latest decision.’”⁵¹⁴

Significantly here, in applying these judicial principles to the constitutionality of sodomy laws, the Court noted that, in the time since the *Bowers* opinion had been issued, there had been several scholarly “criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*.”⁵¹⁵ Upon reexamination of those premises, the Court found that the earlier opinion had been based upon erroneous or at least overstated historical grounds⁵¹⁶ and that “the rationale of *Bowers* does not withstand careful analysis.”⁵¹⁷ Here, a comparable analysis mandates that the Court acknowledge that its earlier opinions on SVP were based upon 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 Shriener’s. But once a policy is enacted, even if it was based largely upon 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. 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.

The Earl Shriener case had particular characteristics that shaped the SVP laws. Given Shriener’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, the public and the policymakers who served them were persuaded 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

⁵¹¹ 478 U. S. 186 (1986).

⁵¹² 539 U.S. 558 (2003).

⁵¹³ *Id.* at 577.

⁵¹⁴ *Id.*

⁵¹⁵ *Id.* at 567–58. 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.

⁵¹⁶ *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.”).

⁵¹⁷ *Id.* at 571.

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 to be clearly a sexual criminal who was all but certain to re-offend after his release. It also seemed that the state should be given 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 such signs were identified by experts as indicating that 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. Here, 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 to the construction in the anxious public mind 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.

The second key mistake was the assumption by the public and legislators that mental health experts could identify such people and prevent sexual violence through a process of legal commitment. As demonstrated in this Article, however, psychiatry lacks the knowledge and the instruments either 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 the SVP laws has been likened by two forensic psychiatrists to the Salem Witch trials of the 17th century.⁵¹⁸ In an essay making the comparison, they go on to argue that the suggestion that clinicians can identify the true predators among us creates a dangerous and false sense of security for the public. 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,⁵¹⁹ 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.

⁵¹⁸ Good & Burstein, *supra* note 46, at 24.

⁵¹⁹ LANCASTER, *supra* note 10, at 78. 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 157, at 5–17; LANCASTER, *supra* note 10, at 78.