

## THE SEXUALLY VIOLENT PREDATOR ACT -- A DANGEROUS ALTERNATIVE

On Wednesday, April 27, 1994, Kansas Governor Joan Finney signed the "Sexually Violent Predator Act"<sup>1</sup> (the Act/S.V.P.A.) into law.<sup>2</sup> The Act, approved overwhelmingly by both houses of the Kansas legislature,<sup>3</sup> was their response to a nation-wide scourge of repeat, violent sexual offenses.

No viable argument can be made that the Kansas Legislature was not justified in taking action against the modern plague of sexual violence, nor can criticism be leveled against their choice of target-repeat sexual offenders. Statistics are not needed to convince the least informed among us that a serious problem exists and is growing. Something needed to be done.

This comment ultimately concludes that the "something" done, though it serves its end, is a departure from historical American principles of justice and dangerous precedent for future legislative action. Part I serves as an introduction to the S.V.P.A., providing a layman's description of its tenets.<sup>4</sup> Part II argues that the S.V.P.A. departs from the nature and history of our American system of justice. Finally, Part III examines the negative consequences of widespread legislation within the S.V.P.A. genus.

### I. INTRODUCTION TO THE SEXUALLY VIOLENT PREDATOR ACT

The S.V.P.A. is modeled after a Washington State act with almost identical provisions.<sup>5</sup> Several other states have similar statutory

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1. *Sexual Predator Bill Signed*, WICHITA EAGLE, May 10, 1994, at 3D.

2. KAN. STAT. ANN. §§ 59-29a01-15 (1994).

3. John A. Dvorak, *Sex Offenders to Face Stricter Law in Kansas*, KAN. CITY STAR, Apr. 28, 1994, at A1, A8.

4. Though this comment focuses on Kansas' S.V.P.A., its analysis and conclusion apply equally to the several Sexual Predator Acts (S.P.A.'s) in force in various states.

5. WASH. REV. CODE § 71.09 (1992).

schemes.<sup>6</sup> These Sexual Predator Acts (S.P.A.'s) share the distinguishing characteristic of providing for the civil confinement of sexual offenders after their criminal sentence is complete.<sup>7</sup> At their heart is legitimate concern for the safety of the citizenry in the face of increasing violent sexual crime.

This concern is recorded in the Kansas Legislature's "findings" which serve as an introduction to the S.V.P.A. "[A] civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary"<sup>8</sup> for three reasons: 1) because sexual predators do not have the necessary level of "mental disease or defect," confinement under current mental illness statutes is not possible; 2) because there is a high probability that sexual predators will engage in repeat acts of sexual violence, the existing mental illness statutes are inadequate to protect society; and 3) treatment of sexual predators is long term and different from that appropriate for traditional mentally ill patients.<sup>9</sup>

The second finding -- lack of adequate societal protection -- is the driving force behind this legislation. Findings one and three simply support the proposition that current mental illness statutes are unable to provide this protection. Noticeably absent from the findings is any mention of the ability of the criminal justice system to provide society with protection from sexual predators.<sup>10</sup>

The protections given Kansas citizens by the S.V.P.A. come in the form of indefinite civil confinement for those found to be within the class of sexually violent predators.<sup>11</sup> A sexually violent predator is

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6. See, e.g., ARIZ. REV. STAT. ANN. §§ 13-4601-13 (Supp. 1996); CAL. WELF. & INST. CODE §§ 6600-6609.3 (West Supp. 1997); IOWA CODE §§ 709C.1-12 (Supp. 1996).

7. See, e.g., KAN. STAT. ANN. § 59-29a02(a) (Supp. 1996) ("Sexually violent predator" means any person who has been convicted of or charged with a sexually violent offense . . .").

8. KAN. STAT. ANN. § 59-29a01 (1994).

9. *Id.*

10. More will be written about this curiosity in the conclusion of this comment.

11. KAN. STAT. ANN. § 59-29a07(a) (Supp. 1996):

If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the secretary of social and rehabilitation services for control, care and treatment until such time as the person's mental

“any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence, if not confined in a secure facility.”<sup>12</sup>

The course of this statute was chiefly designed to begin ninety days prior to the release of a sexual offender.<sup>13</sup> At this time, the agency in charge of the inmate’s release may, at its discretion, give notice to the attorney general and a multidisciplinary team that the criminal “may meet the criteria of a sexually violent predator.”<sup>14</sup>

Acting on this recommendation, the multidisciplinary team reviews the criminal’s records and provides the attorney general its assessment of whether the inmate is indeed a sexually violent predator.<sup>15</sup> Assisting the attorney general is a prosecutor’s review committee. Using the multidisciplinary team’s report as guidance, the attorney general and review committee decide whether to file a civil petition alleging that the person in question is a sexually violent predator.<sup>16</sup>

Following a judge’s decision that probable cause exists,<sup>17</sup> a hearing is held to contest probable cause.<sup>18</sup> At the hearing, the person charged is given, among other protections, the right to counsel, to present evidence, and to cross-examine witnesses.<sup>19</sup> If probable cause

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abnormality or personality disorder has so changed that the person is safe to be at large.

12. KAN. STAT. ANN. § 59-29a02(a) (Supp. 1996).

13. KAN. STAT. ANN. § 59-29a03(a) (Supp. 1996). The S.V.P.A. may also be invoked 90 days prior to the release of a person charged with a sexually violent offense who has been determined to be incompetent to stand trial, or who was found not guilty by reason of insanity, or who was found not guilty but where the jury answered in affirmative to this question asked pursuant to KAN. STAT. ANN. § 22-3428 (Supp. 1996): “Do you find the defendant not guilty solely because the defendant, at the time of the alleged crime, was suffering from a mental disease or defect which rendered the defendant incapable of possessing the required criminal intent?” KAN. STAT. ANN. § 22-3221 (1994).

14. KAN. STAT. ANN. § 59-29a03(a) (Supp. 1996).

15. KAN. STAT. ANN. § 59-29a03(d) (Supp. 1996).

16. KAN. STAT. ANN. § 59-29a03(e) (Supp. 1996).

17. KAN. STAT. ANN. § 59-29a05(a) (Supp. 1996).

18. KAN. STAT. ANN. § 59-29a05(b) (Supp. 1996).

19. KAN. STAT. ANN. § 59-29a05(c) (Supp. 1996).

is found, the accused is transferred to a secure facility pending a professional mental evaluation.<sup>20</sup>

The final stage of this process is a trial to determine if the accused is a sexually violent predator. At the trial, the state provides the defendant a host of procedural protections and privileges: the right to counsel, including appointed counsel for indigents; the right to elect a jury trial; if a jury trial, the requirement that the jury decision be unanimous; the right to a professional psychiatric examination; a "beyond a reasonable doubt" standard of proof, and the right to appeal.<sup>21</sup>

If the trial produces a finding that the accused is a sexually violent predator, he is committed to a secure facility "until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large."<sup>22</sup> From this point on, the court must annually review the status of the committed person.<sup>23</sup> The committed person also has the right to petition for his release annually. If the court finds probable cause that the person's mental condition has substantially improved, then he is entitled to another trial at which the state has the burden of proof beyond a reasonable doubt to show that he is not safe to be released.<sup>24</sup>

This comment will not argue that these procedural steps in confinement are flawed. However, while the S.V.P.A. has every appearance of procedural soundness, affording defendants protections commensurate with a criminal trial, its substance is suspect as a departure from historical practice.

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20. KAN. STAT. ANN. § 59-29a05(d) (Supp. 1996).

21. KAN. STAT. ANN. § 59-29a06-07 (Supp. 1996).

22. KAN. STAT. ANN. § 59-29a07(a) (Supp. 1996).

23. KAN. STAT. ANN. § 59-29a08 (Supp. 1996).

24. *Id.*

## II. HISTORICAL ANALYSIS

The Sexually Violent Predator Act is a unique brand of legislation. It can be compared on some level to several other types of legislation, but is analogous to none. This originality, however, does not itself make the Act suspect. Arguably, complex social problems demand creative solutions. However, attention to the lessons of history must temper the rush to change. America's justice system is rooted in time-tested principles that should not be recklessly abandoned. Those who seek to make changes must critique proposed action in light of these principles and reject change if it is a needless or wrongful departure.

The stated purpose of the S.V.P.A. is societal protection.<sup>25</sup> This statement of purpose is not a novel concept. The state has always had the role of protecting its citizens from invaders without and dangerous individuals within.<sup>26</sup> Historically, however, the criminal justice system has almost exclusively provided the internal protection from dangerous individuals.<sup>27</sup> The formula is simple and as familiar to Americans as Sunday afternoon football -- as wrongs are prohibited and punished, potential harm to society is discouraged and hopefully limited.

Central to the American criminal system is the doctrine that men should only lose their right to life, liberty, and property through forfeiture by their own actions.<sup>28</sup> This axiom is the foundation of the

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25. See, e.g., KAN. STAT. ANN. § 59-29a01 (1994) ("The existing involuntary commitment procedure pursuant to the treatment act for mentally ill persons . . . is inadequate to address the risk these sexually violent predators pose to society.").

26. See ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 87 (1904).

27. See *Foucha v. Louisiana*, 504 U.S. 71 (1992) ("This rationale . . . would . . . 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."). *Id.* at 82-83.

28. According to Sir William Blackstone:

Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the

essential elements of every crime -- *mens rea* (the guilty mind) and *actus reus* (wrongful action).<sup>29</sup> An improper mental state is not enough under the criminal system; illegal deeds must also be present. Criminal law based on wrongful action has several virtues. It allows law abiders to live without fear of arbitrary state sanction; it provides a defense to all accused -- "I didn't do it!;" it reveals the standard for acceptable behavior; and, maybe most importantly, it takes the guesswork from determining who should be deprived of freedom for the good of society.

American law has recognized few exceptions to the general rule that individuals should only lose their freedom through their own actions.<sup>30</sup> Confining and treating the dangerous mentally ill is one such exception.<sup>31</sup> Confinement is not premised on the actions of the confined, but on their mental state.<sup>32</sup> Similarly, the state may temporarily confine crime suspects to keep potential criminals from harming others.<sup>33</sup> Finally, in times of war, courts have allowed the state to confine those suspected of posing a threat to national security.<sup>34</sup> Outside of these three exceptions, societal protection from dangerous individuals has historically been accomplished by punishment of illegal action.<sup>35</sup>

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contrary, no human legislature has power to abridge or destroy them unless the owner shall himself commit some act that amounts to a forfeiture.

I WILLIAM BLACKSTONE, COMMENTARIES \*54 (emphasis added).

Though evidentiary problems sometimes lead to wrong conclusions of guilt, loss of freedom is still directly tied to the state's ability to prove that the defendant forfeited his right to freedom by committing a criminal act.

29. See *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980) ("In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur."). Both purpose and action are required. These requirements assure both that the individual have the intent to forfeit his liberty through criminal action and that the intent be visibly acted upon.

30. See *Foucha*, 504 U.S. at 82-83.

31. See *Addington v. Texas*, 441 U.S. 418, 426 (1979); *Jackson v. Indiana*, 406 U.S. 715, 729-37 (1972).

32. See, e.g., KAN. STAT. ANN. § 59-2912 (1994).

33. See, e.g., *United States v. Salerno*, 481 U.S. 739, 749 (1987) (allowing pretrial detention of dangerous individuals pursuant to the Bail Reform Act of 1984).

34. See, e.g., *Moyer v. Peabody*, 212 U.S. 78, 84-85 (1909).

35. See *Foucha*, 504 U.S. at 82-83.

The remainder of this section will compare the S.V.P.A., first, with the general means of societal protection and, secondly, with each of the exceptions in turn. If the S.V.P.A. cannot be reconciled with the general rule or understood as a variation of one or more exception, one must conclude that it departs from the historical means of societal protection.

*A. Criminal Law -- Deprivation of Rights Based on Action*

By its provisions, the S.V.P.A. claims not to be a criminal statute. The act itself states clearly that its realm of operation is civil.<sup>36</sup> However, those who claim that the S.V.P.A. violates the double jeopardy and *ex post facto* clauses argue that its confinement provisions are inherently punitive.<sup>37</sup> Since punishment by the state is a function of criminal law, they reason that the act must be criminal. The most convincing rebuttal to that argument is made by comparing the S.V.P.A. to civil statutes that allow confinement for mental illness. Mental illness statutes also provide for confinement, but are not labeled criminal as a consequence.<sup>38</sup>

Both sides of this issue support reasonable arguments. However, analyzing the punitive nature of S.V.P.A. confinement is not key in deciding if the S.V.P.A. can be reconciled with the criminal law. For our purposes, it is much more important to discern whether the S.V.P.A. shares the foundational element of criminal laws --

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36. *E.g.*, KAN. STAT. ANN. § 59-29a01 (1994) (“[T]herefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature.”).

37. The Supreme Court has held that “a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.” *United States v. Halper*, 490 U.S. 435, 448 (1989). Therefore, counsel for Leroy Hendricks argued, “[T]he purpose and effect of this statute [Kansas’ S.V.P.A.] is to prolong the incarceration of individuals whose criminal conduct occurred long before the enactment of the statute. Because that ‘purpose and effect’ is unquestionably punitive, the penalty imposed upon Respondent violates the Constitution’s prohibition against *ex post facto* laws.” Brief for Leroy Hendricks Cross-Petitioner at 17, *Kansas v. Hendricks*, (Nos. 95-1649, 95-9075) (1997).

38. *See, e.g.*, Kansas’ “Treatment Act for Mentally Ill Persons.” KAN. STAT. ANN. §§ 59-2901-2941 et. seq., (1994).

punishment based on action. Regarding this issue, there can be little debate. The S.V.P.A. prohibits no conduct and levies no punishment on action. Like mental illness statutes, confinement is unrelated to the performance of criminal acts.<sup>39</sup> Defendants are confined because of their mental state, and their incarceration continues until that mental condition returns to normal.<sup>40</sup>

Furthermore, it is axiomatic that Kansas legislators purposefully avoided any provision that would tie S.V.P.A. confinement to the defendant's actions. If confinement were connected to the illegal actions of the sexual offenders, the double jeopardy clause would most certainly render the S.V.P.A. unconstitutional.<sup>41</sup> This Kansas legislators know well. That is why the S.V.P.A. must and does provide for confinement based solely on the mental state of the defendant.

Because the S.V.P.A. bases confinement on the defendant's mental state and not his actions, it lacks the central element of criminal

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39. See KAN. STAT. ANN. § 59-29a07(a) (Supp. 1996) ("The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If such determination that the person is a sexually violent predator is made by a jury, . . . the person shall be committed . . ."). A person will be committed under the S.V.P.A. only if he is found to be a sexually violent predator. "'Sexually violent predator' means any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence, if not confined in a secure facility." KAN. STAT. ANN. § 59-29a02(a) (Supp. 1996). This definition of sexually violent predator includes a requirement that the individual be convicted of or charged with a sexually violent offense. However, it falls short of requiring criminal action by opening the door to those charged with criminal offenses. Rather than basing confinement on criminal action, this section simply narrows the field of potential sexually violent predators. Ultimately, commitment is still based solely on the individual's mental condition.

40. KAN. STAT. ANN. § 59-29a07(a) (Supp. 1996) ("[T]he person shall be committed . . . until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large.").

41. The Double Jeopardy clause of the U.S. Constitution forbids the states from punishing an individual twice for the same crime. U.S. CONST. amend. V. The Supreme Court has held that the government may "seek civil and criminal sanctions based on the same conduct . . . [but only if] the sanctions are meted out in the same proceeding . . ." 4 JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED §29:42, at 139 (3d ed. 1996). S.V.P.A. proceedings against a soon-to-be-released convict would not be part of the same proceeding as the criminal trial. Consequently, S.P.A.'s are carefully drafted to avoid any suggestion that confinement is based on previous crimes.



laws. Therefore, though argument can be made that the confinement provisions of the S.V.P.A. are punitive, the most compelling of these arguments would still fail to bring the Act within the general boundaries of the criminal law.

### *B. Exceptions*

Though the S.V.P.A. does not follow the customary societal protection framework of confinement based on action, it may fall within one of the exceptions. Outside of criminal confinement, the state has also justified incarceration of the mentally ill, the criminally accused and suspect individuals in time of war or insurrection. Since the S.V.P.A. most closely resembles mental illness legislation, the other exceptions will be considered first.

#### 1. Pre-Trial Confinement

First, the S.V.P.A. does not provide for temporary, pre-trial confinement as allowed and limited by the Bail Reform Act.<sup>42</sup> States permit this type of confinement only because of its temporary nature and close proximity to trial.<sup>43</sup> Its necessity is obvious. Without pre-trial confinement, criminals would rarely stay in the jurisdiction or out of hiding long enough to face trial.

The S.V.P.A. is not preliminary to a criminal trial. Though they will inevitably follow one type of criminal trial or another, S.V.P.A. proceedings have little to no relation to the criminal system. Whatever connection exists can only be attributed to the failure of the criminal system to protect society in the way it was designed.

Nor is S.V.P.A. confinement necessarily temporary. Whereas pretrial detention always ends quickly in freedom or confinement according to sentence, incarceration of sexual predators continues until

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42. 18 U.S.C. § 3141 *et seq.* (1994).

43. See, e.g., *Young v. Weston*, 898 F. Supp. 744, 749 (W.D. Wash. 1995) (“[U]nder certain circumstances, individuals may be detained pending arraignment, trial, or deportation, on the grounds that such individuals are dangerous to the community, dangerous to witnesses, or that they present flight risks.”).

the mental condition is cured.<sup>44</sup> The Kansas S.V.P.A. explicitly admits that this is unlikely to happen any time soon after confinement.<sup>45</sup>

The S.V.P.A. is not a necessary element in the process of a criminal trial, but an extra-criminal measure. It also provides for indefinite incarceration, not temporary confinement as in pre-trial detention. Therefore, the S.V.P.A. is not a type of pre-trial detention, nor can it be justified on similar grounds.

## 2. War or Insurrection

Secondly, the S.V.P.A. is not consistent with confinement of potentially dangerous classes of individuals during a time of war or insurrection. As stated above, confinement under the S.V.P.A. will not likely be temporary. Also, the “small . . . group”<sup>46</sup> of sexual predators dwelling among us hardly creates the same level of emergency as war or insurrection. The situation that has given rise to the S.V.P.A. is simply not similar to the circumstances that would create the need for confinement of certain groups in time of war or insurrection.<sup>47</sup>

## 3. Mental Illness

Of types of legislation, mental illness statutes most closely resemble the S.V.P.A. Proponents of the S.V.P.A. claim that it is just another variation of the many varying mental illness statutes routinely

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44. KAN. STAT. ANN. § 59-29a07(a) (Supp. 1996).

45. KAN. STAT. ANN. § 59-29a01 (1994) (“[T]he treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the treatment act for mentally ill persons . . .”).

46. KAN. STAT. ANN. § 59-29a01 (Supp. 1996).

47. Cf. *Young*, 898 F. Supp. at 749 (listing war or insurrection as an example of accepted non-punitive incarceration, but not considering it as possibly analogous to Washington’s Sexually Violent Predator Act).

administered by the states.<sup>48</sup> Discovering if this is true requires a brief history of the state's role in mental illness.

In the 13th Century, Henry de Bracton laid down a test for insanity that would survive for 400 years. Speaking of mental illness in the context of its ability to absolve of criminal responsibility, he wrote, "A crime is not committed unless the will to harm be present."<sup>49</sup> By this test, to be found mentally ill, the mental condition of the person in question would have to be such that though his body performed the harmful act, his will was either oblivious to the act or desirous of something else. Later, judges began to apply a more descriptive test, finding mental illness if the person were a "wild beast" or "raving maniac."<sup>50</sup>

Consistent in these early descriptions of mental illness is the understanding that mental illness deprives an individual of both his reason and ability to control himself. Though not explicit in these definitions, it is safe to say that they include the idea that mental illness has such a great effect as to be recognizable to the sight -- you know it when you see it.<sup>51</sup>

This understanding of mental illness made its way to colonial America where madmen were generally cared for, if at all, by their own families or private institutions.<sup>52</sup> Local government became

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48. The Petitioner in *Kansas v. Hendricks* noted the history of mental illness statutes.

The states have traditionally exercised broad power to commit persons found to be mentally ill. The substantive limitations on the exercise of this power and the procedures for invoking it vary drastically among the states. The particular fashion in which the power is exercised -- for instance, through various forms of civil commitment, defective delinquency laws, sexual psychopath laws, commitment of persons acquitted by reason of insanity -- reflects different combinations of distinct bases for commitment sought to be vindicated.

Brief of Petitioner at 28, *Kansas v. Hendricks*, Nos. 95-1649, 95-9075 (1997).

49. 2 HENRY DE BRACTON, *ON THE LAWS AND CUSTOMS OF ENGLAND* 424 (George E. Woodbine ed. & Samuel E Thorne trans., 1968-1977).

50. WAYNE C. BARTEE & ALICE FLEETWOOD BARTEE, *LITIGATING MORALITY* 85 (1992).

51. Certainly, no professional diagnosis is needed to identify a "wild beast" or "raving maniac."

52. SAMUEL JAN BRAKEL ET AL., *THE MENTALLY DISABLED AND THE LAW* 12 (1985).

involved only when the madness made the individual dangerous to the community.<sup>53</sup> During this period, the state gave little attention to defining mental illness; the “know it when you see it” standard was the informal measure in use.<sup>54</sup> This lack of an evidentiary standard for recognizing mental illness confirmed again the accepted belief that mental illness has a crippling effect upon reason and volition, but did lead to some abuse. Because no standards were applied, individuals were often committed merely on the testimony of one or more who claimed they were mad.<sup>55</sup>

In 1844, the American Psychiatric Association was formed,<sup>56</sup> and the first psychiatric professionals began to speak against this abuse. Mrs. E.P.W. Packard was one such voice. Having been wrongly committed on the testimony of her husband, she advocated that “commitment should be based only on irregular conduct that indicates that the individual is *so lost to reason* as to render him an unaccountable moral agent.”<sup>57</sup> Because of her efforts, Illinois enacted the “Personal Liberty Bill” which required a jury trial to commit a defendant for mental illness.<sup>58</sup> These first voices from the psychiatric profession reinforced and even strengthened the historical understanding of the effect mental illness has on reason and volition.

From the time of Bracton through the 1800’s, this understanding of mental illness remained largely consistent. However, the role of the state in dealing with mental illness evolved significantly during this time. As the need to develop laws concerning the insane became evident, mental illness jurisprudence and legislation developed along two distinct lines -- confinement of the mentally ill and absolution of the insane of their crimes.<sup>59</sup> Though originally muddled together, confinement of the mentally ill and the insanity defense are generally

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53. *See id.* at 12-13.

54. *See id.* at 13.

55. *Id.* at 14.

56. *Id.*

57. *Id.* (emphasis added).

58. BRAKEL, *supra* note 52, at 14.

59. *See* MENTAL ILLNESS: LAW AND PUBLIC POLICY 26 (Baruch A. Brody & H. Tristram Engelhardt, Jr. eds., 1980).

now separate legal doctrines.<sup>60</sup> Likewise, confinement of the mentally ill followed two courses based on different rationales -- *parens patriae* and police power.<sup>61</sup>

*Parens patriae* means "parent of the country."<sup>62</sup> It "refers traditionally to the role of state as sovereign and guardian of persons under legal disability. . . . It is the principle that the state must care for those who cannot take care of themselves."<sup>63</sup> Statutes that provided for confinement under *parens patriae* did so to protect from themselves individuals who did not have sufficient "insight or capacity to make responsible decisions concerning hospitalization."<sup>64</sup> Though this definition of mental illness does not require that the individual be unable to control himself, it does recognize that mental illness deprives of the ability to reason.

Mental illness combined with dangerousness is the focus of the second line of mental illness confinements. Under the state's police power, it has the authority to legislate for the protection of its citizens.<sup>65</sup> When mental illness is such that it makes a person dangerous to the community, the state has the authority to involuntarily commit the individual.<sup>66</sup>

*Parens patriae* and the police power, as independent justifications for confinement, have been effectively eliminated by the Supreme Court's decision in *Foucha v. Louisiana*.<sup>67</sup> *Foucha* held that due process prohibits involuntary civil confinement absent a finding that the person is *both* mentally ill and dangerous.<sup>68</sup> Therefore both the *parens patriae* and police power justifications must now be present to confine civilly the mentally ill.<sup>69</sup>

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60. *Id.*

61. BRAKEL, *supra* note 52, at 24.

62. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

63. *Id.*

64. BRUCE J. ENNIS & RICHARD D. EMERY, THE RIGHTS OF MENTAL PATIENTS 37 (1978).

65. *See* BRAKEL, *supra* note 52, at 24.

66. *Id.*

67. 504 U.S. 71 (1992).

68. *Id.* at 82-83.

69. *Id.*; *see also* O'Connor v. Donaldson, 422 U.S. 563 (1975) (holding confinement of harmless mentally ill person unconstitutional).

Though remaining fairly consistent throughout modern history, the substantive understanding of mental health has undergone significant change in the last century. Much of this change has come in the form of extensive classification of the types of mental illness. No longer are individuals just insane; they are also schizophrenic, neurotic, or paranoid.<sup>70</sup> The other major change has come through the exploration and discovery of the realm of “mental disorders.”<sup>71</sup>

Mental disorders include such maladies as Eating Disorders, Substance Abuse,<sup>72</sup> and the somewhat less familiar Caffeine Induced Sleep Disorder,<sup>73</sup> Nightmare Disorder,<sup>74</sup> and Nicotine Use Disorder.<sup>75</sup> Also included in the ranks of mental disorders are the “mental abnormality” and “personality disorder” of fame from Kansas’ definition of a “sexually violent predator.”<sup>76</sup> The S.V.P.A. defines “mental abnormality” as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.”<sup>77</sup> “Personality disorder” is not defined in the S.V.P.A., but has meaning in the psychiatric profession. As best can be defined, a person with a personality disorder “has an immature or distorted personality that disrupts the person’s functioning in day-to-day life.”<sup>78</sup>

In less-than-scientific terms, these mental disorders are no more than vehicles to elucidate whatever it is in any wrongdoer that led him to do what he did. They are certainly not consistent with the historical understanding of mental illness. “Victims” of a personality disorder have no difficulty engaging in rational conversation; nor is their

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70. See, e.g., ALLAN LUNDY, *DIAGNOSING AND TREATING MENTAL ILLNESS* 23-30 (1990).

71. See, e.g., DAVID B. WEXLER, *MENTAL HEALTH LAW* 15 (1981).

72. See LUNDY, *supra* note 70, at 35-38.

73. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 604 (4th ed. 1994) (hereinafter *DSM-IV*).

74. *Id.* at 580.

75. *Id.* at 243.

76. KAN. STAT. ANN. § 59-29a02(a) (Supp. 1996).

77. KAN. STAT. ANN. § 59-29a02(b) (Supp. 1996).

78. LUNDY, *supra* note 70, at 36.

volition so impacted that refusal to feed their urges is impossible.<sup>79</sup> These new classes of the mentally ill are no longer recognizable to the sight but live incognito among us. This is not to say that powerful forces are not influencing their decisions. However, those forces have historically been explained by non-illness dynamics such as addiction, sin, or common lust allowed to grow beyond control.<sup>80</sup>

Though emergence of mental disorders has greatly affected the modern understanding of mental illness, the psychiatric community has stopped short of automatically labeling mental disorders as mental illness.<sup>81</sup> However, whether by the influence of mental disorders or by other factors, many of the state definitions of mental illness found in their civil confinement statutes are now broad enough to encompass most mental disorders. Several states require no more than that the

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79. See Brief of Amicus Curiae Washington State Psychiatric Association in Support of Respondent, at 19, *Kansas v. Hendricks*, Nos. 95-1649, 95-9075 (1997) (“There is no evidence that persons with these traits suffer from a mental defect or impairment rendering them incapable of comprehending or conforming to societal norms. Instead, persons with these traits make choices reflecting a failure of moral development, probably stemming from early or middle childhood.”).

80. The National Mental Health Association, in its Amicus Brief, noted the following:

The term “mental illness” is reserved for psychological conditions that impair virtually every aspect of the lives of people it affects. It does not apply to those who merely cannot resist deviant sexual urges whose origin, in any case, is unrelated to mental illness. Criminal behavior, including sexually violent behavior, is more often the product of a failure of moral development, or insufficient impulse control, than it is a result of mental illness.

Amicus Brief for the National Mental Health Association, at 7, *Kansas v. Hendricks*, Nos. 95-1649, 95-9075 (1997).

81. The Washington State Psychiatric Association, in its Amicus Brief, noted:

If the individual is found to suffer from a mental disorder, it would next be determined whether the disorder is of a type and severity which would merit the label “mental illness” for the purpose of either voluntary or involuntary commitment to a psychiatric hospital for treatment. It must be emphasized that not all “mental disorders” found in the DSM-IV would be deemed by any competent mental health provider as constituting a “mental illness” as that term is ordinarily used in the context of civil commitment proceedings.

See Brief of Washington State Psychiatric Association, *supra* note 79, at 4.

individual have a “psychiatric disorder of thought and/or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.”<sup>82</sup> Others define mental illness circularly: “‘Mentally ill’ shall mean a person, who as a result of a substantial disorder of thought, mood, perception orientation, or memory, which grossly impairs judgment, behavior, capacity to recognize and adapt to reality, requires care and treatment at a facility.”<sup>83</sup> In these states, mental illness is defined broadly enough to encompass seemingly whatever the newest trend in psychiatry espouses. Not all states, however, have broadened their definitions of mental illness beyond the traditional understanding. Some even explicitly reject the expanded definitions.<sup>84</sup>

For those states that have completely lost the historical understanding of mental illness, the S.V.P.A. appears to be the logical extension of their evolving definition. Considering the breadth of the definition of mental illness in some states, it is unclear why a S.V.P.A. would even be necessary. However, the ease with which states have accepted broadened definitions is not consistent with the practical application of these statutes. People with no more than personality disorders or mental abnormalities are *not* routinely committed under their provisions.

The state of Iowa is a good example. Its legislature recently enacted its own “Sexually Violent Predator Act.”<sup>85</sup> However, Iowa’s definition of mental illness, for purposes of civil confinement, is

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82. ALA. CODE § 22-52-1.1. (Supp. 1996).

83. IDAHO CODE § 66-317(m) (1996).

84. See, e.g., New Hampshire’s definition:

“Mental illness” means a substantial impairment of emotional processes, or of the ability to exercise conscious control of one’s actions, or of the ability to perceive reality or to reason, when the impairment is manifested by instances of extremely abnormal behavior or extremely faulty perceptions. It does not include impairment primarily caused by: (a) epilepsy; (b) mental retardation; (c) continuous or noncontinuous periods of intoxication caused by substances such as alcohol or drugs; or (d) dependence upon or addiction to any substance such as alcohol or drugs.

N.H. REV. STAT. ANN. § 135-C:2(X) (1996).

85. IOWA CODE §§ 709C.1-12 (1995 & Supp.).



logically broad enough to include sexually violent predators without their S.V.P.A.<sup>86</sup> The Iowa legislature must have realized that juries entrusted with the responsibility of deciding whether a repeat sexual offender (complete with personality disorder or mental abnormality) was mentally ill would be unlikely to decide in the affirmative. Undoubtedly, this is due at least in part to the historical understanding of mental illness which still maintains its efficacy among a large portion of the population. The average citizen might easily be convinced that a sexual offender is a “sexually violent predator” (a recently invented term descriptive of our images of sex offenders). However, mental illness is still generally understood to be inconsistent with reason and volition. Despite the breadth of Iowa’s definition of “mental illness,” most people (and likely most judges as well) would fail to classify the average sexual offender, with reason and volition clearly intact, as mentally ill.

The pattern of American history paints a different picture of mental illness than does the S.V.P.A.. Whereas, historically, mental

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86. IOWA CODE § 229.1 (Supp. 1995) (“‘Mental illness’ means every type of mental disease or mental disorder, except that it does not refer to mental retardation . . . or to insanity, diminished responsibility, or mental incompetency as the terms are defined [by the criminal code].”). In Iowa, you can be involuntarily confined if you are “seriously mentally impaired.” IOWA CODE § 229.11 (1995).

“Serious mental impairment” describes the condition of a person who is afflicted with mental illness and because of that illness lacks sufficient judgment to make responsible decisions with respect to the person’s hospitalization or treatment, and who because of that illness meets any of the following criteria:

- a. Is likely to physically injure the person’s self or others if allowed to remain at liberty without treatment.
- b. Is likely to inflict serious emotional injury on members of the person’s family or others who lack reasonable opportunity to avoid contact with the afflicted person if the afflicted person is allowed to remain at liberty without treatment.
- c. Is unable to satisfy the person’s needs for nourishment, clothing, essential medical care, or shelter so that it is likely that the person will suffer physical injury, physical debilitation, or death.

IOWA CODE § 229.1 (Supp. 1995).

By this definition, the state would need only demonstrate that the sexual offender had some type of mental disorder, could not make responsible decisions concerning treatment (i.e., wouldn’t agree to confinement willingly), and was a danger to the public. These requirements for confinement are as diminutive as those of an S.V.P.A.

illness has been understood to impact greatly the reason and volition of the victim, personality disorders and mental abnormalities do no more than “predispose”<sup>87</sup> the individual to a particular vice or afflict him with an “immature or distorted personality.”<sup>88</sup> This expansion of mental illness is certainly a substantial departure from traditional mental illness statutes that still hold to an historical definition. However, even in states without an historical definition of mental illness, the S.V.P.A. is still at variance with the standard practice of committing the mentally ill.

Legislation that departs from historical practice must be carefully scrutinized to determine if it contradicts sound principles to which the historical means owes its longevity. The remainder of this comment argues that the philosophy and practice of the S.V.P.A. are dangerous to principles that Americans esteem and will lead to undesirable eventualities.

### III. POLICY CONSIDERATIONS

The criminal justice system has always been the primary means for protection of the American public. At its core is the punishment and incarceration of wrongdoers. Fundamentally different, the S.V.P.A. is based on the incarceration of wrong-“be”-ers.<sup>89</sup> Wrong action is not punished; “bad people” are removed. The S.V.P.A., providing for incarceration of those determined to have aberrant mental processes, is flawed and dangerous for several reasons.

First, definitions of these mental aberrations are necessarily so broad as to include all perpetrators of disfavored action (criminal or not), thereby eliminating virtually all potential defenses to incarceration.

Secondly, incarceration under this system makes psychiatry the ultimate arbiter in the decision whether a defendant’s freedom should

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87. See KAN. STAT. ANN. § 59-29a02(b) (Supp. 1996), *supra* note 77, and accompanying text.

88. See LUNDY, *supra* note 78, and accompanying text.

89. Again, in a S.V.P.A. proceeding, it is the state of being of the individual that is at issue – not his actions, since his actions have already been paid for by incarceration.

be taken from him, a choice ultimately left to the defendant under the criminal system.

Finally, several undesirable contingencies could result from widespread acceptance of such legislation: the cost to the state of treating “mental aberration patients” would become overwhelming as incarceration under these statutes becomes favored; the plight and needs of true mental illness patients could become trivialized and overlooked as resources and research focus on the treatment of mental aberrations; and the criminal system could well become increasingly irrelevant as society gradually rejects the inhumanity of punishing mental aberration “victims.”

### A. *Stripping of Defenses*

Under the Kansas S.V.P.A., former sexual offenders who have a personality disorder or mental abnormality which makes them likely to commit sexual crimes in the future are committed indefinitely.<sup>90</sup> As stated above, the definitions of personality disorder and mental abnormality are expansive. This definitional breadth eliminates virtually any defense which the defendant could raise against being classified as a sexually violent predator. A closer look at the definitional structure of the S.V.P.A. bears this out.

In order to incarcerate the defendant, the state must find him to be a sexually violent predator.<sup>91</sup> “Sexually violent predator” is defined as someone who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence.<sup>92</sup> “Mental abnormality” is defined as a condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses.<sup>93</sup> A personality disorder is “an immature or distorted personality that disrupts the person’s functioning in day-to-day life.”<sup>94</sup>

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90. See KAN. STAT. ANN. § 59-29a07(a) (Supp. 1996).

91. *Id.*

92. KAN. STAT. ANN. § 59-29a02(a) (Supp. 1996).

93. KAN. STAT. ANN. § 59-29a02(b) (Supp. 1996).

94. See LUNDY, *supra* note 78.

Notice initially that the definition of “Sexually Violent Predator” can be reduced to “someone who suffers from a mental abnormality.” At first inspection, the definition of Sexually Violent Predator appears to have two distinct elements: 1) someone who suffers from a mental abnormality or personality disorder, 2) which makes the person likely to engage in predatory acts of sexual violence. However, we can logically eliminate “personality disorder” and the entire second requirement from the equation.

First, whatever a mental abnormality is, it is broad enough to encompass personality disorders as well. Anyone with a “condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses” could just as easily be seen to have an “immature or distorted personality that disrupts the person’s functioning in day-to-day life.”<sup>95</sup> Therefore, “personality disorder” is surplus and can be eliminated from the definition.

Secondly, there may be some technical distinction between the “Sexually Violent Predator” requirement that the person be likely to engage in predatory acts of sexual violence and the “mental abnormality” requirement that the person be predisposed to commit sexually violent offenses. However, these elements are largely the same, and to prove one is practically to prove the other. Therefore, the second requirement is a redundancy. Realistically, to prove to a jury of laymen that the defendant is a Sexually Violent Predator, the state need only show that he has a mental abnormality.

This requirement is likely proven with little more than allusion to the defendant’s past crime. Again, a mental abnormality is a condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses. For the defendant to have

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95. Psychiatric professionals admit readily that they are unable to diagnose accurately such mental disorders. See Brief of Washington State Psychiatric Association, *supra* note 79, at 13-14. (“The term ‘mental abnormality’ has no clinically significant meaning and has long been in disuse because the word ‘abnormal’ has several meanings which differ in important ways. . . . Because ‘mental abnormality’ has no recognized clinical meaning, there is no way to assure it will be applied so that only persons who are mentally ill are subject to civil commitment.”). This admission being accurate, the lay jury could not be expected to fare any better in distinguishing between mental abnormalities and personality disorders.

committed a sexual crime, there had to be some condition affecting his emotions or volition.<sup>96</sup> Likewise, it goes without saying that whatever mental condition the defendant possessed predisposed him to commit the crime. The defendant is certainly hard pressed to offer any evidence demonstrating that something other than his mental condition inclined him to commit his crime. Therefore, by simply pointing out to the jury that the defendant committed a sexual crime, the state also demonstrates that the defendant had a mental abnormality when the crime was committed.

Once the state demonstrates that a mental abnormality existed in the past, it then only has to convince the jury that the condition still exists at the time of trial. Though the state has the burden of proof,<sup>97</sup> the defendant is at a severe evidentiary disadvantage. The past actions of the defendant will undoubtedly heavily influence the jury, leaving the defendant with only his personal testimony and that of his psychiatric expert. Whatever testimony or evidence might be raised on the defendant's behalf is likely to be woefully ineffective against the compelling testimony of his past actions.<sup>98</sup>

The criminal justice system has long recognized the severity of indefinitely depriving an individual of his freedom. Many procedural protections have become a part of Due Process -- all for the purpose

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96. Notice that the condition does not need to override the defendant's emotion, nor completely control his volition. It need only "affect" these.

97. See KAN. STAT. ANN. § 59-29a07 (Supp. 1996). ("The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator.").

98. See Schopp & Sturgis, *Sexual Predators and Legal Mental Illness for Civil Commitment*, 13 Behav. Sci. & L. 437, 451 (1995). ("Mental abnormality" is "any emotional state that motivated deviant conduct, including strong desires to engage in such behavior, . . . [which] would . . . include virtually anyone who engages in seriously antisocial conduct."). See also Brief of Washington State Psychiatric Association, *supra* note 79, at 17, describing the similar circularity of proving a "personality disorder" by past actions.

The DSM-IV describes no personality disorder which is peculiar to sex offenders. As a result, courts can expect efforts to invent such a personality disorder merely by labeling a pattern of sex offenses as a personality disorder, which is then diagnosed from this pattern of offenses. From this it is an easy step to assert that the sexual offenses are caused by the personality disorder.

*Id.*

of ensuring that a defendant is worthy of punishment before it is levied him. One such protection is the right of the defendant to defend himself against the charges. All defendants have the basic defense of demonstrating that they did not commit the crime charged. They have every opportunity to present concrete, positive evidence of their innocence. They can produce alibis, demonstrate their inability to commit the crime, introduce DNA evidence, etc. This essential ability to defend oneself is central to the criminal system because of the high liberty interest involved.

The liberty stakes in an S.V.P.A. proceeding are no less grave. The freedom of the defendant is again on the line. Under the S.V.P.A., however, the defenses have been stripped away. Defendants cannot argue their innocence. They can only hope to demonstrate that the state of their mind is acceptable -- a nearly impossible task considering their previous criminal record.<sup>99</sup>

### *B. Psychiatry as Ultimate Arbiter*

Another basic precept of the criminal law is that men should only be deprived of their liberty right by forfeiture through action.<sup>100</sup> The individual, then, makes the ultimate decision whether his freedom should be taken away. Unless the individual commits a crime, the state cannot incarcerate him. There is no such guarantee inherent in incarceration based on a mental state. Instead, the individual is at the

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99. An argument can be made that mental health confinement statutes are equivalent to the S.V.P.A. in regard to available defenses. Like the S.V.P.A., defendants in a mental health proceeding cannot argue their innocence of a crime, but must base their defense on their mental state. However, as mental illness has traditionally been understood to greatly affect the reason and volition of its victims, the defendant will have much more concrete evidence on which to base his defense than will a defendant under the S.V.P.A. A great variety of witnesses and other evidence can be presented to attest to the defendant's rational thought and behavior. In an S.V.P.A. proceeding, this type of testimony would be irrelevant since mental abnormalities and personality disorders do not necessarily lead to irrational thought and behavior. Also, in a mental health proceeding, the state would have to offer convincing evidence to support its contention that the defendant was not in control of reason or volition. As already stated, under the S.V.P.A., the chief evidence of the existence of a mental abnormality or personality is already present in the form of the defendant's sexual offense(s).

100. See BLACKSTONE, *supra* note 28.

mercy of psychiatric professionals given the responsibility of diagnosing his mental condition.

An S.V.P.A. confinement proceeding will, by nature, become almost solely a battle between opposing psychiatrists. Since the objective of such a proceeding is to determine the state of the defendant's mental condition, psychiatric professionals will provide the most significant, if not the only, persuasive evidence of that mental condition.<sup>101</sup> Since there will always be contradictory professional testimony, members of the jury will, at best,<sup>102</sup> base their decision on the testimony of the psychiatrist(s) they find most convincing.

Not surprisingly, the psychiatric community itself is one of the most vocal opponents of a system that places this much responsibility in the hands of its professionals. Concerning Hendricks, three amicus briefs were filed in support of the defendant by various psychiatric associations.<sup>103</sup> These briefs adamantly argue that psychiatry is unfit for such a task. "Mental abnormality" connotes sufficient vagueness that nearly any symptom, deficit, or historical detail might be included. "Mental abnormality" is much broader than any conceivable contemporary psychiatric diagnosis of mental disorder or mental illness. The definition is too broad and elastic to avoid improperly

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101. Here again, argument can be made that the S.V.P.A. and mental health confinement place equal emphasis on testimony of psychiatric professionals. While it is true that psychiatric testimony will always play a role in both types of confinement, the distinction lies in the extent of the part played. Besides psychiatric testimony, actions (including speech, writings, etc.) constitute the evidence of an individual's mental state. As stated in note 99, in a mental health proceeding, the actions of the defendant will play a major evidentiary role in the jury's decision whether a defendant is mentally ill. However, under the S.V.P.A., the only actions relevant to whether the defendant has a mental abnormality are those relating to his sexual impulses. In most cases, the defendant will have been in prison up to the point of the S.V.P.A. hearing. This being the case, his last actions in society were those that prompted his criminal sentence. The defendant cannot then point to actions to exonerate himself, which leaves only psychiatric testimony to vouch for his "pure" mental condition.

102. At worst, the jury will find the defendant's past actions compelling and decide that he is a sexually violent predator solely on that basis.

103. Brief of Washington State Psychiatric Association, *supra* note 79; Brief for the American Psychiatric Association as Amicus Curiae in support of Leroy Hendricks, *Kansas v. Hendricks*, Nos. 95-1649, 95-9075 (1997); and Brief for the National Mental Health Association, *supra* note 80.

encompassing a wide variety of individuals.”<sup>104</sup> In essence, not only will professionals disagree about a defendant’s mental condition, but there is no scientific or practical way to discern if a defendant has a mental abnormality. This psychiatry-dependent system is far from the criminal ideal of forfeiture by action.

Admittedly, the S.V.P.A. does contain some element of forfeiture. At this time, it is only applied against former sexual offenders. However, there is no guarantee or philosophical barrier that would keep the pool of potential defendants from expanding. With the acceptance of the S.V.P.A., legislators are free to expand civil incarceration to those with other mental abnormalities and draw from whatever pool of potential confines they deem proper.<sup>105</sup>

The S.V.P.A. places the fundamental right to liberty, long recognized and protected in the United States, in serious jeopardy. By providing for incarceration based on such ethereal standards as “mental abnormality” and “personality disorder,” the S.V.P.A. takes the choice of freedom from the individual and places it in the

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104. Brief of Washington State Psychiatric Association, *supra* note 79, at 14-15. The same brief also states: “Growing awareness that there is no specific group of individuals who can be labeled sexual psychopaths by acceptable medical standards . . . has led such professional groups as the Group for the Advancement of Psychiatry . . . to urge that these laws be repealed.” *Id.* at 10.

105. It may be true that legislatures will never apply this type of statute to any other class of people than former sexual offenders. The public would likely be greatly offended at the notion of applying such mental scrutiny to those who have not previously committed sexual crime -- especially considering the high liberty stakes involved. However, there would be no theoretical difference between such a statute and the S.V.P.A. as it now stands.

If one accepts the notion that mental abnormalities and personality disorders exist and can be diagnosed and treated, then one must also accept the idea that some of the sex offenders tried under the S.V.P.A. never had or no longer have such an illness. Therefore, if it would be unacceptable to subject one group of potentially innocent individuals -- society as a whole -- to such mental scrutiny, then why do we accept applying this scrutiny to another group of potentially innocent individuals -- sex offenders (including those merely charged with sexual offenses)? The answer is obviously the fact that within the universe of former sexual offenders, you are more likely to find Sexually Violent Predators than within the population as a whole. However, the same could be said about males in general as against females. Statistics may also demonstrate such a disparity between the upper and lower wealth classes, between blacks and whites, etc. States would be wise to close the door on the mental scrutiny of the S.V.P.A. before it is applied to a broader field.



inadequate hands of professionals who are hopelessly unable to determine if the individual meets the criteria for confinement.

### *C. Contingent Dangers*

Because the S.V.P.A. is a unique form of legislation, it is certain to have a significant effect on society. Certainly, the Kansas legislature anticipates that it will have the positive result of keeping dangerous criminals from repeating their crimes. While this may indeed prove true, other less desirable consequences of these acts are also foreseeable.

#### 1. Cost to the State

First, consider the financial effects of widespread mental health regulation. The S.V.P.A. promises to be efficient. Because of its broad reach, it will likely become the method of choice for keeping sexual offenders off Kansas streets. Ensuring long-term incarceration for those who commit sex crimes will be much easier under the S.V.P.A. than under the criminal system. In fact, less attention would need to be paid to seeking the highest criminal penalty for sex offenders since the S.V.P.A. would be available at the end of the criminal sentence to take care of those whose sentences were not adequate.

As more and more sex offenders are in care facilities for their mental condition rather than in prison for their crimes, the cost to the state is sure to increase. Because *parens patriae* justification is required for mental illness confinement,<sup>106</sup> states must show that confinement is in the best interest of the individual as well as the state.<sup>107</sup> Therefore, civil confinees must be provided with treatment for their mental condition. As a result, "patients" of the S.V.P.A. are much more expensive to care for than prisoners are to imprison.<sup>108</sup>

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106. See *supra* note 68.

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

108. Cf. JEFFREY RUBIN, *ECONOMICS, MENTAL HEALTH, AND THE LAW* 10-11 (1978) (demonstrating the huge costs of the care and treatment of the mentally ill).

This cost may become exorbitant if the S.V.P.A. becomes the model for new legislation aimed at removing other undesirables from society. For each mental abnormality created and legislated against, the price of caring for its "victims" multiplies.

## 2. Effect on the Truly Mentally Ill

One group of individuals almost certain to be affected negatively by the S.V.P.A. are those who have true, disabling mental illness. One such effect will come through the extra costs of S.V.P.A. enforcement. As mental institutions become filled with patients suffering from mental abnormalities and personality disorders, those with disabling mental illness will bear the cost.

The inevitable result of committing sexually violent predators to mental health facilities will be a diversion of resources away from the care of people with treatable mental illness. This funding is to be redirected to a population that the [Kansas] Legislature itself admits is not amenable to mental health treatment, and for which experts hold out very little hope of effective treatment. Violent sex offenders will be warehoused in state mental hospitals, consuming significant resources, and displacing services for large numbers of law-abiding people with treatable mental illness.<sup>109</sup>

Another likely negative effect on the mentally ill will be the trivializing of their condition in the public eye as the obviously not-ill become grouped together with the ill.

After slow but steady progress in transforming state mental hospitals and other mental health facilities from "warehouses" and "snakepits," into more modern, therapeutic communities focused on effective treatments, warehousing violent sex offenders without effective treatment represents a major

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109. Brief for the National Mental Health Association, *supra* note 79, at 14-15.

reversal of course. Sending sexually violent predators to mental health facilities . . . adds to the stigma surrounding mental illness because it promotes the idea that hospitals are not places for recovery, and further inflames a public that believes that people with mental illness are prone to violence.<sup>110</sup>

### 3. Effect on the Criminal Law

Finally, the criminal law system as we know it could very well be in danger if the philosophy behind the S.V.P.A. is carried to its logical conclusion. According to the S.V.P.A., Sexually Violent Predators are the product of mental abnormalities. Likewise, these mental abnormalities are a form of mental illness. One must, therefore, wonder what justification the state has for initially punishing these same victims via the criminal law. If mental abnormalities are to blame for creating sexually violent predators, how can the state justifiably focus punishment on the victim? The logical place to place the blame for the sexual predator's actions is the mental abnormality. This is also the logical place to focus the state's protective action. Resources spent on punishing wrongdoers must be seen at best as a complete waste. If the state is to protect society from those with mental abnormalities and personality disorders, then these mental illnesses need to be treated and cured -- punishing those under their influence is wasted and inhumane action.

Few people in this country are likely to buy wholeheartedly into such a philosophy, and yet, this is the foundation on which the S.V.P.A. is built. As confinement based on the mental state gains broader use and acceptance, the attitude of citizens must inevitably turn against the idea of punishing those suffering from mental abnormalities and personality disorders.

In sum, the S.V.P.A. promises to be effective in accomplishing its stated objective. Putting away sexual offenders for good becomes an achievable goal under its broad reach. However, the S.V.P.A. has a

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110. *Id.* at 16-17.

dark side that far outweighs its advantages. Though pragmatically effective, it is a massive breach in the wall surrounding individual liberty. Its reach is so broad as to remove all solid defenses against incarceration. Former sexual offenders have no potentially convincing evidence to show the soundness of their mental state against the overwhelming evidence of their past actions. Also, the ultimate decision of whether defendants will be incarcerated is taken from their control and placed in the hands of mental health professionals who readily admit that they cannot accurately predict if a defendant fits the criteria for confinement. This is especially disturbing in the context of possible expansion of this type of legislation to defendants without criminal records.

Finally, widespread use of the S.V.P.A. promises to have several negative effects including an enhanced financial burden on state taxpayers, harm to those suffering from true mental illness, and the eventual undermining of the criminal system of justice. These serious concerns regarding the S.V.P.A. should make clear that the pragmatic advantages of such legislation are not worth the harm that will inevitably result.

#### IV. CONCLUSION

The S.V.P.A. was drafted to fill a void in the state's protection of its citizens. Appalled by the repeat crimes of a sexually violent portion of the population, the Kansas legislature attempted to permanently purge society of those given to sexual crime.

Though justified in "getting tough" on sexual predators, Kansas chose a course of action contradictory to established, historical methods of societal protection. Under the S.V.P.A., individuals are incarcerated because of their mental state, rather than because of actions committed. This method of incarceration is fundamentally different than that of the primary source of societal protection -- the criminal justice system.

The S.V.P.A. is also inconsistent with pre-trial detention and temporary confinement during time of war or insurrection. Both of these forms of commitment are temporary; whereas, confinement

under the S.V.P.A. is usually long-term. The S.V.P.A. cannot be justified by the circumstances under-girding pre-trial detention and temporary commitment. Unlike pre-trial commitment, the S.V.P.A. is not an essential part of the criminal justice system; nor does sexual crime rise to the same level of emergency as that which is the primary justification behind temporary confinement in time of upheaval.

Finally, the S.V.P.A. is not a variation of mental illness statutes. Personality disorders and mental abnormalities do not substantially affect volition and reason, and as such, are not consistent with the historical understanding of mental illness.

More disturbing than the S.V.P.A.'s departure from historical societal protection are the dangers inherent in its tenets. Grave encroachment of personal liberty will surely result from a statute which strips all defenses from defendants by its overbreadth and leaves the ultimate decision of whether the defendant should lose his freedom in the hands of mental health professionals. Added to this certainty are several other dangers of S.V.P.A. enforcement. As states favor S.V.P.A. regulation, the cost to state taxpayers will dramatically increase; as the number of S.V.P.A. confinees increases, the mentally ill will suffer; and as the philosophy behind the S.V.P.A. becomes accepted, the foundations of the criminal justice system will be undermined.

These negative results of S.V.P.A. enforcement should counsel caution to those wanting to implement this Act. Legislators and citizens should not support legislation that promises such grave effects. However, without the S.V.P.A., Kansas is left with the serious sexual violence problem that prompted the Act. If the S.V.P.A. is not the solution to sexual violence, another solution must be found.

In the legislative findings that introduce the S.V.P.A.,<sup>111</sup> the Kansas legislature outlined why they found the Act to be necessary.<sup>112</sup> Chiefly, they found Kansas' current mental illness statutes inadequate to address the sexual violence epidemic. Missing from these findings is any mention of the ability of the criminal justice system to address

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111. KAN. STAT. ANN. § 59-29a01 (Supp. 1996).

112. See *supra* note 8 and accompanying text.

the problem.<sup>113</sup> Though more than surface analysis of the criminal system is beyond the scope of this comment, it must be noted that legislators should look to the criminal law to deal with sexual violence and the host of other criminal activities growing at alarming rates.

The S.V.P.A. and the criminal law share a common objective -- protecting society from sexual offenders. The S.V.P.A. owes its popularity to the ease with which this objective is accomplished. However, nothing in the philosophy of the criminal law renders it unable to remove sexual offenders from our streets to the same extent as the S.V.P.A.. The criminal law in America owes its longevity to the balance it has maintained between upholding personal liberty and providing real protection to society. While this balance may make obtaining lengthy incarceration difficult at times, reforms in the sentencing and practice of criminal law can and *should* ensure that society is protected from those who truly deserve long-term incarceration. As for the S.V.P.A. alternative, we are much better off without it.

LANCE L. LOSEY

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113. See *supra* note 10 and accompanying text.