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# CONSTITUTIONAL LAW—THE CAGE A FETISH CAN BUILD: PROPOSED LEGISLATIVE REFORM FOR CIVIL COMMITMENT PROCEDURES IN SEXUALLY VIOLENT PREDATOR LAWS

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CONSTITUTIONAL LAW—THE CAGE A FETISH CAN BUILD:  
PROPOSED LEGISLATIVE REFORM FOR CIVIL COMMITMENT PROCEDURES  
IN SEXUALLY VIOLENT PREDATOR LAWS

Anne R. Izzi\*

Currently over five thousand individuals are indefinitely confined in the United States with little hope of release. The 1990s brought a wave of sex offender policy reform, creating Sexually Violent Predator Acts that allowed certain sex offenders to be detained after the completion of a sentence. Legislatures reason that some offenders have mental defects that cause them to lose the ability to control their violent behaviors, and until that mental defect is resolved they pose too great of a risk to live in the community. However, without precise definitions of mental defects or effective treatment options, these offenders are facing the probability of life-long commitment. Until researchers discover sex offender treatment methods that can provide them with a realistic chance of release, the government should limit sex offender civil commitments to those persons who have serious mental illnesses and not merely “mental abnormalities,” in addition to specified offenses that further the goal of the statutes. Given that there are extensive and effective safeguards in place for sex offenders living in the community, confining these offenders is not always necessary to protect the public. If the states narrowed the scope of who could be adjudicated a sexually violent predator there would be fewer civil commitments, and therefore a better balance between the state’s interest in protecting the public and the offender’s interest in retaining liberty.

INTRODUCTION

“The state’s interest in public safety must outweigh the individual’s liberty interest in remaining free from involuntary commitment.”<sup>1</sup>

In the state of Virginia, a fourteen-year-old boy and his twelve-year-old girlfriend had sex, an interaction which would later be the foundation for the fourteen-year-old’s indefinite confinement by the state.<sup>2</sup> After

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1. Jason A. Cantone, *Rational Enough to Punish, but Too Irrational to Release: The Integrity of Sex Offender Civil Commitment*, 57 *DRAKE L. REV.* 693, 704 (2009).

2. Galen Baughman, *Questionable Commitments*, *CATO UNBOUND* (June 1, 2015), <http://www.cato-unbound.org/2015/06/01/galen-baughman/questionable-commitments> [<https://perma.cc/FJ4Y-UMQY>].

servicing four years in juvenile detention for the statutory crime, he was released into the community as a registered sex offender subject to the same conditions as every other offender with a similar offense.<sup>3</sup> When Virginia sent the boy back to jail for a technical violation of the sex offender registry requirements, he was still paying the price for that initial incident when he was fourteen.<sup>4</sup> The repercussions were far from over. A Virginia court declared this young man to be a “Sexually Violent Predator” upon his release from state prison and indefinitely committed him to a different state facility.<sup>5</sup> The state of Virginia did not violate double jeopardy protections because this detention was not considered to be punishment.<sup>6</sup> They were merely protecting the public from his potential for offending based solely on his non-violent sexual interaction at age fourteen.<sup>7</sup> This boy may be, eventually, released from the civil commitment facility, but he will never be released from the stigma of being adjudicated a sexually violent predator.

Sexually violent predators are a class of criminals that repulse the general public.<sup>8</sup> Mass media takes this revulsion and amplifies it, pushing public fear of sex offenders to the point where the delusion that an enraged child molester is around every corner becomes a societal reality.<sup>9</sup> Exceptional and gruesome crimes against children are presented by the media as a global issue instead of the anomaly that they truly are.<sup>10</sup> During

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3. *Id.*

4. *Id.*; see Cecelia Klingele, *Criminal Law: Rethinking the Use of Community Supervision*, 103 J. CRIM L. & CRIMINOLOGY 1015, 1047 (2013). A “technical violation” is a violation of the rules set out in a community supervision order when an offender is being monitored upon release. *Id.* These rules for probation can include abstaining from alcohol, socializing with other felons, or abiding by a curfew. *Id.* at 1030 n.76. Technical violations are a way in which released offenders return to prison absent the commission of a new crime. *Id.* at 1047.

5. *Id.*

6. *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997).

7. *Baughman*, *supra* note 2.

8. Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES (Mar. 4, 2007), [http://www.nytimes.com/2007/03/04/us/04civil.html?\\_r=0](http://www.nytimes.com/2007/03/04/us/04civil.html?_r=0) [<https://perma.cc/5J2B-DQGZ>]. In 1994, Leroy Hendricks was the first man to be committed under the Kansas Sexually Violent Predator Act. *Id.* He had only been released into the community for two days before being forced back into the facility due to a community petition. *Id.* The mother leading the petition to remove Hendricks from the community commented, “[y]ou can tell me that he’s old, but as long as he can move his hands and his arms, he can hurt another child.” *Id.*

9. ROGER N. LANCASTER, *SEX PANIC: AND THE PUNITIVE STATE* 26 (2011).

10. *Id.* at 25–26. Journalists use these notable and outrageous cases to sell their work because society today craves constant stimulation. *Id.* In this “world where everyday experience has been rendered increasingly full of simulations such as television shows, video games, online worlds—virtual realities,” people are not interested in reading about everyday occurrences; they need to be excited by the virtual. *Id.*

the height of hysteria, a newspaper published a comment warning that “[e]veryone should be treating their neighborhood as if a sex offender is lurking there.”<sup>11</sup> Sex offenders constitute a category of society that is denigrated to such a degree that they can be, and are, constitutionally, indefinitely confined. This indefinite confinement generally has the practical consequence of becoming life imprisonment under the guise of public necessity.<sup>12</sup>

Lawmakers have distorted this fictitious fear and codified it by way of Sexually Violent Predator Acts (“SVPA”).<sup>13</sup> Under these laws, sex offenders are subject to life imprisonment masked as preventative detention through civil commitment schemes.<sup>14</sup> SVPAs consist of three elements that must be proven in order to commit an offender: a prior sex offense conviction, a mental abnormality, and a showing that this mental abnormality causes the offender difficulty controlling his behavior.<sup>15</sup> In order to be released from a civil commitment facility, the offender must present evidence that his condition has changed to the extent that he no longer meets the qualifications of a sexually violent predator.<sup>16</sup> These laws use overly broad and discretionary legal elements, creating a nearly

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11. Gene Warner, *2 Sex Offenders Say They Don't Deserve Harsh Label*, BUFFALO NEWS, December 27, 1999, at 1B.

12. Cantone, *supra* note 1, at 727 (arguing civil commitment is merely a pretext for indefinite detainment). While Minnesota has committed more than seven hundred individuals in the past twenty-one years, it has only released *four* of those seven hundred. Brian Bakst, *Judge Orders Review of All Minnesota Sex Offenders in Civil Commitment*, FOX 9 (Oct. 29, 2015 4:52 PM), <http://www.fox9.com/news/40851395-story> [<https://perma.cc/G22G-CLE2>].

13. Throughout the states, these laws have different names for the Acts and terms for the offender, but this Note will use “Sexually Violent Predator” to refer to all state Acts. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-3701(7) (2014) (“Sexually Violent Person”); MASS. GEN. LAWS ch. 123A, § 1 (2015) (“Sexually Dangerous Person”); NEB. REV. STAT. § 71-1211 (2009) (“Dangerous Sex Offenders”); N.D. CENT. CODE § 25-03.3-01 (2015) (“Sexually Dangerous Individual”).

14. Melissa Hamilton, *Adjudicating Sex Crimes as Mental Disease*, 33 PACE L. REV. 536, 552 (2013).

15. KAN. STAT. ANN. § 59-29a03(a) (2013).

16. WASH. REV. CODE § 71.09.090(4) (2014).

(b) A new trial proceeding under subsection (3) of this section may be ordered, or a trial proceeding may be held, only when there is current evidence from a licensed professional of one of the following and the evidence presents a change in condition since the person’s last commitment trial proceeding:

(i) An identified physiological change to the person, such as paralysis, stroke, or dementia, that renders the committed person unable to commit a sexually violent act and this change is permanent; or

(ii) A change in the person’s mental condition brought about through positive response to continuing participation in treatment which indicates that the person meets the standard for conditional release to a less restrictive alternative or that the person would be safe to be at large if unconditionally released from commitment.

*Id.*

insurmountable hurdle when attempting to prove offenders no longer pose a danger to the public.<sup>17</sup> If there is no clear description of the mental abnormality that initially placed the offender in a facility, then there also will be a lack of clarity for what is necessary for release.<sup>18</sup>

Currently, twenty states have codified civil commitment programs, with New York enacting a statute as recently as 2007.<sup>19</sup> The purpose of adjudicating a sex offender as a sexually violent predator is to protect the public from *extremely* dangerous offenders—rather than from every sex offender.<sup>20</sup> In practice, however, these laws have a different effect. As a result of statutes being overly vague in their mental abnormality and offense requirements, states are committing sex offenders who do not pose the *extreme* public danger the statutes were enacted to target.<sup>21</sup> Under these statutes, courts commit sex offenders for offenses that are not necessarily violent and mental “abnormalities” that are not necessarily a disease or societal danger.<sup>22</sup> Legislatures intentionally write SVPAs in a way that can be interpreted broadly in order to reach a greater number of offenders, and judges possess overwhelming discretion in deciding whether the offender satisfies the commitment requirements.<sup>23</sup> The

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17. *See infra* Part I.B.

18. *See infra* Part IV.B.

19. *Civil Commitment of Sexually Violent Predators*, ASS’N FOR TREATMENT SEXUAL ABUSERS, <http://www.atsa.com/civil-commitment-sexually-violent-predators> [https://perma.cc/V93C-B64A]. Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin are states that have enacted civil commitment laws. *Id.*

20. WASH. REV. CODE § 71.09.010 (2014) (“A small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [general involuntary civil commitment statute].”).

21. *Id.*

22. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC & STAT. MANUAL OF MENTAL DISORDERS 686 (5th ed. 2013) [hereinafter DSM-5]. For example, some courts have relied on the existence of a paraphilia when “a paraphilia by itself does not necessarily justify or require clinical [or legal] intervention.” *Id.* *See also* Brown v. Watters, 599 F.3d 602, 606 (7th Cir. 2010). The doctor who evaluated Mr. Brown and determined he had a mental abnormality, later “admitted that the indicators used to reach a diagnosis of paraphilia NOS non-consent were not identified in the DSM; instead, they were indicators Dr. Doren himself had identified to bridge the gap or deficiency [that] . . . exist[s] in the DSM[.]” *Id.* In spite of the doctor’s confession on cross-examination, the court held Mr. Brown met the requirements under Wisconsin’s SVPAs. *Id.* at 617. “NOS” is an acronym for the “paraphilia not otherwise specified” category. Michael B. First, *DSM-5 and Paraphilic Disorders*, 42 J. AM. ACAD. PSYCHIATRY L. 191, 198 (2014). This term is used to diagnose people who display an atypical sexual focus that impairs functioning, but who do not adhere to one of the enumerated paraphilic disorders. *Id.* The DSM-5 further divided the NOS category in two and renamed them “other specified disorder” and “unspecified disorder.” *Id.*

23. N.J. STAT. § 30:4-27.26(b) (2008). A predicate offense can include “any offense for which the court makes a specific finding on the record that, based on the circumstances of the

United States Supreme Court has repeatedly held that infringing on a person's liberty requires there be an overriding state interest necessitating such action; and, although liberty is not an absolute right, it requires a high standard to be taken away.<sup>24</sup>

The severity of loss of liberty implicated by civil commitment dictates an evaluation of its appropriateness relative to the state's valid interest in protecting the public, which is the intended purpose of the laws.<sup>25</sup> This Note argues the current model of sex offender civil commitment does not adequately balance the interest of a sex offender's liberty with the interest of the state in protecting the public. Too much weight is being given to the state's interest at the expense of sex offenders' liberties. When the Supreme Court has been presented with the opportunity to clarify the statutes as issues of constitutionality arise, it has only reinforced the vague terminology.<sup>26</sup>

Additionally, this Note considers the issue of access to treatment that could promote a material change in an offender's mental condition.<sup>27</sup> States may release an offender upon a showing that the offender's mental condition has changed, resulting in the offender no longer posing a danger to the public.<sup>28</sup> However, the Supreme Court ruled sex offenders do not have any constitutional right to receive treatment while they are in facilities.<sup>29</sup> And even the facilities that do offer treatment are not beneficial because, as of yet, researchers in the field have not found any successful treatment options.<sup>30</sup> Thus, offenders effectively receive a life

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case, the person's offense should be considered a sexually violent offense." *Id.*

24. *United States v. Salerno*, 481 U.S. 739, 750–51 (1987) (The "right [to liberty] may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society."). In *Jacobson*, the Court held the right to liberty is not always absolute, even in civil settings. *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) ("There are manifold restraints to which every person is necessarily subject for the common good.").

25. KAN. STAT. ANN. § 59-29a01(a) (2013).

Because the existing civil commitment procedures under [the general involuntary civil commitment statute] are inadequate to address the special needs of sexually violent predators and the risks they present to society, the legislature determines that a separate involuntary civil commitment process for the potentially long-term control, care and treatment of sexually violent predators is necessary.

*Id.*

26. *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997). The *Hendricks* Court reiterated its position that it has "traditionally left to legislators the task of defining terms of a medical nature that have legal significance" and it will not depart from that tradition. *Id.*

27. *See infra* Part II.

28. WASH. REV. CODE § 71.09.090(4) (2014).

29. *Kansas v. Hendricks*, 521 U.S. 346, 366 (1997). While admitting that treatment would be preferable, the Court concluded that the Constitution does not prevent "a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others." *Id.*

30. David W. Nordsieck, *How the Professional Judgment Standard Could Undermine*

sentence when they are civilly committed, without hope of “recovering” from the “mental abnormality” that placed them there.

This Note will explain the issues sex offender civil commitment laws create, both substantively and procedurally. Section I.A will discuss the social atmosphere that gave rise to new laws aimed at sex offenders, including the impact media coverage had on particular influential cases. Section I.A.1 presents and describe specific child victim cases and the legal reaction they provoked. Section I.B explains the common elements and themes in SVPAs, including procedural aspects. This Section will then take an in-depth look at the formulation of prerequisite offense requirement and the mental abnormality requirement that are part of every Sexually Violent Predator Act.

Section II will begin by explaining the constitutional rights afforded—or not afforded—to offenders in this commitment scheme. The Section will go on to discuss the treatment rights of those committed and the difference in treatment as it relates to changing jurisdictions. The Supreme Court holds that sex offenders in civil commitment settings have no right to treatment. However, some jurisdictions have set a higher standard for treatment and other programming requirements. Nevertheless, the issue is not treatment standards, but rather the current lack of any viable treatment methods in the field of sex offender management.

Section III will address ways in which sex offenders not in commitments are supervised and argue that those same methods would be safe and effective for more serious offenders who are currently committed. These community supervision structures include registration and notification, residency restrictions, internet restrictions, and GPS monitoring. Doing so would retain the state’s interest in protecting the public as offenders would be subject to numerous restrictions while at the same time respecting their right to liberty. While it is conceded that living in the community, even under the most severe restrictions, would not provide adequate protection from a minute percentage of offenders, there is a large portion to whom these community restrictions would safely apply.

Finally, Section IV will propose linguistic changes to SVPAs in order to rectify the current problem of overly broad requirements, and if applied correctly will reroute offenders who previously would have been committed into community supervision settings. This Note proposes state legislatures narrow the statutory focus with regard to who can be adjudicated a sexually violent predator. This can be accomplished by

removing vague language and provisions that allow wide judicial discretion. The “mental abnormality” language should be replaced with specified mental diseases, and the predicate offenses replaced with enumerated offenses. In this way, offenders’ liberties will be better protected and the public also will remain protected.

## I. SEXUALLY VIOLENT PREDATOR ACTS

“Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty.”<sup>31</sup>

### A. *Social Origins of Sexually Violent Predator Acts*

Sex offenders are victims of a moral panic.<sup>32</sup> A moral panic is a “mass movement that emerges in response to a false, exaggerated, or ill-defined moral threat to society and proposes to address this threat through punitive measures.”<sup>33</sup> Moral panics prey on the imagination because they are “part real, part imagined,” conferring exaggerated characteristics onto a real scapegoat.<sup>34</sup> Periods of rapid social change provide a ripe environment to twist a disturbing event into an extraordinary fear.

The media is to blame for fueling these intense fears because it calls attention to the most extreme and rare cases, even more so with the rise of the internet.<sup>35</sup> The extraordinary sex offense cases make the news simply because they are extraordinary, rather than “ordinary.” Further, state legislatures are to blame for codifying the unrealistic fear there are sexual predators around every corner into law as “panic [became] the prod and rationale for lawmaking.”<sup>36</sup> The notable kidnapping and molestation cases described below exemplify the moral panic surrounding sex offenders, as the public applies characteristics from few violent offenders to the entire sex offender population.

#### 1. The Crimes Against Children Cases

“Currently, no other population [than sex offenders are] more despised, more vilified, more subject to media representation, and more

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31. O’Connor v. Donaldson, 422 U.S. 563, 575 (1975).

32. LANCASTER, *supra* note 9, at 23.

33. *Id.* Some examples of moral panics include witch hunts, McCarthyism, and Nazism. *Id.* at 23–24. Two key ingredients in each of these examples, and in the moral panic around sex offenses, are an imaginary threat and a real group that is portrayed unrealistically. *Id.* at 24.

34. *Id.* at 25.

35. *Id.* at 26.

36. *Id.* at 78; *see also* Richard G. Wright, *From Wetterling to Walsh: The Growth of Federalization in Sex Offender Policy*, 21 FED. SENT. R. 124, 126 (2008). “Offenders may even stay on their state’s registry after they die . . . [a]pparently even in death, sex offenders are still dangerous.” *Id.* at 125.



likely to be denied basic human rights.”<sup>37</sup> The taboo nature of sex offenders’ crimes makes them an ideal target for moral panic.<sup>38</sup> In the 1980s, there was a 486% increase in the incarceration rates for sex offenders, both because of the rise in rape reporting specifically<sup>39</sup> and because of the sex panic generally.<sup>40</sup> In the 1990s a number of highly publicized cases where children were victims of sexual assaults and murders spurred new laws,<sup>41</sup> which were aimed at punishing perpetrators who committed violent sex crimes against children.<sup>42</sup>

a. *Jacob Wetterling*

In 1994 the federal government passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act<sup>43</sup> (“Wetterling Act”). The Wetterling Act became one of the first legal symbols of the public outcry against sex offenders—the beginning of a series of similar statutes aimed at disproportionately punishing sex crimes and protecting children.<sup>44</sup> The Act is named after Jacob Wetterling, an eleven-year-old boy from Minnesota who was abducted while riding his bike and whose body was not found until twenty-seven years later.<sup>45</sup> The

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37. Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMP. POL. & C.R. L. REV. 1, 2 (2012).

38. LANCASTER, *supra* note 9, at 25.

39. *Id.* at 26.

40. *Id.*

41. H.R. REP. NO. 104-555, at 2 (1996). “[N]o type of crime has received more attention in recent years than crimes against children involving sexual acts and violence. Several recent tragic cases have focused public attention on this type of crime and resulted in public demand that government take stronger action against those who commit these crimes.” *Id.* The Bill aimed at amending the Wetterling Act to include Megan’s law expressed the government’s need to respond to the public’s rising concern and fear about recent sex offenses. *Id.* In addition, through this Bill the government acknowledges that the public outcry does have an influence on the legislative process. *Id.*

42. LAURA J. ZILNEY & LISA ANNE ZILNEY, *PERVERTS AND PREDATORS: THE MAKING OF SEXUAL OFFENDING LAWS* 83 (2009); *see also* Wright, *supra* note 36, at 124 n.4. The author here provides a listing of child victims who were the faces behind the Adam Walsh Act specifically and discusses the rise in sex offender legislation generally. *Id.*

43. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (the “Wetterling Act” or “Megan’s Law”), PUB. L. NO. 104-145, 110 Stat. 1345 (codified at 42 U.S.C. § 14071), *repealed and replaced by* Adam Walsh Child Protection and Safety Act of 2006, PUB. L. NO. 109-248, 120 Stat. 587 (2006).

44. Corey Rayburn Yung, *The Emerging War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 450 (2010).

45. ZILNEY & ZILNEY, *supra* note 42, at 85; Erik Ortiz, *Man Admits to Abducting, Killing Jacob Wetterling, Missing Minnesota Boy in 1989*, NBCNEWS (Sep. 7, 2016, 8:27 AM), <http://www.nbcnews.com/news/us-news/man-admits-abducting-killing-jacob-wetterling-missing-minnesota-boy-1989-n643506> [<https://perma.cc/UX4R-Q5NB>]. On September 6, 2016, Danny Heinrich confessed to abducting, molesting, and killing Jacob twenty-seven years

Wetterling Act required every state to have a system of registration for sex offenders, and, subsequently, was amended to also include community notification laws.<sup>46</sup> The registry included the offender's address in order for public officials to readily locate a registrant during the investigation of future crimes committed in a registrant's vicinity.<sup>47</sup>

b. *Megan Kanka*

The Wetterling Act was amended in 1996 to include Megan's Law, which required states to make their sex offender registries available to the public.<sup>48</sup> The federal government believed "[w]here a state has information through its registration system concerning a child molester or other sexually violent criminal who poses a continuing danger to others, the State should not withhold this information from persons who need it for the security of themselves and their families."<sup>49</sup> After serving his sentence for a prior offense against a child, Jesse Timmendquas raped and murdered his child neighbor, Megan Kanka.<sup>50</sup> Megan's Law was a reaction to Megan's mother's assertion that if she and the community were made aware of the sex offender living next-door Megan's murder would not have happened.<sup>51</sup> Megan's Law was first enacted in New Jersey,<sup>52</sup> where Megan's murder occurred, and was quickly followed by other states and the federal government,<sup>53</sup> reflecting the growing nationwide frenzy to

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earlier. *Id.*

46. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (the "Wetterling Act" or "Megan's Law"), PUB. L. NO. 104-145, 110 Stat. 1345 (codified at 42 U.S.C. § 14071), *repealed and replaced by* Adam Walsh Child Protection and Safety Act of 2006, PUB. L. NO. 109-248, 120 Stat. 587 (2006).

47. *Id.* When a sex or child crime occurs in a particular neighborhood or area, police will use the registry to identify and question registrants who are currently living in that same geographic area. *Id.* Local registered sex offenders automatically come under suspicion because of their existence in the registry. *See id.*

48. Megan's Law, PUB. L. NO. 104-145, 110 Stat. 1345 (1996) (amending 42 U.S.C. § 14071(d) (1994)) ("The designated State law enforcement agency . . . shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section.").

49. H.R. REP. NO. 104-555, at 5 (1996).

50. *See generally* State v. Timmendequas, 161 N.J. 515 (1999).

51. Megan's Law § 14071(d); *see also* HUM. RTS. WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 48 (Sept. 2007), <http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf> [<http://perma.cc/FT5P-GS4A>].

52. N.J. STAT. §§ 2C:7-1–7-11 (2015). The New Jersey Legislature enacted this statute because "[t]he danger of recidivism posed by sex offenders and offenders who commit other predatory acts against children . . . require a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety." N.J. STAT. ANN. § 2C:7-1.

53. ZILNEY & ZILNEY, *supra* note 42, at 87.

protect children from the imagined ubiquitous sexual predator.<sup>54</sup> With this enactment, the community could discover where sex offenders were living, expanding the reach of previous registration laws that gave exclusive access to law enforcement.<sup>55</sup> The method of community notification varies based on the offender's level of dangerousness and specific state regulations.<sup>56</sup> Notification can be as simple as updating the public sex offender website or as deliberate as law enforcement distributing fliers door-to-door.<sup>57</sup>

c. *Amber Hagerman*

The federal AMBER Alert System in place today was adopted from Texas, where the system was first established to find missing children.<sup>58</sup> Nine-year-old Amber Hagerman is the name behind the missing child system that is currently used in every state.<sup>59</sup> In addition to reflecting its namesake, the AMBER alert system also stands for America's Missing: Broadcast Emergency Response because it broadcasts information about abductions through a variety of mediums.<sup>60</sup>

d. *Jessica Lunsford*

Following the abduction of Jessica Lunsford in 2005,<sup>61</sup> over thirty states established twenty-five-year mandatory minimums for offenders who are convicted of sexually assaulting a child twelve years of age or

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54. *Id.* There were concerns that the availability of the registry would further stigmatize and punish sex offenders, but they were ultimately outweighed by the concern for public safety. *See* H.R. REP. NO. 104-555, at 5 (1996).

55. H.R. REP. NO. 104-555, at 5 (1996).

56. LEILAH GILLIGAN, CTR. FOR SEX OFFENDER MGMT., FACT SHEET: WHAT YOU NEED TO KNOW ABOUT SEX OFFENDERS 6 (2008), [http://www.csom.org/pubs/needtoknow\\_fs.pdf](http://www.csom.org/pubs/needtoknow_fs.pdf) [<https://perma.cc/V2HW-FP3N>].

57. *Id.* Community notification can also take the form of posting fliers in the neighborhoods or holding community meetings to inform the neighbors when a sex offender moves into the area. *Id.*

58. *AMBER Alert: Frequently Asked Questions*, U.S. DEP'T OF JUST.: OFF. JUST. PROGRAMS, <http://www.amberalert.gov/faqs.htm> [<https://perma.cc/845K-4ET3>].

59. *Id.*

60. *Id.* Amber alerts reach the public through the radio, television, text messages, and highway signs. *Id.*

61. ZILNEY & ZILNEY, *supra* note 42, at 90. A neighboring registered sex offender, John E. Couey, abducted the nine-year-old girl from Florida, and buried her in his backyard after raping and murdering her. *Id.* John E. Couey received the death penalty. *Id.*

younger.<sup>62</sup> Florida was the originating state of the Jessica Lunsford Act,<sup>63</sup> as it was the state where the crime occurred. Within only a few years, however, the Jessica Lunsford Act became a nationwide punishment against sex offenders.<sup>64</sup> Additionally, the Act implements lifetime electronic surveillance subsequent to the offenders' release, a measure that has also been adopted by a number of other states.<sup>65</sup>

e. *Adam Walsh*

The Adam Walsh Act of 2006 is the most recent and most expansive act stemming from crimes against children and was targeted specifically at sex offenders.<sup>66</sup> This Act was passed on the twenty-fifth anniversary of the abduction and murder of Adam Walsh, who was kidnapped in Florida in 1981 and whose body was found miles away from the abduction site weeks later.<sup>67</sup> This Federal Act established SORNA,<sup>68</sup> a national registry of sex offenders; mandatory minimums for certain crimes involving minors; a tiered classification system for sex offenders; and voluntary civil commitment procedures for states, among other provisions.<sup>69</sup> The Adam Walsh Act changed the face of sex offender control by eliminating interstate confusion and establishing a strict, comprehensive system of managing sex offenders in the community.<sup>70</sup>

## 2. The "Stranger Danger" Misconception

Unfortunately these laws were mostly aimed at sex offenders who were *strangers* to their victims, implying strangers as the ones whom

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62. S. 6389, 59th Leg., 2d Reg. Sess. (Wash. 2006). Washington passed a Bill that went into effect in 2006 in response to Florida's Jessica Lunsford Act. The Bill's amendments included that "an offender convicted of the crime of rape of a child in the first degree or child molestation in the first degree shall be sentenced to a minimum term of total confinement not less than twenty-five years." *Id.* In 2006, Kansas enacted mandatory minimums of twenty-five years for sex offenses involving children and set provisions for electronic monitoring. H.R. 2576, 81st Leg., Reg. Sess. (Kan. 2006). Although Jessica Lunsford's name was not specifically used in the Bill, the similarities in content are evidence that the recent Florida Act propagated the Kansas Act. *Id.*

63. FLA. STAT. § 948.30 (2015).

64. ZILNEY & ZILNEY, *supra* note 42, at 90.

65. *Id.*

66. Adam Walsh Child Protection and Safety Act of 2006, PUB. L. NO. 109-248, 120 Stat. 587 (codified in scattered sections of 18 and 42 U.S.C.).

67. *Id.*

68. *See infra* Part III.A.1.

69. Adam Walsh Act § 111(1)-(4).

70. *See SORNA*, OFFICE OF JUSTICE PROGRAMS: SMART, <http://www.smart.gov/sorna.htm> [https://perma.cc/3MRK-AJY8].

children need to be protected from.<sup>71</sup> This, however, is false, as roughly seventy-percent of child victims are abused by a someone known to them.<sup>72</sup> Stranger danger stories are more widely publicized because they are more sensational, thereby catching the reader's attention.<sup>73</sup> Unsurprisingly, since these laws have the wrong focus—a stranger as the perpetrator instead of a family member—they are not as effective as they could be in decreasing sexual crimes.<sup>74</sup>

For example, the Wetterling Act has language that specifically defines a “predator” as a stranger.<sup>75</sup> Incest offenders are specifically excluded from the Adam Walsh Act,<sup>76</sup> which has drawn criticism, since stranger offenders are the only offenders applicable to the statute and they constitute the smallest percentage of offenders.<sup>77</sup> The public will continue to hold incorrect beliefs about sex offenders as long as legislatures create laws based on exaggerated public fear rather than reality. The acts sex

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71. Wetterling Act, 42 U.S.C. § 14071(a)(3)(E) (1994). The Wetterling Act specifically defines predatory act as “an act directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization.” *Id.*

72. MYTHS & FACTS ABOUT SEX OFFENDERS, CENT. FOR SEX OFFENDER MGMT. 1 (Aug. 2000), <http://www.csom.org/pubs/mythsfacts.html> [<https://perma.cc/V2HW-FP3N>]. “Approximately 60% of boys and 80% of girls who are sexually victimized are abused by someone known to the child or the child’s family.” *Id.* The perpetrators are more often than not people who the child knows as being in authoritative roles, such as older relatives or caretakers. *Id.*

73. JENNY KITZINGER, FRAMING ABUSE: MEDIA INFLUENCE AND PUBLIC UNDERSTANDINGS OF SEXUAL VIOLENCE AGAINST CHILDREN 128 (2004).

74. ZILNEY & ZILNEY, *supra* note 42, at 84. “[T]he public has overwhelmingly supported laws that do not work to protect women and children from the types of sexual offenses by which they are most likely to be victimized.” *Id.* Interestingly, one of the developments that does not characterize strangers as the target perpetrators has a high efficacy rate: the AMBER alert system. NAT’L CENT. FOR MISSING & EXPLOITED CHILDREN, ANALYSIS OF AMBER ALERT CASES IN 2011 128 (2012). “Of the 158 AMBER Alerts issued from January 1, 2011, to December 31, 2011, 144 cases resulted in a recovery, 28 of which were successfully recovered as a direct result of those respective AMBER Alerts being issued.” *Id.* at 8.

75. Wetterling Act, 42 U.S.C. § 14071(a)(3)(E)(1996). This Act is “directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization.” *Id.*

76. ZILNEY & ZILNEY, *supra* note 42, at 92. Including incest offenders on the registry could have adverse effects on the victim. *Id.* For example, if a man is included in the registry and the offense listed is an incest offense, then the community will know that a family member is the victim. Victims’ information is not part of the community notification laws and needs to be protected by law enforcement. *Id.*

77. *Id.* at 92. “[A]s of 2004, only 18 percent of tier 2 and 3 offenders in New Jersey who were eligible for inclusion in the online database were actually included because of appeals and exemptions.” *Id.* The Adam Walsh Act establishes an in-depth categorization of the tier system, but essentially sex offenders in the registry are ranked according to their level of dangerousness and categorized as tier 1, tier 2, or tier 3, with tier 3 being the most dangerous. Adam Walsh Act, 42 U.S.C. § 16901 (2006). This 18 percent statistic is important because it shows that the laws are not able to be as effective as they were designed to be because they are not being based on the realities of sex offenses, namely that strangers are not likely to be the perpetrators. ZILNEY & ZILNEY, *supra* note 42, at 92.

offenders commit already stigmatize them; however, the current “war” on sex offenders intensifies and prolongs the already existent stigma.<sup>78</sup>

When the average person hears the label *sex offender*, he or she imagines those offenders who are on one extreme of the spectrum, usually those who commit violent sex crimes against children.<sup>79</sup> However, “[t]he typical registered sex offender is a less freakish figure than the official narrative suggests.”<sup>80</sup> Child molesters make up a very small percentage of sex offenders, and yet that small population is the connotation for the term “sex offender” in the mind of society.

### B. *Creating Sexually Violent Predator Acts*

The purpose behind creating Sexually Violent Predator Acts (“SVPAs”) was to prevent newly released sex offenders from committing the same crimes for which they were imprisoned in the first place.<sup>81</sup> The inherent assumption in that purpose is that sex offenders have a high risk of recidivism, which is not true.<sup>82</sup> A study by the Department of Justice found that only 5.3% of released sex offenders were arrested again for another sex crime within the next three years.<sup>83</sup> Another study by Human Rights Watch found that only a very small percentage of registered sex offenders ever committed a second offense.<sup>84</sup> Furthermore, there are no reliable tests for determining the likelihood of recidivism.<sup>85</sup>

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78. Yung, *supra* note 44, at 447. There has also been termed a “war on sex offenders,” likening the stark increase in sex offense laws and their publicity to a criminal war, playing off of the moral panic that they promote. *Id.* Criminal wars are typified by three stages: “marshalling of resources, myth creation, and exception making.” *Id.* at 440. Examples of criminal wars include the “War on Drugs,” the “War on Terror,” and the “War on Poverty.” *Id.*

79. John Douard, *Sex Offender as Scapegoat: The Monstrous Other Within*, 53 N.Y.L. SCH. L. REV. 31, 40 (2008). When a Florida school district sent home a letter with their students informing parents that a known sexual predator moved into the area, one parent stated that “I don’t know the circumstances of this gentleman . . . but I took advantage of this to review some ‘Stranger Danger’ tips with my kids.” Jose Lambiet, *Parents Warned About Sexual Predators*, SUNSENTINEL (Feb. 10, 1997), [http://articles.sun-sentinel.com/1997-02-10/news/9702090255\\_1\\_sexual-predator-middle-school-girls-letters](http://articles.sun-sentinel.com/1997-02-10/news/9702090255_1_sexual-predator-middle-school-girls-letters) [https://perma.cc/P8MG-5VB3] (one example of the public making assumptions without the relevant information).

80. Douard, *supra* note 79; LANCASTER, *supra* note 9, at 79.

81. Melissa Wangenheim, Note, *‘To Catch a Predator,’ Are We Casting Our Nets Too Far?: Constitutional Concerns Regarding the Civil Commitment of Sex Offenders*, 62 RUTGERS L. REV. 559, 572 (2010).

82. LANCASTER, *supra* note 9, at 78.

83. *Id.* (citing Patrick A. Langan, Erica L. Schmitt & Matthew R. Durose, *Recidivism of Sex Offenders Released from Prison in 1994*, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT. 1 (2003), <https://www.bjs.gov/content/pub/pdf/rsorp94.pdf> [https://perma.cc/X3F7-UVH7]).

84. NO EASY ANSWERS, *supra* note 51, at 48. 98% of 500 sample registrants on the North Carolina sex offender registry had only committed that original offense. *Id.*

85. Fredrick E. Vars, *Rethinking the Indefinite Detention of Sex Offenders*, 44 CONN. L. REV. 161, 193 (2011). The variation in sex offense characteristics and motivations causes uncertainty in assessing the level of risk for a particular offender. *Risk Assessment*, ASS’N FOR

SVPAs resolved the public fear of sex offenders living unrestrained in society. Under these acts, the state and federal governments are authorized to imprison sex offenders who meet certain criteria either in place of or subsequent to serving their prison sentence.<sup>86</sup> Prosecutors must show an offender qualifies with a specified prerequisite offense and a mental disorder that makes him more likely to reoffend.<sup>87</sup> Although these Acts have withstood constitutional challenges,<sup>88</sup> they present a host of constitutional concerns, including *ex post facto*, double jeopardy, and indeterminate detention.<sup>89</sup>

The state of Washington enacted the first SVPA in 1990<sup>90</sup> in response to Earl Shriner's rape and mutilation of a seven-year-old boy after Shriner was released from prison for kidnapping and raping two teenage girls.<sup>91</sup> In order to be civilly committed, Washington's SVPA requires a prosecutor to prove that an offender is a "sexually violent predator," defined as someone 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 him likely to engage in predatory acts of sexual violence if not confined in a secure facility."<sup>92</sup> To reiterate, a prosecutor needs to prove that the offender has: "(1) a prior conviction for a sexually violent offense; and, (2) a mental disorder or disability (3) causing the individual significant difficulty in controlling recidivist behavior."<sup>93</sup> Other states quickly followed Washington's lead by enacting their own laws that were similar in nature, which also require a finding of those three elements.<sup>94</sup>

In 2006, the federal government began enacting sexually violent predator laws, an authority that, until then, was left to individual states.<sup>95</sup> Now, offenders in federal custody could be subject to civil commitment.<sup>96</sup>

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THE TREATMENT OF SEXUAL ABUSERS, <http://www.atsa.com/risk-assessment> [https://perma.cc/V93C-B64A].

86. Wangenheim, *supra* note 81, at 560.

87. Hamilton, *supra* note 14. The specific statutes for commitment vary between jurisdictions. *Id.*

88. *Kansas v. Hendricks*, 521 U.S. 346, 366 (1997).

89. *See infra* Part II.B. *Id.* at 351; Hamilton, *supra* note 14 ("Those who are committed are rarely ever released.").

90. WASH. REV. CODE §§ 71.09.10–71.09.902 (2014).

91. John M. Fabian, *Kansas v. Hendricks, Crane and Beyond: "Mental Abnormality," and "Sexual Dangerousness": Volitional vs. Emotional Abnormality and the Debate Between Community Safety and Civil Liberties*, 29 WM. MITCHELL L. REV. 1367, 1373–74 n.25 (2003) [hereinafter Fabien, *Kansas v. Hendricks, Crane and Beyond*].

92. WASH. REV. CODE ANN. § 71.09.020(18) (2014).

93. Hamilton, *supra* note 14.

94. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 36-3701–3717 (2014); D.C. CODE §§ 22-3803–3811 (2001); IOWA CODE §§ 229A.1–229A.16 (2014); MINN. STAT. § 253B.185 (2014).

95. 18 U.S.C. § 4248(d) (2006).

96. *Id.*

Not only did this enactment make it possible to include more offenders because of the additional federal offenders, but also the definitions for who qualified as a sexually violent predator were expanded.<sup>97</sup> In order to commit an individual under the federal act, the government only needs to prove by clear and convincing evidence that the individual committed a “sexually violent offense or child molestation.”<sup>98</sup> Notably absent from the requirements is a prerequisite criminal conviction under a reasonable doubt standard. Now, offenders can be classified as a sexually dangerous person without committing a sex offense at all, violent or nonviolent, even though targeting violent offenses was the original goal of SVPAs.<sup>99</sup> In fact, approximately 20% of federally committed individuals were only committed with a finding of clear and convincing evidence of a sex offense.<sup>100</sup> Sex offender legislation is becoming more encompassing at every stage of development and the consequence is that more and more offenders are at risk of civil commitment.

The Sexually Violent Predator requirements are broad because the state and federal legislatures’ goals were to keep sex offenders off the street and away from the community. After an offender has been identified as a potential violent predator based on a prerequisite offense, the offender is evaluated by a mental health professional and given a hearing at which the prosecutor must prove the offender meets the qualifications to be committed under the respective sexually violent predator statutes.<sup>101</sup>

### 1. Prerequisite Offense Requirement

Committing a prerequisite offense is the first step in being considered for commitment under a SVPA, although determining which offenses meet the requirement is not always clear. Since each state’s SVPA contains slight variations from each other, the offenses needed to satisfy the first element are also slightly different and involve varying degrees of judicial discretion. A few states specifically enumerate which offenses qualify without much ambiguity, these states involve the least amount of judicial discretion.<sup>102</sup> Vagueness is introduced, however, in the final

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97. Wangenheim, *supra* note 81, at 575.

98. *Id.*

99. *Id.*

100. Tamara Rice Lave, *Throwing Away the Key: Has the Adam Walsh Act Lowered the Threshold for Sexually Violent Predator Commitments Too Far?*, 14 U. PA. J. CONST. L. 391, 408–09 (2011).

101. See KAN. STAT. ANN. §§ 59-29a03–29a07 (2013).

102. MO. REV. STAT. § 632.480(4) (2010 & Supp. 2014). “Sexually violent offense” is defined as:

Felonies of rape in the first degree, forcible rape, rape, statutory rape in the first degree, sodomy in the first degree, forcible sodomy, sodomy, statutory sodomy in the



provision, which allows for the inclusion of offenses that bear similarities to the enumerated offenses.<sup>103</sup> Judicial discretion is needed, therefore, to interpret the description “any felony offense that contains elements substantially similar to the offenses listed above” is interpreted.<sup>104</sup>

Next are the states that use a more discretionary construction in defining which offenses qualify as a predicate offense.<sup>105</sup> The relevant portion of the Kansas Sexually Violent Predator Act adds “any offense which either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this act, has been determined beyond a reasonable doubt to have been sexually motivated” after its list of particular offenses.<sup>106</sup>

Finally, New Jersey and South Carolina sit on the extreme end of the discretionary spectrum, conferring to the judge complete discretion as to what offenses can be deemed sexually violent, and therefore, satisfy, the statute.<sup>107</sup> Under statutes with this construction, there is no boundary to safeguard which offenders immediately satisfy the first prong.<sup>108</sup> Wide discretion over the determination of prerequisite offenses, coupled with the vague description of “mental abnormality,” raises the concern of whether offenders’ liberty interests are being adequately protected; namely, they are not.

first degree, or an attempt to commit any of the preceding crimes, or child molestation in the first, second, third, or fourth degree, sexual abuse, sexual abuse in the first degree, rape in the second degree, sexual assault, sexual assault in the first degree, sodomy in the second degree, deviate sexual assault, deviate sexual assault in the first degree, or the act of abuse of a child involving either sexual contact, a prohibited sexual act, sexual abuse, or sexual exploitation of a minor, or any felony offense that contains elements substantially similar to the offenses listed above.

*Id.*; see also CAL. WELF. & INST. CODE § 6600(b) (West 2010); VA. CODE ANN. § 37.2-900 (2008).

103. MO. REV. STAT. § 632.480(4).

104. *Id.*

105. KAN. STAT. ANN. § 59-29a02(e) (2013).

106. *Id.* at § 59-29a02(e)(13).

107. N.J. STAT. § 30:4-27.26 (2008).

(a) aggravated sexual assault; sexual assault; aggravated criminal sexual contact; kidnapping pursuant to subparagraph (b) of paragraph (2) of subsection c. of N.J.S.2C:13-1; criminal sexual contact; felony murder pursuant to paragraph (3) of N.J.S.2C:11-3 if the underlying crime is sexual assault; an attempt to commit any of these enumerated offenses; or a criminal offense with substantially the same elements as any offense enumerated above, entered or imposed under the laws of the United States, this State or another state; or

(b) any offense for which the court makes a specific finding on the record that, based on the circumstances of the case, the person’s offense should be considered a sexually violent offense.

*Id.*; see also S.C. CODE ANN. § 44-48-30(2)(o) (2015).

108. Wangenheim, *supra* note 81, at 584.

## 2. Mental Abnormality Requirement

Sex offender civil commitment procedures use general, i.e. for reasons other than sex offenses, civil commitment as guidelines, but provide less constitutional protection because of a lack of specificity. To commit a defendant to an institution instead of prison, there must be a showing that “the person sought to be committed is mentally ill . . . [and] the person requires hospitalization for his or her own safety and for the protection of others.”<sup>109</sup> As soon as the mental illness is no longer present, the person must be released, regardless of how dangerous he continues to be.<sup>110</sup> The crucial disparity between general civil commitments and their sex offender counterparts is that while general commitments require a *mental illness*, sex offender commitments only require a *mental abnormality*.<sup>111</sup>

### a. “Diagnosing” a mental abnormality

Mental abnormality, as it relates to SVPAs, is defined 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 a person a menace to the health and safety of others.”<sup>112</sup> The law relies on psychiatry’s ever-broadening categorization of mental disorders in its requirement of “mental abnormality.”<sup>113</sup> The most common qualifying mental abnormalities are mood disorders, personality disorders, and paraphilias.<sup>114</sup> With the expansive list of disorders available, the law is essentially able to cherry pick a “disorder” to apply when it is deemed to be in the public interest.<sup>115</sup> It has been proposed that courts may purposefully decline to define disorders that qualify under the statute in order for it to be applicable in as many circumstances as possible.<sup>116</sup> This is yet further evidence of the increased stigma placed on sex offenders.

### b. *Implication of socially taboo, but not dangerous, sexual interests*

When the Supreme Court ruled the term “mental abnormality” was not unconstitutionally vague,<sup>117</sup> it “open[ed] the door to the acceptance of

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109. Fabien, *Kansas v. Hendricks, Crane and Beyond*, *supra* note 91, at 1376.

110. *Foucha v. Louisiana*, 504 U.S. 71, 74 (1992).

111. *Id.*; *Kansas v. Hendricks*, 521 U.S. 346, 351 (1997).

112. KAN. STAT. ANN §59-29a02(b) (2012).

113. Hamilton, *supra* note 14, at 546.

114. Fabien, *Kansas v. Hendricks, Crane and Beyond*, *supra* note 91, at 1379.

115. Hamilton, *supra* note 14, at 546; Steven K. Erickson, *The Myth of Mental Disorder: Transsubstantive Behavior and Taxometric Psychiatry*, 41 AKRON L. REV. 67, 114 (2008).

116. Hamilton, *supra* note 14, at 552.

117. *Kansas v. Hendricks*, 521 U.S. 346, 351 (1997).

other paraphilias as qualifying diagnoses.”<sup>118</sup> Paraphilias, or abnormal sexual interests, are a point of contention between the medical and legal field.<sup>119</sup> Paraphilias are defined as “any intense and persistent sexual interest other than sexual interest in genital stimulation or preparatory fondling with phenotypically normal, physically mature, consenting human partners.”<sup>120</sup> Critics view the mental abnormality requirement as far-reaching because paraphilias are only included on the basis of societal taboo, not because they are an actual disease of the mind.<sup>121</sup> In fact, abnormal sexual interests are not always dangerous, nor do they necessarily pose risks to society, and the law generally only addresses them when they are coupled with a crime.<sup>122</sup> Divergent sexual interests that would qualify as a paraphilia in the Diagnostic and Statistical Manual of Mental Disorders<sup>123</sup> are not as anomalous in society as one might think. A survey of men aged forty to seventy-nine found “sixty-two percent reported some degree of sexual arousal from at least one paraphilia-related stimulus while forty-four percent had engaged in at least one paraphilia-related sexual behavior.”<sup>124</sup>

The inclusion of paraphilias based more strongly on societal than medical reasons carries legal implications, since the law takes its cue from the medical categorization.<sup>125</sup> The largest category of mental abnormality relied on to commit offenders is an unspecified paraphilic disorder, meaning that their diagnosis resembles paraphilias but doesn’t match a

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118. Hamilton, *supra* note 14, at 553.

119. First, *supra* note 22, at 191.

120. DSM-5, *supra* note 22, at 685. Most diagnoses fall under the “Other Specific Paraphilic Disorder” or “Unspecified Paraphilic Disorder” category; however, eight of the most common paraphilias include:

voyeuristic disorder (spying on others in private activities), exhibitionistic disorder (exposing the genitals), frotteuristic disorder (touching or rubbing against a nonconsenting individual), sexual masochism disorder (undergoing humiliation, bondage, or suffering), sexual sadism disorder (inflicting humiliation, bondage, or suffering), pedophilic disorder (sexual focus on children), fetishistic disorder (using nonliving objects or having a highly specific focus on nongenital body parts), and transvestic disorder (engaging in sexually arousing cross-dressing).

*Id.*

121. Erickson, *supra* note 115, at 114.

122. Hamilton, *supra* note 14, at 560.

123. DSM-5, *supra* note 22, at xli. The DSM is a comprehensive list of all mental disorders published by the American Psychiatric Association to aid clinicians in classifying and treating patients. *Id.*; John Matthew Fabian, *Paraphilias and Predators: The Ethical Application of Psychiatric Diagnoses in Partisan Sexually Violent Predator Civil Commitment Proceedings*, 11 J. FORENSIC PSYCHOL. PRAC. 82, 83 (2011) (“The classification of a syndrome as a mental disorder in the [DSM-V] must be regarded as the primary standard for medical validity.”).

124. Christopher Joseph Ahlers et al., *How Unusual are the Contents of Paraphilias? Paraphilia-Associated Sexual Arousal Patterns in a Community-Based Sample of Men*, 8 J. SEXUAL MED. 1362, 1366–69 (2011).

125. Hamilton, *supra* note 14, at 555.

listed category.<sup>126</sup> The civil commitment laws operate on a slippery slope by satisfying the mental disease element with a paraphilia or unspecified paraphilic diagnosis as they do not convey much information on the future dangerousness of the offender.<sup>127</sup>

### 3. Commitment Models

Although the language of each state's act is largely the same, there are slight differences.<sup>128</sup> For example, Illinois and Minnesota solve the double jeopardy and *ex post facto* concerns by having a sexually violent predator hearing *before* beginning the offender's prison sentence for the purpose of *either* sending the offender to prison *or* having him civilly committed if he qualifies as a sexually violent predator.<sup>129</sup> Although this does not resolve the issue of indefinite commitment terms, it does ensure offenders are not punished twice. This model of commitment implies the legislature acknowledges civil commitment as akin to punishment.

The post-prison commitment model,<sup>130</sup> represented in Washington and the majority of states' acts, present more constitutional challenges than the Illinois model does because it duplicates the effects of previous prison punishment, despite the Supreme Court ruling on the issue.<sup>131</sup> In *Kansas v. Hendricks*, the Supreme Court held the Kansas Sexually Violent Predator Act was not unconstitutional in regard to double jeopardy and *ex post facto* protections.<sup>132</sup> If Hendricks had been committed prior to serving his prison sentence, the state would not be required to release him from commitment after a period equal to the prison sentence, but instead could hold him for any period that he continues to suffer from a mental abnormality that poses a threat to the public.<sup>133</sup> Likewise, the Court reasoned that a state can commit an offender after completion of a prison sentence if he meets the qualifications, because he would have had no right to be released even if committed initially.<sup>134</sup>

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126. *Id.* at 554. The category is applied when “the clinician chooses *not* to specify the reason that the criteria are not met for a specific paraphilic disorder, and includes presentations in which there is insufficient information to make a more specific diagnosis.” DSM-5, *supra* note 22, at 705 (emphasis added).

127. Hamilton, *supra* note 14, at 555.

128. Wangenheim, *supra* note 81, at 571.

129. 725 ILL. COMP. STAT. §§ 205/0.01–205/12 (2014); MINN. STAT. § 253B.185 (2014). *See infra* Part II.B.

130. Wangenheim, *supra* note 81, at 572. The post-prison model of civil commitment adjudicates the offender as a Sexually Violent Predator after having served a prison sentence for the same prerequisite crime. Six to twelve months before release from prison a prosecutor can move for a probable cause hearing to begin the process of commitment. *Id.*

131. *Kansas v. Hendricks*, 521 U.S. 346, 351 (1997).

132. *Id.* at 369–70.

133. *Id.*

134. *Id.*

If “mental abnormality” was not vague enough, under SVPAs, the abnormality must also render it “difficult for the person to control his behavior.”<sup>135</sup> The Court uses this qualification to justify the future dangerousness component usually necessary to restrain a person.<sup>136</sup> The Supreme Court held that there only needs to be “serious difficulty” in controlling behavior and not a higher standard of a complete lack of control as a subsequent ruling in *Kansas v. Crane* contends.<sup>137</sup> The more SVPAs come under litigation, the more broadly the Court defines the standard.<sup>138</sup>

## II. RIGHTS AFFORDED TO THE COMMITTED

The Due Process Clause protects the liberty interests of individuals as a fundamental right, one that cannot be easily taken away.<sup>139</sup> However, civil commitment are constitutionally permissible because the Supreme Court has ruled their potential dangerousness coupled with a lack of behavioral control is so great as to warrant that loss of liberty.<sup>140</sup> The key component to this exception is the “mental illness” or “mental abnormality” requirement.<sup>141</sup> Mental abnormality, and its effect on an offender’s ability to control his behavior, is what legislatures use to separate sexually violent predators from “typical recidivists.”<sup>142</sup>

The Supreme Court ruled that the civilly committed only hold constitutionally protected rights to “conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests.”<sup>143</sup> Additionally, the right to treatment is clarified by adding that the Court “[has] never held that the Constitution prevents a state from civilly detaining those for whom no treatment is available.”<sup>144</sup> Without a Supreme Court ruling, individual

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135. *Id.* at 358.

136. *Id.* at 351.

137. *Kansas v. Crane*, 534 U.S. 346, 413 (2002).

138. *Id.* (holding that there does not need to be complete lack of control, only serious difficulty); *Hendricks*, 521 U.S. at 351 (holding that mental abnormality satisfies the mental illness requirement although it is not a term used in the medical field).

139. U.S. CONST. amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.”).

140. *Hendricks*, 521 U.S. at 357.

141. *Foucha v. Louisiana*, 504 U.S. 71, 74 (1992); *Crane*, 534 U.S. at 413.

142. *Crane*, 534 U.S. at 413 (“[T]he 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.”).

143. *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982).

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

states are left to determine what services should be provided, resulting in inconsistencies and lack of services.<sup>145</sup> This section will first discuss inconsistencies and lack of services between states, and next will highlight the low rate of release that has the practical consequence of transforming the constitutional indefinite detention into lifetime detention.<sup>146</sup> And this indefinite detention has survived constitutional challenges because it is not governed with the protections afforded to criminal procedures, such as double jeopardy, *ex post facto*, and due process.<sup>147</sup>

#### A. *No Constitutional Right to Treatment*

Inconsistencies in treatment state-by-state exist because the Supreme Court established that those committed have no rights to receive treatment, and the authority is left to the individual states to choose whether to they wish to provide any treatment.<sup>148</sup> Sexually violent predators experience a starkly different type of civil commitment depending on whether they are committed in Washington or in Minnesota.<sup>149</sup> The Washington and Minnesota statutes have withheld challenges to their respective civil commitment provisions, notwithstanding the statutes' drastically different standards with regard to an offender's right to receive treatment while committed, with all other jurisdictions following treatment standards somewhere in between.<sup>150</sup> Commitment standards in the Ninth Circuit, which includes Washington, require treatment that will provide the offender with a "realistic opportunity to be cured and released."<sup>151</sup> In contrast, the treatment provided by facilities in the Eighth Circuit, including Minnesota, merely have to refrain from being "so arbitrary or egregious as to shock the conscience."<sup>152</sup>

##### 1. Shocks the Conscience Standard

The Eighth Circuit has not expanded the Supreme Court's requirements; it has held that those committed do not have "a broader due

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145. *Annual Survey of Sex Offender Civil Commitment Programs 2014*, SEX OFFENDER CIVIL COMMITMENT PROGRAMS NETWORK (Oct. 27, 2014). In a study of seventeen of the states with civil commitment programs, the levels of participation in treatment programs ranged from thirty-percent to one-hundred percent. *Id.*

146. Hamilton, *supra* note 14, at 552. The specific statutes for commitment vary between jurisdictions. *Id.*

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

148. *Id.* at 366.

149. *Compare* *Strutton v. Meade*, 668 F.3d 549, 554 (8th Cir. 2012), *with* *Sharp v. Weston*, 233 F.3d 1166 (9th Cir. 2000).

150. *Strutton*, 668 F.3d at 554; *Sharp*, 233 F.3d at 1172.

151. *Sharp*, 233 F.3d at 1172.

152. *Strutton*, 668 F.3d at 554.

process right to appropriate or effective or reasonable treatment of the illness or disability that triggered the patient's involuntary confinement."<sup>153</sup> Facilities in the Eighth Circuit will release a patient when they no longer have a mental abnormality or pose a danger to the public;<sup>154</sup> however, without the existence of rehabilitative services or the requirement that detainees participate, the provision of release may be meaningless.

The Eighth Circuit has evaluated due process claims under a "shocks the conscience" test.<sup>155</sup> When a civilly committed person asserts he has not been provided with adequate mental health services, he must show "the inadequacies in the treatment [he] received were so arbitrary or egregious as to shock the conscience."<sup>156</sup> The Court even admitted that although the "temporary elimination of psychoeducational courses . . . fell below an acceptable professional standard," it did not defeat the test and therefore the claim was denied.<sup>157</sup> Unfortunately, even if the Court applied the "professional judgment" standard used by other jurisdictions, the result in *Strutton* may have remained the same.<sup>158</sup>

## 2. Professional Judgment Standard

The Supreme Court applies the professional judgment standard, which is an alternative standard for determining what treatment is owed to the offenders.<sup>159</sup> This preferred standard "presumes that the treatment decisions of a qualified mental health professional are valid unless they substantially depart from generally accepted norms."<sup>160</sup> Courts apply this standard by analyzing the treatment a facility provides: if the treatment resembles what is commonly acceptable in the field, then it passes the test and the courts will not get involved with the choices of the facility.<sup>161</sup> Problems currently arise from the application of the professional judgment standard, however, because there is no generally accepted treatment in the field for sexually violent predators.<sup>162</sup> Some professionals have posited

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153. *Elizabeth M. v. Montenez*, 458 F.3d 779, 788 (8th Cir. 2006).

154. MO. REV. STAT. § 632.495(2) (2010 & Supp. 2014). Under the Missouri statute, a sexually violent predator can be committed "for control, care, and treatment until such time as [his] mental abnormality has so changed that [he] is safe to be at large." *Id.*

155. *Strutton*, 668 F.3d at 554.

156. *Id.* at 554 (holding lack of psychoeducational treatment did not violate the rights of someone involuntarily committed for child molestation).

157. *Id.* at 554–55.

158. Nordsieck, *supra* note 30, at 1284.

159. *Youngberg v. Romeo*, 457 U.S. 307, 323 n.30 (1982).

160. Nordsieck, *supra* note 30, at 1284. The only qualifications for making the decisions of treatment are that the decision-maker is "competent, whether by education, training or experience, to make the particular decision at issue." *Youngberg*, 457 U.S. at 323 n.30.

161. Nordsieck, *supra* note 30, at 1298.

162. *Id.*

that sex offenders may not be treatable at all, since, as of now, there is no scientific evidence showing any specific treatment plan can be effective.<sup>163</sup> The Association for the Treatment of Sexual Abusers itself provides unclear advice on how to rehabilitate sex offenders.<sup>164</sup> The Association proffers treatment suggestions, but at the same time caveats those suggestions by advising professionals to depart from the suggestions as they see fit.<sup>165</sup> If the standard of care states a professional can depart from common treatments when they determine it to be appropriate, then the standard becomes wholly based on whatever approach a professional decides, without any regard to the rest of the field.

The Ninth Circuit also uses the professional judgment standard, but accompanies it with a judicial scrutiny provision.<sup>166</sup> This Note will refer to the Ninth Circuit's variation on the professional judgment standard as the "professional judgment plus" standard. The Ninth Circuit criticized the professional judgment standard because it allowed administrators of each facility too much latitude in the individual decision-making procedures.<sup>167</sup> In response to the defendants' appellate claim that the lower court should have deferred to the clinical director's professional judgment, the court warned that if they were to overrule the lower court's decision, the "[c]onditions of confinement would be above judicial scrutiny and would depend on who happened to be in charge of a particular program."<sup>168</sup> For example, in *Sharp*, when there were no clinical directors with specialized sex offender experience, the court did not rule that general mental health professional decisions qualified under the standard.<sup>169</sup> The court made an important distinction here that narrows the scope of acceptable treatment.

Commitment centers in the Ninth Circuit must "provide civilly-committed persons with access to mental health treatment that gives them a realistic opportunity to be cured and released."<sup>170</sup> The professional judgment plus standard is in contrast to the standards of the Eighth Circuit because it seems to be aimed at rehabilitation, rather than an indefinite

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163. *Id.*

164. *Id.*

165. *Research*, THE ASS'N FOR THE TREATMENT OF SEXUAL ABUSERS, <http://www.atsa.com/research> [https://perma.cc/2TH9-27UG] ("ATSA encourages those involved in addressing the problem of sexual offending to adopt practices consistent with the best available evidence, and to change their practices as new evidence becomes available.").

166. *Sharp v. Weston*, 233 F.3d 1166, 1169 (9th Cir. 2000).

167. *Id.* at 1171. In previous court rulings, the Washington Special Commitment Center was under an injunction to put specific treatment programs in place after the court found the conditions of confinement were not unconstitutional. *Id.*

168. *Id.* at 1169.

169. *Id.* at 1171.

170. *Id.* at 1172.



sentence with the empty promise of being released.<sup>171</sup> While this standard identifies the state's obligation to provide an avenue for release if the state chooses to commit, its goal is nevertheless hindered by the obstacle of limited knowledge of the root cause.

B. *Absence of Criminal Protections in Civil Commitment Proceedings*

The Supreme Court ruled that there are no double jeopardy, *ex post facto*, or Fifth Amendment protections during civil commitment procedures due to its civil versus criminal designation.<sup>172</sup> Criminal enforcement is punitive in nature whereas civil enforcement is not. The Double Jeopardy Clause of the Fifth Amendment provides that an individual cannot be charged twice for the same offense.<sup>173</sup> There is no double jeopardy issue present in civil commitment hearings because the offender is technically not being charged twice for the same crime, as civil commitment does not qualify as criminal punishment.<sup>174</sup> Another constitutional protection, *ex post facto*, broadly refers to the concept of retroactivity, specifically, whether new laws have the ability to change the penalties for a certain offense after they are committed.<sup>175</sup> Furthermore, individuals who committed a sex offense prior to the establishment of an SVPA are also subject to civil commitment because the statute is civil and therefore not imposing a new criminal punishment after the fact.<sup>176</sup> “[T]he Court essentially paved the way for the commitment of sexually violent predators both in lieu of and subsequent to completions of a criminal sentence.”<sup>177</sup>

In *Allen v. Illinois*, the Court stated that Allen did not have a Fifth Amendment protection against self-incrimination during the sexually violent predator hearing because it was not a criminal proceeding.<sup>178</sup> A potential predator is required by the court to submit to psychological evaluations where they may reveal incriminating statements that can be

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171. *Strutton v. Meade*, 668 F.3d 549, 554 (8th Cir. 2012) (stating that there were no violations in treatment procedures when procedures did not meet field standards).

172. *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997); *Allen v. Illinois*, 478 U.S. 364, 374 (1986); *Baxstrom v. Herold*, 383 U.S. 107 (1966) (holding there was no double jeopardy issue when Baxstrom already served prison sentence for same crime when he was committed); see also Eli M. Rollman, “*Mental Illness*”: *A Sexually Violent Predator Is Punished Twice For One Crime*, 88 J. CRIM. L. & CRIMINOLOGY 985 (1998).

173. U.S. CONST. amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”).

174. *Hendricks*, 521 U.S. at 369.

175. See Evan C. Zoldan, *The Civil Ex Post Facto Clause*, 2015 WIS. L. REV. 727, 730 (2015).

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

177. Deborah L. Morris, *Constitutional Implications of the Involuntary Commitment of Sexually Violent Predators—A Due Process Analysis*, 82 CORNELL L. REV. 594, 601 (1997).

178. *Allen v. Illinois*, 478 U.S. 364, 374 (1986).

used in court. Allen was awarded a right to counsel during the proceeding; however, allowing the “right to counsel,” which is a characteristic right of a criminal proceeding, did not mean that he was afforded other constitutional rights inherent in criminal proceedings.<sup>179</sup> The dissent in *Allen* held the proceedings *should be* considered criminal because they involve a loss of liberty and bear procedural similarities to criminal proceedings, and, therefore, Allen also should be awarded additional constitutional protections.<sup>180</sup>

Justice Breyer commented in the *Hendricks* dissent that the civil commitment scheme cannot be deemed civil merely by placing the word “civil” in the statute, and instead needs to be analyzed according to its practical effect.<sup>181</sup> If those committed are not receiving effective treatment for their purported mental defects, then their detainment seems more akin to punishment and should be scrutinized as such. By removing the guise of rehabilitation, the proposed reasoning for committing this class of sex offenders is diminished and the serious implications of pure incapacitation should be re-evaluated.<sup>182</sup>

### III. COMMUNITY RESTRICTIONS WOULD SERVE THE STATE’S INTEREST IN PROTECTING THE PUBLIC

To address these constitutional concerns surrounding civil commitment, offenders should be placed under supervised release instead of in commitment facilities. Although offenders would continue to be heavily monitored in the community, they would not be confined. Rather than persisting in the expensive, constitutionally dubious civil commitment regime, states should rely on the already existing supervisory structures created. The Adam Walsh Act created a comprehensive system of sex offender management with strict and specific provisions that, in

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179. *United States v. Salerno*, 481 U.S. 739, 755 (1987) (holding that pretrial detention for dangerousness does not violate Fifth Amendment due process rights). The standard for dangerousness applied in *Salerno* was that “no condition or combination of conditions of release [would] ensure the safety of . . . the community.” *Id.*

180. *Allen*, 478 U.S. at 376–84. The dissent noted that the Sexually Violent Predator hearings only came into effect because of the crime Allen previously committed, and that the hearings would not have taken place if he had not committed the crime. *Id.* at 379. The requirement of a crime and the criminal nature of the proceedings, including confining someone based on a criminal behavior, should qualify SVP statutes as criminal. *Id.*

181. *Hendricks*, 521 U.S. at 381. Justice Breyer concurred with the majority’s determination that the “mental abnormality” language of the statute did not violate the Due Process Clause, but dissented in the opinion because without access to treatment, the statute was punitive in nature. *Id.* at 373.

182. See Edward P. Ra, *The Civil Confinement of Sexual Predators: A Delicate Balance*, 22 ST. JOHN’S J. LEGAL COMMENT. 335, 350 (2007) (“States thus must prove their civil intent in order to defeat challenges rooted in the constitutional protections implicated by criminal processes and punishments.”).

addition to individual state community supervision structures, provide assurance that the public will be protected.<sup>183</sup> The government would also see a cost benefit from changing methods of supervision since the financial burden of civil commitment is so heavy.<sup>184</sup> The solution this Note proposes will address the financial criticisms of civil commitment in addition to offenders' constitutional rights to liberty.<sup>185</sup> These methods, while still costly, would reduce the expenditure for sex offender supervision, serve the government's goals in protecting the public, and return some of the constitutionally-mandated liberty back to sex offenders.

A. *SORNA: Sex Offender Registration and Notification Act*

The Sex Offender Registration and Notification Act ("SORNA") created a national registry for sex offenders, categorizing them into tiers based on the seriousness of the offense.<sup>186</sup> Any person convicted of a sex offense must register himself with the database and provide all identifying information, updating his profile periodically according to his tier group.<sup>187</sup> The least dangerous offenders are in Tier I, escalating in dangerousness to Tier III, which includes those convicted of "aggravated sexual abuse, sexual abuse, abusive sexual contact against a minor under thirteen, or nonparent kidnapping of a minor."<sup>188</sup> Registration as a Tier III sex offender is required for life,<sup>189</sup> which is most likely where current

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183. Adam Walsh Act, 18 U.S.C. § 4248 (2006).

184. See ZILNEY & ZILNEY, *supra* note 42, at 141. The cost of housing one offender in a civil commitment facility ranges from \$17,391 in Texas to \$166,000 in California, usually depending on what services the facility offers. *Id.*

185. Douglas G. Smith, *The Constitutionality of Civil Commitment and the Requirement of Adequate Treatment*, 49 BOS. C. L. REV. 1383, 1427 (2008). Critics of civil commitment have suggested imposing longer prison sentences on sex offenders as a solution to the concern that the government is spending too much money on having sexually violent predators "warehoused" in civil commitment facilities. *Id.* The argument is that since offenders are neither being treated for their mental abnormality nor being released in any significant number, it is not an efficient use of the government's limited budget. *Id.* at 1427. The average cost per year for civilly committing a sexually violent predator is \$92,017. ZILNEY & ZILNEY, *supra* note 42, at 141. In contrast, the average cost per year to house an offender in prison is \$25,994. *Id.*

186. Adam Walsh Act, PUB. L. NO. 109-248, § 103, 120 Stat. 587, 587 (2006) (codified as amended at 18 U.S.C. § 4248). SORNA sets the minimum amount of information and protections that states must adhere to, but the states are permitted to add to the SORNA requirements. *SORNA*, *supra* note 70. The Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking [hereinafter SMART] was created with the Adam Walsh Act to assist states in their implementation of the Act and update the SORNA guidelines as needed. *Id.*

187. Adam Walsh Act, § 113. Convicted persons must provide basic personal and criminal information along with their physical description, Internet identifiers, professional licensing information, temporary lodging information if they are not living at their listed permanent residence, and vehicle information. *Id.*

188. *Id.*

189. *Id.*

adjudicated sexually violent predators would fall. Tier III offenders are required to update law enforcement every three months with their current address and appearance.<sup>190</sup>

SORNA created a monitoring system for sex offenders living in the community, which this Note contends would also be effective for sexually violent predators living in the same communities because of the strict nature of the Tier III regulations. SORNA is retroactive, meaning the offenders who were convicted before 2006 also must register.<sup>191</sup> The retroactivity is crucial to ensuring the intended goal of the statute—to protect the public—is carried out, because it will force *every* sex offender to register.<sup>192</sup> Because retroactivity makes it possible to reach every sex offender, the offenders in civil commitments would be equally and safely monitored by SORNA. The Adam Walsh Act also increased the amount of publically available information about the offender.<sup>193</sup> States can monitor offenders with more confidence now that there is an expansive database that includes sex offenders nationwide, and which prevents offenders from going unaccounted for.<sup>194</sup>

### 1. Residency Restrictions

Nearly all states have enacted residency restrictions for sex offenders as a means of protecting the public.<sup>195</sup> Residency restrictions are also a product of the 1990 crackdown on sex offenders, following the theme of registration and notification laws.<sup>196</sup> A key goal for regulating where sex offenders live is to decrease the availability of victims.<sup>197</sup> This goal is

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190. *Id.*

191. 28 C.F.R. § 72 (2010). An interim rule was put in place, and subsequently codified, to enforce the retroactivity of SORNA since the Adam Walsh Act as enacted did not specifically provide for a retroactive application. 72 FED. REG. 8894 (2007); 28 C.F.R. § 72 (2010).

192. 28 C.F.R. § 72 (2010).

[T]he interests opposing and supporting registration—any adverse effect or burden of SORNA’s requirements on sex offenders weighed against the public safety interests furthered by those requirements—are much the same whether the class of sex offenders with pre-SORNA convictions or the class of sex offenders with post-SORNA convictions is considered.

*Id.*

193. See *Registry Requirement FAQs*, OFFICE OF JUSTICE PROGRAMS: SMART, <http://www.smart.gov/sorna.htm> [<https://perma.cc/3MRK-AJY8>]. The public website for sex offenders lists all past sex offenses, their employer’s address, their school address, all aliases, current photos, a physical description, their permanent and habitual addresses, and vehicle identifying information. *Id.*

194. Wright, *supra* note 36.

195. Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 122 (2007) [hereinafter Yung, *Banishment by a Thousand Laws*]. There are numerous problems and critiques of sex offender residency restrictions, but these are outside the scope of this Note.

196. *Id.* at 121.

197. *Id.* at 154.

accomplished by setting mandatory living distances from child-related sites, for example, schools, playgrounds, and child care centers.<sup>198</sup> In essence, sex offenders are banned from potential child contact. In states that have not mandated any state-wide restrictions, some localities have established their own residency restrictions.<sup>199</sup>

Treatment and other rehabilitative services may be more difficult to access due to the community priority of residency restrictions.<sup>200</sup> Residency restrictions result in “hotbeds” of sex offenders living in certain areas of cities because they are the only part of the city that successfully evades all exclusion zones.<sup>201</sup> Critics of residency restrictions stress the problems with this approach, since it reinforces the sex offender stigma without providing a long-term solution.<sup>202</sup> Forced to live in remote areas with like-minded individuals, offenders do not have access to treatment or other resources.<sup>203</sup> There is a valid concern that the restrictions placed on sex offenders in the community are too inhibitory and further limit access to treatment because individuals’ liberties are being taken away without any benefit.<sup>204</sup> However, at the same time, this critique exemplifies the fact that sex offenders in the community are still heavily monitored and the public’s interest in protecting children is still being met, while giving more liberty to offenders than is given in civil commitments. Offenders’ access to treatment in the community is hindered by their living constraints, and their access to treatment in commitments is likewise hindered by their lack of a statutory right to receive it, both of which are irrelevant since there are no effective treatments.<sup>205</sup> Nonetheless, if offenders are not receiving treatment in either setting and the public’s interest in safety is being served by residency restrictions, then there is no benefit in committing offenders who could live in the community. Therefore, diverting offenders from commitments and into community supervision would more aptly balance the two interests at stake.

## 2. Internet and Computer Restrictions

The growing use of technology, and specifically the Internet, has opened the door for new types of crimes to be committed by sex offenders,

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198. See generally FLA. STAT. § 794.065 (2015); GA. CODE ANN. § 42-1-15 (2015); 720 ILL. COMP. STAT. 5/11-9.3(b-5) (2014); IND. CODE § 35-42-4-11(c) (2015); IOWA CODE § 692A.2A (2014).

199. Yung, *Banishment by a Thousand Laws*, *supra* note 195, at 125.

200. Shelley Ross Saxer, *Banishment of Sex Offenders: Liberty, Protectionism, Justice, and Alternatives*, 86 WASH. U. L. REV. 1397, 1411 (2009).

201. Yung, *Banishment by a Thousand Laws*, *supra* note 195, at 139–40.

202. *Id.* at 141.

203. *Id.*

204. *Id.*

205. See *supra* Part II.A.1.

and consequently, increased types of restrictions. Internet and computer restrictions for released sex offenders have been used to monitor those convicted of sex crimes related to the Internet, such as child pornography.<sup>206</sup> Federal and state laws restrict offenders in varying degrees: some offenders are not allowed to even own a personal computer, while others are only restricted from accessing certain websites.<sup>207</sup> Many jurisdictions allow the use of these types of restrictions because there is a substantial and justifiable relationship between the government interest that is being protected and the restriction (i.e. limited internet or computer use) employed.<sup>208</sup>

The state must balance the interests of the released offender with the interests of the government.<sup>209</sup> Courts are cautious to impose computer restrictions, since they acknowledge computer and Internet access has become a fundamental aspect of life in current society, and therefore, a protected liberty.<sup>210</sup> However, when someone is on supervised release, there is a “diminished expectation of privacy,” and consequently, liberty.<sup>211</sup> The government cannot deprive released offenders of their liberty in using the Internet if the deprivation does not relate to protecting the public, namely, if the offense has little to do with the Internet. Rather, the restriction must be “reasonably related” to the governmental interest being furthered.<sup>212</sup>

Internet restrictions for those offenders who are now placed in civil commitments would be an effective means of monitoring them while, at the same time, increasing liberty in a way that better balances the competing interests of the state and the offender. The state’s interest in protecting the public would be served because courts will impose restrictions that are “narrowly tailored and directly related to the social policies of deterring [the released offender] from committing sexual crimes and also protecting society.”<sup>213</sup> The degree of restrictions courts currently use would be well-suited for those previously adjudicated as

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206. Krista L. Blaisdell, *Protecting the Playground of the Twenty-First Century: Analyzing Computer and Internet Restrictions for Internet Sex Offenders*, 43 VAL. U. L. REV. 1155, 1158 (2009).

207. *Id.* at 1170.

208. *United States v. Lifshitz*, 369 F.3d 173, 192–93 (2d Cir. 2004) (holding there is a government interest in restricting the Internet use of sex offenders).

209. Blaisdell, *supra* note 206, at 1186.

210. *United States v. Crandon*, 173 F.3d 122, 128 (3d Cir. 1999) (acknowledging access to computers may hinder job opportunities where the Internet has become an essential tool).

211. *United States v. Balon*, 384 F.3d 38, 44 (2d Cir. 2004) (comparing the diminished privacy for supervised release to the diminished privacy expected in the prison setting).

212. *United States v. Rearden*, 349 F.3d 608, 621 (9th Cir. 2003) (holding restricting computer and Internet use is “reasonably related” to the goal of protecting the public from an Internet sex offender).

213. Blaisdell, *supra* note 206, at 1175.

sexually violent predators, since they have discretion as to how lenient or strict they need to be in restricting access.<sup>214</sup> If a court decides that completely barring all access to a computer is necessary to prevent a previous sexually violent predator from reoffending, it can impose such a restriction upon release.<sup>215</sup> Even the harshest level of Internet and computer restriction is preferable to civil commitment, and results in a better balance of the two interests at issue.

### 3. Electronic Monitoring

The Jessica Lunsford Act mandated lifetime electronic surveillance post-release for those convicted of sexually assaulting a child under twelve.<sup>216</sup> Over twenty other states have also adopted this provision.<sup>217</sup> Global Positioning System (“GPS”) monitoring provides another method for law enforcement and community corrections to protect the public from released offenders.<sup>218</sup> GPS can be implemented in a variety of ways, modified according to the particular circumstances of each released offender.<sup>219</sup> Active GPS monitoring allows for law enforcement or community corrections to know exactly where an offender is in near-real time.<sup>220</sup> Electronic surveillance is commonly used when the court imposes house arrest, triggering an alert if the offender steps outside a preset radius.<sup>221</sup>

Electronic surveillance can be costly, due to direct equipment cost and labor costs of those personnel who are in charge of the monitoring the offenders. However, the cost of electronic surveillance is far less than the cost of placing the same offender in civil commitment.<sup>222</sup> Additionally it would allow the offender to maintain his own residence and become rehabilitated.<sup>223</sup> Offenders with GPS monitors are frequently given prior approval to leave at certain times for therapeutic treatments, such as counseling or group meetings.<sup>224</sup> This flexibility would allow offenders currently classified as sexually violent predators access to beneficial

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214. *Id.* at 1170.

215. *United States v. Paul*, 274 F.3d 155, 167 (5th Cir. 2001) (holding the state had the authority to restrict *all* computer and Internet use).

216. FLA. STAT. § 948.30 (2016). *See supra* Part I.A.1.d.

217. ZILNEY & ZILNEY, *supra* note 42, at 90.

218. Matthew Demichele & Brian K. Payne, *GPS Tracking and the Law Enforcement Role*, 82 POLICE J. 134, 134 (2009).

219. *Id.* at 136.

220. *Id.* at 137. There is a negligible delay in transmitting the information from the receiver. *Id.*

221. Demichele, *supra* note 218, at 137.

222. *Id.*

223. *Id.* Under house arrest, offenders could reunite with their families and “avoid the negative consequences associated with incarceration.” *Id.*

224. *Id.*

activities, such as therapy, since in some states they would be offered that assistance in the commitment setting.

#### IV. SUGGESTED STATUTORY REFORM FOR ADJUDICATING FEWER SEXUALLY VIOLENT PREDATORS

“To broaden this definition further would be to perpetrate an ongoing stereotype based in social hysteria rather than legitimate state interest.”<sup>225</sup>

Rerouting sex offenders, who would currently be adjudicated as sexually violent predators, from civil commitment placements into community supervision placements would not be a simple task. This Note proposes the statutory language in the Sexually Violent Predator Acts be reformed to allow for fewer sex offenders to be placed in civil commitments. In particular, the current definition of a sexually violent predator is “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 more likely to engage in the predatory acts of sexual violence.”<sup>226</sup> The ambiguity in this definition is problematic and must be altered.

##### A. *Offense Requirement*

The offense requirement in the Sexually Violent Predator Acts is the first step in an offender’s consideration for civil commitment, and therefore is the first opportunity for a statutory reform to eliminate offenders who are not implicated in the legislative purpose of the SVPAs.<sup>227</sup> The acts are meant to only impact those offenders who commit a *violent* sex offense,<sup>228</sup> which is why the offense limitation in the acts is crucial. Currently, some states have wide discretion written into their

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225. Wangenheim, *supra* note 81, at 570.

226. KAN. STAT. ANN. § 59-29a02 (2015).

227. *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997). The *Hendricks* Court explains that the civil commitment process is not meant for those offenders who “are perhaps more properly dealt with exclusively through criminal proceedings.” *Id.*

228. KAN. STAT. ANN. § 59-29a01(a) (2015).

The legislature finds that there exists an extremely dangerous group of sexually violent predators who have a mental abnormality or personality disorder and who are likely to engage in repeat acts of sexual violence if not treated for their mental abnormality or personality disorder. Because the existing civil commitment procedures under [the general involuntary civil commitment statute] are inadequate to address the special needs of sexually violent predators and the risks they present to society, the legislature determines that a separate involuntary civil commitment process for the potentially long-term control, care and treatment of sexually violent predators is necessary.

*Id.*



prerequisite offense sections, opening the door for societal opinion to influence the decision-making process.<sup>229</sup> Sex offenders are in particular need of protection from the influence of public opinion on the legal process because of the heightened negative sentiments toward sex offenses.<sup>230</sup> A bright line rule is necessary to distinguish which offenses qualify and which do not in order to safeguard against any intentional societal biases.

This Note proposes that all SVPAs must have limited discretionary language in the prerequisite offense requirements, similar to the current Missouri statute. The Missouri statute specifically enumerates the offenses that qualify as:

[F]elonies of rape in the first degree, forcible rape, rape, statutory rape in the first degree, sodomy in the first degree, forcible sodomy, sodomy, statutory sodomy in the first degree, or an attempt to commit any of the preceding crimes, or child molestation in the first, second, third, or fourth degree, sexual abuse, sexual abuse in the first degree, rape in the second degree, sexual assault, sexual assault in the first degree, sodomy in the second degree, deviate sexual assault, deviate sexual assault in the first degree, or the act of abuse of a child involving either sexual contact, a prohibited sexual act, sexual abuse, or sexual exploitation of a minor.<sup>231</sup>

The concluding provision adds to the definition “any offense that contains elements substantially similar to the offenses listed above.”<sup>232</sup>

Although this provision does allow for some flexibility for which offenses should be included, it is necessary to account for new or obscure offenses that cannot presently be listed.<sup>233</sup> The “substantially similar” standard is adequate protection because it requires the prosecutor to show an offender committed a sexually violent offense that has similar characteristics to the already listed offenses.<sup>234</sup> The underlying nature of those enumerated offenses is still being used in determining the applicability of an offense not listed, retaining the original goal as to

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229. KAN. STAT. ANN. § 59-29a02(e)(13) (2013) (“any offense which either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this act, has been determined beyond a reasonable doubt to have been sexually motivated”); N.J. STAT. ANN. § 30:4-27.26 (2008) (“any offense for which the court makes a specific finding on the record that, based on the circumstances of the case, the person’s offense should be considered a sexually violent offense”); S.C. CODE ANN. § 44-48-30(2)(o) (2015).

230. See *supra* Part I.A.

231. MO. REV. STAT. § 632.480(4) (2010 & Supp. 2014).

232. *Id.*

233. There is the potential for new crimes to be created due to a continuously changing society, most notably in sex offenses that use technology. See Blaisdell, *supra* note 206, at 1208. Planning for the possibility of new crimes “prevents crafty criminals from identifying and capitalizing on loopholes in the statutory text.” *Id.*

234. See *id.*

whom the Acts should reach. There should be no other discretionary provisions other than the “substantially similar” one listed above; if the existence of a predicate sex offense cannot be proven under that high standard, then the offense was not originally meant to be impacted by the SVPAs, which were created to affect “a small but extremely dangerous group of sexually violent predators [that] exist . . . .”<sup>235</sup> In order to keep this population “small,” a high standard is necessary.

#### B. *Mental Abnormality Requirement*

Once the offense requirement is satisfied, the prosecutor must prove the offender has a mental abnormality or personality disorder and prove that the *same* mental abnormality or personality disorder makes it difficult to control his behavior, and therefore he is likely to reoffend.<sup>236</sup> Because there are multiple steps in this requirement and those steps involve the medical profession, it is more complex and consequently at great risk for error when applied in the courtroom.<sup>237</sup>

The language used in the SVPAs is a combination of both medical and legal terms.<sup>238</sup> Blending terms from these two distinct fields creates a lack of clarity in standards. For instance, the mental abnormality standard is not a medical or scientific one; it is a product of the legal field.<sup>239</sup> Mental abnormality in the SVPAs is defined as a “congenital or acquired condition that affects the emotional or volitional capacity, predisposing the person to commission of criminal sexual acts.”<sup>240</sup> On one hand, the Court in the seminal *Hendricks* case stated that “legal definitions don’t need to mirror the medical profession,” while at the same time the Court used medical professionals to clarify whether or not *Hendricks* met the definition of a sexually violent predator.<sup>241</sup>

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235. WASH. REV. CODE § 71.09.010 (2014).

236. WASH. REV. CODE § 71.09.030 (2014). The Washington statute is representative of the majority of the states’ mental abnormality provisions.

237. Michael B. First & Robert Halon, *Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases*, 36 J. AM. ACAD. PSYCHIATRY L. 443, 444 (2012).

238. John Matthew Fabian, *The Risky Business of Conducting Risk Assessments for Those Already Civilly Committed as Sexually Violent Predators*, 32 WM. MITCHELL L. REV. 81, 93–94 (2005). The author presents a few cases, including *Hendricks* and *Crane*, to illustrate the “psycho-legal issues pertaining to the definitions of mental abnormality, volition, emotional abnormality, and personality disorder [because they] are quite vague and often lead to serious confusion.” *Id.* at 93.

239. The term “Mental Abnormality” is not used by the medical community; instead, it is a specialized term created by legislatures for mental health concepts. *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997). Legislators wanted to broaden the scope beyond a strict “mental illness” diagnosis so the acts would include offenders who could not otherwise be reached by the general civil commitment statute. KAN. STAT. ANN. § 59-29a01(a) (2013).

240. WASH. REV. CODE § 71.09.030 (2014).

241. First & Halon, *supra* note 237 (citing *Kansas v. Hendricks*, 521 U.S. at 359).

A medical standard should be in place throughout the entire civil commitment process in order to reduce confusion and misapplication, in addition to greater specificity in terminology. Medical experts are ordinarily brought in during a civil commitment proceeding to testify about the offender's mental condition.<sup>242</sup> Applying medical opinion based on medical standards to a legal standard does not provide the bright-line clarity that SVPAs should require as a safeguard against societal stigmas entering the courtroom.<sup>243</sup>

Rather than applying the medical testimonial evidence to the current legal standard, the triers of fact should base their determination on the medical reasoning the professional used in making his diagnosis. Both the legal and the medical decision makers would thus view the evidence from the same perspective.

Using a medical framework throughout the legal process would also afford more standardization later, when the court reviews the offender for release.<sup>244</sup> The court will release an offender from civil commitment upon the showing that his "mental abnormality has so changed that [he] is safe to be at large."<sup>245</sup> Medical professionals, usually from the civil commitment facility where the offender resides, provide their opinion to the court as to whether the offender still has the same mental abnormality that initially required his commitment.<sup>246</sup> Legal standards are slower to evolve than scientific understanding, and therefore may often not be as up-to-date and accurate as medical knowledge.<sup>247</sup> It is critical that determinations in sexually violent predator cases be based on the most accurate information available because of the deprivation of liberty that is involved.

In order for the trier of fact in SVPA trials to make an informed decision from medical testimony, the court needs to provide a clear

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242. Fabien, *Kansas v. Hendricks, Crane and Beyond*, *supra* note 123, at 91. The expert can discuss the different aspects of the offender's condition, then the jury decides whether those aspects could satisfy the mental abnormality element. *Id.*

243. See First & Halon, *supra* note 237, at 444 (explaining the vital importance of the medical experts' testimony due to the "complications and subtleties involved in integrating clinical diagnostic information with the kinds of dysfunction required by the statutes").

244. KAN. STAT. ANN. § 59-29a08-11(a) (2013). An offender must be released if at any point during his confinement he no longer satisfies the statutory requirements. *Id.*

245. MO. REV. STAT. § 632.495(2) (2010 & Supp. 2014).

246. Joan Comparet-Cassani, *A Primer on the Civil Trial of a Sexually Violent Predator*, 37 SAN DIEGO L. REV. 1057, 1100 (2000).

247. *Risk Assessment*, *supra* note 85. Courts rely on clinicians for their opinion on the level of "risk" or "dangerousness" that a sex offender presents. *Id.* Although there remains a great amount of uncertainty in the accuracy of risk assessment, research in the past decade has significantly increased that accuracy. *Id.* Research focused on particular sex offender types has shown improved accuracy by tailoring the risk assessment to the characteristics of the offender, as opposed to lumping all types of sex offenders together. *Id.*

understanding of the elements that must be satisfied. This is best accomplished through precise language in the statutes themselves and through the organized presentation of the medical evidence. The current SVPAs combine multiple critical elements into one section, which results in misapplication and confusion of the separate elements.<sup>248</sup> The perspective of the legislators who created the SVPAs was that the mental abnormality in question caused a lack of control and therefore was the reason for a high risk of recidivism, as well as the fact that the prerequisite violent sex offense was a product of that mental abnormality. However, those distinct relationships become confused.<sup>249</sup> Courts in a variety of cases use differing language in analysis of the SVPA, revealing inconsistencies in standards and in results.<sup>250</sup>

### CONCLUSION

Currently over five-thousand offenders are committed throughout the United States,<sup>251</sup> and most will never be released,<sup>252</sup> despite the provision that they will *only* be held as long as their mental abnormality persists. Because the standard is broad, more sex offenders are in commitments than actually need to be for various reasons. Offenders could be committed for “suffering” from a negligible paraphilia that a physician and judge deemed to pass the mental abnormality standard,<sup>253</sup> or they could be committed because the judge used his discretion in deciding that their offense should be considered a sexually violent offense.<sup>254</sup>

Through the expansion of the “sexually violent predator” definition, states are further strengthening public fear by creating a category, and thus a perception, that applies to a wider range of offenders than was originally intended. The public will infer that since more offenders are being sent to civil commitments, their prevalence must be increasing. That is untrue, and a myth that the judicial system should not be promoting.

The government’s legitimate interest in protecting the public from

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248. First & Halon, *supra* note 237, at 444. The Diagnostic and Statistical Manual of Mental Disorders lists the indicators of paraphilias and distinguished them from *paraphilic disorders*. DSM-5, *supra* note 22, at 685–86. A paraphilia is defined as “any intense and persistent sexual interest other than sexual interest in genital stimulation or preparatory fondling with phenotypically normal, physically mature, consenting human partners.” *Id.* at 685. Whereas a paraphilic disorder is defined as “a paraphilia that is currently causing distress or impairment to the individual or a paraphilia whose satisfaction has entailed personal harm, or risk of harm, to others.” *Id.* at 685–86.

249. First & Halon, *supra* note 237.

250. Comparet-Cassani, *supra* note 246.

251. ZILNEY & ZILNEY, *supra* note 42, at 143.

252. Hamilton, *supra* note 14.

253. Ahlers et al., *supra* note 124, at 1366–69.

254. N.J. STAT. § 30:4-27.26(b) (2008).

the dangers of sex offenders and the sex offenders' liberty interests are not being any better served in the civil commitment process than they would be if those designated as sexually violent predators lived in the community under the same restrictions as other sex offenders. The standard for adjudicating someone a "sexually violent predator" under state and federal statutes should be narrowed to include specified mental diseases and specified prerequisite offenses, removing vague language and broad discretionary authority. Narrowing the scope of the statutes will return fundamental rights to a portion of sex offenders whom the statutes were not originally intended to affect.