

# California's Sexually Violent Predator Act: The Role of Psychiatrists, Courts, and Medical Determinations in Confining Sex Offenders

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## Introduction

In the past few years, the California Legislature has attempted to weave a tight web of laws to protect society, and especially children, from sexual predators.<sup>1</sup> One of these laws, the Sexually Violent Predator Act ("SVPA"),<sup>2</sup> which provides for involuntary civil commitment, targets sex offenders nearing the end of their prison terms. The SVPA is a stop-gap, born of ineffective criminal sentencing and a troubled parole system. Its chief targets are not new offenders, but potential recidivists sentenced years ago.<sup>3</sup> Such individuals pose a dilemma

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1. See CAL. WELF. & INST. CODE §§ 6600-08 (West 1996) (providing for the involuntary civil commitment of mentally-disordered sexual predators); CAL. PENAL CODE § 645 (West 1998) (providing for discretionary imposition of chemical castration as a condition of parole for first-time offenders and mandatory chemical castration for second-time offenders); CAL. PENAL CODE § 667.71 (West 1998) (mandating sentence of 25-years to life for certain first-time rapists and child molesters); CAL. PENAL CODE § 667.61 (repealed 1997) (mandating indeterminate sentences for first-time sex offenders).

2. See CAL. WELF. & INST. CODE §§ 6600-08.

3. Notably, under the SVPA, the crime for which the offender is being punished at the time of his commitment can be non-sexual as long as he has committed acts of sexual violence in the past. For example, the appellant in *Hubbart v. Superior Court*, 969 P.2d 584 (Cal. 1999), was serving a sentence for false imprisonment. However, he had a long history of sexual predation, beginning with a conviction in 1973 for one count of sodomy and one count of assault with intent to commit rape. He was confined at the state hospital at Atascadero, where he received both individual and group therapy until 1979. After his release, his doctors discovered that he was offending again and had him recommitted to Atascadero in 1981. The following year, he was convicted and sentenced to a long prison term. See *id.* at 591. Shortly after being paroled in 1990, he abducted a female jogger and was

because changing the sentencing laws does not affect them unless they commit new atrocities upon release.

An arsenal of constitutional challenges has been raised and rejected with regard to involuntary commitment laws in other states. However, there has been little, if any, discussion of California's SVPA, and critiques of other states' laws offer few constructive solutions.<sup>4</sup> The existing scholarship, written before the U.S. Supreme Court's affirmation of a similar Kansas statute in 1997, admits the horrors of sexual violence but sticks to a negative brand of constitutionalism that gives lawmakers little aid in drafting statutes.<sup>5</sup> This article takes a different course. It recognizes the need for two legislative approaches—one for dangerous persons nearing the end of their prison terms and another for new crimes at the guilt phase. The SVPA deals with the first problem. The guilty but mentally ill ("GBMI") verdict offers a strategy for approaching the second.

The U.S. Supreme Court's decision in *Kansas v. Hendricks*<sup>6</sup> and the recent affirmation of the SVPA by the California appellate bench in *Hubbart v. Superior Court*<sup>7</sup> indicate that, at least on its face, the

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sent to prison on the false imprisonment charge. *See id.* Two practicing psychiatrists determined that Hubbart had a diagnosable mental disorder that presented a high risk that he would engage in acts of sexual violence if he were not in custody. *See id.*

4. Compare Brian G. Bodine, Comment, *Washington's New Violent Sexual Predator Commitment System: An Unconstitutional Law and an Unwise Policy Choice*, 14 U. PUGET SOUND L. REV. 105 (1990) (criticizing a similar Washington law for its alleged violations of the Ex Post Facto, Double Jeopardy, Due Process, and Equal Protection Clauses); Beth Keiko Fujimoto, Comment, *Sexual Violence, Sanity, and Safety: Constitutional Parameters for Involuntary Civil Commitment of Sex Offenders*, 15 U. PUGET SOUND L. REV. 879 (1992) (arguing that the Washington law is unconstitutional on several grounds and that sex offenders cannot be treated); and Eric S. Janus, *Sex Offender Commitments: Debunking the Official Narrative and Revealing the Rules-in-Use*, 8 STAN. J. L. & PUB. POL'Y 71 (1997) (attempting to expose the chicanery of a variety of civil commitment statutes that claim to offer civil remedies but which, in Janus' view, actually serve punitive ends) with Katherine P. Blakey, *The Indefinite Civil Commitment of Dangerous Sex Offenders Is An Appropriate Legal Compromise Between "Mad" and "Bad"—A Study of Minnesota's Sexual Psychopathic Personality Statute*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227 (1996) (offering a positive view of Minnesota's sexual offender commitment law) and Kelly A. McCaffrey, Comment, *The Civil Commitment of Sexually Violent Predators in Kansas: A Modern Law for Modern Times*, 42 U. KAN. L. REV. 887 (1994) (foreshadowing the Supreme Court's affirmation of the Kansas law in *Kansas v. Hendricks*, 521 U.S. 346 (1997)).

5. *See generally* Bodine *supra* note 4; Fujimoto, *supra* note 4; Janus, *supra* note 4, but *see* *Kansas v. Hendricks*, 521 U.S. 346 (1997) (foreclosing many of the arguments raised in opposition to civil commitment laws). Although each of these writers makes a case for the unconstitutionality of civil commitment statutes, none of them offers a satisfactory method of combating the threat of sexual predation, and none discusses California's SVPA.

6. 521 U.S. 346 (holding that a similar statute in Kansas did not violate the substantive Due Process, Double Jeopardy, or Ex Post Facto Clauses of the Constitution).

7. 969 P.2d 584, 611 (Cal. 1999).

SVPA is constitutional. However, unresolved questions about the SVPA's therapeutic provisions may prevent it from functioning effectively as a civil remedy. This article argues that the Act must be underpinned by bona fide individualized treatment programs to fulfill its ostensible purpose of treating sex offenders, as well as keeping them off the streets. Sections 6606(a) and 6606(c) of the SVPA instruct the Department of Mental Health to "afford the person with treatment for his or her diagnosed mental disorder" based on a "structured treatment protocol" and to provide such a program in "facilities . . . consistent with current institutional standards."<sup>8</sup> However, critics have suggested that the SVPA and comparable laws in other states use treatment as a fig leaf for extended punishment.<sup>9</sup> Those responsible for the implementation of the SVPA need to disprove such criticisms. Yet, in attempting to do so, they face uncertainties about the treatability of disorders that lead to sexual violence and the constitutionality of potentially successful therapies.

Part One of this article discusses the constitutionality of the SVPA in light of *Hendricks* and *Hubbart*. Part Two argues that sex offenders have a right to be treated but not cured. The courts in *Hendricks* and *Hubbart* blithely accepted legislative characterizations of the Kansas and California laws as civil, rather than penal.<sup>10</sup> Yet, while the wording of the SVPA disavows any punitive purpose,<sup>11</sup> the California Legislature must convert the guarantee of individualized treatment necessary to avoid double jeopardy and ex post facto violations into a reality in the state's mental institutions. This task is especially difficult because psychiatrists disagree about which treatments, if any,

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8. CAL. WELF. & INST. CODE § 6606(a)-(c).

9. See, e.g., *Hendricks*, 521 U.S. at 373 (Breyer, J., dissenting) (opining that the failure of the state of Kansas to provide any treatment convinced the dissent that the statute "was not simply an effort to commit Hendricks civilly, but rather an effort to inflict further punishment upon him"); *Young v. Weston*, 898 F. Supp. 744, 753 (W.D. Wash. 1995) (holding a similar Washington statute unconstitutional because, inter alia, "[t]he Statute is inextricably linked to the traditional goals of punishment, because it requires, on its face, that the detainee serve his entire criminal sentence before being committed or treated."); *State v. Post*, 541 N.W.2d 115, 138 (Wis. 1995) (Abrahamson, J., dissenting) (arguing that the clear punitive purpose of the Wisconsin statute was to prevent sexual predators from reoffending by lengthening their incarceration). See also Fujimoto, *supra* note 4, at 906-08 (contending that treatment is impossible because no known treatment for sex offenders exists).

10. See *Hendricks*, 521 U.S. at 361; *Hubbart*, 969 P.2d at 605-06 (quoting *Hendricks*: "Courts should 'ordinarily defer' to statements in the legislative record indicating that a measure is not penal in nature.")

11. See, e.g., CAL. WELF. & INST. CODE § 6250 (characterizing sexually violent predators "not as criminals, but as sick persons").

are appropriate to the paraphilias<sup>12</sup> and personality disorders from which sex offenders suffer.<sup>13</sup> This article contends that the right to refuse medical treatment should not raise impediments to measures, such as chemical castration, which may be the only hope for the eventual reintegration of persons committed under the SVPA into our society.

Finally, Part Three suggests that the manipulation of medical discourse in the involuntary commitment debate exposes the inadequacy of existing mechanisms for categorizing madness and badness. States such as California that use the capacity to differentiate between right and wrong as a test of criminal responsibility must remedy the uncomfortable fit between their sexual predator statutes and the insanity defense. The California Penal Code explicitly provides that the insanity defense “shall not be found . . . solely on the basis of a personality or adjustment disorder.”<sup>14</sup> Under the SVPA, however, such a disorder combined with a finding of dangerousness may lead to indefinite confinement in a mental hospital, in addition to a prison sentence. This inconsistency suggests the need for a third category between guilty and not guilty by reason of insanity (“NGRI”). Individuals in this middle ground (i.e. those who have mental abnormalities but who un-

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12. Paraphilias are forms of sexual disorder described in the Diagnostic and Statistical Manual of Mental Disorders. See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 522-23 (American Psychiatric Association, 4th ed. 1994) (hereinafter “DSM-IV”). The DSM-IV classification of “paraphilia” requires the occurrence over a period of at least six months of “recurrent, sexually arousing fantasies or sexual urges generally involving 1) non-human objects, 2) the suffering or humiliation of oneself or one’s partner, or 3) children or nonconsenting persons.” It does not require that the subject *act* on his urges. See *id.* See also Brief of the Washington State Psychiatric Association in Support of Respondent, 1996 WL 468611, at \*20, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (Nos. 95-1649, 95-9075) (hereinafter “WSPA Brief”). Deviant sexual behaviors due to mental retardation, dementia, substance abuse, mania, and schizophrenia are not included under the rubric of paraphilia. See Brief of the Association for the Treatment of Sexual Abusers in Support of Petitioner, 1996 WL 471027, at \*6, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (Nos. 95-1649, 95-9075) (hereinafter “ATSA Brief”). At least three severe types of paraphilia constitute mental abnormalities within the meaning of the Kansas statute (and would be considered “mental disorders” under the California SVPA): (1) pedophilia, (2) sexual sadism; and (3) “paraphilia not otherwise specified—rape.” *Id.* at \*\*7-8.

13. Some sex offenders suffer from Antisocial Personality Disorder (“APD”), in addition to one or more paraphilias. For example, in *State v. Post*, 541 N.W.2d 115 (Wis. 1995), one defendant, who was charged with two counts of first degree sexual assault, robbery and false imprisonment after kidnapping women in shopping malls, suffered primarily from APD and secondarily from a paraphilia. See *id.* at 119. The other defendant in *Post* suffered from two paraphilias—sexual sadism and exhibitionism—and only secondarily from APD. See *id.* The second defendant was charged with kidnapping and sexual assault. See *id.* at 119-20.

14. CAL. PENAL CODE § 25.5 (West Supp. 1999).

derstand that their behavior is wrong) would be eligible for both criminal punishment and psychiatric therapy.

## **I. The Turf War Between The Courts And The Psychiatric Profession: Why The SVPA Has Survived Constitutional Challenges**

At least on its face, the SVPA complies with authority emanating from the U.S. Supreme Court, the California Supreme Court, and appellate courts in other states. The *Hubbart* court rejected challenges to the SVPA on due process, equal protection, and ex post facto grounds.<sup>15</sup>

Part One discusses the SVPA's substantial compliance with constitutional directives but suggests that the case law on involuntary civil commitment reveals a disturbing disregard by the judiciary for the advances and limitations of psychiatry. Although lawmakers and courts employ medical jargon when it suits them, praising the SVPA's threshold requirement of a "currently diagnosed mental disorder,"<sup>16</sup> for example, they deny that persons involuntarily committed under such laws have a constitutional right to treatment.<sup>17</sup> In doing so, they give their imprimatur to a scheme that allows sexual predators to be confined without receiving any psychiatric care for the mental problem that afflicts them.

### **A. Substantive Due Process**

The California Legislature skillfully drafted the SVPA to comply with U.S. Supreme Court and California precedent. Hence, the state may involuntarily commit persons who pose a danger to others if its interest in protecting the public outweighs the individual's interest in freedom from confinement.<sup>18</sup> Due process requires proof of dangerousness and a diagnosed mental impairment at the time that the person is committed,<sup>19</sup> though dangerousness may be expressed in terms of probabilities.<sup>20</sup>

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15. See *Hubbart*, 969 P.2d at 587.

16. *Id.* at 597 (quoting CAL. WELF. & INST. CODE § 6600(a)).

17. See *Hendricks*, 521 U.S. at 366; *Hubbart*, 969 P.2d at 602.

18. See *Foucha v. Louisiana*, 504 U.S. 71, 75-76 (1992); *Hubbart*, 969 P.2d at 592.

19. See *Hendricks*, 521 U.S. at 358.

20. See *Hubbart*, 969 P.2d at 600 n.26 (collecting Supreme Court cases).

### 1. *Mental Impairment*

In keeping with the strictures of *Foucha v. Louisiana*,<sup>21</sup> which held that confinement of an NGRI acquittee after he regained his sanity violated due process, sex offenders confined under the SVPA must have “a diagnosed mental disorder,” in addition to being “a danger to the health and safety of others,” at the time of their commitment.<sup>22</sup> While the Kansas law upheld in *Hendricks* uses the term “mental abnormality,” the SVPA defines “diagnosed mental disorder” almost exactly the same way: “a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting . . . a menace to the health and safety of others.”<sup>23</sup> The heart of the controversy is whether such disorders or abnormalities are bona fide mental illnesses that can be cured by any known treatment. The nature of the offender’s mental condition assumes importance because *Foucha* established that confining a person solely on the basis of dangerousness offends due process.<sup>24</sup> Yet, the *Foucha* Court never reached the issue of whether a personality disorder satisfies the mental illness requirement.<sup>25</sup> The *Hendricks* decision subsequently resolved the debate over the meaning of mental illness by denying the authority of the psychiatric profession to make legal determinations.<sup>26</sup>

Any definition lawmakers devise is likely to conflict with some doctor’s view. In a brief filed on behalf of *Hendricks*, the Washington State Psychiatric Association argued that the term “mental illness” refers to a “serious cognitive, perceptual or affective dysfunction,” such as schizophrenia, which “significantly impairs [the] person’s ability to function in ordinary life.”<sup>27</sup> By contrast, “mental disorders” listed in

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21. 504 U.S. 71 (1992) (holding that, to satisfy due process, an insanity acquittee must be released if the state cannot show that he is both mentally ill and dangerous).

22. CAL. WELF. & INST. CODE § 6600(a) (defining a sexually violent predator as a “person who has been convicted of a sexually violent offense against two or more victims for which he or she received a determinate sentence and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.”); see also § 6604 (jury must find beyond a reasonable doubt that the person is a sexually violent predator).

23. *Id.* § 6600(c). See also KAN. STAT. ANN. § 59-29a02(b) (1994).

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

25. See *id.* at 82. For a discussion of the limits of the *Foucha* opinion, see *Hubbart*, 969 P.2d at 597 (pointing out that, because Louisiana only contended that *Foucha* was dangerous, the Court did not rule on the meaning of mental illness).

26. See *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997) (declaring that disagreement in the psychiatric community prevents the term “mental illness” from having any “talismanic significance” for civil commitment laws).

27. WSPA Brief, 1996 WL 468611, at \*5.

the *Diagnostic and Statistical Manual of Mental Disorders* (“DSM-IV”), including caffeine-induced insomnia and nicotine addiction, do not constitute illnesses warranting involuntary confinement.<sup>28</sup> Some psychiatrists consider the sexual urges and fantasies characteristic of paraphilias to be “disorders,” but not “mental illnesses,” because they do not impair “everyday functioning.”<sup>29</sup> Rather, they result from inadequate impulse control or stunted moral development.<sup>30</sup>

Several minority opinions have embraced the American Psychiatric Association’s (the “APA”) definition of mental illness. For example, the dissent in a Wisconsin case warned that if legislatures can “define any deviancy they please as a mental illness . . . a state could civilly commit whole categories of criminal offenders such as intoxicated drivers merely by branding them deviant and designating them mentally disordered.”<sup>31</sup> In the dissent’s view, defining sexually violent predators as a class of people whose mental disorders predispose them to commit sexual violence is “entirely circular.”<sup>32</sup> The Western District of Washington found that this “unacceptable tautology” violated due process,<sup>33</sup> and a California Supreme Court Justice opined in her *Hubbart* concurrence: “To the extent [that a] diagnosis [based on prior offenses] simply places a psychiatric label on a particular character structure or a generalized propensity to do ill, *Foucha*’s warnings assume more immediate constitutional significance.”<sup>34</sup>

While the APA accuses lawmakers of misappropriating medical jargon to describe the behavior of sex offenders, more than a thousand mental health professionals in the Association for the Treatment of Sexual Abusers (“ATSA”)—each of whom has dedicated at least 2,000 hours to the evaluation of sex offenders—contend:

Sex offender specialists are able to use the term “mental abnormality” to identify a small subset of sex offenders who have specific paraphiliac disorders and who are at highest risk to reoffend. The process for doing so is *indistinguishable* from the

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28. *See id.* at \*\*4-5.

29. *Id.* at \*22.

30. *See id.* at \*\*8-9; *see also* Brief For The American Psychiatric Association As Amicus Curiae In Support Of Leroy Hendricks, 1996 W.L. 469200, at \*\*24-25, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (hereinafter “APA Brief”) (concluding that “Hendricks evidently suffers no incompetence to care for himself or to make rational decisions” and that, while he wants to perform deviant sex acts and is willing to act on his desires, his pedophilia involves no cognitive impairment).

31. *State v. Post*, 541 N.W.2d 115, 142 (Wis. 1995) (Abrahamson, J., dissenting).

32. *Id.* at 143 (Abrahamson, J., dissenting).

33. *See Young v. Weston*, 898 F. Supp. 744, 749-50 (W.D. Wash. 1995).

34. *Hubbart v. Superior Court*, 969 P.2d 584, 612 (Cal. 1999) (Werdegar, J., concurring).

process used by mental health professionals to determine “mental illness” in the ordinary course of civil commitment proceedings.<sup>35</sup>

Because there is no biomedical test for discovering the vast majority of mental disorders, psychiatrists must rely on observations of their patients’ behavior and self-reporting.<sup>36</sup> Thus, according to the ATSA, attacking as “circular” reliance on past sexual violence to diagnose present mental abnormalities “would basically dismiss all psychiatric diagnoses.”<sup>37</sup>

In the wake of *Hendricks*, distinctions grounded in psychiatry appear to lack legal force. The Supreme Court split five-to-four over the *ex post facto* issue.<sup>38</sup> Yet, in a surprising moment of unanimity, all nine justices concluded that Kansas’ requirement of “mental abnormality,” as opposed to mental illness, satisfied the Due Process Clause.<sup>39</sup> This consensus reveals the Court’s distrust of medical science as the basis for legal rules. To paraphrase Justice Thomas, the term “mental illness” lacks “talismanic significance” because psychiatrists disagree over its meaning.<sup>40</sup> While the positions of the ATSA and the APA reflect disagreement in the medical community, the Court itself uses terms like “emotionally disturbed,” “mentally ill,” and “insane” interchangeably.<sup>41</sup> For this reason, according to Justice Thomas, legislatures enjoy the “widest latitude” in establishing the bounds of civil commitment.<sup>42</sup>

## 2. *Dangerousness*

While courts refuse to defer to the psychiatric profession in defining mental disorders warranting civil confinement, they rely on state medical experts to predict dangerousness—the other half of the *Foucha* equation. Critics of involuntary confinement argue that as

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35. ATSA Brief, 1996 WL 471027, at \*9 (emphasis added).

36. *See id.* at \*10.

37. *Id.* at \*11.

38. *See Kansas v. Hendricks*, 521 U.S. 346, 348 (1997).

39. *See id.* at 357; *see also id.* at 372 (Kennedy, J., concurring); *id.* at 373 (Breyer, J., dissenting). In his dissent, Justice Breyer agreed that “[t]he psychiatric debate . . . helps to inform the law by setting the bounds of what is reasonable, but it cannot here decide just how the States must write their laws within those bounds.” *Id.* at 375 (Breyer, J., dissenting).

40. *Id.* at 359.

41. *See id.* California courts have agreed with this sentiment in the past. *See, e.g., People v. Martin*, 165 Cal. Rptr. 773, 779 (Cal. App. Ct. 1980) (stating that the term “mental disorder” has a “demonstrably established technical meaning” and is not constitutionally vague).

42. *Hendricks*, 521 U.S. at 360.



many as two-thirds of such predictions are erroneous;<sup>43</sup> yet, the Supreme Court has found forecasts of future criminality to be an essential part of our judicial process.<sup>44</sup> The SVPA places the burden on the state to show dangerousness at the probable cause hearing, the trial, and any subsequent discharge proceedings<sup>45</sup>—requirements that have passed constitutional muster before the California Supreme Court.<sup>46</sup> The lower appellate court in *Hubbart* echoed earlier California holdings by asserting that “[t]he fact that psychiatric predictions are imprecise . . . does not prevent society from protecting itself from those who are dangerously mentally ill.”<sup>47</sup> In the same case, the California Supreme Court upheld the SVPA, even though the sexual offenses serving as prognosticators of Hubbart’s future conduct had occurred many years in the past.<sup>48</sup> In fact, under the SVPA, the offender can be in prison for a wholly unrelated crime.<sup>49</sup>

## B. Procedural Due Process

Like the Kansas law, the SVPA requires proof beyond a reasonable doubt that the individual meets the requirements for classification as a sexually violent predator.<sup>50</sup> This evidentiary standard offers greater protection than the preponderance of evidence standard mandated by the Supreme Court in *Addington v. Texas*,<sup>51</sup> and it comports

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43. See *Jones v. United States*, 463 U.S. 354, 378 (1983) (Brennan, J., dissenting) (citing this statistic in a case dealing with the extension of NGRI commitment); see also APA Brief, 1996 WL 469200, at \*18 (“[T]here is, in the area of psychiatric prediction of violence by the mentally ill, nothing like the level of certainty applicable to contagious disease.”).

44. See *Barefoot v. Estelle*, 463 U.S. 880, 897 (1983); see also *State v. Post*, 541 N.W.2d 115, 125 (Wis. 1995).

45. See CAL. WELF. & INST. CODE §§ 6604-05.

46. See *Hubbart v. Superior Court*, 969 P.2d 584, 589-91 (Cal. 1999).

47. *Hubbart v. Superior Court*, 58 Cal. Rptr. 2d 268, 291 (Cal. App. Ct. 1997); see also *People v. Superior Court (Dodson)*, 196 Cal. Rptr. 431, 436 (Cal. App. Ct. 1983) (declaring that the use of past conduct to predict future dangerousness is a “constitutionally valid evidentiary consideration”); see *People v. Martin*, 165 Cal. Rptr. 773, 780 (Cal. App. Ct. 1980) (upholding the old Mentally Disordered Sex Offender law on the grounds that, inter alia, “[t]he compelling interest in protecting society against sexually motivated injury and in providing beneficial treatment for such disordered persons should not be sacrificed by requiring a certainty of prediction which is currently impossible to obtain”).

48. See *Hubbart v. Superior Court*, 58 Cal. Rptr. 2d 268, 293 (Cal. App. Ct.), *aff'd*, 969 P.2d 584 (Cal. 1999).

49. See CAL. WELF. & INST. CODE § 6600(a). Acceptable predicate offenses include, inter alia, those committed before July 1, 1977, but conviction for past crimes cannot be the “sole basis” for determination that the person is a sexually violent predator. See *id.*

50. See *id.* § 6604; see also KAN. STAT. ANN. § 59-29a07.

51. 441 U.S. 418 (1979) (requiring clear and convincing evidence of both mental illness and dangerousness for involuntary civil commitment). Explicitly denying the need for a reasonable doubt standard, the *Addington* Court stated that:

with California precedents.<sup>52</sup> The SVPA provides that, absent a finding beyond a reasonable doubt that the person is a sexually violent predator, he must be unconditionally released at the end of either his prison term or parole period.<sup>53</sup> The SVPA incorporates other procedural safeguards, including the right to a jury trial, the right to assistance of counsel, and a unanimous verdict.<sup>54</sup> Although critics of other sex offender laws typically assume that involuntary commitment lasts a lifetime,<sup>55</sup> California offenders are committed for renewable two-year terms.<sup>56</sup> They can petition for a discharge hearing after only twelve months and, depending on the court's ruling, they may be released unconditionally or placed on conditional outpatient status.<sup>57</sup> Moreover, the SVPA provides for annual examinations of the offender's mental condition, at which he may retain an independent expert with access to all records.<sup>58</sup> A procedural due process challenge thus fails to invalidate the statute.

### C. Equal Protection

Neither have persons involuntarily confined under the SVPA presented a convincing equal protection argument. For example, the *Hubbart* appellant contended that other involuntary confinement schemes in California, such as the Mentally Disordered Offender Law

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Within the medical discipline, the traditional standard of "factfinding" is a "reasonable medical certainty." If a trained psychiatrist has difficulty with the categorical "beyond a reasonable doubt" standard, the untrained lay juror—or indeed even a trained judge—who is required to rely upon expert opinion could be forced by the criminal law standard of proof to reject commitment for many patients desperately in need of institutionalized psychiatric care.

*Id.* at 430.

52. See *People v. Feagley*, 535 P.2d 373 (Cal. 1975) (holding that the Due Process Clause of the California Constitution demands reasonable doubt standard for involuntary commitment of persons under the old Mentally Disordered Sex Offender Law, former CAL. WELF. & INST. CODE § 6300-30).

53. See CAL. WELF. & INST. CODE § 6604.

54. See *id.* § 6603 (right to jury trial, if requested, to determine suitability for civil commitment; right to assistance of counsel, including court-appointed lawyer for indigent offenders; right to unanimous verdict). The Legislature probably incorporated the unanimous verdict requirement, like the reasonable doubt standard, to comply with *Feagley*. See *Feagley*, 535 P.2d at 381-82 (unanimous verdict necessary to satisfy federal and state Equal Protection Clauses because persons involuntarily committed under another California law, the Lanterman-Petris-Short Act, enjoyed such guarantees).

55. See, e.g., *Young v. Weston*, 898 F. Supp. 744, 749 (W.D. Wash. 1995) ("Like the scheme rejected in *Foucha*, the Statute here permits indefinite incarceration based on little more than a showing of potential future dangerousness").

56. See CAL. WELF. & INST. CODE § 6604.

57. See *id.* § 6608.

58. See *id.*

("MDOL")<sup>59</sup> and the Lanterman-Petris-Short Act ("LPSA")<sup>60</sup> contain more stringent provisions regarding dangerousness.<sup>61</sup> Amended in 1989 to cure equal protection problems,<sup>62</sup> the MDOL requires mental health treatment as a condition of parole for persons deemed to pose a "substantial danger of physical harm to others."<sup>63</sup> The LPSA authorizes involuntary commitment of individuals who show a "demonstrated danger of inflicting substantial physical harm."<sup>64</sup> Neither law, however, mandates a finding of dangerousness that differs materially from that required under the SVPA. The "current" mental disorder from which the sexually violent predator suffers must make him "a danger to the health and safety of others."<sup>65</sup> As the California Supreme Court recently noted, "[t]he statute does not permit the trier of fact to conclude that the [sexually violent predator] is currently mentally disordered and dangerous, even though he is not likely to commit sexually violent crimes and does not pose a present and substantial threat to public safety."<sup>66</sup> Although critics of involuntary commitment schemes disparage the intertwined definitions of "dangerousness" and "mental disorder,"<sup>67</sup> this tautology is not unique to the SVPA, but afflicts the MDOL and the LPSA as well. Hence, persons committed under the SVPA lack a compelling equal protection claim.

#### D. Ex Post Facto and Double Jeopardy

Detractors of involuntary civil commitment laws suggest that the dearth of effective treatment for sexual predators demonstrates that the laws were designed to serve penal ends. Revealing the statutes' punitive nature is vital to the showing that they violate the ex post facto and double jeopardy provisions of the Constitution. The Ex Post Facto Clause, for example, prohibits only those laws which "retroac-

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59. See CAL. PENAL CODE § 2960.

60. See CAL. WELF. & INST. CODE § 5300.

61. See *Hubbart v. Superior Court*, 969 P.2d 584, 604 (Cal. 1999).

62. See *People v. Gibson*, 204 Cal. Rptr. 56, 62 (Cal. Ct. App. 1988) (holding that an older version of the MDOL violated equal protection because it subjected offenders to a less rigorous standard of commitment than did similar California laws).

63. See CAL. PENAL CODE § 2962(d)(1).

64. See CAL. WELF. & INST. CODE § 5300(a).

65. See *id.* § 6600(a), (c); *Hubbart*, 969 P.2d at 604.

66. *Hubbart*, 969 P.2d at 604.

67. See, e.g., *id.* at 1179-80 (Werdegar, J., concurring); *Young v. Weston*, 898 F. Supp. 744, 749-50 (W.D. Wash. 1995).

tively alter the definition of crimes or increase the punishment for criminal acts” and thus does not apply to purely civil schemes.<sup>68</sup>

Lawmakers' apathy toward the development of treatment strategies constitutes the most disturbing aspect of the SVPA and similar laws in other states. Criticizing the statute under which Hendricks was committed, the Kansas Supreme Court noted, “The legislature concedes that sexually violent predators are not amenable to treatment . . . . If there is nothing to treat under [the Kansas statute], then there is no mental illness. In that light, the provisions of the Act for treatment appear somewhat disingenuous.”<sup>69</sup> Critics of the SVPA raise similar objections. For instance, one detractor complained that “[t]he Legislature has spoken out of both sides of its mouth. In one respect, they've said there is no cure . . . . But now they're saying that we shouldn't release them until they're cured.”<sup>70</sup>

Once confined in a mental institution under the California statute, the offender supposedly participates in a narrowly-tailored treatment program.<sup>71</sup> Although sections 6606(a) and 6606(c) say little about the actual regimes to be implemented, they do instruct the State Department of Mental Health to develop a protocol describing “the number and types of treatment components that are provided in the program.”<sup>72</sup> The protocol must “specify how assessment data will be used to determine the course of treatment for each individual offender. [It] shall also specify measures that will be used to assess treatment progress and changes with respect to the individual's risk of reoffense.”<sup>73</sup>

Sections 6606(a) and 6606(c) arguably give substance to the claim that sex offenders will “be committed and treated for their disorders only as long as the disorders persist and *not for any punitive purposes*.”<sup>74</sup> The relative specificity of these provisions has not gone unnoticed. The dissent in *Hendricks* recognized California for mandating individual treatment and considering less restrictive alternatives for sex offenders.<sup>75</sup> Yet the SVPA carefully refrains from

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68. *Hubbart*, 969 P.2d at 605 (quoting *Collins v. Youngblood*, 497 U.S. 37, 43 (1990)).

69. In the Matter of the Care and Treatment of Hendricks, 912 P.2d 129, 136 (Kan. 1996), *rev'd by* *Kansas v. Hendricks*, 521 U.S. 346 (1997).

70. Mary Lynne Vellinga, *Confinement Past Prison*, SACRAMENTO BEE, Feb. 3, 1997, at A1 (quoting Michael Bowman, Sacramento defense attorney and opponent of the SVPA).

71. See CAL. WELF. & INST. CODE § 6606 (a), (c).

72. *Id.* § 6606(c).

73. *Id.*

74. S.B. 1143, 1995 Portion of 1995-96 Reg. Session (Cal. 1995); A.B. 888, 1995 Portion of 1995-96 Reg. Session (Cal. 1995) (emphasis added).

75. See *Kansas v. Hendricks*, 521 U.S. 346, 389 (1997) (Breyer, J., dissenting).

promising a cure. Rather, “[a]menability to treatment is not required for a finding that any person is a person described in Section 6600, nor is it required for treatment of that person.”<sup>76</sup>

The California Legislature’s refusal to guarantee a solution, or even to require that people committed under the SVPA be amenable to treatment, has withstood constitutional scrutiny by the California Supreme Court.<sup>77</sup> Indeed, courts have not usually required legislatures to do more than assert a therapeutic purpose and make some sketchy provisions for treatment. Two lower appellate courts in California suggested that lack of amenability to treatment is of no consequence to constitutional analysis.<sup>78</sup> Justice Thomas went even farther in *Hendricks*, declaring that “[w]e have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available but who nevertheless pose a danger to others.”<sup>79</sup> The California Supreme Court echoed Justice Thomas when it asserted in *Hubbart* that “there is no broad constitutional right of treatment for persons involuntarily confined as dangerous and mentally impaired, at least where ‘no acceptable treatment exist[s]’ or where they cannot be ‘successfully treated for their afflictions.’”<sup>80</sup>

The subtle difference between *Hubbart* and earlier California opinions merits attention. While California judges previously excused ineffective treatment, the *Hubbart* court came close to saying that the State does not have to provide any treatment at all. The former position makes sense if psychiatrists continue to search for therapeutic options. As the Washington Supreme Court noted, “[T]he mere fact that an illness is difficult to treat does not mean it is not an illness.”<sup>81</sup> The language of *Hubbart* and *Hendricks* presents cause for concern, however, for it embraces the state’s police power while turning a blind eye to the arguably pretextual nature of the treatment rationale.

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76. CAL. WELF. & INST. CODE § 6606(b).

77. See *Hubbart v. Superior Court*, 969 P.2d 584, 602 (Cal. 1999) (“[W]e disagree with *Hubbart*’s suggestion that the Act’s treatment provisions are a sham, either because the Legislature intended to withhold treatment or because it found that treatment was futile”).

78. *Hubbart v. Superior Court*, 58 Cal. Rptr. 2d 268, 292-93 (Cal. App. Ct. 1997), *aff’d*, 969 P.2d 584 (Cal. 1999); see also *People v. Superior Court (Cain)*, 57 Cal. Rptr. 2d 296, 302 (Cal. App. Ct. 1996), *rev. granted*, 61 Cal. Rptr. 2d 84 (1997) (“Given the current state of psychiatry, a mental health commitment cannot be invalidated because the person committed may not ever be cured.”); *People v. Martin*, 165 Cal. Rptr. 773, 778 (Cal. App. Ct. 1980) (“The state need not show that appellant will be cured; substantial improvement is . . . a sufficient benefit”).

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

80. *Hubbart*, 969 P.2d at 602.

81. *In re Young*, 857 P.2d 989, 1002 (Wash. 1993).

The California Supreme Court's affirmation of the SVPA must not lull lawmakers into inertia. The unwillingness of the judiciary to explore the interface between law and psychiatry represents an unpardonable oversight that will retard the development of a long-range plan for combating sexual violence. As a matter of policy and constitutional law, the state should not warehouse people in mental hospitals if it has no funds or medical strategies to treat them. Calling upon mental health professionals to assume custody of sex offenders implicates the realm of medicine. And, contrary to the view of the *Hendricks* and *Hubbart* courts, we must consider more fully the implications of annexing a civil and curative regime to solve a criminal law problem.

## II. Treating Sex Offenders in California

Despite the Supreme Court's deference toward the states, individuals involuntarily committed to mental hospitals have a right to be treated, even if they are unlikely to be cured. Although the civil-penal distinction that legitimates the SVPA may turn out to be completely hollow in practice, the solution lies not in striking down the law, but in forcing the state live up to it. Part Two examines California's responsibility for ensuring that the treatment provisions of the SVPA translate into individualized therapy in the mental facilities to which sexual predators are confined.

### A. The Right to Treatment Beyond *Kansas v. Hendricks*

Many years ago, Judge Bazelon asked for legislative cooperation in ensuring that the "right to treatment" takes concrete form in the country's mental hospitals.<sup>82</sup> He emphasized the importance of tailoring treatment programs to the specific needs of each patient.<sup>83</sup> He also argued vigorously that "preventive detention demands standards of procedural due process at least as high as in the criminal law."<sup>84</sup> At least on paper, the SVPA embodies both of these safeguards: (1) a tough evidentiary burden on the state; and (2) provisions for individualized therapy.<sup>85</sup>

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82. See David L. Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742 (1969).

83. See *id.* at 746.

84. *Id.* at 749.

85. It would be misleading to overstate the Act's compliance with the strictures of the Bazelon article. Indeterminate confinement and reliance on predictions of dangerousness are deeply antithetical to Bazelon's aspiration to "end involuntary commitments as a principal response to mental illness." *Id.* at 753.

If the SVPA satisfies Judge Bazelon's procedural concerns, the treatment issue poses deeper problems. Indeed, one of the most serious charges leveled at involuntary commitment laws is that bogus treatment provisions mask legislative intent to turn hospitals into prisons. Unfortunately, the rhetoric of lawmakers and prosecutors seems to substantiate this view. For example, a Sacramento prosecutor admitted that "[s]hort of penile-ectomy, once a child molester, always a child molester," but said he favors the SVPA because it is a valuable tool to "get more time to lock up a person."<sup>86</sup> Sexual predators confined under such laws in other states have rarely received any therapy at all. For instance, the majority in *Hendricks* admitted that the respondent was neither treated in jail before his civil commitment nor at a mental facility thereafter.<sup>87</sup>

Excusing Kansas' failure to treat *Hendricks*, the Supreme Court argued that, under *Youngberg v. Romeo*, "states enjoy wide latitude in developing treatment regimens."<sup>88</sup> In *Romeo*, a profoundly retarded adult man with violent tendencies was confined to a state hospital upon the petition of his mother.<sup>89</sup> His mother later sued, claiming that her child received no training, or inadequate training, at the institution.<sup>90</sup> Because *Romeo* suffered profound retardation, he could at most learn to perform tasks like tying his shoes or using the restroom by himself, skills that might reduce the frustration to which doctors attributed his violent episodes.<sup>91</sup> The respondent conceded that, considering the nature of her son's affliction, no amount of training would make his release possible.<sup>92</sup> According to the Supreme Court, *Romeo* had a constitutional right to "minimally adequate or reasonable training to ensure safety and freedom from undue restraint," but that the judiciary must defer to the hospital's determination of reasonableness.<sup>93</sup> Moreover, the Court noted that states have "considerable discretion" in determining the nature of their responsibility to provide

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86. See Vellinga, *supra* note 70. In a similar vein, Wisconsin Governor Tommy Thompson speculated: "We might be able to use this civil commitment procedure to keep . . . [sexual predators] in jail." *State v. Post*, 541 N.W.2d 115, 139 (Wis. 1995) (Abrahamson, J., dissenting). A supporter of the Kansas law declared: "Because there is no effective treatment for sex offenders, this Bill may mean a life sentence for a felon that is considered a risk to women and children. So be it!" *Hendricks*, 521 U.S. at 385 (Breyer, J., dissenting).

87. *Hendricks*, 521 U.S. at 353-54.

88. *Id.* at 368 n.4 (citing *Youngberg v. Romeo*, 457 U.S. 307 (1982)).

89. See *Romeo*, 457 U.S. at 309.

90. See *id.* at 307.

91. See *id.* at 312 n.7.

92. See *id.* at 317.

93. *Id.* at 319 n.25, 321.

training.<sup>94</sup> Thus, rather than bolstering a federal right to treatment, *Romeo* effectively conceded decision-making in this area to the states.

Because sexual predators are primarily confined under the state's police power due to their dangerousness, they may have a shakier right to treatment than incompetents such as *Romeo*.<sup>95</sup> Sex offenders can take care of themselves; they can eat, dress, drive cars, own houses, and work at paying jobs. Unlike *Romeo*, they are not in mental hospitals because they need help performing the basic functions of life. However, precisely because the facts of *Romeo* are distinguishable, the Court should not use this case to support the continued incarceration of sex offenders under the guise of therapy. Given the SVPA's claims to provide individualized treatment, sex offenders have a right to be treated, and the "reasonableness standard" articulated in *Romeo* is too vague to ensure that California will respect that right.

Instead, another line of cases more solidly supports the right of sex offenders to treatment. In *Rouse v. Cameron*<sup>96</sup> and *Wyatt v. Stickney*,<sup>97</sup> two federal courts explicitly extended the right to treatment to involuntary civil commitment. *Rouse* involved an insanity acquittee warehoused indefinitely in St. Elizabeth's Hospital for the misdemeanor of carrying a dangerous weapon.<sup>98</sup> *Rouse* claimed that he had not received any treatment at all.<sup>99</sup> Similarly, in *Wyatt*, the guardians of Alabama mental patients brought a class action suit against the state hospital.<sup>100</sup> After budget cuts eviscerated the hospital staff, leaving only one clinical psychologist and three doctors with some psychiatric training for about 5,000 patients, treatment nearly ceased.<sup>101</sup>

The *Wyatt* court found that "absent treatment, the hospital is transformed into a penitentiary."<sup>102</sup> The hospital must first develop a mission regarding the type of care it provided and the nature of the people housed there.<sup>103</sup> Second, it must fulfill the right to treatment regardless of budgetary constraints.<sup>104</sup> Like the D.C. Circuit in *Rouse*,

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94. *Id.* at 316.

95. See DAVID B. WEXLER, CRIMINAL COMMITMENTS AND DANGEROUS MENTAL PATIENTS: LEGAL ISSUES OF CONFINEMENT, TREATMENT, AND RELEASE 10 (1976).

96. 373 F.2d 451 (D.C. Cir. 1966).

97. 325 F. Supp. 781 (M.D. Ala. 1971).

98. See *Rouse*, 373 F.2d at 452.

99. See *id.*

100. See *Wyatt*, 325 F. Supp. at 782.

101. See *id.* at 784.

102. *Id.*

103. *Id.*

104. See *id.*



the Alabama district court acknowledged that the dearth of trained psychiatrists was “the most serious problem today in the care of the mentally ill” and that the deficiency could not be remedied immediately.<sup>105</sup> However, in its view, the rights that the patients asserted were “present rights” which permitted no delay.<sup>106</sup>

Under facts analogous to involuntary civil commitment, the Ninth Circuit has held that sex offenders confined under a “rehabilitative rationale” have a right to individualized treatment.<sup>107</sup> The defendants in *Ohlinger v. Watson* were serving indeterminate sentences in an Oregon state penitentiary for molesting young boys.<sup>108</sup> Oregon’s indeterminate sentencing scheme for the sexual assault of children required that the offender have a “mental or emotional disturbance, deficiency, or condition” similar to that specified in the SVPA.<sup>109</sup> Although the petitioners participated in group therapy at the time of their appeal, one of them had been incarcerated for ten years without receiving any treatment.<sup>110</sup> The Ninth Circuit held that “[a]dequate and effective treatment is constitutionally required because, absent treatment, appellants could be held indefinitely as a result of their mental illness, while those convicted under the State sodomy statute need only serve a fifteen year maximum term.”<sup>111</sup>

Two aspects of the *Ohlinger* requirements are notable. First, the petitioners did not demand a cure for their mental disorders, but only a treatment program that addressed their particular needs with “the reasonable objective of rehabilitation.”<sup>112</sup> Second, in harmony with precedent outside the Ninth Circuit, the *Ohlinger* court stated that the “[l]ack of funds, staff or facilities cannot justify the State’s failure to provide appellants with that treatment necessary for rehabilitation.”<sup>113</sup> The state violated these requirements, not only during the ten-year period in which it provided no treatment, but also by offering group therapy that psychiatric experts deemed ineffective.<sup>114</sup> By definition, group therapy does not constitute individualized therapy.

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105. *Id.*

106. *See id.*

107. *See Ohlinger v. Watson*, 652 F.2d 775, 777-78 (9th Cir. 1981) (noting that “appellant’s indeterminate sentences for mental illness in lieu of the maximum criminal penalty for sodomy makes their sentences analogous to civil commitment”).

108. *See id.* at 776.

109. *See id.* at 776-77 n.2 (citing OR. REV. STAT. 137.111).

110. *See id.* at 776.

111. *Id.* at 778.

112. *Id.*

113. *Id.*; cf. *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971).

114. *See Ohlinger*, 652 F.2d at 779.

Moreover, in a prison culture, it may be actively detrimental and even dangerous for prisoners to admit to pedophilia in the presence of their peers.<sup>115</sup>

Despite Justice Thomas' hints to the contrary in *Hendricks*, the deferential dicta in *Romeo* does not overrule the *Ohlinger-Rouse-Wyatt* line of cases. The respondent in *Romeo* demanded "training" or "habilitation," not "treatment."<sup>116</sup> Moreover, the issue before the Court was not total failure to provide training, but only whether existing modes ensured that the hospital would not unduly restrain Romeo with devices like hand muffs.<sup>117</sup> *Romeo* should not apply if California completely fails to treat sex offenders, as Kansas did before *Hendricks* mounted his constitutional challenge. Moreover, reading *Romeo* to favor the state's discretion to decide when and how to treat sex offenders ignores a major difference between this case and the sexual predator laws. *Romeo* was never punished for a crime. Thus, his case did not require the Court to enforce the Double Jeopardy and Ex Post Facto Clauses of the Constitution.

## B. The Potential for Treating Sex Offenders

Because so few sex offenders have actually been committed under the SVPA, we can only speculate about how California's mental health facilities will implement treatment protocols.<sup>118</sup> However, even at this early stage, the Act surpasses the level of treatment provided in *Ohlinger* or in the California state case *People v. Feagley*<sup>119</sup> by guaranteeing that offenders will be treated in a hospital setting.

*Feagley* demonstrates how far California legislation in this area has progressed.<sup>120</sup> *Feagley* was incarcerated in the California Men's

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115. *See id.* at 778.

116. *See* *Youngberg v. Romeo*, 457 U.S. 307, 326 (1982) (Blackmun, J., concurring). Admittedly, Justice Blackmun used the terms "treatment" and "training" almost interchangeably, stating at one point that he was "in accord with the Court's decision not to address the constitutionality of a State's total failure to provide treatment under state law to an individual committed under state law for 'care and treatment.'" *Id.* (Blackmun, J., concurring).

117. *See id.*

118. Only ten offenders had been committed as of February 3, 1997, due to the large numbers of pending appeals. *See* *Vellinga*, *supra* note 70.

119. *See* *People v. Feagley*, 535 P.2d 373, 398 (Cal. 1975) (holding the old Mentally Disordered Sex Offender ("MDSO") procedure unconstitutional because it amounted to so complete a denial of treatment in a penal setting as to be deemed cruel and unusual punishment).

120. *See* *Hubbart v. Superior Court*, 969 P.2d 584, 603 n.29 (Cal. 1999) ("[T]he SVPA does not, on its face, suffer from any of the flaws that supported a finding of cruel and unusual punishment in *Feagley*").

Colony under the old MDSO law, the former California Welfare and Institutions Code, sections 6300-6330.<sup>121</sup> Like the *Ohlinger* defendants, Feagley's treatment problems arose in a prison, not in a hospital, and the *Feagley* court made much of this distinction. Under the MDSO law, incurable patients were sent to "institutional units," a euphemism for confinement at a prison facility where the sex offender "mingled freely with the general prison population, wore standard prison clothing, worked for wages of a few cents an hour in the prison shop, submitted to full censorship of his mail, and was subject to all prison regulations concerning security."<sup>122</sup> Feagley allegedly received no treatment at all.<sup>123</sup>

Feagley's existence contrasted sharply with that of offenders deemed likely to benefit from treatment, who were confined in the state mental hospital at Atascadero. Patients at the state hospital enjoyed the right to wear regular clothes; have access to telephones and writing materials; receive visitors and mail; and refuse both lobotomy and shock therapy.<sup>124</sup> These differences are significant because psychiatrists believe that the prison environment reinforces sexual deviance by exacerbating the offender's sense of inferiority. For example, Dr. David G. Schmidt, then chief psychiatrist at San Quentin, opined that "prison is a poor place to treat sick patients."<sup>125</sup> Since sex offenders often lack initiative, they fail to benefit from prison work programs and are often relegated to sweeping the jailyard or other menial tasks. Other prisoners shun or assault them, and they may be tormented by the guards for being "nuts and fruits, and sex fiends."<sup>126</sup>

The California Supreme Court decided *Feagley* in 1975, long before the SVPA of 1996. Just as the SVPA overcomes the procedural objections of *Feagley*, it also provides for housing of sex offenders at the state hospital, rather than in prisons.<sup>127</sup> Although this step does not ensure individualized treatment, it is a good start.

The most daunting barrier to the implementation of sections 6606(a) and (c) of the SVPA is the dearth of therapeutic options for persons suffering from paraphilias and antisocial personality disorders. The Act explicitly states that:

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121. See *Feagley*, 535 P.2d at 374.

122. *Id.* at 389-90.

123. See *id.* at 390.

124. See *id.* at 391 n.20.

125. *Id.* at 393 n.25.

126. *Id.*

127. See CAL. WELF. & INST. CODE § 6600.05.

Amenability to treatment is not required for a finding that any person . . . [is a sexually violent predator] nor is it required for treatment of that person. Treatment does not mean that the treatment be successful or potentially successful, nor does it mean that the person must recognize his or her problem and willingly participate in the treatment program.<sup>128</sup>

The salient features of this disclaimer are: (1) its lack of clarity about how the state plans to treat potentially untreatable individuals; and (2) its express rejection of the offender's right to refuse therapy. The former, which the courts have never properly examined, may be an example of legislative chicanery; or it may be a practical acknowledgment that, in the absence of a cure for sexual deviancy, the law must allow mental health professionals to do the best they can. However, even if the SVPA's treatment provisions were intended to be a sham, they do not have to be implemented that way.

The psychiatric profession has long expressed skepticism about its ability to treat sexual predators. For example, a study in the 1980s suggested that California state hospitals were "inadequate for anything but warehousing the sex offender."<sup>129</sup> Numerous articles and monographs by American and European authors lament the dearth of effective programs for treating sexual deviance,<sup>130</sup> and neither organic therapies, which can be administered coercively, nor milieu treatments requiring the patient's cooperation have enjoyed much success.<sup>131</sup> More recently, the *Hubbart* appellant attached a letter from Dr. Nadim Khoury, Deputy Director of the Health Care Services Division of the Department of Corrections, to his supplemental brief,<sup>132</sup> noting that the Department offers "no formal treatment programs specifically designed for sex offenders" because no effective treatment exists.<sup>133</sup>

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128. *Id.* § 6606(b).

129. Anthony D. Oliver, *The Mentally Disordered Sex Offender: Facts and Fictions*, 3 AM. J. FORENSIC PSYCH. 87, 95 (1982-83).

130. See, e.g., Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOL., PUB. POL'Y & L. 534, 568, 571 (1995) (stating that neither paraphilias nor antisocial personality disorders respond to psychotropic medication or other organic treatments and that, without the cooperation of the sex offender, no therapeutic regimen will result in lasting changes); ALAN J. PALLONE, REHABILITATING CRIMINAL SEXUAL PSYCHOPATHS 80-84 (1990) (surveying studies of unsuccessful sexual offender treatment programs); Andrew Ashworth & Joanna Shapland, *Psychopaths in the Criminal Process*, CRIM. L. REV. 628, 632 (1980) ("many practitioners believe that psychopathic disorders cannot be improved by any method they would term 'treatment'").

131. Winick, *supra* note 130, at 539.

132. See *Hubbart v. Superior Court*, 969 P.2d 584, 610 n.37 (Cal. 1999). The California Supreme Court refused to take judicial notice of the contents of this letter. See *id.*

133. *Id.*

The bleak outlook for rehabilitating sex offenders has led some writers to conclude that involuntary civil commitment should be impermissible. For instance, Professor Bruce Winick writes:

Although our understanding of treatability may change over time as new treatment approaches are developed, a present deprivation of liberty should not be constitutionally permissible on the basis of *a mere potential of future treatability*. Unless a condition is amenable to hospital treatment at the time involuntary hospitalization is sought, due process should not permit deprivation of liberty.<sup>134</sup>

Although it is grounded in an admirable concern for civil liberty, Winick's position does little to protect women and children from repeat offenders. It also ignores new progress in treating sexual deviancy. As the ATSA argued in its amicus brief on behalf of Kansas in *Hendricks*, "[i]t is true that sex offenders cannot currently be 'cured.' No cures exist for innumerable recognized medical and psychiatric conditions (e.g. AIDS, diabetes, schizophrenia). There is increasing evidence, though, that state-of-the-art treatment programs developed over the last decade significantly reduce recidivism."<sup>135</sup> In a recent article on civil commitment, Professor John Cornwell pointed to advances on two major fronts: (1) the development of cognitive-behavioral programs with modest success in treating pedophiles and exhibitionists; and (2) the use of pharmacologic agents, such as medroxyprogesterone acetate to reduce male testosterone production.<sup>136</sup> The latter development, called "chemical castration," seems especially promising.

### C. Chemical Castration and the Right to Refuse Treatment

The injectible form of medroxyprogesterone acetate, or Depo-Provera,<sup>137</sup> lowers male sex drives and curbs sexually violent behavior in some types of offenders.<sup>138</sup> The drug has been especially successful when used on paraphiliacs who act out specific sexual fantasies.<sup>139</sup> The drug is less likely to help offenders who deny perpetrating sex crimes, blame their conduct on non-sexual agents such as substance abuse, or act on the basis of non-sexual feelings like anger and misog-

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134. Winick, *supra* note 130, at 563 (emphasis added).

135. ATSA Brief, 1996 WL 471027, at \*7.

136. See John Kip Cornwell, *Protection and Treatment: The Permissible Civil Detention of Sexual Predators*, 53 WASH. & LEE L. REV. 1293, 1328 (1996).

137. Depo-Provera is manufactured by Upjohn.

138. See Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 3 (1990).

139. See *id.*

ny.<sup>140</sup> For paraphiliacs, Depo-Provera injections may reduce recidivism rates to less than ten percent, in contrast to rates as high as fifty-four to eighty-four percent for offenders released from prison without treatment.<sup>141</sup>

In California, Depo-Provera treatment has recently become a discretionary parole condition for first-time child molesters and a mandatory condition for repeat offenders.<sup>142</sup> The injections begin one week prior to the prisoner's release and continue until the Department of Corrections demonstrates that the treatment is no longer necessary.<sup>143</sup> The statute requires the physician to inform the person of the drug's potential side effects, and the person may choose to undergo surgical sterilization as an alternative.<sup>144</sup>

Such a program would work better in the context of civil commitment. Unlike the current chemical castration law, the SVPA reaches insanity acquittees, as well as convicted persons.<sup>145</sup> Moreover, administering Depo-Provera in a hospital during an initial observation period, such as the year preceding the right to petition for discharge under the SVPA, facilitates better medical observation. Psychiatrists could analyze the effects of the drug over time, gauge the patient's willingness to accept the treatment, and monitor improvement before conditionally releasing the individual as an outpatient. The provisions allowing for conditional release under SVPA assume importance if the mental facility embarks on Depo-Provera treatment, for the drug may have a less discernible impact when the patient is secluded from women and children.

A civil commitment scheme calling for chemical castration of mentally-disordered sex offenders should limit such treatment to men. As at least one journal has noted, because Depo-Provera causes temporary sterility in women but not in men, the California parole condition may violate equal protection.<sup>146</sup> The *Harvard Law Review*

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140. *See id.* at 4.

141. *See* Daniel L. Icenogle, *Sentencing Male Sex Offenders to the Use of Biological Treatments*, 15 J. LEGAL MED. 279, 282, 288 (1994).

142. *See* CAL. PENAL CODE § 645.

143. *See id.* § 645(d).

144. *See id.* § 645(e)-(f).

145. *Compare* CAL. PENAL CODE § 645 (a)-(b) (applying only to persons found guilty of a conviction for sexual molestation) *with* CAL. WELF. & INST. CODE § 6600(a) (“[A] prior finding of not guilty by reason of insanity . . . shall also be deemed to be a sexually violent offense even if the offender did not receive a determinate sentence for that prior offense”).

146. *See generally*, Harvard Law Review Association, *Recent Legislation, California Becomes First State to Require Chemical Castration of Certain Sex Offenders*, 110 HARV. L.

correctly contends that there is no valid medical justification for requiring female offenders to submit to injections, since Depo-Provera does not suppress the female sex drive but does prevent women from becoming pregnant.<sup>147</sup> This is an important insight and a valid reason for excluding women from the treatment. Although restricting Depo-Provera injections to male sex offenders would also raise equal protection concerns,<sup>148</sup> distinctions between medically appropriate treatments for men and women should survive intermediate scrutiny, especially if an alternative treatment can be devised for women. Under the intermediate standard, the law must “serve important governmental ends,”<sup>149</sup> a test easily met by a measure that protects women and children from sexual violence. Injecting men but not women with a drug that lowers the male sex drive is “substantially related” to these goals.<sup>150</sup>

Although the equal protection problem can be remedied by limiting Depo-Provera treatment to men, other constitutional challenges present more formidable hurdles, even in the civil context. Both Eighth Amendment and privacy-based arguments implicate the patient’s right to refuse treatment and its corollary, the informed consent doctrine—both of which have been acknowledged by federal courts.<sup>151</sup> Characterizing a measure as “treatment” does not shield it from Eighth Amendment scrutiny, for courts may inquire into the pu-

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REV. 799 (1997) (arguing that the chemical castration law is unconstitutional on equal protection grounds).

147. *See id.* at 801.

148. *See id.* at 804 (“A statute that used Depo-Provera to suppress only the male sex drive would still treat men and women differently in that it would require male, but not female sex offenders to submit to medical treatment.”)

149. *See Craig v. Boren*, 429 U.S. 190, 197 (1976) (setting the intermediate standard of Equal Protection review—i.e. that the law must be “substantially related” to the achievement of “important governmental ends”).

150. *See id.*

151. *See, e.g., Mackey v. Procunier*, 477 F.2d 877 (9th Cir. 1973) (holding that a patient stated a civil rights claim based on the non-consensual administration of a fright drug during his prison sentence); *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973) (concluding that the non-consensual administration of a drug that induced vomiting violated the 8th Amendment); *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979), *aff’d in part, rev’d in part*, 634 F.2d 650 (1st Cir. 1980), *vacated sub nom., Mills v. Rogers*, 457 U.S. 291 (1982) (holding that the involuntary medication of patients who are mentally ill but not incompetent to give consent is unconstitutional unless administered during an emergency); *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978), *aff’d* 653 F.2d 836 (3d Cir. 1981), *vacated* 458 U.S. 1119 (1982), *remanded to* 720 F.2d 266 (3d Cir 1983) (finding that the right to privacy gives rise to a right to refuse any treatment that interferes with mental processes and violates bodily autonomy).

nitive nature of a statute, even if its legislative classification is clearly civil.<sup>152</sup>

None of the Eighth Amendment “right-to-refuse-treatment” cases is factually on point, however. Indeed, the only Ninth Circuit case to confront the right to refuse medication, *Mackey v. Proconier*, can be distinguished from the use of Depo-Provera to treat sex offenders. In *Mackey*, the California Medical Facility at Vacaville made the petitioner a guinea pig for a breath-stopping “fright drug” which was counter-indicated for fully conscious patients.<sup>153</sup> The Ninth Circuit held that the petitioner had stated a claim “far beyond” malpractice and remanded the case for further proceedings.<sup>154</sup>

Both *Mackey* and an Eighth Circuit case, *Knecht v. Gillman*, involved drugs that were either unusual or not recommended for the purposes for which the state used them. In *Knecht*, the court noted that “[t]here is no evidence that the drug is used at any other inmate medical facility in any other state.”<sup>155</sup> The fright drug in *Mackey* and the nausea-inducing apomorphine in *Knecht* also had harmful effects which state medical personnel sought to inflict as part of an aversive conditioning program.<sup>156</sup> The inmates were punished for undesirable behavior by medication that induced prolonged bouts of vomiting in *Knecht* and paralyzing feelings of suffocation in *Mackey*.<sup>157</sup>

Chemical castration is neither inherently cruel, experimental, nor likely to result in long-term side effects.<sup>158</sup> The holdings of *Mackey* and *Knecht* regarding experimental aversion therapies and their terrifying impacts thus do not govern Depo-Provera treatment. The FDA has approved Depo-Provera,<sup>159</sup> and at least three states have adopted it for use in treating sex offenders.<sup>160</sup> Its primary physiological effect

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152. See *Knecht*, 488 F.2d at 1138.

153. *Mackey*, 477 F.2d at 878.

154. See *id.* at 877.

155. *Knecht*, 488 F.2d at 1138.

156. See *id.* at 1137.

157. See *id.*

158. See, e.g., *Trop v. Dulles*, 356 U.S. 86 (1958) (establishing a three-part test for determining whether a punishment is cruel and unusual under the 8th Amendment).

159. See Fred S. Berlin, *The Paraphilias and Depo-Provera: Some Medical, Ethical, and Legal Considerations*, 17 BULL. AM. ACAD. PSYCHIATRY & L. 233, 235 (noting that doctors can prescribe Depo-Provera under FDA guidelines).

160. See Atul Gawande, *The Unkindest Cut: Science and the Ethics of Castration*, SLATE: MEDICAL EXAMINER, (last visited July 11, 1997) <[http://www.slate.com/97-07-11/medical\\_examiner.asp](http://www.slate.com/97-07-11/medical_examiner.asp)> (reporting that California, Montana, and Florida allow, and in some cases require, judges to order chemical castration for sex offenders). The article also notes that the Czech Republic and Germany have introduced voluntary testosterone-inhibiting drug treatments. See *id.*



is a reduction in androgen levels in the blood stream.<sup>161</sup> In clinical terms, the decrease in testosterone means a diminution in compulsive sexual fantasies and a lowered sex drive in men.<sup>162</sup> Neither feminization nor total impotence results, and reported side effects (including muscle fatigue, cold sweats, elevated blood pressure, and weight gain) cease as soon as the treatment ends.<sup>163</sup> Depo-Provera has no effect on ability to procreate when administered to males.<sup>164</sup>

Although chemical castration survives Eighth Amendment scrutiny, it may implicate still other constitutional rights. *Rennie v. Klein*<sup>165</sup> and *Rogers v. Okin*<sup>166</sup> carved out a right to refuse treatment, except in emergency situations, by extending the privacy penumbra to involuntarily-committed mental patients. Returning *Rogers* to the First Circuit, the Supreme Court observed in dicta that “involuntarily committed mental patients . . . retain liberty interests protected directly by the Constitution . . . and that these interests are implicated by the involuntary administration of antipsychotic drugs.”<sup>167</sup>

Interestingly, however, both *Rennie* and *Rogers* displayed deference to the treatment decisions of state medical professionals, a trend hastened by *Romeo*. Although the “right-to-refuse-treatment” decisions gave mental patients penumbral protection against medication that compromised their bodily autonomy, the due process holdings of *Rennie* and *Rogers* stopped short of making judges the arbiters of psychiatric treatment. The lower court in *Rennie* left the patient’s appeal to the discretion of an independent psychiatrist guided by four factors: (1) the nature of the threat which the patient posed to the hospital staff; (2) the patient’s competence to decide whether he wanted treatment; (3) the existence of less restrictive alternatives; and (4) the risk

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161. Fitzgerald, *supra* note 138, at 5.

162. Cornwell, *supra* note 136, at 1331.

163. See, e.g., Kimberly A. Peters, *Chemical Castration: An Alternative to Incarceration*, 31 DUQ. L. REV. 307, 310 (1993) (discussing the potential side effects of chemical castration).

164. See Fitzgerald, *supra* note 138, at 6, 44; Peters, *supra* note 163, at 311; see also Steven A. Capps, *Wilson Set to Approve Chemical Castration*, S.F. EXAMINER, Aug. 28, 1996.

165. *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978), *aff’d*, 653 F.2d 836 (3d Cir. 1981), *vacated*, 458 U.S. 1119 (1982), *on remand*, 720 F.2d 266 (3d Cir. 1983) (involuntary mental patient sought to enjoin hospital from forcibly administering drugs to him in absence of emergency).

166. *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979), *aff’d in part, rev’d in part* 634 F.2d 650 (1st Cir. 1980), *vacated sub nom.*, *Mills v. Rogers*, 457 U.S. 291 (1982) (class action of mental patients seeking to prevent forcible administration of drugs).

167. *Mills v. Rogers*, 457 U.S. at 299 n.16.

of permanent side effects from the proposed medication.<sup>168</sup> On remand from the Supreme Court, a year after *Romeo*, the Third Circuit held that the Constitution did not even require this neutral, nonjudicial procedure. Rather, the hospital's treatment team and chief psychiatrist could make the call.<sup>169</sup>

Given the courts' reluctance to reverse the treatment decisions of psychiatric professionals, chemical castration should not be held unconstitutional in the civil context. Indeed, Depo-Provera treatment satisfies two, and probably three, of the *Rennie* factors: (1) the offender represents a menace, perhaps even to members of the hospital staff; (2) Depo-Provera is an approved drug with no debilitating long-term side effects; and (3) its potential for moving sex offenders towards outpatient status makes it a less restrictive alternative than either indeterminate criminal sentencing or permanent hospitalization.<sup>170</sup>

The reasons for seeking the patient's consent may be more medical than legal. Experts hypothesize that medications like Depo-Provera have fewer beneficial effects if the offender does not voluntarily submit to them.<sup>171</sup> Concerns about the efficacy of treatment, and the fear of legal reprisals, have led many states, including California, Pennsylvania and Texas, to require that doctors attempt to obtain informed consent.<sup>172</sup>

However, this approach may ultimately frustrate the right to treatment itself. Citing extreme cases like *Kaimowitz v. Dep't of Mental Health*,<sup>173</sup> where the court found that a patient could not voluntarily consent to an experimental, irreversible, and highly dangerous psychosurgery about which his doctors had insufficient knowledge, some commentators argue that the coercion inherent in choosing between treatment and indefinite confinement makes informed consent impossible.<sup>174</sup> Such a view negates the ability of any patient to assert his right to treatment.

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168. See *Rennie*, 462 F. Supp. at 1145-48.

169. See *Rennie*, 720 F.2d at 270.

170. See *supra* notes 137-67 and accompanying text.

171. See, e.g., Peters, *supra* note 163, at 310 ("The pivotal criterion in calculating the treatability of a sex offender is his acknowledgment that his conduct is intolerable and beyond his control. Accordingly, therapists advocate that the only alternative for [offenders who deny their conditions or are motivated by non-sexual impulses] is incarceration.").

172. See Loren H. Roth, *The Right to Refuse Psychiatric Treatment: Law and Medicine at the Interface*, 35 EMORY L.J. 139, 152 (1986).

173. Civ. No. 73-19434-AW (Cir. Ct. of Wayne County, MI, July 10, 1973).

174. See WEXLER, *supra* note 95, at 17.

The informed consent doctrine is especially pernicious in the involuntary commitment context because it strips doctors of their authority and turns them into custodians who can neither treat nor release their patients. According to one study, an independent psychiatrist or review panel confirmed the need for treatment in ninety-seven percent of all refusals by California mental patients.<sup>175</sup> Because the most troubled individuals may be the least likely to submit voluntarily to beneficial procedures,<sup>176</sup> a rigidly-enforced right to refuse decreases the likelihood of their reintegration into society.

The SVPA's indifference to securing the understanding and cooperation of sexual predators with regard to psychiatric therapy looks questionable in light of the "right-to-refuse-treatment" decisions.<sup>177</sup> However, *Youngberg v. Romeo* has had a mixed legacy in this area. While the *Hendricks* Court recently used *Romeo* to justify the lamentable dearth of treatment attending the Kansas sex offender act, *Romeo* also provides a barrier against ill-considered efforts by patients to refuse medical help. The *Romeo* Court's deference to state doctors with regard to individual treatment decisions should extend to administration of Depo-Provera to involuntarily-committed sex offenders.

#### D. Some Conclusions about the Right to Treatment under the SVPA

The posture of the *Hendricks* Court with respect to the psychiatric community merits notice. Writing for the majority, Justice Thomas deferred to state decisions about whom to confine and how much money is available for treatment.<sup>178</sup> Citing *Romeo*, the majority indicated that it will bow to psychiatric expertise only after offenders have been moved from jails to hospitals.<sup>179</sup> At this stage, doctors may select treatments within budgetary limits defined by the state.<sup>180</sup> Such a position constitutes extreme deference to the face of the legislation with little scrutiny of its impact.

If the judiciary continues to follow the spirit of *Hendricks* and *Hubbart*, the SVPA will be spared, no matter how punitive its implementation may be. However, even if the California Legislature intended to throw away the key to state mental institutions, the SVPA

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175. See Roth, *supra* note 172, at 154.

176. See *id.* (citing California studies). Roth reports that persistent refusers tend to be schizophrenic, psychotic or in denial about having a mental illness. See *id.*

177. See CAL. WELF. & INST. CODE § 6606(b).

178. See *Kansas v. Hendricks*, 521 U.S. 346, 347 (1997).

179. See *id.* at 368 n.4.

180. See *id.*

does contain a rudimentary framework for individualized treatment. This is an encouraging sign.

Federal “right-to treatment” decisions provide the means to enforce the SVPA’s therapeutic provisions. But will the courts accept the burden of policing the right to treatment? The four dissenters in *Hendricks* expressed concern, not only about the state’s failure to provide therapy, but also about the need for less restrictive alternatives like halfway houses and post-release supervision.<sup>181</sup> In his concurrence, Justice Kennedy gave qualified approval to the Kansas law, suggesting that if “civil confinement were to become a mechanism for retribution or general deterrence . . . our precedents would not suffice to validate it.”<sup>182</sup> Given these sentiments, there is reason to hope that, supervised by the courts, California will actually implement the treatment provisions of the SVPA. And despite the pessimism of some members of the psychiatric community, doctors continue to search for new therapies, such as Depo-Provera injections, to reduce the recidivism of sexual predators.

### III. Sex Offenders and the Insanity Defense

By using medical discourse to facilitate the involuntary civil commitment of sexual predators, the California Legislature has not only resurrected an old debate about the tension between preventive detention and the right to treatment; it has also intensified confusion over the boundaries between madness and criminal responsibility. Indeed, amendments to the SVPA passed soon after its enactment extend section 6600 to cases where a prior violent sexual offense charge resulted in a finding of NGRI, as well as to prior convictions.<sup>183</sup> The tensions between the SVPA and the legal definition of insanity implicate an additional issue in this article: the best mode for dealing with sex offenders who have not yet been convicted and sentenced.

Although the mental disorders afflicting many sexual predators satisfy the requirements for extending confinement of NGRI acquittees,<sup>184</sup> they fail to meet the state’s reinvigorated test for legal in-

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181. *See id.* at 387 (Breyer, J., dissenting).

182. *Id.* at 373 (Kennedy, J., concurring); *see also* *Hubbart v. Superior Court*, 969 P.2d 584, 612 (Cal. 1999) (Werdegar, J., concurring) (“The concrete facts of some future proceeding may force this or another court to confront the potential limits of the [SVP] Act.”).

183. *See Hubbart*, 969 P.2d at 588 n.7.

184. *See* CAL. PENAL CODE § 25.5(b) (codifying the M’Naghten “right and wrong” test for the insanity defense). The standard for extending the confinement of an insanity acquittee is codified at CAL. PENAL CODE § 1026.5 (providing that the extension of commitment is appropriate if, “by reason of mental disease, defect, or disorder, [the person]

sanity. Thus, the SVPA's involuntary commitment standard is inconsistent with the insanity defense. To remedy this disjunction, the California Legislature should create of a new legal category, applicable in the guilt phase, which recognizes mental disorders that fall short of insanity. In several states that have adopted it, this new category is known as guilty but mentally ill or GBMI.

#### A. Inconsistencies in the Law

The notorious "Twinkie" defense raised by Dan White, the assassin of San Francisco Mayor George Moscone and Supervisor Harvey Milk, incited the wrath of California citizens and precipitated the reintroduction of the M'Naghten test for legal insanity.<sup>185</sup> White's conviction was reduced from murder to manslaughter when he claimed diminished mental capacity arising from the ingestion of junk food.<sup>186</sup> In response to the White case, outraged California voters passed the Victim's Rights Bill in 1982, eliminating the diminished capacity or irresistible impulse defense.<sup>187</sup> The Victim's Rights Bill also required the accused to prove "by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing between right and wrong at the time of the commission of the offense."<sup>188</sup>

In 1994, further legislation excluded personality disorders from the definition of insanity.<sup>189</sup> Yet, even under the less stringent American Law Institute test, the California Supreme Court had stated that "if the defense expert can point to no symptom, no manifestation of the defendant's condition, except repeated criminal or antisocial acts, that condition cannot be considered grounds for finding the defendant insane."<sup>190</sup> Section 25.5 of the California Penal Code codified a

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represents a substantial danger of physical harm to others"). *See also* *People v. Wilder*, 39 Cal. Rptr. 2d 247, 253 (Cal. App. Ct. 1995) (finding that due process does not require the standards for legal insanity and extension of commitment to be identical); *People v. Superior Court (Williams)*, 284 Cal. Rptr. 601, 609 (Cal. App. Ct. 1991) (same).

185. *See Vicki Torres, Insanity Plea Less a Bargain in the Courts: Tough Guidelines Eclipse Era of Hinckley, White*, SAN DIEGO UNION-TRIB., Dec. 27, 1984 (discussing the legislative fallout from Dan White's insanity acquittal in the Milk and Moscone murders).

186. *See id.* White was only sentenced to eight years in prison. *See id.*

187. *See id.*; CAL. PENAL CODE § 25(a) ("The defense of diminished capacity is hereby abolished).

188. CAL. PENAL CODE § 25(b).

189. *See id.* § 25.5 ("[T]his defense shall not be found by the trier of fact solely on the basis of a personality or adjustment disorder, or a seizure disorder, an addiction to, or abuse of, intoxicating substances").

190. *People v. Fields*, 673 P.2d 680, 676 (Cal. 1983) (jury instructed on subdivision 2 of the ALI test which provides that the jury may find the defendant insane if he lacks the

stricter formulation of this exclusion, expressly prohibiting NGRI defenses based on personality disorders.<sup>191</sup> By implication, the revamped insanity definition embodies the rule that “an irresistible impulse to commit an act which [the defendant] knows is wrong . . . does not constitute the insanity which is a legal defense.”<sup>192</sup>

In affirming the hospitalization of sex offenders who do not qualify for the insanity defense, the courts have again run afoul the psychiatric community. According to the *Hendricks* majority, Kansas properly extended involuntary civil commitment to “those who suffer a volitional impairment rendering them dangerous beyond their control.”<sup>193</sup> Yet, as the APA noted, the Kansas test for insanity is cognitive, not volitional.<sup>194</sup> If Kansas had followed the *APA’s Guidelines for Legislation on the Psychiatric Hospitalization of Adults*,<sup>195</sup> *Hendricks* would not have been eligible for civil commitment. The APA argued in its amicus brief:

The connection between the criminal standard and the standard for permissible involuntary civil commitment under a *parens patriae* power [and the NGRI test] is natural, if not inevitable: lack of substantial responsibility for one’s own actions has traditionally been the central justification both for excusing criminal liability and for allowing state intervention for the *parens patriae* purpose of taking care of “persons incapable of looking after their own interests.” Not surprisingly, an equation of the “mental illness” standard for civil commitment and the criminal law concept of insanity not only has historical roots but also has sometimes been assumed by this Court.<sup>196</sup>

Kansas law embodies a sharp dichotomy between general civil commitment standards, which require incompetence, and the Kansas sex offender act, which encompasses mental abnormalities.<sup>197</sup> By contrast, several California laws besides the SVPA have been challenged

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capacity to appreciate the criminality of his conduct and conform his behavior to the requirements of law) (footnote omitted).

191. See CAL. PENAL CODE § 25.5.

192. *People v. Morisawa*, 178 P. 888, 888 (Cal. 1919) (rejecting the argument that a jury instruction should have included an indication that, to be found guilty, the defendant had to have the “power” or “volition” to act) (quoting *People v. Hoin*, 62 Cal. 120, 121 (1882)).

193. *Kansas v. Hendricks*, 521 U.S. 346, 347 (1997).

194. APA Brief, 1996 WL 469200, at \*13.

195. See *id.* at \*22 (citing *American Psychiatric Association’s Guidelines for Legislation on the Psychiatric Hospitalization of Adults*, 140 AMER. J. PSYCH. 672 (1983) (proposing that involuntary commitment should be contingent upon inability to “engage in a rational decision-making process regarding . . . hospitalization or treatment”) [hereinafter “APA Guidelines”]).

196. *Id.* at \*26 (citations omitted).

197. See *id.*

because they apply to persons who could not have pled NGRI. Indeed, the courts and the California Legislature have struggled with the gray area between madness and badness for more than a decade. The principal source of contention prior to the SVPA was the disparity between standards for legal incompetence, insanity acquittal, and commitment under the LPSA<sup>198</sup> and the MDOL.<sup>199</sup>

Both the LPSA and the MDOL apply to persons with mental disorders. However, in contrast to the mental disorder requirement of the SVPA, a "severe mental disorder" under the MDOL does not include personality or adjustment disorders.<sup>200</sup> The MDOL explicitly targets offenders "about to be released on parole" and, before the legislature amended it in 1989, it did not require a finding of present danger to others.<sup>201</sup> In 1988, a California appellate court found that the old MDOL violated the Equal Protection Clause by subjecting the appellant to "a commitment standard more lenient and a release standard more stringent than that required for the involuntary commitment and treatment of any other mentally disordered person in California."<sup>202</sup> The court in *People v. Gibson* also noted the irony of committing people under the MDOL when they were legally sane for the purposes of sentencing.<sup>203</sup> The legislature responded to the *Gibson* ruling by enacting urgency legislation, effective July 27, 1989, requiring proof that the mentally disordered predator "represent[ ] a substantial danger of physical harm to others."<sup>204</sup> Because the SVPA demands proof of dangerousness beyond a reasonable doubt, it meets one of the chief objections to the old MDOL. However, the disharmony with the NGRI defense has not been remedied. In fact, the California Legislature amended the SVPA to clarify that an sexually violent predator may be someone found NGRI of a sexually violent offense.<sup>205</sup>

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198. See CAL. WELF. & INST. CODE §§ 5150, 5200, 5250(a), 5300(a)-(c). The LPSA provides for 180 days of confinement for an individual who was taken into custody for inflicting or attempting to inflict physical harm upon another, or who inflicted or attempted to inflict such harm while in custody for evaluation and treatment. The Act requires that the person present "a demonstrated danger of substantial physical harm to the others" as a result of a "mental disorder." See *id.* § 5300.

199. See *id.* § 2962.

200. See *People v. Superior Court (Myers)*, 58 Cal. Rptr. 2d 32, 38 n.7 (Cal. App. Ct. 1996).

201. See *supra* notes 62 & 63 and accompanying text.

202. *People v. Gibson*, 252 Cal. Rptr. 56, 63 (Cal. App. Ct. 1988).

203. See *id.* at 1430 n.5.

204. CAL. PENAL CODE § 2962(d)(1) (West 1999); see also *Superior Court (Myers)*, 58 Cal. Rptr. 2d at 35.

205. See *Hubbart v. Superior Court*, 969 P.2d 584, 608 n.34 (Cal. 1999).

The Supreme Court decision in *Foucha* complicated the relationship between insanity findings in the guilt phase and other mental health determinations by conflating the standards for criminal and civil commitment. By requiring present mental illness for the extension of an NGRI commitment, *Foucha* destroyed the boundary separating insanity acquittees from dangerous-but-sane persons confined under civil statutes.<sup>206</sup> Before *Foucha*, courts assumed that the civil standard should be higher because predictions of future dangerousness are less certain than confinement based on the past crimes of an NGRI acquittee.<sup>207</sup> The dissent said of the negative ramifications of *Foucha*:

Because the majority conflates the standard for civil and criminal commitment, treating this criminal case as though it were civil, it upsets a careful balance relied upon by the States, not only in determining the conditions for continuing confinement, but also in defining the defenses permitted for mental incapacity at the time of the crime in question.<sup>208</sup>

The enactment of the SVPA in 1996 thus came at a time when the distinction between mad and bad was especially confused, and the SVPA intensified the uncertainty by encompassing both convicted persons and NGRI acquittees.

## **B. Guilty But Mentally Ill: A Middle Road Between Mad and Bad**

Conservative voices such as Justices Thomas and Kennedy often deny the authority of the medical profession to make legal determinations. This effort to divorce law from science is ironic in the case of sex offender commitments which depend upon proof of a mental disorder. The courts are equally wary of the mental profession's influence on findings of guilt or innocence. For example, Justice Kennedy

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206. See *Foucha v. Louisiana*, 504 U.S. 71, 83 (1997) (holding that an insanity acquittee who no longer had mental illness was no longer legally insane and thus could only be committed under constitutional protections applicable to civil proceedings); see also *id.* at 89-101 (Kennedy, J., dissenting) (complaining that the *Foucha* majority opinion silently overruled *Jones v. United States*, 463 U.S. 354, 365-69 (1983)). Justice Kennedy disagreed with the majority's conflation of the civil and criminal standards on the grounds that:

Present sanity would have relevance if petitioner had been committed as a consequence of civil proceedings, in which dangerous conduct in the past was used to predict similar conduct in the future. It has no relevance here, however. Petitioner has not been confined based on predictions about future behavior but rather for past criminal conduct.

*Id.* at 97-98.

207. See *Jones*, 463 U.S. at 368 (noting that "insanity acquittees constitute a special class and should be treated differently from other candidates for commitment").

208. *Foucha*, 504 U.S. at 102 (Kennedy, J., dissenting).



criticized the *Foucha* Court for failing "to recognize or account for the profound differences between clinical insanity and state-law definitions of criminal insanity. It is by now well established that insanity as defined by the criminal law has no direct analog in medicine or science."<sup>209</sup>

The stark division between law and psychiatry presents the jury with an all-or-nothing decision at the guilt phase: the defendant either can or cannot distinguish between right and wrong. The APA's resolve to separate treatable and potentially untreatable persons has similarly bad effects. People who have mental problems but recognize the evil and savagery of their acts and those people with afflictions for which there is no certain cure fall into the cracks of our legal system and, when they emerge, their recidivism often exacts a horrifying price.

In recent years, however, at least thirteen states have acknowledged a gray area between madness and badness by a creating a new criminal verdict, GBMI.<sup>210</sup> GBMI statutes allow juries to hold the defendant responsible for his crime but recognize that he has a mental problem warranting treatment. At sentencing, the statutory maximum term may be imposed, thus ensuring that the label of criminal culpability is more than symbolic.

According to one author, states with GBMI verdicts fall into two categories.<sup>211</sup> Alaska, Kentucky, and South Carolina place primary emphasis on treatment. In these states, a defendant found GBMI first goes to a mental institution for therapy, finishing his prison sentence only after he completes the treatment program. This model addresses concerns that delaying treatment until after imprisonment is symptomatic of an underlying indifference to the offender's clinical pro-

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209. *Id.* at 96 (Kennedy, J., dissenting).

210. Alaska, Delaware, Georgia, Illinois, Indiana, Kentucky, Michigan, Montana, Nevada, New Mexico, Pennsylvania, South Carolina, South Dakota, and Utah have GBMI statutes. See ALASKA STAT., § 12.47.040 (1990); DEL. CODE ANN., tit. 11, §§ 401(b), 408 (1990); GA. CODE ANN. § 17-7-131 (1985); ILL. COMP. STAT. ANN. ch. 38, ¶ 115-2(b) (Smith-Hurd 1990); IND. CODE § 35-36-2-3 (1982); KY. REV. STAT. ANN. § 504.120 (Michie/Bobbs-Merrill 1990); MICH. COMP. LAWS § 768.36 (1982); MONT. CODE ANN. § 46-14-312 (1993); NEV. REV. STAT. ANN. § 174.035 (Michie 1997); N.M. STAT. ANN. § 31-9-3 (Michie 1984 & Supp. 1994); 18 PA. CONS. STAT. § 314 (1988); S.C. CODE ANN. § 17-24-20 (Law Co-op 1985 & Supp. 1997); S.D. CODIFIED LAWS § 23A-7-2 (Michie 1998); UTAH CODE ANN. §§ 77-13-1, 77-16a-102 (1993).

211. See Mark A. Woodmansee, Student Article, *The Guilty But Mentally Ill Verdict: Political Expediency at the Expense of Moral Principle*, 10 NOTRE DAME J. L. ETHICS & PUB. POL'Y 341, 358 (1996).

gress.<sup>212</sup> The second and larger category of states seems more interested in punishment; psychiatric care is provided only as the Department of Corrections deems necessary.<sup>213</sup> However, in both types of jurisdiction, lay factfinders who determine the individual's mental state at the time of the offense may allow rehabilitative goals to guide their choice of GBMI, instead of guilty.<sup>214</sup>

Opponents of the GBMI verdict offer some predictable arguments. Chief among them is the paternalistic assumption that juries, confused by the new legal jargon, will fail to return NGRI decisions for the genuinely insane.<sup>215</sup> Note, however, that in some states a defendant must plead insanity in order to be found GBMI; consequently, individuals who hope to receive the middle sentence of GBMI may end up being acquitted on insanity grounds. Studies indicate that GBMI statutes have actually increased the number of insanity acquittals in a few states,<sup>216</sup> and although the data is inconclusive, the idea that GBMI has killed the insanity defense appears to be unfounded.

Another concern involves the possibility that legislative provisions for treatment are nothing more than a pretext. Just as sections 6606(a) and 6606(c) of the SVPA must be adequately funded if involuntary commitment is to be therapeutic rather than punitive, the GBMI verdict serves no purpose without bona fide treatment. The allegation that the rehabilitative aims of GBMI are a sham finds support in statistics about the statutes' implementation. For example, supporters of the verdict admit that, in Michigan in the 1980s, seventy-five percent of all GBMI defendants received no therapy at all, and a significant portion of the rest were examined only sporadically.<sup>217</sup>

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212. Several courts have questioned the belated nature of the therapy provided under involuntary civil commitment statutes, for example. *See, e.g.,* *Young v. Weston*, 898 F. Supp. 744, 752 (W.D. Wash. 1995).

213. *See* Woodmansee, *supra* note 211, at 358.

214. *See* Christopher Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 518 (1985).

215. *See, e.g.,* Woodmansee, *supra* note 211, at 364-68.

216. For example, the frequency of insanity acquittals after the implementation of the GBMI verdict increased in Illinois, but decreased in Alaska and Georgia. *See* Slobogin, *supra* note 214, at 506.

217. *See* Ira Mickenburg, *A Pleasant Surprise: The Guilty But Mentally Ill Verdict Has Both Succeeded in its own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943, 992 (1987) (citing Smith & Hall, *Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study*, 16 U. MICH. J.L. REFORM 77, n. 137 (1982)).

Many states in which treatment is discretionary have completely neglected to fund psychiatric programs.<sup>218</sup>

One writer emphasizes the symbolic power of the GBMI verdict in allaying public fears about feigned madness.<sup>219</sup> Yet, while citizens often blame recidivism on the insanity defense, the problem more likely stems from shortcomings in parole and post-acquittal supervision. The value of the GBMI verdict, combined with longer criminal sentences, inheres not in its negligible effect on the insanity defense, but in its utility in earmarking legally-sane but mentally-disordered offenders for a combination of punishment and therapy. This potential will remain unrealized until legislatures, courts, and psychiatric professionals make a concerted effort to develop adequately-funded and scientifically-sound treatment protocols.

### Conclusion

In the struggle against sexual violence, proponents and detractors of involuntary civil commitment have failed to bridge the gap between psychiatry and law. Courts and legislatures deserve blame for inventing a medicalized rationale for shuttling dangerous criminals to mental facilities and then denying the authority of the psychiatric profession to shape legal definitions. Similarly, doctors anxious to preserve resources for other mental patients have been too reluctant to explore avenues of treatment, such as Depo-Provera, which may benefit sexual predators.

With regard to sexual predation, the public's fear of recidivists admittedly approaches hysteria. It is doubtful that legislators would go to similar lengths to address the compulsive behavior of kleptomaniacs or arsonists. Yet, the Equal Protection Clause "does not require the State to choose between attacking every aspect of a public danger or not attacking any part of the danger at all."<sup>220</sup> As a California court recently observed, it is difficult to believe that our Constitution "was intended to preclude the institutionalization and treatment of . . . [a child molester whose] mental disorder causes him to have and even to announce his unwavering determination to attack the first child unfortunate enough to cross his path after his release."<sup>221</sup> Although pre-

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218. See *id.* at 992 & n. 236 (offering Georgia as an example).

219. See *id.* at 977, 994.

220. In the Matter of the Care and Treatment of Hendricks, 912 P.2d at 151 (Larson, J., dissenting), *rev'd*, *Kansas v. Hendricks*, 521 U.S. 346 (1997).

221. *Garcetti v. Superior Court*, 57 Cal. Rptr. 2d 420, 434 (Cal. App. Ct.) (footnote omitted), *rev. granted*, 61 Cal. Rptr. 2d 84 (Cal. 1997).

dicting future violence on the basis of past sex crimes is fraught with uncertainty, the SVPA's critics offer no protection against individuals like Earl Shriner, who spent the last days of his prison term drawing blueprints for an elaborate mobile torture chamber for children.<sup>222</sup> Consecutive or indeterminate sentences and more intensive prison treatment programs cannot accomplish the chief aim of the SVPA and its counterparts outside California—preventing the recidivism of sex offenders currently nearing the end of their criminal sentences.

The approach suggested in this article is two-fold. First, California's Sexually Violent Predator Act should continue to be upheld unless the state refuses to respect the offenders' right to treatment. Reciprocally, the right to refuse therapies approved by the medical community must be drastically circumscribed to prevent seriously disturbed individuals from hampering their own rehabilitation. Second, the use of medical discourse for legal ends requires consistency in all stages of an offender's progress through the courts. If involuntary civil commitment statutes recognize a middle ground between madness and badness, the jury must have the option of doing the same when it returns a verdict. Discretion to order therapy for guilty but mentally ill defendants must not devolve into indifference. Like the treatment provisions bolstering the SVPA, the GBMI laws will be stronger if the courts demand that legislators put their money where their rhetoric is.

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222. See Fujimoto, *supra* note 4, at 882.