

'TO CATCH A PREDATOR,' ARE WE CASTING OUR NETS TOO FAR?: CONSTITUTIONAL CONCERNS REGARDING THE CIVIL COMMITMENT OF SEX OFFENDERS

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INTRODUCTION

A man walks into a house he assumes is only occupied by the underage girl he has been chatting with on the Internet. Instead, he is met with cameras, reporters, and police. The scene is a familiar one, and is one that millions of Americans have witnessed on *Dateline NBC*. But where those millions of Americans can turn off their television and move on with their life, the repercussions for those individuals targeted by *Dateline's* "To Catch a Predator" could last a lifetime.¹ For the more than two hundred individuals caught and convicted as a result of "To Catch a Predator,"² and for countless other qualifying individuals across our country, civil commitment statutes provide a safety net to allow nineteen states' governments to decide whether these individuals may be subjected to an indefinite term of confinement following their already-served prison sentence.

Sexually Violent Predator Acts ("SVPAs") have been hotly contested since their inception.³ In general, these laws allow a state

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1. See MSNBC, *Dateline NBC: To Catch a Predator With Chris Hansen*, <http://www.msnbc.msn.com/id/10912603/> (last visited Mar. 5, 2010).

2. Chris Hansen, *Reflections on To Catch a Predator, Transcript*, <http://www.msnbc.msn.com/id/17601568/> (last visited Mar. 22, 2010).

3. See, e.g., Andrew Horowitz, *Sexual Psychopath Legislation: Is There Anywhere to Go but Backwards?*, 57 U. PITT. L. REV. 35, 53-66 (1995) (criticizing Washington's SVPA as well as noting its potential for constitutional violations); Stephen J. Morse, *Kansas v. Hendricks and its Implications for Civil Commitment: Fear of Danger, Flight from Culpability*, 4 PSYCHOL. PUB. POL'Y & L. 250, 256-66 (1998) (criticizing the potential scope of sexual predator commitment laws); Tanya M. Montano, Comment, *Will California's Sexually Violent Predators Act Survive Constitutional Attacks?*, 39 SANTA CLARA L. REV. 317 (1998) (evaluating the constitutionality of California's SVPA).

to institutionalize a sexually violent offender after he or she serves a prison sentence for one or more predicate offenses and has been diagnosed with a mental abnormality.⁴ While the broader constitutional challenge to their existence was extinguished with a U.S. Supreme Court decision in 1997,⁵ the individual states' SVPAs remain open to interpretation and revision at the state judicial and legislative levels.

The focus of this Note will be the unconstitutionality of the New Jersey Sexually Violent Predator Act ("the SVPA" or "the Act").⁶ However, it is important first to examine the reasoning behind acts of this nature, and the characteristics of the individual offenders they affect. Part I of this Note examines the psychological problem of sexual predators: the mental conditions that afflict them and the unfortunate truth that these conditions are accompanied by a tendency to reoffend.⁷ Part I will also address the social stigmas that have encouraged the enactment of SVPAs, and the questionable diagnostic tools used by mental health experts in commitment hearings to convince judges of an individual's need for treatment.⁸

Part II will discuss the genesis and structure of SVPAs around the country.⁹ Modern sexual predator statutes came about in Washington in 1990.¹⁰ Although states have taken various approaches in enacting SVPAs, state legislatures across the country share a common desire to address the recidivism of sex offenders through commitment procedures.¹¹ While protecting the public is a genuine state concern, it is also important to understand that the problem of prison overcrowding is what ultimately led to the use of rehabilitative statutes to manage overflow.¹² Part II also examines the U.S. Supreme Court decision that upheld the constitutionality of the Kansas SVPA,¹³ as well as the standards of proof and due process protections that the Supreme Court has established for commitment proceedings under acts of this nature.¹⁴

Part III will address the New Jersey SVPA specifically.¹⁵ The

4. See N.J. STAT. ANN. §§ 30:4-27.24 to 30:4-35 (West 2008).

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

6. N.J. STAT. ANN. §§ 30:4-27.24 to 30:4-35.

7. See *infra* Part I.

8. See *id.*

9. See *infra* Part II.

10. See WASH. REV. CODE ANN. §§ 71.09.010 to 71.09.902 (West 2008).

11. See *infra* Part II.

12. See *id.*

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

14. See *id.*

15. See *infra* Part III.

New Jersey Sexually Violent Predator Act is the mechanism under which previously convicted sexual predators are confined to a period of involuntary civil commitment at a state-run mental institution.¹⁶ Statutes of this nature require a two-prong finding before committing someone: 1) the individual must have previously been convicted of or pled guilty to a sexually violent predicate offense, and 2) the State must prove at a dangerousness hearing by clear and convincing evidence that the individual is mentally abnormal and prone to recidivate.¹⁷ Although each state's SVPA enumerates specific "sexually violent" offenses, states differ in how they define the non-enumerated offenses that may also qualify as predicate convictions.¹⁸ This Note will examine a discretionary provision in the New Jersey SVPA, also present in South Carolina's legislation,¹⁹ that allows a trial judge to determine which offenses he or she considers to be "sexually violent" predicate convictions under the first prong of the Act.²⁰

Part III will discuss the procedural structure of the New Jersey SVPA, focusing ultimately on its predicate offense requirements.²¹ The Note will then briefly discuss how the SVPA and other statutes around the country have affected individuals committed thereunder.²² Two New Jersey state court decisions have addressed the discretionary provision of the SVPA.²³ Part III will examine these decisions for their ultimate effect on who may be considered under the Act.²⁴

Finally, Part IV will set forth the argument that the discretionary provision of the SVPA is unconstitutionally vague and overbroad, relying on principles of federal due process.²⁵ The Note will conclude with a recommendation to state legislatures to more adequately tailor statutes of this nature so as not to affect an improper segment of society and deprive individuals of their constitutional rights.²⁶

16. See N.J. STAT. ANN. §§ 30:4-27.24 to 30:4-35 (West 2008).

17. See *id.* § 30:4-27.26.

18. See *infra* Part III.

19. See S.C. CODE ANN. § 44-48-30(2)(o) (2002).

20. See N.J. STAT. ANN. § 30:4-27.26.

21. See *infra* Part III.

22. See *id.*

23. See *id.*

24. See *id.*

25. See *infra* Part IV.

26. See *infra* Conclusion.

I. THE PSYCHOLOGICAL PROBLEM OF SEXUAL PREDATORS

An inquisition into the nature of civil commitment for sexual predators also requires a comprehension of the mental illnesses that drive individuals to engage in sexually deviant behavior. After all, the civil commitment of sex offenders was born out of the same perceived need for treatment that is imposed on the rest of society's dangerously mentally ill.²⁷

As a preliminary matter, it is widely held that sexual violence is the result of mental defect or damage.²⁸ Mood disorders, including depression, bipolar disorder, and antisocial personality disorder, as well as attention-deficit disorder, have all been reported as prevalent among males²⁹ who engage in sexually violent or deviant behavior.³⁰

In April 2007, a study confirming this principle was published in the *Journal of Clinical Psychiatry*.³¹ The study found male sex offenders to have a much higher rate of mental illness and prior hospitalizations than the general public.³² Compared to the general population, male sex offenders are "six times more likely to have ever been hospitalized for a mental illness."³³ Male sex offenders are "five

27. Sexual psychopath legislation was enacted as early as 1937 as a response to the public's "fear, hatred, and hysteria" with regard to sexual offenses. Horowitz, *supra* note 3, at 38-39. The theory of state legislatures at that time was that if the so-called "sexual psychopaths" could be detained indefinitely for mental health treatment, it would decrease the amount of repeat offenses and appease public outcry. *Id.* at 37-39. It is no coincidence, however, that sexual psychopath legislation emerged on the heels of the teachings of Sigmund Freud and an increased recognition of the field of psychiatry. *Id.* at 39 (citing GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE 30S TO THE 80S*, at 853 (1977)). Regardless of the driving forces, "the psychiatric ability to diagnose and treat sexual dangerousness [was] far exceeded [by] the established capabilities of the profession" at the time these laws were created. *Id.*

28. See NATHANIEL J. PALLONE, *REHABILITATING CRIMINAL SEXUAL PSYCHOPATHS: LEGISLATIVE MANDATES, CLINICAL QUANDARIES* 3 (1990).

29. The focus of this Note will be on issues affecting male sex offenders, as males are responsible for the majority of sexually-based crimes. See Franca Cortoni and R. Karl Hanson, *A Review of the Recidivism Rates of Adult Female Sexual Offenders*, CORRECTIONAL SERV. CAN., 2005, at i, available at http://www.csc-scc.gc.ca/text/rsrch/reports/r169/r169_e.pdf. To that end, it is noteworthy that in a 2005 international study, female offenders were found to be responsible for approximately four to five percent of sexual crimes. See *id.*

30. See Robert A. Prentky et al., *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 PSYCHOL. PUB. POL'Y & L. 357, 365 (2006).

31. Amy Norton, *Sex Offenders Have Higher Rate of Mental Illness*, REUTERS, May 17, 2007, available at <http://www.reuters.com/article/healthNews/idUSCOL76032420070517> (citing Bret R. Rutherford, M.D. et al., *A Survey of Psychiatry Residents' Informed Consent Practices*, 68 J. CLINICAL PSYCHIATRY 4, 588 (Apr. 2007)).

32. *Id.*

33. *Id.*

times more likely to have been hospitalized for schizophrenia or other psychotic disorders, and [are] three times more likely to have a history of bipolar disorder.”³⁴ They also suffer “a four-fold greater risk of alcohol or drug dependency, and [are] thirty times more likely” to be diagnosed with a personality disorder.³⁵ All in all, the study found that twenty-four percent of male sex offenders had a history of hospitalization for mental illnesses, whereas only five percent of men in the general population have a similar history.³⁶

In addition to various personality disorders, a large percentage of sexual predators are also diagnosed with forms of paraphilia and pedophilia, which are terms used by diagnostic manuals to describe sexually abnormal behavior.³⁷ Paraphilia is characterized by distressing and “recurrent, intense sexual fantasies, sexual urges, or behaviors” that occur over a significant period of time and interfere with “social, occupational, or other important areas of functioning.”³⁸ Pedophilia is characterized by “intense sexually arousing fantasies, urges, or behaviors involving sexual activity with a prepubescent child (generally age 13 years or younger).”³⁹ Both conditions are marked by high rates of recidivism.⁴⁰

These mental conditions do not always come about solely because of a chemical imbalance; nurture is as important to mental health assessments as nature. The unfortunate truth is that a high percentage of sex offenders were once victims of sexual abuse themselves.⁴¹ This phenomenon has been observed in minors and

34. *Id.*

35. *Id.*

36. *Id.*

37. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM IV) § 302.2 (4th ed. 1994), available at <http://www.psychiatryonline.com/content.aspx?aID=10307>.

38. *Id.* Psychiatry Online, Paraphilias: Diagnostic Features, <http://www.psychiatryonline.com/content.aspx?aID=10252>.

39. AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 37, at § 302.2.

40. *Id.* (“The frequency of pedophilic behavior often fluctuates with psychosocial stress. The course is usually chronic, especially in those attracted to males. The recidivism rate for individuals with Pedophilia involving a preference for males is roughly twice that for those who prefer females.”)

41. See, e.g., Christopher Bagley, *Characteristics of 60 Children and Adolescents with a History of Sexual Assault Against Others: Evidence from a Comparative Study*, 3 J. FORENSIC PSYCHIATRY 299, 300 (1992) (“Existing studies . . . indicate that being a victim of child sexual assault significantly increases the risk of becoming an offender. . . .”); Earl F. Martin & Marsha Kline Pruett, *The Juvenile Sex Offender and the Juvenile Justice System*, 35 AM. CRIM. L. REV. 279, 298 (1998) (“Perhaps the most widely reported shared experience among young sex offenders is a history of sexual victimization.”); Robert Prentky & Ann Wolbert Burgess, *Rehabilitation of Child Molesters: A Cost-Benefit Analysis*, 60 AM. J. ORTHOPSYCHIATRY 108, 114 n.4 (1990)

adult sex offenders alike, but often manifests itself in the form of sex offenses perpetrated by juveniles.⁴² Regardless of the psychological factors that drive individuals to engage in sexual violence, academics in the field remain skeptical that post-conviction mental health treatment for individuals diagnosed with sexual psychopathy is actually effective, and have questioned the true legislative motives for implementing forced treatment.⁴³

A. Mental Health Experts and Civil Commitment Proceedings

Mental health experts are widely used to perform the clinical evaluations that help commitment judges determine whether an individual is sexually violent and/or dangerous.⁴⁴ In many commitment proceedings, the testimony of mental health experts for the prosecution is the only live testimony offered.⁴⁵ Given their importance to the commitment process, it is important to discuss several issues raised by the methods and mechanisms that these experts utilize in making their diagnoses.

As a general matter, the civil commitment of sex offenders presents unique considerations for determining mental capacity *after* an individual has entered a plea or been convicted of a predicate crime. As Nathaniel Pallone has aptly noted, a defendant's mental health or illness is not broached in a criminal trial unless the defendant pleads insanity.⁴⁶ In commitment cases, an individual is

("Perhaps the most critical hidden impact [of sexual victimization] is the suspected cyclic perpetuation of child sexual abuse. A high percentage of child molesters were themselves sexually victimized.").

42. Martin & Pruett, *supra* note 41, at 298 (citing M. E. Ford & J. A. Linney, *Comparative Analysis of Juvenile Sexual Offenders, Violent Nonsexual Offenders, and Status Offenders*, J. INTERPERSONAL VIOLENCE 56, 57 (1995) ("Prior sexual victimization of sex offenders has been a consistent finding across the adult and juvenile literature.")).

43. See, e.g., PALLONE, *supra* note 28, at 80 (1990) ("Indeed, the most egregious gap in the literature on sex offenders is the virtual absence of carefully constructed, scientifically respectable outcome studies on the effectiveness of those therapeutic methods that represent the 'mainstream' measures in legislatively-mandated mental health treatment for criminal sexual deviancy."); Karol Lucken & Jessica Latina, *Sex Offender Civil Commitment Laws: Medicalizing Deviant Sexual Behavior*, 3 BARRY L. REV. 15, 35 (2002) (describing differing opinions held by mental health clinicians and criminal prosecutors as to the actual effectiveness of treatment for sexual psychopaths examined in a Florida study); Prentky et al., *supra* note 30, at 380 ("Although all of the SVP laws profess a treatment purpose, it seems to be distinctly subordinate to the . . . purpose of incapacitation.").

44. DENNIS M. DOREN, *EVALUATING SEX OFFENDERS: A MANUAL FOR CIVIL COMMITMENTS AND BEYOND* 3-4 (2002).

45. See *id.* at 184-88 (describing the kinds of testimony provided by mental health experts).

46. PALLONE, *supra* note 28, at 1.

declared insane *after* pleading or being found guilty of a crime.⁴⁷ For those mental health professionals involved in the commitment process, their task becomes that of differentiating between convicted offenders who are both “guilty and mentally ill” (i.e. criminal sexual psychopaths) and those who are “‘mere’ felony sex offenders.”⁴⁸

Critics have also expressed skepticism regarding the diagnostic tools used by our nation’s mental health experts, namely the validity of the Diagnostic and Statistical Manual of Mental Disorders (DSM).⁴⁹ The DSM currently serves as the diagnostic manual most widely accepted and depended upon for psychological assessments in the United States.⁵⁰ Presently, the DSM references 297 possible mental diagnoses in its 886 pages of text.⁵¹ Since its initial publication in 1952, the DSM’s list of diagnoses “ha[s] ballooned by almost 300% and the book itself has increased by 800% in length.”⁵² While the indicators of core mental illnesses like schizophrenia and manic-depression have not changed throughout the DSM’s revisions, what has been added are other “mental illnesses” that have “little connection with disease” or loose biological ties with the condition’s outward manifestations.⁵³ All of the seventeen sexual disorders in the DSM, such as Exhibitionism, Pedophilia, and Sexual Sadism, are recognized as mental illnesses despite “little to no empirical evidence of any underlying disease process that could account for their existence.”⁵⁴

The lack of a biological or chemical basis for sexual disorders presents a problem when trying to justify civil commitment of sex offenders as a means of effective treatment towards a constructive end. While the DSM, considered as a diagnostic tool alone, cannot affect the individual liberties of a person afflicted with one of its designated mental diseases, where the law borrows its ideas, it has the capability to enforce sanctions on those affected by its findings.⁵⁵ According to some critics, to include pedophilia and other sexual

47. *Id.*

48. *Id.* at 57.

49. DOREN, *supra* note 44, at 54.

50. *Id.*

51. Steven K. Erickson, *The Myth of Mental Disorder: Transsubstantive Behavior and Taxometric Psychiatry*, 41 AKRON L. REV. 67, 113 (2008).

52. *Id.*

53. *Id.* at 113-14.

54. *Id.* at 114. Professor Erickson supports this contention by referencing a “cross-search” performed on the online psychological database PSYCHINFO of any overlap in the terms “pedophilia” and “biology,” as well as “neurobiology” and “paraphilias.” *Id.* at n.254. Any cross-reference between these terms yielded no biological explanation for the two mental illnesses. *Id.*

55. *See id.* at 118.

disorders into a civil commitment scheme which views them as mental diseases despite any biological connection is a treacherous road.⁵⁶ Furthermore, even professionals in the field have expressed the view that the DSM “often leaves [a] clinician without sufficient guidance for diagnostic situations common to incarcerated sex offenders,” as each individual brings his or her own unique circumstances to a diagnosis.⁵⁷ Through civil commitment procedures, the law has been able to manipulate mental illness diagnoses with a suspect level of reliability to achieve what some could see as a politically desirable end: the long-term or indefinite confinement of a class of people viewed as socially undesirable.⁵⁸

B. Recidivism Rates For Sexual Offenses

Although our justice system may be incapable of, or simply uninterested in, rehabilitating sexually violent behavior, incapacitation of offenders also serves the purpose of protecting the public from reoffense. While states may have an auxiliary interest in rehabilitating sex offenders, legislation with a strictly paternalistic interest still passes constitutional muster.⁵⁹

A 2003 study conducted by the U.S. Department of Justice (“DOJ”) investigated the recidivism rates of 9691 violent male sex offenders⁶⁰ released in 1994 from fifteen states’ prisons, including

56. *Id.* at 119.

57. DOREN, *supra* note 44, at 54-55 (noting the shortcomings of the DSM-IV, yet encouraging reviewing clinicians in civil commitment hearings to formulate sexual diagnoses on a conceptual basis so as to avoid the semantic difficulties that relying on the DSM’s definitions present on cross-examination).

58. Erickson, *supra* note 51, at 118; *see also* PALLONE, *supra* note 28, at 13-14 (“The ‘creation’ of sexual psychopathy as a ‘diagnostic’ category with massive legal criminal justice ramifications seems to constitute a particular instance of . . . legislative ‘group think’ that, indeed, even runs counter to contemporary psychiatric group think.”) (emphasis in original). Pallone also hints at the overly-broad manner in which the law classifies “sexual behavior” as encompassing anything from forcible rape to consenting unions between adults of the same sex. *Id.* It is noted that Pallone’s opinions on this issue were published prior to the U.S. Supreme Court’s decision in *Lawrence v. Texas* which struck down criminal anti-sodomy statutes as unconstitutional. *See* 539 U.S. 558 (2003).

59. *See Kansas v. Hendricks*, 521 U.S. 346, 366 (1997) (“While we have upheld state civil commitment statutes that aim both to incapacitate and to treat . . . , we 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.”).

60. *See generally* PATRICK A. LANGAN ET AL., DEP’T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (2003), <http://bsj.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf>. For the purposes of this study, “sex offenders” encompassed two mutually exclusive classifications: “rapists” and “sexual assaulters.” *Id.* at 3-4. Of the 9691 individuals studied, 3115 were male rapists and the remaining 6576 were male sexual assaulters. *Id.* All of the

New Jersey.⁶¹ The DOJ differentiated these individuals as “violent” based on the definitions of violence widely used in state sex offender statutes.⁶² The study found that sex offenders were four times more likely to be rearrested for a sex crime than non-sex offenders.⁶³ The more prior arrests a sex offender had, the more likely he was to reoffend after his release, culminating in a 67 percent reoffense rate for released sex offenders with sixteen or more prior arrests.⁶⁴ Of the 4738 child molesters and statutory rapists studied, 39.4 percent of child molesters and 49.9 percent of statutory rapists were rearrested for some other crime (although not necessarily a sex crime) within three years of their release from prison in 1994.⁶⁵

The possibility of reoffense has been a primary concern for state legislatures choosing to enact SVPAs. Indeed, a concern for recidivism rates is expressly mentioned in many of the legislative findings underlying states’ SVPAs.⁶⁶ However, sex offenders are not the only criminals who are prone to reoffense,⁶⁷ and have been shown to be unresponsive to current treatment techniques.⁶⁸ In most cases, legislatures are more interested in using an already-existing civil commitment scheme to excise a disfavored segment of society than in preventing recidivism through effective treatment.⁶⁹ Unfortunately,

individuals studied had a served a prison sentence of more than one year. *Id.* at 9.

61. *Id.* at 1. Again, it is noted that this study focused on the recidivism of male sex offenders. For an explanation of recidivism rates for female sex offenders, see Cortoni & Hanson, *supra* note 26, at i (finding that a “weighted average across studies resulted in an observed sexual recidivism rate for female sexual offenders of 1.0%”).

62. LANGAN ET AL., *supra* note 60, at 3. Examples of violent sex offenses that the DOJ listed included “forcible rape,” “statutory rape,” “sexual misconduct,” “criminal sexual conduct,” “lewd act[s] with [a] minor,” “indecent liberties with a child,” and “child molesting.” *Id.* Examples of nonviolent sex offenses included “morals and decency offenses” such as indecent exposure, bestiality, bigamy, and even adultery. *Id.*

63. *Id.* at 1.

64. *Id.* at 21.

65. *Id.* at 15. *But see* John Douard, *Sex Offender as Scapegoat: The Monstrous Other Within*, 53 N.Y.L. SCH. L. REV. 31, 40 (2008) (viewing concurrent findings of the same DOJ study to show the recidivism rate to be “relatively low”).

66. *See* N.J. STAT. ANN. § 30:4-27.25 (West 2008) (“Certain individuals who commit sex offenses suffer from mental abnormalities or personality disorders which make them likely to engage in repeat acts of predatory sexual violence if not treated for their mental conditions.”); S.C. CODE ANN. § 44-48-20 (2002 & Supp. 2008); WASH. REV. CODE ANN. § 71.09.010 (West 2008).

67. Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 6 (2003) (noting that “[b]urglars, check forgers, and even killers can be repeat offenders” which may provide a state with a compelling interest in protecting the public).

68. *See* Lucken & Latina, *supra* note 43, at 35; *see also* Prentky et al., *supra* note 30, at 380.

69. *See* Prentky & Burgess, *supra* note 41, at 109 (noting the lack of any real

this scheme is also founded upon harmful stigmas towards the mentally insane.

C. Social Stigmas Towards Sexual Predators and the Mentally Insane

While recidivism is a genuine concern raised by acts of sexual violence, one of the main forces driving the call for civil commitment of sexual psychopaths is the social stigma attached to mental illness and sexual abuse.⁷⁰ “The assumption of a connection between violence and mental illness has played an animating role in the prominence of ‘dangerous to others’ as a criterion for civil commitment . . . in the creation of special statutes for the extended detention of prisoners with mental illness.”⁷¹

In general, society’s view of mental illness has historically been one of intolerance rather than compassion. Indeed, the U.S. Supreme Court has noted that “[t]he loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement.”⁷² The Court has recognized that “commitment to a mental hospital ‘can engender adverse social consequences to the individual’” and “[w]hether we label this phenomena ‘stigma’ or choose to call it something else . . . it can have a very significant impact on the individual.”⁷³ Some have argued that the “original legislative purpose underlying commitment laws” was not to rehabilitate the mentally ill, but rather “to isolate those persons who – for whatever reason – were regarded as intolerably obnoxious to the community.”⁷⁴

For sex offenders, social stigma is even stronger: sexual predators are stereotyped as “monsters” and “beasts” who lurk in bushes, “attacking strangers without provocation or warning.”⁷⁵ And indeed the idea of a man (or woman) who commits rape or who sexually abuses a child is one of the most horrific for us to contemplate. But not all individuals with sexually-based mental

analysis into the effectiveness of treatment programs in place at commitment facilities).

70. See John Monahan & Jean Arnold, *Violence by People with Mental Illness: A Consensus Statement by Advocates and Researchers*, 19 PSYCH. REHAB. J. 67, 67-68 (1996).

71. *Id.* at 68.

72. *Vitek v. Jones*, 445 U.S. 480, 492 (1980).

73. *Id.* (quoting *Addington v. Texas*, 441 U.S. 418, 425-26 (1979)).

74. See Alan M. Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions*, 23 J. LEGAL EDUC. 24, 40 (1970).

75. ERIC S. JANUS, *FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 2* (2006).

illness fit this predatory mold. While the majority of sexual violence is actually “perpetrated by acquaintances and intimates and family,” social stigma and media attention has exacerbated the archetype of the “sexually violent predator” who could attack at any time, drawing attention away from the more pervasive social problems of acquaintance rape or incest.⁷⁶

True, there are individuals whose criminal actions utterly vilify the notion of sexual psychopathy.⁷⁷ But this term is also dangerously overused, often for political or economical purposes. For example, in 2002, a reverend making a speech at a Southern Baptist Convention got nationwide news coverage for making the inflammatory, anti-Muslim statement that “Islam was founded by Muhammad, a demon-possessed pedophile who had 12 wives, the last one of which was a nine-year old girl.”⁷⁸ This accusatory mentality is often used to spark moral panic and “direct public anger and anxiety towards marginal individuals or groups.”⁷⁹ In reality, many felons who are labeled sex offenders under statutory definitions serve their underlying prison sentences for engaging in the statutory, albeit consensual, rape of post-pubescent adolescent girls,⁸⁰ yet society has found it fit to market teenage girls as sex objects when it is commercially advantageous.⁸¹ Because of the many varied forms that sexual

76. *Id.* at 2-3.

77. *See id.* (discussing the murders of several “young innocent[s]” at the hands of released sexual offenders).

78. *See* Daniel M. Filler, *Terrorism, Panic, and Pedophilia*, 10 VA. J. SOC. POL’Y & L. 345, 350-58 (2003) (explaining the politically convenient connections that have been drawn between terrorism and pedophilia in the wake of September 11 to evoke a social reaction).

79. *See id.* at 360 (describing the “[t]hree rhetorical moves” that are used to foster moral panic and social anxiety towards sex offenders).

First, in order to solidify hostility towards the offenders, claims-makers use melodramatic language that demonizes them, creating a stark contrast between the ‘evil’ deviants and the ‘good’ society. . . . Second, in order to heighten concern and promote consensus, they emphasize the randomness of the underlying incident, suggesting that anyone, anywhere might become the next victim. Third, in order to sustain public outrage[,] . . . claims-makers engage in domain expansion, identifying incidents substantially different than the triggering event as further examples of the underlying crisis.

Id.

80. *See* Douard, *supra* note 65, at 40.

81. *See* Steven Daly, *Britney Spears: Inside the Heart and Mind (and Bedroom) of America’s New Teen Queen*, ROLLING STONE MAG., Apr. 15, 1999, <http://www.rollingstone.com/news/coverstory/5938512/page>; *see also* Karen Franklin, *Invasion of the Hebephile Hunters*, IN THE NEWS: FORENSIC PSYCHOLOGY, CRIMINOLOGY, AND PSYCHOLOGY, Oct. 31, 2007, <http://forensicpsychologist.blogspot.com/2007/10/invasion-of-hebephile-hunters.html> (last visited Mar. 5, 2010) (describing

violence can actually take based on statutory civil commitment schemes, it is crucial that legislatures be specific as to who actually fits into the scheme of individuals presenting a real danger to society. To broaden this definition further would be to perpetrate an ongoing stereotype based in social hysteria rather than legitimate state interest.

II. THE GENESIS AND STRUCTURE OF SVPAS AROUND THE COUNTRY

In 1990, Washington passed the first modern sexual predator commitment legislation.⁸² This was done in part as a social response to the rape and sexual mutilation of a seven-year-old boy by Earl Shriner, a repeat sex-offender who had been recently released from prison.⁸³ Over the following years, eighteen more states and the District of Columbia have developed sexually dangerous persons acts, all allowing for the commitment and/or treatment of high-risk sex offenders who have already served time in prison for one or more predicate offenses.⁸⁴

The states that have enacted sexual predator commitment laws have taken several different approaches to their implementation.⁸⁵

how "hebephilia" or sexual attraction to adolescent girls has been incorporated into the diagnosis of pedophilia for commitment evaluations without a legitimate medical basis for the same).

82. See WASH. REV. CODE ANN. §§ 71.09.010-71.09.902 (West 2008); Roxanne Lieb, *Washington's Sexually Violent Predator Law: Legislative History and Comparisons with Other States* v (WASH. INST. FOR PUB. POL'Y, Dec. 1996) [hereinafter Lieb I]. As mentioned in Part I, *supra*, sexual psychopath statutes were enacted as early as 1937, but were remodeled and repealed in the subsequent decades due to changes in popular support and skepticism regarding their possible effect on individual civil liberties. See Horowitz, *supra* note 3, at 45-49.

83. Lieb I, *supra* note 82, at 1.

84. Roxanne Lieb, *Involuntary Commitment of Sexually Violent Predators: Comparing State Laws* 1 (Mar. 2005) [hereinafter Lieb II]. It is noted that the Illinois SVPA allows for the civil commitment and treatment of sexually violent predators, "but only as an alternative to criminal prosecution." Lieb I, *supra* note 82, at v.

85. To date, sexual predator legislation allowing for civil commitment has been enacted in Arizona, California, the District of Columbia, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin. See, e.g., ARIZ. REV. STAT. ANN. §§ 36-3701-3717 (2009); CAL. WELF. & INST. CODE §§ 6600-6609.3 (West Supp. 2009); D.C. CODE §§ 22-3803-3811 (2001); FLA. STAT. ANN. §§ 394.910-.932 (West 2006 & Supp. 2009); 725 ILL. COMP. STAT. §§ 205/0.01-205/12 (Lexis Nexis 2009); IOWA CODE ANN. §§ 229A.1-229A.16 (West 2006 & Supp. 2009); KAN. STAT. ANN. §§ 59-29a01-a22 (2009); MASS. GEN. LAWS ch. 123A §§ 1-16 (2003 & Supp. 2006); MINN. STAT. ANN. § 253B.185 (2009); MO. REV. STAT. §§ 632.480-.513 (2006 & Supp. 2009); N.D. CENT. CODE §§ 25-03.3-01 to 25-03.3-24 (2002 & Supp. 2005); N.H. REV. STAT. ANN. §§ 135-E:1-E:23 (2010); N.J. STAT. ANN. §§ 30:4-27.24 to 30:4-35 (West 2008); N.Y. MENTAL HYG. LAW §§ 10.01-.17 (McKinney Supp.

States like Illinois and Minnesota follow a “sexual psychopath” model, in which the state must choose between criminal prosecution of the individual and filing a sexual psychopath petition.⁸⁶ Laws following this model generally subject high-risk offenders to indefinite commitment terms.⁸⁷ States like California, Kansas, Washington and others follow a “post-prison commitment” model wherein individuals are committed to a correctional facility or mental hospital following their prison sentence.⁸⁸ New Jersey’s SVPA follows a “mental health” model, in which the law for commitment of sexual predators follows the state’s already existing mental health commitment laws.⁸⁹ This was done in part as a response to the legal challenges faced by Washington’s SVPA after it was enacted.⁹⁰ Regardless of the methodology used, states universally turned to SVPAs in an effort to address the high rates of reoffense for sexual predators.⁹¹

However, the surge of sexual predator legislation that followed Washington’s enactment of an SVPA can alternatively be seen as a means of solving the growing problem of prison over-crowding. In

2009); 42 PA. CONS. STAT. ANN. §§ 6401-6409 (West Supp. 2009); S.C. CODE ANN. §§ 44-48-10 to 44-48-170 (West 2002 & Supp. 2008); TEX. HEALTH & SAFETY CODE ANN. §§ 841.001-.147 (2003 & Supp. 2009); VA. CODE ANN. §§ 37.2-900-.2-920 (2005); WASH. REV. CODE ANN. §§ 71.09.010-.902 (West 2008); WIS. STAT. ANN. §§ 980.01-.14 (2007 & Supp. 2009), respectively. Texas’ SVPA exclusively provides for outpatient treatment of committed sex offenders. See TEX. HEALTH & SAFETY CODE ANN. § 841.081 (“If at a trial conducted under Subchapter D the judge or jury determines that the person is a sexually violent predator, the judge shall commit the person for outpatient treatment and supervision to be coordinated by the case manager.”) (footnote omitted). The Pennsylvania SVPA pertains exclusively to an apparently dangerous contingent of sexually violent youths who may be committed for juvenile delinquency related to sex crimes. See 42 PA. CONS. STAT. ANN. § 6401 (“This chapter establishes rights and procedures for the civil commitment of sexually violent delinquent children who, due to a mental abnormality or personality disorder, have serious difficulty in controlling sexually violent behavior and thereby pose a danger to the public and further provides for additional periods of commitment for involuntary treatment for said persons.”).

86. Lieb I, *supra* note 82, at 4-5; see generally 725 ILL. COMP. STAT. ANN. §§ 205/0.01-205/12; MINN. STAT. ANN. § 253B.185.

87. Lieb I, *supra* note 82, at v.

88. *Id.* at 5; see generally CAL. WELF. & INST. CODE §§ 6600-6609.3; KAN. STAT. ANN. §§ 59-29a01-a22; WASH. REV. CODE ANN. §§ 71.09.010-71.09.902.

89. Lieb I, *supra* note 82, at 5; see generally N.J. STAT. ANN. §§ 30:4-27.24 to 30:4-35.

90. Lieb I, *supra* note 82, at 5.

91. See, e.g., FLA. STAT. ANN. § 394.910 (West 2006); KAN. STAT. ANN. § 59-29a01 (2009); N.H. REV. STAT. ANN. § 135-E:1 (2010); N.J. STAT. ANN. § 30:4-27.25 (West 2008); PA. CONS. STAT. ANN. § 6401 (West Supp. 2009); S.C. CODE ANN. § 44-48-20 (2002); TEX. HEALTH & SAFETY CODE ANN. § 841.001 (2003 & Supp. 2009); WASH. REV. CODE ANN. § 71.09.010 (West 2008).

the 1980s and early 1990s, the Reagan and Bush administrations' sentencing reforms increased the penalties for drug crimes in conjunction with an overall "punitive" approach to addressing crime reform.⁹² This ultimately led to a massive overcrowding of prisons.⁹³ Faced with the problem of overcrowding and limited expenditures, state correctional systems turned to forms of intermediate punishment, such as "[h]ome confinement, electronic monitoring, boot camps, intensive supervision probation, and day-reporting centers."⁹⁴ However, state prisons also released many violent offenders, including sex offenders, from custody in an effort to make room for those convicted of serious drug crimes.⁹⁵ In short, the rise of sex offender civil commitment laws was, in part, a response to repeat sex crimes perpetrated by the very individuals who had previously been released by the state from overcrowded prisons.⁹⁶

A. *Kansas v. Hendricks: Upholding the Federal
Constitutionality of SVPAs*

In 1997, Leroy Hendricks, a convict with a long history of molesting children, challenged his civil commitment under the Kansas Sexually Violent Predator Act.⁹⁷ Hendricks challenged the statute on the grounds that it violated his substantive due process and equal protection rights, and on the grounds that it violated the Constitution's prohibitions against double jeopardy and *ex post facto* laws.⁹⁸ The U.S. Supreme Court upheld the constitutionality of the Kansas SVPA in its 1997 decision.⁹⁹

Specifically, the Court held that the Kansas SVPA does not

92. THOMAS G. BLOMBERG & KAROL LUCKEN, AMERICAN PENOLOGY: A HISTORY OF CONTROL 174-79 (2000).

93. *Id.* at 177-79.

94. *Id.* at 182.

95. *See* Lucken & Latina, *supra* note 43, at 15.

96. *Id.*

97. *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997). Hendricks first pled guilty to a sex-related crime in 1955 after being caught exposing himself to two young girls. *Id.* at 354. He subsequently was convicted of and served time for several sexual offenses including lewdness, molestation, and sexual assault of minor children. *Id.* Hendricks' most recent offense came in 1984 when he was "convicted of taking 'indecent liberties' with two 13-year-old boys." *Id.* at 353. Shortly before his scheduled release to a halfway house in 1994, the Kansas Attorney General petitioned for his civil commitment. *Id.* at 354. Hendricks admitted during his psychological assessment that he could not control the urge to molest children and stated that only death would prevent him from sexually abusing children in the future. *Id.* at 355. He "readily agreed with the state physician's diagnosis that he suffer[ed] from pedophilia," and told the physician that treatment was "bull----." *Id.*

98. *Id.* at 356.

99. *Id.* at 371.

offend federal due process because it requires a finding of both “dangerousness” and “mental abnormality” in following with other constitutionally-sound civil commitment statutes.¹⁰⁰ The Court similarly rejected Hendricks’ *ex post facto* and double jeopardy arguments because it held the Kansas SVPA is not punitive in nature.¹⁰¹ In the Court’s opinion, the Kansas SVPA is not aimed at retribution or deterrence, the primary objectives of criminal punishment.¹⁰² Additionally, commitment under the Kansas act is based on mental illness rather than criminal intent, and the Kansas legislature did not intend the act to be punitive.¹⁰³ For these reasons, the Court held that the Kansas SVPA is a civil statute and could not violate the protections from criminal punishment provided in the *Ex Post Facto* and Double Jeopardy Clauses of the Constitution.¹⁰⁴

In a concurring opinion, Justice Kennedy expressed his concerns concerning the practical effect application of the Kansas SVPA would have.¹⁰⁵ In short, Justice Kennedy opined that the applied effect of the SVPA would be to “impose confinement for life” given the unavoidable shortcomings of our collective medical knowledge and the possible reluctance of mental health professionals to acknowledge measurable success for pedophiles.¹⁰⁶ He further expressed concern that, while commitment statutes currently fall under the purview of the civil system, any attempts at using sexual predator statutes to “impose punishment” or deter future behavior would render such statutes criminal in nature, thus wearing out their constitutional welcome.¹⁰⁷

The Court slightly curtailed the scope of *Hendricks* in *Kansas v. Crane*,¹⁰⁸ where it held that while commitment under the Kansas SVPA does not require a showing of total or complete lack of control over an individual’s behavior, some lack of control is required to satisfy a finding of mental abnormality.¹⁰⁹ In order to civilly commit an individual under an SVPA, there “must be proof of serious difficulty in controlling behavior.”¹¹⁰ The Court acknowledged, however, that sexual predators, especially pedophiles, suffer from an

100. *Id.* at 356-60.

101. *Id.* at 360-71.

102. *Id.* at 361-63.

103. *Id.*

104. *See id.* at 369-71.

105. *Id.* at 372-73 (Kennedy, J., concurring).

106. *Id.* at 372.

107. *Id.* at 373.

108. 534 U.S. 407 (2002).

109. *See id.* at 411-14.

110. *Id.* at 413.

inability to control their behavior anyway, given the nature of their diagnosis.¹¹¹

B. Deprivation of Liberty and Standards of Proof for SVPAs

The standard of proof required for civil commitment of any kind was a matter before the U.S. Supreme Court in *Addington v. Texas*.¹¹² As the Court explained in *Addington*, the standard of proof in criminal cases (beyond a reasonable doubt) is our most stringent because of the deference given to the interests of a criminal defendant.¹¹³ For most civil cases, which are a matter of minimal public concern, the standard is proof by a "preponderance of the evidence."¹¹⁴ Intermediate standards of proof, involving proof by "clear," "cogent," or "convincing" evidence are less commonly used, but are still used in certain civil cases where allegations of wrongdoing threaten more than just the financial interests of a defendant.¹¹⁵

It is well-settled that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."¹¹⁶ State civil commitment statutes seeking to deprive an individual of his or her liberty must at least bear a "reasonable relation to the purpose for which the individual is committed."¹¹⁷ For SVPAs, the relationship between commitment and a state's interest easily passes muster under a state's already existing *parens patriae* powers to provide care for those citizens "who are unable because of emotional disorders to care for themselves," and under a state's police power to "protect the community from the dangerous tendencies of some who are mentally ill."¹¹⁸ Modeled after other civil commitment statutes, SVPAs are justified by a "medical judgment that the defendant is mentally ill and treatable, but also on the social and legal judgment that his potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty."¹¹⁹

Civil commitment represents a serious deprivation of liberty, but

111. *Id.* at 414.

112. 441 U.S. 418 (1979).

113. *Id.* at 423.

114. *Id.*

115. *Id.* at 424.

116. *Id.* at 425; *see also* *Zinerman v. Burch*, 494 U.S. 113, 131 (1990); *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

117. *Jackson*, 406 U.S. at 738.

118. *See Addington*, 441 U.S. at 426; *see also* *Allen v. Illinois*, 478 U.S. 364, 373 (1986).

119. *See Humphrey v. Cady*, 405 U.S. 504, 509 (1972).

does not require proof “beyond a reasonable doubt” as criminal convictions do. The *Addington* Court felt that a criminal standard would “erect an unreasonable barrier to needed medical treatment.”¹²⁰ Rather, the standard of proof is one by “clear and convincing evidence,” or a constitutionally similar standard determined by the individual states.¹²¹

C. Recent Developments in Federal Commitment Law

Although the focus of this Note is the manner in which the states have addressed the commitment of sexually violent predators, it is worth mentioning that a federal statutory structure is in place, and is currently being scrutinized for its constitutionality by the Supreme Court. In 2006, Congress developed and enacted a federal civil commitment scheme that subjects federal prisoners in the custody of the Attorney General or Federal Bureau of Prisons to commitment on the same basis as the state SVPAs discussed above.¹²² Section 4248 of this legislation permits the federal government to pursue the indefinite civil commitment of any federal inmate found by “clear and convincing evidence” to be a “sexually dangerous person.”¹²³ Under the act, the definition of a “sexually dangerous person” was broadened to include any “person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others.”¹²⁴ To be “sexually dangerous to others” simply “means that the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.”¹²⁵

18 U.S.C. § 4248 has been declared unconstitutional by several federal district courts on the grounds that it represents an unauthorized exercise of Congress’ lawmaking powers.¹²⁶ In early

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

121. *Id.* at 432-33.

122. See 18 U.S.C. § 4248 (2006). This provision was incorporated into the Adam Walsh Child Protection and Safety Act. 42 U.S.C. § 16901 *et seq.* (2006).

123. 18 U.S.C. § 4248(d).

124. *Id.* § 4247(a)(5).

125. *Id.* § 4247(a)(6).

126. See, e.g., *United States v. Wilkinson*, 626 F. Supp. 2d 184, 189 (D. Mass. 2009) (holding that the enactment of section 4248 was beyond Congress’ authority under the Commerce and Necessary and Proper Clauses of the Constitution); *United States v. Shields*, 522 F. Supp. 2d 317, 319 (D. Mass. 2007). But see *United States v. Abregana*, 574 F. Supp. 2d 1123, 1133-34 (D. Haw. 2008) (“Having committed federal crimes, [sexually violent offenders] are properly within the custody of the federal government, and the fact that they may commit federal sex crimes in the future, makes the civil commitment scheme a necessary and proper exercise of Congressional authority.”).

2009, the Court of Appeals for the Fourth Circuit issued the first federal appellate decision addressing the act's constitutionality.¹²⁷ In *United States v. Comstock*, several individuals who had served time for federal sexual offenses challenged their commitment under § 4248.¹²⁸ The court held that "[t]he Constitution does not empower the federal government to confine a person solely because of asserted 'sexual dangerousness' when the Government need not allege (let alone prove) that this 'dangerousness' violates any federal law."¹²⁹ The court recognized that "the states have long controlled the civil commitment of the mentally ill" in exercise of their *parens patriae* and general police powers, and that the federal government possesses no such powers that would justify its management of the mentally ill.¹³⁰ Congress is not empowered by any authority already enumerated in the Constitution that would permit it to develop a commitment scheme "necessary and proper" for executing legislative power under Article I, section 8, clause 18 of the Constitution.¹³¹ Congress also may not regulate the commitment of sex offenders under the Commerce Clause, as this is not an activity that "substantially affect[s] interstate commerce."¹³² For these reasons, the court felt § 4248 could not "be sustained as an exercise of Congress's authority under . . . [any] provision of the Constitution."¹³³

The *Comstock* matter was granted certiorari on June 22, 2009¹³⁴ and oral argument was heard before the U.S. Supreme Court on January 10, 2010.¹³⁵ While it is not clear how the Court will decide

127. See *United States v. Comstock*, 551 F.3d 274, 276 (4th Cir. 2009). Subsequent federal appeals courts have upheld the act under the Necessary and Proper Clause. See *United States v. Volungus*, No. 09-1596, 2010 U.S. App. LEXIS 428 (1st Cir. Jan. 8, 2010); *United States v. Tom*, 565 F.3d 497 (8th Cir. 2009).

128. *Comstock*, 551 F.3d at 277. Graydon Comstock, the lead respondent in the case, was committed under § 4248 after serving a 37-month prison sentence for being the recipient of child pornography. *Id.* As the court notes in *Comstock*, federal sex crimes are limited to those offenses which affect interstate commerce. *Id.* at 282. Although sexual offenses constitute less than 2 percent of all federal convictions, the nature of these convictions are such that offenses such as possessing "obscene material" or other "non-violent sex offenses" would suffice to subject an individual to post-conviction confinement under the statute. See *id.* at n.8 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, at 62 tbl.4.2 (2005), <http://www.ojp.usdoj.gov/bs/pub/pdf/cfjs03.pdf>).

129. *Id.* at 276.

130. *Id.* at 278.

131. *Id.* at 278-79.

132. *Id.* at 279-80.

133. *Id.* at 284.

134. See *United States v. Comstock*, 129 S. Ct. 2828 (2009).

135. See Transcript of Oral Argument, *United States v. Comstock*, No. 08-1224 (U.S. Jan. 12, 2010).

this matter, the questions posed by the Justices during oral argument give an indication of where their respective concerns lie. For instance, Justice Scalia expressed the belief that the federal government's power regulate the criminal justice system is exhausted at the point a prisoner is released from federal custody.¹³⁶ He voiced the concern that § 4248 could be a "recipe for the Federal Government taking over everything,"¹³⁷ and suggested that the 10th Amendment would be one constitutional provision that outright prohibits the federal government from intruding on this particular area, now dominated by the states.¹³⁸ Justices Stevens and Ginsburg viewed the issue before them as illustrating a situation where the government has a responsibility to protect the public from sexual predators after their release, a responsibility that stems from the government's power to regulate the criminal justice system.¹³⁹ Justice Stevens made the ancillary point that § 4248 "applies to a person who is convicted of armed robbery or bank robbery," and that if "just before the end of his term in prison the authorities decide he is in fact a potential sexual offender[,] [t]hey can detain him."¹⁴⁰

The Court's ruling in *Comstock* will have the direct effect of clarifying the scope of the federal legislature's power to draft civil commitment laws that have otherwise been handled by the individual states. The ultimate application of § 4248 to federal prisoners classified as sex offenders, if allowed, will have the practical consequence of broadening the scope of qualifying predicate offenses to include any federal sex crime, whether violent or not.¹⁴¹

III. THE NEW JERSEY SEXUALLY VIOLENT PREDATORS ACT

The New Jersey Legislature promulgated its SVPA in 1998 and the Act became effective on August 12, 1999.¹⁴² The State Legislature enacted the SVPA to address the problem of recidivism in sexually violent predators.¹⁴³ Specifically, the Legislature found that "[c]ertain individuals who commit sex offenses suffer from mental abnormalities or personality disorders which make them likely to engage in repeat acts of predatory sexual violence if not treated for their mental conditions."¹⁴⁴ The language and procedures

136. *See id.* at 8-10.

137. *Id.* at 20.

138. *See id.* at 32-33.

139. *See id.* at 38-41.

140. *Id.* at 24-25.

141. *See United States v. Comstock*, 551 F.3d 274, 282, n.8 (4th Cir. 2009).

142. N.J. STAT. ANN. § 30:4-27.24 (West 2008).

143. S. Rep. No. 895, 208th Leg., at 2 (N.J. 1998).

144. *Id.*

established under the Act are similar to some of the SVPAs of other states.¹⁴⁵ As will be described below, however, the New Jersey SVPA differs from all other states, save South Carolina, in one important respect. This difference is the ultimate focus of this Note.¹⁴⁶

A. *Commitment Procedures Under the New Jersey SVPA*

The procedure for civil commitment under the Act typically begins when an “agency with jurisdiction” notifies the Attorney General of a person who “may meet the criteria of a sexually violent predator.”¹⁴⁷ The Attorney General thereafter may choose to initiate proceedings for that individual’s consideration under the Act.¹⁴⁸ The individual under consideration need not have been recently released from the state agency’s custody, nor does the individual have to have been recently released from a prison sentence for a sexually violent conviction.¹⁴⁹ In short, the Attorney General has the broadest possible authority to petition for the commitment of “any person” regardless of his incarceration status or how much time has passed since his predicate offense.¹⁵⁰

Upon notice of an individual’s eligibility under the Act, the Attorney General first must petition a court for a probable cause finding that the individual is a sexually violent predator.¹⁵¹ If an individual is not currently in the care of a mental health facility, the Attorney General must submit with his or her petition two supporting certificates alleging mental illness, one of which must be prepared by a psychiatrist.¹⁵² Once the Attorney General’s petition is submitted, a court will “immediately review [it] in order to determine

145. See, e.g., ARIZ. REV. STAT. ANN. §§ 36-3701-3717 (2009); KAN. STAT. ANN. §§ 59-29a01-a22 (2009); MINN. STAT. ANN. § 253B.185 (West 2007 & Supp. 2009); MO. REV. STAT. §§ 632.480-.513 (2006 & Supp. 2009); S.C. CODE ANN. §§ 44-48-10 to 44-48-170 (West 2002 & Supp. 2008); TEX. HEALTH & SAFETY CODE ANN. §§ 841.001-.147 (2003 & Supp. 2009); VA. CODE ANN. §§ 37.2-900-.2-920 (2005); WASH. REV. CODE ANN. §§ 71.09.010-71.09.902 (West 2008).

146. See N.J. STAT. ANN. § 30:4-27.26(b) (West 2008); cf. S.C. CODE ANN. § 44-48-30(2)(o).

147. N.J. STAT. ANN. § 30:4-27.27(a).

148. *Id.* § 30:4-27-28(a).

149. See *id.* § 30:4-27.28(a); see also *In re R.Z.R.*, No. A-6193-02T2, 2005 WL 3533834, at *4 (N.J. Super. App. Div. Dec. 28, 2005); *In re P.Z.H.*, 873 A.2d 595, 599-600 (N.J. Super. App. Div. May 12, 2005) (noting that “[n]othing in the statute as quoted suggests that the Attorney General may only seek commitment of a person who is about to be released from confinement, or that the person, if confined, must have been confined for committing a predicate offense”).

150. *P.Z.H.*, 873 A.2d at 599.

151. N.J. STAT. ANN. § 30:4-27.28(a).

152. *Id.* § 30:4-27.28(b).

whether there is probable cause to believe that the person is a sexually violent predator.”¹⁵³ If the court finds probable cause to believe that the individual is a sexually violent predator, it will issue an order temporarily confining that individual to a mental health facility for “custody, care and treatment.”¹⁵⁴

Here is where deprivation of liberty first occurs: the individual has not yet had time to defend him or herself against this first move of temporary confinement.¹⁵⁵ At the time an individual is temporarily committed, the only evidence that has been presented against him or her is the petition of the state and the state’s psychiatric evaluations.¹⁵⁶ At this stage in the commitment procedure, the state’s power to confine an individual has no check save a court’s probable cause determination.¹⁵⁷

A final commitment hearing is held within twenty days of temporary confinement.¹⁵⁸ At the hearing, an individual is entitled to counsel, to present evidence, and to cross-examine the state’s witnesses against him or her.¹⁵⁹ However, New Jersey does not entitle an individual to a jury trial; all commitment hearings are exclusively heard and determined by a single judge.¹⁶⁰ At a final commitment hearing, the state must demonstrate that the individual: 1) has committed a predicate offense, and 2) suffers from a present mental abnormality such that the individual presents a danger to society unless confined.¹⁶¹ If a judge finds by “clear and convincing” evidence that the individual is a “sexually violent predator” in need of commitment, that person is transferred to the custody of the Department of Corrections for confinement.¹⁶²

Any appellate review of an individual’s commitment is “extremely narrow.”¹⁶³ The “utmost deference” is afforded to the

153. *Id.* § 30:4-27.28(f).

154. *Id.* § 30:4-27.28(g).

155. *See generally id.* § 30:4-27.28 (establishing New Jersey’s procedure for involuntary commitment proceedings).

156. *See id.* § 30:4-27.28(a)-(d).

157. *See id.* § 30:4-27.28(f)-(g).

158. *Id.* § 30:4-27.29.

159. *Id.* § 30:4-27.31.

160. *Id.* § 30:4-27.31. *But see* KAN. STAT. ANN. § 59-29a06 (2009) (“The person, the county or district attorney or attorney general, or the judge shall have the right to demand that the trial be before a jury. Such demand for the trial to be before a jury shall be filed, in writing, at least four days prior to trial. . . . If no demand is made, the trial shall be before the court.”).

161. *See* N.J. STAT. ANN. § 30:4-27.26.

162. *See id.* §§ 30:4-27.32(a) to 27.34.

163. *In re V.A.*, 813 A.2d 1252, 1257 (N.J. Super. Ct. App. Div. 2003) (citing *State v. Fields*, 390 A.2d 574, 588 (N.J. 1978)). It is noted that *Fields* addressed the issue of

commitment judge's determination, and such decisions may be modified on appeal only if there is a clear showing of abuse of the commitment judge's discretion.¹⁶⁴ Individuals committed under the Act are entitled to an annual court review hearing in which the same hearing procedure described above is undertaken and a reviewing court issues a new order either continuing or discontinuing the person's commitment.¹⁶⁵ At any time during a person's commitment, he or she may petition a court for discharge based on a change in conditions or a positive change in his or her mental state as a result of treatment.¹⁶⁶ In the alternative, an individual's treating physicians may also petition a court for discharge based on successful rehabilitation.¹⁶⁷

B. New Jersey's Predicate Offense Requirement

As described above, the Attorney General must satisfy two requirements when seeking an individual's commitment under the Act: 1) that the individual has the requisite sexually violent predicate offense, and 2) that the individual has a present mental abnormality that makes him or her a danger to society.¹⁶⁸ Because having the requisite predicate offense is what opens the door for one to be considered under the Act, understanding predicate offense requirements for SVPAs means also comprehending who may be touched by this legislation.

The New Jersey SVPA defines a "sexually violent offense" as:

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

general civil commitment of an individual who successfully pled insanity to a murder charge. 390 A.2d at 577. However, reviewing courts addressing the SVPA consistently rely on the body of general civil commitment law when making their determinations. See, e.g., *State v. Bellamy*, 835 A.2d 1231, 1238 (N.J. 2003) (using same consideration of the state's interest as a court would in general civil commitment proceedings); *In re W.Z.*, 801 A.2d 205, 214 (N.J. 2002).

164. *Fields*, 390 A.2d at 588.

165. N.J. STAT. ANN. §§ 30:4-27.30, -27.35.

166. *Id.* § 30:4-27.36.

167. *Id.*

168. See *id.* § 30:4-27.26.

*case, the person's offense should be considered a sexually violent offense.*¹⁶⁹

Subsection (a) of this provision outlines the enumerated offenses that can be considered and that presumably have already been determined by the legislature to be sexually violent.¹⁷⁰ However, subsection (a) also has an expanding clause which provides that any offense (federal or otherwise) with “substantially the same elements” as an enumerated offense may also qualify as sexually violent.¹⁷¹ Subsection (b), hereinafter referred to as the “catchall” or “discretionary” provision, allows a commitment court to make a factual finding specific to a particular case that an individual’s predicate offense is sexually violent.¹⁷² Of the nineteen states with SVPAs, the catchall provision is unique only to New Jersey and South Carolina.¹⁷³

As previously mentioned, the Attorney General has broad authority to seek the commitment of an individual who may qualify as a sexually violent predator. For instance, the SVPA allows for the commitment of “any person who has committed a sexually violent offense, without regard to . . . whether the person is currently incarcerated for that offense.”¹⁷⁴ The SVPA also does not limit predicate offenses to those that are unlawful or enumerated under the New Jersey criminal codes.¹⁷⁵ Under the SVPA, and other SVPAs around the country, there is no jurisdictional limitation on where a predicate offense occurred: any federal or other state criminal offense may qualify.¹⁷⁶ Therefore, any individual ever convicted of a sexual offense anywhere in the country may move to New Jersey and be subjected to commitment under the SVPA.¹⁷⁷

C. How the New Jersey SVPA Has Affected Its Targets

Through a public records request, the New Jersey Attorney

169. *Id.* (emphasis added).

170. *See id.*

171. *Id.*

172. *Id.*

173. *See* N.J. STAT. ANN. § 30:4-27.26(b); *cf.* S.C. CODE ANN. § 44-48-30(2)(o) (2002 & Supp. 2008).

174. *See In re R.Z.R.*, No. A-6193-02T2, 2005 WL 3533834, at *4 (N.J. Super. Ct. App. Div. Dec. 28, 2005) (interpreting the predicate offense limitations of N.J. STAT. ANN. § 30:4-27.26, or lack thereof).

175. *See* N.J. STAT. ANN. § 30:4-27.26(a).

176. *See id.*; *see also* CAL. WELF. & INST. CODE § 6600(a)(2)(C) (West 2009); FLA. STAT. ANN. § 394.912(9)(g) (West 2006 & Supp. 2009); KAN. STAT. ANN. § 59-29a02(e)(11) (2009).

177. *See* N.J. STAT. ANN. § 30:4-27.26.

General's Office has provided helpful information regarding how the SVPA has affected individuals in this state.¹⁷⁸ As of December 31, 2008, 386 individuals were committed as sexually violent predators to the Special Treatment Units in Kearny and Woodbridge, New Jersey.¹⁷⁹ Although "many more" individuals have been committed since 1999, certain cases have been dismissed for reasons such as death of the inmate, transfer to prison, transfer to general civil commitment, and deportation.¹⁸⁰ Specific to these categories, thirteen inmates have died while in commitment, and seven have been transferred to a term of general civil commitment.¹⁸¹ Of all the individuals committed, only twenty-one have been conditionally discharged since 1999.¹⁸² Four of the individuals discharged were eventually returned to the Special Treatment Unit, presumably for reoffense.¹⁸³

The Attorney General's Office has committed three individuals under the catchall provision at issue in this Note.¹⁸⁴ Two of these individuals were committed based on the predicate offense of "endangering the welfare of a child."¹⁸⁵ The third had predicate offenses for kidnapping (presumably not a kidnapping that involved endangering the welfare of a child)¹⁸⁶ and criminal restraint.¹⁸⁷

New Jersey's roughly 10 percent release rate for those committed is in line with release statistics around the country.¹⁸⁸ A study was conducted recently that published the national release rates for individuals committed in seventeen states across the country.¹⁸⁹ As of the end of 2006, 4,534 persons were being held under various state

178. Letter from Mark Singer, Senior Deputy Attorney General, State of New Jersey to author (Feb. 11, 2009) (on file with author) [hereinafter Singer Letter].

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 2; see N.J. STAT. ANN. § 30:4-27.26(b) (West 2008).

185. Singer Letter, *supra* note 178, at 2.

186. Kidnapping is a sexually violent predicate offense specifically enumerated in the SVPA when it is accompanied by the endangerment of a child under the age of sixteen. See N.J. STAT. ANN. § 30:4-27.26(a).

187. Singer Letter, *supra* note 178, at 2.

188. Kathy Gookin, *Comparison of State Laws Authorizing Involuntary Commitment of Sexually Violent Predators: 2006 Update, Revised* (WASH. INST. PUB. POL'Y 2007), <http://www.wsipp.wa.gov/pub.asp?docid=07-08-1101>.

189. See *id.* at 1. At the time the study was conducted, only eighteen states had SVPAs in effect. SVPAs in New Hampshire and New York were enacted in 2007 and "are still being implemented." *Id.* at 4.

SVPAs.¹⁹⁰ Over the years, only 494 of these individuals were released from commitment.¹⁹¹ Another eighty-five died during their term of custody.¹⁹²

What statistics have not revealed is the reason why only 10 percent of sexually violent predators are released from commitment. It can be fairly speculated, however, that this low rate of release is due either to unresponsiveness to treatment, ineffective treatment methods, or a general rubber-stamping of commitment renewals when an annual rehearing is held. Whatever the cause, release statistics demonstrate just how indefinite or permanent a term of commitment can be.

D. Comparing the New Jersey SVPA to SVPAs Around the Country

As discussed in Part II, states have taken several different approaches to their sexual predator commitment legislation. As such, the states have also taken varying approaches to how predicate offenses under each SVPA are determined.

Some states take a strict enumerated approach to defining the requisite predicate offenses.¹⁹³ In such states, the requisite predicate offenses are clearly spelled out in the definition of “sexually violent offense” under the statute.¹⁹⁴ Enumerated offenses qualifying under SVPAs might include rape, forced sodomy, sexual abuse, sexual assault, child molestation, or any attempt at committing these crimes.¹⁹⁵ These statutes clearly express which prior convictions will fall under the purview of the relevant commitment act.

The Kansas SVPA that was upheld by the U.S. Supreme Court in *Hendricks* takes a looser approach in that it brings under its scope both enumerated and non-enumerated offenses.¹⁹⁶ Statutes of this nature include a list of enumerated offenses, but may also contain some provisions that are open to interpretation.¹⁹⁷ For example, the Kansas statute provides that “any act which either at the time of sentencing for the offense or subsequently during civil commitment

190. *Id.* at 1.

191. *Id.*

192. *Id.*

193. *See, e.g.*, MO. REV. STAT. § 632.480(4) (West 2006); VA. CODE ANN. §37.2-900 (2005); CAL. WELF. & INST. CODE § 6600(b) (West Supp. 2009).

194. *See, e.g.*, MO. REV. STAT. § 632.480(4); VA. CODE ANN. §37.2-900; CAL. WELF. & INST. CODE § 6600(b).

195. *See, e.g.*, MO. REV. STAT. § 632.480(4); VA. CODE ANN. §37.2-900; CAL. WELF. & INST. CODE § 6600(b).

196. *See* KAN. STAT. ANN. § 59-29a02(e) (2009).

197. *Id.* § 59-29a02(e)(13).

proceedings pursuant to this act, has been determined beyond a reasonable doubt to have been sexually motivated” may serve as the required predicate offense.¹⁹⁸ As the language of an act becomes more and more open to outside interpretation, the actual notice given to those individuals potentially affected by its provision becomes less clear.

New Jersey and South Carolina are the only two states in the country that specifically provide in their SVPAs that a trial judge is free to determine which offenses he or she considers sexually violent.¹⁹⁹ Both states’ statutes grant discretion to a judge to make a “specific finding” that “based on the circumstances of [a given] case, the person’s offense should be considered [sexually violent].”²⁰⁰ For individuals with criminal records in these two states, there is no statutory limit to the scope of what constitutes a sexually violent offense under the act. The statutes grant full authority to one hearing judge as to what satisfies the first prong of commitment.²⁰¹

*E. J.P. and J.M.B.: New Jersey Courts First Examine the
“Catchall” Provision of Section 30:4-27.26 of the New Jersey
Code*

New Jersey courts have tried to interpret section 30:4-27.26(b) of the New Jersey Code in two civil commitment cases that came before the state’s intermediate appellate court.²⁰² In the earlier of these matters, the New Jersey Appellate Division took a first crack at explaining how section 30:4-27.26(b) should be construed by the state courts.²⁰³

*i. In re J.P.: Preliminary Discussions on How Section 30:4-
27.26(b) of the New Jersey Code Might Be Interpreted*

In *J.P.*, an individual committed under the SVPA challenged his confinement on the grounds that the state failed to prove by clear and convincing evidence that he was a sexually violent predator.²⁰⁴ The crux of his argument rested on the claim that J.P. had never been convicted of a sexually violent offense as defined by the

198. *Id.* § 59-29a02(e)(12).

199. See N.J. STAT. ANN. § 30:4-27.26(b) (West 2008); *cf.* S.C. CODE ANN. § 44-48-30(2)(o) (West 2002 & Supp. 2008).

200. N.J. STAT. ANN. § 30:4-27.26(b); S.C. CODE § 44-48-30(2)(o).

201. See S.C. CODE § 44-48-30(2)(o); *see also* N.J. STAT. ANN. § 30:4-27.26(b).

202. See *In re J.P.*, 922 A.2d 754 (N.J. Super. Ct. App. Div. 2007); *In re J.M.B.*, 928 A.2d 102 (N.J. Super. Ct. App. Div. 2007), *cert. granted*, 936 A.2d 969 (N.J. Sup. Ct. 2007).

203. See *J.P.*, 922 A.2d at 759.

204. *Id.* at 756.

SVPA.²⁰⁵

From 1998 through 2003, J.P. was charged with several counts of aggravated sexual assault and child abuse for various incidents, some involving abuse of his own daughter.²⁰⁶ Through a series of plea agreements, however, J.P.'s charges were all reduced to sentences for endangering the welfare of a child.²⁰⁷ For his most recent plea in February 2003, J.P. was sentenced to a five-year custodial term to take place at an adult treatment center.²⁰⁸ The state thereafter petitioned for his civil commitment.²⁰⁹ All three of the mental health experts who evaluated J.P. diagnosed him with pedophilia and found him likely to reoffend if released.²¹⁰ All three experts further agreed that J.P. received "no meaningful treatment" during his confinement at the adult treatment center.²¹¹

Because none of the predicate offenses to which J.P. pled guilty were enumerated under section 30:4-27.26(a),²¹² the trial judge had to exercise discretion under section 30:4-27.26(b) to make a specific finding as to J.P.'s qualifying predicate offenses.²¹³ Based on expert testimony and the details of his various criminal incidents, the trial judge concluded that there was "no dispute . . . that [J.P.] had committed" a sexually violent offense within the jurisdiction of the SVPA.²¹⁴ The trial judge, implementing a "balancing test" of several factors, including considering J.P.'s past behavior,²¹⁵ had "no hesitancy in coming to the conclusion that [J.P. was] dangerous, . . . a substantial high risk, and that he should be committed."²¹⁶

The appeals court reviewing J.P.'s as-applied statutory challenges acknowledged that there was no precedential guidance on the issue of how section 30:4-27.26(b) should be interpreted.²¹⁷ As such, the court turned to established principles of statutory construction to understand subsection (b)'s meaning.²¹⁸ The court

205. *Id.* at 757.

206. *Id.* at 757-58.

207. *Id.* at 757.

208. *Id.*

209. *Id.* at 758.

210. *Id.*

211. *Id.*

212. N.J. STAT. ANN. § 30:4-27.26(a) (West 2008).

213. *See J.P.*, 922 A.2d at 758-59.

214. *Id.* at 758.

215. The trial judge was particularly influenced by evidence of J.P.'s unlawful conduct against his daughter. *Id.* at 759.

216. *Id.*

217. *Id.*

218. *Id.*

stressed the importance of giving deference to legislative intent and well-established canons of statutory construction when examining the provision in question.²¹⁹ The court concluded that, in following with the principle of *noscitur a sociis*,²²⁰ “[t]he open-ended definition in subsection (b) *must be interpreted in the light of the scope of the associated specific definitions in subparagraph (a)*” of the statute.²²¹ The court found that it was the intent of the New Jersey Legislature to expand the definition of “sexually violent offense” through subsection (b) to include non-enumerated, similar offenses, and that the “specific findings” requirement of subsection (b) provides a safeguard against allowing non-related, non-sexual conduct to qualify.²²²

The *J.P.* court further held that a trial judge exercising discretion under subsection (b) must do so following a “meaningful review of the record” in a commitment case.²²³ In dicta, the court suggested that sexual gratification to the actor, evidence of “grooming,”²²⁴ and other case-specific facts supporting sexual violence should be considered in determining whether an individual’s non-enumerated predicate offense would qualify under subsection (b).²²⁵ Because the record in *J.P.*’s case demonstrated “substantial credible evidence” that his conduct fell within the purview of a sexually violent offense, the court affirmed his civil commitment.²²⁶

ii. *In re J.M.B.*: The Constitutionality of Section 30:4-27.26(b) of the New Jersey Code Arrives Before the New Jersey Supreme Court

The first time a New Jersey court examined section 30:4-27.26(b)

219. *Id.* at 759-60.

220. “[I]t is known by its associates.’ A canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it.” BLACK’S LAW DICTIONARY 492 (3rd pocket ed. 2006).

221. *J.P.*, 922 A.2d at 759-60 (citing *Germann v. Matriss*, 260 A.2d 825, 839 (N.J. 1970) (“It is an ancient maxim of statutory construction that the meaning of words may be indicated and controlled by those with which they are associated.”)) (emphasis added).

222. *Id.*

223. *Id.* at 760.

224. “Grooming” describes certain kinds of preparatory actions sex offenders often take to establish and encourage a sexual relationship with child or otherwise vulnerable victim. See GERHARD SCHOMBURG ET AL., PRACTICAL ASPECTS OF RAPE INVESTIGATION: A MULTIDISCIPLINARY APPROACH 519 (4th ed. 2008). Examples of grooming a victim include caretaking, giving gifts, and general efforts to isolate the victim from family members and peers. *Id.*

225. *J.P.*, 922 A.2d at 760.

226. See *id.* at 760-61.

for its constitutionality came in July 2007 as a question before the New Jersey Appellate Division.²²⁷ In *J.M.B.*, the appeals court upheld the civil commitment of an individual committed under the SVPA.²²⁸ Between 1977 and 2002, J.M.B. was arrested on fifteen separate occasions, and was convicted of, and served prison time for, multiple crimes involving unlawful bondage, harassment, kidnapping, intimidation, and assault of minor boys and young men.²²⁹ His many convictions aside, J.M.B. never had sex with or sexually assaulted any of his victims, and a charge of “criminal sexual contact” in 1989 was his first and only charge for a sexual offense.²³⁰ At his commitment hearing, three psychiatric specialists diagnosed J.M.B. with sexual sadism and antisocial personality disorder and testified that he was prone to reoffense.²³¹ No other witnesses testified at the proceeding.²³²

In making her determination, the commitment hearing judge relied upon the testimony of these three experts, in conjunction with documentary evidence presented by the state regarding J.M.B.’s prior convictions.²³³ Acknowledging that J.M.B. had not been convicted of any sexually violent offense enumerated in the SVPA, the commitment hearing judge exercised her discretion pursuant to section 30:4-27.26(b) to make a specific finding that J.M.B.’s previous convictions for contributing to the delinquency of a minor, threatening to kill, kidnapping, aggravated assault, criminal sexual conduct, interfering with the custody of a committed person, and tampering with a witness would suffice as predicate offenses under the Act.²³⁴

J.M.B. challenged his commitment in part by attacking the constitutionality of section 30:4-27.26(b), the catchall provision.²³⁵ Specifically, J.M.B. argued that the SVPA’s discretionary provision was unconstitutional as applied to his commitment proceedings.²³⁶ The Appellate Division’s treatment of this argument was brief and case-specific. In response to J.M.B.’s void-for-vagueness challenges, the appeals court held that section 30:4-27.26(b) is clear in its grant

227. See *In re J.M.B.*, 928 A.2d 102 (N.J. Super. Ct. App. Div. 2007).

228. *Id.* at 119.

229. *Id.* at 105-11.

230. *Id.* at 107.

231. *Id.* at 110-12.

232. *Id.* at 110.

233. *Id.* at 112.

234. *Id.* at 112-13.

235. *Id.* at 113 (arguing the statute was unconstitutionally vague).

236. *Id.* at 119.

of discretionary power to commitment hearing judges.²³⁷ The court further found that because J.M.B. had admitted he knew his non-consensual bondage behavior was wrong, he was properly forewarned of the consequences of his actions (i.e., potential commitment).²³⁸ The court finally acknowledged in dicta that the purpose of the SVPA's catchall provision is to encompass those offenses not specifically mentioned in the statute, but "characterized by the same form of conduct such as violence, intimidation, or exploitation of non-consenting victims, including children or other vulnerable persons, for the sexual gratification of the actor."²³⁹

J.M.B. was granted certification for consideration before the New Jersey Supreme Court in November 2007.²⁴⁰ Oral arguments before the New Jersey Supreme Court took place on September 8, 2008 and the court's decision was released on February 23, 2009.²⁴¹ Among the arguments made by J.M.B.'s counsel (members of the Office of the Public Advocate of the State of New Jersey) at oral arguments were that the catchall provision is both substantively and procedurally unconstitutional (i.e. that the provision was void-for-vagueness both as-applied to the petitioner, and standing alone).²⁴² Counsel for J.M.B. noted at oral argument that while half of the states that have enacted SVPAs have some kind of open-ended language regarding predicate offenses, New Jersey is the only one of these states that has made no effort to limit its discretionary provision.²⁴³ Counsel further noted that in South Carolina, as demonstrated in the case of *Brown v. State*,²⁴⁴ criminal trial courts may make findings at the time of conviction regarding whether an individual may later be subject to

237. *Id.*

238. *Id.*

239. *Id.*

240. *In re J.M.B.*, 928 A.2d 102 (N.J. Super. Ct. App. Div. 2007), *cert. granted*, 936 A.2d 969 (N.J. 2007) (SUP-358-04).

241. *In re J.M.B.*, 964 A.2d 752 (N.J. 2009).

242. *See id.* at 773-74; *see also* Webcast: Supreme Court of New Jersey Oral Arguments Archive, Case No. A-79-07 (Sept. 23, 2008), http://njlegallib.rutgers.edu/supct/args/A_79_07.php.

243. Webcast, Case No. A-79-07, *supra* note 242.

244. In *Brown v. State*, the Court of Appeals of South Carolina held that the state had satisfied the probable cause requirements to petition for the commitment of Renauld Brown, an individual who had previously pled guilty to voyeurism after an incident in which he was caught peeping into a woman's house. 643 S.E.2d 118, 119 (S.C. Ct. App. 2007). In *Brown*, the sentencing judge "made a specific finding" at the time of Brown's plea that his "offense should be considered a sexually violent act under the South Carolina Sexually Violent Predator Act." *Id.* To date, the South Carolina courts have not directly addressed the constitutionality of their parallel catchall provision.

commitment under the SVPA.²⁴⁵ In this way, individuals who may be dragged into consideration by a catchall phrase are put on some notice that civil commitment may ensue from their prior criminal behavior.²⁴⁶ J.M.B.'s counsel expressed concern over the manner in which civil commitment judges frequently and almost exclusively rely on the testimony of mental health experts in considering whether both of the prongs under the SVPA are met.²⁴⁷ In closing, the Public Advocate urged the court to adopt the same standard of the *J.P.* court, which held that a court's ability to interpret subsection (b) is limited by the sexually violent offenses enumerated in subsection (a).²⁴⁸

The Attorney General argued in response that a factual assessment of J.M.B.'s case provided sufficient evidence to support the commitment judge's findings.²⁴⁹ Counsel stressed that in cases involving subsection (b), a multi-factor approach is necessary to consider case-specific details such as whether the actor got sexual gratification from his actions, the evaluation of expert witnesses, and the factual circumstances concerning the non-enumerated offenses.²⁵⁰ This as-applied approach is facilitated in all cases concerning the catchall provision by the help of expert testimony by psychiatrists and psychologists.²⁵¹ In sum, the Attorney General's position was that subsection (b) must be read in conjunction with the enumerated offenses listed in subsection (a) of the Act, but expands these offenses to include similarly motivated crimes.²⁵²

In the end, the New Jersey Supreme Court upheld J.M.B.'s commitment and determined that he was convicted of a "sexually

245. *Id.* The New Jersey courts have previously addressed this issue as it relates to the entry of plea agreements for predicate offenses. In *State v. Bellamy*, the Supreme Court of New Jersey held that while the SVPA is not a penal statute, principles of "fundamental fairness" require that a criminal trial court inform a defendant entering a guilty plea for a potentially sexual offense of the possibility of his or her future commitment under the Act. 835 A.2d 1231, 1238 (N.J. 2003). Although this rule was not applied retroactively, the court did institute a general rule requiring notice going forward and for any related cases pending at the time of the decision. *Id.* at 1240.

246. Webcast, Case No. A-79-07, *supra* note 242. Complicating this issue further is the fact that states such as New Jersey have decided to apply the SVPA retroactively to include predicate offenses that occurred prior to the statute's enactment in 1998. See *In re P.Z.H.*, 873 A.2d 595, 600 (N.J. Super. App. Div. 2005); *In re T.J.T.*, No. 226-02, 2008 WL 313902, at *4 (N.J. Super. Ct. App. Div. Feb. 6, 2008).

247. Webcast, Case No. 1-79-07, *supra* note 226.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

violent offense” under subsection (b) of the SVPA.²⁵³ The court rejected J.M.B.’s constitutional arguments, including his argument that subsection (b) is unconstitutionally vague.²⁵⁴

The *J.M.B.* court made several specific rulings with regard to how the SVPA’s predicate offense language should be, and was meant to be, interpreted. Although the New Jersey Supreme Court acknowledged that the “SVPA itself gives little guidance on the application of [subsection (b)]’s definition of a sexually violent offense” in this matter of first impression, it relied on the plain language of the statute and on accepted canons of statutory construction to come to the conclusion that subsections (a) and (b) must both be read in concert and be individually preserved.²⁵⁵ The main statutory dilemma that the court needed to address was the fact that subsection (a) of the SVPA is repetitive of subsection (b) in that both clauses expand sexually violent predicate offenses to include offenses that are similar in nature to those already enumerated.²⁵⁶ In interpreting subsection (b), the court relied on the axiom that effect should be given to “every clause and word of a statute” to avoid rendering it superfluous.²⁵⁷ The court also relied on the canons of construction referenced by the *J.P.* court to reconcile subsections (a) and (b) as part of a statutory whole.²⁵⁸

The court’s holdings with regard to the statutory construction of the SVPA were as follows. First, the intent of the Legislature was to use the catchall provision to narrowly expand the types of sexually violent conduct already specified in subsection (a) of the Act.²⁵⁹ Subsection (b) should be “read to confer additional authority on a court to determine an offense, which is not listed in subsection (a) and which does not have substantially the same elements as an

253. *In re J.M.B.*, 964 A.2d 752 (N.J. 2009).

254. *See id.* at 774-75.

255. *Id.* at 758.

256. *See id.* at 758-62. Compare N.J. STAT. ANN. § 30:4-27.26(a) (West 2008) (allowing for “a criminal offense with substantially the same elements as any offense enumerated above, entered or imposed under the laws of the United States, this State or another state” to qualify as a sexually violent predicate offense), with N.J. STAT. ANN. § 30:4-27.26(b) (also allowing “any offense for which the court makes a specific finding on the record that, based on the circumstances of the case, the person’s offense should be considered a sexually violent offense” to qualify).

257. *Duncan v. Walker*, 533 U.S. 167, 174 (2001). The court’s arguments relied on a parallel state court decision. *See D’Annunzio v. Prudential Ins. Co.*, 927 A.2d 113, 124 (N.J. 2007).

258. *See J.M.B.*, 964 A.2d at 760; *In re J.P.*, 922 A.2d 754, 759-60 (N.J. Super. Ct. App. Div. 2007) (setting out *noscitur a sociis* argument).

259. *J.M.B.*, 964 A.2d at 761.

enumerated offense, to be, nevertheless, a sexually violent offense.”²⁶⁰ Second, if factual consideration of an individual’s prior crimes reveals that the non-enumerated predicate offense is “substantially equivalent to the sexually violent conduct encompassed by the offenses listed in subsection (a),” then that individual may be committed under subsection (b).²⁶¹ Finally, it is the province of the commitment court to make these factual determinations, and to make them post-conviction.²⁶²

In addition to providing a means of interpreting the SVPA, the *J.M.B.* court also sought to settle the issue of which standard of proof must apply to considerations under the catchall provision. As discussed above, the general evidentiary standard for commitment proceedings is proof by “clear and convincing evidence.”²⁶³ However, this principle is founded on the premise that an underlying conviction was proven beyond a reasonable doubt in a criminal trial court. How then can we reconcile the fact that any offense that is not specifically enumerated in the SVPA was not proven to be sexually violent beyond a reasonable doubt? The *J.M.B.* court determined that “[o]nce a conviction occurs, the beyond a reasonable doubt standard drops out of the case[,]” and the “SVPA itself becomes operative[,]” imposing a looser standard of proof.²⁶⁴ Over the dissenting voices of Justices Albin and Wallace,²⁶⁵ the court held that a commitment judge exercising discretion under subsection (b) need only to be convinced by clear evidence that a predicate offense is sexually violent.²⁶⁶

The court finally and succinctly addressed *J.M.B.*’s argument that the discretionary provision is unconstitutionally vague. The court acknowledged that although the SVPA is not a penal statute, “a vagueness challenge deserves careful consideration,” especially given the fact that the court had previously determined trial courts must “inform criminal defendants of the possible consequence of pleading

260. *Id.* at 759.

261. *Id.* at 761.

262. *Id.*

263. See *Addington v. Texas*, 441 U.S. 418, 432-33 (1979).

264. *J.M.B.*, 964 A.2d at 761.

265. In his dissenting opinion, Justice Albin agreed with the majority’s approach in construing the terms of the SVPA, but argued that the New Jersey Legislature intended to implement a higher standard of proof (i.e. proof beyond a reasonable doubt) to establish a sexually violent offense. *J.M.B.*, 964 A.2d at 775 (Albin, J., dissenting). Justice Albin doubted that the Legislature intended to create the asymmetrical result that ensues when a “court is allowed to designate [a non-enumerated] offense as sexual, for the purposes of the SVPA, by a showing of clear and convincing evidence.” *Id.* at 776.

266. *J.M.B.*, 964 A.2d at 758.

guilty to a predicate SVPA offense.”²⁶⁷ That said, the court reasoned that its “narrow interpretation of subsection (b)’s reach” defeated any void-for-vagueness arguments because the catchall is “an understandable and definitionally precise part of a workable standard.”²⁶⁸ The court adopted the Attorney General’s proffer that subsection (a)’s enumerated offenses share common characteristics, such as “force, coercion, the perpetrator’s sexual gratification, victimization, placing [a] victim in fear, physical and mental suffering, threats, grooming, luring victims with money, alcohol or drugs, and offending against victims who either cannot or will not consent to the behavior.”²⁶⁹ Because J.M.B. had expressed sexual gratification from his crimes, and because other characteristics of his actions fit the above descriptive scheme, he was properly on notice of his potential commitment and his vagueness arguments therefore failed.²⁷⁰

As will be discussed further below, the New Jersey Supreme Court’s decision in *J.M.B.* opened the door for future abuse of the discretionary provision. Despite a “narrow” reading of this provision, in failing to nullify it altogether, the court has essentially qualified all sexual offenses as predicate to the Act, regardless of whether the underlying crime was actually characterized by sexual violence. This decision, taken in concert with the language of the statute and the current social climate, will ultimately result in over-application for individuals who should not properly be targeted by SVPAs.

IV. CONSTITUTIONAL STANDARDS FOR VAGUENESS AND OVERBREADTH

As a general principle, civil commitment represents a curtailment of liberty that calls for sweeping constitutional protections.²⁷¹ Furthermore, that an individual is a convicted felon has no bearing on whether he or she is entitled to equal constitutional protections, even when being considered for commitment.²⁷² While the U.S. Supreme Court has dismissed

267. *Id.* at 774 (citing *State v. Bellamy*, 835 A.2d 1231, 1231 (N.J. 2003)).

268. *Id.*

269. *Id.*

270. *Id.* (“In sum, we conclude that J.M.B. had notice that his conduct might result in commitment under the SVPA.”).

271. *See, e.g., Addington*, 441 U.S. at 425 (affording due process protection in civil commitment proceedings); *Jackson v. Indiana*, 406 U.S. 715, 730 (1972) (holding that a committed individual was denied 14th Amendment equal protection rights); *Humphrey v. Cady*, 405 U.S. 504, 511 (1972) (reversing and remanding a decision to commit based on equal protection violations).

272. *See Vitek v. Jones*, 445 U.S. 480, 492-93 (1980) (“We conclude that a convicted felon also is entitled to the benefit of [due process] procedures appropriate in the circumstances before he is found to have a mental disease and transferred to a mental

constitutional challenges to SVPAs brought under the *ex post facto* and Double Jeopardy clauses of the Constitution,²⁷³ a challenge to a state's SVPA for vagueness and overbreadth violations remains viable.²⁷⁴

A statute is unconstitutional if it is so vague that it fails to provide notice to affected individuals of prohibited conduct, or if it fails to provide minimal guidelines for its application such that arbitrary or discriminatory enforcement of the statute ensues.²⁷⁵ While notice to individuals is a concern, the more important aim of the vagueness doctrine is to eliminate the possibility that individuals are subject to the whim of persons with enforcement power.²⁷⁶

A statute is unconstitutionally overbroad if it is so inadequately tailored that it infringes on or prohibits otherwise constitutionally protected conduct.²⁷⁷ A statute which "sweeps within its prohibitions" those acts which are not intended to be prohibited violates the individual constitutional rights of those potentially affected.²⁷⁸ Although these two doctrines often go hand-in-hand as a tool for assessing the constitutionality of statutes whose language is expansive enough to threaten the individual rights of those affected by their scope, each also has individual merit with regard to the statute at issue here.

A. *The Discretionary Provision of the New Jersey SVPA Is Unconstitutionally Vague*

Although the vagueness doctrine usually applies to criminal statutes,²⁷⁹ it also is an important concern for quasi-criminal statutes such as SVPAs.²⁸⁰ While the New Jersey Supreme Court has already rejected the argument that subsection (b) is unconstitutionally vague, the court's reasoning is both weak and isolated by the facts of the specific case brought before it.²⁸¹ In short, the court determined

hospital.").

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

274. See generally *id.* at 350-71.

275. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983).

276. *Id.* (citing *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

277. *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972).

278. *Id.* at 114-15.

279. See *Gonzales v. Carhart*, 550 U.S. 124, 148-49 (2007) (citing *Kolender*, 461 U.S. at 357).

280. See *In re J.M.B.*, 964 A.2d 752, 774 (N.J. 200) (acknowledging that a "vagueness challenge deserves careful consideration," due to the "pseudo-criminal" nature of the SVPA); see also Slobogin, *supra* note 67, at 18 ("Vagueness doctrine should govern the scope of preventive detention laws even if it is assumed . . . that such laws are not 'criminal' in nature.").

281. *J.M.B.*, 964 A.2d at 758-60.

that J.M.B. had proper notice that his conduct was an improper and sexually violent predicate offense because it “shared characteristics” of enumerated offenses.²⁸² However, what the court failed to acknowledge was that not only were these “characteristics” offered by the state in support of their argument for commitment, but also that the task of weighing what is “substantially the same conduct”²⁸³ is exclusively reserved for a commitment judge in a particular case.²⁸⁴ As the U.S. Supreme Court has noted, “[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”²⁸⁵ The New Jersey Supreme Court, in failing to nullify subsection (b) as unconstitutionally vague, ensured that the subjective opinions of state actors and commitment judges will continue to determine the limits of what constitutes sexual violence.²⁸⁶ The kind of subjectivity inherent to a finding under subsection (b) cannot possibly provide adequate notice to individuals of their potential qualification under the Act and is therefore unconstitutionally vague.²⁸⁷

B. The Discretionary Provision of the New Jersey SVPA is Unconstitutionally Overbroad

Although an overbreadth challenge was not made before the court in *J.M.B.*,²⁸⁸ the New Jersey Supreme Court’s decision has sharpened the argument that the SVPA has the potential to “[sweep] within its prohibitions” what was not intended to fall within the purview of the Act.²⁸⁹ The New Jersey Legislature intended the SVPA to prevent “[c]ertain individuals who commit . . . repeat acts of predatory sexual violence” to be considered for civil commitment.²⁹⁰ What has resulted instead is a statutory scheme that allows for the potential commitment of any individual who has previously committed a crime that is even remotely sexual in nature.

In *J.M.B.*, the court held that subsection (b) allows for an

282. *Id.*

283. *Id.*

284. See N.J. STAT. ANN. § 30:4-27.26(b) (West 2008).

285. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09; see also *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (seeking to discourage “arbitrary and erratic” enforcement of a penal statute).

286. See *Grayned*, 408 U.S. at 108-09.

287. See *id.*; see also Slobogin, *supra* note 71, at 19 (criticizing the subjective assessment of “dangerousness” in SVPAs as “inevitably vague” for those affected).

288. See generally *J.M.B.*, 964 A.2d at 752.

289. See *Grayned*, 408 U.S. at 115.

290. N.J. STAT. ANN. § 30:4-27.25(a).

“additional sliver of offenses to be swept” into the definition of a sexually violent offense, but piled this on top of whatever offenses are considered “substantially equivalent” to the crimes enumerated under subsection (a).²⁹¹ The court found subsection (b) to be an “understandable and definitionally precise part of a workable standard,” yet listed the following “common characteristics” that can help courts define what is sexually violent: “force, coercion, the perpetrator’s sexual gratification, victimization, placing victim in fear, physical and mental suffering, threats, grooming, luring victims with money, alcohol or drugs, and offending against victims who either cannot or will not consent to the behavior.”²⁹² Finally, the court analogized these characteristics to J.M.B.’s prior conduct, finding that his admission to being sexually gratified by his crimes was a particular factor weighing in favor of his classification as a sexually violent predator.²⁹³ Although the court facially appeared to limit the scope of subsection (b) in its decision, it also laid a dangerous and sweeping precedent.

The New Jersey Legislature has already enumerated twelve offenses (six offenses, and six attempt crimes) that qualify as sexually violent.²⁹⁴ It has additionally swept any other state or federal crime with “substantially the same elements” as these enumerated offenses within the Act’s purview.²⁹⁵ The New Jersey Supreme Court has now added to the Act’s scope by conferring even further authority to determine sexual violence under subsection (b).²⁹⁶

So how far is the reach of what may be considered sexually violent in New Jersey? As was mentioned above, the Department of Justice has used state statutes to construe such activities as “lascivious conduct,”²⁹⁷ “sexual battery,” “unlawful sexual activity,”²⁹⁸ and “sexual misconduct”²⁹⁹ as sexually violent in nature.³⁰⁰ The South Carolina Supreme Court, in *Brown v. State*, found it “apodictic

291. *J.M.B.*, 964 A.2d at 760.

292. *Id.* at 774.

293. *Id.* at 772.

294. N.J. STAT. ANN. § 30:4-27.26(a).

295. *Id.*

296. *See J.M.B.*, 964 A.2d at 774.

297. Lascivious conduct is defined as any conduct “tending to excite lust,” which is “lewd,” “indecent,” or “obscene.” BLACK’S LAW DICTIONARY 409 (3rd pocket ed. 2006).

298. New Jersey lists “prostitution” as an unlawful sexual activity punished under the law. *See* N.J. STAT. ANN. § 2C:34-1.

299. As an example, New York defines “sexual misconduct” to include acts of bestiality and necrophilia. *See* N.Y. PENAL LAW § 130.20 (McKinney 2006).

300. *See* LANGAN ET AL., *supra* note 60, at 3.

that in order to qualify as a sexually violent offense, one's actions do not have to be violent in the sense of being physically injurious or destructive."³⁰¹ According to the New Jersey Supreme Court's list of sexually violent characteristics, crimes such as stalking,³⁰² domestic violence,³⁰³ and possession of child pornography³⁰⁴ could also qualify as predicate offenses under the Act. Finally, as the Public Advocate noted in her oral argument before the New Jersey Supreme Court in *J.M.B.*, even an arsonist may get sexual gratification from his crimes, subjecting him to commitment if an expert witness testifies that he is mentally unsound.³⁰⁵ Not only has the New Jersey SVPA strayed away from a focus on actual violence to victims of sex crimes, it has been expanded to include all manner of auxiliary offenses that fit a certain criminal scheme. That the state may sweep within the purview of the Act any number of socially frowned-upon, but nevertheless non-violent sexual offenses, renders the discretionary provision unconstitutionally overbroad.

In closing, and for consideration are the words of a dissenting Chief Justice of the Arizona Supreme Court expressing his concerns

301. *Brown v. State*, 643 S.E.2d 118, 123 (S.C. Ct. App. 2007). Brown's predicate offenses included several acts of voyeurism and stalking, including peering into the windows of two women's houses. *Id.* at 119-20. Although Brown never touched or directly injured his victims, that he was violent in resisting arrest gave the court cause to infer that his crimes were sexually violent in nature. *Id.* at 123-24. The court found it "of no consequence" to Brown's sexually violent predator determination that he was not actually violent toward any of his victims. *Id.* at 123.

302. New Jersey law characterizes stalking as an act that both threatens and victimizes its target. See N.J. STAT. ANN. § 2C:12-10.

303. Domestic violence is characterized by victimization, physical and mental suffering, and could encompass unlawful sexual conduct with a minor child in a household as well as spousal rape. See N.J. STAT. ANN. § 2C:25-18. While a state may have a legitimate interest in protecting its citizens from domestic abuse by possibly expanding an SVPA to include sex acts perpetrated against an abused spouse, research revealed only two state decisions in which an individual was classified as a sexually violent predator based on domestic abuse convictions. See generally *State v. Sopko*, No. 90743, 2009 WL 97705 (Ohio Ct. App. Jan. 15, 2009); *State v. Davis*, No. 79191, 2001 WL 1474701 (Ohio Ct. App. Nov. 15, 2001). In a more disturbing case from the same jurisdiction, the Ohio Court of Appeals affirmed a trial court's refusal to classify a man with two counts of rape, two counts of kidnapping, one count of aggravated robbery, one count of felonious assault, one count of intimidation, and one count of domestic abuse against his partner as a sexually violent predator, despite being shown to have had sexually violent motivations for the above crimes. See *State v. Gross*, No. 89533, 2008 WL 597442, at *1-3 (Ohio Ct. App. Mar. 6, 2008).

304. Child pornography offenses fall under the category of endangering a child under New Jersey penal law. See N.J. STAT. ANN. § 2C:24-4(5)(b). Presumably individuals possess child pornography for sexual gratification purposes as well, giving them cause to be considered sexually violent under the New Jersey Supreme Court's reasoning.

305. See Webcast, Case No. A-79-07, *supra* note 242.

over Arizona's SVPA predicate offense requirements:

Finally, I cannot help but wonder where this novel approach to crime, punishment and public safety will lead us. How can we be sure, as the attorney general has argued, that the legislature will continue to view only sexual offenders as a special and unique class of criminals? If prosecutors are able to find mental health professionals willing to testify that people who commit repetitive assaults of a non-sexual nature have a mental abnormality predisposing them to such violent behavior, will the legislature pass laws to keep them incarcerated beyond their criminal sentences by the device of civil commitment? How about perpetrators of multiple domestic violence? Chronic drunk drivers? Violent drug offenders? What are the limits of this "end run" around the normal criminal justice process?³⁰⁶

CONCLUSION

The New Jersey Sexually Violent Predators Act contains language that is unconstitutionally vague and overbroad.³⁰⁷ Statutes of this nature are intended for a purpose,³⁰⁸ but must be narrowly construed to fit that purpose. This purpose must also be viewed with a critical eye, as civil commitment statutes for sex offenders were largely the product of social outcry,³⁰⁹ a misunderstanding of mental illness,³¹⁰ and ineffective correctional theory.³¹¹ Civil commitment deprives an individual of his or her liberty to an extent that warrants due process protection and a higher level of legislative scrutiny.³¹² It is therefore more properly the province of sentencing reform movements to extend the amount of time an individual is confined to the custody of the state if reoffense is a genuine concern.³¹³ Given

306. *State v. Ehrlich*, 26 P.3d 481, 491 (Ariz. 2001) (Zlaket, C.J., dissenting), *vacated on other grounds*, *Glick v. Arizona*, 535 U.S. 982 (2002).

307. *See supra* Part IV.

308. *See* N.J. STAT. ANN. § 30:4-27.25(a) ("Certain individuals who commit sex offenses suffer from mental abnormalities or personality disorders which make them likely to engage in repeat acts of predatory sexual violence if not treated for their mental conditions.").

309. *See* JANUS, *supra* note 75, at 2.

310. *See* Dershowitz, *supra* note 74, at 40.

311. *See* Lucken and Latina, *supra* note 43, at 15-17.

312. *See* *Addington v. Texas*, 441 U.S. 418, 425 (1979).

313. As an auxiliary matter, the U.S. Supreme Court has consistently emphasized that "[s]tates have a valid interest in deterring and segregating habitual criminals." *Ewing v. California*, 538 U.S. 11, 25 (2003) (quoting *Parke v. Raley*, 506 U.S. 20, 27 (1992)) (upholding California's "three strikes law" for habitual criminal offenders). For the New Jersey Legislature to implement a similar "three strikes" sentencing scheme for repeat offenders would not only be within the Legislature's sound discretion and authority, but would address the problem of recidivism in sex offenders without failing

the above findings and arguments, the New Jersey Legislature and legislatures around the country are urged to reconsider the structure of their states' SVPAs so that otherwise non-violent sexual conduct is not swept up into legislation that already is a questionable deprivation of the affected individuals' freedom.