

The Due Process Implications of Sexually Violent Predator Commitment Hearings

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Abstract:

At the time of this article, over six thousand people are being detained under sexually violent predator commitment laws in the United States. Each one of these offenders have been ruled by the court as sexually violent predators based on psychologist expert testimony and findings which are predicated on diagnoses using the Diagnostic and Statistical Manual of Mental Disorders. Current critique surrounds the possibility of due process implications in the courts over reliance on psychologist diagnoses as proof beyond a reasonable doubt. This article will argue that these due process implications are made a reality by the Diagnostic and Statistical Manual's incapacity to provide proof beyond a reasonable doubt that an offender is a sexually violent predator by illustrating how discrepancies between the Diagnostic and Statistical Manual and the practice of law render it so.

Opinion

In the United States, detention exists in two capacities: civil and criminal. Criminal proceedings deal in the punitive punishment of guilty parties. In order to enact a punitive Punishment, prosecution must prove guilt in the act, Actus Rea, as well as guilt of the mind, Mens Rea.¹ Alternatively, civil commitment deals only in terms of Mens Rea. There are two forms of civil commitment, voluntary and involuntary, both of which result in the admittance of an individual to a treatment facility because they pose a threat to themselves and others. Commitments of this class differ from punitive confinement because they deal in preventative action on the basis of a predisposed condition rendering an individual incapable of restraining themselves from committing dangerous actions. The civil commitment of a sexually violent predator, or SVP, pursuant to the Illinois Sexually Violent Persons Commitment Act bridges civil commitment and punitive confinement by addressing both the Actus Rea and Mens Rea.² SVP commitment can only be enacted when an individual is currently incarcerated for a felony crime and is determined beyond a reasonable doubt probable to re-offend should they be released. To achieve sexually violent predator commitment, an offender must satisfy all three prongs of the Hendricks standard created by *Kansas v. Hendricks*³, they must be:

- 1) Convicted of a violent sexual offense.

¹ Eugene J. Chesney, *The Concept of Mens Rea in the Criminal Law*, 29 J. Crim Law Criminal, 627-644 (1939).

² Sexually Violent Persons Commitment Act, 725 ILCS 207/, 725 Ill. Comp. Stat. Ann. 207.

³ *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

- 2) Diagnosed with a mental abnormality.
- 3) This abnormality makes it highly likely that the offender will re-offend.

At the tail end of time served for a violent sexual offence, the offenders file will cross the desk of their District Attorney, who will pass initial judgment on whether they are a fitting candidate for SVP commitment. If the District Attorney believes the offender is eligible, their file will be passed on to the State Sexual Offenders Assessment Board. Subsequently, there will be a probable cause hearing followed by a ninety-day observation period. During this observation period, the offender is monitored by psychological experts whose notes, reports, and expert testimony are imperative to the deliberations of the impending commitment hearing. When an offender is civilly committed as a sexually violent predator, they remain in custody of the Department of Human Health Services and are set to be released only when a judge decides they are no longer dangerous. Psychologist expert testimony is critical for decisions of SVP commitment, but does this kind of evidence satisfy the standard of proof required at SVP hearings? There is skepticism surrounding the admissibility of psychologists' expert testimony in proving the probability of re-offense beyond a reasonable doubt as well as the capabilities of diagnostic materials, such as the Diagnostic and Statistical Manual, when interacting with legal statute. In more recent years it has come into question whether the limitations of psychological diagnosis introduce due process implications for offenders facing sexually violent predator commitment in hearings where the burden of proof remains beyond a reasonable doubt.

Sexually violent predator statutes have been facing censure since their conception in 1937, however, at this time they existed under the title of "Sexual Psychopath Laws."⁴ These laws were created in the interest of treating offenders for their paraphilias as well as preventing offender recidivism, mirroring the motives of more traditional civil commitment. Sexual psychopath laws remained in effect until the 1960s until states began to grow unsure of the capabilities of SVP commitment, as those confined were being released from treatment earlier than their appropriate sentences and using the system to evade full time served. By 1990, twelve states had repealed their Sexual Psychopath Laws. These statutes were dormant for only three years before being resurrected by the case of Earl Shriver.⁵ Shriver was convicted in 1981 for the kidnapping and assault of two teenage girls, almost immediately after his release from a ten-year sentence for this crime, Shriver raped and castrated a seven-year-old boy. The public outrage following this attack was a resounding plea for the reimplementation of SVP commitment statutes, beckoning the Illinois Sexually Violent Predator Act in 1998. However, the resurgence of these statutes also welcomed dissenters concerned with the due process implications of involuntary civil commitment as a general practice. Critics cautioned that continuing to detain an offender longer than their established sentence in itself is violation of due process liberties, this however was addressed by the Supreme Court in *Kansas v. Hendricks*, which held that the basis

⁴ Edwin H. Sutherland, *The Sexual Psychopath Laws*, 40 J. Crim Law Criminal 22, 543-554 (1950).

⁵ *In Re Carl Elson Shriver*, 735 F.2d 1236 (1984).

of these commitments was tailored to a very dangerous and specific population and therefore does not violate due process liberties.

The true genesis of due process implications in SVP commitments is not the practice of committing someone past their initial sentence, like argued in the aforementioned case, but rather the over reliance on psychologist diagnosis in SVP hearings to do so. The inherently subjective nature of the Diagnostic and Statistical Manual, the DSM, strips the process of diagnosis itself of an ability to independently provide proof beyond a reasonable doubt, and yet it is expected to do so as it is wholly relied upon to fulfill the second prong of the Hendricks standard.

Mental abnormality is not decided through a scientific method by the DSM, instead it is created by people and societal context, the DSM is only a means of defining it. This does not equate to the conclusions of the DSM to being inaccurate or lacking any scientific basis, instead, that the concepts and definitions provided by the DSM are subjectively constructed through social and cultural understandings of baseline deviant behavior.⁶ There are also discrepancies in the integration of psychological language into statutory language. The language of the DSM does not fit into the language of law and requires that experts force two heavily linguistically reliant fields to compromise. This leaves room for a margin of error where the findings of the psychologists' clinical assessments may be inadvertently conflated in the interest of accurately expressing them in legal terminology. For example, the Hendricks standard requires the diagnosis of a mental *abnormality* in order to fulfill the second prong of the commitment requirement.⁷ This terminology, however, is extremely outdated in the psychology community and is rarely, if ever, referred to by experts when issuing diagnosis. Experts who provide testimony at SVP hearings must shift their language between what is accurate in their field and what is detailed in the relevant legal statutes. This stands to compromise the definitiveness of the legal rulings that are made based on the perspective of these testimonies as scientific fact. When a district attorney files a petition for SVP commitment, the offender is required to complete a ninety day observation period under the watch of the psychological experts who will then testify or provide reports for the impending hearing. There is an aspect of predisposed knowledge of the legal outcome that will result from their findings that experts are aware of during their evaluations, because of this, psychologists arguably cannot be expected to be completely and decidedly objective in their pursuits. Additionally, human nature is going to render an emotional response when observing an offender who has been convicted of a violent sexual offence, many times a pedophilic offence. Diagnosis as a means of coming to a legal conclusion compromises the objectivity of the diagnosis as a scientifically factual piece of evidence. Even if it could be proven beyond a reasonable doubt that the defendant does have the "mental abnormality" that they are diagnosed with, it still cannot be proven beyond a reasonable doubt that this fulfills the third prong of the Hendricks standard. Psychology as a practice is not decidedly predictive, and

⁶ Lloyd H. Rogler, *Making Sense of Historical Changes in the Diagnostic and Statistical Manual of Mental Disorders: Five Propositions*, 38 JHSB 9-20 (1997)

⁷ *Constitutional Law. Due Process. Minnesota Supreme Court Upholds Minnesota Sexually Dangerous Persons Act. In Re Linehan*, Harv L. Rev, 113 1228-1233 (2000).

to fulfill the standard it would need to be to be considered fact. DSM diagnoses can provide insight into future behaviors of patients, but it cannot provide the standard of reasoning that they need to reach to be valid deciding factors of legal outcomes.

Reliance on a tool which is not meant to be a legal device and does not naturally fit within statute parameters is a due process liberty violation because it cannot be relied upon to provide sufficient evidence beyond a reasonable doubt. SVP commitment has proven necessary to maintaining the safety of vulnerable populations, but it is impossible to deny the implications present in the means of achieving them.