

Commentary: Punishing the Unpunishable—The Abuse of Psychiatry to Confine Those We Love to Hate

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I commend John Melville and David Naimark for their commentary in this issue of the Journal¹ demonstrating how the guilty but mentally ill (GBMI) verdict perverts the insanity defense by encouraging jurors to find insane defendants guilty (but mentally ill) and by imposing punishment on those found GBMI that is more severe than would have been imposed on them if they had simply been found guilty. I applaud their characterization of the consequences of a GBMI verdict as “punishment,” because that is what it is, rather than some euphemistic non-equivalent, such as “treatment” or “incapacitation of the dangerous,” which it is not. They have told it like it is, not like we claim it is.

I write, however, to suggest that criminal defendants found GBMI are only one group of mentally disordered individuals whom a frightened and vengeful society wrongfully punishes by confining because it deems them dangerous. There are others worth discussing.

Sentence-Expiring Convicts

Consider, for example, mentally ill convicts whose prison sentences are about to expire. In 1966, in the case of *Baxstrom v. Herold*,² the United States Supreme Court held unconstitutional a New York statute that authorized, through administrative decision,

the civil commitment of mentally ill, sentence-expiring convicts and their continued confinement in a maximum security mental institution operated by the department of corrections. Under the invalidated statute, sentence-expiring convicts were the only persons subject to civil commitment who were denied a jury review on the question of whether their mental conditions met the civil commitment criteria. They were also the only persons who were denied court hearings on the question of whether they were dangerously mentally ill, a prerequisite for confinement in a maximum-security mental institution. Writing for a unanimous Court, Chief Justice Warren rejected the assertion that a person’s criminal tendencies or dangerous propensities are established by his or her criminal record. Equal protection demands, he said, that sentence-expiring convicts receive the same procedural safeguards that all others receive in the civil commitment process. They cannot be specially classified to avoid the standard procedural roadblocks to civil commitment. Equal protection also demands that they receive the same procedural safeguards that all other civilly committed patients receive before they may be placed in maximum-security confinement. They cannot be specially classified to avoid the standard roadblocks to such placement. If convicts were to be civilly committed on expiration of their criminal sentences, the state was required to use the same civil-commitment statutes—the same procedures and same criteria used for civil commitment of any other person. Sentence-expiring convicts could not be separately categorized for civil commitment purposes.

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The Supreme Court's opinion makes sense. After all, when a prisoner's sentence expires, his or her debt to society has been paid, and the prisoner is no longer subject to further punishment. Some states, however, are simply unwilling to let these people go. Although we can no longer legally punish them, we can continue to confine them, cloaking our punishment agenda in treatment garb. California, for example, has enacted a mentally disordered offenders statute.³ Despite its title, the statute is applicable, not to sentence-serving offenders, but rather, to exoffenders who are about to be discharged from prison and whom the state would like to continue to confine. If a court or jury finds that the person has a severe mental disorder that is not in remission or cannot be kept in remission without treatment and that the person represents a substantial danger of physical harm to others because of that disorder, the person can be committed for renewable one-year periods. Regular civilly committed patients who suffer from the same mental disorders and who represent the same substantial danger of physical harm to others can be confined only for renewable 180-day periods.⁴ In fact, the regular civilly committed patients may present an even greater danger than do the special civilly committed, sentence-expiring convicts. To be subjected to a 180-day commitment hold, the nonprisoner must have attempted, inflicted, or made a serious threat of substantial physical harm on another person that either resulted in the person's confinement on a short-term evaluation or treatment hold or that occurred during that hold, and must continue to present a demonstrated danger of inflicting substantial physical harm on others. Nevertheless, because we fear sentence-expiring, mentally ill prisoners more than other mentally ill patients, or because we hate them more, we subject them to longer periods of confinement and to confinement in more secure facilities.

Mentally Incompetent Criminal Defendants

Six years after its *Baxstrom* decision, the Supreme Court, again in a unanimous decision, invalidated a statute that authorized indeterminate and potentially lifetime commitment of a mentally retarded, deaf, and mute criminal defendant who had been found incompetent to stand trial. In *Jackson v. Indiana*,⁵ the Court interpreted its *Baxstrom* precedent broadly, stating: "*Baxstrom* held that the State cannot with-

hold from a few the procedural protections or the substantive requirements for commitment that are available to all others" (Ref. 5, p 727). This principle is not limited to sentence-expiring convicts but applies as well to criminal defendants found incompetent to stand trial: "If criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice" (Ref. 5, p 724). *Baxstrom* was not limited to the procedural safeguards in the commitment process. *Jackson* extended *Baxstrom* to the substantive standards for commitment and release. The Constitution's Equal Protection clause is violated when incompetent criminal defendants are subject to a more lenient commitment standard and a more stringent release standard than is applicable to all others undergoing civil commitment. Although a finding of incompetency to stand trial can justify a brief period of detention designed to restore the defendant's competence, only the customary civil commitment proceedings can be used to achieve lengthy or indeterminate confinement of permanently incompetent defendants who cannot be restored to competency within a reasonable period.

Society, however, has not been willing to accept the Supreme Court's judgment. We detest mentally incompetent criminal defendants. After all, their mental condition precludes a trial for a crime they may have committed. They may be guilty, but we will never know. Although a finding of guilt is a prerequisite to punishment, we are unwilling to allow incompetent defendants to escape the punishment that they may deserve. Thus, we turn to psychiatry to enable us to confine indefinitely those we cannot legally punish. A review of legislation in the 50 states and the District of Columbia, conducted 20 years after *Jackson v. Indiana*⁵ was decided, revealed that the Supreme Court's decision has been ignored or circumvented in a majority of jurisdictions.⁶ Some states evade *Jackson* by imposing a lengthy treatment requirement before acknowledging that the defendant is permanently incompetent—that is, that there is no substantial probability that the defendant will become competent to stand trial in the foreseeable future. Although clinicians believe that this decision can be made within six months, or at most, a year,⁷ Florida, for example, mandates a five-year treatment period for any incompetent felony defendant.⁸ In

Minnesota, if the incompetent defendant is found to have homicidal tendencies, the law requires that he or she be committed “to the Minnesota Security Hospital for safekeeping and treatment. . . until recovery.”⁹ Several states tie the maximum length of the treatment period to the maximum sentence that could have been imposed if the defendant were convicted of the crime charged.

These laws do not conform to the Supreme Court’s ruling that confinement of individuals as mentally incompetent criminal defendants requires progress toward the goal of restoration to competence. A defendant charged with a serious crime is not, by that fact alone, more difficult to treat or less responsive to treatment than a defendant charged with a less-serious crime. Progress in treatment simply cannot be measured by the seriousness of the criminal charge or the sentence that could have been imposed if the defendant were to be found guilty in a trial that has yet to be held. Yet, these laws allow us to continue to confine permanently incompetent criminal defendants, even though we know that further treatment will not restore their competency. We are simply unwilling to trust our regular civil commitment laws to afford us adequate protection from all mentally ill and dangerous persons, whether charged with a crime or not.

Insanity Acquittees

If sentence-expiring convicts and mentally incompetent criminal defendants cannot be specially classified for civil commitment purposes, it is logical to assume that any nonconvict cannot be specially classified for that purpose—even if the individual has been “tainted” by his or her involvement in the criminal process. A successful insanity defense precludes criminal responsibility. A seriously mentally ill person who engages in criminal behavior but who lacks the ability to choose between socially acceptable and socially unacceptable behavior is not blameworthy and is not subject to criminal punishment. The state’s definition of insanity establishes the line separating the “bad”—criminals who can be punished for their conduct—from the “mad”—insanity acquittees who cannot. Some commentators¹⁰ believe, and some appellate courts^{11,12} have held, that the regular civil commitment process should be used to confine insanity acquittees. Although a post-trial evaluation may be appropriate to assess the insanity acquittee’s current mental condition, insanity ac-

quittees should not be distinguished from other non-convict mentally disordered persons in the procedures to be used in the civil commitment process and the criteria to be applied in the commitment decision.

However, we do not accept our legal inability to punish insanity acquittees. After all, they have committed criminal acts, even if their mental condition at the time they acted precludes our punishing them. We also believe that they used psychiatric experts to hoodwink the jury into finding them insane. They have cheated us from extracting the full pound of flesh to which we feel rightfully entitled. We blame them because we cannot hold them legally blameworthy. Our love to hate can be satisfied only if we can use psychiatry to enable us to confine them—for life, if possible, or at least for a long, long time.

Fortunately for us, in 1983, in the case of *Jones v. United States*,¹³ a more conservative Supreme Court departed from its precedents, and, by a five-to-four vote, indulged our passions. “Insanity acquittees constitute a special class” said the Court’s majority, “that [can] be treated differently from other candidates for commitment” [Ref. 13, p 370]. As a special class, insanity acquittees can be subjected to automatic, indeterminate commitment without first undergoing the civil commitment process. For civil commitment generally, the state is required to prove, by clear and convincing evidence, that the person is both mentally ill and dangerous. No such burden is imposed on the state before it can commit insanity acquittees. When a criminal defendant pleads and proves insanity, the insanity verdict establishes beyond a reasonable doubt that the defendant committed a criminal act and did so because of mental illness. The legislature may determine that the insanity verdict supports an inference of continuing mental illness and continuing dangerousness. Thus, insanity acquittees can be distinguished from others, such as incompetent criminal defendants, about whom such proof is lacking. The world, we learn from this decision, is not composed of sentence-serving prisoners, worthy of our condemnation, and all others, including insanity acquittees, who are not. Insanity acquittees are a “special” class of people, who are not entitled to the civil commitment safeguards. Although we can’t punish them, we surely can confine them.

The dissenters in *Jones* challenged the majority’s logic.¹³ They noted that the insanity verdict is backward-looking, focusing on the defendant’s mental condition at the time of the criminal act. The issue

for a commitment decision focuses on the present and future. The state should be obligated to bear the burden of proving that the insanity acquittee is currently mentally ill and dangerous. When one considers that confinement in a mental hospital entails a massive curtailment of individual freedom and autonomy that, in some respects (e.g., coerced treatment), is even more intrusive than incarceration in a prison, it is simply unfair to place the burden on the insanity acquittee to prove that he or she is entitled to release. Michael Jones, for example, had been charged with shoplifting. If he had been found guilty of this nonviolent, petit larceny, the maximum sentence that could have been imposed was one year. Instead of one year of punishment, he faced indeterminate, and possibly lifetime, confinement as an insanity acquittee. After all, we are not punishing him for a crime, we are simply treating him until he proves to us that he is no longer mentally ill and dangerous. The distinction between the criminal and the noncriminal has evaporated; the line between the mad and the bad has disappeared.

Sexually Violent Predators

Forty years ago, more than half the states had enacted sexual psychopath legislation. Through such legislation, criminal defendants charged with or convicted of sex crimes and facing a determinate sentence could be detained indefinitely for treatment until they were no longer dangerous. Sexual psychopath legislation was discredited, however, by the inability of psychiatrists to identify a specific mental disorder in individuals who should be included within the targeted group and by the lack of successful treatment methodologies to improve the condition of such individuals. The absence of treatment destroyed any valid basis for distinguishing prisoners deemed sexual psychopaths from other prisoners to subject them to indeterminate commitment. Determinate, but lengthy, penal sentences for sex offenders replaced indeterminate, but largely unsuccessful, treatment of sexual psychopaths. Today, even pedophile priests face punishment, not merely penitence.

Nevertheless, after a series of heinous sex crimes committed by sentence-expired prisoners recently released from criminal confinement, the public demanded more protection, and the legislature acceded to that demand. Sexually violent predator (SVP) legislation was created to reestablish indeterminate commitment of dangerous sexual offenders. In es-

sence, SVP legislation was a reincarnation—a second generation, if you will—of sexual psychopath legislation. Unlike its sexual psychopath predecessor, however, which substituted indeterminate treatment for determinate punishment, the SVP statutes add indeterminate confinement on completion of the offender's criminal sentence. For the heinous crimes they have committed and may again commit in the future, punishment to the full extent of their criminal sentences is simply not enough. We demand their incarceration for life. Even though they have the same mental disorder diagnoses that sexual psychopaths had, and even though treatment is no more likely to be successful for them than it was for sexual psychopaths, we have turned again to psychiatry to keep them confined.

In 1997, in the case of *Kansas v. Hendricks*,¹⁴ the Supreme Court upheld the constitutionality of Kansas's SVP Act¹⁵ against three claims of constitutional infirmity. Under the Kansas statute, a sentence-expiring convict could be subjected to special civil commitment as an SVP if he had a "mental abnormality" or a "personality disorder" that made him "likely to engage in predatory acts of sexual violence." The Court found that the Act satisfied substantive due process requirements. Justice Thomas, writing for the Court's five-justice majority, noted that civil commitment statutes have been sustained when they limit the class of persons eligible for confinement to those who are dangerous and who are unable to control their dangerousness due to mental illness. Although the Kansas statute used the term "mental abnormality" rather than "mental illness," Justice Thomas dismissed the importance of the distinction, declaring that "the term 'mental illness' is devoid of any talismanic significance" (Ref. 14, p 359).

Critics, however, charge that the mental abnormality language is significant. The statute authorizes civil commitment of those who have a legislatively defined mental abnormality, even if they do not have a clinically recognized mental disorder traditionally required for civil commitment under other statutes. Despite this distinction, we call on psychiatrists to serve as experts testifying as to whether the requisite mental abnormality exists. In essence, they serve as the high priests of our ceremony, consecrating these special commitment decisions. The provisions, charged Stephen Morse, "are vague and even incoherent definitions of *abnormally* produced sexual danger [that do not] make any rational sense on

[their] own terms” (Ref. 16, p 260; emphasis in original). The term mental abnormality is “circularly defined. . . , collaps[ing] all badness into madness” (Ref. 16, p 261). The Supreme Court frees state legislatures to define mental abnormality as they wish and to decide that those so defined are unable to control their conduct. The definition is so broad, claimed Morse, “that it, in fact, can be applied to *any* behavior” (Ref. 16, p 261; emphasis in original). Bruce Winick¹⁷ suggested that if pedophiles can be labeled by legislative fiat as unable to control their strong sexual urges—although no theoretical or empirical support exists for this determination—then *Hendricks*, broadly construed, permits legislatures to invent categories such as “violent hotheads,” “violent terrorists,” “persistent kleptomaniacs,” “dangerous pyromaniacs,” and “persistent compulsive gamblers” and to subject those so identified to postprison civil commitment. Robert Schopp declared that SVP statutes “are fundamentally deficient because they. . . provide no guidance to decision makers in identifying those who are legally mentally ill” (Ref. 18, p 342).

In *Hendricks*, the majority also found that the Act did not violate the Constitution’s prohibition against double jeopardy or *ex post facto* lawmaking. The Supreme Court accepted as true the legislature’s stated intention to create a new civil commitment scheme for SVPs, rather than to inflict additional punishment for past criminal acts. Incapacitation—depriving persons who are both mentally ill and dangerous of their freedom—said the Court, “is a legitimate nonpunitive governmental objective.”¹⁴ Thus, even if SVPs suffer from an untreatable condition, they may be detained so long as they pose a danger to others. If treatment is possible, the fact that the state provides treatment only incidentally to its primary incapacitation objective, does not render the statutes punitive. Because the Act was found to have a non-punitive purpose, neither a double jeopardy nor an *ex post facto* claim could be sustained. *Hendricks* was not subjected to multiple punishments, because SVP civil commitment is neither punishment that follows a second prosecution for the same crime for which he served a criminal sentence, nor punishment for conduct that was legal before the statutes were enacted.

The four dissenting justices focused on *Hendricks*’s *ex post facto* claim. In their view, the statutes impermissibly imposed punishment by delaying treatment until *Hendricks* completed his prison sen-

tence. Under the Act, diagnosis, evaluation, and commitment proceedings—prerequisites for treatment—did not occur until the convict’s criminal sentence was about to expire. Additionally, when commitment proceedings were conducted, the decision-maker was not required to consider less restrictive alternatives to confinement. Further, when *Hendricks* was civilly committed as an SVP, the state refused to provide treatment to him.

Scholars have also questioned whether SVP legislation can be justified with an incapacitation, not a punishment, rationale. Without real treatment for the patient’s incapacitating condition, confinement is punitive. John Parry, for example, maintained that it “strains credibility” to conclude that postprison confinement of SVPs is therapeutic, especially when the state withholds treatment while the offender is serving his sentence.¹⁹

SVP legislation inappropriately eradicates the line between the criminal law and the civil law. Without requiring prosecutors to obtain criminal convictions for prohibited acts, SVP laws allow preventive detention of allegedly dangerous individuals who would be found criminally responsible and subject to criminal punishment if they committed those acts. “[I]t seems perverse,” wrote Morse, “to claim that a person is responsible enough to deserve criminal punishment—the most serious state intrusion on liberty—but is *not* responsible enough to avoid preventive confinement for potential harmdoing” (Ref. 20, p 136; emphasis in original). The state should not be allowed to punish a person as criminally responsible for a crime and then, on completion of that sentence, civilly commit him as mentally abnormal and unable to control his dangerousness.

Critics also contend that the *Hendricks* majority failed to address *Hendricks*’ constitutional claims through a principled analytical framework.²¹ The Court simply accepted, at face value, the state’s categorization of SVP commitment as “civil” and imposed on *Hendricks* the heavy, if not impossible, burden of establishing by the clearest proof, that the legislative scheme was punitive. The Court did not consider whether Kansas’s SVP commitment statutes deprived *Hendricks* of a fundamental right, and if it did, whether the deprivation satisfies the test of strict scrutiny—the test traditionally applied to violations of fundamental rights. Any involuntary confinement is a physical restraint of the body, depriving the individual of freedom. In another case, the Supreme

Court declared that freedom from physical restraint is the core liberty interest protected by the Constitution from arbitrary governmental action.²² It is difficult to understand how the core liberty interest protected by the Constitution could be characterized as anything less than fundamental.

Although the Supreme Court upheld the constitutionality of SVP legislation by the narrowest of margins, many states responded quickly to the *Hendricks* decision by enacting SVP legislation. More can be expected to join them. To avoid constitutional problems, the legislation typically mimics the Kansas model. SVP statutes have joined lengthened criminal sentences and sex offender registration laws as politically expedient controls on those who have committed violent sexual offenses and who might do so again in the future.

When sex offenders can no longer be punished for their crimes, we ask psychiatrists to wave their magic wands, declare such people to be SVPs, and continue their confinement. What of the *Baxstrom* decision holding that sentence-expiring convicts cannot be separately categorized for civil commitment purposes, that the same civil commitment standards and procedures must be applied to them as to any other nonconvict? We simply ignore it as if it never existed. The *Hendricks* decision allows states to establish a separate civil commitment category for SVPs. SVPs are especially dangerous people who are not similarly situated with other civilly committed mental patients and are not denied equal protection of the laws simply because they are processed differently. However, the Supreme Court has not yet considered whether sentence-expiring convicts are denied equal protection because they alone, and not others who pose an equal danger, are targeted for SVP commitment. It is an argument that is worthy of consideration.²¹

I am not confident, however, that an attack on SVP legislation predicated on *Baxstrom* will succeed. All other assaults on this fortress of fear have so far failed. If anything, the grasp of SVP commitment law has expanded, not contracted. For example, just a year ago, the Supreme Court ruled that if a state court found that the legislature had a legitimate, nonpunitive purpose for enacting SVP legislation—just ask them and they will say they did—then an SVP may not claim that the legislation, as implemented and applied to him, was punitive.²³ Even though the Special Commitment Center, which housed all of Washington state's SVPs, was located

within the perimeter of a department of corrections facility, had conditions that were incompatible with the statute's stated goal of treatment, and provided no real potential for release, the Supreme Court would not even consider the possibility that the legislature's intent was to punish SVPs by confining them for life, without treatment and without hope.

In 2002, the Supreme Court ruled that in SVP commitment proceedings, the state is not required to prove that the person completely lacks control of his behavior. He can be labeled an SVP so long as his mental abnormality makes it difficult for him to control his dangerous behavior.²⁴ After all, if we required an absolute lack of control, some highly dangerous persons with severe mental abnormalities might escape our clutches. Surely psychiatrists will be able to find that it was at least "difficult" for the alleged predator to control his behavior so that we do not have to wait until he commits his next crime and, when he does, rely exclusively on the criminal law to keep him confined.

State courts have added their questionable support to SVP statutes. For example, this year the California Supreme Court ruled that the SVP statute's definitional requirement that the person be "likely to engage in acts of sexual violence without appropriate treatment and custody. . ." is met if he "presents a *substantial danger*—that is, a *serious and well-founded risk* of criminal sexual violence" (emphasis in original).²⁵ Even though, as the dissent pointed out, "likely" in ordinary and legal usage means having a better chance of occurring than not, and any sentence-expiring prisoner with the requisite prior crimes and a continuing mental disorder would qualify for SVP commitment under the majority's "substantial danger" standard, the majority, nevertheless, embraced the broadened definition. Tell us, doctor, does this violent offender with a diagnosed sexual disorder present a substantial danger if released at the end of his criminal sentence? We have made it easy for you, doctor. Just sign this certificate, and we can keep him confined forever. Was it Humpty Dumpty who said: "When I use a word [such as "likelihood"], it means just what I choose it to mean—neither more nor less."²⁶ Does it surprise you to learn that not a single one of the more than 400 California SVPs committed to Atascadero State Hospital since the SVP law was enacted seven years ago has been released? And yes, California is currently constructing a new facility at Coalinga able to accommodate an ex-

panded SVP population of 1,500 when that facility opens in October 2004.

Conclusion: The Abuse of Psychiatry in the United States

The Analysis and Commentary section of Volume 30, Number 1, of the Journal was devoted to articles discussing the abuse of psychiatry in China and the former Soviet Union. Robin Munro, for example, asserts that in addition to arresting and imprisoning dissidents as enemies of the state who “endanger state security,” the Communist Party of China also subjects some arrested dissidents to legal-psychiatric evaluations, finds them criminally insane, and commits them to psychiatric institutions for long-term custodial care.²⁷ At least 20 police-run facilities for the criminally insane, known as Ankang hospitals, exist in China. Since mid-1999, when the campaign against practitioners of Falun Gong began, Chinese psychiatry invented a new syndrome—“evil cult-induced mental disorder”—to justify psychiatric detention of Falun Gong believers. Richard Bonnie compared political abuse of psychiatry in China today with political abuse of psychiatry in the Soviet Union less than 20 years ago.²⁸ He noted that China’s system of maximum-security forensic hospitals (Ankang) were modeled after the Soviet “special hospitals,” which confined offenders who presented a “social danger.” Typically, patients in such facilities were charged with political crimes, such as “anti-Soviet agitation and propaganda” or “defaming the Soviet state.”

In the United States, we do not confine dissidents as enemies of the state. We are not governed by one political party—such as the Communist Party—that assures its continued existence by denouncing and confining all those who disagree with its policies. Here, the American people govern, acting through their freely elected representatives. The power of the people, however, is not absolute. The Constitution is the supreme law of the land, and it protects the rights of individuals against the will—and the prejudices—of the majority.

When psychiatry is used to substitute special civil commitment for criminal incarceration, we punish the unpunishable. Individual rights are lost, and the Constitution’s rule of law is undermined through commitment laws that separately classify for indeterminate confinement SVPs, insanity acquittees, and other mentally ill and dangerous individuals who have been involved in the criminal process but who are not sentence-serving convicts. When the people’s

legislatures enact these laws and when the courts uphold them from constitutional attack, our approach differs little from that used by totalitarian regimes to rid themselves of enemies of the state.

In post-September 11 America, we are obsessed with the need for security. American citizens are declared to be “enemy combatants” and are confined without trial. Leaders of foreign governments are threatened with assassination and their countries with preemptive strikes. We might as well add dangerous mentally ill people to those we hate and target for removal. In the words of Gilbert and Sullivan’s Lord High Executioner: “I’ve got a little list—I’ve got a little list. . .of society offenders who. . .never would be missed—who never would be missed” (*The Mikado*, Act 1).

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