

Normative Versus Consequential Ethics in Sexually Violent Predator Laws: An Ethics Conundrum for Psychiatry

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Nineteen states and the federal government have statutes for the civil commitment of sexually violent predators (SVP). The American Psychiatric Association has vigorously opposed SVP laws, citing the abuse of both individual civil rights and of psychiatry in forwarding preventive detention. Those who support the laws underscore that the statutes target highly dangerous sex offenders. There are two different approaches to understanding ethics-based problems and their solutions. The normative approach assumes that there is a universal, intuitive, abstract, correct answer to a given question. However, there is no universal right way to balance the important normative ethic of protecting individual rights with the equally important normative ethic of protecting public safety. A less universal approach, consequential ethics, becomes necessary when abstract normative values conflict and lead to opposing conclusions. In this commentary, we examine and attempt to resolve the conflicting positions raised by the SVP statutes by using consequential versus normative ethics.

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Since 1990, 19 states and the federal government have passed sexually violent predator (SVP) or sexually dangerous person (SDP) civil commitment statutes.^{1–20} These laws seek to identify and commit to involuntary, indefinite psychiatric hospitalization, a small group of extremely dangerous incarcerated sexual offenders who represent a threat to public safety if released from custody. The laws have raised controversy in the psychiatric and psychological community on the grounds that civil commitment of offend-

ers who have already served a prison term represents preventive detention.

The American Psychiatric Association has vigorously opposed such statutes in a task force report.²¹ There were three powerful objections: that the statutes violate individual civil rights to due process and represent a form of preventive detention and double jeopardy; that this may create a slippery slope, conceivably leading to the future incarceration, without proper legal grounds, of other groups deemed to have undesirable “mental disorders” (e.g., political dissidents); and that this is an abuse of psychiatry aimed at correcting a social problem caused by short sentences handed down by the legal system.

Those who support the laws emphasize that SVP/SDP civil commitment targets a small group of highly dangerous sex offenders found to have mental disorders that render them an unacceptable risk to public safety. Moreover, they point out that the U.S. Supreme Court has affirmed the constitutionality of the statutes in three separate rulings.^{22–24} It is diffi-

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cult to balance the conflicting values of the professional organization's gatekeeper role in preserving the integrity of civil commitment; the legislature's task of protecting society and finding ways to address legal deficiencies that put the public at risk; the practitioner's responsibilities to public safety as well as to professional integrity; and the constitutional rights of the individuals committed under SVP/SDP statutes.

There are two different approaches to understanding ethics-based problems and their solutions. The normative approach assumes that there is a universal, intuitive, abstract, correct answer to a given question. Unfortunately, however, there is no universal right way to balance the important normative ethic of protecting individual rights with the equally important normative ethic of protecting public safety. A less universal approach, consequential ethics, becomes necessary when abstract normative values conflict, leading to opposing conclusions. In this commentary, we examine the ethics-related conflicts inherent in SVP/SDP statutes and suggest a resolution.

Brief Historical Overview

In the 1930s, several states passed sexual psychopath laws that represented the first "medicalization" of sexual crimes. Hospital commitment was an alternative to, not an extension of, imprisonment. This notion was based on the overly optimistic assumption that the risks posed by sex offenders with mental disorders would be reduced dramatically if they were sent to psychiatric hospitals for treatment instead of incarcerated in prison. The belief was that some persons who engaged in sexual offenses did so because of a mental illness and should not be punished. Consequently, treatment was viewed as beneficial in "curing" them and thus protecting the public upon their release into the community. The sexual psychopath laws were repealed by the early 1980s when questions were raised about the effectiveness of treatment for this population. Various professional organizations, such as the Group for the Advancement of Psychiatry, the President's Commission on Mental Health, and the American Bar Association Committee on Criminal Justice Mental Health Standards urged that these laws be repealed.²⁵ As a result, the criminal justice system handled offenders who committed sexual crimes no differently than offenders who committed other crimes. That is, both were punished.

Civil commitment statutes again emerged in the 1990s for a subpopulation of dangerous sex offenders. The statutes filled a hole caused in the 1980s when the civil rights movement succeeded in promoting a switch from indeterminate to fixed sentencing. Fixed sentencing had the virtuous goal of bringing uniformity and fairness to defendants in the criminal justice system. However, it had the disastrous, unintended consequence of early release of some dangerous individuals who received much less prison time than they would have under indeterminate terms. The sentences were shorter because the fixed sentences for each crime were determined by averaging what had been widely variable, indeterminate sentences and handing them down without regard to context. This meant that obviously dangerous offenders with long histories of recidivism had to be released from prison much sooner than would have previously been the case under indeterminate sentencing. The result was predictable: several egregiously horrid and widely publicized sex crimes were committed by recently released beneficiaries of the short, fixed sentences.

Normative Versus Consequential Ethics

Philosophical ethics offer conceptual approaches to understanding ethics-related problems and their solutions.²⁶ The normative approach assumes that there is a universal, intuitive, abstract, right answer to a given question. The justification for the "norm" may be based on natural law, God's will, tradition, a social contract, or human psychology. Normative ethics work fairly well with some questions (e.g., murder, infanticide, cannibalism, incest, and rape) and are applicable to questions that lend themselves to universal answers or clear-cut conclusions of right and wrong, allowing for the fewest situational exceptions.

The questions of ethics that stimulate the most controversy and debate are those that do not have simple normative answers or that have numerous situational exceptions. A less universal approach, consequential ethics, becomes necessary when abstract normative values conflict and lead to opposing conclusions. Consequential concepts of ethics are based on the argument that the rightness or wrongness of the action (i.e., the morality of it) may best be assessed by its outcome. Consequential decisions use utilitarian reasoning: that is, what offers the greatest good for the greatest number? Consequentialists ap-

prove acts that bring about the optimal consequence. The rightness or wrongness of an action is weighted on the basis of the consequences of the outcome. As we shall now discuss, there are persuasive normative and consequential arguments both for and against the SVP/SDP statutes.

Normative View

There Should Be No SVP/SDP Laws

The normative argument against SVP/SDP statutes is that they commit the wrong of eroding what should be inalienable individual rights. Civil rights lawyers and several state courts have argued strongly that SVP/SDP statutes are an unconstitutional form of preventive detention, double jeopardy, or punishment without due process. The American Psychiatric Association (APA) Task Force on Dangerous Sex Offenders has offered what can be characterized as a blistering critique of these statutes. The APA raised the concern that psychiatric commitment was being misused as a method to cover a shortcoming found in sentencing laws created by a determinate (i.e., fixed) sentencing scheme. The APA Task Force characterized the SVP/SDP statutes as a perversion of legitimate psychiatric commitment, a violation of civil rights, and a dangerous precedent for the possible misuse of psychiatry to label actions that offend as the product of a psychiatric condition. Such misuse had occurred previously in times and places where other behaviors were regarded falsely as psychiatric conditions (e.g., homosexuality or political dissent). The APA Task Force's normative viewpoint is illustrated in the following statement:

In the opinion of the Task Force, the sexual predatory commitment laws establish a nonmedical definition of what purports to be a clinical condition without regard to scientific and clinical knowledge. In so doing, legislators have used psychiatric commitment to effect nonmedical societal ends that cannot be openly avowed. In the opinion of the Task Force, this represents an unacceptable misuse of psychiatry [Ref. 21, p 174].

There Should Be SVP/SDP Laws

The arguments that the SVP/SDP statutes are ethical are based on the normative foundation that rights are superseded by the danger to public safety that the individual's mental condition poses. In such situations, involuntary civil psychiatric commitment of the dangerous individual is justified. Indeed the highest courts of the land support this argument.

The U.S. Supreme Court addressed the APA Task Force's argument that these laws represent preventive detention. The Court rejected double jeopardy, *ex post facto*, and due process objections as applicable to SVP commitments in two separate rulings (i.e., *Kansas v. Hendricks*²² and *Kansas v. Crane*²³). As neither Mr. Hendricks nor Mr. Crane had a psychosis, these rulings stand in contrast to the opinions of APA Task Force members and others who argued that civil commitment is justified only for psychotic individuals. Moreover, in *Jones v. United States*,²⁷ the Court affirmed the constitutionality of the statutes that permit detention of individuals based on mental disorders that render them dangerous to the public. The U.S. Supreme Court, in the majority opinion in *Kansas v. Hendricks*, stated that involuntary commitment statutes have been upheld consistently to detain people who are "unable to control their behavior and thereby pose a danger to the public health and safety" (Ref. 22, p 346). It is also important to note that while the majority in *Kansas v. Hendricks* upheld the involuntary commitment of dangerous offenders with a "mental abnormality," the dissenting justices stated that their opinion would not "preclude a State from deciding that a certain subset of people are mentally ill, dangerous, and untreatable, and that confinement of this subset is therefore necessary" (Ref. 22, p 390). More recently, in the case of *United States v. Comstock*,²⁴ the U.S. Supreme Court found that there are various federal interests, including the mental health of inmates and the protection of communities into which inmates are released, such that the federal government has the power to allow the order of civil commitment for a federal prisoner with mental illness who is a dangerous sex offender, even if the commitment continues beyond the date the inmate would be released.

The *Hendricks* decision led to the APA Task Force's opposition to SVP/SDP laws on the basis that civil commitment should apply only if treatment is available and effective. The standard articulated by the APA for civil commitment is more stringent and exclusive than the encompassing and general views held by the U.S. Supreme Court, such as in *Jones v. United States*. The SVP/SDP statutes are not predicated on a requisite of effective and curative treatment. Indeed, this argument fails as a standard for involuntary civil commitment. As evidenced by matters not related to SVP/SDP, civil psychiatric commitment laws across the country have encompassed

detention of individuals who have conditions that are not easily treated and that render them dangerous to others (e.g., psychosis that does not remit with medication and other treatment). Those who support the SVP/SDP statutes could counter that the APA's view places professional concerns over public safety. Would the American Medical Association (AMA) suggest applying a similar standard to infectious diseases? For example, would they endorse the justification for quarantine solely for those disorders for which treatment was both available and entirely effective without consideration of the risk for widespread outbreaks?

Despite the obvious civil liberty risks and arguments that treatment for this population is not always effective, there are also compelling reasons why the SVP/SDP statutes were passed. That is, the laws recognize that there is a small group of sexually violent predators who pose a likely risk of harm to the public (i.e., acting out in a sexually violent manner), if released from custody. Clearly, there are some legalists who do not defend the SVP/SDP laws as there are some mental health professionals who support the commitment.

This discussion demonstrates that there is no one conclusive normative ethic that can simply guide our understanding of the suitability of SVP/SDP statutes and their proper application to a given individual. Once it is accepted that there will not be a simple correct and absolute answer that settles the SVP/SDP debate, the most ethically appropriate position is that of a consequential model—namely, to consider the ethical application of SVP/SDP statutes to an individual on a case-by-case basis.

Applying a Consequential Template to SVP/SDP Evaluations

Generally, the consequential approach to the quandary between public safety and individual rights would assume that there is no one correct answer regarding the valence of each and the resulting balance between them. Different times, different places, different circumstances, and different risks may require flexible evaluation of the ethical use of the SVP/SDP statute. As we have said, there is no universal right way to balance the important normative ethic of protecting individual rights with the equally important normative ethic of protecting public safety. Relatively small changes in the factual circumstances of a given case may affect the weight of the sides and

influence the balance between these competing values.

A derivation of this consequential approach could then be applied to federal cases and those 19 states that have enacted SVP/SDP statutes; that is, what type of individuals should be subject to such commitment? There are several opposing values, and each deserves careful consideration in what can only be a difficult case-by-case balancing of seemingly incompatible goals: to protect constitutionally guaranteed individual rights from state infringement, both in fairness to the individual and to avoid the slippery slope toward totalitarianism; to protect the integrity of the mental health profession and its practitioners so that they are not compromised inappropriately to fill a gap created by the legal system; and to protect the members of society from sexual predators, each of whom can wreak considerable harm. This is not a problem that lends itself to overarching first principles or elegant Solomonic solutions. Instead, a good-faith, case-by-case, consequential ethics approach should be used that balances the greatest good for the greatest number without trampling unduly on individual rights and each citizen's constitutionally protected liberty interests.

Consequential ethics are driven by the situational circumstance. Critics of this approach would argue that the reasoning of the clinician drives the goodness of the outcome. Moreover, an individual with flawed reasoning, such as one who cannot accurately assess the situation or does not make an effort to gather all data, would not be able to determine the best action. Therefore, adopting a consequential ethics position may also include the moral imperative that mental health professionals have a full understanding of the potential negative consequences of their opinions. The better informed clinicians are, the more likely that consequences will be favorable.

Consequential ethics provides both a method of understanding the need for SVP/SDP civil commitment in certain cases and for the trier of fact to comprehend easily and readily why a specific individual, with his unique case factors, represents a risk to public safety. To discharge the consequential ethics goal, the moral imperative is that the evaluating psychiatrist or psychologist engage in a reasoning process that is transparent to the trier of fact as to why that particular case warrants an SVP/SDP civil commitment. This process would encompass a comprehensive evaluation that is not colored by diagnostic bias

(e.g., without legal direction, automatically rejecting certain diagnoses as “SVP/SDP qualifying mental disorders,” such as schizophrenia or antisocial personality disorder); shallow analysis (e.g., over-reliance on group norms from an actuarial method in rendering risk analysis); or incomplete analysis (e.g., ignoring case-specific factors; listing risk markers present or absent in a checklist manner without discussion). The consequentialist would avoid evaluator bias. An example of such bias is where the material presented in the report is emphasized to reflect the personal views of the psychologist or psychiatrist who opposes the SVP/SDP law (such as, presenting only treatises that describe how mental health professionals cannot predict risk, or intentionally engaging in long and confusing discussions of Bayes’ theorem or statistics to the exclusion of a discussion of the individual’s risk factors). Evaluator bias can also be found in the other direction; for example, a clinician who believes that the act of rape in and of itself qualifies as a mental disorder for SVP/SDP purposes. An ethical approach calls for building into the system as much quality control standardization and procedural safeguards to protect against incomplete analysis, arbitrariness, and individual bias, for both sides of the equation.

Conclusions

The SVP/SDP statutes present a puzzling ethics quandary, both for society as a whole and for the individual mental health professionals who actually conduct the evaluations. The statutes compromise society’s obligation to protect constitutional rights, but in the good cause of ensuring community safety. Clinicians who perform SVP/SDP evaluations have to balance these concerns with insufficient guidance from the courts, from professional associations, and from within their own ranks.

Judicial guidance has so far provided clarity in one crucial way, but has left great confusion. The clarity comes from the fact that SVP/SDP statutes have in three separate cases been declared constitutional by the U.S. Supreme Court. This support provides an important warrant for the ethical authenticity of conducting SVP/SDP evaluations, but the Court has been deliberately vague in defining what the qualifying mental disorders are and how a risk assessment of dangerousness is to be made; thus, leaving these crucial criteria to be determined in a possibly arbitrary, case-by-case manner by the individual SVP/SDP

evaluator. While state courts and statutes may be more specific in their guidelines than the U.S. Supreme Court, far too much latitude and inconsistency remain. The constitutionality of SVP/SDP laws rests completely on the requirement that a mental disorder be present, but the courts have evaded their responsibility of spelling out which mental disorders. The questions of ethics would certainly be much more easily settled if the courts would step up to the plate and fulfill their responsibility of providing the needed legal guidelines.

The two most important professional organizations differ in their positions on SVP/SDP statutes. The American Psychiatric Association Task Force report is strongly against the statutes as a threat to professional integrity and a forensic abuse of psychiatry. The American Psychological Association has no official position. Professional associations do not make law or determine legal limits of practice, but they can help organize a consensus on difficult questions. It would be highly desirable to have both associations revisit the issues fully and afresh, preferably jointly, bringing together the best expertise available from the various interested mental health and legal disciplines to see if a reasonable consensus can be forged. This crucial question requires much more research attention, debate, and consensus-building than it has received.

The task for the SVP/SDP evaluator is to find a solution to the seemingly intractable conflict between the clashing normative values of public safety and of civil rights. In those states that have SVP/SDP statutes, the consequential ethics approach would allow the clinician to perform the evaluation, but would require a higher standard in establishing the presence of mental disorder than would apply in everyday clinical practice. Diagnostic judgments must be especially cautious and well documented when there are such negative potential consequences, both to the individual offender and to the general protection of constitutional rights. In addition, employing evidence-based practices for risk assessment can contribute to making sound judgments regarding the safety of the public from potentially sexually violent offenders.

To date, there have been far too little standardization and quality control in SVP/SDP evaluations. In the absence of clear guidance from the courts and professional associations, the field itself should be developing consensus about which diagnoses meet

the legal definition of a mental disorder, how a risk assessment should be conducted, and what the standards are for documentation. Presently, the opposing sides in this debate are very far apart. They must be brought together.

As they are currently performed, SVP/SDP evaluations risk vulnerability to individual preferences and possible prejudices of each evaluator.

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