Sex Offender Assessment Panels: A Failed Attempt to Protect the Public From Louisiana's Most Violent Predators

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I. INTRODUCTION

Society views the sex offender as an especially heinous type of criminal—a modern day monster of sorts.¹ Over the past 20 years, states have developed unique criminal and regulatory laws designed to punish and restrict sex offenders.² States continue to expand this type of legislation in response to increased public fear and outrage—feelings often provoked by extensive national media coverage that seems to feature only the most sensational sex crimes.³

In addition to requiring sex offenders to register, many states have enacted laws that allow especially dangerous offenders, commonly referred to as “sexually violent predators,” to be civilly committed to mental institutions after being released from prison.⁴ States institutionalize sexual predators not as a form of punishment but rather because these individuals lack control over their behavior and are often unable to abstain from committing further sex crimes.⁵

In 2009, the State of Louisiana enacted its own sexual predator law (SOAP), whereby a “Sex Offender Assessment Panel” must evaluate each sex offender currently incarcerated in Louisiana and determine whether he is a “sexually violent predator.”⁶ Instead of

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4. “Typically, registration laws require a sex offender to provide local law enforcement officers with his name, local address, nature of offense, photograph, fingerprints, and dates of incarceration.” Carol L. Kunz, Note, Toward Dispassionate, Effective Control of Sexual Offenders, 47 AM. U. L. REV 453, 457–58 (1997).
5. See discussion infra Part IV.C.
7. LA. REV. STAT. ANN. § 15:560.2 (2009). The “sexually violent predator” is defined as “an offender who has been convicted of a sex offense as defined in R.S. 15:541 and who has a mental abnormality or antisocial personality disorder that makes the offender likely to engage in predatory sexually violent offenses . . . .” LA. REV. STAT. ANN. § 15:560.1 (2009).
resorting to civil commitment, however, the State will place those it
deems predators on standard probation and electronic monitoring.8

Standard probation and monitoring are questionable methods of
dealing with Louisiana’s most violent sex offenders. Like other
states, Louisiana should confine these individuals and treat them
for their underlying mental conditions. Moreover, unlike civil
commitment, probation is a form of criminal punishment.9 Because
SOAP operates retroactively, its subjection of sexual predators to
punitive probation is a clear violation of the Constitution’s
prohibition against ex post facto legislation (i.e., retroactive
criminal laws).10 Although the Louisiana Supreme Court recently
held that SOAP does violate the Due Process Clause, it has yet to
tackle the ex post facto issue.11

This Comment criticizes SOAP on two separate grounds and
proposes a solution. Part II of this Comment details the substance
of SOAP. Part III then criticizes the law from a public policy and
public safety standpoint. Next, Part IV attacks SOAP as an ex post
facto law—first providing a historical background of the ex post
facto prohibition and its jurisprudential treatment with regard to
the “sexually violent predator” commitment statute (SVPA). Finally,
Part V proposes a method by which the State of Louisiana
can effectively confine and rehabilitate the sexual predator.
Changing the way Louisiana approaches this complex problem is
imperative with regard to both public safety and the protection of
constitutional rights.

II. SOAP: IDENTIFYING AND PUNISHING LOUISIANA’S PREDATORS

In 2009, Louisiana Governor Bobby Jindal signed into law nine
pieces of legislation intended to “crack down on sexual predators
and help make Louisiana’s children safer.”12 Governor Jindal
emphasized the need for the additional laws, saying “[c]riminals
work quickly to get around the law—and we have to be just as

commitment of a “sexually violent predator” was non-punitive). Hendricks is
discussed infra Part IV. For a discussion of the punitive nature of probation see
infra Part IV.G.3.
10. “No state shall . . . pass any . . . ex post facto Law . . .” U.S. CONST.
art. I, §10, cl. 1. See discussion infra Part IV.
1, 2011). See infra Part IV.F.
12. Gov. Jindal Signs Package of Bills to Crack Down on Sexual Predators,
Protect Louisiana’s Children, OFFICE OF THE GOVERNOR (June 30, 2009), http://
gov.louisiana.gov/index.cfm?md=newsroom&ttmp=detail&catID=2&articleID=13
68&printer=1.
swift to modify our existing laws and pass new laws to ensure that our children are kept safe from these monsters." Among the nine bills was House Bill 366, which amended and reenacted Louisiana Revised Statutes section 15:560 and created SOAP—a mechanism that now enables courts to place sexual predators on indefinite probation and electronic monitoring.

A. SOAP’s Purpose

The purpose of SOAP is “to facilitate the identification of those offenders who are sexually violent predators and child sexual predators and to require that those offenders register as sex offenders for life...” SOAP defines a “sexually violent predator” as “an offender who has been convicted of a sex offense and who has a mental abnormality or antisocial personality disorder that makes the offender likely to engage in predatory sexually violent offenses...” SOAP defines a “mental abnormality” as “a congenital or acquired condition of a person...”

13. Id. Although Governor Jindal’s rhetoric is inspiring and the idea of cracking down on “monsters” is noble, many of the enactments seem unnecessary. House Bill 476, for instance, prevents a convicted sex offender from residing within 1,000 feet of a freestanding video arcade. Such a restriction may have been valuable 15 years ago, but today it may be difficult to find, much less reside within 1,000 feet of, a freestanding video arcade.

14. The amendment did not create the SOAP panel, but rather created the current procedures, including the requirement that the predator be placed on probation for the remainder of his life.

15. Jindal praised the bill, stating that SOAP panels will now be required to make recommendations for every sex offender and child predator required to register in Louisiana. He also emphasized the judiciary’s new role in the process. Every offender deemed to be a predator by the panel will now be referred back to his sentencing court, which will review the panel’s finding and make a final determination regarding the offender’s status. Gov. Jindal Signs Package of Bills to Crack Down on Sexual Predators, Protect Louisiana’s Children, supra note 12.


17. LA. REV. STAT. ANN. § 15:560.1 (2009). SOAP defines a “child sexual predator” as:

a person who has been convicted of a sex offense as defined in R.S. 15:541 and who is likely to engage in additional sex offenses against children, because he has a mental abnormality or condition which can be verified by a physician or psychologist, or because he has a history of committing crimes, wrongs, or acts involving sexually assaultive behavior or acts which indicate a lustful disposition toward children, as determined by the court upon receipt and review of relevant information including the recommendation by the sex offender assessment panel as provided for by this Chapter.

Id.
that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of others.”

These definitions are not unique to SOAP. Many states use similar or identical criteria to define the sexual predator and the mental abnormality. Appreciating the characteristics of the sexual predator, beyond these generalized definitions, is critical to understanding why SOAP falls short in its attempt to protect the public from sexual predators.

B. Profile of a “Sexually Violent Predator”: Leroy Hendricks

The State of Kansas adopted one of the first sexual predator commitment laws in the United States. In 1994, Leroy Hendricks became the first sex offender the state classified as a “sexually violent predator.” By 1994, Hendricks had been molesting children for over 30 years. In 1955, Hendricks pleaded guilty to indecent exposure after exposing himself to two young girls. In 1957, Hendricks was found guilty of “lewdness involving a young girl.” In 1960, “he molested two young boys while he worked for a carnival” and served two years in prison. Shortly after being paroled he was arrested again—this time for molesting a seven-year-old girl. Hendricks was then placed in a psychiatric hospital but was released in 1965 after being deemed safe. He was imprisoned again in 1967 for performing oral sex on an 8-year-old girl and fondling an 11-year-old boy. After his release in 1972, Hendricks immediately began molesting his stepchildren, and then,

18. *Id.*
19. The Kansas SVPA defines a “sexually violent predator” as “any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence.” KAN. STAT. ANN. § 59-29a02 (1994). The Kansas SVPA defines a “mental abnormality” as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.” *Id.*
22. *Id.* at 353–55.
23. *Id.* at 354.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
in 1984, he was convicted of taking indecent liberties with two 13-
year-old boys.\textsuperscript{29} For this crime, Hendricks served approximately
ten years of his sentence and was to be paroled and released to a
halfway house in 1994.\textsuperscript{30} The State, however, filed a petition
seeking Hendricks’s commitment under the newly enacted
SVPA.\textsuperscript{31}

During a trial to determine whether he was a “sexually violent
predator,” Hendricks admitted, “when he gets stressed out, he can’t
control the urge to molest children.”\textsuperscript{32} Hendricks recognized that
his behavior was harmful and sincerely hoped he would not molest
another child.\textsuperscript{33} However, he “stated the only sure way he could
keep from sexually abusing children in the future was ‘to die.’”\textsuperscript{34} A
jury unanimously found that Hendricks was a sexually violent
predator, and, in accordance with the SVPA, the State committed
him to the Larned State Hospital.\textsuperscript{35}

C. SOAP’s Substance and Procedures

Hendricks could not control his urge to commit sex crimes.\textsuperscript{36}
This lack of control is what distinguishes him from the standard
sex offender.\textsuperscript{37} Louisiana’s Sex Offender Assessment Panel
attempts to identify individuals who, like Hendricks, lack control
over their behavior and are thus predisposed to committing further
sex crimes.\textsuperscript{38}

SOAP attempts to identify the sexual predator by casting a
wide net. The panel must review every sex offender at least six
months prior to his release from incarceration.\textsuperscript{39} The panel is
composed of three members: a psychologist, the Secretary of the
Department of Public Safety and Corrections, and the warden of
the prison in which the offender is located.\textsuperscript{40}

\begin{itemize}
  \item 29. Id. at 353.
  \item 30. Id. at 353–54.
  \item 31. Id. at 354.
  \item 32. Id. at 355 (internal quotation marks omitted).
  \item 33. Id.
  \item 34. Id.
  \item 35. Id. at 356. Under the Kansas SVPA, the burden of proof at the trial was
        beyond a reasonable doubt. KAN. STAT. ANN. § 59-29a07 (1994).
  \item 36. Hendricks, 521 U.S. at 355.
  \item 37. Id. at 360.
  \item 38. The “mental abnormality” affects the “volitional capacity of the person
        in a manner that predisposes that person to the commission of criminal sexual
  \item 40. Id. Specifically, the statute provides:
To make its determination, the panel reviews the following:

[P]resentence reports, prison records, medical and psychological records, information and data gathered by the staffs of the Board of Pardons and the Board of Parole, information provided by the convicted offender, the district attorney, and the assistant district attorney, and any other information obtained by the boards or the Department of Public Safety and Corrections.  

If the panel determines the offender may be a sexually violent predator, it forwards its recommendation to the criminal court that initially sentenced the offender. After a hearing, if the court finds by clear and convincing evidence that the offender is a "sexually violent predator," then it must order that he "be supervised by the division of probation and parole, Department of Public Safety and Corrections . . . for the duration of his natural life," and upon release, he must:

1. Register as a sex offender in accordance with the provisions of R.S. 15:542 et seq. and maintain such registration for the remainder of his natural life.
2. Provide community notification in accordance with the provisions of R.S. 15:542 et seq. for the duration of his natural life.
3. Submit to electronic monitoring pursuant to the provisions of R.S. 15:560.4 for the duration of his natural life.
4. Report to the probation and parole officer when directed to do so.

One member shall be either a psychologist licensed by the Louisiana State Board of Examiners of Psychologists or a medical psychologist licensed by the Louisiana State Board of Medical Examiners who has been engaged in the practice of clinical or counseling psychology for not less than three consecutive years or a physician in the employ or under contract to the department whose credentials and experience are not incompatible with the evaluation of the potential threat to public safety that may be posed by a sexually violent predator or a child sexual predator . . . . One member shall be the secretary of the Department of Public Safety and Corrections or his designee who shall be chairman . . . . One member shall be the warden, or in his absence the deputy warden, of the institution where the offender is incarcerated, or a probation or parole officer with a minimum of ten years experience, or a retired law enforcement officer with at least five years of experience in investigating sex offenses.

41. Id.
42. Id.
5. Not associate with persons known to be engaged in criminal activities or with persons known to have been convicted of a felony without written permission of his probation and parole officer.
6. In all respects, conduct himself honorably, work diligently at a lawful occupation, and support his dependents, if any, to the best of his ability.
7. Promptly and truthfully answer all inquiries directed to him by the probation and parole officer.
8. Live and remain at liberty and refrain from engaging in any type of criminal conduct.
9. Not have in his possession or control any firearms or dangerous weapons.
10. Submit to available medical, psychiatric, or mental health examination and treatment for persons convicted of sex offenses when deemed appropriate and ordered to do so by the probation and parole officer.
11. Defray the cost, or any portion thereof, of his supervision by making payments to the Department of Public Safety and Corrections in a sum and manner determined by the department, based on his ability to pay.
12. Submit a residence plan for approval by the probation and parole officer.
13. Submit himself to continued supervision, either in person or through remote monitoring, of all of the following Internet-related activities: (a) The offender’s incoming and outgoing electronic mail and other Internet-based communications, (b) The offender’s history of websites visited and the contact accessed, (c) The periodic unannounced inspection of the contents of the offender’s computer or any other computerized device or portable media device and the removal of such information, computer, computer device, or portable media device to conduct a more thorough inspection.
14. Comply with such other specific conditions as are appropriate, stated directly, and without ambiguity so as to be understandable to a reasonable man.43

III. SOAP’S FAILURE FROM A PUBLIC POLICY STANDPOINT

These probationary measures fail to protect the public from the sexual predator. A probation officer is capable only of conducting periodic supervision, and neither probation nor monitoring can

prevent a crime before its commission.\textsuperscript{44} SOAP’s mistaken assumption seems to be that with probation and monitoring in place, sexual predators will weigh the consequences of their actions before offending. However, the State itself has determined the predator to be mentally abnormal—lacking control over his urge to re-offend.\textsuperscript{45} It is foolish to think that the threat of imprisonment, or the watchful eye of a probation officer, can remedy the predator’s underlying mental condition—a condition that affects his volitional capacity.\textsuperscript{46} Because he is mentally abnormal, the sexual predator is unlikely to assess the potential consequences of his actions, which predisposes him to the commission of future sex crimes.\textsuperscript{47}

Moreover, SOAP is ineffective because it fails to place the predator within a restrictive treatment program or institution.\textsuperscript{48} All sex offenders are dangerous, but the sexual predator is dangerous beyond his control.\textsuperscript{49} Hendricks, for example, was unable to control the urge to engage in sexual activity with a child.\textsuperscript{50} The chief psychologist at the Larned State Hospital predicted that if given the opportunity, Hendricks would again engage in predatory acts against children.\textsuperscript{51} The State should not only punish sexual predators for their crimes but also treat their lingering mental conditions. And, it is imperative that treatment be coupled with a degree of confinement or restriction.\textsuperscript{52}

\textsuperscript{44} See discussion infra Part IV.G.
\textsuperscript{46} In reality, the only benefit of electronic monitoring and probation is their potential use in post-crime investigation. If a predator works or resides two blocks from the scene of a child molestation, investigators can track his whereabouts at the time of the offense. If they determine that he was at the scene of the crime, investigators will likely have their culprit. Police will re-arrest the offender and he will be sent back to prison. This outcome, unfortunately, is a lose-lose situation. The predator has molested a child, and he is back in prison. Instead of post-disaster damage control, the goal of SOAP should be to make sure that that predator is not released from state custody until qualified professionals deem him safe to be in the community.
\textsuperscript{47} “Mental abnormality” means a “congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of others.” LA. REV. STAT. ANN. § 15:560.1 (2009) (emphasis added).
\textsuperscript{48} This failure is also pertinent to the question of whether SOAP is an ex post facto law. See discussion infra Part IV.
\textsuperscript{50} Id. at 355.
\textsuperscript{51} Id. at 355 n.2.
\textsuperscript{52} See discussion infra Part V.
SOAP’s lack of proactive prevention and treatment places the public at risk. For example, suppose that a classified sexual predator encounters a child while working—a situation likely to occur given that a predator must work somewhere, and in doing so, will likely at some point encounter a child. Suppose now that the predator gratifies his uncontrollable desire to re-offend, a propensity the State knows he possesses. What good now can the probation and electronic monitoring accomplish? The police can track the predator’s whereabouts at the time of the offense and determine that he was the culprit, but what then? The predator has already violated the child—the very thing SOAP aims to prevent.

Given that SOAP purportedly identifies the violent predator before he is released from prison, it seems only logical that the State would create a program whereby the predator is confined—perhaps in a mental institution. More importantly, the State should provide him with treatment for the abnormality that makes him dangerous in the first place. But instead, SOAP requires only that he wear a monitoring device and that a probation officer keep an eye on him.

IV. SOAP’s VIOLATION OF THE Ex POST FACTO PROHIBITION

In addition to being an ineffective method of dealing with the sexual predator, probation is a form of punishment. Because the provisions of SOAP apply to all sex offenders regardless of when they committed their respective crimes, the provisions are retroactive. The United States Constitution’s Ex Post Facto Clause strictly prohibits retroactive criminal legislation, and


54. LA. REV. STAT. ANN. § 15:560.1 (2009) (A mental abnormality “affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts . . . .”)

55. Obviously, catching the sexual predator after he has committed a crime is better than not catching him at all. However, SOAP is not an investigative tool. It is a preventative measure. See LA. REV. STAT. ANN. § 15:560 (2009) (“[i]n consideration of the potentially high rate of recidivism and the harm which can be done to the most defenseless members of the public by sexually violent predators . . . .”) (emphasis added).

56. See discussion infra Part V.


58. LA. REV. STAT. ANN. § 15:560 (2009) (the panel is required to evaluate every incarcerated sex offender, regardless of when he was convicted).
therefore SOAP should be declared unconstitutional on ex post facto grounds.

A. The Nature and Operation of the Ex Post Facto Clause

The prohibition against ex post facto laws is found in Article I of the U.S. Constitution and provides: "No state shall . . . pass any . . . ex post facto Law . . . ." In *Calder v. Bull*, Chief Justice John Marshall articulated precisely which laws the Clause prohibits:

1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

The ex post facto prohibition serves two purposes: It ensures fair notice regarding which types of conduct will be punished, and it prevents legislators from creating laws that are "arbitrary and vindictive." One scholar eloquently summarized the "type" of citizen who has invoked ex post facto challenges throughout American history, saying: "Over the centuries, the [Ex Post Facto] Clause has been invoked by a veritable 'who's who' of scorned Americans—from supporters of the Confederacy in the late 1860s, to immigrants in the late 1800s, to Communist sympathizers in the 1950s."

Courts have interpreted the Ex Post Facto Clause as applying exclusively to "penal" or "criminal" statutes. Stated differently, the Clause does not apply to statutes that are "civil" or

61. *See* Marks v. United States, 430 U.S. 188, 191 (1977) ("[F]air warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty.").
63. *Id.* at 1267.
"regulatory" in nature. The distinguishing element of a criminal statute is the imposition of punishment. Therefore, to successfully attack a law on ex post facto grounds, the defendant must show that the law applies retroactively and imposes a form of punishment. Because retroactivity is readily identifiable, the point of contention in ex post facto challenges virtually always concerns whether a particular mechanism constitutes punishment.

B. The Jurisprudence of Punishment

Whether a given law imposes punishment is critical not only for ex post facto issues but also for issues of due process, double jeopardy, and cruel and unusual punishment. The United States Supreme Court has developed a jurisprudential test to aid in the determination of whether a particular law is punitive. The "intent/effects" test begins with the premise that "whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction." The first inquiry is "whether [the legislature], in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the

65. Smith v. Doe, 538 U.S. 84, 92 (2003) (where the Court sought to determine "whether the legislature meant the statute to establish civil proceedings").
66. See Logan, supra note 62, at 1280.
67. A law is retroactive if it changes the consequences of a crime after it was committed. See Miller v. Florida, 482 U.S. 423, 430 (1987) ("A law is retrospective if it 'changes the legal consequences of acts completed before its effective date'") (citing Weaver v. Graham, 450 U.S. 24, 31 (1981)).
68. Logan, supra note 62, at 1280–82.
69. An inquiry similar to whether a law is punitive is the question of whether a particular law establishes criminal proceedings. See, e.g., Smith, 538 U.S. at 92 ("The framework for our inquiry, however, is well established. We must 'ascertain whether the legislature meant the statute to establish civil proceedings.' If the intention of the legislature was to impose punishment, that ends the inquiry."); (citing Kansas v. Hendricks, 521 U.S. 346, 361 (1997)).
other." If the legislature explicitly intended to institute criminal proceedings, the inquiry ends, and the Court will hold the law unconstitutional. If, however, the legislature intended to establish civil proceedings, the Court will "ordinarily defer to the legislature's stated intent." The Court will override the legislature's intent only if the "statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it 'civil.'"

In determining whether a law's effects are punitive, the Court has applied a set of factors that it first articulated in Kennedy v. Mendoza:

[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.

72. Id. (citing One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 236–37 (1972)).

73. Smith, 538 U.S. at 93.

74. Hendricks, 521 U.S. at 361.

75. Id. (quoting United States v. Ward, 448 U.S. 242, 248–49 (1980)). Clearly, the "intent/effects" test weighs in favor of the state, and one can argue that it merely provides lawmakers a guide to drafting retroactive legislation. On its face, no matter how punitive a piece of legislation may seem, by labeling it as "civil," it is automatically cloaked with a protective "heavy burden," which the law's opponent must overcome. Id.

76. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963). The statute at issue in Mendoza provided for the loss of citizenship for draft dodgers. Id. at 146. The provision applied to those who had dodged the draft and who, from within 60 days of the enactment, did not return. Id. at 171. The Court rejected the argument that the statute was prospective, because it applied "only on those who have deserted and who shall not return within sixty days." Id. Interestingly, in Mendoza, the Court never applied the factors, finding instead that the statute at issue had a punitive purpose:

[A]lthough we are convinced that application of these criteria to the face of the statutes supports the conclusion that they are punitive, a detailed examination along such lines is unnecessary, because the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive. Id. at 169.
Over the past 50 years, the Court has applied the Mendoza factors inconsistently. What is clear, however, is that the Court will give great weight to legislative labels, especially when reviewing retroactive sex offender legislation.

C. SOAP’s Legislative Ancestor: The Sexually Violent Predator Statute (SVPA)

In the 1990s, states began creating legislation that would allow them to place sexual predators in mental institutions after serving their entire prison sentence. Thus far, the United States Supreme Court has found these laws to be non-punitive under the “intents/effects” test. Although standard SVPAs are similar to SOAP, the history and purpose of these laws demonstrate that probation, unlike civil commitment, is punitive.

In the early 20th century, states began diverting sex offenders from the criminal justice system and committing them to institutions through the enactment of “sex psychopath statutes.” During this time, the criminal justice system and the mental health profession often viewed sex offenders as unable to control their sexually deviant impulses. In light of this perception, courts often considered sex offenders insane and therefore exempt from criminal prosecution. Frequently, a state would convict sex offenders for their crimes, but admit them to institutions for treatment in lieu of incarceration.

The trend of viewing the sex offender as mentally ill continued throughout the 1960s. By the 1980s, however, state legislatures began to re-examine the way in which the justice system dealt with sex crimes, and the idea that sex offenses were the product of mental disease gradually faded. The new school of thought is that

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77. Logan, supra note 62, at 1280 (finding that “the Supreme Court’s case law on the punishment question in recent times has been so inconsistent that it borders on the unintelligible, evidencing a decidedly circular, at times patently result-driven effort to distinguish whether a sanction is ‘civil’ or ‘criminal,’ ‘preventive’ or ‘punitive,’ ‘regulatory’ or ‘retributive’”).
78. Id. at 1288–89.
81. Id. at 899.
82. Id.
83. Id.
84. Id. at 905.
85. Id.
sex offenders are criminals who need to be punished. In addition to statutorily prescribed punishments, today's sex offenders are subject to a variety of non-criminal restrictions, including civil commitment for the most violent offenders.

Washington was the first state to enact a post-prison sentence commitment procedure for the "sexually violent predator." Many states have since enacted similar statutes. These laws differ from the traditional "sex psychopath statutes" of the 1960s and 70s in two main respects. First, SVPA laws do not require that the individual suffer from a distinct and recognized mental illness. For instance, Kansas's SVPA requires only that the individual be "likely to engage in 'predatory acts of violence'" as the result of either a "mental abnormality" or "personality disorder." Second, SVPA proceedings generally take place after the offender has served his prison sentence. The Court has affirmed the constitutionality of traditional sex offender commitment laws.

86. Id. at 906.
89. Cf. Allen v. Illinois, 478 U.S. 364 (1986). In Allen, the Court upheld Illinois' more traditional commitment procedure for sexual dangerous persons—a procedure which required the finding of a "mental illness," stating: the initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution. . . . Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists.
Id. at 371.
90. The Kansas SVPA defines "mental abnormality" as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." KAN. STAT. ANN. § 59-29a02(b) (1994).
91. Blacher, supra note 80, at 912.
The aforementioned distinctions, however, prompted its review of Kansas's modern SVPA.93

D. The Constitutionality of the Kansas SVPA

After the State of Kansas committed Leroy Hendricks to the Larned State Hospital, Hendricks appealed to the Kansas Supreme Court, arguing that the SVPA “violated the Federal Constitution’s Due Process, Double Jeopardy, and Ex Post Facto Clauses.”94 The Kansas Supreme Court did not decide the ex post facto or double jeopardy claims, but reversed on the due process claim, declaring that “in order to commit a person involuntarily in a civil proceeding, the state is required by ‘substantive’ due process to prove by clear and convincing evidence that the person is both (1) mentally ill, and (2) a danger to himself or others.”95 The Kansas Supreme Court found the statutory term “mental abnormality” to be insufficient with regard to the Constitutional requirement that Hendricks be “mentally ill.”96 The State of Kansas appealed, and the United States Supreme Court granted certiorari.97

Kansas v. Hendricks: Due Process and Ex Post Facto Analysis

The Court’s due process analysis in Hendricks centered on the nature of the “mental abnormality.” Kansas argued that “the Act’s definition of ‘mental abnormality’ satisfied ‘substantive’ due process requirements.”98 The Court agreed, finding

[states have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety [,] . . . [and] [w]e have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards.99

The Court first noted that civil commitment proceedings commenced only when a person “‘has been convicted of or charged with a sexually violent offense’ and ‘suffers from a mental

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94. Id. at 356.
95. Id. (quoting the Kansas Supreme Court’s decision in In re Hendricks, 912 P. 2d 129, 138 (Kan. 1996)).
96. Id. at 350.
97. Id.
98. Id. at 356.
99. Id. at 357 (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).
abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." In the Court’s view, the prior charge or conviction satisfied the due process requirement that the offender be dangerous to himself or others. However, the Court acknowledged that a “finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment.” Civil commitments require “proof of some additional factor, such as a ‘mental illness’ or ‘mental abnormality’ . . . [that] serve[s] to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control.”

Hendricks argued that, historically, commitment statutes require a medically accepted form of mental illness and that “a ‘mental abnormality’ [was] not equivalent to a ‘mental illness’ because it [was] a term coined by the Kansas Legislature, rather than by the psychiatric community.” Rejecting this argument, the Court asserted that it had “never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes.” The requirement of a “mental abnormality” was satisfactory because it was illustrative of a state of mind that made it “difficult, if not impossible, for the person to control his dangerous behavior.” This characteristic was adequate to distinguish Hendricks “from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.”

The Court also granted Hendricks’s petition to determine whether the Act should be invalidated on ex post facto grounds. Hendricks claimed that the proceedings were criminal and being confined to a hospital was punishment. To determine the validity of his argument, the Court applied the “intent/effects” test to the...
The Court sought first to “ascertain whether the legislature meant the statute to establish ‘civil’ [or ‘criminal’] proceedings.” With little discussion, it found that Kansas’s objective was to create a civil proceeding. The Court’s conclusion was, in large part, due to the Act’s location in the Kansas probate code instead of the criminal code and additionally because the legislature described the Act as creating a “civil commitment procedure.”

With respect to the “effects” portion of the test, the Court applied several of the Mendoza factors—first stating that the Act “does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence.” The Court did not consider the Act retributive because it did not affix culpability to prior criminal conduct, but instead used past convictions solely for evidentiary purposes.

More specifically, the past crimes were used either to demonstrate that a “mental abnormality” existed or to support a finding of future dangerousness. Moreover, the Act did not “make a criminal conviction a prerequisite for commitment—persons absolved of criminal responsibility [were] nonetheless . . . subject to confinement under the Act.”

The Court also emphasized the distinction between confinement in an institution and confinement in a prison:

[T]he conditions surrounding that confinement do not suggest a punitive purpose on the State’s part. The State has represented that an individual confined under the Act is not subject to the more restrictive conditions placed on state prisoners, but instead experiences essentially the same conditions as any involuntarily committed patient in the state mental institution. Because none of the parties argues that people institutionalized under the Kansas general civil

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109. Id.
110. Id.
111. Id.
112. Id. at 361–62.
113. Id. at 362. The Court found that the Act did not have a deterring effect because “[t]hose persons committed under the Act are, by definition, suffering from a ‘mental abnormality’ or a ‘personality disorder’ that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement.” Id. at 362–363.
114. Id. at 362.
115. Id. (citing to KAN. STAT. ANN. § 59-29a03(a) (1994)). The Court also found that “unlike a criminal statute, no finding of scienter is required to commit an individual who is found to be a sexually violent predator; instead, the commitment determination is made based on a ‘mental abnormality’ or ‘personality disorder’ rather than on one’s criminal intent.” Id.
commitment statute are subject to punitive conditions, even though they may be involuntarily confined, it is difficult to conclude that persons confined under this Act are being punished.\(^{116}\)

Finally, Hendricks argued the Act was punitive because it failed to offer “legitimate treatment . . . [and that] [w]ithout such treatment . . . confinement under the Act amount[ed] to little more than disguised punishment.”\(^{117}\) The Court rejected this argument because it was premised on the assumption that Hendricks’s condition was treatable and that the State had simply failed (or refused) to treat him.\(^{118}\) Instead, the Court accepted the Kansas Supreme Court’s conclusion that “treatment for sexually violent predators is all but nonexistent”\(^{119}\) and held that the U.S. Constitution does not prevent states from “civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others.”\(^{120}\)

The ex post facto holding in *Hendricks* is narrow and can be summarized as follows: A state does not inflict punishment when it civilly commits sex offenders who are a danger to society and “who suffer from a volitional impairment rendering them dangerous beyond their control.”\(^{121}\)

### E. SOAP: From Civil Commitment to Simple Probation

SOAP is similar to the Kansas SVPA in several respects. Its definition of a “sexually violent predator” and “mental abnormality” are the same.\(^{122}\) The critical difference is that SOAP places the predator on probation, instead of committing him to an institution. Clearly, probation has the advantage of being inexpensive when

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116. *Id.* at 362–3 (internal citations omitted). The Court also rejected two other arguments, by which Hendricks claimed that the Act was punitive: (1) the indefinite status of commitment, *id.* at 363–64 (finding that “commitment under the Act is only potentially indefinite” and that “[t]he maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year”); and (2) that “the State's use of procedural safeguards traditionally found in criminal trials makes the proceedings here criminal rather than civil,” *id.* at 364–65 (finding that Kansas’s choice to afford such procedural protections does not transform a civil commitment proceeding into a criminal prosecution) (internal citations omitted).

117. *Id.* at 365.

118. *Id.*

119. *Id.*

120. *Id.* at 366.

121. *Id.* at 347.

122. *See* KAN. STAT. ANN. § 59-29a02(a)–(b) (1994).
compared to civil commitment. With probation, the State is able to monitor the sexual predator but is relieved of the costly duty to provide an environment conducive to mental health.

Interestingly, recent failed legislative proposals indicate that if not for financial obstacles, Governor Jindal and the Louisiana Legislature would prefer a procedure whereby violent predators are properly confined and treated. In 2004, Louisiana Senate Bill 485 provided for a traditional sex offender commitment procedure:

The legislature finds that there exists a small but extremely dangerous number of sexually violent predators who, because of a mental abnormality, are likely to commit a sex offense if not treated for their mental abnormality. The legislature further finds that because the current judicial commitment procedure under R.S. 28:54 et seq. is intended to provide short-term treatment to individuals with serious mental disorders, it is inadequate to address the special needs of sexually violent predators and the risk they present to society. Therefore, the legislature determines that a separate involuntary civil commitment process for the potentially long-term control, care, and treatment of sexually violent predators is necessary.

The Legislature, however, abandoned the effort due to its astronomical costs.

Subsequently, in 2009, House Bill 713 proposed the creation of “Treatment Review Committees” that would identify the “sexually dangerous person.” Unlike a standard SVPA, House Bill 713 would obligate predators to “participate in mandatory treatment” after being released from prison. The proponent of the bill, Representative Fred Mills, voluntarily deferred the legislation in light of an estimate that the program would cost at least $12

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123. According to a recent news article on civil commitment:

[Annual costs per offender topped out at $175,000 in New York and $173,000 in California, and averaged $96,000 a year, about double what it would cost to send them to an Ivy League university. In some states, like Minnesota, sex offender treatment costs more than five times more than keeping offenders in prison. And those estimates do not include the considerable legal expenses necessary to commit someone.


127. Id.
million over five years. Mills initially believed the program would cost approximately $26,000 per offender each year. A revised estimate put this cost closer to $30,000 per year.

Based on these proposals, it is clear that if money were not a factor, Louisiana lawmakers would choose to place sexual predators in restrictive environments where they could receive treatment. The State’s attempt to save money is commendable. Aside from being ineffective, however, SOAP raises constitutional issues that cannot be disregarded in light of financial concerns. Because SOAP operates retroactively, it implicates the Ex Post Facto Clause. An analysis of SOAP strongly suggests that it creates criminal proceedings and imposes punishment. This, in combination with its retroactive effect, makes SOAP an ex post facto law.

F. Louisiana v. Golston

In Golston, several sex offenders challenged the constitutionality of SOAP, alleging it violated both the Due Process and Ex Post Facts Clauses. With regard to the due process claim, the trial court agreed, finding SOAP “failed to meet the requirements of due process because of vagueness caused by its failure to set forth standards to enable sex offenders to protect themselves against arbitrary and discriminatory forfeiture of property and liberty.”

The Court, however, declined to rule on the ex post facto issue, saying only that it “was hesitant ... to label [SOAP’s] restrictions as merely regulatory, and not punitive, in nature. But [that] having found the statute to be void for vagueness, it [was] not necessary ... to explore possible constitutional deficiencies regarding ex post facto application.”

The Louisiana Supreme Court reversed. The Court applied Hendricks and found that because SOAP provides the same definitions as the Kansas SVPA, it satisfies due process.

129. The failed legislation was supposed to be a key component of Bobby Jindal’s 2009 package of sex offender laws. Governor Jindal, however, supported Mills in withdrawing the legislation until the costs could be brought down. Id. (Jindal stated that “[a]s the state faces multiyear budget challenges, we support Representative Mills' efforts to present a more cost-effective approach on this legislation and appreciate his tireless work on the bill.”).
131. Id. at *11.
Specifically, it reasoned that "[t]he definitions and criteria provide sufficient constitutional protections to subject an individual to involuntary civil commitment under the holdings of *Hendricks* . . . and the SOAP scheme requirements are considerably less severe than civil commitments." Unfortunately, the trial court's failure to address the ex post facto challenge allowed the Court to avoid the more difficult question of whether SOAP imposes punishment. In this regard, *Hendricks* is not dispositive—civil commitment is vastly different from probation and requires an independent ex post facto analysis.135

**G. Ex Post Facto Analysis**

In the ex post facto context, the conclusion that a particular law is civil or criminal is somewhat superficial. The essential determination is whether it imposes punishment.136 The determination of punishment, however, is predicated on questions of legislative intent, criminal/civil labels, and practical effects. The Kansas SVPA, for example, did not create criminal proceedings, and its commitment of sexual predators did not constitute punishment.137 Because it was not punitive, its retroactive application did not constitute a violation of the ex post facto prohibition.138 A similar determination must be made with respect to SOAP: whether Louisiana may, instead of commitment, place a sexual predator on standard probation without effectively imposing additional punishment on the predator.

Application of the "intent/effects" test demonstrates that SOAP imposes punishment. First, the Louisiana Legislature has provided no indication that it intended for SOAP proceedings to be civil, i.e. non punitive.139 Second, SOAP's process of assessment amounts to nothing more than a prediction of recidivism, which is indicative

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134. *Id.* at *21.

135. For example, in *Hendricks* the Court addressed the ex post facto argument separately from the due process argument.

136. See Smith v. Doe, 538 U.S. 84, 89 (2003) (where Justice Kennedy framed the core inquiry posed by Alaska's registration statute, saying: "We must decide whether the registration requirement is a retroactive punishment prohibited by the *Ex Post Facto* Clause.").

137. Kansas v. Hendricks, 521 U.S. 346, 369 (1997) ("We therefore hold that the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive. Our conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks' double jeopardy and ex post facto claims.").

138. *Id.*

139. This is the first part of the "intents/effects" test. See *Hendricks*, 521 U.S. at 361.
of a punitive intent. And third, the imposition of standard probation is a traditional form of punishment.\(^{140}\)

1. Legislative Intent Underlying SOAP

In determining whether a statutory scheme is civil or criminal, the first question is "whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other."\(^{141}\) For example, in Hendricks, the Court looked to the express language of the statute to identify the legislature’s preference:

The legislature finds that there exists an extremely dangerous group of sexually violent predators . . . who are likely to engage in repeat acts of sexual violence if not treated for their mental abnormality or personality disorder . . . . [T]he legislature determines that a separate involuntary civil commitment process for the potentially long-term control, care and treatment of sexually violent predators is necessary.\(^{142}\)

Unlike the Kansas SVPA, which clearly sets out an overriding concern (sexual predators), a state interest (public safety), and a remedial action (civil commitment), SOAP fails to clearly articulate a justification for its imposition of probation and electronic monitoring. The only remedial action clearly justified by the legislative text is the requirement that predators register for life pursuant to Louisiana’s registration and notification statute:

The legislature finds that sexually violent predators and child sexual predators often pose a high risk of engaging in sex offenses . . . . Therefore, it is the policy of this state to facilitate the identification of those offenders who are

\(^{140}\) According to the majority opinion in Hendricks, a finding that punishment is implicated may be sufficient to declare legislation ex post facto, assuming it applies retroactively. See id. at 369. (“We therefore hold that the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive. Our conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks’ double jeopardy and ex post facto claims.”).

\(^{141}\) Smith, 538 U.S. at 93.

\(^{142}\) KAN. STAT. ANN. § 59-29a01 (1994); see also Smith, 538 U.S. at 93 (stating that the legislation at issue expressly declared that: (1) “Sex offenders pose a high risk of reoffending”; (2) “protecting the public from sex offenders” is a "primary governmental interest"; and (3) "release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety").
sexually violent predators... and to require that those offenders register as sex offenders for life... .143

The "findings" completely fail to mention or justify the 14 probationary restrictions.144 Moreover, a review of SOAP's legislative history, chronologically, demonstrates that the justifications provided in the "findings" do not even contemplate that the "sexually violent predator" will be placed on probation.145

The Legislature first created SOAP panels in 2006.146 However, the original legislation required only that sexual predators abide by life-long registration requirements and electronic monitoring.147 In 2009, the Legislature drastically altered SOAP to include, among other things, an additional 14 probation requirements.148 But the Legislature left its "findings" unchanged.

Thus, as written today, the legislative findings do not contemplate a requirement of probation. Therefore, one cannot infer that the Legislature has, expressly or impliedly, communicated a labeling preference with regards to the amended proceedings.

In Mendoza, the Court stated that "[a]bsent conclusive evidence of congressional intent as to the penal nature of a statute, [the punitive characteristics of the statute] must be considered in relation to the statute on its face."149 Probation itself is punishment.150 Additionally, the entire assessment process under SOAP—and the subsequent court proceeding—constitutes nothing more than a prediction of future dangerousness based on the offender's past crimes.

2. SOAP's Punitive Process: Re-Sentencing the Offender Based on Future Dangerousness

Because the SOAP panel is incapable of identifying a "mental abnormality," SOAP's assessment process amounts to nothing more than a prediction of recidivism or future dangerousness. In Hendricks, the Court held that a proceeding that solely predicts "future dangerousness" is criminal in character:

144. Further, although the statute does claim an interest in "monitoring those offenders who pose the greatest risk to the health and safety of our citizens," it is unclear whether this refers to electronic monitoring or monitoring that is incidental to life-long registration. Id.
145. Id.
150. See discussion infra Part IV.G.3.
The [Kansas SVPA] requires . . . evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated . . . . This admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes [the sexually violent predator] from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.151

There are currently over 4,000 sex offenders in the Louisiana Department of Corrections, and all 4,000 will be subject to assessment.152 To require evaluation, the offender need not show any signs of an abnormality or a lack of control. The offender is at a clear disadvantage at the outset of the proceeding because the State has already labeled him a sex offender.153 Moreover, Louisiana’s sex offender registration law declares that all “sex offenders, sexually violent predators, and child predators often pose a high risk of engaging in sex offenses . . . after being released from incarceration.”154 Thus, according to the State, every sex offender, regardless of whether he is a violent predator, is likely to re-offend. Apparently, the duty of the panel is to determine which offenders are likely to re-offend because of a “mental abnormality.”

In light of these meaningless semantics, it is truly disturbing that the panel has almost no criteria or guidelines by which to identify a true “mental abnormality.” At a recent hearing on a motion to declare SOAP unconstitutional, Dr. Susan Tucker, a psychologist who has sat on several SOAP panels, testified to the insufficiency
and arbitrariness of the panel’s method of assessment. Dr. Tucker complained of having minimal information and admitted that, although qualified to do so, she could not, in her capacity as a psychologist, evaluate all offenders. Dr. Tucker admitted that she has seen less than 10% of the offenders she has assessed. She also conceded that the prudent thing to do would be to conduct an independent evaluation of each offender. When asked if she could identify a “mental abnormality” given the current procedures, Dr. Tucker responded “absolutely not.” She also stated that, when in doubt, she simply errs on the side of public safety. Ultimately, Dr. Tucker’s testimony reveals that the panel is assessing offenders based on their generalized risks rather than assessing them for a true “mental abnormality.”

a. The “Mental Abnormality” and the Panel’s Lack of Qualification

Even assuming the Legislature provided the panel with sufficient direction and criteria by which to identify a “mental abnormality,” its lay members are nonetheless unqualified to assess the offender’s mental condition. In Hendricks, the Court found the term “mental abnormality” sufficient to identify individuals suffering from conditions that rendered them “dangerous beyond their control.” Conceding that the term itself was not precise, the Court emphasized the need for states to broadly define what constitutes a sufficient mental condition, saying, “we have never required state legislatures to adopt any particular nomenclature . . . . Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance.” The Court, however, did not suggest that states might restrict an individual’s freedom by applying arbitrary criteria with no medical significance.

Outside of the criminal context, states may only impose non-punitive restrictions, like civil commitment, when there is “some

156. Id.
157. Id.
158. Id. at 43.
159. Id. at 50.
160. Id. at 40.
161. By “lay members” it is meant that two of the three individuals on the panel are not mental health professionals.
163. Id. at 359 (emphasis added).
There is no medical justification under SOAP because two-thirds of the panel consist of the warden and the Secretary of the Department of Public Safety and Corrections—two individuals who have absolutely no medical or psychological expertise. And yet, the warden and the Secretary could constitute a majority for purposes of forwarding a recommendation to the sentencing court. If two lay individuals may diagnose a “mental abnormality,” the term necessarily lacks any degree of medical significance, and instead, is only an assessment of future dangerousness.

### b. Same Court, Same Judge, New Punishment

After the panel makes its unguided and arbitrary prediction, the offender is injected back into the criminal justice system. The process the offender undergoes resembles a second criminal proceeding. If the panel determines that the offender may be a sexual predator, it forwards its recommendation to the court that initially sentenced the offender. The procedure is circular—a criminal court convicts and sentences the offender; he then serves his time in prison; and he once again returns to that same court, now with the possibility of being placed on indefinite probation. In the second proceeding, the judge is expected to play the role of psychologist and determine whether a three-member panel correctly “diagnosed” the offender. The offender, however, has not received a true psychological assessment. Moreover, the statute itself does not mandate the use of expert testimony, nor does it give the offender the right to cross-examine members of the panel. So, at no point is the judge obligated to hear from a mental health professional who has personally evaluated the offender. The judge, therefore, has no more guidance than the panel in determining whether the offender has a “mental abnormality.” Unless the judge receives conflicting testimony, he must resort to a basic risk assessment, asking only whether the offender is likely to commit another sex offense.

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164. Id. at 359 (emphasis added) (quoting Foucha v. Louisiana, 504 U.S. 71, 88 (1992) (O'Connor, J., concurring)).
166. Id.
167. Id.
168. Id.
169. At least there is no indication that the offender is entitled to cross-examine members of the panel. Under the Kansas SVPA, offenders were given the right to cross-examine the professionals who diagnosed them. KAN. STAT. ANN. § 59-29a05 (1994).
The above characteristics alone are sufficient to label SOAP as a criminal proceeding. When combined with SOAP's punitive "effects," the criminal label is even more fitting.

3. Determining SOAP's Punitive "Effects" Under Mendoza

The "effect" of a court deeming an offender to be a sexual predator is life-long probation administered by the Louisiana Department of Corrections. Under the Mendoza factors, this "effect" is punitive for four reasons: (1) probation has been historically regarded as punishment, (2) it imposes affirmative disability and restraint, (3) it promotes retribution within the context of the proceedings, and (4) it does not have a rational connection to a non-punitive purpose.

a. Probation's Role in the Criminal Justice System.

Probation has historically been regarded as punishment. Probation, like incarceration, is "a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty." Louisiana's conditions of standard criminal probation are largely identical to those SOAP imposes. Moreover, the Louisiana Department of Corrections administers both "types" of probation, a fact which indicates that SOAP is punitive.

b. SOAP Imposes an Affirmative Disability and Restraint

When analyzing whether a penalizing mechanism imposes an affirmative disability or restraint, the relevant inquiry is "how the

171. See Smith v. Doe, 538 U.S. 84, 97 (2003) (considering these four Mendoza factors to be the "most relevant to [the] analysis").
174. In Hendricks, Justice Thomas gave significant weight to the fact that the Kansas SVPA was administered by the Department of Social Services and not the Department of Corrections, saying: "What is significant, however, is that Hendricks was placed under the supervision of the Kansas Department of Health and Social and Rehabilitative Services, housed in a unit segregated from the general prison population and operated not by employees of the Department of Corrections, but by other trained individuals." Kansas v. Hendricks, 521 U.S. 346, 368 (1997).
175. Mendoza, 372 U.S. at 168.
effects of the Act are felt by those subject to it.” In *Smith v. Doe*, the United States Supreme Court analyzed the disability imposed on sex offenders by the Alaska Sex Offender Registration Act. The respondent argued that the statutory requirements of registration and notification were analogous to those of criminal probation. The Court disagreed, finding that offenders subject to the Alaska statute “are free to move where they wish and to live and work as other citizens, with no supervision,” and that registration is not parallel to probation in terms of its restraint, because, unlike registration, “[p]robation and supervised release entail a series of mandatory conditions.”

Clearly, the opposite is true with respect to SOAP—where the predator is on probation and *cannot* live and work as other citizens do. The sexual predator must report to his probation officer without exception, seek permission to associate with those who have been convicted of a felony, wear an electronic monitoring device, and have his probation officer approve his residence. This series of mandatory conditions is analogous to criminal probation and supervised release.

In *Louisiana v. Trosclair*, the Louisiana Fifth Circuit Court of Appeal found similar conditions to be punitive. In *Trosclair*, the statute in question was Louisiana Revised Statutes section 15:561, which, in part, provides that “[a] person convicted on or after August 15, 2006, of a sex offense as defined in R.S. 15:541 when the victim is under the age of thirteen years shall be placed upon supervised release . . . whenever he is released from the custody . . . .” The statute imposes 17 conditions of supervised probation:

177. *Id.* at 101.
178. *Id.*
179. *Id.*
181. LA. REV. STAT. ANN. § 15:560.3 (2009). Regarding the monitoring device, one may argue that merely wearing an electronic device does not impose upon a person an affirmative disability or restraint. From a literal standpoint, the monitor does not prevent freedom of movement. Looking deeper, however, the imposition of bodily intrusion is surely a form of disability. Forcing someone to wear an electronic monitoring device, where the failure to comply will result in imprisonment, deprives him of the ability to be free in his person. There is great value in the freedom to choose what one wears and does not wear on a daily basis. SOAP’s disregard for the implications of this loss of freedom ignores what is clearly a disability.
release. Like the predators under SOAP, the offender must report to his probation officer when told to do so, seek permission to associate with those who have been convicted of a felony, wear an electronic monitoring device, and have his probation officer approve his residence.

When Louisiana Revised Statutes section 15:561 was initially enacted, the term of supervised release was only five years. In 2009, it was amended to provide for lifetime supervision. Prospectively, this change did not create constitutional concerns, but the legislature provided the increased period of supervision was to apply retroactively. The legislature, clearly realizing the implications of retroactively increasing the period of supervision, declared the amendment to be “curative and remedial.” The court disagreed, and found that because the underlying conditions of release were punitive, increasing the term from five years to life increased the crime’s punishment.

In reaching this conclusion, the court relied in part on Doe’s comparison of registration and probation:

In Smith v. Doe, the Supreme Court found that the appellate court’s holding that the Alaskan registration system was parallel to supervised release had merit. However, the Court rejected that holding, reasoning that unlike probation and supervised release, which ‘entail a series of mandatory conditions . . . ,’ the Alaska statute provides that offenders ‘are free to move where they wish and to live and work as other citizens, with no supervision.’

The court found that “[u]nlke the Alaskan registration statute which allows offenders to live, move, and work as they wish, with no supervision, the provisions of Louisiana Revised Statutes section 15:561.5 gives the supervised release officer the authority to make decisions for the offender.” This, in the court’s opinion made the scheme punitive, and its retroactive application to be unconstitutional.

187. Trosclair, No. 11–KH–312, slip op. at *2.
188. Id.
189. Id.
190. Id. at *7.
191. Id. at *5.
192. Id. at *6.
193. Id. at *9.
c. SOAP Promotes Retribution, a Traditional Aim of Punishment

In Hendricks, the Court found the fact that a criminal conviction was not a prerequisite to commitment under the Kansas SVPA to be indicative of the state's non-retributive intent.\footnote{194} Under the Kansas SVPA, although a person suspected of having a "mental abnormality" was likely to have been convicted of one or more sex crimes, the crime itself was used only as evidence of the offender's mental condition and to predict future dangerousness.\footnote{195} In contrast, under SOAP, a criminal conviction is "both a sufficient and a necessary condition."\footnote{196} A criminal conviction is the exclusive means by which an assessment is triggered under SOAP.\footnote{197} SOAP's applicability to all imprisoned sex offenders suggests a retributive attempt by the State to penalize a broad class of individuals defined solely by the class of crimes for which they have been convicted.\footnote{198}

d. SOAP Does not Have a Rational Connection to a Non-Punitive Purpose\footnote{199}

Public safety is the express concern of the Legislature under SOAP.\footnote{200} The legitimacy of this purpose, however, is only half of the equation under the "connection" factor. The penalizing mechanism (i.e., probation) must, in its operation, be rationally

\begin{footnotes}
\footnote{194}{Kansas v. Hendricks, 521 U.S. 346, 362 (1997).}
\footnote{195}{Id.}
\footnote{196}{Smith v. Doe, 538 U.S. 84, 112 (2003) (Stevens, J., dissenting) (finding this characteristic to be illustrative of the legislature's punitive intent).}
\footnote{197}{LA. REV. STAT. ANN. § 15:560.2 (2009) (a person charged with an offense but not convicted cannot be subject to assessment because he has not been convicted of a "sex offense as defined in La R.S. 15:541").}
\footnote{198}{See also Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963) (inquiring "whether [the mechanism's] operation will promote the traditional aims of punishment—retribution and deterrence"). SOAP does not promote deterrence. The risk presented by the sexual predator is a product of his "mental abnormality." The abnormality impacts his volitional capacity, preventing him from exercising adequate control over his behavior. For this reason, the mere threat of being placed on probation is not likely to impact his decision-making process or to deter any further offenses. This reasoning was employed in Hendricks, where the Court stated that "[t]hose persons committed under the Act are, by definition, suffering from a 'mental abnormality' or a 'personality disorder' that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement." Hendricks, 521 U.S. at 362–63.}
\footnote{199}{See also discussion supra Part II.D (discussing the rationality of SOAP from a public policy standpoint).}
\footnote{200}{LA. REV. STAT. ANN. § 15:560 (2009).}
\end{footnotes}
connected to its purpose. In *Smith v. Doe*, for instance, the Alaska registration statute promoted public safety by enabling citizens to more readily identify sex offenders. Alaska’s requirement that offenders register and notify the community of their crimes was rationally connected to this purpose. Likewise, in *Hendricks*, the purpose of the SVPA was public safety, and because sexual predators are unable to control their dangerousness, confinement was an appropriate and rational measure to achieve public safety.

A comparison of the analyses in *Smith v. Doe* and *Hendricks* suggests that the Supreme Court measures rationality by the nature of the restriction in relation to the overarching purpose of the law. For instance, the outcome of *Smith v. Doe* would likely have been different if instead of requiring sex offenders to register, the state had required them to pay a large fine. Although the fine would be less burdensome, the imposition of the fine would be irrational in relation to the purpose of public safety. Additionally, in *Hendricks*, a rational connection may have been lacking if, instead of commitment, the state sought to place Hendricks in jail for an additional three months. Aside from being de facto punishment, the state’s placing of Hendricks in jail would merely postpone his inevitable release and would not constitute a rational response to his mental abnormality.

SOAP’s placing of sexual predators on probation is not rational in relation to the purpose of public safety. The sexual predator suffers from a volitional impairment that makes him “a menace to the health and safety of others.” Although supervision may deter the standard sex offender, the sexual predator lacks the ability to weigh logical considerations. Monitoring and probation requirements will do nothing to restore his volitional capacity.

Additionally, SOAP’s complete lack of a treatment component is irrational. Unlike in *Hendricks*, where at the time there was serious doubt as to the availability of treatment, SOAP acknowledges the benefits of treatment by allowing the predator to

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201. *See Smith v. Doe*, 538 U.S. 84, 102–03 (2003) (finding that the Alaska Act “ha[de] a legitimate nonpunitive purpose of ‘public safety, which is advanced by alerting the public to the risk of sex offenders in their communit[ee]’”).

202. *Id.*

203. *Id.*


206. This is not to say that the probation and monitoring requirements are utterly useless. They are simply an irrational method of proactively combating the risks posed by the sexual predator because he lacks control over his future behavior, whether or not he is being monitored.
appeal his status only if he "is currently receiving treatment." Nowhere, however, does the statute provide for treatment; instead, SOAP requires only that the offender “[s]ubmit to available medical, psychiatric, or mental health examination and treatment . . . when deemed appropriate and ordered to do so by the probation and parole officer." Louisiana imposes this same generic requirement on all prisoners who are released from prison on parole. Because treatment is required only if it is available and if the probation officer deems it appropriate, it is clear that SOAP does not contemplate a form of treatment that is tailored to the predator’s unique disposition. Clearly, all sexual predators should be receiving treatment and participating in a well-defined treatment program, regardless of whether the probation officer deems it appropriate. Overall, the lack of treatment demonstrates that SOAP is nothing more than a punitive method of further sanctioning high-risk sex offenders. Therefore, SOAP’s retroactive application to Louisiana sex offenders is a violation of the ex post facto prohibition.

V. REFORMING LOUISIANA’S SEXUAL PREDATOR LAW TO PROTECT THE PUBLIC AND CONFORM TO CONSTITUTIONAL STANDARDS

SOAP fails to protect the public because it punishes sexual predators instead of confining and treating them. SOAP is an unconstitutional ex post facto law for essentially the same reason. The Louisiana Legislature can cure both defects by creating a legitimate regulatory scheme whereby sexual predators are identified by qualified personnel and treated for their mental conditions. To achieve this goal the state must: (1) create a competent mental health panel; (2) assess predators before they are sentenced and provide them treatment while in prison; and (3) create an effective treatment program that restricts the predator, but is geared towards rehabilitation and eventual reintegration into society.

209. LA. REV. STAT. ANN. § 15:574.4.2.
210. For a discussion on effective (and ineffective) methods of treatment for sex offenders and sexual predators, see Bruce J. Winick, Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis, 4 PSYCHOL. PUB. POL’Y. & L. 505 (1998).
211. This was the position taken by the dissent in Hendricks, where Justice Breyer stated that “when a State decides offenders can be treated and confines an offender to provide that treatment, but then refuses to provide it, the refusal to treat while a person is fully incapacitated begins to look punitive.” Kansas v. Hendricks, 521 U.S. 346, 390 (1997) (Breyer, J., dissenting).
A. Reforming the Panel

The first step in creating a non-punitive, practical scheme to assess potential sexual predators is the creation of a competent mental health panel. Because the difference between the sex offender and the sexual predator is the presence of a mental abnormality, each member of the panel should have credentials in the field of mental health. For example, the State of Texas uses a two-step method whereby a multi-disciplinary panel makes an initial assessment of the offender. This initial assessment, however, does not identify an abnormality, but rather predicts only whether the offender is likely to commit offenses in the future. If the panel makes this prediction, only then will the offender be assessed for a "behavioral abnormality." The Department of Mental Health or the Department of Criminal Justice then makes the ultimate conclusion as to whether the offender has a "behavioral abnormality" by utilizing a clinical assessment:

To aid in the assessment, the department required to make the assessment shall use an expert to examine the person. That department may contract for the expert services required by this subsection. The expert shall make a clinical assessment based on testing for psychopathy, a clinical interview, and other appropriate assessments and techniques to aid the department in its assessment.

Under the current procedures in Louisiana, a method such as Texas's may be difficult because the SOAP panel is assessing hundreds of offenders. Dr. Tucker stated that due to the high volume of assessments, the panel assesses the average offender in as little as 20 minutes. According to Dr. Tucker, these current procedures are insufficient and do not enable the panel to identify a "mental abnormality." Instead of attempting to assess hundreds of offenders, the panel should filter the offenders it assesses based on risk. A useful strategy may be to limit assessment to the following categories of offenders: offenders who have been convicted of an aggravated offense; offenders who have previously been charged

212. TEX. HEALTH & SAFETY CODE § 841.022 (2009).
213. Id.
215. Id.
216. According to Dr. Tucker, the panel has assessed approximately 1,200 offenders. Transcript of Hearing at 12, Louisiana v. Golston, No. 01-98-0002 (La. Jud. Dist. Ct. 19th Sept. 28, 2010).
217. Id.
218. Id.
and convicted of a sex offense; or offenders for whom the Attorney General petitions the court for assessment. This system would ensure that the panel always assesses those who have committed the most heinous sex offenses and those who have committed multiple sex offenses. Moreover, by allowing the Attorney General to petition for assessment, the law would permit the State to assess an offender who does not fall within a defined category, but whom the State nonetheless believes to be a violent predator.

The Louisiana panel, like the Texas panel, should evaluate possible predators in a one-on-one, in-depth manner. Of the hundreds of individuals assessed by Dr. Tucker, only two have actually appeared before the panel. Identification of a “mental abnormality” should require more than a statistical assessment of risk. After all, a “mental abnormality” is a “congenital or acquired condition of a person.” Currently, the panel looks only at prior crimes and any records provided to them by the Department of Corrections. An effort on the part of the panel to look at the individual, apart from and in conjunction with the crimes he has committed, would create a more accurate and meaningful determination.

B. Early Identification and Post-Prison Assessment

There is no reason the assessment should take place only six months before the offender is released from prison. The panel should assess the offender at the beginning of his sentence, which would enable him to participate in treatment while incarcerated. Although the State need not exempt the offender from punishment, treating the offender while in prison is a practical measure.

219. Id.
221. Id.
222. One method that has been shown to be accurate is clinical evaluation, used in conjunction with statistical risk assessment. This method utilizes an individual clinical evaluation, but removes bias by also utilizing statistical risk prediction. See Winick, supra note 210, at 560.
223. The dissent in Hendricks was critical of the Kansas SVPA’s failure to provide offenders with treatment during incarceration, saying that it is particularly difficult to see why legislators who specifically wrote into the statute a finding that “prognosis for rehabilitating . . . in a prison setting is poor” would leave an offender in that setting for months or years before beginning treatment. This is to say, the timing provisions of the statute confirm the Kansas Supreme Court’s view that treatment was not a particularly important legislative objective.

If the offender receives treatment while in prison, the panel should conduct a second assessment prior to his release. A determination of the success of the treatment should be left to the professionals on the panel. Of course, even if treatment is successful and the offender is released without being deemed a predator, the State will still require him to register and notify the community pursuant to Louisiana’s registration laws. This ensures that there will be a buffer between the community and any risk the offender may still pose.

C. Rehabilitation

The legislature’s creation of an individualized assessment that is focused on mental health will make SOAP’s procedures more characteristic of a civil regulatory scheme. Regardless of the procedures, however, the State must impose restrictions that are specifically and rationally tailored to the sexual predator’s underlying condition. This is not to say that sexual predators should be subject to fewer restrictions than SOAP currently provides. On the contrary, depending on the severity of their conditions, certain predators may need to be civilly committed. What is critical is that the level of monitoring and confinement be unique to the predator and that it be carried out with the hope of rehabilitation. Under the guidance of expert opinions, courts should determine the appropriate level of restriction on an individual basis.

All sexual predators are not equally dangerous. Courts should implement predators’ restrictions on an individual basis using the “least restrictive alternative.” Many states use risk assessment strategies, in which offenders are evaluated and their

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226. See generally John Q. La Fond, Outpatient Commitment’s Next Frontier: Sexual Predators, 9 Psychol. Pub. Pol’y. & L. 159 (2003). The term “least restrictive alternative” refers to the practice of placing a predator in the environment with the least restriction. This environment, however, still allows the state to have sufficient control over the predator, in order to keep the public safe. For some, the least restrictive environment may be civil commitment. These offenders are not safe if they are given any degree of freedom. Id.
treatment is managed based on their risk. For example, the panel may assess a particular offender and find him to be a sexual predator. However, relative to other predators, his mental condition and future risk may be less severe. Leroy Hendricks, for example, was determined to be especially dangerous, largely based on his own admissions, but also because he lacked the ability to understand the significance of his crimes. At least initially, an individual such as Hendricks may belong in an institution where he can receive treatment and be completely confined.

Other predators, although dangerous, may fare better in an outpatient setting. Currently, Texas has a program the state refers to as “outpatient civil commitment.” Under this program, a panel assesses the predators to determine their status, but instead of institutionalizing them the state requires that they participate in intensive outpatient treatment. As a practical matter, the restrictions imposed on predators in the Texas program are likely greater than those that SOAP imposes. The restrictions under the Texas program, however, constitute an integral part of its treatment component, rather than a mere means of punishing predators.

Allowing lower-risk predators to participate in outpatient treatment would produce several benefits. First, it would still allow the State to closely monitor sexual predators. The intense treatment focus, however, would likely cause a court to view the restrictions as non-punitive. Second, compared to a pure civil commitment

227. See John Q. La Fond & Bruce J. Winick, Sex Offender Reentry Courts: A Proposal for Managing the Risk of Returning Sex Offenders to the Community, 34 SETON HALL L. REV. 1173, 1185 (2004) (“Risk management is a strategy that is now being used more frequently to prevent sex offenders from committing more sex crimes. It is much more effective than simply using a prediction strategy. Risk-management requires an initial risk assessment for each sex offender, employing state-of-the-art actuarial instruments and other techniques, when an offender is first sentenced. His release into the community would subsequently be managed using this strategy. Government authorities then increase or decrease control over the offender in the institution and in the community in light of ongoing assessments of risk.”).


229. TEX. HEALTH & SAFETY CODE § 841.001-150 (2009).

230. Id.

231. For instance, the Texas predator is not allowed to initially live without supervision, but must stay in a residential facility. TEX. HEALTH & SAFETY CODE § 841.082 (2009). The predator must also submit to electronic monitoring. Id.

232. See Allen v. Illinois, 478 U.S. 364 (1986). In Allen, the Court found the provision of treatment to be indicative of a non-punitive intent, saying:

We are unpersuaded by petitioner’s efforts to challenge this conclusion. Under the Act, the State has a statutory obligation to provide care and treatment for persons adjudged sexually dangerous designed to effect
scheme, outpatient commitment would cost significantly less.\textsuperscript{233} Granted, it would cost more than the current probation under SOAP, but the benefits would far outweigh the costs. In addition to being constitutional, outpatient commitment would allow the State to both monitor and treat the sexual predator.\textsuperscript{234} Moreover, the State would still have the option to criminally punish those who violate the restrictions of the outpatient program. Third, the offender would be allowed to partially re-integrate into society, which would allow his treatment to address real-world problems and prepare him to deal with his condition in a realistic setting.\textsuperscript{235}

Ideally, as the offender progressed, the restrictions the State placed upon him would decrease. This does not mean, however, that the State would lose control over the offender. The State would still require that the sexual predator comply with its registration and notification laws. Although the predator may never break free from the stigma of being a sex offender, he may still one day become a productive member of society.

\textbf{VI. CONCLUSION}

Sex offenses are heinous crimes, and those who commit them deserve punishment. The State of Louisiana may prospectively impose longer prison sentences for all sex offenses if it wishes to

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\textsuperscript{233} The annual cost per person would likely be between $20,000 and $30,000. See Millhollen, \textit{supra} note 128 (discussing Representative Mill's decision to abandon an outpatient treatment program after finding out that Texas's program may cost up to $30,000 a year per offender).

\textsuperscript{234} That is, a system of monitoring could take place within the program. Perhaps the Department of Probation and Parole could assist the treatment program with enforcement. But, unlike under the current provisions, the role of the probation officer would be ancillary to the primary objective of treatment and reintegration. \textit{See also} La Fond \& Winick, \textit{supra} note 232, at 1190–95 (suggesting a "Community Containment Approach" that utilizes a multi-disciplinary treatment team and requires the predator to submit to polygraph testing).

\textsuperscript{235} \textit{Id.} at 1187–1200.
It cannot, however, impose additional, retroactive punishment upon convicted sex offenders simply because a three-person panel thinks they will strike again. Sex offender laws have already blurred the line that separates criminal punishment from other legitimate regulatory measures. SOAP clearly crosses whatever line still exists. The State cannot transform probation into a non-punitive restriction simply because it is designed to protect the community. If the State were permitted to do so, all criminals could be perpetually sanctioned in the name of public safety. Certain rare and violent predators, however, need to be separated from society and receive extensive treatment. These "sexually violent predators" are not standard recidivists, but are rather the deeply disturbed members of society who cannot control their sexual deviance.

SOAP’s assessment procedures fail to appreciate the sexual predator’s unique mindset. They attempt to sift through the entire population of sex offenders and arbitrarily mark those whom the panel suspects are most likely to reoffend. Given SOAP’s current assessment rate, thousands of offenders will be placed on SOAP probation in the coming years. Among these offenders, a small number will actually be “sexually violent predators.” Louisiana must take steps to accurately identify and separate this small segment of the sex offender population. When identified, these individuals should be confined, monitored, and treated within a framework that is conducive to eventual rehabilitation. If Louisiana fails to do these things, it is waiting for the sexual predator to strike again.

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236. These sentences would operate prospectively, and therefore the ex post facto prohibition would not be implicated. In other words, an increase in sentences for all future sex offenders would mean that the law would not be retroactive.

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