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從美國性罪犯民事拘禁治療制度看我國變革中之性罪犯強制治療制度

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摘要

近年來每遇及法務部審核重大性罪犯是否應予假釋之際，有關如何預防再犯之議題，就會被提出來討論一番。就性犯罪之再犯預防而言，內控機制與外控機制之建立，缺一不可，任何一環失之作用，都將使預防再犯系統發生重大漏洞。通常內控機制係指性罪犯之強制治療；藉由強制治療，使性罪犯學會阻斷犯罪念頭、壓制犯罪動機，以達到自我控制的目的；而外部監控，則指存在在社區，由觀護人、警察、社工、社區之治療團隊、罪犯之家人，甚至義工共同組成之監督網，隨時掌握性罪犯之動態，包括心理的想法，以監督之，且同時給予精神上之支持，以防鬆懈。

提及預防性罪犯之理論與實務，箇中學者、專家無不援引美國、加拿大等國在這方面之法制與經驗，惟不論是強制治療或社區監控制度，都是龐大且值得細膩討論之議題，因筆者於法務部服務期間，適參與草擬刑法第九十一條之一，性罪犯強制治療制度之修法工作，故清楚瞭解該條文之修法緣由及架構，爰選擇性罪犯之強制治療制度，作爲本篇報告之主題。由於此次刑法修正中之強制治療制度，治療期限並無底線，全以性罪犯之再犯危險是否顯著降低爲斷，預料此項制度上之重大修正必將引發關注與討論，由於美國針對性罪犯所設之民事拘禁治療制度，同樣係以性罪犯之危險性是否改變來決定治療是否終止，故本文試從比較法之觀點，以美國現行之性罪犯民事拘禁治療之制度來檢視我國此一制度之改進或不足之處。

礙於篇幅，本文僅簡介佛羅里達州、加州、密蘇里州及堪薩斯州之民事拘禁治療制度，並將我國強制治療制度之緣起、現行制度及未來修法方向，一一說明，最後從美國民事拘禁治療制度反觀我國修正中之強制治療制度是否尚有未盡之處。

筆者於美短暫進修期間，承蒙陳若璋教授之引薦得以順利參訪佛蒙特州，一窺該州性罪犯社區監控與獄中治療之堂奧，使過去僅能從文章中或會議上理解之強制治療理論與實務，透過近身觀察而得印證，謹就本文之一隅，聊表對陳教授難以盡述之感謝。

關鍵字：性侵害犯之內控、性罪犯之強制治療、強制治療、民事拘禁制度

從美國性罪犯民事拘禁治療制度
看我國變革中之性罪犯強制治療制度

壹、前言

許多性罪犯都潛藏著病態的人格特質，這種人格發展與形成常源於早期的受創、受虐經驗或長期不良之人際關係，不良的成長經歷導致這些性罪犯自幼就發展出錯誤的認知及扭曲的價值觀，甚且無法習得正確人際互動方式，成長之後，行強暴或性虐待就成爲肯定自己、發洩憤怒或複製自己早期受虐經驗以從中獲取快感的方式[1]。往往這些性罪犯一旦於現實生活中遇有自己無法承受之壓力事件，就開始觸動了性侵害的犯罪循環的歷程：從孤立自己、沈溺性幻想以尋求慰藉到化爲實際行動，每次犯罪的啓動到結束，通常內心的歷程都是循環著相同的軌跡，不斷重複犯行，直到被捕爲止。[2]

對於此類肇因人格異常或心理變態而犯罪的性罪犯而言，傳統的刑罰及獄中的教化課程，往往既不能有效嚇阻再犯或也難以發揮教化功能。因傳統的教化並未從犯罪心理學的角度去分析各個罪犯犯罪行爲的成因[3]，並使性罪犯瞭解自身人格或心理的問題，進而學習如何自我控制及預防自己再犯的技巧。由於性罪犯出獄後再犯性侵害犯罪的可能性是再犯其他犯罪的七點五倍[4]，故許多性罪犯雖在監所中表現堪稱良好，然出獄後，一旦面臨現實生活中觸發其再犯之事件或情境時，很快又會落入再次犯罪的循環路徑。因此，預防性犯罪的再發生，首應從矯正性罪犯之偏差心理或人格，協助其等建立內控能力開始[5]。

針對性罪犯所施之矯正人格或偏差心理之治療教育，其成效究竟爲何？二０

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[1]陳若璋，狼人現行－遠離性騷擾與性暴力（台北：性林文化， 一九九五年十月），頁十九～二十八。陳若璋，性罪犯心理學－心理治療與評估 (台北：張老師文化，二００一年十一月)，頁七十，依據 Groth 對性罪犯之分類，又可分成權力型、憤怒型及性虐待型。

[2]有關性罪犯會再而三的性侵害，國外學者有提出許多不同的理論，如 Patrick Carnes 提出的上癮理論、Wolf 提出的性侵害循環模式等，參陳若璋，性罪犯心理學－心理治療與評估 前揭書，頁四十八至五十二，筆者參訪佛蒙特州州立監獄時，獄中的治療師即是以循環模式論解說再犯成因及預防再犯的對策 一使罪犯有能力自行阻斷循環模式的繼續，惟隨著犯罪的複雜成因，許多罪犯的犯罪循環模式，並非只有單一，且可交錯進行。

[3] 我國監獄針對性罪犯於假釋前所施之治療或輔導制度，係始於民國八十三年刑法第七十七條修正，因應性罪犯假釋前應經診療之規定而來，於此之前，對性罪犯並未設特殊之治療或輔導課程。

[4] CJ Letter News on Criminal Justice Issues March 2002 www/ncsl.org/programs/cj/cj140302.htm

[5] 預防性犯罪再發生，僅靠性罪犯本身之自我約束並不夠，一旦性罪犯釋回社區後，主要還需有強而有力的社區監控機制：由觀護人、社區治療團隊及由罪犯家屬、朋友，甚至志工等共同組成的社區監控網，監控不僅是監管，還是扮演性罪犯意志薄弱、心性動搖時的心理諮詢角色。參 Georgia Cumming &Maureen Buell, Supervision of the Sex Offender, Safer Society Press, e 1998,頁三十八至四十二

ｏ一年，美國佛蒙特州矯正部（Department of Corrections）曾發表一份研究報告，針對一百九十五名於一九八九年出獄的性罪犯進行再犯之追蹤研究後，發現其中五十六名接受完整治療的性罪犯，六年內再犯性犯罪之比率爲百分之五點四，未完成治療或根本拒絕接受治療的性罪犯在此六年內之再犯比率則高達百分之三十。[6]另外根據美國司法部的研究，未治療的性侵害加害人，在出獄後三年內，其累犯率約百分之六十，經完全治療後，其累犯率降至百分之十五至二十[7]。而加州 Atascadero 監獄所做之研究則顯示，經過治療其再犯率爲百分之十一左右，未經過治療之性罪犯其再犯率則可高百分之十四左右[8]，受過治療與未受過治療之性罪犯再犯率最高差距可達六倍，足見性罪犯的治療對於再犯的預防有良好的成效。然如同治療疾病，每個受治療之人所需治癒的時間，隨個人的病況、體質等均不同。性罪犯之治療亦是如此，治療可達之成效及爲達一定成效所需之治療時間，隨著個別性罪犯之智力、領悟力、改變自我動機之強弱及人格異常或變態程度之不同，而有不同，甚至有些性罪犯，不論如何施以治療都難加以改變。

爲能有效監控及治療性罪犯，迄二ｏｏ二年三月，至少有華盛頓州、加州、堪薩斯州、佛羅里達州及密蘇里州等十六州立法通過性暴力罪犯法（Sexually Violent Predators Law）[9]，其中規定對於服刑期滿之性罪犯，得再施以不定期限之民事拘禁之強制治療（civil commitment of sex offenders）[10]。

各州之性罪犯民事拘禁法律在要件上或有不同，但大致架構如下：凡經有罪判決確定之性罪犯，於服刑期滿後，經判定其屬人格異常或心理變態，且若不予強制拘禁照顧或治療，將可能因其等異常心性，再犯性犯罪時，法院得依聲請對此種性罪犯宣告令入一定之機構，強制其接受不定期限之監控、治療與照顧[11]，直至有明確的證據可信其不再對社會大眾之安全構成威脅爲止。此一法律立法通過後，在美國司法界、學界及人權團體間引發相當多的爭議及討論，甚至質疑此

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[6] Robert J. McGrath, Georgia Cumming, Joy A. Livingston, and Stephen E. Hoke Research Brief- Vermont Department of Corrections- October 2001,此外，根據 Alexander 1993 年所做的分析，發現未受治療者之再犯率爲百分之十八點五，顯高於治療後的再犯率百分之十點九，且採取不同的治療模式，對治療成效也有明顯的影響；在同時採取認知行爲及再犯預防治療模式的團體，其治療成效顯然高於未採取是項治療模式者。參 Georgia Cumming &Maureen Buell, Supervision of the Sex Offender，前揭書頁八十八

[7]轉引自周煌智、郭壽宏、陳筱萍、張永源「性侵害加害人的特徵與治療策略」公共衛生，二十七卷一期，頁四、民國八十九年四月

[8] 轉引自陳若璋，性罪犯心理學心理治療與評估，頁一二四

[9] CJ Letter News on Criminal Justice Issues March 2002，同前注四。

[10] civil commitment 係適用於因精神疾病等、藥癮或類此情形致喪失就審能力或喪失得受刑罰處罰能力之罪犯，改令入一定處所接受治療即 civil commitment 取代刑罰之制度。

[11]加州之民事拘禁制度則設有期限，見本文下述。

法之合憲性。此諸多爭議直至一九九七年美國聯邦最高法院在賴利·韓屈克斯一案中（Kansas v. Leroy Hendricks，參附件），判定本法並不違憲後，仍未完全平息[12]，不過，至少性罪犯之民事拘禁制度是已經通過聯邦最高法院之檢驗。

我國雖自民國八十三年即於刑法第七十七條中增列犯刑法妨害風化罪者，非經強制診療不得假釋規定，然此項強制診療僅適用於在監服刑之性罪犯。八十六年一月二十二日性侵害犯罪防治法公布施行後，確立了出獄後或服刑期滿之性罪犯在社區亦必需接受治療及輔導教育之制度。嗣八十八年四月二十一日刑法修正時，對於性罪犯的強制治療制度又作了重大修正。於該次刑法的修正，增訂了第九十一條之一，將性罪犯強制治療之規定，從假釋章中，移至刑法保安處分章中，至此，性罪犯之強制治療不再只是獄中之教化措施及假釋條件而已，而是法官於裁判時應併同考量之保安處分之一。此外，配合原來獄中之強制診療制度，至此，我國有關性罪犯的強制治療制度，已建立了大體的架構。簡言之，此一架構即是刑前強制治療、刑中強制診療及刑後強制社區治療及輔導。

此三階段之治療均有一定期限：刑前治療最多不得逾三年（刑法第九十一條之一第三項），社區之身心治療及輔導教育之期間最長不得超過三年（參性侵害犯罪加害人身心治療及輔導教育實施辦法第五條），而獄中的強制診療則不得超越刑期，故此等法定治療期間一旦期滿，不論性罪犯的人格傾向有無改變，不論他們對社會大眾的安危是否仍構成潛在威脅，治療都必需終止，此外，性侵害之犯罪事實尚未確定前，即鑑定該被告是否有強制治療之必要，亦使常使鑑定人員陷於兩難[13]。

有鑑於此，法務部於九十一年所草擬之刑法總則修正草案中，將性罪犯強制治療制度做了大幅度修正：性罪犯之強制治療不再與本案判決同時宣告，法院是否宣告性罪犯應接受強制治療，應視此性罪犯在獄中強制診療，或社區中治療、輔導教育之評估結果而定。若性罪犯經過獄中強制診療或社區之治療及輔導教育後，經評估其再犯危險仍高，而有接續治療必要時，檢察官將向法院聲請強制治療。一旦法院為此宣告，該性罪犯就應被置於適當場所，令其接受治療直至其再犯危險顯著降低為止。此項修正草案已於九十一年十一月十五日由行政院與司法院會銜送進立法院審查中。

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[12] Mari M. Miki Presley: Jimmy Ryce Involuntary Civil Commitment For Sexually Violent Predators' Treatment And Care Act: Replacing Criminal Justice With Civil Commitment / Florida State University Law Review，488 頁-489 頁

[13]詳見本文下述

修正之強制治療制度與美國之性罪犯之民事拘禁治療制度，均爲不設期限之治療制度，本文謹就美國聯邦最高法院在韓屈克斯一案（參附件一）中對民事拘禁治療制度之觀點及其所受到之質疑，檢視我國修正中之強制治療制度。雖然刑法九十一條之一之修正草案尚在立法院審查中，何時完成立法，尚難估測，完成後之新制度是否仍維持草案之原樣，更難逆料，然參考美國現行制度之運作，係有助於 我國未來性罪犯強制治療制度之規劃。

貳、美國性罪犯民事拘禁治療制度之簡介

一、佛羅里達州

佛羅里達州「性暴力罪犯強制民事拘禁治療照護法」（Involuntary Civil Commitment For Sexually Violent Predators' Treatment And Care Act）（下稱民事拘禁治療法）是於一九九八年五月完成立法，於一九九九年一月一日施行[14]。如同許多性犯罪防治法之立法背景，佛州性罪犯之民事拘禁治療法之制定背景也有一個令人不忍睜睹的故事[15]。

一九九五年九月十一日九歲的小男孩 Jimmy Ryce 在放學回家的路上失蹤，數月後他的背包及屍體被發現。Jimmy Ryce 生前遭綁架、強姦，而後被歹徒殺害、肢解。兇手雖然很快就被逮捕且數年後判罪確定，但 Jimmy Ryce 的父母痛心於愛子所遭受的不幸，遂積極遊說制定簡稱「吉米法案」的性罪犯之強制拘禁治療法案（Jimmy Ryce Involuntary Civil Commitment For Sexually Violent Predators' Treatment And Care Act），此法案並於一九九八年五月間立法完成，於一九九九年一月一日正式實施。本法定義某些心理變態之性罪犯爲「性暴力犯」（sexually violent predator），並規定應強制這類罪犯進入適當機構接受不定期之拘禁治療。本法只適用於經法院判決有罪確定且服刑完畢之性罪犯。[16]

佛州民事拘禁法之內容如後： 佛州民事拘禁法所定義之「性暴力犯」（sexually violent predator）係指曾犯性暴力犯罪，且該人有再犯性暴力犯罪傾向之變態心理或異常人格，若未令入適當之場所接受長期監控、照顧與治療，其等將仍因其心理及人格因素再度犯案。[17]

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[14] Mari M. Miki Presley，前揭文，頁四九o

[15]一九九四年七歲小女孩梅根遭到一名假釋中之性罪犯姦殺，進而促使日後全美各州及聯邦政府制定俗稱「梅根法案」之性罪犯公告制度；民進黨婦女發展部主任彭婉如於八十五年底遭受性侵害死亡之事件，促使性侵害犯罪防治法於民國八十六年一月二十二日制定公布實施。

[16] Mari M. Miki Presley，前揭文，頁四八八

[17] Mari M. Miki Presley，前揭文，頁四九一

在性罪犯出監前一百八十日，監獄管理員必須將該名人犯即將出獄之事通知綜合小組（multidisciplinary team），及該管事務之檢察官，並由該小組評估該人犯是否爲符合法律所定義之性暴力犯，小組成員中至少有精神科醫師及心理師各一至二名。[18]

綜合小組若評估其等爲性暴力犯（S.V.P），該小組即會將相關之報告及建議送予檢察官，檢察官得依此報告及建議向法院提出民事拘禁之聲請。法院受理該項聲請後，法官即應決定是否有「相當理由」（probable cause）足認人犯是法律所規定需治療之性暴力犯（S.V.P）。若法官認定有相當理由可認該罪犯符合法律上所定義之性暴力犯時，人犯即會被拘禁且令入適當之治療場等候法院最後的審判結果。檢察官可聲請法院進行「當事人進行式的」（adversarial probable cause hearing）聽審程序，以決定是否有相當理由認該人犯爲法定性暴力犯。如此項聲請獲准，相對人（即性罪犯）即有權提出證據，委任律師、交互詰問證人及要求閱覽該小組所做的評估報告。然此項向法院提出聽審要求之權利並不對等，僅限於檢察官才擁有此一聲請權。[19]

如經審理認爲確有相當理由認爲該人犯爲性暴力犯時，法院應在三十天內開庭審理是否應施以民事拘禁治療。此項審理程序與刑事訴訟程序有許多相似之處，例如，相對人得委任律師，若其無資力，則得請求法院指定「公設辨護人」爲其辯護，同時也有權要求陪審團公審。[20]

審理過程中，檢方提出之證據必需達到明確可信的程度（clear and convincing evidence）[21]，法官或陪審員始能判決人犯爲性暴力犯，且此項判決必需全體陪審員無異議一致通過。若僅是多數陪審員認爲該性罪犯屬法律上所定義之性暴力犯時，檢察官可要求重新審理。[22]

一旦相對人被判定爲性暴力犯時，該性罪犯即會被送往由「兒童家庭服務部」（the Department of Children and Family Services）成立之治療機構，並與其他受拘禁治療之普通人犯隔離治療。[23]

在拘禁治療期間每年至少一次應檢驗受治療人之危險情形是否有所改變。法

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[18] Mari M. Miki Presley，前揭文，頁四九0
[19] Mari M. Miki Presley，前揭文，頁四九一
[20] 同注十九
[21] 此舉證程度之要求，通常適用於民事審判案件，雖然其證明之程度不必達於無合理懷疑—beyond a reasonable doubt, 即一般人均不致有所懷疑而得確信其爲真實之程度，但待證事項必需被證明具有高度的可能性或合理的確信
[22] 同注十九
[23] Mari M. Miki Presley，前揭文，頁四九二

院並應審理是否有「相當理由」相信受治療人之情形已有所改變，且釋放後亦不再對社會大眾之安全構成威脅。如果州政府能提出「明確可信」的證據證明受治療人之異常心理狀態仍會對一般民眾的安全構成威脅，且一旦停止拘禁治療，他很有可能再犯，則該性罪犯就必需繼續接受拘禁治療。在拘禁治療期間，受治療之性罪犯雖得隨時向法院提出釋放之聲請，且於法院審理治療成效的程序中，性罪犯亦得委任律師到庭，但並無親自出庭之權也無要求陪審團審判之權利。[24]

二、加州

加州於一九九六年一月一日立法通過施行性暴力罪犯法（The Sexually Violent Predator Law），該法創設了一項專對性暴力罪犯（sexually violent predators）而設的民事拘禁制度。被認定爲 S.V.P.必需同時具備以下兩項要件：（一）、該罪犯曾以強暴、脅迫、恐嚇或以傷害被害人或第三人之方式犯特定之性犯罪，且受害者不止一名。若受害者未滿十四歲，則是否施以暴力在所不論；（二）、經診斷認爲其心理異常且此異常之心理將導致人犯回到社區後，有再爲性暴力犯罪之可能；一旦經認定是 S.V.P 後，透過宣告民事拘禁之方式，將其送入安全機構，且除非其再犯之危險狀況已經解除，否則不予釋放。[25]

加州性罪犯之之民事拘禁法，係規定在該州之「福利機構法」（the Welfare & Institutions Code）中，其程序如下[26]：

（一）個案篩選：性罪犯服刑期滿前六個月，由「矯正部」（the Department of Corrections）及「刑期委員會」（the Board of Prison Terms）檢視該受刑人之犯罪紀錄，是否符合性暴力犯罪法中所定義應接受治療要件，如符合要件，人犯之資料就會被送到「心理衛生部」（the Department of Mental Health）由兩位精神科醫師或心理師進行評估（clinical evaluation），若評估人員一致認爲此人犯心理異常之程度達到未經妥適治療或監控，將有再犯性暴力犯罪之可能時，該案即會送到檢察署，由檢察官向法院聲請宣告民事拘禁治療。如評估結果不認爲該人犯需接受治療時，則心理衛生部將聘請另一組評估人員行二次評估，如果第二次評估結果並未一致認爲該人犯具有需拘禁治療之必要時，人犯即獲假釋，如評估結果一致認應施以治療時，該項資料即送給檢察官。

（二）民事拘禁之聲請：法院接到此項聲請後，應裁定本案是否有相當理由（probable cause）足認爲該人犯需受民事拘禁。於此程序中，人犯有選任律師

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[24] 同注二十三
[25] California Mental Health, www.dmh.ca.gov/faq/faq.asp
[26] California Mental Health，前揭注。

權且有詰問證人（評估人員）之權。若法院認爲有相當理由認爲人犯屬 S.V.P. 時，則擇日開庭審理該民事拘禁案。

（三）民事拘禁之審判：於民事拘禁之審判程序中，不論是人犯本人或檢察官都有權要求組陪審團，此項判決必需是陪審團全數一致且無合理懷疑（beyond a reasonable doubt）認爲人犯爲 S.V.P.之情形下，始能成立。

（四）、民事拘禁之執行：該人犯經上述程序被認定爲 S.V.P 時，即會被送到由「心理衛生部」（the Department of Mental Health）設置之機構，接受爲期兩年之治療。人犯在治療期間，至少每年會受檢一次，人犯亦可在治療一年後向法院聲請附條件釋放[27]。 於兩年期限屆終之時，除非檢察官再提出新的拘禁治療之聲請，並獲法院准許外，治療即結束，人犯亦必需釋放。檢察官於再次聲請拘禁治療時，除程序同前外，並必需提出這兩年之治療評估報告。

（五）、實施情形：屆至一九九八年，「刑期委員會」一共審查超過二千個個案，發現有超過六百個是符合應接受拘禁治療之要件，自性暴力罪犯法施行後，共有一百二十一名性罪犯經法院宣告爲 S.V.P.，且送進治療機構接受治療。[28]

三、密蘇里州

爲保護社會大眾不再受到仍有再犯傾向之性罪犯之侵害，且能夠使這類性罪犯受到完整之治療，密蘇里州於一九九九年一月一日開始施行性暴力罪犯法（the Sexually Violent Predator Act）[29]。該法規定人犯出監前一百八十天內由其矯正部（The Department of Corrections）部長及心理衛生部(the Department of Mental Health)部長共同指定之一個七人小組專責調查該人犯是性暴力犯（S.V.P.），此小組應於三十天內完成調查報告，並將報告送交檢察長，如果報告認爲此人犯符合 S.V.P.之要件時，檢察長即將此一報告送予由其所指定組成之獨立的檢察官審查委員會，進行另調查，以決定應否向法院提出民事拘禁之聲請。審查小組並應將調查結果送交檢察長。[30]

該審查小組如依據組內成員多數決認爲此人犯符合 S.V.P.之要件時，檢察

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[27]California Mental Health，前揭注；人犯經過治療後如經評估不會再犯性暴力犯罪時，心理衛生部可聲請法院無條件釋放，惟在假釋期間，其仍必需受到假釋官之監管；若經評估在持續進行門診治療且受到監控之情況下，將不會再犯時，心理衛生部得向法院聲請附條件釋施一命其獲釋後必需持續接受門診治療及監控，人犯獲得此種附條件之釋放後，除應受監管外，獲釋期間並不計入應受治療之兩年期間內。

[28]California Mental Health，前揭注

[29] Laura Barnickol, Missouri's Sexually Violent Predator Law: Treatment or Punishment? Journal of Law &Policy P322

[30] Robert Bilbrey, Civil Commitment of Sexually Violent Predators: A Misguided Attempt to Solve a Serious Problem, www.mobar.org/journal/1999/novdec/bilbery.htm

長則必需在收受調查小組書面通知之四十五天內向法院提出民事拘禁治療之聲請。[31]

法院接獲聲請後通常於七十二小時內，開庭審理，並將該性罪犯拘禁至適當之安全機構，等候法院審判。於此審判程序，人犯有權選任律師、詰問證人及檢視所有檢方所提出之報告。經此程序審查之結果，法院如基於「相當理由」（probable cause）認爲該性罪犯爲 S.V.P.時，將命心理衛生部指定精神科醫師或心理師對人犯再進行心理衡鑑，此項鑑定必需在接獲法院命令後六十天內執行。此外，人犯亦有權利自費聘請其他之精神科醫師或心理師爲其鑑定。[32]

於鑑定完畢後六十日內，進行民事拘禁治療之審理，於此審理程序中，人犯亦有選任律師之權利，如貧無資力，則由法院爲其指定律師，人犯亦得要求陪審團審理，如不要求陪審團審理，則直接由法官審視證據並爲判決。不論是法官或陪審團，欲認定該性罪犯爲 S.V.P.時，都必需達到無合理懷疑之程度，如已達無合理懷疑之程度時，該名性罪犯將由心理衛生部執行拘禁及治療之工作，直到其不再對社會產生危險。雖然性罪犯在此民事程序中受到如刑事程序提供予被告之保護，但並不得主張刑事被告所可主張憲法上之某些權利，例如緘默權。[33]

治療期間，心理衛生部每年都會對受治療之性罪進行一次心理衡鑑，若受治療人之危險情形已好轉至不再對社區構成威脅，心理衛生部長則得向法院聲請釋放，法院接獲此項聲請後，應於三十日內審理，性罪犯或檢方均得要求陪審團審理，如檢方無法提出證據使法院或陪審團達到無合理懷疑程度，認爲受治療之人之危險仍未改變時，人犯即可獲釋。除此，法院亦每年會審查一次該性罪犯之危險狀況。受治療之人亦得聲請法院釋放。[34]

四、堪薩斯州

堪州性罪暴力犯拘禁治療之規定於一九九四年公布施行[35]，於其規定性罪犯拘禁治療的相關法條第一條即開宗明義，闡明制定此一制度之意旨：因鑑於心理變態或人格異常且具性暴力傾向之人，如不加以矯治，將極具危險，而堪州現有之拘禁治療未能契合性罪犯之特殊治療需求，故慮及性罪犯對社會產生之危害，

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[31] Robert Bilbrey，前揭文
[32] Robert Bilbrey，前揭文
[33] Laura Barnickol, Missouri's Sexually Violent Predator Law: Treatment or Punishment? Journal of Law &Policy P328
[34] Robert Bilbrey，前揭文
[35] Kansas Legislature, http://www.kslegislature.org/cgi-bin/statutes/index.cgi

爰於現行拘禁治療規定外，就性罪犯之拘禁治療另訂特別規定。[36]

其有關性罪犯民事拘禁治療制度之規定如下：

有關之司法機關[37]於法律所特定之性罪犯於獄中釋放前九十天，應出具書面通知檢察長及綜合小組（multidisciplinary team）該罪犯之姓名、足資辨識的特徵、出獄後可能的住處、犯罪史及治療紀錄。綜合小組於收到該書面通知後三十日內應做出該性罪犯是否爲堪州法律所定義應接受民事拘禁治療之性暴力犯（Sexually violent predator）[38]之認定。依據堪州法律第五十九章之 29a02 之規定[39]，所謂性暴力犯係指被控或被判決犯性暴力犯罪確定，且罹於心理變態或人格異常之人，而其變態心理或異常人格可能致其再犯性暴力犯罪。性暴力犯罪指強姦、猥褻幼童、雞姦及性曝露等犯罪之既未遂犯行。而性罪犯的範圍尙包括被控犯前開性犯罪，但喪失就審能力（incompetent to stand trial）者而不予審判或因精神異常（insanity）而被判無罪者。[40]檢察長指定成立一個檢察官審查委員會（prosecutor's review committee），就綜合小組提出的報告進行審查，以決定該性罪犯是否符合性暴力犯的定義，如認與法律定義相符，則應在綜合小組送達書面通知之七十五天內向法院提出民事拘禁之聲請[41]。

法官接獲此項聲請後，先初步審核是否有相當理由（probable cause）認爲該人是法定之性暴力犯，如是，則暫令拘禁，且在七十二小時開庭審理決定是否有「相當理由」認定其爲性暴力犯。於審判中性罪犯可委任律師，行交互詰問及檢閱呈庭的相關報告。如認定成立，法官將令該性罪犯進入包括郡監等適當之安全處所，等候專家進行評估。[42]

之後，法官需在六十日內開庭審判該性罪犯是否爲法定之性暴力犯，於此審判程序中，性罪犯有委任律師之權，如其無資力，法官並應爲其指定律師，以保障其訴訟權益。當性罪犯要求自行聘請專家爲其鑑定時，法官應許可該專家爲性

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[36] Kansas Statute Chapter 59.-Probate Code Article 29a01，參 Kansas Legislature,前揭注。

[37] 依據 Kansas Statute Chapter 59.-Probate Code Article 29a02(f)之規定：有關之司法機關（Agency with jurisdiction）指依據法律有權釋放人犯或有權令人犯受一定期間之拘禁者，其包括矯正部門（the department of corrections）、社會更生服務部門（the department of social and rehabilitation services）及假釋委員會（the Kansas parole board），Kansas Legislature,前揭注。

[38] Kansas Statute Chapter 59.-Probate Code Article 29a03（a），（b），（d）。參 Kansas Legislature, 前揭注。

[39] Kansas Statute Chapter 59.-Probate Code Article 29a.- commitment of sexually violent predator. 參 Kansas Legislature，前揭注。

[40] Kansas Statute Chapter 59.-Probate Code Article 29a03（a）（2）（3）參 Kansas Legislature, 前揭注。

[41] Kansas Statute Chapter 59.-Probate Code Article 29a04 參 Kansas Legislature, 前揭注。

[42] Kansas Statute Chapter 59.-Probate Code Article 29a05 參 Kansas Legislature, 前揭注。

罪犯進行所有必要的檢測，並取得該罪犯相關之醫藥記錄及心理評估和報告。在審判前四日，任何一方均有權提出書面聲請，要求以由陪審員審理，法官亦得指定陪審員審理。[43]如所有事證已達「無合理懷疑」可認該性罪犯屬法定之性暴力犯時，該性罪犯則被送到由「社會更生服務部」(the department of social and rehabilitation service)成立的矯治機構接受治療及照護。於有 陪審團審理時，S.V.P之認定必需陪審員全體爲一致無異議之認定。拘禁治療期間每年均就治療成效檢視一次，治療期間直到其變態心理及異常人格已獲改變，並不再對他人造成危害爲止。[44]

參、性罪犯之民事拘禁法律所引發之爭議

前述各州針對性罪犯設計之民事拘禁制度，幾乎與前述堪薩斯州一九九四之性強暴犯法架構如出一轍[45]。美國聯邦最高法院在一九九七年六月二十三日在韓屈克斯一案中，認爲堪州之「性暴力罪犯法」中有關對性罪犯行強制拘禁治療之程序並不違憲後，此指標性案例，遂爲各州援引作爲釋疑性罪犯民事拘禁制度並不違憲之重要法律見解。

堪薩斯州爲了處理爲數不多但極端度危險性暴力犯，而於一九九四年制定性暴力罪犯法（Sexually Violent Predator Act），堪州政府認爲這些強暴犯並非爲典型之精神病，難以適用一般之民事監護規定令入一定場所接受治療，但他們通常具有極強的反社會人格，致他們有一再犯案之傾向，故必須針對他們制定拘禁治療之法律，迫使他們獲得長期治療。該法不但適用於經法院判決有罪之性罪犯，亦適用於因無就審能力或責任能力而受制裁之性罪犯。在堪州之性暴力罪犯法中規定，只要該性罪犯因心理變態或人格異常致可能再犯性侵害犯罪者，均得對其施以民事拘禁。此項法律通過後不久，韓屈克斯，一名即將出獄且有將近三十年兒童性侵害前科史的戀童犯，即成爲州政府適用該新法的第一個對象。[46]堪州政府向法院聲請對韓屈克斯施以民事拘禁，但韓屈克斯認爲該法違反實質正當法律程序（Substantive Due Process Of Law）、不得重複處罰（Double Jeopardy）及法律不溯既往（Ex Post- Facto）之原則。此案打到堪州最高法院後，該最高

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[43] Kansas Statute Chapter 59.-Probate Code Article 29a06 參 Kansas Legislature, 前揭注。

[44] Kansas Statute Chapter 59.-Probate Code Article 29a07 參 Kansas Legislature, 前揭注。

[45] 堪州有關性罪犯民事拘禁治療制度已如本文前述。

[46] 參附件 Kansas v. Leroy Hendricks 頁三至頁四，韓屈克斯自一九五五年開始至一九八四年，期間不斷性侵害兒童，儘管多次入獄，唯一旦出獄，不久又再度犯案，其自承對兒童有種克制不住的衝動。

法院認爲要對人民施以民事拘禁時，必須透過實質正當法律程序及明確可信之證據來證明該人不但精神異常（mental ill）且足以對自身或他人產生危險。而堪州性暴力罪犯法中所規定得拘禁性罪犯之要件僅是心理變態（Mental abnormality），其程度與民事拘禁中應構成之精神異常並不相同，僅以心理變態就做爲拘禁之要件，是違反實質正當法律程序，故判決韓屈克斯勝訴。[47]敗訴之堪州政府及勝訴之韓屈克斯均向聯邦最高法院提出上訴。韓屈克斯並認爲堪州法院尚應處理他的另兩項上訴理由：該法違反重複處罰及法律不溯既往的規定。聯邦最高法院受理兩造之上訴後，駁回堪州最高法院的原判決，改判堪州政府勝訴[48]，其理由如下：

1、堪州之性暴力罪犯法不僅是性罪犯本身具有危險性就足夠，尚需該性罪犯罹於心理變態或精神異常。此項民事拘禁治療之要件與肯達基州、伊利諾州、明尼蘇達州等之民事拘禁法所適用的對象爲心理變態或人格異常或精神異常的要件相同，而各該州針對少數無法自控其危險性的心理變態或人格異常者所規定之民事拘禁法律，業經聯邦最高法院肯認其合法性在案，故在要件上與該等州之民事拘禁法並無二致的堪州性暴力罪犯法，亦無何違法之處。稱精神異常也好或稱心理變態，不管再怎麼去定義一個具有醫學內涵之法律名詞，都難與真正的醫學專業上的內涵相一致，因此我們所該關心的不是如何從醫學的角度去解釋此一法律名詞，而是該法律所設定之要件既然是要使那些對自已之危險性無自控能力之性罪犯受到民事拘禁治療，而韓屈克斯經過鑑定被評定爲嚴重心理變態的戀童癖，而符合該法需拘禁治療要件之人時，就得適用該法。韓屈克斯本人亦承認一有壓力時，就完全無法克制猥褻兒童的衝動。其本人的這段陳述不但預示其未來所具備之危險性，且正足以顯示他和一般可用刑事程序就可處理的人犯不同。[49]

2、至於韓屈克斯抗辯此種拘禁治療根本是種處罰，從其過去的已經判刑且服刑完畢之犯行去預測他將來必然會再犯罪而加以「預先處罰」，是憲法上所禁止之重複處罰，且違反及不溯既往之規定方面，由於該二項憲法上對被告所保障之權利僅適用於刑事程序中之被告，並不適用民法上之當事人，故其抗辯是否成立，首應釐清性暴力罪犯法究竟是民事法還是刑事

[47]Kansas v. Leroy Hendricks 頁二至頁三，前揭注。
[48] Kansas v. Leroy Hendricks 頁四至頁五，前揭注。
[49] Kansas v. Leroy Hendricks 頁六，前揭注。

法。刑罰的目的有二：一是處罰；一是嚇阻。堪州對性罪犯之拘禁治療並不含有處罰的目的，性罪犯之前的犯罪紀錄僅是一項認定其有無心理變態或人格異常的證據，拘禁之目的與「犯行」無關，亦與其犯罪的「惡意」無關，只與其是否爲心理變態或人格異常有關。此從因欠缺責任能力而未獲有罪判決之性罪犯亦應接受治療即可印證，拘禁與否與先前之犯行並無關聯。此外，本法亦看不出有嚇阻犯罪之目的，因爲應受拘禁治療之人犯均因人格異常或心理變態致無法控制自己的行爲而一再犯罪，對這種人，豈是靠「拘禁」就能嚇阻其等不再犯？況且，拘禁治療的過程，對受治療人限制的程度均與任何其他拘禁治療的病人相同，遠非可與「坐牢」相提並論，既然從沒有人認爲對其他具危險性的精神病患以拘束其等行動自由之方式使其之接受治療是一種「懲罰」，與此情形相同之性罪犯拘禁治療當然亦難認爲是種「懲罰」。雖然韓屈克斯認爲，無期限之拘禁治療也是另一項意圖「懲罰」性罪犯之證明，然此種此種「無限期」只是種可能性，非必然結果，蓋本法以一年爲期，如政府要繼續對該人施以拘禁，必需提出「無合理懷疑」之證據證明該性罪犯之情況仍仍符合應拘禁治療之各項要件，才能繼續拘禁之。[50]最後，韓屈克斯認爲本法根本未規定任何治療內容，因此拘禁的本質只是囚禁。在這點上，聯邦最高法院倒是滿贊同堪州最高法院的見解：民事拘禁法最重要的目的不是如何治療，而是持續將性罪與社會大眾隔離。治療他們使其得以復歸社會只是本法之附隨目的。許多精神疾病是無法治療的，對於該無可治療之性罪犯，以是否有能力治療該名性罪犯作爲是否應對其施以拘禁治療之先決條件，是無意義的，因爲無法治療的人難道反應釋放到社會上去嗎？實則，要經由嚴謹的法律程序妥善的處理無可治療且具危險性之性罪犯或精神病患，就是民事拘禁之立法意旨。若該性罪犯是有治療可能性，則政府是否有義務提供治療呢？即便堪州最高法院認爲治療並非本法主要目的之論點成立，提供治療起碼也是「附隨」義務，且爲法律所明定，故一旦施以拘禁，政府就必須依法提供治療（treatment）及照顧（care）。雖然本案中韓屈克斯是堪州適用該法之第一人，因爲新法上路致政府尚未規劃出完整的治療計劃致韓某本人未受到足夠之治療，然重點是韓屈克斯是受到受過治療方面專業訓練之人員之看管而非受監所管理員之看管，故不得因其未受到足夠之治療，就

[50] Kansas v. Leroy Hendricks 頁七至頁九，前揭注。

推論該法之目的在於「處罰」。[51]

基於本法僅適用於一小部分極具危險之性罪犯，且是依照嚴謹之程序來篩選需經拘禁治療之人，受拘禁治療之人於拘禁期間所受之待遇完全比照一般拘禁治療之病人而非如同坐牢般，再加上如有治療可能性時，政府應提供受拘禁人治療措施，及一旦危險情況好轉則立即釋等諸點分析，本法不具刑事處罰之性質甚明。既然本法非刑事法，且法律的目的與處罰性罪犯毫不相關，因此韓屈克斯所提本法違反一事不二罰之主張即無由成立。至於所謂「不溯既往」條款是指禁止任何新定之處罰規定適用於規定適用前已遂行的犯罪，本法既無關於「處罰」，自無是否違反不溯既往原則之問題。[52]

在聯邦最高法院這番論述後，並未平息學者對性罪犯民事拘禁法各項爭議之討論：

（一）、對性罪犯之拘禁治療本質上就是種刑罰：[53]

1、從立法過程的討論可以看出它的刑罰性：

立法過程的辯論中，堪州檢察長曾說，幾乎不可能再有機會去通過一種法律，將這些危險人物在他們服刑期滿後繼續與受到拘禁。在立法的過程中，如何繼續拘禁性罪犯的著墨遠比如何治療他們來得多的多。由於對性罪犯的治療成效不彰，所以只藉著民事的拘禁制度，對其等執行一個變相的無期徒刑。

2、從成效不彰的犯罪防治體系可以看出它的刑罰性：

在吉米法案通過的那天，佛州報紙的一篇報導道出了人民對「認罪協商」制度在性侵害案件中濫用的無力感與挫折感：以佛州博渥郡（Broward）爲例，十一個性罪犯中只有二個曾入監服刑。在棕梠灘郡（Palm Beach）則是四個登記有案對兒童性侵害的性罪犯全都直接宣告緩刑附保護管束。就佛州全州而言，自一九九五年十一月以來，五百七十七個被認定有罪確定的性罪犯中，有百分之七十五被法院所宣告的刑期，較州規定之標準刑期（State Guideline）更短。從各

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[51] Kansas v. Leroy Hendricks 頁九至十一，前揭注

[52] Kansas v. Leroy Hendricks 頁十一，前揭注

[53] Mari M. Miki Presley: Jimmy Ryce Involuntary Civil Commitment For Sexually Violent Predators' Treatment And Care Act: Replacing Criminal Justice With Civil Commitment，前揭文 頁四九四～四九七

種資料顯示，這些性罪犯不是獲得緩刑就是在認罪協商制度下獲得比應得徒刑更輕之刑期。因此，在刑事體系無法獲得的公道，只好從拘禁制度中討回，這或許是設計此一制度的一部分動機。

3、法條本身就可看出它的刑罰性：

不論是佛州或堪州之法律，拘限於適用於有再犯傾向之心理變態且具危險性之性罪犯，而用以認定該名服刑完畢之性罪犯是否心理變態或人格異常的唯一證據，就是之前法院判決確定之犯罪事實，這是一項人犯在入監前，最後一次與社會互動的紀錄。這是不客觀的，因爲一旦入監服刑，在監獄這種封密而無機會再犯罪的環境裡，人犯心態縱有所改變，亦難被採信，人犯在監所的表現無從成爲評估的資料後，只好以之前之犯罪事實做爲唯一之評估依據。因此人犯的前次犯罪紀錄，到底是成爲對其等施以更多的處罰之依據，還是認定其等心理異常之依據，就顯得模糊不清了

4、從性罪犯之治療現況可以看出它的刑罰性：

佛州吉米法全稱雖爲「性侵害犯之強制民事拘禁治療照護法」，且本法立法之初雖倡者諄諄央求性罪犯治療的重要性，但諸多事由可判定對性罪犯之治療並非通過本法之主要動機。（１）、對性罪犯之治療並非是施以何種有效之藥物，因此當法律規定，對有些根本無可能改變其心理現狀之人犯而言，仍要以治療爲名拘禁在特定處所裡，本身就是種矛盾。（２）、僅憑其過去的犯行就可認定其等是心理變態嗎？此外，如真爲治療，爲何除拘禁方式外，別無其他較彈性之作法呢？因精神疾病而犯罪的人，在刑事體系中尚可以令其接受適當之治療以代坐牢，爲何在吉米法中，對這種人犯之治療卻仍一律必需以拘禁之方式，而無其他較有彈性之方式？如果受治療人在與治療目的不相衝突的情形下，爲何不允其的獲取適度自由？此項毫無彈性的強制拘禁作法應認爲是違憲的。

（二）、吉米法或其他性罪犯拘禁治療法本身之與刑罰理論之矛盾處：[54]

依吉米法之定義那群需接受治療之性罪犯是指「其等之心理狀況影響其等之情緒及意志力以致於傾向對他人性侵害」（五百頁最後一段），既然認定其等因心理問題而無法掌控自己之行爲，就應認定

[54] 同前注，頁四九八

此種人無可責性而免除刑罰。

（三）、最高法院在民事拘禁治的這批性罪真是精神病患嗎？其不過是一群不受道德束縛極欲遂行犯罪意念的人。此外，拘禁期間，政府亦未提供任何治療，只是形同預防犯罪之拘留而已，因爲這些人根本沒有疾病，如何治療？刑事的歸刑事，民事的民事，用重刑、長期刑一樣可以達到預防犯罪之目的。韓屈克斯一案中，聯邦最高法院用低標準去檢視法律，只要民事拘禁處分有適當的程序及一定的證據標準，最高法院就寧可接受此一制度而犧牲人民的自由權。[55]

綜上，學者對性罪犯民事拘禁制度之質疑如下：

（一）、性罪犯民事拘禁制度本質上就是一種對性罪犯的二次懲罰

（二）、性罪犯民事拘禁制度是因爲犯罪預防體係無能力防止性暴力犯的再犯下，所制定出來的制度。

（三）、僅憑罪犯過去的犯行紀錄就斷定其有人格變態及再犯傾向，並不合理。

（四）、對於這群不是精神病患的性罪犯真的能施予治療嗎？如無可治療可能性時，還要以治療爲名留置拘禁嗎？爲何不能使用拘禁以外之方式，在機構外施以治療？

（五）、爲何在認定這群性罪犯如同危險之精神患一般需要接受治療之同時，又認爲他們之刑事責任能力不受任何影響。

肆、我國性罪犯治療制度之定位

法務部於九十一年提出刑法總則之修正草案，其中於第九十一條之一有關性罪犯之強制治療之規定修正爲：「犯第二百二十一條至第二百二十七條、第二百二十八條、第二百二十九條、第二百三十條、第二百三十四條、第三百三十二第二項第二款、第三百三十四條第二款、第三百四十八條第二項第一款及其特別法之罪者，於刑之執行期間曾接受以防治其再犯性侵害犯罪爲目的之診療或身心治療或輔導教育後，經鑑定、評估而有施以治療之必要者，得令入相當處所，施以強制治療。」「前項處分期間至其再犯危險顯著降低爲止。」「前二項之情形，適用裁判時之法律。」此番修正，不但將強制治療擴大適用於性侵害犯罪之結合犯及特別法上所規定之妨害性自主犯罪、將強制治療之宣告之時點與本案判決之時點分離，且強制治療不設期限，直到再犯危險顯著降低爲止。相較於現行法所規定之治療期限最長不得逾三年，此項修正，必然對性罪犯的權益發生重大影響。

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[55] 同前注，頁五一一～五一二

於說明此項修正中之強制治療制度之前，謹先就我國性罪犯強制治療制度之沿革及本次修法背景，做一概述。

一、假釋要件之強制診療

（一）制定緣由及內容

早期，並不認爲性罪犯與一般罪犯有何不同，故在刑法中，除了刑罰規定外，並沒有特別關於性罪犯的任何制度。然隨著性罪犯治療理論之引進，性罪犯之治療不再僅是犯罪心理學或精神醫學所研究之課題，而成爲犯罪預防的重要措施。民國八十三年修正刑法假釋章時，於刑法第七十七條有關假釋要件之規定中，增訂第三項：「犯刑法第十六章妨害風化各條之罪者，非經強制診療，不得假釋。」，查當年之立法經過，原本刑法第七十七條之修正草案中，並未增列任何關於強制診療之規定，但於立法院討論應如何放寬假釋門檻之規定時，由前立法委員潘維剛等連署提出「要求增列犯有妨害風化罪名的累犯，應施予專業性心理的強制治療，以期達到教化及解決問題的目的，否則不得假釋」之修正動議後，性罪犯獄中強制診療制度才列入討論。其等提出此項修正之理由是認爲強姦罪之受刑人有超過五分之一是累犯，單純服刑期滿無法達到矯治效果，應從心理、生理兩方面給予診療後，才能讓他們回到社會。假釋條件放寬後，若亦適用於強姦罪之累犯受刑人時，將使這些高再犯危險之性罪犯大量釋回社區，屆時婦女人身安全將受到嚴重威脅，因此提出於刑法第七十七條增列一項：「犯刑法第十六章妨害風化各條之罪並爲累犯者，除經強制治療不得假釋」修正條文[56]。該項文字於最後表決之階段，又修正爲「犯刑法第十六章妨害風化各條之罪者，非經強制診療，不得假釋」[57]。至此，不限累犯，所有犯妨害風化罪之受刑人，皆有適用獄中強制診療之規定。該條修正通過後，對犯妨害風化罪之受刑人而言，假釋之要件除需有悛悔實據、服滿法定刑度外，尚需在獄中經過強制診療。

（二）缺失

立法者雖然認定性罪犯有治療之必要，然立法討論的過程中，強制診療原欲適用之對象，原爲典型之性暴力犯—強姦犯，且是再犯危險甚高且已呈現再犯傾向之「累犯」，惟最後立法通過適用強制診療的對象爲所有

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[56]立法院公報第八十三卷第七期，院會紀錄，頁一二六至一五四

[57]院會紀錄，前揭文，頁二０五至二０八

犯妨害風化罪之受刑人。當民國八十三年刑法第七十七條有關假釋之規定，作如上之修正時，刑法妨害風化罪章中尚包含性侵害犯罪與風化犯罪。亦即，該章所規定之犯罪類型，既包含典型的性侵害犯罪如強姦、猥褻罪等，亦包含僅是散布猥褻書刊，或引誘、容留婦女與他人淫之風化犯。在性侵害犯罪與風化犯罪皆適用強制診療的情況下，不但模糊了強制診療制度之立法原意，在執行上也易生困難。蓋姑不論當時國內對於性罪犯之治療，尚在摸索階段，該如何進行治療，尚無統一之模式[58]，如此全盤適用，徒然造成紛亂，在性侵害罪犯之治療，尚因犯罪類型不同，如成人強暴犯、亂倫犯或是戀童犯，而有不同之治療重點，凡此皆需治療人員針對犯罪類型、特質及罪犯之個別情況，費心規劃治療計畫[59]。若將無涉心理或生理問題，純爲營利而犯罪之風化犯亦納入「強制診療」之範圍，將排擠「真正的」性罪犯所需要的治療資源。

此外，並非所有之性侵害犯，均有心理變態或人格、生理異常之問題，未加篩選而令其等一律需接受治療，亦無法使有限之治療資源充分運用在真正應受治療之性罪犯身上。最後，依本法規定，非經強制診療不得假釋，因此只要曾經強制診療，即符合假釋要件，不問治療成效如何，有無繼續治療之必要或其再犯危險是否降低，都無礙假釋之審核，亦有不妥。惟不論此項立法是否有未盡周延之處，不可否認的，當年刑法第七十七條第三項之規定，確實使性罪犯之治療制度正式被納在司法體系內。

二、保安處分之強制治療

（一）制定之緣由及內容

由於性罪犯之強制治療，除具有預防個別行爲人再犯之目的外，尚有促使其再社會化之矯正的目的，本具有保安處分之性質，僅將性罪犯之強制治療制度置於刑法第七十七條第三項，並不足以突顯其保安處分之本質，反易認其只是針對性罪犯所設之假釋條件。爲釐清強制治療保安處分之性質，使性犯罪之強制治療成爲保安處分之一環，藉醫療處遇達矯正偏

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[58]周煌智、郭壽宏、陳筱萍、張永源，「性侵害加害人的特徵與治療策略」，前揭文，頁十，文內提及：國內性犯罪診療仍在起步階段，主要集中在台北及高雄監獄，中部監獄則是剛起步，無法與已有數十年治療經驗的美國相比。實則，有關針對台灣本土的性罪犯所進行之各項研究，如再犯危險因子等，迄今仍由箇中專家學者不斷研究中。

[59]周煌智，「性侵害犯罪加害人鑑定與刑前治療實務」，刑事法雜誌，四五卷三期，頁一三七：「性侵害加害人是一個多重因素所決定之異質性團體，因此必須針對個案加以分類治療，不可以同樣的模式給予治療，同時治療與輔導教育界線難以切割。」

差行爲，避免再犯之目的，法務部乃於八十八年刑法修正時，增定第九十一條之一，亦即現行法之規定[60]：「犯第二百二十一條至第二百二十七條、第二百二十八條、第二百二十九條、第二百三十條、第二百三十四條之罪者，於裁判前應經鑑定有無施以治療之必要。有施以治療之必要者，得令入相當處所，施以治療。」「前項處分於刑之執行前爲之，其期間至治癒爲止。但最長不得逾三年。」「前項治療處分之日數，以一日抵有期徒刑或拘役一日或第四十二條第四項裁判所定之罰金額數。」此項修正，不但使強制診療從獄中之教化措施提昇至保安處分之位階，且量及並非所有性罪犯皆有受治療之必要，故令受強制治療前，必需經過專家鑑定，以作爲法官裁定強制治療之依據。

（二）缺失

此項強制治療措施與刑法上之其他大部分之保安處分制度相同：設有期限（定爲三年）、應於裁判時併予宣告、應於刑之執行前爲之，並得折抵刑期。修正爲保安處分後之強制治療，經實際執行後，仍有以下實務上之問題：

1、鑑定之時點並不適當

性罪犯的「鑑定」，並不是其「到底有無犯罪」的鑑定，而是一種「危險評估」，故鑑定人員不是在做測謊的工作[61]，而是在做危險預測的工作。此項「危險評估」，依據陳若璋教授於*性罪犯心理學心理治療與評估*一書中所述[62]，不僅在預測再犯的可能性，還需評估犯罪者對社區的危險性，評估人員與性罪犯進行心理評估的臨床會談時，應包含以下十個向度[63]，並對是否強制治療作出建議：一、性罪犯之生長史：特別注意其有無家庭暴力、同儕輪姦文化、性創傷史特質；二、人格特質：表達溝通能力、情緒穩定度；三、偏差的性癖好：性幻想、看A片的頻率及模仿的程度；四、性犯罪內涵，尤其是性犯罪時的受害對象的性別、年齡及關係及犯罪手法；五、性罪犯相關壓力事件：有那些壓力事件及

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[60]參「法務部家庭暴力防治法種籽教官研習會」之「刑法部分修正條文修正重點」，頁十九；立法院公報，八十八卷十三期，頁一三五頁至一三六

[61]周煌智，「性侵害犯罪加害人鑑定與刑前治療實務」，刑事法雜誌，四五卷三期，頁一三一。文中提及美國司法審判系統是先經過調查、起訴並決定有罪後，於宣判前進行心理調查，判決將依據調查結果以決定是否命其治療，臨床人員應避免被當成「測謊器」

[62] 陳若璋，性罪犯心理學—心理治療與評估，前揭書，頁一三七

[63] 陳若璋，性罪犯心理學—心理治療與評估，前揭書，頁一四五至一四八

內在的心理歷程促發性侵害案件發生；六、對害人同理的程度：犯後有無愧疚感或罪惡感；七、社會與情緒適應：目前人際關係是否良好、自我調節情緒的能力爲何；八、對防止復發的自覺：性罪犯是否瞭解到自身犯案的循環歷程；九、責任及否認程度：認知扭曲的程度；十、社會支持系統的完整度。此十項會談內容，其中「性犯罪內涵」、「相關壓力事件」、「對受害人同理程度」，評估人員都必需在充分瞭解本次犯罪之發生及情節後，始能做出客觀的評估，而性罪犯的「否認程度」的判斷，更是必需在有確定犯罪事實之基礎下，才能判斷性罪犯的「否認」究竟是重申冤枉的意思表示，或是有再犯可能性的一項重要指標。

在佛蒙特州，對性罪犯的評估鑑定評估在犯罪事實認定後進行，且爲使每次評估時所參考的資料都是被告明確的犯罪紀錄，評估人員甚至建議檢察官在認罪協商時，不要接受被告的Alford Plea [64]，亦即不置可否之認罪請求[65]，此種被告既不承認犯罪也不否認犯罪，僅表願接受刑罰之認罪請求，無助於事實之真相之瞭解，鑑定人員在與性罪犯對談時，因乏明確之性侵害事實作基礎，很難對性罪犯之心理作出正確評估，而美國所實施之性罪犯民事拘禁治療，更不會有在判決尚未確定前，即必需決定性罪犯是否應於刑後接受拘禁治療之問題。

國內由於現行刑法第九十一條之一規定鑑定應於裁判前爲之，鑑定人員在無確定之犯罪事實下，只得以「假設起訴事實爲真」之前提下進行鑑定，不但徒增難度，且當法院最後以證據不足爲被告無罪之判決時，先前之鑑定所耗資源均附諸流水。

2、是否「有治療之必要」欠缺明確標準，致鑑定人員解讀各異

現行刑法第九十一條之一僅規定，「裁判前應經鑑定有無施以治療之必要。有施以治療之必要者，得令入相當處所，施以治療。」對何謂「有治療之必要」，法條文字及立法理由中並未闡明，從而產生實務上鑑定人員對該項法律要件之各種不同解讀[66]。同一個案，可因不同人員

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[64] Georgia Cumming and Maureen Buell, Safe Society Press, "Supervision of the Sex Offender",page13。

[65]此種認罪請求是爲規避民事賠償，亦即避免被害人援引被告在刑事庭之認罪答辯，作爲民事相關請求之依據，故有不認罪之認罪請求，即被告雖願接受刑罰制裁，但不表示其承認犯罪

[66]周煌智，「性侵害犯罪加害人鑑定與刑前治療實務」，刑事法學雜誌，四五卷三期，頁一三二，文內略以：目前國內鑑定標準有三種意見：甲說：以高雄市立凱旋醫院爲代表，刑法第九十一條之一之鑑定，應指有無施以治療之必要之鑑定，性侵害加害人之治療處遇目標在於終身控制而非治療，故鑑評估其有無治療之必要，並非單純的精神疾病診斷，而是考慮其再犯可能性的高低，以及涉案所導致的危險性而定。乙說：以某軍醫院爲代表，雖該院亦傾向以性罪犯之再犯危險可

鑑定，而有不同之結論；蓋有以患精神病者，始有治療之必要；亦有以再犯可能性高，所致危險性大者，始有治療之必要；另有以性罪犯是否需接受治療，應以治療資源之多寡爲定，若資源足夠，則認知扭曲及行爲偏差者，亦得認定其有治療之必要[67]。實則，究竟何種性罪犯應施以強制治療，此一答案似不應由鑑定人員決定，立法者既將強制治療明定爲保安處分之一種，應否接受強制治療，即應從保安處分之目的性來看；保安處分既係一種對受處分人將來之危險性所爲拘束其身體、自由等，以達教化與治療目的之處置[68]，係針對個別行爲人而設之特別預防措施，則是否需施以強制治療，當以該性罪犯將來是否對社會顯現出一定之危險來決定。故性罪犯是否有治療之必要，當以其未來再犯危險性之高低爲斷，致於造成高再犯危險之原因究竟是精神疾病、認知扭曲或行爲偏差等，只是強制治療時之治療重點，應非判斷應否施以強制治療之要件。[69]

由於對應施以強制治療要件解讀紛亂，致實務上常見鑑定報告上出現「無具體證據顯示ＯＯＯ（受鑑定人）因性行爲異常或受其他精神疾病之影響而有強制性交犯行，故認其無接受精神科治療之必要」之結論[70]，此不但將性罪犯之強制治療與精神病犯鑑定混爲一談，僅以受鑑定人無精神疾病，即認無治療之必要，完全未就此被告未來再犯之危險評估預測，此種鑑定顯非刑法第九十一條之一之所要求之鑑定。[71]

此外，在鑑定實務上，縱以性罪犯之「再犯危險」爲鑑定之內容及

能性之高低，爲鑑定標準，亦認爲爲避免大量需治療之加害人湧進，初期暫以精神疾病及人格違常二類爲主，至於認知扭曲或偏差行爲，如有必要亦可爲需接受強制治療之認定；丙說：以某療養院爲代表，不認爲高危險、高再犯爲是否有治療必要之鑑定標準，故鑑定有治療必要之案例不足五％。參照本文註釋，採丙說者，似認爲具精神病者，始有治療之必要。

[67] 同前注

[68] 參司法院大法官會議釋字第四七一號解釋

[69] 現行監獄行刑法第八十一條第三項雖規定強制診療之對象爲患有精神疾病之性罪犯，然實務執行上並不狹猛的限於精神衛生法上所定義之精神疾病，故接受強制治療者不乏高學歷、高智商，並無精神狀態異常致適應生活之功能發生障礙者，如華岡之狼楊姓受刑人。爲杜疑義，法務部於九十一年著手修正監獄行刑法有關性罪犯強制診療之規定，除係爲配合修正中的刑法第九十一條之一外，亦將強制診療之對象修改爲「經評估爲生理或心理異常者」，此項修正草案已經行政院審查完竣。

[70]參台灣高等法院九十二年度上重訴字第二四號判決書

[71]實務上並非所有鑑定人員對性罪犯之刑前鑑定內容，都有正確之認識，再加上認是否需要強制治療之標準，又各憑鑑定人員解釋，而性罪犯之鑑定及強制治療之理論，又跨及心理學之專業，法官或檢察官對五花八門，各式之鑑定報告不應均照單全收，法務部及司法院似可頒行函送鑑定時要求應予鑑定之項目之制式函文，以解決目前鑑定報告內容欠缺一致化之問題。

決定是否強制治療之標準，然多高之再犯危險需要強制治療，亦應訂定一套可遵循之客觀標準，又是否有施以治療之必要亦應考量再犯時所致之實害，否則因一時忘情致觸犯法律之青少年情侶，可能僅因「再犯」可能性大，而被建議應施以強制治療。

3、實施強制治療之時間並不恰當：

「再犯預防取向」是目前最被廣泛使用之治療模式。依其理論，性罪犯可以改變或增加其自身對性侵害犯罪行爲之控制[72]，因此治療者從加害者之生活史、經驗和人格特質中去分析性侵害的原因，幫助罪犯找出本身引發犯罪之因素，並使其瞭解自身犯罪的歷程，進而發展並學習「避免再犯」之技巧，以達到學會終生自我控制之目的。[73]治療的過程中，建立性罪犯之責任意識、矯正其錯誤之認知、發展並建立其等對被害人之同理心、學習控制性衝動及發展避免再犯之技巧等，都是性罪犯相當重要的學習目標[74]。簡言之，強制治療之目的就是使性罪犯明瞭自身之問題，建立正確的觀念，並學會自我控制及再犯預防，且成功的將這些觀念及技巧運用在真實生活中。因此強制治療的過程是一種學習的階段，出獄後，就是學以致用的階段。

然依現行法第九十一條之一第二項之規定，強制治療於刑之執行前爲之，治療完畢尚需接續服刑，服刑期間若無機會「復習」治療期間所學之各項預防再犯之技巧，則待其出獄時，恐早已遺忘治療期間所學，治療成效將將大打折扣[75]。所幸獄中強制診療制度，仍舊實施，許多性罪犯於刑之執行期間，仍接受本質與強制治療完全相同之「強制診療」，故不致中斷「學習」成效，然重複兩次強制治療徒然造成浪費，不言自明。

由於強制治療貴在一氣呵成，故在假釋前或刑之執行完畢前爲之，應係最爲恰當之時機，出獄後再配合社區之身心治療及輔導教育，使全部之

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[72]陳若璋；性罪犯心理學—心理治療與評估，前揭書，頁二一二至二一三；林明傑，「性罪犯之再犯預防——個需整合司法處遇及臨床處遇之預防策略」，中華民國犯罪學學會會刊，二卷四期，頁十，九十年十一月

[73] 陳若璋，性罪犯心理學心理治療與評估，前揭書，頁二一二至二一三

[74] Georgia Cumming and Maureen Buell，前揭書，page91-92

[75]周煌智「性侵害犯罪加害人鑑定與刑前治療實務」，刑事法雜誌，四五卷三期，頁一二九；林明傑，「性罪犯之心理評估暨危險評估」，社區發展季刊，八十八期，頁三三o，文中提及「性犯罪之治療改在刑之執行前爲之，確是有待商榷。因爲性罪犯之治療其最終目的是希望其能在回歸社區後免於再犯，而此有待獄中治療能有效率地與釋放後之社區治療聯結，因此治療仍以在釋放前爲之爲佳。」

治療相連，以發揮最大之效果。

4、以監獄爲治療場所之「刑前」治療：

依現行保安處分執行法第七十八條之規定，強制治療應在花柳病院、痲瘋病院或公立醫院，尚非在監獄中，且性罪犯所執行的是「刑前」而非「刑中」治療。然在尚無禁戒設備得以監管受治療者之適當醫院接手治療工作前，性罪犯的刑前治療均在台北、台中及高雄三所監獄實施。

其實，監獄並非不得做爲強制治療之地點，欲使監獄成爲真正適合強制治療之場所，最重要的是使受治療者能在不受干擾的環境下接受治療。在監獄特殊的次文化環境下，性罪犯地位低，往往成爲其他獄友嘲弄恥笑的對象，若不在獄中設置專區，集中管理性罪犯，使其等能在不受干擾的情形下接受治療，將有礙於治療工作之進行。[76]

三、再修正中的強制治療

現行法雖確立了強制治療保安處分的屬性，因仍有許多執行上的問題，因此法務部於九十一年提出之刑法總則修正草案中，重塑刑法第九十一條之一之架構。刑法第九十一條之一修正草案規定：「犯第二百二十一條至第二百二十七條、第二百二十八條、第二百二十九條、第二百三十條、第二百三十四條、第三百三十二第二項第二款、第三百三十四條第二款、第三百四十八條第二項第一款及其特別法之罪者，於刑之執行期間曾接受以防治其再犯性侵害犯罪爲目的之診療或身心治療或輔導教育後，經鑑定、評估而有施以治療之必要者，得令入相當處所，施以強制治療。」「前項處分期間至其再犯危險顯著降低爲止。」「前二項之情形，適用裁判時之法律。」

此一修正與現行法最大的區別有三。一、擴大適用強制治療之性犯罪犯範：強制治療適用的範圍不但及於與強制性交之結合罪亦包括特別法之性侵害犯罪。例如及少年性交易防治條例第二十二條之罪。二、強制治療實施之時點從現行法之「刑前」修改爲「刑後」，且是否聲請法院宣告執行強制治療，以刑中強制診療或社區之治療成效而定，因此性罪犯強制治療之宣告，不再與本案判決同時爲之。三、強制治療不設期限：一旦法院

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[76]林明傑，「性罪犯之心理評估暨危險評估」，前揭文，頁三三一，文中提及「在監獄中以設立專舍爲宜，以避免其他類型犯人的騷擾及增加人犯之治療動機」此外，筆者於二00二年十月間參訪佛蒙特州聖荷本州立監獄，該監獄對性罪犯即是採取專區集中管理之方式，在全區都是性罪犯之情形下，性罪犯可毫無心理壓力的投入於治療課程中。

宣告此性罪犯應接受強制治療，其治療期限不限三年，直到再犯危險顯著降低爲止。

修正中的強制治療架構，除了與前述美國之性罪犯民事拘禁制度中之刑後執行，且治療不設期限之規定相同外，將性罪犯治療之發動置於判決確定後，也係爲有效整合性罪犯之治療資源。

蓋現行有關性罪犯治療之規定，分別訂於刑法第九十一條之一（刑前保安處分之強制治療）、監獄行刑法第八十一條第二項及第三項（獄中強制診療）及性侵害犯罪防治法第十八條（性侵害犯罪之加害人經判決有罪確定，不論是假釋、緩刑、免刑、赦免或刑及保安處分執行完畢，主管機關均應對其實施身心治療及輔導教育）。在刑法第九十一條之一之刑前治療部分，由於強制治療過早實施，無法與受刑人之假釋出獄時程相銜接，治療成效因而無法有效發揮；在刑中強制診療部分，雖然目前入獄服刑之性罪犯，許多都依照監獄行刑法第八十一條第二項之規定施以強制診療[77]，惟刑期屆滿，診療即必需結束，屆時縱評估人犯仍具高再犯危險，亦應釋放。雖然依據性侵害犯罪防治法第十八條之規定，在社區中依法仍得對出監之性罪犯，繼續施以刑後之治療或輔導，惟若人犯屬高再犯危險，又因刑期屆滿，保護管束終止，則僅靠社區之治療，實難以發揮有效之監控，阻止其等再犯。

故本次修法，改將刑法之強制治療，置於補充性地位：亦即性罪犯入監服刑後，依修正中之「監獄行刑法」草案第三十七條之一之規定[78]，經評估認其爲生理或心理異常者，即應應接受強制診療；未入獄者，依性侵害犯罪防治法之規定[79]，在社區中亦有治療或輔導之機制。經此獄中強制診療或社區之治療、輔導後，若依其等之治療評估報告，認該性罪犯之再犯危險仍居高不下時，檢察官即得檢具鑑定及評估報告，向法院聲請宣告強制治療。故修法後之強制治療，可謂係針對業經治療、輔導後，但再犯危險仍高之少數性罪犯實施，認定性罪犯等必需施以強制治療之基礎，爲

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[77] 依據「妨害性自主罪及妨害風化罪受刑人輔導與治療實施辦法」第四條之規定，指定治療之監獄於受刑人入（移）監一個月內進行測驗、調查與晤談，彙整資料後會同精神科醫師、臨床心理師及社工人員進行初步診斷篩選，對於患有精神疾病者，施以治療，其餘則交由管教小組加強輔導。

[78] 爲配合刑法第九十一條之一強制治療制度之修正，監獄行刑法及保安處分執行法亦配合修正，修正草案並經行政院審查完畢。

[79]爲配合刑法第九十一條之一強制治療制度之修正，「性侵害犯罪防治法」正由內政部性侵害防治委員會研修中。

獄中強制診療或社區治療之成效評估報告。基本上與性罪犯之犯行無關，只與其再犯危險可能性之高低有關[80]，且此一再犯危險評估，係性罪犯之最新治療評估報告。

伍、從美國性罪犯民事拘禁制度看我國修正中之強制治療制度

一、不設期限之強制治療是否是對性罪犯的二次處罰

美國聯邦最高法院花費許多力氣來爲性罪犯之拘禁治療制度之屬性正名，因其被界定爲民事程序，故無二次處罰之問題。但在我國，性罪犯之強制治療爲保安處分之一種，而保安處分又爲刑罰之補充制度，故性罪犯之強制治療，毫無疑問的，是刑事制度之一環。雖然修正中不設期限之強制治療與現行保安處分多設有期限之規定不同[81]，且在理論上，極可能產生終生拘禁之結果，亦不宜據此認爲不定期限之強制治療是對性罪犯在本案刑罰以外之二次處罰。蓋現代刑罰理論係綜合應報理論的罪責主義與行爲人取向的特別預防主義；即刑罰之輕重應完全以犯人之「行爲罪責」爲量刑之基準，刑罰必需與罪責相等，不能超過行爲之罪責，但同時亦認爲刑罰具有預防個別行爲人再犯之目的，故刑罰之目的不是單純爲了懲罰行爲人，而是有促使行爲人再社會化及防範其再犯之矯正上之目的。因此在特別預防主義及行爲人刑法理論下衍生了以矯治改善人犯之危險性爲導向之保安處分制度。[82]故保安處之久暫應從行爲人整體人格、其反社會性之強度及刑中執行之成效來決定，並不受罪責輕重之限制，因此依受治療人個別情況，以決定治療期間長短之制度，應未逾越保安處分之理論，亦不應視爲一種處罰。

二、不設期限之強制治療制度是否符合比例原則

誠如最高法院所示，保安處之宣告必須符合比例原則[83]，大法官會議解釋釋字第四七一號更明白闡釋保安處分與比例原則間之關係。該號解釋認爲憲法第八條明定，人民身體之自由應予保障，限制人身自由之法律，其內容

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[80] 修正中之強制治療制度，對性罪犯權益影響大，不但對其人身自由有嚴格之限制，且治療不設期限，故是否有施以強制治療之必要，不應單從再犯可能性之高低來決定，恐應參酌再犯所生之危害是否必需以強制治療之手段來預防。例如暴露狂再犯機率雖然很高，但所生危害較其他犯罪，尚屬輕微，若評估並無產生其他危害之可能性即施以強制治療，恐嫌過當。

[81]刑法中有關花柳病及痲瘋病的強制治療亦不設期限，但此種病理治療與心理治療意義不同，且治療之地點亦不同，受治療人所受到的行動限制亦不同

[82] 林鈺雄，保安處分與比例原則及從新從輕原則—評大法官釋字第四七一號解釋，台灣本土法學雜誌，一期，頁九十八至一00，一九九九年四月。

[83] 八十九年度台上字第三五六七號判決、九十年度台非字第三七七號判決、九十二年度台上字第三三一五號判決

須符合憲法第二十三條所定要件。保安處分係對受處分人將來之危險性所爲拘束其身體、自由等之處置，以達教化與治療之目的，爲刑罰之補充制度。本諸法治國家保障人權之原理及刑法之保護作用，其法律規定之內容，應受比例原則之規範，使保安處分之宣告，與行爲人所爲行爲之嚴重性、行爲人所表現之危險性，及對於行爲人未來行爲之期待性相當。雖然此號解釋係針對槍砲彈藥刀械管制條例第十九條第一項之規定而爲，但比例原則已是宣告保安處分時必須恪遵的最基本原則。

未設期限之強制治療是否有違比例原則？一般而言比例原則有三項檢視標準：一、適當性：採取之方法必需有助於目的之達成；二、必要性：有多種同樣能達成目的之方法時，應選擇對人民權益損害最小者；三、狹義的比例性（又稱過度禁止原則）：採取之方法所造成之損害不得與目欲達成目的之利益顯失均衡。

首先，就適當性原則審查。不設期限之強制治療是否是達成性罪犯再犯預防之適當手段。如前所述，強制治療目的是幫助接受治療之性罪犯找出並明瞭自身犯罪之因素，並幫助他們發展及學習避免再犯之技巧，且使其等運用於真實生活中。然隨著每個性罪犯的智力、人格特質及犯罪成因複雜程度之不同，所需治療的時程長短亦不盡相同，故對所有性罪犯之治療，統設一定之期限，並不能切合治療實務，尤期對於嚴重變態或人格異性罪犯，限期治療並不能達到保安處分之目的。此外，修正中之強制治療制度，亦非適用於所有性罪犯，如前所述，僅適用於業經獄中強制診療或社區身心治療或輔導教育，並經評估其等再犯危險仍高，而有施以強制治療必要之性罪犯。以「再犯危險顯著降低」，作爲強制治療之終期，應是對少數雖經治療但再犯危險仍高之性罪犯，爲達到治療目的之適當手段。

其次，是否有其他與不限期之強制治療同樣有效，但對性罪犯權利侵害更小且同樣可達再犯預防目的之矯正措施？可否以其他之社區監控，或以非拘禁式之治療，達到矯正及防止再犯之目的？許多社區監控的措施，如電子監控、自宅監禁及密集式之監督等，雖可達到將監控性罪行蹤，並與社區大眾相隔離之目的[84]，但這些措施只是對性罪犯之外部監控手段，亦即，透過這些措施固可以實質控制性罪犯在社區活動的範圍，然並無助於

[84]參韓玉元，社區性矯正處遇可行性之探討，中央警察大學學報，三八期，頁二四三～二六六，民國九十年

性罪犯內控能力的建立，對性罪犯而言，難謂是一種矯正措施。一旦失去外部監控，性罪犯就極可能再犯，故強制治療仍是矯治性罪犯，幫助其等建自內控能力之必要方式。

最後，就修正中「不設期限」之強制治療制度是否違反過度禁止原則，亦即此一強制治療所欲達成目的之利益與所造成之損害是否顯失均衡。「不定期限」之強制治療，其目的並非創設另一種絕對不定期刑之效果，誠如美國聯邦最高法院在韓屈克斯一案中之論述，「無限期」之拘禁只是種可能性，並非必然之結果。「不設期限」是因爲無法以一種齊頭式之期限，適用於犯罪成因各自不同、人格偏差程度亦極具個別化的各類性罪犯，不定期限之治療縱帶給受治療之性罪犯難以估算治療完畢之日之不確定感及人身自由受到限制的重大影響，然與此等高再犯危險之性罪犯帶給社會大眾之危險與傷害相較，似難認定此一治療制度有過度之處。

三、不設期限之強制治療制度應透過正當法律程序宣告

性罪犯之治療是建立性罪犯自我內控的不二方法，也是預防性犯罪之重要措施，不設期限之治療，目的並非爲了終生監禁性罪犯，爲不使強制治療流於恣意，使變相成爲「對付」性罪犯之不理性措施，強制治療應由法院透過公平嚴謹程序宣告之。誠如美國聯邦最高法院在韓屈克斯一案之論述，堪薩斯州對性罪犯之民事拘禁治療制度並不違憲的理由之一是因爲拘禁治療有其嚴謹之程序。法院審理之程序幾乎比照刑事案件之審理程序，經由嚴格之證明後，才判定該名性罪犯應接受民事拘禁治療，蓋限制人民之身體自由應經由正當法律程序爲之。故在架構不定期限之強制治療制度背後，所應深思的是，應透過何種正當法律程序去實現強制治療之目的及內涵，以免不定期限之強制治療制度之本意遭到扭曲。

保安處分之宣告係以犯罪事實成立爲前提，故法院於認定犯罪事實之後，再依據被告反社會性之強度、所需之治療或教化，同時宣告適當之保安處分。然刑法上所規定之許多保安處分，法院於宣告時，仍應斟酌犯罪事實以外，專屬於該保安處分應具備之要件，例如「酗酒」（刑法第八十九條第一項）、「犯罪習慣」、「遊蕩」及「懶惰成習」(刑法第九十條第一項)及「有治療之必要」等（刑法第九十一條之一）。實務上對犯罪構成要件事實，固認定應採嚴格之證明程序，且須達無合理懷疑之程度，始能宣告被告

有罪[85]，但對於保安處分之宣告，最高法院僅指出應於裁判內敘明個案情節，且何以依被告行爲之嚴重性、所表現之危險性及未來行爲期待性之結果，必須採取如主文宣告之保安處分[86]，及保安處分之宣告應受比例原則之規範，亦即應與行爲人所爲行爲之嚴重性、表現出之危險性及未來行爲之期待性相當[87]等，對於構成保安處分之要件事實應達於何種證明程度，則未觸及。實則，保安處分係針對受處分人將來之危險性所爲之處置，欲藉教化及治療，改善受處分人潛在的危險性格，協助其再社會化，以達預防再犯之目的，故保安處分相關要件事實之認定，並非犯罪構成要件事實之認定，保安處分之宣告，應屬量刑之範圍，似經自由之證明爲已足。[88]

唯以自由之證明程序來認定性罪犯是否有治療之必要是否妥適？蓋判斷是否「治療必要」，不但涉及性罪犯未來危險性之評估，亦必需對此再犯危險程度，是否達於應施以強制治療之門檻，作出評價，如僅採取自由之證明程序，且不要求評估報告及相關認定該性罪犯應施以治療之事證，應達於一定之證明程度，則以法官之專業能力，恐無從檢視並質疑該評估報告之可信度。正因修正中不設期限之強制治療制度，對受治療人之人身自由有莫大之影響，故此一強制治療宣告之程序，甚至治療期間之成效檢視程序等，誠應作有別於其他保安處分之思考，有其嚴謹之審理程序，如此才能使強制治療之目的及內涵透過正當法律程序實現出來，不致淪爲侵害人權的手段。

四、是否應施強制治療更應從再犯可能致生之實害來考量

美國民事拘禁治療，依前述加州及佛州之制度，係以心理變態或人格異常之性罪犯爲治療之對象，另連續暴力性侵害者，不問身心狀態，亦爲拘禁治療之適用對象。我國刑法第九十一條之一修正草案，雖將所有性侵害犯罪的法條均臚列其上，使該等罪犯均得爲強制治療之潛在對象，但同時規定，受強治療者，必須以曾在獄中受過強制診療或在社區接受治療者爲限，亦即除非性罪犯曾受過強制診療或社區治療，否則並不會成爲強制治療適用的對象，而依據監獄行刑法修正草案[89]的規定，犯刑法第九十一條之一之罪之受

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[85] 九十年度台上字第三一一五號判決指出對於犯罪構成要件應予嚴格證明。
[86] 參八十九年度台上字第三五六七號判決
[87] 參九十二年度台上字第三三一五號判決、九十年度台非字第三七七號判決
[88] 參七十七年度台上字第五八一五號、八十七年度台上字第三四八五號判決，量定刑罰之事實，係屬自由證明之事項，所謂自由證明，係指使用之證據，其證據能力或證據調查程序不受嚴格限制而已，關於科刑審酌之裁量事項之認定，仍應與卷存證據相符，始屬適法。
[89] 同注七十七

刑人，經評估爲生理或心理異常者，應接受診療；從而，限於評估爲心理或生理異常之性罪犯，始有適用強制治療之可能，另研修中之性侵害犯罪防治法修正草案[90]，亦規定只有經評估認有治療必要之性罪犯，始需接受社區治療。故未來有受強制治療之可能者，恐將以生理或心理異常之性罪犯爲主，此固符合「治療」之目的，唯仍得參考美國性罪犯拘禁治療之規定，限於與導致性犯罪間有相當因果關係之異常心、生理，才有評價受治療之必要。另宣告性罪犯應受強制治療時，尚應參酌性罪犯可能致生危害大小之評估，以確保此一不設期限之強制治療制度，係適用在真正對社會具有嚴重危害之性罪犯身上。

陸、建言與結論

一、提昇治療人員之素質

性罪犯的治療是一門橫跨法律、精神醫學與犯罪心理學三方不同領域之專業，而強制治療之目的是預防再犯，並非藉故將性侵害終身與社會隔離。雖然強制治療對大多數性罪犯之再犯預防，確實是有助益的，然這種成效不會因爲實施強制治療制度而當然產生，成就這些成效的是專業的治療團隊、持續不斷的專業訓練、良好的社工督導制度及不斷的對治療技術理論的研究及成效的檢討。以佛蒙特州爲例，筆者參訪期間曾進入該州之聖荷本（San Alban）州立監獄，觀察一個稱爲核心治療團體（The Core Group）之治療過程。團體中之成員皆是犯下重持槍侵入住宅強姦等重罪之重刑犯。治療師既像是一個傾聽者，又像是一個引領者，不但團體中之每個個案之成長背景、每次犯罪情節、所侵害之被害人特質及危險因子瞭若指掌，且有極佳之對談能力及引領能力。治療師洞悉每個成員所困擾的問題，提供他們解決問題之思考方向，或引領人犯回顧過去犯行，運用所學之再犯預防技巧，自設一套防治之道。治療師必需隨時提醒治療成員記住自己之危險因子、再犯循環路徑、引發犯罪之慣性思考模式及不斷練習防止再犯之步驟及策略，使他們熟悉並可隨時運用。

在本次修正之強制治療制度中，性罪犯是否有繼續接受強制治療之必要，治療人員之專業評估報告將佔相當重要的份量，若未來有關強制治療之宣告也採取嚴格之證明程序，則只有經得起法院以嚴謹檢視之治療評估報告，才能將性罪犯送進治療處所。

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[90] 同注七十八

二、制定宣告強制治療之正當法律程序

性罪犯之鑑定與評估結果，不但是法院宣告強制治療之重要依據，對性罪個人之權利亦有極爲重大影響，然性罪犯之鑑定與評估，全然不似血跡、指紋或DNA等之科學鑑識，有與無、是與否，清楚明確，不容置辯，性罪犯之再犯危險程度是否達於應施予不定期限之強制治療，實是一項容有辯論空間及值得說服的客題，姑不論性罪犯之鑑定與評估是個別再犯危險可能性之預測與推估，故此一「再犯可能性」之百分比推估[91]，可能因爲治療人員之訓練、實務經驗、專業素養，甚且所採用之量表不同，而產生不同之結果，甚且治療人員個人對性罪犯之觀感等，亦都足以左右鑑定報告之結論；即便鑑定報告內容接近正確，應受不定期限強制治療之「再犯危險」之臨界值應落在何處？再犯危險降至多低，可以結束治療？此皆必須透過大量之實證研究結果，以說服裁判者。此外，是否應透過詰問程序來辯證此項再犯危險之評估（推估）是否接近正確？又宣告性罪犯應接受強制治療之證據，需達到何種程度之證明力，甚且性罪犯在裁判強制治療之程序中，可否享有比照刑案審判之訴訟上權益及一旦宣告性罪犯應接受強制治療後，一旦令其強治療後，檢視「治療成效」之程序應爲何等，凡此種種，都必需是配合修正中之強制治療制度應建構之配套制度。

三、建制性罪犯之累犯與強制診療、社區治療及強制治療資料以供強制治療實務之修正及改進

在臺灣，性罪犯之強制治療之理論與經驗幾乎都自國外移殖而來，不論臺灣性罪犯與美國的性罪犯在心理或生理因素方面有多少之共通性，不同文化及傳統社會觀念仍會造成各種犯罪成因上之差別，甚至影響矯正成效，故精進性罪犯之治療技術，不但應不斷汲取國外經驗，更應發展本土之研究。此外本土之強制治療對於犯罪預防之成效有多少，必然要藉著個案之長期追蹤及統計資料之累積、分析後，始能有所瞭解，也只有做到客觀真實的評估強制治療對犯罪預防之成效，才能知其不足，且求其改進。

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[91]「危險因子」是實務上評估性罪犯的再犯危險之重要評量，所謂危險因子係指存在於性罪犯內在可刺激再犯之因素或是對性罪犯自我內控構成威脅因而增加再犯危險的外在環境。危險因子分爲靜態及動態：前者如對兒童的性癖好、異常性癖好、以前之性侵害紀錄等已無可改變的「歷史」或「紀錄」，後者如未完療程、治療過程的態度、對受害者之同理程度等可有所改變因素，根據研究從性罪犯所具備之危險因子之種類與多寡，可預測其等再犯危險性。參參 Georgia Cumming &Maureen Buell, Supervision of the Sex Offender，前揭書頁三十六，陳若璋、犯罪心理學心理治療與評估，前揭書頁 98-100

臺灣對性罪犯之治療，早始於民國八十三年刑法假釋章修正之時，迄今已有十餘年，性罪犯應受強制治療始有助於再犯預防的觀念，已非新穎，且投身於性罪犯治療實務之專家學者亦愈來愈多，如能更進一步建制完備之性罪犯再犯統計與強制治療成效之相關資料，提供改進治療技術之實證研究，必然有助於提昇臺灣強制治療之水準，使強制治療不再只是存在於法律上，而是真正能發揮犯罪預防功效的有用制度。

(95-1649),			
Opinion [Thomas]	Concurrence [Kennedy]	Syllabus	Dissent [Breyer]
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SUPREME COURT OF THE UNITED STATES

Nos. 95-1649 and 95-9075

KANSAS, PETITIONER 95-1649 *v.* LEROY HENDRICKS LEROY HENDRICKS, PETITIONER 95-907

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF KANSAS

[June 23, 1997]

Justice Thomas delivered the opinion of the Court.

In 1994, Kansas enacted the Sexually Violent Predator Act, which establishes procedures for the civil commitment of persons who, due to a "mental abnormality" or a "personality disorder," are likely to engage in "predatory acts of sexual violence." Kan. Stat. Ann. §59-29a01 *et seq.* (1994). The State invoked the Act for the first time to commit Leroy Hendricks, an inmate who had a long history of sexually molesting children, and who was scheduled for release from prison shortly after the Act became law. Hendricks challenged his commitment on, *inter alia,* "substantive" due process, double jeopardy, and *ex post-facto* grounds. The Kansas Supreme Court invalidated the Act, holding that its pre-commitment condition of a "mental abnormality" did not satisfy what the court perceived to be the "substantive" due process requirement that involuntary civil commitment must be

predicated on a finding of "mental illness." *In re Hendricks*, 259 Kan. 246, 261, 912 P. 2d 129, 138 (1996). The State of Kansas petitioned for certiorari. Hendricks subsequently filed a cross petition in which he reasserted his federal double jeopardy and *ex post-facto* claims. We granted certiorari on both the petition and the cross petition, 518 U. S. __ (1996), and now reverse the judgment below.

The Kansas Legislature enacted the Sexually Violent Predator Act (Act) in 1994 to grapple with the problem of managing repeat sexual offenders. [n.1] Although Kansas already had a statute addressing the involuntary commitment of those defined as "mentally ill," the legislature determined that existing civil commitment procedures were inadequate to confront the risks presented by "sexually violent predators." In the Act's preamble, the legislature explained:

> "[A] small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [general involuntary civil commitment statute] . . . . In contrast to persons appropriate for civil commitment under the [general involuntary civil commitment statute], sexually violent predators generally have anti social personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure . . . is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the [general involuntary civil commitment statute]." Kan. Stat. Ann. §59-29a01 (1994).

As a result, the Legislature found it necessary to establish "a civil commitment procedure for the long term care and treatment of the sexually violent predator." *Ibid.* The Act defined 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 the predatory acts of sexual violence." §59-29a02(a).

A "mental abnormality" was defined, in turn, 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." §59-29a02(b).

As originally structured, the Act's civil commitment procedures pertained to: (1) a presently confined person who, like Hendricks, "has been convicted of a sexually violent offense" and is scheduled for release; (2) a person who has been "charged with a sexually violent offense" but has been found incompetent to stand trial; (3) a person who has been found "not guilty by reason of insanity of a sexually violent offense"; and (4) a person found "not guilty" of a sexually violent offense because of a mental disease or defect. § 59-29a03(a), §22-3221 (1995).

The initial version of the Act, as applied to a currently confined person such as Hendricks, was designed to initiate a specific series of procedures. The custodial agency was required to notify the local prosecutor 60 days before the anticipated release of a person who might have met the Act's criteria. §59-29a03. The prosecutor was then obligated, within 45 days, to decide whether to file a petition in state court seeking the person's involuntary commitment. §59-29a04. If such a petition were filed, the court was to determine whether "probable cause" existed to support a finding that the person was a "sexually violent predator" and thus eligible for civil commitment. Upon such a determination, transfer of the individual to a secure facility for professional evaluation would occur. §59-29a05. After that evaluation, a trial would be held to determine beyond a reasonable doubt whether the individual was a sexually violent predator. If that determination were made, the person would then be transferred to the custody of the Secretary of Social and Rehabilitation Services (Secretary) for "control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." §59-29a07(a).

In addition to placing the burden of proof upon the State, the Act afforded the individual a number of other procedural safeguards. In the case of an indigent person, the State was required to provide, at public expense, the assistance of counsel and an examination by mental health care professionals. §59-29a06. The individual also received the right to present and cross examine witnesses, and the opportunity to review documentary evidence presented by the State. §59-29a07.

Once an individual was confined, the Act required that "[t]he involuntary detention or commitment . . . shall conform to constitutional requirements for care and treatment." §59-29a09. Confined persons were afforded three different avenues of review: First, the committing court was obligated to conduct an annual review to determine whether continued detention was warranted. §59-29a08. Second, the

Secretary was permitted, at any time, to decide that the confined individual's condition had so changed that release was appropriate, and could then authorize the person to petition for release. §59-29a10. Finally, even without the Secretary's permission, the confined person could at any time file a release petition. §59-29a11. If the court found that the State could no longer satisfy its burden under the initial commitment standard, the individual would be freed from confinement.

In 1984, Hendricks was convicted of taking "indecent liberties" with two 13-year old boys. After serving nearly 10 years of his sentence, he was slated for release to a halfway house. Shortly before his scheduled release, however, the State filed a petition in state court seeking Hendricks' civil confinement as a sexually violent predator. On August 19, 1994, Hendricks appeared before the court with counsel and moved to dismiss the petition on the grounds that the Act violated various federal constitutional provisions. Although the court reserved ruling on the Act's constitutionality, it concluded that there was probable cause to support a finding that Hendricks was a sexually violent predator, and therefore ordered that he be evaluated at the Larned State Security Hospital.

Hendricks subsequently requested a jury trial to determine whether he qualified as a sexually violent predator. During that trial, Hendricks' own testimony revealed a chilling history of repeated child sexual molestation and abuse, beginning in 1955 when he exposed his genitals to two young girls. At that time, he pleaded guilty to indecent exposure. Then, in 1957, he was convicted of lewdness involving a young girl and received a brief jail sentence. In 1960, he molested two young boys while he worked for a carnival. After serving two years in prison for that offense, he was paroled, only to be rearrested for molesting a 7-year old girl. Attempts were made to treat him for his sexual deviance, and in 1965 he was considered "safe to be at large," and was discharged from a state psychiatric hospital. App. 139-144.

Shortly thereafter, however, Hendricks sexually assaulted another young boy and girl--he performed oral sex on the 8-year old girl and fondled the 11-year old boy. He was again imprisoned in 1967, but refused to participate in a sex offender treatment program, and thus remained incarcerated until his parole in 1972. Diagnosed as a pedophile, Hendricks entered into, but then abandoned, a treatment program. He testified that despite having received professional help for his pedophilia, he continued to harbor sexual desires for children. Indeed, soon after his 1972 parole, Hendricks began to abuse his own stepdaughter and stepson. He forced the children to engage in sexual activity with him over a period of approximately four years. Then, as noted above, Hendricks was convicted of "taking indecent liberties" with two adolescent boys after he attempted to fondle them. As a result of that conviction, he was once again imprisoned, and was serving that sentence when he reached his conditional release date in September 1994.

Hendricks admitted that he had repeatedly abused children whenever he was not confined. He explained that when he "get[s] stressed out," he "can't control the urge" to molest children. *Id.*, 172. Although Hendricks recognized that his behavior harms children, and he hoped he would not sexually molest children again, he stated that the only sure way he could keep from sexually abusing children in the future was "to die." *Id.*, at 190. Hendricks readily agreed with the state physician's diagnosis that he suffers from pedophilia and that he is not cured of the condition; indeed, he told the physician that "treatment is bull----." *Id.*, at 153, 190. [n.2] The jury unanimously found beyond a reasonable doubt that Hendricks was a sexually violent predator. The trial court subsequently determined, as a matter of state law, that pedophilia qualifies as a "mental abnormality" as defined by the Act, and thus ordered Hendricks committed to the Secretary's custody.

Hendricks appealed, claiming, among other things, that application of the Act to him violated the Federal Constitution's Due Process, Double Jeopardy, and *ExPost Facto* Clauses. The Kansas Supreme Court accepted Hendricks' due process claim. *In re Hendricks*, 259 Kan., at 261, 912 P. 2d, at 138. The court declared that in order to commit a person involuntarily in a civil proceeding, a 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 to others. *Id.*, at 259, 912 P. 2d, at 137. The court then determined that the Act's definition of "mental abnormality" did not satisfy what it perceived to be this Court's "mental illness" requirement in the civil commitment context. As a result, the court held that "the Act violates Hendricks' substantive due process rights." *Id.*, at 261, 912 P. 2d, at 138.

The majority did not address Hendricks' *ex post-facto* or double jeopardy claims. The dissent,

however, considered each of Hendricks' constitutional arguments and rejected them. *Id.*, at 264-294, 912 P. 2d, 140-156 (Larson, J., dissenting).

Kansas argues that the Act's definition of "mental abnormality" satisfies "substantive" due process requirements. We agree. Although freedom from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action," *Foucha* v. *Louisiana,* 504 U.S. 71, 80 (1992), that liberty interest is not absolute. The Court has recognized that an individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context:

> "[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members." *Jacobson* v. *Massachusetts,* 197 U.S. 11, 26 (1905).

Accordingly, 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. See, *e.g.*, 1788 N. Y. Laws, ch. 31 (Feb. 9, 1788) (permitting confinement of the "furiously mad"); see also A. Deutsch, The Mentally Ill in America (1949) (tracing history of civil commitment in the 18th and 19th centuries); G. Grob, Mental Institutions in America: Social Policy to 1875 (1973) (discussing colonial and early American civil commitment statutes). We have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards. See *Foucha, supra*, at 80; *Addington* v. *Texas,* 441 U.S. 418, 426-427 (1979). It thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty. Cf. *id.*, at 426.

The challenged Act unambiguously requires a finding of dangerousness either to one's self or to others as a prerequisite to involuntary confinement. Commitment proceedings can be initiated only when a person "has been convicted of or charged with a sexually violent offense," and "suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." Kan. Stat. Ann. §59-29a02(a) (1994). The statute thus requires proof of more than a mere predisposition to violence; rather, it 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. As we have recognized, "[p]revious instances of violent behavior are an important indicator of future violent tendencies." *Heller* v. *Doe,* 509 U.S. 312, 323 (1993); see also *Schall* v. *Martin,* 467 U.S. 253, 278 (1984) (explaining that "from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct"). A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a "mental illness" or "mental abnormality." See, *e.g., Heller, supra*, 314-315 (Kentucky statute permitting commitment of "mentally retarded" or "mentally ill" and dangerous individual); *Allen* v. *Illinois,* 478 U.S. 364, 366 (1986) (Illinois statute permitting commitment of "mentally ill" and dangerous individual); *Minnesota ex rel. Pearson* v. *Probate Court of Ramsey Cty.,* 309 U.S. 270, 271-272 (1940) (Minnesota statute permitting commitment of dangerous individual with "psychopathic personality"). These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control. The Kansas Act is plainly of a kind with these other civil commitment statutes: It requires a finding of future dangerousness, and then links that finding to the existence of a "mental abnormality" or "personality disorder" that makes it difficult, if not impossible, for the person to control his dangerous behavior. Kan. Stat. Ann. §59-29a02(b) (1994). The precommitment requirement of a "mental abnormality" or "personality disorder" is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.

Hendricks nonetheless argues that our earlier cases dictate a finding of "mental illness" as a prerequisite for civil commitment, citing *Foucha,* and *Addington.* He then asserts that a "mental abnormality" is *not* equivalent to a "mental illness" because it is a term coined by the Kansas Legislature, rather than by the psychiatric community. Contrary to Hendricks' assertion, the term

"mental illness" is devoid of any talismanic significance. Not only do "psychiatrists disagree widely and frequently on what constitutes mental illness," *Ake* v. *Oklahoma,* 470 U.S. 68, 81 (1985), but the Court itself has used a variety of expressions to describe the mental condition of those properly subject to civil confinement. See, *e.g., Addington*, 441 U. S., at 425-426 (using the terms "emotionally disturbed" and "mentally ill"); *Jackson,* 406 U. S., at 732, 737 (using the terms "incompetency" and "insanity"); cf. *Foucha*, 504 U. S., at 88 (O'Connor, J., concurring in part and concurring in judgment) (acknowledging State's authority to commit a person when there is "some medical justification for doing so").

Indeed, we have never required State legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance. Cf. *Jones* v. *United States,* 463 U.S. 354, 365, n. 13 (1983). As a consequence, the States have, over the years, developed numerous specialized terms to define mental health concepts. Often, those definitions do not fit precisely with the definitions employed by the medical community. The legal definitions of "insanity" and "competency," for example, vary substantially from their psychiatric counterparts. See, *e.g.,* Gerard, The Usefulness of the Medical Model to the Legal System, 39 Rutgers L. Rev. 377, 391-394 (1987) (discussing differing purposes of legal system and the medical profession in recognizing mental illness). Legal definitions, however, which must "take into account such issues as individual responsibility . . . and competency," need not mirror those advanced by the medical profession. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders xxiii, xxvii (4th ed. 1994) .

To the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's inability to control his dangerousness, the Kansas Act sets forth comparable criteria and Hendricks' condition doubtless satisfies those criteria. The mental health professionals who evaluated Hendricks diagnosed him as suffering from pedophilia, a condition the psychiatric profession itself classifies as a serious mental disorder. See, *e.g., id.*, at 524-525, 527-528; 1 American Psychiatric Association, Treatments of Psychiatric Disorders, 617-633 (1989); Abel & Rouleau, Male Sex Offenders, in Handbook of Outpatient Treatment of Adults 271 (M. Thase, B. Edelstein, & M. Hersen, eds. 1990). [n.3] Hendricks even conceded that, when he becomes "stressed out," he cannot "control the urge" to molest children. App. 172. This admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt

with exclusively through criminal proceedings. Hendricks' diagnosis as a pedophile, which qualifies as a "mental abnormality" under the Act, thus plainly suffices for due process purposes.

We granted Hendricks' cross petition to determine whether the Act violates the Constitution's double jeopardy prohibition or its ban on *ex post-facto* lawmaking. The thrust of Hendricks' argument is that the Act establishes criminal proceedings; hence confinement under it necessarily constitutes punishment. He contends that where, as here, newly enacted "punishment" is predicated upon past conduct for which he has already been convicted and forced to serve a prison sentence, the Constitution's Double Jeopardy and *Ex Post-Facto* Clauses are violated. We are unpersuaded by Hendricks' argument that Kansas has established criminal proceedings.

The categorization of a particular proceeding as civil or criminal "is first of all a question of statutory construction." *Allen,* 478 U. S., at 368. We must initially ascertain whether the legislature meant the statute to establish "civil" proceedings. If so, we ordinarily defer to the legislature's stated intent. Here, Kansas' objective to create a civil proceeding is evidenced by its placement of the Sexually Violent Predator Act within the Kansas probate code, instead of the criminal code, as well as its description of the Act as creating a "*civil commitment procedure.*" Kan. Stat. Ann., Article 29 (1994) ("Care and Treatment for Mentally Ill Persons"), §59-29a01 (emphasis added). Nothing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm.

Although we recognize that a "civil label is not always dispositive," *Allen, supra*, at 369, we will reject the legislature's manifest intent only where a party challenging the statute provides "the clearest proof" that "the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil." *United States* v. *Ward,* 448 U.S. 242, 248-249 (1980). In those limited

circumstances, we will consider the statute to have established criminal proceedings for constitutional purposes. Hendricks, however, has failed to satisfy this heavy burden.

As a threshold matter, commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence. The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes, either to demonstrate that a "mental abnormality" exists or to support a finding of future dangerousness. We have previously concluded that an Illinois statute was nonpunitive even though it was triggered by the commission of a sexual assault, explaining that evidence of the prior criminal conduct was "received not to punish past misdeeds, but primarily to show the accused's mental condition and to predict future behavior." *Allen*, *supra*, at 371. In addition, the Kansas Act does not make a criminal conviction a prerequisite for commitment--persons absolved of criminal responsibility may nonetheless be subject to confinement under the Act. See Kan. Stat. Ann. §59-29a03(a) (1994). An absence of the necessary criminal responsibility suggests that the State is not seeking retribution for a past misdeed. Thus, the fact that the Act may be "tied to criminal activity" is "insufficient to render the statut[e] punitive." *United States* v. *Ursery,* 518 U. S. __ (1996) (slip op., at 24).

Moreover, 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. The existence of a scienter requirement is customarily an important element in distinguishing criminal from civil statutes. See *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 168 (1963). The absence of such a requirement here is evidence that confinement under the statute is not intended to be retributive.

Nor can it be said that the legislature intended the Act to function as a deterrent. Those 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. And the 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. App. 50-56, 59-60. Because none of the parties argues that people institutionalized under the Kansas general civil 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."

Although the civil commitment scheme at issue here does involve an affirmative restraint, "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." *United States* v. *Salerno,* 481 U.S. 739, 746 (1987). The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate non punitive governmental objective and has been historically so regarded. Cf. *id.,* at 747. The Court has, in fact, cited the confinement of "mentally unstable individuals who present a danger to the public" as one classic example of nonpunitive detention. *Id.,* at 748-749. If detention for the purpose of protecting the community from harm *necessarily* constituted punishment, then all involuntary civil commitments would have to be considered punishment. But we have never so held.

Hendricks focuses on his confinement's potentially indefinite duration as evidence of the State's punitive intent. That focus, however, is misplaced. Far from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others. Cf. *Jones,* 463 U. S., at 368 (noting with approval that "because it is impossible to predict how long it will take for any given individual to recover [from insanity]--or indeed whether he will ever recover--Congress has chosen . . . to leave the length of commitment indeterminate, subject to periodic review of the patients's suitability for release"). If, at any time, the confined person is adjudged "safe to be at large," he is statutorily entitled to immediate release. Kan. Stat. Ann. §59-29a07 (1994).

Furthermore, commitment under the Act is only *potentially* indefinite. The maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year. §59-29a08. If Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a

reasonable doubt that the detainee satisfies the same standards as required for the initial confinement. *Ibid.* This requirement again demonstrates that Kansas does not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness.

Hendricks next contends that the State's use of procedural safeguards traditionally found in criminal trials makes the proceedings here criminal rather than civil. In *Allen*, we confronted a similar argument. There, the petitioner "place[d] great reliance on the fact that proceedings under the Act are accompanied by procedural safeguards usually found in criminal trials" to argue that the proceedings were civil in name only. 478 U. S., at 371. We rejected that argument, however, explaining that the State's decision "to provide some of the safeguards applicable in criminal trials cannot itself turn these proceedings into criminal prosecutions." *Id.*, at 372. The numerous procedural and evidentiary protections afforded here demonstrate that the Kansas Legislature has taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards. That Kansas chose to afford such procedural protections does not transform a civil commitment proceeding into a criminal prosecution.

Finally, Hendricks argues that the Act is necessarily punitive because it fails to offer any legitimate "treatment." Without such treatment, Hendricks asserts, confinement under the Act amounts to little more than disguised punishment. Hendricks' argument assumes that treatment for his condition is available, but that the State has failed (or refused) to provide it. The Kansas Supreme Court, however, apparently rejected this assumption, explaining:

> "It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent. The legislature concedes that sexually violent predators are not amenable to treatment under [the existing Kansas involuntary commitment statute]. If there is nothing to treat under [that statute], then there is no mental illness. In that light, the provisions of the Act for treatment appear somewhat disingenuous." 259 Kan., at 258, 912 P. 2d, at 136.

It is possible to read this passage as a determination that Hendricks' condition was *untreatable* under the existing Kansas civil commitment statute, and thus the Act's sole purpose was incapacitation. Absent a treatable mental illness, the Kansas court concluded, Hendricks could not be detained against his will.

Accepting the Kansas court's apparent determination that treatment is not possible for this category of individuals does not obligate us to adopt its legal conclusions. We have already observed that, under the appropriate circumstances and when accompanied by proper procedures, incapacitation may be a legitimate end of the civil law. See *Allen, supra*, at 373; *Salerno*, 481 U. S., at 748-749. Accordingly, the Kansas court's determination that the Act's "overriding concern" was the continued "segregation of sexually violent offenders" is consistent with our conclusion that the Act establishes civil proceedings, 259 Kan., at 258, 912 P. 2d, at 136, especially when that concern is coupled with the State's ancillary goal of providing treatment to those offenders, if such is possible. While we have upheld state civil commitment statutes that aim both to incapacitate and to treat, see *Allen, supra*, we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others. A State could hardly be seen as furthering a "punitive" purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease. Accord *Compagnie Francaise de Navigation a Vapeur* v. *Louisiana Bd. of Health*, 186 U.S. 380 (1902) (permitting involuntary quarantine of persons suffering from communicable diseases). Similarly, it would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions. Cf. *Greenwood* v. *United States*, 350 U.S. 366, 375 (1956) ("The fact that at present there may be little likelihood of recovery does not defeat federal power to make this initial commitment of the petitioner"); *O'Connor* v. *Donaldson*, 422 U.S. 563, 584 (1975) (Burger, C. J., concurring) ("[I]t remains a stubborn fact that there are many forms of mental illness which are not understood, some which are untreatable in the sense that no effective therapy has yet been discovered for them, and that rates of `cure' are generally low").

Alternatively, the Kansas Supreme Court's opinion can be read to conclude that Hendricks' condition is treatable, but that treatment was not the State's "overriding concern," and that no treatment was being provided (at least at the time Hendricks was committed). 259 Kan., at 258, 912 P. 2d, at 136. See also *ibid.* ("It is clear that the primary objective of the Act is to continue incarceration and not to provide treatment"). Even if we accept this determination that the provision of treatment was not the Kansas Legislature's "overriding" or "primary" purpose in passing the Act, this does not rule out the possibility that an ancillary purpose of the Act was to provide treatment, and it does not require us to conclude that the Act is punitive. Indeed, critical language in the Act itself demonstrates that the Secretary of Social and Rehabilitation Services, under whose custody sexually violent predators are committed, has an obligation to provide treatment to individuals like Hendricks. §59-29a07(a) ("If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the secretary of social and rehabilitation services for *control, care and treatment* until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large" (emphasis added)). Other of the Act's sections echo this obligation to provide treatment for committed persons. See, *e.g.*, §59-29a01 (establishing civil commitment procedure "for the long term care and treatment of the sexually violent predator"); §59-29a09 (requiring the confinement to "conform to constitutional requirements for care and treatment"). Thus, as in *Allen*, "the State has a statutory obligation to provide `care and treatment for [persons adjudged sexually dangerous] designed to effect recovery,'" 478 U. S., at 369 (quoting Ill. Rev. Stat., ch. 38, ¶ 105-8 (1985)), and we may therefore conclude that "the State has . . . provided for the treatment of those it commits." 478 U. S., at 370.

Although the treatment program initially offered Hendricks may have seemed somewhat meager, it must be remembered that he was the first person committed under the Act. That the State did not have all of its treatment procedures in place is thus not surprising. 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. [n.4] And, before this Court, Kansas declared "[a]bsolutely" that persons committed under the Act are now receiving in the neighborhood of "31.5 hours of treatment per week." Tr. of Oral Arg. 14-15, 16. [n.5]

Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent. 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.

The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Although generally understood to preclude a second prosecution for the same offense, the Court has also interpreted this prohibition to prevent the State from "punishing twice, or attempting a second time to punish criminally, for the same offense." *Witte* v. *United States*, 515 U.S. 389, 396 (1995) (emphasis and internal quotation marks omitted). Hendricks argues that, as applied to him, the Act violates double jeopardy principles because his confinement under the Act, imposed after a conviction and a term of incarceration, amounted to both a second prosecution and a second punishment for the same offense. We disagree.

Because we have determined that the Kansas Act is civil in nature, initiation of its commitment proceedings does not constitute a second prosecution. Cf. *Jones* v. *United States*, 463 U.S. 354 (1984) (permitting involuntary civil commitment after verdict of not guilty by reason of insanity). Moreover, as commitment under the Act is not tantamount to "punishment," Hendricks' involuntary detention does not violate the Double Jeopardy Clause, even though that confinement may follow a prison term. Indeed, in *Baxstrom* v. *Herold*, 383 U.S. 107 (1966), we expressly recognized that civil commitment could follow the expiration of a prison term without offending double jeopardy principles. We reasoned that "there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." *Id.*, at 111-112. If an individual

otherwise meets the requirements for involuntary civil commitment, the State is under no obligation to release that individual simply because the detention would follow a period of incarceration.

Hendricks also argues that even if the Act survives the "multiple punishments" test, it nevertheless fails the "same elements" test of *Blockburger* v. *United States,* 284 U.S. 299 (1932). Under *Blockburger,* "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.*, at 304. The *Blockburger* test, however, simply does not apply outside of the successive prosecution context. A proceeding under the Act does not define an "offense," the elements of which can be compared to the elements of an offense for which the person may previously have been convicted. Nor does the Act make the commission of a specified "offense" the basis for invoking the commitment proceedings. Instead, it uses a prior conviction (or previously charged conduct) for evidentiary purposes to determine whether a person suffers from a "mental abnormality" or "personality disorder" and also poses a threat to the public. Accordingly, we are unpersuaded by Hendricks' novel application of the *Blockburger* test and conclude that the Act does not violate the Double Jeopardy Clause.

Hendricks' *ex post-facto* claim is similarly flawed. The *Ex Post-Facto* Clause, which "`forbids the application of any new punitive measure to a crime already consummated,'" has been interpreted to pertain exclusively to penal statutes. *California Dept. of Corrections* v. *Morales,* 514 U.S. 499, 505 (1995) (quoting *Lindsey* v. *Washington,* 301 U.S. 397, 401 (1937)). As we have previously determined, the Act does not impose punishment; thus, its application does not raise *ex post-facto* concerns. Moreover, the Act clearly does not have retroactive effect. Rather, the Act permits involuntary confinement based upon a determination that the person currently both suffers from a "mental abnormality" or "personality disorder" and is likely to pose a future danger to the public. To the extent that past behavior is taken into account, it is used, as noted above, solely for evidentiary purposes. Because the Act does not criminalize conduct legal before its enactment, nor deprive Hendricks of any defense that was available to him at the time of his crimes, the Act does not violate the *Ex Post-Facto* Clause.

We hold that the Kansas Sexually Violent Predator Act comports with due process requirements and neither runs afoul of double jeopardy principles nor constitutes an exercise in impermissible *ex post-facto* lawmaking. Accordingly, the judgment of the Kansas Supreme Court is reversed.

It is so ordered.

Notes

[1] Subsequent to Hendricks' commitment, the Kansas Legislature amended the Act in ways not relevant to this case. See, *e.g.,* Kan. Stat. Ann. §59-29a03 (Supp. 1996) (changing notification period from 60 to 90 days); §59-29a04 (Supp. 1996) (requiring state attorney general to initiate commitment proceedings).

[2] In addition to Hendricks' own testimony, the jury heard from Hendricks' stepdaughter and stepson, who recounted the events surrounding their repeated sexual abuse at Hendricks' hands. App. 194-212. One of the girls to whom Hendricks exposed himself in 1955 testified as well. *Id.,* at 191-194. The State also presented testimony from Lester Lee, a licensed clinical social worker who specialized in treating male sexual offenders, and Dr. Charles Befort, the chief psychologist at Larned State Hospital. Lee testified that Hendricks had a diagnosis of personality trait disturbance, passive aggressive personality, and pedophilia. *Id.,* at 219-220. Dr. Befort testified that Hendricks suffered from pedophilia and is likely to commit sexual offenses against children in the future if not confined. *Id.*, at 247-248. He further opined that pedophilia qualifies as a "mental abnormality" within the Act's definition of that term. *Id.,* at 263-264. Finally, Hendricks offered testimony from Dr. William S. Logan, a forensic psychiatrist, who stated that it was not possible to predict with any degree of accuracy the future dangerousness of a sex offender. *Id.,* at 328-331.

[3] We recognize, of course, that psychiatric professionals are not in complete harmony in casting

pedophilia, or paraphilias in general, as "mental illnesses." Compare Brief for American Psychiatric Association as Amicus Curiae 26 with Brief for Menninger Foundation et al. as *Amici Curiae* 22-25. These disagreements, however, do not tie the State's hands in setting the bounds of its civil commitment laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes. Cf. *Jones* v. *United States,* 463 U.S. 354, 365, n. 13 (1983). As we have explained regarding congressional enactments, when a legislature "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." *Id.*, at 370 (internal quotation marks and citation omitted).

[4] We have explained that the States enjoy wide latitude in developing treatment regimens. *Youngberg* v. *Romeo,* 457 U.S. 307, 317 (1982) (observing that the State "has considerable discretion in determining the nature and scope of its responsibilities"). In *Allen,* for example, we concluded that "the State serves its purpose of treating rather than punishing sexually dangerous person by committing them to an institution expressly designed to provide psychiatric care and treatment." 478 U. S., at 373 (emphasis in original omitted). By this measure, Kansas has doubtless satisfied its obligation to provide available treatment.

[5] Indeed, we have been informed that an August 28, 1995, hearing on Hendricks' petition for state habeas corpus relief, the trial court, over admittedly conflicting testimony, ruled that: "[T]he allegation that no treatment is being provided to any of the petitioners or other persons committed to the program designated as a sexual predator treatment program is not true. I find that they are receiving treatment." App. 453-454. Thus, to the extent that treatment is available for Hendricks' condition, the State now appears to be providing it. By furnishing such treatment, the Kansas Legislature has indicated that treatment, if possible, is at least an ancillary goal of the Act, which easily satisfies any test for determining that the Act is not punitive.