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THE CIVIL CONFINEMENT OF SEXUAL PREDATORS: A DELICATE BALANCE

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INTRODUCTION

In May of 1989, a seven-year-old boy was attacked while riding his bicycle near his home in Tacoma, Washington.¹ The boy was dragged into the woods where he was raped, choked and sexually mutilated.² The attacker then cut off the boy’s penis leaving him in the dirt in a semiconscious state.³ The boy’s attacker, Earl Shriner, was mentally retarded and had a twenty-four year record of attacks on young people.⁴ Two years earlier, Shriner had been released from prison after serving a ten year sentence for the kidnapping and assault of two teenage girls.⁵ Prior to his release, corrections officials sought to have him committed to a

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² See Blacher, supra note 1, at 908 (describing that Shriner took a seven year old boy into the woods, raped him and strangled him); see also Siegel, supra note 1, at A1 (stating that a “7-year-old boy riding his bike near his Tacoma home was dragged into the nearby woods, raped, choked nearly to death and sexually mutilated”).

³ See Blacher, supra note 1, at 908 (describing that Earl K. Shriner cut off his victim’s penis); see also Siegel, supra note 1, at A1 (stating that “[b]efore leaving him semi-conscious in the dirt, Earl K. Shriner cut off the boy’s penis”).

⁴ See Blacher, supra note 1, at 908-09 (describing that “Shriner had a history of violent crimes” and previously spent time in a mental institution); see also Siegel, supra note 1, at A1 (stating that “Shriner had a 24-year record of assaults on young people” and was diagnosed “at the age of 3 as being mentally retarded”).

⁵ See Blacher, supra note 1, at 909 (describing that Shriner “kidnapped and assaulted two teenage girls”); see also Siegel, supra note 1, at A1 (stating that upon Shriner’s release from prison in his “mid-20s, he’d kidnapped and assaulted two teen-age girls”).
state hospital rather than release such a dangerous individual.⁶ Although a psychiatric evaluation concluded that Shriner had unusual sadistic sexual fantasies and a desire to carry them through, doctors ruled he did not meet the legal criteria for confinement because he was neither mentally ill nor acting in a violently dangerous manner.⁷ Since the state could not commit people unless they suffered from a recognized mental disorder rendering them immediately and substantially dangerous, Shriner was released.⁸ Just two years after this failed attempt to confine him, Shriner committed the heinous crime described above.

This incident sparked outrage in the State of Washington and provided the impetus for the Washington State Community Protection Act of 1990,⁹ the first of the modern sexually violent predator acts.¹⁰ Unfortunately, similar incidents have occurred all around the United States. In response, outraged communities have pushed for tougher laws against sex offenders, including sex offender civil commitment acts. Being the first of its kind, the Washington Act became a model for other sexually violent predator (SVP) statutes around the country.¹¹ In Kansas v.

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⁶ See Blacher, supra note 1, at 909 (stating that “[s]tate correction officials attempted to commit Shriner for treatment under Washington’s Involuntary Treatment Act”); see also Siegel, supra note 1, at A1 (describing that officials “tried to get him committed involuntarily to Western State Hospital”).

⁷ See Blacher, supra note 1, at 909 (stating that “Shriner . . . could not be committed under the involuntary commitment act because he failed to meet the two criteria necessary: Shriner was not mentally ill and he had not performed any overt act during confinement . . . demonstrating dangerousness to himself or others”); see also Siegel, supra note 1, at A1 (describing that “doctors ruled he didn’t meet the legal criteria, because he wasn’t mentally ill or, just then, acting in a violently dangerous manner”).

⁸ See Blacher, supra note 1, at 909 (stating that the “Tacoma paper printed editorials responding to Shriner’s criminal history and the system’s inadequacy to civilly commit Shriner for indefinite period of time”); see also Siegel, supra note 1, at A1 (describing the public outrage that resulted from releasing Shriner).

⁹ WASH. REV. CODE §§ 71.09.010 - 71.09.902 (West 2006).

¹⁰ See W. Lawrence Fitch, Sexual Offender Commitment in the United States: Legislative and Policy Concerns, 989 ANNALS N.Y. ACAD. SCI. 489, 491 (2003) (stating that Washington's law was first of the new breed of sexual offender commitment laws); see also Law Enforcement/DSHS Notification, http://www.doc.wa.gov/CPUlawenfjindex.htm (last visited Nov. 5, 2006) (stating that “the primary function of the program is to provide law enforcement with timely and accurate information on registerable sex/kidnapping offenders who release from Department of Corrections institutions (prisons) to the community”).

¹¹ See Fitch, supra note 10, at 491 (stating that at least fourteen jurisdictions pattern their laws on the law in Washington State); see also Eric S. Janus & Wayne A. Logan, Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators, 35 CONN. L. REV. 319, 321 (2003) (noting that "states have confined over 2400 SVPs during the past several years").
Hendricks, the central Supreme Court case examining the Constitutionality of SVP statutes, the Court upheld a Kansas statute modeled after the Washington Act. This paper seeks to examine sexually violent predator statutes from their very foundations working to their implementation and ultimate effectiveness. Part II looks at the problem of sexual predators and the solutions that have been implemented throughout the country in order to address this problem. Additionally, it gives a fundamental understanding of how civil confinement statutes work. Part III examines several keystone issues including where states draw the power to pass such statutes and the constitutional issues they raise. Part IV looks at the Supreme Court's decisions relating to civil confinement which have given the states solid ground on which to continue the practice of civilly confining sexual predators. Finally, Part V addresses four features of SVP statutes which this author feels are essential for allowing a state to adequately protect society while, at the same time, giving consideration to the rights of the confined individual.

I. SEXUALLY VIOLENT PREDATORS

A. The Root of the Problem

In recent years, the problem of sex offender recidivism has gained greater national attention in part because of incidents like the one described above. The problem is made particularly complex in that studies have failed to show sex offenders as any more likely to be repeat offenders than are other criminals. In a study conducted by the United States Bureau of Justice, researchers tracked released offenders for a three year period following their release from prison. Of the 9,691 sex offenders

13 See Steven I. Friedland, On Treatment, Punishment, and the Civil Commitment of Sex Offenders, 70 U. COLO. L. REV. 73, 83 (1989) (stating the difficulty in determining recidivism rates for sex offenders); see also Candace J. Samolinski, When Predators Walk; After Horrible Cases of Sexual Abuse, the Florida Legislature Considers Placing Released Convicts in Mental Institutions, TAMPA TRIB., Mar. 1, 1998, at 1 (discussing that "[a]mong career criminals, police and mental health experts agreed they may be the most calculating and hardest to control").
14 See Jennifer B. Siverts, Note and Comment, Punishing Thoughts Too Close to Reality: A New Solution to Protect Children From Pedophiles, 27 T. JEFFERSON L. REV. 393, 397 (2005) (stating that "[o]ne of the most comprehensive and detailed studies on sex
released in the fifteen states studied, 517 of them (5.3%) were rearrested for a new sex crime within three years.\textsuperscript{15} However, a study conducted by the Washington State Institute for Public Policy,\textsuperscript{16} found much more significant recidivism rates although in a much smaller sample size.\textsuperscript{17} The study tracked sixty-one sex offenders released in Washington State during follow-up periods of various lengths.\textsuperscript{18} During this time more than half of the group was rearrested\textsuperscript{19} and twenty-eight percent were rearrested for a new sex crime.\textsuperscript{20}

Additional consideration should also be given to the difficulty in truly measuring sex offender recidivism. Since sex crimes are notoriously underreported\textsuperscript{21} it becomes more difficult to measure whether offenders are truly first time offenders and whether those who have been released are committing new crimes. Regardless of the true level of recidivism amongst sexual

\textsuperscript{15}See Langan, supra note 14, at 21 (stating that new sex crimes were forcible rapes and sexual assaults and almost 40% of these new sex crimes were committed within the first year of release); see also Siverts, supra note 14, at 398 (stating that “[t]he study followed approximately ten thousand convicted sex offenders released from prison in 1994 and measured their rate of re-arrest, reconviction, and re-imprisonment during the three year period following release.”).


\textsuperscript{17}See id. (tracking the recidivism of 61 offenders in the State of Washington who were recommended for civil confinement but for whom petitions were never filed because the prosecutor determined that one or more of the requirements for civil confinement could not be met).

\textsuperscript{18}See id. at 9 (stating that following-up periods ranged from 5 to 70 months with a mean length of 46.1 months).

\textsuperscript{19}See id. (stating that 36 out of 61 were rearrested for some offense during the follow-up period).

\textsuperscript{20}See id. (stating that the vast majority (76%) of these new sex crimes were contact crimes including rape and assault, while most other offenses could be considered to be crimes which lead to child molestation).

\textsuperscript{21}See R. Karl Hanson & Monique T. Bussiere, Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 357 (1998) (stating that many offenses go undetected and thus rates may be underestimated); see also Sherry F. Colb, Assuming Facts Not In Evidence: A Response to Russell M. Coombs, Reforming New Jersey Evidence Law on Fresh Complaint of Rape, 25 RUTGERS L. J. 745, 753 (1994) (noting “[t]he Rape in America report disclosed that only 16% of sexual assault victims ever report the assault to the police ... [t]he Senate Judiciary Committee found an even lower reporting rate of 7%, compared with a reporting rate of 53% for robberies.”).
predators, this remains a serious problem given the serious long term effects on their victims.\textsuperscript{22}

\textbf{B. Solutions Utilized}

The number of new approaches being utilized to address the problem of sex offender recidivism is not surprising given the strong feelings stories like that of Earl Shriner are sure to inspire.\textsuperscript{23} The proper way to address the problem of sexual predators is nonetheless a difficult legal issue.\textsuperscript{24} This issue involves the delicate balance of two competing goals: reducing predation on the one hand, and treating predators fairly on the other.\textsuperscript{25} This issue is made more complicated in that it may be very difficult to achieve one of these goals without compromising the other.\textsuperscript{26} As a result, the Supreme Court has imposed procedural and substantive requirements with the aim of

\textsuperscript{22} See Hanson & Bussiere, supra note 21, at 357 (stating "[l]ow rates of recidivism can, nevertheless, be worrisome, given the serious effects of sexual victimization"); see also Eric S. Janus, and Robert A. Prentky, Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability, 40 AM. CRIM. L. REV. 1443 (2003) (discussing an empirical study concerning sex offenders and recidivism rates).

\textsuperscript{23} See Robert Billbrey, Civil Commitment of Sexually Violent Predators: A Misguided Attempt to Solve a Serious Problem, 55 J. MO. B. 321, 321 (1999) (recounting the story of Larry Don McQuay, another notorious sex offender who throughout his lifetime acknowledges molesting approximately 240 children and recognizing these types of stories as a likely reason for the increase in the number of approaches towards this problem); see also Stacy Russell, Comment, Castration Of Repeat Sexual Offenders: An International Comparative Analysis, 19 HOUS. J. INT'L L 425, 425 (1997) (stating that "[m]any states have proposed some type of legislation regarding castration for sexual offenders... [f]or example, in Texas, a voluntary castration bill for repeat sexual offenders was introduced."

\textsuperscript{24} See Stephen J. Morse, Preventive Confinement of Dangerous Offenders, 32 J.L. MED. & ETHICS 56, 57 (2004) (noting that "[t]he desire to be safe ultimately conflicts with and complements the desire to be free... [b]ut achieving the safety that makes freedom possible inevitably requires substantial infringement on the liberty of dangerous agents"); see also Stephen J. Morse, Uncontrollable Urges and Irrational People, 88 VA. L. REV. 1025 (2002) (articulating the legal limbo sexual predators fall in regards to criminal law theories of punishment and how a minority of states have taken action to fill the void by enacting indefinite involuntary civil confinement for sexual predators).

\textsuperscript{25} See Morse, Preventive Confinement of Dangerous Offenders, supra note 24, at 56 (identifying these dueling objectives); see also Recent Cases, Constitutional Law - Due Process (excused) - Minnesota Supreme Court Upholds Minnesota Sexually Dangerous Persons Act - In Re Linehan, 594 N.W.2d 867 (Minn. 1999), 113 HARV. L. REV. 1228, 1228 (2000) (articulating this as "a delicate issue because it requires courts to balance society's safety against the need for adequate procedural and substantive protections for the offender.").

\textsuperscript{26} See Morse, supra note 24, at 62 (noting "how could it be fair to hold responsible and punish a [sexual predator] for yielding to urges that are impossible or supremely difficult to control? Control or volitional problems should be abandoned as legal criteria on both conceptual scientific grounds"); see also Recent Cases, supra note 25, at 1228 (explaining that this difficulty results in both goals being undermined).
striking a fair balance between the State's legitimate concerns and the individual's interests.27

The most common tools used to protect society and especially children from sex offenders are sex offender registration laws known as "Megan's laws."

Megan's laws require the registration of sex offenders who will be living in a community after they are released from prison as well as the notification of the community where they will be living.29 Like the Washington Sexual Predator act, the original Megan's law was enacted in response to a gruesome sex crime committed against a child.30 Less than a year after the rape and murder of a seven year old girl in New Jersey by a two-time convicted sex offender, the State of New Jersey enacted the nation's first statewide sex offender registration statute in early 1995.31 Today all fifty states have enacted sex offender registration laws32 and there is also a

27 See, e.g., Kansas v. Hendricks, 521 U.S. 346, 358 (1997) (stating that substantive due process requires a finding of dangerousness coupled with some "metal abnormality" or "personality disorder"); see also Addington v. Texas, 441 U.S. 418, 431 (1979) (holding that a mid level burden of proof properly promotes this balance).


29 See Billbrey, supra note 23, at 321 (explaining the notification process); see also Petrucelli, supra note 28, at 1130-34 (explaining the multi-tiered process of the Megan's Law, and the notification process).

30 See Petrucelli, supra note 28, at 1127 (depicting the actions of Jesse Timmendequas, a convicted sex offender who unbeknownst to Megan Kanka or her parents had moved across the street from her home and subsequently lured Megan into his house and sexually assaulted Megan prior to killing her); see also Tracey A. Van Wickler, H.B. 2564: The Real Estate Disclosure Act Threatens Arizona's Children with Becoming "Megan" Victims, 32 ARIZ. ST. L.J. 367, 368 (2000) (describing a detailed account of Megan Kanka's death by Jesse Timmendequas).

31 See Allen & Strossen, supra note 28, at 1320-21 (stating that "[p]ublic outrage about Megan's murder was immediate, intense, and inevitably political...[w]ithin two weeks New Jersey's governor and the State General Assembly were considering bills..."); see also Petrucelli, supra note 28, at 1128 (describing New Jersey's swift action in response to the murder of seven year old Megan Kanka).

32 See David M. Boyers, Review of Selected 1996 California Legislation: Criminal Procedure: Emotion Over Reason: California's New Community Notification and Chemical Castration Laws Feel Good, but Fail "Sensible" Scrutiny, 28 PAC. L. J. 740, 743 (1997) (explaining that all fifty states have some form of notice laws); see also Friedland, supra note 13, at 76 (explaining "[a]ll fifty states now have some form of registration and notice laws").
federal statute requiring uniform sex offender registration in all fifty states.33

The issue of sex offender recidivism has also become a topic of political debate and has as a result become a campaign issue nationwide.34 Although other approaches may help prevent future crimes, they do not have the potential to reduce recidivism in the same way that civil confinement does. As a result, some experts believe that the only way to address this problem is through incapacitation. 35 However, although civil confinement may be more effective at preventing future crimes it also has much greater costs against the liberty interests of past offenders than do these other approaches.

C. The Rise of Sexually Violent Predator Statutes

Every state has a statute for the civil commitment of individuals with mental illness.36 However, these laws are normally used only in situations where an individual suffers from a severe psychiatric illness and the person's symptoms put them at an imminent risk of serious physical harm.37 Additionally, this

33 See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program Act, 42 U.S.C. § 14071 (2006) (establishing uniform sex offender registration in all fifty states); Allen & Strossen, supra note 28, at 1321 (noting that President Clinton signed a Congressional version in 1996); see also Petrucelli, supra note 28, at 1136-37 (clarifying that the federal statute permits but does not require the police to notify a community if a released pedophile or rapist will be living in their community only where there is a threat to the public and stating that the statute requires States to enact similar statutes within three years or lose certain forms of federal funding).

34 See Janus & Prentky, supra note 22, at 1443 (discussing different empirical studies concerning sex offender recidivism rates); see also Gregory Roberts, Sex Offender Issue Used o Pan for Votes, SEATTLE POST INTELLIGENCER, March 23, 2006, at B1 (identifying harsher penalties for sexual offenses against children as a major campaign issue).

35 See KAN. STAT. ANN. § 59-29a01 (2006) (noting that “[Kansas] legislature determin[ed] that a separate involuntary civil commitment process for the potentially long-term control, care and treatment of sexually violent predators [was] necessary”); Friedland, supra note 13, at 82 (explaining “some experts maintain that the chronicity of the problem can only be deterred through incapacitation and removal of offenders from society at large.”).

36 See Fitch, supra note 10, at 489. This is in effect the involuntary hospitalization of an individual with a mental illness. See Paul F. Stavis, Civil Commitment: Past, Present and Future, Address Before the National Conference of the National Alliance for the Mentally Ill, (July 21, 1995), available at http://www.cccapd.state.ny.us/counsels_corner/cc64.htm. This notes that “[a]t the present time every state in the United States has a statute permitting person to be committed because they pose a danger to themselves or others.”

37 See Billbrey, supra note 23, at 323-24. The author discusses the punishment the Supreme Court issued in Kansas v. Hendricks, citing to the Court which held that the finding of the offender’s violent nature alone was insufficient and that a mental abnormality or personality disorder is necessary so that it made it difficult for the
type of commitment is normally for a short period of time. Most states also have laws providing for the civil confinement of individuals charged with a crime and found incompetent to stand trial or found to be not criminally culpable due to legal insanity. In such situations, those individuals incompetent to stand trial are discharged once they have improved to the point that they no longer meet incompetency standards while those found not criminally responsible generally are released through conditional release programs as their condition improves.

In the past twenty years a new waive of civil commitment laws specifically targeting sexually violent predators has emerged. These sex offender commitment laws were enacted because standard civil confinement statutes proved inadequate to handle the problem of sexual predators. This is mainly due to the notion that sexual predators are not “mentally ill” in the manner required by traditional civil confinement statutes. Moreover, offender to control their behavior. See Fitch, supra note 10, at 489. These laws may be used for individuals with disorders such as schizophrenia and bipolar disorder.

See Billbrey, supra note 23, at 324-25. Billbrey chronicles the procedural events of Missouri’s sex offender statute in placing a sexually violent predator into a mental facility. See Fitch, supra note 10, at 489. The individual is typically released once the symptoms remit, thus eliminating the risk and as a result, hospital stays for such patients rarely exceed thirty days in length.

See Fitch, supra note 10, at 489-90. Fitch notes the strictness of these laws which ensures that they are only used for the confinement of individuals with the most serious of disorders. See generally Editorial, Life Tough For Offenders? Awww, DAYTON DAILY NEWS, March 20, 2006, at A8. The author discusses the issue of punishment and sentencing for sex offenders and dismisses the sentiment for weaker penalties, arguing for harsher penalties.

See Fitch, supra note 10, at 490. Those who do not sufficiently improve or are unlikely to do so normally must be released for confinement under normal civil commitment laws. See Morse, supra note 24, at 61. Morse analyzes the ill-fitting courts use for disposing of sexual predators when he states “[u]nless personality disorder or mental abnormality produces a lack of control, the causal link between abnormality and predation does no legal justificatory work . . . .”

See Billbrey, supra note 23, at 325-26 (explaining the alternative methods to involuntary civil confinement); see also Fitch, supra note 10, at 490 (explaining the failure of similar types of laws in the 1960s and the reemergence of sexual predator commitment laws in the 1990s).

See In re Young, 857 P.2d 989, 1009 (Wash., 1993) (finding that “the Legislature expressly noted that the involuntary commitment statute ... was an inadequate remedy because confinement prevented any overt act”); see also Eric S. Janus, Sex Offender Commitments: Debunking the Official Narrative and Revealing the Rules-in-Use, 8 STAN. L. & POL’Y REV. 71, 72 (1997) (explaining that sexual predator commitment laws were enacted precisely for this reason).

See Janus, supra note 42, at 72 (noting that “[t]he targets of sexual predator commitment acts do not have this same appearance of mental illness that is required by traditional commitment statutes”); see generally Robert M. Wettstein, A psychiatric Perspective on Washington’s Sexually Violent Predators Statute, 15 U. PUGET SOUND L.
sexual predators are not suited for the type of short-term civil commitment utilized for those who are mentally ill due to the personality features predisposing them towards future acts. Many state legislatures have been persuaded to enact sex offender commitment statutes as a result of public outcry over incidents of sexual violence.

D. The Confinement Process

Sexually violent predator commitment laws provide procedures by which the most dangerous sexual predators can be incapacitated and treated after they have completed their prison sentences. Although the procedures vary from state to state, the steps involved are similar throughout the country. Normally, the process begins when a particular agency or state authority files a petition within a certain period of time prior to the SVP's scheduled release from criminal confinement. The length of time in advance of the individual's release in which this must be done varies by jurisdiction. This process is not limited to just

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44 See WASH. REV. CODE § 71.09.010 (West 2006) (stating that "involuntary treatment . . . which is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment to individuals with serious mental disorders and then return them to the community"); see also Jennifer M. Connor, Note, Seling v. Young: Constitutionally Protected But Unjust Civil Commitment For Sexually Violent Predators, 18 J. CONTEMP. HEALTH L. & POL'Y 511, 515 (2001-02) (stating that "[d]ue to these personality features, such persons are not suited to short-term civil commitments which are appropriate for other with mental disorders.").

45 See Claudine M. Leone, New Jersey Assembly Bill 155- A Bill Allowing the Civil Commitment of Violent Sex Offenders After the Completion of a Criminal Sentence, 18 SETON HALL LEGIS. J. 890, 890 (1994) (describing community's outrage over release of violent sex offender); see also Deborah L. Morris, Note, Constitutional Implications of the Involuntary Commitment of Sexually Violent Predators: A Due Process Analysis, 82 CORNELL L. REV. 594, 595 (1997) (stating that "[p]ublic outcry over ever increasing of sexual violence encouraged a number of state legislatures to enact laws requiring the involuntary commitments of sexual predators.").

46 See ARIZ. REV. STAT. § 36-3702(A) (2006) (stating that an agency has jurisdiction over the person); see also 725 ILL. COMP. STAT. § 207/10(a) (West's Smith-Hurd 2006) (defining the agency as referred to in the Act as "the agency with the authority or duty to release or discharge the person").

47 See e.g., ARIZ. REV. STAT. § 36-3702(A) (2006) (allowing the agency to submit a written request "to the attorney general not more than one hundred eighty days and not less than thirty days before the person's anticipated release"); see also 725 ILL. COMP. STAT. § 207/10(b) (West's Smith-Hurd 2006) (stating that "the agency with jurisdiction shall inform the Attorney General and the State's Attorney in a position to file a petition . . . regarding the person as possible . . .").

48 See KAN. STAT. ANN. § 59-29a03(a)(1) (2006) (stating the agency with jurisdiction must give written notice to the attorney general ninety days prior to release); see also
those serving sentences for convictions but also includes individuals who have been confined as incompetent to stand trial and those who were found guilty although legally insane.\textsuperscript{49}

After this initial petition has been filed a process is commenced leading to a commitment hearing that is not unlike a criminal proceeding in the various protections provided. In some states an initial hearing may be held to determine whether there is probable cause to believe the individual is a sexually violent predator and thus eligible for commitment under the act.\textsuperscript{50} At this hearing the defendant is afforded numerous procedural protections.\textsuperscript{51} If probable cause is found the person will then undergo an evaluation in order to determine whether he or she is a sexually violent predator,\textsuperscript{52} otherwise the petition will be dismissed.\textsuperscript{53} If probable cause is found a trial must be conducted

\textsuperscript{49}See KAN. STAT. ANN. § 59-29a03(a)(1) (2006) (allowing confinement petitions to be filed ninety days prior to release from total confinement, of an individual found incompetent to stand trial, or of a person found not guilty by reason of insanity or not guilty by reason that he suffered from a particular disease or defect which rendered him incapable of possessing the required criminal intent); see also 725 ILL. COMP. STAT. 207/10(b) (West's Smith-Hurd 2006) (allowing petition beginning three months prior to release from total confinement or anticipated entry into a mandatory supervised release program, those adjudicated delinquent under state statutes or the discharge of those found not guilty by reason of insanity).

\textsuperscript{50}See ILL. COMP. STAT. § 207/30(b) (West's Smith-Hurd 2006) (requiring a court hearing to determine probable cause whenever a petition is filed); see also KAN. STAT. ANN. § 59-29a05(a) (2006) (providing for a probable cause hearing in which the judge will "determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator").

\textsuperscript{51}See ARIZ. REV. STAT. § 36-3705(a) (2006) (giving the defendant notice and the opportunity to appear at a probable cause hearing and additionally the right at hearing to present evidence on his own behalf, cross-examine witnesses against him, and view and copy all documents and reports in the court file); see also KAN. STAT. ANN. § 59-29a05(E) (2006) (granting the defendant the following rights "(1) To be represented by counsel; (2) to present evidence on such person's behalf; (3) to cross-examine witnesses who testify against such person; and (4) to view and copy all petitions and reports in the court file").

\textsuperscript{52}See ARIZ. REV. STAT. § 36-3705(G) (2006) (noting that "[i]f at the hearing the court reaffirms that probable cause exists to believe the person is a sexually violent person, the judge shall order an evaluation as to whether the person is a sexually violent person"); see also KAN. STAT. ANN. § 59-29a05(d) (2006) (providing for an evaluation as to whether the individual is a sexually violent predator "by a person deemed to be professionally qualified to conduct such an examination").

\textsuperscript{53}See CAL. WELF & INST. CODE § 6602 (2006) (stating that if probable cause is lacking the judge shall dismiss the petition); see also ARIZ. REV. STAT. § 36-3705(F) (2006) (holding that if "the court determines probable cause does not exist to believe that the person is a sexually violent person, the court shall dismiss the petition.").
within a certain period of time to determine the person’s status as a sexually violent predator.\textsuperscript{54} The protections provided at trial also vary from state to state. Many states provide the defendant with the right to have this trial before a jury.\textsuperscript{55} The defendant in such proceedings is additionally entitled to representation by counsel and must be provided with one if indigent.\textsuperscript{56} In several states, the individual has the right to retain experts and professionals to perform an evaluation on their behalf.\textsuperscript{57} The individual remains confined during the trial process.\textsuperscript{58} At trial the state will have the ability to introduce evidence of past offenses,\textsuperscript{59} although this evidence alone will not be sufficient to prove that the individual is a sexually violent predator.\textsuperscript{60} In most states the individual must be shown to be a sexually violent predator beyond a reasonable

\textsuperscript{54} See ARIZ. REV. STAT. § 36-3706 (2006) (requiring a trial be conducted within one hundred twenty days of the filing of a petition under the act); WASH. REV. CODE § 71.09.010 (2006) (providing for a trial within forty-five days after the completion of a probable cause hearing).

\textsuperscript{55} See WASH. REV. CODE § 71.09.010 (2006) (giving the individual, the prosecuting attorney, or the judge to right to demand a trial by jury and providing that absent such a demand the trial will be conducted before a court); KAN. STAT. ANN. § 59-29a06 (2006) (affording the right to demand a trial by jury at least four days prior to trial to the person, the attorney general or the judge and stating “[i]f no demand is made, the trial shall be before the court”).

\textsuperscript{56} See KAN. STAT. ANN. § 59-29a06(b) (2006) (providing for the court to appoint counsel for the individual’s assistance if indigent); see also ARIZ. REV. STAT. § 36-3704(C) (2006) (explaining that “the person who is named in the petition is entitled to assistance of counsel at any proceeding that is conducted pursuant to this article. If the person is indigent, the court shall appoint counsel to assist the person”).

\textsuperscript{57} See WASH. REV. CODE § 71.09.050 (2006) (describing the state’s procedure with regards to the defendant retaining experts and other professionals); see also ARIZ. REV. STAT. § 36-3703(A) (2006) (maintaining that “if a person [defendant] is subject to an examination... each party [defendant included] may select a competent professional to perform simultaneous evaluations of the person [defendant].”).

\textsuperscript{58} See CALIF. WELF. & INST CODE § 6602(a) (2006) (stating “the judge shall order that the person remain in custody in a secure facility until a trial is completed”); see also ARIZ. REV. STAT. § 36-3705(B) (2006) (mandating that “if the judge determines that probable cause exists to believe that the person named in the petition is a sexually violent person, the judge shall order that the person be detained in a licensed facility under the supervision of the superintendent of the Arizona state hospital.”).

\textsuperscript{59} See 725 ILL. COMP. STAT. § 207/35(b) (2006) (allowing evidence of the commission of crimes and punishments received to be admitted in the civil commitment trial); see also ARIZ. REV. STAT. § 36-3704(B) (2006) (holding that the court may admit evidence of “past acts that would constitute a sexual offense”).

\textsuperscript{60} See 725 ILL. COMP. STAT. § 207/35(e) (2006) (explaining that evidence that the defendant “was convicted for or committed sexually violent offenses before committing the offense or act on which the petition is based is not sufficient to establish beyond a reasonable doubt that the person has a mental disorder”); see also STAT. ANN. § 980.05(4) (1998 & Supp. 2006) (effective Aug. 1, 2006) (maintaining that evidence that indicates that the defendant committed prior sexually motivated acts is not sufficient to establish that the person has a mental disorder).
Once the jury or the court makes this determination, the person will incapacitated for treatment or where available may be considered for a less restrictive alternative as appropriate. If the person is not found to be a sexually violent predator, he will be released unless lawfully confined for some other reason.

Once an individual has been committed as a sexually violent predator he is entrusted to the custody of a designated state authority for treatment. Although the duration of commitment is indefinite, in many states the person will not be kept for more than a year without being reevaluated. Additionally, certain procedures exist which allow a person to petition for release at any time that authority believes the person's condition has improved, no longer classifying the person as a sexually violent predator. Once a person is no longer a high risk to re-offend, he...
may be eligible for a less restrictive alternative or a conditional release program.\textsuperscript{68}

II. STATE POWER AND CONSTITUTIONAL CONSIDERATIONS

A. Sources of State Power

The Supreme Court has recognized two sources of power under which a state may confine individuals: state police power and parens patriae power.\textsuperscript{69} Some civil confinement statutes may be justified under both of these sources of power, as they are not mutually exclusive.\textsuperscript{70} In \textit{Addington v. Texas},\textsuperscript{71} the Court recognized the state's authority to civilly confine individuals pursuant to these powers.\textsuperscript{72} Although an individual may be confined based on either of these powers, the purposes for which a state may act under the authority of each of these powers is very different.\textsuperscript{73} This distinction is especially important given that the principle motivation for sexual predator commitment statutes is different from that of standard civil confinement statutes.\textsuperscript{74}
i. State Police Power

Pursuant to its police power, the state may act “to protect the general health, safety, and well-being of society.”75 Two common examples of the state exercising its police power are the criminal law and public health regulations.76 Pursuant to its police powers, a state can limit a person’s freedom for the protection of society.77 The Supreme Court has held that in certain circumstances, the state’s interest in public safety might outweigh an individual’s liberty interest.78 Consequently, in the sexual predator context, the state can incapacitate a mentally ill individual in order to protect society from his dangerous sexual tendencies.79 However, the police power is subject to the limitations of the Constitution.80 In the aftermath of Hendricks, the Court seems to have concluded that civil confinement relying solely on state police power is constitutionally permissible.81

75 Janus, supra note 70, at 6 (explaining state police power); see BLACK’S LAW DICTIONARY 1178 (7th ed. 1999) (defining police power as “A state’s Tenth Amendment right, subject to due-process and other limitations, to establish and enforce laws protecting the public’s health, safety, and general welfare, or to delegate this right to local governments.”).

76 See Janus, supra note 70, at 6 (mentioning these two “classic examples of police power interventions”); see also Morris, supra note 45, at 627-28 (giving examples of state police powers including convicting criminals and promoting “order, safety, security, health, morals and general welfare . . .”).

77 See Janus, supra note 42, at 72 (stating that a “key use of civil commitment has been to protect the public from dangerous individuals”); see also Morris, supra note 45, at 627 (recognizing the legitimacy of this state action).

78 See United States v. Salerno, 481 U.S. 739, 748 (1987) (stating such and giving examples of situations in which community safety can outweigh an individual’s liberty interest); see also Elizabeth A. Weeks, Note, The Newly Found “Compassion” for Sexually Violent Predators: Civil Commitment and the Right To Treatment in The Wake of Kansas v. Hendricks, 32 GA. L. REV. 1261, 1284 (1998) (stating “a state’s interest in protecting the public health and safety of the population as a whole justifies depriving a single individual’s liberty.”).

79 See Addington, 441 U.S. at 426 (saying that the state has authority to protect communities from dangerous mentally ill persons); see also Weeks, supra note 78, at 1284 (adducing that the policing power of the state may incapacitate mentally ill individuals to protect society).

80 See Addington, 441 U.S. at 425 (stating the civil commitment requires “due process protection”); see also Morris, supra note 45, at 627-28 (recognizing that state’s policing power is subject to Constitutional limitations).

81 See Janus, supra note 70, at 12 (evaluating the absence of a discussion of the parens patriae power in Hendricks); see also Weeks, supra note 78, at 1284 (some courts “assert that police power alone may justify indefinite preventative detention”).
Thus, this may give the states more freedom when civilly confining individuals than they previously enjoyed.82

ii. Parens Patriae Power

Another justification for state civil confinement laws is the parens patriae power.83 This source of power illustrates the state as a guardian of individuals under legal disability.84 Examples of the use of parens patriae power include guardianship laws and traditional civil confinement statutes.85 This state power is often acted upon in the civil context as the state acts for the purposes of protecting an ill individual.86 Thus, the use of parens patriae justifications for sex offender civil confinement is difficult because sex offenders are not normally "incompetent" in the way traditionally required for confinement.87 However, the confinement of sexual predators for treatment aimed at their general health and welfare may still be constitutional under parens patriae powers.88

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82 See Janus, supra note 70, at 12 (clarifying that "police power itself entails no limits other than dangerousness"); see also Weeks, supra note 78 at 1299 (illustrating that through the Hendricks decision, the Supreme Court created a "loophole through which states can keep prior sex offenders off the streets indefinitely").

83 See Janus, supra note 70, at 6 (identifying this source of state power); see also BLACK'S LAW DICTIONARY 1144 (8th ed. 2004) (describing parens patriae as "the state in its capacity as provider of protection to those unable to care for themselves").

84 See Morris, supra note 45, at 624 (explaining that parens patriae power "embodies the notion that the state must care for individuals incapable of caring for themselves"); see also BLACK'S LAW DICTIONARY 1144 (8th ed. 2004) (defining parens patriae).

85 See Janus, supra note 70 at 6 (noting that parens patriae "authorizes the state to protect individuals who are unable to help themselves"); see also Christine Steib Stickler, Note, In Re S.G.: Parens Patriae and Wardship Proceedings—Exactly Who in the State Should Determine the Best Interest of the Child, 7 WIDENER J. PUB. L. 377, 379 (1998) (stating "[t]he parens patriae doctrine provides the state with the general power of guardianship over children and other persons with legal disabilities.").

86 See Foucha v. Louisiana, 504 U.S. 71, 96 (1992). The state acts in the civil context in large part for the purposes of protecting and providing for these individuals. See Addington v. Texas, 441 U.S. 418, 426 (1979). This case states that "[t]he state has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for themselves."

87 See Janus, supra note 70, at 6-7 (explaining "sex offender commitment schemes cannot be supported by classic parens patriae arguments"); see also Weeks, supra note 78, at 1272 (stating "[t]he two state purposes most commonly asserted to justify civil commitment are protection of society under the state's police power and protection of an incompetent individual under the parens patriae power.").

88 See generally Robinson v. California, 370 U.S. 660 (1962) (discussing the state's right to use its parens patriae powers on various individuals); see also Morris, supra note 45, at 625 (acknowledging the Court's willingness to accept this justification).
B. The Distinction between acts civil in nature and acts criminal in nature

Along with the two sources of state power discussed above, there are two distinct categories of government action under which states exercise these powers. The major difference between these two types of state action is the aims the state seeks to advance through these types of laws. The distinction between laws aimed to punish and laws aimed at civil remedies lies at the heart of many challenges to civil confinement statutes. States thus must prove their civil intent in order to defeat challenges rooted in the constitutional protections implicated by criminal processes and punishments.

i. Punitive/ Criminal laws

Criminal laws are intended to punish and, thus, serve the two traditional goals of punishment: retribution and deterrence. Criminal statutes are retroactive in nature as they punish a past act for which the offender is culpable. Additionally, although criminal punishment can utilize incapacitation as a preventative device, this incapacitation must be proportional to an individual's

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89 See Richard P. Ieyoub, Symposium, State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Pares Patriae, 74 Tul. L. Rev. 1859, 1864 (2000) (discussing that parens patriae can be used in both civil and criminal actions); see also Janus, supra note 70, at 6 (describing this distinction as the two “modes” in which state power is exercised).

90 See Todd M. Grossman, Comment, Kansas v. Hendricks: The Diminishing Role of Treatment in the Involuntary Civil Confinement of Sexually Dangerous Persons, 33 New Eng. L. Rev. 475, 477-78 (1999) (distinguishing civil and criminal aims); see also Janus, supra note 70, at 6 (explaining the differing intents of criminal and civil laws).


92 See Hendricks, 521 U.S. at 369 (stating “[o]ur conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks’ double jeopardy and ex post facto claims.”); see also Grossman, supra note 90, at 477 (acknowledging that a statute must be civil in nature in order to avoid certain constitutional problems).

93 See Hendricks, 521 U.S. at 361-62 (discussing that the two primary objectives of criminal punishment are retribution and deterrence); see also Grossman, supra note 90, at 478 (identifying these twin goals of punishment).

94 See Allen, 478 U.S. at 371. This case discussed that if an act does not try to prevent past misdeeds, it is not criminal in nature. See also Janus, supra note 70, at 6. Note that the act be done with a guilty mind and thus where the act is done with an insane mind this culpability is lacking.
blameworthiness for a particular act. Due to the deprivation of liberty involved, criminal proceedings and punishments require unique procedural protections and implicate substantive rights which are not of concern in civil proceedings.

ii. Laws civil in nature

Civil schemes are intended to serve civil goals of incapacitation and treatment, but not punishment. Unlike criminal laws, civil statutes are prospective, seeking to prevent future harm. In order to avoid implicating various constitutional protections, sexual predator statutes must be civil in nature. Thus, a common question when courts analyze civil confinement questions is whether they are merely a camouflaged form of punishment. As a result, most states stress the punitive intent of their sexual predator statutes, sometimes explicitly. The

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95 See Russell L. Christopher, Article, *Time and Punishment*, 66 Ohio St. L.J. 269, 270-71 (2005) (noting that under retributivism, only punishments deserved and proportional are justified); see also Janus, supra note 70, at 5, 6 (noting that incapacitation is nonetheless triggered by a blameworthy act which the confined has committed).

96 See United States v. Klein, 474 F. Supp. 1243, 1246 n.4 (S.D.N.Y. 1979) (stating that the prosecution must prove the crime beyond a reasonable doubt); see also Janus, supra note 70, at 6 (including in these procedural protections is the required burden of proof beyond a reasonable doubt).

97 See Florida v. A.C., 714 So. 2d. 617, 619 (Fl. Ct. App. 4th dist. 1998) (stating that “a law violates the ex post facto clause of the constitution only if it punishes as a crime an act which was not a crime when committed, makes the punishment for a crime more onerous than it was at commission, or deprives one charged with a crime of a defense available when the crime was committed”); see also Janus, supra note 70, at 6 (noting that criminal proceedings must not violate the Ex Post Facto clause or the right against self-incrimination).

98 See Grossman, supra note 90, at 478 (articulating these goals); see also Carla B. Keegan, Comment, *Washington’s Sexually Violent Predator Statute: Constitutionally Sound and the Best Alternative for the Problem of Violent Predators*, 20 SEATTLE UNIV. L. R. 157, 167 (1996) (discussing that the two civil goals of incapacitation and treatment).

99 See Janus, supra note 70, at 6 (emphasizing that past behavior is nonetheless relevant as an evidentiary factor for purposes of diagnosis and prediction); see also Lief Kjehl Rasmussen, Note and Comment, *Abolishing the Privity Doctrine in Texas—Just Do It!*, 2 TEX. WESLEYAN L. REV. 559, 574 (1996) (noting that civil liability should exist if the liability will prevent future harm).

100 See In re Young, 857 P.2d 989, 1023-24 (Wash. 1993) (Johnson, J., dissenting) (arguing that a criminal sexual predator statute is "fundamentally flawed"); see also Grossman, supra note 90, at 478 (stating that a civil statute must not aim to punish).

101 See In re Hendricks, 912 P.2d 129, 136 (Kan. 1996) (stating that the legislature has given the state several options rather than "camouflaging statutes"); see also Grossman, supra note 90, at 478 (identifying this common concern that civil confinement statutes might intend to remedy shortcomings of criminal punishment).

102 See e.g., KAN. STAT. ANN. § 59-29a01 (2006) (stressing the need for “a separate involuntary civil commitment process for the potentially long-term control, care and treatment of sexually violent predators”) (emphasis added); see also Kansas v. Hendricks,
Supreme Court has viewed this question as one primarily of statutory construction and thus has given deference to the legislature's stated intent.

C. Constitutional Concerns

Critics of civil confinement laws often base their opposition on their opinions that the laws violate various constitutional protections. Many challenges to civil confinement statutes are based at least in part on the Due Process clause. Additionally, individuals have challenged civil commitment laws on the grounds that they are criminal rather than civil in nature and thus implicate the various protections provided by the constitution in the context of criminal prosecutions and process.

i. Due Process Clause

The protections of the Due Process Clause are implicated in any confinement proceeding regardless of the civil or criminal nature of the act. The Due Process clause guarantees that an individual will not be deprived of "life, liberty or property without due process of the law". Since civil confinement laws involve a deprivation of liberty for an indefinite period of time, the due process clause protections must be met. As a result challenges to civil confinement statutes are often based in part on

521 U.S. 346, 361 (1997) (finding evidence of Kansas' intent that the act be civil in nature in its placement in the Kansas probate code rather than the criminal code).

103 See Allen v. Illinois, 478 U.S. 364, 368 (1986) (stating "[t]he question whether a particular proceeding is criminal for the purposes of the Self-Incrimination Clause is first of all a question of statutory construction"); see also Hendricks, 521 U.S. at 361 (citing Allen for this proposition).

104 See Smith v. Doe, 538 U.S. 84, 92 (2003) (stating since the court normally defers to the legislature's stated intent, only the "clearest proof" will suffice to override legislative intent and prove the act punitive in nature); see also Hendricks, 521 U.S. at 361 (stating the court "ordinarily defers to the legislature's stated intent").

105 See Bilbrey, supra note 23, at 322 (introducing this argument); see also Jeremiah White, Is Iowa's Sexual Predator Statute "Civil'? The Civil Commitment of Sexually Violent Predators After Kansas v. Crane, 89 IOWA L. REV. 739, 749-50 (2004) (noting petitioners constitutional arguments of double jeopardy, ex post facto and substantive due process were rejected in Kansas).


107 See e.g., Addington v. Texas, 441 U.S. 418, 425 (1979) (stating "[t]his Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"); see also Jackson v. Indiana, 406 U.S. 715, 735 (1972) (concluding that the nature and duration of the commitment must "bear some reasonable relation to the purpose for which the individual is committed").
CIVIL CONFINEMENT OF SEXUAL PREDATORS

substantive due process.\textsuperscript{108} The Supreme Court has imposed various requirements on civil confinement statutes in order to ensure that these protections are met. For example, the Court has held that due process requires that the burden of proof in civil confinement cases be higher than mere preponderance of the evidence.\textsuperscript{109} Additionally, the Court has required certain findings to be made in order for a government to civilly confine a defendant. These include (1) a mental abnormality or personality disorder, (2) that this condition renders him likely to commit future acts of violence, and (3) an inability to control behavior.\textsuperscript{110}

\textbf{ii. Other constitutional concerns}

In addition to the due process clause, several other constitutional provisions have been relied on to challenge civil confinement laws.\textsuperscript{111} Two provisions often relied upon by those challenging civil confinement laws are the ex post facto\textsuperscript{112} clause and the double jeopardy clause.\textsuperscript{113} The ex post facto clause protects an individual from being punished by a law made effective retroactively\textsuperscript{114} and thus in order to prevail on such a challenge the petitioner must prove the criminal nature of the

\textsuperscript{108} See Kansas v. Hendricks, 521 U.S. 346, 350 (1997) (stating Hendricks challenged the statute on substantive due process grounds); see also Bilbrey supra note 23, at 322 (stating that many civil confinement cases are brought on due process grounds).

\textsuperscript{109} See Addington, 441 U.S. at 431. Although the Court required a burden of proof greater than mere preponderance of the evidence, a standard as strong as the `beyond a reasonable doubt' standard employed in criminal cases was not necessary according to the Court. See Murel v. Baltimore City Criminal Court, 407 U.S. 355, 364 (1972). The court also required a higher burden of proof for based on civil confinement nature.


\textsuperscript{111} See Hendricks, 521 U.S. at 350. Hendricks challenged his confinement on double jeopardy and ex post facto grounds, in addition to his due process claims. See Allen v. Illinois, 478 U.S. 364, 366 (1986). The petitioner in Allen challenged his confinement based on the Fifth Amendment right against self-incrimination.

\textsuperscript{112} See U.S. CONST. art. I, § 9, cl. 3. “No bill of attainder or ex post facto Law shall be passed.” See U.S. CONST. art. I, § 10. “No state shall... pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.”

\textsuperscript{113} U.S. CONST. amend. V. (quoting “[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb”); Janus, supra note 70, at 6 (commenting that “[c]riminal interventions... invoke a unique set of rights and immunities... [including] no double jeopardy.”).

\textsuperscript{114} See BLACK’S LAW DICTIONARY 601 (7th ed. 1999) (defining “ex post facto law” as “[a] law that applies retroactively, esp. in a way that negatively affects a person’s rights, as by criminalizing an action that was legal when it was committed.”).
act. Ex Post Facto challenges are asserted when a party whose confinement is sought by the state committed the acts leading to the proceeding prior to the passage of the confinement act. These provisions have also been relied upon in challenges to state sex offender registration laws. Challenges based on the Double Jeopardy Clause, on the other hand, stem directly from the nature of civil confinement statutes. Since the Double Jeopardy Clause protects individuals from being tried for the same crime twice, they also rely on the punitive or civil nature of an act. This type of claim could be brought in any situation where an individual who has already been tried for his offenses is then subjected to civil commitment proceedings, stemming from those same crimes.

III. CIVIL CONFINEMENT JURISPRUDENCE

A. Foundations of Hendricks

_Addington v. Texas_ is considered by many to be the first modern Supreme Court case dealing with civil confinement. The appellant in _Addington_ challenged a Texas statute under which his mother had petitioned to have him committed indefinitely to a state mental hospital. The case directly addressed the

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115 See Dobbert v. Florida, 432 U.S. 282, 293 (1977), aff'd, 718 F.2d 1518 (11th Cir. 1983) (noting the law did not violate ex post facto clause because it did not make any previously innocent act criminal); see also supra text accompanying notes 89-104 (discussing the difference between laws criminal and civil in nature).

116 See e.g., Hendricks, 521 U.S. at 372 (Kennedy, J., concurring) ("A law enacted after commission of the offense and which punished the offense by extending the term of confinement is a textbook example of an ex post facto law"); see also Dobbert, 432 U.S. at 292 (defining ex post facto violation as any law that makes a crime something that was not criminal when committed).


118 See BLACK'S LAW DICTIONARY 491 (6th ed. 1990) (defining "double jeopardy" as "protect[ing] against second prosecution for same offense after acquittal or conviction, and against multiple punishments for same offense.").

119 See e.g., Hendricks, 521 U.S. at 361 (articulating Hendricks' claim that he was being subjected to new "punishment" for acts for which he had already been convicted); see also Seling v. Young, 532 U.S. 250, 257 (2001) (outlining cases in which petitioner claimed double jeopardy based on their commitment or confinement).

120 441 U.S. 418 (1979).

121 Addington, 441 U.S. at 420. The appellant had been committed temporarily on seven occasions between 1969 and 1975.
question as to what standard of proof is required by the Due Process clause of the Fourteenth Amendment in a civil proceeding brought under state law for the indefinite commitment of an individual to a state mental hospital.\textsuperscript{122} The Court found the “preponderance of the evidence” standard required in most civil cases to be Constitutionally inadequate to meet the requirements of the Due Process Clause because of the magnitude of the individual’s interest in a civil commitment proceeding.\textsuperscript{123} However, the Court also concluded that a standard as strict as the “beyond a reasonable doubt” standard applied in criminal cases was not necessary to meet due process requirements.\textsuperscript{124} As a result, the Court held that the Texas standard of “clear and convincing evidence” was sufficient to meet Due Process requirements.\textsuperscript{125} Lastly, the Court recognized the powers of a state to civilly confine those who are mentally ill.\textsuperscript{126} In doing so the Court articulated the requirement that a state acting pursuant to its police powers must show the individual to be both dangerous and mentally ill.\textsuperscript{127}

Seven years after \textit{Addington}, the Court handed down a landmark decision involving the civil confinement of sexual predators. In \textit{Allen v. Illinois},\textsuperscript{128} the Court rejected a challenge to the Illinois Sexually Dangerous Persons Act.\textsuperscript{129} The petitioner, Terry B. Allen, appealed the trial court’s determination that he was a “sexually dangerous person”\textsuperscript{130} as defined by the Act.\textsuperscript{131} In

\begin{itemize}
  \item \textsuperscript{122} Id. at 421-22 (identifying this issue).
  \item \textsuperscript{123} Id. at 427 (reasoning “[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.”).
  \item \textsuperscript{124} Id. at 432 (stating “the reasonable-doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment.”).
  \item \textsuperscript{125} Id. at 433 (concluding that “clear, unequivocal and convincing evidence” was “adequate” standard).
  \item \textsuperscript{126} Id. at 426 (stating “[t]he state has a legitimate interest under its \textit{parens patriae} powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill”).
  \item \textsuperscript{127} Id. (stating “[the state] has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill”).
  \item \textsuperscript{128} 478 U.S. 364 (1986).
  \item \textsuperscript{129} Sexually Violent Persons Commitment Act, 725 ILL. COMP. STAT. § 207/1-99 (West’s Smith-Hurd 2006).
  \item \textsuperscript{130} See \textit{Allen}, 478 U.S. at 366 (finding that the petitioner was a sexually dangerous person under Act).
\end{itemize}
reaching this determination the trial court relied on the testimony of two psychiatrists who had examined Allen. Allen argued that his Fifth Amendment right against self-incrimination was violated when the court allowed the psychiatrists to testify at his confinement trial. In advancing this argument, the petitioner contended that the Act was punitive in nature. However, the court disagreed and ruled that the Act was not criminal for Fifth Amendment purposes. In reaching this decision the Court relied on the legislature's stated civil purpose, the treatment provided, and the ability of the individual to petition for release.

Less than a year after Allen, the Court decided an important case dealing with substantive due process in civil confinement cases. In U.S. v. Salerno, the Court concluded that in certain circumstances the state's interest in public safety can outweigh the individual liberty interest. The Salerno case involved a federal statute which allowed the court to detain arrestees prior to trial where they conclude that no release conditions would reasonably assure "the safety of any other person and the community." The government held Solerno pursuant to the act without bail while his trial was pending. After the district

131 See 725 ILL. COMP. STAT. § 207/5(f) (West's Smith-Hurd 2006) (defining sexually violent person as someone convicted of a sexually violent offense, adjudicated delinquent for a sexually violent offense, or "has been found not guilty of a sexually violent offense by reason of insanity" but remains dangerous due to a mental disorder).
132 See Allen, 479 U.S. at 366 (explaining the court's finding was "[b]ased upon the testimony of the psychiatrists, as well as that of the victim of the sexual assault for which petitioner had been indicted . . .").
133 Id. at 370-71. (noting that "[Allen] places great reliance on the fact that proceedings under the Act are accompanied by procedural safeguards usually found in criminal trials").
134 Id. at 370-71 (describing petitioner's arguments that the requirements that the state must first file criminal charges against the person and that the person must have committed an act of sexual assault or molestation indicate the act's criminal purpose).
135 Id. at 370 (noting that "[t]he discussion of civil commitment in Addington . . . this Court concluded that the Texas involuntary-commitment scheme is not criminal insofar as the requirement of proof beyond a reasonable doubt is concerned, fully supports our conclusion here . . .").
136 Id. (concluding "[t]he Act thus does not appear to promote either of the traditional aims of punishment—retribution and deterrence").
138 Id. at 748 (stating that "[w]e have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest.").
140 See Salerno, 551 U.S. at 743 (noting that "[t]he District Court granted the Government's detention motion, concluding that the Government had established by clear
court determined that the government had met this burden of showing that the safety of the community was threatened, the Court of Appeals for the Second Circuit reversed, and concluded that allowing such pre-trial detention would violate substantive due process.\(^\text{141}\) The Supreme Court reversed, holding that despite the importance of the individual liberty right, “this right may, in circumstances where the government’s interest is sufficiently weighty, be subordinated to the greater needs of society.”\(^\text{142}\)

Perhaps the most important case prior to Hendricks, however, was decided by the Court in 1992.\(^\text{143}\) Foucha v. Louisiana\(^\text{144}\) involved the confinement of an individual who although no longer suffering from mental illness remained confined because the state could not “certify that he would not constitute a menace to himself or others if released.”\(^\text{145}\) The petitioner, Terry Foucha was committed to a facility in 1984 after he was found not guilty by reason of insanity of aggravated burglary and illegal discharge of a firearm.\(^\text{146}\) At the time of trial, doctors determined that Foucha was unable to distinguish right from wrong and was thus insane at the time of the offense.\(^\text{147}\) In 1988, the facility where he was committed recommended his release and the trial judge appointed the same two doctors that had examined Foucha prior to trial to examine him.\(^\text{148}\) This panel of doctors was reluctant to certify Foucha for release.\(^\text{149}\) The Court invalidated the Louisiana statute on which Foucha’s commitment was based and held that continued confinement was unconstitutional where the

\(^{141}\) Id. (finding that “to the extent that the Bail Reform Act permits pretrial detention on the ground that the arrestee is likely to commit future crimes, it is unconstitutional on its face”).

\(^{142}\) Id. at 750-51.

\(^{143}\) See Kansas v. Hendricks, 521 U.S. 346, 357 (1997) (discussing the importance of the precedent established in Foucha); see also Friedland, supra note 13, at 91 (stating that “[t]he most important case preceding the Hendricks decision, however, was probably Foucha v. Louisiana”).

\(^{144}\) 504 U.S. 71 (1992).

\(^{145}\) Id. at 74-75.

\(^{146}\) Id. at 73-74 (stating that “[t]he doctors reported that Foucha was unable to distinguish right from wrong and was insane at the time of the offense.”).

\(^{147}\) Id. at 73-74.

\(^{148}\) Id. at 74.

\(^{149}\) Id. at 74-75.
state could no longer show by clear and convincing evidence that
the individual was both mentally ill and dangerous.150

Justice Thomas, who wrote the majority opinion in Hendricks,
authored a dissent in which Justices Rehnquist and Scalia
joined.151 Thomas argued that there is no general fundamental
right to freedom from bodily restraint.152 Thomas thus concluded
that the Due Process Clause does not prevent a State from
confining an individual who has regained his sanity but
nonetheless remains dangerous.153

B. Kansas v. Hendricks154

In the years following Allen, courts reviewing the civil
confinement of sexually violent predators required that the
statute: (1) seeks to protect society from the dangerous behavior
of sexually violent predators; and (2) provides adequate
treatment after such confinement.155 As a result of Hendricks,
however, courts are now able to apply a much more lenient
standard in evaluating such statutes.156

In 1994, the State of Kansas passed the Sexually Violent
Predator Act.157 The Act was enacted in order to create “a

150 Id. at 86 (concluding that the State to meet its burden of proving that Foucha was
both “insane and dangerous by clear and convincing evidence in order to confine [him]
beyond his criminal sentence, when the basis for his original confinement no longer
exists” and that as such it would be unconstitutional to continue to confine Foucha).
151 Id. at 102 (Thomas, J., dissenting).
152 Id. at 118 (stating “[t]here is simply no basis in our society’s history or in the
precedents of this Court to support the existence of a sweeping, general fundamental
right to “freedom from bodily restraint” applicable to all persons in all contexts.”).
153 Id. at 124 (concluding “[f]inally, I see no basis for holding that the Due Process
Clause per se prohibits a State from continuing to confine in a ‘mental institution’—the
federal constitutional definition of which remains unclear—an insanity acquittee who has
recovered his sanity”).
155 See Wisconsin v. Carpenter, 197 Wis. 2d 252, 273-74 (Wis. 1995) (concluding
that the Wisconsin civil commitment statute “is aimed at protecting the public by providing
concentrated treatment for convicted sex offenders who are at a high risk to reoffend
based upon a mental disorder which predisposes them to commit acts of sexual violence”);
see also Grossman, supra note 90 at 502 (noting that the test to apply is “whether the
statute (1) sought to protect society from the dangerous behavior of a sexually violent
predator; and (2) whether adequate treatment was provided for after such confinement.”).
the civil confinement of a sexual predator though there was no known medical treatment
for his disorder, because his "lack of amenability to treatment does not preclude an
extension of his commitment"); see also Grossman, supra note 90, at 502-03 (commenting
that “courts are now free to apply a much more lenient standard than that which was
previously required to satisfy due process.”).
separate involuntary civil commitment process for the potentially long-term control, care and treatment of sexually violent predators . . . .”158 Leroy Hendricks was the first man that the State of Kansas attempted to commit under the Act.159 Hendricks challenged his confinement on several grounds, claiming that it violated the Due Process Clause, the Ex Post Facto Clause, and the Double Jeopardy Clause.160 After the Kansas Supreme Court invalidated the law, the State petitioned the Supreme Court for certiorari which was granted.161 The Supreme Court reversed the lower decision and affirmed the Act as Constitutional.162

Justice Thomas’ plurality opinion proposed two different interpretations of the Kansas Supreme Court’s holding.163 The first interpretation was that the Kansas Supreme Court had determined that Hendricks was not treatable under the Act and thus the sole purpose of his confinement was incapacitation.164 The Kansas Supreme Court thus concluded that absent a treatable illness, Hendricks could not be confined.165 However, the Supreme Court refused to adopt this reasoning stressing that they had never held that the Constitution prohibits a state from confining an individual for whom no treatment is available.166 The second interpretation offered by the Court was that the Kansas court concluded that although Hendricks was treatable, treatment was not the state’s overriding concern.167 The Court

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159 See Hendricks, 521 U.S. at 350 (stating that “[t]he state invoked the Act for the first time to commit Leroy Hendricks . . .”); see also Kimberly A. Dorsett, Note, Kansas v. Hendricks: Marking the Beginning of a Dangerous New Era in Civil Commitment, 48 DEPAUL L. REV. 113, 132 (1998) (stating "Hendricks was the first person committed under the SVP Act").
161 See id.
162 See id.
163 See id. at 365, 366-67.
164 See id. at 365 (stating “it is possible to read [the opinion of the lower court] as a determination that Hendricks’ condition was untreatable under the existing Kansas civil commitment statute, and thus the Act’s sole purpose was incapacitation.”).
165 See id. (stating “absent a treatable mental illness, the Kansas court concluded, Hendricks could not be detained against his will.”).
166 See id. at 366 (stating “[the Court has] 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.”).
167 See id. at 366-67 (stating “[a]lternatively, the Kansas Supreme Court’s opinion can be read to conclude that [although] Hendricks’ condition is treatable, that treatment was not the State’s ‘overriding concern.’”).
concluded that even adopting this determination of the state's motivation, it did not follow that the Act was necessarily punitive as it remained possible that treatment was at least an ancillary purpose.\textsuperscript{168} The Court thus held that involuntary confinement pursuant to the Act was not punitive.\textsuperscript{169}

In a dissent joined by Justices Stevens and Souter, Justice Breyer questioned the act's civil nature.\textsuperscript{170} Although Breyer agreed with the majority that the requirements of substantive due process had been met,\textsuperscript{171} he argued that the act imposed further punishment on Hendricks and thus violated the \textit{Ex Post Facto} clause.\textsuperscript{172} Breyer bases this argument on his disagreement with the majority's conclusion that the act is not punitive.\textsuperscript{173} In reaching his conclusion, Breyer discussed several factors. First, he distinguishes the Kansas Supreme Court's holding that treatment was not a significant purpose of the Act from the state court's opposite finding in \textit{Allen}.\textsuperscript{174} Second, he looks at the delay in treatment which results from the application of the Kansas statute to previously convicted offenders like Hendricks.\textsuperscript{175}

\textsuperscript{168} \textit{See id.} (noting that "... 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.").

\textsuperscript{169} \textit{See id.} at 365-67 (noting that where the State has "disavowed any punitive intent" and took such measures as limiting confinement to a small segment of particularly dangerous individuals, provided procedural safeguards, directed the segregation of confined persons from the general prison population and afforded the same status as others who have been civilly committed 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").

\textsuperscript{170} \textit{See Hendricks}, 521 U.S. at 373-74 (Breyer, J., dissenting) (questing whether the \textit{Ex Post Facto} Clause prohibits application of the Act to Hendricks, who committed his crime prior to Act's enactment).

\textsuperscript{171} \textit{See id.} at 374 (stating that the "Kansas Act's 'definition of 'mental abnormality' satisfies the 'substantive' requirements of the Due Process Clause").

\textsuperscript{172} \textit{See id.} at 379 (arguing that the Act's failure to "provide Hendricks (or others like him) with any treatment until after his release date from prison and only inadequate treatment thereafter ... and certain other, special features of the Act" leads to the conclusion that the Act was not "simply an effort to commit Hendricks civilly, but rather an effort to inflict further punishment upon him" thereby violating the \textit{Ex Post Facto} Clause).

\textsuperscript{173} \textit{See id.} 379-80 (finding "[c]ertain resemblances between the Act's 'civil commitment' and traditional criminal punishments" such as confinement and incapacitation and the use of prosecutors, procedural guarantees, and standards "traditionally associated with the criminal law").

\textsuperscript{174} \textit{See id.} at 385 (distinguishing \textit{Allen} by observing that the state had had a statutory duty to provide treatment designed to achieve recovery in a facility especially set aside to provide psychiatric care; no such safeguards are written into the Kansas Act).

\textsuperscript{175} \textit{See id.} at 385. Justice Breyer relies on the text of the Act which delays evaluation and the beginning of the commitment process until a few weeks prior to the release of the
Third, Breyer points out the Act's failure to consider less restrictive alternatives. Lastly, Breyer compares the Kansas Act to that of sixteen other states and concludes that the Kansas act does not require certain statutory features consistent with a punitive purpose. Justice Breyer categorizes these acts based on three factors: (1) whether the act delays treatment until after the offender has served his criminal sentence, (2) whether the state considers less restrictive alternatives, and (3) whether the act applies only prospectively or retrospectively. Based on these criteria he concludes that amongst the acts of these seventeen states, only the Kansas act both delays treatment and confinement and fails to consider less restrictive alternatives and also applies retrospectively. Breyer thus concludes that for Ex Post Facto Clause purposes the Kansas act has a punitive rather than purely civil purpose as applied to previously convicted sex offenders.

C. The Aftermath of Hendricks

In the opinion of many observers, the Hendricks decision eroded the right to treatment of sex offenders who are to be civilly confined. Some fear that in light of this decision, states
will be able to use treatment as a “hook” to ensure the constitutionality of civil confinement statutes without having any real intention of providing any meaningful treatment.\(^1\) Although cases subsequent to Hendricks have failed to address this problem, they have added some important dynamics to civil confinement jurisprudence.

In Seling v. Young,\(^2\) the Court rejected an “as applied” challenge to a civil commitment statute similar to the one in Hendricks.\(^3\) The Court examined the civil nature of the statute as the petitioner claimed that the act was punitive as applied to him.\(^4\) The Court denied the claim, holding that an “as-applied” challenge would prove unworkable in determining whether the act was criminal in nature and thus violating the Ex Post Facto and Double Jeopardy Clauses.\(^5\) The Court reasoned that allowing such a challenge would prevent a conclusive resolution as to the punitive nature of a statute and thus whether it was constitutionally valid.\(^6\)

(noting that the danger of the Hendricks decision is that it “implies that treatment has little if any bearing on whether a state’s decision to civilly commit a person comports with due process”); \(^7\) see also Grossman, supra note 90, at 503 (stating “after the Hendricks decision, court are now free to apply a much more lenient standard than that which was previously required ... ”).

See Gaston, supra note 181, at 227 (implying that whether or not the “criminal” in question receives treatment no longer matters in determining constitutionality); see also Weeks, supra note 78, at 1274 (explaining that although the Kansas statute in issue in Hendricks contained provisions which seemingly attributed the measure to the legislature’s desire for treatment, it lacked the actual intention to provide that treatment).

See id. at 260-61. The statute at issue in Seling functioned much like the one in Hendricks, when a person who has committed a sexually violent offense is about to be released, an “attorney files a petition alleging that that person is a sexually violent predator ... trigger[ing] a process for charging and trying the person as a sexually violent predator, during which he is afforded ... counsel and experts ... a probable cause hearing, and trial by judge or jury ... The Act also provides a procedure to petition for conditional release to a less restrictive alternative to confinement.” Id. at 254-55.

See id. at 261-63. The court declared that Hendricks made clear that whether an act is civil or punitive is a matter of statutory construction, derived from the text and legislative history. See id. “[C]learest is required to override legislative intent and conclude that an Act denominated civil is punitive in purpose or effect.” Id. at 254-55. Petitioners here failed to do so and the court therefore worked under the assumption that the Act was civil in nature. id.

Id. at 263 (stating that “[u]nlike a fine, confinement is not a fixed event ... it extends over time under conditions that are subject to change. The particular features of confinement may affect how a confinement scheme is evaluated to determine whether it is civil rather than punitive, but it remains no less true that the query must be answered definitively. The civil nature of a confinement scheme cannot be altered based merely on vagaries in the implementation of the authorizing statute”)

Id. (declaring that “an ‘as-applied’ analysis would prove unworkable” as it “would never conclusively resolve whether a particular scheme is punitive and would thereby
The Kansas Sexually Violent Predator Act was challenged before the Supreme Court of the United States for a second time in Kansas v. Crane. This challenge involved the Kansas Supreme Court's interpretation of Hendricks as requiring "a finding that the defendant cannot control his dangerous behavior". The State of Kansas argued that not only is such a finding not constitutionally necessary, but the Constitution permits confinement without any lack-of-control determination. The Court rejected both of these interpretations, holding that although Hendricks set forth no total or complete lack of control requirement, the state could nonetheless not confine a sexually violent individual without some lack of control determination.

The most recent of the major cases relevant to the civil confinement of sexual predators was Smith v. Doe, decided in 2003. Although Smith involved a challenge to a community notification law rather than a civil confinement statute, the Court's analysis of the act's civil nature was nonetheless similar. The Alaska law at issue contained both a notification requirement and a registration system requiring sex offenders to register if they were physically present in the State of Alaska. The petitioner claimed the act violated the Ex Post Facto Clause of the Constitution because its two components were applied retroactively. Like the claims in many of the cases discussed above, this challenge relied on the plaintiff's contention that the

prevent a final determination" as to a statute's constitutionality—a statute might remain in perpetual constitutional limbo awaiting an instance in which its heretofore just application exceeds the confines of the Constitution).

See id. at 411 (stating that "Kansas now argues that the Kansas Supreme Court wrongly read Hendricks as requiring the State always to provide that a dangerous individual is completely unable to control his behavior").

See id. (stating constitutional necessity of distinguishing between dangerous sexual offenders who require civil commitment versus those who can be dealt with in criminal proceedings alone).

See Smith, 538 U.S. at 90. A sex offender's knowing failure to comply with the Act results in criminal charges.

See id. at 92. Petitioner's claim invoked the well established framework for dealing with claims that a statute violates the Ex Post Facto Clause. The Court must "ascertain whether the legislature meant the statute to establish 'civil' proceedings." Kansas v. Hendricks, 521 U.S. 346, 361 (1997).
act was criminal in nature. The Court, relying on *Hendricks*, considered this primarily a question of statutory construction and gave deference to the stated intent of the state legislature. The Court held that where the challenger could not show that the effects of the law negate Alaska's intention to create civil regulation, the act is non-punitive and thus does not violate the Ex Post Facto clause.

IV. ANALYSIS: ESSENTIAL FEATURES OF A SEXUALLY VIOLENT PREDATOR STATUTE

With so many states now having sexually violent predator statutes and several more seeking to pass them in the future, it is of major importance to discuss what features of current statutes best advance the goals of civil confinement. This is particularly important as new states seeking to enact their own sexually violent predator laws will no doubt model their own after those of states whose laws have been upheld by the Supreme Court. As stated above, it is critical that states properly balance society's interest in protecting the public with the fundamental liberty and fairness interests of those whom the state is seeking to confine. It is asserted that the most ideal sexually violent predator statutes must include the features described below.

A. Individualized Treatment Plans

The specificity with which civil confinement statutes address treatment of confined individuals varies from detailed and
explicit to very broad and general. Some states require that each individual be treated in accordance with an individualized treatment plan. In order to ensure such treatment is provided there are often requirements that the treating authority keep detailed records regarding the treatment being provided to individual patients. Other states are much less protective of the right to treatment and thus define this right in a much broader manner. These state statutes are particularly problematic in light of the Hendricks decision and the erosion of the right to treatment.

It is argued that the treatment of confined individuals is of utmost importance in ensuring that sexual predator commitment programs are not abused as a method for incapacitating offenders permanently. Instead, the state should intend through treatment of the individual to progress towards a goal of reintegrating the offender into society. Since it is unlikely that any two offenders will be the same in the nature and root of their problems, it becomes essential that sexual predators are treated and evaluated as individuals rather than through a

199 See e.g., WASH. REV. CODE § 71.09.080 (West 2006) (providing a right to adequate care and individualized treatment); see also Committee on Criminal Law, Principles on Megan's Law, 52 THE RECORD 704, 710 (1997) (stating that individualized treatment plans for sex offenders are to be made by qualified professionals to ensure they address offender's individual pathology, serving both the individual and the community to prevent recidivism).

200 See MASS GEN LAWS ch. 123A, § 16 (2005) (requiring annual reports be submitted to clerks of the senate and house of representatives describing treatment offered and treatment provided to each person who has been committed); see also WASH. REV. CODE § 71.09.080(2) (West 2006) (stating that "[t]he department of social and health services shall keep records detailing all medical, expert, and professional care and treatment received by a committed person . . .").

201 See e.g., FLA. STAT. § 394.922 (2006) (noting that "[t]he long-term control, care, and treatment of a person committed under this part must conform to constitutional requirements"); see also IOWA CODE § 229A.9 (2005) (explaining "The involuntary detention or commitment of persons under this chapter shall conform to constitutional requirements for care and treatment.").

202 See Friedland, supra note 13, at 112 (commenting that "the Court no longer had to examine the circumstances of a commitment to determine whether the law met the treatment minimum; it could now simply look at the face of the law"); see also Weeks, supra note 78, at 1274 (suggesting that although premised on care and treatment, the statute at issue in Hendricks had no such intentions).

203 See Committee on Criminal Law, Principles on Megan's Law, 52 THE RECORD 704, 710 (1997) (stating that "[t]he treatment plan for a sex offender should be designed to address the individual pathology of the sex offender. The recommendation should incorporate the sex offender's personal history, characteristics, targets and modus operandi. The treatment plan should address each sex offender individually, because different sex offenders will require different plans . . ."); see also Friedland, supra note 13, at 81 (stating that although sexual predators may share similar characteristics, "there are many differences among them as well, preventing a clear "profile" from being developed").
general program treating all offenders in the same manner. Thus, individualized treatment plans allow professionals to examine the offenders and set forth a course of treatment that will present the best opportunity for the state to improve the condition of these offenders to the point that they are no longer a danger to society.\textsuperscript{204}

\textbf{B. Less Restrictive Alternatives}

Another important feature of civil confinement statutes is the availability of less restrictive alternatives to which a sexual predator can be assigned.\textsuperscript{205} These alternatives may include court ordered treatment in an environment that is less restrictive than total confinement.\textsuperscript{206} In states offering this option, the individual will be eligible for a less restrictive alternative provided certain requirements are met.\textsuperscript{207} Most significantly the person must no longer be at a high risk to reoffend.\textsuperscript{208} One factor

\textsuperscript{204} See Anita Schlank & Pam Bidelman, Transition - Challenges for the Offender and the Community, in \textit{THE SEXUAL PREDATOR VOLUME II} 10-7 (Anita Schlank and Fred Cohen ed., 1999) (arguing "[t]reatment programs and staff need opportunities to validate the sex offender's progress in a way that protects public safety, avoids revictimization or new victims, and enhances the offender's ability to function without incident in less restrictive environments"); see also Anita Schlank and Rick Harry, \textit{Examining Our Approaches to Sex Offenders & The Law: The Treatment of the Civilly Committed Sex Offender in Minnesota: A Review of the Past Ten Years}, 29 WM. MITCHELL L. REV. 1221, 1226-27 (2003) (noting that "it is extremely important that sex offenders are observed at all times during their treatment... Only through constant observation... can the staff be assured that the patients have progressed to a point where they can be gradually re-integrated into the community.").

\textsuperscript{205} See e.g., ARIZ. REV. STAT. § 36-3701(4) (2006) (defining less restrictive alternative as "court ordered treatment in a setting that is less restrictive than total confinement and that is conducted in a setting approved by the superintendent of the state hospital"); see also ARIZ. REV. STAT. § 36-3707 (B) (2006) (allowing the court to either commit the person to the custody of department of health services or order that the person be released to a less restrictive alternative after court or jury determines the person to be a sexually violent predator).

\textsuperscript{206} See WASH. REV CODE § 71.09.020 (6) (2005) (noting that the "less restrictive alternative" means court-ordered treatment in a setting less restrictive than total confinement"); see also \textit{In re Brock}, 995 P.2d 111, 113 (2000) (noting that "it is irrelevant that the treatment itself may be less restrictive than what is provided at the secure facility. Rather, it is the setting that must be less restrictive than total confinement.").

\textsuperscript{207} See IOWA CODE § 229A.8A (2) (2005) (providing conditions that individual must meet in order to be eligible for a less restrictive alternative); see also WASH. REV. CODE § 71.09.092 (West 2006) (requiring certain findings prior to release to a less restrictive alternative).

\textsuperscript{208} See IOWA CODE § 229A.1 (2005) (stating the general assembly's findings that sexually violent predators have a high likelihood of engaging in repeat acts and therefore require long-term care and treatment different from traditional treatment found in prison setting); see also IOWA CODE § 229A.8A (2005)(2)(a) (explaining that "[t]he committed person's mental abnormality is no longer such that the person is a high risk to reoffend.").
that differs from state to state is the time and manner in which an individual's release to a less restrictive alternative will be considered. Some states may consider less restrictive alternatives at the time of a finding that the person is a sexually violent predator,\(^{209}\) while others may only consider less restrictive alternatives as a form of conditional release after a certain period of confinement.\(^ {210}\) The latter is very important as a gradual transition period will allow treatment providers to monitor offenders as they demonstrate responsibility through gradually increased privileges.\(^ {211}\)

It is suggested that whether a state considers less restrictive alternatives for those it deems to be sexually violent predators provides an important insight into the state's intentions. It seems more likely that a state's intentions are truly civil if they consider the possibility of treating an offender in less than total confinement than if they put each offender deemed to be dangerous into a complete confinement facility without considering other options which would have a lesser effect on the individual's freedom. In his Hendricks dissent, Justice Breyer considered whether a statute considers less restrictive alternatives to be an important indicator of the legislature's true purpose.\(^ {212}\) He reasoned that a State intending to both help the individual and protect the public would seek to limit the restriction on an individual's liberty to no more than what is

\(^{209}\) See Ariz. Rev. Stat. § 36-3707(B) (2006) (providing a less restrictive alternative as an alternative to commitment after a finding that the person is a sexually violent predator); see also Ariz. Rev. Stat. § 36-3711(1-3) (2006) (allowing for release to a less restrictive alternative if person undergoes a specific course of treatment and obtains housing "sufficiently secure to protect the community").

\(^{210}\) See Cal. Welf. & Inst. Code § 6607(a) (West 2006) (allowing conditional release "[i]f the Director of Mental Health determines that the person's diagnosed mental disorder has so changed that the person is not likely to commit acts of predatory sexual violence while under supervision and treatment in the community"); see also Wis. Stat. Ann. § 980.08(1) (West 2006) (granting the right to petition "

\(^{211}\) See Schlank & Bidelman, supra note 204, at 10-1, 10-2 (commenting on the difficulty that sexual predators have in readjusting to society); see also Managing Sex Offenders in the Community: A National Overview, 27 (2003), at http://www.atsa.com/pdfs/Managing Sex Offenders in the Community-A National Overview.pdf (listing follow up treatment as an encouraged or mandatory procedure for sexual offenders as one of the principles of treatment).

\(^{212}\) See See Kansas v. Hendricks, 521 U.S. 346, 388 (1997) (Breyer, J., dissenting) (noting that "[t]his Court has stated that a failure to consider, or to use, 'alternative and less harsh methods' to achieve a nonpunitive objective can help to show that legislature's 'purpose . . . was to punish'")(quoting Bell v. Wolfish, 441 U.S. 520, 539 n.20 (1979)).
necessary for the protection of the public.\textsuperscript{213} In offering less restrictive alternatives, the state can protect society by both monitoring his release and treating him with the aim of reducing the likelihood that he will commit future offenses; while at the same time allowing the person to retain their liberty.

\textbf{C. Frequency of Reevaluation}

One feature that is fairly uniform in state sexual predator laws is the periodic reexamination of confined individuals. Most states require that an individual be reexamined once per year to ensure he still meets the requirements for confinement.\textsuperscript{214} Some states require even more frequent reevaluations for a period following initial commitment and then annually thereafter.\textsuperscript{215} The procedure and depth of this reexamination varies from state to state and may include a report filed by the confining authority assessing the current mental condition of the individual.\textsuperscript{216} Some states provide significant procedural protections to ensure individuals who are no longer dangerous are released. For example, the State of New Mexico provides “[a]t the expiration of the commitment order the client may be detained only after a new commitment hearing . . . .”\textsuperscript{217} Conversely, the State of Iowa has a rebuttable presumption that the individual should remain confined.\textsuperscript{218}

The author asserts that periodic review of the confined individual’s status should act to provide a procedure for ensuring

\begin{itemize}
\item \textsuperscript{213}See id. at 388 (noting that “[l]egislation that seeks to help the individual offender as well as to protect the public would avoid significantly greater restriction of an individual’s liberty than public safety requires”).
\item \textsuperscript{214}See e.g., \textsc{kA}N. STAT. ANN § 59-29a08(a) (2005) (requiring a current examination of the person’s mental condition once per year); see also \textsc{Wis. Stat. Ann.} § 980.08(1) (West 2006) (allowing a review of confinement after twelve months).
\item \textsuperscript{215}See 725 ILL. COMP. STAT. § 207/55(a) (West’s Smith-Hurd 2005)(a) (requiring a report within six months of initial confinement); see also \textsc{Wis. Stat. Ann.} § 980.08(1) (West 2006) (stating that committed persons can petition the committing court to modify its release 12 months since the initial commitment or at least 12 months have elapsed since the most recent release petition was denied).
\item \textsuperscript{216}See 725 ILL. COMP. STAT. § 207/55(b) (West’s Smith-Hurd 2005) (indicating the standard to which the examination should conform); see also \textsc{Wis. Stat. Ann.} § 980.08(3) (West 2006) (leaving the court to determine whether or not an examiner has the specialized knowledge).
\item \textsuperscript{217}N.M. STAT. ANN. § 43-1-12(C) (West 2006).
\item \textsuperscript{218}See \textsc{iowa Code} § 229A.8(1) (2006) (stating “[u]pon civil commitment of a person pursuant to this chapter, a rebuttable presumption exists that the commitment should continue”); see also \textsc{In re Detention of Shelby}, 710 N.W.2d 249, 250 (Iowa Ct. App. 2005) (holding that the previous version of the statute is facially constitutional).
\end{itemize}
that those who continue to be dangerous remain committed, while those whose conditions have improved to the point that they are no longer dangerous are released. An annual review can also function as a mechanism for reviewing the type of treatment being provided, its level of success and whether a modified treatment plan might be more successful. Lastly, these evaluations might consider whether the confined individual's condition has improved sufficiently that he might now be an appropriate candidate for a less restrictive alternative as discussed above.

D. Right to Petition for Release

Another feature that varies greatly from state to state is the right of a confined individual to petition for his release. While some states permit confined individuals to petition for release at any time, others are much more restrictive and only allow the person to petition for release with the permission of an official charged with his supervision. Many states provide a mutual right to petition for release allowing both the confined individual to petition for release and the supervising authority to authorize a petition for release upon a finding that the individual is no longer dangerous. Since there exists a great potential for a confined individual to abuse his right to petition for his own release by making frequent frivolous petitions, this privilege is

219 See Wis. Stat. Ann. § 980.08(1) (West 2006) (permitting any person committed under the act to petition the court for conditional release); see also 725 Ill. Comp. Stat. § 207/55(a) (West’s Smith-Hurd 2006) (requiring the Secretary to authorize the person to petition for his release if at any time the Secretary determines that the confined individual is no longer a sexually violent person).

220 See e.g. Wis. Stat. Ann. § 980.08 (West 2006) (providing the committed person a procedure to petition for release without authorization); see also Tex. Health & Safety Code Ann. § 841.122 (Vernon’s 2006) (requiring notice to the confined person of his right to make an unauthorized petition).

221 See 725 Ill. Comp. Stat. § 207/55 (West’s Smith-Hurd 2006) (failing to provide a procedure for petition for release without authorization); see also Cal. Welf. & Inst. Code § 6607(a) (West 2006) (giving the responsibility to the “Director of Mental Health” to make a “report and recommendation” for release).

222 See Ariz. Rev. Stat. Ann. § 36-3709 (2006) (allowing the director to permit the confined individual to petition for release upon the determination of the “superintendent of the state hospital or the director of the department of health services” and allowing the committed person to annually petition the court for conditional release without superintendent or director approval); see also Wash. Rev. Code § 71.09.090(1) (West 2006) (allowing the secretary to petition for release but noting that this does not prohibit the committed person to do so without approval).
often qualified and can be forfeited by those engaging in such behavior.223

It is put forth that when exercised and administered properly, this mutual ability to petition for release can provide an important safeguard of the liberties of the individual confined. On the one hand, by giving the person charged with the care of the individual the ability to permit a petition for release, this process hopefully ensures that when an individual is clearly no longer a sexually violent predator he will be considered for release. Similarly, the individual is protected by possessing ability to petition himself for release without the need for others to first determine that such a petition is appropriate. Unfortunately this can become a hollow right if the reviewing authority never seriously considers these petitions. Nonetheless, the more steps that are taken to protect an individual's rights the more likely that the individual will gain a good faith determination of his condition and will thus be released when appropriate.

E. The Best of the Statutes

Of the sixteen states that currently have statutes for the civil confinement of sexual predators, less than a handful include all of the features described above. Although most of the statutes include some of these features, only three include all of them in some form. These are the statutes enacted in the states of New Mexico,224 Texas,225 and Washington.226 These statutes make these important procedures available to their respective states while also providing important safeguards. Each includes a specific and individualized right to treatment.227 These statutes

223 See FLA. STAT. § 394.920 (2006) (providing for the individual to petition for release at any time provided he has not previously abused the procedure by filing frivolous petitions); see also Kelly A. McCaffrey, Comment, The Civil Commitment of Sexually Violent Predators in Kansas: A Modern Law for Modern Times, 42 KAN. L. REV. 887, 894 (1994) (commenting that “[i]f the court determines that the petition is frivolous, the court must deny it without a hearing.”).
224 N.M. STAT. ANN. §§ 43-1-1- 43-1-25 (West 2006).
225 TEX. HEALTH & SAFETY CODE ANN. § 841.001 (Vernon's 2005).
226 WASH. REV. CODE §§ 71.09.010 - 71.09.902 (West 2006).
227 See N.M. STAT. ANN. § 43-1-7 (West 2006) (stating “[e]ach resident client receiving mental health services shall have the right to prompt treatment pursuant to an individualized treatment plan”); see also TEX. HEALTH & SAFETY CODE ANN. § 841.083(a) (West 2005) (requiring the council to “approve and contract for the provision of a treatment plan for the committed person to be developed by the treatment provider”);
also consider less restrictive alternatives to complete confinement. Like most others, these states also provide for an annual examination to determine whether continued confinement is necessary. Finally, these statutes provide a right to the confined individual to petition for release without permission of the confining authority and give the authority the ability to allow a petition upon a determination that the person is no longer dangerous. It is asserted that these three statutes provide proper protections of the rights of confined individuals and thus do the best job possible of balancing society's interests with the rights of those the states seek to confine.

**CONCLUSION**

Given the nature of the problem of sexual predators, especially those who prey on children, there is always sure to be strong feelings favoring harsher penalties and confinement of these individuals. On the other hand, many groups dedicated to protecting certain fundamental rights are sure to feel equally as strong that it is not only fundamentally unfair but
unconstitutional to confine an individual against his will once his criminal sentence has been served. As a result this issue must be handled delicately considering both the interests of protecting our neighborhoods and of preserving the fundamental right to liberty. It is asserted that when one interest has to prevail the scales must tip in favor of protecting society. If they are properly drafted and administered, these sexually violent predator statutes can adequately address both of these concerns. They can effectively help protect society from sexual predators by incapacitating them and at the same time confine individuals in such a manner which is both consistent with the constitution and fair. Additionally, we can strive to treat those individuals who are amenable to such treatment with the goal of reintegrating them into society confident that they no longer pose a risk. This is not to say that civil confinement should be used liberally, but should instead be reserved for only those offenders who have exhibited serious mental characteristics which render them dangerous to our society. Given the nature of sex crimes and the long term effects they cause their victims, we can not release offenders who we know remain dangerous into society where they may strike again.