

## NOTE

### RESIDENT EVIL: A REFORMATION OF U.S. CIVIL CONFINEMENT LAW

*Jessica Morak\**

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### I. INTRODUCTION

Traditionally, sexual offenders have attained the reputation as the most dangerous category of criminals.<sup>1</sup> Issues concerning this population tend to ignite powerful and emotional responses.<sup>2</sup> These responses, unique to this population,<sup>3</sup> blossom out of the assumption that *all* sexual offenders are highly dangerous<sup>4</sup> criminals, predisposed to and unable to refrain from the commission of profane acts of sexual violence.<sup>5</sup> This perception underlies and propels the development of special legislation designed to manage individuals who repeatedly commit criminal sexual acts. This Note will examine one method of such management: the U.S. system of civil confinement for “sexually

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\* Associate Editor, *Cardozo Journal of International and Comparative Law*. J.D. Candidate, Benjamin N. Cardozo School of Law; May 2014; B.A. University of Michigan, May 2011. Thank you to Professor Jonathan Oberman for his endless stream of guidance and unwavering support. Thank you to my favorite Maple Leaf Paul, the only person who actually wanted to read this Note. Thank you to my roommates, Mandy and Sara, without whom I could not get through the day. Thank you to my father, my eternal source of inspiration. This Note is dedicated to the memory of my grandmother, Helen Kohlman -- a pioneer in law and life.

<sup>1</sup> Michael Petrunik, *The Hare and the Tortoise: Dangerousness and Sex Offender Policy in the United States and Canada*, 45 *CAN. J. CRIMINOLOGY & CRIM. JUST.* 43, 44 (2003) (“Those offenders who sexually assault and kill or maim their victims . . . are arguably among the most feared as well as loathed offenders in contemporary society.”) [hereinafter Petrunik, *Hare and the Tortoise*].

<sup>2</sup> *Id.* (noting that, when it comes to issues regarding sexual offenders, “powerful [and] primal feelings are at work.”).

<sup>3</sup> In particular, sexual offenders, unlike other types of violent criminals, are perceived as being compelled to re-offend, and, therefore, in need of additional methods of control. *See id.* at 45-46 (arguing that a repeat non-violent sex offender may be perceived as *more dangerous* than an individual who commits one non-sexually motivated homicide).

<sup>4</sup> *Id.* at 45.

<sup>5</sup> *Id.* at 45-46.

violent predators.”<sup>6</sup> This legal practice allows for the indefinite detention of a sexually violent predator, in a specialized facility, following the expiration of a criminal sentence.<sup>7</sup>

The U.S. system of civil confinement is based on the concept of “dangerousness.”<sup>8</sup> Dangerousness refers to “the capacity of persons to harm themselves or others, physically, psychologically, or morally, and their likelihood of doing so.”<sup>9</sup> When assessing an individual’s dangerousness, the perceived likelihood of that offender committing a harmful act in the future is combined with a prediction about how serious that harm is considered to be.<sup>10</sup> Ingrained in the concept of dangerousness is the assumption that these offenders are driven to commit these heinous acts by uncontrollable sexual desires and impulses.<sup>11</sup> Systems of indefinite confinement, therefore, were designed to effectuate the incapacitation of this population of criminals, whose inability to be deterred<sup>12</sup> presents a continuing danger to public safety.

Beginning in the 1990s, state legislatures passed sexually violent predator statutes, which contain the provisions for post-sentence confinement.<sup>13</sup> Individuals confined under these statutes are committed to specialized facilities, where they will remain until deemed to no longer pose a danger to themselves or their community.<sup>14</sup> Generally, requests for civil confinement proceedings are filed by the State in

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<sup>6</sup> This phrase is used to refer to the specific population of sexual offenders who require civil confinement. See Raquel Blacher, Comment, *Historical Perspective of the “Sex Psychopath” Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV 889, 907 (1995) (noting that the Washington legislature instituted the system of civil confinement for “a certain class of sex offenders — ‘sexually violent predators.’”).

<sup>7</sup> See ROXANNE LIEB & SCOTT MATSON, WASH. STATE INST. FOR PUB. POL’Y, SEXUAL PREDATOR COMMITMENT LAWS IN THE UNITED STATES: 1998 UPDATE 2 (1998) (stating that sexually violent predator commitment occurs after the completion of a criminal sentence).

<sup>8</sup> Petrunik, *Hare and the Tortoise*, *supra* note 1, at 45-46.

<sup>9</sup> *Id.* at 45 (internal citation omitted). See also Michael Petrunik et al., *American and Canadian Approaches to Sex Offenders: A Study of the Politics of Dangerousness*, 21 FED. SENT’G REP 111, 111 (2008) (defining “dangerousness” as “the combination of propensity to commit acts of grave harm (physical, psychological, or moral) against particularly vulnerable segments of the population—children and women—and a ‘high’ probability of multiple harmful acts occurring over long periods of time unless special controls are exercised.”) [hereinafter Petrunik, *Politics of Dangerousness*].

<sup>10</sup> Petrunik, *Hare and the Tortoise*, *supra* note 1, at 45.

<sup>11</sup> Petrunik, *Politics of Dangerousness*, *supra* note 9, at 111.

<sup>12</sup> In other words, individuals who remain undeterred by the imposition of previous fixed criminal sanctions. Petrunik, *Hare and the Tortoise*, *supra* note 1, at 46.

<sup>13</sup> LIEB & MATSON, *supra* note 7, at 2.

<sup>14</sup> *Id.*

anticipation of the scheduled release of an offender from prison.<sup>15</sup> Most offenders who become the subject of a civil confinement proceeding have committed sexually violent offenses in the past.<sup>16</sup>

In Part II of this Note, the origin of civil confinement in the U.S. is explored by examining the legislation that preceded sexually violent predator laws. These statutes, known as the sexual psychopath laws, used commitment as an alternative to criminal sentences.<sup>17</sup> These statutes will be used to critique the pre-requisite of incarceration under sexually violent predator statutes. Part II then details how the repeal of these statutes came about and introduces the first sexually violent predator statute: the Washington Sexually Violent Predator Act. In Part III, the body of civil confinement case law is laid out, starting with the landmark decision of *Kansas v. Hendricks*.<sup>18</sup> Additionally, Part III discusses any due process issues involved in the State's decision to involuntarily civilly commit a sexually violent predator. This Note will then focus on whether or not the pre-commitment requirement of incarceration, under sexually violent predator statutes, truly comports with this standard.

Part IV introduces and explains the Canadian approach to managing dangerous sexual offenders under the Dangerous Offender laws. The Dangerous Offender provisions are codified in the Criminal Code of Canada and impose indeterminate prison sentences upon dangerous offenders. In particular, it will emphasize how the procedures effectuating indefinite incapacitation in Canada, unlike in the U.S., occur before confinement. Next, the current procedure for civil confinement in the U.S. is demonstrated by focusing on Article 10 of New York's Mental Hygiene Law, enacted as part the Sex Offender Management and Treatment Act ("SOMTA").<sup>19</sup> A comparison of these two systems reveals that while both seek to indefinitely confine repeat sexual offenders, the timeline for when the respective procedures take place is entirely distinct.

Part V focuses on one particular critique of civil confinement laws.

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<sup>15</sup> *Kansas v. Hendricks*, 521 U.S. 346, 352 (1997). Civil confinement proceedings can also be used to confine individuals found incompetent to stand trial for a sexually violent offense, as well as individuals found to be "not guilty" of a sexually violent offense, by reason of mental disease or defect. *See id.*

<sup>16</sup> LIEB & MATSON, *supra* note 7, at 2. ("Predator laws generally target repeat sex offenders.").

<sup>17</sup> *Id.*

<sup>18</sup> *Hendricks*, 521 U.S. at 346. *See also* LIEB & MATSON, *supra* note 7, at 1.

<sup>19</sup> N.Y.S. OFFICE OF MENTAL HEALTH, 2010 ANNUAL REPORT ON THE IMPLEMENTATION OF MENTAL HYGIENE LAW ARTICLE 10: SEX OFFENDER MANAGEMENT AND TREATMENT ACT OF 2007 pt. 3 (2011).

This critique centers on the scheme's effect of delaying the evaluation and treatment of sexually violent predators until after the offender has substantially completed his or her criminal sentence. After discussing the financial and treatment-oriented disadvantages associated with first mandating individuals to a period of incarceration, this Note proposes the adoption of a "hybrid" system. This "hybrid" system combines the Canadian procedure for evaluating dangerousness pre-confinement with the practices of the earlier sexual psychopath legislation. This system does not require the offender to first serve out a criminal sentence. Rather, following a civil confinement proceeding, which will occur after the completion of a sentencing hearing, a qualifying individual will be committed immediately to an already established specialized confinement center.

## II. HISTORY AND DEVELOPMENT OF U.S. CIVIL CONFINEMENT LAWS

### A. *The Sexual Psychopath Laws*

The history of the U.S. system of civil confinement of sexually violent predators has its roots in sexual psychopath statutes enacted in the 1930s.<sup>20</sup> There were two main objectives behind these statutes: (1) protect society through incapacitation of the offender, and (2) rehabilitate the offender.<sup>21</sup> These objectives were achieved by removing the offender from society through civil commitment, which served as an alternative to incarceration.<sup>22</sup> Sexual psychopath laws relied on the assumption that the commission of a sex crime indicated the presence of a mental disorder, landing the issue more appropriately under the authority of the mental health system than the penal system.<sup>23</sup> Sexual psychopaths were considered to be among the population of mentally ill individuals not fit for punishment since they could not be

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<sup>20</sup> LIEB & MATSON, *supra* note 7, at 1.

<sup>21</sup> Blacher, *supra* note 6, at 901. See also Alan H. Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. CRIM. L. & CRIMINOLOGY 215, 215 (1960).

<sup>22</sup> Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69, 71 (1996) (stating that this approach "was assumed preferable to conviction and penal incarceration.").

<sup>23</sup> Frederick J. Hacker & Marcel Frym, *The Sexual Psychopath Act in Practice: A Critical Discussion*, 43 CALIF. L. REV. 766, 766 (1955) (explaining that the influential forces behind the sexual psychopath statutes were medical and legal leaders who believed that sex offenders suffered from mental disorders and therefore should be treated rather than punished).

blamed for their impulses.<sup>24</sup> Although the statutes' definition of "psychopathic" differed between the states, generally, the term was used to describe an individual who lacked the power to control his or her sexual impulses and/or possessed a criminal propensity for committing sexual offenses.<sup>25</sup>

The sexual psychopath laws were designed to reflect the assumption that the mental defects causing the commission of sexual offenses were curable and treatable.<sup>26</sup> The emphasis on institutionalization in lieu of incarceration is a unique characteristic of the sexual psychopath statutes. This feature sets these laws apart from the later enacted sexually violent predator statutes and the modern system of civil confinement. The sexual psychopath laws furthered the growing belief that mental illness, which did not meet the criterion for "legal insanity," still warranted "special treatment [which was] somewhat different from the customary penal law enforcement procedure."<sup>27</sup>

The question then became, what kind of "special treatment" should be imposed? As stated above, protection of the public was a significant legislative aim.<sup>28</sup> As such, it was a considerable factor in determining what type of special treatment would be imposed.<sup>29</sup> The era between the 1930s and the 1950s saw an increased level of public anxiety concerning the danger posed by sexual offenders.<sup>30</sup> The same assumptions that had previously served to support the gusto for treatment, rather than incarceration, would similarly be used to buttress the argument advocating for the offender's removal from society. Since

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<sup>24</sup> Blacher, *supra* note 6, at 899 (stating that because *sexual psychopaths* had no control over their impulses, they suffered from a mental defect and were, therefore, not responsible for the actions caused by their behavior). *See also* *Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945) (noting "our collective conscience does not allow punishment where it cannot impose blame.").

<sup>25</sup> Swanson, *supra* note 21, at 215.

<sup>26</sup> Additionally, these statutes assumed that sexual psychopaths could be distinguished from other sex offenders (i.e. those without psychopathic personalities). Schulhofer, *supra* note 22, at 71. Lastly, the laws assumed that mental health professionals are capable of reliably predicting which offenders will recidivate in the future. *Id.* at 72; *see also* Edwin H. Sutherland, *The Sexual Psychopath Laws*, 40 J. CRIM. L. & CRIMINOLOGY 543, 544 (1950) (commenting that this legislation assumes that "[a] sexual psychopath can be identified with a high degree of precision even before he has committed any sex crimes.").

<sup>27</sup> Hacker & Frym, *supra* note 23, at 766.

<sup>28</sup> *See* Swanson, *supra* note 21, at 215.

<sup>29</sup> Blacher, *supra* note 6, at 901 ("State legislatures introduced their crime bills as 'the appropriate measures . . . to protect society more adequately from aggressive sexual offenders'").

<sup>30</sup> This surge of anxiety is due in part to the fact that mass media was becoming drastically more sophisticated, leading to increased and widespread publicity of heinous sexual crimes. *Id.* at 899. *See also* Swanson, *supra* note 21, at 215.

the public believed sexual psychopaths were incapable of controlling their deviant impulses, the public emphasized that the offender would continue committing sexual offenses if given the opportunity to remain in society.<sup>31</sup> Therefore, the sexual psychopath statutes reflected a societal demand for more aggressive and restrictive protection from these dangerous “creatures,”<sup>32</sup> by way of mandatory confinement of the population to institutions.<sup>33</sup> Under sexual psychopath laws, confinement continued until the offender was fully cured, or until the offender was no longer deemed a “menace to others.”<sup>34</sup>

Beginning in the 1970s, several challenges to the sexual psychopath laws had been voiced by a number of influential private groups.<sup>35</sup> First, critics of the sexual psychopath statutes argued that the statutes’ definition of “mental illness” was unreasonably broad, so as to include “almost any mental aberration or emotional disorder.”<sup>36</sup> Second, throughout the 1980s, the notion that the commission of a sex offense, on its own, was not indicative of the presence of a mental illness gained widespread recognition.<sup>37</sup> Third, the definition and criteria for a designation of sexual psychopathy lacked national uniformity.<sup>38</sup> Lastly, the 1980s witnessed a political and economic shift favoring de-institutionalization.<sup>39</sup> All of these contributing factors led to the eventual disuse and formal repeal of most of the sexual psychopath laws. By the 1990s, the idea of punishment as a valued

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<sup>31</sup> Simply incarcerating these offenders for their crimes was not seen as adequate protection for potential victims, as the offender would later re-enter society once their debt was paid. Blacher, *supra* note 6, at 899 (explaining that “[b]ecause of their inability to control their behavior,” society had little hope that sexual psychopaths would ever desist). *See also* Sutherland, *supra* note 26, at 544.

<sup>32</sup> Sexual criminals were referred to as “creatures” in a 1948 magazine, a term indicative of the intense public fear of these types of offenders during this period. Blacher, *supra* note 6, at 899 & n.89.

<sup>33</sup> Swanson, *supra* note 21, at 215 n.6 (“[T]he frequency of sex crimes within this state necessitates that appropriate measures be adopted to protect society more adequately from aggressive sexual offenders; . . . [S]ociety as well as the individual will benefit by a civil commitment which would provide for indeterminate segregation and treatment of such persons.” (quoting the New Hampshire Sexual Psychopath Statute, N.H. REV. STAT. ANN. § 173.1 (1955))).

<sup>34</sup> Blacher, *supra* note 6, at 898.

<sup>35</sup> Schulhofer, *supra* note 22, at 72. The Group for the Advancement of Psychiatry was one such notable group advocating for the repeal of the sexual psychopath statutes. *Id.* at 72 n.11.

<sup>36</sup> *Id.* at 72. This expansive definition enabled the confinement of individuals labeled as mentally ill, who had been charged with only minor or non-aggressive sexual offenses (such as peeping, flashing, or non-aggressive touching). Petrunik, *Politics of Dangerousness*, *supra* note 9, at 114.

<sup>37</sup> Blacher, *supra* note 6, at 906.

<sup>38</sup> *See* Swanson, *supra* note 21, at 216.

<sup>39</sup> Schulhofer, *supra* note 22, at 72.

method of sex offender management had re-gained popularity.<sup>40</sup> This shift would be crucial to the development of sexually violent predator laws.

*B. First of Its Kind: The Washington Sexually Violent Predator Statute*

The question of civil confinement first gained public attention in the 1990s, largely due to the act of violence committed by Earl Shriner in 1989.<sup>41</sup> Shriner kidnapped, raped, and mutilated<sup>42</sup> a seven-year-old boy in Tacoma, Washington.<sup>43</sup> Shriner had previously served a ten-year sentence for the kidnapping and sexual assault of two teenage girls.<sup>44</sup> Towards the end of this sentence, prison officials took steps to further detain Shriner due to the nature of the instant offense, his lengthy criminal record,<sup>45</sup> and previous history of institutionalization.<sup>46</sup> Before his release in 1987, correction officials attempted to use Washington's Involuntary Treatment Act (a civil mental health law)<sup>47</sup> to confine Shriner to a state psychiatric hospital, believing that he was too dangerous to be released back into the public.<sup>48</sup> Despite his considerable criminal record and demonstrated propensity of violence towards children,<sup>49</sup> Shriner was not eligible for involuntary commitment because he did not possess the requisite elements for hospitalization.<sup>50</sup>

First, Shriner did not suffer from an active mental disorder as required by civil mental health legislation for involuntary

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<sup>40</sup> Blacher, *supra* note 6, at 907.

<sup>41</sup> *Id.* at 908 ("It was not until the violent sexual attack on a seven-year-old boy, however, that . . . the Washington legislature was dramatically kindled into a storm of community shock and outrage.").

<sup>42</sup> As a result of Shriner's brutal assault, the young boy's penis was severed. ROXANNE LIEB, WASH. STATE INST. FOR PUB. POL'Y, WASHINGTON'S SEXUALLY VIOLENT PREDATOR LAW: LEGISLATIVE HISTORY AND COMPARISONS WITH OTHER STATES 1 (1996).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Shriner had a twenty-four year record of demonstrated violence towards young people. Barry Siegel, *Locking Up 'Sexual Predators': A Public Outcry in Washington State Targeted Repeat Violent Sex Criminals. A New Preventive Law Would Keep them in Jail Indefinitely*, L.A. TIMES, May 10, 1990, at A1; *see also* Blacher, *supra* note 6, at 908 (stating that Shriner's history of violent crime included the murder of a schoolmate).

<sup>46</sup> Petrunik, *Hare and the Tortoise*, *supra* note 1, at 48 (explaining that Shriner had been involuntarily committed during his adolescence).

<sup>47</sup> *Id.*

<sup>48</sup> Blacher, *supra* note 6, at 909.

<sup>49</sup> Shriner had once confessed to a prison cellmate that, "he wanted a van equipped with cages so he could capture children, sexually abuse them, and then murder them." *Id.*

<sup>50</sup> Petrunik, *Hare and the Tortoise*, *supra* note 1, at 48 ("He failed to qualify for involuntary commitment under civil mental health legislation on his release, despite the discovery of plans he had made to torture and rape children.").

hospitalization.<sup>51</sup> Second, Shriner had not committed any recent “overt acts,” thereby failing to establish that he posed an *imminent* danger<sup>52</sup> to himself and/or to his community.<sup>53</sup> The inability to commit Shriner, a sexual predator with a demonstrated history of violence, to a mental institution was described as “a ‘gap in [the] law and administrative structures [that] allow the release of known dangerous offenders who are highly likely to commit very serious crimes.’”<sup>54</sup> In an attempt to bridge this gap, the Washington legislature enacted the Washington Sexually Violent Predator Law,<sup>55</sup> instituting a unique civil commitment system targeted at sexually violent predators.<sup>56</sup>

This statute was the first<sup>57</sup> to identify the new<sup>58</sup> and narrower<sup>59</sup> legislative category of sexually violent predators. The most controversial aspect of sexually violent predator statutes is the post-sentence commitment feature.<sup>60</sup> Post-sentence commitment involves the involuntary and indefinite<sup>61</sup> commitment of this category of offenders, in addition and subsequent to the offender’s completion of their criminal sentence.<sup>62</sup> In this respect, the sexually violent predator statutes differ significantly from the preceding sexual psychopath laws, which implemented institutionalization as an *alternative* to incarceration.<sup>63</sup> The Washington Sexually Violent Predator Law codified the definition of a sexually violent predator.<sup>64</sup> This designation was intended to apply to offenders convicted of and incarcerated for the

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<sup>51</sup> See Blacher, *supra* note 6, at 909; see also Petrunik, *Politics of Dangerousness*, *supra* note 9, at 114.

<sup>52</sup> *Id.*

<sup>53</sup> Blacher, *supra* note 6, at 909; see also LIEB & MATSON, *supra* note 7, at 2.

<sup>54</sup> Blacher, *supra* note 6, at 907 (quoting GOVERNORS TAX FORCE ON COMMUNITY PROTECTION, DEP’T OF SOC. AND HEALTH SERVS., FINAL REPORT II-20 (1989)).

<sup>55</sup> 1990 Wash. Legis. Serv. 3 (West), codified at WASH. REV. CODE ANN. §§ 71.09.010 *et seq.* (West 1991).

<sup>56</sup> Blacher, *supra* note 6, at 910.

<sup>57</sup> Schulhofer, *supra* note 22, at 74.

<sup>58</sup> Robert M. Wettstein, *A Psychiatric Perspective on Washington’s Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 597, 599 (1992).

<sup>59</sup> Petrunik, *Politics of Dangerousness*, *supra* note 9, at 114.

<sup>60</sup> See LIEB & MATSON, *supra* note 7, at 1-2.

<sup>61</sup> Barbara K. Schwartz, *The Case Against Involuntary Commitment*, in THE SEXUAL PREDATOR: LAW, POLICY, EVALUATION AND TREATMENT 4-1, 4-5 (Fred Cohen & Anita Schlink eds., 1999) (“Commitments are indeterminate, based on an offender’s assessed continued need for treatment and on the desire to ensure public safety.”).

<sup>62</sup> LIEB & MATSON, *supra* note 7, at 1-2.

<sup>63</sup> Wettstein, *supra* note 58, at 600.

<sup>64</sup> “[A]ny person who has been *convicted of or charged with a crime of sexual violence* and who *suffers from a mental abnormality or personality disorder* which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” WASH. REV. CODE ANN. § 71.09.020(18) (West 1990) (emphasis added).

commission of prior sexual offenses.<sup>65</sup> Although these offenders had previously been deemed appropriate subjects only for punitive measures, the Washington Sexually Violent Predator Law proclaimed that they also required civil mental health intervention.<sup>66</sup>

### III. CIVIL CONFINEMENT JURISPRUDENCE

#### A. *Kansas v. Hendricks*

In response to concerns over inadequate measures of protection against sexually violent predators, the Kansas State legislature enacted the Sexually Violent Predator Act in 1994.<sup>67</sup> The first offender committed under this statute was Leroy Hendricks, a self-professed pedophile,<sup>68</sup> whose prison term was nearing expiration when the statute was ratified.<sup>69</sup> In an attempt to prevent Hendricks from re-entering society, the State petitioned to have him civilly committed under Kansas' Sexually Violent Predator Act as a sexually violent predator. A jury trial found that Hendricks met this definition.<sup>70</sup> After serving nearly ten years in prison for his most recent offense,<sup>71</sup> he was involuntary committed to the custody of the Secretary of Social and Rehabilitation Services.<sup>72</sup>

Hendricks appealed his commitment on “‘substantive’ due process, double jeopardy, and ex post facto grounds.”<sup>73</sup> In 1996, the Kansas

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<sup>65</sup> WASH. REV. CODE ANN. § 71.09.025(1)(a)(i) (stating that the prosecuting attorney should be notified that an offender may meet the definition of a sexually violent predator “three months prior to: [t]he anticipated release from total confinement of a person who has been convicted of a sexually violent offense”).

<sup>66</sup> Schwartz, *supra* note 61, at 4-5.

<sup>67</sup> KAN. STAT. ANN. § 59-29a(01) (1994) (stating that Kansas' existing civil commitment procedures were inadequate to deal with the special risks posed to society by sexually violent predators, thereby creating the need for “a separate involuntary civil commitment process for the potentially long-term control, care and treatment of sexually violent predators”). *See also* *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997) (“The Kansas Legislature enacted the Sexually Violent Predator Act in 1994 to grapple with the problem of managing repeat sexual offenders.”).

<sup>68</sup> Leroy Hendricks, similar to Earl Shriner, had a long history of engaging in acts of child molestation. *See id.* at 353-54. Hendricks agreed that he was and continued to be a pedophile, harboring feelings of sexual desire towards children, which he was unable to control when he was “stressed out.” *Id.* at 360. For a discussion of the Court's reliance on this information in deciding that Hendricks was an appropriate candidate for civil confinement, *see id.* (“This admitted lack of volitional control . . . adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.”).

<sup>69</sup> *Id.* at 350.

<sup>70</sup> *Id.* at 355.

<sup>71</sup> In 1984, Hendricks was convicted of sexually abusing two 13-year-old-boys. *Id.* at 353.

<sup>72</sup> *See id.* at 353-54.

<sup>73</sup> *Id.* at 350.

Supreme Court had invalidated the Act in *In re Hendricks*.<sup>74</sup> Without addressing the double jeopardy or ex post facto claims,<sup>75</sup> the Kansas Supreme Court held that the Act violated the Due Process Clause of the Fourteenth Amendment.<sup>76</sup> The court engaged in a lengthy discussion of the prior case law concerning the involuntary civil commitment of mentally ill individuals.<sup>77</sup> The court relied mostly on the holdings of *Foucha v. Louisiana*<sup>78</sup> and *Addington v. Texas*,<sup>79</sup> and concluded that the Kansas Sexually Violent Predator Act violated the constitutional standard set forth in those cases.<sup>80</sup>

*1. The Due Process Standard for Involuntary Civil Commitment of Mentally Ill Persons*

The Due Process Clause of the Fourteenth Amendment mandates that a state seeking to involuntarily commit an individual to a mental institution in a civil proceeding, must comply with two requirements. The state must establish, by clear and convincing evidence, that the individual: (1) suffers from a mental illness, *and* (2) poses a current danger to himself and/or others.<sup>81</sup> In *Foucha v. Louisiana*, the Court held that the State could not continue the confinement of insanity acquitee,<sup>82</sup> Terry Foucha, in a state mental hospital, since he could no longer be considered mentally ill.<sup>83</sup> Although it was determined that Foucha suffered from antisocial personality disorder,<sup>84</sup> the Court had previously held that this affliction does not constitute a mental disease.<sup>85</sup> Therefore, Foucha could no longer be considered legally insane or mentally ill.<sup>86</sup> As such, any further confinement of Foucha would be subjected to the constitutional procedures for involuntary civil

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<sup>74</sup> *In re Hendricks*, 912 P.2d 129, 138 (Kan. 1996).

<sup>75</sup> *Hendricks*, 521 U.S. at 356. These claims are discussed *infra* in Part III.C.

<sup>76</sup> *In re Hendricks*, 912 P.2d at 138.

<sup>77</sup> *See id.* at 133-38.

<sup>78</sup> 504 U.S. 71 (1992) (discussed *infra* Part III.A.1).

<sup>79</sup> 441 U.S. 418 (1979) (discussed *infra* Part III.A.1).

<sup>80</sup> *In re Hendricks*, 912 P.2d at 138.

<sup>81</sup> *Foucha*, 504 U.S. at 86; *Addington*, 441 U.S. at 421.

<sup>82</sup> Terry Foucha, arrested for aggravated burglary and illegal discharge of a firearm, was found not guilty by reason of insanity by a trial court in 1984. *Foucha*, 504 U.S. at 73-74.

<sup>83</sup> *Id.* at 85-86. In 1988, a panel of staff members at the psychiatric facility that Foucha had been committed to determined that Foucha showed no signs of mental illness. *Id.* at 74.

<sup>84</sup> *Id.* at 75.

<sup>85</sup> *Id.* A question still remained as to whether or not Foucha still posed a danger to himself or others. *Id.* at 74-75 (a report detailing an evaluation of Foucha by the same two doctors who had conducted his pretrial examination stated, “[w]e cannot certify that he would not constitute a menace to himself or others if released.”).

<sup>86</sup> *Id.* at 85.

commitment proceedings set forth in *Addington v. Texas*.<sup>87</sup>

*Addington* dictated, and *Foucha* affirmed, that constitutional civil commitment proceedings require the State to establish by clear and convincing evidence that the individual is both mentally ill and meets the requirements for dangerousness.<sup>88</sup> To hold otherwise, the Court noted, would violate state law by allowing confinement of non-mentally ill<sup>89</sup> individuals, solely upon a finding of dangerousness.<sup>90</sup> Relying on these constitutional requirements, the Kansas Supreme Court, in *In re Hendricks*, held that the Kansas Sexually Violent Predator Act was unconstitutional.<sup>91</sup>

The Kansas Supreme Court concluded that the Kansas Sexually Violent Predator Act did not require the finding of a mental illness as a necessary element of a civil confinement proceeding.<sup>92</sup> Instead, the Act's pre-commitment requirement necessitated the finding of the presence of a "mental abnormality."<sup>93</sup> The Kansas Supreme Court rejected the State's contention that a mental abnormality is the constitutional equivalent of a mental illness, relying on the definition contained in the Kansas Statute governing the involuntary commitment of mentally ill persons.<sup>94</sup> The court noted that legislative findings codified in the Act indicate that the legislature clearly understood that sexually violent predators are *not* mentally ill.<sup>95</sup> The legislative findings explicitly assert that because sexually violent predators *do not* suffer from a mental disease or defect, they are not amenable to commitment under the existing civil commitment procedures, which are designed to target mentally ill persons.<sup>96</sup> In fact, this deficiency was a motivating factor in the Act's creation.<sup>97</sup> Despite suffering from alleged

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<sup>87</sup> See *id.* at 77, 86 (relying on *Addington v. Texas*, 441 U.S. 418, 425-33 (1979)).

<sup>88</sup> *Id.* at 86.

<sup>89</sup> *Id.* at 80.

<sup>90</sup> *Id.* at 85.

<sup>91</sup> *In re Hendricks*, 912 P.2d 129, 138 (1996) (holding that the constitutional standard set out in *Foucha* and *Addington* requires a finding of mental illness and dangerousness, by clear and convincing evidence, in order for the civil commitment to be constitutionally permissible).

<sup>92</sup> *Id.* at 137.

<sup>93</sup> *Id.* at 133.

<sup>94</sup> *Id.* at 138. At the time, the Kansas State legislature defined a mental illness as any person who: "(1) [i]s suffering from a severe mental disorder to the extent that such person is in need of treatment; (2) lacks capacity to make an informed decision concerning treatment; and (3) is likely to cause harm to self or others." KAN. STAT. ANN. § 59- 2902(h).

<sup>95</sup> *In re Hendricks*, 912 P.2d at 137.

<sup>96</sup> *Id.* at 131-32 (quoting KAN. STAT. ANN. § 59-29a01).

<sup>97</sup> "[T]he existing involuntary commitment procedure . . . for mentally ill persons . . . is inadequate to address the risk these sexually violent predators pose to society." *Id.* at 132 (quoting KAN. STAT. ANN. § 59- 29a01 (1996)).

mental abnormalities, the Kansas Supreme Court noted that these offenders do not suffer from the type of mental illness contemplated by the *Foucha* and *Addington* courts for civil commitment proceedings.<sup>98</sup>

The court held that the standard for a mental abnormality amounted to little more than a mere finding of dangerousness,<sup>99</sup> an impermissible justification for confinement under *Foucha*.<sup>100</sup> The court noted that the phrase mental abnormality, far from constituting a severe mental disorder,<sup>101</sup> represented nothing more than a condition that predisposed the individual to commit sexual offenses.<sup>102</sup> The court emphasized that the term did not represent a formal psychiatric diagnosis; rather, it is a legal term.<sup>103</sup> However, only a year later, the Supreme Court of the United States reversed the decision reached by the Kansas Supreme Court and held that the Kansas Sexually Violent Predator Act was constitutional.

## 2. Circumventing *Foucha* and *Addington*: The “Mental Abnormality” Standard

The Court in *Kansas v. Hendricks* found that the Act’s definition of a mental abnormality satisfied substantive due process requirements.<sup>104</sup> The Court found that the mental abnormality standard required proof of “past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated.”<sup>105</sup> The *Hendricks* majority rejected the Kansas Supreme Court’s assumption that the Kansas State legislature’s failure to use the precise term of “mental illness” rendered the entire Act unconstitutional.<sup>106</sup> In ridding the phrase mental illness of its “talismanic significance,”<sup>107</sup> the *Hendricks* majority pointed out that the Court, even in *Foucha* and *Addington*, had used a plethora of expressions when describing the mental state of proper candidates for

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<sup>98</sup> *Id.* at 137-38.

<sup>99</sup> *Id.* at 138.

<sup>100</sup> *See supra* text accompanying notes 88, 98.

<sup>101</sup> *See supra* note 94.

<sup>102</sup> *In re Hendricks*, 912 P.2d. at 138. This circular logic will be discussed in greater detail *infra* in Part III.B.2.

<sup>103</sup> *Id.* *See also* Young v. Weston, 898 F.Supp 744, 750 (W.D. Wash. 1995) (“[T]he term ‘mental abnormality’ has neither a clinically significant meaning nor a recognized diagnostic use among treatment professionals.”).

<sup>104</sup> *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997).

<sup>105</sup> *Id.* at 357-58.

<sup>106</sup> *Id.* at 359 (“Indeed, we have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes.”).

<sup>107</sup> *Id.*

civil confinement.<sup>108</sup>

The Court glossed over the clear contemplation of the Kansas State legislature with regards to the distinct difference between a mental illness and a mental abnormality.<sup>109</sup> The majority in *Kansas v. Hendricks* disregarded the Act's text, which indicated that any offender who met the criteria for a sexually violent predator designation was *not* mentally ill.<sup>110</sup> Instead, the Court noted that traditionally, legislatures have been the entity responsible for "defining terms of a medical nature that have legal significance."<sup>111</sup> Because of this practice, states had developed a myriad of different terms used to define mental conditions.<sup>112</sup> These terms, the Court held, did not fail to meet constitutional due process standards because their definitions were not identical to their "psychiatric counterparts."<sup>113</sup>

The Court remarked that the Kansas Act's "precommitment [sic] requirement of a 'mental abnormality'"<sup>114</sup> closely resembled the precommitment requirements of other civil commitment statutes that had been deemed constitutional.<sup>115</sup> The Court found that this Act, like other constitutional civil commitment acts, required more than just a finding of dangerousness.<sup>116</sup> The Court asserted that the mental abnormality standard required proof of future dangerousness *linked* to a mental condition that rendered the offender incapable of controlling his behavior.<sup>117</sup> Under the *Hendricks* majority view, the specific term used

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<sup>108</sup> *Id.* (citing examples such as "emotionally disturbed," "mentally ill," "incompetency," and "insanity.>").

<sup>109</sup> *See supra* notes 92-97 and accompanying text.

<sup>110</sup> "In contrast to persons appropriate for civil commitment under [K.S.A. 59-2901, statute for civil commitment for mentally ill persons] . . . sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities[.]" *Hendricks*, 521 U.S. at 351 (citing KAN. STAT. ANN. § 59- 29a01).

<sup>111</sup> *Id.* at 359.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* For example, the legal definitions for "insanity" and "competency," which "need not mirror" their "psychiatric counterparts," are nevertheless valid because they "take into account such issues as individual responsibility . . . and competency." *Id.* (quoting AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxiii, xxvii (4th ed. 1994)).

<sup>114</sup> *Id.* at 358. The court elaborated that the "precommitment requirement of a 'mental abnormality' or a 'personality disorder'" found in the Kansas Statute was similar to previous statutes in that "it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness." *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> The Court conceded that a finding of dangerousness, on its own, would not be sufficient evidence to justify civil confinement. *Id.*

<sup>117</sup> *Id.*

in the statute was irrelevant.<sup>118</sup> Instead, the critical feature is that the pre-commitment requirement served to narrow the population eligible for civil confinement.<sup>119</sup> By applying only to those individuals “who suffer from a volitional impairment rendering them dangerous beyond their control,”<sup>120</sup> the pre-commitment requirement adequately distinguishes sexually violent predators from other dangerous offenders, “who are perhaps more properly dealt with exclusively through criminal proceedings.”<sup>121</sup> In the next section, however, this Note examines whether, in practice, the mental abnormality standard truly achieves this stated goal.

*B. The Ongoing Controversy Regarding the “Mental Abnormality” Standard*

The terms “mental abnormality” or “mental disorder” have been used by a number of states as the eligibility criteria for civil confinement.<sup>122</sup> For purposes of this Note, the term “mental abnormality” will represent the definition for both terms, as their definitions are substantially similar.<sup>123</sup> Despite its importance in the case law concerning involuntary civil commitment proceedings,<sup>124</sup> no current sexually violent predator statute makes reference to the term

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<sup>118</sup> *Id.* (“We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a ‘mental illness’ or ‘mental abnormality.’”) (emphasis added). Additionally, the Court noted that other constitutional civil commitment statutes, such as Illinois, Minnesota, and Kentucky, had been upheld as constitutional, despite the fact that they used terms other than “mentally ill” to describe the mental state of the subject in question. *See id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 360.

<sup>122</sup> As of 2005, the statutes in Florida, Iowa, Kansas, Massachusetts, Missouri, New Jersey, Pennsylvania, South Carolina, Virginia, and Washington used the term “mental abnormality.” Thomas K. Zander, *Civil Commitment Without Psychosis: The Law’s Reliance on the Weakest Links in Psychodiagnosis*, 1 J. OF SEXUAL OFFENDER CIV. COMMITMENT: SCI. & L. 17, 25 (2005). New York joined this group in 2007. *See* N.Y. MENTAL HYG. § 10.03(i) (2011) for the New York statute’s definition of mental abnormality.

<sup>123</sup> As of 2005, Arizona, California, Illinois, Minnesota, North Dakota, and Wisconsin used the term “mental disorder” in their respective sexually violent predator statutes. Zander, *supra* note 122, at 25. Wisconsin’s sexually violent predator statute defines a “mental disorder” as “a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence.” WIS. STAT. ANN. § 980.01(2) (West 2010). This is the definition used in in the Wisconsin civil confinement case *State v. Post*, 541 N.W.2d 115 (1995), discussed *infra* in this section and in Part III.B.2.

<sup>124</sup> *See supra* Part III.A.1.

mental illness.<sup>125</sup> Notwithstanding its prevalence as the default eligibility criteria for civil confinement proceedings, the mental abnormality standard has not been isolated from critique and challenge.

### *1. The Circular Logic of the Mental Abnormality Standard*

Justice Kennedy, in his concurrence in *Kansas v. Hendricks*, cautioned that “if it were shown that mental abnormality is *too imprecise a category* to offer a *solid basis* for concluding that civil detention is justified, our precedents would not suffice to validate it.”<sup>126</sup> The category of mental abnormality is a legislatively created and judicially promulgated term.<sup>127</sup> As such, the definition has been criticized for failing to indicate the presence of any *real* mental disorder and lacking any real psychiatric authority.<sup>128</sup> It has been argued, instead, that the standard promulgates a kind of circular logic: the existence of the mental abnormality or mental condition is based on the commission of past sexual crimes, which are then used as grounds for establishing that the offender is predisposed to committing sexual offenses.<sup>129</sup> By this logic, it is reasonable to argue that a finding of a mental abnormality represents a finding of nothing more than an offender’s propensity for committing sexual violence.<sup>130</sup> In *State v. Post* and *In re Young*, both civil confinement cases where the sexually violent predator statute was upheld, the dissenting judges vigorously

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<sup>125</sup> Zander, *supra* note 122, at 25 (explaining that no state requires an offender recommended for civil confinement to be “mentally ill.”).

<sup>126</sup> *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring) (emphasis added).

<sup>127</sup> See *Young v. Weston*, 898 F. Supp. 744, 750 (W.D. Wash. 1995) (“[T]he Washington State Psychiatric Association explains that the term ‘mental abnormality’ has neither a clinically significant meaning nor a recognized diagnostic use among treatment professionals.”); *In re Hendricks*, 912 P.2d 129, 138 (Kan. 1996) (holding that the term mental abnormality is a “legal term defined in the Act.”); *In re Young*, 857 P.2d 989, 1020 (Wash. 1993) (Johnson, J., dissenting) (holding that the term mental abnormality, as used in the statute’s definition of a sexually violent predator, “does not apply to a group of individuals who are mentally ill in any medically recognized sense.”).

<sup>128</sup> Zander, *supra* note 122, at 26. It is completely foreign and unfamiliar to the American Psychiatric Association’s *Diagnostic and Statistical Manual* (DSM). The DSM is a manual used by mental health professionals to diagnose mental disorders. *Id.* at 18. See also *In re Hendricks*, 912 P.2d at 137-38 (explaining that because mental abnormality is not defined in the DSM, its use as a “formal diagnosis” would be inappropriate).

<sup>129</sup> *Weston*, 898 F. Supp. at 750; *In re Young*, 857 P.2d at 1021 (holding that the definition for mental abnormality is “merely circular.”); *State v. Post*, 541 N.W.2d 115, 144 (Wis. 1995) (Abrahamson, J., dissenting). See also *In re Hendricks*, 912 P.2d at 138 (citing *Weston*, 898 F. Supp. at 750) (“[T]he only observed characteristic of the [mental abnormality or personality] disorder is the predisposition to commit sex crimes.”).

<sup>130</sup> *Post*, 541 N.W.2d at 143.

emphasized the dangers this standard presents, as did the majority in *Young v. Weston*, a civil confinement challenge heard in a federal district court in Washington.<sup>131</sup> Challengers argue that this malleable standard promotes the very system the *Foucha* court was trying to avoid: a system authorizing the lifetime commitment of offenders based purely on a finding of dangerousness.<sup>132</sup>

In *State v. Post*, Justice Abrahamson's dissenting opinion challenged the careless manner taken by the *Post* majority, and arguably by the *Hendricks* majority,<sup>133</sup> in allowing the mental condition component of the confinement statute to be defined in more than one way.<sup>134</sup> With regard to the circular definition of mental abnormality, Justice Abrahamson stated, "[i]f the constitutionally prescribed threshold of mental illness has no core meaning and can mean everything, then it means nothing."<sup>135</sup> The tautological and malleable nature of this pre-commitment requirement raises serious questions as to whether the standard truly comports with substantive due process rights. Is this definition truly one that serves to adequately distinguish sexually violent predators "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings"?<sup>136</sup>

## 2. *One Step Further: The Mental Abnormality Standard under Kansas v. Crane*

The necessity of distinguishing sexual offenders requiring civil confinement from other dangerous persons was re-iterated by the Supreme Court of the United States in *Kansas v. Crane*.<sup>137</sup> The Court

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<sup>131</sup> The Western District of Washington federal district court held, in 1995, that the Washington sexually violent predator statute was unconstitutional and reversed the civil confinement decree for petitioner, Andre Brigham Young. *Weston*, 898 F. Supp. at 754. This is the same offender who had previously challenged the statute's constitutionality in 1993 in *In re Young*, in the Washington Supreme Court. See *In re Young*, 857 P.2d at 989. In response to the decision rendered in the federal district court, the Superintendent of the Washington confinement center filed an appeal. *Young v. Weston*, 176 F.3d 1196, 1198 (9th Cir. 1999). While that appeal was pending, the Supreme Court of the United States decided *Kansas v. Hendricks*. *Id.* In light of the *Hendricks* decision, the Ninth Circuit remanded the *Weston* case back to the federal district court, where Young's petition was denied. *Id.*

<sup>132</sup> *Weston*, 898 F. Supp. at 749; *In re Hendricks*, 912 P.2d at 138; *Post*, 541 N.W.2d at 144.

<sup>133</sup> See *supra* text accompanying notes 115-116.

<sup>134</sup> *Post*, 541 N.W.2d at 142 (Abrahamson, J., dissenting) (explaining that the majority approach "suggests that mental illness can be defined howsoever the state pleases.").

<sup>135</sup> *Id.* at 142.

<sup>136</sup> *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997).

<sup>137</sup> *Kansas v. Crane*, 534 U.S. 407, 411 (2002) (holding that the distinction was necessary).

in *Crane*<sup>138</sup> emphasized that the offender's "serious mental illness, abnormality, or disorder," which subjects him to civil confinement must be sufficient to distinguish him "from the dangerous but typical recidivist convicted in an ordinary criminal case."<sup>139</sup> The Court further cautioned that this distinction is crucial in making sure that civil confinement does not become a "mechanism for retribution or general deterrence."<sup>140</sup>

These concerns were recently addressed in a New York Court of Appeals decision, *State v. Shannon S.*<sup>141</sup> In this case, the court upheld the civil confinement of a sexually violent predator after determining that the offender's diagnosis of "paraphilia not otherwise specified"<sup>142</sup> (hereinafter, paraphilia-NOS) and "hebephilia"<sup>143</sup> constituted a mental abnormality.<sup>144</sup> In the dissenting opinion, Justice Smith argued that scientific vigor must be used to define a "mental abnormality" to prevent it from becoming a tool that states could use to lock up any and every sex offender based on the judgment of a trier of fact that this individual is *likely* to re-offend.<sup>145</sup>

In the instant case, Justice Smith found that civil confinement is no more than a civil substitute for a criminal proceeding designed to keep dangerous offenders locked up,<sup>146</sup> echoing the concerns presented in Justice Kennedy's concurrence in *Hendricks*.<sup>147</sup> Of particular concern in the *Shannon S.* decision were the specific diagnoses used to authorize a sentence of indefinite confinement. Paraphilia-NOS, a common

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<sup>138</sup> The issue in *Kansas v. Crane* centered on whether the State, when seeking to confine an offender under the Kansas Sexually Violent Predator Act, was required to prove an offender's "total or complete lack of control" over his dangerous behavior. The Court ruled that the State, under *Kansas v. Hendricks* had no such obligation. *Id.*

<sup>139</sup> *Id.* at 413.

<sup>140</sup> *Id.* at 412 (quoting *Hendricks*, 521 U.S. at 372-73 (Kennedy, J., concurring)).

<sup>141</sup> *New York v. Shannon S.*, 980 N.E.2d 510 (2012).

<sup>142</sup> The *Shannon S.* majority supplied the following definition for paraphilia-NOS: recurrent and intense sexual fantasies, urges or behaviors which involve . . . [t]he physical or psychological suffering, including the humiliation of oneself or one's partner or children or other nonconsenting partners which occurs over a period of at least six months and results in personal distress or impairment in some clinically significant area of functioning.

*Id.* at 512.

<sup>143</sup> Hebephilia is not mentioned in the DSM IV. *Id.* However, the majority provided this helpful definition for this "diagnosis": "an apparent attraction to pubescent girls." *Id.*

<sup>144</sup> *Id.* at 515.

<sup>145</sup> *Id.* (Smith, J., dissenting).

<sup>146</sup> *Id.*

<sup>147</sup> *Kansas v. Hendricks*, 521 U.S. 346, 371-73 (1997) (Kennedy, J., concurring).

diagnosis in sexually violent predator commitment cases,<sup>148</sup> is mentioned in the Diagnostic and Statistical Manual of Mental Disorders (DSM) as a “residual category”<sup>149</sup> included for the purpose of “coding paraphilias that do not meet the criteria for any of the specific categories.”<sup>150</sup> Known as the “rape-related paraphilia,”<sup>151</sup> this diagnosis’ definition<sup>152</sup> is amorphous<sup>153</sup> and applicable to every dangerous rapist. Additionally, Justice Smith argued that “hebephilia,”<sup>154</sup> mentioned nowhere in the DSM IV,<sup>155</sup> represented nothing more than a tendency to commit statutory rape.<sup>156</sup>

It is here that we see the true danger of the tautological nature of the mental abnormality standard. These two diagnoses, both of which are often cited as mental abnormalities in sexually violent predator commitment proceedings,<sup>157</sup> if anything, demonstrate only that the offender exhibits a tendency to commit the crimes for which he has already been incarcerated for.<sup>158</sup> Their descriptions of the offender’s mental condition fail to distinguish the offender from, or show that he is any more mentally abnormal than, any other sexual/dangerous offender, as required by the court in *Crane*.<sup>159</sup> These two diagnoses demonstrate nothing more than a finding that the offender is dangerous, functioning much like a diagnosis that the offender suffers from an antisocial personality.<sup>160</sup> The Court in *Foucha* held that a finding of an antisocial personality on its own, is not sufficient grounds for a civil commitment

<sup>148</sup> In a 2003 study of 120 civilly committed offenders in Arizona, 56% had been diagnosed with paraphilia-NOS. Zander, *supra* note 122 at 41. For other statistics concerning the prevalence of diagnosis of paraphilia-NOS in sexually violent predator commitment cases, see *generally id.*

<sup>149</sup> *Shannon S.*, 980 N.E.2d at 516 (Smith, J., dissenting).

<sup>150</sup> Zander, *supra* note 122, at 41.

<sup>151</sup> *Id.* at 43.

<sup>152</sup> For the definition of Paraphilia-NOS relied upon by the *Shannon S.* majority, see *Shannon S.*, 980 N.E.2d at 511.

<sup>153</sup> See Zander, *supra* note 122, at 44.

<sup>154</sup> *Id.* at 47.

<sup>155</sup> *Id.*

<sup>156</sup> *Shannon S.*, 980 N.E.2d at 517 (Smith, J., dissenting).

<sup>157</sup> See Zander, *supra* note 122, at 36.

<sup>158</sup> *State v. Post*, 541 N.W.2d 115, 143-44 (1995) (Abrahamson, J. dissenting) (holding that the mental abnormality standard authorizes “lifetime commitment based not on mental illness but on past crimes for which the prospective committee has already served the prescribed sentence. This definition . . . is derived from past sexual offenses which, in turn, are used to establish a predisposition to commit future sexual offenses.”).

<sup>159</sup> *Shannon S.*, 980 N.E.2d at 517 (Smith, J., dissenting).

<sup>160</sup> *Foucha v. Louisiana*, 504 U.S. 71, 82 (1992) (explaining the impermissibility of this rationale: “the State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely.”).

proceeding, because it represents merely a finding of dangerousness.<sup>161</sup> It is hard then to imagine that these two diagnoses represent the types of mental illnesses contemplated by the *Foucha* court, when considering that they could both be readily applied to any other sexual offender.<sup>162</sup>

Justice Smith, in his dissenting opinion in *Shannon S.*, argued that scientific vigor must be used to define the term mental abnormality, to prevent it from being used by states as a means to lock up any sex offender that a trier of fact thinks is *likely* to re-offend.<sup>163</sup> Considering the severe consequences the finding of a present mental abnormality can bring about,<sup>164</sup> the examination of whether or not it comports with constitutional standards should be given the highest level of scrutiny. Every effort should be made to ensure that this criteria is “specific and reliable” enough to sufficiently determine who is appropriate for civil management by confinement.<sup>165</sup> As it stands, however, the definition’s malleability enables it to stand for “whatever a state claims it means.”<sup>166</sup> An inevitable consequence of this danger is the transformation of “a constitutionally required threshold for deprivation of liberty . . . into a meaningless standard signifying whatever state legislatures want it to signify.”<sup>167</sup>

### C. *Just How “Civil” is Civil Confinement?*

In order to dismiss the other constitutional challenges raised by *Hendricks*,<sup>168</sup> it was necessary for the Court to hold that the Kansas Statute is a *civil*, rather than *criminal* statute, and that the proceedings imposing involuntary confinement do not do so for punitive or

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<sup>161</sup> *Id.* at 86 (explaining that the State cannot continue to confine Foucha, who has an antisocial personality, *id.* at 75, as this constitutes only an indicator of dangerousness, not mental illness).

<sup>162</sup> *Shannon S.*, 980 N.E.2d at 517 (Smith, J., dissenting) (“This [Paraphilia NOS] could describe the mental state of every dangerous rapist . . . [I]n other words, [hebephilia means] they commit statutory rape.”) (emphasis added). See also *Foucha*, 504 U.S. at 85 (holding that many criminals will “likely suffer from the same personality disorder that Foucha exhibits. However, state law does not allow for their continuing confinement based merely on dangerousness.”).

<sup>163</sup> *Shannon S.*, 980 N.E.2d at 515. (Smith, J., dissenting).

<sup>164</sup> *State v. Post*, 541 N.W.2d 115, 143 (1995) (Abrahamson, J. dissenting) (authorizing lifetime commitment).

<sup>165</sup> *Id.* at 142-43 (citing *Foucha v. Louisiana*, 504 U.S. 71, 76 n.3 (1992)).

<sup>166</sup> *Id.* at 143.

<sup>167</sup> *Id.*

<sup>168</sup> In addition to substantive due process grounds, *Hendricks* challenged his civil confinement on double jeopardy and ex post facto grounds. *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997).

punishment purposes.<sup>169</sup> It is long held precedent that laws designed to punish individuals may not violate the ex post facto and double jeopardy clauses. Once the practice of civil confinement is categorized as civil, these safeguards are inapplicable. Both principles apply only if the government seeks to “punish” an individual.<sup>170</sup>

In making its determination, the Court first examined whether the Kansas State legislature manifested an intention for the proceedings established by the statute to be considered “civil.” The *Hendricks* court accepted as evidence of this intent the following factors: (1) the placement of the statute in the State’s Probate Code, rather than its Criminal Code, and (2) the description of the Act as a *civil* commitment procedure.<sup>171</sup> The Court then concluded that this manifested intent would be rejected *only if*, under the test posited in *United States v. Ward*,<sup>172</sup> *Hendricks* could prove by “the clearest proof” that ‘the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention’ to deem it ‘civil.’”<sup>173</sup>

In evaluating the civil confinement scheme under the parameters set by *Ward*, the Court first identified what it referred to as the “two primary objectives of criminal punishment: retribution or deterrence.”<sup>174</sup> The majority held that instances of prior criminal conduct are used during civil confinement proceedings solely for the evidentiary purposes of supporting a finding of a mental abnormality or dangerousness.<sup>175</sup> In concluding that the statute is not intended to be retributive, the Court identified that it does not affix culpability for the prior conduct.<sup>176</sup> Further, it does not require a conviction<sup>177</sup> or the finding of scienter<sup>178</sup> as pre-requisites for its application.<sup>179</sup> All of these

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<sup>169</sup> Fred Cohen, *The Law and Sexually Violent Predators—Through the Hendricks Looking Glass*, in *THE SEXUAL PREDATOR: LAW, POLICY, EVALUATION AND TREATMENT* 1-1 to -4 (Fred Cohen & Anita Schlank eds., 1999). See also *Hendricks*, 521 U.S. at 360.

<sup>170</sup> Cohen, *supra* note 169, at 1-4.

<sup>171</sup> *Hendricks*, 521 U.S. at 361.

<sup>172</sup> *United States v. Ward*, 448 U.S. 242 (1980).

<sup>173</sup> *Hendricks*, 521 U.S. at 361 (quoting *Ward*, 448 U.S. at 248-49).

<sup>174</sup> *Id.* at 361-62.

<sup>175</sup> *Id.* at 362.

<sup>176</sup> *Id.*

<sup>177</sup> The Act allows for the involuntary confinement of persons absolved of criminal responsibility. The Court noted that the absence of a requirement for criminal responsibility for the underlying offense serves as evidence that the Act is non-retributive in nature. *Id.*

<sup>178</sup> Scienter is defined as: “A degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act’s having been done knowingly, esp. as a ground for civil damages or criminal punishment.” *BLACK’S LAW DICTIONARY* 1463 (9th ed. 2009).

characteristics are commonly found in criminal statutes.<sup>180</sup> Turning to the objective of deterrence, the *Hendricks* court examined the requisite criteria for a sexually violent predator designation. Since, by definition, sexually violent predators suffer from a lack of control over their behavior, the Court speculated that the Act's threat of indefinite confinement was not likely to function as a deterrent.<sup>181</sup>

Hendricks argued that the act of confinement itself transforms the statute into a punitive scheme.<sup>182</sup> The Court quickly countered, however, that civil commitment of mentally ill individuals, especially those who pose a danger to society, has been recognized as a "legitimate nonpunitive [sic] governmental objective."<sup>183</sup> In noting the legitimacy of general civil commitment statutes,<sup>184</sup> the Court stated that the conditions present in civil confinement centers more accurately resemble those of state mental institutions than prisons.<sup>185</sup> Using this logic, the Court reasoned that since we do not consider the involuntary civil commitment of mentally ill individuals "punitive," it is difficult to characterize the Kansas statute in such a way.<sup>186</sup>

Lastly, the court addressed the issue of treatment and rehabilitation as an objective of the statute. It is here that the *Hendricks* majority engages in a somewhat confusing discussion concerning whether or not the population of sexually violent predators is amenable to treatment. Hendricks asserted that the Act does not offer confined individuals any real or legitimate form of treatment, and is, therefore, a punitive statute disguised as a civil one.<sup>187</sup> The Court begins its discussion by examining the language promulgated by the Kansas Supreme Court in *In re Hendricks*. The meaning of the Kansas Supreme Court's language

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<sup>179</sup> The commitment determination is not based on a demonstration of the offender's criminal intent. This is an element, the Court notes, which is commonly present in traditionally criminal statutes. The commitment is based, instead, on a finding of a "mental abnormality." *Hendricks*, 521 U.S. at 362 (holding that "[t]he existence of a scienter requirement is customarily an important element in distinguishing criminal from civil statutes.").

<sup>180</sup> *See id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 363-64.

<sup>183</sup> The Court reasoned that if the sexually violent predator statute were to be considered punitive merely because it involves an "affirmative restraint" of an individual, then all general civil commitments would be similarly punitive. *Id.* at 363.

<sup>184</sup> The statutes to which the Court refers are those that govern the involuntary civil commitment of mentally ill individuals who pose a danger to themselves and/or society. As previously mentioned, *supra* Part B, sexually violent predators do not meet the criteria for commitment under this legislation.

<sup>185</sup> *Hendricks*, 521 U.S. at 363.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 365.

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in one excerpt in particular was the center of much controversy. The Kansas Supreme Court stated:

It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is *incidental, at best*. The record reflects that *treatment for sexually violent predators is all but nonexistent*. The legislature concedes that sexually violent predators are not amenable to treatment under [the existing Kansas involuntary commitment statute]. If there is nothing to treat under [that statute], then there is no mental illness. In that light, the provisions of the Act for treatment appear somewhat disingenuous.<sup>188</sup>

The Court first purports to construe this passage as an indication that the condition that sexually violent predators, such as Hendricks, suffer from is untreatable.<sup>189</sup> The *Hendricks* majority then stated that even if this determination were accepted, the statute would not necessarily fail as a civil one.<sup>190</sup> The Court noted that the incapacitation of individuals who pose a danger to others may be a “legitimate end of the civil law,”<sup>191</sup> even if no treatment for these individuals currently exists.<sup>192</sup> The Court pointed out that if amenability to treatment were a requirement, this would prohibit the confinement of individuals concluded to be both mentally ill and dangerous, “simply because they could not be successfully treated for their afflictions.”<sup>193</sup>

The Court then abruptly shifted gears. It stated, in the alternative, that this passage could *also* stand for the proposition that, although treatment was not the legislature’s “overriding concern” in passing the statute, this did not necessarily mean that Hendrick’s condition was untreatable.<sup>194</sup> Instead, the Court posited that Hendrick’s condition may be treatable, but that at the time Hendricks was committed, no treatment was being provided.<sup>195</sup> Treatment for sexually violent predators was characterized as an ancillary purpose of the Act.<sup>196</sup> The Act’s language

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<sup>188</sup> *In re Hendricks*, 912 P.2d 129, 136 (1996) (emphasis added).

<sup>189</sup> *Hendricks*, 521 U.S. at 365.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 366.

<sup>192</sup> In support of its position, the Court points to the legitimacy of involuntarily confining individuals affected by a highly contagious untreatable disease. *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 366-67.

<sup>195</sup> *Id.* at 367. The Court comments that it is important to remember that Hendricks was the first person committed under the Act, so it is not surprising that the State had not fully established all available treatment procedures. *Id.* at 367-68.

<sup>196</sup> *Id.* at 367.

indicates, in several places, that the organization assuming custody of confined sexually violent predator's is under an obligation to provide treatment.<sup>197</sup> Additionally, the Court relied on the State's declaration that persons confined under the Act were receiving approximately 31.5 hours of treatment per week.<sup>198</sup> Based on a combination of all these factors, the Court in *Hendricks* concluded that the sexually violent predator statute is not punitive.<sup>199</sup>

#### IV. THE DANGEROUS OFFENDER LEGISLATION IN CANADA AND CURRENT PRACTICE OF CIVIL CONFINEMENT IN NEW YORK (ARTICLE 10)

##### A. *Canada's Dangerous Offender Legislation: A System of Indeterminate Prison Sentences*

In 1977, the Canadian government passed the *Criminal Law Amendment Act*, implementing the provisions and procedures that currently constitute the Dangerous Offender legislation into the Canadian Criminal Code.<sup>200</sup> Criminal law falls under the exclusive jurisdiction of the Canadian Parliament.<sup>201</sup> Therefore, in Canada, the federal government supplies the regulations dictating the procedures for making a dangerous offender application; meaning that these provisions apply uniformly to all of the provinces.<sup>202</sup> The sole and established purpose of the Dangerous Offender legislation is to effectuate public safety through incapacitation of the dangerous population.<sup>203</sup> The Dangerous Offender legislation implements the possibility of an

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<sup>197</sup> The statute at issue in *Hendricks* stated that a person designated as a sexually violent predator is mandated to the control of "the secretary of social and rehabilitation services for control, care and treatment until such time as the person's mental abnormality . . . has so changed that the person is safe to be at large." KAN. STAT. ANN. § 59-29a07(a) (1999) (emphasis added). See also KAN. STAT. ANN. § 59-29a01 (1996) (stating that the civil confinement procedure is established "for the long-term care and treatment of the sexually violent predator").

<sup>198</sup> *Hendricks*, 521 U.S. at 368.

<sup>199</sup> *Id.* at 369.

<sup>200</sup> Canada Criminal Code, R.S.C. 1985, c. C-46.

<sup>201</sup> Michael Jackson, *The Sentencing of Dangerous and Habitual Offenders in Canada*, 9 FED. SENT'G REP. 256, 256 (Mar./Apr. 1997).

<sup>202</sup> Additionally, all amendments to the Criminal Code are applied uniformly within the various provinces. Petrunik, *Politics of Dangerousness*, *supra* note 9, at 116 ("Canada has a single Criminal Code applicable to all its provinces and territories, unlike the United States, where each state has its own Criminal Code[.]").

<sup>203</sup> PUB. SAFETY CAN., *Dangerous Offender Designation*, <http://www.publicsafety.gc.ca/cnt/cntrng-crm/crrctns/protctn-gnst-hgh-rsk-ffndrs/dngrs-ffndr-dsgntn-eng.aspx> (last visited Mar. 15, 2014) ("The Dangerous Offender provisions of the *Criminal Code* are intended to protect all Canadians from the most dangerous violent and sexual predators in the country.).

indeterminate prison sentence for offenders deemed to be public threats.<sup>204</sup> Despite their differing natures,<sup>205</sup> the systems are designed to target the same population of offenders. Although the Dangerous Offender provisions technically can apply to all criminals, sexual and non-sexual violent offenders, most offenders affixed with the dangerous offender designation are sexual offenders.<sup>206</sup>

Despite the fact that both the Canadian and American systems generally seek to confine offenders with a propensity to commit sexual offenses, it is not likely that Canada will adopt the American system of post-sentence civil confinement. In January 1993, and again in March 1994, a Task Force assembled by the Solicitor General concluded that it would not adopt the post-sentence preventive detention characteristic of U.S. sexually violent predator laws.<sup>207</sup> Several reasons were set forth justifying this decision. First, the Task Force speculated that an amendment authorizing post-sentence detention would not comply with the constraints imposed by Canada's Charter of Rights and Freedoms.<sup>208</sup> Since its inception in 1982, the Charter of Rights and Freedoms has led to an increased consideration of due process concerns, including those regarding the rights of accused and incarcerated individuals.<sup>209</sup> Additionally, mental health care in Canada is subject to provincial jurisdiction, and each province has its own unique mental health legislation.<sup>210</sup> As stated earlier, the federal government has jurisdiction over criminal law. Due to this jurisdictional split, Canada has struggled "to bridge the gaps between criminal justice and civil mental health controls."<sup>211</sup> Therefore, Canada would have difficulty in establishing legislation that mirrors civil confinement, since it concerns offenders "at

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<sup>204</sup> *Id.*

<sup>205</sup> Dangerous Offender proceedings are considered criminal and punitive in nature. Therefore, the procedures and provisions of the legislation are documented in the Canadian Criminal Code, which is uniform throughout Canada. In contrast, U.S. civil confinement proceedings have been held to be civil in nature. The "civil" nature of involuntary commitment proceedings under sexually violent predator statutes is discussed *supra* Part III.C.

<sup>206</sup> In a 2002 profile of 179 dangerous offenders conducted by the Correctional Service of Canada, it was demonstrated that 85% had committed sexual offenses. Petrunik, *Politics of Dangerousness*, *supra* note 9, at 116; *Dangerous Offender: What the Label Means*, CBC NEWS (Oct. 21, 2010, 1:19 PM), <http://www.cbc.ca/news/canada/story/2010/10/21/f-dangerous-offender.html>.

<sup>207</sup> Petrunik, *Politics of Dangerousness*, *supra* note 9, at 117.

<sup>208</sup> *Id.*

<sup>209</sup> Petrunik, *Hare and the Tortoise*, *supra* note 1, at 58.

<sup>210</sup> *Id.* ("[E]ach province has its own mental health legislation, with different understandings of mental disorder, and attempts to develop uniform standards have proved very difficult.")

<sup>211</sup> *Id.* See also Petrunik, *Politics of Dangerousness*, *supra* note 9, at 117 ("[T]he federal-provincial split in constitutional responsibilities for criminal law and mental health made a civil commitment process at the federal level unworkable.").

the interface of the criminal justice and mental health systems.”<sup>212</sup> Instead, the Canadian Task Force advocated improving upon and strengthening the already existing dangerous offender legislation.<sup>213</sup>

*1. The Procedure for Affixing the Dangerous Offender Designation*

Under the Canadian system, an offender may be designated as either a dangerous offender or, since 1997, a long-term offender.<sup>214</sup> A Crown Prosecutor (hereinafter, Prosecutor), ordinarily, must submit an application for a dangerous offender designation after the offender is found guilty, but *before* the sentencing stage.<sup>215</sup> Unlike an assessment of dangerousness, made under the U.S. practice of civil confinement, the assessment is made *before* the offender begins to serve out his imposed criminal sentence.

The Prosecutor’s duty to advise the court of his or her intention to make a *dangerous offender* application is codified in Section 752.01 of the Code.<sup>216</sup> Upon the application by the Prosecutor, the court will consider whether there are reasonable grounds to believe that the individual constitutes a dangerous offender.<sup>217</sup> If the court is of such an

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<sup>212</sup> *Id.* at 116.

<sup>213</sup> *Id.* at 117.

<sup>214</sup> DOMINIQUE VALIQUET, THE DANGEROUS OFFENDER AND LONG-TERM OFFENDER REGIME 2 (2006), available at <http://www.parl.gc.ca/Content/LOP/researchpublications/prb0613-e.pdf>. The *long-term* offender category is designed to apply to those high-risk offenders whose risk of re-offense is amenable to management and supervision in a community setting and, therefore, do not require indeterminate confinement. Petrunik, *Politics of Dangerousness*, *supra* note 9, at 117.

<sup>215</sup> Canada Criminal Code, R.S.C. 1985, c. C-46, § 753(2) (“An application under subsection (1) [dangerous offender application] must be made before sentence is imposed[.]”). Two exceptions to this rule are codified in Section 753(2):

(a) [B]efore the imposition of sentence, the prosecutor gives notice to the offender of a possible intention to make an application under section 752.1 and an application under subsection (1) not later than six months after that imposition; and (b) at the time of the application under subsection (1) that is not later than six months after the imposition of sentence, it is shown that relevant evidence that was not reasonably available to the prosecutor at the time of the imposition of sentence became available in the interim.

*Id.* §§ 753(2)(a)-(b).

<sup>216</sup> *Id.* § 752.01 (emphasis added):

If the prosecutor is of the opinion that an offence for which an offender is convicted is a serious personal injury offence that is a designated offence and that the offender was convicted previously at least twice of a designated offence and was sentenced to at least two years of imprisonment for each of those convictions, the prosecutor shall advise the court, as soon as feasible after the finding of guilt and in any event before sentence is imposed, whether the prosecutor intends to make an application under subsection 752.1(1).

<sup>217</sup> *Id.* § 752.1(1).

opinion, the individual will be detained so that experts in corrections and mental health may conduct an assessment of his or her behavior and render a psychological diagnosis.<sup>218</sup> This assessment, which will be used as evidence in the dangerous offender hearing, will rely on dangerousness criteria<sup>219</sup> and consider whether supervision within the community would be a possible solution to indefinite incarceration.<sup>220</sup> The procedure for determining that an offender is in fact a dangerous offender is codified in Section 753(1) of the Criminal Code.<sup>221</sup>

Under Section 753(1)(a), the court may find that the designation is appropriate if it is satisfied that the underlying conviction is a serious personal injury offense, as defined in Section 752,<sup>222</sup> and the offender poses a danger to the life, safety, or physical well being of other persons.<sup>223</sup> This section details that such a determination will be made on the basis of evidence establishing certain criterion,<sup>224</sup> which demonstrate that the offender is incapable of controlling his brutal behavior and impulses.<sup>225</sup> Additionally, under Section 753(1)(b),<sup>226</sup> the Criminal Code codifies the procedure to be followed if the offender has committed sexual assault, sexual assault with a weapon/threats to a third party causing bodily harm, or aggravated sexual assault.<sup>227</sup>

If the court is satisfied that the individual meets the criteria under

<sup>218</sup> *Id.* See also VALIQUET, *supra* note 214, at 3.

<sup>219</sup> *Id.* at 3 n.21 (criteria include: “preference for children; criminal social environment; mental problems; antisocial tendencies (characterized by impulsiveness, egocentricity, thrill-seeking, inability to control one’s actions, as well as a criminal propensity and flagrant indifference to the welfare of others).”).

<sup>220</sup> *Id.* at 3.

<sup>221</sup> Canadian Criminal Code § 753.

<sup>222</sup> A serious personal injury offence, under Section 752, is defined as:

an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving (i) the use or attempted use of violence against another person, or (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person, and for which the offender may be sentenced to imprisonment for ten years or more.

*Id.* § 752.

<sup>223</sup> VALIQUET, *supra* note 214, at 4 & n.23.

<sup>224</sup> See Canada Criminal Code, R.S.C. 1985, c. C-46, § 753(1)(a).

<sup>225</sup> VALIQUET, *supra* note 214, at 4.

<sup>226</sup> Canada Criminal Code, R.S.C. 1985, C. C-46 § 753(1)(b):

[T]hat the offence for which the offender has been convicted is a serious personal injury offence . . . and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.

<sup>227</sup> *Id.* § 752 (“serious personal injury offence”).

Section 753(1), the court has the option of sentencing the dangerous offender to a period of indeterminate incarceration.<sup>228</sup> Unless the court is reasonably assured that a lesser measure<sup>229</sup> will adequately protect the public, the court will impose an indeterminate sentence.<sup>230</sup> A dangerous offender sentenced to indeterminate incarceration will become eligible for standard parole, for the first time, after serving seven years.<sup>231</sup>

*B. New York's Civil Confinement Statute: Article 10 of the Sex Offender Management and Treatment Act*

In March 2007, the New York legislature passed the Sex Offender Management and Treatment Act (SOMTA). SOMTA includes Article 10 of the Mental Hygiene Law ("M.H.L.").<sup>232</sup> Article 10 contains the provisions enabling the post-sentence civil confinement of sex offenders requiring civil management.<sup>233</sup> The legislative findings of Article 10, codified in M.H.L. § 10.0, indicate that the standard to be used in New York for civil confinement eligibility is the presence of a mental abnormality.<sup>234</sup> The New York legislature's definition of "mental abnormality" is identical to the definition present in the Kansas sexually violent predator statute at issue in *Hendricks*.<sup>235</sup> The New York legislation resembles other sexually violent predator statutes in that it applies only to offenders "who have been subjected to criminal proceedings for a qualifying felony offense and who suffer from a mental abnormality."<sup>236</sup> New York also distinguishes between sex

<sup>228</sup> *Id.* § 753(4)(a).

<sup>229</sup> *See id.* §§ 753(4)(b)-(c).

<sup>230</sup> *Id.* § 753(4.1):

The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced . . . that there is a reasonable expectation that a lesser measure . . . will adequately protect the public against the commission by the offender of murder or a serious personal injury offense.

<sup>231</sup> VALIQUET, *supra* note 214, at 5-6. Additionally, the offender is eligible for "day parole" after four years in prison. If released under "day parole," the offender must return to the correctional facility each night. *Id.* at 5 n.39.

<sup>232</sup> N.Y. STATE OFFICE OF THE ATTORNEY GEN. SEX OFFENDER MGMT. BUREAU, A REPORT ON THE 2007 LAW THAT ESTABLISHED CIVIL MANAGEMENT FOR SEX OFFENDERS IN NEW YORK STATE 1 (Apr. 13, 2012).

<sup>233</sup> N.Y. MENTAL HYG. § 10.01(b) (McKinney 2007) ("In extreme cases, confinement of the most dangerous offenders will need to be extended by civil process in order to provide them such treatment and to protect the public from their recidivistic conduct.").

<sup>234</sup> *Id.* ("[S]ome sex offenders have *mental abnormalities* that predispose them to engage in repeated sex offenses.") (emphasis added).

<sup>235</sup> *Id.* § 10.03(i).

<sup>236</sup> N.Y. STATE OFFICE OF THE ATTORNEY GEN. SEX OFFENDER MGMT. BUREAU, *supra* note 232, at 2.

offenders in need of civil management and the traditional population of mental health patients,<sup>237</sup> reiterating once again the notion that existing civil commitment statutes, targeting mentally ill persons, were not adequate to handle this population of offenders.

SOMTA is unique, however, as it provides a second option for offenders suffering from a mental abnormality. In New York, an offender suffering from a mental abnormality can escape a decree of indefinite confinement if it is determined that he or she can live safely in the community under the Strict and Intensive Supervision and Treatment (“SIST”) program.<sup>238</sup> Whether or not an offender is appropriate for SIST hinges on an assessment of each offender’s likelihood of committing future sex offenses if allowed to live in the community,<sup>239</sup> despite being subjected to the close supervision of specially trained SIST parole officers.<sup>240</sup> Offenders on SIST are subjected to much stricter regulations and closer monitoring than regular sex offender parolees, mainly due to the fact that the caseload of SIST parole officers is significantly less than that of regular sex offender parole officers.<sup>241</sup> If an offender on SIST violates any of the restrictions he or she is mandated to abide by,<sup>242</sup> the offender risks the chance of being civilly confined.<sup>243</sup>

### 1. *The Civil Confinement Procedure in New York Under Article 10*

With the exception of the phase focused on determining whether an offender could be civilly managed under the SIST program, the procedures for civilly confining an offender in New York are substantially similar to other state schemes. The first stage in New York’s civil confinement process is the referral phase, instigated by the agency currently responsible for the offender’s custody, in anticipation of the offender’s release from confinement.<sup>244</sup> Once New York’s Office of Mental Health (“OMH”) and the New York State Office of the

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<sup>237</sup> MENTAL HYG. § 10.03(g).

<sup>238</sup> *See id.* § 10.01(c); N.Y. STATE OFFICE OF THE ATTORNEY GEN. SEX OFFENDER MGMT. BUREAU, *supra* note 232, at 12 (“SIST is intended for those offenders who can live safely in the community under close supervision, support, and monitoring.”).

<sup>239</sup> *Id.* at 3.

<sup>240</sup> *Id.* at 12.

<sup>241</sup> *Id.*

<sup>242</sup> Common SIST restrictions include abiding by an imposed curfew, attending sex offender and/or substance abuse treatment, and avoiding contact with minors. Additionally, depending upon the offense, the offender may be prohibited from accessing a computer. *Id.*

<sup>243</sup> *Id.* at 12-13.

<sup>244</sup> MENTAL HYG § 10.05(b); N.Y. STATE OFFICE OF THE ATTORNEY GEN. SEX OFFENDER MGMT. BUREAU, *supra* note 232, at 4.

Attorney General (“OAG”) are notified of the offender’s impending release, OMH assembles a panel of clinical and professional staff to screen the offender.<sup>245</sup> If the offender meets the screening panel’s criteria, the offender will undergo assessment by a Case Review Team, which usually includes a psychiatric evaluation.<sup>246</sup> If the assessment by the Case Review Team reveals that the subject of the assessment is a sex offender requiring civil management, OMH will give notice of this conclusion to the OAG.<sup>247</sup>

Following the filing of an OAG petition for civil confinement,<sup>248</sup> a hearing is held to determine whether or not there is probable cause to believe that the sex offender requires civil management.<sup>249</sup> Upon a finding of probable cause, the case is put on for trial by jury.<sup>250</sup> At this trial, the State bears the burden of demonstrating, by clear and convincing evidence, that the offender suffers from a mental abnormality.<sup>251</sup> If a mental abnormality is found to exist, the court must deliberate as to whether the offender would be more properly managed under the SIST provisions in the community or via confinement in treatment facility.<sup>252</sup> If the offender is determined to suffer from “such a strong predisposition to commit sex offenses . . . that the [person] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility,” they will be transferred to secure treatment facility, operated by OMH, for an indefinite period of time.<sup>253</sup> An individual’s need for continued civil confinement will be reviewed on an annual basis.<sup>254</sup>

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<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> MENTAL HYG § 10.05(g). The OAG will conduct its own review of whether or not the offender requires civil management. N.Y. STATE OFFICE OF THE ATTORNEY GEN. SEX OFFENDER MGMT. BUREAU, *supra* note 232, at 9.

<sup>248</sup> MENTAL HYG § 10.06(a).

<sup>249</sup> *Id.* § 10.06(g).

<sup>250</sup> *Id.* § 10.07(d). The offender has the option of waiving his right to a jury trial, if he or she so chooses. N.Y. STATE OFFICE OF THE ATTORNEY GEN. SEX OFFENDER MGMT. BUREAU, *supra* note 232, at 10.

<sup>251</sup> *Id.*

<sup>252</sup> MENTAL HYG § 10.07(f). For more on the factors considered by the court in determining which method of treatment is more appropriate, see N.Y. STATE OFFICE OF THE ATTORNEY GEN. SEX OFFENDER MGMT. BUREAU, *supra* note 232, at 10.

<sup>253</sup> MENTAL HYG § 10.07(f) (stating that the offender will be civilly confined “until such time as he or she no longer requires confinement.”)

<sup>254</sup> *Id.* § 10.09(a).

V. CRITIQUING U.S. CIVIL CONFINEMENT: THE “DELAY IN TREATMENT”  
CHALLENGE

A. *Are We Hovering Over the Punitive Boundary?*

In the dissenting opinion of *Kansas v. Hendricks*, Justice Breyer expresses his reluctance in fully agreeing with the majority’s holding that the Act is not punitive.<sup>255</sup> Breyer begins his discussion by pointing out the similarities between the civil confinement statute and traditional criminal punishment.<sup>256</sup> In light of the ambiguity surrounding the true nature of the Act,<sup>257</sup> Breyer emphasizes focusing on the statute’s treatment aim as a distinctly non-punitive purpose.<sup>258</sup> This is the approach taken in *Allen v. Illinois*, where the Court found that a civil confinement statute’s concern for treatment was a distinguishing “civil” characteristic.<sup>259</sup> Reliance on treatment as a distinguishing feature in determining the punitive or non-punitive nature of a statute is a logical distinction. It is expected that a non-punitive statutory scheme to confine would do so for purposes of treatment, not just safety.<sup>260</sup>

The punitive nature of sexually violent predator statutes is readily visible when examining the common<sup>261</sup> requirement that offenders must first serve out a criminal sentence before ever being evaluated as a

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<sup>255</sup> It is important to note, however, that Justice Breyer clearly indicates he agrees with the majority holding that the Act’s definition of a “mental abnormality” does not violate substantive Due Process requirements. See *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Breyer, J., dissenting).

<sup>256</sup> These similarities focus on the use of involuntary confinement (or incarceration) as a means of effecting incapacitation, which Breyer indicates is a common objective and purpose of criminal law. Breyer notes, however, that these characteristics, alone, are not legally sufficient to prove that this Act is criminal. *Id.* at 379-80.

<sup>257</sup> *Id.* at 379-81 (explaining that despite the similarities of civil commitment statutes with traditional criminal punishment statutes, the Kansas Sexually Violent Predator Act remains civil.).

<sup>258</sup> *Id.* at 381 (focusing on the treatment aspect of sexually violent predator statutes as a “feature[] that would likely distinguish between a basically punitive and a basically nonpunitive purpose.”).

<sup>259</sup> *Allen v. Illinois*, 478 U.S. 364, 373 (1986) (“State serves its purpose of *treating* rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment.”). See also *id.* (“Had petitioner shown, for example, that the confinement of such persons imposes on them a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case.”).

<sup>260</sup> *Hendricks*, 521 U.S. at 382 (noting that “one would expect a nonpunitively motivated legislature that confines *because of* a dangerous mental abnormality to seek to help the individual himself overcome that abnormality.”).

<sup>261</sup> As of 2003, 16 states had enacted post-sentence civil confinement. See George G. Woodworth & Joseph B. Kadane, *Expert Testimony Supporting Post-Sentence Civil Incarceration of Violent Sexual Offenders*, 3 LAW, PROBABILITY, AND RISK 221, 222 tbl.1 (2004).

candidate for civil confinement.<sup>262</sup> This practice purposely delays the imposition of specialized treatment until the offender's criminal sentence is nearly complete.<sup>263</sup> There is no non-punitive justification for first initiating civil confinement proceedings, and the imposition of allegedly necessary treatment, years after the criminal act requiring it occurred.<sup>264</sup> It is difficult to imagine that requiring a period of incarceration first advances the interest in treatment in any tangible way, since prison is generally considered a poor environment for rehabilitation.<sup>265</sup> This purposeful delay seems intentional.<sup>266</sup> It enables the more punitive interest in total and indefinite incapacitation to overpower and dominate the civil interest in treatment.<sup>267</sup> In this perspective, the practice begins to look more like a statutory scheme simply seeking to confine certain offenders when those offenders become eligible for release.<sup>268</sup>

Additionally, it is suspicious that the offender contracts a newly discovered mental abnormality, which is now in dire need of treatment,

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<sup>262</sup> *In re Young*, 857 P.2d 989, 1025 (Wash. 1993) (Johnson, J., dissenting) (noting that because the State seeks to treat an offender only after the individual has served out a criminal sentence, punishment becomes an essential component of the sexually violent predator statute); *State v. Post*, 541 N.W.2d 115, 140 (Wis. 1995) (Abrahamson, J., dissenting) ("Furthermore, because chapter 980 requires that convicted sex offenders serve their criminal sentences before being committed under its auspices, the statute is inextricably linked to a punitive purpose and effect, notwithstanding its remedial features.").

<sup>263</sup> *Hendricks*, 521 U.S. at 385 (Breyer, J., dissenting) (the Kansas statute explicitly defers commitment proceedings "until a few weeks prior to the 'anticipated release' of a previously convicted offender from prison."). The civil confinement petition for Andre Brigham Young, the subject offender in *Young v. Weston* and *In re Young*, was not filed until a day before Young was to be released from prison. *Young v. Weston*, 898 F. Supp. 744, 748 (W.D. Wash. 1995).

<sup>264</sup> *Hendricks*, 521 U.S. at 385-86 (Breyer, J., dissenting). See also *Post*, 541 N.W.2d at 140 (Abrahamson, J., dissenting) ("Why would a legislature with a principal interest in treatment create a statute deliberately delaying the promised treatment and thereby exacerbating the alleged ills which it is designed to cure?").

<sup>265</sup> *Hendricks*, 521 U.S. at 386 (Breyer, J., dissenting) (the Kansas statute specifically states that "prognosis for rehabilitating . . . in a prison setting is poor."); *Post*, 541 N.W.2d 115, 140 (Abrahamson, J., dissenting). See also *infra* Part IV.B.1.

<sup>266</sup> *Hendricks*, 521 U.S. at 385 (Breyer, J., dissenting) ("time-related circumstance seems deliberate."). See also *In re Young*, 857 P.2d at 1025 (Johnson, J., dissenting) ("The timing alone is a strong indication that the Legislature was less interested in treatment than in confinement.").

<sup>267</sup> *Hendricks*, 521 U.S. at 385 (Breyer, J., dissenting) ("An act that simply seeks confinement . . . would not need to begin civil commitment proceedings sooner."); *In re Young*, 857 P.2d at 1025 (Johnson, J., dissenting) ("Although the Statute provides for treatment, this goal is completely subordinated to punishment.").

<sup>268</sup> *Young v. Weston*, 898 F. Supp. 744, 753 (W.D. Wash. 1995) (holding that the punishment interest is advanced when the "[s]tatute forecloses the possibility that offenders will be evaluated and treated until after they have been punished."); *In re Young*, 857 P.2d at 1025 (Johnson, J., dissenting) ("An individual's need for diagnosis and treatment is *never* sufficiently compelling under the Statute until the individual is nearing the end of his or her criminal sentence.").

upon the imminent expiration of the current method of incapacitation.<sup>269</sup> It is an utter fallacy to claim that mental abnormalities, which cause uncontrollable propensities to commit sexual offenses, are identifiable only at completion of a criminal sentence.<sup>270</sup> Are these mental abnormalities, which will propel an offender to commit future sexual offenses, absent when these sexual offenses actually occurred in the past?<sup>271</sup> The reliance on this circular logic by sexually violent predator statutes supports the idea that the interest in effectuating treatment is minimal, if not nonexistent. Rather, a stated interest in treatment enables the statutes to be characterized as “civil,” and therefore isolated from the procedural safeguards of ex post facto and double jeopardy.

### B. Expensive and Ineffective

At the time when *Hendricks* was decided, the practice of civil confinement of sexually violent predators was a relatively novel and continually developing scheme.<sup>272</sup> The majority in *Hendricks* even acknowledged that at the time of *Hendricks*' confinement, not all of the available treatment procedures had been put into place yet.<sup>273</sup> Today, civil confinement centers are highly specialized facilities, operated by the agency responsible for administering and monitoring mental health services in that state.<sup>274</sup> Considering the language used in a number of civil confinement statutes, legislatures of various states contemplated that these confinement centers are capable of controlling, incapacitating, monitoring, and possibly administering treatment to this specific

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<sup>269</sup> *Hendricks*, 521 U.S. at 381 (Breyer, J., dissenting) (pointing out that “when a State believes that treatment does exist, and then couples that admission with a legislatively required delay of such treatment until a person is at the end of his jail term (so that further incapacitation is therefore necessary), such a legislative scheme begins to look punitive.”).

<sup>270</sup> *Weston*, 898 F. Supp. at 753 (“[I]t defies reason to suggest that the mental abnormalities or personality disorders causing violent sexual predation surface only at the termination of a prison term.”); *Post*, 541 N.W.2d at 140 (Abrahamson, J., dissenting) (“An individual’s need for diagnosis and treatment does not surface only at the end of a prison term.”).

<sup>271</sup> *Weston*, 898 F. Supp. at 753 (“Common sense suggests that such mental conditions, if they are indeed the cause of sexual violence, are present at the time the offense is committed.”).

<sup>272</sup> As stated previously, Leroy *Hendricks* was the first person to be committed under the Kansas Sexually Violent Predator Act. *Hendricks*, 521 U.S. at 367-68.

<sup>273</sup> *Id.* at 368.

<sup>274</sup> For example, in Washington, the agency responsible for the operation of the confinement center is the Department of Social and Health Services (DSHS). *Civil Commitment of Sexually Violent Predators*, DEP’T OF CORR., WASH. STATE, <http://www.doc.wa.gov/community/sexoffenders/civilcommitment.asp> (last visited Mar. 27, 2014). Alternatively, in New York, the Office of Mental Health (OMH) operates the secure treatment centers. N.Y. STATE OFFICE OF THE ATTORNEY GEN. SEX OFFENDER MGMT. BUREAU, *supra* note 232, at 4.

population.<sup>275</sup> If, by the legislatures own admission, these confinement centers are capable of adequately protecting the public from sexually violent predators while simultaneously treating their mental abnormalities, there seems to be no clear advantage in subjecting these offenders to incarceration.

### *1. The Costs of Civil Confinement*

There is arguably no economic advantage in mandating that an offender must first serve out a fixed criminal sentence before being considered for indefinite civil confinement. The costs associated with implementing civil commitment programs are astronomical. It has been estimated that various states have spent, on average, between 450<sup>276</sup> to 500<sup>277</sup> million dollars each year on their civil commitment programs. The annual cost of civilly committing the predator, averages out to about \$100,000 per inmate.<sup>278</sup> This staggeringly high number far exceeds the average annual cost of keeping an offender incarcerated, which is estimated to be about \$26,000 per year.<sup>279</sup> These costs vary from state to state.<sup>280</sup>

In general, the costs of civil confinement have continued to rise as states are forced to expand the size and number of staff working at their facilities to accommodate the growing number of confined

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<sup>275</sup> See KAN. STAT. ANN. § 59-29a01 (“[T]he legislature determines that a separate involuntary civil commitment process for the potentially long-term control, care and treatment of sexually violent predators is necessary.”); N.Y. MENTAL HYG. § 10.01(b) (“[C]onfinement of the most dangerous offenders will need to be extended by civil process in order to provide them such treatment.”); N.Y. STATE OFFICE OF THE ATTORNEY GEN. SEX OFFENDER MGMT. BUREAU, *supra* note 232, at 1 (“SOMTA is designed both to protect society from sex offenders with mental abnormalities . . . and to provide those offenders with specialized care and mental health treatment.”). See also N.Y. MENTAL HYG. § 10.03(g) (in defining a “detained sex offender” as a “person who is in the care, custody, control, or supervision of an agency with jurisdiction.”).

<sup>276</sup> Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES (Mar. 4, 2007), [http://www.nytimes.com/2007/03/04/us/04civil.html?pagewanted=1&\\_r=1&adxnlnx=1197299708-UXMD0LcHdb71VkeCogOecg](http://www.nytimes.com/2007/03/04/us/04civil.html?pagewanted=1&_r=1&adxnlnx=1197299708-UXMD0LcHdb71VkeCogOecg).

<sup>277</sup> This estimate was calculated by an analysis conducted by the Associated Press. *Sex Offender Confinement Costing States Too Much*, CBS (June 22, 2010), [http://www.cbsnews.com/2100-201\\_162-6605890.html](http://www.cbsnews.com/2100-201_162-6605890.html).

<sup>278</sup> Davey & Goodnough, *supra* note 276.

<sup>279</sup> *Id.*

<sup>280</sup> For a state by state breakdown of the respective costs associated with civil commitment, see *A Profile of Civil Commitment Around the Country*, N.Y. TIMES (Mar. 3, 2007), [http://www.nytimes.com/imagepages/2007/03/03/us/20070304\\_CIVIL\\_GRAPHIC.html](http://www.nytimes.com/imagepages/2007/03/03/us/20070304_CIVIL_GRAPHIC.html).

individuals.<sup>281</sup> The increasing financial burden associated with the civil confinement has led to criticism of the program, with some commentators arguing that the legislation should focus instead on lengthening the prison sentences for sexual offenders or restricting the level of plea agreements that can take place for these offenses.<sup>282</sup> Some states have declined to engage in civil commitment programs because of the financial burden they pose.<sup>283</sup> At least one state, in an effort to combat the rising costs, has contemplated allowing a private prison company to contract for the operation of a confinement facility,<sup>284</sup> a choice that could turn the civil confinement scheme into a lucrative business practice.<sup>285</sup>

Despite these obvious financial burdens, civil confinement schemes continue to operate and expand throughout the nation. It is probable that this practice has been protected, even during a period of recession, because lawmakers fear being viewed as taking a “soft” stance on the issue of sexual offenders.<sup>286</sup> Since the public outcry, following the commission of a violent sexual offense, motivates the

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<sup>281</sup> Between 2001 and 2005, the cost of civil confinement in Kansas has increased from \$1.2 million to \$6.9 million. Davey, *supra* note 276; *Sex Offender Confinement Costing States Too Much*, *supra* note 277 (noting that the costs of civil confinement have grown exponentially from when the scheme was first implemented in the 1990’s). See also Chris Kirkham, *Private Prison Company May Take Over Virginia Sex Offender Center*, HUFF. POST (July 16, 2012, 9:57 AM), [http://www.huffingtonpost.com/2012/07/16/private-prisons-virginia-sex-offenders\\_n\\_1672526.html](http://www.huffingtonpost.com/2012/07/16/private-prisons-virginia-sex-offenders_n_1672526.html) (according to a state legislation report, the number of inmates civilly confined in Virginia has increased from ten per year from 2003 to 2006, to 57 per year, from 2007 to 2010).

<sup>282</sup> Davey & Goodnough, *supra* note 276.

<sup>283</sup> Both Louisiana and Vermont have rejected civil confinement schemes, at least in part due to their costs. *Sex Offender Confinement Costing States Too Much*, *supra* note 277.

<sup>284</sup> Kirkham, *supra* note 281 (Two private groups, GEO and Liberty “have promised they can save Virginia substantial amounts of money . . . a central concern for state lawmakers, who have seen the costs of the civil commitment program multiply nearly tenfold in less than a decade.”).

<sup>285</sup> *Id.* (Tracy Velazquez, the Executive Director of the Justice Policy Institute, stated that “[t]here’s a disincentive for the companies to provide treatment, because the inmates continue to be customers. There is no end of sentence.”). For more on the potential consequences which could flow from allowing private groups to assume obligation of confinement centers, see *generally id.* (“The company would have a financial incentive to hold onto sex offenders for as long as possible while skimping on required mental health services.”).

<sup>286</sup> Even as Minnesota Representative Michael Paymar questioned the amount his own state was spending on its civil confinement program, he remarked “[n]o one wants to be – certainly here in this body – perceived to be soft on sex offenders.” *Sex Offender Confinement Costing States Too Much*, *supra* note 277. Similarly, Tracy Vazquez, Executive Director of the Justice Policy Institute, stated, with regards to the Virginia civil commitment program, “[w]e can’t afford this system, but politically we don’t have the will to change the system.” Kirkham, *supra* note 281.

passing of sexually violent predator law,<sup>287</sup> lawmakers prudently emphasize that the scheme's effective method of incapacitation is worth the cost.<sup>288</sup> It is clear then, that despite the cost, the ability to indefinitely confine individuals deemed too dangerous to be in the community makes civil confinement an attractive scheme. As will be demonstrated in the next section, this Note's proposal for reform does not dispense with the valued element of incapacitation. Instead, the proposal offers states a way to eliminate the costs incurred in mandating that the predator first serve out a criminal sentence, before the question of civil confinement ever arises.

## 2. *The Therapeutic Disadvantages of the "Delayed Treatment" Scheme*

As mentioned in the dissenting opinion of *Hendricks*, delayed treatment could potentially harm the goal of administering effective rehabilitation. According to Dr. Robert Wettstein,<sup>289</sup> it is much more difficult to begin treatment for the sexual offense years after its commission than when treatment occurs soon thereafter.<sup>290</sup> The longer the period between the commission of the offense and the beginning of treatment, the more opportunities for the offender to distort the facts and circumstances surrounding the offense, which can serve as a hindrance to the offender's ability to take responsibility.<sup>291</sup> Additionally, this lapse in time gives the offender ample opportunity to formulate justifications, excuses, and defenses for his or her action.<sup>292</sup> The prison environment has been viewed, in general, as non-conducive to

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<sup>287</sup> The Minnesota sexually violent predator law was passed as a response to the public outcry surrounding the kidnapping and murder of a 14-year old girl. The culprit was Dennis Linehan, a repeat sex offender. *Sex Offender Confinement Costing States Too Much*, *supra* note 277. See also Davey & Goodnough, *supra* note 276 (sexually violent predator laws are "[b]orn out of the anguish that followed a handful of high-profile sex crimes in the 1980s[.]"); *supra* Part II.B. See generally *id.* (section titled "New Laws Follow Publicized Cases").

<sup>288</sup> In holding that safety benefit outweighs the financial burden posed by civil confinement, California Assemblyman Nathan Fletcher stated, "you have to keep them incarcerated whatever the cost." *Sex Offender Confinement Costing States Too Much*, *supra* note 277.

<sup>289</sup> Dr. Robert M. Wettstein, M.D. is an Assistant Professor of Psychiatry at the University of Pittsburgh School of Medicine. Additionally, Dr. Wettstein serves as a co-director of the Law and Psychiatry Program at the Western Psychiatric Institute and Clinic.

<sup>290</sup> Wettstein, *supra* note 58, at 617.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

therapeutic purposes.<sup>293</sup> A prisoner faces stigmatization and possible violence from other inmates, by exhibiting any form of “weakness,” such as engaging in therapy, or simply disclosing his status as a sexual offender.<sup>294</sup> Therefore, an inmate has no real incentive to discuss or take responsibility for his offense.<sup>295</sup> If there is a real and tangible treatment aim embedded in the sexually violent predator statutes, its mission is not being effectively achieved by first processing individuals through the corrections system.

#### VI. CONCLUSION: ADOPTING A “HYBRID” SYSTEM

One way to lessen the demonstrated and overwhelming costs of civil confinement, while simultaneously addressing the problems that accompany a delayed treatment scheme, is to eliminate the existing requirement that the offender first serve out a criminal sentence before being evaluated or considered for civil confinement. This Note proposes a “hybrid” system, combining features of the Canadian Dangerous Offender legislation and features associated with the earlier Sexual Psychopath legislation. Essentially, instead of the offender first serving out a fixed criminal sentence in a prison setting, if found to be in need of civil confinement in a specialized treatment center, the individual would be transferred to such a center at the outset of his or her sentence.

Under the proposed system, the application for a civil confinement hearing would follow soon after the conclusion of the offender’s sentencing hearing. Under the Canadian legislation, the Criminal Code dictates that the Prosecutor is obligated to inform the court of his or her decision to seek a *dangerous offender* designation “as soon as feasible after the finding of guilt.”<sup>296</sup> Under this proposed system, however, the application for a civil confinement hearing would be required to be submitted as soon as feasible, or within a reasonable period of time, after the conclusion of the offender’s sentencing hearing. It may be prudent and efficient for state legislatures to prescribe what would constitute a “reasonable time after”; for example, no later than thirty days following the conclusion of the offender’s sentencing hearing.

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<sup>293</sup> See *Kansas v. Hendricks*, 521 U.S. 346, 386 (1997) (Breyer, J., dissenting) (the Kansas legislature specifically wrote in the sexually violent predator statute that the “prognosis for rehabilitating . . . in a prison setting is poor.”). See also Wettstein, *supra* note 58, at 617 (“Few, if any, correctional institutions are designed to function as therapeutic environments, much less actually do so.”).

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> Criminal Code, R.S.C., 1985, c. C-46 § 752.01.

Once the application has been made, the hearing would be conducted in the same manner, with the same criteria, as under the existing civil confinement scheme. The author emphasizes that the proposal does not seek to change the substantive procedures involved in evaluating the dangerousness of a civil confinement candidate, but rather when the evaluation should take place. This change would enable the determination of whether or not a mental abnormality exists when the underlying offense is fresh in the offender's mind, allowing for a more accurate evaluation of his true level of dangerousness.<sup>297</sup> This is a clear benefit that the Canadian system possesses that the U.S. should consider implementing.

Additionally, the timing of the evaluation under the proposed system is more logical. Under the existing system of civil confinement, the offender, who was not identified as suffering from any mental abnormalities at the time of his conviction or incarceration, has suddenly developed one just in time for his release from incarceration.<sup>298</sup> This sudden presence is somewhat suspect, considering the fact that the criteria used in determining if a mental abnormality exists in the first place is based on a finding that the offender is predisposed to commit sexual offenses.<sup>299</sup> This finding is grounded upon evidence of the offender's history of prior sexual offenses.<sup>300</sup> Therefore, all that is accomplished by determining that an offender suffers from a mental abnormality, is to say that he is likely to commit offenses in the future because he has committed them in the past.<sup>301</sup> Clearly we already have a substantial portion of the evidence that will be relied upon in the civil confinement hearing. What advantage is there in waiting ten or so years to utilize it, except to further prolong the offender's duration of incapacitation?

Since the evaluation would follow the offender's sentencing hearing, the length of the sentence decided upon during the hearing

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<sup>297</sup> Wettstein, *supra* note 58, at 617 (holding that "cognitive distortions" of the offense "become further consolidated over time, making it more difficult for the offender to truly accept responsibility for his earlier behavior.").

<sup>298</sup> See *supra* text accompanying notes 269-271.

<sup>299</sup> For almost all sexually violent predator laws, the statutory definition of a "mental abnormality" (sometimes referred to as a "mental disorder") generally requires that the individual have a "condition" that affects the person in such a way, as to predispose him or her to the commission of sexual offenses. See KAN. STAT. ANN. § 59-29a02(b) (2009); N.Y. MENTAL HYG. § 10.03(i); WIS. STAT. ANN. § 980.01(2) (1994).

<sup>300</sup> See *supra* text accompanying notes 129-130.

<sup>301</sup> *State v. Post*, 541 N.W.2d 115, 143 (1995) (Abrahamson, J., dissenting) (stating that the definition of "mental disorder" in the Wisconsin statute "means no more than a predisposition to engage in acts of sexual violence.").

would serve as a baseline minimum for civil confinement. The author emphasizes that the proposed system does not allow the offender to escape his sentence, or to receive a lighter or less restricted sentence. Instead the proposed system more accurately achieves the alleged goals of sexually violent predator laws in general: incapacitation and treatment. The offender will be confined in the specialized confinement center for *at least* the number of years as his judicially sanctioned sentence. Every year after that term of years, the offender will be re-evaluated to determine if civil confinement is still necessary.<sup>302</sup> Because the statute is civil, the agency in charge of the confinement center always has the authority to indefinitely confine the offender should he require it, so there is no fear that the goal of incapacitation will be weakened. However, under the proposed system, the important treatment feature of the civil statute will be more accurately and effectively achieved.

This proposed system attempts to address several of the established criticisms of modern civil confinement schemes. Enabling predators to serve out their sentences in the already established and existing specialized confinement centers more accurately reflects the alleged non-punitive nature of the statute, since the offender will not suffer an unreasonable delay in necessary treatment. Additionally, under the proposed system, the individual will not first serve a prison sentence and subsequently be subjected to an evaluation determining length of appropriate indefinite confinement without the commission of an additional qualifying offense. Therefore, there is no risk of imposing double or multiple “punishments” for the same crime; the offender will serve one sentence, albeit a potentially indefinite one.<sup>303</sup> Lastly, under the proposed system, states may be able to lessen the financial burden posed by civil confinement, since they are now able to cut the additional cost of first incarcerating the individual.

Specialized treatment for the sexually violent predator will begin immediately following the confinement, rather than allowing the offender to wait a number of years in prison before ever even being considered for such treatment. This procedure is similar to the manner in which the earlier sexual psychopath laws functioned.<sup>304</sup> As stated earlier, these laws fell into disuse, mainly due to a political and economic climate that favored de-institutionalization. This viewpoint

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<sup>302</sup> Most states, including New York, review a civilly confined offender’s case on an annual basis already. See MENTAL HYG. § 10.09(a).

<sup>303</sup> See *Hendricks*, 521 U.S. 346, 370 (1997).

<sup>304</sup> See *supra* Part II.A.

does not present an obstacle or barrier to the author's proposed system. It is clear from the case law upholding the practice of civil confinement and the language of sexually violent predator statutes, that the legislature believes the population of sexually violent predators is in need of specialized treatment in facilities of a psychiatric nature.<sup>305</sup> As can be demonstrated from the civil confinement jurisprudence, the goal of treatment, even as an ancillary goal, is a viable and constitutionally permissible aim of civil confinement laws.<sup>306</sup>

A tremendous number of financial resources have been allocated for the building, securing, and staffing of specialized confinement centers. These centers are designed specifically for and have been deemed adequate to serve the stated aims of sexually violent predator statutes: indefinite incapacitation *and treatment*. It is difficult, then, to explain why these centers should not be used to their maximum potential of achieving the identified goals by utilizing them from the outset. Unless the sexually violent predator statutes are indeed purely punitive laws, the goal of treatment should be a more focused and important consideration in this area of law. Without disturbing the system's ability to impose indefinite incapacitation, adoption of the "hybrid" system will engender an important opportunity for treatment to become an actual, viable, and visible goal of sexually violent predator statutes.

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<sup>305</sup> "[T]he treatment needs of this population [sexually violent predators] are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the [general involuntary civil commitment statute]." *Hendricks*, 521 U.S. at 351 (quoting KAN. STAT. ANN. § 59-29a01 (1994)). The Washington Statute contains the same language. See WASH. REV. CODE ANN. § 71.09.010. See MENTAL HYG. § 10.01(a) ("The legislature finds . . . [t]hat recidivistic sex offenders pose a danger to society that should be addressed through *comprehensive programs of treatment and management*." (emphasis added)).

<sup>306</sup> See *Hendricks*, 521 U.S. at 367.