CIVIL CONFINEMENT OF SEX OFFENDERS: NEW YORK'S ATTEMPT TO PUSH THE ENVELOPE IN THE NAME OF PUBLIC SAFETY

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INTRODUCTION

The United States Supreme Court has long sanctioned the states' civil confinement of individuals against their will, provided certain requirements are met.[1] In most cases, states exercise this option in the context of (1) caring for those who cannot care for themselves through its *parens patriae* powers, or (2) protecting the public from those who are mentally ill and dangerous through its police powers.[2] Confinement is based on the dual requirements of dangerousness and "some additional factor," usually mental illness.[3] Civil confinement is not intended as punishment, and criminal wrongdoing is not a prerequisite for imposing civil commitment.[4] The Supreme Court has explicitly concluded that civil confinement is not a punishment.[5] The penal system, however, has faced considerable difficulty in its attempts to deal with mentally ill individuals who are being punished separately for criminal actions.[6] The debate over the civil confinement of sex offenders is one such example.[7]

[1] Although freedom from physical restraint is a liberty interest protected by the Due Process Clause, this interest can be overridden in civil circumstances if there is a danger to public safety. *See* Kansas v. Hendricks, 521 U.S. 346, 356-57 (1997); Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905). Confinement must take place, however, pursuant to the requirements of due process protection. Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

[2] *See* Addington v. Texas, 441 U.S. 418, 426 (1979).

[3] Jones v. United States, 463 U.S. 354, 362 (1983). The Court has usually upheld civil commitment statutes "when they have coupled proof of dangerousness with the proof of some additional factor," such as mental illness or abnormality. *Hendricks*, 521 U.S. at 358. The words "mentally ill" need not be used; the state legislature can choose how to craft the statute within constitutional limits. *See id.* at 359.

[4] *See Addington*, 441 U.S. at 428 ("[A] civil commitment proceeding can in no sense be equated to a criminal prosecution.").

[5] The Court first looks to the legislature's stated intent as to whether the statute is civil or penal. *Hendricks*, 521 U.S. at 361. However, even if the statute is labeled civil, if a "statutory scheme [is] so punitive either in purpose or effect as to negate [the stated] intention," the Court will treat it as penal. United States v. Ward, 448 U.S. 242, 248-49 (1980). In determining if the scheme is actually punitive when labeled civil, the Court relies on a list of factors laid out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). *See* discussion *infra* Part I.A.

[6] *See, e.g.*, Jennifer S. Bard, *Re-arranging Deck Chairs on the Titanic: Why the Incarceration of Individuals with Serious Mental Illness Violates Public Health, Ethical,*

Sex offenders are often referred to as particularly dangerous criminals.[8] The definition of a "sexual offense" is rather broad, but politicians, activists and the public focus primarily on offenses involving children. Although advocates of tougher sex offender laws cite studies showing high recidivism rates, civil liberties groups argue that the statistics are inconclusive in showing the risk presented by sex offenders.[9] While the legitimacy of the goals of public safety and the protection of children cannot be questioned, it is important not to overlook the civil rights of sex offenders in the move toward a safer society.

In the pursuit of public safety, one particularly controversial tool is the civil confinement of sex offenders at the conclusion of their prison terms.[10] The Supreme Court upheld a statute specifically designed to accomplish this

and Constitutional Principles and Therefore Cannot Be Made Right by Piecemeal Changes to the Insanity Defense, 5 HOUS. J. HEALTH L. & POL'Y 1, 1 (2005) ("'Anyone who has spent any time in the criminal justice system – as a defense lawyer, as a district attorney, or as a judge – knows that our treatment of criminal defendants with mental disabilities has been, forever, a scandal. Such defendants receive substandard counsel, are treated poorly in prison, receive disparately longer sentences, and are regularly coerced into confessing to crimes (many of which they did not commit).'" (quoting Michael L. Perlin, *"Life Is in Mirrors, Death Disappears": Giving Life to* Atkins, 33 N.M. L. REV. 315, 315 (2003))).

[7] *See, e.g.*, Adam J. Falk, Note, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment After* Kansas v. Hendricks, 25 AM. J.L. & MED. 117, 117-28 (1999) (criticizing the use of civil confinement for sex offenders).

[8] *See, e.g.*, Anemona Hartocollis, *Sex Offenders Held Illegally, Judge Rules*, N.Y. TIMES, Nov. 16, 2005, at B1 (quoting New York Governor George Pataki as stating that a court ruling allowing the release of civilly confined sex offenders would "'jeopardize the safety of our children and communities throughout the state'"); Anahad O'Connor, *A Shelter Draws Attention to the Comforts It Provides*, N.Y. TIMES, Dec. 25, 2005, § 14WC, at 8 (discussing the "vehement not-in-my-backyard campaign" that Westchester residents launched in response to a proposal that thirteen convicted sex offenders live in a county homeless shelter); National Association to PROTECT Children, Promise to Protect Agenda, http://www.protect.org/agenda.html (last visited Oct. 1, 2006) (decrying the lack of adequate political response to the danger posed by sex offenders).

[9] The argument put forth by advocates of tougher sex offender laws is that sex offenders cannot recover and will likely strike again. *See, e.g.*, National Association to PROTECT Children, *supra* note 8 ("[R]esearch shows that treatment programs simply cannot 'cure' child sexual offenders."). Civil liberties groups question the truth of such research and ask for stronger scientific support. *See, e.g.*, NYCLU: Regarding Legislative Proposals Related to Sex Offenses, http://www.nyclu.org/leg_sexoffenders_2005.html (last visited Oct. 1, 2006) (criticizing legislative efforts as uninformed, and posing questions about the "true risks posed by convicted sex offenders").

[10] *See* Falk, *supra* note 7 (discussing constitutional problems with the civil confinement of sex offenders); Editorial, *Pushing the Envelope*, N.Y. TIMES, Dec. 7, 2005, at A32 [hereinafter *Pushing the Envelope*] (criticizing civil confinement of sex offenders because of the high cost involved and the restriction on civil liberties).

purpose in the landmark case of *Kansas v. Hendricks*.[11] The Court ruled that the statute did not violate due process requirements, double jeopardy, or the Ex Post Facto Clause.[12] In addition, the Court found that the confinement was not punishment.[13] Following the ruling, at least sixteen other states and the District of Columbia enacted similar statutes.[14] Despite some residual controversy in this area,[15] this type of legislation has become an accepted part of efforts to control sex offenders.[16]

Politicians and activists in New York State have recently started a campaign to protect the public from convicted sex offenders.[17] New York Governor George E. Pataki has long advocated tougher laws regulating sex offenders, in particular a statute like the one upheld in *Hendricks*, allowing for civil confinement of sex offenders after the conclusion of their prison terms.[18] Although the State Senate has passed such a bill, the State Assembly has refused to pass it six times.[19] The movement to protect the public from sex offenders gained considerable momentum and public support, particularly in Westchester County, when a woman was stabbed and killed in June 2005 by a

[11] 521 U.S. 346, 371 (1997).

[12] *Id.*

[13] *Id.* at 361-65.

[14] Alan Feuer, *Pataki Uses State Law to Hold Sex Offenders After Prison*, N.Y. TIMES, Oct. 4, 2005, at B4; *see also In re* Fisher, 164 S.W.3d 637, 646 (Tex. 2005) ("Relying on *Hendricks*, courts in fourteen states have determined that their [Sexually Violent Predators] civil commitment schemes are civil, not criminal."); Grant H. Morris, *Mental Disorder and the Civil/Criminal Distinction*, 41 SAN DIEGO L. REV. 1177, 1190 ("Although the United States Supreme Court upheld the constitutionality of [Sexually Violent Predator] legislation by the narrowest of margins, many states responded quickly to the *Hendricks* decision by enacting SVP legislation.").

[15] *See, e.g.*, Morris, *supra* note 14, at 1178, 1187-97 (lamenting "the evaporating distinction between sentence-serving convicts and mentally disordered nonconvicts who are involved in, or who were involved in, the criminal process"); *see also* discussion *infra* Part II.A.2.

[16] *See Pushing the Envelope*, *supra* note 10 (discussing the effects of the civil confinement statute, particularly in Kansas).

[17] *See, e.g.*, Feuer, *supra* note 14 (describing Governor Pataki's instruction to use existing civil confinement statutes to restrain sex offenders at the conclusion of their prison terms); Lisa W. Foderaro, *Spano to Seek New System of Monitoring Sex Offenders*, N.Y. TIMES, Apr. 22, 2005, at B4 (describing Westchester County Executive Andrew Spano's plan to use global positioning technology to track sex offenders on probation); Anahad O'Connor, *Westchester to Accompany Most Dangerous Sex Offenders, Monitoring All Activities*, N.Y. TIMES, Sept. 30, 2005, at B5 (describing proposed supervision of sex offenders at a county-run homeless shelter).

[18] Feuer, *supra* note 14.

[19] *Id.*; *see also* State *ex rel.* Harkavy v. Consilvio, 809 N.Y.S.2d 836, 837 (Sup. Ct. 2005) (discussing the failed bill attempts in New York), *rev'd*, 812 N.Y.S.2d 496 (App. Div. 2006).

convicted sex offender.[20] As a result, in October 2005, Governor Pataki ordered that state correction and mental health officials use the state's existing involuntary civil confinement statute – one designed for the mentally ill and not specifically for sex offenders – to commit sex offenders upon completion of their sentences.[21] Kevin Quinn, a spokesperson for Governor Pataki, acknowledged that the Governor wanted to "'push the envelope'" and that he expected the action to be challenged in court.[22]

It was, in *State ex rel. Harkavy v. Consilvio*,[23] when a New York State Supreme Court judge held that the confinement of twelve sex offenders under the existing civil confinement statute was unconstitutional.[24] Judge Silbermann found that the state violated the committed individuals' due process rights by not complying with existing procedures contained in the New York Correction Law.[25] However, this ruling was recently overturned, as an appellate court found that the Correction Law did not govern the proceedings and that the individuals' due process rights were adequately protected.[26] The Mental Hygiene Legal Services plans to appeal, suggesting that the future of civil confinement of sex offenders in New York remains unsettled.[27]

The purpose of this Note is to explore the effect that past Supreme Court decisions have had on contemporary treatment of sex offenders, specifically through a discussion of the recent events in New York State. In Part I, I trace the Supreme Court's treatment of involuntary civil confinement in cases that have not involved sex offenders. These cases provide a backdrop for Supreme Court jurisprudence specifically related to sex offenders, which I address in Part II. In doing so, I highlight important turning points in civil confinement jurisprudence that provide the foundation of current efforts to restrain sex offenders, such as the Supreme Court's ruling in *Hendricks* that civil confinement of sex offenders is civil and not punitive. I then address the

[20] O'Connor, *supra* note 8. An organization called NOWAY has led protests and rallies against a homeless shelter that would house sex offenders, while another organization has filed a lawsuit against Westchester County. *Id.* "Their cause gained an unexpected sense of urgency in June, when a 56-year old woman was stabbed to death . . . ; a convicted rapist who had been using the shelter system . . . was charged with her killing." *Id.*

[21] Feuer, *supra* note 14 (reporting Governor Pataki's decision to use the existing civil confinement statute to lock up sex offenders, resulting in the confinement of five sex offenders at the Manhattan Psychiatric Center on that same day).

[22] *Id.* (quoting Kevin Quinn).

[23] 809 N.Y.S.2d 836 (Sup. Ct. 2005).

[24] *Id.* at 840-41.

[25] *Id.*; *see also* Hartocollis, *supra* note 8 (discussing the due process right of offenders to receive notice of transfer and a chance to be heard).

[26] State *ex rel.* Harkavy v. Consilvio, 812 N.Y.S.2d 496, 500-01 (App. Div. 2006); *see also Metro Briefing New York: Court Upholds Sex Offender Civil Confinement*, N.Y. TIMES, Mar. 31, 2006, at B7 [hereinafter *Metro Briefing*]; Jennifer Smith, *Sex Offender Confinement Upheld*, NEWSDAY, Mar. 31, 2006, at A02.

[27] Smith, *supra* note 26; *see also* discussion *infra* Part III.

concerns raised in light of these developments, including the possibility that the United States is creating a group of "second-class citizens – citizens with fewer rights than the rest of us."[28] Finally, in Part III, I analyze recent developments in New York regarding sex offenders and explore potential problems with New York's approach.

I. SUPREME COURT JURISPRUDENCE REGARDING CIVIL CONFINEMENT AND LIBERTY INTERESTS

Involuntary civil commitment of the mentally ill has long been accepted in the United States as a constitutional tool to accomplish two purposes. First, under a state's *parens patriae* powers, civil commitment may be used to care for a mentally ill individual who cannot care for himself.[29] Second, under a state's police powers, civil commitment may be used as a means to protect the public at large from those who are mentally ill and may pose a danger to others.[30] For the second approach to be valid, two elements must be established: the aspect of dangerousness (either to oneself or to others), and the presence of an additional factor such as mental illness or abnormality.[31] In addition, the state must comply with procedural due process requirements under the Fourteenth Amendment when subjecting individuals to involuntary civil confinement.[32]

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[28] Stanley Fish, *A Constitution of Contradictions*, N.Y. TIMES, Jan. 9, 2006, at A21 (posing potential questions to ask Supreme Court Justice Samuel Alito during his nomination hearings, including whether "constitutional concerns are raised" by recent developments in sex offender jurisprudence). In discussing this issue, particular attention will be paid to the Court's treatment of alcoholism as contrasted with its attitude toward sex offenders. Powell v. Texas, 392 U.S. 514, 529 & n.24 (1968) (emphasizing that a conviction hinges on one's acts, not one's status as an alcoholic); *see also* discussion *infra* Part I.B.

[29] Addington v. Texas, 441 U.S. 418, 426 (1979).

[30] *Id.*

[31] Kansas v. Hendricks, 521 U.S. 346, 356 (1997) ("[The Supreme Court has] 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'"). Note that the second element does not have to specifically be "mental illness." *Id.*; *see also* Heller v. Doe, 509 U.S. 312, 314-15 (1993).

[32] The Supreme Court, in addition to examining the procedures provided in each challenged statute, has laid out some general principles regarding procedural due process. *See generally* John A. Frey, Annotation, *Supreme Court's Views as to Due Process Requirements, Under Federal Constitution's Fourteenth Amendment, with Respect to Noncriminal Commitment or Confinement of Persons Who Have, or Allegedly Have, Mental Disabilities*, 138 L. ED. 2d 1069 (2006). At a minimum, the Court has held that an individual is entitled to a pre-deprivation hearing as long as it is possible to provide such a hearing. Zinermon v. Burch, 494 U.S. 113, 138-39 (1990). One illustration of state processes that comply with procedural due process requirements can be found in *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940). Under the

A. *Determining Whether State Action Is Civil or Punitive: The Supreme Court's Two-Prong Test and the* Kennedy v. Mendoza-Martinez *Factors*

Many civil statutory schemes, including involuntary civil confinement, resemble penal action by the state. However, the distinction between civil and criminal confinement is important, as many constitutional protections, such as the privilege against self-incrimination, the Sixth Amendment protections, double jeopardy, and the requirement of proof beyond a reasonable doubt, only apply in criminal cases.[33] The Supreme Court has developed a two-part test to distinguish whether actions by the state are civil or criminal in nature.[34] First, a court must look to the intent of the legislature.[35] If the legislature labels an action civil, this is often the end of the inquiry.[36] However, in situations where the effect or purpose of the statute is clearly penal, the court will reject the legislature's label and instead treat the statute as criminal.[37] This second part of the test is accomplished through examination of such factors as

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose.[38]

As I will discuss below, these factors played an important role in *Hendricks*, in which the Supreme Court determined that civil confinement of sex offenders

Minnesota statute, the individual was afforded the right to be represented by counsel, the right to compel witnesses, an examination by court appointed doctors, the ability to petition for release, and a right of appeal. *Id.* at 272-73.

[33] United States v. Ward, 448 U.S. 242, 248 (1980).

[34] *Id.*

[35] *Hendricks*, 521 U.S. at 361 ("We must initially ascertain whether the legislature meant the statute to establish 'civil' proceedings.").

[36] *Id.* (explaining that when the legislature intends for a penalty to be civil, the Court "ordinarily defer[s] to the legislature's stated intent").

[37] *Id.* ("[W]e will reject the legislature's manifest intent only where a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" (alterations in original) (quoting *Ward*, 448 U.S. at 248-49)).

[38] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (footnotes omitted); *see also Hendricks*, 521 U.S. at 362 (applying the *Mendoza-Martinez* factors); *Ward*, 448 U.S. at 248 (stating that the factors laid out in *Mendoza-Martinez*, while "neither exhaustive nor dispositive," are used to guide the inquiry as to whether penalties labeled civil are actually punitive).

after the completion of their sentences was a civil measure as opposed to a punitive restriction.[39]

B. *Supreme Court Precedent on Civil Confinement*

1. *Baxstrom v. Herold*: Equal Protection Rights of Prisoners Vis-à-vis Other Persons Confined Through Civil Commitment

The Supreme Court's past decisions help clarify the circumstances in which civil confinement is constitutional as well as the procedures that must be used. In 1966, the Court examined New York's civil confinement statute in *Baxstrom v. Herold*.[40] A prisoner, Johnnie K. Baxstrom, was convicted of assault and certified insane upon arrival in prison.[41] He was transferred to a mental institution run by the New York Department of Correction, designed to house mentally ill prisoners during their sentences.[42] As Baxstrom's sentence was about to end, the director of the mental institution determined that Baxstrom was still mentally ill and dangerous.[43] The director requested that Baxstrom be held under the civil confinement laws after his sentence expired.[44] Baxstrom was given a hearing, but not a trial, which resulted in a finding that Baxstrom still required treatment of his mental condition, and an order to transfer Baxstrom from the custody of the Department of Corrections to the Department of Mental Hygiene.[45] Baxstrom filed a writ of habeas corpus in state court, but "[d]ue to his indigence and his incarceration in [the psychiatric hospital], Baxstrom could not produce psychiatric testimony to disprove the testimony adduced at the prior hearing," and the writ was dismissed.[46] The Supreme Court reversed, holding that Baxstrom's equal protection rights had been violated, because all other persons civilly committed in New York were granted jury trials before commitment to determine whether they were dangerously mentally ill.[47]

The Court determined that the State, having made a particular review process available to some, could not withhold it from prisoners transferred to mental institutions at the conclusion of their sentences.[48] The State had established a distinction between the civilly and the criminally insane,

[39] *See* discussion *infra* Part II.A.1.

[40] 383 U.S. 107 (1966).

[41] *Id.* at 108.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 109.

[46] *Id.*

[47] *Id.* at 110 (holding that there must be "a judicial determination that [Baxstrom] is dangerously mentally ill such as that afforded to all so committed except those, like Baxstrom, nearing the expiration of a penal sentence").

[48] *Id.* at 111.

providing fewer procedural rights to prisoners nearing the end of their prison terms.[49] The Court agreed that such a distinction might be appropriate in determining what type of care a patient should receive, but insisted that it was not relevant in determining what type of hearing an individual should be granted to establish whether he was mentally ill in the first place.[50] This decision is important because it established a prisoner's right to receive the same hearing as any other person about to be civilly confined. As Justice Stevens later wrote, *Baxstrom* recognized that "involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual."[51]

2. *Jackson v. Indiana*: Civil Confinement of the Accused

The 1972 case of *Jackson v. Indiana*[52] also addressed the issue of civil confinement of criminal defendants.[53] The defendant, accused of two robberies, was found incompetent to stand trial.[54] The trial court ordered that he be committed until he became competent to stand trial, even though an expert expressed doubt as to whether he possessed "sufficient intelligence ever to develop the necessary communication skills" to stand trial.[55] The Supreme Court reversed. The case stands for the principles that (1) equal protection requires that those who are charged with an offense must be subject to the same standards for civil confinement and release as those who are not,[56] and (2) due process prohibits potential lifetime commitment simply because one has been found incompetent to stand trial.[57]

[49] *Id.*

[50] *Id.* at 111-12.

[51] Washington v. Harper, 494 U.S. 210, 242 (1990) (Stevens, J., dissenting); *see also* Vitek v. Jones, 445 U.S. 480, 493 (1980).

[52] 406 U.S. 715 (1972).

[53] *Id.* at 717.

[54] *Id.* at 717-19.

[55] *Id.* at 719. Furthermore, the record indicates that the expert did not believe Indiana had sufficient facilities to develop the defendant's skills. *Id.* In other words, there was a possibility that he would be confined for the rest of his life, never developing the competence to stand trial.

[56] *Id.* at 723-31. If not for the criminal charges against him, the State would have had to proceed against Jackson under the ordinary civil commitment statute. *Id.* The Court held that "by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by [the state statutes providing for the commitment of the 'mentally ill' and 'feeble minded'], Indiana deprived petitioner of equal protection of the laws under the Fourteenth Amendment." *Id.* at 730.

[57] *Id.* at 731-39. The Court has found that incompetence alone cannot justify indefinite confinement. *Id.* When waiting for a defendant to gain competence, the defendant can only

This case reinforced the principle established in *Baxstrom* that the Equal Protection Clause guarantees the same rights, in the face of civil commitment, to criminal defendants as to individuals not charged with an offense. Furthermore, *Jackson* introduced the idea that it is inappropriate to impose lifelong civil confinement on an individual who has not been convicted of a crime. While sex offenders have been convicted of a crime, the Court's reluctance to inflict an indefinite sentence disproportionate to the crime committed is important, as it underscores the proposal that a sex offender who has reached the close of his sentence should not be subjected to lifelong civil confinement after the completion of his prison term.

3. *Powell v. Texas*: The Court Discusses Civil Confinement as It Would Apply to Alcoholics

In *Powell v. Texas*,[58] the defendant was found guilty of public intoxication.[59] His defense was that he was suffering from the disease of alcoholism, and therefore was not acting on his own free will when he committed the offense.[60] The Court discussed whether alcoholism is a disease, observing that beyond the general consensus that alcoholism required treatment, the issue remained controversial.[61] The Court acknowledged the "social and public health problems" associated with alcoholism, as well as the possibility that alcoholism is incurable.[62] It was for this reason that the Court expressed concern – in dicta – over civil confinement schemes for alcoholics, which could be used to confine alcoholics for indefinite periods of time with no prospect of "receiving effective treatment and no prospect of periodic 'freedom.'"[63] The Court stated that "we run the grave risk that nothing will be accomplished beyond the hanging of a new sign – reading 'hospital' – over one wing of the jailhouse."[64]

be committed for a "reasonable period of time." *Id.* at 733. However, the State may show that the defendant is dangerous to support an indefinite confinement. *Id.* at 732-33.

[58] 392 U.S. 514 (1968).

[59] *Id.* at 516.

[60] *Id.*

[61] *Id.* at 522-25 ("In other words, there is widespread agreement today that 'alcoholism' is a 'disease,' for the simple reason that the medical profession has concluded that it should attempt to treat those who have drinking problems. There the agreement stops."). The Court discussed the difficulty in defining whether alcoholism is a disease in and of itself, or whether it stems from other "underlying psychiatric disorders." *Id.* at 522.

[62] *Id.* at 526-28.

[63] *Id.* at 529 & n.24.

[64] *Id.* at 529. Admittedly, the holding of *Powell* did not depend on the discussion of civil confinement, but that discussion is nevertheless highly relevant to the issue of civil confinement of sex offenders. *See infra* notes 69-71 and accompanying text.

Powell reflects the Court's attitude that individuals with drinking problems must only be punished for their criminal acts, not their status as alcoholics.[65] The Court acknowledged that the criminal system is not ideal for dealing with alcoholics, as their disease makes it likely that they will commit further crimes.[66] However, because civil commitment offers little hope of treatment and a lifetime of confinement, the Court determined that the use of the criminal process to battle public intoxication did provide some social value.[67] The Court pointed to the "absence of a coherent approach to the problem of treatment," and "the almost complete absence of facilities and manpower for the implementation of a rehabilitation program," to justify continued reliance on an imperfect criminal system rather than civil confinement to deal with public intoxication.[68]

The Court's analysis with regard to alcoholism resonates within the debate over sex offenses, particularly for those who believe that sex offenders share many of the characteristics discussed above.[69] Some mental health advocates have compared sex offenders to alcoholics, stating that only six percent of sex offenders have diagnosed mental illnesses, while most "are more akin to alcoholics or someone suffering from a compulsive disorder."[70] As long as it remains difficult to pin down the exact condition that a sex offender is afflicted with, as well as the realistic possibilities for treatment, the civil confinement of sex offenders and the civil confinement of alcoholics are issues with some common ground.[71]

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[65] *Id.* at 532 (discussing Robinson v. California, 370 U.S. 660 (1962), which overturned a state statute criminalizing addiction to narcotics).

[66] *Id.* at 530 ("The picture of the penniless drunk propelled aimlessly and endlessly through the law's 'revolving door' of arrest, incarceration, release and re-arrest is not a pretty one.").

[67] *Id.* at 530-31.

[68] *Id.*

[69] The *Powell* Court refused to conclude that "chronic alcoholics . . . suffer from such an irresistible compulsion to drink . . . that they are utterly unable to control their performance . . . and thus cannot be deterred at all from public intoxication." *Id.* at 535. However, the Court conceded that its opinion on the subject was based upon the evidence on record and the state of medical knowledge at the time.

[70] Jennifer Medina, *As Albany Weighs Confinement of Sex Offenders, Some Fear a Threat to Civil Liberties*, N.Y. TIMES, Feb. 6, 2006, at B4. Such statistics are difficult to reconcile with studies that indicate that large portions of the prison population suffer from mental illness. This may simply reflect the uncertain state of research regarding the mental state of sex offenders and prisoners in general.

[71] The dangers of alcohol related offenses have long been prominent. For instance, in 2004, a total of 16,694 deaths were caused by drunk driving. This number represented thirty percent of all traffic fatalities that year. MADD Online, State-by-State Traffic Fatalities – 2004, http://www.madd.org/stats/10213 (last visited Oct. 1, 2006) (citing the National Highway Traffic Safety Administration). Another study indicated that thirty-six percent of all incarcerated offenders in 1996 had been drinking when they committed their crimes.

4. *Addington v. Texas*: Clear and Convincing Standard Required for Civil Commitment Proceedings

In *Addington v. Texas*,[72] the Supreme Court determined that "clear and convincing" evidence is required to subject an individual to involuntary civil commitment.[73] *Addington* dealt with an individual diagnosed as a psychotic schizophrenic with paranoid tendencies.[74] The individual did not dispute the finding of mental illness, only the finding that he was dangerous to himself or others.[75] The issue for the Court centered on the standard of proof that should have been required at the jury trial.[76] The defendant argued that the standard ought to be the same as in criminal convictions: "beyond a reasonable doubt."[77] The Court of Civil Appeals agreed, but the Texas Supreme Court did not, finding that only the lowest standard, a "preponderance of the evidence," applied in civil cases.[78] The United States Supreme Court came out in the middle, holding that "clear and convincing evidence," the standard originally used by the trial court, was appropriate.[79]

In reaching this decision, the Court balanced the individual's interest in not being involuntarily confined against the state's interest in having certain individuals committed.[80] The Court recognized the significant liberty interest that individuals have in not being committed against their will, and the due process protections that must be afforded before such commitment.[81] Therefore, although the state has a legitimate interest in providing care for and protecting its citizens, "the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence."[82]

However, the Court made it clear that the "beyond a reasonable doubt" standard required in criminal proceedings was too high, stating that a non-punitive "civil commitment proceeding can in no sense be equated to a

LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, ALCOHOL AND CRIME: AN ANALYSIS OF NATIONAL DATA ON THE PREVALENCE OF ALCOHOL INVOLVEMENT IN CRIME, at vi (1998), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ac.pdf.

[72] 441 U.S. 418 (1979).

[73] *Id.* at 433.

[74] *Id.* at 421.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 421-22.

[78] *Id.* at 422.

[79] *Id.* at 425-33.

[80] *Id.* at 425.

[81] *Id.*

[82] *Id.* at 426-27.

criminal prosecution."[83] The Court stated that this "unique standard of proof" should be reserved for criminal cases.[84] Furthermore, the Court explained that this burden could be too high for the states to realistically meet.[85] Therefore, with one standard too low and the other too high, the Court required a middle ground to satisfy due process rights.[86]

C. Vitek v. Jones*: The Court Recognizes a Prisoner's Liberty Interest in Not Being Transferred to a Mental Institution When Treatment Is Possible in Prison*

In *Vitek v. Jones*,[87] the Supreme Court addressed the due process rights of mentally ill prisoners, holding that the involuntary transfer of a prisoner to a mental institution implicated a liberty interest and therefore required due process protections.[88] The state could not transfer the prisoner unless he suffered from a mental illness that could not be treated in prison.[89] Recognizing that a prisoner has a lessened liberty interest upon his conviction,[90] the Court noted that an adverse change in the conditions of confinement does not trigger due process protection "'[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him.'"[91] The Court, however, found that civil confinement in a mental institution "is not within the range of conditions of confinement to which a prison sentence subjects an individual."[92] The Court cited the stigma associated with such a transfer and the mandatory behavior modification associated with psychiatric treatment as two reasons to require additional procedural safeguards.[93] Finally, the Court emphasized notice and an adversary hearing as critical aspects of what due process required.[94]

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[83] *Id.* at 427-28.

[84] *Id.* at 428.

[85] *Id.* at 432 ("[T]he reasonable-doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment.").

[86] *Id.* at 431-33.

[87] 445 U.S. 480 (1980).

[88] *Id.* at 494.

[89] *Id.* at 488-91.

[90] *Id.* at 493.

[91] *Id.* (alteration in original) (quoting Montanye v. Haymes, 427 U.S. 236, 242 (1976)).

[92] *Id.*

[93] *Id.* at 494.

[94] *Id.* at 495-96.

II. SEX OFFENDER JURISPRUDENCE

A. Kansas v. Hendricks*: The Landmark Case in the Field of Civil Confinement of Sex Offenders*

Long after the Supreme Court sanctioned the involuntary civil confinement of the mentally ill, provided that proper safeguards were in place, Kansas attempted to use this process for an untested purpose: confining convicted sex offenders at the termination of their criminal sentences. The Kansas legislature enacted the Sexually Violent Predator Act.[95] The first sex offender to be committed under the statute was Leroy Hendricks, a convicted pedophile who admitted being unable to control his urge to molest children.[96] Toward the end of his prison sentence, a jury found that Hendricks was a sexually violent predator, which resulted in his civil commitment.[97] Hendricks challenged the Kansas statute, claiming substantive due process, ex post facto, and double jeopardy violations.[98] Hendricks won in the Kansas Supreme Court, which ruled that two conditions must be present for civil confinement: a finding of dangerousness and mental illness.[99] Because the Kansas statute did not require a finding of "mental illness," but merely a "mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence,"[100] the Kansas Supreme Court held that the statute fell short of guaranteeing due process.[101]

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[95] KAN. STAT. ANN. § 59-29a01 (2005), *amended by* 2006 KAN. SESS. LAWS ch. 214 (explaining that the legislature deemed the existing civil confinement statute inadequate for the purpose of dealing with the "extremely dangerous group of sexually violent predators who have a mental abnormality or personality disorder and who are likely to engage in repeat acts of sexual violence if not treated for their mental abnormality or personality disorder").

[96] Kansas v. Hendricks, 521 U.S. 346, 350 (1997); *In re* Hendricks, 912 P.2d 129, 131 (Kan. 1996), *rev'd*, 521 U.S. 346 (1997).

[97] *In re Hendricks*, 912 P.2d at 131.

[98] *Hendricks*, 521 U.S. at 350.

[99] *In re Hendricks*, 912 P.2d at 136.

[100] KAN. STAT. ANN. § 59-29a02(a).

[101] *In re Hendricks*, 912 P.2d at 137-38. The court reached this conclusion in part based on the specific distinction that the legislature drew between sexually violent predators and those confined under a different part of the statute designed for the mentally ill. *Id.* The court pointed out that the statutory definition of mental illness did not seem to encompass sex offenders. *Id.* at 138 (defining a mentally ill individual as one 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'" (alteration in original) (quoting KAN. STAT. ANN. § 59-2902(h))).

However, in a 5-4 decision, the United States Supreme Court reversed, holding that the statute was constitutional.[102] The Court found that the definition of "mental abnormality" under the Kansas statute satisfied substantive due process requirements.[103] The Court concluded that the statute was in line with other statutes providing for involuntary civil confinement that the Court previously had found constitutional.[104] Mental health professionals had diagnosed Hendricks as a pedophile, which fit the definition of mental abnormality.[105] Furthermore, Hendricks admitted to a lack of control, which, when combined with his showing of past dangerousness, indicated that he was an appropriate candidate for civil confinement.[106]

1. The Court's Analysis of the *Mendoza-Martinez* Factors

The Supreme Court also rejected Hendricks' double jeopardy and ex post facto claims, finding that the proceedings leading to his confinement under the new statute were civil, not criminal.[107] In determining that the proceedings were not criminal, the Court claimed to follow the two-part test discussed in *Ward*.[108] The Court observed that the legislature had intended the statute to establish civil proceedings, and that Hendricks "failed to satisfy [the] heavy burden" of showing that the act was indeed punitive in purpose or effect.[109] As a result, civil commitment could follow a term of imprisonment, as long as the requirements of the statute were met, without violating the Double Jeopardy Clause.[110] Similarly, Hendricks' ex post facto claim also failed, because the Ex Post Facto Clause applies only to penal statutes and is not triggered by civil confinement.[111]

Many commentators have questioned the Court's holding that the commitment proceedings established by the Kansas statute are civil, arguing that the confinement of sex offenders at the end of their criminal sentences is

[102] *Hendricks*, 521 U.S. at 350. Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy joined in Justice Thomas's majority opinion. Justices Breyer, Stevens, Souter, and Ginsburg dissented.

[103] *Id.* at 359 ("[The Court has] never required State legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance.").

[104] *Id.* at 358.

[105] *Id.* at 360 (asserting that psychiatrists consider pedophilia "a serious mental disorder").

[106] *Id.*

[107] *Id.* at 360-69.

[108] *Id.*; *see also* discussion *supra* Part I.A.

[109] *Hendricks*, 521 U.S. at 361.

[110] *Id.* at 370 ("Because we have determined that the Kansas Act is civil in nature, initiation of its commitment proceedings does not constitute a second prosecution.").

[111] *Id.* at 370-71 ("The *Ex Post Facto* Clause . . . has been interpreted to pertain exclusively to penal statutes.").

indeed punishment.[112] Although the Court cited *Ward* and *Mendoza-Martinez*, it did not undertake a systematic, explicit review of each of the *Mendoza-Martinez* factors.[113]

In his dissent, Justice Breyer argued that the statute did in fact inflict punishment.[114] Specifically, Breyer pointed out the many similarities between the Kansas civil confinement statute and criminal punishment, such as the confinement and incapacitation produced by the statute, the necessity of criminal behavior to trigger the statute, and "criminal law-type procedures."[115] However, to Breyer, none of these factors alone were determinative: The key factor that made this scheme punitive in Breyer's view was the lack of treatment that Hendricks could hope to receive during his commitment.[116] Breyer also asserted that many of the *Mendoza-Martinez* factors weighed in favor of finding that Kansas' civil confinement constituted punishment.[117]

In fact, even in later cases the Court seemed to recognize the fine line it had drawn when defining the confinement as civil and not criminal. In *Kansas v. Crane*,[118] (which now found Justice Breyer writing for the majority, vacating a Kansas Supreme Court judgment that had tried to interpret *Hendricks*), the Court emphasized that a civil confinement statute must require that a sex offender suffer from at least some "serious difficulty in controlling behavior."[119] The Court explained the importance of ensuring that only the proper prisoners were subject to civil confinement, so that it would not "become a 'mechanism for retribution or general deterrence' – functions properly those of criminal law, not civil commitment."[120] However, it is not

[112] Specifically, critics have taken issue with the Court's focus on retribution and deterrence as the primary objectives of criminal punishment. *See, e.g.*, Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 13 n.48 (2005) ("The Court [in *Hendricks*] was, in effect, segregating incapacitation from deterrence and making the questionable assumption that incapacitation is not a punitive goal.").

[113] Some commentators feel that the Court did not apply the factors at all. *See* Stephen R. McAllister, Kansas v. Hendricks *Package: "Punishing" Sex Offenders*, 46 KAN. L. REV. 27, 58 (1997) ("In *Hendricks*, for example, the majority cited *Kennedy v. Mendoza-Martinez* once, but never purported to examine or apply the factors.").

[114] *Hendricks*, 521 U.S. at 373 (Breyer, J., dissenting).

[115] *Id.* at 380-81.

[116] *Id.*

[117] *Id.* at 394 ("[T]he Act before us involves an affirmative restraint historically regarded as punishment; imposed upon behavior already a crime after a finding of scienter; which restraint, namely, confinement, serves a traditional aim of punishment, does not primarily serve an alternative purpose (such as treatment), and is excessive in relation to any alternative purpose assigned.").

[118] 534 U.S. 407 (2002).

[119] *Id.* at 413.

[120] *Id.* at 412 (quoting *Hendricks*, 521 U.S. at 372-73 (Kennedy, J., concurring)).

entirely clear how the "lack of control" element will ensure that civil confinement is not used to achieve the purposes of criminal law.

2. The Ensuing Controversy over the *Hendricks* Decision

The *Hendricks* decision has not passed into American jurisprudence without controversy.[121] Critics have also argued that it is paradoxical to hold a person responsible for his acts during his prison term and then determine that he is unable to control himself after that term has been completed.[122] Another more general question concerns when it is appropriate for an individual to be in prison rather than in treatment. Some have argued that offenders who are purportedly "mentally ill and in need of hospitalization" should have been in hospitals instead of prisons since their sentences began.[123] In contrast, others echo the views of Westchester County District Attorney Jeanine F. Pirro, who has argued that sex offenders should simply be given longer prison sentences if they remain dangerous: "'If offenders are so dangerous that they need to be monitored 24/7, then they need to be in jail.'"[124]

In spite of being at the forefront of civil confinement of sex offenders, Kansas is currently attempting to scale back its civil confinement program, relying on increased sentences and less costly methods of monitoring sex offenders after they are released.[125] Other states, however, have instituted their own versions of civil confinement statutes, often modeled on the Kansas statute to assure constitutionality.[126] Furthermore, the Court has continued to affirm legislation meant to control and restrain sex offenders in the name of

[121] *See, e.g.*, Falk, *supra* note 7, at 132-33 (criticizing the *Hendricks* Court for "disregarding the established framework" of substantive due process analysis); Fellmeth, *supra* note 112, at 13 n.48 (criticizing the *Hendricks* Court for not treating incapacitation as a punitive measure).

[122] *See, e.g.*, Falk, *supra* note 7, at 119-20.

[123] State *ex rel.* Harkavy v. Consilvio, 809 N.Y.S.2d 836, 840 (Sup. Ct. 2005), *rev'd*, 812 N.Y.S.2d 496 (App. Div. 2006).

[124] Foderaro, *supra* note 17 (quoting District Attorney Jeanine F. Pirro).

[125] *See Pushing the Envelope*, *supra* note 10; *see also* Feuer, *supra* note 14 (quoting the Executive Director of the New York Association of Psychiatric Rehabilitation Services, who said that civil confinement of sex offenders is "a misuse of the health system . . . especially given its scant resources").

[126] *See In re* Fisher, 164 S.W.3d 637, 646 (Tex. 2005) ("Relying on *Hendricks*, courts in fourteen states have determined that their [Sexually Violent Predators] civil commitment schemes are civil, not criminal."). The fourteen states are Arizona, California, Florida, Illinois, Iowa, Massachusetts, Minnesota, Missouri, New Jersey, North Dakota, South Carolina, Washington, Wisconsin, and Virginia. *Id.*; *see also* Allison J. Skowron, Note, *Massachusetts Chapter 123A: Civil Commitment of Sexually Dangerous Persons: A Constitutional Necessity*, 36 SUFFOLK U. L. REV. 487, 489 (2003) (contending that the similarity of the Massachusetts statute to the Kansas Act considered in *Hendricks* almost guaranteed that the Massachusetts statute would withstand constitutional challenge).

public safety.[127] But the recent developments in New York do not fit this pattern. The officials in New York are not working under a statute modeled after the Kansas statute affirmed in *Hendricks*, but under a civil confinement statute designed for a different purpose.[128] Although constitutional for its alternative purpose, the question now is whether the Supreme Court would hold constitutional the use of this statute for the confinement of sex offenders.

B. Kansas v. Crane*: The Court Refines and Explains* Hendricks

The majority in *Crane*, claiming to rely on the precedent established in *Hendricks*, held that a statutory confinement scheme for sex offenders must, if it is to be considered civil, not criminal, require proof that the offender has serious difficulty controlling his behavior.[129] The Court explained that this "lack of control" factor was necessary to distinguish sex offenders from other recidivists who could be dealt with entirely within the mechanisms of the criminal justice system.[130] This distinction was important, as it maintained the civil function of civil confinement, preventing it from crossing over into the deterrent and retributive functions of criminal law.[131]

Justice Scalia, in his dissent, accused the majority of adding a requirement that was not originally articulated in *Hendricks*.[132] Scalia argued that the language of the Kansas statute upheld in *Hendricks* only required that the perpetrator be "'likely to engage in repeat acts of sexual violence.'"[133] He acknowledged that *Hendricks* did refer to lack of control, but as a description of the mental abnormality or personality disorder that the sex offender was afflicted with, not as a separate element.[134] Scalia also accused the majority of re-opening an issue that was decided in *Hendricks*: the constitutionality of civilly confining an individual with a mental illness other than a volitional impairment.[135] The implication is that the Court, when faced with a man described as suffering only from "exhibitionism and antisocial personality disorder," attempted to limit their former decision without overruling it.[136]

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[127] *See* discussion i*nfra* Part II.B-D.

[128] *See* discussion *infra* Part III.

[129] Kansas v. Crane, 534 U.S. 407, 413 (2002) ("[T]here must be proof of serious difficulty in controlling behavior."). The Court, however, further elaborated that a complete lack of control was not required because such a standard would be too difficult to meet, even when dealing with the most dangerous sex offenders. *Id.* at 412-13.

[130] *Id.* at 412.

[131] *Id.*

[132] *Id.* at 418-20 (Scalia, J., dissenting).

[133] *Id.* at 417 (quoting KAN. STAT. ANN. § 59-29a02(a) (2005)).

[134] *Id.* at 418-19.

[135] *Id.* at 421-22.

[136] *Id.* at 425.

C. *The Constitutionality of Sex Offender Registration and Online Posting*

In cases following *Hendricks*, the Supreme Court has made it clear that it would support states' efforts to protect the public from sex offenders. In *Connecticut Department of Public Safety v. Doe*,[137] the Court considered a procedural due process challenge to Connecticut's Megan's Law, which required convicted sex offenders to register with the state.[138] The law also required the on-line posting of the names of sex offenders.[139] A convicted sex offender challenged the law on due process grounds, based on its failure to provide a hearing on the danger posed by offenders before their names were posted on the internet.[140] The Court noted that "mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest."[141] Furthermore, the Court stated that even if the liberty interests of the sex offenders were implicated, due process would not entitle them to a hearing to determine an issue immaterial under the statute.[142] The Court held that in this case, the issue of *current* dangerousness was not material, as the law was merely concerned with the offender's past conviction.[143] The Court did not reach the issue of substantive due process.[144]

Later the same day, in *Smith v. Doe*,[145] the Court held that requiring sex offenders to register with the state did not violate the Ex Post Facto Clause.[146] The Court found that the registration required under Alaska's Megan's Law was not punitive, and, therefore, its application did not violate the Ex Post Facto Clause, which prohibits retroactive punishment.[147] According to the Court, the legislature intended for the Act to be a means of identifying sex offenders for the protection of the public.[148] Furthermore, the challengers were unable to convince the Court that the effects of the law were punitive enough to negate this intent.[149] The Court noted, in this regard, that the challengers had even conceded that the asserted purpose of protecting the public was rational and valid.[150] The outcomes in these cases are not

[137] 538 U.S. 1 (2003).

[138] *Id.* at 4.

[139] *Id.* at 5.

[140] *Id.* at 4-5.

[141] *Id.* at 6-7.

[142] *Id.* at 7.

[143] *Id.* at 7-8.

[144] *Id.* at 8.

[145] 538 U.S. 84 (2003).

[146] *Id.* at 105-06.

[147] *Id.*

[148] *Id.* at 96.

[149] *Id.* at 97-106 (applying the seven *Mendoza-Martinez* factors to determine whether the registration requirement of Alaska's Megan's Law was punitive in effect).

[150] *Id.* at 103. The Court stated that the most significant of the *Mendoza-Martinez* factors was a rational connection to a non-punitive purpose. *Id.* at 102. Although the challengers

surprising. In the balancing act between the general public safety and the civil rights of sex offenders, it seemed that the Court was placing great weight on public safety, making it difficult to mount a challenge based on the rights of sex offenders.

D. *Equal Protection Analysis: The Current State of the Law*

The Supreme Court has determined that, under the Equal Protection Clause, criminals are to receive the same procedures as others before being civilly confined.[151] The Court has not squarely addressed the equal protection rights of sex offenders as compared with the rights of other classes of prisoners, such as murderers, drug offenders, or alcoholics who committed crimes while intoxicated.[152] However, several lower courts have concluded that sex offenders are not a suspect class, and that at least some laws affecting sex offenders do not affect a "fundamental right."[153] Therefore, these courts have concluded that laws regarding sex offenders are subject only to rational basis scrutiny.[154] Although the Supreme Court has shown some inconsistency when applying rational basis scrutiny to a challenged law, in general the Court is very deferential to the government when examining laws under this standard.[155] As the law currently stands, courts have not considered equal

conceded that the purpose was rational, they argued that the Act was not narrowly drawn to achieve that purpose. *Id.* at 103. The Court responded that "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Id.* Instead, the Court must examine whether the non-punitive purpose is nothing more than a "'sham or mere pretext.'" *Id.* (quoting Kansas v. Hendricks, 521 U.S. 346, 371 (1997) (Kennedy, J., concurring)).

[151] *See* discussion *supra* Part I.B.1-2.

[152] Given the dispute over recidivism rates as well as the comparison that can be made between sex offenders and alcoholics, an argument based on equal protection principles does not seem that farfetched. *See* discussion *infra* Part III.F.2. Justice Souter has specifically mentioned the possibility of an equal protection claim when looking to the distinctions drawn between different classes of offenders. Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 10 (2003) (Souter, J., concurring) ("[T]he Court's rejection of [the challengers'] procedural due process claim does not immunize publication schemes like Connecticut's from an equal protection challenge."). However, he specifically declined to comment on the merits of such a claim or the level of scrutiny that would be used to evaluate it. *Id.*

[153] *See* Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1514 n.99 (2005) (noting examples of failed equal protection challenges to FED. R. EVID. 413).

[154] *See, e.g.*, United States v. Mound, 149 F.3d 799, 801 (8th Cir. 1998). Although other grounds for an equal protection challenge to civil confinement laws may still exist, they would likely face an uphill battle. *See* discussion *infra* Part III.F.2.

[155] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 652-53 (2d ed. 2003).

protection claims to present a serious challenge to the constitutionality of sex offender civil confinement laws.

III. THE CONSTITUTIONALITY OF RECENT DEVELOPMENTS IN NEW YORK STATE

A. *Recent Events in Westchester County*

On June 29, 2005, a 56-year-old woman was stabbed to death in a mall parking lot in Westchester, New York.[156] The man convicted of her murder, Phillip Grant, was at the time of the attack a convicted rapist and a Level Three sex offender who had been released from prison two years earlier.[157] He had served twenty-three years for two rape convictions and an attempted assault conviction.[158] At the time of the attack, Grant had been staying at a drop-in homeless shelter at the Westchester County Airport.[159] Within days, the county of Westchester responded with calls for "Concetta's Law," named after victim Concetta Russo Carriero, which would provide for the civil confinement of sex offenders just as the Kansas law at issue in *Hendricks* does.[160] Westchester District Attorney Jeanine Pirro, Westchester County Executive Andrew Spano, and New York Governor George Pataki renewed their crusades for a civil confinement statute.[161] There were multiple public forums calling for a civil confinement law, with Carriero's sons appearing to express their support.[162] The Republican-controlled New York Senate had previously endorsed such a law several times, but each time the Democrat-controlled New

[156] Richard Liebson & Bill Hughes, *Woman Slain in Garage at Galleria*, THE JOURNAL NEWS (Westchester County, N.Y.), June 30, 2005, at 1A.

[157] *Id.* Grant, who is black, has been convicted of committing a hate crime, because he told police that he had been looking to kill a white woman, and that his victim "'had to die'" because she had blonde hair and blue eyes. Jonathan Bandler, *Suspect Accused of Bias in Killing*, THE JOURNAL NEWS (Westchester County, N.Y.), July 27, 2005, at 1A [hereinafter Bandler, *Suspect Accused of Bias*] (quoting Grant's taped statement); *see also* Jonathan Bandler, *Homeless Man Guilty of Hate-Crime Murder*, THE JOURNAL NEWS (Westchester County, N.Y.), July 12, 2006, at 1A [hereinafter Bandler, *Homeless Man Guilty*].

[158] Liebson & Hughes, *supra* note 156.

[159] *Id.*

[160] *See* Phil Reisman, *Concetta's Law: Keep Sex Predators in Prison*, THE JOURNAL NEWS (Westchester County, N.Y.), July 1, 2005, at 1B.

[161] *See* Richard Liebson & Jonathan Bandler, *Suspect Set Out to Kill, Cops Say*, THE JOURNAL NEWS (Westchester County, N.Y.), July 1, 2005, at 1A.

[162] Bandler, *Suspect Accused of Bias*, *supra* note 157 (describing Carriero's sons' statements at a public hearing affirming their support for a civil confinement statute called "Connie's Law"); *see also* Richard Liebson, *Legislators Set Discussion of Civil-Commitment Bill*, THE JOURNAL NEWS (Westchester County, N.Y.), July 19, 2005, at 5B (discussing the Assembly's plan for a round-table discussion in Manhattan about civil confinement, as well as a public hearing held by a state senator in Westchester).

York Assembly failed to pass it.[163] The public fear that escalated in the weeks following Carriero's death provided a new source of support for tough laws dealing with sex offenders.[164]

Suddenly, the public became aware of buses that shuttled homeless men from the shelter at the Westchester Airport to the heart of downtown White Plains every day.[165] Among these men were several Level Three sex offenders, whom one columnist described as "sharks in a pool of minnows," opining that it was "a sucker's bet [Grant] wouldn't strike again."[166] Such media commentary fueled debates about safety, as well as protests in response to talk of moving the shelter to a different location in Westchester.[167] A group called NOWAY (Neighborhood Organizations for Westchester And Youth) quickly opposed relocating the shelters, citing concerns about the dangers that sex offenders posed.[168] In spite of these protests, the new shelter opened, housing at least thirteen convicted sex offenders.[169]

Westchester County quickly moved to provide additional security measures against sex offenders in an effort to satisfy the public outcry that arose following Carriero's tragic death. For example, the county equipped the new homeless shelter with twenty-four hour video surveillance, and posted police cars outside the shelter every night.[170] Furthermore, as part of his effort to assure Westchester residents that the shelter would be safe, County Executive Spano outlined a program requiring the most dangerous sex offenders to be chaperoned or monitored at all times.[171] Men who did not comply with the restrictions would not be allowed to remain in the shelter.[172] While there have been no legal challenges to these new security measures, some civil rights activists have publicly opposed them, suggesting the possibility of lawsuits in the future.[173]

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[163] Liebson, *supra* note 162.

[164] This incident sparked a movement for tough sex offender laws in spite of the fact that the incident itself had not involved a sexual assault. Grant, clearly a dangerous man and a past sex offender, was not charged with any sexual offense related to the incident. Richard Liebson & Christine Pizzuti, *Woman Killed in Garage 'Had to Die,' Suspect Says*, THE JOURNAL NEWS (Westchester County, N.Y.), July 6, 2005, at 1A (reporting that Grant was charged with second-degree murder and third-degree criminal possession of a weapon).

[165] Reisman, *supra* note 160.

[166] *Id.*

[167] Liz Sadler, *Valhalla Group to Rally Against Moving Shelter*, THE JOURNAL NEWS (Westchester County, N.Y.), July 7, 2005, at 12A.

[168] *Id.*

[169] O'Connor, *supra* note 8.

[170] *Id.*

[171] O'Connor, *supra* note 17.

[172] *Id.*

[173] *See, e.g.*, *id.* (quoting Donna Lieberman, of the New York Civil Liberties Union, as asserting that "'[t]here is no legal basis for the county to seize that authority'").

Spano also instituted a plan that would track sex offenders on probation using global positioning technology.[174] Sex offenders would be given an ankle bracelet and cell phone, which would alert police when they entered schools, playgrounds, and other restricted areas.[175] Civil liberties advocates have called this "an extraordinary intrusion" and criticized its failure to distinguish between classes of sex offenders.[176] Spano even created a counseling session for sex offenders to attend on Halloween to prevent them from interacting with children who were out trick-or-treating.[177] While this plan may not have much legal significance, it reflected the efforts of Westchester officials to quell residents' fear in the months following Carriero's murder. However, to the dismay of Governor Pataki, Spano, Pirro, and the public supporters of civil confinement, one event did not occur: The state legislators still did not act to pass a civil confinement law.

B. *Governor George Pataki's Use of the Existing Civil Confinement Statute to Restrain Sex Offenders After Completion of Their Sentences*

Governor Pataki grew frustrated with the legislature and decided "to take matters into his own hands."[178] After years of being stymied by the Assembly in his attempts to pass a civil confinement statute aimed at sex offenders, he decided to "'push the envelope with the application of existing law.'"[179] He ordered the State Office of Mental Health and the State Department of Correctional Services to use the existing civil confinement law, which applies generally to the mentally ill and not specifically to sex offenders, to commit sex offenders at the close of their sentences.[180] Governor Pataki's spokesperson cited the threat posed by sex offenders as the key factor that warranted this move, while some reporters also referred to the escalation of the issue in the public eye following Carriero's murder.[181] Five men were

[174] Foderaro, *supra* note 17.

[175] *Id.*

[176] *Id.*

[177] Shawn Cohen, *Spano Tells Sex Abusers to Report*, THE JOURNAL NEWS (Westchester County, N.Y.), Oct. 2, 2005, at 1B (explaining that even though sex offenders who did not attend the Halloween session would not be in violation of their parole, they would receive a visit that evening from either the police or probation officers).

[178] Kenneth Lovett, *Pataki Tosses Freed Pervs Back in Lockup*, N.Y. POST, Oct. 3, 2005, at 2. The New York Post was the first newspaper to report on this development, approximately three weeks after Governor Pataki first directed the civil confinement to begin.

[179] Feuer, *supra* note 14 (quoting Governor Pataki's aide and spokesperson Kevin Quinn).

[180] *Id.*

[181] Jonathan Bandler, *Pataki Confines Child Sex Abusers*, THE JOURNAL NEWS (Westchester County, N.Y.), Oct. 4, 2005, at 1A (discussing the role that the murder played in intensifying the "debate in Albany over civil confinement" and increasing public support for a civil confinement law, led in part by the victim's sons).

confined by the time Governor Pataki's actions had been reported in the paper, weeks after he initially directed the confinement to begin.[182]

Civil libertarians immediately challenged the action. Donna Lieberman, Executive Director of the New York Civil Liberties Union, stated that "'it poses serious dangers when our governor directs state officials to ignore the limits of the law simply because he doesn't like those limits.'"[183] Lieberman criticized Governor Pataki, stating that he was acting as "'judge and legislature,'" a move that left much room for abuse.[184] Governor Pataki expected his action to be challenged, but his spokesperson said that the Governor could not "'wait any longer for the Assembly leadership to pass his proposal.'"[185]

C. *New York's Existing Civil Confinement Statute*

Governor Pataki ordered the civil confinement under New York Mental Hygiene Law Section 9.27(a), which provides for involuntary admission of the mentally ill on medical certification.[186] Specifically, the law requires the certification of "two examining physicians" that a person is "mentally ill and in need of involuntary care and treatment."[187] New York courts have read the statute to require an additional showing of dangerousness to oneself or others.[188] The courts also have set the standard of proof as "clear and convincing,"[189] thereby satisfying the requirements of *Addington*.[190] The certifying physicians are required to consider alternative forms of treatment before resorting to involuntary care.[191] Once this determination is made and a hospital admits an individual, a physician on the hospital's psychiatric staff – who is not one of the certifying physicians – must examine the patient.[192] While no judicial hearing is required prior to the patient's admittance, the patient cannot be held for more than sixty days without a court's approval.[193] The patient, or anyone acting on his behalf, can request a hearing evaluating the need for continued commitment.[194] A judicial hearing must be held within

[182] Feuer, *supra* note 14; Lovett, *supra* note 178.

[183] Bandler, *supra* note 181 (quoting NYCLU Executive Director Donna Lieberman).

[184] *Id.* (quoting Donna Lieberman).

[185] Lovett, *supra* note 178 (quoting Kevin Quinn); *see also* Feuer, *supra* note 14.

[186] N.Y. MENTAL HYG. LAW § 9.27(a) (McKinney 2006).

[187] *Id.*

[188] *See* Scopes v. Shah (*In re* Scopes), 398 N.Y.S.2d 911, 913 (App. Div. 1977) (holding that involuntary confinement violates due process "where the sole justification . . . is the provision of some treatment").

[189] *Id.* at 913-14.

[190] *See* discussion *supra* Part I.B.4.

[191] N.Y. MENTAL HYG. LAW § 9.27(d).

[192] *Id.* § 9.27(e).

[193] *Id.* § 9.33(a).

[194] *Id.* § 9.31(a).

five days of the request, and the court will hear testimony regarding the need to retain the patient further.[195] At this point, the court may grant or deny the patient's application for release.[196] If the patient is denied release, he may request a rehearing within thirty days of the court's decision, and is entitled to a jury trial.[197] A patient's status must be reviewed every twelve months.[198]

New York's reliance on this statute raises important questions. The context in which New York's civil confinement practices were altered – the failed attempts to pass a law through the legislature, the public outcry after Carriero's murder, the secrecy with which Governor Pataki acted – caused a great deal of controversy. In particular, civil rights advocates have raised concerns about the misuse of power in this case, arguing that Governor Pataki overstepped his role in the executive branch and acted inappropriately when the legislature would not pass the law he wanted.[199] The propriety of the procedures used in this case are still being debated in the court system.[200] So far that debate has only touched on procedural issues, without examining the differences between the New York statute and the statute at issue in Kansas.

D. *New York's Statutory Treatment of Mentally Ill Inmates*

Among the requirements set out by New York law regarding the treatment of mentally ill prisoners,[201] of particular importance is the provision that a mentally ill inmate cannot be transferred to an institution without judicial intervention.[202] The court appoints two examining physicians who determine the need for commitment.[203] If both physicians determine that the inmate is mentally ill and in need of care or treatment, then the superintendent of the prison must petition for a court order committing the inmate.[204] The inmate must receive written notice of this decision, and has the right to request a hearing.[205] Confinement is limited to six months,[206] and a judicial order is

[195] *Id.* § 9.31(c).

[196] *Id.* § 9.31(c)-(d).

[197] *Id.* § 9.35.

[198] *Id.* § 9.25.

[199] *See, e.g.*, Hartocollis, *supra* note 8.

[200] *See, e.g.*, *Metro Briefing*, *supra* note 26; Smith, *supra* note 26.

[201] N.Y. CORRECT. LAW §§ 400-405 (McKinney 2006) ("Provisions Relating to Mentally Ill Inmates").

[202] *Id.* § 402.

[203] *Id.* The statute defines an "examining physician" as one licensed to practice medicine in the State of New York, but not on the staff of the facility where the inmate is confined. *Id.* § 400(1).

[204] *Id.* § 402(3).

[205] *Id.* § 402.

[206] *Id.* § 402(4).

necessary to extend this time period.[207] Therefore, the procedure is significantly different for the commitment of a prisoner than for the involuntary commitment of an individual not in the custody of the criminal justice system.

Governor Pataki failed to consider this piece of the statutory puzzle when he chose to use the Mental Hygiene law to commit sex offenders. Because the prisoners in question were committed shortly before their scheduled release, state officials assumed the Correction Law provisions requiring a judicial order would not be applicable. Traditionally, the statute has applied to mentally ill prisoners with a substantial portion of their prison terms remaining.

E. State *ex rel.* Harkavy v. Consilvio*: The New York Courts Debate the Constitutionality of Governor Pataki's Actions*

As expected by many, even by Governor Pataki himself, the unconventional use of the New York Mental Hygiene Law quickly resulted in a lawsuit.[208] The Director of the Mental Hygiene Legal Service filed a petition for habeas corpus, seeking the release of twelve sex offenders who had been transferred to psychiatric hospitals shortly before their scheduled release from prison.[209] The petitioners argued that Corrections Law Section 402 was not properly followed, thereby denying the prisoners of their due process rights.[210] The trial court held for the petitioners, stating that though the prisoners were about to be released, they were, "in fact, imprisoned at the time of their civil commitment," and were therefore guaranteed all procedural safeguards secured by the law.[211] Furthermore, the trial court found that the prisoners had a liberty interest in not being transferred to a mental institution, requiring the State to provide such due process protections as "prior written notice and a hearing before an independent decisionmaker."[212] In this case, some of the prisoners were notified on the ride to the hospital that they were being committed instead of released, as they had believed.[213] Furthermore, the psychological examinations as a whole were deemed inadequate, one of them allegedly lasting only ten to fifteen minutes and done via teleconference.[214] In fact, one examining doctor admitted to not wanting to commit the patient she

[207] *Id.* § 402(10). The subsequent procedures required are then the same as those under the Mental Hygiene statute.

[208] *See, e.g.*, Feuer, *supra* note 14.

[209] *Id.*

[210] State *ex rel.* Harkavy v. Consilvio, 809 N.Y.S.2d 836, 839 (Sup. Ct. 2005).

[211] *Id.*

[212] *Id.*

[213] Hartocollis, *supra* note 8 (quoting a lawyer for the petitioners as stating that some of them "'reported finding out in the van on their way there' that they were going to a mental hospital instead of being released from prison").

[214] *Harkavy*, 809 N.Y.S.2d at 840.

examined, but explained that "a directive had 'come down from Albany.'"[215] Judge Silbermann's opinion acknowledged the danger that some sex offenders pose to society, but reminded all parties that "[a] showing of mental illness and a need for inpatient care and treatment is also required."[216] Judge Silbermann concluded that the procedures provided in this case did not satisfy due process requirements.[217]

Even before it was overruled, *Harkavy's* importance as a victory to civil rights advocates and to the prisoners themselves was not as far-reaching as it might have appeared. Judge Silbermann did *not* hold that the prisoners had to be released outright; rather, the order was for conditional release based on the procedural errors.[218] The men had to be re-examined, within five business days of the decision, by two independent physicians appointed by the court.[219] For those prisoners who, upon re-examination, were "deemed in need of involuntary confinement by both independent examining physicians, the provisions of Corrections Law § 404 and [Mental Hygiene Law] § 9.33 [were] to be followed."[220] Instead of stating that these men could not be held under the New York civil confinement law, the ruling implied just the opposite: that the law itself was acceptable even though the procedures used here were not.[221]

On appeal, the Appellate Division found that the procedures did indeed satisfy due process requirements, stating that it "[found] no basis to provide petitioners heightened due process protections not afforded to their non-incarcerated counterparts."[222] Because the men were so close to their release, the court held that they were no longer serving a term of imprisonment, and therefore the Mental Hygiene Law, and not the Correction Law, applied.[223] The court also summarily concluded that the claim that the procedures under the New York Mental Hygiene Law "deprived [the petitioners] of their due process rights under the Fourteenth Amendment, [was] also baseless."[224] The Mental Hygiene Legal Service, the agency that represented the petitioners, indicated that it would likely appeal the decision.[225] The agency issued a

[215] *Id.* (quoting an examining doctor).

[216] *Id.*

[217] *Id.* ("[T]hat some of the petitioners may involuntarily have been placed in the mental health system by executive fiat is a possibility which this Court cannot ignore.").

[218] *Id.* at 841 (explaining that the statute "does not contemplate the release of individuals based on procedural errors, and that a substantive review of the person's mental state must be conducted by the court before it can order their immediate release").

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] State *ex rel.* Harkavy v. Consilvio, 812 N.Y.S.2d 496, 498 (App. Div. 2006).

[223] *Id.* at 500-01.

[224] *Id.* at 501.

[225] Smith, *supra* note 26.

statement disagreeing with the court's determination that these men were no longer serving a prison term, explaining that the men "'were sent over in correctional vehicles, in shackles and orange jumpsuits.'"[226] By the time the Appellate Division's decision was handed down, forty-nine sex offenders had been confined subject to the existing Mental Hygiene Law.[227]

F. *Grounds for Future Challenges*

Hope is not lost for those who wish to challenge New York's civil confinement of sex offenders. Two unsettled areas of law offer promise.

1. The Problem of Treatment

The Supreme Court has recognized that due process requires the conditions and duration of civil confinement of sexually violent predators to bear some reasonable relation to the purpose for which the individuals are committed.[228] This raises a question of whether the only purpose of these statutes is to protect the public, or whether these statutes may also serve the purpose of providing treatment to mentally ill sex offenders. The argument that the statutes contemplate some form of treatment for the mentally ill seems especially plausible when examining the New York statute. The New York Mental Hygiene statute requires that a person be "in need of involuntary care and treatment" before the person can be committed.[229] If the only concern were the danger that a sex offender presents to the public at large, this criterion would not be necessary.

If New York does not fulfill the stated purpose of the Mental Hygiene statute, then sex offenders are merely being subjected to a lifetime sentence, with little prospect of ever proving themselves safe enough to be released. Indeed, this was the problem that the Court mentioned in *Powell* when it discussed the civil confinement of alcoholics.[230] Opponents of civil confinement point to the low numbers of people released after they are found

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[226] *Id.* (quoting Stephen Harkavy of Mental Hygiene Legal Service).

[227] *Metro Briefing*, *supra* note 26. A few months after ruling on the *Harkavy* case, the Appellate Division handed down a similar ruling in a companion case, also brought by the Mental Hygiene Legal Service on behalf of a different group of individuals. State *ex rel.* Harkavy v. Consilvio, 819 N.Y.S.2d 499, 501 (App. Div. 2006). Once again, the Appellate Division reversed a decision by Judge Silbermann, finding that there had been no violation of due process or equal protection and that petitioners were held in compliance with New York Mental Hygiene Law Section 9.27. *Id.*

[228] *See* Seling v. Young, 531 U.S. 250, 265 (2001); Frey, *supra* note 32, § 4[a].

[229] N.Y. MENTAL HYG. LAW § 9.27(a) (McKinney 2006). This is a slightly different requirement from the test used by the Supreme Court, and raises a question as to whether sex offenders subject to civil confinement will receive treatment, or if, as some advocates of civil confinement contend, treatment would be impossible.

[230] *See* discussion *supra* Part I.B.3.

to be dangerous,[231] and worry that a finding of dangerousness is simply a euphemistic life sentence, condemning sex offenders to indefinite confinement without proper safeguards.[232]

States may have difficulty arguing that there is a high likelihood of treatment in civil confinement facilities. Typically, states base their arguments for involuntary civil confinement of sex offenders on the premise that convicted sex offenders are a danger to society upon release. Politicians and lawmakers repeatedly tell the public that these people are untreatable and will repeat their crimes. Therefore, states may not be able to simultaneously contend that the facilities will offer sex offenders treatment.[233]

2. Potential Equal Protection Problems

Another possible strategy calls for challenges on equal protection grounds.[234] Though several lower courts have held that statutes differentiating sex offenders from other classes of criminals should only be subject to rational basis review, the United States Supreme Court has not yet directly addressed the issue.[235] Challengers could put forth two different equal protection arguments. First, in spite of the rulings of the lower courts, challengers could argue that sex offenders are a suspect class vis-à-vis other convicted individuals, which would subject laws that treated sex offenders differently than other criminals to strict scrutiny analysis. Second, challengers could argue that even under rational basis scrutiny, the differentiation of sex offenders from other dangerous criminals is irrational.

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[231] *See, e.g.*, *Pushing the Envelope*, *supra* note 10 ("Of the 156 offenders [hospitalized in Kansas] since the program began 11 years ago, only one has been released after completing treatment.").

[232] *Cf.* Powell v. Texas, 392 U.S. 514, 529 & n.24 (1968) (quoting counsel for amici curiae ACLU et al. as stating that "'[t]he euphemistic name 'civil commitment' can easily hide nothing more than permanent incarceration'"). There is also concern that this treatment of sex offenders creates a group of second-class citizens. *See* John F. Kavanagh, Jr. & Matthew C. Welnicki, *A Practical Overview of Massachusetts General Law 123A: Care, Treatment and Rehabilitation of Sexually Dangerous Persons*, 24 W. NEW ENG. L. REV. 1, 10-22 (2002); Fish, *supra* note 28.

[233] Even though public rhetoric may state that treatment is impossible, clinicians seem to have more hope. Karen Kersting, *New Hope for Sex Offender Treatment: Research Suggests Psychological Treatment Helps Reduce Recidivism Among Convicted Sex Offenders*, MONITOR ON PSYCHOL., July/Aug. 2003, at 52, 52, *available at* http://www.apa.org/monitor/julaug03/newhope.html.

[234] For an equal protection analysis of *Hendricks*, see Morris, *supra* note 14, 1191-97.

[235] *See* discussion *supra* Part II.D. In spite of the Court's application of a rational basis standard in *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 274-75 (1940), the issue here can be distinguished, as it examines the rights of sex offenders in comparison to other classes of criminals. Scholars have viewed Sexually Violent Predator statutes as open to equal protection attacks in recent years. *See infra* note 236.

The first argument, that sex offenders are a suspect class for purposes of equal protection, would require the Court to examine the criteria used to determine the level of scrutiny under equal protection.[236] In determining whether a class should be "suspect," the Supreme Court examines several factors.[237] First, the Court has looked to whether the class is characterized by immutable characteristics.[238] The argument in favor of civil confinement hinges in large part on the premise that a person who is once a sex offender is bound to always be a sex offender and cannot control or change this aspect of his personality. Second, the Court looks to the ability of the group to protect themselves through the political process.[239] Many sex offenders are felons, and have therefore lost the right to vote. Third, the Court looks to a history of discrimination against the group.[240] While the goal of protecting society from sex offenders cannot be denied, it is not impossible that fear and prejudice are driving forces behind sex offender civil confinement laws.[241]

However interesting this argument might be in theory, the Court would not be likely to determine that laws treating sex offenders more harshly than other criminals should be subject to strict scrutiny. First, the Court has been reluctant to characterize "new" groups as suspect classes.[242] For instance, the

[236] CHEMERINSKY, *supra* note 155, at 646. Scholars have put forth arguments that Sexually Violent Predator statutes should be subject to heightened scrutiny. One argument hinges on the fact that any legislation that impinges on a fundamental right should be subjected to heightened scrutiny and "[i]t is difficult to understand how the core liberty interest protected by the Constitution could be characterized as anything less than fundamental." Morris, *supra* note 14, at 1196 & n.120. Several scholars have argued that at least an intermediate standard should be applied. *Id.* at 1196 n.120. However, it does not seem that any court has done so yet. *Id.*

[237] CHEMERINSKY, *supra* note 155, at 646. Granting a class suspect status means that legislation differentiating between persons based on that status is examined with the strictest scrutiny. *Id.*

[238] *Id.* (explaining that the Court finds it "unfair to penalize a person for characteristics that the person did not choose and the individual cannot change").

[239] *Id.* (explaining that gender-based classifications receive intermediate scrutiny because women have not historically had the same access to the political process as men, and that the same is true for aliens, who do not have the right to vote).

[240] *Id.* The Court will determine if the "classification reflects prejudice as opposed to a permissible government purpose." *Id.*

[241] For instance, Harvey Rosenthal, the director of the New York Association of Psychiatric Rehabilitation Services, argues that decisions to allow for the civil confinement of sex offenders have been made on the basis of "fear rather than on fact." Medina, *supra* note 70. The response in Westchester County to recent events is indicative of this fear. The attack, although tragic, did not involve a sexual assault. However, much has been made of Grant's status as a sex offender. *See, e.g.*, Liebson & Pizzuti, *supra* note 164 (discussing Grant's general lack of remorse and violent expressions, many of which are generic as opposed to sexually based).

[242] CHEMERINSKY, *supra* note 155, at 646 ("[T]he Court has shown little willingness in the past two decades to subject additional classifications to strict or intermediate scrutiny.").

Court declined to apply heightened scrutiny to a law that applied classifications based on mental retardation, a more sympathetic group than sex offenders, all of whom are convicts and many of whom have committed heinous crimes.[243] Furthermore, the fact that lower courts have universally ruled that these statutes are subject to rational basis scrutiny may influence the Court.[244] These precedents certainly are consistent with the Court's recent history of sex offender jurisprudence,[245] which has valued public safety above the rights of sex offenders. Therefore, it seems unlikely that the Court would apply strict scrutiny.

Challengers would face a far more difficult task invalidating these laws under rational basis scrutiny. Rational basis is the lowest level of scrutiny for equal protection claims, and rarely has been used to declare laws unconstitutional.[246] However, there have been cases in which the Court has declined to elevate a group to protected status, but has seemed to apply a more rigorous standard than the usual rational basis test.[247] This has been referred to as rational basis with "bite," and has been used to invalidate laws that have created legally differentiated groups such as the mentally retarded, unrelated individuals living together, and homosexuals.[248] If the Court were willing to apply such review to sex offenders, challengers might be able to make a case that laws addressing sex offenders do not even pass rational basis analysis.[249]

Proponents of tough sex offender laws cite high recidivism rates as the "rational basis" that justifies treating sex offenders differently than other classes of criminals. Dale M. Volker, the Republican sponsor for civil confinement laws in New York, stated, "'[i]f they can't be treated and they are dangerous, you have got to come to grips with the fact that they should be put away.'"[250] According to the New York State Division of Criminal Justice Services, eight percent of convicted sex offenders are arrested again within eight years of being released.[251] Whether that number is large enough to justify special treatment of sex offenders seems to depend on recidivism rates for other crimes, considered in conjunction with the dangerousness of each of

[243] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 435 (1985).

[244] *See* discussion *supra* Part II.D. Furthermore, although *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 274-75 (1940) can be distinguished, the Court may choose to cite this case as support if it chooses to reject the argument that sex offenders are a suspect class.

[245] *See* discussion *supra* Part II.

[246] CHEMERINSKY, *supra* note 155, at 646.

[247] *Id.* at 653.

[248] *Id.*

[249] Given the rarity with which the Court has used this standard, as well as the Court's trend toward placing a high value on public safety, such a review seems unlikely.

[250] *See* Medina, *supra* note 70 (quoting Dale M. Volker).

[251] *Id.*

those crimes.[252] Furthermore, the statistics regarding the recidivism of sex offenders have been widely questioned by critics, as different studies have produced disparate results.[253] For instance, a study in Washington State indicated that the recidivism rate among sex offenders was only 2.7%, "lower than the rate of repeat arrests for felony-level drug violations and several other categories of crime."[254] Finally, critics have raised the possibility that all sex offenders are not equally likely to commit further crimes.[255] Different crimes may have different recidivism rates, which further highlights the problems with classifying sex offenders as one group separate from other criminals.[256]

The Supreme Court suggested another possible distinction between sex offenders and other criminals in *Kansas v. Crane*.[257] There, the Court explained that the requirement of a lack of control on the part of the sex offender distinguished sex offenders from other recidivists who did not have to be civilly confined.[258] However, Justice Scalia, in his dissenting opinion, argued that "[o]rdinary recidivists *choose* to reoffend and are therefore amenable to deterrence through the criminal law; those subject to civil commitment under [sex offender statutes], because their mental illness is an affliction and not a choice, are unlikely to be deterred."[259] The debate over the actual recidivism of sex offenders and the comparison of sex offenders to

[252] For instance, some studies indicate that sex offenders are actually less likely to be rearrested than other convicts. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL OFFENDER STATISTICS, http://www.ojp.usdoj.gov/bjs/crimoff.htm#recidivism (last visited Oct. 1, 2006) ("Sex offenders were less likely than non-sex offenders to be rearrested for any offense – 43 percent of sex offenders versus 68 percent of non-sex offenders."). Sex offenders were more likely than non-sex offenders to be arrested for another sex crime, but the percentages are arguably low for both groups: 5.3% for sex offenders and 1.3% for non-sex offenders. *Id.*; *see also* CTR. FOR SEX OFFENDER MGMT., U.S. DEP'T OF JUSTICE, MYTHS AND FACTS ABOUT SEX OFFENDERS (2000), http://www.csom.org/pubs/mythsfacts.html (stating that "recidivism rates for sex offenders are lower than for the general criminal population").

[253] *See, e.g.*, CTR. FOR SEX OFFENDER MGMT., *supra* note 252 (relating different results achieved in different studies, as well as the different factors that seem to influence recidivism rates); NYCLU, *supra* note 9 (criticizing legislative efforts as being uninformed, and putting forth questions about the "true risks posed by convicted sex offenders").

[254] Medina, *supra* note 70.

[255] *See, e.g.*, CTR. FOR SEX OFFENDER MGMT., *supra* note 252 (stating that "reoffense rates vary among different types of sex offenders and are related to specific characteristics of the offender and the offense").

[256] It is true that sex offenders are broken down into categories depending on the severity of their crimes. However, the civil confinement laws do not speak to these different categories, but rather to the mental states of the perpetrators. This increases the potential for unequal treatment.

[257] 534 U.S. 407, 412 (2002).

[258] *Id.*; *see also* discussion *supra* Part II.B.

[259] *Crane*, 534 U.S. at 420 (Scalia, J., dissenting).

others, such as alcoholics, draw both the majority and the dissenting opinions into question. Neither may be adequate grounds for distinction.

Mental illness certainly does not seem to be an adequate reason to distinguish sex offenders from other inmates. With 75% of the prison population suffering from Antisocial Personality Disorder,[260] it is disturbing to think of the number of prisoners sitting in jail in need of treatment. Alternatively, it is disturbing to think of the number of ex-prisoners sitting in mental institutions, with the same mental state as millions of free men who have served their sentence, separated for life merely by the label they carry of being sex offenders. However, the reality remains that a very low threshold is required to sustain a statute under rational basis review.[261] Challengers bringing such a claim would have to be realistic about their chances of success.

G. *The Next Steps in New York: The Future of Civil Confinement*

In the aftermath of these developments, the New York legislature has agreed to work toward a civil confinement statute.[262] The Assembly recently outlined a plan for the civil confinement of sex offenders, which would require evaluations by the Office of Mental Health to determine whether the individual was likely to repeat the crime, as well as separate housing for sex offenders and patients diagnosed with mental illness.[263] Committee members from the Senate and the Assembly have recently begun meeting to determine what the criteria for civil confinement will be.[264] The current state budget sets aside $130 million to demolish an existing prison in upstate New York and replace it with a facility with the capacity to house five hundred sex offenders who have already served their sentences.[265] When these new proposals are presented, it will be important to examine the provisions they set forth in light of *Hendricks.*

The new proposals also raise an interesting question. Governor Pataki successfully appealed the decision in *Harkavy v. Consilvio*, claiming that the use of existing mental health laws to civilly confine sex offenders was legal.[266] If lawmakers claim that the existing civil confinement law can be applied to sex offenders legally, why does New York even need this more specific law? Judge Silbermann, the trial judge who was overruled by the Appellate Division in the first *Harkavy* case, criticized civil confinement of sex offenders without

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[260] State *ex rel.* Harkavy v. Consilvio, 809 N.Y.S.2d 836, 840 (Sup. Ct. 2005) (citing the American Psychiatric Association).

[261] CHEMERINKSY, *supra* note 155, at 646.

[262] Medina, s*upra* note 70.

[263] Jennifer Medina, *Getting Down to Business, Albany Splits on Crime Issues*, N.Y. TIMES, Jan. 10, 2006, at B5.

[264] *Id.*

[265] *Id.* It is not clear what impact the recent ruling will have on the progress of these bills, which seem to have "stalled during negotiations over the state budget." Smith, *supra* note 26.

[266] Medina, s*upra* note 70; Smith, *supra* note 26.

a specific statute aimed at that purpose when she ruled on the companion case a few months afterward. In fact, the same question can be asked of the Kansas legislature that drafted the statute challenged in *Hendricks*. The legislative findings stated that the existing civil confinement law was "inadequate to address the special needs of sexually violent predators and the risks they present to society," and that a "separate involuntary civil commitment process for the potentially long-term control, care and treatment of sexually violent predators is necessary."[267] It is not clear from the legislative findings what prompted this belief.

CONCLUSION

While the actions New York has taken in recent months may, for the time being, have been adjudged constitutional, an examination of the history of sex offender jurisprudence raises questions regarding the path New York, or any state, should take in the future. First, *Powell v. Texas* raises important concerns about the comparison between alcoholics and sex offenders.[268] Similar issues can be raised in terms of the lack of treatment options for each of these groups, the compulsions that cause their behaviors, the underlying debate in the psychiatric community about whether the affliction is a disease, and the high rates of recidivism. While the Court was sympathetic to the amici curiae arguments warning that civil confinement of alcoholics could result in life sentences with little hope of treatment, the Court has not entertained this argument with respect to sex offenders. When the harm produced by alcohol-related crimes is considered, this inconsistency seems even more significant. In *Powell*, the Court acknowledged the imperfections of the criminal justice system in dealing with alcoholics, but determined that the solution lay elsewhere: in increased funding for treatment and other social solutions. Fear has led the courts to refuse to acknowledge similar imperfections in our justice system with respect to sex offenders.

Second, the Court's determination that confinement was civil and not punitive in *Hendricks* has been largely determinative of the course that states have taken in enacting sex offender laws.[269] The *Hendricks* decision, however, has led to an inherent contradiction: sex offenders are held responsible for their acts while in prison, but then adjudged largely unable to control their behavior upon their release. The only conclusion is that the system has failed. Either sex offenders are too sick to go to prison in the first place, or they are too dangerous to be released from prison after the set term limit, and sentences should be lengthened. The current state of the law allows lawmakers to have it both ways.

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[267] KAN. STAT. ANN. § 59-29a01 (2005).

[268] *See* discussion *supra* Part I.B.3.

[269] *See* discussion *supra* Part II.

Third, there is the issue of equal protection.[270] With such a large portion of the prison population suffering from mental illnesses, it becomes troubling when sex offenders are subject to special treatment specifically because they alone have been classified as mentally ill. The justifications that have been put forth for this distinction, such as high recidivism rates, may not be supported so much by hard data as by public rhetoric and fear. Lawmakers and judges should ask whether the distinction between sex offenders and other classes of criminals really is significant enough to justify this separate treatment. The question is especially important in New York, given the current application of a general state mental hygiene law to sex offenders only, and not to murderers, drug offenders, or other convicts upon their release from prison.

With so many questions left unanswered, it seems that states may want to carefully consider the path they choose when balancing the civil rights of sex offenders against the interests of public safety. No one can dispute the compelling nature of a state's desire to keep its citizens safe. However, the courts and legislatures in New York should consider their actions carefully and ask what price they are willing to pay for safety. Fear has driven lawmakers to curtail the civil liberties of individuals in the past, and in retrospect, these actions often seem more expansive and harmful to individual rights than would have been ideal.

[270] *See* discussion *supra* Part III.