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Civil Commitment and the Sexually Violent Predator

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NOTE

CIVIL COMMITMENT AND THE SEXUALLY VIOLENT PREDATOR

Stability without tyranny and liberty without anarchy.[1]

I. INTRODUCTION

Kansas last convicted Leroy Hendricks for child molestation in 1984,[2] ten years before the creation of Kansas's Sexually Violent Predator Act (SVP Act).[3] When Hendricks reached the end of his ten-year prison sentence, Kansas sought to confine him to a mental hospital under the SVP Act as a sexually violent predator.[4] Hendricks challenged the Act on substantive due process, double jeopardy, and ex post facto grounds.[5] On June 23, 1997, the United States Supreme Court, in a five to four decision, rejected all of Hendricks's arguments and held that the SVP Act applied to Hendricks.[6] Neither the SVP Act nor the fact that Hendricks molested children made the decision controversial. Rather, the fact that a slim majority of justices upheld retroactive application of the SVP Act to Hendricks sparked debate.[7] Although the retroactive application became the primary focus of the Court's analysis, *Hendricks*'s greater significance should be the Court's eight to one holding that civil commitment legislation for sexually violent predators does not violate an individual's substantive due process rights.[8] The *Hendricks* decision creates both a significant historical marker in the legal treatment of sexual predators[9] and an immediate catalyst for more effective legislation to handle individuals who commit sex crimes against children.

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1. Joseph Hamburger, *Utilitarianism and the Constitution*, *in* CONFRONTING THE CONSTITUTION 235, 257 (Alan Bloom ed., 1990).

2. Kansas v. Hendricks, 117 S. Ct. 2072, 2078 (1997).

3. Kansas enacted the Sexually Violent Predator Act in 1994. KAN. STAT. ANN. §§ 59-29a01 to -29a15 (1994 & Supp. 1996).

4. *Hendricks*, 117 S. Ct. at 2076. The term "sexually violent predator" includes more criminals than just those who prey on children. *Id.* at 2077. However, for purposes of this Note the term "sexually violent predator" refers to offenders who commit crimes against children. Discussion of sexually violent offenses against adults lies outside of the scope of this Note.

5. *Id.* at 2076.

6. *Id.* at 2076, 2086.

7. *Id.* at 2087 (Kennedy, J., concurring).

8. *Id.* at 2079. Justice Kennedy concurred with the majority's finding that the SVP Act satisfied substantive due process requirements. *Id.* at 2087. Justice Ginsberg did not join in Part I of the dissent in which the three remaining justices agreed that the SVP Act satisfied substantive due process requirements. *Id.* at 2087-90.

9. *Hendricks* stands as the first case heard by the U.S. Supreme Court regarding the issue of validating civil commitment for sexually violent predators after an offender completes criminal incarceration. *See* Mark Hansen, *Danger vs. Due Process*, A.B.A. J., Aug. 1997, at 43, 43.

The complicated issues in *Hendricks* present an excellent example of the difficulty in maintaining a balance between opposite forces inherent in a democratic society: tyranny and anarchy.[10] Our Constitution guarantees individuals the freedoms of life and liberty.[11] With these freedoms, however, lies the grim reality that not all people respect or even consider others' rights. Because no society functions devoid of criminal acts, survival necessitates the formation of a legal structure that will maintain the safety of the community.[12] Although not always popular, state and federal governments must construct certain mechanisms to assure that all citizens can enjoy their constitutional freedoms.[13] This juxtaposition of protecting individual rights while securing community safety renders the *Hendricks* case and others like it difficult to satisfactorily resolve. The paradox becomes especially prominent when the targets of the criminal acts are children.

When society must cope with a person who violates the sanctity of youth by committing sexual offenses against children, the community's interest in punishing the offender and deterring future acts competes with the offender's long-term liberty interests. A relatively short period of criminal incarceration does not usually prompt tyrannical concerns. However, after an offender completes a criminal sentence, society struggles with the anarchical problem presented by trying to control a freed offender and preventing that offender from molesting again. This Note discusses the ever present struggle between tyranny and anarchy ingrained in our constitutional law, from the inception of our legal system to the present controversy of courts and legislatures striving to address and control sex crimes against children without denying the individual rights of sexually violent predators. While focusing on the tragedies of child sexual abuse, this Note demonstrates why civil commitment provides society and the offender with the most humane response to the serious dilemma created by sexually violent predators.

II. HISTORY

A. *Constitutional Balancing of Individual Rights Against Community Rights*

In 1787, the delegates to the Constitutional Convention gathered in Philadelphia.[14] Their experiences, first as British colonials and then as

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10. *See* Hamburger, *supra* note 1, at 257; *see also* DAVID W. MINAR, IDEAS AND POLITICS: THE AMERICAN EXPERIENCE 101-02 (1964) (describing how the Constitution institutionalized the tension between liberty and authority).

11. U.S. CONST. amend. V.

12. MINAR, *supra* note 10, at 101 (asserting that one of the major aims of the Constitutional Convention was to establish authority).

13. *Id.*

14. CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787, at 3 (1966).

rebels, and aspiring republican thoughts led them to some astounding conclusions.[15] The delegates understood the genuine tension between the threat of tyranny on one hand and the equally dangerous possibility of anarchy on the other.[16] They also perceived the delicate state of equilibrium necessary to ensure that the document they created to govern their new world would fairly serve individual rights while securing societal stability.[17] The framers recognized that the solution lay in a document that could embody and negotiate discordant principles.[18]

The authors of the Constitution melded protection for individual rights and protection for society into this unique governing document to avoid the extremes of totalitarianism and chaos.[19] These pioneers relied on a practical approach to draft a governing document that both obscured philosophical origins and opened the possibility of future consideration of unrealized ideas.[20] The amazing prescience of these delegates propelled the Constitution through over two hundred years into the present as a largely unchanged and living framework for a "well-constructed Union."[21]

In *The Federalist Number 44*,[22] James Madison's discussion of powers conferred by the Constitution noted the impossibility of enumerating "a complete digest of laws on every subject to which the Constitution relates. . . ."[23] Madison argued that the creators could not possibly accommodate all the changes which "futurity may produce."[24] The release

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15. *See id.* at 3-15. The 55 delegates who arrived in Philadelphia in 1787 came from a variety of backgrounds and participated in what was called "a Grand Convention at Philadelphia" or the "Federal Convention." The delegates closed their meetings to the public, and at the time neither the country, nor the delegates themselves, referred to these sessions as a "constitutional" convention. *Id.*

16. Hamburger, *supra* note 1, at 257.

17. MINAR, *supra* note 10, at 100-01 (describing the Constitution as an expression of the American social consensus and stating that the framers "institutionalized a set of preferences firmly rooted in the American society of the time").

18. Hamburger, *supra* note 1, at 257. American constitutional thought emphasizes balancing, described as "a perpetual system of compromise, a perpetual trimming." *Id.* (quoting James Mill, *Periodical Literature, Edinburgh Review*, WESTMINSTER REV., Jan. 1824, at 203, 218).

19. *Id.* at 256-57.

20. *Id.* at 257.

21. THE FEDERALIST NO. 10, at 122 (James Madison) (Isaac Kramnick ed., 1987).

22. THE FEDERALIST No. 44 (James Madison) (Isaac Kramnick ed., 1987).

23. *Id.* at 289. Written by Alexander Hamilton, James Madison, and John Jay in order to persuade Americans to support ratification of the Constitution, the Federalist Papers present a series of essays widely accepted as the standard authority on Constitutional principles behind the Constitution. ALAN PENDLETON GRIMES, AMERICAN POLITICAL THOUGHT 119 (1960). The authors of *The Federalist*, by unveiling the intentions of the convention delegates, clarify the framers' dilemma over establishing national unity without abusing the rights of individual states and citizens. *Id.* at 199-221.

24. THE FEDERALIST NO. 44, *supra* note 22, at 289. In the same essay, Madison described some restrictions on the power of the states, including the prohibition against ex post facto laws, which he defined as "contrary to the first principles of the social compact and to every principle of sound legislation." *Id.* at 287. Madison clearly desired to protect citizens from the improper use of power by the government, yet he also felt that without the power afforded by the "necessary and proper" clause, the Constitution would be a "dead letter." *Id.* at 288-89. The Madison argument often

of sexually violent predators into society after completion of their criminal sentences, despite high rates of recidivism, presents a problem not anticipated by the writers of the Constitution.[25] Madison and Hamilton concurred that "[i]t is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."[26] Although Madison and Hamilton were not speaking specifically of child sex offenders when they wrote this essay, their words reverberate with ironic implications:

> Justice is the end of government. It is the end of civil society[27]. . . . In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger. . . .[28]

The framers' ingenious decision to instill underlying flexibility in the Constitution allows courts and state legislatures to apply constitutional principles to modern problems—problems unfathomable over two centuries ago. Sadly, in today's complex society, child sex abusers like Leroy Hendricks victimize growing numbers of children. State legislatures must put an end to this "anarchy" by protecting the "weaker" members of our society.

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used to defend a "loose construction" of the Constitution states: "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included." *Id.* at 290.

It should be noted that another *Federalist* author, Alexander Hamilton, proposed the establishment of a national bank in 1790 while serving as Washington's Secretary of the Treasury. GEORGE BROWN TINDALL, AMERICA: A NARRATIVE HISTORY 300-01 (2d ed. 1988). The opponents of this proposal, including Thomas Jefferson and James Madison, claimed that the bank would represent an unconstitutional presumption of power on the part of the national government. *Id.* Resorting to a literal interpretation of the Constitution, Jefferson argued that because the Constitution did not provide for a bank and because a national bank was not "necessary" for the execution of delegated powers, the Hamilton proposal was unconstitutional. *Id.* Hamilton, using the concept of "implied powers," responded in defense of the bank that if the Constitution were limited to a literal interpretation, it would "arrest the motions of government." GRIMES, *supra* note 23, at 138. Hamilton's "loose construction" defense of the bank echoed Madison's sentiments:

> That every power vested in a government is in its nature *sovereign* and includes, by *force* of the *term*, a right to employ all the *means* requisite and fairly applicable to the attainment of the *ends* of such power, and which are not precluded by restrictions and exceptions specified in the Constitution, or not immoral, or not contrary to the *essential ends* of political society.

Id. at 137 (quoting 3 ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON 181 (Henry Cabot Lodge ed., 1885-86)).

25. In *The Federalist No. 44*, Madison describes some of the powers that the Constitution confers on the federal government for the greater good of the nation, but also supports the rights of the individual, stating that ex post facto laws run "contrary to the first principles of the social compact, and to every principle of sound legislation." THE FEDERALIST No. 44, *supra* note 22, at 287.

26. THE FEDERALIST NO. 51, at 321 (James Madison) (Isaac Kramnick ed., 1987).

27. The use of the word "end" in this context means aim, goal, objective, or purpose. *Id.* at 322.

28. *Id.*

B. *The* Hendricks *Example: Leroy Hendricks's History as a Sexually Violent Predator*

Leroy Hendricks inflicted many known acts of sexual abuse upon children.[29] In 1955, Hendricks pled guilty to indecent exposure when he exposed his genitals to two young girls.[30] In 1957, after a conviction for lewdness with a young girl, Hendricks served a brief jail sentence.[31] Hendricks returned to jail in 1960 for two years after molesting two boys while he worked at a carnival.[32] In 1962, Hendricks was paroled but immediately rearrested for molesting a seven-year-old girl.[33] Following the arrest, Hendricks received treatment at a state psychiatric hospital but was discharged in 1965, considered "safe to be at large."[34]

Rearrested just two years later in 1967, Hendricks served prison time for sexually assaulting an eight-year-old girl and an eleven-year-old boy.[35] While incarcerated, Hendricks refused to participate in a sex offender treatment program.[36] Hendricks gained parole in 1972.[37] After being diagnosed as a pedophile, he entered, but subsequently abandoned, a treatment program.[38] At the time of his parole, Hendricks admitted that he still harbored sexual desires for children.[39] Shortly after his 1972 parole, Hendricks began to molest his own stepdaughter and stepson.[40] He forced these children to participate in sexual activity with him for over four years.[41] Finally, in 1984 Leroy Hendricks pled guilty and was incarcerated for taking "indecent liberties" with two thirteen year-old boys who entered the electronics store where he worked.[42]

Just before Hendricks's imminent release to a halfway house in 1994, Kansas petitioned to further confine him "civilly" as a sexually violent predator under the state's newly ratified "Sexually Violent Predator Act."[43] Hendricks challenged the SVP Act as violating the Ex

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29. Hansen, *supra* note 9, at 43. Given the small fraction of sexual abuse incidents actually reported, however, Hendricks's total acts of abuse likely approach two to three times the number of his known acts. *See infra* note 49 and accompanying text; *see also* Stephen R. McAllister, *The Constitutionality of Kansas Laws Targeting Sex Offenders*, 36 WASHBURN L.J. 419, 443-44 (1997) (citing testimony of psychologist Dr. Befort that Hendricks told a clinician that he acted sexually based on his urges to molest children at least "once per month, twice a month").

30. Kansas v. Hendricks, 117 S. Ct. 2072, 2078 (1997).

31. *Hendricks*, 117 S. Ct. at 2078.

32. *Id.*

33. *Id.*

34. *Id.* (citing Respondent's Brief Joint App. at 143-44, *Hendricks* (Nos. 95-1649 & 95-9075)).

35. *Id.* Hendricks had performed oral sex on the young girl and fondled the boy. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *See id.*; Brief for Leroy Hendricks, Cross-Petitioner at 3, *Hendricks* (No. 95-1649).

43. Cross-Petitioner's Brief at 1-2, *Hendricks* (Nos. 95-1649 & 95-9075).

Post Facto and Double Jeopardy Clauses and his substantive due process rights.[44] The Kansas trial court held that probable cause existed to find Hendricks a sexually violent predator, but did not rule on the constitutionality of the SVP Act.[45] The trial court ordered Hendricks to submit to an evaluation at the Larned State Security Hospital.[46] Hendricks requested a jury trial to determine whether he was a sexually violent predator.[47]

At his trial, Hendricks testified about his extensive history of molestation and sexual abuse of children.[48] Admitting that he repeatedly molests children when not confined, Hendricks said when he "'gets stressed out,' he 'can't control the urge' to molest children."[49] While acknowledging that his behavior harms children and stating that he hoped he would not molest any more children, Hendricks said that the only way to make sure that he would not molest another child was for him "to die."[50] Hendricks concurred in the diagnosis of a testifying state physician that he continues to suffer from pedophilia.[51] The state physician also testified that Hendricks remarked that "treatment is bullshit."[52]

The jury unanimously affirmed beyond a reasonable doubt that Hendricks met the definition of a sexually violent predator.[53] The Kansas trial court then determined that pedophilia qualified as a "mental abnormality" under the SVP Act and ordered Hendricks to civil commitment.[54] When Hendricks appealed the trial court's finding, the Kansas Supreme Court held that the SVP Act violated Hendricks's substantive due process rights because the Act's definition of "mental abnormality" did not satisfy the United States Supreme Court's "mental illness" requirement in an action for civil commitment.[55] At the time of the *Hendricks* decision, seventeen states had enacted legislation designed to segregate sexually violent predators from the public through mandatory treatment pro-

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44. *Hendricks*, 117 S. Ct. at 2076.

45. *Id.* at 2078.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* (quoting Respondent's Brief Joint App. at 172, *Hendricks* (Nos. 95-1649 & 95-9075)).

50. *Id.* (quoting Respondent's Brief Joint App. at 190, *Hendricks* (Nos. 95-1649 & 95-9075)).

51. *Id.* at 2078-79 (citing Respondent's Brief Joint App. at 153, *Hendricks* (Nos. 95-1649 & 95-9075)).

52. Respondent's Brief Joint App. at 190, *Hendricks* (Nos. 95-1649 & 95-9075); *see also Hendricks*, 117 S. Ct. at 2078-79.

53. *Hendricks*, 117 S. Ct. at 2079.

54. *Id.*

55. *Id.*; *see also* Foucha v. Louisiana, 504 U.S. 71, 78 (1992) (stating that civil commitment is improper unless civil commitment proceedings result in determination that the individual currently suffers from a mental illness and is dangerous). The U.S. Supreme Court granted both the petition for certiorari filed by Kansas (based on the adverse due process ruling) and Hendricks's cross-petition for certiorari (based on the rejection of his ex post facto and double jeopardy arguments). *Hendricks*, 117 S. Ct. at 2076.

grams or civil confinement.[56] The Kansas SVP Act provides a good example of the general structure and content of these statutes.

C. *Kansas's 1994 Sexually Violent Predator Act*

The Kansas SVP Act[57] filled a loophole created by Kansas's general civil commitment statute.[58] These loopholes also exist in many other states' civil commitment statutes.[59] Most general civil commitment statutes apply only to the mentally ill.[60] The SVP Act addresses a small, but extremely dangerous, group of sexual predators who do not fit within the criteria for traditional involuntary civil commitment.[61] The SVP Act reasons that sexually violent predators require different treatment because generally they: (1) have anti-social personalities; (2) are incompatible with mental illness treatment modalities; (3) are likely to engage in sexually violent behavior; and (4) are characterized by a high likelihood of repetitive acts of predatory sexual violence.[62]

Kansas recognized that its general civil commitment statute inadequately addressed the risks sexually violent predators pose to its society.[63] For example, the prognosis for rehabilitation of a sexually violent predator in a prison setting remains poor.[64] Further, the treatment of sexually violent predators requires more of a long-term approach and differs from the traditional treatment modalities used with people committed under the general civil commitment statute for reasons other than sexual violence.[65]

Kansas provides procedural safeguards to reasonably protect an individual's liberty interests from the powerful reach and impact of the SVP Act. Kansas places the burden on the state to prove beyond a reasonable doubt that an individual satisfies the statutory criteria for the label of "sexually violent predator."[66] Indigents receive appointed counsel and a choice of qualified mental health experts for examination.[67] The

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56. *Hendricks*, 117 S. Ct. at 2095 (Breyer, J., dissenting).

57. KAN. STAT. ANN. § 59-29a01 to -29a15 (1994 & Supp. 1996).

58. *Id.* § 59-29a01.

59. To fill the gap created when sexual predators fail to qualify for confinement under general civil commitment statutes, many states have enacted forms of sexually violent predator statutes. *See* ARIZ. REV. STAT. §§ 13-4601 to -4613 (West Supp. 1996); CAL. WELF. & INST. CODE §§ 6600 to 6609.3 (West 1984 & Supp. 1997); COLO. REV. STAT. §§ 16-11.7-101 to -107 (1997); ILL. COMP. STAT. §§ 205/0.01 to 205/0.12 (West 1992 & Supp. 1997); MINN. STAT. § 253B.185 (1996); NEB. REV. STAT. §§ 29-2922 to 2926, 29-2928 to 2930, 29-2934 to 2936 (1995 & Supp. 1996); TENN. CODE ANN. §§ 33-6-301 to -306 (1984 & Supp. 1997); WASH. REV. CODE §§ 71.09.010 to 71.09.902 (1996); WIS. STAT. §§ 980.01 to .13 (West Supp. 1996).

60. Brief of Petitioner at 28, *Hendricks* (No. 95-1649).

61. *Id.* at 4, *Hendricks* (No. 95-1649).

62. KAN. STAT. ANN. § 59-29a01.

63. *Id.*

64. *Id.*

65. *Id.*

66. KAN. STAT. ANN. § 59-29a07 (Supp. 1996).

67. *Id.* § 59-29a05 to -29a06 (Supp. 1996).

respondent may present witnesses, cross-examine witnesses offered by the state, and review state documents.[68] Once it confines an individual involuntarily, the state must conform to all constitutional requirements for treatment.[69] A person civilly committed may file a petition for release at any time,[70] and the state may find that an individual's improvement merits authorizing a petition for release.[71] The state also must participate in an annual court review, which determines if continued detention remains justifiable.[72] A court may free an individual after reviewing a petition for release if it finds that the state can no longer satisfy its burden under the initial commitment standard.[73]

The liberty protections afforded by the SVP Act help satisfy concerns that such legislation could lead to unbridled tyranny. Safeguarding individual rights merits attention and enforcement. However, in the hostile world of child sex offenses lies the shocking danger of anarchy and both the emotional and detached arguments for civil commitment as a desired control.

D. *The Harmful Effects of Child Sexual Abuse and the Social Response*

Pedophilia exists as the most common of the paraphiliac[74] acts.[75] Pedophilia involves sexual touching or activity with a prepubescent child,[76] a person defined as one who cannot give consent.[77] Conservative estimates acknowledge that 20% of all female children and 10% of all male children suffer at the hands of sexual molesters before reaching the

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68. *Id.* § 59-29a05.

69. *Id.* § 59-29a09 (1994); *see also* Allen v. Illinois, 478 U.S. 364, 369 (1986) (discussing a state's obligation to treat and care for sexually violent predators with a focus toward recovery). *Cf.* Addington v. Texas, 441 U.S. 418, 432-33 (1979) (concluding that the standard of proof in a civil commitment proceeding must be greater than a preponderance of evidence but that proof beyond a reasonable doubt is not constitutionally required).

70. KAN. STAT. ANN. § 59-29a11 (1994).

71. *Id.* § 59-29a10 (Supp. 1996).

72. *Id.* § 59-29a08 (Supp. 1996).

73. *Id.*

74. Essential features of paraphilia include recurrent, intense sexual fantasies, urges or behaviors over a six month period involving: (1) nonhuman objects; (2) suffering or humiliation of one's partner or oneself; or (3) children or other nonconsenting persons. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS, DSM IV 522-23 (4th ed. 1994) [hereinafter DSM-IV].

75. 2 GLEN O. GABBARD, TREATMENTS OF PSYCHIATRIC DISORDERS 1960 (2d ed. 1995). Ironically, pedophilia literally means "love of children." 1 AMERICAN PSYCHIATRIC ASSOCIATION, TREATMENT OF PSYCHIATRIC DISORDERS 617 (1989).

76. DSM-IV, *supra* note 74, at 527 (stating that a prepubescent child generally refers to a 13 year-old or younger child and that an individual with pedophilia must be at least 16 years old and at least five years older than victim). *But see* GABBARD, *supra* note 75, at 1960 (urging caution in defining pedophilia due to inconsistent views).

77. GABBARD, *supra* note 75, at 1960. The criminal justice system always has defined pedophilic offenses as sex crimes while the American Psychiatric Association continues to define pedophilia as a psychiatric disorder. *Id.*

still tender age of eighteen.[78] Unfortunately for those studying cases in order to postulate improved treatment, the data as to whether family members or other persons known to the child or strangers commit most acts of molestation languish in statistical contradiction.[79] Society no longer ignores or dismisses the many thousands of children who become victims every day.[80] Experts opine that the number of child sex abuse cases reported actually represents only a fraction of the actual number of offenses committed because of a significant number of clandestine incestuous incidents, and the varied, sometimes nonexistent, symptoms of the victims.[81] Others believe the inability of families to deal with the reality of child sex abuse in their own families will increase the current rate of child sex abuse incidents.[82] A perpetual risk for child sex abuse continues because humans exist as inherently sexual beings.

It is impossible to determine why every person who sexually abuses children does so. History shows that pedophilia may perpetuate itself from the environmental conditioning of child victims who then become adult offenders.[83] Many pedophilic urges develop during adolescence and adulthood and recur throughout an individual's lifetime.[84] Resisting the

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78. *Id.*

79. *See* Robin L. Deems, *California's Sex Offender Notification Statute: A Constitutional Analysis*, 33 SAN DIEGO L. REV. 1195, 1231 (1996) (claiming that family members perpetrate the majority of child sexual abuse); Robert E. Freeman-Longo, *Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 303, 313 (1997) (indicating that 75% of child sexual abuse cases are perpetrated by someone the child knows). *But see* GABBARD, *supra* note 75 at 1960 (stating that child molesters say they do not know most of their victims despite data from victims' treatment programs reporting numbers to the contrary). The tendency of the media to generate horrifying statistics concerning the prevalence and character of sexual abuse contributes to inaccuracies in public understanding of the problem. Freeman-Longo, *supra*, at 79.

80. *See, e.g.*, Sasha Seiden, *Report Says 30,000 Children Physically or Sexually Abused*, JERUSALEM POST, Jan. 25, 1993, at 3 (noting statistics in Israel and that the Israeli Association for Child Protection hopes to reach out to a greater number of abused children in the country); *see also* GABBARD, *supra* note 75, at 1960 (stating that a 1992 nationwide study approximated 21 million adult women had suffered sexual abuse and that 60% of that number were assaulted before age 18); Arthur J. Lurigio et al., *Child Sexual Abuse: Causes, Consequences, and Implications for Probation Practice*, FED. PROBATION, Sept. 1995, at 1, 69 (tracing increase of 2100% in reported cases of child abuse from 1976 to 1986 and an additional increase of 227% by 1991).

81. *See* Brief on Behalf of the Public Defender, Amicus Curiae, Doe v. Poritz, 662 A.2d 367 (N.J. 1995) [hereinafter Brief: Doe v. Poritz]; Roger J.R. Levesque, *Prosecuting Sex Crimes Against Children: Time for "Outrageous" Proposals?*, 19 LAW & PSYCHOLOGY. REV. 59, 64-68 (1995); *Symposium on Megan's Law*, 6 B.U. PUB. INT. L.J. 75, 78 (1996) (reprinting Brief: Doe v. Poritz, *supra*).

82. Jenny A. Montana, *An Ineffective Weapon in the Fight Against Child Sexual Abuse: New Jersey's Megan's Law*, 3 J.L. & POL'Y 569, 594 & n.115 (1995); *see also* Freeman-Longo, *supra* note 79, at 313-14 (noting denial in intrafamilial sexual abuse cases).

83. Lurigio et al., *supra* note 80, at 70; *see also* Freeman-Longo, *supra* note 79, at 309-10 (discussing violence and sexual assault as a public health problem).

84. DSM-IV, *supra* note 74, at 524-25; Ron Langevin & R.J. Watson, *Major Factors in the Assessment of Paraphilics and Sex Offenders*, *in* SEX OFFENDER TREATMENT 39, 56 (Eli Coleman et al. eds., 1996) (finding that around 5% to 10% suffer from mental illness and that clinicians must carefully evaluate whether the mental illness explains or is coincidental to the sexual offense). Per-

urge to molest children becomes exceedingly difficult for pedophiles during periods of psychological stress.[85] For the pedophile[86] who sexually abuses male children, the drive to molest is usually more chronic.[87] Generally, recidivism rates for individuals preferring male children approach double the rates of those molesting female children.[88]

Child sex offenders differ from other criminal offenders because a child sex offender generally victimizes multiple children,[89] and the urge to reoffend continues over time.[90] Also, the rate of recidivism for most criminal acts pales in comparison to the rate of recidivism of a sex offender.[91] Treatment for child sex offenders usually involves more difficult

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sonality evaluations are also very important, as they may evidence an anti-social personality disorder. *Id.* at 57. Diagnosis of anti-social personality disorder shows a high level of risk for acting out. *Id.* Some individuals define this type of personality as "psychopathic." *Id.* at 57-58. Review of past behavior for episodes of aggression is important because past violence remains the best predictor of future violence. *Id.* at 58. Recent research shows the substantial occurrence of brain damage and dysfunction among the paraphilic population. *Id.* at 60. "Pedophiles, particularly, show language-based cognitive impairment that presents problems of comprehension, information retention, retrieval, and application in therapy and their lives in general." *Id.*

85. DSM-IV, *supra* note 74, at 528.

86. Typically, males dominate the class of pedophiles. JOHN C. GONSIOREK ET AL., MALE SEXUAL ABUSE 49 (1994); Gail Elizabeth Wyatt & M. Ray Mickey, *The Support by Parents and Others as it Mediates the Effects of Child Sexual Abuse: An Exploratory Study, in* LASTING EFFECTS OF CHILD SEXUAL ABUSE 211, 211 (Gail Elizabeth Wyatt & Gloria Johnson Powell eds., 1988). However, female pedophiles exist. L.C. Miccio-Fonseca, *Comparative Differences in the Psychological Histories of Sex Offenders, Victims, and Their Families, in* SEX OFFENDER TREATMENT 71, 72 (Eli Coleman et al. eds., 1996) (stating that men commit approximately 95% of reported sex crimes).

87. DSM-IV, *supra* note 74, at 528 (referring to male on male contact). Although male on male pedophiles offend in a more habitual manner, male on female pedophiles comprise the majority of child sex offenders. *See, e.g.*, CHILDREN'S DIVISION, AMERICAN HUMANE ASS'N, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS 216-17 (Vincent De Francis ed., 1969) (stating that while the majority of child sex offenses are committed by men, 90% of their victims are women).

88. DSM-IV, *supra* note 74, at 528.

89. Brief: Doe v. Poritz, *supra* note 81, at 80 (citing a study that estimated that extrafamilial child molesters who assault girls average 19.8 victims, and that those who assault boys average 150 victims); Margit C. Henderson & Seth C. Kalichman, *Sexually Deviant Behavior and Schizotypy: A Theoretical Perspective with Supportive Data*, 61 PSYCHIATRIC Q. 273, 273 (1990) (citing study in which self-reported child molesters averaged 72 victims); Jessica R. Ball, Comment, *Public Disclosure of "America's Secret Shame:" Child Sex Offender Community Notification in Illinois*, 27 LOY. U. CHI. L.J. 401, 407-08 (1996) (stating that sex offenders generally attack more than one victim).

90. Brief: Doe v. Poritz, *supra* note 81, at 80 (stating that, in contrast to other offenders, as sex offenders age their urge to reoffend does not seem to decline); DSM-IV, *supra* note 74, at 524 (clarifying that the urges and fantasies of paraphilics are by definition recurrent and may endure for a lifetime); *see also* Jonathan J. Hegre, *Minnesota "Nice"? Minnesota Mean: The Minnesota Supreme Court's Refusal to Protect Sexually Abused Children in* H.B. ex rel. Clarke v. Whittmore, 15 LAW & INEQ. J. 435, 435-37 (1997) (discussing a Minnesota case involving the conviction of seventy-four year-old Willard Wittemore on five counts of second degree criminal sexual conduct with four girls ages four to seven).

91. Brief: Doe v. Poritz, *supra* note 81, at 80 n.20 (citing a 1994 study that found a recidivism rate as high as 75% for untreated child sex offenders, regardless of the victim's gender). This study also indicated that sex offenders who molest young girls recidivate at rates up to 29%, and up to 40% of those who molest young boys repeat sex offenses. *Id.* at 80.

measures because of the offenders' reluctance to acknowledge their sexual activity as a crime and their consequential lack of motivation to participate voluntarily in therapy.[92] Many offenders believe they cannot be cured.[93] Some studies prove that assessment and treatment of some pedophiles reduces sex assaults on children.[94] One thing remains certain, however: pedophilia presents a major problem for society as well as a serious health concern for American children.[95]

Meanwhile, the effects of child sexual abuse on victims endure for a lifetime, often leading to a continuing legacy of intrafamily child sex abuse.[96] Common manifestations of child sex abuse include chronic depression, anxiety, poor social adjustment, substance abuse, suicidal behavior, and involvement in abusive relationships.[97] Sexually abused children stand a 55% greater chance of being arrested later in life, a 500% greater chance of being arrested for sex crimes, and a 3,000% greater chance of being arrested for adult prostitution.[98] Victims of child sexual abuse often evolve into adult child molesters themselves, avoid adult intimacy or sexual relationships altogether, develop eating disorders, and experience severe marital distress.[99]

Public acknowledgment of the existence of child sexual abuse as a serious social problem began in the late 1970s.[100] Unheard victims of sexual abuse no doubt exist as far back as the beginning of human his-

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92. *See* MICHAEL A. O'CONNELL ET AL., WORKING WITH SEX OFFENDERS 13 (1990) (asserting that it is rare for sex offenders to voluntarily enter treatment programs and that those who do usually refuse to make the commitment that is essential to changing their behavior to the extent necessary to prevent reoffense); Freeman-Longo, *supra* note 79, at 316-17 (stating that many professionals question whether successful treatment for sexually violent predators such as Leroy Hendricks exists and that the law should provide treatment for those sexual offenders that will respond to treatment and protection for society from those sexual predators refusing treatment or who exhibit behaviors considered untreatable); Ron Langevin et al., *Why Therapy Fails with Some Sex Offenders: Learning Difficulties Examined Empirically, in* SEX OFFENDER TREATMENT 143, 144 (Eli Coleman et al. eds., 1996) (discussing study of 87 sex offenders and their attitudes toward treatment, finding that only 49% even wanted treatment); McAllister, *supra* note 29, at 443-44 (restating the testimony of psychologist Dr. Befort who believed that Hendricks would offend again if released because Hendricks did not display any desire to control his behavior, failed to comprehend the seriousness of his behavior and demonstrated disinterest in treatment).

93. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2078-79 (1997) (reciting Hendricks's testimony that the only sure way to stop him from abusing children in the future was for him to "die" and that "treatment is bull[shit]"). Many sex offenders simply refuse to acknowledge that they have a problem. *See* O'CONNELL ET AL., *supra* note 92, at 13-15; Langevin et al., *supra* note 92, at 144 (1996).

94. *See* GABBARD, *supra* note 75, at 1975 (stating that treatment of pedophiles stops sex crimes against children); Freeman-Longo, *supra* note 79, at 323 (citing a study that found the comprehensive treatment of pedophilia had at least a 90% success rate); Lurigio et al., *supra* note 80, at 72 (citing various studies that have concluded sex offender treatment works, and discussing various types of treatment).

95. GABBARD, *supra* note 75, at 1975.

96. Brief: Doe v. Poritz, *supra* note 81, at 79.

97. *Id.* at 78-79.

98. Hegre, *supra* note 90, at 440-41.

99. Lurigio et al., *supra* note 80, at 70-71.

100. Levesque, *supra* note 81, at 63.

tory.[101] Until recently, the mental health community reacted with ambivalence toward pedophilia treatment because effective treatments were unknown and clinicians often were seen as supporting pedophiles rather than as preventing the abuse through treatment.[102] Should the mental health profession or the criminal justice system primarily be responsible for pedophiles?[103] Rarely does an individual suffering from pedophilia enter the observation of the psychological community without involvement from the legal system.[104] Society only recently began attempting to provide educational and preventive measures directed toward ending the problem of child sex abuse.[105]

E. *The State of the Law Before* Hendricks

Prior to the decision in *Hendricks*, states instituted a number of other methods in attempting to deal with the growing problem of sexually violent predators.[106] Michigan enacted the first statutes aimed at segregating convicted sex offenders in 1937.[107] Twenty-five states eventually adopted these "mentally disordered sex offender" statutes.[108] When first instituted, mentally disordered sex offender statutes authorized indefinite confinement.[109] However, the statutes generally confine the sex offender for only a period of time equivalent to the maximum criminal incarceration allowed by law.[110] Most states have repealed their mentally disordered sex offender statutes.[111]

States utilize a number of methods to counteract the threat of sex offenders. Some states handle the problem of habitual child sex abusers by instituting longer and harsher prison sentences.[112] New Jersey made national headlines in 1994 by enacting state legislation called "Megan's

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101. *See id.*

102. GABBARD, *supra* note 75, at 1960.

103. *Id.*

104. Langevin & Watson, *supra* note 84, at 40.

105. *See* GABBARD, *supra* note 75, at 1960; Ball, *supra* note 89, at 444-47.

106. Six states, including Kansas, passed some form of legislation involving civil commitment for sexually violent predators at the time of the *Hendricks* decision. McAllister, *supra* note 29, at 421. At that time, nearly three dozen other states expressed interest in similar statutes if the U.S. Supreme Court found the Kansas SVP Act constitutional. *Id.; see also* RALPH REISNER & CHRISTOPHER SLOBOGIN, LAW AND THE MENTAL HEALTH SYSTEM CIVIL AND CRIMINAL ASPECTS 586-587 (2d ed. 1990) (discussing the history of sexually violent offender legislation and civil commitment in the United States).

107. REISNER & SLOBOGIN, *supra* note 106, at 587.

108. *Id.*

109. *Id.*

110. *Id.*

111. In 1990, only around 15 states still subscribed to mentally disordered sex offender statutes. *Id.*

112. McAllister, *supra* note 29, at 420; *see also* Laura J. Fowler & Johnnie Beer, *Crimes: Aggravated Sexual Assault on Children*, 26 PAC. L.J. 219, 219-21 (1995) (discussing a California law that requires a crime of aggravated sexual assault of a child to be punished by a prison sentence of 15 years to life).

Law," which required registration and community notification of the presence of sexual predators.[113] Megan's Law generated the impetus for the first federal sex offender registration law.[114]

Around the time New Jersey passed Megan's Law, Congress enacted a federal form of Megan's Law under the name "Jacob Wetterling Act."[115] This statute required all states to implement a registration system for sex offenders or face a 10% loss of funding for state criminal justice operations.[116] Even without the Jacob Wetterling Act, some states felt compelled to institute these laws or risk becoming havens for sexual predators.[117] Megan's Law, for example, enabled New Jersey to require mandatory registration for sexual predators in the community.[118] As a result, sex offenders deterred from living in New Jersey would choose to reside in neighboring states instead. The procedures for community notification outlined by the registration and notification statues in New Jersey, Louisiana, Washington, and Oregon remain among the most formal and active.[119]

Critics of notification and registration laws like Megan's Law argue that these measures provide ineffective protection because of easy circumvention,[120] the creation of anger and vigilantism in communities,[121] and the lack of overall physical protection of the community's children.[122] Once notified of a registered sex offender living in their neighborhood, residents stage protests and picket the offender's home,[123] develop classes to alert children to sexual predators,[124] and ensure that police distribute flyers.[125] Enforceability presents a real problem because the registration system only works with the cooperation of the sex offenders, who may not register or who may give phony addresses and frequently relocate.[126] The offenders usually gravitate to areas where they disappear into the surroundings, such as bigger cities and poorer urban areas.[127] In some

113. N.J. STAT. ANN. §§ 2C:7-1 to :7-11 (West 1996 & Supp. 1997); Montana, *supra* note 82, at 569-71. Megan's Law created a three-tiered approach based on the perceived risk of recidivism to determine the degree to which a sex offender's personal information will be disseminated. Ball, *supra* note 89, at 413. Only law enforcement agencies received notification of a low-risk offender's whereabouts. *Id.* at 414. Schools, religious and youth organizations received a moderate risk offender's personal information. *Id.* Individuals living in a community where a high risk sex offender relocates received personal notification of the sex offender's presence in their community. *Id.*

114. 42 U.S.C. § 14071 (1994 & Supp 1997); McAllister, *supra* note 29, at 420.

115. 42 U.S.C. § 14071.

116. *See* Deems, *supra* note 79, at 1197; Freeman-Longo, *supra* note 79, at 312.

117. Ball, *supra* note 89, at 444.

118. N.J. STAT. ANN. § 2C:7-2 (Supp. 1997).

119. Ball, *supra* note 89, at 412-13.

120. Montana, *supra* note 82, at 590-93.

121. *Id.* at 577-79.

122. *Id.* at 603-04.

123. *Id.* at 579.

124. Freeman-Longo, *supra* note 79, at 319.

125. Deems, *supra* note 79, at 1226 n.194.

126. Montana, *supra* note 82, at 590-93.

127. *Id.* at 582-83.

instances, inadequacies in the legislation itself leads to problems. For example, New Jersey enacted its mandatory registration/notification laws without providing the requisite funds for implementation, and New Jersey's law enforcement departments now struggle without adequate resources to inform the public of the presence of a sexual offender.[128]

Faced with the ever increasing incidents of sexual abuse of children, in 1990 the state of Washington became the first to institute a statute allowing involuntary civil commitment of sexually violent predators.[129] Civil commitment differs from increased prison sentences by focusing on treatment and deterrence rather than punishment. Civil commitment provides the additional advantage of physical segregation that registration laws do not accomplish.

F. *Civil Commitment*

The United States has a lengthy history of involuntarily, civilly committing citizens found to be "furiously mad."[130] Of course, the Due Process Clause of the Fifth Amendment lurks nearby whenever a government attempts to physically confine an individual for any length of time.[131] While the Fifth Amendment's Due Process Clause protects an individual's liberty interest from arbitrary governmental infringement, that liberty interest does not exist as an absolute.[132] The United States Supreme Court recognizes numerous instances where an individual's constitutionally protected right to avoid physical restraint must succumb to other concerns, even in the civil context.[133]

The law relating to involuntary civil confinement now requires that, before being civilly committed, an individual pose a threat to the health and safety of the public due to an inability to control his or her behavior.[134] An involuntary civil commitment statute also must consider collateral factors, such as a mental disorder, to withstand constitutional scrutiny. In 1940, the United States Supreme Court in *Pearson v. Ramsey County* upheld the civil commitment of a dangerous and "psychopathic" individual under a Minnesota statute.[135] In 1986, the Court in *Allen v. Illinois*[136] upheld the involuntary civil commitment of an individual found to be dangerous and mentally ill.[137] Then, in 1993, the Court in *Heller v.*

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128. *Id.* at 583.

129. McAllister, *supra* note 29, at 420 n.2.

130. Kansas v. Hendricks, 117 S. Ct. 2072, 2089 (1997). The phrase refers to citizens possessing sexual abnormalities similar to insanity. *Id.*

131. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.9, at 571 (5th ed. 1995).

132. *Hendricks*, 117 S. Ct. at 2079.

133. *Id.*

134. *Id.* at 2079-80.

135. 309 U.S. 270, 276-77 (1940).

136. 478 U.S. 364 (1986).

137. *Allen*, 478 U.S. at 371.

Doe[138] noted the necessity of both a "mental illness" and a "dangerousness" finding to establish the constitutionality of a statute requiring involuntary civil commitment.[139] The Court recently held that a finding of general dangerousness alone would not permit the involuntary and indefinite civil confinement of an individual.[140]

As far back as the early nineteenth century, states implemented measures to force confinement when necessary to protect society.[141] For example, in 1845 the Massachusetts Supreme Court rejected Josiah Oakes's request for release from forced commitment because he suffered from a hallucinatory mental state.[142] The court, in refusing to grant Oakes's petition for a writ of habeas corpus, proclaimed:

> The right to restrain an insane person of his liberty is found in that great law of humanity, which makes it necessary to confine those whose going at large would be dangerous to themselves or others .... And the necessity which creates the law, creates the limitation of the law. The question must then arise in each particular case, whether a patient's own safety, or that of others, requires that he should be restrained for a certain time, and whether restraint is necessary for his restoration, or will be conducive thereto. The restraint can continue as long as the necessity continues.[143]

While the facts in the *Oakes* case apparently did not involve acts of violence, the Massachusetts Supreme Court clearly projected acceptance of a concept of civil confinement for individuals who were not only potentially dangerous to others but who also posed a threat to themselves.[144]

States in the early twentieth century developed, through legislation, indeterminate sentencing programs to target and separate offenders in the regular prison system who were difficult to treat.[145] These statutes still exist in some states but are seldom, if ever, applied.[146] In contrast, statutes

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138. 509 U.S. 312 (1993).

139. *Heller*, 509 U.S. at 328.

140. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2080 (1997) (finding dangerousness alone insufficient to justify involuntary commitment); Foucha v. Louisiana, 504 U.S. 71, 85-86 (1992) (holding that when a person is no longer classified as insane, dangerousness alone does not provide enough support to continue civil confinement). The Supreme Court imposes other requirements on states seeking civil confinement of an individual. The Supreme Court consistently requires proper procedures and evidentiary standards as a prerequisite to the constitutionality of involuntary commitment statutes. *Hendricks*, 117 S. Ct. at 2080. In addition, in *Addington v. Texas*, 441 U.S. 418, 431-32 (1979), the Court determined that, in a proceeding to involuntarily commit an adult considered dangerous to himself or others, the burden of proof must be more than a mere preponderance of evidence. However, because the determination of an individual's placement in a psychiatric institution depends on issues with little factual certainty, the Court did not require a "beyond a reasonable doubt" standard of proof. *Addington*, 441 U.S. at 432.

141. REISNER & SLOBOGIN, *supra* note 106, at 598.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 586-87.

146. *Id.* at 587.

aimed specifically at diverting individuals charged with sex offenses into treatment programs were much more popular.[147] As noted above, twenty-five states adopted statutes of this nature: Michigan was the first to enact such a statute in 1937.[148] Over time, these statutes became known as "mentally disordered sex offender statutes" and were considered successful because of a sex offender's uniquely high likelihood to recidivate.[149] Originally, many statutes targeting the mentally disordered sex offender authorized indefinite confinement; now, they usually limit commitment to the maximum term of incarceration existing under the applicable criminal statutes.[150] Many of these mentally disordered sex offender statutes disappeared with the advent and popularity of forced sentencing requirements.[151]

Civil commitment law, as opposed to criminal law, seeks not to punish for past bad acts but attempts to control, by confinement and treatment, future conduct which could harm the individual or others.[152] For example, individuals found not guilty by reason of insanity and some individuals confined for substance abuse remain institutionalized even though they have not been convicted of a crime.[153] Some states maintain statutes that confine people who have no mental illness but who are deemed dangerous to society for other reasons.[154] In light of the various forms of civil confinement used and legally upheld throughout history, "confinement of a limited subclass of [mentally disabled and] dangerous persons,"[155] like sexually violent predators, does not offend "our understanding of ordered liberty."[156]

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* Only about 15 states still subscribe to mentally disordered sex offender statutes. *Id.*

152. *Id.* at 611.

153. *See id.* at 756; Jones v. United States, 463 U.S. 354, 363-64 (1983) (upholding automatic commitment of persons acquitted of crime by reason of insanity); *see also* United States v. Salerno, 481 U.S. 739, 755 (1987) (supporting preventive pre-trial detention of certain dangerous indictees).

154. *See, e.g.*, MINN. STAT. ANN. § 253B.02, subd. 14 (West 1992 & Supp. 1997) (mentally retarded); MINN. STAT. ANN. § 253B.01, subd. 2 (West 1992 & Supp. 1997) (chemically dependant); MINN. STAT. ANN. § 144.4172, subd. 8 (West 1992 & Supp. 1997) (a health threat to others). These types of statutes remain constitutionally untested via consideration by the U.S. Supreme Court. *In re* Blodgett, 510 N.W.2d 910, 914 (Minn. 1994).

155. Kansas v. Hendricks, 117 S. Ct. 2072, 2080 (1997).

156. *Id.*

III. ANALYSIS

A. *The* Hendricks *Decision Resolved Important Constitutional Issues Surrounding the Civil Commitment of Sexually Violent Predators*

1. Ex Post Facto[157]

United States Supreme Court opinions frequently illustrate the disagreement among the Justices about the correct theoretical basis for interpreting the Constitution.[158] As with many other governmental affairs, the competing views usually align into partisan groups.[159] The Court conservatives generally stand firm for judicial restraint and strict construction of the Constitution.[160] The liberals advocate judicial activism, arguing that the Constitution exists as a living document subject to continual re-interpretation as the world continues to advance and change.[161] Ironically, in *Hendricks*, the Court breaks with form.

Justices generally viewed as strict constructionists found that a state statute, such as the Kansas SVP Act, did not violate the Ex Post Facto Clause of the Constitution even when applied retroactively.[162] This finding runs contrary to a literal interpretation of the Ex Post Facto Clause which states that "[no] ex post facto Law shall be passed."[163] Instead of holding to the literal language of the Constitution, the normally conservative majority employed a flexible interpretation of the clause, arguing that no violation of the clause exists when the law sought to be applied retroactively is of a civil, rather than a criminal, nature.[164] The Ex Post Facto Clause does not distinguish between the criminal or civil nature of a prohibited retroactive law.[165] The majority relied on some previous

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157. This Note avoids analysis of the Double Jeopardy Clause because the *Hendricks* dissent failed to focus on, and the majority only cursorily discusses, the double jeopardy issue. *Hendricks*, 117 S. Ct. at 2086.

158. *See generally* Earl M. Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629 (1990) (discussing numerous decisions of the U.S. Supreme Court and how political forces create viewpoints on the Court that result in opinions reflecting liberalism on one hand and conservative constitutional theory on the other).

159. *Id.* at 629-31. Maltz's article takes the approach that there are associations between liberal theory and judicial activism as well as between conservative reasoning and institutional and ideological forces. *Id.* at 630-31. Maltz predicts that these ideological forces will influence future Courts towards a pattern of reviewing cases with a more aggressive conservative activism. *Id.* at 631.

160. *Id.*

161. *See id.* at 630-31; Arlin M. Adams, *Justice Brennan and the Religion Clauses: The Concept of a "Living Constitution,"* 139 U. PA. L. REV. 1319, 1319 (1991).

162. *Hendricks*, 117 S. Ct. at 2081-85.

163. U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1.

164. *Hendricks*, 117 S. Ct. at 2085.

165. U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1. The Supreme Court, however, interprets the Ex Post Facto Clause to apply only to criminal punishments. *See* Calder v. Bull, 3 U.S. 386, 390 (1798); Lindsey v. Washington, 301 U.S. 397, 401 (1937); Weaver v. Graham, 450 U.S. 24, 29-30 (1981); *see also* NOWAK & ROTUNDA, *supra* note 131, § 11.9, at 428 (discussing the Supreme Court's determination that the Ex Post Facto Clause applies only to criminal or penal measures).

caselaw that permitted application of civil actions retroactively to individuals convicted of certain crimes in order to promote public safety.[166]

Perhaps cognizant of the prevailing attitudes regarding child sex offenders, the majority discarded a strict application of the Ex Post Facto Clause, and instead appeared influenced by the immediate concern that Hendricks could not live in a community among children without presenting a real danger.[167] By characterizing Hendricks as a person who currently suffers from a mental disorder and who likely poses a future danger, the majority held that retroactive application of the SVP Act was not improper.[168] Interpreting the consequences of the SVP Act as something other than punishment allowed the majority to draw the conclusion that applying the SVP Act to Hendricks did not violate the Ex Post Facto Clause.[169]

The dissent, dominated by those generally considered the more liberal Justices, agreed with the majority's view that Hendricks's substantive due process rights were not unduly infringed upon by commitment to a mental institution.[170] Justice Breyer, however, stated that the SVP Act's application to Hendricks—regardless of the statute's label, its procedural protections, or any extenuating circumstances—clearly represented retroactive punishment by statute for a prior criminal act and, as such, proved unconstitutional.[171] Because the SVP Act's application to Hendricks focused more on punishment than treatment,[172] the dissent's opinion that the case exemplified a classic Ex Post Facto Clause violation established a more sound resolution to the case from a strict constructionist standpoint. Viewing the decision in this light makes it more apparent that the majority's manipulation of the Ex Post Facto Clause may in fact represent a veiled method of confining Leroy Hendricks at all costs.

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166. *Hendricks*, 117 S. Ct. at 2086 (citing California Dep't of Corrections v. Morales, 514 U.S. 499, 505 (1995) (quoting Lindsay v. Washington, 301 U.S. 397, 401 (1937)). In *California Dep't of Corrections*, the Supreme Court held that the Ex Post Facto Clause, which forbids the application of any new punitive measure to a crime already consummated, pertains exclusively to penal statutes. *California Dep't of Corrections*, 514 U.S. at 505; *see also* DeVeau v. Braisted, 363 U.S. 144, 160 (1960) (holding that refusal to employ convicted felons as officers of waterfront union does not violate Ex Post Facto Clause); Marcello v. Bonds, 349 U.S. 302, 314 (1955) (finding that requiring deportation based on a person's past bad conduct does not violate the Ex Post Facto Clause); Hawker v. New York, 170 U.S. 189, 200 (1898) (finding that law barring doctor from practicing medicine because of a prior felony conviction does not violate the Ex Post Facto Clause). *See generally* NOWAK & ROTUNDA, *supra* note 131, § 11.9, at 429 (noting that convicted felons may not own firearms).

167. *Hendricks*, 117 S. Ct. at 2086.

168. *Id.*

169. *Id.*

170. *Id.* at 2087-88 (Breyer, J., dissenting).

171. *Id.* at 2088, 2098.

172. *Id.* at 2093-98 (concluding that the failure to treat Hendricks or other offenders while civilly committed reveals the punitive nature of the Kansas statute).

Nevertheless, the Ex Post Facto Clause's application to the Kansas SVP Act[173] pales in legal significance to the *Hendricks* Court's resounding eight to one approval of civil commitment as a method of dealing with the sexually violent predator—the paramount consequence of this decision.[174] With *Hendricks*, the Court renders a uniquely strong pronouncement that state statutes such as the one at issue in *Hendricks*—the civil commitment of a sexually violent predator after the individual has completed a criminal penal sentence—do not offend the Due Process Clause.[175] The fact that a majority of conservative Justices steadfastly refused to rigidly apply the Ex Post Facto Clause in *Hendricks* represents the country's current disposition toward the breadth of legally permissible treatment of sexually violent predators.

2. Due Process

Eight Justices agreed that the SVP Act's definition of a "mental abnormality" satisfied substantive due process requirements.[176] Apparently, only Justice Ginsberg found a violation of due process; however, to the extent she did, she did so without written opinion.[177] The Court failed to specifically state whether it applied the rational basis constitutional standard propounded by Kansas or the strict scrutiny test argued for by Hendricks. The majority opinion simply concluded that application of the SVP Act to Hendricks was consistent with the Due Process Clause because the Act requires evidence of past sexually violent behavior linked to a finding of mental abnormality.[178] Dissenting, Justice Breyer conceded that Kansas may classify Hendricks as mentally ill and dangerous[179] because: (1) a consensus of mental health professionals consider pedophilia a serious mental disorder; (2) Hendricks's pedophilia predominates his psyche so strongly that he cannot resist the urge to molest children; and (3) as such, Hendricks presents a serious and continuing danger to children.[180]

The SVP Act should pass muster under the constitutional tests commonly referred to as "rational basis" and "strict scrutiny." The less stringent rational basis test requires only that the SVP Act rationally relate to a legitimate state objective.[181] No one can dispute that protecting children from sexually violent predators such as Leroy Hendricks satisfies a legitimate state objective and that treating repeat offenders like

173. An in depth discussion of the Ex Post Facto Clause and the constitutional analysis thereof lies beyond the scope of this Note.

174. *Hendricks*, 117 S. Ct. at 2076, 2086-88.

175. *Id.* at 2086-88.

176. *Id.* at 2076, 2086-88.

177. *Id.* at 2087.

178. *Id.* at 2080-81.

179. *Id.* at 2089 (noting that the Court used the terms "mentally ill" and "dangerous" in the same sense in Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).

180. *Id.*

181. Pearson v. Ramsey County, 309 U.S. 270, 274 (1940).

Hendricks, even after incarceration, soundly relates to that goal. The SVP Act's terms similarly satisfy the strict scrutiny test, which requires that the Act be narrowly tailored to serve a compelling state interest.[182] The SVP Act imposes a lesser punishment than the more onerous, yet constitutionally permissible, life sentence without parole, and provides specialized treatment for offenders suffering from pedophilic disorders—all while protecting the state's children from further harm at the hands of these criminals. The Court's overwhelming rejection of Hendricks's due process challenge provides strong support for civil commitment laws as applied to future sexual predators.

B. *Balancing the Community's Interest in Protecting Its Children Against the Liberty Interest of Sexually Violent Predators*

Protecting society and its children from sex abuse while granting the sexually violent predator the full extent of his or her constitutional liberty interests presents at best a complex proposition. An individual's right to be free from arbitrary constraints on his or her physical liberty stands as one of our nation's most fundamental maxims.[183] However, equally as basic lies society's right to protect its citizens.[184] A strong case for diminishing a defendant's constitutional interests exists when children represent the subject of protection because of children's diminished capacity to defend themselves.[185] The United States Supreme Court has held that society may demand that an individual's physical freedom surrender to criminal incarceration[186] or civil confinement.[187] In a case such as *Hendricks*, society's right to prevent the continued victimization of its children should constitutionally outweigh the sexually violent predator's right not to be involuntarily confined, especially if the issue involves civil treatment, not criminal punishment.

Freedom from physical restraint, often referred to as the "core of the liberty protected by the Due Process Clause,"[188] does not exist as an absolute.[189] Clearly, the Constitution allows the restriction of individual liberty interests when those who commit crimes threaten society.[190] However, the criminal justice system does not seek to forever incarcerate someone based on his or her status.[191] The penal system does not punish

182. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995).

183. NOWAK & ROTUNDA, *supra* note 131, § 13.4, at 518-20.

184. MINAR, *supra* note 10, at 367-69.

185. For example, the U.S. Supreme Court held that no violation of the Confrontation Clause exists when necessity requires a child to testify via closed-circuit television. Maryland v. Craig, 497 U.S. 836, 857 (1990).

186. *See* NOWAK & ROTUNDA, *supra* note 131, § 13.4, at 518-19.

187. Kansas v. Hendricks, 117 S. Ct. 2072, 2079 (1997).

188. *Id.* at 2079 (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).

189. *Id.*

190. NOWAK & ROTUNDA, *supra* note 131, § 13.4, at 519-20.

191. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 3 (2d ed. 1986).

prospectively; rather, it responds to a particular criminal act.[192] Our criminal system's design and purpose remains the protection of society from individuals who commit crimes, rationalizing that the criminal justice system will minimize crime by effecting deterrence, retribution, and punishment.[193] But what becomes of an individual who cannot, because of a mental disorder, resist the impulse to harm others? What becomes of an individual who cannot be deterred by any possible prison sentence or fine? Must the community form groups of vigilantes because of the unyielding rigidity of our criminal justice system and our Constitution, both of which are incapable of handling these unique situations? Civil commitment helps resolve these questions. As noted above, the Court recognizes numerous instances where an individual's constitutionally protected right to avoid physical restraint may be overridden in the civil context.[194]

Organized society could not exist safely without subjecting all persons to some manifold restraints for the common good.[195] Thus, forced civil confinement of a group of mentally ill and dangerous persons, such as sexually violent predators, does not violate the constitutional guarantee of individual liberty.[196] Unlike the criminal justice system's goals of punishment for crimes through incarceration, retribution, and deterrence, the civil commitment system involves the confinement and control of possible future conduct that could harm the individual or others.[197] The civil commitment system labels an individual dangerous when that person remains powerless to restrain himself from exerting behavior that might cause harm to himself or the public.[198] Where states follow proper procedures and evidentiary standards, the United States Supreme Court consistently upholds involuntary commitment statutes.[199]

In order for society to function effectively, each community must institute measures to maintain order and safety.[200] This action necessarily results in a corresponding decrease in individual rights.[201] The community's interest in protecting its children, the most vulnerable members of society, should constitutionally outweigh the individual rights of a convicted sexual predator when preserving public safety demands these measures.[202] When the situation involves crimes against children, the case for preserving the full dimension of an individual's constitutional inter-

192. PETER W. LOW ET AL., CRIMINAL LAW: CASES AND MATERIALS 33-34 (2d ed. 1986).

193. LAFAVE & SCOTT, *supra* note 191, at 23-25.

194. *Hendricks*, 117 S. Ct. at 2079.

195. MINAR, *supra* note 10, at 367-69.

196. *Cf. Hendricks*, 117 S. Ct. at 2079-80 (holding that Hendricks's civil confinement satisfies substantive due process requirements).

197. REISNER & SLOBOGIN, *supra* note 106, at 611.

198. *Hendricks*, 117 S. Ct. at 2079.

199. *Id.* at 2080.

200. MINAR, *supra* note 10, at 367-69.

201. *Hendricks*, 117 S. Ct. at 2079.

202. *Id.* (citing Jacobsen v. Massachusetts, 197 U.S. 11, 26 (1905)).

ests weakens considerably.[203] No crime against children, short of murder, stands out as more invasive and damaging than sexual assault.[204] Child sex offenses are markedly different from other criminal acts such as theft. Unlike theft, parents and their children cannot buy back the property lost from sexual assault—the child's innocence.

Civil libertarians feel that child sexual offenders, even Hendricks and others like him who abuse children over many years and face multiple arrests and convictions for these offenses, should enjoy release once they serve their prison time for their last known act.[205] When the data shows, and the pedophile himself[206] admits, that without confinement he will molest again, the system must react differently. The justice system unfortunately must continue to segregate individuals who suffer from an "irresistible impulse" to engage in sexual contact with children and/or who refuse treatment once convicted, even if that confinement endures indefinitely. The future safety of children outweighs the liberty interests of the convicted, untreated (or untreatable) sexually violent predator. *Hendricks* establishes that confining an individual who poses a danger to himself or others, especially when that individual remains mentally disordered, does not offend the Constitution.[207]

The last violation committed by an offender similar to Leroy Hendricks usually does not present the greatest concern; rather, people abhor the inability of the offender to function in society without posing a serious threat to children. Civil commitment exists as common practice at much lower thresholds of mental abnormality or dangerousness. The Supreme Court has upheld the constitutionality of civilly confining someone who has never committed a crime but, as mentally ill and incurable, *might* be a danger to himself or others.[208] States support civilly confining people who simply cannot care for themselves.[209] Thus, when an individual admittedly cannot stop raping, fondling, and sodomizing children, states should categorically reject the notion that the individual should experience only criminal incarceration, with little if any treat-

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203. *See supra* note 185 and accompanying text.

204. *See* Hegre, *supra* note 90, at 440-41; Rachel I. Wolliter, Note, *Sixth Amendment—Defendant's Right to Confront Witnesses: Constitutionality of Protective Measures in Child Sexual Assault Cases*, 79 J. CRIM. L. & CRIMINOLOGY 759, 780 n.186 (1988).

205. Brief of the American Civil Liberties Union as Amici Curiae in Support of Respondent at 8, *Hendricks* (No. 95-1649) (arguing on behalf of Leroy Hendricks that he "has fully served his criminal sentence and should have been released into society").

206. This Note uses the male pronoun for clarity and because males make up 95% of sex offenders. *See supra* note 86 and accompanying text.

207. *Hendricks*, 117 S. Ct. at 2079.

208. Addington v. Texas, 441 U.S. 418, 432-33 (1979) (holding that a state must prove by a preponderance of the evidence that the individual poses a threat to society in order to commit him). The Court also permits states to confine defendants indefinitely for lesser so-called "victim-less" crimes. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 994-95 (1991) (upholding life sentence for person convicted of drug possession, even without prior felony convictions).

209. *Addington*, 441 U.S. at 426.

ment, and then be thrust back into a now notified and hostile community to offend again.[210] Civil confinement offers a more effective solution.[211]

An individual's specific liberty interests and the more comprehensive interests of society exist in tension. Placing the two interests in opposition leads to difficult choices. Confining sexually violent individuals like Leroy Hendricks, whose abuse of children spanned four decades, numerous arrests and failed attempts at treatment,[212] remains the only choice available to protect the safety of a community's children. This choice is reasonable and it is just. Carefully enacting sexually violent predator statutes, specifically tailored to define those subject to civil commitment and including proper procedural and evidentiary standards,[213] defies any sort of "slippery slope" counter argument to civil commitment for sexually violent predators.[214]

C. Hendricks *Signifies a Change in the Legal Response to Sexually Violent Predators*

Hendricks should be viewed as the test case for a more modern, progressive view that supports providing a weapon to states in order to directly confront the problem presented by the sexually violent predator. These new sexually violent predator laws shift the burden of remedial action from the community to the convict—and rightfully so.[215] By implementing a common theme that forces sexually violent predators to control their own destiny, these statutes benefit society as a whole.[216]

To gain any hope of release, the sexually violent predator must actively begin his own recovery by accepting responsibility for the harm suffered by the victim of his sexual molestation and participating in therapy to redirect his sexual urges towards adults, not children.[217] The offender himself can then petition for release upon a showing of fitness to

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210. *See* Montana, *supra* note 82, at 569-76.

211. *Cf.* 1 AMERICAN PSYCHIATRIC ASS'N, TREATMENT OF PSYCHIATRIC DISORDERS 617 (1989) (stating that "[t]here is probably no group of criminal offenders with which the court can get more help in arriving at proper disposition through a complete psychiatric evaluation than the pedophilics").

212. *See Hendricks*, 117 S. Ct. at 2078.

213. *See, e.g.*, KAN. STAT. ANN. §§ 59-29a01 to -29a11 (1994 & Supp. 1996).

214. *See* Hansen, *supra* note 9, at 43 (stating that the *Hendricks* ruling opens a Pandora's box on the question of what constitutes mental abnormality).

215. Because the predator must show that he is no longer mentally ill or dangerous, he may help to make his release possible by participating in treatment. *See, e.g.*, KAN. STAT. ANN. § 59-29a11.

216. While the sexually violent predator is confined, children are safe from molestation and the individual is receiving treatment to better understand his behavior and prepare for a possible return to society with the ability to control pedophilic urges. *See supra* text accompanying note 94.

217. A variety of treatment methods exist to help the sexual predator accept responsibility for the harm directly caused by his behavior, which is fundamental to the individual's recovery. *See supra* text accompanying note 92-94. The better the offender does in therapy, the more likely he is to gain release. *See, e.g.*, KAN. STAT. ANN. § 59-29a11.

return to society.[218] The state must review the sex offender's progress every year to determine whether the individual continues to suffer from pedophilia and still exhibits a danger to himself or others.[219] The treatable offender controls his own future by motivating himself towards successful treatment.[220] For the untreatable, we should devote resources to further study of violent sex offender behavior, which may lead to prevention of future offenses. Until a solution develops to prevent child sexual abuse, the offender must remain separated from the society he threatens. The supreme benefit of this approach lies in its simultaneous protection of children, who will not fear the release of an untreated or untreatable sexually violent predator.

1. Defects in Current Corrective Measures

In the past, states relied on longer periods of incarceration to address offenders who sexually molested children.[221] Incarceration does not address a pedophile's inability to associate with children in a non-sexual manner. While sexually violent predators must remain incarcerated for criminal punishment purposes, a prison sentence will not deter a sexually violent predator with an irresistible impulse.[222] A typical child molester behaves as a model prisoner because the source of his or her temptation does not exist within the physical confines of an adult prison facility.[223] The question of whether the sex offender experiences successful rehabilitation remains a mystery upon the offender's release. During a child sex offender's time in prison, he or she usually receives little, if any, therapy.[224] A number of experts believe that sex offenders who do not receive treatment contribute greatly to the high recidivism rates.[225] Further, victims and their families must worry about early release due to

218. KAN. STAT. ANN. § 59-29a11.

219. *Id.* § 59-29a08.

220. *Id.*

221. *See* Fowler & Beer, *supra* note 112, at 219-21; McAllister, *supra* note 29, at 420.

222. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2078-79 (1996) (describing Hendricks's many convictions for sexual offenses against children).

223. *See, e.g.*, Brief for Leroy Hendricks Cross-Petitioner at 4, Kansas v. Hendricks, 117 S. Ct. 2072 (1996) (Nos. 95-1649 & 95-9075) (confirming that Hendricks earned all possible good time towards release for his 1984 conviction and served his sentence without incident); Raquel Blacher, Comment, *Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 915 (1995) (discussing the fact that convicted child molester Joeseph Gallardo served as a "model prisoner" during his incarceration for raping a ten-year-old girl).

224. Brief of Petitioner at 4-5, *Hendricks* (No. 95-1649) (stating that prison provides a poor setting for a strong showing of rehabilitation among sex offenders because typically the offenders require long term treatment and a variety of treatment modalities).

225. *See* Brief of the Association for the Treatment of Sexual Abusers Amicus Curiae in Support of Petitioner at 11, *Hendricks* (No. 95-1649) (affirming that while there currently exists no "cure" for sex offenders, evidence shows that over the last ten years, treatments for sex offenders have considerably reduced recidivism); Freeman-Longo, *supra* note 79, at 323; Lurigio et al., *supra* note 80, at 72 (citing studies that find no link between treatment and recidivism, as well as studies that find treatment reduces recidivism).

parole, must continue to testify at parole hearings, and must relive the experiences again and again. Upon the offender's release, society at large must deal with a sexual predator now hardened by prison life.[226]

States should reallocate the funding and resources currently apportioned to imprisoning child sex offenders into civil commitment facilities that educate, study, and treat sexually violent predators. In order to stop the cycle of abuse, state authorities need a better understanding of sexually violent predators and an appropriate treatment system, not additional jail space. As evidenced by the continuing rise in incidents of child sexual abuse and the lack of decline in the recidivism rate, incarceration alone offers little overall, and certainly no deterrent, effect to someone with an "irresistible impulse" to offend again.

New Jersey's Megan's Law enables its state courts to require mandatory registration in the community and lifetime community supervision,[227] setting the example for registration and/or notification legislation in other states.[228] Forty-seven states have enacted registration laws that allow law enforcement officials access to information revealing where sex offenders reside in their community.[229] Thirty states have gone further

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226. Kenneth Shuster, *Halacha as a Model for American Penal Practice: A Comparison of Halachic and American Punishment Methods*, 19 NOVA L. REV. 965, 968 (stating that the American prison system does not rehabilitate or deter offenders but rather "does more both to teach inmates more efficient means of committing crime and to transform inmates into more hardened criminals").

227. N.J. STAT. ANN. § 2C:43-6.4 (West 1995).

228. Tara L. Wayt, *Megan's Law: A Violation of the Right to Privacy*, 6 TEMP. POL. & CIV. RTS. L. REV. 139, 156 (1997).

229. Alison Virag Greissman, *The Fate of Megan's Law in New York*, 18 CARDOZO L. REV. 181, 189 (1996); *see* ALA. CODE §§ 15-20-20 to -24 (1995 & Supp. 1997); ALASKA STAT. §§ 12.63.010 to .100 (Michie 1962 & Supp. 1996); ARIZ. REV. STAT. ANN. §§ 13-3821 to -3824 (West 1989 & Supp. 1997); ARK. CODE ANN. §§ 12-12-901 to -909 (Michie 1987 & Supp. 1995); CAL PENAL CODE § 290 (West 1988 & Supp. 1997); COLO. REV. STAT. § 18-3-412.5 (1997); CONN. GEN. STAT. ANN. § 54-102r (West 1994 & Supp. 1997); DEL. CODE ANN. tit. 11, § 4120 (1974 & Supp. 1996); FLA. STAT. ANN. §§ 775.21 to .255 (West 1992 & Supp. 1997); GA. CODE ANN. § 42-9-44.1 (1997); HAW. REV. STAT. § 846E-3 (1993 & Supp. 1996); IDAHO CODE §§ 18-8301 to -8311 (1997); ILL. COMP. STAT ANN. 150/1 to 150/10 (West 1992 & Supp. 1997); IND. CODE ANN. § 5-2-12 (Michie 1994 & Supp. 1997); IOWA CODE §§ 692A.1 to .15 (1997); KAN. STAT. ANN. §§ 22-4901 to -4910 (1995); KY. REV. STAT. ANN. §§ 17.500 to .540 (Michie 1996); LA. REV. STAT. ANN. §§ 15:540 to :549 (West 1997); ME. REV. STAT. ANN. tit. 34-A, §§ 11001 to 11004 (West 1988 & Supp. 1996); MD. ANN. CODE art. 27, § 792 (1996 & Supp. 1997); MICH. COMP. LAWS ANN. §§ 28.721 to .732 (West 1994 & Supp. 1997); MINN. STAT. ANN. § 243.166 (West 1992 & Supp. 1997); MISS. CODE ANN. §§ 45-33-1 to -15 (1972 & Supp. 1996); MO. ANN. STAT. §§ 566.600 to .625 (West 1979 & Supp. 1997); MONT. CODE ANN. §§ 46-23-501 to -507 (1997); NEV. REV. STAT. ANN. §§ 207.151 to .157 (Michie 1997); N.H. REV. STAT. ANN. §§ 632-A:11 to -A:19 (1996); N.J. STAT. ANN. § 2C:7-1 (West 1996 & Supp. 1997); N.M. STAT. ANN. §§ 29-11A-1 to -8 (Michie 1978 & Supp. 1997); N.Y. CORRECT. LAW § 168 (McKinney 1987 & Supp. 1997); N.C. GEN. STAT. §§ 14-208.5 to .13 (1996); N.D. CENT. CODE § 12.1-32-15 (1985 & Supp. 1997); OHIO REV. CODE ANN. §§ 2950.01 to .99 (Anderson 1996); OKLA. STAT. ANN. tit. 57, §§ 581 to 587 (West 1991 & Supp. 1998); OR. REV. STAT. §§ 181.517 to .519 (1991 & Supp. 1996); 42 PA. CONS. STAT ANN. §§ 9791 to 9799.5 (West 1982 & Supp. 1997); R.I. GEN. LAWS § 11-37.1-16 (1994); S.C. CODE ANN. §§ 23-3-400 to -490 (Law. Co-op. 1976 & Supp. 1996); S.D. CODIFIED LAWS §§ 22-22-31 to -39 (1988 & Supp. 1997); TENN. CODE ANN. §§ 40-39-101 to -108 (1997); TEX. CODE CRIM. P. ANN. arts. 62.01 to .12 (West Supp. 1998); UTAH CODE ANN. § 77-27-21.5 (1995 & Supp. 1997); VA.

by passing legislation that gives a central authority the ability to contact local law enforcement officials about a sexually violent predator in the community.[230] A number of states even sanction notification to school systems, employers, community members, and the general public.[231] Although states no doubt drafted such legislation with the best intentions, these laws afford only a passive remedy to the problem[232] and, in fact, put a great strain on the community.[233] Megan's Laws and similar registration laws do not provide an effective response to the problem of sexual predators because many such laws developed from "spur of the moment" emotional reactions to a problem deserving much more reasoned thought.[234] Critics argue that the registration laws do not work to protect children.[235] Rather, the laws tend to enrage communities, create vigilantism and simply harass the sex offender by driving the sex offender from one community to the next.[236] As a result, the stressed offender is more

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CODE ANN. §§ 19.2-298.1 to .3 (Michie 1995 & Supp. 1997); WASH. REV. CODE §§ 9A.44.130 to .140 (1996 & Supp. 1997); W. VA. CODE §§ 61-8F-1 to -8 (1997); WIS. STAT. ANN. § 301.45 (West 1991 & Supp. 1997); WYO. STAT. ANN. §§ 7-19-301 to -306 (Michie 1997).

230. Greissman, *supra* note 229, at 189-90; *see* ALASKA STAT. § 12.63.010 (Michie 1962 & Supp. 1996); ARIZ. REV. STAT. ANN. § 13-3825 (West 1989 & Supp. 1997); CAL. PENAL CODE § 290.4 (West 1988 & Supp. 1997); COLO. REV. STAT. § 18-3-412.5 (1997); CONN. GEN. STAT. ANN. § 54-102r (West 1994 & Supp. 1997); DEL. CODE ANN. tit. 11, § 4120 (1974 & Supp. 1996); FLA. STAT. ANN. §§ 775.21 to .23 (West 1992 & Supp. 1997); GA. CODE ANN. § 42-9-44.1 (1997); IDAHO CODE § 18-8311 (1997); IND. CODE ANN. § 5-2-12-11 (Michie 1994 & Supp. 1997); IOWA CODE ANN. § 692A.13 (West 1993 & Supp. 1997); KAN. STAT. ANN. § 22-4909 (1995); LA. REV. STAT. ANN. § 15:546 (West 1997); ME. REV. STAT. ANN. tit. 34-A, § 11004 (West 1988 & Supp. 1996); MD. ANN. CODE art. 27, § 792 (1996 & Supp. 1997); MISS. CODE ANN. § 45-33-17 (1972 & Supp. 1996); MONT. CODE ANN. § 44-5-301 (1997); NEV. REV. STAT. ANN. § 207.155 (Michie 1997); N.H. REV. STAT. ANN. § 632 A:17 (1996); N.J. STAT. ANN. § 2C:7-6 (West 1996 & Supp. 1997); N.Y. CORRECT. LAW § 168 (McKinney 1987 & Supp. 1997); N.C. GEN. STAT. § 14-208.10 (1996); N.D. CENT. CODE § 12.1-32-15 (1985 & Supp. 1997); OR. REV. STAT. § 181.586 (1991 & Supp. 1996); PA. CONS. STAT ANN. §§ 9797 to 9798 (West 1982 & Supp. 1997); S.D. CODIFIED LAWS § 22-22-31 (1988 & Supp. 1997); TENN.CODE ANN. §§ 40-39-101 to -108 (1997); TEX. CODE CRIM. P. ANN. arts. 62.01 to .12 (West Supp. 1998); VA. CODE ANN. § 19.2-390.1 (Michie 1995 & Supp. 1997); WASH. REV. CODE § 4.24.550 (1996 & Supp. 1997).

231. Greissman, *supra* note 229, at 189-90; *see* GA. CODE ANN. § 42-9-44.1(e) (1997); LA. REV. STAT. ANN. § 15:546 (West 1997); WASH. REV. CODE § 4.24.550 (1996 & Supp. 1997). New Jersey authorizes notification of members of the community "likely to encounter the registrant." N.J. STAT. ANN. § 2C:7-1 (West 1996 & Supp. 1997).

232. Ball, *supra* note 89, at 444 (stating that notification laws regarding where sex offenders live in communities exemplify a "quick-fix, band-aid reaction to the serious threats imposed by sex offenders"); *see also* Wayt, *supra* note 228, at 141 (suggesting that the best way to protect society from the harms of a sexual offender is to treat the offender's disorder).

233. Montana, *supra* note 82, at 569-76 (detailing acts of vigilantism and heightened community fear and anger resulting from notification of a sex offender's presence in the community).

234. *See id.* at 576-77 (arguing that Megan's Law represents a "short-term solution" and will not deter sexual predators from reoffending); Deems, *supra* note 79, at 1233 (explaining that responsible legislators attacking the serious problem of child sexual abuse should find actual, functional remedies for this dilemma, not "empty gestures").

235. Montana, *supra* note 82, at 576-77 (proclaiming that notification does not address the causes of child sexual abuse or control the sexual predator's harmful sexual behaviors).

236. *Id.* at 577-83 (describing how registration laws provide the community with a powerful weapon against convicted sexual predators).

likely to reoffend or to simply refuse to register.[237] Deciding how to best prevent a crime that will affect one in every five children[238] certainly deserves more serious attention and thorough research.

Our nation has ignored the reality of the magnitude of child sexual abuse until only recently,[239] and now states have begun to panic and draft emotionally charged legislation without considering what will actually remedy the problem in the long run. The current "quick fixes" enacted in many states to deal with sexual offenders prove defective.[240] Registration systems create a false sense of security.[241] Because the registration information goes only to one specified area and not to the surrounding communities, the sex offender easily may avoid registration or recognition in the community in which he registers by simply relocating to or reoffending in the next town.[242]

The required registration of all sexual predators creates multiple problems, especially for economically disadvantaged areas.[243] More affluent communities can afford personnel to keep registration records current, picket the offenders' houses, and post flyers of the sex offenders around the neighborhood.[244] Sex offenders find this diligence a disincentive to register in these communities and consequently head to the poorer sections of larger cities where they can disappear more easily.[245] Residents of wealthier neighborhoods who learn of the presence of a sexual offender through local notification systems[246] become motivated to drive the sexual predators out of their "nice communities" with little consid-

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237. *See id.* at 584-85 (explaining that communities that fail to allow offenders to reassimilate create feelings of anger, frustration and sadness in the ostracized offender that may have the counterproductive result of compelling the sex offender to recidivate); *id.* at 590-93 (noting that in Washington approximately 20% of offenders have not registered, and in California close to 75% of sex offenders neglect to register, while some offenders who register give false information).

238. Freeman-Longo, *supra* note 79, at 308.

239. *See* GABBARD, *supra* note 75, at 1960 (stating that, until recently, the mental health profession remained ambivalent about treating pedophiles). *But see* Freeman-Longo, *supra* note 79, at 304 (confirming that child sex abuse remains a serious health problem).

240. Montana, *supra* note 82, at 576-77 (discussing how registration/notification laws do not remove the threat of child sexual abuse regardless of whether members of the neighborhood are aware of the sex offender's presence in the community).

241. *Id.* at 594-95 (arguing that children have a 200% greater chance of being molested by a family member or friend than by a sex offender who is a stranger, and that Megan's Law thus falls short of protecting children from their most frequent sexual abusers).

242. *See* Freeman-Longo, *supra* note 79, at 314 (revealing that a registered sex offender can easily venture into adjacent communities, where he is unknown, to reoffend); Montana, *supra* note 82, at 590-93 (noting that many offenders do not even register).

243. *Cf.* Montana, *supra* note 82, at 582-83 (stating that inner cities are havens for sexual offenders seeking to avoid New Jersey's Megan's Law).

244. *Cf. id.* at 578-83 (describing how wealthier New Jersey communities have resources and political clout to object to convicted sex offenders' presence in their neighborhoods).

245. *Cf. id.* (stating that large inner-city areas are attractive to sex offenders because the enforcement agencies are understaffed and under funded in these areas, and therefore Megan's Law is not strictly enforced).

246. Ball, *supra* note 89, at 432-33 (asserting that community notification laws raise public awareness but also heighten neighborhood anger).

eration for the consequences of their actions.[247] Further, if a more visible community successfully uses such combative tactics and forces a sexual predator to leave the community, the offender likely will experience heightened stress, greatly increasing the chances of another child in another community becoming a victim.[248]

Compelling communities to shoulder the responsibility of policing neighborhoods against sexually violent predators imposes an undue burden on society. Community protests damage and detract from community prosperity, resources, and morale.[249]

Sexual predator registration and notification, community uproar, flyer distribution, and conducting classes to alert children to an offender's identity will not resolve the problem of child sexual abuse.[250] These actions allow people in communities to feel more secure in the present, but have devastating long term effects. For example, classes designed to teach children to identify a sexual predator in their neighborhood may create fear in children of going to school or even of walking outside.[251] These tactics often breed local vigilante movements, which in some cases have mistakenly brutalized innocent, wrongly identified community members.[252] Some neighborhoods have resorted to criminal acts against a known offender, under the guise of protecting their children, as they try to run the offender out of town or into the next commu-

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247. Poorer communities remain the "islands" for the sexual offenders. *See id.* at 433-34 (discussing how acts of vigilantism force sex offenders from financially sound communities into low-income areas that have a greater incidence of crime); Montana, *supra* note 82, at 580-83 (describing how the notification laws enable the wealthier communities to drive convicted sex offenders out of their neighborhoods into low-income and inner city areas where enforcement is lax due to lack of funding, thus allowing the middle and upper class to essentially "pick and choose" their neighbors).

248. *See* DSM-IV, *supra* note 74, at 528 (stating that the frequency of the pedophilic urges usually fluctuates in relation to psychological stress); Deems, *supra* note 79, at 1233 (noting that stress resulting from notification may increase the likelihood that the pedophile will reoffend, and may prevent his rehabilitation by obstructing his efforts to find stable employment, housing, and normal relationships).

249. *See* Ball, *supra* note 89, at 434 (arguing that communities are incapable of responsibly handling notification that a convicted sex offender is in their neighborhood).

250. *See* Freeman-Longo, *supra* note 79, at 319-20 (noting that child sexual abuse prevention classes have engendered mixed results); Montana, *supra* note 82, at 579 (highlighting incidents of community vigilantism and lawlessness).

251. *See* Freeman-Longo, *supra* note 79, at 314 (stating that children receiving sexual abuse education may feel more traumatized than safe; children may be afraid to play outside for fear that "a sex offender may get me").

252. *See* Montana, *supra* note 82, at 579 (arguing that community notification laws regarding sex offenders provoke extreme public outrage directed not only at the sex offender but also at the offender's family and friends); James O. Hacking, III, Comment, *Won't You Be My Neighbor?: Do Community Notification Statutes Violate Sexual Offenders' Rights Under the Constitution's Ban on the Passage of Post Ex Post Facto Laws?*, 41 ST. LOUIS U. L.J. 761, 804 (1997) (citing an incident in Phillipsburg, New Jersey, where two individuals broke into a registered sex offender's house and beat a man who happened to be visiting the offender's residence).

nity.[253] Escalating the problem of sexually violent predators should not be the preferred response.

Certainly no one wants Leroy Hendricks or any pedophile living in his or her neighborhood. However, moving to a "safer" or "nicer" neighborhood does not remove the threat of a sexually violent predator coming in contact with a child. Sexually violent predators know no racial or socioeconomic boundaries.[254] Sexually violent predators exist whether created by genetics or environmental conditioning.[255] Statistics show a rise in the number of arrests for sex crimes.[256] The effects of child sex abuse touch everyone's lives.[257] If states do not seriously address the problem of child sex abuse and the prevention of sexually violent offenses against *all* of our children, then the *Hendricks* decision will achieve nothing.

2. Recognizing a State's Autonomy to Legislate Against Child Sex Offenses

The Constitution grants the states power and autonomy to decide what statutes to enact and how to interpret them.[258] The United States Supreme Court accords considerable deference to states' choices of criminal laws.[259] In the *Hendricks* case, the Court received amicus briefs

253. *See* Ball, *supra* note 89, at 433-34 (describing how communities take it upon themselves to punish sex offenders and their families); Hacking, *supra* note 252, at 804 (noting various incidents of vigilantism directed toward sex offenders). For example, in Snohomish County, Washington, community members, informed of convicted sex offender Joesph Gallardo's return, burned down his house, and in Megan Kanka's New Jersey neighborhood, residents threw rocks at the offender's roommates. Ball, *supra* note 89, at 433-34; *see also* Montana, *supra* note 82, at 580-83 (discussing how community notification laws cause the migration of sex offenders into other neighborhoods because of the offenders' inability to deal with harassment).

254. Lurigio et al., *supra* note 80, at 69 (stating that child sexual abuse appears in 10 to 25% of American families and affects both male and female children).

255. *See* Freeman-Longo, *supra* note 79, at 327-28 (discussing the cycle of child abuse and the fact that some sexually abused children react by sexually abusing other children, and stressing the need to continue to develop methods to help teachers, professionals and others identify children who show signs of a predisposition to act out sexually).

256. *Id.* at 304-05 (stating that the continued increase in the number of sexual abuse crimes shows that the nation has not yet begun to reverse the problem). Before reaching their eighteenth birthday, one out of five children will be abused. *Id.* at 308. The American Medical Association, in a statement published on November 6, 1995, identified sexual assault as a health problem and stated that sexual assault is a "silent-violent epidemic in the United States today." *Id.* at 309-10. Certain paraphilic behavior begins in childhood and many individuals describe these sexual urges and fantasies as constantly present. DSM-IV, *supra* note 74, at 524. For some people, acting on their urges results only because of other mental disorders, such as dementia, substance intoxication, manic episodes, or schizophrenia, and does not represent the individual's preferred behavior. *Id.* at 525.

257. *See* Freeman-Longo, *supra* note 79, at 304-12 (explaining that the problem of sexual abuse profoundly impacts society at a variety of levels and that society must address this problem with the attention it deserves). Every time one child suffers sexual abuse, it costs taxpayers between $138,000 and $152,000. *Id.* at 317.

258. U.S. CONST. amend. X.

259. *See* Montana v. Egelhoff, 116 S. Ct. 2013, 2024-25 (1996) (Ginsburg, J., concurring) (stating that states have wide latitude in defining criminal offenses); *see also* Poulson v. Turner, 359 F.2d 588, 591 (10th Cir. 1966) (stating that the administration of criminal justice reserved to the states includes the comprehensive right to fashion their own rules for the enforcement of criminal

representing over forty states, all asking the Court to uphold civil commitment for sexually violent predators.[260]

While described as "a government of laws, and not of men,"[261] our nation exists as a democracy. As a country founded on the individual's right to speak and be heard,[262] changes in our laws occur as the result of such citizen pressure.[263] While the popularity of a particular law should not necessarily persuade the Court, advocacy for the better protection of our children should. Citizens continually must evaluate and, if necessary, redefine ways to coexist with one another as freely as possible but with clear and certain consequences resulting from harming one another.

States may utilize their police power and their role as parens patriae to impose civil commitment on sexually violent predators.[264] The fact that the majority of states feel an overwhelming urgency to enact legislation similar to Kansas's Sexually Violent Predator Act to protect their communities, even with retroactive application, should not be ignored. The Court, in upholding the Kansas SVP Act as constitutional, both retroactively and more importantly prospectively, correctly upheld a state's autonomy to enact legislation focused on a grave and serious issue. This aspect of the *Hendricks* decision should lend comfort to parents, and ultimately to their children.

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laws); *see, e.g.*, Patterson v. New York, 432 U.S. 197, 201-02 (1977); Martin v. Ohio, 480 U.S. 228, 232 (1987).

260. *See* McAllister, *supra* note 29, at 449.

261. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

262. U.S. CONST. amend. I.

263. Examples of citizen groups bringing pressure to bear on state legislatures or on the U.S. Congress for the purposes of initiating, changing or adapting laws blanket American political history. The Progressive movement of the early twentieth century, which demanded social action to reform American society, produced a multitude of laws intended to bring the United States more in line with the promises contained in the documents of the Revolutionary period (The Declaration of Independence and the U.S. Constitution). *See* GRIMES, *supra* note 23, at 381. Progressives lobbied for such laws as the direct election of the Senate, corrupt-practices legislation, child labor laws, minimum wage and maximum hour laws. *Id.* at 387. Women's temperance groups sought to combat the liquor industry's "corrupt manipulations" of American politics by advocating both suffrage and prohibition. Carolyn De Swart Gifford, *Frances Willard and the Woman's Christian Temperance Union's Conversion to Woman Suffrage, in* ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT 117, 118 (Marjorie Spruill Wheeler ed., 1995). American women, reviving the suffrage movement whose roots stretched back to 1848, used this popular reform atmosphere to once again demand and in 1920 successfully win the right to vote. WILLIAM H. CHAFE, THE PARADOX OF CHANGE 4 (1991). In the 1950s and 1960s, Americans joined in a crusade to end racial discrimination, culminating in the passage of the 1964 Civil Rights Act. *Id.* at 198. Clearly, pressure by citizen members of the women's rights and civil rights movements "exerted a substantial influence on the content of legislation, executive action, and judicial decisions in the 1960s and 1970s." *Id.* at 234.

264. *See* Addington v. Texas, 441 U.S. 418, 426 (1979) (discussing parens patriae and police powers). Civil commitment may be "the most dramatic example of state paternalism." REISNER & SLOBOGIN, *supra* note 106, at 646.

D. *Why Civil Commitment is More Humane for the Offender and for Society*

As applied to sexually violent predators, civil commitment and treatment should be imposed for first-time offenders convicted of an offense involving physical sexual contact with a child, no matter how minor the offense.[265] Admittedly, the heinous acts committed by Leroy Hendricks for over three decades present an extreme example. This Note advocates mandatory civil confinement and treatment based on a much lower threshold than over thirty years of child sexual abuse. Studies show that child sex offenders differ from other criminal offenders because: (a) they generally prey on multiple victims;[266] (b) the urge to reoffend increases with time;[267] and (c) they present a higher rate of recidivism.[268] Some studies also show that some child sex abusers tend to increase the severity of their crimes with time—what starts out as sexual gratification from fondling can, without treatment, turn into more explicit acts of penetration, rape, torture, and even murder.[269] Many sexual predators never experienced any sexual adult-to-adult activity or any education as to adult sexual relations.[270] Pedophilia is considered a mental abnormality,[271] which in many instances the individual cannot control.[272] Imprisoning and then casting these offenders back into an antagonistic community produces no effect on the offender, who probably will recidivate,[273] or the community, which may respond with paranoia and vigilantism.[274] Every sex offender convicted of a crime involving physical contact of a sexual nature with a child should be required to submit to at least one year of civil commitment during which the offender may petition for early release.[275]

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265. This would apply equally to juvenile offenders. However, a physical location separate from adult sex offenders would house civilly confined juveniles. As further protection, juveniles with over three years age difference among themselves would live separately within the juvenile facility.

266. *See* Brief: Doe v. Poritz, *supra* note 81, at 80 (estimating that extrafamilial child molesters average 19.8 female victims and for those targeting males, 150 victims); Ball, *supra* note 89, at 407-08.

267. *See* Brief: Doe v. Poritz, *supra* note 81, at 79-80.

268. *Id.*

269. Lurigio et al., *supra* note 80, at 72 (quoting L. K. Scott, *Sex Offenders: Prevalence, Trends, Model Programs, and Costs, in* CRITICAL ISSUES IN CRIME AND JUSTICE 52 (A. Roberts ed., 1994)).

270. *See* GABBARD, *supra* note 75, at 1966-68.

271. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2088 (1997); DSM-IV, *supra* note 74, at 527-28.

272. *See, e.g., Hendricks*, 117 S. Ct. at 2088-89.

273. Montana, *supra* note 82, at 584-86.

274. *Id.* at 577-80.

275. Only if an offender proves that he or she no longer suffers from a mentally abnormality and does not pose a danger to himself or to others, would release occur.

Professionals believe that only a small minority of sexual predators cannot be helped by therapy.[276] Therefore, the problem presented by sexual predators should be approached from a preventive point of view. Some experts feel that the most beneficial point of intervention for sex offenders exists during adolescence.[277] Many sex offenders begin molesting children as little more than children themselves, and experts believe concentrated treatment at the adolescent stage helps stop young offenders from using sexual molestation as an acceptable means of sexual gratification.[278] Early intervention also allows mental health professionals the chance to educate young adolescents as to the seriousness of their offenses.[279]

Professionals can provide counseling to the adolescent offenders, some of whom experienced abuse as younger children, and others currently suffering abuse, and can begin to help young offenders redirect their sexual urges to age-appropriate partners.[280] Concentrating on adolescent sexual offenders also helps identify those individuals who present especially dangerous risks and suffer from mental disorders before they further abuse children.[281]

Contrary to the traditional responses to child sex offenders, resources and efforts should be spent creating programs that reintroduce the sexual offender to society in a healthy way, monitored and controlled, rather than in a way that wreaks havoc in communities.[282] A sex offender confined, treated, and then carefully released back into society faces a better chance of not reoffending and harming the community.

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276. *See* Brief of the Association for the Treatment of Sexual Abusers Amicus Curiae in Support of Petitioner at 11-12, *Hendricks* (No. 95-1649); Freeman-Longo, *supra* note 79, at 323.

277. *See* GONSIOREK ET AL., *supra* note 86, at 113 (describing the high percentage of adolescent sex offenders); *see also id.* at 114 (defining juvenile sex offender); *id.* at 119 (describing the increase in programs for adolescent sex offenders); *id.* at 117 (describing how a lack of sex education, parents' unwillingness to teach acceptable sexual behavior and America's erotophobia in general exacerbates the problem of sexual abuse); Freeman-Longo, *supra* note 79, at 317 (stating that 25% of all sex crimes are committed by juveniles, including 50% of child sexual abuse crimes); *id.* at 320-21 (discussing how sex education for adolescent abusers and would-be abusers may deter future child sexual abuse).

278. *See* Freeman-Longo, *supra* note 79, at 327-28.

279. *See* GONSIOREK ET AL., *supra* note 86, at 116-17 (discussing the advantages of early intervention).

280. *See* Freeman-Longo, *supra* note 79, at 327-28.

281. *See* DSM-IV, *supra* note 74, at 619 (stating that pedophilic urges peak in adolescence); Freeman-Longo, *supra* note 79, at 327-28.

282. The treatment needs for sex offenders vary from those confined under general civil commitment statutes. While many generally committed persons respond well to medication, pedophilic treatment includes techniques such as behavioral reconditioning, relapse prevention, social skills enhancement, family systems approaches and the addictive model. W.L. MARSHALL ET AL., TREATMENT OF THE OFFENDER, HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES AND TREATMENT OF THE OFFENDER 279-385 (1990); *see also* Barbara K. Schwartz, *Effective Treatment Techniques for Sex Offenders*, PSYCHIATRIC ANNALS, June 1992, at 315, 316 (arguing that treatment of sex offenders must be tailored to meet the needs of the individual offender rather than taking a blanket approach).

This system would serve the dual purpose of protecting children while helping the offender learn to control and adapt his or her behavior. State programs focused on civil confinement with treatment and a subsequent reintroduction system at least give the individual an opportunity to one day lead a somewhat dignified, normal life. For sex offenders more severely mentally disordered and dangerous, confinement may need to be indefinite to protect society. Others that pose less of a risk may only need the structure of civil confinement for a shorter period of time to learn the skills necessary to resist the impulse to molest and abuse children and to cultivate an appropriate adult sexual response.

Mental health programs must specifically treat the problems forced upon society by the sexually violent predator by shifting the burden to the perpetrator through concepts such as restricted halfway houses, assignment of specific supervisors, mandatory curfews, employment requirements, no contact with children, and group homes located away from areas where children play or live. These facilities would not resemble a typical state mental hospital, state prison, or state halfway house. The facility would not focus on punishment or the simulation of criminal incarceration because commitment would occur after the sexually violent predator had already completed a criminal sentence. Concurrent with receiving intense treatment for violent sexual behavior, offenders would wear their own clothes, receive more liberal visitations, correspond with loved ones, and participate in controlled working environments. Offenders evaluated as less of a risk might be allowed more freedom and benefits, such as supervised and chaperoned day passes. Those posing higher risks would be subjected to greater security controls, although they would experience treatment modalities similar to the other, lesser risk offenders. The degree of dangerousness and of the mental disorder the sexually violent predator exhibits would dictate the differing levels of security. In sum, the core objective would be to create an atmosphere as close as possible to the rest of society without unnecessarily subjecting children to the risk of being sexually molested.

Child sex offenders present a problem incapable of resolution by an easy answer. As a result, this problem calls for the implementation on a broader scale of certain measures society has been reluctant to administer. Introducing legislation that confines and treats sexual predators based on a system of classification[283] to evaluate more closely what, if any, ability a particular individual has to adapt to normal non-sexual contact with children provides the first step. Individuals fitting the profile of offenders with the highest recidivism rates would submit to a more restrictive treatment and routine. Instead of spending scarce resources and human effort to register sex offenders in a system easy to thwart, difficult to maintain and largely ineffective,[284] or simply extending prison sentences

283. *See* Lurigio et al., *supra* note 80, at 71-72.

284. *See* Montana, *supra* note 82, at 577-96.

with very little hope of deterrence, community resources should be reallocated. States should fund the hiring and training of more mental health care professionals to study, evaluate, treat and hopefully cure these sexually violent predators.

Some states such as Louisiana and Georgia have enacted legislation that applies the death penalty for sexual predators who rape children under twelve.[285] Montana is seeking to pass laws that impose the death penalty for repeated convictions of rape, and groups in Pennsylvania are striving for a similar statute for repeated sexual assaults on children.[286] Civil commitment offers a much more humane approach to protecting children and gives the offender the opportunity to learn to change his behavior and possibly return to society.[287] These recent death penalty laws do not protect children.[288] Instead, they create difficulties for children, as some offenders may be family members and the trauma of a child victim knowing that reporting a sexual abuse may end a loved one's or trusted friend's life may plunge the victim even further into silence.[289] Segregation is necessary; ending a life is not.

The aim of the states in managing this problem should focus on careful consideration of workable, preventive action, responding to a complex situation. Assuming that the dilemma of sexually violent predators can be removed by one piece of legislation, whether death penalty or notification/registration laws, underestimates the problem and performs a disservice to victim, society, and the offenders. Law enforcement officials claim they can catch the perpetrators. Prosecutors affirm that they can incarcerate the offenders. Psychologists assert that they can treat the pedophile. The only way to ensure that a child sex offender cannot create another victim is segregation. States must take the initiative and create better systems to control the problems of the sexually violent predator. As with any system, miscalculations and mistakes exist, but implementing a new means of handling sexually violent predators through intensive treatment and controlled confinement must begin now. In order to perfect a system, a system must be created. The many methods states have tried have not resulted in a great degree of success. Some individuals in our society are incarcerated for life because of their offense, and society accepts this as appropriate. Instead of sentencing sexually violent predators to life in prison, states should institute mental health programs to attempt to treat, educate and prevent these crimes in the future. Some sexually violent predators require indefinite

285. *See* John Q. Barrett, *Death for Child Rapists May Not Save Children*, NAT'L L.J., Aug. 18, 1997, at A21.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

segregation, but at least with civil commitment programs, the offender retains the opportunity and possibility of rehabilitation and release.

IV. CONCLUSION

A problem society shoved underground for so long[290] now emerges as a dilemma impossible to avoid any longer. States now confront the conundrum of what to do with sexually violent predators like Leroy Hendricks. How do legislatures keep individuals, who suffer from and even admit an irresistible impulse to molest children and who inflict over thirty years of sexual abuse, segregated from children? How do states repent for the leniency and the lack of serious attention devoted to child sexual abuse when it comes time for the release of a sexual predator like Hendricks?

Education and prevention remain the best solution for the offender and for the potential victim, but for some it arrives too late. At present, offenders with multiple convictions over decades[291] co-exist in neighborhoods with victims living with the result of society's inability to protect its future.[292] For some offenders, emergency information hotlines[293] or out patient treatment programs signal a step in the right direction and even satisfy our concerns. Other offenders with a long history of recidivism presently in jail or living in society must submit to more intensive action, such as civil confinement. Teaching child sex offenders how to relate to children in a non-sexual manner while still protecting children in communities should be the aim. Because the nature of child sexual abuse

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290. As late as 1975, child victims were described as seductive or provocative, and as late a 1981 people believed that the offender's word should be taken over official records when the two were contradictory on the point of "victim participation." O'CONNELL ET AL., *supra* note 92, at 3 (citing M. Virkkunen, *Victim-Precipitated Pedophilia Offenses*, BRIT. J. CRIMINOLOGY 175, 175-80 (1976)); M. Virkkunen, *The Child as Participating Victim, in* ADULT SEXUAL INTEREST IN CHILDREN, 121-34 (M. Cook & K. Howells eds., 1981)). Observers in 1964 noted, "We rarely had the opportunity of examining the victims of peodphiles; however, we have the clinical impression that quite often the child is aggressive and seductive and often induces the offender to commit the offense." *Id.* (quoting E. Revitch & R. G. Weiss, *The Pedophilac Offender, in* DISEASES OF THE NERVOUS SYSTEM, 33, 73-79 (1962)).

291. *See* Hacking, *supra* note 252, at 761-62 (discussing the offenses of several repeat sexual predators in New Jersey); Claudine M. Leone, Legislative Survey, *New Jersey Assembly Bill 155—A Bill Allowing the Civil Commitment of Violent Sex Offenders After the Completion of a Criminal Sentence*, 18 SETON HALL LEGIS. J. 890, 892 n.7 (1994) (discussing repeat offender Earl Shriner whose criminal record stretches back to 1966).

292. *See* GABBARD, *supra* note 75, at 1960 (noting in a 1992 nationwide survey of 21 million adult women who suffered sexual abuse that 60% of this group were assaulted before age 18); Lurigio et al., *supra* note 80, at 69 (reporting a 2,100% increase in cases of child abuse from 1976 to 1986 and an additional 227% increase by 1991).

293. *See* Freeman-Longo, *supra* note 79, at 328 (describing "STOP IT NOW," a telephone hotline piloted in Vermont as a public medical and outreach program providing information about resources for abusers who want quit abusing, the legal system as it regards sex offenders, treatment for offenders, attorney and therapist referrals and opportunities to converse with recovering sex offenders).

offenses is so dangerous and vile,[294] the damage so intense and long lasting, and the treatment and understanding of sexual predators so perplexing, the right of the community to protect its children must outweigh the right of these types of offenders to remain at liberty after only criminal incarceration without any treatment or supervision.

The epidemic of child sexual abuse was not created in one day; it follows that a solution will be a long and difficult struggle indeed. But if communities lack the desire to commit to this effort for our children, then for whom else could such an imposing and daunting struggle be justified? Putting programs in place to severely limit, if not end, the risk that one out of every five children will suffer an act of sexual abuse should be the goal of all state legislatures.[295] Innocent vulnerable victims, who depend on adults for protection and guidance, now suffer at the hands of the system adults created.[296] Not all children can grow up privileged with tangible and intangible wealth and advantages. But every child should have the right to grow up without being raped, sodomized, or fondled. Child sex abuse should not be thought of as something that "just happens," that all children should "go through" or as "some other family's problem." If it affects one child, it affects us all.

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294. *See* Margret A. Healy, Note, *Prosecuting Child Sex Tourists at Home: Do Laws in Sweden and the United States Safeguard the Rights of Children as Mandated by International Law?*, 18 FORDAM INT'L L.J. 1852, 1852-53 (1995) (discussing the death of a 12 year-old street child living in the Philippines, Rosario Baluyot, who died in 1987 after seven months of excruciating pain from a night of sex with an Austrian medical doctor who forced an electric vibrator so deeply into her vagina that it broke and lodged inside her—he remains a free man today).

295. *See* Freeman-Longo, *supra* note 79, at 308.

296. An expert of sex offender laws says the reason child sex abuse creates so much attention relates to the nature of the victim. David E. Rovella, *Sex-Crime Laws Given Free Rein: Circuits Use High Court Decision on Commitment to Bless Megan's Laws*, NAT'L L.J., Oct. 27, 1997, at A21. "[T]he real reason this is such a hot button is because you are taking advantage of vulnerable [children] who can't protect themselves." *Id.* (quoting former assistant U.S. Attorney Rebekah J. Poston, chair of the White Collar Criminal Group at Miami's Steel Hector & Davis L.L.P.).

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