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SEX OFFENDER EXCEPTIONALISM AND PREVENTIVE DETENTION

COREY RAYBURN YUNG*

I. INTRODUCTION

At the end of his thirty-seven-month prison sentence for possessing child pornography, Graydon Earl Comstock, Jr. expected to be released back into society. However, the federal government had other plans. It decided to test its newly authorized power to detain indefinitely persons designated as “sexually dangerous” who were already in federal custody.¹ Comstock’s lawyers acted quickly to block the Government’s efforts to essentially add a second period of incarceration to Comstock’s prison term.² A federal district judge held that the new statute was beyond the scope of the Constitution’s enumerated powers and the established procedures for determining Comstock’s future dangerousness were constitutionally inadequate.³

The Fourth Circuit reviewed the Government’s appeal and unanimously affirmed the district court’s judgment concerning the scope of federal power (while not reaching the due process question).⁴ During this entire period of time, Comstock remained in federal prison even though his sentence was completed and not a single judge who had reviewed the case had found the government was constitutionally authorized to detain him via the new civil commitment statute. While the United States Attorneys waited for the Supreme Court to issue a writ of certiorari to hear the case, they sought a special order from the Court.⁵ The Government’s lawyers

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¹ 18 U.S.C. § 4248 (2006).

² See *United States v. Comstock*, 507 F. Supp. 2d 522, 526 (E.D.N.C. 2007) (noting that even though Comstock’s incarceration expired on November 8, 2006, pursuant to the government’s certification of Comstock as a “sexually dangerous person,” Comstock’s release was stayed pursuant to § 4248 for the entire duration of the proceedings).

³ *Id.* at 559–60.

⁴ *United States v. Comstock*, 551 F.3d 274, 284 (4th Cir. 2009).

⁵ *Sex Offenders’ Release is Blocked*, L.A. TIMES, Apr. 4, 2009, at A14 (“Chief Justice John G. Roberts Jr. has granted the Obama administration’s request to block the release of certain sex offenders who have completed their federal prison terms.”).

filed a motion with Chief Justice Roberts, while neither notifying the defense lawyers nor offering them an opportunity to be present, requesting that the Chief Justice prevent Comstock and other persons targeted for commitment from being released from federal custody.⁶ With the stroke of a pen, Chief Justice Roberts ordered that Comstock continue to be detained until the Court reached a decision on the certiorari petition.⁷

Months later, the Court decided to hear the case,⁸ and all the while Comstock remained in a federal prison cell based upon the ruling of a single Justice who had only heard arguments from federal government attorneys before deciding to order Comstock's continued detention. By the time the Supreme Court issued its opinion in the case upholding the civil commitment statute, Comstock had spent approximately three and one-half years in federal prison beyond the period for which he was sentenced.⁹ When the Fourth Circuit reversed the remaining grounds identified by the district court as constitutionally barring Comstock's commitment to a federal sex offender facility, Comstock had spent four years in prison for which he had neither had a trial nor been sentenced.¹⁰ The original sentence for possession of child pornography for which he was imprisoned was less than the time he served in prison pending the outcome of the Government's case to institutionalize him through its new civil commitment law. Now, if the experience with similar state laws is any guide,¹¹

⁶ Lyle Denniston, *Release of Sex Offenders Delayed*, SCOTUSBLOG (Apr. 3, 2009, 5:38 PM), <http://www.scotusblog.com/2009/04/release-of-sex-offenders-delayed> ("The Justice Department in the morning asked for a delay of the appeals court decision, but also sought an 'immediate, interim' stay while its request was awaiting the Chief Justice's reaction. Roberts, without seeking a response from the challengers to the federal law, by late afternoon issued his order fully staying the Circuit Court.").

⁷ *United States v. Comstock*, No. 08A863 (08-1224) (U.S. Apr. 3, 2009) (ordering a stay of the Fourth Circuit's ruling).

⁸ *United States v. Comstock*, 129 S. Ct. 2828 (2009) (granting certiorari).

⁹ Comstock's prison term expired in November 2006. Brief for Respondent at 2, *United States v. Comstock*, 130 S. Ct. 1949 (2009) (No. 08-1224) [hereinafter Respondents' Brief]. The Court did not issue its opinion in the case until May 17, 2010. *United States v. Comstock*, 130 S. Ct. 1949 (2010).

¹⁰ The Fourth Circuit heard the case on expedited review, issuing its decision in December 2010. *United States v. Comstock*, No. 07-7671(L), 2010 U.S. App. LEXIS 16976 (4th Cir. June 8, 2010) (granting expedited review); *United States v. Comstock*, Nos. 07-7671, 07-7672, 07-7673, 07-7674, 07-7675, 2010 U.S. App. LEXIS 24830 (4th Cir. Dec. 6, 2010).

¹¹ The number of sex offenders who have been released from civil commitment is astonishingly low. Meaghan Kelly, Note, *Lock Them Up—and Throw Away the Key: The Preventive Detention of Sex Offenders in the United States and Germany*, 39 GEO. J. INT'L L. 551, 560 (2008) ("[V]ery few of those committed are released, thus amounting to lifetime confinement.").

Comstock will likely spend the rest of his life in another government detention facility.

Comstock's long-term incarceration after his sentence expired is a microcosm of the general indifference displayed to the use of preventive detention for sex offenders. Although Comstock's case has become well-known for its importance in the continuing development of Court doctrine relating to the scope of federal power,¹² his individual story was virtually omitted from coverage of the case. Indeed, in all of the opinions by the Supreme Court Justices reviewing Comstock's case, no Justice even mentioned Comstock's name or the history of his case.¹³ Comstock will likely be remembered as the man whose case shaped the doctrine that would eventually determine the constitutionality of President Obama's health care reform initiative,¹⁴ but his individual fate will not even be a footnote in that history. And, unlike the detainees held as part of the War on Terror, the tale of Comstock's long term preventive detention based upon a single government actor simply has not been a concern of the public, media, scholars, and activists. Given the scant attention paid to Comstock, others without the virtue of a Supreme Court case may be similarly held with no hint of public scrutiny.

The emerging war on sex offenders, as typical of wartime mentality, has been marked by substantial deviations from established legal doctrine, constitutional protections, and the rule of law.¹⁵ Because of a high level of panic among the general population about sex offenders,¹⁶ the use of preventive detention for sex offenders like Comstock has received little attention or scrutiny. While the population of the detention facility at Guantanamo Bay has slowly decreased,¹⁷ the number of persons in state and federal detention centers dedicated to sex offenders has continued to

¹² See Jeffrey Toobin, *Without a Paddle; Can Stephen Breyer Save the Obama Agenda in the Supreme Court?*, NEW YORKER, Sep. 27, 2010, at 34, 40.

¹³ *United States v. Comstock*, 130 S. Ct. 1949 (2010).

¹⁴ See N.C. Aizenman, *Fate of Law Probably up to High Court*, WASH. POST, Dec. 14, 2010, at A9.

¹⁵ See generally Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435 (2010) [hereinafter *War on Sex Offenders*]; Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369 (2009).

¹⁶ Michael M. O'Hear, *Perpetual Panic*, 21 FED. SENT'G REP. 69, 69 (2008).

¹⁷ See Charlie Savage & Andrew W. Lehren, *Haggling over Guantánamo's Fate*, INT'L HERALD TRIB., Nov. 30, 2010, at 2.

climb.¹⁸ With the courts largely rubberstamping the federal civil commitment of sex offenders allowed under the Adam Walsh Child Protection and Safety Act (AWA) in 2006,¹⁹ the path has been cleared for an enormous expansion of sex offender detention.²⁰

Because of the limited attention given to these detentions, they represent a particularly dire threat to American liberties.²¹ The normal societal and institutional checks against government abuse embodied in the media, public, Constitution, and courts have essentially been removed. Consequently, the various government agencies in the United States have virtually unfettered power to preventively detain sex offenders. And because of the expansive holdings of courts in these cases, the doctrinal precedents being set afford governments at all levels the ability to apply similar schemes to any vulnerable population in the United States.²²

Part II of this Article details the growing use of preventive detention of sex offenders at the state and federal levels and the statutory structure that has made such detentions possible. Part III places this emerging trend within the larger concerns related to the use of preventive detention in America. Part IV discusses how the shape of constitutional doctrines related to preventive detention has been fundamentally altered in a way that greatly expands the possibility of the future applications of such detention schemes. The Article concludes with some thoughts about how sex offender issues in this area relate to the overall topic of this symposium.

¹⁸ JOHN Q. LA FOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS 145 (2005) (calling the use of civil commitment for sex offenders a “growth industry”).

¹⁹ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587.

²⁰ See Eric S. Janus, *Closing Pandora’s Box: Sexual Predators and the Politics of Sexual Violence*, 34 SETON HALL L. REV. 1233 (2004); Jeslyn A. Miller, Comment, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CALIF. L. REV. 2093, 2099–100 n.29 (2010).

²¹ “The political rhetoric tends to shape the problem of sexual violence in the form of the archetypal ‘Beauty and the Beast’ story, focusing intense attention on rare but vivid crimes. Such a narrow framing of the problem renders the huge proportion of sexual violence relatively invisible.” Janus, *supra* note 20, at 1248.

²² Once the Attorney General certifies that a person within federal custody is “sexually dangerous” under § 4248:

[T]he district court in the jurisdiction in which the federal government holds a person[] automatically stays that person's release from prison. . . . Moreover, § 4248 empowers the Attorney General to prolong federal detention in this manner without presenting evidence or making any preliminary showing; the statute only requires that the certification contain an allegation of dangerousness.

United States v. Comstock, 551 F.3d 274, 277 (4th Cir. 2009) (emphasis added).

II. PREVENTIVE DETENTION OF SEX OFFENDERS

Based upon the popular, but largely incorrect, belief that sex offenders have an abnormally high risk of recidivism, sex offenders represent an ideal population to target for preventive detention.²³ Indeed, if one believes that it is only a matter of time before a child molester will rape another child, it makes perfect sense to detain them indefinitely.²⁴ Further, if Americans think that the prototypical child molester is lurking in the bushes waiting to attack children, and is not a friend or family member, then focusing criminal justice resources on those already convicted of such crimes logically follows. These particular myths of extremely high recidivism rates and “stranger danger” have largely served to support various restrictions on sex offenders as well as substantiate court opinions upholding those restrictions.²⁵

Americans overwhelmingly believe that sex offenders are mentally deranged and that the risk of post-release recidivism is very high.²⁶ As one church leader stated in deciding to exclude sex offenders from his congregation: “[I]t would probably be easier for a congregation to accept a former murderer.”²⁷ Courts have internalized this popular opinion in their decisionmaking. In *Smith v. Doe*, the Supreme Court wrote that Alaska’s registration statute helped prevent the “frightening and high” risk of recidivism by sex offenders.²⁸ At the oral argument reviewing Kansas’s sexual predator law, Chief Justice Rehnquist seemingly rejected the longstanding model of the American criminal justice system when he rhetorically asked, “So what’s the State supposed to do, just wait till he goes out and does it again?”²⁹ The Eighth Circuit, in *Doe v. Miller*, relied on the unsubstantiated finding that sex offender recidivism “is between 20 and 25 percent.”³⁰ The Fifth Circuit upheld special conditions on supervised release in *United States v. Emerson* based upon a U.S. probations officer’s testimony that, in his “professional experience . . . sex offenders . . . have a recidivism rate of approximately 70%.”³¹

²³ See ERIC JANUS, FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 2–3 (2006).

²⁴ See *id.*

²⁵ *Id.*; see *War on Sex Offenders*, *supra* note 15, at 453–55.

²⁶ See, e.g., Eilene Zimmerman, *Churches Slam Doors on Sex Offenders*, SALON (Apr. 26, 2007), http://www.salon.com/life/feature/2007/04/26/sexoffenders_church.

²⁷ *Id.*

²⁸ 538 U.S. 84, 103 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)).

²⁹ Transcript of Oral Argument, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (Nos. 95-1649, 95-9075), 1996 U.S. Trans. LEXIS 80, at *41.

³⁰ 405 F.3d 700, 707 (8th Cir. 2005).

³¹ 231 F. App’x 349, 352 (5th Cir. 2007).

However, the best available evidence does not support those beliefs. The Department of Justice examined the criminal records of the 9,691 sex offenders, rapists, child molesters, statutory rapists, and those who committed sexual assault released in fifteen states in 1994.³² The study found that sex offender recidivism among that population was far lower than believed and in line with other violent offenders.³³ The recidivism rate was only 5.3% for the critical first three years after release.³⁴ Further, the study found that the sex offender recidivism rate was almost 37% less than the non-sex offender population for all crimes during that same time frame.³⁵ The Bureau of Justice Statistics has found that sex offenders, as a group, have among the lowest recidivism rates of the various criminal populations studied.³⁶ The general recidivism studies should be understood with a significant caveat: because of underreporting, it is difficult to know the validity of these studies simply because a record of reoffense may never be created.³⁷ However, studies that focus on comparisons between stranger and known offenders do not suffer from the same deficiency.

Among those studies, a clear pattern emerges that the inordinate focus on past offenders is misguided. Although the fear of strangers has been the hallmark of sex offenders, 90% of child molestations are committed by family members or acquaintances and friends of the family.³⁸ As Eric Janus has noted, “Sexual predators are rare, atypical sex offenders. But because of the intense focus of the media . . . , predators have become archetypical.”³⁹ As a result, the myth of incurable predators has been at the center of efforts to divert sex offender facilities for “treatment” at the state and federal levels.

A. STATE CIVIL COMMITMENT STATUTES

In the late 1980s and early 1990s, triggered by high-profile, horrific sex crimes, Washington and Minnesota enacted laws to allow for civil

³² LAWRENCE A. GREENFELD, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994*, at 2 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf>.

³³ *Id.*

³⁴ *Id.* at 24.

³⁵ *Id.* at 2.

³⁶ See Dwight H. Merriam, *Residency Restrictions for Sex Offenders: A Failure of Public Policy*, 60 *PLAN. & ENVTL. L.* 3, 4 (2008).

³⁷ Kirk Heilbrun et al., *The Science of Sex Offenders: Risk Assessment, Treatment, and Prevention*, 4 *PSYCHOL. PUB. POL'Y & L.* 138, 139–140 (1998).

³⁸ See Ellen Perlman, *Where Will Sex Offenders Live?*, *GOVERNING MAG.*, June 2006, at 56, available at <http://www.governing.com/topics/public-justice-safety/Sex-Offenders-Live.html>.

³⁹ JANUS, *supra* note 23, at 3.

commitment of sex offenders after their release from prison.⁴⁰ These laws designated committed persons as “sexually violent predators” (SVPs) with strong public support.⁴¹ Thus began a slow trend toward greater restrictions on sex offenders after they had served their sentences. Along with registration requirements and residency restrictions, SVP laws provided a range of options for states to control sex offenders after their release from prison.⁴²

This was not the first time, however, that American governments used psychiatric facilities to detain sex offenders. In the late 1930s, a variety of “sex psychopath laws” were implemented to detain sex offenders deemed incurable or unfit for criminal punishment.⁴³ In 1940, in *Minnesota ex rel. Pearson v. Prob. Ct. of Ramsey County*, the Supreme Court upheld the constitutionality of one of these laws against equal protection and due process challenges.⁴⁴ In 1966, the Supreme Court, in *Baxstrom v. Herold*, articulated a significant distinction that would shape the future of civil commitment laws.⁴⁵ The Court recognized that the purposes of civil commitment were not punitive in nature.⁴⁶ However, by the late 1970s, it had become painfully clear that the civil commitment of so-called sex psychopaths had been an abject failure from a policy perspective.⁴⁷ And most of the states that had laws enabling these programs soon eliminated them.⁴⁸

With seemingly no regard to the past, states simply enacted new versions of the sex psychopath laws throughout the 1990s in response to public panic regarding sex offenders.⁴⁹ Presently, at least twenty states have enacted SVP laws that allow sex offenders to be sent to detention

⁴⁰ WASH. REV. CODE ANN. § 71.09 (West 2008); JANUS, *supra* note 23, at 14–15.

⁴¹ See Tom Prettyman, *Federal And State Constitutional Law Challenges to State Sex Offender Laws*, 29 RUTGERS L.J. 1075, 1080–81 (1998); ROXANNE LIEB, WASH. STATE INST. FOR PUB. POLICY, WASHINGTON'S SEXUALLY VIOLENT PREDATOR LAW: LEGISLATIVE HISTORY AND COMPARISONS WITH OTHER STATES 1 (1996), available at <http://www.wsipp.wa.gov/rptfiles/WAsexlaw.pdf>.

⁴² See *War on Sex Offenders*, *supra* note 15, at 447–53.

⁴³ JANUS, *supra* note 23, at 22.

⁴⁴ *Minnesota ex rel. Pearson v. Prob. Ct. of Ramsey Cnty.*, 309 U.S. 270, 277 (1940).

⁴⁵ *Baxstrom v. Herold*, 383 U.S. 107 (1966).

⁴⁶ *Id.* at 111–12, 114.

⁴⁷ Civil commitment had proven to be an extremely costly system, prone to abuse, with no actual success in treatment. JANUS, *supra* note 23, at 22; Rudolph Alexander, Jr., *The United States Supreme Court and the Civil Commitment of Sex Offenders*, 84 PRISON J. 361, 363 (2004).

⁴⁸ JANUS, *supra* note 23, at 22; Andrew J. Harris, *The Civil Commitment of Sexual Predators: A Policy Review*, in *SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS* 339, 343 (Richard G. Wright ed., 2009).

⁴⁹ JANUS, *supra* note 23, at 22.

facilities for “treatment” after release from prison.⁵⁰ Placement within the sex offender centers will often amount to a lifetime sentence after the offender was released from prison.⁵¹ Procedures for commitment to these facilities vary widely.⁵² Many states require that an offender have his or her own psychiatrist expert and be represented by legal counsel.⁵³ Whereas some states require proof beyond a reasonable doubt of the elements needed for institutionalization, a minority only necessitate that the Government show by clear and convincing evidence the facts related to dangerousness.⁵⁴ Some states require periodic court review of a person’s case to determine if there is continuing dangerousness while others rely solely on a doctor’s determination with no scheduled windows for review.⁵⁵

Notably, none of these institutionalization schemes have exclusively relied on an offender’s prior convictions (doing so would surely cause constitutional problems) and instead have used past behavior to predict the future dangerousness that is the basis for detention.⁵⁶ Indeed, it was the distinction between stopping future harm versus punishing for past conduct that was the touchstone for the Supreme Court in upholding Kansas’s commitment statute in *Kansas v. Hendricks*.⁵⁷

In many ways, *Hendricks* was the ideal test case from the Government’s perspective. The petitioner’s brief before the Supreme Court outlined why Leroy Hendricks was the perfect person for the Government to contend that he belonged in potentially lifetime civil detention:

[Hendricks] testified [in 1994] that . . . his history of sexual involvement with children began in 1955—he was 20—when he exposed his genitals to two young girls In 1957, Hendricks was convicted of lewdness for playing strip poker with a 14-year-old girl, and in 1960, while working for a carnival, he molested two young boys—ages 7 and 8—by fondling their genitals.

⁵⁰ Kelly, *supra* note 11, at 552–53 (“Today 20 states have SVP laws, providing for the indefinite detention of about 2,700 offenders.”). Among the states that have SVP laws are: Washington, Kansas, Minnesota, Wisconsin, Iowa, New Jersey, California, Texas, Arizona, Illinois, North Dakota, Missouri, Florida, Massachusetts, South Carolina, Pennsylvania, Virginia, New York, New Hampshire, and Nebraska. Harris, *supra* note 48, at 371 n.ii.

⁵¹ Kelly, *supra* note 11, at 560. One study indicated that civil commitment of sex offenders amounts to a life sentence in approximately 90% of cases. See KATHY GOOKIN, WASH. STATE INST. FOR PUB. POLICY, COMPARISON OF STATE LAWS AUTHORIZING INVOLUNTARY COMMITMENT OF SEXUALLY VIOLENT PREDATORS: 2006 UPDATE, REVISED (2007), available at <http://www.wsipp.wa.gov/rptfiles/07-08-1101.pdf>.

⁵² See Harris, *supra* note 48, at 350–57.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See Miller, *supra* note 20, at 2110–11.

⁵⁷ *Kansas v. Hendricks*, 521 U.S. 346 (1997).

After three years of imprisonment, Hendricks was paroled and then promptly arrested, convicted and imprisoned for molesting a seven-year-old girl by placing his fingers in her vagina Hendricks testified that he understood his behavior was wrong, but that he was unable to control himself. As a result of his molestation of this girl, Hendricks was adjudicated a sexual psychopath under Washington law and civilly committed to a mental institution for treatment until 1965, when he was released. In 1967, Hendricks was again convicted and imprisoned for molesting another young boy and girl. Hendricks had repeatedly performed oral sex on the 8-year-old girl and fondled the 11-year-old boy over a period of two months. Again, Hendricks stated that he committed these crimes because he had an urge to do so which he did not even try to control. After being released from prison in 1972 Hendricks began a prolonged period of molesting his own stepdaughter and stepson. He testified that he knew his behavior was a problem, but that he did not cease it or seek treatment. Hendricks' stepdaughter testified that Hendricks performed oral sex on her several times a month from the time she was approximately 9 until she was 14 Hendricks' stepson also testified that Hendricks performed oral sex on him and fondled his genitals approximately once a week from the time the stepson was about 9 until he was 14. The stepson further testified that Hendricks also made him perform oral sex on Hendricks. . . .

Hendricks' most recent conviction was in 1984 for the molestation of two 13-year-old boys, resulting in his serving ten years in prison before his scheduled release in 1994. At the time of these offenses, Hendricks told a police detective that he could not control his urge to touch the boys' penises. Hendricks testified that he had spent half his life since 1955 in prison or in psychiatric institutions. He further testified that when he suffers stress, he is unable to control the urge to engage in sexual activity with a child, declaring that "I can't control the urge when I get stressed out."⁵⁸

With such a horrific record and a complete failure of the criminal justice system to properly punish and deter Hendricks, he seemed perfectly fitted for the SVP law. Hendricks concluded his testimony by noting that treatment was "bullshit" and when asked how he could be stopped from molesting more children if released, he said that "the only way to guarantee that is to die."⁵⁹ If preventive detention for sex offenders were limited to the Leroy Hendrickses of the world, there would not be much ground to object against the use of civil commitment in this area.

Ultimately, in Hendricks's case, the Supreme Court held that, because these facilities were civil and not punitive in nature or effects, constitutional protections related to double jeopardy, due process, and ex post facto punishment were not implicated by the Kansas SVP law.⁶⁰ Similarly, the strong bias in certain constitutional doctrines against punishing persons solely for their status was overruled by the desire to prevent future sex

⁵⁸ Brief for Petitioner at 8–10, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (No. 95-1649) (internal citations omitted).

⁵⁹ *Id.* at 11.

⁶⁰ *Hendricks*, 521 U.S. at 361.

crimes.⁶¹ While the number of states with SVP programs constitute a minority due to economic realities, block grants given as part of the AWA are likely to increase the number in the future.⁶² In addition to block grants, the AWA established the first federal SVP program.⁶³

B. THE ADAM WALSH ACT

In 2006, coinciding with the twenty-fifth anniversary of the abduction of Adam Walsh, President Bush signed into law the AWA.⁶⁴ The statute contained a plethora of new restrictions, sentences, and requirements for sex offenders.⁶⁵ Included among the hodge-podge of new federal initiatives⁶⁶ was Title III § 302 of the Act, which established the Jimmy Ryce Civil Commitment Program. Codified at 18 U.S.C. § 4248, the program authorized federal authorities to divert someone to a sex offender detention facility if: (1) he or she was “in the custody of the Bureau of Prisons”;⁶⁷ (2) “the Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons [certified] that the person is a sexually dangerous person”; and (3) “after the hearing, the court finds by clear and convincing evidence that the person is a sexually dangerous person.”⁶⁸ To prove that a person was “sexually dangerous,” the Government needed to show that “a person [had] engaged or attempted to engage in sexually violent conduct or child molestation and . . . suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.”⁶⁹

The process by which a person would be committed followed many states, but there were significant differences in the federal law. The procedure to commit a person in custody begins with a decision by the

⁶¹ See JANUS, *supra* note 23, at 19–20.

⁶² See John Matthew Fabian, *To Catch a Predator, and Then Commit Him for Life: Analyzing the Adam Walsh Act’s Civil Commitment Scheme Under 18 U.S.C. § 4248*, CHAMPION, Feb. 2009, at 44, 45.

⁶³ See *War on Sex Offenders*, *supra* note 15, at 450–51.

⁶⁴ Kris Axtman, *Efforts Grow to Keep Tabs on Sex Offenders*, CHRISTIAN SCI. MONITOR, July 28, 2006, at 1.

⁶⁵ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587.

⁶⁶ See Press Release, White House Office of the Press Sec’y, Fact Sheet: The Adam Walsh Child Protection and Safety Act of 2006 (July 27, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-7.html>.

⁶⁷ 18 U.S.C. § 4248(a) (2006).

⁶⁸ *Id.* § 4248(d).

⁶⁹ *Id.* § 4247(a)(5)–(6).

Bureau of Prisons to designate that person as “sexually dangerous.”⁷⁰ There is no subsequent requirement that the Attorney General make a preliminary showing as to the applicability of the certification procedures—the allegation alone is sufficient.⁷¹

At that time, the person designated as “sexually dangerous” will not be released from custody until the completion of civil commitment proceedings.⁷² Once that stay is automatically issued, the designated person will be held indefinitely and there is no requirement that civil commitment proceedings or related litigation occur in a timely fashion. And the stay is not based upon anything other than a Bureau of Prisons finding and there are no means for the designated person to contest the designation until the formal civil commitment hearing.⁷³

Once the hearing is held, the Government must prove the elements described above by a standard of clear and convincing evidence.⁷⁴ The designated person has rights to counsel, cross-examine witnesses, testify, and subpoena witnesses on his or her behalf.⁷⁵ However, among the many rights that are not guaranteed are the following: (1) to remain silent; (2) to a jury trial; (3) to discovery; (4) to procedural rights at the hearing analogous to the Federal Rules of Criminal Procedure; (5) to a speedy trial; and (6) to bail while awaiting any stage to proceed.⁷⁶ If the Government meets its burden of proof, then the designated person is committed to the custody of the Attorney General. The Attorney General will then order the person to a federal sex offender facility unless a state assumes responsibility for the designated person.⁷⁷

After being committed to a federal institution, the sexually dangerous person will be subject to periodic review by the facility director until such time as the director believes the person no longer poses a substantial threat.⁷⁸ If the facility director makes such a finding then a certificate will

⁷⁰ *Id.* § 4248(a).

⁷¹ *See* 18 U.S.C. §§ 4248(a), (d).

⁷² *Id.* § 4248(a) (“A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.”).

⁷³ *See* *U.S. v. Shields*, 522 F. Supp. 2d 317, 332–333 (D. Mass. 2007).

⁷⁴ 18 U.S.C. §§ 4247(d), 4248(a), (d).

⁷⁵ *Id.* § 4247(d) (“At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.”).

⁷⁶ Fabian, *supra* note 62, at 46.

⁷⁷ 18 U.S.C. § 4248(d).

⁷⁸ *Id.* § 4247(e).

be issued allowing for a new court hearing.⁷⁹ At this hearing, the burden of proof is on the sexually dangerous person to show he or she is “cured” of the illness that created a “serious risk” of committing a sex offense.⁸⁰ Because these are the same procedures used for a person awaiting trial but deemed mentally incompetent (and not specific to sex offender commitment), there have been no articulated criteria for how a committed person would make such a showing.

III. UNUSUAL ASPECTS OF SEX OFFENDER PREVENTIVE DETENTION

Although all instances of preventive detention share certain common aspects, there are definite differences as well. In the case of sex offenders, there are elements of medical and actuarial science that buttress the authority for these new programs. Also, the processes by which an offender is detained and released vary substantially. Further, the lack of social and institutional constraints on government action related to sex offenders makes their situation relatively unique among forms of preventive detention in recent American history. Each of the unusual aspects related to the new sex offender facilities is discussed below.

A. PSEUDO-SCIENCE

Unlike other modern instances of preventive detention in America, SVP laws have relied on medical authority to administer and support the enacted programs. For example, the language of 18 U.S.C. § 4248 and related provisions appear to incorporate a strong foundation built upon psychiatric understanding of sex offender behavior. In order for a person to be committed, a psychological evaluation must be issued meeting the following criteria:

A psychiatric or psychological report . . . shall be prepared by the examiner designated to conduct the psychiatric or psychological examination and . . . shall include—

- (1) the person’s history and present symptoms;
- (2) a description of the psychiatric, psychological, and medical tests that were employed and their results;
- (3) the examiner’s findings; and
- (4) the examiner’s opinions as to diagnosis, prognosis, and . . . whether the person is a sexually dangerous person.⁸¹

⁷⁹ *Id.*

⁸⁰ *See* 18 U.S.C. § 4248(e).

⁸¹ *Id.* § 4247(c).

However, a closer look at the law and the diagnostic techniques used to determine the dangerousness of persons subject to institutionalization reveals a very different picture.

One of the most significant problems with § 4248 concerns the “serious risk” that a person will not be able to suppress their urges to commit a qualifying sexual offense. While every state statute included a showing that the defendant would “likely” recidivate, the AWA SVP law only needs proof as to a “serious risk.”⁸² It is possible that courts will construe the “serious risk” to mean “likely,” but it is also possible that a view that affords even greater government latitude will take hold.⁸³ As Dr. John Matthew Fabian has recognized, the language of “serious risk” implies a volitional impairment in judgment.⁸⁴ If that is the case, then the diagnosis of many related mental illnesses required by the statute may meet this element as well because volitional impairment is often a symptom of such conditions.

Unfortunately, the social science in the area is so underdeveloped that regardless of the definition used by courts, the ability to predict future dangerousness of particular sex offenders is rudimentary at best. The only objective tool for determining the future recidivism risk for sex offenders is called STATIC-99. The ten question diagnostic assessment relies on actuarial data to identify if an offender is a low, low-moderate, moderate-high, or high risk. The ten questions are straightforward:

- Aged 25 or older
- Ever lived with lover for at least two years
- Index non-sexual violence—Any Convictions
- Prior non-sexual violence—Any Convictions
- Prior Sex Offences
- Prior sentencing dates (excluding index)
- Any convictions for non-contact sex offences
- Any Unrelated Victims
- Any Stranger Victims
- Any Male Victims⁸⁵

⁸² See Fabian, *supra* note 62, at 48.

⁸³ See *id.*

⁸⁴ *Id.*

⁸⁵ KARL HANSON & DAVID THORNTON, STATIC-99 CODING FORM, available at http://www.static99.org/pdfdocs/static-99-coding-rules_e71.pdf.

The answers to each of those questions are linked with a variety of scores which either add or subtract from a person's risk index number. If an offender scores 1 or below, they are a low risk, 2 or 3, low-moderate risk, 4 or 5, moderate-high risk, and 6 and above, high risk.⁸⁶ It is not difficult for an offender to find himself classified in the moderate-high or high risk categories.

For example, if an offender is a nineteen-year-old gay man convicted of a low-degree sexual assault because he grabbed another man's buttocks without consent, the offender will likely score a 5 placing him at the upper end of the moderate-high risk category. One point is for his age, one is because he likely has not lived with a lover for more than two years, one is because the victim was unrelated, one is for the victim being a stranger, and the last point is because the victim was male.⁸⁷ If that same offender had a prior conviction for assault from a bar fight or an indecent exposure charge because of public urination, he would find himself in the high risk category. As a result, this hypothetical offender would be categorized as having the same actuarial risk as a ten-time convicted child molester who has an extensive collection of child pornography.

In part because of its tendency to group large populations of sex offenders together based upon potentially spurious connections, substantial controversy has emerged among the psychological community about the use of the STATIC-99.⁸⁸ Nonetheless, courts across America regularly cite STATIC-99 results to support various restrictions on and punishments of sex offenders.⁸⁹ For example, the Eleventh Circuit, sitting en banc, recently reversed a district court sentence because it was too low based, in part, upon the preference for the objective STATIC-99 categorization of low-moderate risk instead of the subjective opinion of the defense psychiatrist that did not

⁸⁶ *Id.*

⁸⁷ *Id.*; see also ANDREW HARRIS, AMY PHENIX, R. KARL HANSON & DAVID THORNTON, *STATIC-99 CODING RULES* (2003).

⁸⁸ See Richard Wollert, *Low Base Rates Limit Expert Certainty When Current Actuarials Are Used To Identify Sexually Violent Predators: An Application of Bayes's Theorem*, 12 *PSYCHOL. PUB. POL'Y & L.* 56 (2006); *CTR. FOR SEX OFFENDER MGMT., RECIDIVISM OF SEX OFFENDERS* (May 2001), www.csom.org/pubs/recidsexof.html (last visited Nov. 20, 2010).

⁸⁹ See, e.g., *United States v. Adams*, 385 F. App'x 114, 116–17 (3d Cir. 2010) (citing the STATIC-99 results in affirming a district court sentence); *United States v. McIlrath*, 512 F.3d 421, 425 (7th Cir. 2008) (noting that “[t]he methodology employed by Static 99 to predict the probability of recidivism has been accepted in a number of cases”); *Bagent v. Mayberg*, No. 1:07-cv-01687-AWI-SKO, 2010 U.S. Dist. LEXIS 94053, at *5 (E.D. Cal. Sept. 9, 2010) (recommending that an offender committed to a sex offender treatment facility not be released even though his STATIC-99 score was based largely on conduct for which he was not convicted).

use a risk categorization system.⁹⁰ Georgia even incorporates STATIC-99 directly into its classification scheme such that a score of 5 or more automatically places an offender in the “dangerous sexual predator” category.⁹¹ Notably, even among the advocates and creators of the tool, the psychological community is united in its belief that STATIC-99 should only be used by trained professionals as part of an overall diagnostic profile.⁹² The courts’ and legislatures’ usage of the diagnostic tool is directly at odds with accepted practice in the area.

Further, the notion that the sex offenders are being medically “treated” as part of this program is largely a fiction. There is no evidence that such treatment (1) is effective,⁹³ or (2) could not be done during an offender’s time in prison.⁹⁴ Psychiatric organizations have been unified in their opposition to these programs in large part because there is no evidence that “treatment” is the goal or the result.⁹⁵ In 1996, the American Psychiatric Association issued a draft report that stated the new state programs “distort the traditional meanings of civil commitment, misallocate psychiatric facilities and resources, and constitute an abuse of psychiatry.”⁹⁶

To the degree that treatment is possible, it is entirely unclear why such programs could not be implemented during the prisoner’s original sentence. If the genuine goal of these civil commitment laws was to “cure” sick individuals, then it would be preferable to start the process sooner rather than later. These statutes, however, have actually undermined prison treatment programs.⁹⁷ Because the courts have allowed evidence obtained during an offender’s prison treatment program to be admitted at a civil commitment hearing,⁹⁸ sex offenders are increasingly forgoing any

⁹⁰ *United States v. Irej*, 612 F.3d 1160, 1213 (11th Cir. 2010).

⁹¹ *United States v. Farley*, 607 F.3d 1294, 1318 n.11 (11th Cir. 2010).

⁹² *See, e.g., HARRIS, PHENIX, HANSON, & THORTON, supra note 87, at 3–5; Robert A. Prentky et al., Sexually Violent Predators in the Courtroom: Science on Trial*, 12 *PSYCHOL. PUB. POL’Y & L.* 357, 384–85 (2006).

⁹³ *See John Q. La Fond, The Costs of Enacting a Sexual Predator Law*, 4 *PSYCHOL. PUB. POL’Y. & L.* 468, 472 (1998).

⁹⁴ *See id.* at 495–96 (stating that in Washington state sex offenders can undergo treatment while in prison but they are required to waive confidentiality).

⁹⁵ *See JANUS, supra note 23, at 23.*

⁹⁶ W. Lawrence Fitch, *Sexual Offender Commitment in the United States*, 989 *ANNALS N.Y. ACAD. SCI.* 489, 496 (2003).

⁹⁷ *See La Fond, supra note 93, at 495–96* (explaining that prisoners are punished by participating in prison treatment programs).

⁹⁸ *United States v. Zehnter*, 1:06-cr-0219, 2007 U.S. Dist. LEXIS 4700, *2–*3 (N.D.N.Y. Jan. 23, 2007) (“Defendant, nevertheless, contends that the report also needs to be excluded from use by the Bureau of Prisons because the Bureau of Prisons may use information in the report to determine that he is a sexually dangerous person within the

treatment.⁹⁹ From their perspective, it is simply too risky to speak to a therapist who will then testify against the offender in a hearing that could result in the offender being detained for life.¹⁰⁰ And without confronting their past misdeeds in a clinical or therapeutic setting, the prison treatment is rendered wholly ineffective.¹⁰¹ The end result of these new programs hardly seems to be medical treatment, but instead is large-scale preventive detention.

B. LOW BURDEN OF PROOF

Unlike the statute that was reviewed in *Kansas v. Hendricks*,¹⁰² the AWA SVP provisions only require that the Government show by clear and convincing evidence that an offender poses a serious risk of recidivism.¹⁰³ As a consequence, a person can be detained for life with a burden of proof not near the certainty required before a criminal tribunal. In contrast, clear and convincing proof had primarily been used in forums such as bail hearings where any resultant detention was necessarily of limited duration. Given the mistaken beliefs about sex offender recidivism by courts and the general public, the clear and convincing standard seems especially easy to meet for those that have committed sex crimes in the past. With seemingly scientific evidence like STATIC-99 being introduced the lower burden of proof is a small hurdle for a skilled prosecutor.

Further, because of the lower standard, criminal cases that could not succeed or actually failed can be brought through the AWA process. Notably, three of the five persons who were designated as “sexually dangerous” in *Comstock* were only convicted of possessing child pornography.¹⁰⁴ So, to commit those three persons, the Government must essentially stage a criminal trial for “sexually violent conduct” or “child molestation” at a lower burden of proof with less procedural protections in

meaning of the Adam Walsh Act and, therefore, be subjected to civil commitment under that Act.”) (internal citation omitted).

⁹⁹ See Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, at 1 (“But many of those committed get no treatment at all for sex offending, mainly by their own choice. In California, three-quarters of civilly committed sex offenders do not attend therapy. Many say their lawyers tell them to avoid it because admission of past misdeeds during therapy could make getting out impossible, or worse, lead to new criminal charges.”).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (“Admitting to previous crimes is a crucial piece of a broad band of treatment, known as relapse prevention, that is used in at least 15 states and has been the most widely accepted model for about 20 years.”).

¹⁰² *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

¹⁰³ 18 U.S.C. §§ 4247(a)(5)–(6), 4248(a), (d) (2006).

¹⁰⁴ *United States v. Comstock*, 130 S. Ct. 1949, 1955 (2010).

order to commit a person to a sex offender facility (assuming that the court decides that possession of child pornography is not “sexually violent conduct” or “child molestation”). This means a person may be detained longer than authorized under the criminal code for offenses that would not be provable in a criminal court. This is an end run around the criminal justice system that is the hallmark of preventive detention programs.

C. INDEFINITE TERM

One clear lesson from the state experiences with sex offender facilities is that once a person is in, they do not get out. Releases have been extremely rare and have been usually due to factors unrelated to successful treatment of sex offenders.¹⁰⁵ While persons detained for the War on Terror may face a lifetime of incarceration, there is at least a prospect that the seemingly never-ending war will conclude. In contrast, because of the criteria used to allow a sex offender to leave a detention facility, there is virtually no chance of release.¹⁰⁶

If the government truly believed that these facilities would effectuate better treatment for sex offenders than in the prison environment, the statute authorizes the offenders to be diverted to those facilities at any time during their incarceration.¹⁰⁷ However, the use of the AWA commitment provisions indicates that, rather than exhibiting a concern for better treatment, the government seems particularly concerned that offenders remain detained in some facility for as long as possible. At the time the *Comstock* case was decided by the Fourth Circuit, over 98% of those designated by the government as “sexually dangerous” were at the end of

¹⁰⁵ See Allison Retka, *Missouri's Sexual Predator Law Called Punitive, Preventative*, MO. LAWYERS MEDIA, Dec. 19, 2010, <http://molawyersmedia.com/blog/2010/12/19/svp-law-called-punitive-preventative/> (subscription required, on file with the *Journal of Criminal Law and Criminology*) (“Of the 150 sex offenders committed under the law since 1999, not one has completed treatment and been released.”); *Treatment for Sex Offenders Crunches State Budgets; ‘Civil Commitment’ Programs Create Political Quandary*, WASH. POST, Jun. 27, 2010, at A2 (“Wisconsin has released 61 sex offenders since adopting a civil-commitment system in 1994. But in Minnesota, no one has ever gotten out. One man was released provisionally but got pulled back for a technical violation and later died in confinement. ‘Are Minnesota sex offenders that much more dangerous than Wisconsin sex offenders? Why can’t we do that?’ asked Eric Janus, an expert on civil commitment who heads William Mitchell College of Law in St. Paul. Missouri and Pennsylvania have released one patient each. Nebraska has released one person since 2006. Texas has yet to release anyone from its outpatient program. That contrasts with states such as California, which has put nearly 200 offenders back into the community, and New Jersey, where 123 have been let go.”) [hereinafter *State Budgets*].

¹⁰⁶ See Retka, *supra* note 105; *State Budgets*, *supra* note 105.

¹⁰⁷ The only requirement in these types of cases is that a person be in the custody of the Bureau of Prisons. 18 U.S.C. § 4248(a).

their prison sentences and about to be released.¹⁰⁸ While not dispositive of intent, this trend certainly is indicative of a desire by the government to apply a second term of incarceration with neither a jury trial nor new wrongful conduct by the offender.

D. STATUTORY CLASSIFICATIONS

Unlike the text and application of the statute in *Kansas v. Hendricks*, the federal law opens civil commitment to a much larger population. Indicative of the potentially broad reach, the Bureau of Prisons reviewed the files of every single inmate in federal custody, not limiting itself to sex offenders, to determine if they were eligible for the program.¹⁰⁹ The federal courts have also approved the use of the law in ways that have been much more expansive than necessary.

While the federal civil commitment statute is filled with various terms of art, many are entirely undefined. For example, “sexually violent conduct,” “child molestation,” and “mental disease, abnormality or disorder” are essential parts of the statute that have been left for courts and agencies to determine the meaning.¹¹⁰ Perhaps most importantly, the unusual term “serious difficulty” is likely to be the key factor in many commitment cases because the government must show such difficulty “in refraining from sexually violent conduct or child molestation if released.”¹¹¹ And there is no guidance as to what “serious difficulty” should mean in this context.

The Bureau of Prisons has filled the gaps left for some of the statutory terms but in a manner that would ensure very broad application. For example, the Bureau defines child molestation as “any unlawful conduct of a sexual nature with, or sexual exploitation of, a person under the age of 18 years.”¹¹² Such a definition clearly includes consensual statutory rape and probably envelops possession of child pornography as well. Similarly, “sexually violent conduct” has been defined to include instances where a person is so intoxicated by alcohol or drugs as to be “incapable of appraising the nature of the conduct.”¹¹³ No actual force or “violence” is required in such situations. Moreover, because the statute only requires that these underlying crimes be attempted and not completed and the burden of

¹⁰⁸ Respondents’ Brief, *supra* note 9, at 2 (citing statistics for the Eastern District of North Carolina).

¹⁰⁹ See Amy Baron-Evans & Sara Noonan, *Grid & Bear It*, CHAMPION, July 2008, at 58, 59.

¹¹⁰ *Id.* at 58.

¹¹¹ 18 U.S.C. § 4247(a)(6) (2006).

¹¹² 28 C.F.R. § 549.93 (2010).

¹¹³ *Id.* § 549.92.

proof is low, the potential reach of the statute under the Bureau's definitions is very broad.

Another unusual aspect of the language of § 4248 is that there is no *mens rea* requirement.¹¹⁴ By including any acts, even unintentional or merely negligent ones, as the basis for commitment, the statute reaches much further than any criminal law in this area. Because the persons designated as “sexually dangerous” have to be diagnosed with some mental illness, there is some logic to omitting a *mens rea* requirement. It would be very difficult to show that a person has a mental illness that so severely limits self-control as to justify commitment, but would still be able to form the requisite intent required by most statutes. Regardless, the lack of a *mens rea* requirement expands the potential reach of the statute. Thus, a person who unknowingly acquires child pornography (that he or she believes to be legal adult pornography) can be designated as “sexually dangerous” under the Bureau's broad definitions without ever being charged, tried, or convicted.¹¹⁵

Although those initially targeted for detention under 18 U.S.C. § 4248 were sex offenders, nothing in the statute requires a person to have been convicted of such a crime. Instead, as part of the commitment hearing, the Government can attempt to prove acts for which the designated person was often neither charged nor convicted. This inclusion of non-sex offenders under the SVP law was not accidental as the accompanying regulations in the Federal Register anticipate commitment of such persons.¹¹⁶ If the states

¹¹⁴ Baron-Evans & Noonan, *supra* note 109, at 58.

¹¹⁵ Because the statute has only begun to be applied, there have been no such cases yet. However, child pornography alone has served as the sole crime underlying an SVP designation. See *United States v. Comstock*, 627 F.3d 513, 517 (4th Cir. 2010) (“Matherly had pled guilty to one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(5)(B) and § 2252(b)(2) and received a sentence of 41-months imprisonment, followed by a 3-year term of supervised release. The Government certified him as a ‘sexually dangerous’ person on November 22, 2006, one day before his projected release date.”); *United States v. Bolander*, No. 01-CR-2864-L, 2010 U.S. Dist. LEXIS 134749, at *1-2 (S.D. Cal. Dec. 21, 2010) (“Defendant is a federal prisoner who is being held in the custody of the Bureau of Prisons pending the resolution of civil commitment proceedings pursuant to the Adam Walsh Child Protection and Safety Act of 2006, 18 U.S.C. § 4248. In February 2002, Defendant was committed to the custody of the Bureau of Prisons to serve three sentences of imprisonment, arising from a conviction for possession of child pornography and two violations of supervised release. Defendant was also sentenced to a three-year term of supervised release. Shortly before Defendant was to be released, the Government filed a ‘Certification of a Sexually Dangerous Person’ under 18 U.S.C. § 4248(a). As a result, Defendant has remained in custody beyond his term of incarceration.”).

¹¹⁶ 72 Fed. Reg. 43205, 43206 (proposed Aug. 3, 2007) (codified at 28 C.F.R. § 549) (the proposed regulations were “not limited to offenses for which he/she has been convicted or is presently incarcerated, or for which he/she presently faces charges” but include “any conduct of the person for which evidence or information is available”).

provide a prediction of what will happen at the federal level, then civil commitment will be frequently used for conduct which could not be proven at trial or which resulted in convictions that would be subsequently overturned.¹¹⁷

The dynamics of modern plea bargaining also create unique risks of over-expansive application of the AWA's civil commitment provisions. Because post-release institutionalization is considered to be a "collateral consequence" that does not directly flow from a person's conviction, the courts have repeatedly held that there is no obligation to inform a person pleading guilty about the possibility of civil commitment.¹¹⁸ As Professor Jenny Roberts has astutely recognized, the lack of notice given to many offenders in these cases about civil commitment means that they may plead guilty to a lesser offense with limited jail time only to find themselves facing a lifetime of detention.¹¹⁹

E. LIMITED INSTITUTIONAL CHECKS

It is difficult, if not impossible, to name a group in the United States that is more reviled than sex offenders. They are a population with no political power and limited resources that is subject to unrelenting negative media coverage reinforcing their vulnerability.¹²⁰ In such circumstances,

¹¹⁷ See, e.g., Jason Cantone, *Rational Enough to Punish, but Too Irrational to Release: The Integrity of Sex Offender Civil Commitment*, 57 *DRAKE L. REV.* 693, 694–95 (2009):

A jury found Crane guilty of four criminal charges and sentenced him to thirty-five years to life in prison. However, the Kansas Supreme Court reversed all of the convictions except for lewd and lascivious behavior. Addressing the attempted sodomy and attempted rape charges, the court found that a "fatally defective" complaint denied Crane his due process rights. The kidnapping conviction was reversed because there was insufficient evidence. Fearing that the last charge could be dropped in a retrial, the prosecutor accepted a plea for aggravated sexual battery, and Crane was sentenced to time served.

With Crane's victims outraged and the community fearing the release of another sex offender who would prey on its children, the prosecutor sought to declare Crane a sexually violent predator (SVP) under the Kansas Sexually Violent Predator Act (KSVPA), which allowed indefinite civil commitment. To civilly commit Crane, the State needed to prove: (1) that Crane was convicted of a sex crime and (2) that he suffered from a mental condition that makes him likely to engage in future sexual predatory acts. Crane's guilty plea to the lesser charge of aggravated sexual battery guaranteed the first element would be met. To prove the second element, the State relied upon a psychiatrist from Crane's original trial who found Crane to be a sexual deviant and exhibitionist who enjoyed fearful responses from victims. This established the necessary elements for a commitment, and the jury unanimously committed Crane after ninety minutes of deliberation.

¹¹⁸ See, e.g., *Steele v. Murphy*, 365 F.3d 14, 17 (1st Cir. 2004).

¹¹⁹ See generally Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators"*, 93 *MINN. L. REV.* 670 (2008).

¹²⁰ See JANUS, *supra* note 23, at 3.

the normal impediments that exist to check governmental abuse of liberties are absent. These institutional checks occur at a variety of levels. Government abuse can often be blunted by public pressure, countermajoritarian court decisions, media exposure, or acts by individual political figures. None of those is likely to be present in regard to preventive detention of sex offenders.

Public opinion is overwhelmingly in favor of virtually every sex offender restriction that has been passed (with only economic cost providing any basis for opposition). In addition to SVP laws, a wide range of sex offender laws have been passed at the behest of a fearful public including registration requirements,¹²¹ community notification,¹²² residency restrictions,¹²³ loitering laws,¹²⁴ Global Positioning System (GPS) monitoring,¹²⁵ higher mandatory minimums,¹²⁶ evidentiary restrictions in child pornography cases,¹²⁷ specially marked driver's licenses,¹²⁸ chemical castration¹²⁹ (with one state allowing for surgical castration as well¹³⁰), and the death penalty for child rapists.¹³¹ In such a political environment, any

¹²¹ See *Smith v. Doe*, 538 U.S. 84, 90 (2003).

¹²² See HUMAN RIGHTS WATCH, *NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S.* 50 (2007).

¹²³ See Paula Reed Ward, *Residency Restrictions for Sex Offenders Popular, but Ineffective*, PITTSBURGH POST-GAZETTE, Oct. 26, 2008, at B1.

¹²⁴ See HUMAN RIGHTS WATCH, *supra* note 122, at 100.

¹²⁵ See Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 124 (2007).

¹²⁶ See John Q. La Fond, *Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 375, 410–11 (1999) (“Most states have increased criminal sentences for convicted sex offenders and more sex offenders are actually serving longer prison terms. Some states have passed mandatory life sentences for certain sex offenders.”).

¹²⁷ See 18 U.S.C. § 3509(m) (2006).

¹²⁸ See *Bill Would Modify IDs for Sex Offenders*, MONTEREY COUNTY HERALD (Cal.), May 26, 2010, at A5 (“Driver’s licenses in Delaware are marked with the letter ‘Y,’ and Louisiana emblazons licenses with the words ‘sex offender.’”).

¹²⁹ See John Gramlich, *Lawsuits Test Crackdown on Sex Criminals*, STATELINE (Apr. 18, 2008), <http://www.stateline.org/live/details/story?contentId=302066>.

¹³⁰ See Robert Crowe, *Is It Tarot or Porno? Offender in Trouble*, SAN ANTONIO EXPRESS-NEWS, Oct. 9, 2008, at 1A (“[I]n 1997, Texas became the first state to allow surgical castration for repeat sex offenders.”).

¹³¹ See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2651 (2008) (“Five States have since followed Louisiana’s lead [in imposing the death penalty for rape of a child]: Georgia, see GA. CODE ANN. § 16-6-1 (2007) (enacted 1999); Montana, see MONT. CODE ANN. § 45-5-503 (2007) (enacted 1997); Oklahoma, see OKLA. STAT., Tit. 10, § 7115(K) (West 2007 Supp.) (enacted 2006); South Carolina, see S.C. CODE ANN. § 16-3-655(C)(1) (Supp. 2007) (enacted 2006); and Texas, see TEX. PENAL CODE ANN. § 12.42(c)(3) (West Supp. 2007) (enacted 2007); see also § 22.021(a).”).

expectation that public pressure would limit the use of preventive detention for sex offenders is misguided.

Similarly, the media has acted to not only reinforce, but to inflame public passions about the issue by labeling it an ongoing “war.”¹³² As I have written elsewhere, the media has even prodded already harsh legislatures to enact even more draconian laws on sex offenders:

When Bill O’Reilly started a segment on his Fox News show that exposed states with “weak” sex offender laws, one of his early targets was Alabama. Because of the O’Reilly segment, the Governor called a special session of the legislature which met one week later and passed new harsh sex offender restrictions unanimously.¹³³

Broadcast television even allocated programming somewhere between news media and entertainment, which stoked public fears when the show *To Catch a Predator* became a sensation.¹³⁴ There is simply no reason in our modern world of sensationalized media coverage to expect the media to be a watchdog for government abuse of sex offenders through preventive detention.

At different moments throughout American history, the courts have stepped in to prevent a public caught up in the moment from infringing on basic constitutional liberties. However, when it comes to sex offenders, their decisions have trended strongly in the opposite direction. While a variety of constitutional rights and doctrines have been implicated by new sex offender laws, the courts have refused to recognize this and instead

¹³² See, e.g., Mark Donald, *Hello My Name Is Pervert*, DALLAS OBSERVER, Jan. 11, 2001, at 34 (“Among their numbers is an even smaller percentage who kidnap and maim and murder and who set the harsh tone of the war against all sex offenders.”); Brian Friel, *The War on Kiddie Porn*, NAT’L J., Mar. 25, 2006, at 40 (“No matter what happens in Congress, law enforcement officials expect child porn—and the war on porn—to continue expanding.”); Dave Johnston, *Proposed Sex-Criminal Law Reaches Too Far*, U. CAL. SAN DIEGO GUARDIAN, Mar. 12, 2007, available at <http://www.ucsdguardian.org/opinion/proposedsexcriminallawreacheestoofar> (“Americans have a growing cache of weapons in the war on sexual predators.”); Lisa B. McPheron, *Team Formed to Keep Track of Sex Offenders*, PRESS ENTERPRISE (Riverside, Cal.), Jan. 20, 2006, at B08a (““This is a pandemic issue that we can’t take serious enough,” she said. ‘This is a war.’”) (quoting activist Erin Runnion); *Tough Child Sex Crimes Bill Now Law in California; Loopholes for Child Rapists Closed*, U.S. NEWSWIRE, Oct. 4, 2005 (““This is the real battleground in the war against child molesters,” said PROTECT executive director, Grier Weeks. ‘For every child abducted by a stranger, there are tens of thousands who are prisoners in their own homes. Today, we won a major victory for these children.’”); Maria Vogel-Short, *Rarely Seen, Always There*, N.J. LAW., Dec. 23, 2002, at 1 (“It’s a plain, nondescript room on the fifth floor of Trenton’s Justice Complex, where handpicked cops who can work computers with the same ease that others work radar or stakeouts, quietly wage war on child molesters and others who can be nailed via the computer.”).

¹³³ *War on Sex Offenders*, *supra* note 15, at 458.

¹³⁴ *To Catch a Predator* (NBC).

have shown a willingness to create rules to accommodate these statutes.¹³⁵ Courts have engaged in legal gymnastics to find all of the following to be non-punitive: registration,¹³⁶ civil commitment,¹³⁷ residency restrictions,¹³⁸ and, unbelievably, criminal prosecutions for failing to register carrying ten year prison penalties.¹³⁹ As a result, numerous constitutional rights have been held to not apply to sex offenders subject to those restrictions, programs, and prosecutions.

Sometimes, political or other prominent figures will emerge to lead the charge against excessive governmental actions which infringe upon basic freedoms. In the case of sex offenders, it is likely that either no such person will emerge or that they will simply be ignored. In the case of the various restrictions passed against sex offenders, they are usually passed unanimously and without debate.¹⁴⁰ The story of Patty Wetterling presents an interesting instance of a person with sufficient credibility to question sex offender laws largely being dismissed. Wetterling's son, Jacob, was

¹³⁵ *War on Sex Offenders*, *supra* note 15, at 459–71.

¹³⁶ *See, e.g.*, *Smith v. Doe*, 538 U.S. 84 (2003).

¹³⁷ *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346 (1997).

¹³⁸ *See, e.g.*, *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005).

¹³⁹ *See, e.g.*, *United States v. May*, 535 F.3d 912, 920 (8th Cir. 2008) (“As was the case in *Smith*, SORNA’s registration requirement demonstrates no congressional intent to punish sex offenders.”); *United States v. Pitts*, No. 07-157-A, 2007 U.S. Dist. LEXIS 82632, at *16–17 (M.D. La. Nov. 7, 2007) (“As to the first prong of the test, the Congress clearly intended this to be a civil, nonpunitive, regulatory regime. Congress stated that intent in the text of the statute by declaring that the Sex Offender Registration and Notification Act was established ‘in order to protect the public from sex offenders and offenders against children.’ Nothing in the Walsh Act suggests that this was intended to be anything else.”) (internal citation omitted); *United States v. Cardenas*, No. 07-80108-Cr-Hurley/Vitunac, 2007 U.S. Dist. LEXIS 88803, at *29 (S.D. Fla. Nov. 5, 2007) (“Like the Alaska statute in *Smith*, SORNA was entirely codified in a section of the code, civil in nature, which is devoted to ‘Public Health and Welfare,’ with the exception of the new federal failure to register crime which is codified in Title 18. The preponderance of SORNA relates to a national registration system that cures defects in the state systems and provides uniformity in the management of sex offender registration information. For these reasons, this Court finds that SORNA is a civil, non-punitive law.”); *United States v. Buxton*, No. CR-07-082-R, 2007 U.S. Dist. LEXIS 76142, at *11 (W.D. Okla. Aug. 30, 2007) (“Congress expressly stated that the purpose of SORNA was ‘to protect the public from sex offenders and offenders against children.’ This Court concurs with the above cases wherein the courts concluded that SORNA’s stated purpose is non-punitive.”) (internal citation omitted); *United States v. Hinen*, 487 F. Supp. 2d 747, 755 (W.D. Va. 2007); *United States v. Lang*, No. CR-07-0080-HE, 2007 U.S. Dist. LEXIS 56642, at *5 (W.D. Okla. June 5, 2007); *United States v. Mason*, 510 F. Supp. 2d 923, 929 (M.D. Fla. 2007).

¹⁴⁰ *See* Wayne Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1 n.9 (2006).

kidnapped at gunpoint in 1989.¹⁴¹ After the tragic disappearance of her son, Wetterling formed a major non-profit organization that focused on improving child safety.¹⁴² She lambasted government officials for inadequate efforts to address sex crimes against children.¹⁴³ Her efforts led to the federal predecessor law of the AWA, the Jacob Wetterling Crimes Against Children and Sex Offender Registration Act,¹⁴⁴ and other laws being passed across the United States.¹⁴⁵ More recently, however, Wetterling has become an outspoken critic of sex offender residency restrictions, lifetime registration, and other newer statutes.¹⁴⁶ She believes

¹⁴¹ Richard Meryhew, *Jacob's Legacy; Ten Years of Heartache Haven't Weakened Patty Wetterling's Tireless Resolve to Protect Children*, STAR TRIB. (Minneapolis), Oct. 17, 1999, at 1A.

¹⁴² *Id.*

¹⁴³ Daniel R. Browning, *Bill Calls for National Registry of Sex Offenders After Prison*, ST. LOUIS POST-DISPATCH, Dec. 19, 1993, at 7A (“[Patty Wetterling] started the Jacob Wetterling Foundation to lobby for a law requiring convicted sex offenders to register with authorities when they are freed from prison. So far, 24 states have passed such a law, including Illinois, which requires registration for 10 years after parole. Missouri does not require sex offenders to register with authorities, but Attorney General Jay Nixon is interested in the idea, said a spokeswoman for Nixon. In a telephone interview last week, Patty Wetterling said a federal law was needed so sex offenders wouldn’t be able to slip from scrutiny in states that don’t have registration requirements. Most child-sex offenders are habitual criminals, she said.”).

¹⁴⁴ Greg Gordon, *Wetterling Sets Her Sights on House Seat; Experts Say She Is a Long Shot Against Incumbent Kennedy*, STAR TRIB. (Minneapolis), Apr. 27, 2004, at A1.

¹⁴⁵ Browning, *supra* note 143.

¹⁴⁶ See, e.g., Catharine Skipp and Arian Campo-Flores, *A Bridge Too Far: Residency Restrictions Have Forced Child Sex Offenders in Florida to Camp Out Under a Causeway*, NEWSWEEK, Aug. 3, 2009, at 46, 50 (“‘If an offender ends up with no residence, that shouldn’t make any of us feel safer,’ says Patty Wetterling, whose son’s abduction prompted the creation of the first federal sex-offender registry in 1994. ‘What they need is stability, support, counseling, and treatment.’”); Patty Wetterling, *The Harm in Sex-Offender Laws*, SACRAMENTO BEE, Sep. 14, 2007, available at <http://www.sacbee.com/110/story/377462.html>:

But I’m worried that we’re focusing so much energy on naming and shaming convicted sex offenders that we’re not doing as much as we should to protect our children from other real threats.

Many states make former offenders register for life, restrict where they can live, and make their details known to the public. And yet the evidence suggests these laws may do more harm than good. . . . Few people today are concerned about the rights of sex offenders. Most now complain our laws are not tough enough.

But they might be missing some basic facts. First, in most states “sex offender” covers anyone, including juveniles, convicted of any sexual offense, including consensual teenage sex, public urination and other non-violent crimes. Second, Jacob was the exception, not the rule: more than 90 percent of sexual violence is committed by someone the child knows. And third, most shocking to me, sex offenders are less likely to re-offend than commonly thought. A Department of Justice study suggested ex-offenders have a recidivism rate of 3 percent to 5 percent within the first three years after release. . . . We need better answers. We need to fund prevention

that the government has overreacted based upon a societal panic about sex offenders.¹⁴⁷ Even while running for Congress,¹⁴⁸ she has steadfastly maintained that some sex offender policies ultimately do a disservice to children like her son Jacob.¹⁴⁹ Not surprisingly, now that she is an advocate against sex offender laws, politicians are less willing to champion her cause.

With the courts, politicians, media, and public aligned in supporting virtually every sex offender law that is proposed, it is difficult to imagine that preventive detention will face any serious opposition. Perhaps the only possible check is economic. The cost of housing sex offenders in these facilities is very high.¹⁵⁰ Yet, despite enormous budgetary pressures, SVP programs have become budgetary “sacred cow[s]” in jurisdictions because of political pressures in favor of them.¹⁵¹ As the United States economy

programs that stop sexual violence before it happens. We need to look at what can help those released from prison to succeed so that they don't victimize again—and that probably means housing and jobs and treatment and community support. Given that current laws are extremely popular, taking truly effective measures may exact a high political price. But that's surely not too much to pay to prevent the kidnap, rape or murder of another child.

¹⁴⁷ Wetterling, *supra* note 146.

¹⁴⁸ See Gordon, *supra* note 144, at 1A.

¹⁴⁹ Barbara Polichetti, *Residency Limits on Sex Offenders Questioned*, PROVIDENCE J., Dec. 6, 2008, at A2:

Patty Wetterling has spent 19 years trying to find out what happened to her son, Jacob, abducted at age 11 while riding his bike near the family's Minnesota home.

But although she is well aware that statistics show sexual assault is the prime motivation in child kidnappings, Wetterling doesn't back tough residency restrictions for convicted sex offenders

As one of the conference's keynote speakers, Wetterling, a former math teacher who now serves as director of sexual violence prevention for the Minnesota Department of Health, said she came to Rhode Island to “talk about hope.”

“The topic of sex offenders is one that promotes fear, and I know that fear because I lived it,” she said. “I lived it and I didn't like it so I have moved [toward] hope. I have hope that I will find out what happened to my son.”

“And we must have hope that sex offenders will succeed in their rehabilitation, because that is the ultimate safety for our children.”

¹⁵⁰ See Gary Craig, *Cost and Number Committed Surpass State's Expectations*, ROCHESTER DEMOCRAT & CHRON., Dec. 24, 2010, available at 2010 WLNR 25407862:

The program is far costlier than imprisoning criminals: a civilly detained offender costs four times the spending for an inmate jailed in a state prison. New York's average price tag to treat sex offenders in secured facilities—about \$175,000 a person—makes it the costliest program of its kind in the country, slightly more than in California. . . . For New York lawmakers, this will create a demand for tens of millions of tax dollars in coming years at the same time that officials face dire budgetary constraints.

¹⁵¹ *Id.*

recovers, even the modest economic constraints that exist will surely diminish.

IV. DANGEROUS PRECEDENTS

Because of the severe deprivation of basic freedoms involved with lifetime detention, it might simply be enough to object to such laws on that basis alone. However, the leeway that has been afforded to the government regarding sex offenders is particularly problematic because of the precedents being set. By using particularly broad statutory language and court rulings, the exceptions relevant to sex offenders threaten to swallow the general rule for Americans. Further, as these commitment provisions fit into a larger criminal war on sex offenders, they represent particular dangers over the long term.

A. BROAD APPLICATION AND COURT RULINGS

The language of the federal SVP statute gives it a wide reach and its indefinite term with limited review affords significant government control of individuals. However, not satisfied with the already broad terms of the AWA civil commitment program, the government has sought to expand its scope even further. And courts have issued opinions in reviewing the constitutionality of the statute that have gone beyond what is necessary to uphold the statute. The result of these two trends is that the limits of preventive detention application are being pushed more broadly, setting dangerous future precedents.

Even though the Government might not be expected to test the limits of the AWA criteria until it had received clear court approval,¹⁵² early cases show the potentially dangerous strategic use of the statute. The Government has attempted to move persons to sex offender facilities from immigration detention,¹⁵³ into a Bureau of Prisons facility because of space

¹⁵² Baron-Evans & Noonan, *supra* note 109, at 58 (noting that in its initial attempts to commit persons, the “[Bureau of Prisons] is presumably exercising the utmost care in filing [Sexually Dangerous Person] certifications in order to minimize judicial discomfort with the statute”).

¹⁵³ *United States v. Hernandez-Arenado*, 571 F.3d 662, 663 (7th Cir. 2009):

This case presents us with the question of whether a person held by the United States Immigration and Customs Enforcement (“ICE”—formerly the Immigration and Naturalization Service (INS)) who is placed in a facility run by the Bureau of Prisons (“BOP”), is in the custody of the BOP for purposes of the Adam Walsh Child Protection and Safety Act of 2006 (the “Act”) or whether he is in the custody of the ICE and therefore does not fall within that Act. Under the Act, if he is in the custody of the BOP and is certified to be a sexually dangerous person, his release from custody is stayed and he is subject to civil commitment.

(internal citation omitted).

constraints in United States Army prisons,¹⁵⁴ and to move some who had been determined incompetent to stand trial.¹⁵⁵ In several cases, the Government even contended that persons already released from federal custody were eligible for certification to be placed in civil commitment.¹⁵⁶ Because of the low burden of proof on the Government in AWA civil commitment cases, it is easier for offenders to be moved into that stream when legal actions in other environments show only limited possibilities of success. Now, with the courts being largely complacent as to the use of AWA civil commitment, it is likely that more offenders in a variety of

¹⁵⁴ *United States v. Joshua*, 607 F.3d 379, 381 (4th Cir. 2010):

Appellee Benjamin Barnard Joshua was an Army officer stationed in Germany. He was prosecuted by military court-martial in 1995 for sexually molesting children in violation of the Uniform Code of Military Justice (the "UCMJ"). After Joshua pleaded guilty, the court-martial sentenced him to 25 years imprisonment. The court-martial also ordered loss of pay and dishonorable discharge. Joshua began serving his prison sentence with an Army garrison in Germany. He was later transferred to the United States Disciplinary Barracks in Leavenworth, Kansas ("USDB Leavenworth"), operated by the military.

In June 2001, when USDB Leavenworth was being downsized, the Army transferred Joshua to the BOP. He was initially housed at the Federal Correctional Institute in Sandstone, Minnesota, and later transferred to the Federal Correctional Institute in Butner, North Carolina. Because of his military prisoner status, the BOP housed Joshua under a May 1994 "Memorandum of Agreement" between the Army and BOP (the "Memorandum") regarding "Transfer of Military Prisoners to the Federal Bureau of Prisons." Under this agreement, the BOP promised to house up to 500 military prisoners for the Army's convenience. The BOP has called such prisoners "[c]ontractual boarders." Although they become "subject to all []BOP administrative and institutional policies and procedures," the Memorandum states that military prisoners within BOP facilities remain "in permanent custody of the U.S. Army," which "retain[s] clemency authority."

On March 9, 2009, eight days before Joshua's scheduled release, the Attorney General certified him as "sexually dangerous" and the government filed a petition for civil commitment under § 4248. Joshua moved to dismiss the petition, claiming that he was not "in the custody of the Bureau of Prisons."

(internal citations omitted); *United States v. Parker*, 2010 U.S. App. LEXIS 19327 (4th Cir. Sep. 16, 2010).

¹⁵⁵ Respondents' Brief, *supra* note 9, at 3:

After Respondent Shane Catron was found not competent to stand trial, the government filed a "Certificate of Mental Disease or Defect and Dangerousness" under 18 U.S.C. § 4246. Two months later, the government withdrew the § 4246 certificate and substituted a certificate pursuant to § 4248. Throughout his competency study, the § 4246 certification process, and the initial period of his § 4248 certification, Mr. Catron was hospitalized at the Federal Medical Center in Butner, North Carolina. He is now incarcerated in the segregated housing unit of FCI-Butner.

¹⁵⁶ *United States v. Broncheau*, Nos. 5:06-HC-2219-BO, 5:07-HC-2101-BO, 5:07-HC-2148-BO, 5:07-HC-2166-BO, 5:07-HC-2025-BO, 5:07-HC-2185-BO, 5:07-HC-2206-BO, 5:08-HC-2037-BO, 5:07-HC-2063-BO, 2010 U.S. Dist. LEXIS 126202, at *1 (E.D.N.C. Nov. 22, 2010) ("Respondents are former federal prisoners who have had Certifications of a Sexually Dangerous Person pursuant to 18 U.S.C. § 4248 filed against them by the federal government under the Adam Walsh Child Protection and Safety Act of 2006.").

locations throughout the federal legal system might find themselves in the civil commitment net.

The potential reach of a sex offender civil commitment program was initially widened by the Court's holding in *Hendricks*. One of the oddities created by the Court's decision is that a statute that applies more broadly and offers less protection for individual rights will be *more* likely to be held constitutional. If a state enacted a law that authorized civil commitment to only those persons convicted of sex offenses and offered the full panoply of constitutional safeguards of a criminal trial, the established methodology will mean that the statute is more likely to be determined punitive and not civil. However, if a statute applies to any person who is potentially sexually dangerous and offers scant procedural protections that are associated with civil hearings, the *Hendricks* analysis would indicate that such a law would certainly be constitutional. This counterintuitive result can occur because the Court determines punitiveness largely based upon whether the hearing seems more like a criminal or civil process and if the conduct regulated appears to be entirely coextensive with the criminal statute used in the prior criminal trial. As a result, *Hendricks* and its progeny essentially encourage legislatures around America to offer less due process and allow preventive detention to be applied as widely as possible in order to ensure constitutionality.

The *Comstock* opinion¹⁵⁷ is certainly notable in the extensive authority that has been given to the federal government in this area. The Court could have simply decided that a person's original conviction based upon an enumerated power (usually the Commerce Clause) would have afforded the federal government the authority to divert a person to a mental facility. A tightly woven analogy to persons who commit crimes or suffer a mental breakdown in prison could have provided a narrow ruling. However, the majority opinion essentially rewrote law surrounding the Necessary and Proper Clause to allow for virtually unfettered federal power in the area of sex offender civil commitment.

Lower federal courts have also been permissive in upholding other aspects related to the federal SVP law. Because of the recent application of the civil commitment provisions, there have only been a handful of cases thus far. Yet, the early opinions by the federal appellate courts are disconcerting. The First Circuit allowed a diagnosis to be used to commit a person that the defense expert concluded

was not a generally accepted diagnosis in the mental health community, did not fit within the DSM definition of paraphilia, lacked diagnostic criteria and could not be consistently defined; that normal adults may find adolescents arousing; and that

¹⁵⁷ United States v. Comstock, 130 S. Ct. 1949 (2010).

articles offered by the government to support a hebephilia diagnosis were not legitimate peer-reviewed research.¹⁵⁸

The Court found that neither consensus of the medical community nor placement within the DSM was necessary to be the statutory definition of “mental illness.”¹⁵⁹ The Second Circuit held that court-ordered polygraph tests taken throughout a convict’s supervised release could be used as evidence in a subsequent civil commitment hearing.¹⁶⁰ This effectively removed any right against self-incrimination and allowed for government-compelled testimony in civil commitment cases. While there is still a chance for federal courts to limit the scope of the federal SVP law, early indications are not supportive of that possibility.

B. WAR MENTALITY

While murderers, armed assailants, gang leaders, and spousal abusers return to the streets of America after their sentences are complete, sex offenders are treated differently. The distinction between those who commit sex offenses and other criminals is not so much substantive as it is political. America has begun what can only be described as a criminal war on sex offenders akin to the War on Drugs that has continued for nearly forty years.¹⁶¹ And as in any war, domestic or foreign, the normal rules protecting liberty are suspended and significant exceptions are made to allow for wartime governmental action. In the case of the drug war, the changes to constitutional doctrine and policing in general have been

¹⁵⁸ *United States v. Carta*, 592 F.3d 34, 38 (1st Cir. 2010).

¹⁵⁹ *Id.* at 39–40 (“The district court may have assumed that the statutory concept is delimited by the consensus of the medical community, but this is not so. Further, a mental disorder or defect need not necessarily be one so identified in the DSM in order to meet the statutory requirement.”).

¹⁶⁰ *United States v. Ayers*, 371 F. App’x 162, 163 (2d Cir. 2010):

[Ayers’s] sole challenge is to the district court’s failure to prohibit the use of testing results in any future civil commitment proceedings.

The absence of such a prohibition does not intrude on a cognizable liberty interest. The Self-Incrimination Clause of the Fifth Amendment is expressly limited to “any criminal case.” Moreover, federal regulations contemplate that civil commitment decisions will be based on all available relevant evidence.

Ayers nevertheless suggests that because no statutory or constitutional provision expressly bars the use of the ordered examination results during civil commitment proceedings, the district court was required to provide such protection to ensure that the condition did not reach farther than required by legitimate sentencing concerns. The argument misunderstands the nature of the relevant inquiry under 18 U.S.C. § 3583(d)(2), which focuses on the unnecessary deprivation of liberty as reflected in an existing right.

(internal citations omitted).

¹⁶¹ *War on Sex Offenders*, *supra* note 15, at 444–46.

substantial.¹⁶² Once these exceptions are made, they are rarely, if ever, removed. A criminal war is marked by three elements: myth creation, exception-making, and a marshaling of resources.¹⁶³

Civil commitment fits well within all three criteria in the War on Sex Offenders. As mentioned previously, the cost of civil commitment is exorbitant and requires a substantial marshaling of resources to implement.¹⁶⁴ With federal block grants under the AWA buttressing the states, the programs are better funded than they ever have been.¹⁶⁵ The entrance of the federal government into a criminal war is a notable event because criminal justice expenses are a much higher percentage of state budgets (and are thus often unsustainable).¹⁶⁶

Civil commitment relies on and reinforces several myths regarding sex offenders. Because of the focus on post-release recidivism, SVP laws are part of the narrative of “incurable” sex offenders discussed earlier. The laws also emphasize the danger of strangers instead of the 90% of child molestations which are done by acquaintances, friends, and family members.¹⁶⁷ By creating a program focused on “stranger danger,” it spends an inordinate amount of criminal justice resources to fulfill the goals created by a widespread myth.

Also significant is that the civil commitment programs maintain the illusion of a homogenous sex offender class.¹⁶⁸ As I have noted elsewhere, sex offenders are a remarkably diverse group:

There are, of course, rapists, child molesters, and child pornographers as some of the focal populations. However, many other crimes are substantially represented on sex offender registries, including flashers, gropers, voyeurs, prostitutes, persons who have engaged in an adult incest relationship, stalkers, and those who have committed bestiality.

Even that extensive list only tells part of the story. For example, many persons are currently on sex offender registries for consensual sodomy even though such statutes are presumptively unconstitutional after *Lawrence v. Texas*. Producers of obscene videos can also be considered sex offenders

There are, however, many other sex offenders reported in the media who further illustrate that the sex offender population is far from homogeneous. In many states, public urination is prosecuted as public indecency, meaning that those persons so convicted are categorized with flashers. For example, Janet Allison was a mother

¹⁶² *Id.*

¹⁶³ *See generally id.*

¹⁶⁴ *Id.* at 440–46.

¹⁶⁵ Fabian, *supra* note 62, at 45.

¹⁶⁶ *State Budgets*, *supra* note 105.

¹⁶⁷ *See* Perlman, *supra* note 38.

¹⁶⁸ *War on Sex Offenders*, *supra* note 15, at 455–58.

who, after trying to stop her fifteen-year-old daughter's relationship, allowed her daughter's boyfriend to move in with the family. She was prosecuted as an accessory to statutory rape and is subject to the full range of sex offender requirements and restrictions in her state. Other crimes are so strange as to defy categorization. A recent survey found that 20% of teens engage in "sexting" which is the transmission of images that might be deemed child pornography. Already, some prosecutors have sought to charge such teens with distribution of child pornography for "sexting."

The sex offender population is so diverse that treating the population as a monolith, as almost all modern sex offender laws have, is foolish.¹⁶⁹

While it might appear that the label "sexually dangerous person" might be narrower than the overall population of sex offenders, it is unclear to what degree the label is not all-inclusive. As noted previously, the Bureau of Prisons's definitions of operative statutory language give wide latitude to the government in seeking civil commitment. Further, because the "sexually dangerous" classification does not require a past sex crime conviction, it is in some ways broader than the already confused "sex offender" category.

The exception-making aspect of criminal wars typically comes about in court doctrines but emerges in other ways as well. In the case of new constitutional exceptions, civil commitment has radically changed the areas related to the Ex Post Facto Clause,¹⁷⁰ due process,¹⁷¹ the Commerce Clause,¹⁷² and double jeopardy.¹⁷³ Because of the newness of the laws, there has been very little litigation as to standards for release, but it is likely that new constitutional issues will emerge in those cases as well.¹⁷⁴ A non-constitutional exception being brought about by civil commitment of sex offenders is the blurring of the lines between criminal punishment and medical treatment. Indeed, it is the cooption of psychiatry for criminal ends that has troubled many members of the medical community.¹⁷⁵

Criminal wars bring costs not associated with traditional crime fighting. As civil commitment has become part of the War on Sex Offenders, it too will be subject to and part of these broad consequences. The primary concerns with criminal war fighting related to policy lock, the

¹⁶⁹ *Id.* at 455–56.

¹⁷⁰ *Id.* at 459–63.

¹⁷¹ *Id.* at 468–72.

¹⁷² *Id.* at 463–67.

¹⁷³ *Kansas v. Hendricks*, 521 U.S. 346 (1997).

¹⁷⁴ For example, in the context of residency restrictions on sex offenders, new constitutional claims are regularly attempted with occasional success. *See, e.g., Mann v. Ga. Dep't of Corr.*, 653 S.E.2d 740 (Ga. 2007) (holding that retroactive application of residency restriction to a preestablished residence was an unconstitutional taking of the sex offender's property).

¹⁷⁵ *Harris, supra* note 48, at 340.

erosion of civil liberties on a wide scale, collateral damage, and exceptions becoming rules.

A criminal war can bring about a policy lock that prevents policy corrections even in the face of failure.¹⁷⁶ The War on Drugs, in particular, has been marked by growing escalation as evidence has increasingly shown it to be ineffective.¹⁷⁷ Because a war is an existential crisis premised on the idea that the enemy is a genuine threat to our way of life, it cannot simply be abandoned in the manner of other failed criminal justice programs.¹⁷⁸ As the War on Drugs has illustrated, rather than eliminating failed policies, the course taken is usually escalation.¹⁷⁹

In the case of civil commitment of sex offenders, politicians have already demonstrated a seeming immunity to evidence of ineffectiveness and have pushed science aside in formulating the laws. As Eric Janus noted:

Despite the acknowledged failure of the earlier sex offender commitment laws, Washington and Minnesota returned to this legal form in the early 1990s to address the “gap” in social control. A few other states . . . quickly followed suit Almost all of the second-wave laws claim to address “sexual predators,” a term that invokes images of nonhuman beasts, and places the role of psychiatric disorder more in the background.¹⁸⁰

With the societal panic regarding sex offenders being so high, it is difficult to imagine a shift away from civil commitment. One need only imagine the media coverage and political advertisements decrying the release of “sexual predators” into the street.¹⁸¹ As noted previously, the lack of institutional checks in regard to SVP laws make policy lock a likely consequence as part of the War on Sex Offenders.

The case that SVP laws erode civil liberty is fairly easy to make. It is the greatest violation of a person’s freedom to be incarcerated against his or her will, potentially for life, with little or no legal recourse, subject to unauthorized treatment, and based upon standards and procedures far less than would normally be afforded in such a situation. However, the potential reach of the SVP laws is still to be determined. The phrase “sexually dangerous” has proven to be highly malleable (including

¹⁷⁶ *War on Sex Offenders*, *supra* note 15, at 472–73.

¹⁷⁷ *Id.*

¹⁷⁸ Radley Balko, *More on Drug Czar's Bid To End War on Drugs*, REASON HIT & RUN (May 14, 2009), <http://reason.com/blog/show/133496.html>.

¹⁷⁹ *War on Sex Offenders*, *supra* note 15, at 437–40.

¹⁸⁰ JANUS, *supra* note 23, at 22–23.

¹⁸¹ See, e.g., Keith Matheny, *Areas Fear Predators' Releases: States Struggle with What To Do When Sexually Violent Offenders Finish Their Sentences*, USA TODAY, Mar. 4, 2010, at 3A.

possession of child pornography and statutory rape according to the Bureau of Prisons). Further, because of permissive court rulings, the only real limitations on who can be committed are statutory and not constitutional. Presently, there is nothing in the existing case law to preclude broader definitions of populations from becoming eligible for commitment.

Criminal wars, like military ones, inevitably bring collateral damage.¹⁸² In the case of civil commitment of sex offenders, families may be forever broken apart, persons who have committed minor offenses might be detained for life, and resources might be taken away from more effective policies against sexual violence. These forms of intentional and unintentional collateral damage will be a consequence of long-term use of preventive detention of sex offenders.

A highly salient point throughout this Article has been the way in which precedents have enormous staying power. And when an exception is created for sex offenders, it becomes a rationale for another vulnerable group to be targeted. Ultimately, the exception stops being exceptional and instead becomes the rule. This has been a particularly negative aspect of the War on Drugs. Police forces have become militarized in areas beyond drug-fueled gang violence.¹⁸³ The doctrines of the First,¹⁸⁴ Second,¹⁸⁵ Fourth,¹⁸⁶ Fifth,¹⁸⁷ Sixth,¹⁸⁸ Eighth,¹⁸⁹ Ninth,¹⁹⁰ Tenth,¹⁹¹ and Fourteenth¹⁹²

¹⁸² *War on Sex Offenders*, *supra* note 15, at 475–77.

¹⁸³ Rafeal Hermoso, *Police Brutality an Endemic, Not Isolated Problem*, ORANGE COUNTY REG., Sept. 28, 1999, available at LEXIS.

¹⁸⁴ See *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (creating what appears to be a drug use speech exception for students); Tom C. Rawlings, Employment Division, Department of Human Resources v. Smith: *The Supreme Court Deserts the Free Exercise Clause*, 25 GA. L. REV. 567, 593 (1991) (defining a limitation to the Free Exercise Clause related to the use of drugs for religious purposes).

¹⁸⁵ See Robert J. Cottrol, *Submission Is Not the Answer: Lethal Violence, Microcultures of Criminal Violence and the Right to Self-Defense*, 69 U. COLO. L. REV. 1029, 1032 n.8 (1998).

¹⁸⁶ See Michael D. Blanchard & Gabriel J. Chin, *Identifying the Enemy in the War on Drugs: A Critique of the Developing Rule Permitting Visual Identification of Indescript White Powder in Narcotics Prosecutions*, 47 AM. U. L. REV. 557, 603–05 (1998).

The impact of the drug war on the scope of Fourth Amendment protection from unreasonable search and seizure has been dramatic. Intensified law enforcement efforts involving wiretaps, as well as innovations in search and seizure such as police saturation patrols and street sweeps, drug courier profiles, aerial surveillance, drug testing, thermal surveillance, and the demise of the ‘knock and announce’ rule, all justified by the exigencies of the War on Drugs, have significantly encroached on Fourth Amendment protections of personal privacy.

(footnotes omitted); see also Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851 (2002); David A. Moran, *The New Fourth Amendment Vehicle Doctrine: Stop and Search Any Car at Any Time*, 47 VILL. L. REV. 815 (2002); Michael J. Reed, Jr., Comment, *Florida v.*

Amendments have all been changed because of certain aspects of the drug war. As the War on Sex Offenders is still in its early stages, it is too early to tell what the long-term implications of ongoing exception-making will be.

V. CONCLUSION

Our nation is one that has defined the legal term “sex offender” very broadly to include, among other crimes, people convicted of rape, indecent exposure (including some public uriners), possession of child pornography, voyeurism, production or distribution of obscenity, bestiality, solicitation of a prostitute, statutory rape, distribution of child pornography (including what has become known as “sexting” by teenagers),¹⁹³ incest, and lower degrees of sexual assault including groping. It has not even been a decade since the Supreme Court finally struck down laws punishing

Bostick: The Fourth Amendment Takes a Back Seat to the Drug War, 27 NEW ENG. L. REV. 825 (1993).

¹⁸⁷ See Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 YALE L.J. 2593, 2612 (1994) (“[T]he property rights acknowledged by the Fifth Amendment have been greatly undermined by civil asset forfeitures. When the drug war finally ends, these rights and freedoms will only be regained with great struggle.”).

¹⁸⁸ See Kathleen R. Sandy, *The Discrimination Inherent in America’s Drug War: Hidden Racism Revealed By Examining the Hysteria Over Crack*, 54 ALA. L. REV. 665, 668 (2003):

Sixth Amendment rights have also been whittled down to fight the War on Drugs. Those accused of selling drugs have no right to confront their accuser, presumably to protect informants, even though the Sixth Amendment clearly states that “the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation [and] to be confronted with the witnesses against him.

¹⁸⁹ See *id.* at 668–69 (“Traditionally, the Eighth Amendment’s ban on ‘cruel and unusual punishments’ has been used to require that any punishment is proportional to the crime committed. Mandatory minimums have taken away judicial discretion in sentencing and mock the idea of proportional punishment. In 1997, a low-level crack dealer on a first offense charge would have served ten years and six months, while a weapons charge would have earned seven years and seven months and rape would have earned a mere six years and five months.”).

¹⁹⁰ See *Gonzales v. Raich*, 545 U.S. 1 (2005) (rejecting Ninth and Tenth Amendment arguments in upholding the Controlled Substances Act as applied under the Commerce Clause power).

¹⁹¹ See *id.*

¹⁹² See Robert Michael Dykes, Comment, *Cache and Prizes: Drug Asset Forfeiture in California*, 20 W. ST. U. L. REV. 633, 646 (1993) (“Our cornerstone of legal rights, the Constitution, particularly the Fourth, Fifth, Sixth and Fourteenth Amendments, has suffered serious erosion in the name of the ‘War on Drugs.’”).

¹⁹³ Tamar Lewin, *Rethinking Sex Offender Laws for Youths Showing Off Online*, N.Y. TIMES, Mar. 21, 2010, at A1 (“In most states, teenagers who send or receive sexually explicit photographs by cellphone or computer—known as ‘sexting’—have risked felony child pornography charges and being listed on a sex offender registry for decades to come.”).

consensual sodomy.¹⁹⁴ In such an environment, we authorize the government to detain indefinitely those who are deemed “sexually dangerous” at our peril. Such a tool and the legal exception-making necessitated by it represent a fundamental shift in the protection of our basic liberties. Once the government has such a power, it will not be easily taken away. And although few of us may shed tears for the rapists and child molesters subject to these new legal provisions, the potentially unending reach of these programs represents a threat to all us. In the name of protecting children and treating the mentally ill, there is the greatest danger to freedom because we may not see the threats to our way of life until it is too late.

Preventive detention, by its very nature, represents a departure from the normal model of criminal justice. It is usually justified as a necessary precaution in times of war, including criminal wars. Instead of waiting for someone to commit a wrong, the government acts to restrict liberty of persons who have yet to commit a wrong (but the government believes will likely do so in the future). The criminal justice system offers plenty of opportunities for the government to prosecute someone before harm is done using inchoate and conspiracy crimes. To go beyond those already broad tools, the circumstances should be highly exceptional, the danger should be real and imminent, and the net should be cast narrowly. In the case of sex offender civil commitment, the circumstances are no more dire than for other serious crimes, the danger is speculative based upon pseudo-science, and the net is far too broad. Because of these aspects of SVP laws, America should fundamentally reconsider its approach to fighting sexual violence. Laws like the federal SVP statute, premised on myths that allocate substantial resources in a never ending war, do not create a just or better society.

¹⁹⁴ *Lawrence v. Texas*, 539 U.S. 558 (2003).

