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## Striking a Balance Between the Paramount Importance of the Safety of Children and Constitutionally-Imposed Limits on State Power

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# Striking a Balance Between the Paramount Importance of the Safety of Children and Constitutionally-Imposed Limits on State Power

LINDSEY LAZOPOULOS FRIEDMAN\*

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## INTRODUCTION

There is arguably no penalty severe enough to punish those who sexually abuse and murder children.<sup>1</sup> However, the federal and Florida Constitutions say otherwise.

This Article takes the difficult position of exploring whether the State of Florida has deprived sexually violent predators—actors who unequivocally embody evil—of their constitutional rights. This Article examines and calls attention to the question of whether the United States justice system’s treatment of these sexually violent predators has the unintended consequence of undermining and eroding due process and liberty.

Florida civilly commits these criminals to indefinite confinement after the completion of their criminal sentences.<sup>2</sup> Under this regime, the court or a jury decides whether to release the criminal back into society *after* the criminal completes his or her sentence. In making this decision, the fact finder considers whether the criminal might—in the future—commit another act of sexual violence against a child, and if so, to *indefinitely* commit the criminal to detention at a mental institution.<sup>3</sup>

Let it be clear: Crimes of sexual violence are unspeakably evil and the perpetrators of these crimes should be punished to the maximum extent permitted by law.<sup>4</sup> This Article should not be misconstrued as a plea for leniency with respect to punishing sexually violent predators. Rather, the Article strives to identify the boundaries of legally permissible punishments, as well as provide ideas and information intended to improve our system of justice by, for example,

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<sup>1</sup> See Steven J. Wernick, *In Accordance with a Public Outcry: Zoning Out Sex Offenders Through Residence Restrictions in Florida*, 58 FLA. L. REV. 1147, 1151 (2006).

<sup>2</sup> See *infra* Part I, Section B.

<sup>3</sup> See 18 U.S.C. § 4248 (titled “Civil commitment of a sexually dangerous person”).

<sup>4</sup> See Wernick, *supra* note 1, at 1151.

issuing stiffer criminal sentences that satisfy constitutional safeguards.

The impetus for confining these criminals is readily apparent. The examples of horrifying cases are plenty. Megan Kanka was seven years old when she was raped and murdered by a man with two previous convictions for sexually assaulting children.<sup>5</sup> Megan's grave is covered in pink flowers—her favorite color.<sup>6</sup> Eleven-year-old Jacob Wetterling was riding his bike home in 1989 after renting a movie when he was kidnapped, assaulted, and murdered by Danny Heinrich.<sup>7</sup> Jacob's body was not found until 2016, after Heinrich confessed, he admitted that Jacob asked him “What did I do wrong?” before Heinrich shot Jacob.<sup>8</sup> Jimmy Ryce, nine years old, was walking home from the school bus in South Florida when he was abducted by Juan Carlos Chavez.<sup>9</sup> Chavez raped Jimmy, shot him in the back, and dismembered Jimmy before hiding his body in planters.<sup>10</sup> Jessica Lunsford was also a nine-year-old from Florida when

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<sup>5</sup> See Rich Schapiro, *Parents of Little Girl Who Inspired Megan's Law Recall Tragedy*, NY DAILY NEWS (July 27, 2014, 2:30 AM), <http://www.nydailynews.com/news/crime/parents-girl-inspired-megan-law-recall-tragedy-article-1.1881551>.

<sup>6</sup> See *id.*; The Associated Press, *Excerpt and Statement in 'Megan' Murder Case*, NEW YORK TIMES (June 19, 1997), <http://www.nytimes.com/1997/06/19/nyregion/excerpt-and-statement-in-megan-murder-case.html>.

<sup>7</sup> See *James Wetterling's Killer: "I am truly sorry for my evil acts"*, CBS News (Nov. 21, 2016, 2:14 PM), <http://www.cbsnews.com/news/jacob-wetterlings-killer-danny-heinrich-i-am-truly-sorry-for-my-evil-acts/> [hereinafter *James Wetterling's Killer*]; *The Hunt': Jacob Wetterling's Abductor*, CNN (Aug. 31, 2014), <http://www.cnn.com/2015/07/03/us/jacob-wetterling-abductor-the-hunt-john-walsh/>.

<sup>8</sup> See *James Wetterling's Killer*, *supra* note 7.

<sup>9</sup> See Jay Weaver & David Ovalle, *Juan Carlos Chavez Executed for Murder of Jimmy Ryce* (Feb. 12, 2014, 11:34 AM), <http://www.miamiherald.com/news/state/article1960281.html>.

<sup>10</sup> See *id.*

she was abducted and raped by John Couey, a convicted sex offender living near her home.<sup>11</sup> Couey buried Jessica alive in a garbage bag.<sup>12</sup>

When confronted with the most frightening, sickening acts that human beings inflict on others, a primary comfort to the victims' families involves assuring that the perpetrator will never harm another child. Indeed, Megan, Jacob, Jimmy, and Jessica are all namesakes for acts of state legislation aimed at preventing similar future crimes.<sup>13</sup> These laws, referred to as Sexually Violent Predator ("SVP") statutes, typically have registration or notification requirements and impose residency restrictions. Most significantly, with regard to infringing on the right to due process, SVP statutes permit indefinite civil commitment after the completion of a criminal sentence.

In response to the cruel torture Jimmy Ryce endured, Florida's legislature enacted the Jimmy Ryce Involuntary Commitment for Sexually Violent Predators Treatment and Care Act ("Jimmy Ryce Act") in 1998.<sup>14</sup> The Act was part of "a national movement to 'get tough' on sex offenders after the heinous murder and rape" of Jimmy.<sup>15</sup> But the Jimmy Ryce Act was not the first "unique pen-

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<sup>11</sup> See *Convicted Child Killer Couey Dies in Prison, Florida Officials Say*, CNN (Sep. 30, 2009, 7:42 PM), <http://www.cnn.com/2009/CRIME/09/30/florida.couey.dead/>; The Associated Press, *Convicted Child Killer John Evander Couey Dies in Prison, Before Planned Execution*, NEW YORK DAILY NEWS (Oct. 1, 2009, 9:23 AM) <http://www.nydailynews.com/news/national/convicted-child-killer-john-evander-couey-dies-prison-planned-execution-article-1.382004>.

<sup>12</sup> See *id.*

<sup>13</sup> See Schapiro, *supra* note 5; Weaver & Ovalle, *supra* note 9; *Convicted Child Killer Couey Dies in Prison, Florida Officials Say*, *supra* note 11; Jacob Wetterling's Killer, *supra* note 7.

<sup>14</sup> John Matthew Fabian, *The Risky Business of Conducting Risk Assessments for Those Already Civilly Committed as Sexually Violent Predators*, 32 WM. MITCHELL L. REV. 81, 82-83 (2005) (quoting Mari M. Presley, Comment, *Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act: Replacing Criminal Justice with Civil Commitment*, 26 FLA. ST. U.L. REV. 487, 494 (1999)); Presley, *supra* note 14, at 488.

<sup>15</sup> Fabian, *supra* note 14, at 83; Presley, *supra* note 14, at 494.

alt[y] that state and federal justice systems appl[ied] to sex offenders.”<sup>16</sup> The state of Washington “passed the first modern SVP statute in 1990.”<sup>17</sup>

SVP statutes often impose civil commitment on SVPs that meet certain criteria. The Jimmy Ryce Act, for example, requires a prior conviction for sexual violence, a mental abnormality, and a likelihood of reoffending.<sup>18</sup>

Critics of SVP civil commitment laws question whether these commitment statutes are “in truth, only further punishment of despised criminals.”<sup>19</sup> They argue that these acts are “thinly veiled effort[s] to circumvent a disappointing criminal justice system by keeping these criminals locked up long past their expired jail sentences.”<sup>20</sup>

The United States Supreme Court has repeatedly upheld SVP statutes as constitutional because the statutes are civil and not punitive.<sup>21</sup> But, “[c]ivil commitment [remains] the single most intrusive paradigm of post-conviction restraint, and it deserves our continued attention. . . .”<sup>22</sup> In fact, Jacob Wetterling’s mother, Patty, an advocate of children’s safety and a former chair of the Board of Directors of the National Center for Missing and Exploited Children,<sup>23</sup> has become an outspoken critic of sex offender registry laws, including the Adam Walsh Act<sup>24</sup> (the federal embodiment of the Jimmy Ryce Act). Patty Wetterling has urged “a second look” to determine

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<sup>16</sup> John L. Schwab, *Due Process and “The Worst of the Worst”: Mental Competence in Sexually Violent Predator Civil Commitment Proceedings*, 112 COLUM. L. REV. 912, 913 (2012).

<sup>17</sup> *Id.* at 916.

<sup>18</sup> See Presley, *supra* note 14, at 488.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See Mary Prescott, *Invasion of the Body Snatchers: Civil Commitment After Adam Walsh*, 71 U. PITT. L. REV. 839, 839–40 (2010).

<sup>22</sup> *Id.* at 839.

<sup>23</sup> See *Board of Directors*, NAT’L CTR. FOR MISSING & EXPLOITED CHILD., <http://www.missingkids.org/boardofdirectors> (last visited Apr. 17, 2017) (listing prior Board of Directors for the National Center for Missing and Exploited Children).

<sup>24</sup> Adam Walsh Child Protection and Safety Act (“Adam Walsh Act”) of 2006, Pub. L. No. 109-248, 120 Stat. 587, 42 U.S.C. §§ 16901–16991 (2012).

“whether laws like the ones named for her son are doing more harm than good and should be curbed.”<sup>25</sup>

This Article seeks to address the “single most invasive paradigm of post-conviction restraint,”<sup>26</sup> and grapples with the competing interests of the general public. When reviewing these statutes, the paramount safety of our children and deterrence to de-incentivize atrocious violence must be balanced against fundamental constitutional concepts of due process and the limits of the power of the police state. Florida Supreme Court Justice Barbara J. Pariente recognized the tension inherent in SVP civil commitment statutes in her dissenting opinion in *Westerheide v. State*:

Let there be no mistake: I deplore the criminal acts that [the defendant] committed. However, no matter how reprehensible an individual’s past criminal behavior has been, this country has prided itself on placing constitutional restrictions on the government before that individual’s liberty may be completely restrained.<sup>27</sup>

Part II of this Article describes SVP statutes, including a brief history, and provides more detail regarding the requirements of the Jimmy Ryce Act.<sup>28</sup> Part III examines prior constitutional challenges in the Supreme Court and the Eleventh Circuit’s treatment of challenges to the Jimmy Ryce Act—Florida being the only state in the Eleventh Circuit with an SVP civil commitment statute.<sup>29</sup> Part IV discusses the challenges to the constitutional justification that the Jimmy Ryce Act is “civil” rather than “punitive,”<sup>30</sup> Part V concludes

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<sup>25</sup> See Matt Mellema, Chanakya Sethi, & Jane Shim, *Sex Offender Laws Have Gone Too Far*, SLATE (Aug. 11, 2014, 12:20 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/08/sex\\_offender\\_registry\\_laws\\_have\\_our\\_policies\\_gone\\_too\\_far.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/sex_offender_registry_laws_have_our_policies_gone_too_far.html). See also Sarah Stillman, *The List*, THE NEW YORKER (Mar. 14, 2016), <http://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes> (reviewing unintended consequences of sex offender registries and the Adam Walsh Act).

<sup>26</sup> Prescott, *supra* note 21, at 839.

<sup>27</sup> *Westerheide v. State of Florida*, 831 So. 2d 93, 120 (Fla. 2002) (Pariente, J., dissenting in part).

<sup>28</sup> See *infra* Part I.

<sup>29</sup> See *infra* Part II.

<sup>30</sup> See *infra* Part III.

that criminal justice reform may be a better means to both protect victims from sexual predators and prevent circumvention of constitutional protections for individual liberties.<sup>31</sup>

### I. SEXUALLY VIOLENT PREDATOR CIVIL COMMITMENT ACTS

“Sex crimes have long been considered among the most monstrous offenses in society, especially when the victims are children.”<sup>32</sup> Legislation responding to sex crimes, particularly those against children, “has progressed from laws focused on identifying sex offenders and notifying the public, to laws that literally remove certain offenders from a community altogether.”<sup>33</sup> The most stringent laws, classified as civil commitment laws, “serve[] multiple purposes, only one of which is incapacitation.”<sup>34</sup> This Section begins with a brief historical overview of criminal punishment and civil restraints placed on sexually violent predators.<sup>35</sup> It then provides a description of the implementation and logistics of Florida’s Jimmy Ryce Act.<sup>36</sup>

#### A. *A Historical Pendulum of Criminal Punishment and Civil Restraint of Sexually Violent Predators*

By 1960, a majority of states enacted sexual predator legislation, “though the laws were rarely implemented.”<sup>37</sup> However, “[b]y the end of the 1980s, the number of states with sexual predator legislation had been cut in half due to concerns about the violation of constitutional rights and about whether such treatment programs were successful in diminishing sex offending once the offender [was] released.”<sup>38</sup>

As access to media progressed and news coverage of heartbreaking stories like Megan, Jacob, and Jimmy’s increased, the pendulum soon swung in the opposite direction.<sup>39</sup> By 1996, all fifty states and

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<sup>31</sup> See *infra* Conclusion.

<sup>32</sup> Wernick, *supra* note 1, at 1151.

<sup>33</sup> *Id.* at 1153.

<sup>34</sup> Presley, *supra* note 14, at 502.

<sup>35</sup> See *infra* Part I, Section A.

<sup>36</sup> See *infra* Part I, Section B.

<sup>37</sup> Fabian, *supra* note 14, at 89.

<sup>38</sup> *Id.*

<sup>39</sup> See Wernick, *supra* note 1, at 1153.

the District of Columbia had a law requiring registration and notification protocols ensuring public access to information about registered sex offenders.<sup>40</sup> Residence restrictions soon followed.<sup>41</sup> In 1996, shortly after Jimmy Ryce's death, "Florida became the first state to enact statewide residence restrictions against sexual predators whose victims were children."<sup>42</sup> In 1999, Alabama, also an Eleventh Circuit state, became the first state to extend the restrictions to all sex offenders.<sup>43</sup>

Since then, twenty states—Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin, as well as the District of Columbia, have enacted laws permitting the civil commitment of sexual offenders.<sup>44</sup> In 2006, Congress enacted the Adam Walsh Child Protection and Safety Act,<sup>45</sup> which authorized the federal government to make grants to states in order to establish civil commitment programs for sexually dangerous persons.<sup>46</sup>

The statutes' impact on reducing sexually violent crimes is murky.<sup>47</sup> Although a "decrease in sexual offending and reoffending has indeed occurred in Florida and nationwide," "[w]hatever effect civil commitment has had on preventing sexual crime, it is much smaller than lawmakers likely expected."<sup>48</sup>

Admittedly, if the threat of indefinite civil commitment does not stop sexually violent predators from committing sex crimes against

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<sup>40</sup> See *id.* at 1154.

<sup>41</sup> See *id.* at 1153–54. See, e.g., *id.* at 1157.

<sup>42</sup> *Id.* at 1157.

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* at 1157–58 n.60. Schwab, *supra* note 16, at 917 n.31 (citing Adam Deming, Sex Offender Civil Commitment Programs: Current Practices, Characteristics, and Resident Demographics, 36 J. Psychiatry & L. 439, 441 (2008)).

<sup>45</sup> 42 U.S.C. §§ 16901–16991.

<sup>46</sup> See 42 U.S.C. § 16971 ("[T]he Attorney General shall make grants to jurisdictions for the purpose of establishing, enhancing, or operating effective civil commitment programs for sexually dangerous persons.").

<sup>47</sup> See generally, e.g., Daniel Montaldi, *A Study of the Efficacy of the Sexually Violent Predator Act in Florida*, 41 WM. MITCHELL L. REV. 780 (2015).

<sup>48</sup> *Id.* at 848 ("In fact, the effect is too small to have had any empirically measurable effect on statewide sex crimes or totals.").

children then this statistic offers a practical basis for removing these offenders from our communities.

B. *Florida's Involuntary Civil Commitment of Sexually Violent Predators Act, (the Jimmy Ryce Act)*

Over three years after Jimmy Ryce's backpack was found in Chavez's trailer, the Involuntary Civil Commitment of Sexually Violent Predators Act (the "Jimmy Ryce Act" or "the Act") went into effect in Florida.<sup>49</sup> As discussed in Part IV, the Act was originally enacted in Title XLVII *Criminal Procedure & Corrections*, Chapter 916 *Mentally Deficient and Mentally Ill Defendants*.<sup>50</sup> Now, however, the Act is part of a civil body of law, Title XXIX *Public Health and Chapter 394 Mental Health*.<sup>51</sup>

Florida's statutory definition of a "sexually violent predator" is "any person who: (a) [h]as been convicted of a sexually violent offense; and (b) [s]uffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment."<sup>52</sup> The two factors actually create three criteria: (1) a previous conviction for sexual violence; (2) a mental abnormality; and (3) likely to reoffend.<sup>53</sup>

The Department of Children and Families is the state agency "responsible for establishing and maintaining the [State and Violent Predators Program ("SVPP")]."<sup>54</sup> The SVPP is located in Tallahassee and is "responsible for making commitment-related recommendations to state attorneys and for overseeing the operation of the Florida Civil Commitment Center (FCCC). . . ."<sup>55</sup> All case referrals—typically from the Department of Corrections—are received and processed by the SVPP for commitment consideration.<sup>56</sup>

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<sup>49</sup> *See id.* at 786.

<sup>50</sup> *See infra* Part III.

<sup>51</sup> *See* FLA. STAT. §§ 394.910–394.932 (2016).

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

<sup>53</sup> *See id.*

<sup>54</sup> Montaldi, *supra* note 47, at 786.

<sup>55</sup> *Id.*

<sup>56</sup> *See id.*

## II. PRIOR CONSTITUTIONAL CHALLENGES

Civil commitment regimes are typically justified under either the State's *parens patriae* power or its police power.<sup>57</sup> Put simply, the state's *parens patriae* power obligates the state "to provide and care for individuals who, due to a mental condition, cannot provide for themselves."<sup>58</sup> The police power doctrine obligates the state to, in pertinent part, "protect its citizens from dangerous, mentally ill persons."<sup>59</sup>

Whatever the justification for the state's power to enact such a law, the Florida Supreme Court has repeatedly stated that the "Legislature has the final word on declarations on public policy, and the courts are bound to give great weight to legislative determinations of facts."<sup>60</sup> For similar reasons, the United States Supreme Court has repeatedly upheld SVP civil commitment statutes as constitutional.<sup>61</sup> This Section briefly explores two determinations from the United States Supreme Court. It then examines the Eleventh Circuit's review and handling of challenges to the Jimmy Ryce Act, the only state SVP statute in the Eleventh Circuit.

### A. *The Supreme Court Held That SVP Statutes do not Violate Constitutional Safeguards; and that the Federal Statute is Valid Under the Necessary and Proper Clause*

The Supreme Court first encountered a challenge to an SVP statute similar to the Jimmy Ryce Act in *Kansas v. Hendricks*.<sup>62</sup> Leroy Hendricks had an extensive history of sexually molesting children.<sup>63</sup> When he was due to be released from prison, the State of Kansas filed a petition under the State's Sexually Violent Predator Act (the

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<sup>57</sup> See Presley, *supra* note 14, at 502–503.

<sup>58</sup> *Id.* at 503.

<sup>59</sup> *Id.*

<sup>60</sup> *Westerheide*, 831 So. 2d at 101 (quoting *Univ. of Miami v. Echarte*, 618 So. 2d 189, 196 (Fla. 1993)) (internal quotation marks omitted). See also *id.* (quoting *Echarte*, 618 So. 2d at 196) ("[L]egislative determinations of public purpose and facts are presumed correct and entitled to deference, unless clearly erroneous.") (internal quotation marks omitted).

<sup>61</sup> See *infra* Part II, Section A.

<sup>62</sup> See 521 U.S. 346, 350 (1997).

<sup>63</sup> See *id.*

“Kansas Act”) in state court to involuntarily commit Hendricks.<sup>64</sup> Hendricks was the first individual to be civilly committed under the state civil commitment law.<sup>65</sup>

Hendricks appealed his commitment and the Kansas Supreme Court ruled that the Kansas Act was invalid because the term “mental abnormality” did not satisfy the substantive due process requirement that involuntary civil commitment must be based on the finding of the presence of a “mental illness.”<sup>66</sup> The Kansas Supreme Court did not address Hendricks’s claims that the Kansas Act violated his constitutional right protected by the *ex post facto* and double jeopardy clauses.<sup>67</sup>

The State of Kansas petitioned for certiorari with the United States Supreme Court, and the Supreme Court ultimately found that the Kansas Act’s definition of “mental abnormality” satisfied substantive due process requirements.<sup>68</sup> The Court began by noting that “[a]lthough freedom from physical restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action, that liberty interest is not absolute.”<sup>69</sup> Even in the civil context, “an individual’s constitutionally protected interest in avoiding physical restraint may be overridden. . . .”<sup>70</sup> Overriding factors include what is necessary for “the common good,” and whether without “manifold restraints” that ensure the common good, “organized society could not exist with safety to its members.”<sup>71</sup> So long as “the confinement takes place pursuant to proper procedures and evidentiary standards,” the Court has consistently upheld state statutes that provide “for the forcible civil detainment of people who are unable to control their behavior” and are thus “a danger to the public health and safety.”<sup>72</sup>

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<sup>64</sup> *See id.*

<sup>65</sup> *See id.*

<sup>66</sup> *See id.*

<sup>67</sup> *See id.* at 356 (“The majority [of the Kansas Supreme Court] did not address Hendricks’ *ex post facto* or double jeopardy claims.”).

<sup>68</sup> *See id.* at 350, 356.

<sup>69</sup> *Id.* at 356 (internal quotation marks and citations omitted).

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

<sup>71</sup> *See id.* at 357 (internal quotation marks omitted).

<sup>72</sup> *See id.*

The Kansas Act required not only a finding of dangerousness, but also proof of an additional factor: a mental abnormality.<sup>73</sup> Hendricks argued that the “mental abnormality” term was not the equivalent of “mental illness”; “mental abnormality” was a legal term, not a medical term.<sup>74</sup> The Court found that the Kansas Act did not violate Hendricks’s constitutional due process right, however, because: (1) Even in psychiatry, the definitions of “mental illness” are variable; and (2) Hendricks was diagnosed with pedophilia and had testified that he was unable to control himself.<sup>75</sup>

Next, the Court considered whether the Kansas Act established criminal proceedings, which would implicate Hendricks’s constitutional protections against double jeopardy and *ex post facto* prosecution.<sup>76</sup> Hendricks argued that the Kansas Act establishes criminal proceedings because the newly enacted punishment is predicated on past conduct for which he has already been convicted and forced to serve a prison sentence.<sup>77</sup> The Court disagreed and found that the civil commitment proceedings did not amount to criminal proceedings for five main reasons.<sup>78</sup>

First, “[t]he categorization of a particular proceeding as civil or criminal ‘is first of all a question of statutory construction.’”<sup>79</sup> Kansas’s legislature intended to create a civil proceeding and that intent is evidenced by the placement of the Kansas Act in the probate code rather than the criminal code, as well as the description of the Kansas Act as a civil commitment procedure.<sup>80</sup> Justice Thomas, writing for the Court, noted that “[n]othing on the face of the [Kansas Act] suggests that the legislature sought to create anything other than civil commitment scheme designed to protect the public from harm.”<sup>81</sup> The Court only rejected the legislature’s manifest intent when a party “challenging the statute provides ‘the clearest proof”

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<sup>73</sup> See *id.* at 357–58.

<sup>74</sup> See *id.* at 358–59.

<sup>75</sup> See *id.* at 359–60.

<sup>76</sup> See *id.* at 360–61.

<sup>77</sup> See *id.* at 360.

<sup>78</sup> See *id.* at 360–69.

<sup>79</sup> *Id.* at 361.

<sup>80</sup> See *id.*

<sup>81</sup> *Id.*

that ‘the statutory scheme [is] so punitive either in purpose or effect as to the negate [the State’s] intention’ to deem it ‘civil’ . . . .”<sup>82</sup>

Second, the Court found that commitment under the Kansas Act did “not implicate either of the two primary objectives of criminal punishment: retribution or deterrence.”<sup>83</sup> The Act was “not retributive because it does not affix culpability for prior criminal conduct. Instead such conduct is used solely for evidentiary purposes, either to demonstrate that a ‘mental abnormality’ exists or to support a finding of future dangerousness.”<sup>84</sup>

Third, the Court reasoned that, unlike a criminal statute, the Kansas Act did not require a finding of scienter to commit an individual as a sexually violent predator.<sup>85</sup> The commitment was based on a mental abnormality rather than criminal intent.<sup>86</sup> Thus, the Court concluded, confinement was not intended to be retributive.<sup>87</sup>

Fourth, the Kansas Act did not function as a deterrent in the way that a criminal punishment does because people suffering from a mental abnormality are “unlikely to be deterred by the threat of confinement” considering they are unable to exercise adequate control over their behavior.<sup>88</sup>

Last, the Court reasoned the Kansas Act to be civil, not punitive, because individuals confined under the Kansas Act were not subject to punitive conditions.<sup>89</sup> Even though the Kansas Act included “an affirmative restraint, ‘the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.’”<sup>90</sup> The Kansas legislature took “great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards.”<sup>91</sup> The determination “that the [Kansas Act] is nonpunitive thus removes an

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 361–62.

<sup>84</sup> *Id.* at 362.

<sup>85</sup> *See id.* at 362.

<sup>86</sup> *See id.*

<sup>87</sup> *See id.*

<sup>88</sup> *Id.* at 362–63.

<sup>89</sup> *See id.* at 363.

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

<sup>91</sup> *Id.* at 364.

essential prerequisite for both Hendricks' double jeopardy and *ex post facto* claims."<sup>92</sup>

Justice Kennedy, whose concurrence in the judgment was particularly key as it provided the fifth vote,<sup>93</sup> wrote to "caution against dangers inherent when a civil confinement law is used in conjunction with the criminal process, whether or not the law is given retroactive application."<sup>94</sup> Justice Kennedy recognized that for the despicable nature of crimes like Hendricks's, "a life term may well have been the only sentence appropriate to protect society and vindicate the wrong," but highlighted the concern that "[w]e should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone."<sup>95</sup> The Kansas Act, therefore, risks the State using the civil system to impose a sentence it either was not able to initially procure through the criminal judicial system or was the result of an "improvident plea bargain on the criminal side."<sup>96</sup>

Justices Breyer, Stevens, Souter, and Ginsberg dissented, with Justice Breyer writing the dissenting opinion.<sup>97</sup> Justice Breyer pointed out "[c]ertain resemblances between the [Kansas] Act's 'civil commitment' and traditional criminal punishments are obvious," noting that the "secure confinement" amounted to "incarceration against one's will."<sup>98</sup>

More than ten years later the Supreme Court was confronted with the federal version of the Kansas Act and the Jimmy Ryce Act in *United States v. Comstock*.<sup>99</sup> In *Comstock*, the Court examined "whether the Necessary and Proper Clause, Art. I, § 8, cl. 18, grants Congress authority sufficient to enact the. . . [civil commitment scheme of the Adam Walsh Act]."<sup>100</sup> Ultimately, the Court also con-

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<sup>92</sup> *Id.* at 369.

<sup>93</sup> *See Pesci v. Budz*, 730 F.3d 1291, 1297 n.2 (11th Cir. 2013).

<sup>94</sup> *Hendricks*, 521 U.S. at 371–72 (Kennedy, J., concurring).

<sup>95</sup> *Id.* at 373.

<sup>96</sup> *Id.*

<sup>97</sup> *See id.* at 373–98.

<sup>98</sup> *Id.* at 379 (Breyer, J., dissenting) (internal quotation marks omitted).

<sup>99</sup> 560 U.S. 126 (2010).

<sup>100</sup> *Id.* at 133. *See also* 18 U.S.C. § 4248 (titled "Civil commitment of a sexually dangerous person").

sidered five factors, which when “‘taken together’ led to the conclusion that the Necessary and Proper clause granted Congress the power to enact the federal SVP statute.”<sup>101</sup> The Court considered:

(1) [T]he breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute’s enactment in light of the Government’s custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute’s accommodation of state interests, and (5) the statute’s narrow scope.<sup>102</sup>

As a starting point, the Court assumed, based on *Kansas v. Hendricks*, that the Due Process Clause did “not prohibit civil commitment in these circumstances.”<sup>103</sup> Next, the Supreme Court reviewed the five factors in some detail, and ultimately reasoned that:

Taken together, these considerations lead us to conclude that the statute is a “necessary and proper” means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others. The Constitution consequently authorizes Congress to enact the statute.<sup>104</sup>

But nothing in the Court’s reasoning supported *civil* commitment for *future* crimes.<sup>105</sup> Justice Kennedy again concurred, this time taking issue with the conclusions that the majority reached in order to find that the federal civil commitment statute was necessary

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<sup>101</sup> Schwab, *supra* note 16, at 921 (summarizing the *Comstock* considerations for whether a civil commitment statute violated a defendants’ due process rights).

<sup>102</sup> *Id.*

<sup>103</sup> *Comstock*, 560 U.S. at 133.

<sup>104</sup> *Id.* at 149.

<sup>105</sup> See generally *Comstock*, 560 U.S. 126.

and proper.<sup>106</sup> Justice Kennedy argued that the majority's opinion was based on case law which was inapplicable.<sup>107</sup>

Justice Alito also concurred, noting that the only question the Court needed to review was whether "it is also necessary and proper for Congress to protect the public from dangers created by the federal criminal justice and prison systems."<sup>108</sup> Justice Alito took a simplified approach, reasoning that "[j]ust as it is necessary and proper for Congress to provide for the apprehension of escaped federal prisoners, it is necessary and proper for Congress to provide for the civil commitment of dangerous federal prisoners who would otherwise escape civil commitment as a result of federal imprisonment."<sup>109</sup>

But the analogy ignores that the Adam Walsh Act allows for confinement of individuals that (1) have already served time for a crime or (2) have not yet committed a further crime.<sup>110</sup> The escaped federal prisoner ostensibly (1) has not finished serving time for the original time, and (2) is in the process of committing another crime. Congress's proper invocation of the Necessary and Proper Clause to detain escaped prisoners is an insufficient means of support for Congress's use of the Necessary and Proper Clause to detain individuals that served their sentences and have not committed further crimes.

Justices Thomas and Scalia dissented, noting that:

[F]ederal legislation is a valid exercise of Congress' authority under the [Necessary and Proper] Clause if it satisfies a two-part test: First, the law must be directed toward a "legitimate" end, which *McCulloch* [*v. Maryland*] defines as one "within the scope of the [C]onstitution"—that is, the powers expressly delegated to the Federal Government by some provision in the Constitution. Second, there must be a necessary and proper fit between the "means" (the federal

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<sup>106</sup> See *id.* at 150 (Kennedy, J., concurring).

<sup>107</sup> See *id.* at 152 (Kennedy, J., concurring).

<sup>108</sup> *Id.* at 157 (Alito, J., concurring).

<sup>109</sup> *Id.*

<sup>110</sup> See 18 U.S.C. § 4248(a).

law) and the “end” (the enumerated power or powers) it is designed to serve.<sup>111</sup>

Justice Thomas concluded that “[n]o enumerated power in Article I, § 8, expressly delegates to Congress the power to enact a civil-commitment regime for sexually dangerous persons, nor does any other provision in the Constitution vest Congress or the other branches of the Federal Government with such a power.”<sup>112</sup> Thus, the Adam Walsh Act “can be a valid exercise of congressional authority only if it is ‘necessary and proper for carrying into Execution’ one or more of those federal powers actually enumerated in the Constitution.”<sup>113</sup> The dissent eviscerated any connection to a federal power that Congress may have relied upon in order to enact the Adam Walsh Act.<sup>114</sup>

In conclusion, the dissent stated that the power to protect the community is “among the numerous powers that remain with the States.”<sup>115</sup> “States may take measures to restrict the freedom of the dangerously mentally ill. . . provided that such commitments satisfy due process and other constitutional requirements.”<sup>116</sup>

The dissent recognized that “protecting society from violent sexual offenders is certainly an important end” and that “[s]exual abuse is a despicable act with untold consequences for the victim personally and society generally.”<sup>117</sup> However, the dissent stated that “the Constitution does not vest in Congress the authority to protect society from every bad act that might befall it.”<sup>118</sup> Permitting the Constitution to extend to such a degree, “comes perilously close to transforming the Necessary and Proper Clause into a basis for the federal police power that we *always* have rejected.”<sup>119</sup>

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<sup>111</sup> *Comstock*, 560 U.S. at 160 (Thomas, J., dissenting) (citing *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)).

<sup>112</sup> *Id.* at 163.

<sup>113</sup> *Id.* (quoting U.S. CONST. art. I, § 8, cl. 18).

<sup>114</sup> *See id.* at 163.

<sup>115</sup> *Id.* at 164.

<sup>116</sup> *Id.* at 164 (citing *Hendricks*, 521 U.S. at 363) (internal quotation marks omitted).

<sup>117</sup> *Id.* at 165.

<sup>118</sup> *Id.* (citing *New York v. United States*, 505 U.S. 144, 157 (1992)).

<sup>119</sup> *Id.* at 180 (emphasis in original) (internal quotation marks and citations omitted).

B. *The Eleventh Circuit's Treatment of the Jimmy Ryce Act.*

Florida is the only state in the Eleventh Circuit with an SVP statute, and there are only twelve published Eleventh Circuit opinions concerning the Jimmy Ryce Act, primarily in the context of habeas petitions and claims brought under 42 U.S.C. § 1983. There is a dearth of Eleventh Circuit case law considering constitutional challenges to the Jimmy Ryce Act.

The Eleventh Circuit has never addressed the constitutionality of the Jimmy Ryce Act. For example, in *Newsome v. Broward County Public Defenders*, Alonzo Newsome appealed the dismissal of his § 1983 complaint, challenging his civil commitment under the Jimmy Ryce Act as unconstitutional.<sup>120</sup> Invoking the *Younger v. Harris* Abstention Doctrine,<sup>121</sup> the Eleventh Circuit refused to consider whether the Jimmy Ryce Act was unconstitutional, but noted that it was “equally clear that this case involves an important state interest, namely, Florida’s need to ensure that violent sex offenders do not harm its citizens after the expiration of their incarcerative sentences.”<sup>122</sup>

Rather than review the constitutionality of the Jimmy Ryce Act, the Eleventh Circuit has instead analyzed discrete questions related to the Act.<sup>123</sup> Notably, the Court analyzed these claims invoked by other inmates.<sup>124</sup> For example, in *Bauder v. Department of Corrections*, Bauder, a state prisoner, brought a federal habeas petition citing ineffective assistance of counsel, where his defense counsel failed to warn him that taking a plea might later subject him to civil commitment under the Jimmy Ryce Act.<sup>125</sup> After procedural volleying, the Eleventh Circuit affirmed the district court, finding that a

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<sup>120</sup> See 304 F. App’x 814, 814–15 (11th Cir. 2008).

<sup>121</sup> *Id.* at 816. Under the *Younger* Abstention Doctrine, “federal courts ordinarily must refrain from deciding the merits of a case when (1) there is a pending state judicial proceeding; (2) the proceeding implicates important state interests; and (3) the parties have an adequate opportunity to raise any constitutional claims in the state proceeding.” See *id.* (citing *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 432 (1982)). See generally *Younger v. Harris*, 401 U.S. 36 (1970).

<sup>122</sup> *Id.*

<sup>123</sup> See, e.g., *Bauder v. Dep’t of Corr.*, 333 F. App’x 422 (11th Cir. 2009).

<sup>124</sup> See *id.* at 423.

<sup>125</sup> See *id.* at 423.

failure to advise about the risks of the Jimmy Ryce Act was ineffective assistance of counsel because “pending criminal charges may carry a risk of adverse [collateral] consequences.”<sup>126</sup>

On the other hand, in *Troville v. Venz*, the Eleventh Circuit refused to allow Troville, who had been civilly committed pursuant to the Jimmy Ryce Act, to bring an action under the Prison Litigation Reform Act.<sup>127</sup> The Eleventh Circuit held that “[c]ivil detention is by definition non-punitive” and thus, a civil detainee “simply does not fall under § 1915’s definition of ‘prisoner . . . .’”<sup>128</sup>

The Eleventh Circuit came close to reviewing the constitutionality of civil commitment in *Pesci v. Budz*.<sup>129</sup> In *Pesci*, the Eleventh Circuit reviewed a civil detainee’s claim that a detention center policy forbidding a certain publication infringed on his First and Fourteenth Amendment rights.<sup>130</sup> The district court previously reviewed Pesci’s claims under *Turner v. Safley*, which held that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate *penological* interests.”<sup>131</sup>

Pesci argued that “since he [was] not a prison inmate—rather only a civil detainee—*Turner* [did] not provide sufficient protection of his First Amendment rights” and asked the Eleventh Circuit to use a standard of intermediate scrutiny from *United States v. O’Brien*.<sup>132</sup> The court noted that there was “no salient difference between a civil detention center like the FCCC and a prison”<sup>133</sup> but determined that a “balance should be struck in scrutinizing the constitutional claims of civil detainees” and “the standard must be modified to reflect the salient differences between civil detention and

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<sup>126</sup> See 619 F.3d 1272 (11th Cir. 2010) (citing *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010)) (internal quotation marks omitted).

<sup>127</sup> See 303 F.3d 1256, 1260 (11th Cir. 2002).

<sup>128</sup> *Id.*

<sup>129</sup> 730 F.3d 1291.

<sup>130</sup> See *id.* at 1292.

<sup>131</sup> *Pesci*, 730 F.3d at 1296 (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)) (emphasis added) (internal quotation marks omitted).

<sup>132</sup> *Id.* at 1296. See also *United States v. O’Brien*, 391 U.S. 367 (1968).

<sup>133</sup> *Pesci*, 730 F.3d at 1299.

criminal incarceration.”<sup>134</sup> The Court noted “that the range of legitimate governmental interests is narrower [in the civil commitment context] than it is in the prison context.”<sup>135</sup>

The Eleventh Circuit acknowledged that the “‘legitimate *penological* interests’ highlighted by the Supreme Court in *Turner* are not coextensive with the legitimate interests found in the civil detention context” because civil commitment is not penological.<sup>136</sup> Accordingly, “the government’s interests in retribution and general deterrence—plainly legitimate justifications for prison regulations—decidedly are *not* a proper foundation for the restriction of civil detainees’ constitutional rights.”<sup>137</sup>

Moreover, the government “may not justify a restraint on detainees’ constitutional rights for reasons related to punitive conditions of confinement.”<sup>138</sup> But, where a civil regulation has a “valid, rational connection to legitimate interests in institutional order, safety, and security and in the rehabilitation and treatment of civil detainees” regulations on civil detainees are appropriate.<sup>139</sup> Ultimately, the Eleventh Circuit determined that “while there may be shared governmental interests surrounding civil and criminal detention, they are not coextensive. Thus, in the context of this case, the government may not justify a limitation on expressive freedoms based on retribution or general deterrence.”<sup>140</sup>

### III. IS THE JIMMY RYCE ACT PUNITIVE RATHER THAN CIVIL?

If sexual predator commitment statutes “only further punishment of despised criminals,” and are “thinly veiled effort[s] to circumvent a disappointing criminal justice system by keeping these criminals locked up long past their expired jail sentences,”<sup>141</sup> the Eleventh Circuit should review the Jimmy Ryce Act using the criteria in *Kansas v. Hendricks*.<sup>142</sup> This Section begins by examining the

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<sup>134</sup> *Id.* at 1297.

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

<sup>136</sup> *Id.*

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

<sup>138</sup> *Id.* at 1298.

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

<sup>140</sup> *Id.*

<sup>141</sup> Presley, *supra* note 14, at 488.

<sup>142</sup> See *Hendricks*, 521 U.S. at 360–69.

factors that indicate that the Jimmy Ryce Act is punitive rather than civil. It then examines the use of the term “mental abnormality” in the statute and the possible resulting overreach. Finally, this Section reviews other varied challenges to SVP statutes, including a failure to hold an adversarial probable cause hearing.

A. *Statutory Signs that the Legislature Intended the Jimmy Ryce Act to Impose Punitive Consequences*

One of the determining factors the Supreme Court relied on in its designation of the Kansas SVP law as civil rather than criminal in *Kansas v. Hendricks* was statutory construction.<sup>143</sup> In *Hendricks*, the Court noted that the SVP was part of the Kansas probate code, instead of the criminal code.<sup>144</sup> Although now part of the Public Health laws,<sup>145</sup> the Jimmy Ryce Act was originally enacted in Title XLVII Criminal Procedure & Corrections, Chapter 916 Mentally Deficient and Mentally Ill Defendants. Thus, under *Hendricks*, the original placement of the Act evidences an intent to extend the sentences of the original crimes.<sup>146</sup>

Another indication that the Jimmy Ryce Act is punitive in nature is the lack of provisions for treatment or monitoring of an offender following release from commitment.<sup>147</sup> Kansas and Washington officials warned legislators of the need to include provisions for treatment in order for the confinement to serve a purpose other than retribution or deterrence.<sup>148</sup> The lack of any meaningful provision of treatment or monitoring suggests that the focus and purpose of the Jimmy Ryce Act is to detain criminals, rather than reform or monitor them.<sup>149</sup>

Yet another indicator is the lack of less restrictive alternatives.<sup>150</sup> In *Hendricks*, Justice Breyer pointed out in his dissenting opinion that the Court has often held that “a failure to consider, or to use,

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<sup>143</sup> See *id.* at 361.

<sup>144</sup> See *id.*

<sup>145</sup> See Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators’ Treatment and Care Act (“Jimmy Ryce Act”) of 1998, ch. 98-64, § 24, 1998 Fla. Laws 445–455 (codified as FLA. STAT. §§ 394.910–394.932 (2016)).

<sup>146</sup> See *Hendricks*, 512 U.S. at 361.

<sup>147</sup> See Presley, *supra* note 14, at 499–500.

<sup>148</sup> See *id.*

<sup>149</sup> See *id.* at 500.

<sup>150</sup> See *Hendricks*, 521 U.S. at 388 (Breyer, J., dissenting).

alternative and less harsh methods to achieve a nonpunitive objective can help show that legislature's purpose. . . was to punish."<sup>151</sup> The Jimmy Ryce Act does not account for less restrictive means to "protect the public" and imposes "significantly greater restriction of an individual's liberty than public safety requires."<sup>152</sup>

During the Florida Supreme Court's review of the Jimmy Ryce Act, the civil detainee, Westerheide, raised several points to demonstrate that commitment was not civil in nature:

[The] treatment is delayed until after an individual's criminal sentence has been served; there is no effective treatment available for sexually violent offenders; the scheme creates barriers to effective treatment by removing the confidentiality of the patient-psychotherapist relationship and [by] not providing for community aftercare; and the scheme fails to provide for a less restrictive alternative to total confinement in a secure facility.<sup>153</sup>

In response, the Florida Supreme Court examined each of those contentions and concluded that they did not disprove the State's declared intent to create a civil commitment program.<sup>154</sup>

*B. Unintended Indications that the Jimmy Ryce Act Functions as Punitive Confinement*

In addition to the constructive examples contradicting the legislature's purported intent to create civil confinement procedures, since the Act's enactment, challenges to implementation have also indicated that the SVP statute acts punitively. For example, "[t]he lack of funding for the Jimmy Ryce Act further undermines the notion

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<sup>151</sup> *Id.* (internal quotation marks and citations omitted).

<sup>152</sup> *Id.*

<sup>153</sup> *Westerheide*, 831 So. 2d at 100–101.

<sup>154</sup> *See id.* at 101–104.

that Florida will use this program as a genuine attempt at treatment.”<sup>155</sup> The Florida Department of Children and Family Services—the Department charged with implementing the Act<sup>156</sup>—estimated the program to top \$60.6 million in the first year.<sup>157</sup> However, the legislature allocated less than \$4 million towards the program.<sup>158</sup> Nearly ten years after the passage of the Act, the funding issue persisted.<sup>159</sup> In an alarming review of the Act, David M. Reutter, a prisoner himself, disputed the purported rehabilitative purpose and claimed that “not one resident has completed the treatment regimen, but over 200 formerly-incarcerated sex offenders have been released from” the treatment center.<sup>160</sup>

Reutter is not alone in pointing to a lack of funding as evidence that the Act is not designed to provide treatment.<sup>161</sup> Justice Pariente of the Florida Supreme Court supports Reutter’s position, noting that “the Department of Children and Family Services (DCF) houses detained and committed residents in what has been termed a \$62–million, ‘state-of-the-art facility’ that opened in April 2009.”<sup>162</sup> The sexual offender treatment program—considered “one of the cornerstones of the Act”—was the subject of a class action lawsuit in federal court due to concerns of its adequacy.<sup>163</sup>

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<sup>155</sup> Presley, *supra* note 14, at 496.

<sup>156</sup> See FLA. STAT. § 394.457(1) (2016) (stating that the “Department of Children and Family Services is designated the ‘Mental Health Authority’ of Florida.”).

<sup>157</sup> See Presley, *supra* note 14, at 496.

<sup>158</sup> See *id.*

<sup>159</sup> See David M. Reutter, *Florida’s Civil Commitment Center Under Funded and Out-of-Control*, PRISON LEGAL NEWS (Nov. 15, 2006), <https://www.prison-legalnews.org/news/2006/nov/15/floridas-civil-commitment-center-under-funded-and-out-of-control/>.

<sup>160</sup> Reutter, *supra* note 159.

<sup>161</sup> See, e.g., *Morel v. Wilkins*, 84 So. 3d 226, 248 (Fla. 2012) (Pariente, J., concurring).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* Prior to the opening of the FCCC facility in 2009, Michelle Barki of the Fourth Circuit Public Defender’s Office in Jacksonville “point[ed] to a February 2008 report from the Office of Program Policy Analysis & Government Accountability that noted ‘offenders often spend extended periods in detention while awaiting the outcome of the civil commitment process, increasing program costs and diminishing effectiveness.’” Jan Pudlow, *Court Sounds the Alarm on Lanquishing Jimmy Ryce Cases*, FLA. BAR: FLA. BAR NEWS (Apr. 1, 2012),

As of February 2011, only 386 of the 663 residents at the FCCC “were committed and consenting to treatment.”<sup>164</sup> And, “[s]ince the inception of the Act, 700 individuals have been released from detention.”<sup>165</sup> Only “thirty-two residents [had] actually completed all four phases of the sexual offender treatment program, and of those thirty-two, only eighteen [had] received a letter of maximum therapeutic benefit.”<sup>166</sup> This further undermines the purported palliative goals of confinement.

The vast majority of Jimmy Ryce respondents were not released as a result of their successful completion of “the four-phase treatment regimen, but by prevailing at trial, obtaining a court-ordered release with stipulated conditions, receiving a trial court determination that they no longer meet the criteria of being a sexually violent predator, or returning to prison.”<sup>167</sup> These statistics suggest that the Jimmy Ryce Act may not be serving its intended purpose because sex offenders are being released without any meaningful intervention or rehabilitation.<sup>168</sup>

*C. Further Problems with the Jimmy Ryce Act Beyond Whether it is Punitive*

Although the *Hendricks* Court dismissed Hendricks’s argument that “mental abnormality” was not a proper medical term,<sup>169</sup> concerns remain that its usage effectively creates “a controversial branch of mental illness that ostensibly justifies involuntary civil commitment.”<sup>170</sup> If the definition of mental abnormality means that “a sexually violent predator lacks volitional control over his or her actions,” the issue of competence invariably arises, as well as the propriety of criminal punishment to begin with.<sup>171</sup> In other words, these offenders were not competent to stand trial in the first instance; civil commitment would have been appropriate after the mentally

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<sup>164</sup> *Morel*, 84 So.3d at 248.

<sup>165</sup> *Id.*

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

<sup>167</sup> *Id.* at 248–49.

<sup>168</sup> *See id.*

<sup>169</sup> *See Hendricks*, 521 U.S. at 358–60.

<sup>170</sup> Presley, *supra* note 14, at 500.

<sup>171</sup> *Id.* at 500–501.

abnormal individual—that cannot control him or herself—first committed an act of sexual violence out of his or her control.<sup>172</sup>

Along the same vein, the term “mental abnormality” is problematic because applying law based on a term that lacks a precise and consistent meaning will result in an imprecise and inconsistent application of the law.<sup>173</sup> Mental abnormality is a requisite to civil commitment, but the legislature and advocates for civil confinement eschew the possibility that the detainees are mentally ill.<sup>174</sup> Even Jimmy Ryce’s mother said in regard to SVP: “These people are not insane.”<sup>175</sup>

The use of mental abnormality creates at least two important problems. First, as mentioned above, if the SVP is mentally ill, they should be committed, not imprisoned.<sup>176</sup> Second, if the definition of “mental abnormality” is open to variability,<sup>177</sup> what are the safeguards against any number of behaviors being deemed a “mental abnormality” and a permissible basis for civil confinement?<sup>178</sup> A possible consequence of “employing commitment in lieu of criminal prosecution and labeling behavior insane rather than criminal,” is that the state could “circumvent the system of constitutional protections afforded to persons accused of crimes.”<sup>179</sup> By permitting SVP statutes to be deemed “civil” rather than “punitive,” we risk “the precise abuse of power Article I is designed to prevent—the use of

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<sup>172</sup> See *id.* at 500–501 (“[I]f these legislatures truly endorse the controversial perspective that persons who commit sexually violent crimes suffer from a mental illness, and *that condition* makes them a danger to society, then it should not assess criminal culpability.”).

<sup>173</sup> See Prescott, *supra* note 21, at 848.

<sup>174</sup> See Presley, *supra* note 14, at 488–89. See also Prescott, *supra* note 21, at 848 (“Abnormal behavior, such as criminal acts of sexual violence, do not indicate a ‘mental illness’ unless the individual’s thoughts are distorted by mental disease.”).

<sup>175</sup> Presley, *supra* note 14, at 489 (internal quotation marks omitted).

<sup>176</sup> See 18 U.S.C. § 4248(a).

<sup>177</sup> See *Hendricks*, 521 U.S. at 359.

<sup>178</sup> See Presley, *supra* note 14, at 489 (“[A]ny number of behavioral patterns are unusual; thus, any number of behavioral patterns could be labeled ‘insane’ by the state under legislation similar to the Jimmy Ryce Act.”).

<sup>179</sup> *Id.*

a limited grant of authority as a ‘pretext. . . for the accomplishment of objects not intrusted [sic] to the government.’”<sup>180</sup>

In addition to concerns regarding whether the Jimmy Ryce Act is punitive rather than civil, and whether it permits an encroachment of government control over individuals deemed to have a “mental abnormality,” since the Act’s enactment, commentators and critics have pointed to numerous other issues implicating the Act’s constitutionality.<sup>181</sup> One such example is found in *Westerheide*.<sup>182</sup> Justice Quince concurred in result only and wrote an opinion pointing out the lack of adversarial probable cause hearings.<sup>183</sup> The Act permits “*ex parte* determinations of whether probable cause exists to believe that the defendants are sexual predators and thus eligible for continued confinements after the expiration of their sentences.”<sup>184</sup> This includes preliminary detainment after the defendant’s sentence has been served but they have not yet been tried under the Act.<sup>185</sup> Defendants and their attorneys are not allowed to be present at the initial probable cause determination—but if the trial judge has found probable cause, then “the trial judge will order that the defendants remain in custody and then be immediately transferred to a secure facility, if their sentences have already expired.”<sup>186</sup>

#### CONCLUSION

SVP statutes confront the legal system with a seemingly irreconcilable dissonance. On the one hand, the goal of preventing the commission of horrific crimes is indisputably invaluable. But on the other hand, “[t]here is no question that SVP civil commitment constitutes a complete loss of liberty, and the statistics regarding SVPs eventually released into society make clear the possibility of lifelong commitment is very real.”<sup>187</sup> That loss of liberty constitutes a basis

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<sup>180</sup> *Comstock*, 560 U.S. at 180 (Thomas, J., dissenting) (citing *McCulloch*, 17 U.S. at 423).

<sup>181</sup> See generally, e.g., Presley, *supra* note 14.

<sup>182</sup> See *Westerheide*, 831 So. 2d at 113–14 (Quince, J., concurring).

<sup>183</sup> See *id.* at 113 (Quince, J., concurring).

<sup>184</sup> *Id.*

<sup>185</sup> See *id.*

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

<sup>187</sup> Schwab, *supra* note 16, at 932.

for concern and contemplation because our government, for an undeniably good intention, has increased its power to incarcerate individuals, carved out an exception to a limit on its power, and as a result, has infringed on individuals' fundamental right to liberty and due process. While weighing these competing interests, our judicial system has—perhaps reasonably—erred on the side of protecting children, but it remains that our judicial system has erred.

No one denies the importance of protecting children from horrific abuse and violence, but how “can we be sure . . . that the legislature will continue to view only sexual offenders as a special and unique class of criminals?”<sup>188</sup> For example, civil commitment could easily present itself as a solution to the crimes of other habitual offenders, such as those who commit domestic violence or suffer from addiction to alcohol or drugs. Justice Pariente in her *Westerheide* dissent implored, “[f]or the sake of our democracy and the freedom that has been the hallmark of our society, let us hope that is not where we are headed.”<sup>189</sup>

Practical considerations—for example, the lack of treatment or monitoring options—may tie the hands of judges and give them no meaningful option other than civil detention. Rehabilitative services cost money, and the judiciary does not control funding for such programs. Therefore, this issue requires alternative solutions.

Perhaps the solution to stopping sexually violent predators like Danny Heinrich and John Couey lies in a wider reformation of the *criminal* justice system. The need for the allocation of additional resources, especially funding of treatment and rehabilitative programs, is glaring. In addition, comprehensive monitoring—i.e., ankle bracelets, probation officers, check-ins, and restricted mobility—may serve as less restrictive alternatives to the constitutionally questionable practice of state-administrated indefinite detention. Justice Quince argues that if society's “true goal is to change the behavior of the defendants so that they can be safely returned to our

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<sup>188</sup> *In re Leon G.*, 26 P.3d 481, 491 (Ariz. 2001) (Feldman, J., concurring), *vacated sub nom. Glick v. Arizona*, 535 U.S. 982 (2002) (“If prosecutors are able to find mental health professionals willing to testify that people who commit repetitive assaults of a non-sexual nature have a mental abnormality predisposing them to such violent behavior, will the legislature pass the laws to keep them incarcerated beyond their criminal sentences by the device of civil commitment?”).

<sup>189</sup> *Westerheide*, 831 So. 2d at 120 (Pariente, J., dissenting in part).

communities then we should begin this process in a more timely fashion.”<sup>190</sup>

In the alternative, harsher sentencing that avoids the prospect of releasing sex offenders into the public is another consideration. As Justice Kennedy suggested, the appropriate sentences for criminals who commit sexual violence against children may possibly be a life sentence.<sup>191</sup>

More sophisticated legal reasoning is yet another option. As it stands, the Supreme Court’s justification for condoning sexual predator civil commitment laws—that those laws are civil in nature, not criminal—is not persuasive legal reasoning. As a result, regardless of the understandable motivation, criticism of the judiciary’s allowance of these statutory schemes is valid.

In the 2002 film adaptation of *Minority Report*, Tom Cruise plays a police detective who stops crimes before they occur by relying on the visions of three psychics who see into the future.<sup>192</sup> The psychics eventually predict that Cruise will commit a murder, setting him off on a journey to vindicate himself before the authorities incarcerate him. Ultimately, Cruise reveals a flaw in the system; namely, that once a person is forewarned of their crime, they are free to choose not to commit it.

In Hollywood, potential criminal actors are morally sound and make the right decisions. In the real world, potential criminal actors cannot be trusted to exercise sound moral judgment and make good decisions. However, our constitution limits the power of the state to deprive individuals of liberty without due process. Once the erosion of a fundamental boundary is accepted, it is difficult and unlikely that the state will ever cede that power back to the people. Accordingly, it is imperative to closely analyze and contemplate the solution we have devised for dealing with sexually violent predators.

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<sup>190</sup> *Id.* at 113 (Quince, J., concurring).

<sup>191</sup> *Cf. Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring) (“With [Hendricks’s] criminal record, after all, a life term may well have been the only sentence appropriate to protect society and vindicate the wrong.”).

<sup>192</sup> MINORITY REPORT (Twentieth Century Fox and Dreamworks Pictures 2002).