



2003

Abusing State Power or Controlling Risk?: Sex Offender Commitment and Sicherungsverwahrung

Nora V. Demleitner

Washington and Lee University School of Law, demleitner@wlu.edu

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlufac>

 Part of the [Criminal Law Commons](#)

Recommended Citation

Nora V. Demleitner, *Abusing State Power or Controlling Risk? Sex Offender Commitment and Sicherungsverwahrung*, 30 Fordham Urb. L. J. 1621 (2003).

This Article is brought to you for free and open access by the Faculty Scholarship at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Scholarly Articles by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

HEINONLINE

Citation: 30 Fordham Urb. L.J. 1621 2002-2003

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Tue Nov 20 11:03:04 2012

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0199-4646](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0199-4646)

ABUSING STATE POWER OR CONTROLLING RISK?: SEX OFFENDER COMMITMENT AND SICHERUNGVERWAHRUNG

Nora V. Demleitner*

INTRODUCTION

This Article addresses a paradigmatic, risk-based collateral sanction—the so-called “civil commitment” for “sexually predatory” offenders. Even though the number of individuals covered by such statutes is relatively small, civil confinement for this group of individuals presents the starkest example of a collateral sanction. It deprives an offender of one of the most important aspects of life—liberty. Sex offender commitment statutes reflect the state’s increasing acceptance of its crucial role in managing the risk criminal offenders pose to public safety, often at the expense of individual liberties.¹

Sex offender commitment statutes constitute risk-based collateral sanctions that employ the power of the state to confine individuals based on a prediction of future dangerousness against the individual’s right to liberty.² Ultimately, it clearly presents the issue as to what extent and how the community can protect itself

* Professor, Hofstra University School of Law. Special thanks for their input and comments go to W. Lawrence Fitch, George Fletcher, James Garland, Jörg Kinzig, Eric Janus, Michael Smith, and the participants at the *Fordham Urban Law Journal’s* symposium *Beyond the Sentence: Post-Incarceration Legal, Social, and Economic Consequences of Criminal Convictions* and at the faculty workshop at the Roger Williams University School of Law. Jörg Kinzig and Eric Janus were a most valuable source of knowledge and insight. All errors are, for course, the Author’s. Support for this Article was provided through a Hofstra Law School summer research grant; the Author’s research visit to the Max Planck Institute for Foreign and International Criminal Law, Freiburg, Germany was funded by a *Deutscher Akademischer Austauschdienst* (“DAAD”) Study Visit Research Grant. For their research assistance, the Author is grateful to the Max Planck Institute and its staff, Hofstra’s reference librarian Patricia Kasting, and the Author’s research assistants Lisa Perillo (Hofstra 2004) and Daniel Smith (Hofstra 2004).

1. Malcolm Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 *CRIMINOLOGY* 449, 449-59 (1992). For a general discussion of the “risk society,” see *CRIME AND THE RISK SOCIETY* (Pat O’Malley ed., 1998).

2. See, e.g., FLA. STAT. ch. 394.910 (2002); IOWA CODE § 229A.1 (2002); KAN. STAT. ANN. § 59-29a01 (2001); N.J. STAT. ANN. § 30:4-27.25 (West 2002); S.C. CODE ANN. § 44-48-20 (Law. Co-op. 2002); TEX. HEALTH & SAFETY CODE ANN. § 841.001 (Vernon 2002); WASH. REV. CODE § 71.09.010 (2003); see also *Foucha v. Louisiana*, 504 U.S. 71, 80, (1992) (stating that “[f]reedom from bodily restraint has always been

against potentially dangerous offenders, and specifically what types of sanctions society can impose after an individual has served her criminal justice sentence.³ Implicit are questions to what extent risk-based collateral sanctions are ever defensible,⁴ and what substantive and procedural protections must exist to balance the state's coercive powers against the individual's liberty interests.

In *Hendricks v. Kansas*, the Supreme Court specifically upheld involuntary commitment following a criminal justice sentence for a violent sexual "predator."⁵ The Kansas statute allowed for such detention following a criminal justice sentence upon a jury's or judge's determination of an offender's future dangerousness resulting from a mental abnormality.⁶ Once the Court characterized the sanction as "civil," it concluded that procedural protections mandated in the criminal context, such as the prohibitions on ex post facto legislation or double jeopardy, do not apply.⁷ *Hendricks* follows the Supreme Court's uneasy parsing of so-called "civil" and criminal sanctions⁸ and fails to provide a coherent picture of how the two should be reconciled.

at the core of the liberty protected by the Due Process Clause from arbitrary governmental action").

3. See Editor's Preface, *Predators and Politics: The Dichotomies of Translation in the Washington Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 507, 513 (1992).

4. In the current regime of collateral sanctions, non-risk based sanctions are never appropriate as their function is punitive. Therefore, they should be abolished. See Nora V. Demleitner, *Preventing Internal Exile: The Need For Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 162-63 (1999) [hereinafter Demleitner, *Preventing Internal Exile*].

5. 521 U.S. 346, 350 (1997). Modern sex offender commitment statutes are referred to as "sexual predator" legislation; in the past, such laws were called "sexual psychopath" legislation. Michael Louis Corrado, *Punishment and the Wild Beast of Prey: The Problem of Preventive Detention*, 86 J. CRIM. L. & CRIMINOLOGY 778, 785 (1996).

6. Compare KAN. STAT. ANN. § 59-29a07(a) (providing the requirements for commitment), with *id.* § 59-29a02 (defining sexually violent predator).

7. *Hendricks*, 521 U.S. at 368-69; see *Allen v. Illinois*, 478 U.S. 364 (1986) (privilege against self-incrimination not applicable in proceedings under Illinois Sexually Dangerous Persons Act).

8. See, e.g., *United States v. Bajakajian*, 524 U.S. 321, 329-32 (1998) (emphasizing that civil *in rem* forfeiture is not punitive in nature, and therefore the double jeopardy clause does not bar the institution of such an action after the defendant's criminal conviction); *Bennis v. Michigan*, 516 U.S. 442, 451-52 (1996) (discussing state's right to use civil forfeiture statutes to seize property used for criminal purposes from an innocent owner); *Addington v. Texas*, 441 U.S. 418, 423-24 (1979) (distinguishing standards of proof in civil and criminal proceedings); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441-42 (1911) (distinguishing civil and criminal contempt); see also Susan R. Klein, *Redrawing the Boundary Between Criminal and Civil Actions: The Supreme Court's 1995-1997 Terms*, 2 BUFF. CRIM. L. REV. 679, 685-92 (1999) (discuss-

While not without its critics, the German *Sicherungsverwahrung*, at least as applied prior to a recent legislative change, may provide a more satisfying blueprint for accommodating goals of punishment and risk considerations. *Sicherungsverwahrung*—confinement based on security concerns—may be imposed at sentencing on select offenders who are found to constitute a high risk of recidivism.⁹ During *Sicherungsverwahrung*, the offender is supposed to be treated and rehabilitated,¹⁰ whereas imprisonment, which precedes it, fulfills retributive and deterrent sentencing goals.

The imposition of *Sicherungsverwahrung* at sentencing acknowledges the direct connection between the criminal offense and the confinement, which is downplayed in United States-style civil commitments for sex offenders.¹¹ Moreover, it accomplishes the goals of the criminal justice system without creating uncomfortable sentence dislocations.¹² While this Article will highlight the problems with *Sicherungsverwahrung*, it supports an approach that borrows heavily from it as a more honest and satisfying way to accommodate the functions of sentencing while protecting public safety. The proposal, which derives from the German model, would allow for a limitation on all risk-based collateral sanctions by integrating them into the sentencing process, and acknowledging the exercise of the state's coercive powers in that process.

ing the negative affects of labeling an action entirely criminal or civil for purposes of determining a defendant's procedural rights); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1864-71 (1992) (recommending that a coherent jurisprudence must first distinguish between civil and criminal processes within the field of punitive sanctions and second differentiate between conduct for which punitive sanctions are fitting and conduct for which they are inappropriate).

9. Tatjana Hörnle, *Penal Law and Sexuality: Recent Reforms in German Criminal Law*, 3 BUFF. CRIM. L. REV. 639, 674-82 (2000).

10. *Id.* at 680-82.

11. Even though a criminal conviction is a prerequisite for the commitment of sex offenders, by separating the commitment hearing from the sentencing for the criminal offense—often by years, if not decades—a disconnect between the two is being created.

12. See, e.g., Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315 (2001); Wayne A. Logan, *Jacob's Legacy: Sex Offender Registration and Community Notification Laws, Practice, and Procedure in Minnesota*, 29 WILLIAM MITCHELL L. REV. 1287, 1287-1321 (2003) (discussing impact of high profile sex offenses on legislative changes, especially in Minnesota); Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 LAW & SOC. INQUIRY 1111 (2000).

Part I of this Article outlines the most prevalent United States approaches to the control of sexual offenders, focusing on civil commitment and the Supreme Court's decision in *Hendricks*. Part II details the German *Sicherungsverwahrung*, which is designed to guarantee greater state control over sex offenders considered dangerous to the public. It describes the origin of the sanction and its fit into the German sentencing scheme. Moreover, it provides a critique of this sanction and outlines recent changes to the practice. In Part III, this Article proposes the adoption of a scheme based on the concept of *Sicherungsverwahrung*. Instead of advocating that the United States borrow the concept *in toto*, the Article modifies it by accepting it as a separative criminal justice sanction that makes public safety its hallmark. The proposed model responds to both the German critics of *Sicherungsverwahrung* and the United States critics of current sex offender commitment legislation and practice. The ultimate goal is to create a more honest, less punitive sentencing structure that assures proportionality and public safety without sacrificing individual liberties.

I. THE UNITED STATES' APPROACH TO SEX OFFENDERS

In the wake of some highly publicized sexual offenses against children, many of which involved recidivists, the states and the federal government passed a myriad of statutes designed to control the risk sex offenders allegedly pose.¹³ In a number of Western European countries and Canada, similar developments occurred.¹⁴ While the term "sex offender" encompasses a large set of individu-

13. E.g., Nora V. Demleitner, *First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders*, 87 IOWA L. REV. 563, 564, 571-79 (2002) [hereinafter Demleitner, *First Peoples, First Principles*] (discussing Congress' passage of the bills and the motives behind them). This occurred even though sexually violent crime did not rise at a faster rate than other crime. Stuart Scheingold et al., *The Politics of Sexual Psychopathy: Washington State's Sexual Predator Legislation*, 15 U. PUGET SOUND L. REV. 809, 812-13 (1992).

For an additional example of a creative approach to sex offenders, see *Doe v. City of Lafayette*, 334 F.3d 606, 613 (7th Cir. 2003) (striking down city's order banning convicted sex offender from all public parks).

14. Hans-Jörg Albrecht, *Dangerous Criminal Offenders in the German Criminal Justice System*, 10 FED. SENTENCING REP. 69, 69-72 (1997) (explaining German criminal law's two step sentencing procedure); Nora V. Demleitner, *Searching for a Solution: How to Punish, Restrain and Treat Sex Offenders*, 10 FED. SENTENCING REP. 59, 59 (1997) [hereinafter Demleitner, *Searching for a Solution*] (comparing and contrasting the American and European sex offender legislation); Michael Jackson, *The Sentencing of Dangerous and Habitual Offenders in Canada*, 9 FED. SENTENCING REP. 256, 256 (1997) (discussing the Habitual Offender legislation and the Dangerous Offender legislation enacted in Canada).

als ranging from the statutory or serial rapist to the individual downloading child pornography or a mere exhibitionist, the public's fear and disgust are generally centered on those violating children, and sometimes on violent rapists of adult women.¹⁵ Nevertheless, current legislation often makes little distinction between sub-categories of sexual offenders.¹⁶ Its focus has been on longer prison terms for all sex offenders, as well as new means to prevent the commission of future offenses upon release.¹⁷ The baseless assumptions that all sex offenders are at a higher risk of recidivism and are uniquely unsuitable for rehabilitation have driven much of the legislation.¹⁸

A. Extended Prison Terms, Notification, and Registration for Sex Offenders

One set of statutes increased the sanctions imposed directly on sex offenders at sentencing, such as lengthened prison terms.¹⁹ Other examples of increased sanctions are mandatory post-release supervision and strengthened supervision conditions imposed on sex offenders upon release.²⁰

The most dramatic change, though, occurred with regard to so-called collateral sanctions following release. Collateral sanctions as

15. This Article refers to the violent sex offender as "he" because offenders of that type are predominantly, but not exclusively, male. See, e.g., Maura Dolan, *Not Only Men are Molesters*, L.A. TIMES, Aug. 16, 2002, at A1 (of 352 convicted offenders civilly committed in California as sexual "predators," one is a woman). The approach proposed, as it is applicable to all collateral sanctions, is, of course, appropriate for male and female offenders. For a discussion of the social construction of dangerousness, see DEIDRE N. GREIG, *NEITHER BAD NOR MAD: THE COMPETING DISCOURSES OF PSYCHIATRY, LAW AND POLITICS* 17-18 (2002).

16. See Eric Lotke, *Politics and Irrelevance: Community Notification Statutes*, 10 FED. SENTENCING REP. 64, 66-67 (1997) (critiquing the overbreadth of California's notification statutes).

17. Demleitner, *Searching for a Solution*, *supra* note 14, at 60; e.g., WASH. REV. CODE. §§ 9.94A.510-.515 (2000) (providing higher penalties for sex offenders); *id.* §§ 13.40.020(3), 13.40.210(4) (providing post release supervision and civil obligations and restitution); *id.* § 13.40.160(3) (providing the court with the ability to order an examination to determine if a juvenile sex offenders is amenable to treatment); *id.* §§ 4.24.550, 9A.44.130 (discussing mandatory registration of sex offenders).

18. Lucy Berliner, *Sex Offenders: Policy and Practice*, 92 NW. U. L. REV. 1203, 1208-11, 1215 (1998) (discussing sex offender's recidivism and its effect on legislation). For a recidivism study, see PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994, at 7-10 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf> (last visited July 15, 2003). For an account of the apparent failure of sex offender programs, see Lita Furby et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 3-4 (1989).

19. Demleitner, *First Peoples, First Principles*, *supra* note 13, at 571-73.

20. *Id.* at 566, 571-73.

a whole can be grouped broadly into two categories—those which are risk-based and those which are not. The former are based on incapacitative and preventive reasoning,²¹ while the latter might be defended on retributive or deterrent grounds.²² Even though some of the sex offender-focused collateral sanctions include a risk component, disputes have arisen over their effectiveness in controlling such risk.²³

During the 1990s, Congressional legislation required the states to set up sex-offender registries for certain types of sex offenders in the community.²⁴ In 1996, through Megan's Law, named after seven-year-old Megan Kanka who was sexually abused and killed by a recidivist sex offender, Congress mandated states to release certain information about sex offenders to the public.²⁵ While these acts have been defended on grounds of risk control, many of them are counterproductive and drawn too broadly to be successful as preventive measures.²⁶ Notification statutes are misleading as the risk of re-offending is difficult, if not impossible, to assess. Many sex offender notification statutes are also drawn too broadly, as they include offenders, such as statutory rapists whose recidi-

21. Demleitner, *Preventing Internal Exile*, *supra* note 4, at 156-60 (discussing collateral sanctions and their justifications on preventive grounds).

22. See Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 13-25 (Marc Mauer & Meda Chesney-Lind eds., 2002) (describing the multitude of collateral sanctions). Examples of non-risk based collateral sanctions include broad restrictions on ex-offender voting rights, the denial of access to public housing for ex-drug felons and the limitations on federal education benefits for those convicted of a drug offense, however minor. See, e.g., Eric Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61, 64 (2002) (discussing federal law limiting federal funding to schools that imposed a mandatory one-year expulsion for students bringing weapons to school); see also Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753, 769-73 (2000) [hereinafter Demleitner, *Continuing Payment*] (discussing criminal disenfranchisement and its justifications); Alec C. Ewald, "Civil Death": *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1072-95 (exploring justifications for criminal disenfranchisement).

23. See, e.g., Lotke, *supra* note 16, at 65-67; see also Conn. Dep't of Pub. Safety v. Doe, 123 S. Ct. 1160, 1164-65 (2003) (upholding Connecticut's statute requiring publication of names of convicted sex offenders without determining dangerousness of individual).

24. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. XVII, 108 Stat. 2038 (1994) (codified at 42 U.S.C. § 14071); Demleitner, *First Peoples, First Principles*, *supra* note 13, at 570-71.

25. Pub. L. No. 104-145, 110 Stat. 1345 (1996); 42 U.S.C. §§ 14071-14072 (1999).

26. Lotke, *supra* note 16, at 65-67.

vism rates are very low.²⁷ Instead of being useful as preventive measures, these statutes divert public attention from offenders who may constitute an increased risk. Moreover, as notification is limited to specific geographic areas, ex-offenders may be able to escape heightened suspicion by leaving this area to commit further offenses.²⁸

Presumably, the only guaranteed method to prevent the further commission of sexual offenses by former sex offenders is to incapacitate them.²⁹ Longer prison sentences serve this purpose. Under current law, however, almost all sex offenders, barring those who commit murder in conjunction with a sex crime, will ultimately be released from prison.³⁰ For the most dangerous of them, a number of states have developed special legislation leading to what they term "civil commitment."³¹ As the prison terms for sex offenders have been lengthened, interest in sex offender commitment statutes is likely to decline.³²

27. See, e.g., *Conn. Dep't of Pub. Safety*, 123 S. Ct. at 1164-65 (upholding Connecticut's sex offender notification statute which does not require state to assess dangerousness of convicted sex offenders before putting their name on its website).

28. Lotke, *supra* note 16, at 66.

29. This assumes that none of these inmates will escape. Moreover, only certain populations will be protected entirely, such as children. Rape of other inmates and of (female) correctional staff may occur even in prison. The former type of victimization, however, continues to remain uncounted and often unacknowledged, and the latter is presumably less likely to occur than if the offender were released back into society.

30. E.g., WASH. REV. CODE. §§ 9.94A.510-.515 (2001) (the only crime that carries life without parole as a penalty is aggravated murder).

31. E.g., FLA. STAT. ch. 394.910 (2002); IOWA CODE § 229A.1 (2002); KAN. STAT. ANN. § 59-29a01 (1994); N.J. STAT. ANN. § 30:4-27.25 (West 2002); S.C. CODE ANN. § 44-48-20 (Law. Co-op. 2002); TEX. HEALTH & SAFETY CODE ANN. § 841.001 (Vernon 2002); WASH. REV. CODE § 71.09.010. While the state of Virginia has adopted a legal basis for the civil commitment of dangerous and mentally abnormal sex offenders, it has not yet allocated the required funds. See *Virginia Horror Crime is Used in Fight to Lengthen Custody*, N.Y. TIMES, Jan. 25, 2003, at A13 (discussing legislative proposals to provide funding in Virginia).

32. W. Lawrence Fitch, *Sex Offender Commitment in the United States: Legislative and Policy Concerns* (forthcoming 2003) (manuscript at 18-19, on file with author); Letter from Professor Eric Janus, William Mitchell College of Law, to Nora V. Demleitner (Feb. 23, 2003) (on file with author).

The number of individuals under such confinement, however, might remain high as release appears unlikely. See, e.g., Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability* 7 (Apr. 25, 2003), available at www.forensicexaminers.com/forensicuse.pdf (last visited July 15, 2003).

B. Civil Commitment for Sex Offenders

Collateral sanctions vary in the way in which they can be imposed upon criminal offenders.³³ Some automatically follow a criminal conviction, while others must be imposed separately through an administrative process.³⁴ Where separate administrative action is required, the criminal conviction is a necessary, but not sufficient prerequisite for the imposition of the additional sanction.³⁵ Civil confinement for sex offenders falls into this category, as it must be imposed judicially or through a jury following a hearing that typically includes an array of procedural protections.³⁶ Statutorily, these civil commitment statutes do not require a criminal conviction.³⁷ A charge of a sex offense is sufficient for the institution of such proceedings, as would be an acquittal based on insanity.³⁸ Such civil commitment can no longer be considered a collateral sanction as it is not based on a conviction. A state, however, should not be in a position to evade limitations on collateral sanctions merely by adding triggers other than a conviction for instituting such proceedings. In addition, existing legislation has been applied largely against offenders who were about to be released from confinement after having served long sentences for sexual offenses.³⁹

Civil commitment statutes for sex offenders are arguably fashioned on civil commitment statutes for the mentally incompetent.⁴⁰ Those do not require a criminal conviction, but instead focus on determining mental illness and the danger the individual poses to

33. Demleitner, *Preventing Internal Exile*, *supra* note 4, at 154-58.

34. *Id.* at 154.

35. *See id.* at 154-58 (discussing various collateral consequences).

36. *See, e.g.*, FLA. STAT. ch. 394.913, 394.915 (requiring various procedures such as full notice to multidisciplinary teams and finding of probable cause); WASH. REV. CODE § 71.09.040 (1999) (requiring certain procedural safeguards such as a judge determining whether there is probable cause to believe that the person is a sexually violent predator before that person is taken into custody).

37. *See, e.g.*, WASH. REV. CODE § 71.09.030(3)-(4) (allowing prosecutor to allege a person who has committed a sex offense is a sexually violent predator).

38. *E.g., id.* A discussion of the problems implicit in charge-based civil commitment of sex offenders is beyond the scope of this Article.

39. *See, e.g.*, *Kansas v. Crane*, 534 U.S. 407, 411 (2001) (seeking the civil commitment of a previously convicted sexual offender based on the application of *Hendricks*); *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997) (based on Kansas' Sexually Violent Predator Act, seeking the commitment of Hendricks, an inmate who had a history of molesting children and was scheduled to be released from prison).

40. *See Hendricks*, 521 U.S. at 356-57 (discussing where states have in narrow circumstances provided for the civil commitment of people who are unable to control their behavior and thus pose a danger to public health and safety).

himself or others.⁴¹ The goal of civil commitment statutes is to provide an effective therapy to persons committed, so as to enable them to live independently upon release.⁴² On the other hand, sex offender commitment statutes generally focus on the danger the offender poses to others because of a “mental abnormality” or “mental disorder,” and are aimed primarily at incapacitation rather than treatment.⁴³ These differences bring sex offender commitment statutes closer to so-called “criminal sexual psychopath”⁴⁴ legislation than civil commitment. Starting in the 1950s, sexual psychopaths, however defined, were targeted for indefinite detention.⁴⁵ Many of these offenders were not dangerous, but were considered socially deviant,⁴⁶ and upon conviction were either sentenced or committed civilly. During the early to mid-1990s, a number of states reinvigorated their civil commitment statutes for

41. *Foucha v. Louisiana*, 504 U.S. 71, 75-76 (1992) (citing *Addington v. Texas*, 441 U.S. 418, 429 (1979)) (finding that to commit an individual to a mental institution in a civil proceeding, the state is required to prove by clear and convincing evidence that the person is mentally ill and requires hospitalization for his own welfare and the protection of others). Civil commitment statutes for sex offenders also cover those who are considered “not guilty by reason of insanity”—a standard that many states have changed to “guilty but insane”—“not guilty by reason of a mental disease of defect,” and offenders who are found incompetent to stand trial. See, e.g., *Hendricks*, 521 U.S. at 352 (Kansas civil commitment statute applied to all of these categories of sex offenders in addition to those convicted of and charged with sex crimes). The number of such offenders is presumably very small, and would have been covered by existing civil commitment statutes. *Id.* at 351-52.

42. See *Addington v. Texas*, 441 U.S. 418, 426 (1979) (stating that states have a legitimate interest in providing care to its citizens that cannot take care of themselves); Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 182 (1996) [hereinafter Janus, *Preventing Sexual Violence*] (stating that the purpose of confinement is not to reduce the capacity of the individual, but rather to restore autonomy and thereby enhance her capacities).

43. See, e.g., KAN. STAT. ANN. § 59-29a01 (1994); WASH. REV. CODE § 71.09.010 (1999); *Hendricks*, 521 U.S. at 358. (stating that commitment statutes narrow the class of persons eligible for confinement to those who are unable to control their aggressiveness).

44. Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 NW. U. L. REV. 1317, 1351-52 (1998).

45. *Id.* at 1351-52 (describing “sexual psychopath” laws passed between 1937 and 1957). For a discussion of the historical background of such legislation in Canada and Great Britain, see Yukimi Henry, *Psychiatric Gating: Questioning the Civil Commitment of Convicted Sex Offenders*, 59 U. TORONTO FAC. L. REV. 229, 230-46 (2001).

46. Henry, *supra* note 45, at 231. For a description of the abuse of such legislation in Alabama and the horrible conditions in state mental hospitals until at least the early 1970’s, see James Allon Garland, *The Low Road to Violence: Governmental Discrimination as a Catalyst for Pandemic Hate Crime*, 10 LAW & SEXUALITY 1, 75-76 (2001).

sex offenders,⁴⁷ despite the criticism levied against earlier legislation in this area and its abolition during the 1970s.⁴⁸

The constitutionality of such statutes was challenged in *Kansas v. Hendricks*.⁴⁹ In that case, the Supreme Court upheld Kansas' civil commitment statute for sex offenders against challenges under the Due Process, Double Jeopardy, and Ex Post Facto Clauses of the federal Constitution.⁵⁰

1. *Kansas v. Hendricks*

The impending release of a sex offender considered highly dangerous caused the Kansas legislature to pass the Sexually Violent Predator Act in 1994.⁵¹ It considered the existing civil commitment statute insufficient to address the situation of sexual offenders, because the sexual offenders have different treatment needs and pose a different level of threat.⁵² The new legislation allowed for the civil confinement of persons who had a "mental abnormality" or "personality disorder" that was likely to lead them to engage in "predatory acts of sexual violence" if they had been "convicted of or charged with a sexually violent offense."⁵³ Such a statute appeared to follow Supreme Court mandates handed down in a number of earlier cases that prohibited as unconstitutional confinement based solely on dangerousness.⁵⁴ The Court in those cases held that dangerousness alone cannot be the reason for detention, and required dangerousness with "proof of some additional factor."⁵⁵

The Kansas law allows the local prosecutor, upon notification of impending release of the prisoner, to petition for the person's in-

47. Fitch, *supra* note 32 (manuscript at 3).

48. See, e.g., GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE THIRTIES TO THE EIGHTIES 858-60, 935-42 (1977) [hereinafter PSYCHIATRY AND SEX PSYCHOPATH] (stating that sex psychopath and sexual offender statutes are approaches that have failed).

49. 521 U.S. 346, 350 (1997).

50. *Id.* at 370-71.

51. KAN. STAT. ANN. § 59-29a01 (1994).

52. *Id.*

53. *Hendricks*, 521 U.S. at 350, 352, 358; see KAN. STAT. ANN. §§ 59-29a01—59-29a20; cf. Denno, *supra* note 44, at 1352 (describing statutory prerequisites for commitment under earlier "sexual psychopath" legislation).

54. *Heller v. Doe*, 509 U.S. 312, 314-315 (1993); *Allen v. Illinois*, 478 U.S. 364, 366 (1986); *Minnesota ex rel. Pearson v. Probate Court of Ramsey Cty.*, 309 U.S. 270, 271-72 (1940).

55. *Heller*, 509 U.S. at 314-15; *Allen*, 478 U.S. at 366; *Minnesota ex rel. Pearson*, 309 U.S. at 271-72. For a discussion of indefinite detention and dangerousness "plus," see T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365, 369-73 (2002).

voluntary civil commitment as a sex offender.⁵⁶ The statute mandates a judicial hearing on “probable cause” for certification, followed by a psychiatric assessment of the inmate’s mental and psychological make-up.⁵⁷ After a trial in which the state has to prove beyond a reasonable doubt that the offender is a violent sexual predator, the person would be sent to a secure psychiatric institution for treatment until his mental abnormality has been changed so as to allow for his release.⁵⁸

The Supreme Court held the Kansas statute to accord with traditional involuntary commitment statutes as “[i]t requires a finding of future dangerousness, and then links that finding to the existence of a ‘mental abnormality’ or ‘personality disorder’ that makes it difficult, if not impossible, for the person to control his dangerous behavior.”⁵⁹ The Court found the statute non-retributive, as the criminal conviction serves merely to supply evidence of dangerousness or mental abnormality.⁶⁰ Since the Court did not discern any other punishment purpose behind the statute, such as deterrence, it did not view the statute as criminal, but instead considered it an appropriate state restraint on mentally ill and dangerous offenders.⁶¹ As the statute falls squarely into the civil paradigm, the Court held that it violates neither the Double Jeopardy Clause, nor the prohibition on ex post facto legislation.⁶² According to the majority, the state’s police power—its function as the guarantor of public safety and security—allows it to detain the dangerous sexual offender.⁶³

The comparison with civil commitment statutes, framing the categorization of sex offender commitment statutes as civil,⁶⁴ appears forced. Civil commitment statutes have historically been used only

56. KAN. STAT. ANN. § 59-29a03.

57. *Id.* § 59-29a05.

58. *Hendricks*, 521 U.S. at 353 (describing procedure). In *Hendricks*, the psychiatric facility was on prison grounds. *Id.* at 379 (Breyer, J., dissenting).

59. *Id.* at 358.

60. *Id.* at 362.

61. *Id.* at 368-69.

62. *Id.* at 371.

63. For a distinction between the state’s police power and its *parens patriae* power in civil commitment proceedings, see David J. Gottlieb, *Preventive Detention of Sex Offenders*, 50 KAN. L. REV. 1031, 1035-36 (2002).

64. See *Hendricks*, 521 U.S. at 369 (holding that the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive).

for individuals with the most serious psychiatric disorders.⁶⁵ Usually, patients are stabilized, and released after approximately thirty days.⁶⁶

Justice Breyer wrote a dissenting opinion in which three other justices joined in whole or in part.⁶⁷ He did not find a violation of the Due Process Clause,⁶⁸ but instead focused on the state's provision of treatment.⁶⁹ In light of the delay of treatment during incarceration, which deprives the offender of any opportunity to be cured prior to release, Justice Breyer found the statute to be punitive.⁷⁰ Therefore, he would have held it in violation of the Ex Post Facto Clause.⁷¹ Instead of civil commitment, Justice Breyer recommended sentencing at the maximum of the statutorily authorized prison term, use of consecutive sentences, or of recidivism statutes to lengthen sentences for sex offenders.⁷²

In recent years, the Supreme Court has increasingly been asked to distinguish criminal from civil sanctions.⁷³ Despite enormous efforts to do so in a principled manner, the Court has not been able to draw a clear line.⁷⁴ Nevertheless, it has found commitment statutes for so-called "sexual predators" civil, and therefore exempt from the protections that generally apply in criminal cases.⁷⁵ In

65. See PSYCHIATRY AND SEX PSYCHOPATH, *supra* note 48, at 862-63 (stating that all sex psychopath legislation during the thirties to eighties had extreme danger as a common factor).

66. The information in this paragraph is derived from Fitch, *supra* note 32 (manuscript at 1). The mental illness in these cases is medically based, rather than legally constructed, as is the case in sex offender commitment statutes. *Id.* (manuscript at 14). Even those sent to mental institutions upon a finding of legal "insanity," generally do not spend substantial periods of time there. *Id.* (manuscript at 1).

67. *Hendricks*, 521 U.S. at 373-97 (Breyer, J., dissenting).

68. Justice Ginsburg did not join in this part of the dissent. *Id.* at 373 (Breyer, J., dissenting).

69. *Id.* at 373-74 (Breyer, J., dissenting).

70. *Id.* at 381 (Breyer, J., dissenting). It made a crucial difference to Justice Breyer that the state did not appear to act in the individual's best interest by providing him with treatment already during his criminal sentence. *Id.* at 396.

71. *Id.* at 395-96 (Breyer, J., dissenting).

72. *Id.* at 395 (Breyer, J., dissenting); *but see* MINN. DEP'T OF CORR., SEX OFFENDER POLICY AND MANAGEMENT BOARD STUDY 17 (2000) (reporting that enhanced sentenced are often used as bargaining chips in plea negotiations).

73. See, e.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (stating that in some cases the distinction is difficult; factors relevant to the inquiry include whether the sanction involves a restraint or disability, whether it has historically been regarded as punishment, and whether the behavior to which it applies is already a crime).

74. *Id.*

75. See *Kansas v. Crane*, 534 U.S. 407, 412 (2002) (discussing *Hendrick's* distinction between dangerous sex offenders subject to civil commitment from other dangerous persons who are perhaps more properly dealt with exclusively through criminal

recent cases, the Supreme Court has approved of even broader coverage of sex offender commitment statutes and looser protections for sex offenders than applied in *Hendricks*.⁷⁶

2. *Treatment: The State's Obligation?*

Hendricks epitomizes the public's fear of so-called "sexual predators." Civil commitment statutes make up only a small aspect of the "war on sexual predators," but are indicative of the concerns of the public, as well as the ease with which civil instruments can be used to achieve incapacitative goals.⁷⁷ Legislative debates quoted in *Hendricks* indicate that some legislators saw civil confinement merely as an alternative to or extension of imprisonment.⁷⁸ For some, civil confinement created the option of a virtual life term for sexual offenders.⁷⁹

As sanctions for sexual offenses have increased over the last decade, some offenders may be perceived as not having received a sufficient sentence, either from a retributive or an incapacitative perspective. This may be the case either because offenders did not avail themselves of treatment options available in prison, because the sentence they received at the time of their sentencing appears inappropriate from today's perspective, or because even a maximum sentence does not seem to guarantee safety. For these offenders, civil commitment statutes similar to Kansas's legislation⁸⁰ appear to present the only opportunity for further incapacitation. Currently, fifteen states and the District of Columbia have such laws.⁸¹

proceedings); *Seling v. Young*, 531 U.S. 250, 260 (2001) (finding the Washington Act, which authorizes civil commitment of "sexually violent predators," to be civil in nature).

76. See, e.g., *Crane*, 534 U.S. at 412-14 (refusing to define narrowly term "lack of control," the finding of which warrants "civil" commitment).

77. John F. Kavanagh, Jr. & Matthew C. Welnicki, *A Practical Overview of Massachusetts General Laws Chapter 123A: Care, Treatment and Rehabilitation of Sexually Dangerous Persons*, 24 W. NEW ENG. L. REV. 1, 3 (2002) (arguing that legislators have passed civil commitment statutes and registration statutes for sexual offenders in part in response to public and media pressure). For the genesis of the Kansas law, see Gottlieb, *supra* note 63, at 1047-48.

78. *Kansas v. Hendricks*, 521 U.S. 346, 372-73 (1997) (Kennedy, J., concurring).

79. Gottlieb, *supra* note 63, at 1048 (stating that the Act was packaged as one "whose purpose was to provide essentially lifetime incarceration for a group of individuals who never should be released.").

80. KAN. STAT. ANN. § 59-29a01 (1994).

81. Fitch, *supra* note 32 (manuscript at 3). For a listing of various sexual predator statutes, see *supra* note 3.

To prevent due process concerns, the civil commitment must promise treatment and hold out the possibility of a cure for the mental abnormality or an end to the dangerousness. Many legislators and members of the public, however, have already indicated that they consider the possibility of "curing" sexual predators remote, if existent at all. If the possibility of curing is so remote, then civil commitment for these sex offenders undermines the criminal justice and the mental health systems.⁸² It supplants criminal justice sanctions while confining individuals who are either untreatable, or whose underlying condition may not constitute a mental illness.⁸³ The failure to provide any, or at least adequate, treatment during incarceration, led the American Psychiatric Association to conclude that sex offender commitment is "incapacitative rather than therapeutic."⁸⁴

Even if those who believe "nothing works" are wrong, existing treatment options that hold out the promise of success are very expensive.⁸⁵ If civil commitment is to fulfill its function, such treatment options must be provided in psychiatric facilities housing sex offenders.⁸⁶ Instead, however, many such institutions provide only prison-like confinement without treatment.⁸⁷ This reflects the as-

82. Jennifer M. Connor, Note, *Seling v. Young: Constitutionally Protected but Unjust Civil Commitment for Sexually Violent Predators*, 18 J. CONTEMP. HEALTH L. & POL'Y 511, 536-38 (2002) (stating that the American Psychological Association chastises civil commitment of sex offenders as a way to detain people "for whom confinement rather than treatment [is] the real goal.").

83. See, e.g., Henry, *supra* note 45, at 231 (stating that a major criticism of civil confinement is that it is "an illegitimate use of the mental health system to confine a class of individuals whose mental status and responsiveness to treatment is a matter of clinical dispute.").

84. AM. PSYCHIATRIC ASSOC., DANGEROUS SEX OFFENDERS: A TASK FORCE REPORT OF THE AMERICAN PSYCHIATRIC ASSOCIATION 12 (1999) [hereinafter DANGEROUS SEX OFFENDERS]. The mental health establishment has generally been critical of sex offender commitment legislation. Fitch, *supra* note 32 (manuscript at 3) (stating that the American Psychiatric Association ("APA") claimed that, "no one has suggested these laws reflect a renewed faith in the power of psychiatry to cure sex offenders.").

85. Steven I. Friedland, *On Treatment, Punishment, and the Civil Commitment of Sex Offenders*, 70 U. COLO. L. REV. 73, 130-32 (1999).

86. Anna Gorman, *Sex Offenders Seek End to Extra Jail Time*, L.A. TIMES, May 13, 2002, at L.A. Metro pt. 2, at 1. Most prisons housing sex offenders also do not provide for such treatment options. *Id.* They should do so, however, to justify the state exerting coercive powers to detain dangerous offenders.

87. See, e.g., *Turay v. Seling*, 108 F. Supp. 2d 1148, 1151-52 (W.D. Wash. 2000) (modifying contempt order once state facility began to offer appropriate treatment for sex offenders), *aff'd sub nom.*, *Sharp v. Weston*, 233 F.3d 1166 (9th Cir. 2000); Connor, *supra* note 82, at 525-26 (recounting *Turay* litigation which challenged absence of treatment for sexual offenders held in Washington's Special Commitment Center).

sumption that “nothing works” for sex offenders, and the primary rationale for commitment must be incapacitation—preventing the offenders from re-joining the larger society.⁸⁸

3. *Civil Commitment as a Collateral Sanction: A Critique*

Much of the criticism of *Hendricks* centers around the categorization of post-sentence confinement for sex offenders as a civil sanction.⁸⁹ Were such commitment to be styled as a criminal penalty, then all the protections otherwise applicable in criminal cases would apply.⁹⁰ Others have challenged the Kansas legislative scheme as inappropriate, independent of whether it is considered a civil or criminal sanction.⁹¹ They consider it impossible to predict correctly the future risk any offender poses, and view the confinement of any individual based on such a prediction as an unnecessary and unconstitutional deprivation of liberty in a democracy.⁹²

Hendricks is not only a case about civil commitment of sex offenders, or a disconcerting account of society's current approach to such criminals, but rather epitomizes the debate about collateral sanctions.⁹³ Collateral sanctions sit uneasily at the civil/criminal di-

88. Friedland, *supra* note 85, at 82.

89. See, e.g., Kimberly A. Dorsett, *Kansas v. Hendricks: Marking the Beginning of a Dangerous New Era in Civil Commitment*, 48 DEPAUL L. REV. 113, 156-57 (1998); Carol S. Steiker, *Supreme Court Review: Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771 (1998).

90. This Article does not review the constitutional issues in *Hendricks* that arose from the retroactive application of the law to *Hendricks* himself. *Kansas v. Hendricks*, 521 U.S. 346, 370 (1997). For such an analysis, see Adam J. Falk, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment After Kansas v. Hendricks*, 25 AM. J.L. & MED. 117, 130-31 (1999); Friedland, *supra* note 85, at 77-154; Joseph Hough, *Seling v. Young: No “As Applied” Challenge to Civil Commitment*, 28 AM. J. CRIM. L. 251, 252-84 (2001).

91. See, e.g., Erich H. Gaston, *Privacy & Autonomy in Health Care: Kansas v. Hendricks*, 117 S. Ct. 2072 (1997); *The Court's Unworkable Constitutional Standards and Flawed Analysis Threaten Freedom*, 2 QUINNIPIAC HEALTH L.J. 227, 264-65 (1998).

92. Even though I have serious misgivings about the possibility of accurately assessing an individual offender's future risk and am deeply concerned about the high likelihood of false positives, I allow for the need to confine extremely dangerous offenders who are considered highly likely to commit serious violent acts, especially those directed at a vulnerable population, such as children. Therefore, this Article assumes that the state must have at its disposal certain instruments to detain particularly dangerous offenders beyond the time that a retributive sanction would allow, as long as there is treatment available for them. The state, however, should restrictively exercise its right to put the population's safety interest ahead of individual liberty interests.

93. *Hendricks*, 521 U.S. at 356-69 (discussing the due process, ex post facto, and double jeopardy issues based around the civil/criminal distinction).

vide.⁹⁴ They are styled “collateral” because they are viewed as non-criminal even though they carry the hallmarks of criminal sanctions; many are punitive, focused on incapacitation and deterrence.⁹⁵ Nevertheless, the non-criminal label makes it possible for them to be assessed at a point other than sentencing. Kansas, for example, allows for the imposition of confinement under the sex offender legislation after the completion of imprisonment.⁹⁶ Even though the framework provided by the Kansas legislature for civil commitment appears desirable if compared to the wholesale imposition of other collateral sanctions, it perpetuates the existence of a bifurcated system that renders the existing sentencing framework unpredictable, inconsistent and irrational.

In these respects the Kansas scheme for sex offender commitment reflects the problems of collateral sanctions generally.⁹⁷ Collateral sanctions are imposed on criminal offenders either automatically or through a separate, administrative process.⁹⁸ Most sanctions apply only after such offenders have served their criminal sentences.⁹⁹ Such sanctions limit the political, social, or economic rights of offenders.¹⁰⁰ They restrict their ability to vote, to run for political office, to live in public housing, or to get state licenses for professions ranging from attorney to barber.¹⁰¹ While sex offender commitment does not impact as large a number of ex-offenders as other collateral consequences,¹⁰² in the summer of 2002, 1,632 individuals were labeled sexually violent predators and 846 were confined pending a commitment hearing.¹⁰³ Even though the number of individuals directly affected may be comparatively

94. Nora V. Demleitner, “*Collateral Damage*”: No Reentry for Drug Offenders, 47 VILL. L. REV. 1027, 1032 (2002) [hereinafter Demleitner, “*Collateral Damage*”].

95. *Id.*

96. KAN. STAT. ANN. § 59-29a03 (1994).

97. See, e.g., Demleitner, “*Collateral Damage*”, *supra* note 94, at 1048 (generally, collateral sanctions “hinder individual offenders’ rehabilitation and reintegration into society by restricting welfare benefits, employment and skills training opportunities, and the reunion with the family.”).

98. *Id.*

99. *Id.* at 1048.

100. *Id.* at 1032.

101. For a discussion of the myriad collateral sanctions in existence, see Demleitner, *Preventing Internal Exile*, *supra* note 4, at 154-58; Travis, *supra* note 22, at 20-25.

102. See, e.g., JAMIE FELLNER & MARC MAUER, HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELON DISENFRANCHISEMENT LAWS IN THE UNITED STATES 4 (1998). As of 1998, approximately 3.9 million people were disenfranchised either because they had felony records, or were imprisoned. *Id.* at 1-2.

103. Fitch, *supra* note 32 (manuscript at 6).

small, sex offender commitment is among the most extreme of collateral sanctions as it deprives an offender of his liberty after he has finished his criminal justice sentence.¹⁰⁴

In determining whether a collateral sanction amounts to criminal punishment, courts begin by ascertaining the intent of the legislature.¹⁰⁵ As long as the legislature did not intend the law to impose punishment, the statute is presumptively non-criminal.¹⁰⁶ When looking beyond the legislative intent, the courts tend to view only retribution and deterrence as traditional goals of punishment.¹⁰⁷ Alternatively, incapacitation is considered a goal of the criminal and civil systems.¹⁰⁸ If courts were to acknowledge incapacitation as a traditional punishment goal, this would undermine the carefully crafted, albeit flimsy, distinction between civil and criminal sanctions. Most importantly, if incapacitation were viewed as a punishment goal, legislators would have to mandate individualized risk assessments and create procedural protections for ex-offenders subject to collateral sanctions.¹⁰⁹

In many respects, involuntary confinement for sex offenders already presents a narrowly tailored approach to collateral sanctions. For example, the civil confinement process is limited to sex offenders,¹¹⁰ as opposed to many collateral sanctions which impact a vast array of offenders.¹¹¹ In fact, only sex offenders who present a future danger and have a mental defect that makes it impossible for them to control their sexual desires are eligible.¹¹² This targeted

104. *Id.* (manuscript at 18); John Q. LaFond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655, 656-57 (1992).

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

106. *Id.* at 368-69.

107. *See, e.g.*, *Kansas v. Crane*, 534 U.S. 407, 412 (describing "retribution or general deterrence" as functions of criminal law) (quoting *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring)); *see also* *Allen v. Illinois*, 478 U.S. 364, 370 (1986) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)).

108. *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring).

109. DIRK VAN ZYL SMIT, *TAKING LIFE IMPRISONMENT SERIOUSLY IN INTERNATIONAL AND INTERNATIONAL LAW* 73-75 (2002); Gottlieb, *supra* note 63, at 1046-49.

110. *See, e.g.*, *Hendricks*, 521 U.S. at 350-53 (Kansas statute limits sanctions to sexual predators).

111. *See, e.g.*, Demleitner, "Collateral Damage", *supra* note 94, at 1035-36 (citing federal housing policies which exclude drug offenders from publicly subsidized housing); *see also* FELLNER & MAUER, *supra* note 102 (discussing sweeping state statutes disenfranchising convicted felony offenders).

112. *See* *Kansas v. Crane*, 534 U.S. 407, 413 (2002) (requiring "proof of serious difficulty in controlling behavior.").

approach makes it more likely that the civil commitment laws fulfill their purpose—protecting the public.

Whether civil commitment laws protect the public, however, depends largely on the definitions of the key terms in such statutes and the applicable procedure. How is dangerousness to be assessed? What type and level of mental abnormality is required? For example, under Kansas law, the state merely has to show a “mental abnormality” or “personality disorder” that predisposes the offender to commit future sexual crimes.¹¹³ Even though the state has conceded that the interpretation of these terms must be limited to recognized mental conditions, the assessment does not appear to provide any substantial limitation on the offender’s classification since it includes “antisocial personality disorder,” a disorder from which probably about half of all criminal defendants suffer.¹¹⁴

The severity of sex offender commitment causes those selected for such confinement to be granted protections tantamount to those in the criminal process.¹¹⁵ This differs from many other collateral sanctions, which are imposed automatically upon the conviction of a specific type of offense.¹¹⁶ In those cases, no individual risk assessment occurs and therefore no procedural protections apply.¹¹⁷

Even though civil confinement statutes improve upon other collateral sanctions regimes, the mere possibility of such a sanction following the criminal punishment undermines the sentencing process and purposes of punishment.¹¹⁸ Many sex offenses carry high

113. VAN ZYL SMIT, *supra* note 109, at 76. “The shift from ‘mental illness’ to ‘mental abnormality’ . . . is a move away from the expertise of the relatively independent quasi-medical expert to the expert knowledge of criminal justice professionals, such as prosecutors, who now take the initiative in keeping ‘sexual predators’ in indefinite detention.” *Id.*

114. Gottlieb, *supra* note 63, at 1040.

115. See, e.g., *Kansas v. Hendricks*, 521 U.S. 347, 351-53 (1997) (describing protections granted by the state of Kansas during involuntary confinement procedures for sex offenders). But the procedures vary depending on state law. See, e.g., John Kirwin, *One Arrow in the Quiver—Using Civil Commitment As One Component of a State’s Response to Sexual Violence*, 29 WILLIAM MITCHELL L. REV. 1135, 1185 (2003) (describing Minnesota’s procedures).

116. See, e.g., Demleitner, “Collateral Damage”, *supra* note 94, at 1034-45 (stating that many are denied access to federal benefits, such as food stamps or subsidized housing upon their first conviction and may be permanently denied benefits upon a subsequent conviction).

117. *Id.*

118. See *Hendricks*, 521 U.S. at 373 (Breyer, J., dissenting).

maximum sentences, often including life terms.¹¹⁹ In determinate and indeterminate sentencing regimes, the criminal sentences for sex offenders are based not only on retribution but also on predictions of the offender's future dangerousness.¹²⁰ Therefore, incapacitative considerations frequently enter the sentencing process.¹²¹

The court has no control over the likelihood that the offender be civilly confined following the prison term.¹²² Rather than relying on an unpredictable civil process, a court may be likely to impose a sentence that accounts for community protection.¹²³ Yet, no medical or psychiatric assessment of the offender is required and the court decision does not depend on a finding of mental abnormality.¹²⁴ In fact, it is likely that courts impose relatively high sentences on all sex offenders for community protection purposes, even if lengthy prison terms overpredict the danger of recidivism.¹²⁵ Thus, many sex offenders may serve an unnecessary community protection component of their sentence based on their low risk of recidivism.¹²⁶ Moreover, offenders who are subsequently predicted to be dangerous and mentally deficient under the involuntary confinement laws are doubly punished as they serve the community protection component of their sentence twice—first in prison, and then again in a psychiatric facility.¹²⁷

119. See, e.g., KAN. STAT. ANN. § 21-4704 (J) (2001); *id.* § 21-4716(F)(ii) (listing predatory sexual conduct as an aggravating factor for sentencing purposes); *People v. Snow*, 129 Cal. Rptr. 2d 314, 323-24 (Cal. Ct. App. 2003) (holding that a sentence of eighty-five years to life for child molestation did not constitute cruel and unusual punishment under the state and federal constitutions).

120. KAN. STAT. ANN. § 21-4704 (J); *id.* § 21-4716(F)(ii); Demleitner, *Searching for a Solution*, *supra* note 14, at 59.

121. Demleitner, *Searching for a Solution*, *supra* note 14, at 59.

122. See *Hendricks*, 521 U.S. at 385 (Breyer, J. dissenting).

123. PSYCHIATRY AND SEX PSYCHOPATH, *supra* note 48, at 853-86.

124. *Id.*

125. Any reference to recidivism herein pertains to the commission of a serious sexual offense following a sex offense conviction. DANGEROUS SEX OFFENDERS, *supra* note 84, at 132 (explaining that recidivism can be defined narrowly as the commission of an identical crime or more broadly as the commission of any subsequent crime). While overall recidivism rates for all offenders are high, sex offenders are highly unlikely to commit another dangerous sex crime even though their reconviction rates for another sexual offense are high. LANGAN & LEVIN, *supra* note 18, at 8 tbls. 9, 10.

126. See LaFond, *supra* note 104, at 667 (noting that sex offenders have relatively low rates of recidivism or at least rates similar to other crimes and are given higher sentences based on the misconception that sexual offenders are recidivists).

127. *Id.* at 656-57.

The consequences of being confined under a sex offender commitment statute are grave. A Minnesota study regarding sex offender commitment demonstrated that between 1975 and 1995 no offender had been discharged, and only one had been provisionally discharged.¹²⁸ While in 1994, fewer than a quarter of all civilly committed mentally ill had spent more than a year in a state mental hospital,¹²⁹ eighty percent of all committed sex offenders had been there for more than a year, and almost half of them had been there for more than two years—one tenth had already been confined for over a decade.¹³⁰ As a result, for most it seems that civil commitment as a sex offender has turned into lifetime confinement.¹³¹

If involuntary commitment decisions for dangerous sex offenders continue to be categorized as civil, sentencing courts may not be under any obligation to inform the offender of the potential consequence of a sex crime conviction.¹³² Since the Kansas civil commitment law did not exist at the time Hendricks was sentenced, the court could not have informed him of the consequences.¹³³ So far, state courts have not required such information, even though they do so with regard to deportation.¹³⁴ Therefore, sex offenders may not be able to assess their trial strategy correctly, or adjust their behavior during imprisonment.

The inability to assess the likelihood of the imposition of civil commitment after the criminal justice sentence has been served also inserts unpredictability into the prisoner's life. This, in turn, may lead to behavioral difficulties.¹³⁵ Such a reaction borne out of frustration may be particularly likely if the offender fears civil commitment—whether correctly or not—but is not provided any treatment to show rehabilitation at the commitment hearing. On the other hand, some sex offenders may sign up for unsuitable programs to be able to demonstrate treatment efforts during a poten-

128. Janus, *supra* note 42, at 205-06.

129. *Id.* at 205.

130. *Id.* at 205-06.

131. *Id.* at 191.

132. See, e.g., Kavanagh & Welnicki, *supra* note 77, at 40 (noting that the Massachusetts courts have not required that a person pleading guilty to a sexual offense be given notice of possible later civil commitment as a sex offender).

133. *Kansas v. Hendricks*, 521 U.S. 346, 373-74 (1997) (Breyer, J., dissenting).

134. Kavanagh & Welnicki, *supra* note 77, at 40-41. In most states, deportation is the only potential collateral consequence of which offenders must be informed at sentencing. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 708 (2002).

135. Dorsett, *supra* note 89, at 155.

tial subsequent civil process, which would deprive other, more suitable offenders of such treatment.¹³⁶

For the above reasons, involuntary confinement does not present a principled way of addressing the danger sex offenders may pose to the community. Such confinement would serve greater overall justice and save valuable resources only if the likelihood of being sent into the involuntary commitment process after having served one's criminal sentence could be predicted at the time of sentencing. A determination of involuntary commitment and imprisonment at the same time should also lead to a decrease in the length of prison terms for sex offenders since those would be guided by retributive rather than incapacitative considerations, while dangerous offenders could subsequently be incapacitated.

A unitary model would fulfill the goals of the traditional punishment regime, provide predictability to criminal defendants, assure visibility, and place sanctions that pursue traditional punishment goals squarely into the criminal arena. The existing German sentencing regime will allow us to test what such a system would look like and how it would function. The model, as it operates presently, does not present an ideal system but rather provides the necessary impetus for re-thinking our current approach.

II. SEX OFFENDER SENTENCING IN GERMANY

In recent years Germany has faced similar issues regarding the sentencing of sex offenders as the United States.¹³⁷ The highly publicized rape-murder of a number of young children led to calls for increased sentences for sex offenders in the mid-1990s.¹³⁸ Since then, the German parliament has broadened the definitions of criminal offenses in the sexual arena, expanded sentence ranges, and created the possibility for additional, non-prison sanctions.¹³⁹ Because of their sweeping nature, some have argued that the

136. Cf. Jörg Kinzig, *Als Bundesrecht gescheitert—als Landesrecht zulässig?*, 2001(20) NJW (NEUE JURISTISCHE WOCHENSCHRIFT) 1455, 1459 (2001) [hereinafter Kinzig, *Als Bundesrecht gescheitert*] (discussing projected difficulties with imposition of *Sicherungsverwahrung* at the end of prison term).

137. The two countries are not alone in their approach to sexual offenders. For a discussion of the Canadian response, and especially its use of preventive detention for sex offenders, see generally Henry, *supra* note 45.

138. See, e.g., Hörnle, *supra* note 9, at 641-43.

139. *Id.* at 644-71, 674-80.

changes that have occurred constitute a re-ordering between liberty and security interests, with the latter dominating.¹⁴⁰

Among the sanctions available to German courts is the so-called *Sicherungsverwahrung* which allows for the confinement of offenders separate from the criminal incarceration, based largely on the danger of recidivism the offender poses.¹⁴¹ This sanction is imposed at sentencing.¹⁴²

A. "Penalties and Measures for Improvement and Safety"

German criminal law has traditionally distinguished between penalties on the one hand and the so-called "measures for improvement and safety" (*Massregeln der Besserung und Sicherung*) on the other.¹⁴³ While the full complement of criminal procedural protections governs penalties, not all such protections apply to *Massregeln*, which seem to fall between the civil and criminal paradigms.¹⁴⁴ *Massregeln* include suspension of a driver's license as well as *Sicherungsverwahrung*.¹⁴⁵ In both cases the protection of the public is the governing objective.¹⁴⁶ This contrasts with criminal penalties where the sentence must be proportionate to the offense.¹⁴⁷ Although penalties are retributive, within that goal the state may pursue preventive measures, such as the rehabilitation of the offender as well as protection of the public.¹⁴⁸ Nevertheless, penalties must accord with the proportionality principle and may not exceed the retributively permissible range while *Massregeln* are based on preventive concerns, such as the offender's dangerousness.¹⁴⁹ For those reasons, a dramatic rise in the length of imprisonment for select offenders seems impossible under German

140. Hans-Jörg Albrecht, Die Determinanten der Sexualstrafrechtsreform, 111(4) ZstW (*Zeitschrift für Strafrechtswissenschaft*) 863, 865 (1999).

141. Hörnle, *supra* note 9, at 675.

142. § 66 StGB.

143. See, e.g., WOLFGANG NAUCKE, *Strafrecht: Eine Einführung* 90-105 (9th ed. 2000) (discussing distinction, including its historical development and justifications).

144. See, e.g., *id.* at 91-92, 101-102 (ex post facto prohibition not applicable to *Massregeln*).

145. See, e.g., Johann Schütz, Die Rechtsfolgen der Straftat (Schluss), 1995(9) JURA (*Juristische Ausbildung*) 460, 463-65 (1995) (listing *Massregeln* and distinguishing between those which deprive offender of liberty and those that do not).

146. See, e.g., NAUCKE, *supra* note 143, at 93.

147. This does not mean that there is no proportionality requirement for *Massregeln*. § 62 StGB; see, e.g., NAUCKE, *supra* note 143, at 100.

148. NAUCKE, *supra* note 143, at 94.

149. Bernd Müller-Christmann, Die Massregeln der Besserung und Sicherung, 1990(10) JuS (*Juristische Schulung*) 801, 802 (1990).

criminal law as it permits only proportionate and retribution-based sentence increases.¹⁵⁰

The first German penal code of 1871 did not distinguish between penalties and *Massregeln*.¹⁵¹ Initial proposals to separate the two stem from the early twentieth century.¹⁵² Despite the existence of legislative proposals to create a bifurcated system throughout the 1920s, *Massregeln* were not introduced into the German penal code until 1933.¹⁵³ Even though the implementing legislation for the dualist system was passed in the early days of the Nazi regime, it was not originally conceived by the Third Reich, but has much deeper roots in German criminal law theory.¹⁵⁴ By that time, a number of other European countries had already adopted such a bipartite sentencing regime.¹⁵⁵

The need for such a dual system arose because criminal justice theorists considered a retribution-based penalty system an insufficient response to dangerous offenders who need additional rehabilitative treatment before being released back into society.¹⁵⁶ Rather than changing the purposes of criminal sanctions to include incapacitation and prevention as primary goals or leaving the issue of the dangerous offender unresolved, the penal system opted for the adoption of a dualist system where the penalty regime, governed by legal responsibility for the severity of the offenses, was supplemented by a regime of *Massregeln* designed to treat the offender and provide public safety.¹⁵⁷

Among the measures included in the original catalog was the so-called *Sicherungsverwahrung* which, albeit with modifications, con-

150. Schütz, *supra* note 145, at 464.

151. NAUCKE, *supra* note 143, at 94.

152. *Id.*; see Wolfgang Frisch, Die Massregeln der Besserung und Sicherung im strafrechtlichen Rechtsfolgensystem, 102(2) ZStW 343, 345-47 (1990).

153. NAUCKE, *supra* note 143, at 94.

154. Müller-Christmann, *supra* note 149, at 802. This did not prevent the Nazis from using—and abusing—the concept in their interest.

155. See, e.g., Enzo Musco, Massregeln der Besserung und Sicherung im strafrechtlichen Rechtsfolgensystem Italiens, 102(2) ZStW 415, 415 (1990).

156. NAUCKE, *supra* note 143, at 96; Frisch, *supra* note 152, at 345-47.

157. NAUCKE, *supra* note 143, at 96 (outlining possible responses to the dilemma of having a retribution-focused criminal system while having to address the needs of and concerns about dangerous offenders).

tinues to exist today.¹⁵⁸ Increasingly, it has come to be applied to sex offenders.¹⁵⁹

B. *Sicherungsverwahrung*

The *Sicherungsverwahrung* presents a way to deal with offenders who are viewed as posing an ongoing danger to society, which does not end with their retribution-based sentence.¹⁶⁰ Originally, it became part of the German penal code in November 1933.¹⁶¹ Despite changes, it exists to this day. Like all *Massregeln*, it is considered justified when the protection of the public and the prevention of crime clearly outweigh the individual's interest in liberty and development of his personality.¹⁶² Therefore, it can be explained either because the public is justified in depriving an individual of his liberty who abuses it in a criminal manner, or because the public has a right to self-defense.¹⁶³

The largest number of offenders sentenced to *Sicherungsverwahrung* ever was 268, in 1968.¹⁶⁴ In the 1980s and early 1990s, however, the annual number of commitments has never surpassed forty.¹⁶⁵ This means about two hundred individuals are confined in this manner at any point in time.¹⁶⁶

1. Procedure

German courts can impose *Sicherungsverwahrung* only if the offender has already been sentenced to two terms of imprisonment of at least one year on an earlier occasion;¹⁶⁷ he spent at least two

158. The other *Massregeln* that deprive offenders of liberty are confinement in a psychiatric hospital and in a drug rehab center. §§ 63-64 StGB; Schütz, *supra* note 145, at 463. Three other *Massregeln* which do not deprive the offender of her liberty are also available: intensive supervised release (*Führungsaufsicht*) deprivation of a driver's license, and the prohibition on exercising one's profession. § 61 StGB; see Müller-Christmann, *supra* note 149, at 803.

159. Jörg Kinzig, Die Praxis der Sicherungsverwahrung, 109(1) ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 122, 132 (1997) [hereinafter Kinzig, Die Praxis].

160. Jörg Kinzig, Die Sicherungsverwahrung: bewährt oder obsolet?, 30(3) ZRP (ZEITSCHRIFT FÜR RECHTSPOLITIK) 99, 99 (1997) [hereinafter Kinzig, Die Sicherungsverwahrung].

161. Kinzig, Die Praxis, *supra* note 159, at 122 n.2.

162. Müller-Christmann, *supra* note 149, at 803.

163. Schütz, *supra* note 154, at 464.

164. Kinzig, Die Praxis, *supra* note 159, at 131.

165. *Id.*

166. *Id.*

167. While such a classification appears to make all low-level recidivist felony offenders potentially liable for *Sicherungsverwahrung*, we must consider that statutorily prescribed and imposed penalties in Germany are substantially lower than in the

years in prison or under a measure depriving him of liberty for those or other offenses; on the present occasion he faces at least two years imprisonment; and he poses a danger to the public because he is likely to commit further serious offenses.¹⁶⁸ The danger consists of serious offenses which harm the victim substantially, either emotionally or physically, or inflict serious economic damage.¹⁶⁹ The court can impose *Sicherungsverwahrung* also on a serial offender who does not have any prior convictions but who is currently being sentenced for three intentional offenses for which he receives at least three years imprisonment.¹⁷⁰ In the case of certain sex offenses the offender may be subject to *Sicherungsverwahrung* if he has a prior conviction for a similar offense for which he was sentenced to at least three years imprisonment.¹⁷¹ Moreover, no prior record is required if the offender has committed two sexual offenses for which he could receive at least a two-year sentence and is sentenced to at least three years.¹⁷² The crucial prerequisite for the imposition of *Sicherungsverwahrung* is that the court finds the offender likely to commit serious offenses in the future.¹⁷³ To help it make such a determination, the court must appoint an expert, and consider the offender's criminal and social history.¹⁷⁴ It appears that the prosecutor's request for an expert

United States. Even though historically a fair number of relatively minor property offenders has been confined through *Sicherungsverwahrung*, see *infra* notes 187-190 and accompanying text, the requisite length of imprisonment is not easily convertible. For a general comparison of sentence length, see Thomas Weigend, *Sentencing in West Germany*, 42 MD. L. REV. 37, 40-89 (1983).

168. § 66(1) StGB.

German law does not currently permit the imposition of *Sicherungsverwahrung* on juveniles and young offenders since they are not legally considered fully responsible. Schütz, *supra* note 154, at 463. United States sex offender commitment legislation also applies to juveniles. WASH. REV. LAWS § 71.09.030(2) (2003).

Doctrinally unresolved remained the problem of imposition of *Sicherungsverwahrung* following one or multiple life terms which was prohibited unless a life term resulted from multiple time-limited sentences. Jens Peglau, *Zur Anordnung der Sicherungsverwahrung neben lebenslanger Freiheitsstrafe*, 2000(40) NJW 2980, 2980 (2000). Recent legislative changes, however, allow imposition of *Sicherungsverwahrung* now despite a life sentence. The practical relevance of this legislative change will be limited since release from a life sentence—as well as release from *Sicherungsverwahrung*—is based on a positive prediction of social integration.

169. § 66(1)3 StGB.

170. *Id.* § 66(2).

171. *Id.* § 66(3).

172. *Id.*

173. *Id.* § 66(1)3, (2), (3).

174. § 80a StPO; THEODOR LENCKNER ET AL., *Schönke/Schröder, Strafgesetzbuch-Kommentar* 887 (26th ed. 2001) (discussing issues, such as offender's upbringing, prior criminal record, onset of first offense, types of offenses, social behavior, character,

testimony on the question of future dangerousness virtually prejudices the question of whether *Sicherungsverwahrung* should be imposed.¹⁷⁵

As a consequence of violent sex crimes against children—some of which were committed by recidivists—*Sicherungsverwahrung* for sex offenders has been expanded.¹⁷⁶ Until recent changes in legislation, *Sicherungsverwahrung* ran a maximum of ten years the first time it was imposed; at the second time it could be unlimited.¹⁷⁷ Now a court can impose *Sicherungsverwahrung* for an unlimited period the first time.¹⁷⁸ For those offenders currently in *Sicherungsverwahrung* release occurs at the ten-year mark only if the court determines that the offender is no longer likely to commit another serious offense.¹⁷⁹

The only recent and comprehensive study on *Sicherungsverwahrung*, done by Jörg Kinzig of the Max Planck Institute for Foreign and International Criminal Law in Freiburg, Germany, indicates that—prior to the legislative change—in the three German states studied the average time an offender spent in *Sicherungsverwahrung* was slightly over four years.¹⁸⁰ Only sixteen offenders had been held for more than ten years; nine of them were sexual offenders, largely pedophiles.¹⁸¹

Historically, *Sicherungsverwahrung* could be imposed for all types of offenses, including minor property crimes, as long as the offender fulfilled the statutory sentencing prescriptions.¹⁸² The most serious initial criticism levied against *Sicherungsverwahrung*

which court should consider in determining whether offender continues to be dangerous); Schütz, *supra* note 150, at 463.

175. Michael Kilchling, Kolloquiumsdiskussion “Die Praxis der Sicherungsverwahrung”, 109(1) ZStW (*Zeitschrift für die gesamte Strafrechtswissenschaft*) 165, 168 (1997) (presenting Kinzig’s findings).

176. Jörg Kinzig, Schrankenlose Sicherheit?—Das Bundesverfassungsgericht vor der Entscheidung über die Geltung des Rückwirkungsverbots im Massregelrecht, 20(6) StV (*Strafverteidiger*) 330, 330 (2000) [hereinafter Kinzig, Schrankenlose Sicherheit?].

177. Kinzig, *Die Praxis*, *supra* note 159, at 125.

178. § 67 StGB. For a description of the legislative process, see Kinzig, Schrankenlose Sicherheit?, *supra* note 176, at 330-31. The changes were conceived because of two offenders, including one sex offender, who were about to be released at the end of their ten-year *Sicherungsverwahrung* even though the psychiatric staff feared the commission of serious violent offenses. *Id.* at 330.

179. § 67d(3) StGB.

180. Kinzig, *Die Praxis*, *supra* note 159, at 157-58.

181. *Id.* at 158-59.

182. § 66(1), (2) StGB (providing no limitation on types of offenses that constitute prerequisite for *Sicherungsverwahrung* other than that they must be intentional crimes); Kinzig, *Die Praxis*, *supra* note 159, at 132 n.46 (discussing prior empirical

focused on its wide availability.¹⁸³ In empirical studies conducted largely during the 1970s it became clear that most of those in *Sicherungsverwahrung* were small time property and fraud offenders.¹⁸⁴ These findings parallel those on the impact of the three-strikes legislation in California, which has been justified in part as a preventive and incapacitative measure.¹⁸⁵ In *Lockyer v. Andrade*, the Supreme Court upheld California's legislation against an Eighth Amendment challenge, even though Andrade had been sentenced to a minimum of fifty years in prison based on two shoplifting incidents combined with two prior burglary convictions.¹⁸⁶

Kinzig's more recent empirical study indicates, however, that the number of sexual offenders in *Sicherungsverwahrung* has increased as compared with the number of property offenders.¹⁸⁷ By the early 1990s, they constituted about one third of all those in *Sicherungsverwahrung*,¹⁸⁸ and most of them had prior convictions for sexual offenses. These data accord with the statutory focus on the prevention of serious future offenses, especially those causing physical or psychological harm.

Compared to some other violent offenders, sex offenders in *Sicherungsverwahrung* had relatively short prison sentences.¹⁸⁹ This may be due to the fact that many of them were found to have limited legal responsibility for their actions, due to some mental abnormality.¹⁹⁰ In general, there seems to be an inverse relationship between the length of imprisonment and the length of *Sicherungsverwahrung*.¹⁹¹ Some have argued that this indicates that judges consider imprisonment and *Sicherungsverwahrung* a unit, which would violate the notion that they serve different function.¹⁹² One could also find, however, these data to indicate that

studies of *Sicherungsverwahrung* which showed higher percentage of property offenders held).

183. Cf. Denno, *supra* note 44, at 1352-53 (describing overinclusiveness of earlier "sexual psychopath" legislation: "The harmless groups [homosexuals, peepers, exhibitionists and fetishists] thus constituted a substantial portion of institutionalized sex offenders.").

184. Kinzig, *Die Praxis*, *supra* note 159, at 130; Kinzig, *Die Sicherungsverwahrung*, *supra* note 160, at 100.

185. FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 85 (2001).

186. 123 S. Ct. 1166, 1170-71 (2003).

187. Kinzig, *Die Praxis*, *supra* note 159, at 132, 134.

188. *Id.*

189. *Id.* at 142-43.

190. *Id.* at 145.

191. *Id.* at 160.

192. *Id.*

courts understand the different purposes the two forms of confinement serve, and that *Sicherungsverwahrung* implies an impaired mental state.

As all *Massregeln*, *Sicherungsverwahrung* is imposed at sentencing, as part of the overall sentence imposed on the offender. Initially, the offender's dangerousness is assessed at the time of trial.¹⁹³ Since it is a *Massregel*, which is based on the public's safety needs rather than a retributive penalty, the time must not necessarily be served, assuming the offender constitutes no longer a danger.¹⁹⁴ After the offender serves two thirds of his sentence, a special chamber of the court responsible for parole decisions will determine whether the *Sicherungsverwahrung* can be suspended.¹⁹⁵ The judges serving on this court must be particularly trained as to the safety and rehabilitative effect of penalties and *Massregeln*.¹⁹⁶ Kinzig's recent empirical study has indicated that such suspension occurs in almost twenty percent of all cases,¹⁹⁷ with sexual offenders benefiting from it slightly less frequently.¹⁹⁸

A similar assessment of dangerousness occurs at the time of release from imprisonment and after that every other year.¹⁹⁹ Generally, the review of *Sicherungsverwahrung* during the time it is served is very restrictive. Courts are more inclined to side with experts who predict future offenses.²⁰⁰ Once *Sicherungsverwahrung* is suspended, the offender will be subject to intensive supervision (*Führungsaufsicht*) through a probation officer.²⁰¹

193. Müller-Christmann, *supra* note 149, at 804. At that point the court may consider the impact of a long prison term and likely personality changes because of increasing age. Formelle Voraussetzungen der Sicherungsverwahrung, 2000(3) NSrZ 138, 139 (discussing the judgment of the *Bundesgerichtshof* published July 14, 1999—3 StR 2/0/99 (LG Wuppertal)).

194. In contrast to other measures, the *Sicherungsverwahrung* generally follows the penalty phase, and neither one replaces the other, even though it can be suspended. There is no attempt made, though to replace the penalty phase through *Sicherungsverwahrung* or vice versa. NAUCKE, *supra* note 143, at 101. For a discussion of the reasons for the order of measures and penalties, see Müller-Christmann, *supra* note 149, at 805.

195. § 67e StGB; LENCKNER ET AL., *supra* note 174, at 901-03.

196. NAUCKE, *supra* note 143, at 103.

197. Kinzig, *Die Praxis*, *supra* note 159, at 153. The same study found that the release rate varies widely between different German states. *Id.*

198. *Id.* at 154.

199. §§ 67c, 67e StGB; see Kinzig, *Die Praxis*, *supra* note 159, at 125.

200. For the situation under United States' laws, see Janus, *Preventing Sexual Violence*, *supra* note 42, at 202-03.

201. §§ 67, 68 StGB; Schütz, *supra* note 150, at 464. The goal of *Führungsaufsicht* is to protect the public while allowing the ex-offender to reenter society successfully. Schütz, *supra* note 145, at 464.

In only about one third of all cases was the release from *Sicherungsverwahrung* revoked. This is slightly higher than the general recidivism rate for those sentenced to *Sicherungsverwahrung*, which is about one quarter.²⁰² But in almost all cases the offenders committed relatively minor offenses.²⁰³

2. The Challenges

a. More *Sicherungsverwahrung*

Some challengers of *Sicherungsverwahrung* have argued that public safety alone, or the perception of public safety, can never constitute a sufficient justification for confinement.²⁰⁴ The decreasing number of referrals during the 1980s and early 1990s appeared to indicate that many prosecutors and courts shared this view. During this time, efforts to abolish *Sicherungsverwahrung* seemed destined to succeed. With the perceived increase in violent sex crimes, however, the opposite occurred. The availability and length of *Sicherungsverwahrung* were increased.²⁰⁵ No longer is the first imposition of *Sicherungsverwahrung* limited to ten years.²⁰⁶ Now courts can end *Sicherungsverwahrung* after ten years only if they find the detained no longer likely to commit serious offenses.²⁰⁷

Even though the *Sicherungsverwahrung* is imposed at sentencing, Germany's penal law distinguishes between criminal justice sanctions, such as fines or imprisonment, and *Massregeln*.²⁰⁸ As a *Massregel*, *Sicherungsverwahrung* is not covered by some traditional procedural protections, including the ex post facto rule.²⁰⁹ Therefore, the German Parliament allowed for the retroactive application of the lifting of the ten year time limit to those currently

202. Kinzig, *Die Praxis*, *supra* note 159, at 156.

203. *Id.* at 157.

204. *See, e.g., id.* at 164.

205. Jörg Kinzig, *Neues von der Sicherungsverwahrung—ein Überblick über den Stand der Gesetzgebung 1* (June 2002) (on file with the author) [hereinafter Kinzig, *Neues von der Sicherungsverwahrung*]; Kinzig, *Schrankenlose Sicherheit?*, *supra* note 176, at 330-31.

206. Kinzig, *Schrankenlose Sicherheit?*, *supra* note 176, at 330-35 (discussing removal of ten year maximum of *Sicherungsverwahrung*).

207. 67d(3) StGB. For a summary of the critique of recent legislative developments, *see* VAN ZYL SMIT, *supra* note 113, at 162-64.

208. NAUCKE, *supra* note 143, at 90-99.

209. *Id.* at 91, 103-04 (discussing that expansion of *Sicherungsverwahrung* for sex offenders is exempt from prohibition on ex post facto laws).

in *Sicherungsverwahrung*.²¹⁰ Some of the individual German states have gone yet farther and allow for the retroactive application of *Sicherungsverwahrung*, similar to the example provided by the Kansas legislature in *Hendricks*.²¹¹ This means that even offenders released from any criminal justice sanctions could be detained in *Sicherungsverwahrung* if a change in circumstances makes them appear to constitute a threat to public safety.

The federal government in Berlin also passed legislation that allows courts to state in their sentencing judgments that it was “impossible to determine with sufficient likelihood” whether the offender constitutes a threat to public security.²¹² If that occurs, the offender’s dangerousness will be assessed about six months prior to his release.²¹³ Since the law went into effect just last fall, it is too early to assess its impact. It appears, though, to undermine many of the advantages—legally and with regard to treatment—of the current German legislation. All of these developments have caused some to charge that public safety and protection have come to trump concerns about the unconstitutional deprivation of liberty.²¹⁴

b. Risk Assessments

Because the goal of *Sicherungsverwahrung* is to provide greater protection of the public, the assessment of the offender’s future dangerousness is crucial. Such a determination, however, is notoriously unreliable. Therefore, many have argued that *Sicherungsverwahrung* should be abolished since it fails to fulfill its goal—public safety—largely because the prediction of dangerousness is fraught with error.²¹⁵ The *Sicherungsverwahrung* does not require

210. For a stringent critique of this extension, see Kinzig, *Schrankenlose Sicherheit?*, *supra* note 176, at 331-35.

211. See generally Jörg Kinzig, *Als Bundesrecht gescheitert—als Landesrecht zulässig?*, 20 NJW (*Neue Juristische Wochenschrift*) 1455, 1455 (2001) [hereinafter Kinzig, *Als Bundesrecht gescheitert*] (discussing legal developments in Baden-Württemberg); Kinzig, *Neues von der Sicherungsverwahrung*, *supra* note 205 (discussing state laws allowing for the imposition of *Sicherungsverwahrung* on incarcerated or released offenders if events after their conviction make it likely that they constitute a danger to bodily integrity; such events include the rejection of treatment). The German courts and possibly the European Court of Human Rights will have to determine whether the implemented changes violate the German Constitution and/or the European Convention of Human Rights. For a sampling of opinions on this issue, see Kinzig, *Neues von der Sicherungsverwahrung*, *supra* note 205, at n.33.

212. Kinzig, *Neues von der Sicherungsverwahrung*, *supra* note 205, at 7.

213. *Id.* at 7-8.

214. *Id.* at 331.

215. Kinzig, *Die Praxis*, *supra* note 159, at 125-28.

a finding of a mental abnormality but rather only of an “inclination” (*Hang*) to commit further offenses. No criteria outline how a court is to find such an inclination.²¹⁶ Law and practice, however, provide some guideposts.

A court may impose *Sicherungsverwahrung* only upon expert medical advice.²¹⁷ In addition, such assessments prove very influential with the court, as Kinzig’s study indicated. In about sixty percent of all cases in which the offender was ultimately sentenced to *Sicherungsverwahrung*, the experts found a psychopathic or other mental disorder.²¹⁸ This indicates that in more than half of the cases in which *Sicherungsverwahrung* was imposed, the formal requirement of U.S. law—mental abnormality or personality disorder—would have been fulfilled. In almost all cases did the experts draw conclusions about the offender’s future dangerousness.²¹⁹ In all cases in which the experts predicted future offending, the courts imposed *Sicherungsverwahrung*.²²⁰ In the rare cases in which the experts made no such finding, the courts usually appointed a second expert.²²¹ It appears therefore that most experts considered their appointment to assess an individual’s dangerousness as a call to find such.²²²

In addition to the expert’s advice and in the absence of other criteria, the offender’s prior record appears to hold the most predictive power.²²³ A long prior record frequently indicates that the offender is older. *Sicherungsverwahrung*, however, may be unnecessary for many older offenders even if they have a long list of prior offenses as they tend to be past the prime of their criminal career.²²⁴ This is particularly true for property and even many vio-

216. *Id.* at 126-27. The same problem also applies to the hearings before the parole chamber. *See id.* at 128.

217. § 246a StPO.

218. It is unclear whether that percentage is higher for sex offenders.

219. Kinzig, *Die Praxis*, *supra* note 159, at 149.

220. *Id.* at 149-50.

221. *Id.* at 150.

222. Georg Küpper, Diskussionsbericht über die Arbeitssitzung der Fachgruppe Strafrechtsvergleichung bei der Tagung der Gesellschaft für Rechtsvergleichung am 14.9.1989 in Würzburg, 102(2) ZStW (ZEITSCHRIFT FÜR DIE STRAFRECHTSWISSENSCHAFT) 448, 449 (1990).

223. *Id.* at 451.

224. *Sicherungsverwahrung* appears to be imposed often in cases where the offender’s criminal career is likely over. Kinzig, *supra* note 161, at 128. For certain categories of sex offenders this might be of lesser concern since their proneness to commit future crime is not tied to their chronological age. *See, e.g.*, GORDON C. NAGAYAMA HALL, THEORY-BASED ASSESSMENT, TREATMENT, AND PREVENTION OF SEXUAL AGGRESSION 87 (1996); *see also* Robert F. Schopp et al., *Expert Testimony*

lent offenders, both groups eligible for *Sicherungsverwahrung*.²²⁵ In light of methodological problems, the lack of legal guidance, and the breadth of offenses which make an offender eligible for *Sicherungsverwahrung*, prediction of danger under the current German system leaves much to be desired.

c. Confinement and Treatment

Problems related to confinement and treatment also arise under the German regime. The consecutive sequence of penalty and *Sicherungsverwahrung* is often incomprehensible to the individual offender and therefore does not contribute to reintegration.²²⁶ Additional criticism is connected to the conditions under which the offender is being held. Because of safety concerns, offenders in *Sicherungsverwahrung* do not generally enjoy benefits usually available to those imprisoned, such as the ability to leave the prison regularly during the final part of a sentence, as part of the reintegration process.²²⁷ Therefore, *Sicherungsverwahrung* is often conducted under conditions similar to if not more severe than regular imprisonment.²²⁸

Treatment is mandated, however, throughout the prison sentence so as to minimize the likelihood that the offender will be sent to *Sicherungsverwahrung*.²²⁹ Complaints about the type and amount of treatment offered during imprisonment and *Sicherungsverwahrung* exist.²³⁰ They focus on the limited number of treatment spaces and the fact that some of the offenders who were sentenced to *Sicherungsverwahrung* are considered too old for

and Professional Judgment: Psychological Expertise and Commitment as a Sexual Predator after Hendricks, 5 PSYCH. PUB. POL. & L. 120, 134-37 (1999) (discussing research findings as to recidivism of sex offenders); but see JOHN MONAHAN, RISK AND RACE: AN ESSAY ON VIOLENCE FORECASTING AND THE CIVIL/CRIMINAL DISTINCTION 26 (2003) (Canadian review of actuarial studies indicates that rate of recidivism for rapists declines with age).

225. § 66(1), (2) StGB (only limitation on triggering offenses are requirements that these are intentional and offender be sentenced to a minimum sentence of two and one year, respectively). Recidivism data indicate that recidivism declines steeply with increased age. See, e.g., LANGAN & LEVIN, *supra* note 18, at 7.

226. Kinzig, Die Praxis, *supra* note 159, at 128.

227. *Id.* at 129, 155.

228. *Id.* at 128-29. This is referred to as *Etikettenschwindel* (sticker fraud).

229. Kinzig, Neues von der Sicherungsverwahrung, *supra* note 205, at 4 (referring to court decision criticizing prison for not providing treatment facilities to offender immediately upon his incarceration).

230. Letter from Dr. Jörg Kinzig, Max Planck Institute for Foreign and International Criminal Law, to Nora V. Demleitner (Mar. 24, 2003) (on file with author).

treatment.²³¹ It is likely that such complaints will increase in light of the possible indefinite extension of *Sicherungsverwahrung*. So far, treating therapists had an incentive to rehabilitate an offender because of mandatory release upon first commitment, though individual offenders were guaranteed release even without treatment success.²³²

d. Geographic Disparity

The Kinzig study indicates that geographic disparities have developed in the imposition of *Sicherungsverwahrung*.²³³ Kinzig found a substantial number of offenders to be sentenced to *Sicherungsverwahrung* in one jurisdiction which appeared to be due solely to the preference of only one district attorney who regularly asked for its imposition.²³⁴ This indicates the lack of sufficient guidelines for prosecutors in the selection of cases for *Sicherungsverwahrung*.

Such disparate application is always likely to occur if guiding principles for prosecutors and courts are absent. While appellate courts can review the judgment made by trial courts, they cannot police the prosecutors' choice to demand *Sicherungsverwahrung*.

e. Summary

These problems indicate that the German *Sicherungsverwahrung*, especially in its more recent incarnation, provides no perfect model for the United States system. With all its flaws, however, it presents a more honest, rational, and coherent way to sentence dangerous sex offenders than the ad hoc method available through civil commitment. Moreover, the adoption of the overall approach, with appropriate modifications, holds out promise for the integration of other collateral sanctions into the sentencing process, with all attendant possibilities for further "truth in sentencing."²³⁵ By integrating collateral sanctions into the sentencing

231. *Id.*

232. The attempts on part of some German states to impose *Sicherungsverwahrung* on offenders after sentencing seems connected in part to the offenders' refusal of treatment during incarceration. See Kinzig, *Neues von der Sicherungsverwahrung*, *supra* note 205, at 4.

233. Kinzig, *Die Praxis*, *supra* note 159, at 150, 153-54 (demonstrating divergence between three German states studied).

234. *Id.* at 150.

235. The call for "truth in sentencing" characterized the sentencing reform movement during the 1970s and 1980s that aimed at more determinate sentences and the abolition of parole. See, e.g., ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 107-23 (1976) (providing theoretical framework for changes in U.S.

process and the calculation of an overall sentence, the public and the offender would be on notice as to the total amount of punishment the offender has to serve, and what incapacitative measures have been taken.

III. A MODIFIED *SICHERUNGSVERWAHRUNG*: A MODEL FOR THE IMPOSITION OF COLLATERAL SANCTIONS

This Section outlines a new approach to the sentencing of dangerous and abnormal sex offenders, by combining the German and United States' approaches. The proposed model relies heavily on the idea that all sanctions should be imposed at sentencing to provide the offender and the public with a clear sense of the penalty assessed. Moreover, it advocates restrictions on coercive state power to guarantee public safety while requiring the state to provide rehabilitation and re-entry assistance for those on whom such power is exercised.²³⁶

A. Rationales and Promises for Security-Based Detention

Sicherungsverwahrung, as its name implies, explicitly condones detaining an individual for public protection.²³⁷ It is based on an explicit incapacitation rationale, which is permitted under German law as long as the sanction is imposed as a *Massregel* rather than a penalty.²³⁸ The only apparent limitation on this power is the requirement that the state must provide treatment to the offenders so as to decrease the threat they pose.

Sex offender commitment statutes in the United States, however, are justified as non-criminal sanctions.²³⁹ Therefore, none of the protections of the criminal process attach,²⁴⁰ and no penologi-

sentencing). Its goal was to give offenders and the public a more honest assessment of the length of sentence offenders would have to serve. See, e.g., Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 U. COLO. L. REV. 679, 685 (1993). For a discussion of the impact federal "truth in sentencing" grants had on state sentencing legislation and practices, see WILLIAM J. SABOL ET AL., URBAN INST., *THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATE'S SENTENCING PRACTICES AND PRISON POPULATIONS* (2002).

236. For a description of the re-entry movement, see JEREMY TRAVIS ET AL., URBAN INST., *FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY* (2001); see also WILLIAM J. SABOL & JAMES P. LYNCH, URBAN INST., *PRISONER REENTRY IN PERSPECTIVE* (2000).

237. See, e.g., Schütz, *supra* note 145, at 463-64.

238. See, e.g., Frisch, *supra* note 152, at 345-48.

239. See *Kansas v. Hendricks*, 521 U.S. 346, 369 (1997).

240. See *id.* (holding that because proceedings under Kansas' Sexual Predator Act are not punitive, neither Double Jeopardy, nor Ex Post Facto Clauses apply to sex offender confinement).

cal justifications appear applicable. The analogy presented as the most apt is civil commitment statutes for the insane who are held to shield the public and them from harm,²⁴¹ as sex offender commitment statutes require the offender not only to pose a future danger, but also to suffer from a mental abnormality or personality disorder.²⁴² The comparison is flawed, doctrinally as well as practically.

1. *The Role of the Mental Health System*

In contrast to those with serious mental illness whom the medical establishment can at least stabilize, if not cure, it is unclear whether sex-offender treatment will be successful for the most dangerous offenders, even though some treatment appears quite promising.²⁴³ Therefore, some have argued that sex offender commitment statutes are a “deliberate misuse of the therapeutic state for social control.”²⁴⁴ As long as treatment for sex offenders is not more effective, the promise of sex offender commitment statutes is misleading, and ultimately disingenuous as they condone life imprisonment for any sex offender judged dangerous.²⁴⁵

This assessment might be too negative as it underestimates the success of some treatment options, which are, however, very costly. When the state uses its coercive power to restrict the liberty of some offenders who are adjudged to constitute a public risk because of a mental defect, it should be obligated to assist such offenders to re-enter society successfully. This is especially the case as long as our predictive ability with regard to sex offenders is very

241. See, e.g., WASH. REV. CODE § 71.05.010(2), (3), (7) (2003) (providing the legislative findings for civil commitment for mental illnesses).

242. E.g., *id.* § 71.09.010 (providing the legislative findings for Washington’s Sexually Violent Predator statute).

243. See *Hendricks*, 521 U.S. at 365-66 (accepting the Kansas Supreme Court’s finding that effective treatment for sexually violent predators is “all but nonexistent”).

244. La Fond, *supra* note 104, at 655.

245. In contrast to many civil commitment statutes, sex offender commitment statutes often do not require that the offender be treatable. See WASH. REV. CODE § 71.09.040 (making no mention that an individual must be treatable to be lawfully committed); *Hendricks*, 521 U.S. at 366-67 (establishing that the Kansas Sexually Violent Predator Act is based in the state’s obligation to provide care and treatment for these individuals, but noting that many mental illnesses are not treatable); Robert M. Wettstein, *A Psychiatric Perspective on Washington’s Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 597, 609 (1992) (noting that since many civil commitment statutes do not require an individual be treatable to be committed, the emphasis of the statute is inherently shifted toward incarceration over treatment).

low.²⁴⁶ Therefore, all offenders sentenced to additional security-based confinement should be provided with the option of treatment, however expensive, during imprisonment and security-based confinement to allow for their quick reintegration.²⁴⁷ Imposing security-based detention at trial also eliminates the danger that incarcerated sex offenders shy away from treatment out of fear that it may ultimately be held against them.²⁴⁸ Treatment during imprisonment is crucial as attempts must be made to restrict security-based confinement to a minimum because of its coercive nature.

2. *Mental Disorder or Mental Abnormality*

One of the most important safeguards of the United States' approach to civil commitment is the dual requirement of assessing mental illness *and* dangerousness.²⁴⁹ As the Supreme Court has indicated in a long line of cases, confinement based on dangerousness alone is generally inconceivable in our judicial system.²⁵⁰ Exceptions, however, exist as the courts have permitted confinement of individuals in the non-criminal arena on dangerousness grounds alone.²⁵¹ Moreover, in many states the mental *illness* requirement inherent in civil commitment statutes has been downgraded to a

246. See Corrado, *supra* note 5, at 793; Wettstein, *supra* note 245, at 608 (indicating that even though accuracy of prediction may only be fifty percent, public and legislators perceive a much higher accuracy of prediction rates).

247. There are also treatment-based reasons for such a requirement: "Delays before treatment begins permit opportunities for significant distortions and defenses by the offender." Wettstein, *supra* note 245, at 617.

248. Jeffrey A. Klotz et al., *Cognitive Restructuring Through Law: A Therapeutic Jurisprudence Approach to Sex Offenders and the Pleas Process*, 15 U. PUGET SOUND L. REV. 579, 594 (1992). Because of high failure rates in sex offender treatment, a rational sex offender incarcerated under the current regime may decide against treatment to avoid a potential trigger for post-release confinement, as failing treatment is more likely to lead to commitment than refusal to enter treatment. Eric S. Janus, *Minnesota's Sex Offender Commitment Program: Would an Empirically-Based Prevention Policy Be More Effective?*, 29 WILLIAM MITCHELL L. REV. 1083, 1122-24 (2003) [hereinafter Janus, *Minnesota's Sex Offender Commitment Program*].

249. *Kansas v. Hendricks*, 521 U.S. 346, 357-58 (1997); *Foucha v. Louisiana*, 504 U.S. 71, 75 (1992).

250. *Hendricks*, 521 U.S. at 358; *Foucha*, 504 U.S. at 75; *Addington v. Texas*, 441 U.S. 418, 425-26 (1979). The reverse also holds true. Detention of non-dangerous individuals who are mentally ill is not permissible. See *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 274 (1940) (upholding a sex offender commitment statute where applied to dangerous persons, but noting the importance of maintaining the liberty interests of the insane through due process of law).

251. For a listing of grounds for such confinement and judicial decisions on the subject, see, for example, Paul H. Robinson, *Supreme Court Review: Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693, 711-14 (1993).

“mental disorder” or “abnormality.”²⁵² Those terms include personality disorders and paraphilias.²⁵³ Even a blanket assessment of “psychopathy,” for example, may be sufficient for sex offender commitment. Determinations of such disorders are difficult to oppose since they are almost impossible to observe in an institutional setting.²⁵⁴

Due to the seriousness of this collateral sanction, stringent requirements should surround it.²⁵⁵ This means that either the mental illness requirement should be applied to sex offender commitment statutes,²⁵⁶ or at least a more stringent standard should be applied to the broader “abnormality” definition.²⁵⁷ At present, a finding of dangerousness might be sufficient to meet the abnormality standard.²⁵⁸ If that is the case, then the present application of sex offender commitment statutes does not vary from the standard applied to *Sicherungsverwahrung*, which relies merely on a finding of dangerousness, determined by prior criminal record and a psychiatric assessment.²⁵⁹

Tighter requirements of mental abnormality or illness would be necessary if the analogy to civil commitment statutes held, so as to restrict unbridled state power. If sex offender commitment is conceptualized as an incapacitative criminal justice sanction, doctrinally the requirement could be removed. Because of the

252. See, e.g., KAN. STAT. ANN. § 59.29 a01 (1994) (applying to individuals with a “mental abnormality or personality disorder”); WASH. REV. CODE § 71.09.010 (2003) (applying to individuals with a “mental abnormality or personality disorder”); Janus, *Preventing Sexual Violence*, *supra* note 42, at 197-98 (stating that in many sex offender commitment cases the mental abnormality or personality disorder can be satisfied with a showing of a personality disorder or paraphilia).

253. David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET SOUND L. REV. 525, 569 (1992); Janus, *Preventing Sexual Violence*, *supra* note 42, at 197-98.

254. Janus, *Preventing Sexual Violence*, *supra* note 42, at 198.

255. GREIG, *supra* note 15, at 173 (citing Verdun-Jones to the effect that “there is always the danger that [] restrictive measures will be imposed upon mentally disordered offenders without the benefit of the due process of law that, in theory at least, is emphasized in the sentencing of ‘normal’ offenders.”).

256. E.g., WASH. REV. CODE § 71.05.010(3), (7) (2003) (providing the legislative findings for civil commitment for mental illnesses).

257. E.g., *id.* § 71.09.020.

258. One of the main drafters of Washington’s Sexual Predator statute even stated that he “included this definition [of mental illness as ‘personality disorder’] because it focused on dangerousness, which was the purpose of commitment.” Boerner, *supra* note 253, at 569.

259. § 66 StGB (describing prerequisites for *Sicherungsverwahrung*); § 246a StPO (requiring expert assessment prior to judicial decision on *Sicherungsverwahrung*); see Kinzig, *Die Praxis*, *supra* note 159, at 137-49.

uncertainty of dangerousness predictions,²⁶⁰ however, a second safeguard against the deprivation of liberty should be provided in the form of a tight mental abnormality requirement.

Such a substantive requirement alone is insufficient. The calling of experts at sentencing should not imply that the court wants them to find a mental abnormality and dangerousness.²⁶¹ In *Hendricks*, for example, the defendant found an expert witness who was willing to provide at least tentative testimony that Hendricks does not fulfill the elements required for civil commitment.²⁶² Some state statutes, however, make independent expert testimony largely impossible because of restrictions on the selection of experts.²⁶³ Such limitations should be abolished as courts have the legal mechanisms available to them to distinguish valid from invalid scientific methods.²⁶⁴ Otherwise safety-based commitments will be determined by the prosecutor's willingness to request such confinement based on dangerousness.²⁶⁵

More difficult than remedying explicit statutory limitations on expert testimony will be confining extra-legal pressures on experts to find dangerousness.²⁶⁶ Among such pressures are "a fear of liability or censure from a false prediction of safety; the absence of any external consequences from a false prediction of violence . . . ; and the tendency of clinicians to see those factors which confirm the existing diagnosis and predictions, and ignore those which dis-

260. Combining clinical risk assessments with actuarial risk scores might prove promising in the development of more accurate predictions of future violent recidivism. See Grant T. Harris et al., *Prospective Replication of the Violence Risk Appraisal Guide in Predicting Violent Recidivism Among Forensic Patients*, 26 L. & HUM. BEHAV. 377, 389-92 (2002); see also MONAHAN, *supra* note 224, at 16-23, 47-48 (reviewing clinical and actuarial approaches to risk and advocating use of the latter in commitment proceedings for sex offenders); Janus & Prentky, *supra* note 32 (manuscript at 10, 87) (strongly advocating use of actuarial risk assessment in sex offender commitment proceedings).

261. Demleitner, *Searching for a Solution*, *supra* note 14, at 62 (discussing how the review process provides the judge with information to impose an appropriate treatment based sentence).

262. *Kansas v. Hendricks*, 521 U.S. 346, 353 n.2 (1997).

263. See, e.g., Kavanagh & Welnicki, *supra* note 77, at 44-45 (critiquing the requirements for experts under the Massachusetts civil commitment statute for dangerous sexual offenders).

264. *Daubert v. Merrill-Dow*, 509 U.S. 579, 596 (1993).

265. The Supreme Court has rejected this model. *Hendricks*, 521 U.S. at 358; see *Foucha v. Louisiana*, 504 U.S. 71, 75 (1992) (noting that due process requires a state to prove both mental illness and dangerousness to commit an individual to a mental institution through a civil commitment).

266. Janus, *Preventing Sexual Violence*, *supra* note 42, at 202-03.

confirm it.”²⁶⁷ Due to such outside influences, which counsel in favor of detention, the ability of a number of experts to examine the offender is crucial.²⁶⁸

B. Limited Scope of Security Detention

Safety-based detention as a sentencing option should only be available upon conviction of a serious violent sexual offense.²⁶⁹ Since past behavior tends to be a reasonable predictor of future behavior, those who committed a serious violent sex crime in the past—combined with a set of additional factors—are more likely to engage in such behavior in the future.²⁷⁰ Therefore, conviction of such a crime in the past plus the additional considerations should be the best predictor of future dangerousness.²⁷¹

The recidivism rates for rapists, however, are generally low, especially if compared to those for property offenders.²⁷² Recidivism studies also indicate that those convicted of rape are substantially more likely to commit a property offense than another violent sexual crime.²⁷³ Therefore, even a statutory limitation is insufficient unless combined with a stringent individual selection process.

The future threat should extend to another serious, violent sexual offense that threatens a potential victim with substantial psychological or physical harm.²⁷⁴ Since public safety concerns are focused on random acts of violence, only sex offenders likely to engage in such behavior—rather than, for example, violence focused on family members—should be covered.²⁷⁵ Nothing less than the prediction of such a serious, “predatory” crime should be

267. *Id.*

268. *Id.*

269. For a different perspective, see Falk, *supra* note 90, at 147 (noting that “indefinite and lifetime criminal sentences provide the flexibility of indefinite civil commitment without sacrificing the fundamental right of Americans to be free from physical restraint.”); see also Connor, *supra* note 82, at 537.

270. LANGAN & LEVIN, *supra* note 18, at 9-10 tbls.10 & 11.

271. See Boerner, *supra* note 253, at 568 (explaining the rationale of the Washington Task Force on Community Protection when it made its recommendations regarding Washington’s sexual psychopath law); see also WASH. REV. CODE § 71.09.020(7) (2003).

272. LANGAN & LEVIN, *supra* note 18, at 8-9 Tbls. 9-10.

273. *Id.* Nevertheless, a rapist’s odds of committing another rape are 3.2 times greater than those of a non-rapist. *Id.* at 10.

274. See Boerner, *supra* note 253, at 569.

275. *Id.* Other measures should be taken to protect family members, a tightly circumscribed group of individuals; cf. Janus, *Minnesota’s Sex Offender Commitment Program*, *supra* note 248, at 1101-09, 1133 (arguing that re-allocation of resources from sex offender commitment to other forms of prevention and treatment would likely result in decreased recidivism).

required to justify such a serious sanction, imposed for the greater good of society.²⁷⁶

C. An Integrated Process: Imposing Security Detention at Sentencing

Imposing the entire sentence—retributive-based imprisonment and security-based confinement—at sentencing carries a number of advantages. First, the offender is informed at this point about his total sentence exposure.²⁷⁷ Since one of the most profound criticisms of indeterminate sentencing regimes was that defendants lacked information and certainty about their release date,²⁷⁸ enabling the state to start civil commitment procedures for sex offenders at the end of the criminal justice sentence infuses such uncertainty and unpredictability back into the sentencing process.²⁷⁹

Second, dangerousness predictions at the point of sentencing, which occurs usually relatively shortly after commission of the offense, tend to be more accurate than those made long after the offense, as is currently the case.²⁸⁰ Therefore, practical safety reasons counsel in favor of an early assessment of risk and mental abnormality.

Third, a joint imposition of retributive sanctions and incapacitative detention allows the court to impose a sentence that considers both factors.²⁸¹ If the court determines that there is a need for safety-based confinement, this implies a finding of mental abnor-

276. WASH. REV. CODE. § 71.09.020(9), (16) (defining “predatory” and “sexually violent predator”).

277. *Cf. Kansas v. Hendricks*, 521 U.S. 346, 370 (1997) (finding that one convicted of a sex crime does not suffer a violation of his constitutional rights if he is subject to civil commitment following the conclusion of his criminal sentence).

278. MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

279. *See Connor, supra* note 82, at 539.

To allow the state to first choose the criminal sanction, which requires a finding of a specific state of mind, and then when that sanction is completed, to choose another sanction which requires a finding of the opposite state of mind, is a mockery of justice which places both the criminal and civil systems for dealing with sexual predators in disrepute.

Id.

280. Janus, *Preventing Sexual Violence, supra* note 42, at 200-01. It must be acknowledged that if security-based detention is imposed, such predictions will become more difficult during review hearings as the interval between the offense and such hearings will increase over time. *Id.* at 200.

281. *Id.* at 182.

mality.²⁸² While such abnormality will not necessarily reach the level of mental illness, it is nevertheless likely to decrease the offender's full responsibility or control over his actions. Therefore, the retributive sanction imposed on the offender should not be as stringent as that imposed on an offender who does not suffer from such a defect, and is not eligible for an incapacitative sanction.

The current system, however, does not account for such abnormality in the retributive component of a sentence.²⁸³ Either the defense fails to produce expert testimony on such an abnormality for monetary considerations, or it makes a strategic choice not to do so because of concerns that this might lead to a longer, not a shorter, sentence for the defendant, as the judge would have no other mechanism to address her concerns about a recurrence of serious sexual violence.²⁸⁴ Therefore, under the present system, it is neither in the defense's nor in the prosecution's interest to provide such information.²⁸⁵ A combination of retributive and preventive sanctions, however, would provide a more honest approach to sentencing as it allows for a disintegration of the different penalty components.

Fourth, even though misidentifications and false positives are still likely at sentencing, especially since it will presumably be the prosecutor's initial decision to demand security-based detention, sentencing is more open and accessible than the current process. Independent researchers and sentencing commissions would be able to track the cases in which security-based detention was imposed, and should be able to point to selection bias, geographic disparities, or other potentially distorting factors.²⁸⁶

Fifth, imposition of a security-based sanction at sentencing guarantees the defendant the procedural due process rights that generally attach at that phase. While the Kansas law at issue in *Hendricks* provided Hendricks with a wide array of procedural

282. See *id.* at 174-75; see also *Foucha v. Louisiana*, 504 U.S. 71, 77-78 (1992) (holding that a prediction of future dangerousness without a finding of mental disability is not sufficient to maintain an individual in civil commitment).

283. Janus, *Preventing Sexual Violence*, *supra* note 42, at 163.

284. See Jeffrey A. Klotz et al., *Cognitive Restructuring Through Law: A Therapeutic Jurisprudence Approach to Sex Offenders and the Plea Process*, 15 U. PUGET SOUND L. REV. 579, 593-94 (1992) (illustrating how potential for later commitment affects defense strategy and encourages "charge bargaining").

285. See *id.*

286. Cf. Janus, *Preventing Sexual Violence*, *supra* note 42, at 202 (asserting that since only six percent of sex offenders released from prison in Minnesota are committed civilly, based on social science principles "the identification of such low base rate phenomena will be highly error prone").

protections usually typical of the criminal rather than the civil process,²⁸⁷ such are not necessarily required for sex offender commitment. Tying the commitment to the disposition of the criminal case assures protections, such as the right to counsel, an evidentiary hearing, an opportunity to respond to the state's evidence, a reasoned written or oral decision by the sentencing judge, and appellate review.²⁸⁸ The only right currently guaranteed that would possibly not continue—the right to a jury—might be of dubious value in this context.²⁸⁹ Jury discretion might be more harmful to the defendant, as juries frequently make up their minds before the sentencing phase, fail to follow sentencing directions, and lack comparative experience.²⁹⁰

Despite these advantages, imposing security-based detention at sentencing also has drawbacks. Defendants, threatened with its possible imposition, may attempt to engage in charge or sentence bargaining to prevent such additional sanction.²⁹¹ These attempts at plea bargaining, however, may not be different, from a legal perspective, then what occurs in other cases.²⁹² It is also likely that the trial rate for sex offenders will rise if safety-based detention becomes a possibility.²⁹³ Since only a small number of sex offenders would likely be eligible for an additional confinement, the burden on courts should remain limited.²⁹⁴ From a psychological perspec-

287. See *Kansas v. Hendricks*, 521 U.S. 346, 352-53 (1997).

288. Determinate sentencing and appellate review are both inherent features of sentencing guidelines. DALE PARENT, *STRUCTURING CRIMINAL SENTENCING* 219-20 (1988). Hence, in non-sentencing guideline states without these measures, legislation or judicial rules may have to assure reasoned decisions and appellate review.

289. Should jury sentencing in this area be viewed as beneficial, possibly in the form of an advisory opinion, a sentencing jury, akin to a capital jury, could be empaneled. FLA. STAT. ch. 921.141 (2002) (advisory jury in sentencing phase of capital case); cf. TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon 2002) (binding jury verdict in sentencing phase of capital case).

290. See William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998).

291. This, however, is already an issue under the current regime. See Klotz et al., *supra* note 284, at 593-94 (illustrating how the Washington Sexually Violent Predators law will cause defendants to "charge bargain" to avoid possible commitment later).

292. See *id.* at 583-84 nn.19-21.

293. See *id.* at 593-94 (noting that the Washington law may result in an increase of defendants who decide to take their case to trial).

294. Compare this with the increase in trial rates in California under the state's Three Strikes legislation, which tells a cautionary tale about the dangers of prosecutorial discretion. ZIMRING ET AL., *supra* note 185, at 126-28. Since the California statute is drawn more broadly than the statute envisioned here, the likelihood of a comparable development is limited.

tive, a trial, however, may have a negative impact on the defendant's ability to admit his factual guilt.²⁹⁵

D. The Length of Security Detention

While it may be advisable to limit the length of safety-based detention because of the danger of abuses of state power and the likelihood that too many offenders will be warehoused for life, a time limit may be problematic for truly dangerous offenders whose treatment is very difficult, if possible at all. If an indeterminate commitment is impermissible, courts may resort to longer sentences than retributively and incapacitatively permitted and necessary.²⁹⁶ Moreover, a time limitation may necessitate the premature end of treatment that appears to lead to successful rehabilitation.²⁹⁷

On the other hand, experience with *Sicherungsverwahrung* in Germany has indicated that more than ten years of *Sicherungsverwahrung* are unnecessary, and in fact counterproductive. There is some evidence that a limit of five to six years leads offenders to accept safety-based preventive detention more easily.²⁹⁸ Some recidivist studies of sex offenders also indicate that prolonged detention, especially in conjunction with forced treatment, increases the risk of recidivism.²⁹⁹

A time-limited security-based detention will provide mental health professionals with a more precise prediction horizon.³⁰⁰ While release from civil commitment is usually based on a short-term prediction of future dangerousness, in sex offender release determinations, experts are expected to predict recidivism over a very long period of time.³⁰¹ If security-based detention were limited to a ten year maximum, then that would be the maximum requisite time horizon to be considered at the initial release hearing.³⁰² The more short term the predictions, the more accurate they tend to be.³⁰³

295. See Klotz et al., *supra* note 284, at 595.

296. See, e.g., Irene Sagel-Grande, Die Massregeln der Besserung und Sicherung im strafrechtlichen Rechtsfolgensystem der Niederlande, 103(3) ZSRW (*Zeitschrift für Strafrechtswissenschaft*) 250, 268 (1991).

297. *Id.* at 269. This consequence does not have to follow automatically as the offender may be able to receive the same form of treatment while in the community.

298. Kinzig, *Schrankenlose Sicherheit?*, *supra* note 176, at 335.

299. See Henry, *supra* note 45, at 246.

300. Janus, *Preventing Sexual Violence*, *supra* note 42, at 200-01.

301. *Id.* at 201.

302. *Id.* at 200-01.

303. *Id.* at 201.

Even though practical considerations—treatment and prediction—counsel in favor of an upper limit on security-based detention well short of a life term,³⁰⁴ the most difficult hurdle might be judges. If the judiciary fails to embrace such a limit, it is likely that judges will construct sentences that are longer than necessary from a retributive perspective to circumvent the upper limit on safety-based detention. The reason that the previously existing limits in Germany did not have such a result, has not been active appellate review, but rather an apparent belief on the part of German judges that any offender has the right to be released at some point.³⁰⁵

E. Treatment

In order to demonstrate society's disapproval of the offense, the retributive part of the criminal justice sanction should precede a security-based sanction. Treatment for the perceived mental abnormality and the offender's dangerousness, however, must be offered not only during the safety-based detention, but also during the retributive part of the sentence.³⁰⁶ To provide offenders with an effective opportunity of suspension of safety detention, they must be allowed access to meaningful treatment while imprisoned.³⁰⁷ Rehabilitative offerings do not interfere with the retributive component of the sentence since it is fulfilled through the deprivation of liberty and attendant privileges.³⁰⁸

Since sex-offender treatment, because of its cognitive basis, fails with those who refuse it rather than with those who are in coerced confinement, its availability is not tied to a non-prison setting.³⁰⁹

304. *Id.*; Sagel-Grande, *supra* note 296, at 749-51, 753-55 (in the Netherlands, the upper limit of four years applies only to offenders who did not commit violent crime; for all others, courts frequently reject recommendations of prosecutors and psychological experts to prolong security-based detention, largely on proportionality grounds).

305. Kinzig, *Die Praxis*, *supra* note 159, at 160.

306. Janus, *Preventing Sexual Violence*, *supra* note 42, at 206-07.

307. Fitch, *supra* note 32 (manuscript at 19); Janus, *Preventing Sexual Violence*, *supra* note 42, at 206-07.

308. Compare the array of rehabilitative services, ranging from literacy programs to drug treatment, offered in prisons. Such programs, however, have been substantially and negatively impacted by the budget crises in the states. See, e.g., V. Dion Haynes & Vincent J. Schodolski, *Strapped States Turn to Prisons*, CHI. TRIB., May 5, 2003, at 8; Haya El Nassen, *Red Ink Overtakes State Budgets*, USA TODAY, Dec. 10, 2001, at 3A.

309. Janus, *Preventing Sexual Violence*, *supra* note 42, at 206. For a more troubling assessment of the exchangeability of treatment for "sexual psychopaths" in prison and in a mental institution, see Garland, *supra* note 46, at 75 (quoting Superintendent for the Alabama State Mental Hospital).

In fact, mental health and prison settings operate with the same set of incentives and disincentives: "They both use the threat of lengthy incarceration, and the incentive of possible release from incarceration, to obtain consent and cooperation with treatment."³¹⁰

Successful treatment addressing the mental abnormality or the dangerousness of the offender during imprisonment or at any point during safety-based detention should lead to the offender's release either after the imprisonment phase or as soon as possible thereafter.³¹¹ The overall goal should be to limit preventive detention as much as possible, so as to restrict the state's coercive powers.³¹² Due to the ongoing possibility of successful treatment and rehabilitation,³¹³ during safety-based detention sentence reviews should occur annually.³¹⁴ For these reasons, annual reviews have also been proposed, albeit not implemented, in Germany.³¹⁵

Once a determination of release has been made, sex offenders should be allowed to graduate back into the community by living in a supervised residential setting and then through receiving treatment-based supervision.³¹⁶ Under the current regime, however, release has been virtually non-existent.³¹⁷ Only eighty-two individuals committed as "sexually violent predators" have been released from confinement nationally.³¹⁸

IV. THE BROADER GOAL: PURPOSIVE SANCTIONING AND LIMITING PUNISHMENT

In the United States sexual offenders have been exposed to ever longer sentences, often based on the perceived high danger of recidivism connected to their offenses.³¹⁹ Because of its constitution-

310. Janus, *Preventing Sexual Violence*, *supra* note 42, at 207.

311. *See id.* at 182-83.

312. *See id.* at 183-85.

313. *See id.* at 183-84, 206-07.

314. GREIG, *supra* note 15, at 262 (evincing concern about "the gulf between the psychiatrist's social and therapeutic obligations and [] ethical issues about a division of loyalties.").

315. The current law allows for reviews at any point. § 67e(1) StGB. It mandates reviews every other year, but the court can shorten this timeframe. *Id.* § 67e.

316. Wettstein, *supra* note 245, at 622; *see* Fitch, *supra* note 32 (manuscript at 6-7) (some states allow for sex offender commitment on an outpatient basis; the numbers are small, however).

317. Fitch, *supra* note 32 (manuscript at 7).

318. *Id.*

319. A number of studies seem to indicate that the recidivism rate for sex offenders overall is not higher, and may even be lower, than for all convicted criminals. *E.g.*, LANGAN & LEVIN, *supra* note 18, at 8-9 tbls. 9-10. Certain sub-groups of sex offend-

ally mandated focus on proportionality, German penal law does not permit for the unbounded lengthening of sentences as a viable alternative. For that reason, it has fallen back on safety-based alternatives, in the form of *Massregeln*.³²⁰

Safety-based detention of a small number of highly dangerous and mentally defective sex offenders imposed at sentencing might help reduce the public's perception of a heightened general danger emanating from all sex offenders.³²¹ The availability of such an additional sanction should liberate judges from incapacitative concerns in their imposition of imprisonment so that they can focus on its retributive effect.³²² The separation of retributive- and risk-based sentencing would constitute a first step toward integrating collateral sanctions into the overall sentencing framework while beginning the process of assigning sentencing purposes to specific sanctions. While German criminal law is concerned about the collapse of penalty and *Massregel*, in terms of their purposes and functions,³²³ for United States' criminal law, a separation of sanctions in terms of their purposes and functions would be the first step toward disentangling the two, and toward moving away from the flawed civil-criminal dichotomy currently employed.³²⁴

One of the potential, salutary consequences of this development may be a decrease in the length of prison terms imposed on sex offenders who are mentally defective or cannot control their ac-

ers, however, may have a higher re-offending risk, and those seem to commit the most serious sexual offenses. *Id.*

320. Kilchling, *supra* note 175, at 170-73 (discussing Jescheck's comments asserting that lengthened penalties violate the sense of justice more than the *Sicherungsverwahrung* and Schöch's concern about the potential increase in length of imprisonment if *Sicherungsverwahrung* were abolished).

321. For a discussion of the same doctrinal approach, see Robinson, *supra* note 251, at 716.

322. For a discussion of the focus on individual culpability in sentencing, see Janus, *Preventing Sexual Violence*, *supra* note 42, at 211 ("The principle of criminal interstitiality would allow civil commitment nonetheless, but only if the individual's mental disorder rendered him or her unamenable to criminal prosecution."). In defending the concept of individual responsibility in criminal adjudications, Eric Janus rejects prevention-based sex offender commitment statutes, while Paul Robinson defends them, see Robinson, *supra* note 251, at 716-17.

323. Kinzig, *Schrankenlose Sicherheit*, *supra* note 176, at 334.

324. See *supra* note 9.

tions.³²⁵ In such cases, it is incapacitation that frequently leads courts to impose long sentences under the present system.³²⁶

Unfortunately, the opposite may occur as well, and the German experience counsels some caution. Historically, the more rehabilitative the penalty phase in Germany, the more *Massregeln* came to focus on social assistance.³²⁷ Recent events in Germany have shown, however, that the harsher criminal penalties become, the harsher are attendant *Massregeln*.³²⁸ Some have even argued that the recent expansion of *Sicherungsverwahrung* undermines rather than supports the retributive character of penal law since legal and factual responsibility are only an initial step toward the imposition of punishment.³²⁹ In light of its already highly punitive character, it is conceivable that the United States would follow this model, and the possibility of preventive detention for sex offenders would lead to even longer, more punitive sanctions for all.³³⁰ This, however, might be a risk worth taking since sex offenses in the United States already have substantially longer maximum and presumptive sentencing ranges.³³¹ Even if no immediate decrease in retributive sanctions were measurable, a focused purposes discussion and oversight through sentencing commissions might be valuable gains.

The lessons learned from moving determinations on safety-based detention into the sentencing process would be useful in creating a similar framework for other collateral sanctions. Currently, such sanctions are not considered at sentencing. How they should be considered is not easily ascertainable as it might be difficult to determine how much of an imprisonment discount a drug offender should get for the life-long denial of access to public housing, or how much of an imprisonment discount is due a nurse who helped defraud Medicare because of an effective ban from nursing upon

325. Robinson, *supra* note 251, at 700; see Boerner, *supra* note 253, at 564-65 (arguing for desert as limiting principle even in sentencing of sex offenders, and against indeterminate sentences requiring showing of absence of danger for release of sex offenders); Stephen R. McAllister, *Some Reflections on the Constitutionality of Sex Offender Commitment Laws*, 50 U. KAN. L. REV. 1011, 1018-19 (2002) (arguing against Hendricks' position which seems to lead inevitably to longer incarceration).

326. McAllister, *supra* note 325, at 1019.

327. NAUCKE, *supra* note 143, at 104.

328. *Id.* (noting the connections between penalties and *Massregeln*).

329. See Kinzig, Neues von der Sicherungsverwahrung, *supra* note 205, at 9.

330. Robinson, *supra* note 251, at 705-06. At least one commentator has argued that restrictions on sexual offender commitment laws that make their use more onerous and inefficient have increased "pressure to criminally convict [sex] offenders." *Id.* at 705.

331. LaFond, *supra* note 104, at 667; see Weigend, *supra* note 167, at 45-49 (comparing German and American sentencing).

her release. Such difficult questions would have to be considered by an expert body that could ascertain the purposes underlying such collateral sanctions, ascertain whether they are risk-based, and how they should be weighed. It would then be up to the courts to craft individualized sentences in which risk-based collateral sanctions were merged with more traditional punishment.

If security-based detention, which presents the starkest collateral sanction,³³² were to move into the sentencing process, sufficient attention would be generated to bring questions of purposes and functions of such sanctions to the fore.³³³ Ultimately, the goal has to be to forge a basket of sanctions that assures retributive sanctions proportionate to the harm committed and also public safety. Collateral sanctions may assist in the latter and provide a valuable alternative to longer and more costly incarceration.³³⁴ This, however, will only be the case if these sanctions are risk-based and individualized rather than imposed on broad categories of offenders where they would constitute merely a further burden on reintegration.

CONCLUSION

Criminal penalties and safety-based detention can be conceived as exchangeable elements of social control that supplement each other.³³⁵ If that is the case, a unitary approach to the sentencing of dangerous and mentally abnormal sex offenders necessitates a more serious, and long overdue discussion about the state's coer-

332. Only deportation is likely to be considered of rising to almost the same level of restriction as security-based confinement. See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Law and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938-43 (2000) (discussing the 1996 deportation laws and how they have affected legal permanent residents). While the latter deprives an individual of her liberty, the former may deprive her of her way of life, and throw her into an unknown environment, as is the case for some permanent residents who came to the United States as small children and were later deported, usually upon commission of a criminal offense. See, e.g., *id.* at 1939-41, 1962 (discussing Jose Velasquez's story); see also *Velasquez v. Reno*, 37 F. Supp. 2d 663, 664-65 (D.N.J. 1999).

333. Currently, a few so-called collateral sanctions are directly deniable at sentencing, but most of them center on the denial of public benefits to drug offenders. See Demleitner, "Collateral Damage", *supra* note 94, at 1034-35; Robert W. Musser, Jr., *Denial of Federal Benefits to Drug Traffickers and Drug Possessors: A Broad Reaching But Seldom Used Sanction*, 12 FED. SENTENCING REP. 252, 255 (2000) (discussing how only few courts impose such sanctions if not mandated by law). Because of the limited use of such sanctions, no academic or public discussion has taken place about the function or purpose of such additional measures.

334. Janus, *Preventing Sexual Violence*, *supra* note 42, at 168-69.

335. See NAUCKE, *supra* note 143, at 104.

cive power and its responsibility for those it incarcerates and detains. This, however, will not occur as long as so-called safety measures with a clearly punitive component occur in secret, apart from the punishment process.

