

**THE SEX OFFENDER MANAGEMENT AND
TREATMENT ACT: NEW YORK'S ATTEMPT
AT KEEPING SEX OFFENDERS OFF THE
STREETS ... WILL IT WORK?**

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INTRODUCTION

Recidivism is an ever-present threat whenever a sex offender is released from prison. When the threat posed by an offender is particularly acute, civil confinement,¹ involuntary post-prison release detention,² has become an increasingly popular public safety measure. Where certain requirements are met, the Supreme Court has approved states' civil confinement of individuals against their will.³ Civil confinement statutes for dangerous sex offenders have been enacted in numerous states.⁴

New York's civil confinement statute, known as the Sex Offender Management and Treatment Act⁵ ("Act"), has thus far escaped judicial scrutiny. The few cases which have considered the legislation show that its language has led, and will continue to lead, to problems in its implementation and application.

Part I of this note will examine the need for a civil confinement statute in New York and Mental Hygiene Law § 9,⁶ the predecessor to the Act. It will also discuss cases that fell under this statute and the problems they revealed. Part II will analyze the Act itself. It will first discuss definitions important to explaining how the Act works, and then the actual procedure of civilly confining an individual. Part III will discuss issues that are apparent from the wording of the Act itself and the problems that have already arisen in its implementation. Part IV will discuss the over-inclusiveness of the Act, and compare the Act to similar legislation enacted in Florida, the Jimmy Ryce Act, illustrating how an effective civil commitment statute is

¹ "Civil confinement" and "civil commitment" are used interchangeably within the discourse and bear the same definition. This note will limit itself to the term civil confinement.

² Allison Morgan, Note, *Civil Confinement of Sex Offenders: New York's Attempt to Push the Envelope in the Name of Public Safety*, 86 B.U. L. REV. 1001, 1002 (2006).

³ *Id.*

⁴ See, e.g., FLA. STAT. ANN. § 394.910 (West 2008); KAN. STAT. ANN. § 59-29a01 (2003); N.H. REV. STAT. ANN. § 135-E:1 (West Supp. 2007); N.J. STAT. ANN. § 30:4-27.25 (West 2008).

⁵ N.Y. MENTAL HYG. LAW § 10 (McKinney Supp. 2008).

⁶ N.Y. MENTAL HYG. LAW § 9 (McKinney 2006); Morgan, *supra* note 2, at 1005 (stating that this statute was "designed for the mentally ill and not specifically for sex offenders.").

constructed and implemented.

I. CIVIL CONFINEMENT IN NEW YORK PRIOR TO THE SEX OFFENDER MANAGEMENT AND TREATMENT ACT

The need for the civil confinement of sex offenders in New York was highlighted on June 29, 2005 when a fifty-six year old woman was stabbed to death in a mall parking lot in White Plains, New York.⁷ Phillip Grant, later convicted of the murder, was a convicted rapist and a level three sex offender.⁸ Only two years prior to the slaying, Grant was released from prison where he served twenty-three years for two rape convictions and an attempted assault conviction.⁹ As a result of this incident, Westchester District Attorney Jeanine Pirro, Westchester County Executive Andrew Spano, and New York Governor George Pataki, “renewed their crusades” to enact a civil confinement statute.¹⁰

The New York State Senate, while under the control of the Republican Party, previously endorsed the passage of such a law but the State Assembly, under the control of the Democratic Party, failed to pass it.¹¹ Immediately following the incident, County Executive Andrew Spano instituted measures within Westchester County, including tracking sex offenders using global positioning technology.¹² Under this plan, sex offenders were each given an ankle bracelet and a cell phone that would alert police if the offender entered schools, playgrounds, or other restricted areas.¹³ Despite this and other efforts, state legislators still did not pass the proposed state-wide civil confinement law.¹⁴ Pataki “decided to ‘take matters into his own hands,’”¹⁵ and “‘push the envelope with the application of existing law.’”¹⁶ To commit

⁷ Richard Liebson & Bill Hughes, *Woman Slain in Garage at Galleria*, JOURNAL NEWS, June 30, 2005, at 1A.

⁸ *Id.*

⁹ *Id.*

¹⁰ Morgan, *supra* note 2, at 1021.

¹¹ *Id.* at 1021-22.

¹² *Id.* at 1023 (citing Lisa W. Foderaro, *Spano to Seek New System of Monitoring Sex Offenders*, N.Y. TIMES, Apr. 22, 2005, at B4).

¹³ Morgan, *supra* note 2, at 1023.

¹⁴ *Id.*

¹⁵ *Id.* (citing Kenneth Lovett, *Pataki Tosses Freed Pervs Back in Lockup*, N.Y. POST, Oct. 3, 2005, at 2).

¹⁶ Morgan, *supra* note 2, at 1023 (citing Alan Feuer, *Pataki Uses State Law to*

sex offenders at the end of their criminal sentences, Governor Pataki looked to existing civil confinement law, which did not apply specifically to sex offenders, but to the mentally ill.¹⁷

The existing civil confinement law at the time was New York Mental Hygiene Law § 9.27(a).¹⁸ Mental Hygiene Law § 9.27(a) states that:

The director of a hospital may receive and retain therein as a patient any person alleged to be mentally ill and in need of involuntary care and treatment upon the certificates of two examining physicians, accompanied by an application for the admission of such person. The examination may be conducted jointly but each examining physician shall execute a separate certificate.¹⁹

The Appellate Division, Third Department interpreted this statute to require more than a “provision of some treatment”²⁰ to civilly confine someone; there also must be “a finding that the person . . . poses a real and present threat of substantial harm to himself or others.”²¹ To meet this standard the evidence must be “clear and convincing.”²²

The statute also provides that, “[b]efore an examining physician completes the certificate of examination of a person for involuntary care and treatment, he shall consider alternative forms of care and treatment that might be adequate to provide for the person’s needs without requiring involuntary hospitalization.”²³

A further step in this process is that the person who is brought to the hospital must be examined by a third physician who is a member of the psychiatric staff of that hospital.²⁴ If the person is then determined to be in need of involuntary care and treatment, he may be admitted.²⁵

Hold Sex Offenders After Prison, N.Y. TIMES, Oct. 4, 2005, at B4 (quoting Pataki spokesperson Kevin Quinn).

¹⁷ Morgan, *supra* note 2, at 1023.

¹⁸ *Id.* at 1024.

¹⁹ N.Y. MENTAL HYG. LAW § 9.27(a) (McKinney 2006).

²⁰ *Scopes v. Shah*, 398 N.Y.S.2d 911, 913 (3d Dep’t 1977) (citing *O’Connor v. Donaldson*, 422 U.S. 563, 589 (1975)).

²¹ *Scopes*, 398 N.Y.S.2d at 913 (citing *Bell v. Wayne County Gen. Hosp. at Eloise, D.C.*, 384 F. Supp. 1085 (1974)).

²² *Scopes*, 398 N.Y.S.2d at 913-14.

²³ N.Y. MENTAL HYG. LAW § 9.27(d) (McKinney 2006).

²⁴ § 9.27(e).

²⁵ *Id.*

Under this statute, there is no requirement for a judicial hearing before the patient is admitted to the hospital, but the patient cannot be held for more than sixty days without the court's approval.²⁶ The patient, or anyone acting on behalf of the patient, can request this hearing,²⁷ which must be held within five days of the request.²⁸ At this hearing the court will hear testimony and examine the person alleged to be mentally ill, and if it is determined by the court that the person is in need of retention, the court shall deny the application for release of the patient.²⁹ Conversely, if the court determines the individual is not in need of retention, a release will be ordered.³⁰ If release is denied, the patient may request a rehearing within thirty days of the decision, and is entitled to a trial by jury.³¹ The status of this patient must be reviewed every twelve months.³²

Beyond the fact that it is not specifically tailored to sex offenders, Mental Hygiene Law § 9.27(a) is riddled with problematic due process implications.³³ The judicial hearing should be required by law, and counsel for the patient should be appointed by the court if the patient cannot afford one. This hearing is the first opportunity for the patient to make his/her case that he/she is not an individual requiring civil commitment. Without having appointed counsel and a required hearing, there is a high likelihood that the patient will forego the hearing, either because he/she is not aware of its importance, or because he/she does not have an attorney to help him/her through it. This hearing should be required to occur before the sixty day determination made by the court. Sixty days is too long to hold someone, after completion of their prison sentence, pending a

²⁶ § 9.33(a).

²⁷ § 9.31(a).

²⁸ N.Y. MENTAL HYG. LAW § 9.31(c) (McKinney 2006).

²⁹ *Id.*

³⁰ § 9.31(d).

³¹ § 9.35.

³² § 9.25(a).

³³ N.Y. MENTAL HYG. LAW § 9.27(d) (McKinney 2006). *See* O'Connor v. Donaldson, 422 U.S. 563, 580 (1975) (stating "[t]here can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law." (internal citation omitted)). *See also* Project Release v. Prevost, 722 F.2d 960, 971 (2d Cir. 1983) (explaining that involuntary confinement in a mental institution is a "massive curtailment of liberty" (internal citation omitted)); *In re Stefano*, 531 N.Y.S.2d 212, 214 (N.Y. Sup. Ct. 1988) (noting that involuntary confinement of a mentally ill individual may be unconstitutional under certain circumstances (internal citation omitted)).

court determination.³⁴

Many civil rights advocates opposed Pataki's civil confinement directive, arguing that Pataki overstepped his authority when the legislature failed to pass the law that he wanted.³⁵ This argument was fueled as much by the directive's circumstances, "the failed attempts to pass a law through the legislature, the public outcry after Carriero's murder, the secrecy with which Governor Pataki acted,"³⁶ as by its substance. The directive issued to the State Office of Mental Health (OMH) and the State Department of Correctional Services (DOCS) by Governor Pataki to use existing involuntary civil confinement law was a quiet one.³⁷ A spokesman for the Governor, Kevin Quinn, stated that Pataki himself "expected lawsuits to arise from his decision."³⁸ It seems clear from that statement that Pataki knew what he was doing might not be entirely appropriate.

Also problematic was the apparent overruling of Correction Law §§ 400-405 by the new application of portions of Mental Hygiene Law § 9. Correction Law § 402 states that a physician of any correctional facility or other similar facility shall report in writing to the superintendent of that facility:

[A]ny person undergoing a sentence of imprisonment or adjudicated to be a youthful offender or juvenile delinquent confined therein is, in his opinion, mentally ill, such superintendent shall apply to a judge of the county court or justice of the supreme court in the county to cause an examination to be made of such person by two examining physicians . . . Each such physician, if satisfied, after a personal examination, that such inmate is mentally ill and in need of care and treatment, shall make a certificate to such effect.³⁹

Under this statute the inmate is required to have a judicial hearing before commitment; however, the application of Mental Hygiene Law § 9 dispenses with this requirement.⁴⁰ When Governor Pataki chose to use Mental Hygiene Law § 9 to commit sex offenders, the prisoners in question were committed before their scheduled release and therefore did not receive the judicial

³⁴ N.Y. CRIM. PROC. LAW § 380.30(1) (McKinney 2000).

³⁵ Morgan, *supra* note 2, at 1025.

³⁶ *Id.*

³⁷ Feuer, *supra* note 16, at B4.

³⁸ *Id.*

³⁹ N.Y. CORRECT. LAW § 402(1) (2003).

⁴⁰ N.Y. MENTAL HYG. LAW § 9.31(a) (McKinney 2006).

hearing referred to in Correction Law § 402. The question then became, should mentally ill prisoners be subjected to Correction Law or, because these prisoners were close to their release, should they be subjected to the Mental Hygiene Law?

State ex rel. Harkavy v. Consilvio (Harkavy I) was the first case to address this issue.⁴¹ In this case the petitioners were close to “the end of their prison sentences for various felony sex offenses, when they were examined by two Office of Mental Health (OMH) physicians for the purpose of involuntary commitment to an OMH facility.”⁴² These doctors certified that each of the petitioners had a mental illness and if they did not receive inpatient psychiatric treatment, there was a high risk they would commit new sexual crimes if released into the community.⁴³ The applications for involuntary commitment were completed pursuant to Mental Hygiene Law § 9.27.⁴⁴ Following the petitioners’ prison terms, they were transported to a psychiatric center where they were re-examined by a third OMH doctor who also found that this involuntary commitment was necessary.⁴⁵

A habeas corpus proceeding was filed by Mental Hygiene Legal Service, on behalf of petitioners, seeking their immediate release.⁴⁶ The petitioners argued that because they were still undergoing a sentence of imprisonment, the State had to follow the procedure in Correction Law § 402.⁴⁷ Under that section a prison superintendent is not authorized to file this application; instead it must be initiated by a physician who reports to the superintendent, who then files an application with a judge for an examination of the inmate.⁴⁸ In *Harkavy I*, these steps were not taken because the procedure in Mental Hygiene Law § 9 was followed instead of the procedure in Correction Law § 402. The Supreme Court granted this petition and ordered the conditional release of the prisoners because this application of Mental Hygiene Law deprived the prisoners of their rights under Correction Law.⁴⁹

The Appellate Division reversed this decision and vacated the

⁴¹ *State ex rel. Harkavy v. Consilvio*, 859 N.E.2d 508 (N.Y. 2006) [hereinafter *Harkavy I*].

⁴² *Id.* at 509.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Harkavy I*, 859 N.E.2d at 509.

⁴⁷ *Id.*

⁴⁸ *Id.*; N.Y. CORRECT. LAW § 402(1) (McKinney 2003).

⁴⁹ *Harkavy I*, 859 N.E.2d at 510.

order for release, holding that the State had properly committed the petitioners under Mental Hygiene Law § 9 because Correction Law § 402 “applies only to persons undergoing a sentence of imprisonment, it contemplates return to a DOCS facility,’ whereas these petitioners were not returning to DOCS custody but were instead soon to be released.”⁵⁰

The Court of Appeals, however, did not agree with the Appellate Division’s conclusion that the proper procedure was followed by using the Mental Hygiene Law § 9 procedure because the prisoners were still inmates and were therefore subject to the provisions of Correction Law.⁵¹ Upon examination of *Harkavy I*, the conflict between the two statutes is clear, as is the resolution. It is clear that application of Mental Hygiene Law § 9 over Corrections Law § 402 works to deprive a prisoner of his right to a pre-confinement judicial hearing. *State ex rel. Harkavy v. Consilvio (Harkavy II)* was the second appeal to come before the Court of Appeals on this issue.⁵² The Court in *Harkavy II* recognized that:

[N]either statutory scheme had been specifically designed to address this class of mentally ill patients but concluded, “in the absence of a clear legislative directive in regard to inmates nearing their release from incarceration, . . . that Correction Law § 402 is the appropriate method for evaluating an inmate for postrelease involuntary commitment to a mental facility.”⁵³

The court went on to say that there had been a “statutory void” which was filled by the Sex Offender Management and Treatment Act following the resolution of *Harkavy I* and while *Harkavy II* was pending.⁵⁴

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *State ex rel. Harkavy v. Consilvio*, 870 N.E.2d 128, 129 (N.Y. 2007) [hereinafter *Harkavy II*].

⁵³ *Id.* at 131.

⁵⁴ *Id.*

II. NEW YORK'S SOLUTION: THE SEX OFFENDER MANAGEMENT AND TREATMENT ACT

The Sex Offender Management and Treatment Act was passed by the New York State Legislature on April 13, 2007.⁵⁵ The following discussion analyzes this rather complex piece of legislation in which many different sections work together to form a complicated procedure.

Section 10.01 of the Act addresses legislative findings.⁵⁶ This briefly addresses the need for “long-term specialized treatment” for the most dangerous sex offenders, those that are most likely to re-offend.⁵⁷ This specialized treatment, in extreme cases, will be an extension of their commitment by civil process upon conclusion of their criminal sentence.⁵⁸ The ultimate goals of civil confinement are to protect society, supervise the offenders, and manage their behavior.⁵⁹ This section of the Act stresses that the system is designed for “treatment and protection.”⁶⁰ This distinction is important because the Supreme Court has upheld other civil confinement statutes precisely because their aim is to treat, not to punish a second time.⁶¹ Another aim of the Act is that it be implemented in such a way that “do[es] not endanger, stigmatize, or divert needed treatment resources away from such traditional mental health patients.”⁶²

Section 10.03 of the Act provides definitions that are key to understanding the statute, including the definition of “dangerous sex offender requiring confinement.”⁶³ This is defined as, “a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility.”⁶⁴ The Act is aimed at these

⁵⁵ N.Y. MENTAL HYG. LAW § 10.01 (McKinney Supp. 2008).

⁵⁶ *Id.*

⁵⁷ § 10.01(b).

⁵⁸ *Id.*

⁵⁹ § 10.01(d).

⁶⁰ N.Y. MENTAL HYG. LAW § 10.01(e) (McKinney Supp. 2008).

⁶¹ Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 6, 2007, at 1, available at <http://www.nytimes.com/2007/03/04/us/04civil.html>.

⁶² § 10.01(g).

⁶³ § 10.03(e).

⁶⁴ *Id.*

offenders, those so likely to re-offend that it would be a danger to release them back into society.

Also provided in this section is the definition of “detained sex offender.”⁶⁵ This definition is very detailed, presumably as an attempt to extend to all possible offenders. A “detained sex offender” is not only someone convicted of or charged with a sex offense, but it also applies to those convicted of sexually motivated “designated felonies.”⁶⁶ A designated felony is defined in detail in section 10.03(f), and includes felonies such as assault, manslaughter, murder, kidnapping, burglary, and robbery.⁶⁷

Because these designated felonies run the gamut of crimes, it is important to recognize how the statute defines “sexually motivated.” Section 10.03(s) defines “sexually motivated” as “the act or acts . . . were committed in whole or in substantial part for the purpose of direct sexual gratification of the actor.”⁶⁸ One saving grace of the statute is that this determination is made by a jury, not just one judge or one psychologist. This provision of the statute will be discussed below.

⁶⁵ N.Y. MENTAL HYG. LAW § 10.03(g) (McKinney Supp. 2008).

⁶⁶ *Id.*

[A] person who is in the care, custody, control, or supervision of an agency with jurisdiction, with respect to a sex offense or designated felony, in that the person is either:

(1) A person who stands convicted of a sex offense . . . and is currently serving a sentence for, or subject to supervision by the division of parole, whether on parole or on post-release supervision, for such offense or for a related offense;

(2) A person charged with a sex offense who has been determined to be an incapacitated person with respect to that offense and has been committed . . . but did engage in the conduct constituting such offense;

(3) A person charged with a sex offense who has been found not responsible by reason of mental disease or defect for the commission of that offense;

(4) A person who stands convicted of a designated felony that was sexually motivated and committed prior to the effective date of this article;

(5) A person convicted of a sex offense who is, or was at any time after September first, two thousand five, a patient in a hospital operated by the office of mental health, and who was admitted directly to such facility . . . upon release or conditional release from a correctional facility, provided that the provisions of this article shall not be deemed to shorten or lengthen the time for which such person may be held pursuant to such article or section respectively; or

(6) A person who has been determined to be a sex offender requiring civil management pursuant to this article.

⁶⁷ § 10.03(f).

⁶⁸ § 10.03(s).

Other important definitions provided in this section are “mental abnormality,” “related offense,” “secure treatment facility,” “sex offense,” and “sex offender requiring strict and intensive supervision.”⁶⁹ A “sex offender requiring strict and intensive supervision” is an offender who, while not deemed ready to be released into the community with nothing more than parole supervision, is not such a danger to society as to warrant civil confinement.⁷⁰

Also in this section of the statute is the definition for “sex offender requiring civil management.”⁷¹ This is defined as “a detained sex offender who suffers from a mental abnormality. A sex offender requiring civil management can, as determined by procedures set forth in this article, be either (1) a dangerous sex offender requiring confinement or (2) a sex offender requiring strict and intensive supervision.”⁷² This definition combines the dangerous sex offender requiring confinement, and the sex offender requiring strict and intensive supervision into one category, a category of offenders that need much stricter supervision than any other offender released into society at the end of their prison sentence.⁷³

Section 10.05 of the Act discusses the requirements of notice and case review.⁷⁴ It provides that there must be a case review panel of at least fifteen members, some with certain qualifications, who review each case.⁷⁵ This panel is broken down into teams of three who review particular cases.⁷⁶ At least two members of this team must be professionals in the mental health field or the mental retardation and developmental disabilities field.⁷⁷ These two members must also have appropriate experience in “treatment, diagnosis, risk assessment or management of sex offenders.”⁷⁸ This section further mandates that notice be given to the Attorney General providing very specific information, including the person’s name; photograph and fingerprints; a description of the acts constituting the sex offense; a description of the person’s criminal history; and the person’s

⁶⁹ N.Y. MENTAL HYG. LAW § 10.03 (McKinney Supp. 2008).

⁷⁰ § 10.03(r).

⁷¹ § 10.03(q).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ N.Y. MENTAL HYG. LAW § 10.05 (McKinney Supp. 2008).

⁷⁵ § 10.05(a).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

institutional history.⁷⁹ If the respondent is determined by the case review team to be a sex offender requiring civil management, a petition is filed by the Attorney General in the supreme or county court in the county in which the respondent is located; the respondent also receives a copy of this petition.⁸⁰ Included in the petition will also be statements of evidentiary facts which support the allegation that the respondent is a sex offender requiring civil management.⁸¹

Section 10.06 provides for one of the most important protections created by this statute: a probable cause hearing.⁸² The purpose of this hearing is to determine “whether there is probable cause to believe the respondent is a sex offender requiring civil management.”⁸³ After the petition is filed, this hearing must occur within thirty days, and is conducted without a jury.⁸⁴ If the respondent has been convicted of a sex offense; was found not responsible for commission of a sex offense due to mental disease or defect; or was indicted for a sex offense by a grand jury but was not competent to stand trial for this offense, the commission of the sex offense is deemed “established” and “shall not be relitigated” at this probable cause hearing.⁸⁵ The issue of whether a felony was sexually motivated is only determined by the court in this hearing when the petition alleges the commission of a designated felony.⁸⁶ The clearly problematic nature of this provision will be discussed later.

If it is determined at this hearing that there is no probable cause to believe that the respondent is a sex offender requiring civil confinement, the petition is dismissed and the respondent will be released in accordance with the law.⁸⁷ However, if it is determined that there is probable cause to believe that the respondent is a sex offender requiring civil management, the respondent will be committed to a secure treatment facility, the court will set a trial date, and the respondent will remain

⁷⁹ N.Y. MENTAL HYG. LAW § 10.05(c) (McKinney Supp. 2008).

⁸⁰ § 10.06(a).

⁸¹ *Id.*

⁸² § 10.06(g).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ N.Y. MENTAL HYG. LAW § 10.06(j) (McKinney Supp. 2008).

⁸⁶ *Id.*

⁸⁷ § 10.06(k).

confined pending completion of the trial.⁸⁸

Unless otherwise requested, the trial will be conducted with a jury, before the same court that performed the probable cause hearing.⁸⁹ The difference between this trial and the earlier probable cause hearing is the determination being sought. The goal of the probable cause hearing is to determine if the respondent is a sex offender requiring civil management.⁹⁰ If it is determined that he/she is, it only means that he/she requires some kind of management, either civil confinement or strict and intensive supervision. The trial, however, is to determine if the respondent is a detained sex offender who suffers from a mental abnormality, which would mean he/she is an offender in need of civil confinement.⁹¹ The trial procedure is similar to that of any civil trial, with certain differences clarified in the Act.⁹² One such difference is the jury may hear evidence of whether the respondent refused to submit to a psychiatric evaluation.⁹³ This provision appears to warrant juror prejudice.

The trial is similar to the probable cause hearing in that the commission of a sex offense is considered established, while the sexual motivation of a designated felony is to be determined by the jury.⁹⁴ The jury is admonished by the judge that the commission of a sex offense may not alone determine that the person is a detained sex offender who suffers from a mental abnormality. The jury members must also look to the sexual motivation in making this determination.⁹⁵ The burden of proof at this trial lies with the Attorney General, and the standard of proof is clear and convincing.⁹⁶ If the jury unanimously finds that the respondent is not a detained sex offender who suffers from a mental abnormality, the respondent will be released in accordance with the law.⁹⁷ However, if a unanimous verdict is not reached the court will continue the commitment order and schedule a second trial to be held within sixty days.⁹⁸ If this second jury cannot reach a unanimous verdict, the petition is

⁸⁸ *Id.*

⁸⁹ § 10.07(a).

⁹⁰ N.Y. MENTAL HYG. LAW § 10.06(k) (McKinney Supp. 2008).

⁹¹ *Id.*

⁹² § 10.07(b).

⁹³ § 10.07(c).

⁹⁴ *Id.*

⁹⁵ N.Y. MENTAL HYG. LAW § 10.07(d) (McKinney Supp. 2008).

⁹⁶ *Id.*

⁹⁷ § 10.07(e).

⁹⁸ *Id.*

dismissed.⁹⁹

If the jury unanimously determines “that the respondent is a detained sex offender who suffers from a mental abnormality,” the court will then “consider whether the respondent is a dangerous sex offender requiring confinement or a sex offender requiring strict and intensive supervision.”¹⁰⁰ In making this determination, the parties may offer additional evidence to reargue this issue.¹⁰¹ If by clear and convincing evidence, the court finds that the “respondent has a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the respondent is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility,” then the court must find the respondent to be a detained sex offender suffering from a mental abnormality.¹⁰² The respondent is then committed to a secure treatment facility until he/she no longer requires confinement.¹⁰³ While the jury has the final say as to whether the respondent suffers from a mental abnormality, the ultimate determination of whether this warrants civil confinement or merely supervision is the province of the judge.¹⁰⁴ One person determines whether the respondent will be indefinitely deprived of liberty.

Section 10.09 discusses annual examinations and petitions for discharge.¹⁰⁵ The civilly confined have the opportunity to petition for discharge annually.¹⁰⁶ Also included in the Act is a right to psychiatric evaluation of his or her mental condition at least once each year.¹⁰⁷ Following the evaluation, the psychiatric examiner will report to the commissioner, and to the offender’s counsel, his or her findings as to whether the civilly confined remains a threat requiring continued confinement.¹⁰⁸ The offender will also have the right to be evaluated by an independent psychiatric examiner, and if the respondent cannot afford one, the court will appoint an

⁹⁹ *Id.*

¹⁰⁰ N.Y. MENTAL HYG. LAW § 10.07(f) (McKinney Supp. 2008).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ N.Y. MENTAL HYG. LAW § 10.09 (McKinney Supp. 2008).

¹⁰⁶ § 10.09(a).

¹⁰⁷ N.Y. MENTAL HYG. LAW § 10.09(b) (McKinney Supp. 2008).

¹⁰⁸ *Id.*

examiner of the offender's choice.¹⁰⁹ This is a crucial protection for the civilly confined. This independent psychiatric examiner must also report to the commissioner and to the offender's counsel.¹¹⁰

The commissioner will then review these evaluations, as well as any other relevant information, and determine, in writing, whether the danger posed by the offender warrants continued confinement.¹¹¹ This determination is forwarded to the court where the offender is to be heard, and an evidentiary hearing regarding the continued retention of the respondent is conducted.¹¹² "[I]f the court finds by clear and convincing evidence that the respondent is currently a dangerous sex offender requiring confinement," the respondent's confinement shall continue.¹¹³ If the court finds that the offender is no longer a danger, the court will issue an order discharging him to "strict and intensive" supervision and treatment.¹¹⁴

Beyond the annual review, the civilly confined offender can petition for discharge to treatment at any time.¹¹⁵ While the court can order an evidentiary hearing regarding this, it can also deny the petition outright if it is deemed frivolous or if it provides insufficient basis for review prior to the offender's next annual evaluation.¹¹⁶

If at any time the commissioner determines that the respondent is no longer a dangerous sex offender requiring confinement, the commissioner can petition the court for the offender's discharge to supervision and treatment.¹¹⁷ Upon receipt of such a petition, provided that it has also been served on the Attorney General, the court must order an evidentiary hearing or discharge the offender.¹¹⁸

The remainder of the Act discusses, *inter alia*, confinement and treatment therein, the requirements of "strict and intensive supervision and treatment," and appeals.¹¹⁹

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² N.Y. MENTAL HYG. LAW § 10.09(c) (McKinney Supp. 2008); N.Y. MENTAL HYG. LAW § 10.09(d).

¹¹³ § 10.09(h).

¹¹⁴ *Id.*

¹¹⁵ § 10.09(f).

¹¹⁶ *Id.*

¹¹⁷ N.Y. MENTAL HYG. LAW § 10.09(e) (McKinney Supp. 2008).

¹¹⁸ *Id.*

¹¹⁹ §§ 10.10-10.17.

III. FROM THE BEGINNING: PROBLEMS WITH THE ACT

After passage of the Act, Mental Hygiene Legal Services sought a federal injunction against its implementation.¹²⁰ They argued that the Act was overbroad in extending to felonies committed with sexual motivation, not just to sex offenses.¹²¹ Of particular concern was the possibility of a retroactive finding that a non-sex crime was sexually motivated, a finding that could render a defendant a sex offender long after the fact.¹²² Also argued was the fact that those not incarcerated for sex crimes can later be sentenced to sex-offender commitment without the defendant ever having a chance to be heard on the issue.¹²³ These points are only a few of many issues with the Act, and this federal action was only the first of many attempts to have parts of the Act deemed unconstitutional.

A detailed analysis of the Act makes apparent many problems likely to arise. One such problem is the determination that a designated felony was sexually motivated. This initial determination is left up to the court and made during the probable cause hearing. All that is required is a finding of whether or not probable cause exists that the “commission of the offense was sexually motivated.”¹²⁴ This standard of proof is so low it will likely lead to faulty determinations of “sexual motivation.” At such a hearing the court will have little to go on: reports made by various police officers at the time of the crime, the statement of the convicted criminal, etc. Given the People’s *de minimis* burden of proof and the chilling effect incarceration has on building a defense, it is unlikely the prisoner will prevail. Further, when this goes to a jury, the jury must determine whether the evidence is clear and convincing. At no point does the “beyond a reasonable doubt” standard we use in criminal law come into play. Whether deprived via the civil law by confinement or the penal law by imprisonment, liberty is a person’s most sacred right and is worthy of better protection than that provided by a “clearly convinced” judge or jury.

¹²⁰ Mark Fass, *Group Challenges Civil Confinement for Sex Offenders*, 237 N.Y. L.J. 1 (2007).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ N.Y. MENTAL HYG. LAW § 10.06(j) (McKinney Supp. 2008).

The issue of the burden of proof came into play in the case of *New York v. Pedraza*.¹²⁵ Pedraza was days away from his prison release after serving six years for a sexual abuse conviction when the New York State Attorney General filed a petition for civil management in order to have the respondent civilly committed.¹²⁶ In this case the respondent and petitioner had differing interpretations as to the meaning of probable cause in the Mental Health Law Article 10 determination.¹²⁷ The petitioner, the State of New York, asserted that probable cause meant “reasonable cause to believe,” while the respondent asserted that the standard of proof should be “by clear and convincing evidence,” as is the standard of proof for Article 10 proceedings.¹²⁸ The court held that the correct interpretation was the lesser standard, “reasonable cause to believe,” as is the standard for preliminary hearings.¹²⁹

Modeling the standard of proof after that of a preliminary hearing raises yet another issue. The court here equated the probable cause hearing to a preliminary hearing in a criminal case. But for the ultimate determination of the criminal process, on the question of guilt or innocence, guilt can only be found when no reasonable doubt exists in the mind of the fact-finder. This is the highest standard of proof, and the prosecution must satisfy it in a criminal case because the consequence of a finding of guilt, the loss of all liberty, is grave. Similar is the case of civil confinement. If the respondent is determined to be a detained sex offender requiring civil management, he/she faces a similar loss of liberty. Should the court decide to treat the probable cause hearing as a preliminary hearing in a criminal case, the standard of proof at the commitment trial should be the same as that of a criminal trial - proof beyond a reasonable doubt.

Also troubling is subsection (g) of section 10.03 and the backdating to September 2005.¹³⁰ If a conviction was made two years prior to this statute being enacted, the importance of a crime being sexually motivated was not apparent at that time. It could have been ruled that a crime was sexually motivated and this detail was just glossed over because at that time there were not serious consequences like there are now under this statute.

¹²⁵ *New York v. Pedraza*, 853 N.Y.S.2d 476 (N.Y. Sup. Ct. 2007).

¹²⁶ *Id.* at 477.

¹²⁷ *Id.* at 480.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ N.Y. MENTAL HYG. LAW § 10.03(g)(5) (McKinney Supp. 2008).

Also problematic is the catch-all nature of subsection (6) of section 10.03(g).¹³¹ If someone does not fit directly into one of the above subsections, there is the opportunity for them to be placed under this statute if the case review committee sees fit. This gives the committee an inordinate amount of discretion in terms of applying this statute.

Also important to note are the potential problems that could arise in the application of the Act, specifically with section 10.06(j) which states that in certain circumstances the respondent is not permitted to “relitigate” their commission of the sex offense.¹³² Instead there is a presumption that the respondent did in fact commit the sex offense, and any other issues that may be relevant to the determination of whether or not the respondent is a sex offender requiring civil management cannot be brought to the attention of the court. This does not take into account the fact that circumstances may have changed. At the time of the probable cause hearing, the individual who was previously deemed unfit to stand trial may be in significantly better mental health and should be afforded the opportunity to speak on their behalf, since they were not previously afforded that opportunity.

Most recently, the case of *Mental Hygiene Legal Service v. Spitzer* challenged various parts of the Act.¹³³ Mental Hygiene Legal Service sought “a declaratory judgment action attacking the constitutionality of certain provisions of the Act” on April 12, 2007, and “moved for preliminary injunctive relief and a temporary restraining order.”¹³⁴ Later, Shawn Short, who was “subject to various provisions of the law,” joined Mental Hygiene Legal Service in their motions.¹³⁵ At issue was not the constitutionality of the statute as a whole, but rather particular procedural provisions of the Act. These provisions failed to protect the constitutional right against deprivation of liberty without due process of law.¹³⁶ Mental Hygiene Legal Service also contended that certain aspects of the Act deny individuals subject to the Act equal protection as guaranteed by the Constitution.¹³⁷

¹³¹ § 10.03(g)(6).

¹³² § 10.06(j).

¹³³ *Mental Hygiene Legal Serv. v. Spitzer*, No. 07 Civ. 2935, 1, 2007 WL 4115936, *1 (S.D.N.Y. Nov. 16, 2007).

¹³⁴ *Id.* at *1.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

The specific provisions of the Act challenged by the Plaintiffs were Mental Hygiene Law §§ 10.06(f), 10.06(k), 10.06(j)(iii), 10.07(d), 10.07(c), and 10.05(e).¹³⁸ Section 10.06(f) authorizes the New York State Attorney General to issue a petition in order to detain certain individuals after the completion of their prison term before the probable cause hearing, without notice or opportunity for review.¹³⁹ Mental Hygiene Law § 10.06(k) mandates involuntary civil detention while the individual is awaiting the commitment trial, “based on a finding at the probable cause hearing that the individual might have a mental abnormality even if there is no finding of current dangerousness.”¹⁴⁰ Mental Hygiene Law § 10.06(j)(iii) does not allow an individual who was indicted for a crime but found incompetent to stand trial to contest the commission of the crime at the probable cause hearing.¹⁴¹ Mental Hygiene Law § 10.07(d) authorizes civil confinement of persons deemed incompetent to stand trial and never convicted of any offense on a showing of clear and convincing evidence that he/she committed the sexual offense that he/she was charged with.¹⁴² Mental Hygiene Law § 10.07(c) “authorizes the factfinder at the commitment trial to make a retroactive determination by clear and convincing evidence that certain non-sex crimes” were sexually motivated.¹⁴³ Mental Hygiene Law § 10.05(e) authorizes some pre-hearing psychological evaluations, without counsel, of the individual subject to the Act.¹⁴⁴

The court held that section 10.06(k) is unconstitutional because it allows civil detention pending trial without a finding of current dangerousness.¹⁴⁵ Plaintiffs argued that it was not being determined, on an individual basis, whether they could safely be at their own liberty pending their commitment trial, which could lead to offenders being held just because they are members of a class of criminals determined to be sex offenders requiring civil management.¹⁴⁶ Plaintiffs saw this as analogous to bail, where it is an individual determination as to whether someone should be held rather than require all criminal defendants to be held

¹³⁸ *Mental Hygiene Legal Serv.*, 2007 WL 4115936, at *1, 2.

¹³⁹ *Id.* at *1.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Mental Hygiene Legal Serv.*, 2007 WL 4115936, at *2.

¹⁴⁴ *Id.* at *2.

¹⁴⁵ *Id.* at *15.

¹⁴⁶ *Id.* at *12.

pending trial.¹⁴⁷ The court agreed with plaintiffs and even stated that holding someone upon a finding of probable cause to believe he/she may have a mental abnormality as defined by the statute could be “potentially catastrophic.”¹⁴⁸ The court went on to point out that the Supreme Court has never held it allowable to detain an individual for a substantial period of time based only on mental incapacity.¹⁴⁹ The civil confinement statutes upheld by the Supreme Court all require a specific “finding of dangerousness” which, when linked to their mental abnormality, makes the person incapable of controlling their dangerous behavior.¹⁵⁰ The court held that the harm to the respondent who is involuntarily committed without a finding of dangerousness is both “grave and irreparable,” and found this provision of the Act to be unconstitutional.¹⁵¹

The court also found section 10.07(d) to be unconstitutional because it allows detention of individuals after the commitment trial without a finding “beyond a reasonable doubt” that the individual “committed the acts which constituted the crime for which they had been charged.”¹⁵² The plaintiff pointed out that while the vast majority of individuals subject to the Act have been found to be guilty beyond a reasonable doubt, the Act authorizes the detention of two other groups following a commitment trial, even though the individuals have not been convicted of any crime.¹⁵³ The first group includes individuals who, while found guilty beyond a reasonable doubt by a jury at the criminal trial, were found not guilty because of mental disease or defect. The second group includes individuals who were charged with sex offenses but were unable to stand trial because it was determined by the court that they were unable to prepare their own defense, and were therefore incapacitated.¹⁵⁴

This second group, those deemed unable to stand trial, face the designation of a sex offender with the possibility of civil confinement, without a finding beyond a reasonable doubt to have

¹⁴⁷ *Id.*

¹⁴⁸ *Mental Hygiene Legal Serv.*, 2007 WL 4115936, at *14.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at *14.

¹⁵¹ *Id.* at *15.

¹⁵² *Id.* at *2.

¹⁵³ *Mental Hygiene Legal Serv.*, 2007 WL 4115936, at *17.

¹⁵⁴ *Id.*

committed any crime.¹⁵⁵ The court pointed out that while the Supreme Court has upheld the civil confinement of those deemed mentally ill and dangerous, the Act is not just a civil confinement statute because it “applies only to those who have committed a sexual offense.”¹⁵⁶ The court held that due process requires that when an individual is subject to a stigma, such as being labeled a sex offender, and is subject to a finding that he violated a criminal law creating the possibility of institutional confinement, proof that he committed the acts labeling him an offender must be proven beyond a reasonable doubt.¹⁵⁷

The court conducted an in-depth analysis into the plaintiff’s contention that section 10.06(f) is facially invalid.¹⁵⁸ The court, however, could not uphold this contention. In order to succeed in a facial challenge, the plaintiff would have to show that there is no set of circumstances under which the challenged practices would be constitutional. The court did analyze the problematic issues that arise from this section of the Act.¹⁵⁹

Plaintiffs contended that this section of the Act violates one of the basic provisions of due process; “notice to the individual and an opportunity to challenge the continued detention.”¹⁶⁰ The State of New York attempted to defend the Act by insisting that this securing petition protects the individual by providing an opportunity for evaluation; he/she is secured only after notice is given, and only when the individual’s confinement is required to protect public safety.¹⁶¹ The court found these arguments to be unpersuasive and pointed out that while notice is given, it is not given to the individual who will be secured and is not notice about the potential detention.¹⁶²

The State of New York further contended that because the detention would be seventy-two hours at most, the deprivation of liberty would be modest.¹⁶³ The court pointed out that this was not entirely accurate because while the probable cause hearing is scheduled to be held within seventy-two hours of the filing of the

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at *18.

¹⁵⁷ *Id.*

¹⁵⁸ *Mental Hygiene Legal Serv.*, 2007 WL 4115936, at *7. See N.Y. MENTAL HYG. LAW § 10.06(f) (McKinney Supp. 2008) (authorizing detention of the offender before the probable cause hearing).

¹⁵⁹ *Mental Hygiene Legal Serv.*, 2007 WL 4115936, at *11.

¹⁶⁰ *Id.* at *7.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at *8.

securing petition, the hearing can be delayed in certain circumstances, including a showing of good cause by the Attorney General as to why the hearing could not commence.¹⁶⁴ The court also pointed out that it is problematic that the Act does not set a limit for the Attorney General's postponement prerogative.¹⁶⁵ So while the plaintiff was not able to convince the court to find this provision unconstitutional, the court made it clear that it was skating on thin constitutional ice.

While the court held only two provisions of the Act to be unconstitutional, and discussed the obvious problems with a third provision, the mere existence of a meritorious suit evidences obvious problems with the Act.

IV. HOPE IS NOT LOST: WAYS TO IMPROVE THE ACT

It is clear that the New York State Sex Offender Management and Treatment Act is over-inclusive in that it not only includes sex offenses, but also "sexually motivated" felonies.¹⁶⁶ The law requires a retroactive determination of whether a convict committed the crime with such motivation in mind because this determination is made years later, after the offender has been convicted, and served his or her prison sentence.¹⁶⁷ This can lead to many problems, specifically the ability of the defendant to convince a jury that at that time he/she did not have such motivation. It is also problematic that there is no specific burden of proof for finding a felony to be sexually motivated.¹⁶⁸ A practical consequence of the Act is the ability of prosecutors to sneak through civil law "sexual motivation" as an aggravating factor in the sentencing of a crime, except that a determination for sexual motive is conducted years afterward. It seems necessary that there be some kind of requirement to prove this

¹⁶⁴ *Mental Hygiene Legal Serv.*, 2007 WL 4115936, at *8.

¹⁶⁵ *Id.* at *9.

¹⁶⁶ See N.Y. MENTAL HYG. LAW § 10.03(p) (McKinney Supp. 2008) (indicating that sex offenses include sexually motivated felonies).

¹⁶⁷ See *Mental Hygiene Legal Serv.*, 2007 WL 4115936, at *2 (recognizing that some sex offenders have a predisposition to repeat sex offenses, and authorizing a retroactive determination that non-sex crimes were committed with sexual motivation). See also N.Y. MENTAL HYG. LAW §§ 10.01(b), 10.07(c) (McKinney Supp. 2008).

¹⁶⁸ See N.Y. MENTAL HYG. LAW § 10.03(s) (McKinney Supp. 2008) (defining the term "sexually motivated" but failing to provide the burden of proof for finding a felony to be sexually motivated).

specific element.

After examining other states' civil commitment statutes, it is apparent that there is not one that resolves every problem with the Act.¹⁶⁹ But one that does deal with the over-inclusiveness issue, among the many other issues of the New York statute, is the Jimmy Ryce Act, the Florida statute that deals with the involuntary civil commitment of sexually violent predators.¹⁷⁰ The Jimmy Ryce Act states the same general purpose as the New York Act. The Jimmy Ryce Act recognizes that the chances of rehabilitating sexually violent predators in the prison setting is poor, and that this group of individuals requires a long term, specialized treatment.¹⁷¹ The Florida Legislature recognizes that while this group of individuals is small, they are extremely dangerous by reason of mental disease or defect, and require this specialized treatment.¹⁷²

The overall procedure of the Jimmy Ryce Act is very similar to that of New York's statute. Written notice is given to a team, with a copy to the Attorney General, for the purpose of beginning the process of involuntarily civilly committing an individual who has been convicted of a sexually violent offense prior to their scheduled release from prison.¹⁷³ This team is comprised of, but is not limited to, two licensed psychiatrists or psychologists, or one licensed psychiatrist and one licensed psychologist.¹⁷⁴ The team makes an assessment as to whether the individual is a sexually violent predator.¹⁷⁵ But, before this recommendation is made, the convict is offered a personal interview with the team.¹⁷⁶ This is one protection that New York does not offer to the individual.¹⁷⁷ In New York the team makes the determination without ever meeting, or even having the opportunity to meet, with the individual face to face.¹⁷⁸

There are also very rigorous time requirements in Florida's

¹⁶⁹ See, e.g., FLA. STAT. ANN. § 394.910 (West Supp. 2008); KAN. STAT. ANN. § 59-29a01 (2005); N.H. REV. STAT. ANN. § 135-E:1 (West Supp. 2008); N.J. STAT. ANN. § 30:4-27.25 (West 2008).

¹⁷⁰ The Jimmy Ryce Act, FLA. STAT. ANN. §§ 394.910-394.932 (West 2008).

¹⁷¹ *Id.* § 394.910.

¹⁷² *Id.*

¹⁷³ FLA. STAT. ANN. § 394.913(1) (West Supp. 2008).

¹⁷⁴ FLA. STAT. ANN. § 394.913(3)(b) (West Supp. 2008).

¹⁷⁵ *Id.*

¹⁷⁶ FLA. STAT. ANN. § 394.913(3)(c) (West Supp. 2008).

¹⁷⁷ See N.Y. MENTAL HYG. LAW § 10.05(e) (McKinney Supp. 2008) (listing the team's requirements, which do not include a personal interview with the individual).

¹⁷⁸ *Id.*

civil confinement law.¹⁷⁹ If the individual's release from prison becomes immediate for any reason, the team is given only seventy-two hours to determine whether the individual is a sexually violent predator.¹⁸⁰ If the team decides the individual is not a sexually violent predator, he/she is immediately released.¹⁸¹ If the team decides that the individual is a sexually violent predator, the state attorney is required to file a petition with the circuit court stating the facts sufficient to support this allegation within forty-eight hours.¹⁸² If this petition is not filed within forty-eight hours, the individual is released.¹⁸³ If the petition is filed, the judge then determines whether there is probable cause to believe the person is a sexually violent predator, and if he/she is determined to be, he/she is returned to custody.¹⁸⁴ These rigorous time requirements provide the offender with a crucial and reasonable layer of protection and would go a long way towards bolstering New York's Act against Constitutional challenge without undermining its efficacy.

There are also very specific protections in the Florida Statute. While the Act's application may render them informally present in New York, they are not specifically mandated by statute. Some of these protections include the individual being afforded the opportunity to have an adversarial probable cause hearing.¹⁸⁵ This hearing, which can be considered by the court as long as any delay in the trial process is not the fault of the respondent, gives the respondent an opportunity to cross examine any witnesses who testify against the person and view and copy all petitions and reports in the court's file.¹⁸⁶ This affords the individual yet another layer of protection.

The actual civil commitment trial under the Jimmy Ryce Act is very similar to that in New York. The person must be found to be a sexually violent predator by clear and convincing evidence,¹⁸⁷

¹⁷⁹ FLA. STAT. ANN. § 394.9135(1)-(2).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² FLA. STAT. ANN. § 394.9135(3) (West Supp. 2008).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ FLA. STAT. ANN. § 394.915(2) (West Supp. 2008).

¹⁸⁶ FLA. STAT. ANN. § 394.915(2); FLA. STAT. ANN. § 394.915(3)(c); FLA. STAT. ANN. § 394.915(3)(d).

¹⁸⁷ FLA. STAT. ANN. § 394.917(1) (West Supp. 2008).

just as in New York.¹⁸⁸ This determination must be made by a unanimous jury, if a jury is present,¹⁸⁹ again the same as in New York.¹⁹⁰ Because an individual could be involuntarily civilly confined for years beyond his or her prison sentence, this clear and convincing standard is just as problematic in Florida as it is in New York.

One glaring difference between New York's Act and the Jimmy Ryce Act is that the former does not presume that the individual did in fact commit the sex offense. In New York, in certain circumstances the respondent is not permitted to "relitigate" their commission of the sex offense.¹⁹¹ That the presumption of innocence is one of the dwindling differences between our civil confinement and criminal imprisonment procedures is deeply troubling. Florida wisely avoids the necessary contradictions simply by extending to what may be the criminal defendant's most crucial protection to an offender subject to civil confinement.

While there still are portions of the Jimmy Ryce Act that appear problematic on its face, and have been challenged over the years, this involuntary civil confinement statute reconciles many of the problems found in the New York statute. Although portions of the Jimmy Ryce Act have been challenged, the act as a whole has been deemed to be constitutional.¹⁹² It serves the same stated purpose of the New York statute, and that is the "long-term care and treatment of sexually violent predators."¹⁹³ It differs in how it goes about doing so, as well as in the tendency toward constitutionality and a respect for human liberty.

CONCLUSION

It is understandable that an incident such as the one that occurred in the Westchester parking garage would invoke fear in some, getting them to act to protect citizens from sex offenders who have been released. Whether Governor Pataki's creative

¹⁸⁸ N.Y. MENTAL HYG. LAW § 10.07(d) (McKinney Supp. 2008).

¹⁸⁹ FLA. STAT. ANN. § 394.917(1).

¹⁹⁰ N.Y. MENTAL HYG. LAW § 10.07(d).

¹⁹¹ N.Y. MENTAL HYG. LAW § 10.06(j).

¹⁹² *Westerheide v. State*, 831 So. 2d 93, 112 (Fla. 2002). See *Kansas v. Hendricks*, 521 U.S. 346 (1997) (holding that Kansas' civil commitment statute is constitutional); Mari M. "Miki" Presley, *Jimmy Ryce Involuntary Civil Commitment For Sexually Violent Predators' Treatment and Care Act: Replacing Criminal Justice with Civil Commitment*, 26 FLA. ST. U. L. REV. 487, 489 (1999) (stating "[b]ecause the Jimmy Ryce Act is nearly identical to the Kansas statute, *Hendricks* presumably establishes the Act's constitutionality.>").

¹⁹³ FLA. STAT. ANN. § 394.910 (West Supp. 2008).

application of Mental Hygiene Law section nine was a good or bad way to do this is not at issue here. What is important now is the current legislation in place to cover these sex offenders: the Sex Offender Management and Treatment Act.

Many persuasively argue that there is a vital need for the Act. Because there are multiple statistics illustrating that sex offenders are likely to re-offend, there has to be some way for society to protect itself at the end of sex offenders' prison terms.¹⁹⁴ Still, this overall protection of society must not be done in lieu of protecting the constitutional guarantees afforded to all citizens, even those convicted of sexual offenses. While the Supreme Court has upheld these statutes, because they are aimed at the care and treatment of sex offenders, that does not mean that the rights of sex offenders are protected in civil confinement statutes.

The newly enacted Sex Offender Management and Treatment Act infringes on some rights that even sex offenders deserve to have. The over-inclusiveness of this statute, subjecting those that committed not only sexually violent felonies, but also sexually motivated felonies, to civil commitment is only one issue. The Act also makes a dangerous presumption of guilt, one that the offender is not given the chance to fight against. These are only two of the many problems plaguing the Sex Offender Management and Treatment Act.

The lawsuit discussed in Part III is presumably the first of many. As the procedure in the Act is used more frequently, further problems with its implementation will inevitably reveal themselves, problems that this note has failed to foresee and discuss but that will undoubtedly arise.

This is not to say that the Act as a whole is unconstitutional, or even poorly written. While there are problems with various provisions, the Act as a whole serves its purpose, to protect society from these dangerous sex offenders while also ensuring that they receive the treatment they need so that maybe someday they can return to society as productive, and hopefully harmless, members.

¹⁹⁴ See, e.g., *McKune v. Lile*, 536 U.S. 24, 33 (2002) (citing a study by the Department of Justice that indicated that sex offenders "are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.").