Creeping by Moonlight: A Look at Civil Commitment Laws for Sexually Violent Predators Through the Lens of The Yellow Wallpaper

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ABSTRACT

This note examines the constitutional and social implications of the civil commitment of sexually violent predators in the United States. These commitments are implemented on sexual offenders deemed too dangerous to be placed back into society after serving prison sentences and have been gaining popularity across the United States. Currently, these commitments are considered constitutional in limited circumstances by the Supreme Court, but while these commitments are meant for only the most dangerous and least controllable individuals, the public reaction to sexual offenses increases the possibility these commitments will be misused. As a part of examining this commitment process, this note analyzes the short story, The Yellow Wallpaper, a first hand fictive account of a woman undergoing the rest cure, an eighteenth century medically accepted treatment for women suffering a variety of mental ailments, which isolated women and left them to sleep, eat, and do little else.

Today, women look back on this “cure” and wonder how it could have ever been considered an appropriate medical treatment. This story of one woman’s confinement to a room as a part of a medically accepted treatment offers a different angle on the situation men face today under changing sexual offender laws and medically accepted treatment programs. By comparing this treatment of women submitted to the rest cure both in The Yellow Wallpaper and in Victorian society to the current constitutional treatment of men submitted to commitment for sexually violent offenses, this note hopes to show how medically accepted treatment regimes with little or no individual treatment are socially and morally dangerous. In the end, there are better alternatives to commitment of sexual offenders that will keep society safe, provide individualized treatment, and uphold constitutional liberties so valued by our society. Perhaps one day, a hundred years from now, society will also look back on the commitment of sexually violent predators as medically inappropriate and wonder how it ever became the socially instituted procedure.
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INTRODUCTION

Charlotte Perkins Gilman wrote The Yellow Wallpaper in the late 1800s, at a time when women's bodies were considered inferior to men's, and school, work, and books were believed to cause women serious mental maladies. The treatment developed to combat these supposed mental abnormalities was called the rest cure, a method which removed women from their “usual environment” and secluded them in bed for weeks. The Yellow Wallpaper is the diary of a woman whose doctor husband has decided she needs the rest cure, and the reader follows as this cure brings her closer to madness until she finally has a complete breakdown.

3. Id.; Denise D. Knight, Texts and Contexts in Gilman's World: A Biographical Approach, in APPROACHES TO TEACHING GILMAN'S "THE YELLOW WALL-PAPER" AND HERLAND 17, 18 (Denise D. Knight & Cynthia J. Davis eds., 2003).
5. Dale M. Bauer, Invalid Women, in THE YELLOW WALLPAPER, supra note 2, at 130, 130.
The *Yellow Wallpaper* has become a mainstay in women's studies and women's literature courses, but the story can and has been studied in many other academic departments, including medical school and psychology courses. It is the goal of this note to show how this story can be put to yet another application: the better understanding of how civil commitment laws for sexually violent predators affect the men committed and why individualized treatment would serve society better in the long run instead of commitment. This story of one woman's confinement to a room as a part of a medically accepted treatment offers a different angle on the situation men face today under changing sexual offender laws and medically accepted treatment programs.

Part I discusses *The Yellow Wallpaper* in the context of the rest cure. First, this section will analyze the story before delving into a more detailed discussion of the social conditions and medical beliefs of the time, and in particular those beliefs of Dr. S. Weir Mitchell, the man who developed the rest cure and treated Charlotte Perkins Gillman. This section will then briefly discuss the autobiographical nature of the story before analyzing its use as a comment on the rest cure.

Part II will examine civil commitment laws and sexual offender definitions in depth, with particular focus on the laws of Kansas and Texas. Kansas's laws are discussed because two cases from this state define the constitutionality of civil commitment for sexual offenders. On the other hand, Texas's laws are important because of the unique outpatient approach to civil commitment, and while certain aspects of this approach are preferable to traditional programs, dangers still

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8. *See* Marnie E. Rice & Grant T. Harris, *What We Know and Don't Know About Treating Adult Sex Offenders*, in *PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY* 101, 101 (Bruce J. Winick & John Q. La Fond eds., 2003) (claiming no knowledge of "controlled outcome studies of the treatment of female sex offenders, who, in any case, form a very tiny proportion of the population of sex offenders"); *see also* Roy B. Lacoursiere, *Evaluating Offenders Under a Sexually Violent Predator Law: The Practical Practice*, in *PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY*, *supra*, at 75, 76 (explaining that “[female and adolescent offenders will . . . not be included, not because they are excluded by these laws, but because their numbers in SVP [Sexually Violent Predator] settings are still small”)

lurk. This section will detail the history and typical language of statutes in states with commitment laws.

Part III will critique the use of civil commitment for sexually violent predators through the lens of *The Yellow Wallpaper*. First, this section will discuss arguments made by the American Psychological Association (APA) and mental health professionals about the impacts of commitments and their ability to help those suffering sexual mental illnesses. Second, this section will address recidivism rates for sexual offenders as a reflection on the effectiveness of commitment as the best way to protect society. Lastly, this section will give an example of real sexual offenders living in society and suggest that providing hope of recovery and reintegration into society might reduce recidivism and protect society more than commitment. Part IV will conclude with an examination of alternative programs and solutions for our growing population of sex offenders.

I. *THE YELLOW WALLPAPER*

*The Yellow Wallpaper* is a series of journal entries written by an unnamed woman over a period of three months. Her husband, John, a doctor, has diagnosed her with a “temporary nervous depression—a slight hysterical tendency” and instituted a treatment of rest, air, tonics, exercise, isolation, and absolutely no writing or “work.” By the middle of the first entry, the narrator has made clear that she disagrees with John’s diagnosis of her condition and his treatment: “Personally, I disagree . . . . Personally, I believe that congenial work, with excitement and change, would do me good.” She also wonders if the fact that John is a doctor, and will not listen to her, is a reason for her persisting condition.

The narrator and her husband move to a country estate to encourage her recovery, and they take an attic bedroom covered in yellow wallpaper the narrator immediately finds distasteful, but which John refuses to change. With John away during the day and with nothing to do but rest, the narrator clandestinely keeps this
journal and watches the patterns in the wallpaper. Before too long, she discovers figures moving behind the bar-like patterns, and begs her husband to take her away from the house. He refuses, and the journal entries become increasingly obsessed with the wallpaper and increasingly less reliable. "[S]he becomes convinced that there is a woman . . . behind the yellow wallpaper waiting to get out, a woman who creeps around the house and garden only by moonlight when no one will see her."

On the last day at the house, the narrator locks herself inside. As the day passes, she strips off as much of the paper as she can, in order to set the creeping woman free. Later, when John returns and finds the door locked, at first he either refuses to or cannot understand what she has done with the key, and begs her to open the door. When he finds the key at last, he opens the door to discover his wife crawling around the room, all the yellow paper stripped from the walls. Horrified, he asks what she is doing, to which she replies: "I've got out at last . . . [A]nd I've pulled off most of the paper, so you can't put me back!" At that point her husband John, the upstanding doctor, faints. The story ends with the narrator crawling over him as she continues her circles around the room, shoulder pressed against the wall.

A. Victorian Nervous Disorders and the Rest Cure

When first published, this story was seen by contemporaries "as a harrowing case study of neurasthenia." Neurasthenia, which is

19. Id. at 43-44, 47-49.
20. Id. at 50-52.
21. Id. at 50.
22. Id. at 50-56; see also Paula A. Treichler, Escaping the Sentence: Diagnosis and Discourse in "The Yellow Wallpaper," 3 TULSA STUD. WOMEN'S LITERATURE 61, 72-73 (1984) (supporting the proposition that the narrator is unreliable because "the narrative is unfolding in an impossible form"; she tells the reader she is always "sleeping, creeping, or watching the wallpaper" so the reader wonders if at that point she would even be able to keep a journal).
23. Oakley, supra note 6, at 31.
25. Oakley, supra note 6, at 31.
26. Treichler, supra note 22, at 73.
27. Gilman, supra note 14, at 58.
28. Id.; Treichler, supra note 22, at 73 (suggesting why it took so long to find the key).
29. Gilman, supra note 14, at 50; Oakley, supra note 6, at 31.
30. Gilman, supra note 14, at 58.
31. Id.
32. Id.; Oakley, supra note 6, at 31.
33. Gilman, supra note 14, at 58.
34. Treichler, supra note 22, at 64.
also referred to as puerperal mania,\textsuperscript{35} acute mania,\textsuperscript{36} or hysteria,\textsuperscript{37} was a term used by Dr. S. Weir Mitchell and others to describe conditions that might be better known today as post partum depression,\textsuperscript{38} bipolar disorder, or anxiety disorder.\textsuperscript{39} The narrator in \textit{The Yellow Wallpaper} exhibits some of the classic symptoms of this disorder: "exhaustion, crying, nervousness, synesthesia, anger, paranoia, and hallucination."\textsuperscript{40} As more and more women developed similar symptoms, Victorians became alarmed and sought a treatment: women suffering these nervous disorders were unable to be effective mothers or manage their households.\textsuperscript{41}

The solution became the rest cure, originally developed by Dr. S. Weir Mitchell for soldiers suffering "battle fatigue" after the end of the Civil War,\textsuperscript{42} which was applied for the next half century or so to women "suffering from battle fatigue on the homefront [sic]."\textsuperscript{43} Dr. Mitchell believed that women’s "inappropriate displays of feeling" and expressions of emotion made them predisposed for nervous disorders.\textsuperscript{44} At this time, Dr. Mitchell and others considered a woman’s

\textsuperscript{35} Kellogg, supra note 2, at 171-73 (describing puerperal mania, a term used by Dr. Kellogg to reference a mental illness which "show[ed] itself about two weeks after delivery [of a child]" with symptoms ranging from anxiety, irritability, and possible use of profanity, to beliefs that evil had or was about to befall husband or child).

\textsuperscript{36} The symptoms of acute mania include insomnia, flushed complexion, rapid glances, headaches, inability to produce enough milk, and distortion of the mind. Alfred Meadows, "Perpetual Mania," \textit{A Manual of Midwifery, Including the Signs and Symptoms of Pregnancy, Obstetric Operations, Diseases of the Puerperal State, etc, etc}, in \textit{THE YELLOW WALLPAPER}, supra note 2, at 173, 175.

\textsuperscript{37} Hysteria was a common term "for a variety of nervous disorders, ranging from seizures to schizophrenia, attributed primarily to women." Bauer, \textit{Invalid Women}, supra note 5, at 144 n.11.

\textsuperscript{38} \textit{Id.} at 166 (highlighting editors' comparison of puerperal mania to post-partum depression).

\textsuperscript{39} \textit{See} David H. Barlow \& V. Mark Durand, \textit{Abnormal Psychology: An Integrative Approach} 113, 155 (3rd ed. 2002) (noting that anxiety disorders can range from a general inability to stop worrying, to panic attacks, and phobias); Dale M. Bauer, \textit{Introduction: Cultural and Historical Background}, in \textit{THE YELLOW WALLPAPER}, supra note 2, at 3, 4 (suggesting the narrator's condition might be known today as "manic-depressive illness"); \textit{see also} American Psychiatric Association, \textit{Diagnostic and Statistical Manual of Mental Disorders} 382-97 (4th ed. 2000) (discussing the diagnostic symptoms of bipolar disorder, previously known as manic-depressive illness).

\textsuperscript{40} Treichler, supra note 22, at 65; \textit{see also} 2 \textit{Shorter Oxford English Dictionary} 3148 (6th ed. 2007) (defining "synesthesia" as "[t]he production of a mental sense impression relating to one sense by the stimulation of another sense, as in coloured hearing").

\textsuperscript{41} \textit{See} Bauer, supra note 39, at 10-13 (describing turn of the century alarm at women's growing intellectual life, expanding female sexuality, and reactions); Bassuk, supra note 1, at 253-54.

\textsuperscript{42} Bassuk, supra note 1, at 247.

\textsuperscript{43} \textit{Id.}

\textsuperscript{44} \textit{Id.} at 249.
body inferior to a man’s. This theory was supported mainly on a belief that a woman’s reproductive organs “dominated” her nervous system, making her more susceptible to diseases and mental illness.

According to some texts of the day, physicians “attributed real health problems to women’s intellectual activities.” This meant not reading novels, not seeking education outside the home, and not doing any intellectual work.

The rest cure took these restrictions to the extreme in order to return women back to proper health: Dr. Mitchell applied a regimen of rest, isolation, and overfeeding over a matter of weeks.

“At first, and in some cases for four to five weeks, I do not permit the patient to sit up or to sew or write or read, or to use the hands in any active way except to clean the teeth... I arrange to have the bowels and water passed while lying down, and the patient is lifted onto a lounge for an hour... and then lifted back again into the newly-made bed.’ The nurse spoonfeeds the patient, gives her a sponge bath, [and] administers vaginal douches... To offset the ill-effects of prolonged immobility and confinement to bed, the patient was subjected to... passive exercises such as massage, electricity, and hydrotherapy... Tonics, stimulants and nutriments were given to... promote digestion... Once under Mitchell’s care and confined to bed, the patient was started on an exclusive diet of milk, administered in four-ounce doses every two hours..."

Once a woman had gained weight and rested fully, the treatment ended with lessons on how to suppress emotions and live highly structured lives.

These steps were designed to “infantilize the patient so that she acknowledged the paternal authority of the doctor.” She was taught

45. Id. at 251.
46. Id.; see also Bauer, supra note 39, at 14 (supporting the theory that female sexuality was linked to mental illness); Bauer, supra note 5, at 144 n.11 (explaining “Victorian medical and scientific communities linked women’s sexual organs — their ‘wandering wombs’ — to a propensity for insanity”).
47. Bauer, supra note 5, at 131.
48. See Kellogg, supra note 2, at 160.
49. Bassuk, supra note 1, at 251-52.
50. Id. at 252. “Its cornerstone was bed rest for six weeks to two months, but the length of time and completeness of rest were individually determined.” Id. at 247.
52. Id. at 249.
53. Bauer, supra note 5, at 131.
through this process that she did not and could not know what was best for her.\textsuperscript{54} However, for some women, including Charlotte Perkins Gilman, these treatments did not help in the slightest.\textsuperscript{55} The constant rest, inability to read or work, and the repression of their ideas literally drove them insane.\textsuperscript{56} Victorian ideals about motherhood and family, coupled with the rest cure, kept women in "nursery-prisons" where they could see the world through the bars on their windows but were not allowed to be a meaningful part of it.\textsuperscript{57}

\textbf{B. The Yellow Wallpaper as a Comment on the Rest Cure}

After the birth of her daughter, Gilman felt an inability to be near or care for her child.\textsuperscript{58} Alarmed, she sought treatment from Dr. Mitchell.\textsuperscript{59} He put her to bed and after a month declared there was nothing wrong with her.\textsuperscript{60} Before returning her to her family, Dr. Mitchell gave her these instructions: "'[l]ive as domestic a life as possible. Have your child with you all the time.' . . . 'Lie down an hour after each meal. Have but two hours' [sic] intellectual life a day. And never touch pen, brush, or pencil as long as you live.'"\textsuperscript{61} She followed his advice for three months, and when she felt on the brink of utter madness, she disregarded his advice, went back to work,\textsuperscript{62} left her husband, and moved to California.\textsuperscript{63} The Yellow Wallpaper is a stylized, embellished version of her struggle with the rest cure and her attempt to change Dr. Mitchell's opinion of his treatment of mentally ill women.\textsuperscript{64}

\textsuperscript{54} Jonathan Crewe, Queering "The Yellow Wall-Paper": A Pedagogic View, in THE PEDAGOGICAL WALLPAPER: TEACHING CHARLOTTE PERKINS GILMAN'S "THE YELLOW WALLPAPER," supra note 6, at 47, 49.
\textsuperscript{55} Bassuk, supra note 1, at 245 (noting that another famous Victorian author who suffered from an unsuccessful rest cure application was Virginia Woolf).
\textsuperscript{56} See id. at 252.
\textsuperscript{57} See Dale M. Bauer, Conduct Literature and Motherhood Manuals, in THE YELLOW WALLPAPER, supra note 2, at 63, 65.
\textsuperscript{58} See CHARLOTTE PERKINS GILMAN, THE LIVING OF CHARLOTTE PERKINS GILMAN 96 (1990). "Be it remarked that if I did but dress the baby it left me shaking and crying . . . ." Id.
\textsuperscript{59} Knight, supra note 3, at 20.
\textsuperscript{60} GILMAN, supra note 58, at 96.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 96-97; Charlotte Perkins Gilman, Why I Wrote the Yellow Wallpaper?, in THE YELLOW WALLPAPER, supra note 2, at 347, 348-49.
\textsuperscript{63} Knight, supra note 3, at 21.
\textsuperscript{64} Gilman, supra note 62, at 349. Gilman commented she wrote The Yellow Wallpaper "to save people from being driven crazy" and considered the story successful when she learned years later Dr. Mitchell had read it and changed the way he treated patients as a result. Id.
Through the narrator in *The Yellow Wallpaper*, Gilman was able to express her own dissatisfaction with the rest cure.65 “[A]lmost from the first [the narrator’s language] serve[s] to call into question both the diagnosis of her condition and the rules established to treat it.”66 This leads the reader to believe there is in fact something wrong with the narrator, but “to doubt that the diagnosis names the real problem.”67 Gilman’s story becomes, in the end, a “challenge to the patriarchal diagnosis of women’s condition” and “a public critique of a real medical treatment.”68

Misdiagnosis had “sentence[d]” Gilman, and others like her, to “isolation, deprivation, and alienation.”69 In the end, the reader comes away from the story wondering if “the diagnosis of hysteria may be a sham” or worse, “socially constituted.”70 Her husband, according to Weinstock, has tried to teach his wife the “correct” way to view her symptoms,71 but by the end of the story the audience realizes that not only has he failed, but he has created a worse situation for his wife.72 As a way to bring his wife around to his medically accepted way of thinking, John dismisses and devalues her ideas and assessments of her condition.73 This becomes another way she is infantilized by his rest cure;74 through this failed attempt to teach her, John de-means her intelligence and “deflates her self-esteem,” which only “engenders resentment” in the narrator and “ultimately facilitates [her] psychotic break.”75

The rest cure, meant to discipline her body, had not “produce[d] a concomitant subordination of mind” in the narrator as it supposedly had in other women.76 “[D]eprived of the opportunity to express herself and to engage in meaningful dialogue about her thoughts and feelings, the narrator develops her own discordant interpretation of her condition in secret.”77 This hidden interpretation is what, according to Weinstock, creates the shocking ending, but also what sends

66. Treichler, supra note 22, at 66.
67. Id.
68. Id. at 68-69.
69. Id. at 69.
70. Id. at 70.
71. Weinstock, supra note 6, at 10.
72. Id. John fails because his wife “does not learn the lesson she is supposed to learn . . . .” Id.
73. See id.
74. Id.
75. Id.
76. Id.
77. Id.
a powerful message: maybe if John had listened to his wife or taken her seriously, she would not have had a breakdown.78

The narrator was not a typical Victorian woman because she preferred writing to being with her child.79 Her symptoms could be seen as “social or political critiques [that] were ‘treated’ rather than credited.”80 This is one of the reasons this story has become a shining beacon of the feminist literary canon — the story “terminate[s] an overlong historical succession of madwomen to the attic.”81 It offers, according to Crewe, a lesson about “women’s psychotherapeutic ‘management’ and its consequences.”82 More than that, it “teach[es] a lesson to the reader about the destructive effects of gender inequality and communications breakdown through the fictive representation of mental derangement and psychic crisis,”83 and as such is a perfect tool to use in the discussion of civil commitment for sex offenders in order to better understand mental illness.

II. THE CIVIL COMMITMENT OF SEXUAL PREDATORS

In the last few decades the United States has seen a significant increase in sexually motivated crimes.84 As a reaction to the horrific nature of these crimes and media attention they receive, states have developed a number of protective measures to keep these sexual offenders, labeled sexual predators, from having the opportunity to commit future crimes once released from jail.85 These measures include registration systems, community awareness initiatives, chemical castrations, and civil commitment programs for those considered to be especially dangerous.86 The impetus behind these measures seems to be a public “demanding that sex offenders never recidivate and declaring that any method of incarceration or deterrence is acceptable.”87 In states with civil commitment laws, after people have

78. See id. at 10-11.
79. See Bassuk, supra note 1, at 253 (explaining that Victorian women “were told only to strive for a domestic life focused on the needs of . . . children).
80. Crewe, supra note 54, at 49.
81. Id. 49-50.
82. Id. at 50.
83. Weinstock, supra note 6, at 11.
84. Introduction to PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY, supra note 8, at 3, 3.
86. Preface to PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY, supra note 8, at XV, xv.
87. APA, supra note 85, at vii.
served their sentences, the state can ask a court to civilly commit offenders to mental hospitals or treatment programs. This commitment can last indefinitely and is currently constitutional.

These laws are purportedly meant for only the most dangerous men who commit sexual crimes, and legislatures have been very careful to draft statutes so they do not appear facially punitive. However, in practice these laws are punitive, they are motivated by outside pressures on the legal system including victims’ families and the media, and they do not take into account true medical and psychological definitions of sexual disorders. After reading The Yellow Wallpaper, one should be wary of just what damage socially accepted cures for mental illness can do when they are instituted on a general, rather than individual basis.

A. History

Laws calling for the commitment of especially dangerous sexual offenders are nothing new in the United States. Some states have had commitment laws on the books since the 1930s and 1940s. By the 1960s, “more than 25 states had enacted sex offender commitment laws, variously called ‘sexual psychopath’ laws, ‘sexually dangerous persons’ acts, and ‘mentally disordered sex offender’ acts.” Originally these statutes viewed commitment as an alternative to prison and did not contemplate its use after completion of a prison sentence. This was true until the 1970s when, because people never seemed to be cured, these statutes became disfavored. By 1990, only twelve states had not repealed their statutes. Then, in the mid 1990s, states began enacting new commitment laws out of “frustration with the criminal justice system’s perceived inability to keep sex

88. Id.
89. See id. at 19 (stating that the “law provides for confinement ‘until such time as the person’s mental abnormality or personality disorder has so changed that the person is safe to be at large’”).
90. Id. at viii.
91. See infra notes 103-06 and accompanying text (defining sexually violent predators).
92. Preface, supra note 86, at xv (describing reasons for civil commitment statutes).
93. APA, supra note 85, at vii-ix, 167-81.
94. Id. at 11-13, 27.
95. Id. at 11.
97. APA, supra note 85, at 11.
98. Id.
offenders off the streets." Currently, nineteen states and the District of Columbia have sex offender commitment laws or bills pending. Washington was the first state to enact this new breed of statute, and although Kansas's cases were eventually taken to the Supreme Court, Kansas copied the language of its commitment laws from Washington, which has also served as a model for several other states.

Washington was also the first state to use the term "sexually violent predator," now a common term in this area of law. Washington law defines a "sexually violent predator," or SVP as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence . . . ." A crime of sexual violence typically can mean "forcible rape, statutory rape, indecent liberties by forcible compulsion or against a child under age 14, and other offenses determined to have been 'sexually motivated.'" "Mental abnormality" is defined as 'a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts'' while the term "personality disorder" has no general definition.

In Washington, and most states with SVP laws, a sex offender only becomes eligible for this civil commitment at the expiration of his prison sentence. At that time, the prosecuting attorney for the jurisdiction "where the individual was convicted (or charged) or . . .

101. Fitch & Hammen, supra note 96, at 29.
102. Id.
103. Id.
104. WASH. REV. CODE § 71.09.020(16) (2008); see Fitch & Hammen, supra note 96, at 29 (quoting the 1990 version of Washington's Sexually Violent Predator Statute which has since been amended, but not substantively changed).
105. Fitch & Hammen, supra note 96, at 29 (quoting WASH. REV. CODE § 71.09.020(4) (1990)).
106. Id. (quoting WASH. REV. CODE § 71.09.020(2) (1990)).
107. See id.
the state's Attorney General" files a petition for commitment. Then a proceeding is held to determine if there is probable cause for commitment. If probable cause is found, the offender must be evaluated by the state, or he may choose to be evaluated by an independent expert. "[T]he state must prove beyond a reasonable doubt that the individual is a sexually violent predator." If the State finds that he meets this criteria, then he is held "until such a time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." Once offenders have been committed as SVPs, they are typically sent to state-run inpatient facilities under the supervision of the state "mental health authority." This usually means spending commitment time in mental health hospitals, or, in the case of certain states, special facilities within the state prison system.

B. Constitutional Considerations

1. The Kansas Cases and the Supreme Court

The Kansas Sexually Violent Predator Act was purposely worded very broadly, defining a "sexually violent predator" as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence." The first case to test this language all the way to the Supreme Court was Kansas v. Hendricks. Leroy Hendricks was a man with over forty years of child molestation convictions on his record, including the molestation of his own step children. He had been on a ten year sentence for molesting two boys and about to be released to a half way home when Kansas decided to try to have him civilly committed. He admitted that he could not control his desires for children at times of high stress, and the Kansas court determined

108. *Id.* at 29-30.
109. *Id.* at 30.
110. *Id.* at 29-30.
111. *Id.* at 30.
112. *Id.* (quoting WASH. REV. CODE § 71.09.100 (1990)).
113. *Id.* at 32-33.
114. *Id.* at 33.
115. KAN. STAT. ANN. § 59-29a02(a) (2008).
117. Hendricks, 521 U.S. at 354-55; Pfaffenroth, supra note 116, at 2240.
118. Hendricks, 521 U.S. at 354.
that his pedophilia could count as a mental abnormality and committed him.\textsuperscript{119}

At the Supreme Court, a majority held that civil commitment of sexual offenders was not criminal punishment and as such did not violate the \textit{Ex Post Facto} Clause of the constitution or constitute Double Jeopardy.\textsuperscript{120} It justified this decision by finding the act did "not affix culpability for prior criminal conduct," but rather used it "solely for evidentiary purposes" and therefore served neither the retributive nor deterrent features of the criminal law.\textsuperscript{121} In reality, this use of past behaviors to commit a person "blurs the line between civil commitment and criminal incarceration..."\textsuperscript{122}

Under the Kansas statute, the state was required to prove the offender to be committed had a mental abnormality that made "it difficult, if not impossible, for the person to control his dangerous behavior."\textsuperscript{123} This focus on mental abnormality was designed to limit the person's eligibility for commitment, but the Court determined these abnormalities did not have to match or relate to psychological categories of diagnosis.\textsuperscript{124} This was because mental health professionals disagree on definitions and courts have always allowed legislatures to determine their own mental illness categories and definitions.\textsuperscript{125} Although the state conceded it could offer Hendricks no real treatment through civil commitment, the majority determined that this did not make the statute punitive and, in fact, that the state was constitutionally justified in committing Hendricks because of the danger he presented.\textsuperscript{126}

In his concurrence, Justice Kennedy defended the constitutionality of the statute, but rejected the idea that Kansas did not have to try to treat Hendricks.\textsuperscript{127} He warned that while Hendricks's commitment was constitutional based on the facts of his case, if future cases presented evidence that the commitment was sought purely for retribution or deterrence purposes, or if it was shown mental abnormality was too vague a term to be trusted, civil commitment of sexual predators would no longer be constitutional.\textsuperscript{128} Even Justice Breyer's

\begin{enumerate}
\item\textsuperscript{119} \textit{Id.} at 355-56.
\item\textsuperscript{120} \textit{Id.} at 360-62, 368-71.
\item\textsuperscript{121} \textit{Id.} at 361-62.
\item\textsuperscript{122} ANDREW J. HARRIS, CIVIL COMMITMENT OF SEXUAL PREDATORS: A STUDY IN POLICY IMPLEMENTATION 50 (2005).
\item\textsuperscript{123} Hendricks, 521 U.S. at 358.
\item\textsuperscript{124} \textit{Id.} at 358-60; HARRIS, supra note 122, at 53.
\item\textsuperscript{125} Hendricks, 521 U.S. at 359.
\item\textsuperscript{126} \textit{Id.} at 365-66; APA, supra note 85, at 30.
\item\textsuperscript{127} See Hendricks, 521 U.S. at 371-73 (Kennedy, J., concurring); APA, supra note 85, at 31.
\item\textsuperscript{128} Hendricks, 521 U.S. at 373 (Kennedy, J., concurring).
\end{enumerate}
dissent did not find the Kansas law *per se* unconstitutional or criminal, 129 but Breyer did point out three similarities between commitments and criminal punishments, ultimately concluding they were not enough to transform commitment into criminal punishments. 130 Breyer also argued that Kansas's statute was punitive, at least as applied to Hendricks because “he had a condition for which treatment was available.” 131 Furthermore, Justice Breyer argued that a statute is punitive when a state *can* treat someone, but chooses to delay that treatment until the end of a criminal sentence. 132 Much debate has raged about these issues, but nothing has been settled. 133

Despite Kennedy's warnings, prosecutors in Kansas and all states with these laws “assumed that the Act had passed constitutional muster . . . .” 134 Since this ruling was handed down, “the number of sex offenders committed in Kansas ballooned from twelve in August 1998 to sixty-five in June 2001. As of January 2002 . . . only three SVPs had been conditionally released. Nationally . . . the number of SVPs held in states with . . . similar . . . Act[s] rose from 523 to around 1200.” 135

In 2002, Michael Crane's appeal of Kansas's attempt to have him civilly committed was granted certiorari by the Supreme Court, allowing the justices another opportunity to assess the constitutionality of sexual offender civil commitment. 136 Michael Crane's story is much different than Leroy Hendricks's: one day Crane showed himself to a female employee at a tanning salon and masturbated in front of her. 137 When she reached for a phone to call authorities, he left, telling her “you could have had this, baby . . . .” 138 Later that day, he was in a video store being helped by another female employee. 139 When she became distracted from helping him find a video he had requested, he came over to her with his pants around his ankles, picked her up and carried her to the back of the store where he tried to force

129. See id. at 373 (Breyer, J., dissenting); see APA, supra note 85, at 31.
130. *Hendricks*, 521 U.S. at 379-80 (Breyer, J., dissenting). Justice Breyer compared the “secure confinement” of civil commitments to penal incarcerations, pointing out that commitment is reserved only for those who are already in the criminal justice system, and that the commitment procedure necessarily involves the same prosecutors and government officials as traditional criminal punishments. *Id.*; APA, supra note 85, at 31.
131. APA, supra note 85, at 31 (emphasis added) (footnotes omitted).
133. APA, supra note 85, at 31-32.
134. Pfaffenroth, supra note 116, at 2242.
135. *Id.* (footnotes omitted).
136. See id. at 2265.
139. *Id.* at 1259.
her to perform fellatio.\textsuperscript{140} She fought back and screamed, causing him to leave the store.\textsuperscript{141}

A psychiatrist determined he had a sexual dysfunction revolving around exhibitionism and the need to see fear or shock in another person.\textsuperscript{142} A jury convicted him, but it was overturned on appeal.\textsuperscript{143} At that time, the prosecutor accepted a guilty plea to aggravated sexual battery for his time served: four years.\textsuperscript{144} However, only days from Crane’s release, the prosecutor began proceedings to have him civilly committed, which were successful.\textsuperscript{145}

The state interpreted the law to require only showing he had a mental abnormality or personality disorder that made him more likely to continue that behavior in the future (his sexual dysfunction) and that he had been convicted of one sexual crime (his plea to aggravated sexual assault).\textsuperscript{146} The case made it to the Supreme Court, which granted certiorari to “revisit[] the question of the Act’s constitutionality” because Crane’s case was very different from Hendricks’s.\textsuperscript{147} Crane was better able to control himself, was less likely to re-offend, and was suffering from antisocial personality disorder, a very common mental abnormality in prisons that is almost untreatable.\textsuperscript{148} This raised the very concerns Kennedy had warned of in his concurrence in \textit{Hendricks}.\textsuperscript{149}

In \textit{Kansas v. Crane}, the Supreme Court read an additional volitional requirement into the Kansas law.\textsuperscript{150} After \textit{Crane}, not only does the state have to show that the defendant committed a sexual crime and has a mental abnormality making him more likely to recommit the same type of crimes, but the state must also show that the mental abnormality cannot be controlled by the defendant.\textsuperscript{151} The state is not required to prove a complete lack of control, but the holding requires that states prove at least some lack of control on part of the Defendant.\textsuperscript{152}

\textsuperscript{140} \textit{Id.}; Pfaffenroth, \textit{supra} note 116, at 2230.
\textsuperscript{141} \textit{State v. Crane}, 918 P.2d at 1259.
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.} at 1256, 1274.
\textsuperscript{144} Pfaffenroth, \textit{supra} note 116, at 2231.
\textsuperscript{145} \textit{Id.} at 2231-32.
\textsuperscript{146} \textit{In re Crane}, 7 P.3d 285, 286-88 (Kan. 2000); Pfaffenroth, \textit{supra} note 116, at 2232.
\textsuperscript{147} Pfaffenroth, \textit{supra} note 116, at 2243.
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} Kansas v. Hendricks, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring); \textit{In re Crane}, 7 P.3d at 291-92.
\textsuperscript{150} Kansas v. Crane, 534 U.S. 407, 411-13 (2002); Pfaffenroth, \textit{supra} note 116, at 2232.
\textsuperscript{151} Kansas v. Crane, 534 U.S. at 413.
\textsuperscript{152} \textit{Id.}; Pfaffenroth, \textit{supra} note 116, at 2232.
CREEPING BY MOONLIGHT

The majority stressed that such findings keep the Act constitutional by distinguishing between those eligible for civil commitment and those who must be dealt with exclusively through ordinary criminal proceedings. “That distinction is necessary lest ‘civil commitment’ become a ‘mechanism for retribution or general deterrence’ — functions properly those of criminal law, not civil commitment.”

This holding shows raised awareness of the ways the Act has been misapplied since 1997, but it does not go far enough in narrowly tailoring these laws to only those who are truly the most dangerous to society. “Despite the constitutional importance of only committing those with ‘serious difficulty’ controlling themselves, the Supreme Court neither clarified where to draw that critical line nor specified whether existing state procedures comport with the lack of volitional control requirement.” What it did suggest was the need to question whether allowing a broad mental abnormality like antisocial personality disorder to be the basis of these civil commitments was wise.

After Crane, states have used the ambiguity of this case to either keep or only slightly alter their commitment laws for sexual offenders. This ignores the fact that by vacating the Kansas Supreme Court’s decision in Crane, the Supreme Court was actually requiring states to implement additional safeguards in their systems to assure that only those who showed a true lack of control could be committed. That has not happened.

2. Texas’s Unusual Approach to Civil Commitment

In 1999, “[t]he Texas Legislature . . . added Chapter 841 to the Health and Safety Code and created the nation’s first out-patient civil commitment program for sexually violent predators.” Texas is the only state that does not involuntarily commit sexual predators to hospitals or inpatient treatment facilities. Instead, as a part of their outpatient program, SVPs must sign a contractual agreement concerning their residence, drug use, vocation, and sexual activities, and any violation of this contract is considered a third degree felony.

154. Id.
155. Id. at 2245-47.
156. Id. at 2248.
157. Id. at 2248-50.
158. Id. at 2248-49.
159. Curry, supra note 12, at 404.
160. Hall, supra note 12, at 176, 186.
161. Id. at 176, 187.
Texas's statutory language is almost identical to those of Kansas and Washington, all defining an SVP as a repeat sex offender. The only difference is that where Kansas and Washington use the phrase “mental disease or defect,” Texas uses the phrase “behavioral abnormality.” Texas's reasoning also mirrors Kansas and Washington: the legislature determined there was a small segment of the population that could not be treated, and that it was in the best interest of the state to commit those offenders to keep them from repeating their sexual crimes.

Although the Texas statute reads exactly like the Kansas statute, the Texas legislature has enacted vastly different procedures. SVPs sign a contract in which they agree to reside in a state residential facility (a halfway house), abstain from the use of alcohol or controlled substances, participate in treatment, submit to tracking or other supervision, and some ninety-seven other obligations. SVPs are also monitored with tracking devices and must maintain certain restrictions on entertainment, sexual activity, and contact with children, just to name a few.

Texas's program commits around fifteen SVPs each year, and spends considerably less money on each one than any other state with SVP laws: around $15,000 per year per SVP compared to $100,000 per year per SVP in other states. This is accomplished by “incorporating intensive treatment and case management, coupled with the use of global positioning satellite tracking of SVPs.” This allows the state to avoid the costs of state-run inpatient facilities, while ensuring participation in the program. Also keeping costs down are the low numbers: while Kansas and Washington currently have hundreds of SVPs committed to state inpatient programs, by 2006, Texas had committed only about sixty-eight to its outpatient program.

So far, this approach has been highly praised and widely accepted as successful. Of the sixty-eight people committed by 2006 “[t]wenty-seven . . . are currently living in the community. Twenty-nine have

162. See Curry, supra note 12, at 403-04; Hall, supra note 12, at 186.
163. See Curry, supra note 12, at 404; Hall, supra note 12, at 186.
164. See Curry, supra note 12, at 404.
165. Hall, supra note 12, at 186-88.
166. Id.
167. Id.
168. Curry, supra note 12, at 405.
169. Id.
170. Id. (pointing out that refusing to participate in treatment in Texas can be a third degree felony).
171. Hall, supra note 12, at 211; see Curry, supra note 12, at 405.
172. Hall, supra note 12, at 211-12.
returned to prison. Five have returned to prison twice. None of the violations leading to re-arrest or re-incarceration involved a sexual offense.\textsuperscript{173} Even psychologists, who in general have been adverse to commitment laws for sexual predators,\textsuperscript{174} have responded positively to Texas's program:

Dr. Rahn Bailey, a psychiatrist who frequently serves on the multidisciplinary team assessing alleged SVPs [in Texas], has praised the state's "moderate approach." While acknowledging that controversy exists among clinical professionals about this type of commitment, Dr. Bailey wrote, "Texas, by using the least restrictive alternative of outpatient treatment is able to provide civil commitment at a greatly diminished cost." Other writers have praised this "innovative" program, even suggesting that, if successful, "it should serve as model for other states and communities."\textsuperscript{175}

However, despite its apparent successes and admittedly less restrictive approach, Texas still faces the same fundamental constitutional and therapeutic issues as Kansas and other states with inpatient programs.

C. The Dangers in Either Kansas or Texas

The blurring of the line between civil proceedings and criminal punishments gives prosecutors the ability to make an "[e]nd [r]un" around the Constitution to make sentences longer and avoid due process.\textsuperscript{176} "Commitment . . . places a too-powerful tool in the hands of prosecutors, who may use it punitively to effectively lengthen criminals' detention; such legal moves imperil the principle that criminal sentences should be predictable and final."\textsuperscript{177} Prosecutors face overwhelming pressure to please the people who elect them, and as the number of sex crimes rise in number and media attention, this pressure is destined to grow even stronger.\textsuperscript{178} "Public pressure and changing policies may also motivate states to use commitment to alter sentences and parole decisions previously determined."\textsuperscript{179}

\textbf{Notes:}

\textsuperscript{173} Id. (footnotes omitted).
\textsuperscript{174} See generally APA, supra note 85 at 171; Rich Daly, Lawmakers Reject Civil Commitment for Sex Offenders, PSYCHIATRIC NEWS, Mar. 17, 2006, at 21, http://pnc.psychiatryonline.org/cgi/content/full/41/6/21.
\textsuperscript{175} Hall, supra note 12, at 211 (citations omitted).
\textsuperscript{176} Pfaffenroth, supra note 116, at 2253-56.
\textsuperscript{177} Id. at 2251.
\textsuperscript{178} Introduction, supra note 84, at 3; Pfaffenroth, supra note 116, at 2253.
\textsuperscript{179} Pfaffenroth, supra note 116, at 2253.
One example is Crane, where "the prosecutor felt 'the system' had cheated him out of the thirty-five year to life sentence he had earlier secured and so he sought to augment Crane's detention using a less-rigid alternative venue" of civil commitment. When this happens and commitment merely becomes a way to overcome "an adverse criminal ruling," the supposedly civil state interest in protecting its citizens is merely transformed into another means of seeking criminal punishment. In his concurrence in Hendricks, Justice Kennedy stated: "If the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function." The same can be said for imposing additional punishment at the end of a legitimate prison sentence. If we allow prosecutors to punish sexual offenders who did not receive a strong sentence or got off on a technicality by having those offenders committed, then commitment is not serving its proper function: to protect society from those sex offenders who are truly dangerous and unwilling or unable to control their sexually violent desires.

While it is perhaps easy to understand a prosecutor's frustration with light sentences and public pressure from the media, the use of civil commitments to extend punishments in this way only makes commitment completely criminal and punitive. Of course, the Supreme Court ruled that these commitments were not punishment and could not be used as a way to extend unfavorable sentences or confinements of offenders. And it is also clear that not every person who has been committed under these laws was so committed out of the prosecutor's desire for a longer sentence: Hendricks had a forty-year history of sexual offenses and fully admitted he could not control his behavior. He is perhaps a good example of the intended target and function of these laws, and he truly might be better served and treated in a hospital or commitment facility than in society. When we give prosecutors the ability to commit sexual offenders in this way, we give them an "enormous power" that, as shown in Crane

180. Id.
181. Id. at 2254.
183. See Pfaffenroth, supra note 116, at 2240, 2256 (discussing the "potential for abuse" in "undo[ing] the finality of criminal sentences").
184. Id. at 2255.
185. Hendricks, 521 U.S. at 373 (Kennedy, J., concurring).
186. See Pfaffenroth, supra note 116, at 2256 ("Clearly, civil commitment is not always punitive, as evidenced by Hendricks.").
187. Id. at 2240.
188. Id. at 2240, 2256.
and other cases,\textsuperscript{189} carries a "very real potential for abuse."\textsuperscript{190} The sheer increase in the number of commitments suggests that prosecutors may start seeking commitment at the end of any sexual offender's sentence, with no regard to true dangerousness, because of public demand, personal regard for the sentence, or general desire for a bright line procedural rule.\textsuperscript{191}

III. THE LESSONS \textit{THE YELLOW WALLPAPER} MAY HOLD FOR SEXUALLY VIOLENT PREDATORS

A. Diagnosis and Recidivism

While reading \textit{The Yellow Wallpaper}, "almost from the first [moment, the narrator's language] serve[s] to call into question both the diagnosis of her condition and the rules established to treat it" because the reader can see that she does not get better, and in fact gets worse.\textsuperscript{192} A close look at the SVP laws and the way they are applied also calls into question both the validity of the mental abnormalities men are diagnosed with under SVP laws and the process by which they are committed. \textit{The Yellow Wallpaper} was Gilman's "critique of a real medical treatment" that, while not mandated by law, was applied in a similar fashion to the SVP civil commitment laws: as a form of civil commitment in the home by doctors and husbands who had legal control over the woman and her freedom.\textsuperscript{193} This note is a critique of real laws that partially incorporate real medical treatments and beliefs, but only so far as they facilitate the purpose of the laws being drafted. The law chooses to ignore the other side of the very mental diagnoses used in statutes as incompatible with the law.

The narrator in \textit{The Yellow Wallpaper} was "sentence[d]" to "isolation, deprivation, and alienation" under the rest cure, which exacerbated her mental disorders and led ultimately to her psychotic break.\textsuperscript{194} Civil commitment of SVPs also leads to isolation, deprivation, and alienation of the offender, which may in the end increase


\textsuperscript{190} Pfaffenroth, supra note 116, at 2256 ("Although hopefully few prosecutors act as Crane's did, civil commitment — so long as it is permitted to complement, not substitute ... criminal punishment — is simply too tempting a blank check to afford the government.").

\textsuperscript{191} \textit{See id.}

\textsuperscript{192} Treichler, supra note 22, at 66.

\textsuperscript{193} \textit{See id.} at 68-69.

\textsuperscript{194} \textit{Id.} at 69.
chances of recidivism. If offenders undergoing legally mandated treatment have no opportunity to participate meaningfully in their own treatment or any reason to hope that what they are learning can make them a meaningful part of society again, the tools and rules they learn are essentially meaningless.

The narrator in *The Yellow Wallpaper* was “infantilize[d]” by her husband and her doctors, made to believe she could not know what was best for her or what caused her condition. Sexually violent predator laws also create a class of convicted criminals outside the criminal justice system who have been infantilized and told they cannot control or take care of themselves. When reading *The Yellow Wallpaper*, the reader begins to wonder if the narrator’s “hysteria” is a sham diagnosis or worse, “socially constituted.” After reading the many statutes and debates that rage across this country concerning SVPs, it is also easy to wonder if antisocial personality disorder, paraphilia, and pedophilia, while real diseases, are essentially sham diagnoses for commitment purposes. "No one is quite sure what counts as a mental disorder’. . . . If no one can be sure of that, how can courts rely on psychiatric diagnoses to incarcerate offenders who have served their sentence?"

These concerns arise primarily because “many sex offenders do not easily fit any of the categories defined in the . . . *Diagnostic and Statistical Manual of Mental Disorders* or DSM,” which “lists a range of . . . paraphilias” defined as “intense sexually arousing fantasies, sexual urges or behaviours that recur over a period of at least six months.” Included in this category are “[s]exual sadism” and “paedophilia” but “only a small minority of rapists have sadistic fantasies,” and not all persons who sexually abuse children are necessarily “paedophiles.” Currently, in Minnesota, there are more SVPs diagnosed with paraphilia than ever before, and it seems to have become the diagnosis of choice for SVP commitments over the last decade. Many SVPs that are committed have also been diagnosed with pedophilia, but as suggested above, any sexual harm of

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195. Bauer, supra note 5, at 131; Crewe, supra note 54, at 49.
196. Treichler, supra note 22, at 70.
197. Pfaffenroth, supra note 116, at 2246-47 (discussing the term “antisocial personality disorder” being used too broadly); Peter Aldhous, *Special Report Sex Offenders: Throwing Away the Key*, NEW SCIENTIST, Feb. 21, 2007 at 6-8, http://www.newscientist.com/article.ns?id=mg19325924.200 (suggesting the terms paraphilia and pedophilia are applied too broadly).
199. Id. at 7.
200. Id.
201. See id. at 8.
a child does not necessarily correlate to the level of fascination and obsession with children a diagnosis of pedophilia would normally require under the DSM.\textsuperscript{202}

The biggest lesson of Gilman's story is that when medicine infantilizes adults, ignores their role in their own treatment, and broadly applies a treatment regimen with no individualized tailoring, it can backfire in the most dramatic fashion.\textsuperscript{203} Applying that lesson of private commitment to state mandated civil commitment is telling: apply a vague statute to a too broad class of former convicts, teach offenders they cannot control themselves, and take away hard-earned liberty, and it will backfire. In fact, it has not seemed to serve its purpose of protecting society from sexual crimes: “On top of its implications for the civil liberties of the people who would otherwise have been released, the practice is estimated to cost more than a quarter of a billion dollars a year to implement and does little to reduce levels of sexual abuse or rape in society.”\textsuperscript{204} According to a recent survey conducted by Adam Deming of the Indiana Sex Offender Management and Monitoring Program, “[b]y May 2006, 3646 individuals were being held in the US under these laws . . . 2627 [of whom] had been committed as dangerous sexual predators . . . .”\textsuperscript{205} Of the “3493 offenders detained since 1990” only “427 . . . had been released by 2004 . . . .”\textsuperscript{206}

The United States Bureau of Justice Statistics studied a group of more than 270,000 prisoners released in 1994 across 15 states.\textsuperscript{207} Sex offenders made up “about 4 per cent of those released . . . .”\textsuperscript{208} After three years, sex offenders were found to be “on average about four times as likely to be arrested for a subsequent sex offence as those previously jailed for other crimes.”\textsuperscript{209} However, because they made up such a small percentage of the released men actually studied, “sex offenders still accounted for only a minority of the sex crimes committed by the group as a whole: of the ex-cons subsequently

\begin{itemize}
\item \textsuperscript{202} Id. at 7-8.
\item \textsuperscript{203} See Roxanne Lieb, \textit{State Policy Perspectives on Sexual Predator Laws}, in \textit{Protecting Society From Sexually Dangerous Offenders: Law, Justice, and Therapy}, supra note 8, at 41, 58 (suggesting that if courts are going to commit SVPs, “[i]ndividualized treatment plans are necessary . . . .”); Weinstock, supra note 6, at 10.
\item \textsuperscript{204} Aldhous, supra note 197, at 6. “So do these laws protect the public? Statistics on sex crimes suggest they do not to any great extent.” Id. at 9.
\item \textsuperscript{205} Id. at 6.
\item \textsuperscript{206} Id. at 7 (citing statistics produced in a survey conducted by Roxanne Lieb of the Washington State Institute for Public Policy in Olympia).
\item \textsuperscript{207} Id. at 9.
\item \textsuperscript{208} Id.
\item \textsuperscript{209} Id.
\end{itemize}
arrested for sexual offences, 87 per cent had previously been imprisoned for some other type of crime." \(^{210}\) In fact, studies of larger urban centers show that "most sex crimes are committed by people who have never been convicted of any crime . . . 79 per cent of those charged with rape had no prior felony convictions." \(^{211}\)

These recidivism rates are probably surprising to the public, \(^{212}\) however, our tools of predicting recidivism are sadly lacking. \(^{213}\) Even using our best prediction tools the outcomes suggest that "40 per cent of those kept locked up would not have been reconvicted within 15 years had they been released instead." \(^{214}\) For the most part, clinicians cannot agree on when a person is likely to recidivate and often make poor assessments in the first place, even though most civil commitment proceedings rely on these assessments. \(^{215}\) If our best statistical evidence is heavily flawed or just imperfect, it should make sense that this harsh, liberty restricting process should be limited to only those offenders whom all evidence and all clinicians agree are too dangerous to control themselves in society. These laws are so controversial because despite these findings, more and more people previously convicted of any kind of sex crime, no matter how severe, are being subjected to this civil remedy. \(^{216}\)

Just as John, the narrator's husband in *The Yellow Wallpaper*, dismissed and devalued her self-perceptions and the best course of treatment, so do our current laws dismiss and devalue sex offenders and the observations and recommendations of the APA. Psychologists disfavor commitment because it tends to "lump[] multiple patient populations together, including those with antisocial personality disorder, who may not benefit from such treatment." \(^{217}\) They also reject the process of commitment of sex offenders as a "'misuse of a process long used to treat people with mental illness.'" \(^{218}\) In 1999, an

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210. *Id.*
211. *Id.*
   Apparently much of the impetus for sex offender commitment laws was rooted in the mistaken impression that sex offenders are more likely to recidivate than other criminals. In fact, the opposite is true: Rapists . . . are only half as likely . . . as other violent probationers to commit a new felony within three years of release.
214. *Id.*
215. *Id.* at 9.
216. *See id.* at 8 (discussing the increase in paraphilic diagnoses and civil commitment in Minnesota).
218. *Id.* (quoting Jonathan Weker, M.D. of the Vermont Psychiatric Association).
APA task force report denied support for the use of commitment because it “misused psychiatry to detain a class of people for whom confinement rather than treatment was the real goal.” Mental health professionals also “stress that being a sexual offender does not necessarily make you mentally ill according to any recognised criteria.” Just as abusing children does not necessarily make someone a pedophile — although the public may believe otherwise — an offender’s “persistent criminal behaviour” or persistent criminal sexual behavior, does not make them mentally ill. “The behaviour itself is not enough to make the diagnosis . . . .”

B. A Reason to Hope

Not all Americans believe that previous sex offenders should be locked up indefinitely, and a growing number believe the best remedy for sexual offenders is return to the community. For example, there is a trailer park in St. Petersburn, Florida that has allowed hundreds of paroled sex offenders to live as normal a life as possible. The park is far enough from schools, parks, and playgrounds to accommodate registration and GPS restrictions imposed on many sex offenders in the country, and has been attracting attention from sex offenders not originally from St. Petersburg. The manager offers them more than cheap rent including the cost of utilities: she offers them therapy and tries to “help them become part of society again.” CNN interviewed a resident, a former sex offender named Michael, who called the park paradise and stated in an interview that without the park, a place to live a more normal life, he would likely be back in jail for something as simple as not alerting his parole officer to a change of address.

“Some experts agree that it is hope as much as fear that keeps offenders from relapsing.” According to Dr. Don Sweeney, a psychologist who worked with the trailer park residents, “You have to

219. Id.
220. Aldhous, supra note 197, at 8.
221. Id. at 7.
222. Id. at 8.
223. Id. (quoting Michael Frist of Columbia University).
225. Id.
226. Id.
228. Phillips, supra note 224.
offer people hope if you expect them to change’... ‘If society only wants to tear them down and doesn’t show them any way back, then all help is lost in their minds, and they are more likely to relapse.’ 229 That is exactly what Victorian society did to women suffering from “nervous disorders” like the narrator in The Yellow Wallpaper: it tore them down, made them feel worthless, and then expected them to recover through mere rest. Now, we take sex offenders and either try to have them committed or force them to live with numerous restrictions on their actions even after they are paroled, in stark contrast to the way persons who commit other crimes are treated. 230

If we kept these restrictions, but also provided individualized treatment and allowed offenders to feel as though they were a part of society, as though they could eventually have a place again in society, then recidivism rates would drop. Most sex offenders who have been in jail do not want to return, 231 but when you strip people of the hope that they will ever get better or that society will ever accept that they are changed, then of course they are going to end up back in the criminal justice system. The manager of the St. Petersburg trailer park knows there is no way to tell which of her residents will commit crimes again, but she is willing to give them a chance. 232 In all of the years she has been managing the park, only one man has tried to commit another sexually motivated crime, and a fellow sex offender resident turned him in. 233

Living in society, with all the social pressures and expectations that come with it, can really help people further rehabilitate. If committing sexual offenders, with little reliable information that they are actually dangerous or likely to recidivate, is such a huge burden on society and the Constitution, why not devise a system that offers a little hope? After all, as Stephen King once wrote, “hope is a good thing, . . . maybe the best of things . . . .” 234 And maybe, just maybe, if our treatment regimes were more individually tailored and took into account the willingness and ideas of sexual offenders, they would be much less likely to re-offend than they are under the current law and after being civilly committed.

229. Id.
230. Id.
231. Id.
232. Id.
233. Id.
IV. CONSIDER THE ALTERNATIVES

Instead of committing people at the end of their criminal sentences, there are many alternatives that could satisfy the public need for protection and justice, while still reducing the costs of housing so many criminals, and that could reduce the likelihood of recidivism with individualized treatment and a dash of hope. The first alternative has been suggested by many other authors: if criminals have such profound mental abnormalities that they will prove dangerous to society once released, perhaps they should be committed in lieu of any criminal sanctions in order to protect society and to keep the true distinction between civil and criminal law. This system has been in place for years, and can certainly keep those who are truly ill and dangerous segregated from the public. This is not a popular alternative, however, because society feels perpetrators are somehow escaping punishment for their actions by being committed before ever serving time in prison.

The second alternative is actually a combination of changes to the criminal justice system. First, sex crimes should be separated by type and severity. Currently, repeated child molestation and statutory rape involving consenting teenagers are both considered sex crimes. Obviously, society abhors one much more than the other. Accordingly, the crimes that society finds truly heinous — child molestation, serial rape, and other more seriously violent crimes — should be the only kind of crimes where the perpetrators are labeled sexual predators after they are released from jail. This distinction should also play into sentencing guidelines. Because of public perception and outcry, it is obvious that prison terms for all sexual crimes should be lengthened. The sentences for those two or three crimes that society particularly abhors should be particularly harsh. If jail terms were extended, the public would not have to worry about a feared sexual predator or sexual pervert being released from jail after only a few years, it would make the public feel safer, and it would reflect how seriously these crimes are taken in our country.

On top of longer prison terms, there should be no opportunity for parole for sex offenders. This is one of the reasons so many people

235. Lieb, supra note 203, at 41-42.
236. Id. at 41.
237. Id. at 42 (explaining that committed offenders spend “considerably less time in confinement than those who were imprisoned”).
238. See Fitch & Hammen, supra note 96, at 29 (reflecting on the disparities among the actual acts committed and the similarities among the punishments for those offenses).
239. Pfaffenroth, supra note 116, at 2263.
240. See id. at 2253-54 (discussing how public pressure may cause states to use civil commitments to alter parole decisions).
have been committed in the last few years and also one of the reasons commitment is dangerous in the hands of prosecutors who feel jilted by hard won sentences reduced by parole. It is also likely that if a twenty-five year sentence actually lasted a full twenty-five years instead of four or five, the public would not feel so afraid or so frustrated with the system.

While in prison, sex offenders (and even other kinds of criminals) should be offered the option of individual or group treatment so that once their full sentences have been completed, they are more prepared to be out in society and have more hope that they will be able to stay there and not return to jail. As a part of a sex offender’s sentence, it would be wise to incorporate a period of parole after the whole sentence has been served: perhaps a parole length of two to five years. In the first few years monitoring would be more intense and perhaps would involve registration and GPS monitoring systems that are also currently used for paroled sex offenders, mandatory individual treatment sessions, and other similar requirements. In the last few years of parole, as the person spends more time in society, those requirements and restrictions should be periodically lessened, but treatment should continue to be available on either a mandatory or voluntary basis. If the particular person’s sexually violent impulses are less likely than others’ to be lessened by treatment, there could be other kinds of social training or monitoring in place.

These alternatives serve dual functions: they protect society and remove fears of sex offenders being freely released into communities, and also allow sex offenders a role in their treatment and give hope that they will not re-offend and will be able to have a meaningful place in society. Once a person has served a prison sentence, the debt to society has been paid. Perhaps if these alternatives were actually used, society would feel comforted by that debt and release would seem more justified. Commitment is done to protect society, but there is little evidence to prove that it works. Sex offenders are already a small population of released prisoners, and only a minority of those released prisoners are sent back to jail for committing

241. Id. at 2253-56.
242. Id. at 261-62; see, e.g., APA, supra note 85 at 177; Bruce J. Winick, A Therapeutic Jurisprudence Analysis of Sex Offender Registration and Community Notification Laws, in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY, supra note 8, at 213, 226.
243. See supra notes 163-65 and accompanying text for a comparison of how these suggestions are similar to Texas’s unique system, but without the need for actual commitment.
244. See Pfaffenroth, supra note 116, at 2256-57.
sexual crimes. Perhaps if society were less judgmental and more willing to give second chances, recidivism rates would go down and maybe, like in the St. Petersburg trailer park, sexual predators would be more apt to monitor themselves.

CONCLUSION

When Charlotte Perkins Gilman wrote *The Yellow Wallpaper*, the most influential medical minds believed women's bodies and minds were inferior to men's, and that reading, work, and education could cause women serious mental maladies. They implemented treatments like the rest cure, in which women were isolated and left to sleep, eat, and do little else in order to cure mental problems and re-integrate these women into appropriate Victorian Society. Today, a majority of the public and law makers believe that the only way to protect society from sexual criminals is to commit them after they have served their criminal sentences for indefinite periods of time. If sexual predators really do suffer mental illnesses, locking them up, sequestering them, giving them their own modern rest cure of sorts, and stripping them of hope will cause recidivism and further mental breakdown.

The narrator of *The Yellow Wallpaper* was trapped metaphorically in a marriage she did not know how to deal with and trapped literally in a room at the top of stairs in a house in the isolated country. Authors have suggested that she was infantilized by her husband and the medical community — the rest cure was meant to make her give up all control over herself and her life and to let people who knew better for her to take care of her. That is exactly what is now being done to men committed as SVPs. Society locks them away, removes all control over their own recovery and puts it in hands of doctors and judges. Moreover, society strips them of hope that they will be reformed and be able to be a part of society after having paid their debt in jail.

In a society which values liberty so highly, we cannot and should not commit people for thoughts or actions which may happen at an indeterminate date in the future or may never happen at all. We

245. Aldhous, supra note 197, at 9.
246. See supra notes 1-2 and accompanying text (discussing opinions of Victorian women's physical and mental constitutions).
247. See supra note 4 and accompanying text (discussing the rest cure).
249. See supra Part I.
250. Treichler, supra note 22, at 65.
should not strip people of the hope of reintegrating into society if we ever hope to see a reduction in our prison populations. No one wants to see women or children fall victim to sexual crimes, but there is no real proof that commitment protects anyone. In fact, if some of the suggested alternatives were implemented, not only would society potentially be safer from these criminals, but we would also reduce the costs, both socially and financially, of sequestering an entire segment of our population.

This is a very controversial area of public policy where alternatives to the current system are available, but these alternatives require fundamental shifts in thinking that are not easy, and because they are not easy, they will not be popular. The kinds of suggested alternatives would require a rejuvenation of our prison and criminal justice systems — where the option of parole did not exist for certain crimes, where it was not more dangerous to live in prison than outside, and where people with legitimate mental illness could be treated and not isolated until they lose all hope.

There are fundamental contradictions in this area of the law: the public wants sexual criminals to be punished to the fullest extent of the law and views commitment as an extension of punishment, but the Supreme Court recognizes that the only constitutional kind of civil commitment for SVPs cannot be punishment. Laws tend to focus less on treatment and more on prevention, but by using mental illnesses as categories for commitment, the law assumes treatment of this mental abnormality is the only way a person can be successfully returned to the public:

the mismatch between public perceptions and crime statistics is at the root of the problem. People are appalled by sex offending, but do not like to acknowledge that it is widespread throughout society. So the public and media demonise convicted offenders, and politicians devise laws such as civil commitment in response. "It's a way of articulating society's condemnation of sexual violence without doing anything fundamental about it . . . ."

Society prefers these laws because they believe, mistakenly, that commitment prevents recidivism. But most rapes, for example,

251. See supra notes 208-11 and accompanying text (suggesting that recidivism rates of sexual offenders are significantly lower than publicly perceived).
are committed by people who have never set foot in jail for a felony conviction.\textsuperscript{255} Civil commitment of sexual predators is meant for only the most dangerous, most predatory former convicts, who are least likely to be able to control their actions.\textsuperscript{256} Unfortunately under current laws, the procedure is used much more widely.\textsuperscript{257} Even though the laws have been upheld as constitutional, those constitutional affirmations are very limited, and the danger of these laws is that now that they have been approved, prosecutors will use them more broadly than the Supreme Court intended. It is natural to have fears that men who once sexually abused people will continue to do so once they are released from prison, but it is time to stop running this country on fear.

Women like Charlotte Perkins Gilman found a way to fight back against the socially instituted treatment regimen of the rest cure, which today is widely recognized as an improper medical treatment.

\[\text{[T]he most profound message in 'The Yellow Wallpaper'... is the one about how women's problems are constantly individualized: it is the individual woman who has the problem, and, even if many individual women have the same problem, the explanation of a defective psychology rather than that of a defective social structure is usually preferred.}^{258}\]

One day, a hundred years from now, perhaps society will also look back on the commitment of SVPs as medically inappropriate and wonder how it ever became the socially instituted procedure. The Yellow Wallpaper, long considered a shining beacon of feminism, serves now also as a different approach to understanding sexual offenders and how to better treat them for themselves as individuals, and for our society as a whole.

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\textsuperscript{255} Aldhous, supra note 197, at 9 (quoting Eric Janus of William Mitchell College of Law).
\textsuperscript{256} Id. at 7.
\textsuperscript{257} Id. at 8 (explaining that “offenders are being shoehorned [sic] into diagnoses that do not apply to satisfy the Supreme Court's requirement[s]”).
\textsuperscript{258} Oakley, supra note 6, at 32.

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