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"Purgatory Cannot Be Worse than Hell": The First Amendment Rights of Civilly Committed Sex Offenders

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"Purgatory Cannot Be Worse than Hell": The First Amendment Rights of Civilly Committed Sex Offenders

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“PURGATORY CANNOT BE WORSE THAN HELL”¹: THE FIRST AMENDMENT RIGHTS OF CIVILLY COMMITTED SEX OFFENDERS

*Tanya Kessler**

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I. INTRODUCTION

One of former New York Governor Eliot Spitzer’s first priorities upon taking office in January 2007 was passing a sex offender civil commitment bill.² Enacted with bipartisan support, the law is part of a wave of legislation restricting the freedoms of convicted sex offenders after they have completed their sentences.³ Following the passage of federal legislation that provided funding to states that enact restrictive measures, every state passed such measures.⁴

¹ *Jones v. Blanas*, 393 F.3d 918, 933 (9th Cir. 2004) (holding that detainees awaiting civil commitment proceedings under California’s Sexually Violent Predator Act must be held in conditions less harsh than those of criminal detainees).

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² See Michael Cooper & Danny Hakim, *Accord on Bill to Detain Sex Offenders*, N.Y. TIMES, Mar. 1, 2007, at B1.

³ Danny Hakim, *Bills on Workers Aid and Civil Confinement Pass*, N.Y. TIMES, Mar. 7, 2007, at B1; Sex Offender Management and Treatment Act, N.Y. MENTAL HYG. LAW art. 10 (McKinney 2008).

⁴ Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 (2006) (requiring sex offenders to register for at least 10 years after prison, parole or probation, and states to collect identifying information

These measures include registration and community-notification requirements, as well as residency restrictions.⁵ At the extreme end of this troubling continuum are state laws that allow offenders who complete their sentences to be committed civilly. Twenty states have passed such sex offender civil commitment laws.⁶

Rather than protecting communities, such measures may be counterproductive, isolating sex offenders from community support and hindering their reintegration and motivation to change.⁷ Forty-five convicted sex offenders live in one Long Island town—seventeen on one block—in Suffolk County, where sex offenders are prohibited from living within a quarter mile of any school, playground, or day care center, regardless of whether their crimes involved children.⁸ In Miami, thirty-two sex offenders live under a bridge, an arrangement approved by the Corrections Department in the absence of affordable housing that complies with the

about offenders, including their name, address, photograph, and offense history). This Act was amended by “Megan’s Law” in 1996, which created a notification provision allowing states to disclose information collected through registration. Pub. L. No. 104-145 (1996) (codified at 42 U.S.C. § 14071(e)). A later amendment, the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, expanded registration and notification requirements, to include license plate numbers, physical descriptions, and the name and address of any school attended. The Act further required jurisdictions to make registry information publicly available, and created registration and notification requirements depending on the “tier” of offender, ranging from fifteen years to lifelong. The constitutionality of a federal sex offender civil commitment statute has been called into question. The Fourth Circuit held that the statute is beyond the scope of Congress’ authority and intrudes upon the powers of the states. *United States v. Comstock*, 1 F.3d 274, 276 (2009), *cert. granted*, 129 S.Ct. 2828 (U.S. Jun. 22, 2009) (No. 08-1224) (argued Jan. 12, 2010). HUMAN RIGHTS WATCH, *NO EASY ANSWERS: SEX OFFENDERS LAWS IN THE U.S. (2007)* (describing sex offender registration and community notification laws in the United States and their effects on parolees), <http://www.jjay.cuny.edu/HumanRightsWatchReportNoEasyAnswers.pdf>.

⁵ HUMAN RIGHTS WATCH, *supra* note 4.

⁶ TRACY VELASQUEZ VERA INST. OF JUSTICE, *THE PURSUIT OF SAFETY: SEX OFFENDER POLICIES IN THE UNITED STATES* 26 (2008), *available at* http://www.vera.org/download?file=1801/Sex_offender_policy_with_appendices_final.pdf. Louisiana is the latest state to consider civilly committing sex offenders. Governor Bobby Jindal introduced legislation in January 2008 providing for the civil commitment of sex offenders after they complete their sentences. Jindal had been critical of the Supreme Court’s decision in 2008 overturning laws in six states, including Louisiana, allowing defendants convicted of child rape to be sentenced to death. Michelle Millhollon, *Jindal Works on Sex Offenders’ Civil Confinement*, *ADVOCATE* (Baton Rouge), Dec. 4, 2008, at A1; *see Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008).

⁷ ERIC S. JANUS, *FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE* 70 (2006) (citing 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* (2003)).

⁸ Jennifer Gonnerman, *The House Where They Live*, *N.Y. MAG.*, Dec. 30, 2008.

county's residency restrictions.⁹ A sex offender in Michigan froze to death on the street; shelters were forced to turn him away because they were located within one thousand feet of a school.¹⁰ A computer technician in Washington State, convicted of soliciting an underage prostitute, and whose profile was posted on the state's online sex offender registry, was fired from four jobs and could not find an apartment.¹¹ A developmentally disabled, wheelchair-bound man, previously convicted of charges related to exposing himself to a child, called the sheriff's office reporting that he wanted to kill himself.¹² He made the call after fliers were posted in his neighborhood identifying him and his conviction.¹³ He was found dead the next day, apparently due to suicide.¹⁴ These anecdotes describe the effects of restrictive measures on convicted sex offenders living in the community; the stigma and isolation are even more extreme for those who are civilly committed.

Civil commitment laws often are enacted after a highly publicized violent crime by a sex offender,¹⁵ and a rush by elected officials to show they are "doing something."¹⁶ Based on the popular and erroneous belief that sex offenders are highly recidivistic,¹⁷ sex

⁹ Nicolas Spangler, *For Sexual Predators, It's a Camp of Isolation*, MIAMI HERALD, Apr. 19, 2008, at A1.

¹⁰ *Death Sentence: Sex-Offender Law Pushed Homeless Man Out of Shelters, Into Cold*, GRAND RAPID PRESS, Jan. 29, 2009, at A1.

¹¹ HUMAN RIGHTS WATCH, *supra* note 4, at 83.

¹² Cara Buckley, *Town Torn Over Molester's Suicide*, MIAMI HERALD, Apr. 23, 2005, at 1.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, at A1.

¹⁶ JANUS, *supra* note 7, at 13–16 (describing a pattern of passages of sex offender commitment laws following highly publicized rape-murders by recently released sex offenders in Washington, Minnesota and New Jersey). New York followed a similar pattern. Although Connie Russo Carrierro's murder by a convicted sex offender was not as widely publicized across the state, it drew a great deal of media attention in Westchester. The man who killed her had been ejected from a homeless shelter, resulting in a monitoring system for sex offenders and calls by the Westchester County Executive, Andrew Spano, for a civil commitment law. Anahad O'Connor, *Westchester Plans Monitoring of Sex Offenders in Shelters*, N.Y. TIMES, Sept. 29, 2005, at B6.

¹⁷ See Michelle Cohen & Elizabeth L. Jeglic, *Sex Offender Legislation in the United States: What Do We Know?*, 51 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 369, 369 (2007) (noting that research suggests that sex offenders' rates of recidivism are low relative to other criminal offenders); see also N.Y. STATE DIV. OF PROB. AND CORR. ALTERNATIVES, RESEARCH BULLETIN: SEX OFFENDER POPULATIONS, RECIDIVISM AND ACTUARIAL ASSESSMENT 3, (1997) (summarizing the research on re-arrest rates: "sex offenders are arrested and/or convicted of committing a new sex crime at a lower rate than other offenders who commit other new non-sexual crimes"); JANUS, *supra* note 7, at 91–92 (arguing that sex offender laws undo feminist work on understandings of

offender civil commitment laws are bad public policy.¹⁸ States that have passed them now face heavy burdens, with burgeoning numbers of civilly committed sex offenders and a dearth of community placements after release¹⁹ (though in some states few offenders are ever released).²⁰ Despite their popularity, the effectiveness of civil commitment laws is unproven.²¹ What has been clearly documented, however, is that they are enormously expensive.²² The even greater expense is to American constitutional principles.

Preventive detention raises obvious concerns about infringements on the constitutional prohibition against *ex post facto* laws and on double jeopardy.²³ But even constitutional infringements stemming from civil commitment that do not involve bodily restraint, such as limitations on First Amendment rights, are more than merely incidental: they reveal the practical implications of civil commitment's disregard for individuals' constitutional rights.

violence; focusing public attention on "predator violence" at expense of addressing the more common sources as well as the underlying causes of violence).

¹⁸ JANUS, *supra* note 7, at 61–66 (reviewing the benefits and costs of civil commitment laws).

¹⁹ See, e.g., N.Y. STATE OFFICE OF MENTAL HEALTH, 2008 ANNUAL REPORT OF THE IMPLEMENTATION OF MENTAL HYGIENE LAW ARTICLE 10: SEX OFFENDER MANAGEMENT AND TREATMENT ACT OF 2007 27 (2009) (noting that the annual cost of civil confinement per civil committee is \$225,000, and that such costs will pose a challenge to the state as the numbers of sex offenders in civil confinement increases); see also, e.g., Candace Rondeaux, *Va. Faces Ballooning Cost to Confine Sex Offenders*, WASH. POST, Apr. 2, 2006, at C01; Davey & Goodnough, *supra* note 15 (describing the struggles of Kansas to keep up with the costs of the program there; costs have risen from \$1.2 million to nearly \$6.9 million annually, and a state audit found that unless offenders are released from the program, costs will continue to rise).

²⁰ VELÁSQUEZ, *supra* note 6, at 27.

²¹ Cohen & Jeglic, *supra* note 17, at 380. "[T]he current legal methodologies for controlling sex offenders are unproven and very much underresearched The public is relying upon sex-offender-related legislation to protect them from sex offenders, but the research on these methods has not been promising thus far." *Id.*

²² While estimates of costs vary, there is general agreement that expenditures are high and rising. Davey & Goodnough, *supra* note 15 (noting that costs are spiraling, with state expenditures on civil commitment approaching \$450 million annually. Civil commitment costs approximately \$100,000 per year per person, compared to \$26,000 per year for prisoners); JANUS, *supra* note 7, at 62–63 (stating that the average cost of civil commitment per sex offender is \$75,000 annually; the total costs nationally are estimated at two hundred twenty-five to three hundred thirty-one million dollars annually); see VELÁSQUEZ, *supra* note 6, at 26 (estimating the cost in New York per sex offender at \$225,000 annually).

²³ See, e.g., JANUS, *supra* note 7, at 93–95 (arguing that civil commitment represents an ominous trend favoring suspension of constitutional rights in the name of preventing risks to public safety such as crime and terrorism); Steven I. Friedland, *On Treatment, Punishment, and the Civil Commitment of Sex Offenders*, 70 U. COLO. L. REV. 73, 121–22 (1999) (arguing that allowing civil commitment of sex offenders opens the door to the involuntary detention of all recidivists).

Courts and commentators have long viewed First Amendment protections as first among the individual rights protected by the Bill of Rights, a foundation underlying other protections.²⁴ The Supreme Court has noted that the protections of the First Amendment have a “preferred place” in the American constitutional scheme, and, therefore, “any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger.”²⁵ The Court has struggled to reconcile these basic protections of individual rights with perceived threats to public safety and the national interest.²⁶

This Article will argue that the Court has veered in a dangerous direction in its civil commitment jurisprudence, as demonstrated by judicial treatment of civilly committed sex offenders’ First Amendment claims. This approach exemplifies the jurisprudence of fear Justice Brandeis famously warned against: “Fear of serious injury cannot alone justify suppression of free speech and assembly. . . . It is the function of speech to free men from the bondage of irrational fears.”²⁷ Part II of this Article places civil commitment in the context of the historical and ongoing practice of involuntarily confining people with mental illnesses. Part II also discusses the especial importance of judicial review given the political environment that has spawned sex offender civil commitment laws. Part III describes the *Kansas v. Hendricks* decision upholding sex offender civil commitment, in which the Court found that because Kansas’s civil commitment law was not punitive, it did not violate the prohibitions on double jeopardy and *ex post facto* laws. Part IV reviews the standards applied by courts to First Amendment claims brought by prisoners, focusing on the standard set out in *Turner v. Safley*. Part V describes federal courts’ treatment of civilly committed sex offenders’ free speech and free exercise of religion

²⁴ Edmond Cahn, *The Firstness of the First Amendment*, 65 YALE L.J. 464, 471 (1956) (arguing that Justice Black’s view, as articulated in his decision in *Marsh v. Alabama*, that the First Amendment has a “preferred position” among the constitutional rights is supported by the historical views of the founders).

²⁵ *Thomas v. Collins*, 323 U.S. 516, 532 (1945) (holding that a state law requiring labor organizers to secure permission and register before soliciting members violates the First Amendment); see *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (citing *Schneider v. New Jersey*, 308 U.S. 147, 151 (1939) (stating that “exercise of [First Amendment] rights lies at the foundation of free government by free men”)).

²⁶ See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925) (upholding a state law that outlawed advocating the overthrow of the government); *c.f.* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (holding that inflammatory speech can only be punished if it incites imminent lawless action).

²⁷ *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis and Holmes, J.J., concurring).

claims, and argues that the courts' reliance on prison standards undermines the premise of the *Kansas v. Hendricks* decision. Part VI questions the underpinnings of *Hendricks* and suggests that courts should not rely on prison First Amendment cases to decide the First Amendment rights of civilly committed sex offenders. This Part suggests that courts look above the floor, as embodied by prison standards, but also consider First Amendment rights of individuals in other contexts, to develop a standard for the First Amendment rights of civilly committed sex offenders.

II. CIVIL COMMITMENT IN CONTEXT

Civil commitment is the term used to describe involuntary hospitalization of people with mental illnesses.²⁸ While individuals have been civilly confined in America since colonial times, the statutory structure for committing persons to insane asylums developed in the 1800s.²⁹ A series of Supreme Court decisions established that proving dangerousness³⁰ was a prerequisite to involuntary commitment, the standard of proof in commitment proceedings was clear and convincing evidence,³¹ and that mental illness was required in addition to dangerousness.³²

Modeled on the early civil commitment laws, "sexually violent predator" civil commitment laws more closely resemble the sexual psychopath laws of the 1930s and 1940s.³³ Most states either re-

²⁸ See BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 2 (2005).

²⁹ Paul S. Appelbaum, *Civil Mental Health Law: Its History and Its Future*, 20 MENTAL & PHYS. DISABILITY L. REP. 599, 599 (1996).

³⁰ *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975). "A finding of 'mental illness' alone cannot justify a State's locking up a person against his will . . . Assuming that that term can be given a reasonably precise content and that the 'mentally ill' can be identified with reasonable accuracy, there still is no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live in freedom." *Id.* at 575. Michael Perlin notes that *O'Connor* is particularly important for its recognition of "the legitimacy of judicial involvement in activities previously considered to be the exclusive domain of psychiatrists." MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL 142 (1998).

³¹ *Addington v. Texas*, 441 U.S. 418, 425 (1979) (noting that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection").

³² *Foucha v. Louisiana*, 504 U.S. 71 (1992).

³³ Franklin T. Wilson, *Out of Sight, Out of Mind: An Analysis of Kansas v. Crane and the Fine Line Between Civil and Criminal Sanctions*, 84 PRISON J. 379, 380 (2004); see JANUS, *supra* note 7, at 22; see also *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940) (upholding a Minnesota statute providing for the civil commitment of sex offenders who habitually committed sexual misconduct, utterly lacked control of their sexual impulses, and were likely to commit future harm).

pealed or stopped using the psychopath laws after the Supreme Court ruled that sex offenders could not be civilly committed until they had been found guilty of prior criminal acts, thereby ensuring procedural protections.³⁴ Unlike modern sex offender civil commitment laws, under sexual psychopath laws, civil commitment was an alternative to a criminal trial imprisonment.

By contrast, contemporary sex offender civil commitment laws provide for commitment *after* imprisonment. The civil commitment of sex offenders has required a new set of laws because sex offenders generally do not meet the definition of mental illness in the statutory requirements for civilly committing people with mental illnesses, though critics have charged that even “mental illness” is an ill-defined term.³⁵

Sex offenders are a “discrete, insular minority”³⁶ whose constitutional rights are subject to infringement by a democratic majority’s impulse to keep them “behind bars.”³⁷ If judicial review is essential to protect the rights of convicted felons, convicted sex offenders who have completed their sentences equally require such protection. It has been argued that the Supreme Court’s extreme deference to prison administrators denies prisoners constitutional protections “where judicial review is most essential.”³⁸ The same brand of deference removes protection from a population that is even more unpopular than the general class of prisoners, those

³⁴ *Specht v. Patterson*, 386 U.S. 605 (1967); *Humphrey v. Cady*, 405 U.S. 504 (1972). For further discussion, see PERLIN, *supra* note 30, at section 2A-3.3.

³⁵ PERLIN, *supra* note 30, at 62–68. “[I]nvoluntary civil commitment statutes present a bewildering array of broad, narrow[,] and even circular definitions of mental illness for the purposes of the involuntary civil commitment process.” *Id.* at 66–67. Perlin comments that the “mental abnormality” standard upheld in *Kansas v. Hendricks* “will most likely blur even further the line between clinical and legal terminology in the commitment context.” *Id.* at 68.

³⁶ See *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

³⁷ For an example of the majority’s impulse, see Friedland, *supra* note 23, at 76 (quoting Maria Holiday, the victim of a sexual offense, “I don’t really care if they’re in a state mental hospital or if they’re in jail for the rest of their life. I just want them behind bars. I don’t want them out,” *60 Minutes* (CBS television broadcast Jan. 11, 1998)).

³⁸ JANUS, *supra* note 7, at 118–19 (citing Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 441, 442 (1999) (arguing that authoritarian institutions share several characteristics: they are not operated democratically; they involve people who are generally involuntarily present; and they are rigidly hierarchical; noting also that the Supreme Court defers to the institutions’ authority and refuses to protect individual liberties)); see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 101–03 (1980) (arguing that judicial review protects political minorities, who are systematically disadvantaged in a representative democracy).

who have been deemed “sexually violent predators”³⁹ subject to civil commitment. If prisoners generally are a despised minority,⁴⁰ sex offenders are the most despised.⁴¹ But where judicial review is most needed, the courts have adopted an extremely deferential approach, giving civil commitment center administrators wide berth to curtail sex offenders’ constitutional rights.

The glaring constitutional problem with civil commitment is that it violates the basic protections in the criminal justice system by moving sex offenders to the civil arena where protections are more limited.⁴² The Supreme Court has not recognized this constitutional infirmity. In *Kansas v. Hendricks*, the Court held that civil commitment is not punitive and therefore does not violate the Double Jeopardy or *Ex Post Facto* Clauses.⁴³ If this decision seems counterintuitive in light of elected officials’ and the public’s desire to lock up sex offenders beyond their prison terms,⁴⁴ recent court decisions make it clear that the Supreme Court’s position is an outlier view, even in the federal judiciary. The Court’s five–four deci-

³⁹ “Sexually violent predator” is the term used in many of the civil commitment statutes. See, e.g., KAN. STAT. ANN. §§ 59-29a01 to -29a22 (1994); WASH. REV. CODE §§ 71.09.01–.903 (2003). This Article uses the term “civilly committed sex offenders” because other descriptions are unwieldy (e.g. “people who have been convicted of sex offenses and are civilly committed”). But this shorthand is problematic: referring to people as “sex offenders” reduces individuals to their crimes. Even the definition of “sex offender” is far from uniform. See Adam Shajnfeld & Richard B. Krueger, *Reforming (Purportedly) Non-Punitive Responses to Sexual Offending*, 25 DEV. MENTAL HEALTH L. 81, 82 (2006) (describing the varying definitions of “sex offender” in different states, which include persons convicted of statutory rape in New York, possession of child pornography in Florida, engaging in consensual incest in Louisiana, and indecent exposure in Texas).

⁴⁰ JANUS, *supra* note 7, at n.207 (quoting CHRISTOPHER E. SMITH, COURTS, POLITICS AND THE JUDICIAL PROCESS 289 (1993) (“Incarcerated criminal offenders constitute a despised minority without the political power to influence the policies of legislative and executive officials.”)).

⁴¹ Michael Perlin argues that sex offenders have replaced insanity defendants as “the lightning rod for our fears, our hatreds, and our punitive urges.” Michael L. Perlin, *“There’s No Success Like Failure/And Failure’s No Success at All”: Exposing the Pretextuality of Kansas v. Hendricks*, 92 NW. U. L. REV. 1247, 1248 (1998). “If we are no longer focusing on insanity defendants as the most ‘despised’ group in society, it is more likely because there is a new universe of ‘monsters’ replacing them in our demonology: sex offenders, known variously, as mentally disordered sex offenders, or sexually violent predators, the ultimate ‘other.’ ” *Id.*

⁴² JANUS, *supra* note 7, at 32–34. Character evidence is routinely admitted in civil commitment proceedings, and the evidence concerns hypothetical future acts, rather than specific past allegations. *Id.* The privilege against self-incrimination does not apply in civil commitment proceedings. *Allen v. Illinois*, 478 U.S. 364, 374 (1986). The burden of proof is a preponderance of the evidence or clear and convincing evidence rather than beyond a reasonable doubt. See *Addington v. Texas*, 441 U.S. 418 (1979).

⁴³ *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997).

⁴⁴ See *supra* notes 16 and 38 and accompanying text.

sion in *Hendricks* has been called into question by subsequent lower federal court decisions reviewing the First Amendment claims of civilly committed sex offenders. Lower courts most often apply prison standards to review the constitutional claims of sex offenders, rarely recognizing any distinction between criminal imprisonment and civil commitment.

III. KANSAS V. HENDRICKS: UPHOLDING SEX OFFENDER CIVIL COMMITMENT

In 1997 the Supreme Court upheld Kansas's civil commitment statute against a challenge by the first person committed under its provisions, Leroy Hendricks.⁴⁵ The Court's decision hinged on its finding the statute's provisions were not punitive, as they implicated neither retribution nor deterrence, "the two primary objectives of criminal punishment."⁴⁶

The challenged statute provided for the civil commitment of persons who are likely to commit "predatory acts of sexual violence" due to a "mental abnormality" or "personality disorder"⁴⁷ and required specific procedures for inmates already confined to prison, including a jury trial, a right to counsel and cross examine witnesses, and annual review by the committing court.⁴⁸ Hendricks, a convicted sex offender scheduled for release from prison soon after the statute was enacted, challenged his commitment on substantive due process, double jeopardy, and *ex post facto* grounds.⁴⁹

Hendricks appealed the Kansas trial court's civil commitment order, and the Kansas Supreme Court found that the Act violated his substantive due process rights.⁵⁰ Under the statute, involuntary civil commitment required a finding by clear and convincing evidence that a person is both mentally ill and a danger to him- or herself or others, but the Act's definition of mental abnormality did not satisfy the mental illness requirement.⁵¹ The majority did not reach Hendricks's *ex post facto* or double jeopardy claims.⁵²

The Supreme Court reversed the Kansas Supreme Court decision. The Court cited the history of forcible civil detainment of people posing a danger to public health and safety, concluding

⁴⁵ *Hendricks*, 521 U.S. at 371.

⁴⁶ *Id.* at 361-62.

⁴⁷ *Id.* at 350 (citing KAN. STAT. ANN. §§ 59-29a01 to -29a22 (1994)).

⁴⁸ *Id.* at 352-53.

⁴⁹ *Id.* at 350.

⁵⁰ *In re Care and Treatment of Hendricks*, 912 P.2d 129, 138 (1996).

⁵¹ *Id.* at 138.

⁵² *Id.*

that involuntary commitment statutes are not contrary to “our understanding of ordered liberty” so long as they include appropriate procedural protections and evidentiary standards.⁵³ The Court disagreed with the Kansas Supreme Court’s holding that the requirement of mental defect or personality disorder was constitutionally defective, finding that mental illness is “devoid of talismanic significance” and therefore is not the only mental impairment that can pass constitutional muster.⁵⁴ The Court found that Hendricks satisfied the statutory requirement of lacking volitional control based on a diagnosis of pedophilia and Hendricks’s admission that he was unable to control his urge to molest children.⁵⁵

Relying on the *Kennedy v. Mendoza-Martinez* factors for determining whether a law is penal or regulatory in nature,⁵⁶ the Court found that the Kansas civil commitment statute was not punitive. In applying the factors,⁵⁷ the Court noted the absence of several characteristics of criminal laws. The Act’s use of prior criminal conduct was solely for evidentiary purposes: to show mental abnormality or future dangerousness.⁵⁸ That neither a criminal conviction nor a finding of scienter was required indicated that the statute was not retributive.⁵⁹ The Court rejected Hendricks’s claim that the lack of treatment given him showed that confinement is “disguised punishment,” and it noted that incapacitation was a legitimate goal

⁵³ *Hendricks*, 521 U.S. at 357.

⁵⁴ *Id.* at 358–59.

⁵⁵ *Id.* at 360.

⁵⁶ 372 U.S. 144, 168–69 (1963) (holding that a statute divesting an American citizen of citizenship for leaving the country to evade military service at a time of war was unconstitutional). The *Hendricks* decision holds that scienter is an element, but *Kennedy* lists it among seven factors. *See generally id.*

⁵⁷ The factors are described as follows: “Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment, retribution[,] and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.” *Id.* at 168–69.

⁵⁸ *Hendricks*, 521 U.S. at 362. The Court did not address the prejudicial effect of such evidence. Juries and judges aside, even clinicians’ professional judgment can be biased by “vivid or emotionally laden information.” Robert A. Prentky et al., *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 PSYCHOL. PUB. POL’Y & L. 357, 371–72 (2006) [hereinafter Prentky, *Science on Trial*] (citing Rebecca L. Jackson et al., *The Adequacy and Accuracy of Sexually Violent Predator Evaluations: Contextualized Risk Assessment in Clinical Practice*, 3 INT’L J. OF FORENSIC MENTAL HEALTH 115 (2004)).

⁵⁹ Prentky, *Science on Trial*, *supra* note 59.

given the finding of the state supreme court that treatment was unavailable and Hendricks might be untreatable.⁶⁰ Even though the Kansas Supreme Court found that treatment was not the primary goal, it could still be an ancillary goal.⁶¹ Regardless, the court decided the Act was not punitive.⁶² The Court noted that the States have wide latitude in developing treatment regimens.⁶³

The Court based its findings on several assertions by the state: (1) the intent of civil commitment was not punitive, a small segment of “particularly dangerous” persons were confined; (2) treatment was recommended if possible; and (3) the statute permitted immediate release when the person no longer met the statutory criteria.⁶⁴ The Court then concluded that because the Act was not punitive or criminal, Hendricks did not have sufficient basis for double jeopardy or *ex post facto* claims.⁶⁵

Justice Breyer’s dissent found an *ex post facto* clause prohibition on the Act, as it inflicted a greater punishment on Hendricks than the law ascribed to his crimes.⁶⁶ Justice Breyer reasoned that while an incapacitative law’s lack of concern for treatment is not sufficient to make the law punitive, the State’s assertion that treatment exists, and its delay of treatment until after the completion of a criminal sentence suggests a punitive purpose.⁶⁷ Furthermore, the Supreme Court of Kansas had found that segregation was the primary purpose of the statute, with treatment “incidental at best.”⁶⁸ The Supreme Court of the United States normally defers to state court interpretations of its own laws, and the record supported the Kansas court’s conclusion.⁶⁹ Justice Breyer observed that Hendricks received no treatment for the first ten months of his civil commit-

⁶⁰ *Hendricks*, 521 U.S. at 363, 365.

⁶¹ *Id.* at 367.

⁶² *Id.*

⁶³ *Id.* at 368 (citing *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982)). The quality of treatment in sex offender commitment facilities is uneven at best, and professional standards are lacking. In one facility in Florida, only one of hundreds of detainees was deemed ready for release while the underfunded facility was administered by a private contractor. Abby Goodnough & Monica Davey, *A Record of Failure at Center for Sex Offenders*, N.Y. TIMES, Mar. 5, 2007. “Many outside experts, even some of the center’s critics, said the state’s insufficient financing of the center made Florida as much to blame as Liberty for the many failings, many of which are common in other states.” *Id.*

⁶⁴ Prentky, *Science on Trial*, *supra* note 59, at 368–69.

⁶⁵ *Hendricks*, 521 U.S. at 369.

⁶⁶ *Id.* at 379.

⁶⁷ *Id.* at 381. By providing for treatment only years *after* an offense is committed, when the offender is nearing the completion of his or her sentence, the statute necessitates “further incapacitation” and therefore “begins to look punitive.” *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

ment and, at the time of the civil commitment determination, the State had allocated no funding for treatment and had hired no one to operate the program or to serve as clinical director or psychiatrist.⁷⁰ He further noted that incapacitation is a punitive goal.⁷¹ Incapacitation appeared to be the primary purpose of the statute as treatment was delayed until after the prison sentence was completed, and there was no provision for considering less restrictive alternatives (unlike in the civil commitment of persons with mental illness).⁷² The state's assertion that civil commitment was not punitive was wholly unconvincing.⁷³ In a subsequent case, the Court clarified that while there need not be a complete lack of control, "there must be proof of serious difficulty in controlling behavior," in addition to proof of dangerousness and mental abnormality, to satisfy the requirements of civil commitment.⁷⁴

Hendricks has been criticized on a number of grounds, for: "strain[ing] the distinction between criminal punishment and civil commitment";⁷⁵ creating criteria based on erroneous understandings of sex offending behavior;⁷⁶ relying on an "unacceptably fuzzy" mental abnormality standard;⁷⁷ ignoring the clear legislative purpose of the statute;⁷⁸ and, more fundamentally, authorizing

⁷⁰ Prentky, *Science on Trial*, *supra* note 59, at 383–84.

⁷¹ *Hendricks*, 521 U.S. at 379–80 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *11–12 (incapacitation is one important purpose of criminal punishment) and *United States v. Brown*, 381 U.S. 437, 458 (1965) ("Punishment serves several purposes; retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.")).

⁷² *Id.* at 389.

⁷³ *Id.*

⁷⁴ *Kansas v. Crane*, 534 U.S. 407, 407 (2002).

⁷⁵ WINICK, *supra* note 28, at 120.

⁷⁶ *Id.* at 128 (citing studies that show that sex offenders can control their behavior).

⁷⁷ See Friedland, *supra* note 23, at 115, 117 (arguing that states have wide latitude to allow for the civil commitment of people with mental abnormalities and personality disorders, "giving rise to the specter of political agendas and capriciousness in the law's application.").

⁷⁸ JANUS, *supra* note 7, at 40. "[T]he Court approved the use of predator commitments in the face of clear evidence that their central purpose was to bypass the limits of the criminal law." *Id.* The legislative findings in the statute clearly evinced the legislature's view that sex offenders are not amenable to treatment: "[S]exually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities." KAN. STAT. ANN. § 59-29a01 (1994). Kansas Attorney General Robert Stephan testified to the state legislature that prior to the passage of the civil commitment law, "there [was] no adequate legal provision to continue incarceration of violent sexual predators past the period of mandatory incarceration." Brief of the American Civil Liberties Union et al. as Amicus Curiae in Support of Respondent at 23, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (No. 95-1649). Ste-

“the use of extensive preventive detention, dressed up in mental health language.”⁷⁹ Scholars also note that predicting dangerousness on the basis of past crimes “would be ‘impermissible character evidence’ for other felony defendants.”⁸⁰ The core constitutional problems of *Hendricks* are only amplified by the application of the prison standard to the constitutional claims of individuals with civil status.

IV. *TURNER V. SAFLEY*: EXTREME DEFERENCE TO PRISON ADMINISTRATORS

Federal courts routinely apply an extremely deferential prison standard to the First Amendment claims of civilly committed sex offenders. *Turner v. Safley* established this extreme judicial deference to prison administrators for prisoners’ First Amendment rights,⁸¹ cementing the decade-long shift away from the high-level scrutiny courts had applied to infringements on prisoners’ constitutional rights. Courts’ approaches to prisoners’ constitutional rights have been embodied in three phases in modern times. Federal courts adhered to the “hands-off” doctrine starting in the 1930s, refusing to protect prisoners from constitutional violations, partly on the basis of federalism.⁸² Starting in the late 1960s, federal courts extended constitutional protections to many aspects of incarceration, including First Amendment rights and living conditions.⁸³ During this more protective period, under *Procunier v. Martinez*, the standard for First Amendment violations of prisoner rights was akin to strict scrutiny: the regulation had to further “an important or substantial government interest unrelated to the suppression of expression” and the limitation could be “no greater than necessary” to the interest involved.⁸⁴ This protective period

phan also testified that the Act “will keep dangerous sex offenders confined past their scheduled prison sentence.” *Id.* Carla Stovall, Attorney General of Kansas and member of the state Parole Board at the time *Hendricks* was decided by the Supreme Court, testified, “We cannot open our prison doors and let these animals back into our communities.” *Id.* She described the goal of the Act as keeping sex offenders “locked up indefinitely.” *Id.*

⁷⁹ Perlin, *supra* note 42, at 1275.

⁸⁰ Erica Beecher-Monas & Edgar Garcia-Rill, *Genetic Predictions of Future Dangerousness: Is There a Blueprint for Violence?*, 69 LAW & CONTEMP. PROBS. 301, 307 (2006).

⁸¹ *Turner v. Safley*, 482 U.S. 78 (1987).

⁸² James E. Robertson, *The Rehnquist Court and the “Turnerization” of Prisoners’ Rights*, 10 N.Y. CITY L. REV. 97, 99 (2006).

⁸³ *Id.* at 100.

⁸⁴ *Procunier v. Martinez*, 416 U.S. 396, 413 (1974) (striking down a prison regulation barring correspondence from inmates to non-inmates that was inflammatory or complained excessively).

was short-lived. The seeds of judicial deference to prison administrators were sown in *Pell v. Procunier*, which noted that decisions regarding prisoner security “are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.”⁸⁵

A 1977 case involving prisoners’ rights to engage in activities related to union formation, including the use of bulk mailings, furthered the doctrinal shift: the Court criticized the lower court’s failure to give “appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement.”⁸⁶ Two years later, the Court upheld a restriction prohibiting pretrial detainees from receiving hardcover books from sources other than publishers or bookstores.⁸⁷

The *Turner* decision announced a new era of extreme deference, citing the prior cases trending toward deference, noting that the Court applied heightened scrutiny to none of them, and rejecting the Eighth Circuit’s use of *Martinez*’s strict scrutiny standard over the deferential review of the later cases.⁸⁸

In *Turner*, prisoners challenged Mississippi Division of Corrections regulations restricting prisoner mail and marriage.⁸⁹ The marriage regulation prohibited inmates from marrying other inmates or non-inmates, unless the prison administration found compelling reasons to allow it.⁹⁰ The challenged mail regulations prohibited mail between inmates at different prisons, unless the inmates were immediate family members, corresponding about legal matters, or the prison administration had deemed such correspondence in the best interest of the parties.⁹¹ At the facility in

⁸⁵ 417 U.S. 817, 827 (1974) (upholding a prison regulation prohibiting face-to-face media interviews with prisoners).

⁸⁶ *Jones v. North Carolina Prisoners’ Union*, 433 U.S. 119, 125, 129 (1977) (holding that restrictions on prisoners’ union meetings and solicitation were rationally related to prison administrators’ objectives).

⁸⁷ *Bell v. Wolfish*, 441 U.S. 520, 550 (1979).

⁸⁸ *Turner v. Safley*, 482 U.S. 78, 86–87, 88 (1987) (rejecting the Eighth Circuit’s bases for distinguishing the deferential cases where the Eighth Circuit distinguished the cases as involving time, place, and manner restrictions or “presumptively dangerous inmate activities”).

⁸⁹ *Id.*

⁹⁰ *Id.* at 97–98.

⁹¹ *Id.* at 81–82.

which the plaintiffs were imprisoned, the rule in practice barred all inmates from writing incarcerated non-family members.⁹² Inmates challenged the mail regulations as an infringement of their First Amendment rights under the free speech clause.⁹³

The Court held that the marriage regulation was not reasonably related to the asserted penological interests of promoting the rehabilitation of women through self-reliance or protecting security by preventing love triangles, but upheld the prison mail regulations, setting out an extremely deferential test: “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate interests.”⁹⁴ A four-factor test determines the reasonableness of the regulation. First, “there must be a ‘valid, rational connection’ between the prison regulation and the legitimate [and neutral] governmental interest put forward to justify it.”⁹⁵ The second factor is “whether there are alternative means of exercising the right that remain open to prison inmates” and the third factor is the “impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.”⁹⁶ The Court explained that when “accommodation of the asserted right will have a significant ‘ripple effect’ on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials.”⁹⁷ The last factor is “the absence of ready alternatives” to the challenged regulation. If “obvious, easy alternatives” exist “at *de minimis* cost to valid penological interests,” the regulation may not be reasonable.⁹⁸ The Court specified that this factor does not require that prison officials find the least restrictive alternative.⁹⁹

In applying the test, the Court found that the mail rule was reasonably related to “legitimate security interests,” noting that it was content-neutral, and not an exaggerated response to legitimate safety and security concerns.¹⁰⁰ The Court compared mail between prisoners to parole conditioned on non-association with known criminals, reasoning that mail between prisoners “is a potential

⁹² *Id.* at 82.

⁹³ *Id.* at 93; U.S. CONST. amend. I. “Congress shall make no law . . . abridging the freedom of speech . . .” *Id.*

⁹⁴ *Turner*, 482 U.S. at 89.

⁹⁵ *Id.* (citing *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 90–91.

¹⁰⁰ *Turner*, 482 U.S. at 91.

spur to criminal behavior.” The prohibition therefore furthered the state’s policy of separating gang members.¹⁰¹ As to the second factor, the court reasoned that alternative means of communication remain open because prisoners are able to correspond with non-prisoners.¹⁰² Such a broad interpretation of alternative means weighs strongly in favor of an infringement’s constitutionality. The Court’s analysis of the third factor, in which it criticized the Eighth Circuit’s decision, exhibits its new brand of super-deference: the Court noted that prison officials asserted that mail between inmates contributes to informal organizations that threaten safety and security, but mentions no evidence that supports the assertion.¹⁰³ As to the fourth factor, the plaintiffs proposed that inmate correspondence be monitored, rather than banned, but the Court found that this could not be achieved at *de minimis* cost, citing prison administrators’ assertion that it would be impossible to read all correspondence, and that prisoners could still communicate in code.¹⁰⁴

Justice Steven’s opinion, concurring as to the marriage regulation and dissenting as to the mail regulation, criticized the majority for accepting prison administrators’ rationale, and ignoring the lower courts’ finding that the justification for the rules was speculative. No facts were presented to support assertions that the rules furthered safety and security interests.¹⁰⁵ He noted that requiring no more than a “logical connection” between the challenged regulation and a legitimate penological goal provides almost no constitutional protection; “the use of bullwhips on prisoners” for the purpose of discipline could satisfy the logical connection requirement.¹⁰⁶ Justice Stevens criticized the majority’s inconsistent approach, giving “virtually total deference” to prison administrators on the mail policy while discounting prison administration speculation about security risks related to marriage.¹⁰⁷ This inconsistent stance was contrary to the text of the Constitution, which “more clearly protects the right to communicate than the right to marry.”¹⁰⁸

Commentators have echoed Stevens’ criticisms, noting that

¹⁰¹ *Id.* at 91–92.

¹⁰² *Id.* at 92.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 93.

¹⁰⁵ *Id.* at 106.

¹⁰⁶ *Turner*, 482 U.S. at 101.

¹⁰⁷ *Id.* at 113.

¹⁰⁸ *Id.* at 116.

the first factor of the *Turner* test is determinative, as the factors operate “like dominoes: Once the first and most weighty prong falls, the others do as well.”¹⁰⁹ Furthermore, that first critical prong fails to differentiate between weak and strong rights.¹¹⁰ Professor James E. Robertson has described *Turner* as “faux balancing” because while the decision appears to require the weighing of factors, the prisoner’s infringed-upon right is entirely absent from the analysis.¹¹¹ Courts do not examine the degree of deprivation or importance of the right at issue, and therefore most any accommodation can be found onerous.

Subsequent cases followed *Turner*’s extreme deference to prison administrators on prison mail, rather than the skepticism the Court had afforded the justifications for the marriage ban. Another five-to-four decision exemplified the new approach, this time applying the *Turner* test to a First Amendment free exercise of religion claim.¹¹² In *O’Lone v. Estate of Shabazz*, the Court upheld work rules in a New Jersey prison that assigned prisoners to work details outside the prison, thereby preventing Muslim prisoners from attending a weekly service at the prison.¹¹³ The Court found that the rules were logically connected to the legitimate purpose of maintaining “institutional order and security” as well as relieving overcrowding during the day.¹¹⁴ The requirement of a full eight-hour workday was logically related to rehabilitation goals.¹¹⁵ The decision afforded little importance to the second factor, interpreting alternative means broadly: after conceding that prisoners had no alternative means of exercising their right to attend the weekly service,¹¹⁶ the Court concluded that because the service takes place at a specific time, as commanded by the Koran—every Friday after the sun reaches its zenith but before the afternoon prayer¹¹⁷—it was “extraordinarily difficult” for prison officials to accommodate.¹¹⁸ The Court noted that in *Turner*, the analysis of this factor

¹⁰⁹ Robertson, *supra* note 82, at 120.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 119 (citing *Jordan v. Gardener*, 986 F.2d 1521, 1597 (9th Cir. 1993) (Wallace, C.J., dissenting)).

¹¹² *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); see U.S. CONST. amend. I. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” *Id.*

¹¹³ *O’Lone*, 482 U.S. at 353.

¹¹⁴ *Id.* at 351–52.

¹¹⁵ *Id.* at 352.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 345.

¹¹⁸ *Id.* at 351.

focused on whether prisoners were denied “all means of expression,” rather than the means to communicate with other prisoners, and reasoned that prisoners were not denied all forms of religious exercise, only the ability to participate in the weekly service.¹¹⁹ As to the impact on other inmates, prison personnel and the allocation of prison resources, the Court found that the alternatives suggested by the prisoners, allowing Muslim prisoners to work on-site or on weekends, would either undermine the goal of off-site work, require additional resources, promote the growth of affinity groups, which would threaten security, or create perceptions of favoritism.¹²⁰ The Court thus conflated the last two factors, coming to the conclusion that “there are no ‘obvious, easy alternatives to the policy adopted by petitioners.’”¹²¹

Outside of the context of prison rights cases, free exercise and free speech claims are analyzed under entirely distinct doctrinal lines.¹²² Under the *Turner* test, it seems that all constitutional rights are equivalent in the eyes of the Court (with the exception, perhaps, of marriage). Accordingly, the criticisms of the test’s application to free exercise and free speech claims are remarkably similar. Like Justice Stevens’s dissent in *Turner*, Justice Blackmun’s dissent in *O’Lone* points out that the Court accepted the prison administration’s implausible reasons for rejecting alternative policies with no substantiation.¹²³ The prison arranged work schedules to accommodate Jewish and Christian inmates’ attendance at their weekly services, but prison administrators asserted that such accommodation could not be made for Muslims and failed to explain why resulting Jewish- and Christian- affinity groups did not pose a security threat, while Muslims did.¹²⁴ This illustrates the problem of *Turner* extreme deference: while the *Turner* Court voiced concern for respecting the “policy of judicial restraint regarding prisoner complaints” and “the need to protect constitutional rights,”¹²⁵ a

¹¹⁹ *O’Lone*, 482 U.S. at 352.

¹²⁰ *Id.* at 352–53.

¹²¹ *Id.* at 353 (citing *Turner v. Safley*, 482 U.S. 78, 93 (1987)).

¹²² *See, e.g.*, *Reynolds v. United States*, 98 U.S. 145 (1878) (holding that religious duty was not a defense to a criminal indictment); *see also Cantwell v. Connecticut*, 310 U.S. 296 (1940) (holding that the Free Exercise Clause is incorporated into the Fourteenth Amendment Due Process Clause, and thereby applies to the states); *see also Schenck v. United States*, 249 U.S. 47 (1919) (upholding a conviction for espionage for publishing leaflets challenging the draft because such activity posed a clear and present danger); *see also United States v. O’Brien*, 391 U.S. 367 (1968) (upholding a criminal prohibition against burning draft cards).

¹²³ *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 365 (1987).

¹²⁴ *Id.* at 365–66.

¹²⁵ *Turner*, 482 U.S. at 85 (citing *Procunier v. Martinez*, 416 U.S. 396, 396 (1974)).

deference that requires no substantiation of the legitimate interests asserted by prison officials, is more than deference: it is practically a foregone conclusion.¹²⁶

Subsequent cases applied the *Turner* rule to other First Amendment claims by prisoners. Two years later, the Court upheld regulations allowing wardens to prohibit inmate's receipt of subscription publications if prison administrators found the specific publications detrimental to institutional security.¹²⁷ The Court also upheld policies that infringed on inmates' rights of association in the form of restrictive visitation policies, adding a new requirement to the *Turner* test: the burden is on the prisoner to disprove the validity of the challenged regulation, rather than on the administration to prove its validity.¹²⁸ An even harsher restriction on the receipt of publications was upheld by the Roberts Court, allowing prison administrators to forbid inmates in the highest security unit from receiving any newspapers, magazines, or photographs.¹²⁹ In *Beard v. Banks*, the Court granted summary judgment to prison officials after assessing just one of three asserted purposes of the restriction. After finding that "motivat[ing] better behavior on the part of particularly difficult prisoners" was a legitimate penological interest reasonably related to the challenged restriction, the Court felt no need to examine the other asserted rationales.¹³⁰ The Court noted that sufficient evidence was presented to show that the restrictions serve to advance that purpose: "namely, the views of the deputy superintendent."¹³¹ The decision illustrates the importance of the first factor in determining the outcome of the *Turner* test. In analyzing the third factor, Justice Breyer reasoned that "[i]f the Policy (in the authorities' view) helps to produce better behavior, then its absence (in the authorities' view) will help to produce worse behavior, e.g., "backsliding."¹³² Prison administrators' assertion that a policy is effective in furthering a legitimate penological purpose, is the beginning and end of the analysis; the rest of the factors are superfluous.

Professor James E. Robertson has noted that the *Turner* test

¹²⁶ *O'Lone* exemplifies the manner in which the *Turner* test is applied, though a federal statute has since established strict scrutiny for prisoners' free-exercise claims. See *O'Lone*, 482 U.S. 342. This statute has also been applied to civilly committed sex offender claims. See *infra* Part IV.B.

¹²⁷ *Thornburgh v. Abbott*, 490 U.S. 401, 403 (1989).

¹²⁸ *Overton v. Bazzetta*, 539 U.S.126, 132 (2003).

¹²⁹ *Beard v. Banks*, 548 U.S. 521, 535 (2006).

¹³⁰ *Id.* at 530.

¹³¹ *Id.* at 531.

¹³² *Id.*

has been applied by lower federal courts far beyond its initial First Amendment application, to such constitutional rights as equal protection.¹³³ He argues that *Turner* exemplifies the Rehnquist Court's judicial minimalism, an approach that "accommodates and implicitly legitimates the countermajoritarian difficulty," skirting key questions, such as which constitutional rights are consistent with incarceration.¹³⁴ If it is troubling that all manner of prisoners' constitutional rights are being "Turnerized," the entry of "Turnerization" into the civil arena, through its application to the constitutional claims of civilly committed sex offenders, is even more alarming.

V. CIVIL STATUS IS CIVIL STATUS (EXCEPT WHEN IT'S NOT):
THE COURTS' TREATMENT OF FIRST AMENDMENT CLAIMS
BY CIVILLY COMMITTED SEX OFFENDERS

The application of the *Turner* prison standard by federal courts to civilly committed sex offenders' First Amendment claims shows that the courts see little distinction between imprisonment and civil commitment. The Supreme Court is isolated in its view, articulated in *Hendricks*, that civil commitment is not imprisonment.¹³⁵ An examination of First Amendment cases illustrates how the conflation of prison and civil commitment operates.

Two of the most common First Amendment claims brought by civilly committed sex offenders are free speech clause challenges to mail policies in civil commitment facilities, and free exercise clause challenges to infringements on civil committees' religious practices. In both categories of claims, federal courts frequently rely on prison precedents, and fail to acknowledge any difference in the status of civilly committed sex offenders, as compared to the status of prisoners.¹³⁶

¹³³ Robertson, *supra* note 82, at 105. The Supreme Court applied the *Turner* standard "beyond its original First Amendment boundaries" in *Washington v. Harper*, 494 U.S. 210, 244 (1991), where the Court upheld the involuntary use of psychotropic medication on prison inmates in a due process claim, and lower courts have continued in that vein. Robertson, *supra* note 80, at 105. Roberts calls this expansion of the *Turner* approach to non-First Amendment constitutional rights "Turnerization." *Id.*

¹³⁴ *Id.* at 118.

¹³⁵ See *supra* notes 44–65 and accompanying text.

¹³⁶ Civilly committed sex offenders have also brought First Amendment claims based on retaliation for complaints or lawsuits. In these cases, courts also rely on the prison standard, but because prisoners' rights in this arena are clearly established, in this instance, courts need go no further than establishing the "floor." One particularly well-reasoned decision (although later reversed in a memorandum disposition and remanded to the circuit court of appeals) is in *Hydrick v. Hunter*, a class-action suit filed by California sex offenders who are civilly committed or detained awaiting com-

A. *Free Speech Claims*

In analyzing civilly committed sex offenders' challenges to mail policies, the courts often go no further than prison mail cases to conclude that either there is no First Amendment right, or no clearly established right for the purposes of overcoming a qualified immunity defense. The courts in these cases could just as easily be reviewing claims from prisoners. If civil commitment is not prison, the prison standard should establish the floor, but not the very architecture of the building.

*Rivera v. Rogers*¹³⁷ exemplifies the judicial approach that treats civilly committed sex offenders' First Amendment claims no differently than those of prison inmates. In *Rivera*, the Third Circuit considered a First Amendment claim by a civilly committed New Jersey sex offender, and started from the premise that "his status is similar to that of a prisoner . . ."¹³⁸ The court affirmed the district court's decision granting the defendants' motions for summary judgment, referencing the district court's application of the *Turner* test.¹³⁹ The district court relied heavily on *Waterman*, a Third Circuit decision, quoting its pronouncement that "it is beyond dispute that New Jersey has a legitimate penological interest in rehabilitat-

mitment hearings. 500 F.3d 978 (9th Cir. 2007), *rev'd*, 129 S.Ct. 2431 (2009) (mem.). The offenders sued the state and administrators of Atascadero State Hospital, claiming, among other things, that retaliation for filing lawsuits and coerced participation in treatment constituted violations of their First Amendment rights. *Id.* at 984. The Ninth Circuit noted that in ascertaining whether a right is clearly established for qualified immunity purposes, there are two relevant bodies of case law: rights afforded prisoners, which set the floor, and rights afforded other civilly detained persons, such as involuntarily hospitalized people with mental illnesses. *Id.* at 989. The court cited *Youngberg's* finding that civilly detained persons are entitled to "more considerate treatment and conditions of confinement" than inmates. *Id.* at 989 (citing *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982)). After finding that protection from retaliation is a clearly established right for prisoners, the court noted that the involuntary hospitalization in *Youngberg* may not be entirely analogous to the civil commitment of sex offenders since "SVPs have been civilly committed subsequent to criminal convictions and have been adjudged to pose a danger to the health and safety of others," and so "the rights of SVPs may not necessarily be coextensive with those of all other civilly detained persons." *Id.* at 990. The court did not decide what the standard should be, because the issue was whether qualified immunity had been satisfied. It remains to be seen how the case will be decided on remand from the U.S. Supreme Court since the case was reversed without a written opinion.

¹³⁷ *Rivera v. Rogers*, 224 F. App'x 148, 151 (3d Cir. 2007).

¹³⁸ If his status was different in any respect, the court did not say so. *Id.*

¹³⁹ *Id.* at 151 (citing *Rivera v. Rogers*, No. 02-CV-2798 (DMC), 2006 WL 1455789 (D.N.J. May 22, 2006)). The defendants presumably are personnel and administrators from the Special Treatment Unit that housed Rivera, although the decisions do not say so specifically.

ing its most dangerous and compulsive sex offenders.¹⁴⁰ The district court had neglected to mention that *Waterman* involved the claims of incarcerated sex offenders still serving their prison terms,¹⁴¹ unlike the plaintiff in *Rivera*, who had completed his sentence and was civilly committed.¹⁴²

The district court also cited *Youngberg v. Romeo*, the Supreme Court case that established that involuntarily committed persons with mental illnesses are entitled to more considerate treatment and conditions than criminals, because, unlike criminals, their confinement is not punitive.¹⁴³ In *Youngberg*, the mother of a mentally retarded man who was involuntarily committed to Pennhurst State Hospital in Pennsylvania filed suit against hospital officials. Her son had suffered injuries more than seventy times, some of them self-inflicted and some inflicted by other patients. Some of the injuries, which included a broken arm, human bites, and black eyes, had become infected due to inadequate medical care and contact with human excrement.¹⁴⁴ Hospital staff kept him shackled to a bed or chair for long periods of time.¹⁴⁵ The suit claimed violation of his liberty interests in safe conditions of confinement, freedom from bodily restraint, and skills training.¹⁴⁶ The Court reasoned that because prisoners have a right to personal security, the involuntarily committed must as well: “[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily confined—who may not be punished at all—in unsafe conditions.”¹⁴⁷ However, the claim of a right to the training and development of needed skills (termed “habilitation”) did not succeed. The Court found that the State has the discretion to decide which services are appropriate.¹⁴⁸ Decisions regarding treatment “if made by a professional” are “presumptively valid.”¹⁴⁹

In *Rivera*, the district court noted that patients’ constitutional rights “must be balanced against the reasons put forth by the State for restricting their liberties,” then turned to *Turner*, strangely char-

¹⁴⁰ *Rivera*, 2006 WL 1455789, at *2 (citing *Waterman v. Farmer*, 183 F.3d 208, 215 (3d Cir. 1999)).

¹⁴¹ *Waterman*, 183 F.3d at 210.

¹⁴² *Rivera*, 2006 WL 1455789, at *1.

¹⁴³ 457 U.S. 307, 322 (1982).

¹⁴⁴ *Romeo v. Youngberg*, 644 F.2d 147, 155 (3d Cir. 1980).

¹⁴⁵ *Id.*

¹⁴⁶ *Youngberg*, 457 U.S. at 315.

¹⁴⁷ *Id.* at 315–16.

¹⁴⁸ *Id.* at 318.

¹⁴⁹ *Id.* at 323.

acterizing it as an expansion of *Youngberg*.¹⁵⁰ *Youngberg* and *Turner* are worth comparing: both involve constitutional claims by institutionalized persons. In both, the U.S. Supreme Court set out rules affording considerable deference to institutional administrators.¹⁵¹ In setting out standards of review, both cases emphasize the importance of considering the purpose of the confinement.¹⁵² *Youngberg* did not involve a First Amendment claim but a substantive due process claim based on liberty interests.¹⁵³ The levels of deference the two cases establish are different, if only by degrees. The deference to state hospital administrators in *Youngberg*, while strong, is not as complete as the deference to prison administrators in *Turner*.¹⁵⁴ In establishing a standard of review, Justice Powell's decision in *Youngberg* cites the standard articulated by the Third Circuit in *Rivera*: "the Constitution only requires that the courts make certain that professional judgment was in fact exercised."¹⁵⁵ The Court later qualifies this somewhat: while a decision made by a professional is presumptively valid, the decision may create liability if the professional's decision is "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."¹⁵⁶ The Court notes that while "[p]ersons who

¹⁵⁰ *Rivera*, No. 02-CV-2798 (DMC), 2006 WL 1455789, at *2 (D.N.J. May 22, 2006). "The Supreme Court expanded on the *Youngberg* decision in *Turner v. Safley*." *Id.*

¹⁵¹ *Youngberg*, 457 U.S. at 315; *Turner v. Safley*, 482 U.S. 78, 82–83 (1987).

¹⁵² See *Youngberg*, 457 U.S. at 321 (finding that the purpose of the plaintiff's confinement was to provide "reasonable care and safety" where his family was not able to provide it for him); see also *Turner*, 482 U.S. at 89, 93 (holding that a regulation that impinges on a prisoner's constitutional rights is valid "if it is reasonably related to legitimate penological interests").

¹⁵³ *Youngberg*, 457 U.S. at 324. The challenge to the marriage restriction in *Turner* also was a substantive due process challenge.

¹⁵⁴ This is not to suggest that *Youngberg* offers a model of judicial protection of constitutional rights. *Youngberg* has been strongly criticized for establishing a presumption of validity of professional decisions and eliminating the least restrictive means doctrine of care for people with mental disabilities. See, e.g., Bruce A. Arrigo, *The Logic of Identity and the Politics of Justice: Establishing a Right to Community-Based Treatment for the Institutionalized Mentally Disabled*, 18 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 2–4 (1992).

¹⁵⁵ *Youngberg*, 457 U.S. at 321 (citing *Romeo v. Youngberg*, 644 F.2d 147, 178 (3d Cir. 1980)). *Youngberg* defines a professional decisionmaker as "a person competent, whether by education, training[,] or experience, to make the particular decision at issue. Long-term treatment decisions normally should be made by persons with degrees in medicine or nursing, or with appropriate training in areas such as psychology, physical therapy, or the care and training of the retarded. Of course, day-to-day decisions regarding care . . . necessarily will be made in many instances by employees without formal training but who are subject to the supervision of qualified persons." *Id.* at 323 n.30.

¹⁵⁶ *Id.* at 323.

have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish,” the standard is “lower than the ‘compelling’ or ‘substantial’ necessity tests” applied by the Third Circuit.¹⁵⁷

Thus *Youngberg* establishes a standard that is very deferential to hospital administrators, but unlike *Turner*, presumably involves some examination of decisionmakers’ qualifications and whether their decisions substantially depart from acceptable practices. Even while noting that courts should defer to professional judgment, the *Youngberg* Court opined that, given the facts of the plaintiff’s case, “[i]t may well be unreasonable not to provide training when training could significantly reduce the need for restraints or the likelihood of violence.”¹⁵⁸ In *Turner*, by contrast, the Court does not concern itself with the qualifications of prison administrators or the possibility of a substantial departure from accepted professional judgment. The decision draws on *Bell v. Wolfish*, which held that the “expert judgment” of prison administrators should be accorded “wide-ranging deference.”¹⁵⁹ *Wolfish* has been criticized for ignoring the factual question of “whether [prison officials] actually possess such expertise.”¹⁶⁰

The Third Circuit in *Rivera* invokes *Youngberg* in a token acknowledgment of the plaintiff’s civil status, but proceeds to use the prison standard articulated by *Turner* as the framework for its analysis. The court’s reliance on the district court’s reasoning is troubling given the lower court’s failure to differentiate between the status of prisoners and involuntarily committed persons and its seemingly reflexive decision to rely on prison standards.¹⁶¹ The dis-

¹⁵⁷ *Id.* at 321–22.

¹⁵⁸ *Id.* at 324.

¹⁵⁹ 441 U.S. 520, 547–48 (1979) (upholding a number of challenged prison policies, including double-bunking in rooms intended for single occupancy, restricting the receipt of hardcover books and food packages, and requiring visual body-cavity searches after visits).

¹⁶⁰ Robertson, *supra* note 82, at 102 (citing Fred Cohen, *The Limits of Judicial Reform of Prisons: What Works, What Doesn’t*, 40 CRIM. L. BULL. 421, 440–41 (2004) (quoting John Boston of the Legal Aid Society Prisoners Rights Project as saying, “If the poet laureate of New York were named a prison warden on January 1, he would be a corrections expert in the *Bell [v. Wolfish]* mode the following morning.”)). *Id.* at 125 n.49.

¹⁶¹ *Rivera v. Rogers*, 224 F. App’x 148, 151 (3d Cir. 2007). “[W]e agree with the District Court’s decision to proceed with its analysis of his First Amendment claim by looking to case law interpreting a prisoner’s rights. The [d]istrict [c]ourt’s Memorandum Opinion contains a thorough application of the test set forth in *Turner*[,] and we see no reason to reiterate that entire analysis here.” *Id.* (citation omitted).

strict court refers to civilly committed sex offenders variously as “patients,” “residents,” and “prisoners,”¹⁶² sometimes switching terms in the same sentence: “*Prisoners* may still receive and send mail to whomever they wish, so long as a *resident* is not receiving contraband, pornographic material or sexually explicit correspondence.”¹⁶³ The court is consistent in referring to “penological interests” throughout.¹⁶⁴ The Third Circuit echoes the district court’s approach, noting that although “prisoners and those involuntarily committed, by virtue of their incarceration and custody status, ‘do not forfeit their First Amendment right to use of the mails,’¹⁶⁵ that right can be limited by . . . legitimate penological interests.”¹⁶⁶ If the plaintiff’s constitutional rights can be infringed upon to further penological interests,¹⁶⁷ it follows that the court views his status as that of a prisoner incarcerated in a penological institution.¹⁶⁸

In applying the *Turner* test to Rivera’s claim that his First Amendment rights were violated by the facility’s policy of opening packages (with the exception of legal mail) mailed to prisoners,¹⁶⁹ the district court found that the facility’s legitimate interests in safety and rehabilitation were furthered by the mail policy. Those interests and the policy were rationally related because harmful materials in the mail posed a threat to staff and patients and because sexually explicit material “could prove detrimental to a patient’s rehabilitation.”¹⁷⁰ Interestingly, the court cited *Youngberg* in analyzing the second factor of the *Turner* test, finding that persons committed to the units have alternative means of receiving and sending mail, so long as mail received did not include “contraband, pornographic material or sexually explicit correspon-

¹⁶² *Rivera v. Rogers*, No. 02-CV-2798 (DMC), 2006 WL 1455789, at *3 (D.N.J. May 22, 2006).

¹⁶³ *Id.* at *3 (emphases added).

¹⁶⁴ *Id.* at *3, *4.

¹⁶⁵ *Rivera*, 224 F. App’x at 151 (quoting *Jones v. Brown*, 461 F.3d 353, 358 (3d Cir. 2006) (holding that a state prison’s policy of opening mail outside of prisoners’ presence was not reasonably related to its legitimate interest in protecting the safety and security of the prison in the wake of post-September 11 anthrax scares when the policy was still being followed three years later)).

¹⁶⁶ *Id.* (citing *Turner v. Safley*, 482 U.S. 78, 92 (1987)).

¹⁶⁷ “Penology” is defined as “[t]he study of penal institutions, crime prevention, and the punishment and rehabilitation of criminals, including the art of fitting the right treatment to an offender.” BLACK’S LAW DICTIONARY 954 (8th ed. 2005).

¹⁶⁸ The district court cited two other prisoner cases to support its decision: *Fraise v. Terhune*, 283 F.3d 506 (3d Cir. 2002) and *DeHart v. Horn*, 227 F.3d 47 (3d Cir. 2000).

¹⁶⁹ *Rivera*, 2006 WL 1455789, at *3.

¹⁷⁰ *Id.*

dence,”¹⁷¹ while noting *Youngberg*’s holding that the constitutional rights of patients at state institutions “may be restricted in certain situations after being balanced against the reasons put forth by the State for restricting their liberties.”¹⁷² Invoking *Youngberg* here did not change the analysis, however, because the *Turner* test was the overriding framework; once the first factor was satisfied, the rest fell into place “like dominoes.”¹⁷³ Unlike in *Youngberg*, the court gave only cursory consideration to how the challenged policies advanced state interests; there is no indication of how the court came to its conclusion that a sexually explicit letter from the plaintiff’s girlfriend was detrimental to his therapy. The court’s ultimate holding that the policy was rationally related to legitimate interests¹⁷⁴ thus comes as no surprise.

Even a court that views civil commitment as different from imprisonment will apply the prison standard, raising the question of what civil status means. In *Fogle v. Bellow-Smith*, the clinical leader of a sex offender treatment center entered a “read order” for the plaintiff’s mail after staff members discovered that he had received a phone card from his father with a number preprogrammed for a sex line, in violation of the center’s policy against unauthorized exchanges and gifts.¹⁷⁵ The district court stated that civil commitment can be distinguished from imprisonment, but nevertheless applied *Turner*.¹⁷⁶ For the purposes of qualified immunity, the court found that the plaintiff did not have an established First Amendment right to receive mail without interference.¹⁷⁷

The court began by establishing that the plaintiff’s confidential communications with his attorney are clearly protected, noting that prisoners’ legal mail is protected, and “the standard would not be lower for civil detainees, who are generally subject to a higher level of protection [than prisoners].”¹⁷⁸ As to whether the plaintiff has a right to non-legal correspondence free from scrutiny, and whether the delay in receipt of mail caused by the read order was a constitutional violation, the court relied on the *Turner* standard, as

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Robertson, *supra* note 80, at 120; *see id.* and accompanying text.

¹⁷⁴ *Rivera*, 2006 WL 1455789, at *3.

¹⁷⁵ No. 4:06CV00227-ERW, 2007 WL 2507756, at *1 (E.D. Mo. Aug. 30, 2007). The plaintiff’s father also sent a similar phone card to another offender at the center in violation of the same policy. *See id.*

¹⁷⁶ *Id.* at *7, *8.

¹⁷⁷ *Id.* at *8.

¹⁷⁸ *Id.* at *7.

articulated by a decision in an Eighth Circuit prisoner case.¹⁷⁹ The court found that the *Turner* analysis was “applicable in the context of a civil detainee,” noting that “in determining the legitimacy of the state interest, the classification of the Plaintiff is significant.”¹⁸⁰ The court in *Fogle* then used *Youngberg* “to assess the legitimate government interest,” reasoning that the court’s role is to determine whether the restraint was the “result of professional judgment.”¹⁸¹ The court deferred to the judgment of the Center’s personnel, quickly concluding, “the Court believes that the treatment objectives of MSOTC are comparable to the safety concerns of prisons.”¹⁸² The decision gives no indication that the court examined the qualifications of the decisionmakers or whether their decision was a substantial departure from practices in similar facilities. So, while the decision nods to *Youngberg*, the extreme deference embodied by *Turner* decided the case, as the court accepted without question the administrators’ asserted justifications. The court accepted the commitment-center administrators’ argument that reading the mail was a necessary response to the plaintiff’s alleged breaking of phone card rules. Finding that the center “stated a legitimate government interest in reviewing Plaintiff’s non-legal mail, to ensure that Plaintiff did not continue to violate the rules regarding phone cards,”¹⁸³ the court did not explain how reading the content of mail related to two rules infractions—use of a phone card to call a sex line and an unauthorized gift or exchange of a phone card to another offender—that appear unrelated to the written content of correspondence.¹⁸⁴ The extreme deference of *Turner* requires no such explanation, and thus infringements on free speech are easy to defend.

A third decision involving mail restrictions takes a more considered approach to determining the standard for a civilly committed sex offender’s First Amendment claims. The court’s conclusion that *Turner* applies is deceptive because its application

¹⁷⁹ *Id.* (citing *Thongvanh v. Thalacker*, 17 F.3d 256, 259 (8th Cir. 1994) (holding that a ban on non-English prisoner correspondence violated due process, free speech and equal protection, where exceptions were made for Spanish speakers as well as for the plaintiff’s correspondence with his Lao-speaking parents and grandparents, for which translation services were used)).

¹⁸⁰ *Id.* at *8.

¹⁸¹ *Fogle*, 2007 WL 2507756 (citing *Youngberg v. Romeo*, 457 U.S. 307, 322(1982)).

¹⁸² *Id.* “The Court is not in a position to second guess the professional judgment of MSOTC personnel, as they are in a position to determine the best course of treatment for Plaintiff.” *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

of *Turner* eschews the usual extreme deference; this perhaps is an acknowledgement that the status of civil committees is distinct from that of prisoners and deserves a lesser degree of deference. In *Willis v. Smith*,¹⁸⁵ the district court found that staff at a civil commitment facility had violated the rights of a sex offender by opening a publication mailed to him when he was not present and confiscating it without ever informing him of their actions. The plaintiff's friend had mailed him a book that advocated the abolition of polygraphy, and the facility staff had confiscated it without informing him of its delivery because they believed that its contents were anti-therapeutic (the facility used polygraph tests extensively as part of its treatment).¹⁸⁶ Interestingly, the plaintiff argued that his status was much like a prisoner, and that he should therefore enjoy the protections he had enjoyed when he was in prison, including prompt notification and a clear process for appeal if the prison administration deemed incoming mail to be contraband.¹⁸⁷ The defendants argued that whether he is considered a patient or prisoner, the constitutional analysis would be the same, and the court agreed. Indeed, after considering the statuses of pretrial detainees and persons confined to state mental institutions after being found not guilty by reason of insanity, the court concluded that the status of civilly committed sex offenders was substantially similar to that of prisoners because, like prisoners, they have been convicted of a crime.¹⁸⁸ For this reason, the prisoner precedents applied. The court found that the plaintiff may be subjected to even more restrictive policies than prisoners, in light of the facility's interest in maintaining not only security, but also "the integrity of the treatment environment."¹⁸⁹

However, after concluding that the plaintiff's rights may be even more limited than prisoners', the court disagreed with the facility's professional judgments, even while proclaiming its deference to institutional decisionmaking. The court held that facility administrators failed to assert a legitimate institutional interest for opening the plaintiff's mail outside of his presence.¹⁹⁰ This examination of the institutional interest is more searching than the usual application of *Turner*. While the defendants asserted that they opened the package outside of the plaintiff's presence because of

¹⁸⁵ No. C04-4012-MWB, 2005 WL 550528 (N.D. Iowa Feb. 28, 2005).

¹⁸⁶ *Id.* at *3-4.

¹⁸⁷ *Id.* at *8.

¹⁸⁸ *Id.* at *10.

¹⁸⁹ *Id.* at *12.

¹⁹⁰ *Id.* at *16.

the high volume of packages during the holidays, unlike in *Turner*, the court did not view administrative efficiency as a factor in its analysis. As to the facility's decision to deny the plaintiff access to the entire book, the court found that only some parts of the book could be constitutionally withheld from the plaintiff, and that the defendant's efforts to deny information from specific sources was based on "personal biases and prejudices rather than upon their professional judgment."¹⁹¹ While the court deferred to the administrators' professional judgment that portions of the book on polygraph counter measures were anti-therapeutic, noting that the plaintiff presented no contrary evidence at trial, the court disputed administrators' assertions that materials on the validity of polygraphy would cause other patients at the facility to refuse to take polygraph tests.¹⁹² In doing so, the court disregarded *Turner's* "ripple effect" factor. Since the impact on other patients would, in the court's view, be minimal, the infringement on the plaintiff's constitutional rights by denying him the sections of the book questioning polygraphy was not justified.¹⁹³

While this decision presents a possibility of a searching inquiry with regard to civilly committed sex offenders' First Amendment claims, quite unlike the *Turner* standard's usual extreme deference toward prison administrators, it has been cited by at least one other federal district court to support a finding that civilly committed sex offenders are like prisoners and that *Turner* applies to civilly committed sex offenders' claims regarding mail policies.¹⁹⁴ The latter decision fails to note that *Willis's* version of *Turner* looks like an altogether different standard, as it uncharacteristically eschews extreme deference.¹⁹⁵

¹⁹¹ *Willis*, 2005 WL 550528 at *18.

¹⁹² *Id.* at *18.

¹⁹³ *Id.*

¹⁹⁴ See *Kollyns v. Watson*, No. 3:05-2401-JFA-JRM, 2006 WL 2716426 (D.S.C. Sept. 22, 2006) (holding that the *Turner* test applies to sexually violent predators and finding that the plaintiff failed to show that the facility's policy impinged on his right to freely exercise his Wiccan religion). *Kollyns* also cites the application of the *Turner* test by a district court in Iowa in *Thompson v. Vilsack*, and by a district court in New Jersey in *Rivera v. Rogers*, to civilly committed sex offenders' claims without acknowledging that the applications of *Turner* differ so dramatically in those two decisions that they scarcely seem to be using the same standard. *Kollyns*, 2006 WL 2716426, at *3 (citing *Thompson v. Vilsack*, 328 F. Supp. 2d 974 (S.D. Iowa 2004) and *Rivera v. Rogers*, No. 02-CV-2798 (DMC), 2006 WL 1455789 (D.N.J. May 22, 2006)). For further discussion of *Rivera* and *Thompson*, see *supra* notes 137-74 and *infra* notes 220-30 and related text.

¹⁹⁵ Two recent mail cases brought by civilly committed sex offenders mention an array of rules. Both decisions hold that the plaintiffs stated cognizable claims regarding the seizing and opening of incoming and outgoing mail, without indicating which

Compared to the court decisions on free speech, the free exercise of religion decisions are generally less tolerant of First Amendment infringements. The standards courts apply still approximate those applied to prisoners' claims. The difference is that while infringements on civilly committed sex offenders' free speech rights are permissible under the *Turner* standard, courts are more protective of the free exercise of religion for prisoners and civilly committed sex offenders alike.

B. Free Exercise of Religion Claims

Decisions on civilly committed sex offenders' free exercise of religion claims likewise echo courts' reasoning in decisions on prisoners' free exercise of religion claims, but with these claims, plaintiffs are much more likely to prevail, much like prisoner-plaintiffs. The courts rely on two standards: the *Turner* test and a federal statute that incorporates and expands the First Amendment protections of free exercise of religion for institutionalized persons. Both tests are also used for prisoners' free exercise of religion claims.

With the passage of the Religious Land Use and Institutionalized Persons Act¹⁹⁶ (RLUIPA), the landscape for prisoners' free exercise claims has shifted considerably from the precedent set by *O'Lone*.¹⁹⁷ RLUIPA was passed by Congress after its predecessor, the Religious Freedom Restoration Act (RFRA),¹⁹⁸ was invalidated as applied to the states.¹⁹⁹ The Supreme Court held that the RFRA exceeded Congress's remedial powers under section 5 of the Fourteenth Amendment.²⁰⁰ RLUIPA thus far has withstood constitutional challenges: its scope is narrower than RFRA, applying only to land use and institutionalized persons. The provisions of the statute relating to the free exercise of religion by institutionalized persons were enacted under Congress' interstate commerce and

standard should be applied. *See* *McNeal v. Mayberg*, No. 1:07-cv-00851-GSA (PC), 2008 WL 5114650 (E.D. Cal. Dec. 4, 2008); *see also* *Allen v. Mayberg*, No. 1:06-cv-01801-AWI-GSA (PC), 2008 WL 5135629 (E.D. Cal. Dec. 8, 2008).

¹⁹⁶ 42 U.S.C. §§ 2000cc-2000cc-5 (2006). After citing the *Turner* test for incoming prisoner mail and the *Procunier v. Martinez* standard for censorship of outgoing mail, these cases cite *Hydrick* for the proposition that plaintiffs' rights must be balanced with the State's interest in safety and security. The court does not clarify how the *Turner*, *Procunier*, and *Hydrick* standards relate to one another.

¹⁹⁷ *See supra* notes 113-26 and related discussion.

¹⁹⁸ Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4.

¹⁹⁹ *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

²⁰⁰ *Id.*

spending powers.²⁰¹ The statute prohibits the imposition of “substantial burdens” on the religious practices of people confined to institutions unless the government can prove that the burden furthers a compelling government interest by the least restrictive means.²⁰² RLUIPA therefore “incorporates and exceeds the Constitution’s basic protections of religious exercise,” expressly referencing the Free Exercise Clause of the First Amendment and establishing the strict scrutiny standard of review for claims under the statute.²⁰³

At least three federal courts have assumed without discussion that RLUIPA applies to civilly committed sex offenders,²⁰⁴ but it is worth examining whether the statute applies to them and, if so, under what category they are included because these questions implicate fundamental questions about sex offender civil commitment. RLUIPA applies to state-run institutions in four categories: (1) facilities for persons who are mentally ill, mentally retarded, or disabled; (2) “a jail, prison[,] or other correctional facility”; (3) “a pretrial detention facility”; or (4) a facility for juveniles in some circumstances.²⁰⁵ RLUIPA might apply to civilly committed sex offenders under the first or second definition but both possibilities raise constitutional difficulties. As to the application of RLUIPA to persons who are mentally ill, state statutes providing for civil commitment of sex offenders have used several variations of mental abnormality to justify civil commitment, as well as to determine criteria for commitment. Courts have struggled with the definition of mental impairment, as opposed to mental illness, as it pertains to the civil commitment of sex offenders and persons with mental illness, respectively. Critics argue that the definitions used for sex offenders are so blurry that serious constitutional questions are implicated.²⁰⁶ Kansas’s Sexually Violent Predator Act, for example,

²⁰¹ See 42 U.S.C. § 2000cc-1(b). The land-use provisions also rely on Congress’s powers under section 5 of the Fourteenth Amendment.

²⁰² *Id.*

²⁰³ *Lovlace v. Lee*, 472 F.3d 174, 198 (4th Cir. 2006) (citing 42 U.S.C. § 2000cc-2).

²⁰⁴ *Thompson v. Vilsack*, 328 F. Supp. 2d 974, 980 (S.D. Iowa 2004); *Bilal v. Lehman*, No. C04-2507-JLR-JPD, 2006 U.S. Dist. LEXIS 93152 (D. Wash. Oct. 2, 2006); *DeSimone v. Bartow*, No. 08-C-638, 2008 WL 3540565 (E.D. Wis. Aug. 12, 2008). See *infra* notes 220–55 and related discussion.

²⁰⁵ See 42 U.S.C. § 1997(1)(B). The statute defines an institution as a state-owned, -operated, or -managed facility “for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped,” or “a jail, prison, or other correctional facility” which “provid[es] skilled nursing, intermediate or long-term care, or custodial or residential care.” *Id.* § 1997(1).

²⁰⁶ For further discussion of the Court’s treatment of mental-health issues with regard to civil commitment, see Rudolph Alexander, Jr., *The United States Supreme Court*

defines 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 the predatory acts of sexual violence.”²⁰⁷ In *Hendricks*, the Court reversed the Kansas Supreme Court’s holding that the statutory requirement of “mental abnormality” failed to satisfy due process requirements that civilly committed individuals have a serious mental illness.²⁰⁸ The decision allows states great latitude in how mental impairment is defined.²⁰⁹ While the American Psychiatric Association has protested the “unacceptable misuse of psychiatry” to civilly commit sex offenders, “serv[ing] essentially nonmedical purposes,”²¹⁰ states remain free to commit sex offenders based on diagnoses which arguably apply to large numbers of incarcerated people, whether or not they have been convicted of sex offenses.²¹¹ Whether courts would view RLUIPA as applying to civilly committed sex offenders depends on their interpretation of the statute’s term “mental illness.” If their interpretation is broad enough to encompass “mental impairment,” civilly committed sex offenders likely are covered by RLUIPA.

RLUIPA might apply to sex offenders under RLUIPA’s “correctional facility” category. The statute does not define “correctional facility.” In defining “correctional institution,” *Black’s Law Dictionary* says “[s]ee prison,” and it further defines “[c]orrection” as “[t]he punishment and treatment of a criminal offender through a program of imprisonment, parole, and probation.”²¹² Under *Hendricks*, sex offender civil commitment would appear not to fall into RLUIPA’s correctional facility category because correctional facilities are at least partially punitive.²¹³ But because courts

and the Civil Commitment of Sex Offenders, 84 PRISON JOURNAL 361 (2004); see also Franklin T. Wilson, *Out of Sight, Out of Mind: An Analysis of Kansas v. Crane and the Fine Line Between Civil and Criminal Sanctions*, 84 PRISON J. 379 (2004); see also JANUS, *supra* note 7, at 36–41; see also Adam J. Falk, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment After Kansas v. Hendricks*, 25 AM. J. L. & MED. 117 (1999).

²⁰⁷ KAN. STAT. ANN. §§ 59-29a03(a) (1999), 59-29a07 (2006), 59-29a08 (2007).

²⁰⁸ *Kansas v. Hendricks*, 521 U.S. 346, 370 (1997).

²⁰⁹ *In re Care and Treatment of Hendricks*, 912 P.2d 129, 137–38 (Kan. 1994); *Hendricks*, 521 U.S. at 359.

²¹⁰ JANUS, *supra* note 7, at 23 (2006) (citing AM. PSYCHIATRIC ASSOC., DANGEROUS SEX OFFENDERS: A TASK FORCE REPORT ON SEXUALLY DANGEROUS OFFENDERS 173–74 (1999)).

²¹¹ Friedland, *supra* note 23, at 121–22.

²¹² BLACK’S LAW DICTIONARY 293, 294 (8th ed. 2005).

²¹³ *Hendricks*, 521 U.S. at 369.

considering RLUIPA claims brought by civilly committed sex offenders have also relied on prison free exercise cases and on *Turner*, without questioning the prison standard's applicability, an argument can be made that sex offender civil commitment does belong in RLUIPA's correctional facility category. RLUIPA's definition of institutionalized persons includes persons in "other correctional facilit[ies]";²¹⁴ it might also be argued that civil commitment centers, being post-correctional facilities, are included in this category.

RLUIPA's protections ought to extend to civilly committed sex offenders because, while Congress may not have anticipated sex offender civil commitment when it set out statutory categories of institutions, civilly committed sex offenders are, in fact, institutionalized. In a case upholding RLUIPA against an Establishment Clause challenge, the Supreme Court described the institutions covered by the statute as those:

in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise. RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion.²¹⁵

By this description, sex offenders who have been confined civilly, and whose physical movement, food, physical possessions, and attendance at religious services are subject to the control of commitment facility administrators, are institutionalized persons.

In analyzing the Free Exercise Clause claims of civilly committed sex offenders, two district courts applied an unusually deferential version of the *Turner* prison standard, and another never reached the First Amendment issue because it held that the challenged practices violated RLUIPA. In all three decisions, the analyses employed are identical to prison free exercise of religion cases.²¹⁶

*Thompson v. Vilsack*²¹⁷ is a rare decision finding a challenged restriction unconstitutional under the *Turner* standard. The district

²¹⁴ 42 U.S.C.A. § 1997(1)(B)(ii) (2006).

²¹⁵ *Cutter v. Wilkinson*, 544 U.S. 709, 710 (2005) (citation omitted).

²¹⁶ Two other recent district court decisions also treated a civilly committed sex offender's free exercise claim in the same manner as a prisoner's claim, applying both RLUIPA and *Turner* and granting the defendants' motion for summary judgment under both standards. *Strutton v. Meade*, No. 4:05CV02022 ERW, 2008 WL 4534015 (E.D. Mo. Sept. 30, 2008); *Palermo v. White*, No. 08-cv-126-JL, 2008 WL 4224301 (D.N.H. Sept. 5, 2008).

²¹⁷ 328 F. Supp. 2d 974, 980 (S.D. Iowa 2004).

court's application of *Turner* in *Thompson* is less deferential than most. The U.S. District Court in Iowa applied *Turner* to a civilly committed sex offender's motion for summary judgment regarding a proposed settlement agreement requiring him to pay for kosher meals.²¹⁸ After he sued the state for refusing to provide him kosher meals, the parties reached a settlement: the Iowa Department of Human Services agreed to provide him with Kosher meals, but only if Thompson paid part of the cost of the meals from his earnings while civilly committed, an arrangement that he contended was unconstitutional.²¹⁹

The court in *Thompson* cited *Beerheide v. Suthers*,²²⁰ a Tenth Circuit case that held that requiring Jewish prisoners to partially pay for Kosher meals violated the Free Exercise Clause.²²¹ The *Thompson* court's reasoning closely paralleled that in *Beerheide*: after establishing that the plaintiff's beliefs were sincerely held, both courts found that two asserted penological interests—conserving prison resources and preventing inmate conflict—were legitimate,²²² but that the state provided insufficient evidence to show that the challenged policies furthered those legitimate penological goals.²²³ The court in *Thompson* additionally found that a third asserted governmental interest—"rehabilitation of the patient by teaching financial responsibility"—failed to even satisfy the first prong of the *Turner* standard: the requirement that Thompson, unlike others, must pay for his meal punished him "solely on the basis of his faith."²²⁴

The court in *Beerheide* cited *Turner* for the proposition that prison officials "must still make their case by presenting evidence, however minimal that evidence might be."²²⁵ While this approach puts more of a burden on the state than the usual application of

²¹⁸ *Id.*

²¹⁹ *Id.* at 976.

²²⁰ *Beerheide v. Suthers*, 286 F.3d 1179 (10th Cir. 2002).

²²¹ *Id.*

²²² *Id.* at 1187; *Thompson*, 328 F. Supp. 2d at 978.

²²³ *Beerheide*, 286 F.3d at 1191–92 (upholding the district court's finding that the state failed to present sufficient evidence that the cost impact of providing kosher meals would be more than de minimis and that providing kosher meals free of charge would negatively affect prison guards and other prisoners); *Thompson*, 328 F. Supp. 2d at 978 (noting that the state fails to provide budgetary figures to demonstrate a financial impact or that requiring co-payments would reduce tensions between kosher and non-kosher "inmates").

²²⁴ *Thompson*, 328 F. Supp. 2d at 979.

²²⁵ *Beerheide*, 286 F.3d at 1191.

the *Turner* test,²²⁶ the analyses for prisoners in *Beerheide* and civilly committed sex offenders in *Thompson* are virtually identical. The *Thompson* court did not mention whether civil commitment might differ from prison, or whether penological interests might be different from those of administering a civil commitment center. Even when the state asserted it had a legitimate interest in rehabilitation, the court failed to take the *Hendricks* purpose-is-treatment-not-punishment bait, dismissing that interest in relation to the required payment for kosher food, and continuing to apply the prison standard from *Beerheide*.²²⁷

A recent district court decision in New York similarly applied the *Turner* test to a civilly committed sex offender's claim that his free exercise of religion was infringed by a state psychiatric hospital's failure to provide him halal meals and refusal to let him pray.²²⁸ In *Abdul-Matiyn v. Pataki*, the court denied a motion to dismiss filed by staff and administrators of a state psychiatric hospital First Amendment claims brought by a convicted sex offender who had been civilly committed there.²²⁹ The court cited a case that held, "[t]he Free Exercise clause extends 'into other aspects of prison life including, pertinently, that of an inmate's diet . . .,'" ²³⁰ implicitly assuming that the status of the plaintiff was the same as that of a prisoner. In fact, Abdul-Matiyn was a sex offender who, after his release from prison, had been arrested and detained in jail due to a parole violation, then transferred to a psychiatric facility and civilly committed past the time he was scheduled for release.²³¹ The court applied the *Turner* test, as articulated by a Second Circuit prison case.²³² In that case, the court ruled in favor of the plaintiff, denying the defendants' motion to dismiss because they had failed to assert any legitimate penological interest to justify denying the plaintiff halal meals, religious texts, and prayer

²²⁶ Perhaps this application of *Turner* is less deferential because Congress demonstrated its intent to provide extra protections for the free exercise of religion.

²²⁷ *Thompson*, 328 F. Supp. 2d at 979.

²²⁸ *Abdul-Matiyn v. Pataki*, No. 9:06-CV-1503 (N.D.N.Y. Apr. 8, 2008).

²²⁹ *Id.*

²³⁰ *Id.* at *12 (citing *Johnson v. Guiffere*, No. 9:04-CV-57, 2007 WL 3046703, at *4 (N.D.N.Y. Oct. 17, 2007)).

²³¹ *Id.* at *2-3.

²³² *Benjamin v. Coughlin*, 905 F.2d 571, 574 (2d Cir. 1990) (holding that Rastafarians' religious practice of leaving hair unshorn can be reasonably accommodated by pulling their hair back rather than enforcing a haircut policy but that prison officials have legitimate penological interests for prohibiting prayer groups that are unsupervised by non-prisoner religious leaders and for prohibiting the wearing of crowns).

time.²³³ While an application of *Turner* that renders a decision in favor of a plaintiff appears unusual, the decision in *Abdul-Matiyn* did not reach the merits, as it denied the motion to dismiss a pro se litigant's claim. The court's assumption that the *Turner* test applied remains troubling.²³⁴

Another decision on a civilly committed sex offender's free exercise claim, *Bilal v. Lehman*, applies RLUIPA after holding that the *Turner* standard has been supplanted by the federal statute.²³⁵ Yet the *Bilal* decision is similar to *Thompson* and *Abdul-Matiyn* in that it treats a free exercise claim under civil commitment much like a prisoner's free exercise claim. Applying RLUIPA's strict scrutiny, the court found that denying the plaintiff a halal meat diet substantially burdened his sincerely held religious beliefs, failed to further a compelling governmental interest, and was not the least restrictive means of furthering any compelling governmental interest.²³⁶ *Bilal*, a civilly committed Muslim sex offender in Washington State, sued both Department of Corrections (DOC) officials and officials of the sex offender civil commitment unit for violating the First Amendment, the Equal Protection Clause, and RLUIPA.²³⁷ While incarcerated, the defendant had repeatedly requested halal meat,²³⁸ but was given only vegetarian meals, except during religious holidays.²³⁹ After he was civilly confined, he again requested halal meat, but was given kosher meat until he obtained counsel

²³³ *Abdul-Matiyn*, 2008 WL 974409, at *12.

²³⁴ Another recent decision applying the *Turner* test to a civilly committed sex offender's claim found that a facility's ban on the practice of martial arts was reasonably related to institutional security. *Marsh v. Liberty Behav. Health Care, Inc.*, No. 2:06-cv-125-FtM-34SPC, 2008 WL 821623 (M.D. Fla. Mar. 27, 2008). In *Marsh*, the plaintiff argued that karate was an integral aspect of his Zen Buddhist religious practice, but the court granted defendants' motion for summary judgment, pointing to factual evidence of the security threat posed by martial arts practice. *Id.* at *3. The plaintiff had used karate to seriously injure another resident, and that the plaintiff was not prohibited from practicing martial arts in his cell. *Id.* at *4. The court began its analysis by noting that civilly committed persons are "due a higher standard of care than those who are criminally committed" but nevertheless finding that the *Turner* test applied because sexually violent predators are in an analogous position to persons who are criminally confined. *Id.* at *5.

²³⁵ *Bilal v. Lehman*, No. C04-2507-JLR-JPD, 2006 U.S. Dist LEXIS 93152, at *38 (W.D. Wash. Oct. 2, 2006) (citing *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005)).

²³⁶ *Id.* at *42.

²³⁷ *Id.* at *1-2. The equal protection claim was based on the fact that prison inmates who were Jewish were given kosher meat, but Muslim inmates were not given halal meat. *Id.*

²³⁸ *Id.* at *3.

²³⁹ *Id.* at *26

and filed a complaint.²⁴⁰ At that point, the facility provided him halal meat but maintained that it was not obligated to do so.²⁴¹ The plaintiff sought monetary, injunctive, and declaratory relief against both the prison where he had been incarcerated and the facility where he continued to be civilly committed.²⁴²

The court assumed that RLUIPA applied to civil commitment, analyzing the applicability of RLUIPA to the plaintiff's claim only on the issue of whether facilities that did not receive federal funds were subject to RLUIPA.²⁴³ The court approached the claims against the prison and the civil commitment facility differently only to the extent that, because the plaintiff was no longer in prison, his claims for injunctive and declaratory relief against *prison* officials were moot.²⁴⁴ The court then analyzed the plaintiff's claim against civil commitment center officials under RLUIPA.²⁴⁵ With Bilal's "sincerely held religious belief" undisputed, the court found that his religious practices were substantially burdened.²⁴⁶ Citing the *Cutter* decision on the same issue, the court reasoned that evidence showed that eating halal meat is a regular practice of many Muslims,²⁴⁷ and the state had failed to demonstrate compelling reasons to deny the plaintiff halal meat or that such denial is the least restrictive means to achieve its purposes.²⁴⁸ The court then found that the state failed to show that the challenged policy furthered the asserted governmental interests of reducing costs,²⁴⁹ streamlining food production,²⁵⁰ or limiting security risks.²⁵¹ The court rejected the defendants' assertion that the *Turner* standard should be applied to determine whether the policy is the least restrictive means of achieving government goals: "When Congress passed RLUIPA, it replaced the *Turner* rational basis standard of review with a strict scrutiny standard."²⁵² The state clearly failed that test.²⁵³

Infringements on civilly committed sex offenders' speech are

²⁴⁰ *Id.* at *6.

²⁴¹ *Bilal*, 2006 U.S. Dist. LEXIS 93152, at *6.

²⁴² *Id.* at *2.

²⁴³ *Id.* at *8.

²⁴⁴ *Id.* at *48.

²⁴⁵ *Id.* at *5–6.

²⁴⁶ *Id.* at *19, *26–27.

²⁴⁷ *Bilal*, 2006 U.S. Dist. LEXIS 93152, at *26–27; *Cutter*, 544 U.S. at 714.

²⁴⁸ *Bilal*, 2006 U.S. Dist. LEXIS 93152, at *57.

²⁴⁹ *Id.* at *31 (citing *Luckette v. Lewis*, 883 F. Supp. 471, 480 (D. Ariz. 1995)).

²⁵⁰ *Id.* at *35.

²⁵¹ *Id.* at *37.

²⁵² *Id.* at *38.

²⁵³ *Id.* at *42.

highly likely to be upheld with the extremely deferential *Turner* test, but infringements on free exercise of religion are likely to be found unconstitutional under RLUIPA (and a less deferential version of *Turner* that perhaps stems from the courts' knowledge that Congress has legislated on the issue.). Prisoners' and civilly committed sex offenders' First Amendment claims thus fare the same in federal court because the same tests are applied to both categories of plaintiffs. Either the status of prisoners and civilly committed sex offenders is the same (implicating double jeopardy, *ex post facto*, and procedural due process violations with regard to civil commitment), or courts should apply a different standard recognizing civilly committed sex offenders' civil status.

VI. ALTERNATIVES TO THE PRISON STANDARD

Given the United States Supreme Court's holding in *Hendricks* that civil commitment is not imprisonment,²⁵⁴ the prison standard is not appropriate for civilly committed sex offenders' First Amendment claims. It is worth asking what the appropriate standard would be, but before doing so, some fundamental issues require attention.

A core problem with civil commitment is the underlying constitutional infirmity of civilly committing sex offenders when treatment—the characteristic that allegedly distinguishes civil commitment from imprisonment—has not been proven to reduce recidivism and is often a legislative justification rather than a genuine goal.²⁵⁵ Even beyond the question of the efficacy of treatment, much of the science underlying civil commitment is suspect. Michael Perlin has argued that the *Hendricks* decision, like much mental disability jurisprudence, is characterized by what he terms “pretextuality”: “courts accept, either implicitly or explicitly, testimonial dishonesty and engage similarly in dishonest decisionmaking.”²⁵⁶ Other scholars have noted that the use of dubious scientific claims to justify civil commitment constitutes another variation of pretextuality, one that “provides a legitimizing cover, allowing the state to cast the constitutionally doubtful preventive detention of dangerous individuals as constitutionally safe civil commitment.”²⁵⁷

The *Hendricks* decision hinges on treatment—because the statute's purpose was treatment and not punishment, the Court found

²⁵⁴ See *supra* notes 41–61 and accompanying text.

²⁵⁵ See *supra* note 18.

²⁵⁶ Perlin, *supra* note 42, at 1252.

²⁵⁷ Prentky, *Science on Trial*, *supra* note 58, at 361.

that it passed constitutional muster. But treatment was merely a pretext for the Kansas civil commitment statute. The Court ignored facts that showed that treatment was not the bona fide goal of Kansas's confinement of Hendricks,²⁵⁸ and failed to consider compelling evidence that the treatment of sex offenders was entirely unproven.²⁵⁹ Twelve years after *Hendricks*, the efficacy of sex offender treatment is still far from widely accepted.²⁶⁰ Although courts are reluctant to become involved in "battles of the experts" over whether treatment works, given the high constitutional values at stake, the judiciary cannot afford to ignore the contested state of scientific research on the treatment of sex offenders in civil commitment.²⁶¹ The law has developed tools to evaluate the acceptability of scientific evidence,²⁶² and courts must be cautious about premising decisions on unproven science.

Scholars have argued that science plays an especially important role in civil commitment proceedings, in which scientific testimony on diagnoses and future risk of harmful behavior are determinative of indefinite confinement.²⁶³ The question of what is

²⁵⁸ The State of Kansas failed to afford Hendricks any treatment during his civil commitment until the eve of litigation. *Kansas v. Hendricks*, 521 U.S. 346, 383–84 (1997). See *supra* note 69.

²⁵⁹ Two amicus briefs made this point: Brief for the American Psychiatric Association as Amicus Curiae in Support of Leroy Hendricks at 29–30, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (Nos. 95-1649, 95-9075), 1996 WL 469200 (citing U.S. GEN. ACCOUNTING OFFICE, SEX OFFENDER TREATMENT: RESEARCH RESULTS INCONCLUSIVE ABOUT WHAT WORKS TO REDUCE RECIDIVISM GAO/GDD-96-137 (1996) (arguing that a *parens patriae* state power does not justify civil confinement where "available treatments are far from proven") and Brief for the National Mental Health Association as Amicus Curiae in Support of Respondent at 14, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (No. 95-1649), 1996 WL 471077 (pointing to research findings that "little, if any, effective treatment for violent sex offenders" exists). Both briefs point out that, unlike sex offender treatment, treatment of mental illness is widely accepted and demonstrably effective. See Brief of the Association for the Treatment of Sexual Abusers Amicus Curiae in Support of Petitioner at 11–12, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (No. 95-1649), 1996 WL 471027.

²⁶⁰ See *supra* note 19 and accompanying text; see also Monica Davey & Abby Goodnough, *For Sex Offenders, Dispute on Therapy's Benefit*, N.Y. TIMES, Mar. 6, 2007, at A1 (noting the lack of research on effective treatment as well as a dearth of ethical and training standards for psychologists conducting assessments). Janus points to research that suggests that highly supervised community living can effectively reduce the risk of recidivism. See JANUS, *supra* note 7, at 121–22.

²⁶¹ One barrier to evaluating the efficacy of treatment in the context of civil confinement is that so few civilly confined offenders are released, resulting in a dearth of data on recidivism rates after their release.

²⁶² *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (announcing a multi-factor test to determine whether novel scientific evidence should be admitted).

²⁶³ Prentky, *Science on Trial*, *supra* note 59, at 357.

“good science” plagues courtrooms and has been the subject of much scholarship.²⁶⁴ Some have argued that critics of “junk science” in courtrooms carry their own political agendas.²⁶⁵ It is clear, nevertheless, that in the scientific community, the meaning and validity of diagnoses assigned to sex offenders,²⁶⁶ the reliability of actuarial assessments of future dangerousness,²⁶⁷ and the efficacy of

²⁶⁴ See, e.g., PETER W. HUBER, GALILEO'S REVENGES: JUNK SCIENCE IN THE COURTROOM (1991). “Good science” has been defined as “the faithful and rigorous adherence to the findings, the limitations, and the conclusions of published, peer-reviewed articles in scientific journals.” Prentky, *Science on Trial*, *supra* note 59, at 358.

²⁶⁵ See, e.g., Gary Edmond & David Mercer, *Trashing “Junk Science,”* 1998 STANFORD TECH. L. REV. 3 (1998) (arguing that the junk-science model is a politically charged framework used to advance a conservative tort-reform agenda).

²⁶⁶ See Andrew Hammel, *The Importance of Being Insane: Sexual Predator Civil Commitment Laws and the Idea of Sex Crimes as Insane Acts*, 32 HOUS. L. REV. 775, 808–09 (1995) (noting that the most common diagnosis applied to sex offenders, antisocial personality disorder, probably applies to the majority of incarcerated criminal offenders generally); see also Prentky, *Science on Trial*, *supra* note 59, at 368 (citing John Kip Cornwell, *Understanding the Role of the Police and Parens Patriae Powers in Involuntary Civil Commitment Before and After Hendricks*, 4 PSYCHOL. PUB. POL'Y AND L. 377 (1998)) (anywhere between 50% and 75% of the prison population might qualify for civil commitment on the basis of an [Antisocial Personality Disorder] diagnosis,” raising a constitutional problem because the Supreme Court has held that “SVP commitments must target a small subgroup that is somehow distinguished from the ordinary dangerous recidivist.”). Prentky also notes that, because the *Diagnostic and Statistical Manual of Mental Disorders* used by psychiatrists provides little guidance on diagnosing rapists, many are diagnosed with Paraphilia Not Otherwise Specified, a diagnosis whose definition is “so amorphous that no research has ever been conducted to establish its validity.” *Id.* at 366 (citing Holly A. Miller et al., *Sexually Violent Predator Evaluations: Empirical Evidence, Strategies for Professionals, and Research Directions*, 29 LAW & HUMAN BEHAV. 29, 39 (2005)).

²⁶⁷ Actuarial risk assessment is a statistical method of assessing the risk of recidivism that identifies and assigns importance to various risk factors, creating a formula to calculate the risk for an individual offender. JANUS, *supra* note 7, at 56–58. While many researchers allow that actuarial assessments are more accurate than clinical assessment (wherein an individual clinician estimates future risk of reoffending based on interviewing an offender), whether these new techniques merit admissibility is an open question. See, e.g., Terence W. Campbell, *Sexual Predator Evaluations and Phenology: Considering Issues of Evidentiary Reliability*, 18 BEHAV. SCI. & L. 111 (2000); Thomas R. Litwack, *Actuarial Versus Clinical Assessments of Dangerousness*, 7 PSYCHOL. PUB. POL'Y & L. 409 (2001); see also Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 AM. CRIM. L. REV. 1443, 1444 (2003) (arguing that “actuarial methods have proven equal or superior to clinical judgments,” though some scales are more reliable than others). Even so, “the morality of depriving people of long-term liberty based on predictions of future crimes is questionable, in significant part because all prediction is ultimately based on group membership.” *Id.* at 1478. The Department of Justice noted that actuarial risk assessment, while more accurate than clinical judgment, “cannot determine whether a particular person will or will not reoffend.” CTR. FOR SEX OFFENDER MGMT., U.S. DEP'T OF JUSTICE, THE IMPORTANCE OF ASSESSMENT IN SEX OFFENDER MANAGEMENT: AN OVERVIEW OF KEY PRINCIPLES AND PRACTICES 6 (2007), available at <http://>

treatment²⁶⁸ are deeply contested. While diagnosis and predictions of future dangerousness are the elements that determine whether a sex offender will face indeterminate detention, the efficacy of treatment is the linchpin to the constitutionality of the civil commitment enterprise.²⁶⁹

If one accepts for a moment the premise that civil commitment is not punitive and is on that basis distinguishable from imprisonment, the question becomes what standard should apply to civilly committed sex offenders' First Amendment claims. An application of the *Turner* test with civil-confinement-related interests simply substituted for penological interests is inappropriate because *Turner* drew on a long line of prison cases.²⁷⁰ The great deference to prison administrators' goals stems from the well-established primacy of prison security as a penological goal.²⁷¹ Because *Hendricks* held that the purpose of sex offender civil confinement is not punitive,²⁷² courts would need to look to First Amendment free speech cases outside of the incarceration context to develop a standard for analyzing the rights of civilly committed sex offenders.²⁷³ One potential model is the treatment of students' First Amendment rights at school.

In *Tinker v. Des Moines Independent School District*, the Supreme Court declared that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the school-

www.csom.org/pubs/assessment_brief.pdf. It also noted that the tool can produce both false-positive and false-negative results. *Id.*

²⁶⁸ JANUS, *supra* note 7, at 53–54. "There is no consensus about the efficacy of sex offender treatment." *Id.* Janus notes that some experts believe intensive supervision in the community is the best strategy to prevent recidivism. *Id.* at 121 (citing ROBERT ALAN PRENTKY & ANN WOLBERT BURGESS, FORENSIC MANAGEMENT OF SEXUAL OFFENDERS 243 (2000)).

²⁶⁹ A recent case points out deeply troubling methods of predicting of future dangerousness. In *In re M.D.*, the North Dakota Supreme Court affirmed the denial of a civilly committed sex offender's petition for discharge after ten years in civil confinement. 757 N.W.2d 559 (N.D. 2008). One expert testified, based on actuarial assessments, that M.D. was unlikely to reoffend. *Id.* at 560. The other expert found that his treatment had thus far been ineffective, largely on the basis of the petitioner's consensual sexual relationship with another civilly committed man who was described as "young-looking." *Id.* The dissent pointed out that the court's decision would indefinitely confine a person based on a homosexual relationship for which the petitioner could not be sanctioned criminally, and that if after ten years, the petitioner had not completed treatment, the efficacy of such treatment was questionable. *Id.* at 563–64 (Kapsner, J., dissenting) (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

²⁷⁰ See *supra* notes 82–88 and accompanying text.

²⁷¹ *Id.*

²⁷² See *supra* Section III.

²⁷³ Because the civil commitment of sex offenders falls within RLUIPA's application to institutions, that statute provides the standard for free exercise claims.

house gate.”²⁷⁴ The Court held that freedom of speech may be restricted by school administrators only with a showing that such expression “materially and substantially” interferes with appropriate discipline.²⁷⁵ *Tinker* acknowledges that students’ First Amendment rights are affected by the “special characteristics of the school environment,” noting that schools educate “the young for citizenship” but that school officials have the “comprehensive authority. . .to prescribe and control conduct in the schools,” albeit in a manner “consistent with fundamental constitutional safeguards.”²⁷⁶ The *Tinker* rule has been modified by subsequent decisions holding that school officials can restrict vulgar and lewd student speech,²⁷⁷ school-sponsored student speech,²⁷⁸ and student speech that promotes (or can be reasonably interpreted as promoting) drug use,²⁷⁹ regardless of whether such speech has caused a disruption. A standard that similarly acknowledges the right of civilly committed sex offenders to speak freely unless such expression materially and substantially interferes with the administration of civil commitment centers would put a higher burden on administrators to justify restrictions than the extremely deferential *Turner* test.

Clearly the functions and characteristics of civil commitment facilities are entirely different from those of schools. A First Amendment rule based on *Tinker* must take into account the special characteristics of civil commitment facilities, including security concerns and their underlying purposes of providing treatment and incapacitating sex offenders. With these characteristics and purposes in mind, courts might conduct a fact-specific inquiry to determine whether the speech a commitment facility seeks to limit would substantially and materially interfere with the center’s administration. In *Tinker*, the Court noted that the donning of black armbands to protest the Vietnam War by high school students was a “silent, passive expression of opinion”²⁸⁰ and that there was “no evidence whatever of petitioners’ interference, actual or nascent, with the schools’ work or of collision with the rights of other students to be secure and to be let alone.”²⁸¹ The Court also found

²⁷⁴ *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969). See *infra* Part V.B.

²⁷⁵ *Tinker*, 393 U.S. at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir.1966)).

²⁷⁶ *Id.* at 506, 507.

²⁷⁷ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

²⁷⁸ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

²⁷⁹ *Morse v. Frederick*, 551 U.S. 393 (2007).

²⁸⁰ *Tinker*, 393 U.S. at 508.

²⁸¹ *Id.*

that there was no evidence that the actions resulted in violence or threats of violence or the disruption of classes.²⁸² In the sex offender commitment facility context, the Court in *Rivera* might have looked to whether the sexually explicit letter from the plaintiff's girlfriend threatened to disrupt the administration of the center.²⁸³ The letter was presumably mailed from one consenting adult to another. While the court noted that sexually explicit materials might interfere with treatment goals, a fact-specific inquiry would determine whether the letter undermined the plaintiff's treatment. Such an inquiry would likely raise difficult questions, reminiscent of *Youngberg*: should a facility's assertion that such a letter was contrary to treatment goals be accepted at face value? In *Tinker*, the Court questioned the school's assertion that the wearing of armbands was inherently disruptive, a reminder that the judiciary has not always deferred so completely to institutional administrators. A court is more likely to follow the considerable deference to hospital administrators in *Youngberg*, however, as the civil commitment of people with mental illnesses is more analogous to sex offender civil commitment than is a public secondary school, characterized by the Court in *Tinker* as "a marketplace of ideas."²⁸⁴

Even if courts gave more deference to civil commitment administrators than to the school administrators in *Tinker*, once the extreme deference of *Turner* is removed, a global policy that bans all sexually explicit materials would become suspect. Where the goal is treatment, not punishment, a strong argument can be made that policies in treatment centers should be individualized, since sex offenders are a heterogeneous group.²⁸⁵ In prisons, by contrast, policies address universal institutional needs, such as security. Individual facts might still support interference with mail in a civil commitment facility. If the facts showed that a civilly committed sex offender was sexually coercing others at the commitment center, and such behavior was linked to his possession of sexually explicit materials, a court might find that the restriction on speech was justified because of material and substantial interference with the ad-

²⁸² *Id.*

²⁸³ *Rivera v. Rogers*, No. 02-CV-2798 (DMC), 2006 WL 1455789 (D.N.J. May 22, 2006). See notes 137–56 and accompanying text.

²⁸⁴ *Tinker*, 393 U.S. at 512.

²⁸⁵ CTR. FOR SEX OFFENDER MGMT., *supra* note 272, at 1 (stating that comprehensive assessments are needed to determine how best to manage individual sex offenders because they are a "heterogeneous group" with differences in "the types of victims they target, their reasons for engaging in such behavior, the degree to which they are motivated to change, the types of interventions that will be most effective for them, and their risk of reoffending.").

ministration of the center.²⁸⁶

Applying this test to the facts in *Fogle*,²⁸⁷ a court would inquire whether the “read order” for the plaintiff’s mail was justified because unscrutinized mail materially and substantially interfered with the administration of the Missouri Sexual Offender Treatment Center. While the Center might argue that by breaking the phone card rules, the plaintiff *had* substantially interfered with rules of the Center and, therefore, with its orderly administration, the court might ask how reading the content of the plaintiff’s mail related to such interference. The court’s account of the facts of the case does not indicate how the content of the letters relates to the receipt of phone cards.

The risk to modeling an analysis of the First Amendment rights of civilly committed sex offenders on *Tinker* and the subsequent school cases is that the exceptions could swallow the rule, as civil commitment facility administrators are likely to argue the same interests advanced by prison officials: security, safety, and the need to create incentives for good behavior. If these interests resemble penological interests, it is because they are such interests. Even a new standard might slide into the prison standard because, as the federal courts have implicitly recognized, sex offender civil commitment is penological in nature. Attempts to find a more appropriate First Amendment standard inevitably lead back to the prison cases, revealing the pretextuality of the *Hendricks* holding that civil commitment is not punitive and is thereby constitutional.

The constitutional implications of confining individuals without clear criteria for future dangerousness or mental impairment and without the due process protections of the criminal justice system have been much discussed. The First Amendment infringements that accompany civil commitment also deserve serious attention. With the First Amendment’s exalted place in the American constitutional scheme,²⁸⁸ the Supreme Court has warned that

²⁸⁶ These hypothetical facts are based on a recent case involving First Amendment claims by an incarcerated sex offender. *See Thomas v. Werholtz*, 272 F. App’x 687 (10th Cir. 2008). The Tenth Circuit affirmed the district court’s holding that the confiscation of twelve sexually explicit letters by prison officials did not violate the plaintiff’s First Amendment rights because, while he had a right to receive the mail, “the continuing right to retain the mail lies in state law, not constitutional law.” *Thomas v. Werholtz*, No. 04-3237-CM, 2006 WL 2726271, at *1 (D. Kan. Sept. 20, 2006). The Tenth Circuit also noted that other inmates had complained that the plaintiff tried to intimidate them into having sex with them; prison personnel asserted that the letters corroborated these complaints. *Id.*

²⁸⁷ *See supra* notes 175–86 and accompanying text.

²⁸⁸ *See supra* notes 24–27 and accompanying text.

any such restriction is only justified by “clear and present danger.”²⁸⁹ The future danger to public safety posed by any individual sex offender is speculative, but the danger to such an offender’s First Amendment rights, by contrast, is manifest. First Amendment rights are being abridged by the application of the prison standard to persons with civil status—clearly, presently, and dangerously.

VII. CONCLUSION

The state cannot have it both ways. If confinement of a sexually violent predator is civil for the purposes of evaluation under the Ex Post Facto Clause, that confinement is civil for the purposes of determining the rights to which the detainee is entitled while confined. Civil status means civil status, with all the . . . rights that accompany it.²⁹⁰

Presently, civilly committed sex offenders lack the protections of the criminal justice system, but endure all of the restrictions of imprisonment. They are in an untenable legal limbo. When the Ninth Circuit addressed a challenge to the conditions of confinement by a sex offender awaiting a commitment hearing, the court held that if conditions prior to confinement are worse than conditions in confinement, the challenged conditions are presumed to be unconstitutionally punitive, “[o]r to put it more colorfully, purgatory cannot be worse than hell.”²⁹¹ While the Ninth Circuit was referring to a detainee’s substantive due process claim prior to civil commitment, the same principle holds for the First Amendment rights of civilly committed sex offenders. With their double jeopardy and *ex post facto* claims denied, but their First Amendment claims treated like those of prisoners, civilly committed sex offenders are in a kind of purgatory. Their constitutional rights are curtailed under the deferential *Turner* standard as though they were prisoners, but they lack the procedural protections the Constitution affords prisoners. The state is indeed having it both ways.

²⁸⁹ *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

²⁹⁰ *Jones v. Blanas*, 393 F.3d 918, 933 (9th Cir. 2004) (reversing summary judgment in a civil detainee’s claim of substantive due process violations). While awaiting a civil commitment determination the detainee was subjected to more restrictive conditions than prison inmates in the same facility: he was denied access to religious services; his access to the prison library was curtailed; and his recreational activities were eliminated. *Id.* at 924.

²⁹¹ *Id.* at 933; *see Bell v. Wolfish*, 441 U.S. 520 (1979) (holding that pretrial detainees cannot be punished because they have not yet been convicted).

