

# Massachusetts's Sexually Dangerous Persons Legislation: Can Juries Make a Bad Law Better?

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Lisa Kavanaugh\*

## Introduction

On September 9, 1999, the Massachusetts legislature passed a bill reauthorizing the indefinite civil commitment of "sexually dangerous persons" under chapter 123A of the General Laws of Massachusetts ("chapter 123A").<sup>1</sup> For nine years prior to the passage of the legislation, chapter 123A had lain dormant, following a 1990 determination by a panel of lawyers, psychologists, prison administrators, and judges that Massachusetts's civil commitment scheme for sex offenders "neither enhance[s] public safety nor successfully treat[s] these offenders."<sup>2</sup> Emboldened by the Supreme Court's decision in *Kansas v. Hendricks*<sup>3</sup>—and apparently unconstrained by the findings of its own commission nine years earlier—the Massachusetts legislature "found" that the danger of recidivism among sex offenders was "grave" and that civil commitment was a justifiable measure to protect the public from such individuals.<sup>4</sup>

The Massachusetts legislature committed an egregious error by reenacting the dormant provisions of chapter 123A. More than any prior incarnations, the 1999 legislative scheme repudiates the collective wisdom of legal and mental health professionals that sex offenders do not

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<sup>1</sup> See 1999 Mass. Acts 74.

<sup>2</sup> Governor's Special Advisory Panel on Forensic Mental Health, Final Report to Governor Dukakis, Senators Harold, Houston, and McGovern, and Representatives Brett, Kollios, and Voke 47 (Sept. 25, 1989) [hereinafter Final Report] (on file with the *Harvard Civil Rights-Civil Liberties Law Review*). The Final Report prompted the legislature, in 1990, to repeal §§ 3–6 of chapter 123A, thereby forbidding all new sex offender commitments on or after September 1, 1990. See 1990 Mass. Acts 150, § 304.

<sup>3</sup> 521 U.S. 346 (1997) (upholding Kansas's sexually dangerous predator legislation, which authorized civil commitment for convicted sex offenders who suffer from a "mental abnormality or personality disorder").

<sup>4</sup> See 1999 Mass. Acts 74.

suffer from a cognizable mental impairment, nor is their conduct any more predictable than other forms of criminal misconduct. Both the substantive definitions and procedural mechanisms of the revised law show the willingness of the Massachusetts legislators to abandon the rehabilitative ideal of traditional civil commitment schemes in favor of purely incapacitative goals. Despite its being premised on several flawed scientific assumptions, however, the law is likely to survive constitutional scrutiny, particularly in light of the Supreme Court's decision in *Kansas v. Hendricks*<sup>5</sup> and its capital punishment decisions upholding reliance on future dangerousness predictions.<sup>6</sup> Moreover, the local and national political climate, with respect to sex offenders, makes repeal of the legislation unlikely.

In a development that has surprised everyone—from litigants to the legislators who amended the law to create a right to a jury trial—Massachusetts juries are beginning to emerge as a critical safeguard of civil liberties in the *sexually dangerous persons* ("SDP") arena.<sup>7</sup> Preliminary findings suggest that, in the six years since the legislature enacted a jury right for petitioners challenging their confinement under chapter 123A,<sup>8</sup> juries have released petitioners at nearly twice the rate of judges.<sup>9</sup> While there have been too few jury trials to support serious statistical analysis, these preliminary numbers suggest that, as in the criminal context, SDP juries may be more skeptical than judges about restraints on personal liberty—or at least less reluctant to make controversial, liberty-protective release decisions.<sup>10</sup> Assuming that trial statistics continue to bear out this analysis, juries may play a critical role in safeguarding the liberty inter-

<sup>5</sup> See *Hendricks*, 521 U.S. at 346.

<sup>6</sup> See *Barefoot v. Estelle*, 463 U.S. 880 (1983), *Estelle v. Smith*, 451 U.S. 454 (1981), *Jurek v. Texas*, 428 U.S. 262 (1976).

<sup>7</sup> Out of twelve states with sexual predator commitment laws, as of 1998, nine states provided for a jury trial. See ROXANNE LIEB & SCOTT MATSON, WASH. ST. INST. FOR PUB. POL'Y, *SEXUAL PREDATOR COMMITMENT LAWS IN THE UNITED STATES: 1998 UPDATE* 14–15 (1998) (on file with the *Harvard Civil Rights-Civil Liberties Law Review*). Of those nine states, six require the jury to reach a unanimous verdict. See *id.*

<sup>8</sup> See MASS. GEN. LAWS ch. 123A, § 9 (Pocket Part 2000) ("[i]n any hearing held pursuant to the provisions of this section, either the petitioner or the commonwealth may demand that the issue be tried by a jury. If a jury trial is demanded, the matter shall proceed according to the practice of trial in civil cases in the superior court.").

<sup>9</sup> According to informal statistics compiled by one lawyer at the Nemasket Correctional Center, which was called the Bridgewater Treatment Center prior to 1993, see *infra* note 65 and accompanying text, there have been 114 trials of petitioners challenging their commitments under chapter 123A since May 1994: 91 bench and 23 jury trials. Of the bench trials, 80% (73 petitioners) were found to remain sexually dangerous and 20% (18 petitioners) were found no longer sexually dangerous. Of the jury trials, 65% (15 petitioners) were found to remain sexually dangerous, and 35% (8 petitioners) were found no longer sexually dangerous. See Telephone Interview with Dan Less, Staff Attorney, Legal Department, Nemasket Correctional Center (Jan. 20, 2000) [hereinafter Less Interview I]. In 1999, of the 17 cases that proceeded to trial, 15 petitioners elected to have jury trials. See *id.*

<sup>10</sup> See *infra* Part III.

ests of persons adjudicated to be sexually dangerous or subject to confinement under the revised chapter 123A. Moreover, to the extent that lawmakers rely on the participation of community members to legitimize this draconian mechanism of civil confinement, jury verdicts that run contrary to legislative expectations should cause them to question whether the revised chapter 123A accurately reflects societal norms with respect to sexually dangerous persons.

A brief overview of the recent history that led to the enactment of the 1999 law reveals the legislature's thinly veiled abandonment of the rehabilitative goals of civil commitment in favor of incapacitation and punishment of sex offenders. The 1989 Final Report that led to the repeal of chapter 123A cited two primary flaws with Massachusetts's civil commitment scheme: the absence of authoritative research on recidivism to support treatment techniques and the lack of evidence that repeat sex offenders suffer from a mental illness.<sup>11</sup> Neither the text nor the legislative history of the new legislation reveal evidence negating the findings of the 1989 Advisory Panel. Instead, the legislature declared, in Section 1 of the statute, that sex offenders pose a grave threat of recidivism, for which civil commitment is an appropriate response, regardless of whether these offenders suffer from an identifiable and treatable mental illness.

If legislators had attempted to support this declaration with authoritative research, they would have been hard pressed to locate such support. In the ten years since the 1989 Final Report, studies of recidivism among sex offenders have been contradictory at best, revealing only minimal improvements in the ability of mental health professionals to predict long-term future conduct by sex offenders.<sup>12</sup> The greatest ad-

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<sup>11</sup> See Final Report, *supra* note 2, at 61; see also Memorandum from Edward M. Murphy, Commissioner of the Department of Mental Health, to the Members of the Governor's Anti-Crime Council Re: Sexually Dangerous Persons (Jan. 9, 1987) (on file with the *Harvard Civil Rights-Civil Liberties Law Review*) (writing that, not only is there "no scientific basis for the claim that persons who commit sexually violent crimes are clinically mentally ill," but "it is not reasonable [given the limitations of the standard prediction model] to assume that mental health professionals can properly judge someone to be sexually dangerous in a prospective sense.").

<sup>12</sup> In evaluating the ability of psychologists to measure an offender's likelihood of reoffense, critics tend to conflate two distinct issues: the recidivism rates of sex offenders and the ability of psychologists to predict future behavior in light of those recidivism rates. With respect to the former issue, there is a significant body of literature indicating that recidivism rates among sex offenders are, in fact, lower than among many other classes of violent offenders. See, e.g., L.L. Bench et al., *A Discriminant Analysis of Predictive Factors in Sex Offender Recidivism*, in *THE SEX OFFENDER: NEW INSIGHTS, TREATMENT INNOVATIONS AND LEGAL DEVELOPMENTS* 15-1 (Barbara K. Schwartz & Henry R. Cellini eds., 1996) (finding that "only about 50% of sex offenders engaged in any recidivistic activity of any form" and that "only 6% of the offenders went on to commit felony sex offenses for which they were convicted"); R. Karl Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-analysis of Sexual Offender Recidivism*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 357 (1998) ("Out of 23,393 cases of sex offenses, only 13.4 percent were known to have committed another sexual offense after four to five years in the community . . . . [Although] [t]his is an underestimate . . . these findings contradict the popular

vancement has been the discovery that reliance on actuarial data to predict future dangerousness leads to greater predictive accuracy than reliance on clinical data alone.<sup>13</sup> Most mental health professionals agree, however, that advances in actuarial techniques have not yet significantly improved their ability to predict long-term future dangerousness, which is the centerpiece of most civil commitment schemes.<sup>14</sup> Moreover, reliance on actuarial techniques as a panacea for inaccurate predictions may

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view that sex offenders inevitably re-offend . . . ."); John Q. LaFond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655, 667 (1992) ("[i]n a study of all state prisoners released in 1983, researchers found that rapists had lower recidivism rates, as measured by rearrest, than kidnappers, robbers, and persons who had committed assault . . . ." (citing BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1983 5 (1989))); Eric Lotke, *Sex Offenders: Does Treatment Work?* in RESEARCH UPDATE, NAT'L CENTER ON INSTITUTIONS & ALTERNATIVES (April 1996) (on file with the *Harvard Civil Rights-Civil Liberties Law Review*) ("On average, untreated sex offenders sentenced to prison have a recidivism rate of 18.5%. In comparison, recidivism rates range around 25% for drug offenses and 30% for violent offenses . . . ." (internal citations omitted)). Even the highest estimates of recidivism show no more than 25% to 30% of sex offenders committing repeat sex offenses. See, e.g., R.A. Prentky, et al., *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 LAW & HUM. BEHAV. 635 (1997).

With respect to the ability of psychologists to predict future behavior in light of those recidivism rates, see *infra* notes 152–153 and accompanying text.

<sup>13</sup> Actuarial data incorporates statistical correlates between particular offender characteristics (age, gender, prior criminal activity, and educational level) and violent behavior and is used to assess an individual's likelihood of reoffending in light of observed behavioral patterns among other similarly situated offenders. Clinical predictions, by contrast, rely solely upon observations and analysis of the particular individual whose behavior is being predicted.

<sup>14</sup> See, e.g., Barbara K. Schwartz & Henry R. Cellini, *Sex Offender Recidivism and Risk Factors in the Involuntary Commitment Process*, in THE SEX OFFENDER: THEORETICAL ADVANCES, TREATING SPECIAL POPULATIONS AND LEGAL DEVELOPMENTS 8-1 (Schwartz, ed. 1999) (surveying formal systems of risk assessment and suggesting ways to improve actuarial risk assessment scales but acknowledging that current actuarial techniques cannot predict with professionals lack the scientific studies to support long-term predictions of future dangerousness); greater than 50% accuracy who will reoffend in the long-term future); Kenneth Tardiff, *A Model for the Short-Term Prediction of Violence Potential*, in CURRENT APPROACHES TO THE PREDICTION OF VIOLENCE 3 (David A. Brizer & Martha Crouner, eds., 1989) (defending use of short-term predictions but noting that "[b]eyond that time [a few days to a week] there is an opportunity for many intervening factors . . . ."); D. Grubin & S. Wingate, *Sexual Offense Recidivism: Prediction versus Understanding*, 6 CRIM. BEHAV. & MENTAL HEALTH 349, 354 (1996) (noting that, because the incidence (or base rate) of targeted offender behavior is so low, it is not possible—even with the most reliable actuarial technique—to predict with greater than 50% accuracy which particular individuals within high-risk groups will reoffend); George B. Palermo, et al., *On the Predictability of Violent Behavior: Considerations and Guidelines*, 36 J. FORENSIC SCI. 1435 (1991) (advocating continued use of clinical predictions in some limited settings but noting that mental health professionals lack the scientific studies to support long-term predictions of dangerousness).

Even if such techniques were adequate to respond to current concerns about the lack of predictive accuracy, Massachusetts is one of the only states without an actuarial risk assessment system, although the state will have to develop one in order to comply with the new registry portion of chapter 123A. See Telephone Interview with Barbara K. Schwartz, Director of Treatment, Nemasket Correctional Center, (Nov. 8, 1999).



eventually lead to a host of other potential infirmities with the application of Massachusetts's civil commitment scheme.<sup>15</sup>

The legislature's definition of sexually dangerous persons likewise exhibits a flagrant disregard for the views of mental health professionals with respect to sex offenders. The modern incarnation of chapter 123A echoes the assumption of its statutory predecessors that sexual dangerousness is linked to a specific and identifiable mental disability that distinguishes sex offenders from other criminals and predisposes them to commit dangerous sexual crimes.<sup>16</sup> The law authorizes indefinite civil commitment for "sexually dangerous persons," a class of individuals that includes any person who has been:

(i) convicted of or adjudicated as a delinquent juvenile or youthful offender by reason of a sexual offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility; (ii) charged with a sexual offense and was determined to be incompetent to stand trial and who suffers from a mental abnormality or personality disorder which makes such person likely to engage in sexual offenses if not confined to a secure facility; or (iii) previously adjudicated as such by a court of the Commonwealth and whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by either violence against any victim, or aggression against any

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<sup>15</sup> See, e.g., Malcolm M. Feeley & Jonathan Simon, *Actuarial Justice: The Emerging New Criminal Law*, in *THE FUTURES OF CRIMINOLOGY* 173 (David Nelken, ed., 1994); Jill Gaubling, *Race, Sex, and Genetic Discrimination in Insurance: What's Fair?*, 80 CORNELL L. REV. 1646 (1995) (exploring potential discriminatory effect of reliance on actuarial information in the insurance context); Deborah S. Hellman, *Is Actuarially Fair Insurance Pricing Actually Fair?: A Case Study in Insuring Battered Women*, 32 HARV. C.R.-C.L. L. REV. 355 (1997); Sheri Lynn Johnson, *The Politics of Predicting Criminal Violence*, 86 MICH. L. REV. 1322 (1988) (arguing that "decisions to predict criminal violence and to use those predictions to deprive individuals of liberty should be considered in light of their racially disparate impact").

<sup>16</sup> See ABA STANDING COMMITTEE ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE: PROPOSED MENTAL HEALTH STANDARDS (1986). In recommending the nationwide repeal of civil commitment schemes for sex offenders, the American Bar Association found that such legislation was based on six assumptions:

- (1) [T]here is a specific mental disability called sexual psychopathy, psychopathy, or defective delinquency;
- (2) persons suffering from such a disability are more likely to commit serious crimes, especially dangerous sex offenses, than normal criminals;
- (3) such persons are easily identified by mental health professionals;
- (4) the dangerousness of these offenders can be predicted by mental health professionals;
- (5) treatment is available for the condition; and
- (6) large numbers of persons afflicted with the designated disabilities can be cured.

victim under the age of 16 years, and who, as a result, is likely to attack or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires.<sup>17</sup>

In light of the Supreme Court's decision in *Kansas v. Hendricks*,<sup>18</sup> Massachusetts's definition of sexually dangerous persons—which is closely modeled on the language of the Kansas statute<sup>19</sup>—may well withstand constitutional scrutiny. Nevertheless, as critics of *Kansas v. Hendricks* have repeatedly argued, this definition does virtually nothing to limit the class of mentally impaired persons potentially subject to confinement. In fact, the *Diagnostic and Statistical Manual of Mental Disorders IV* ("DSM-IV")<sup>20</sup> does not provide a definition for the term *mental abnormality*.<sup>21</sup> While the term *personality disorder* does appear in the DSM-IV, its broad definition under Massachusetts's new chapter 123A appears to encompass all sex offenders.<sup>22</sup> Although the Massachusetts legislature did not overtly reject the rehabilitative goal of civil commitment in its revision of chapter 123A,<sup>23</sup> legislators made no effort to refute the findings of the 1989 Advisory Panel that sex offenders do not suffer from a treatable mental illness.<sup>24</sup>

Perhaps the most powerful evidence that the Massachusetts legislature has abandoned the treatment ideal in favor of purely punitive and incapacitative goals stems from the procedural mechanisms by which offenders are determined to be sexually dangerous under the revised SDP statute. The previous version of chapter 123A had authorized two meth-

<sup>17</sup> MASS. GEN. LAWS ch. 123A, § 1 (1986 & Pocket Part 2000).

<sup>18</sup> 521 U.S. 346 (1997).

<sup>19</sup> See KAN. STAT. ANN. §§ 59-29a02 (b) (Pocket Part 1999) (defining *mental abnormality* as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.").

<sup>20</sup> AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV (4th ed. 1994) [hereinafter DSM-IV].

<sup>21</sup> See Brief of Amicus Curiae Washington State Psychiatric Association in Support of Respondent on Writ of Certiorari to the Supreme Court of Kansas at 14-15, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (No. 95-1649) ("[b]ecause 'mental abnormality' has no recognized clinical meaning, there is no way to assure it will be applied so that only persons who are mentally ill are subject to civil commitment . . . [Kansas'] definition [of this term] cannot provide meaningful guidance to mental health professionals, judges, or lay persons.") [hereinafter Washington State Psychiatric Association Brief].

<sup>22</sup> See MASS. GEN. LAWS ch. 123A, § 1 (1986 & Pocket Part 2000) (defining a *personality disorder* as "a congenital or acquired physical or mental condition that results in a general lack of power to control sexual impulses."). For an example of critiques of the reliance on personality disorders to narrow the class of eligible sex offenders, 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 (1995).

<sup>23</sup> In contrast, their counterparts in Kansas openly acknowledged that the targets of civil confinement under the revised Kansas legislation "do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to [the general involuntary civil commitment statute]." KAN. STAT. ANN. § 59-29a01 (Pocket Part 1999).

<sup>24</sup> See Final Report, *supra* note 2, at 61; Murphy, *supra* note 11.

ods of involuntary commitment for sex offenders: (1) commitment by a court at the close of a criminal trial, upon evaluation, hearing, and subsequent finding of sexual dangerousness;<sup>25</sup> or (2) commitment from prison, upon showing that the inmate engaged in "sexually assaultive behavior."<sup>26</sup> By contrast, under the new law, civil commitment proceedings do not ordinarily commence until six months prior to the release of a person eligible for chapter 123A commitment.<sup>27</sup> This change marks both the symbolic and actual abandonment of the treatment ideal in favor of purely incapacitative goals.<sup>28</sup> By attempting to identify sexually dangerous persons before or during incarceration, the former chapter 123A appeared committed, at least ostensibly, to providing treatment for sex offenders—not merely warehousing them. The new law, by contrast, waits until the eve of release before authorizing any specialized treatment for "dangerous" sex offenders.<sup>29</sup> This shift, combined with the fact that no treatment is required during the lengthy period of incarceration prior to initiation of civil commitment proceedings, highlights the fact that the primary objective of the Act is to extend the length of incarceration, rather than to provide treatment or rehabilitation.

In light of the public outcries following several well-publicized recidivist sexual offenses,<sup>30</sup> Massachusetts juries may seem, at first blush, an unlikely source of protection against legislative efforts to squelch politically unpopular liberty interests. Indeed, the asserted goal of the jury provision enacted in 1993<sup>31</sup> was to lend legitimacy and proximity to release decisions, as well as to "minimize the possibility of dangerous individuals being released to the streets."<sup>32</sup> Juries, it was argued, would

<sup>25</sup> See MASS. GEN. LAWS ch. 123A, §§ 3–5 (1986) (repealed 1990); see also A. Louis McGarry & Raymond D. Cotton, *A Study in Civil Commitment: The Massachusetts Sexually Dangerous Persons Act*, 6 HARV. J. ON LEGIS. 263, 274–77 (1969).

<sup>26</sup> See MASS. GEN. LAWS ch. 123A, § 6 (1986) (repealed 1990).

<sup>27</sup> See MASS. GEN. LAWS ch. 123A, § 14 (Pocket Part 2000).

<sup>28</sup> The media rhetoric surrounding the passage of the revised chapter 123A strongly supports this conclusion. See, e.g., State House News Service, Cellucci, Swift Target Sex Offenders (Feb. 4, 1999) (calling to reinstate civil commitments to "[ensure] that these criminals remain incarcerated [past their criminal sentences] until they no longer pose a threat to society . . .") (on file with the *Harvard Civil Rights-Civil Liberties Law Review*).

<sup>29</sup> See § 14.

<sup>30</sup> See, e.g., John Ellement, *Rapist Ordered Freed by SJC, Reluctant Court Says Law Gave it No Choice*, BOSTON GLOBE, May 8, 1998, available in 1998 WL 9132445; Marcella Bombardieri, *Release of 1982 Rapist Sparks Call for New Law*, BOSTON GLOBE, June 9, 1998, available in 1998 WL 9137776; State House News Service, Life Sentence, Life Parole, Civil Commitments Face Sex Offenders (Feb. 4, 1999) (on file with the *Harvard Civil Rights-Civil Liberties Law Review*) (noting that Governor Paul Cellucci "urged swift passage of [his proposed sex offender legislation] . . . pointing to the latest headline-grabbing child rape case . . .").

<sup>31</sup> See MASS. GEN. LAWS ch. 123A, § 9 (Pocket Part 2000).

<sup>32</sup> State House News Service, Weld Pushes Tough Penalties for Sex Offenders (June 29, 1992) (on file with the *Harvard Civil Rights-Civil Liberties Law Review*). Governor Weld was the initial proponent of legislation to "get tough" on sex offenders. His 1992 press release, which called for systemwide reform of the civil commitment system, proposed that the legislature implement jury hearings along with a number of additional "get

curb the alarming trend of SDP releases by superior court judges.<sup>33</sup> Yet, as noted above, preliminary release statistics suggest that juries may be even more willing than judges to make the politically unpopular decision to release a sex offender.<sup>34</sup>

Part I of this Article examines the newly revised chapter 123A in detail, highlighting some of the changes from earlier versions of the legislation and placing the law in its historical and national context. Part II explores possible legal challenges in the wake of the Supreme Court's decision in *Kansas v. Hendricks*, suggesting possible limiting principles and examining Massachusetts's state law with respect to these issues. Part III addresses the apparently liberty-protective role of juries in the context of SDP hearings. This section summarizes the principal substantive, procedural, and evidentiary issues that arise in jury trials and explores some of the institutional pressures and procedural safeguards that may explain differential results in jury and bench trials. The Article ultimately suggests that not only should legislators leave the jury provision intact, but they should look to juries for guidance in deciding whether or not to retain the civil commitment scheme at all. To the extent that juries are indeed "best situated" to make the complex moral decision to release a sexually dangerous person, it would be wrong to silence them simply because their verdicts run contrary to legislative expectations. Moreover, to the extent that jury verdicts do indeed express the voice of the community, legislators should take heed of trends that potentially call into question the legitimacy of civil commitment for sex offenders.

## I. Massachusetts Revised Sexually Dangerous Person Legislation: New Law in Historical Perspective

### A. *Reenacting Chapter 123A: An Overview of the 1999 Legislative Initiative*

The reinstitution of a specialized civil commitment scheme for sex offenders follows a now familiar pattern across the nation: media coverage of sexually violent crimes provokes public outcry for punishment,

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tough" measures, including transferring control of the Nemasket Correctional Center from the Department of Mental Health to the Department of Correction. *See id.*

<sup>33</sup> Media coverage leading up to the 1994 amendment clearly focused on the need for juries as a countermeasure to increased willingness on the part of judges to release SDP petitioners. *See generally* Sean P. Murphy, *Judges Are Freeing More Sex Offenders*, BOSTON GLOBE, June 11, 1992, available in 1992 WL 4179584 (citing dramatic increase in number of discharges by judges following state's decision to phase out sex offender commitments from 33% found not to be sexually dangerous in 1989 to 62% in 1990); Sean P. Murphy, *Rise in Releases from Bridgewater: Alarmed Staff Therapists Urged Slowdown*, BOSTON GLOBE, June 22, 1992, available in 1992 WL 4180929 (citing Treatment Center statistics that, in late 1980s, offenders lost two out of three times, and, in 1990s, offenders have won half of their cases).

<sup>34</sup> *See* Less Interview I, *supra* note 9.

and legislators respond with hastily drafted legislation that promises to sweep the sexually dangerous off the streets.<sup>35</sup> Then-Acting Governor Paul Cellucci was a principal proponent of the legislation, having first called for legislation that was tough on sex offenders in early 1998.<sup>36</sup> Additional impetus for new legislation came from former Chief Justice Herbert Wilkins of the Massachusetts Supreme Judicial Court, who suggested—in an opinion in which he and four other members of the court released a sexually dangerous person committed under a constitutionally flawed version of chapter 123A—that, “[i]f there is no statutory basis for detaining [a person that credibly threatens to assault others if given a chance] . . . new legislation may be in order.”<sup>37</sup> Although state legislators were initially slow to act on Cellucci’s proposed legislation, by September 1999, House Bill No. 4387,<sup>38</sup> as amended by Senate Bill No. 1930,<sup>39</sup> was enacted into law in a revised version of chapter 123A.<sup>40</sup>

The 1999 amendment reauthorizing the indefinite civil commitment of sexually dangerous persons under chapter 123A appeared within a broader piece of legislation entitled *An Act Improving the Sex Offender Registry and Establishing Civil Commitment and Community Parole Supervision for Life for Sex Offenders*.<sup>41</sup> The Act opened with an emergency preamble<sup>42</sup> in which the legislature purported to “find” that there was a grave danger of recidivism among sex offenders, particularly “sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior.”<sup>43</sup> In response to this perceived crisis of recidivism among sex offenders, the legislation established three mechanisms to protect the public from sex offenders: (1) a revamped, state-wide computerized sex offender registry;<sup>44</sup> (2) lifetime community

<sup>35</sup> See, e.g., Raquel Blacher, *Historical Perspective of the “Sex Psychopath” Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 *MERCER L. REV.* 889, 897 (1995) (“fear of sexual crimes, particularly those having violent overtones or involving children, often created the atmosphere for the passage of such legislation . . .”); Sarah H. Francis, *Sexually Dangerous Person Statutes: Constitutional Protections of Society and the Mentally Ill or Emotionally-Driven Punishment?*, 29 *SUFFOLK U. L. REV.* 125, 126 n.3 (1995) (noting recent wave of SDP legislation in response to public outcry created by media reports of violent sex offenses).

<sup>36</sup> See Ellement, *supra* note 30.

<sup>37</sup> *Commonwealth v. Crepeau*, 693 N.E.2d 1000, 1002 (Mass. 1998) (citing *Kansas v. Hendricks*, 521 U.S. 346 (1997)).

<sup>38</sup> H. Bill 4387, 181st Gen. Court, 1st Ann. Sess. (Mass. 1999).

<sup>39</sup> S. Bill 1930, 181st Gen. Court, 1st Ann. Sess. (Mass. 1999).

<sup>40</sup> MASS. GEN. LAWS ch. 123A (Pocket Part 2000).

<sup>41</sup> See 1999 Mass. Acts 74.

<sup>42</sup> Section 1 of the legislation was added by the Senate in an emergency preamble to the House bill. See Uncorrected Proof of the Journal of the Senate (September 9, 1999) <<http://www.magnet.state.ma.us/legis/journal/sj090999.htm>>. The text of the emergency preamble was adopted wholesale from S. Bill 1930, 181st Gen. Court, 1st Ann. Sess. (Mass. 1999).

<sup>43</sup> See 1999 Mass. Acts 74, § 1.

<sup>44</sup> See MASS. GEN. LAWS ch. 6, §§ 178C–178P (Pocket Part 2000); MASS GEN. LAWS ch. 211D, § 16 (Pocket Part 2000).

parole supervision for certain eligible sex offenders;<sup>45</sup> and (3) indefinite civil commitment for sexually dangerous persons.<sup>46</sup> Each of these provisions has come under heavy fire by civil liberties advocates, who argue that the legislation has dealt an extremely heavy blow to an already vulnerable subgroup of the criminal offender population.<sup>47</sup>

### 1. Sex Offender Registry

The sex offender registry, which is administered by a board of seven forensic psychologists, psychiatrists, criminal justice experts, parole officers and/or probation officers,<sup>48</sup> requires all sex offenders<sup>49</sup> to register voluntarily with the sex offender registry board upon release from prison or treatment. Sixty days prior to release, individuals who qualify as sex offenders are entitled to notice and an opportunity to submit documentary evidence relative to their risk of reoffense. Upon consideration of any such evidence, the board recommends a particular risk classification. The sex offender may request an evidentiary hearing to challenge such classification, at which time he has the right to assistance of counsel and may also petition for funds for an expert.<sup>50</sup>

<sup>45</sup> See MASS. GEN. LAWS ch. 127, § 133D (Pocket Part 2000); MASS. GEN. LAWS ch. 211D, § 16 (Pocket Part 2000); MASS. GEN. LAWS ch. 265, §§ 26 & 45 (Pocket Part 2000).

<sup>46</sup> See MASS. GEN. LAWS ch. 123A, §§ 12–16 (Pocket Part 2000).

<sup>47</sup> See Eric Lotke, *Politics and Irrelevance: Community Notification Statutes*, 10 FED. SENT. REP. 64 (1997); William J. Leahy, Chief Counsel, Committee for Public Counsel Services, Sex Offender Registry Law in Need of Dramatic Simplification, Statement to the Massachusetts Senate Committee on Criminal Justice (Mar. 15, 1999) (on file with the *Harvard Civil Rights-Civil Liberties Law Review*) (criticizing retroactive effect of registry provision and advocating a number of revisions to law).

<sup>48</sup> For a description of the board's composition, see MASS. GEN. LAWS ch. 6, § 178K (Pocket Part 2000). Board members are responsible for promulgating guidelines to determine the level of risk of reoffense and degree of dangerousness of particular sex offenders and to place sex offenders into one of three risk categories on the basis of these guidelines. The risk categories determine the requisite level of community notification. For Level One offenders with a low risk of reoffense and a degree of dangerousness not such that public safety is served by public information availability, the law forbids the police to disseminate information to the general public, with the exception of correctional or other governmental facilities. For Level Two offenders with a moderate risk of reoffense and a degree of dangerousness that warrants public availability of registration information, the law authorizes public access to registration information. See §§ 178I & 178J. For Level Three offenders with a high risk of reoffense and a degree of dangerousness "such that a substantial public safety interest is served by active dissemination," the law authorizes the police department to notify organizations and individuals in the community who are likely to encounter such sex offender. See § 178K.

<sup>49</sup> Section 2 of the statute identifies three classes of individuals who qualify as sex offenders: (1) persons who have been convicted of a sex offense or who have been adjudicated as a youthful offender or as a delinquent juvenile by reason of a sex offense; (2) persons who have been released from incarceration, parole, or probation supervision, or custody with the department of youth services for such a conviction or adjudication; (3) persons who have been adjudicated sexually dangerous under section 14 of chapter 123A, as in force at the time of adjudication, or persons released from civil commitment pursuant to section 9 of chapter 123A. See MASS. GEN. LAWS ch. 6, § 2 (Pocket Part 2000).

<sup>50</sup> See § 178L.

There are several problems with the sex offender registry provision, many of which have been addressed in recent civil law suits challenging the constitutionality of the law. First, the list of sex offenses eligible for the sex offender registry<sup>51</sup> is incredibly broad, including a number of nonviolent offenses, such as: (1) second and subsequent adjudication or conviction for open and gross lewdness and lascivious behavior;<sup>52</sup> (2) disseminating harmful matter to a minor;<sup>53</sup> (3) posing or exhibiting a child in a state of nudity;<sup>54</sup> and (4) possession of child pornography.<sup>55</sup> In addition, as originally drafted, the registry requirements applied retroactively to all eligible sex offenders released from treatment or incarceration on or after August 1, 1981, although the retroactivity provision was subsequently struck down.<sup>56</sup> Litigants have also challenged the law on procedural due process grounds.<sup>57</sup>

## 2. Lifetime Community Parole Supervision

Under the lifetime community parole supervision provision, any person who is convicted of one of an enumerated list of sex crimes<sup>58</sup> may be punished by a term of community parole supervision for life, in addition to the term of imprisonment authorized for the particular crime.<sup>59</sup> Individuals subject to community parole, like all other parolees, must comply with a list of terms and conditions established by the registry board prior to their release and subject to the board's revision at any time. In addition to any other conditions set by the board, all parolees must participate in sex offender treatment "for as long as the board deems necessary."<sup>60</sup> Furthermore, most offenders (subject to waiver) must pay a probation fee to offset the cost of the supervision program. Violation of parole presumably imparts the same consequences as would a violation under the tradi-

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<sup>51</sup> See MASS. GEN. LAWS ch. 6, § 178C (Pocket Part 2000).

<sup>52</sup> See MASS. GEN. LAWS ch. 272, § 16 (1990).

<sup>53</sup> See § 28.

<sup>54</sup> See § 29A.

<sup>55</sup> See § 29C. The concurring opinion in *Doe v. Attorney General*, 426 Mass. 136 (1997), in which the Massachusetts Supreme Judicial Court ("SJC") struck down the retroactivity portion of a previous version of the Sex Offender Registry Statute, MASS. GEN. LAWS ch. 6, § 178C (Supp. 1998 & Pocket Part 1999), strongly suggested that the statute may be unconstitutional as applied to a person whose sex offenses posed no grave danger to children or other vulnerable individuals. See *Doe*, 426 Mass. at 151 (1997) (Fried, J., concurring).

<sup>56</sup> See MASS. GEN. LAWS ch. 6, § 178C (Pocket Part 2000); see also *Doe*, 426 Mass. at 136 (striking down retroactivity portion of law).

<sup>57</sup> See *Doe v. Attorney General*, 430 Mass. 155 (1999) (holding that an individualized hearing is a necessary prerequisite to registration as a sex offender).

<sup>58</sup> See MASS. GEN. LAWS ch. 265, § 45 (Pocket Part 2000).

<sup>59</sup> See MASS. GEN. LAWS ch. 127, § 133D (Pocket Part 2000) (setting forth terms of community lifetime parole); MASS. GEN. LAWS ch. 265, § 45 (Pocket Part 2000) (authorizing imposition of sentence of community lifetime parole and setting forth list of enumerated offenses).

<sup>60</sup> MASS. GEN. LAWS ch. 127, § 133D (Pocket Part 2000).

tional parole scheme.<sup>61</sup> The parole sentence commences upon expiration of the individual's term of imprisonment or discharge from the Nemanasket Correctional Center.

Of the three provisions enacted by the 1999 legislation, the parole provision is the only one to be incorporated into the sentencing decision and administered by the sentencing judge. In this sense, it does not pose the same *ex post facto*, double jeopardy, and notice concerns that arise with both the registry and civil commitment provisions of the legislation. In addition, the parole requirement, unlike the registry and civil commitment provisions, at least recognizes the goals of treatment and reintegration of sex offenders.<sup>62</sup> However, as one commentator has noted, "to require a lifetime on parole after a first offense, with no ability to review the need to remain on parole, is excessive."<sup>63</sup> Moreover, the parole provision may also be subject to an equal protection challenge on the ground that it unreasonably targets sex offenders.<sup>64</sup>

### 3. *Civil Commitment: One Day to Life*

Both the registry and the lifetime parole provisions implicate important liberty interests. Nevertheless, the civil commitment portion of the legislation poses the most direct threat to the liberty of individuals who have been convicted or adjudicated delinquent on the basis of eligible sex offenses or who have been found incompetent to stand trial for a sex offense. Under the revised chapter 123A, an individual who meets the statutory criteria of a sexually dangerous person faces a potential lifetime commitment to the Nemansket Correctional Center.<sup>65</sup> Both the conditions of confinement and the procedures by which individuals are adjudicated sexually dangerous under the new law strongly suggest that the civil commitment provision is designed to be punitive, rather than rehabilitative.

With respect to the conditions of confinement, several important changes over the past six years have transformed confinement at the Nemansket Correctional Center into the functional equivalent of incarceration, despite the stated rehabilitative goals of the former chapter 123A.

<sup>61</sup> See § 133D (a) ("[e]xcept as otherwise provided in this section, a person serving such sentence of community parole supervision for life shall be subject to the provisions of law governing parole as if such person were a parolee.").

<sup>62</sup> See Saloom, *supra* note 47, at 2. As Stephen Saloom points out, Massachusetts has a pilot treatment program known as Intensive Parole for Sex Offenders. In the three years since its creation, this program has reduced recidivism rates among participants to zero. See *id.*

<sup>63</sup> *Id.*

<sup>64</sup> See discussion of recidivism rates of sex offenders compared to other offenders, *supra* note 12, and accompanying text.

<sup>65</sup> Prior to 1993, the Nemansket Correctional Center was called the Bridgewater Treatment Center. See 1993 Mass. Acts 489, § 5. This Article uses either Nemansket or Bridgewater, as appropriate, depending on the date of the reference. See *infra* note 66 and accompanying text.



One critical change was the transfer of control from the Department of Mental Health to the Department of Correction.<sup>66</sup> This change occurred in tandem with the creation of the jury right and numerous other measures designed to "get tough" on sex offenders subject to continued confinement under former chapter 123A.<sup>67</sup> Another "get tough" measure was the revocation of the restrictive integration program, by which participants could spend up to seven days and six nights in the community, returning to confinement one night a week.<sup>68</sup> Prior to 1993, a resident of the Bridgewater Treatment Center could participate in a restrictive integration program provided that three conditions were met: (1) the resident had been at the Bridgewater Treatment Center for at least two years; (2) restrictive integration was "appropriate" and would "significantly advance" treatment; and (3) the resident did not pose a danger to the community under the controls of the program.<sup>69</sup> In 1992, following a double homicide committed by a former resident of the Bridgewater Treatment Center, the Weld Administration called for an end to this transitional release program. The 1993 amendment to chapter 123A replaced the Restrictive Access Board with the Community Access Board ("CAB"), a far more restrictive community access provision.<sup>70</sup> Eligibility for work release became far more restrictive than it had been.<sup>71</sup> The 1993 amendment also eliminated the residential component of chapter 123A, requiring participants to "continue to reside within the secure confines of MCI-Bridgewater."<sup>72</sup> Some critics of the 1993 amendment note that the above revisions to chapter 123A may have made confinement at the newly renamed Nemasket Correctional Center *worse* than incarceration at a regular correctional facility.<sup>73</sup>

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<sup>66</sup> See An Act Transferring Control of the Bridgewater Treatment Center from the Department of Mental Health to the Department of Correction, 1993 Mass. Acts 489 § 5; see also Murphy, *supra* note 33. The Act also renamed the facility the Nemasket Correctional Center.

<sup>67</sup> See State House News Service, *supra* note 32.

<sup>68</sup> See Interview with John Swomley, Partner, Swomley & Wood, Attorney for Frederick Wyatt, in Boston, Mass. (Oct. 6, 1999).

<sup>69</sup> See MASS. GEN. LAWS ch. 123A, § 8 (1990) (repealed 1993).

<sup>70</sup> See MASS. GEN. LAWS ch. 123A, § 6A (Pocket Part 2000).

<sup>71</sup> See *id.* Under § 6A, only a person whose criminal sentence has expired, or upon whom a criminal sentence was never imposed, can even apply to participate in the community access program.

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

<sup>73</sup> Critics note that the Department of Correction offers prerelease and furlough programs that are not available to Nemasket Correctional Center residents and that, in prison, an inmate is rewarded for participating in treatment by obtaining an earlier release date whereas, at the Nemasket Correctional Center, an inmate's participation in treatment may be used against him at his release hearing. Consequently, many attorneys advise their clients at the Nemasket Correctional Center to refuse treatment. See, e.g., Murphy, *supra* note 33 (quoting Attorney Bruce Carroll, who has found that Department of Correction facilities provide superior treatment services, including prerelease and better vocational training and therapy programs). One notable change in the quality of available treatment is the increased reliance on group therapy over individual therapy. See Final Report, *supra*

Despite the disturbing similarities between the Nemasket Correctional Center and most state prisons, the conditions of confinement at this facility have not been found to amount to punishment.<sup>74</sup> While reviewing courts may not overturn the revised legislation on this basis, they may be convinced on other grounds that the purpose of the legislation is punitive, and hence impermissible. Perhaps the strongest evidence of the legislation's punitive purpose is the punitive effect of its procedural mechanisms. Under the revised chapter 123A, commitment proceedings do not ordinarily commence until six months prior to the release from prison of a person eligible for civil commitment as a sexually dangerous person.<sup>75</sup> This procedural mechanism stands in stark contrast to that authorized under former chapter 123A, by which inmates ordinarily were committed by the sentencing court at the close of a criminal trial, upon evaluation, hearing, and subsequent finding of sexual dangerousness.<sup>76</sup> Whereas the old law strove to identify sexually dangerous persons in need of treatment as early as possible in the process, subject to later commitment only upon showing of sexual misconduct in prison, the new law does not authorize any specialized treatment for sex offenders until the eve of release. This shift highlights the primary purpose of the new SDP law—to warehouse sex offenders, rather than to treat them.

A second aspect of the commitment proceedings that highlights the law's criminal and punitive objectives is that the District Attorney's office, not the Department of Correction, litigates new commitments to the Nemasket Correctional Center. Although the Department of Correction (or another agency with jurisdiction over a person eligible for com-

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note 2, at 54 (noting increased reliance on group treatment due to high cost of individual sessions).

<sup>74</sup> In *Commonwealth v. Page*, 159 N.E.2d 82 (Mass. 1959), the court released an inmate who had been committed to a hastily constituted treatment center within the general population at M.C.I. Concord, reasoning that, in order to justify departure from the constitutional requirements of due process, "remedial" confinement of persons subject to civil commitment under chapter 123A must, at a minimum, be differentiated from incarceration of convicted criminals. *See id.* at 85. Just one year later, the court, in *Commonwealth v. Hogan*, 170 N.E.2d 327 (Mass. 1960), upheld the use of a separate wing within the Bridgewater State Hospital for the criminally insane, in which patients shared common staff, dining, and infirmary facilities with the criminally insane, but were able to participate in separate treatment programs from that population and lived in a separate wing of the facility. The court found that, while the treatment wing for sexually dangerous persons left much to be desired, it was adequate under chapter 123A because it provided separate living space and medical staff for patients. *See id.* at 329–30. The Bridgewater Treatment Center / Nemasket Correctional Center has been the subject of several consent decrees. *See King v. Greenblatt*, 149 F.3d 9 (1st Cir. 1998); *King v. Greenblatt*, 127 F.3d 190 (1st Cir. 1997); *In Re Pearson*, 990 F.2d 653 (1st Cir. 1993); *Pearson v. Fair*, 935 F.2d 401 (1st Cir. 1991); *Langton v. Johnston*, 928 F.2d 1206 (1st Cir. 1991); *Williams v. Lesiak*, 822 F.2d 1223 (1st Cir. 1987); *Pearson v. Fair*, 808 F.2d 163 (1st Cir. 1986). However, current conditions are apparently adequate to constitute nonpenal confinement. *See King v. Greenblatt*, 53 F.Supp.2d 117 (D. Mass. 1999) (terminating the *Lesiak* and *Greenblatt* consent decrees).

<sup>75</sup> *See* § 12(a).

<sup>76</sup> *See supra* note 25 and accompanying text.

mitment as a sex offender) is responsible for flagging eligible offenders prior to release, a district attorney acting on behalf of the Attorney General ultimately determines whether the prisoner or delinquent youth is "likely to be a sexually dangerous person."<sup>77</sup> If the district attorney so finds, he or she is authorized to file a petition with the superior court alleging that the prisoner or youth is a sexually dangerous person and stating sufficient facts to support the allegation.<sup>78</sup> As in a criminal proceeding, the initial determination to proceed against an inmate is left to the discretion of the district attorney's office. The court then holds a probable cause hearing to "determine whether probable cause exists to believe that the person named in the petition is a sexually dangerous person."<sup>79</sup> Only at the probable cause hearing does the legislation recognize the petitioner's right to assistance of counsel, to present evidence on his own behalf, to cross-examine witnesses, and to view and copy all petitions and reports in the court file.<sup>80</sup> Upon a finding of probable cause, the district attorney or attorney general has the discretion to petition the court for a trial to determine whether the person named in the petition is sexually dangerous.

Revisions affecting the petitioner's right to a trial by jury reveal the legislature's increasing reliance on the criminal model to conceptualize the procedures leading to confinement under the new SDP law. Unlike the 1993 provisions of chapter 123A, under which a petitioner may request a jury trial on a petition for discharge from commitment if he so desired,<sup>81</sup> the commitment trial under the new legislation is presumptively by jury, "unless affirmatively waived by the person named in the petition."<sup>82</sup> The petitioner is entitled to assistance of counsel and may retain experts to perform an examination on his behalf.<sup>83</sup> He also has a right to service of process to compel the attendance of witnesses on his behalf,<sup>84</sup> as well as a right to confront any reports or witnesses against him.<sup>85</sup>

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<sup>77</sup> § 12(b).

<sup>78</sup> *See id.*

<sup>79</sup> § 12(c).

<sup>80</sup> *See* § 12(d)(1)–(4). If the court finds probable cause, then the petitioner will be committed to the Nemasket Correctional Center for no longer than sixty days "for the purpose of examination and diagnosis under the supervision of two qualified examiners." § 13(a)–(b). After conducting an "independent" examination of the petitioner and reviewing any records regarding prior offenses, disciplinary history, and psychiatric treatment, the examiners file a written report with the court, which includes a diagnosis and recommended disposition. *See* § 13(b). The petitioner is entitled to counsel, copies of all written documentation submitted by the examiners, and an opportunity to retain a psychologist or psychiatrist to dispute the findings of the examiner. *See id.*

<sup>81</sup> *See* § 9.

<sup>82</sup> § 14(a).

<sup>83</sup> *See* § 14(b).

<sup>84</sup> *See id.*

<sup>85</sup> However, certain hearsay statements are admissible at trial, including: (1) juvenile and adult court probation records; (2) psychiatric and psychological reports, including the reports of any Qualified Examiner; (3) police reports relating to prior sex offenses;

However, the new commitment provision of chapter 123A not only requires that the jury find beyond a reasonable doubt that the petitioner is a sexually dangerous person, but also requires that the jury reach this conclusion unanimously.<sup>86</sup> If the jury so finds, the petitioner is committed to the Nemasket Correctional Center "for an indeterminate period of a minimum of one day and a maximum of such person's natural life."<sup>87</sup>

Lastly, the revised definition of sexually dangerous persons reveals the primacy of incapacitation, rather than rehabilitation, as the justification for confinement under chapter 123A. While both the old and new definitions of sexual dangerousness focus to some degree on the petitioner's inability to control his impulses and his likelihood of violent re-offense,<sup>88</sup> the new legislation is far more outcome determinative, incorporating the need for confinement in a secure facility into the definition of mental abnormality.<sup>89</sup> The new SDP law also explicitly contemplates two new categories of eligible offenders: juveniles and persons found incompetent to stand trial.<sup>90</sup> The combined effect of these two transformations

(4) incident reports arising out of petitioner's incarceration or custody; and (5) oral or written statements by the victim(s) of the petitioner. *See* § 14(c).

<sup>86</sup> *See* § 14(d).

<sup>87</sup> *See id.* Section 15 of the new law sets out a separate commitment process for individuals who are charged with a qualifying sexual offense but have been found incompetent to stand trial. *See* § 15.

<sup>88</sup> Former chapter 123A defined a sexually dangerous person as one:

whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by either violence against any victim, or aggression against any victim under the age of sixteen years, and who, as a result, is likely to attack or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires.

MASS. GEN. LAWS ch. 123A, § 1 (1986), *amended by* MASS. GEN. LAWS ch. 123A, § 1 (Pocket Part 1999), *amended by* MASS. GEN. LAWS ch. 123A, § 1 (Pocket Part 2000).

<sup>89</sup> The thrust of the new SDP law is that sexually dangerous persons suffer from a "mental abnormality or personality disorder that makes [them] likely to engage in sexual offenses if not confined to a secure facility." § 1 (emphasis added). Under the revised chapter 123A, civil commitments of persons previously adjudicated as sexually dangerous persons are governed by the prior statutory definition of sexual dangerousness, while all new commitments are subject to the new standard of "mental abnormality or personality disorder." *See id.*

<sup>90</sup> Whereas nothing in the prior statutory definition necessarily precluded civil commitment of juveniles and persons found incompetent to stand trial, sections 3-6, which governed the commitment process, made it clear that the old law did not contemplate subjecting either class of persons to civil commitment. *See supra* text accompanying notes 65-76. Moreover, the considerable legislative debate about whether to extend civil commitment to juveniles suggests that legislators understood the previous statute to apply only to adult offenders. *See, e.g.,* State House News Service, Committee Supports, Questions Cellucci on Sex Offender Bills (Mar. 15, 1999) (noting that Governor Paul Cellucci sparred with several Criminal Justice Committee members over the impact of bills on juveniles); STATEHOUSE NEWS SERVICE MINUTES 4 (daily ed. June 2, 1999) (statement of Rep. Paulsen) (defending an amendment that would preclude juveniles from civil commitment and stating "I hope we think very seriously before sending young people down this road . . ."); STATEHOUSE NEWS SERVICE MINUTES 5 (daily ed. July 1, 1999) (statement of Sen. Creem) (noting her concern with the inclusion of juveniles in the civil commitment scheme).

is to expand greatly the category of persons eligible for civil commitment as sexually dangerous persons<sup>91</sup> and to ensure that, once persons have been found sexually dangerous, they are not released into the community as part of their treatment.

### *B. Historical Backdrop of Chapter 123A*

The notion of a specialized civil commitment scheme for sex offenders is by no means a recent phenomenon in Massachusetts. The legislature passed the state's first "sexual psychopath" law in 1947.<sup>92</sup> The original sex offender scheme, like its modern counterpart, was hastily drafted in response to public clamor for legislation to address a perceived rash of sex-related crimes.<sup>93</sup> As initially conceived, chapter 123A reflected the twin goals of rehabilitation and incapacitation of a particular class of sex offenders.<sup>94</sup> This first generation of SDP legislation contemplated the indefinite civil commitment of any individual<sup>95</sup> that, by an habitual course of misconduct in sexual matters, evidenced an utter lack of power to control his sexual impulses and that, as a result, was likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his un-

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<sup>91</sup> In a recent opinion addressing the retroactive effect of the newly revised chapter 123A, Superior Court Judge Hely remarked that "St. 1999, c. 74, sec. 6, establishes a definition of a sexually dangerous person in MASS. GEN. LAWS ch. 123A, sec. 1 (1999), that may be easier for the Commonwealth to satisfy than the definition in effect in 1981." *Commonwealth v. Bruno*, No. CA 99-1108A (Mass. Super. Nov. 1, 1999).

<sup>92</sup> See 1947 Mass. Acts 683. For a more complete discussion of the early history of Massachusetts's sex crime legislation, see, for example, William J. Curran, *Commitment of the Sex Offender in Massachusetts*, 37 MASS. L. Q. 58, 59 (1952) (characterizing the sexual psychopath legislation as a "step into a new field of law making" through which "the legal order for the first time recognizes a 'twilight zone' between sanity and insanity"); McGarry & Cotton, *supra* note 25 (tracing the development of the Massachusetts Sexually Dangerous Persons Act from its inception as an emergency provision in 1947).

<sup>93</sup> See Charles W. Tenney, Jr., *Sex, Sanity and Stupidity in Massachusetts*, 42 B.U. L. REV. 1, 12 (1962) (noting that the sexual psychopath law arose "as a result of the public clamor for legal checks against sex crime"); Note, *Out of Tune with the Times: The Massachusetts SDP Statute*, 45 B.U. L. REV. 391 (1965) (characterizing the original sexual psychopath legislation as hastily drafted in response to public clamor for legislation, which in turn was prompted by magazine articles "ominously warn[ing] of an alarming increase in the frequency of sex crimes."); see also Edwin H. Sutherland, *The Sexual Psychopath Laws*, 40 J. CRIM. L. & CRIMINOLOGY 543, 543 n.2 (1950) (citing several contemporary magazine and newspaper articles addressing the perceived prevalence of sexual crimes committed by alleged sexual psychopaths).

<sup>94</sup> See Note, *supra* note 93, at 391-92 ("The desire to afford humane and enlightened care was manifested in the statute's substitution of treatment for punishment. On the other hand, the statute's indeterminate sentence provision reflected the community's repugnance for sex crimes, fear of the sex offender, and the desire to remove him from society."); see also *In re Sheridan*, 591 N.E.2d 193 (Mass. 1992) ("the primary objective of c. 123A . . . is to care for, treat, and, it is hoped, rehabilitate the sexually dangerous person, while at the same time protecting society from this person's violent, aggressive, and compulsive behaviors").

<sup>95</sup> The legislation did not distinguish between those with criminal records and those without.

controlled and uncontrollable desires.<sup>96</sup> Over the next several years, the legislature revised the individual within the scope of the statute from "psychopathic personality"<sup>97</sup> to "sex offender"<sup>98</sup> to "sexually dangerous person."<sup>99</sup> In 1958, the legislature finally settled on a definition of persons subject to civil confinement under the statute that covered "any person whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive behavior and either violence, or aggression by an adult against a victim under the age of sixteen years, and who as a result is likely to attack or otherwise inflict injury on the objects of his uncontrolled or uncontrollable desires."<sup>100</sup>

In the half a century or so since Massachusetts's first sexual psychopath legislation, legal and mental health professionals have persistently criticized the specialized civil commitment scheme as ill fit to address the problems of dangerous sex offenders. First, the legislation has created a twilight zone between sanity and insanity, thereby upsetting the traditional "primacy of the criminal justice system . . . as a tool for social control" by permitting the indefinite confinement of persons who are not mentally ill and, hence, not eligible for traditional civil commitment.<sup>101</sup> Second, chapter 123A has relied upon the predictive powers of mental health professionals that are, according to many, unable to predict reliably the likely future behavior of sex offenders.<sup>102</sup> Third, the promise of treatment—which legitimizes the departure from the substantive and procedural protections of the criminal justice system—has often been ephemeral, calling into question the alleged rehabilitative ideal behind the legislation.<sup>103</sup>

Despite the above criticisms, chapter 123A has survived constitutional challenges on both substantive due process and equal protection grounds. In 1988, the Massachusetts legislature established a Special Advisory Panel on Forensic Mental Health ("the Panel")<sup>104</sup> and author-

<sup>96</sup> See 1947 Mass. Acts 683 (repealed 1985). The Massachusetts law borrowed its language and structure essentially verbatim from the Minnesota sexual psychopath legislation, as upheld by the Supreme Court in *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940). See Curran, *supra* note 92, at 62.

<sup>97</sup> 1947 Mass. Acts 683 (repealed 1985).

<sup>98</sup> 1954 Mass. Acts 686 (repealed 1985).

<sup>99</sup> 1958 Mass. Acts 646 (repealed 1985).

<sup>100</sup> *Id.* at § 1. For a more complete description of the various substantive and procedural amendments to the legislation, see, for example, Tenney, *supra* note 93, at 12–19.

<sup>101</sup> Eric S. Janus, *Foreshadowing the Future of Kansas v. Hendricks: Lessons from Minnesota's Sex Offender Commitment Litigation*, 92 Nw. U. L. REV. 1279, 1288 (1998) (citing *In re Linehan*, 557 N.W.2d 171 (Minn. 1996)). See also Curran, *supra* note 92, at 59–60 (criticizing the definition of psychopathic personality).

<sup>102</sup> See *supra* note 12 and accompanying text; *infra* note 152 and accompanying text.

<sup>103</sup> See *supra* note 74 and accompanying text.

<sup>104</sup> See 1988 Mass. Acts 1. Panel members included local judges, forensic mental health professionals, practitioners, and financial advisors, as well as leaders of agencies, such as the Parole Board, Department of Correction, Department of Youth Services, and

ized the Panel to make broad-based recommendations regarding mental health and substance abuse services, including those provided to individuals committed under chapter 123A as sexually dangerous persons.<sup>105</sup> The Panel's Final Report, which represented the product of seventeen months of careful study, determined that "the current system of committing a small number of repeat sex offenders to the Treatment Center has failed to meet either public safety concerns or the treatment needs of those committed."<sup>106</sup> On the basis of this determination, the Panel recommended the repeal of chapter 123A.

The concerns motivating the Panel's recommendations mirrored those articulated across the nation: (1) that criminal sexual violence is best understood as a form of antisocial behavior, rather than the product of mental illness; (2) that very little meaningful data exists on recidivism rates of treated sex offenders; (3) that there is very little evidence that treatment programs are effective in reducing recidivism rates among sex offenders; and (4) that mental health professionals cannot properly predict future sexual dangerousness.<sup>107</sup> In recommending the repeal of Massachusetts's sex offender legislation, the Panel was also clearly influenced by reports of several major professional organizations debunking the popular assumptions upon which sexual psychopath legislation had previously rested.<sup>108</sup>

Acting on the advice of the Panel, in 1990, the legislature voted to repeal Massachusetts's SDP law, sections 3–6 of chapter 123A, thereby establishing that there would be no new commitments under chapter 123A on or after September 1, 1990.<sup>109</sup>

### C. *Massachusetts Law in National Context: Kansas v. Hendricks*

The timing of Massachusetts's latest legislative initiative follows closely on the heels of the Supreme Court's 1997 decision in *Kansas v. Hendricks* to uphold a third generation of civil commitment legislation

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the Department of Mental Health.

<sup>105</sup> At that time, Massachusetts was among the last states to retain its specialized civil commitment scheme for sex offenders. By 1990, one-half of the 26 states that had had SDP legislation on the books had abolished it, and only five states continued to enforce such legislation actively. See Blacher, *supra* note 35, at 903, 920; see also Brian G. Bodine, *Washington's New Violent Sexual Predator Commitment System: An Unconstitutional Law and an Unwise Policy Choice*, 14 U. PUGET SOUND L. REV. 105, 110 nn.27–28 (1990).

<sup>106</sup> See Final Report, *supra* note 2, at 48.

<sup>107</sup> See *id.* at 59–62; Blacher, *supra* note 35, at 906.

<sup>108</sup> See Final Report, *supra* note 2, at 59 (citing a 1977 study by the American Bar Association arguing that sexual psychopath legislation should be repealed and reporting that the categories of mental disorders addressed by sexual psychopath legislation were no longer viewed as clinically valid; that treatment for special offenders had been nonexistent or largely ineffective; and that some offenders had been held longer than community protection requires while others were released as cured, only to commit new offenses).

<sup>109</sup> See 1990 Mass. Acts 150, § 304.

targeting "sexually violent predators."<sup>110</sup> The trend toward revitalization of SDP laws reflected in the *Hendricks* decision ironically began in 1990, the same year that Massachusetts voted to repeal its own SDP commitment procedures. In the wake of nationwide efforts to repeal specialized civil commitment schemes for sex offenders, Washington state enacted legislation reauthorizing the indefinite civil commitment of criminal defendants determined to be "sexually violent predators."<sup>111</sup> In support of this measure, the Washington legislature found that there was a "small but extremely dangerous group of sexually violent predators" that are not mentally ill but suffer from "antisocial personality features which are unamenable to existing mental illness treatment modalities . . . [and which] render them likely to engage in sexually violent behavior."<sup>112</sup> The legislature further found that the treatment needs of this population are different from those of the mentally ill, thereby necessitating "a civil commitment procedure for the long-term care and treatment of the sexually violent predator."<sup>113</sup> As a result of these findings, the legislature established procedures for the indefinite civil commitment of persons who, due to a "mental abnormality"<sup>114</sup> or "personality disorder,"<sup>115</sup> are "likely to engage in predatory acts of sexual violence."<sup>116</sup>

Washington's legislation was ultimately held unconstitutional by the U.S. District Court for the Western District of Washington.<sup>117</sup> Nevertheless, the legislation prompted other states, including Kansas, to rethink prior decisions to repeal civil commitment provisions for sex offenders. In 1994, Kansas enacted a sexually dangerous predator statute virtually

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<sup>110</sup> 521 U.S. 346 (1997).

<sup>111</sup> WASH. REV. CODE, § 71.09 (Pocket Part 1999). The Sexually Violent Predator Statute was enacted as part of the Community Protection Act of 1990, which addressed various issues related to violent crimes. See *Young v. Weston*, 898 F.Supp. 744, 746 (W.D. Wash. 1995).

<sup>112</sup> § 71.09.010.

<sup>113</sup> *Id.*

<sup>114</sup> The statute defines *mental abnormality* as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." § 71.09.020 (2).

<sup>115</sup> The statute does not define personality disorder. Although the concept of a personality disorder has a clinically recognized meaning, it is essentially a "shorthand way to describe or label a pattern of maladaptive behaviors," most of which would never in themselves constitute mental illness. See Washington State Psychiatric Association Brief *supra* note 21, at 16-17. Moreover, the DSM-IV "describes no personality disorder which is peculiar to sex offenders." *Id.*

<sup>116</sup> The statute defines "likely to engage in predatory acts of sexual violence" as meaning that "the person more probably than not will engage in [acts of sexual violence]" and that such propensity "must be evidenced by a recent overt act if the person is not totally confined at the time" the petition is filed. § 71.09.020 (3). The statute also contains procedures for civil commitment in such cases.

<sup>117</sup> See *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995) (holding that the absence of a mental illness requirement under Washington's sexually violent predator law rendered the civil commitment scheme invalid on substantive due process grounds because the state could not justify indefinite confinement based on dangerousness alone).



identical to that in Washington.<sup>118</sup> The Kansas legislation similarly authorized indefinite civil commitment based on dangerousness, coupled with a showing of either "mental abnormality" or "personality disorder." Three years later, in *Kansas v. Hendricks*, the Supreme Court upheld Kansas's sexually dangerous predator statute, finding that the Act's definition of mental abnormality satisfied the substantive due process requirements for indefinite civil commitment.<sup>119</sup>

The *Hendricks* decision signalled a significant departure from the Court's traditional view that, in order to justify a circumvention of the substantive and procedural protections of the criminal justice system, the state must prove by clear and convincing evidence that an individual is both mentally ill and dangerous.<sup>120</sup> Under its substantive due process analysis of civil commitment schemes, the Court traditionally had asked three basic questions: (1) whether the goal of civil confinement outweighs the individual's loss of liberty and other costs,<sup>121</sup> (2) whether the nature and duration of commitment is reasonably related to the purpose of confinement,<sup>122</sup> and (3) whether confinement lasts only as long as there is a constitutionally adequate basis for it.<sup>123</sup> Applying this analysis, the Court held, in *Foucha v. Louisiana*, that indefinite confinement of an insanity acquittee based on dangerousness alone, absent a showing of mental illness or impairment, is insufficient to satisfy substantive due process.<sup>124</sup> Likewise, the Court has also held that indefinite civil com-

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<sup>118</sup> See KAN. STAT. ANN. § 59-29a01 (Pocket Part 1999).

<sup>119</sup> See 521 U.S. 346, 356-60 (1997). The Court also upheld the statute on double jeopardy and *ex post facto* grounds, holding that the Act did not establish "criminal proceedings" and that the indefinite confinement pursuant to the Act was not punitive. See *id.* at 361-70.

<sup>120</sup> See *Foucha v. Louisiana*, 504 U.S. 71 (1992) (holding that Louisiana statute allowing continued confinement of insanity acquittee on basis of his antisocial personality, after hospital review committee had reported no evidence of mental illness and recommended conditional discharge, violated due process); *Addington v. Texas*, 441 U.S. 418 (1979) (holding that due process requires that the standard of proof for committing mentally ill persons is clear and convincing evidence). Indeed, both the Washington federal district court and the Kansas Supreme Court understood *Foucha* and *Addington* to guide the substantive due process analysis of SDP statutes, and both courts understood these decisions to require a showing of dangerousness and actual mental illness prior to indefinite confinement. Under this standard, neither a mental abnormality nor a personality disorder qualifies as a sufficient prerequisite of confinement to satisfy substantive due process. See *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995); *Care and Treatment of Hendricks*, 912 P.2d 129 (Kan. 1996).

<sup>121</sup> See *Addington*, 441 U.S. at 425.

<sup>122</sup> See *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

<sup>123</sup> See *O'Connor v. Donaldson*, 422 U.S. 563 (1975). With respect to the length of confinement for insanity acquittees, the Supreme Court has held that an insanity acquittee is not entitled to release merely because he has been hospitalized for a period longer than he could have been incarcerated if convicted, so long as continued confinement is justified by the goals of treatment and incapacitation. See *Jones v. United States*, 463 U.S. 354 (1983).

<sup>124</sup> See *Foucha*, 504 U.S. at 71. The following forms of civil confinement remained constitutionally permissible after *Foucha*: (1) confinement of pretrial detainees who pose a danger to themselves or others but are not mentally ill, see *United States v. Salerno*, 481

mitment of an individual who is mentally ill, but no longer demonstrably dangerous, violates substantive due process.<sup>125</sup>

At a superficial level, the *Hendricks* opinion was neither surprising nor particularly radical. By approving Kansas's legislative scheme, the Court merely recognized the need for deference to "reasonable legislative judgments" in the face of uncertainty in the mental health arena, as had long been its practice.<sup>126</sup> Prior to *Hendricks*, few if any legislative schemes had explicitly required a showing of mental illness as a prerequisite to civil commitment.<sup>127</sup> In the face of widespread consensus among mental health professionals that the majority of sex offenders are neither mentally ill<sup>128</sup> nor demonstrably more likely to reoffend than other classes

U.S. 739, 750-51 (1987); (2) post arrest regulatory detention of juveniles who pose a danger to themselves or others, see *Schall v. Martin*, 467 U.S. 253 (1984); (3) detention of persons awaiting deportation, see *Carlson v. Landon*, 342 U.S. 524, 542 (1952); (4) quarantine of individuals with infectious diseases, see *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905), (5) indefinite confinement of sexually violent offenders who suffer a mental dysfunction that causes them to endanger themselves or others, see *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940); and (6) detention for a reasonable period of time of dangerous defendants found incompetent to stand trial, see *Jackson*, 406 U.S. at 738-39.

<sup>125</sup> See *O'Connor*, 422 U.S. at 563.

<sup>126</sup> The Court cited *Jones* for the proposition that, not only should the State's hands not be tied by disagreements among psychiatric professionals as to whether pedophilia, or paraphilias in general, are mental illnesses, but "it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes." See *Hendricks*, 521 U.S. at 360. In the quoted passage of *Jones*, the Court had stated that "[t]he only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment. The lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments (citations omitted)." *Jones*, 463 U.S. at 365 n.13.

<sup>127</sup> See, e.g., *Pearson*, 309 U.S. at 270; see also Robert F. Schopp, *Civil Commitment and Sexual Predators: Competence and Condemnation*, 4 PSYCHOL., PUB. POL'Y & L. 323, 328-30 (1998) (arguing that, contrary to the Court's assertion in *Hendricks*, prior Supreme Court cases involving challenges to civil commitment schemes did not require both mental illness and dangerousness to justify civil commitment, nor has any Supreme Court decision ever provided a substantive analysis of what type of mental disability satisfies the requirement of mental illness); John P. Zanini, *Considering Hendricks v. Kansas for Massachusetts: Can the Commonwealth Constitutionally Detain Dangerous Persons who are not Mentally Ill?* 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 441 (1997) (maintaining that there has never been a requirement in Massachusetts that persons committed to the Nemasket Correctional Center be mentally ill, nor was there ever any link made between the cessation of mental illness and release).

<sup>128</sup> See, e.g., Bodine, *supra* note 105, at 106 n.13; James D. Reardon, *Sexual Predators—Mental Illness or Abnormality? A Psychiatrist's Perspective*, 15 U. PUGET SOUND L. REV. 849, 850 (1992) (arguing that, not only is there "no scientifically valid treatment for these sexual predators," but, by the legislature's reasoning in adopting the SDP law, there is nothing to stop future lawmakers from claiming, by the same reasoning, that car thieves and bank robbers should also be confined due to a "mental abnormality or personality disorder that made them likely to steal cars or commit robberies"); see also Hammel, *supra* note 22, at 804 (arguing that the mental health community's consistent opposition to sexual psychopath laws in the face of public pressure is striking and that "[b]y refusing to designate a mental illness that 'explains' rape," psychiatrists are sending a clear message that "the psychological factors that lead to rape are not very different from the psychological

of criminal offenders,<sup>129</sup> the Court took the safest available course. Rather than adhering to the *Foucha* model of dangerousness as well as mental illness—at the risk of freeing thousands of committed sexually dangerous persons—the Court deferred to state legislatures on the difficult question of how mentally infirm an individual must be to justify indefinite civil confinement.

At a deeper level, however, the *Hendricks* opinion marked a radical departure from the previous view of civil commitment as an extremely narrow exception to the traditional substantive and procedural guarantees of the criminal justice system. The decision refuted what most states had clearly assumed to be a fundamental prerequisite of indefinite civil confinement—that the individuals in question suffer from an identifiable and treatable mental illness. Repeal efforts throughout the 1980s routinely relied upon research that sex offenders do not suffer from an identifiable mental illness that distinguishes them from other violent offenders in support of their decision to repeal the legislation.<sup>130</sup> This reliance suggested that most state legislatures perceived mental illness as a crucial underpinning of indefinite civil commitment, even if SDP legislation did not explicitly require a showing of mental illness. Whether motivated by concern for civil liberties or by the perceived ineffectiveness of SDP laws in ensuring public safety, most state legislatures had reached a common consensus by 1990 that the civil commitment experiment had simply failed.

The *Hendricks* decision, by authorizing civil commitment without a showing of mental illness, made irrelevant the opinions of mental health professionals and state legislators that civil commitment serves neither the treatment needs of individual offenders nor the public safety imperatives of the community at large. In doing so, the Supreme Court paved the way for poorly thought-out legislative efforts, such as Massachusetts's newly revamped chapter 123A.

## II. Possible Legal Challenges in the Wake of *Kansas v. Hendricks*

### A. Confinement Without Showing of Mental Illness

As one commentator has noted, the central dispute about sex offender commitment laws in the wake of *Hendricks* is whether the breach in criminal justice safeguards posed by such laws “is a limited and principled one, or an expediency whose logical expansion swallows those protections.”<sup>131</sup> This question certainly applies with great force to the lat-

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factors that lead to other serious crimes that are not generally thought to be caused by mental illness . . .”).

<sup>129</sup> See *supra* note 12 and accompanying text.

<sup>130</sup> See Final Report, *supra* note 2.

<sup>131</sup> Eric S. Janus, *Foreshadowing the Future of Kansas v. Hendricks: Lessons from*

est legislative initiative in Massachusetts. The *Hendricks* decision endorsed civil commitment for those who suffer from a mental abnormality or personality disorder that predisposes them to commit sexual acts in a degree that constitutes a menace to the health and safety of others.<sup>132</sup> Massachusetts quickly followed suit, adopting legislation that is virtually identical in substance and procedure to the legislation upheld in *Hendricks*.

There is already a vast body of literature identifying and critiquing possible limiting principles to guide legislators in crafting new civil commitment legislation in the wake of *Hendricks*. One example is what some commentators have termed the *control-incapacity test*.<sup>133</sup> Under this test, civil commitment schemes of the sort at issue in *Hendricks* are sufficiently limited if they reach only those individuals who demonstrate an utter lack of ability to control their violent impulses. The dissenting opinion, in *Hendricks*, suggested a second possible limiting principle—namely, restricting the application of Kansas's SDP law to those individuals who, like Hendricks, suffer from a serious mental disorder.<sup>134</sup>

At first blush, the control-incapacity test seems like a reasonable limiting principle under chapter 123A.<sup>135</sup> Nevertheless, as critics of the *Hendricks* opinion have amply demonstrated, the control-incapacity test does not ultimately provide sufficient limits on the state's exercise of police power. The primary difficulty with the test is that it conflates the concepts of dangerousness and mental illness, the two constitutional pre-

*Minnesota's Sex Offender Commitment Litigation*, 92 NW. U. L. REV. 1279, 1279 (1998).

<sup>132</sup> See *Kansas v. Hendricks*, 521 U.S. 346, 357–58 (1997).

<sup>133</sup> See, e.g., Janus, *supra* note 131, at 1281–82.

<sup>134</sup> See *Hendricks*, 521 U.S. at 375 (Breyer, J., dissenting) (citing DSM-IV, *supra* note 20, at 524–25, 527–28; Abel & Rouleau, *Male Sex Offenders*, in HANDBOOK OF OUTPATIENT TREATMENT OF ADULTS 271 (M. Thase, B. Edelstein, & M. Hersen eds., 1990)). The state physician who testified at Hendricks's jury trial diagnosed him as suffering from pedophilia, a condition classified by the psychiatric profession as a serious mental disorder. See *Hendricks*, 521 U.S. at 376 (Breyer, J., dissenting). At his jury trial, Hendricks conceded that he suffered from pedophilia and was not cured of that condition. See *id.* at 355.

<sup>135</sup> At least superficially, the control-incapacity test is an appealing principle by which to limit the state's power to confine civilly because it provides a neat demarcation of the civil/criminal divide. See *supra* text accompanying note 133. As many commentators have pointed out, the central premise of the criminal justice system is that human beings are by nature rational decision makers and, as such, may be held morally accountable for the choices that they make. See, e.g., Stephen J. Morse, *Fear of Danger, Flight from Culpability*, 4 PSYCHOL., PUB. POL'Y & L. 250 (1998) (highlighting tension between the two principles that culpability is a necessary constraint on the limits of just punishment and that the primary goal of punishment is to protect society by incapacitating dangerous people); Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771 (1998). The civil commitment system carves out a limited exception for those individuals who are incapable of making rational choices by reason of their mental impairment. The control-incapacity test articulates this basic division between the rational decision makers and those individuals whose actions are not fully the product of their own will. According to this principle, the latter group is more appropriately dealt with through the civil commitment process. See *supra* note 133 and accompanying text.

requisites of civil confinement under *Foucha* and *Addington*.<sup>136</sup> Even where, as in *Hendricks*, an inmate concedes that he lacks volitional control over his conduct, this concession merely establishes a strong likelihood of his future dangerousness; it does not necessarily constitute evidence of the type of mental impairment contemplated by *Foucha*.<sup>137</sup> In this sense, the control-incapacity test merely disguises the Court's normative determination that the danger posed by pedophiles is greater than that posed by some other group that suffers from a volitional impairment, such as alcoholics.<sup>138</sup> This determination, however valid, does not resolve the issue of whether an individual suffers from a mental disorder that would justify indefinite confinement.<sup>139</sup>

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<sup>136</sup> See Rebecca Kesler, *Running in Circles: Defining Mental Illness and Dangerousness in the Wake of Kansas v. Hendricks*, 44 WAYNE L. REV. 1871, 1890-92 (1999). The author notes that the *Hendricks* opinion manipulates the DSM-IV to intertwine the psychiatric diagnosis of pedophilia with dangerousness when, in reality, "the DSM-IV expressly rejects the Court's position regarding the relationship between mental illness and dangerousness." *Id.* at 1893. Whereas the Court held that "the only requirement for the mental element is that a person 'suffer from a volitional impairment rendering them dangerous beyond their control,'" the DSM-IV "expressly rejects the assertion that a diagnosis of a mental disorder has any bearing upon a person's ability to control themselves." *Id.* (internal citations omitted); see also Jeffrey W. Swanson, *Mental Disorder, Substance Abuse, and Community Violence: An Epidemiological Approach*, in VIOLENCE AND MENTAL DISORDER DEVELOPMENTS IN RISK ASSESSMENT 101, 131-32 (John Monahan & Henry J. Steadman eds., 1994) (noting that, while persons with serious and persistent mental illnesses are on average more violent than the rest of the population, "the mentally ill, as a group, do not pose a high risk in absolute terms. Only about 7% of all those with major mental disorder (but without substance abuse) engage in any assaultive behavior in a given year"); Thomas A. Widiger & Timothy J. Trull, *Personality Disorders and Violence*, in VIOLENCE AND MENTAL DISORDER DEVELOPMENTS IN RISK ASSESSMENT 203, 215 (John Monahan & Henry J. Steadman eds., 1994) (noting that, while a diagnosis of borderline or personality disorder "does provide a risk factor for violent, aggressive behavior . . . neither diagnosis in the absence of a history of violent, aggressive behavior is likely to indicate a risk with substantial clinical or social significance.").

<sup>137</sup> Many authors have acknowledged the slippery slope risk posed by legislation of the sort at issue in *Hendricks*. See, e.g., LaFond, *supra* note 12, at 698-99, noting with respect to Washington's legislation that:

the predator commitment law has detached involuntary commitment from the medical model of mental illness and bona fide treatment. Once detached, literally no stopping point exists. The logic of the predator commitment law can be applied to people who drive while under the influence of alcohol, who assault their domestic partners or children, who use crack cocaine, or who commit whatever the new "crime of the month" happens to be.

<sup>138</sup> As Barbara Schwartz persuasively argues in her letter to the Massachusetts Legislature opposing the new chapter 123A, "[i]ndividuals who commit sexually violent crimes are no more mentally ill than heroin addicts or alcoholics" and that "to define them as mentally ill and thus eligible for commitment diminishes the very real needs of the mentally ill." See Barbara K. Schwartz, Letter to the Massachusetts Legislature, *reprinted in* WHITESTONE FOUNDATION NEWSLETTER, (Sept. 1999) (visited Apr. 8, 2000) <[http://www.visualwave.com/whitestone-fdn/9909\\_nl.html](http://www.visualwave.com/whitestone-fdn/9909_nl.html)>.

<sup>139</sup> Even the *Hendricks* majority acknowledged that "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary confinement." *Hendricks*, 521 U.S. at 358.

Massachusetts courts have yet to consider whether having a mental abnormality or personality disorder constitutes a constitutionally sufficient prerequisite for civil confinement under chapter 123A. If the dicta in *Commonwealth v. Crepeau*<sup>140</sup> is any indication of the mood of the Massachusetts Supreme Judicial Court ("SJC") with respect to SDP legislation, however, the new definition will likely survive constitutional scrutiny. Moreover, it is unclear whether Massachusetts courts have ever explicitly required a showing of mental illness as a prerequisite to civil confinement. In *Petition of Peterson*, the SJC made no reference to a requirement of mental illness when it upheld the 1968 definition of "sexually dangerous person" on vagueness grounds.<sup>141</sup> One proponent of the movement to reinstate civil commitment for sex offenders has argued that Massachusetts courts have never required that persons committed to the Nemasket Correctional Center suffer from a mental illness, nor have they ever made any link between the cessation of mental illness and release.<sup>142</sup>

Nevertheless, there are some indications that the current definition of sexual dangerousness might not survive state constitutional scrutiny, at least not if the statute is construed as broadly as the Kansas legislation upon which it was modeled. One such indication comes from the analogous context of juvenile detentions based on dangerousness. In *Thompson v. Commonwealth*,<sup>143</sup> the SJC considered several constitutional challenges to a statute authorizing extension of a juvenile delinquent's commitment beyond his eighteenth birthday on the basis of evidence that he would be "physically dangerous to the public because of [his] mental or

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<sup>140</sup> 693 N.E.2d 1000, 1002 (Mass. 1998) (encouraging the legislature to create a new statutory basis for detaining persons who credibly threaten to assault others if given a chance and citing to *Hendricks* as a model for such legislation).

<sup>141</sup> 236 N.E.2d 82 (Mass. 1968). The court reasoned that the definition was constitutionally sufficient where it required repetitive or compulsive behavior, violence, or aggression by an adult against a person under the age of sixteen and a likelihood that injury would be inflicted. See also *Peterson v. Gaughan*, 404 F.2d 1375 (1st Cir. 1968).

<sup>142</sup> See Zanini, *supra* note 127, at 452 (arguing that the SJC has recognized, in several recent opinions, "that a key distinction between persons committed as mentally ill and those committed as sexually dangerous persons is the conviction of a predicate crime after a criminal trial.") (citing *Mendoza v. Commonwealth*, 673 N.E.2d 22, 28 (Mass. 1996)).

<sup>143</sup> 438 N.E.2d 33 (Mass. 1982). A review of the case law suggests that there may not be as neat a divorce of mental illness and SDP commitments as the one that Zanini articulates. For instance, in *Commonwealth v. Major*, 241 N.E.2d 822 (Mass. 1968), the SJC, in rejecting an equal protection challenge to chapter 123A, described the law as a specialized statute that deals with "one category of illness." See *Major*, 241 N.E.2d at 824. Moreover, one of the primary justifications for repealing chapter 123A in 1990 was the discovery that sex offenders do not suffer from an identifiable and treatable mental illness. See Final Report, *supra* note 2, at 47; see also State House News Release (Mar. 19, 1990) (quoting Human Services Secretary Philip Johnston's testimony before the Human Services Committee for the proposition that the view that "sexual offenses reflected a specific mental problem that needed special treatment" has been discredited) (on file with the *Harvard Civil Rights-Civil Liberties Law Review*). This fact suggests that many of those involved in the treatment of sex offenders under chapter 123A did view mental illness as a prerequisite of confinement, even if no such prerequisite was ever explicitly articulated by the courts.

physical deficiency, disorder or abnormality.”<sup>144</sup> In analyzing the petitioner’s vagueness challenge to the juvenile civil commitment scheme, the court recognized that traditional civil commitment, pursuant to the state’s police power, requires a showing of both mental illness and dangerousness.<sup>145</sup> The court then went on narrowly to construe the statute’s language of “mental or physical deficiency, disorder or abnormality” as identical in meaning to the term “mental illness” as defined under chapter 123.<sup>146</sup>

A second indication of the constitutional vulnerability of the definition of sexual dangerousness under the state constitution stems from the fact that, at least with respect to procedural mechanisms, Massachusetts courts have construed the Massachusetts Declaration of Rights<sup>147</sup> to afford greater protection with respect to civil confinement under chapter 123A than that required by the United States Constitution. While the Supreme Court, in *Addington v. Texas*,<sup>148</sup> authorized involuntary commitment under a clear and convincing evidence standard, the SJC has held that “the Commonwealth [must] prove beyond a reasonable doubt that the release of a mentally ill person would create a substantial risk of physical harm to others as a predicate to involuntary commitment of such person.”<sup>149</sup>

### *B. Confinement Based on Predictions of Future Dangerousness*

However ineffective their solutions, the majority and dissenting opinions in *Hendricks* at least shared a common concern that there was a need to articulate a limiting principle with respect to legislative definitions of mental abnormality. Such a concern is notably absent with respect to the legislative definition of dangerousness. While both opinions identify dangerousness as a prerequisite of civil confinement,<sup>150</sup> neither questions the state’s reliance on expert predictions as a constitutionally acceptable method of establishing future dangerousness.<sup>151</sup> A

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<sup>144</sup> MASS. GEN. LAWS ch. 120, § 17 (1993 & 2000 Pocket Part).

<sup>145</sup> See *Department of Youth Services v. A Juvenile*, 499 N.E.2d 812, 816 (Mass. 1986) (citing *Thompson v. Commonwealth*, 438 N.E.2d 33, 36 (Mass. 1982)).

<sup>146</sup> See *Department of Youth Services*, 499 N.E.2d at 816–17 (reasoning that, because chapter 120 and chapter 123 are concerned with the same general subject matter, chapter 123’s definitions of similar words would apply to chapter 120); see also MASS. GEN. LAWS ch. 123 (1986 & Pocket Part 2000).

<sup>147</sup> See MASS. DECL. HUMAN RIGHTS, art. I, X, XII, & XXVI.

<sup>148</sup> 441 U.S. 418 (1979).

<sup>149</sup> *Aime v. Commonwealth*, 611 N.E.2d 204, 213 n.18 (Mass. 1993) (citing *Superintendent of Worcester State Hospital v. Hagberg*, 374 Mass. 271, 276–77 (1978)).

<sup>150</sup> See *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (“We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a ‘mental illness’ or ‘mental abnormality.’”); *id.* at 374 (Breyer, J., dissenting) (“This Court has held that the civil commitment of a ‘mentally ill’ and ‘dangerous’ person does not automatically violate the Due Process Clause provided that the commitment takes place pursuant to proper procedures and evidentiary standards.”).

<sup>151</sup> Both the majority and dissenting opinions cited, with approval, the State’s expert

significant body of research suggests that experts are unable to predict long-term future violent conduct with any greater accuracy than chance alone.<sup>152</sup> The American Psychiatric Association has consistently maintained that long-term predictions are essentially lay determinations that "should be based . . . on predictive statistical or actuarial information that is fundamentally non-medical in nature."<sup>153</sup> Notwithstanding these argu-

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psychiatric testimony that Hendricks was likely to commit further acts of sexual violence if released. *See id.* at 355; *id.* at 376 (Breyer, J., dissenting).

<sup>152</sup> *See* JOHN MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* 47-49 (1981) (concluding that the "'best' clinical research currently in existence indicates that psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several-year period among institutionalized populations that had both committed violence in the past . . . and who were diagnosed as mentally ill . . ."); John Monahan, *Risk Assessment of Violence Among the Mentally Disordered: Generating Useful Knowledge*, 11 INT'L J.L. & PSYCHIATRY 249, 250-51 (1988) (noting that although research published since 1981 challenges the conclusion of his 1981 study, "[t]he upper bound of accuracy that even the best risk assessment technology could achieve was on the order of .33."); John Monahan & Henry J. Steadman, *Toward a Rejuvenation of Risk Assessment Research*, in *VIOLENCE AND MENTAL DISORDER* 1, 5-6 (noting that, while the one study on the validity of clinical predictions of violent behavior in the community found that "[p]atients who elicited professional concern regarding future violence were found to be significantly more likely to be violent after release (53%) than were patients who had not elicited such concern (36%)," none of the other studies focusing on the validity of clinical prediction of institutional violence found a statistically significant correlation between clinical predictions and actual violence).

According to Professor Monahan, pre-1994 assessments of the potential of mentally disordered persons for violence suffered from four methodological weaknesses: "inadequacy of cues or factors chosen to forecast whether violence will occur, inability to determine the extent of violence within the population studied, limited applicability of research designs used to validate risk factors, and failure to coordinate research efforts in the field." *See id.* at 7. Other researchers echo Monahan's methodological concerns, proposing new models of risk assessment that would take into account the various environmental and social conditions that have an impact on violent behavior. *See, e.g.,* Sue E. Estroff & Catherine Zimmer, *Social Networks, Social Support, and Violence Among Persons with Severe, Persistent Mental Illness*, in *VIOLENCE AND MENTAL DISORDER* 259, 289 (John Monahan & Henry J. Steadman eds., 1994) (arguing that accurate prediction of violent behavior depends upon "assessing more carefully how fearful and victimized individuals feel (and are) in their household or social networks . . ."); Edward P. Mulvey & Charles W. Lidz, *Conditional Prediction: A Model for Research on Dangerousness to Others in a New Era*, 18 INT'L J.L. & PSYCHIATRY 129, 135-36 (1995) (arguing that judgments regarding future violent behavior should be more elaborate, rather than simply on/off outcome decisions, and that they should be based on an assessment of "what particular type of violence the patient might commit and the circumstances under which it will be done"); Widiger & Trull, *supra* note 136, at 216:

Violent behavior results from a complex interaction among a variety of social, clinical, personality, and environmental factors whose relative importance varies across situations and time. The complexity of this interaction raises the issue of the extent to which one should conceive violent behavior as resulting from a personality disorder rather than a situational, environmental, or other factor.

<sup>153</sup> Brief for the American Psychiatric Association ("APA") as Amicus Curiae at 14, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080). *See also* Marilyn Hammond, *Predictions of Dangerousness in Texas: Psychotherapists' Conflicting Duties, Their Potential Liability, and Possible Solutions*, 12 ST. MARY'S L.J. 141, 144 (1980) (arguing that therapists' natural predisposition to overpredict is reinforced by the fact that they "do not re-



ments,<sup>154</sup> the Court held, in a series of cases examining the sentencing phase of the Texas capital punishment scheme,<sup>155</sup> that expert testimony regarding future dangerousness forms a constitutionally sufficient basis for the most serious deprivation of liberty. Likewise, in the civil commitment context, the Court repeatedly has deferred to legislative judgment in the face of uncertainty about the validity of predictive psychiatric judgments.<sup>156</sup>

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ceive feedback on individuals erroneously committed as dangerous, while strong media feedback is likely if individuals are erroneously predicted to be non-dangerous and later commit violent acts.”).

<sup>154</sup> Brief for the APA as Amicus Curiae at 14, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080). In its amicus curiae briefs in several challenges to Texas’s capital sentencing scheme, the APA also argued that psychiatrists are unable to predict long-term future violent behavior with greater than one-third accuracy. *See id.*

<sup>155</sup> *See Barefoot*, 463 U.S. at 880 (upholding reliance on testimony of two expert psychologists who testified in response to hypothetical questions that the petitioner would probably commit further acts of violence and represent a continuing threat to society); *Estelle v. Smith*, 451 U.S. 454 (1981) (upholding petitioner’s Fifth Amendment challenge to the use of a pretrial examiner’s testimony at the penalty phase of a capital case without deciding whether to extend the endorsement of lay predictions to expert psychiatric predictions based on clinical evaluation of the petitioner); *Jurek v. Texas*, 428 U.S. 262, 274–75 (1976) (upholding reliance on predictions of dangerousness in the sentencing phase of capital cases on the ground that, while it is not easy to predict future behavior, “[t]he fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system”). The combined effect of *Jurek*, *Smith*, and *Estelle* is that predictions of dangerousness, whether by laypersons or experts, and whether based on personal examination or response to hypothetical questions, constitute a constitutionally acceptable basis on which to impose the death penalty. As long as there is some expert willing to testify “without contradiction that a psychiatrist could predict the future dangerousness of an individual,” *Smith*, 463 U.S. at 899 n.7, the Court is unlikely to alter its position that psychiatric predictions of dangerousness form a constitutionally sufficient basis for imposing the death penalty. *See id.* at 901.

<sup>156</sup> *See, e.g., Jones v. United States*, 463 U.S. 354, 365 n.13 (1983) (“The lesson we have drawn [from the uncertainty of diagnosis and tentativeness of professional judgment in the field of prediction] is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments”); *Addington v. Texas*, 441 U.S. 418, 429 (1979):

Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists. Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.

(emphasis in original).

*But see* Brief for the National Association for Mental Health, American Orthopsychiatric Association, National Association of Social Workers, and American Psychological Association as Amici Curiae at 18–23, *Addington v. Texas*, 441 U.S. 418 (1979) (No. 77-5992) (advocating imposition of beyond a reasonable doubt standard in civil commitment proceedings because medical professionals are able to reach a conclusion on the criterion of dangerousness to that degree of precision and because “problems of proof do not justify a lower standard of proof.”).

Of course, the facts of *Hendricks* made it a particularly unlikely candidate to renew previous challenges to the validity of psychiatric predictions of future dangerousness. Because Hendricks himself conceded that he would commit crimes in the future, the state did not need to produce any expert testimony to establish that prong of the Kansas statute.<sup>157</sup> Even a more sympathetic case is unlikely to prevail in challenging the validity of expert predictions on federal constitutional grounds, however, in light of the numerous Supreme Court decisions in the capital punishment and civil commitment contexts endorsing reliance on such predictions.<sup>158</sup> A survey of Massachusetts case law reveals that, while courts are willing to entertain challenges to the reliability of expert predictions, these challenges go primarily to the weight and sufficiency of the evidence, rather than to the constitutionality of confinement premised on such predictions. With one notable exception,<sup>159</sup> the SJC has simply assumed that the science of prediction is sufficiently reliable to justify confinement, focusing instead on the proper bases for psychiatric testimony. Subsequent cases have established that psychiatric testimony need not be excluded if based on hearsay staff summaries<sup>160</sup> or on the fact that the petitioner had been convicted of certain offenses.<sup>161</sup> Likewise, psychiatric testimony need not be excluded because it goes to the ultimate issue of sexual dangerousness, as long as there is sufficient evidence of the facts underlying the psychiatric conclusions.<sup>162</sup>

<sup>157</sup> See *Kansas v. Hendricks*, 521 U.S. 346, 355 (1997).

<sup>158</sup> Despite the Court's seeming foreclosure of legal challenges to expert predictions of dangerousness, litigants may still prevail on state constitutional or evidentiary grounds. For an outline of possible evidentiary challenges to the admissibility of psychiatric predictions in SDP hearings, see, for example, Gary Gleb, Comment, *Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings*, 39 UCLA L. REV. 213 (1991); see also Clayton C. Skaggs, Note, *Kansas' Sexual Predator Act and the Impact of Expert Predictions: Psyched Out by the Daubert Test*, 34 WASHBURN L.J. 320 (1995) (arguing that psychiatric predictions of dangerousness in the SDP context fail the *Daubert* requirement of reliability and are more prejudicial than probative under FED. R. EVID. 403); Stephen D. Easton, "Yer Outta Here!" *A Framework for Analyzing the Potential Exclusion of Expert Testimony Under the Federal Rules of Evidence*, 32 U. RICH. L. REV. 1 (1998); Edward Imwinkelried, *The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology*, 28 VILL. L. REV. 554 (1983).

<sup>159</sup> In *Commonwealth v. McHoul*, 360 N.E.2d 316 (Mass. 1977), the SJC considered a direct challenge to the reliability of the state's proffered evidence on dangerousness. The *McHoul* court determined that the fact finder was not precluded from finding that the petitioner was sexually dangerous where the state's psychiatrists: (1) noted the difficulty in making accurate predictions about future violent acts; (2) would not categorically predict defendant's future acts; and (3) differed in their characterizations of the likelihood that the defendant would reoffend.

<sup>160</sup> See *Commonwealth v. Childs*, 360 N.E.2d 312 (Mass. 1977); *Commonwealth v. Lamb*, 360 N.E.2d 307 (Mass. 1977). The extent to which reports containing hearsay statements may be admitted into evidence is a separate issue. See *Commonwealth v. Tucker*, 502 N.E.2d 948 (Mass. App. Ct. 1987); see also *infra* note 258 and accompanying text.

<sup>161</sup> See *In re Andrews*, 334 N.E.2d 15 (Mass. 1975).

<sup>162</sup> See *Commonwealth v. Gomes*, 245 N.E.2d 429 (Mass. 1969).

Nevertheless, it is possible that a convergence of factors under the new law may inspire Massachusetts courts to reconsider whether the danger of recidivism is a constitutionally sufficient basis for indefinite civil confinement. For one thing, under the new Massachusetts legislation, dangerousness does far more work than ever before in defining what qualifies for civil confinement. Mental health professionals largely agree that neither the concept of mental abnormality nor personality disorder narrows the class of offenders that should qualify for civil confinement because neither term has any meaning that is specific to sex offenders.<sup>163</sup> If these terms do not distinguish sex offenders from other violent offenders, then what does? It appears that the dangerousness of sex offenders—both in terms of the nature of their underlying offenses and in terms of alleged rates of recidivism—makes them uniquely subject to civil commitment. In this sense, the revised chapter 123A places even greater faith than its statutory predecessor in the ability of the state's Qualified Examiners to predict the future behavior of criminal offenders.

The convergence of the new law's increased reliance on dangerousness with a second critical aspect of the law—jury trials—may cause Massachusetts courts to reconsider the constitutional sufficiency of predictive science as a basis for civil confinement. Under the old law, trial courts were fairly deferential to the legislature's determination that dangerousness is one of the prerequisites of civil confinement, as well as its designation of a particular means of demonstrating dangerousness. For the most part, petitioners have been able to challenge the state's proffered expert predictions with cross-examination and rebuttal experts.<sup>164</sup> Nevertheless, trial judges have cautiously limited the extent to which petitioners may attack the reliability of the underlying predictive science.<sup>165</sup> The new law may provide appellate courts with an opportunity to reconsider the wisdom of the legislature's reliance on the science of prediction.<sup>166</sup>

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<sup>163</sup> See *supra* note 128–30 and accompanying text.

<sup>164</sup> Indeed, Frederick Wyatt, the first petitioner to be released by a Massachusetts jury, did not present any expert testimony at all, but relied solely on cross-examination of the state's experts as to the unreliability of predictions and lack of adequate treatment at the Nemasket Correctional Center. See Interview with John Swomley, *supra* note 68.

<sup>165</sup> See *infra* notes 265–266 and accompanying text.

<sup>166</sup> New challenges to predictive science could take the form of evidentiary challenges to the admissibility of expert predictions, see *supra* note 158 and accompanying text, or substantive due process challenges to the sufficiency of prediction as a legislative basis for confinement. In the findings section of House Bill 2387, the Massachusetts legislature asserted that there was a “grave” danger of recidivism posed by sex offenders, “especially sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior.” See 1999 Mass. Acts 74. As previously discussed, recidivism rates among sex offenders are far from conclusive and fluctuate radically depending on the measure of recidivism employed. See *supra* note 12 and accompanying text. Context suggests that the legislature intended for this term to refer to future criminal acts that would constitute sex offenses of the sort targeted by the legislation. By this definition, the overwhelming evidence suggests that sex offenders actually have lower recidivism rates than most other violent offenders.

### III. Juries as the Laboratories of Justice: The Role of Massachusetts Juries in Curbing the Damage of a Bad Law

It has yet to be determined whether Massachusetts's new SDP law will survive judicial scrutiny. Moreover, even if the law ultimately survives, it may be several years before any sex offender is confined pursuant to this law due to a number of recent successful retroactivity challenges. One feature of the old law that survived the 1999 revisions, which may dramatically shape the future of civil commitment in Massachusetts, is the provision of the jury right.<sup>167</sup> The legislature's decision to grant petitioners the right to have their cases heard by juries has affected not only the procedural mechanisms, but also the outcomes of the discharge hearings under chapter 123A.<sup>168</sup> In the six years since the legislature enacted a jury right for petitioners challenging their confinement under chapter 123A, juries have released petitioners at nearly twice the rate of judges.<sup>169</sup> While the small sample size and short time span make it difficult to hypothesize about the significance of these numbers, at least as a descriptive matter, Massachusetts juries appear more willing than judges to make controversial, liberty-protective release decisions in the SDP context. In this sense, jury trials appear to have served as important laboratories of justice under chapter 123A, providing petitioners with an important opportunity to challenge potential abuses.

This section offers a brief history of the jury right in chapter 123A proceedings before exploring the extent to which jury trials have pro-

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While the legislature's rationale for enacting legislation providing for civil commitment of sex offenders is certainly relevant to judicial consideration of that form of confinement, the assertions contained in the findings section of House Bill 2387 should not preclude independent judicial inquiry into the basis for the legislature's judgment. In *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Supreme Court adopted an extremely deferential stance with respect to legislative findings in the face of scientific uncertainty. Nevertheless, the Court has also recognized that a legislative declaration "does not preclude inquiry into the question whether . . . the conditions existed which are essential to validity under the . . . Constitution." *Whitney v. California*, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring). There is nothing to preclude Massachusetts's courts from reexamining the legislature's asserted justification for confinement in light of scientific developments.

So far, litigants have relied upon narrower and more functional arguments to challenge the new legislation. *See, e.g., Commonwealth v. Bruno*, No. CA 99-1108A (Mass. Super. Nov. 1, 1999) (upholding challenge to retroactivity portion of revised chapter 123A).

One final issue that may arise in the context of the new law is the claim that sex offenders have a right to treatment throughout their incarceration, not merely after they have completed their incarceration and upon commitment to the Nemasket Correctional Center. For a discussion of the implications of *Hendricks* for the right to treatment throughout incarceration, see, for example, 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 & L. 377 (1998).

<sup>167</sup> Indeed, the revised version of chapter 123A not only preserves the jury right, but strengthens this right, by creating a presumption in favor of jury trials that is waivable only by the petitioner. *See* MASS. GEN. LAWS ch. 123A, § 9 (Pocket Part 2000).

<sup>168</sup> *See* § 9.

<sup>169</sup> *See supra* note 9 and accompanying text.

duced more liberty-protective results than bench trials. The Article then offers several possible explanations for the disparate trial verdicts by juries and judges and advocates the continued vitality of jury trials as an additional safeguard against a law with draconian implications for individual liberty. The argument for preserving jury trials under chapter 123A is not dependent upon the assumption that juries are *per se* more protective of liberty, or more skeptical of liberty restraints, than judges. Indeed, there may be many jurisdictions or contexts in which juries are far less willing than judges to release SDP petitioners. Moreover, to the extent that juries do possess characteristics that enhance their skepticism about constraints on liberty, or that make them more likely to function as bulwarks of protection for SDP petitioners, legislators could amend chapter 123A in order to undermine or nullify this observed effect. Instead, the argument for jury trials stems from the observation that, in this particular context and at this particular historical moment, Massachusetts juries are demonstrably more willing to release petitioners than judges. Regardless of the explanation for this phenomenon, chapter 123A petitioners should continue to have access to the decision makers most willing to make the politically unpopular decision to release them. The continued vitality of juries, bolstered by procedural mechanisms that enable their continued skepticism, benefits petitioners and society by providing an avenue of community scrutiny of a law that could pose a serious threat to civil liberties. However, the jury right also strengthens chapter 123A by bolstering the legitimacy of decisions to confine sex offenders and by educating community members about the civil commitment process and the individuals who come within its bounds.<sup>170</sup>

#### A. *Origin and Evolution of the Jury Right in Massachusetts*

The 1990 amendment repealing portions of Massachusetts's civil commitment scheme left intact all commitments that occurred prior to

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<sup>170</sup> Many lawyers and judges maintain that jury trials serve a variety of hidden social values. See, e.g., Ronald J. Allen, *Unexplored Aspects of the Theory of the Right to Trial by Jury*, 66 WASH. U. L.Q. 33, 35 (1988); Richard Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68, 80-84 (1981) (suggesting that the jury system promotes several important social values, including the wisdom of common jurors, the need to incorporate community values into the trial system, the possibility of jury nullification, and the democratic utility of involving citizens in the workings of government and entrusting them to perform competently). Specifically in the context of chapter 123A hearings, jury trials may help to educate the public that not all sex offenders are monsters and, in the long run, may lead to greater community sympathy for people accused of sex offenses. See Interview with Anonymous Superior Court Judge 2, in Boston, Mass. (Jan. 4, 2000) [hereinafter Interview with Judge 2]. One might also argue that jury trials bring a common wisdom and sense of community values to bear on SDP trials, thereby legitimizing decisions to confine. Where a petitioner has chosen to have his case heard by a jury, the jury's finding of sexual dangerousness is that much more unassailable.

September 1, 1990.<sup>171</sup> Although there have been no new commitments since September 1990, lawmakers and judges have continued to shape the conditions of confinement and procedures by which individuals committed prior to that date may challenge their continuing commitment. Perhaps the most significant legislative development is the provision of a jury trial to adjudicate petitions for release from the Nemasket Correctional Center.<sup>172</sup> This change was implemented as part of the 1993 amendment transferring control of the Nemasket Correctional Center from the Department of Mental Health to the Department of Correction.<sup>173</sup> Prior to the 1993 amendment, a person committed to the facility could petition for examination and discharge by filing a petition in the superior court that was heard by a superior court judge.<sup>174</sup> In 1992, however, Governor Weld's "get tough on sex offenders" policy<sup>175</sup> led to the eventual institution of a jury trial option for all review hearings under chapter 123A. The new legislation provided that, in "any hearing held pursuant to the provisions of this section, either the petitioner or the Commonwealth may demand that the issue be tried by a jury. If a jury trial is demanded, the matter shall proceed according to the practice of trial in civil cases in the superior court."<sup>176</sup>

For several years after the 1993 amendment, the jury provision lay dormant, presumably because petitioners assumed, like the drafters of the legislation, that juries were less likely than judges to release individuals

<sup>171</sup> See 1990 Mass. Acts 150, § 304. As of September 25, 1989, 263 men were committed to the Bridgewater Treatment Center. See Final Report, *supra* note 2, at 53.

<sup>172</sup> Any person committed to the Nemasket Correctional Center is entitled to petition for release once every 12 months, at which time the fact finder determines whether the state has established beyond a reasonable doubt that such person "remains a sexually dangerous person." § 9.

<sup>173</sup> See *supra* notes 65-66 and accompanying text.

<sup>174</sup> MASS. GEN. LAWS ch. 123A, § 9 (1986), amended by MASS. GEN. LAWS ch. 123A, § 9 (2000 Pocket Part).

<sup>175</sup> In a 1992 press release announcing proposed "tough penalties for sex offenders," then Governor Weld's office characterized the jury trial as a means of "minimiz[ing] the possibility of dangerous individuals being released to the streets." See State House News Service, *supra* note 32. The press release referred to a growing recognition that sex offenders should be treated as criminals, not persons suffering from mental illness, and pointed to the recent deaths of two young women at the hands of Michael Kelley, a former patient of the Nemasket Correctional Center, as justification for a number of additional "get tough" measures, including: (1) replacing former 123A civil commitment with habitual sex offender legislation that would guarantee life in prison for repeat sex offenders; (2) transferring sex offenders who are serving concurrent civil commitment and state sentences back to the state prison system; (3) barring the release of inmates serving prison sentences concurrent with civil commitment; (4) eliminating parole for sex offenders; and (5) reestablishing the death penalty. See State House News Service, *supra* note 32.

<sup>176</sup> MASS. GEN. LAWS ch. 123A, § 9 (Pocket Part 2000). Interestingly, in the same month that the Massachusetts legislature enacted the 1993 amendment, the SJC ruled that a petitioner was not constitutionally entitled to a jury trial to determine whether he remained sexually dangerous, even where he alleged that his commitment to the Nemasket Correctional Center had become penal in nature due to the lack of adequate treatment. See *In re Gagnon*, 625 N.E.2d 555, 558 (Mass. 1994); see also *Commonwealth v. Barboza*, 438 N.E.2d 1064, 1069-70, n.6.

who had been convicted of sexual offenses.<sup>177</sup> The first prisoner at the Nemasket Correctional Center to exercise the right to jury trial was Frederick Wyatt, who was found sexually dangerous by a Suffolk Superior Court jury on November 25, 1996.<sup>178</sup> At the time of Mr. Wyatt's trial, the SJC had issued only one opinion addressing the procedures to be followed in SDP jury trials.<sup>179</sup> *Sheridan* established that, while some of the procedures that protect criminal defendants are required in chapter 123A proceedings, due process does not require the jury to reach its verdict unanimously—a five-sixths majority is sufficient.<sup>180</sup> The court further noted that, "[s]ince SDP proceedings are to be conducted pursuant to civil actions in the Superior Court, not the District Court, it follows that the minimum number of jurors permitted in an SDP proceeding is ten and minimum five-sixths verdict is a vote of nine to one."<sup>181</sup>

The only other appellate decision addressing the procedures for jury trials was the product of Frederick Wyatt's second jury trial, in which the SJC upheld the state's first jury verdict to release a resident of the Nemasket Correctional Center.<sup>182</sup> As an initial matter, the *Wyatt* court affirmed the Commonwealth's right to appeal all determinations that a petitioner was not sexually dangerousness, regardless of whether made by judge or jury.<sup>183</sup> With respect to the merits of the Commonwealth's appeal, the court held that the judge had properly instructed the jury "that the petitioner was presumed not to be a sexually dangerous person,"<sup>184</sup> although such an instruction was not constitutionally mandated in a civil commitment proceeding.<sup>185</sup> Likewise, the court found that the judge

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<sup>177</sup> See Telephone Interview with Bruce W. Carroll, Mr. Talbot's attorney (Jan. 7, 2000) (noting that, when the legislature first amended the law in 1994, he was completely against the jury trial and could not imagine any jury actually releasing a petitioner). Attorney Carroll has represented petitioners in civil commitment bench trials since 1983 and has handled one jury trial. See also *supra* note 33.

<sup>178</sup> See John Ellement, *Jury Rules that Rapist Must Stay Locked Up*, BOSTON GLOBE, November 26, 1996, at B1.

<sup>179</sup> See *In re Sheridan*, 665 N.E.2d 978 (Mass. 1996).

<sup>180</sup> See *Sheridan*, 665 N.E.2d, at 980. The court also noted, by way of analogy, that "historically based safeguards," such as the right to trial by jury, the right to indictment by a grand jury, the privilege against self-incrimination, and the prohibition against double jeopardy, "do not apply" to SDP hearings. See *id.* (citing *In re Hill*, 661 N.E.2d 1285, 1290 (Mass. 1996)).

<sup>181</sup> *Sheridan*, 665 N.E.2d at 981 n.5.

<sup>182</sup> See *In re Wyatt*, 701 N.E.2d 337 (Mass. 1998).

<sup>183</sup> See *id.* at 340 (citing *In re Hill*, 661 N.E.2d 1285, 1285 (Mass. 1996) (upholding right of Commonwealth to appeal a judge's determination that a petitioner was no longer sexually dangerous against substantive due process and double jeopardy challenges)).

<sup>184</sup> *Wyatt*, 701 N.E.2d at 341.

<sup>185</sup> The court reasoned that:

In a criminal case, neither the Massachusetts Declaration of Rights nor the Federal Constitution requires a judge to instruct a jury on the presumption of innocence . . . [as long as the instructions] "make clear that an indictment does not imply guilt, and that the jury must base their decision on the evidence, and not on 'suspicion or conjecture.'" A fortiori an instruction on the presumption of non-

properly instructed the jury to determine whether the petitioner "is" sexually dangerous, rather than whether he "remains" sexually dangerous.<sup>186</sup> Finally, the court determined that, where the Commonwealth relied upon evidence of petitioner's refusal to participate in treatment to prove that he remained sexually dangerous, the judge properly admitted testimony regarding the adequacy of treatment available to the petitioner and the conditions of confinement at the Nemasket Correctional Center.<sup>187</sup> The court conceded that the commitment hearing was not the appropriate forum in which to raise constitutional challenges to a petitioner's confinement.<sup>188</sup> Nevertheless, the court concluded that the trial judge had permissibly admitted evidence of treatment and conditions of confinement because it was relevant to the petitioner's efforts to explain his refusal to participate in treatment.<sup>189</sup>

### *B. Evidence That Juries Are Acting in Liberty-Protective Ways*

Although the 1993 amendment to chapter 123A gave no indication of the purpose of the jury right,<sup>190</sup> news coverage and legislative debate strongly suggested that jury trials were offered in an effort to curb a perceived rash of releases by judges following the repeal of portions of chapter 123A in 1990.<sup>191</sup> Contemporary news sources focused on the need for juries as a countermeasure to an increased willingness on the part of judges to release SDP petitioners.<sup>192</sup> Many superior court judges shared this popular view that legislators enacted the jury provision to counteract perceived judicial lenience towards SDP petitioners following the repeal of portions of chapter 123A.<sup>193</sup> Governor Weld's press releases in support of the proposed amendment focused on the need to "minimize the possibility of dangerous individuals being released to the streets."<sup>194</sup> Juries, it

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sexual dangerousness is not constitutionally required in a civil commitment proceeding under MASS. GEN. LAWS ch. 123A (1999).

*Id.* at 341 n.10 (internal citations omitted) (quoting *Commonwealth v. DeFrancesco*, 142 N.E. 749 (Mass. 1924)).

<sup>186</sup> The court stated that, although the word "remains" more closely tracks the language of the statute, the judge's choice of the word "is" properly focused the jury's inquiry on the petitioner's present condition. *See In re Wyatt*, 701 N.E.2d at 343.

<sup>187</sup> *See id.* at 343-45.

<sup>188</sup> *See id.* at 345 (citing *In re Gagnon*, 625 N.E.2d 555 (Mass. 1994)).

<sup>189</sup> *See Wyatt*, 701 N.E.2d at 345 n.21.

<sup>190</sup> *See* MASS. GEN. LAWS ch. 123A, § 9 (Pocket Part 2000).

<sup>191</sup> *See* MASS. GEN. LAWS ch. 123A, §§ 3-6, *repealed by* 1990 Mass. Acts 150, § 304.

<sup>192</sup> *See supra* note 33 and accompanying text.

<sup>193</sup> *See* Interview with Anonymous Superior Court Judge 3, in Boston, Mass. (Jan. 4, 2000) [hereinafter Interview with Judge 3]; Interview with Anonymous Superior Court Judge 4, in Cambridge, Mass. (Jan. 7, 2000) [hereinafter Interview with Judge 4]; Telephone Interview with Anonymous Superior Court Judge 5 (Jan. 7, 2000) [hereinafter Interview with Judge 5].

<sup>194</sup> *See* State House News Service, *supra* note 32.



was argued by proponents of the change, would lend "legitimacy and proximity" to release decisions.<sup>195</sup>

It was, thus, a great surprise to both critics and proponents of the law when, in 1998, a Suffolk Superior Court jury voted to release Frederick Wyatt on the grounds that he was not sexually dangerous.<sup>196</sup> Emboldened by news of this release, individuals who petitioned for release in 1998 and 1999 opted overwhelmingly for trial by jury.<sup>197</sup> Not only have the vast majority of petitioners during this time period elected to have their cases heard by juries, but preliminary release statistics indicate that Massachusetts juries have found petitioners not to be sexually dangerous at nearly twice the rate of judges.<sup>198</sup> Massachusetts juries are doing something surprising, something that no one—former Governor Weld, legislators, treatment providers, defense attorneys, or judges—expected them to do. They are releasing individuals who have been convicted of multiple and serious sexual offenses. The original proponents of the jury trial argued that the voice of the community needed to be heard on the important decision to release sexually dangerous persons and that jury trials would lend legitimacy to the civil commitment process. Yet, no one, least of all the legislators who voted to amend chapter 123A, predicted that the voice of the community would express such obvious skepticism about efforts to confine sex offenders civilly.

The significance of juries as potential safeguards of unpopular liberty interests has been recognized in many related legal arenas, including criminal trials and preventive confinement decisions. In an article on preventive detention published in the early 1970s, Professor Alan Dershowitz posits that, "[i]f it is acknowledged that the decision to confine someone on the basis of a prediction is a social policy judgment to be made by the community and not the expert alone, a compelling argument emerges supporting the right to trial by jury in preventive confinement cases."<sup>199</sup> Professor Dershowitz identifies a number of arguments in favor of the right to a jury trial in this context, including: (1) that juries reflect the social policy judgments regarding standards for civil confinement that the legislature has ignored; (2) that, if decisions about risks and freedom in a democratic society are to be abdicated, it is better that they be abdicated to a jury than to a psychiatrist or judge; and (3) that jury trials require a judicial articulation and elaboration of the criteria for confinement, whereas, in bench trials, judges can merely state conclusions in the bare

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<sup>195</sup> See *id.*

<sup>196</sup> See Ellement, *supra* note 30.

<sup>197</sup> In 1999, for example, 15 out of 17 petitioners who went to trial requested juries. See Less Interview I, *supra* note 9.

<sup>198</sup> See *id.*

<sup>199</sup> Alan Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277, 1317 (1973).

language of the statute.<sup>200</sup> This analysis echoes the Supreme Court's assertion in *Humphrey v. Cady* that most states that have legislation providing for civil commitment:

condition[ ] such confinement "not solely on the medical judgment that the individual is mentally ill and treatable, but also on the social and legal judgment that his potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty." In making this determination, the jury serves the critical function of introducing into the process *a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment.*<sup>201</sup>

Such comments reflect the widely held view that juries are a bulwark of protection for the liberty interests of criminal defendants.<sup>202</sup> Lawyers and lay observers of the criminal justice system would probably agree that "one of the least well-kept secrets of our criminal justice system [is] . . . that juries acquit more frequently than do judges."<sup>203</sup> In their seminal study on the jury system in the United States, Professors Kalven and Zeisel empirically demonstrated that defendants are likely to fare significantly better before juries than judges.<sup>204</sup> The authors further found that jury lenience "is distributed widely and diffusely over all crime categories,"<sup>205</sup> rather than being concentrated in cases involving particularly unpopular crime categories.

Yet, when legislators passed the right to jury trials under chapter 123A, it was because they believed that juries would release fewer peti-

<sup>200</sup> See *id.* at 1317-18.

<sup>201</sup> 405 U.S. 504, 509 (1972) (emphasis added).

<sup>202</sup> See HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 58 (photo reprint 1986) (1970).

<sup>203</sup> Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1123 (1991).

<sup>204</sup> See KALVEN & ZEISEL, *supra* note 202, at 55-81. The authors point out that, on balance, the defendant who decides to bring his case before a jury "will fare better 16 percent of the time than he would have in a bench trial." *Id.* at 59. In their study of 3576 cases, the jury convicted in 64.2% of cases, acquitted in 30.3%, and failed to reach a verdict in 5.5% of them. Judges, by contrast, convicted in 83.3% of cases and acquitted in the remaining 16.7%. Taking into account acquittals and hung juries, the authors found that juries failed to convict more than twice as often as did judges (35.8% vs. 16.7%). See *id.* at 55-65.

<sup>205</sup> KALVEN & ZEISEL, *supra* note 202, at 76. The authors define *lenience* to include acquittals and convictions of lesser offenses. The statistics with respect to juror lenience in sex offense cases indicate that jurors are no less lenient in sex cases than in any other crime categories: jurors were 41% more lenient in indecent exposure cases, 32% more lenient in statutory rape cases, 21% more lenient in molestation of a minor cases, 18% more lenient in incest and forcible rape cases, and 13% more lenient in sodomy and all other sex offense cases. See *id.* at 69-75. These figures are roughly comparable to leniency rates of other crimes against persons and property. See *id.*

tioners from the Nemasket Correctional Center.<sup>206</sup> Judges, it was said, were releasing too many sexually dangerous persons. Law enforcement officials, not defense lawyers, endorsed the institution of the jury trial. The consensus—even among defense lawyers—appeared to be that juries simply would not act as bulwarks of protection for persons convicted of multiple sex crimes. This view did not begin to change until 1996, when the first Massachusetts superior court jury to hear a chapter 123A petition deliberated “longer than expected” before finding that petitioner Frederick Wyatt remained sexually dangerous.<sup>207</sup> Not until two years later, when a second jury voted to release Frederick Wyatt, did requests for jury trials surface in full force.<sup>208</sup>

There is powerful evidence that, at least in the two years since 1998, juries are indeed living up to their image of bulwarks of protection. Certainly, petitioners place far greater faith in juries today than they did in the first several years after the legislature amended chapter 123A to include a jury right. However, evidence of jury trial outcomes under chapter 123A should not necessarily be interpreted as proof that juries are inherently better able to protect politically unpopular liberty interests. Indeed, even the most avid supporter of the jury system would probably agree that, in many circumstances, cognitive limitations and/or prejudices may make jurors far less critical of liberty constraints. Indeed, a certain degree of skepticism about jury prejudice is built into the criminal jury system.<sup>209</sup> Moreover, empirical studies tracking the accuracy of juror predictions of dangerousness in the capital punishment context have found that sentencing juries tend to err in the direction of false positives despite the demonstrable weakness of predictive science.<sup>210</sup> These factors and others suggest the danger of drawing sweeping conclusions about the superiority of juries with respect to protecting liberty interests.

For the above reasons, there are two important caveats to the endorsement of jury trials in the SDP context. The first caveat is that, just as in the criminal context, petitioners should retain the right to choose

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<sup>206</sup> See *supra* notes 192–193 and accompanying text.

<sup>207</sup> See Ellement, *supra* note 178.

<sup>208</sup> While there may be no direct connection between the Wyatt trial and developments in the criminal arena, one 1999 editorial noted that, between 1996 and 1998, Massachusetts courts saw a 22% jump in requests for jury criminal trials by sex offenders and a corresponding decline in conviction rates from 33% in the first three months of 1996 to 28% in the first six months of 1998. See *Punishing Sex Offenders*, BOSTON GLOBE, Aug. 18, 1999, at A22.

<sup>209</sup> The very fact that litigants are permitted—indeed required—to engage in jury selection, rather than forced to accept the first 6 or 12 jurors seated, suggests a recognition that some jurors may possess biases or prejudices that impede their fact-finding ability. Many basic evidentiary principles, such as the rule barring admission of propensity evidence in criminal trials, likewise are designed to curb potential jury prejudice.

<sup>210</sup> See, e.g., James W. Marquart, et al., *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 L. & SOC'Y REV. 449 (1989); Jonathan R. Sorensen & James W. Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 743, 776 (1990/1991).

whether to have their cases heard by judges or juries. In this regard, the revised chapter 123A actually improves upon its statutory predecessor, by relying upon the criminal model of a presumptive jury trial that is subject to waiver by the petitioner only.<sup>211</sup> Under both versions of the legislation, the choice to elect a jury or bench trial belongs to the petitioner alone. However, unlike the criminal model, chapter 123A petitioners do not have a constitutional right to trial by jury.<sup>212</sup> For this reason, the legislature could theoretically amend the law to require jury trials in all cases, just as it could amend the law to prohibit jury trials altogether. Mandatory juries would undercut one of the primary value of juries, namely, to enable the petitioner whose liberty is at stake to select the decision maker whom he believes will be most willing to hold the government to its burden of proof. Both opponents and proponents of the law benefit from an elective jury right. Opponents of the law benefit because the more skeptical party—whether jury or judge—is likely to apply a bad law more loosely. Proponents of the law benefit because the petitioner's ability to choose lends legitimacy to the decision-making process and to decisions to confine the petitioner.

The second caveat is that, in order to ensure that juries continue to play a liberty-protective role under chapter 123A, judges and reviewing courts should continue to strengthen their application of existing procedural safeguards in order to encourage jury skepticism about the law's constraints on liberty interests. Chapter 123A proceedings share many aspects of criminal trials, although the law formally characterizes them as civil. The 1999 revisions to chapter 123A have built in even more procedural protections than previously available. Not only does the government bear the burden of proof beyond a reasonable doubt,<sup>213</sup> but chapter 123A trials are presumptively by jury, and jury verdicts must be unanimous.<sup>214</sup> Nevertheless, judges retain considerable discretion over matters like jury selection, evidentiary rulings, and jury instructions, which shape the information upon which juries rely and which may powerfully shape the outcome of jury trials. The revised chapter 123A creates a greater need for procedures that enhance jury skepticism in light of the its single-minded focus on incapacitation.

### *C. What Is Driving Jury Behavior?*

There are several possible explanations for the observed conduct of Massachusetts juries and for the disparity in release determinations be-

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<sup>211</sup> See MASS. GEN. LAWS ch. 123A, § 14 (Pocket Part 2000).

<sup>212</sup> See *In re Gagnon*, 625 N.E.2d 555 (Mass. 1994); *Commonwealth v. Barboza*, 438 N.E. 2d 1064, 1069 & n.6 (Mass. 1982).

<sup>213</sup> Both versions of the law share this feature. See MASS. GEN. LAWS ch. 123A, § 9 (1986), amended by MASS. GEN. LAWS ch. 123A, § 9 (Pocket Part 2000).

<sup>214</sup> See MASS. GEN. LAWS ch. 123A, § 14 (Pocket Part 2000).

tween judges and juries. The first possible explanation is that juries are *per se* more liberty protective than judges. While preliminary statistics with respect to Massachusetts jury conduct under chapter 123A suggest that there may be a degree of truth to that generalization, they do not support such a sweeping claim. A second possible explanation is that jury conduct has nothing to do with juries, *per se*, but instead follows from the strong, quasicriminal procedural safeguards afforded to petitioners under chapter 123A. In contrast to the first, this explanation may downplay important differences between judges and juries. The third possible explanation is that the higher rates of release by juries reflect jury incompetence to decide cases involving future dangerousness. The fourth possible explanation is that these release statistics may signal an effort by juries to nullify a law generally perceived to be unfair.<sup>215</sup> A fifth possibility, and the one that this Article advocates, is that jury verdicts flow from the combination of skeptical jurors and liberty-protective trial procedures.

What follows is an attempt to elucidate some of the juror and judge characteristics that may influence trial results in light of the procedural protections available under chapter 123A. While juries may indeed differ from judges in ways that make them more willing to make politically unpopular release decisions, trial procedures have a critical impact on the fact finding of juries and may potentially undercut the liberty-protective effect of jury trials. Conversely, while many jurors may indeed be reluctant to safeguard the liberty interests of sex offenders,<sup>216</sup> criminal-like procedural protections ensure that even these jurors hold the Department of Correction to its burden of proof.

### 1. *Are Juries and Judges Inherently Different?*

The Massachusetts legislature passed the right to a jury trial in 1993,<sup>217</sup> partially because of a belief that juries as a group would be more

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<sup>215</sup> The preliminary numbers do not support the conclusion that a majority of juries or community members oppose civil commitment under chapter 123A. To the contrary, jury selection in section 9 hearings reveals an overwhelming degree of prejudice against sex offenders. *See infra* note 216 and accompanying text. Nevertheless, as one judge revealingly stated, if juries are releasing people more frequently, "maybe judges are wrong." *See* Interview with Judge 3, *supra* note 193.

<sup>216</sup> A number of practitioners and judges have noted that jurors are unusually expressive about their prejudices toward sex offenders during the jury selection process. *See* Interview with John Swomley, *supra* note 68 (recalling that, during jury selection in the first Wyatt trial, jurors "were very open about how they thought sex offenders should be killed, maimed, should have their balls cut off. Some were saying they do not belong in court, they belong under it."); Telephone Interview with Judge Patrick Brady (Jan. 5, 2000) (noting that, in contrast to a typical nonmurder, non-high-profile case, in which a handful of jurors usually raise their hands in response to group questions about the ability to be impartial, nearly every juror empaneled for jury duty raised his or her hand with a problem in the Wyatt case); *see also* Interview with Judge 5, *supra* note 193.

<sup>217</sup> *See* MASS. GEN. LAWS ch. 123A, § 9 (Pocket Part 2000).

reluctant to release SDP petitioners than judges would be. As an empirical matter, it appears that just the opposite is true. Nevertheless, the question remains whether there are any salient differences between juries and judges in this context and, if so, whether these differences explain the disparate results in chapter 123A proceedings.

*a. Judicial Characteristics*

There are a number of characteristics unique to judges that may influence their release decisions in the chapter 123A context. The fact that judges are repeat players in the justice system may influence their fact-finding abilities, leading them to more standardized results. Whereas juries are, on the whole, new to the fact-finding process, judges hear multiple chapter 123A cases, many with similar fact patterns, and may develop more settled attitudes toward particular actors in the system or toward the reliability of certain evidence.<sup>218</sup> The standardization of fact finding may lead judges to be less critical of the psychologists who testify against petitioners or to be more persuaded by scanty evidence of future dangerousness.<sup>219</sup> It may also lead some judges to make snap judgments about the petitioners, particularly those who have appeared before them on more than one occasion.<sup>220</sup>

As judges grow accustomed to fact finding in SDP hearings, they may also apply standards of proof less rigorously than juries. In this regard, a judge in Washington State once commented that:

[t]he longer I have been on the bench, the more value I have placed on the jury. I have often said, particularly when an adult felon through his counsel or her counsel announces that they would like to waive a jury, I have—it has become routine for me to tell them that it's my perception that the longer I am on the bench, at least, the more uncertain I am that I am truly upholding the concept of presumption of innocence. I cannot be sure that it is true for anyone else, but I believe that it simply becomes easier for a human being to say another human being

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<sup>218</sup> See Ainsworth, *supra* note 203, at 1123–24 (explaining why judges tend to convict more often than juries in juvenile delinquency and criminal cases).

<sup>219</sup> See *id.* at 1124.

<sup>220</sup> During interviews of superior court judges who have presided over jury trials, a surprising number of judges noted that a petitioner's physical appearance may play a significant role in determinations of sexual dangerousness. One judge commented that one of the petitioners released by a jury was a nice-looking guy—a guy who did not look abnormal. See Interview with Judge 5, *supra* note 193. Another judge commented that the petitioner looked like a middle-aged accountant, not like a sex offender. See Interview with Judge Patrick Brady, *supra* note 216. While one would hope that neither judges nor juries make decisions based solely on physical appearance, these observations suggest that the fact finder's ability to identify with the petitioner and recognize that he is not wholly "other" can significantly affect the outcomes of cases.

citizen is guilty, if you've seen a jury do it a number of times and if you have done it yourself. I fear that the standard that I think I hold for myself—it becomes eroded. I try to avoid that, but I tell you, I sometimes agonize about it, so I have come to believe, I've said and I've written about it a couple of times, that the jury is an even more important institution than I apprehended a few years ago.<sup>221</sup>

Many of the superior court judges who preside over chapter 123A proceedings acknowledge that oft repeated phrases, such as “beyond a reasonable doubt,” may indeed mean something slightly less momentous to them than it does to most juries.<sup>222</sup> Judge Brady notes that this may also be a function of differences between lawyers and nonlawyers: lawyers hear the words “beyond a reasonable doubt” as just another legal phrase; to nonlawyers, these words may have more powerful meaning and may cause them to look more carefully for evidence that the state has met its burden of proof.<sup>223</sup>

Judges may also be vulnerable to institutional and media pressures that cloud their judgment regarding whether to release petitioners. While most judges deny that public scrutiny plays any role in their decision making,<sup>224</sup> at least one acknowledges that judges have greater difficulty than juries releasing a sex offender because they know that legislators and the media will hold them personally accountable if that person reoffends.<sup>225</sup> A number of others express relief that juries now decide these cases and faith in jury competence to decide issues of future dangerousness.<sup>226</sup>

### *b. Juror Characteristics*

There is already a vast body of literature exploring the qualities of juries that may explain differences in verdicts among juries and judges in the criminal context. Many authors cite the dynamics of group decision

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<sup>221</sup> Report of Proceedings, Court's Ruling on Respondent's Motion for Jury Trial at 12–13 (Dec. 13, 1985), *Washington v. Loney* (King Co. Sup. Ct., No. 85-8-04998-7), *aff'd. sub nom* *State v. Schaaf*, 743 P.2d 240 (Wash. 1987).

<sup>222</sup> One judge commented that she is probably less apt than a jury to be stopped by the Commonwealth's burden of proof beyond a reasonable doubt. Although she recognizes it as a high burden of proof, she knows that there can and will be many cases in which this burden is met by the Commonwealth. See Interview with Anonymous Superior Court Judge 1, Boston, Mass. (Jan. 4, 2000) [hereinafter Interview with Judge 1].

<sup>223</sup> See Interview with Judge Patrick Brady, *supra* note 216.

<sup>224</sup> See, e.g., Interview with Judge 4, *supra* note 193; Interview with Judge 5, *supra* note 193; Telephone Interview with Anonymous Superior Court Judge 6 (Jan. 12, 2000) [hereinafter Interview with Judge 6].

<sup>225</sup> See Interview with Judge 3, *supra* note 193.

<sup>226</sup> See Interview with Judge 1, *supra* note 222; Interview with Judge 2, *supra* note 170; Interview with Judge 3, *supra* note 193.

making—"the back-and-forth, give-and-take of a discussion"—as one important and distinctive feature of juries.<sup>227</sup> For example, Kalven and Zeisel, in their famous comparative study of judge and jury verdicts, found that jurors who deliberate are more likely to acquit than judges.<sup>228</sup> Interviews with attorneys, judges, and one juror confirm that jurors can and do change their minds as a result of group discussion.<sup>229</sup> One judge commented that jurors tend to deliberate for far longer than most judges would when deciding the cases.<sup>230</sup> This suggests that the opportunity for group discussion may raise issues not otherwise considered by judicial fact finders.

Jurors may also weigh the reasonable doubt burden of proof standard more heavily than judges. A number of judges have commented that jurors tend to take this standard to heart and understand that this is a very high burden of proof.<sup>231</sup> Jurors typically hear only one case and are less likely to become jaded by the process.<sup>232</sup> One juror agreed that jurors truly grasp the notion that the petitioner is presumed not to be sexually dangerous.<sup>233</sup> Similarly, one judge commented that juries, by virtue of their anonymity and fresh perspective on SDP cases, are freer than judges to say that "there's something unfair about these laws."<sup>234</sup>

Scholars of the jury system also suggest that, as compared to judges, as a group, jury pools better reflect the composition of the community at large.<sup>235</sup> In this regard, one judge commented that SDP juries are typically composed of highly conscientious people because the jury selection process brings to the surface the importance of not allowing emotions about sexual crimes to cloud their judgment.<sup>236</sup> Not all judges would agree with this position—indeed, one judge commented that SDP juries inevitably lack a fair cross section of the community because "no rational human being could presume someone to be not sexually dangerous if they've committed numerous horrible sex crimes."<sup>237</sup> At the least, jury voir dire provides litigants with an opportunity to probe the fact finders for hidden biases and attitudes toward sex crimes, whereas "[i]n a bench

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<sup>227</sup> See Ainsworth, *supra* note 203, at 1124–25 & nn.275–76 (citing R. KEVELSON, *THE LAW AS A SYSTEM OF SIGNS* 59–78 (1988); Norton, *What a Jury Is*, 16 VA. L. REV. 261, 266 (1930)).

<sup>228</sup> See KALVEN & ZEISEL, *supra* note 202, at 59.

<sup>229</sup> See, e.g., Telephone Interview with Bruce W. Carroll, *supra* note 177; Interview with William VanLonkhuyzen, Attorney at Law, Zalkind, Rodriguez, Lunt & Duncan, Boston, Mass., who was one of the jurors who voted to release Mr. Talbot (Jan. 26, 2000) (notes on file with the *Harvard Civil Rights-Civil Liberties Law Review*).

<sup>230</sup> See Interview with Judge 1, *supra* note 222.

<sup>231</sup> See *id.*; Interview with Judge 4, *supra* note 193.

<sup>232</sup> See Interview with Judge Patrick Brady, *supra* note 216.

<sup>233</sup> See Interview with William VanLonkhuyzen, *supra* note 229.

<sup>234</sup> See Interview with Judge 1, *supra* note 222.

<sup>235</sup> See Ainsworth, *supra* note 203, at 1125 n.278.

<sup>236</sup> See Interview with Judge Patrick Brady, *supra* note 216.

<sup>237</sup> See Interview with Judge 5, *supra* note 193.



trial, no analogous opportunity exists to explore the judge's background."<sup>238</sup>

*c. What Conclusions Can Be Drawn from These Characteristics?*

Although there are no empirical studies comparing juries and judges in the SDP context, interviews with superior court judges, practitioners, and jurors suggest that observed differences between juries and judges in the criminal context<sup>239</sup> may hold true in the SDP context. These differences—in the weight given to particular types of evidence, in the length of time devoted to deliberation over facts, and in the level of concern about media repercussions—appear to correlate with an increased reluctance on the part of juries to find that petitioners remain sexually dangerous.

Of course, a skeptic of the jury system might argue that, while juries are indeed more liberty protective than judges, this difference is a function of their relative incompetence to decide cases involving expert predictions of dangerousness. Scholars like Laurence Tribe argue persuasively that the use of probabilistic evidence may distort jury verdicts because the "overpowering number" dwarfs efforts to bring in impressionistic evidence.<sup>240</sup> Empirical studies tracking the accuracy of jury predictions of dangerousness in the capital punishment context, moreover, have found that jurors "do not make decisions on the basis of legal factors that can be easily identified," but instead "determine punishment based on their own mental images of the violent criminal" rather than on scientific facts.<sup>241</sup> Yet there are other studies that suggest, contrary to the popular belief that juries are mystified by science, that juries are competent to decide quite complex scientific cases.<sup>242</sup> One recent study of jury decision making in the capital punishment context found that:

juries are strongly disinclined to accept an expert witness's theory or analysis simply because the testimony is coming from an expert. The expert who believes that her testimony will be revered by the jury based upon the dazzle of her credentials, the glitter of her academic appointments, and the sophistication of

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<sup>238</sup> See Ainsworth, *supra* note 203, at 1125 & n.278.

<sup>239</sup> See *supra* text accompanying note 202.

<sup>240</sup> See Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).

<sup>241</sup> Sorensen & Marquart, *supra* note 210, at 776.

<sup>242</sup> See, e.g., Michael S. Jacobs, *Testing the Assumptions Underlying the Debate about Scientific Evidence: A Closer Look at Juror "Incompetence" and Scientific "Objectivity,"* 25 CONN. L. REV. 1083 (1993); Neil Vidmar, *Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data from Medical Malpractice*, 42 EMORY L.J. 885 (1994); see also KALVEN & ZEISEL, *supra* note 202, at 55-57, 149 ("the jury does by and large understand the facts and get the case straight . . .").

her analysis would be in for a rude shock if she could hear the jury deliberate.<sup>243</sup>

The judges who preside over SDP commitment hearings almost universally agree that jurors are just as competent as judges to decide the question of sexual dangerousness<sup>244</sup> and possess a healthy skepticism about expert testimony.<sup>245</sup> A number of judges commented that, precisely because the entire field of science upon which this determination rests is fundamentally subjective, there is absolutely no reason to believe that judges are better equipped than jurors to weigh the scientific evidence.<sup>246</sup>

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<sup>243</sup> Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1139-40 (1997).

<sup>244</sup> To the extent that jurors do suffer in their ability to assess expert testimony regarding future dangerousness, these impairments may be addressed by means short of eliminating the jury trial. One option is to eliminate professional expert witnesses altogether and instead require the state to rely upon staff with real knowledge of how the petitioner interacts with other people and lay testimony regarding the static factors found to be most reliable in predicting future dangerousness. See *supra* notes 13-14 and accompanying text (discussing preference for actuarial over clinical judgments); Brief for the APA as Amicus Curiae at 14, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080) (characterizing dangerousness as an essentially lay determination).

Another option is to offer testimony regarding future dangerousness by means of briefs submitted by parties to the trial judge, who would then conduct an independent investigation and convey his/her findings to the jury in the form of a jury instruction. See Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987) (positing a new category of *social framework evidence* that is neither legislative nor adjudicative, but instead is comprised of general conclusions from social science research that are used to frame factual issues in a specific case). But see Neil Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 LAW & CONTEMP. PROBS. 133, Autumn 1989 (reviewing empirical research regarding jury comprehension of three types of social framework evidence: battered women syndrome, rape trauma, and eyewitness unreliability and (tentatively) concluding that juries can utilize social framework evidence in a legally appropriate manner).

The most radical alternative may be to encourage the SJC to reconsider the validity of the underlying science upon which the legislature has relied in order to justify civil confinement of certain classes of sex offenders. If juries struggle to understand expert testimony regarding future dangerousness and judges admittedly fare no better in assessing the science, perhaps the problem is the science, not the fact finder!

<sup>245</sup> While most attorneys present expert testimony on behalf of petitioners, many agree that the expert testimony is by no means determinative. See, e.g., Interview with John Swomley, *supra* note 68 (noting that the jury voted to release Frederick Wyatt despite the absence of expert testimony on his behalf). Juries typically hear from experts on both sides, and, according to many judges and practitioners, the expert testimony is often a wash. See, e.g., Interview with Judge 2, *supra* note 170; Interview with Judge 5, *supra* note 193; Interview with William VanLonkhuyzen, *supra* note 229; see also Sundby, *supra* note 243, at 1115 (noting tendency of jurors to view experts as "hired guns").

<sup>246</sup> See Interview with Judge 1, *supra* note 222; Interview with Judge 3, *supra* note 193; Interview with Judge 4, *supra* note 193. Of course, there may be salient differences between the capital punishment and SDP contexts that explain the increased reliability of SDP jury verdicts relative to capital sentencing determinations. In the capital punishment context, the same jury decides both guilt and punishment. The process of finding a defendant guilty might affect a jury's view of that defendant as dangerous. Moreover, studies suggest that "death qualified" jurors are more prone to convict; this phenomenon may also explain their predisposition to overpredict. Finally, in the death penalty context, the jury has a recent offense on which to base its finding of dangerousness. In the SDP context, by

Another potential criticism of the SDP jury system is that, while jurors may be better than judges at fact finding, they possess a limited ability to apply the law.<sup>247</sup> It is true that the legal standards under chapter 123A are rather confusing. The jury is required to find beyond a reasonable doubt that the petitioner is *likely* to reoffend. Does this mean reasonable doubt, or is it really a disguised version of the preponderance of the evidence standard? Moreover, how is a jury to presume that someone who has committed multiple sex offenses and been previously adjudicated sexually dangerous is nevertheless not sexually dangerous? Yet, anecdotal evidence suggests that juries do not have any more difficulty applying legal standards in the SDP context than in criminal trials. Jury questions during deliberations focus on appropriate issues,<sup>248</sup> and most judges agree that juries appear to understand the burden of proof and to apply it fairly.<sup>249</sup> Moreover, to the extent that jurors do struggle with the complex standards, the solution may be to improve the instructions, not to do away with the jury. Multiple studies have found that jury instructions can and do improve the quality of deliberation and the degree to which juries comprehend legal standards.<sup>250</sup>

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contrast, unless the petitioner has committed violent or sex-related disciplinary offenses while incarcerated, the most recent evidence of dangerousness may be more than twenty years old.

<sup>247</sup> See Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, Autumn 1989, at 223–24.

<sup>248</sup> In the Frederick Wyatt trial, for instance, jurors wanted to know, among other things, whether Wyatt's commitment to the Nemasket Correctional Center was voluntary or involuntary and whether Wyatt's brother (with whom he planned to live) had children or planned to have children. See Record at 117, 203, Wyatt v. Commonwealth of Massachusetts (No. 97-229) (Mass. Super. Ct. 1998). During the testimony of the state's second expert, Dr. Meadows, the jury submitted the following list of questions to the court:

- [1] Were either Dr. Meadows or Dr. Grief qualified as "experts" by the Court? If so, on which topics or in which fields?
- [2] Is there a way the jury can be informed about the total population of the center since 1983? Can the following questions be answered from DOC records? Number one, total number of inmates in the program (cumulative). Number two, total number released into the community from 1983 to 1992 and 1992 to 1998. Number three, total number of inmates found to be sexually non dangerous since 1992. Number four, any evaluations of Nemasket Correctional Center staff as to fitness, efficacy of treatment programs, et cetera . . .

*Id.* at 205–06.

<sup>249</sup> See *supra* notes 230–234 and accompanying text.

<sup>250</sup> For a discussion of how jury instructions might improve jury decision making, see, for example, Geoffrey P. Kramer & Doreen M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401 (1990) (finding that juror comprehension would improve if new wording and presentation of instructions were implemented, but that there is no incentive in the legal system to do so); Laurence J. Severance et al., *Toward Criminal Jury Instructions that Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198 (1984) (expressing overall optimism that simplified language and reorganized presentation of legal concepts, coupled with the opportunity to deliberate, can improve juror comprehension and application of the law); Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of*

Even assuming that Massachusetts juries are competent to decide SDP cases and are, on average, more skeptical of restraints on liberty than judges, the question remains whether they are necessarily more liberty protective than judges. The procedures that govern chapter 123A proceedings influence the scope of jury protection and may be used to enhance or undercut the role of juries as bulwarks of protection. For this reason, it would be mistaken to conclude from preliminary jury statistics that juries will always be properly prepared to challenge terms of confinement under chapter 123A.

## 2. Trial Procedures

There is virtually no case law that elaborates on the procedural requirements for jury trials under chapter 123A.<sup>251</sup> What little case law does exist, however, suggests that the creation of a jury right for SDP proceedings has forced reviewing courts, more than ever, to confront the hybrid civil/criminal nature of confinement under chapter 123A. Appellate courts have long recognized the need for certain criminal-like procedural safeguards in chapter 123A proceedings, such as the right to exclude certain hearsay statements<sup>252</sup> and the right to exclude communications made to court-appointed psychotherapists absent a showing that the prisoner received adequate warning that such communications would not be privileged.<sup>253</sup> Perhaps the most striking criminal-like safeguard is the requirement that, at any annual hearing on a petition by a sexually dangerous person for his release from the Nemasket Correctional Center, the Commonwealth bears the burden of proving beyond a reasonable doubt that, at the time of the hearing, the petitioner continues to be sexually dangerous.<sup>254</sup> With the institution of a jury right, however, comes the

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*Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 L. & Soc'y REV. 153 (1982) (finding that use of common, concrete words, active voice, and verbs rather than nominalizations improves juror comprehension and legal accuracy of verdicts). *But see* Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICH. L. REV. 2590, 2595-96 (1996) (arguing that employing "guided discretion" by means of "mind-numbing details about the state's and the defendant's respective burdens of proof" not only does not guide jurors, but may diminish their personal moral responsibility for the decisions that they make).

<sup>251</sup> The only two published opinions discussing jury trial procedure in SDP proceedings are *In re Sheridan*, 655 N.E.2d 978 (Mass. 1996) and *In re Wyatt*, 701 N.E.2d 337 (Mass. 1998).

<sup>252</sup> See *Commonwealth v. Bladsa*, 288 N.E.2d 813 (Mass. 1972) (holding that petitioner had the right to exclude hearsay statements in police and Department of Correction reports where such statements were not subjected to cross-examination by a prisoner represented by counsel).

<sup>253</sup> See *Commonwealth v. Lamb*, 311 N.E.2d 47 (Mass. 1974).

<sup>254</sup> See *In re Andrews*, 334 N.E.2d 15, 25 (Mass. 1975) (noting that, although SDP hearings are civil in nature, the civil/criminal distinction cannot be blindly applied to deny constitutional rights to those persons subject to indeterminate commitment as sexually dangerous persons, for such a disposition might have far more serious consequences for the individual than criminal punishment); see also *In re Wyatt*, 701 N.E.2d 337 (Mass.

greatest opportunity for litigants to ensure that the law's criminal-like safeguards are utilized in practice. This development has forced trial judges to articulate legal definitions and standards of proof and has provided a forum for lawyers to advocate increased adherence to criminal-like procedures.

In the absence of published jury instructions or a guiding body of law, the conduct of jury trials remains fluid and subject to judicial interpretation. This initial period of fluidity has invited judges to grapple with some of the most difficult questions posed by chapter 123A: Is confinement under chapter 123A predominantly civil or criminal? What evidence is relevant to the determination that an individual is sexually dangerous? What legal presumptions, if any, apply in the chapter 123A context?

In the course of developing appropriate procedural mechanisms to govern chapter 123A hearings, superior court judges have enormous power to shape the scope of future applications of this law. Procedural choices, particularly with respect to the conduct of voir dire, certain evidentiary issues, and jury instructions, have the potential to tip the balance in favor of affording chapter 123A many, if not most, of the procedural safeguards of the criminal justice system. In this sense, while juries may indeed function as bulwarks of protection, judges can shape the scope of this protection in a number of important ways.

#### *a. Voir Dire*

The conduct of voir dire highlights the hybrid civil/criminal nature of SDP jury trials. The number of peremptory challenges available to each side and the first challenge requirement are among the many ambiguities in jury trials. In a civil case, the plaintiff and defendant are each entitled to five peremptory challenges, and the plaintiff, who bears the burden of proof, exercises the first challenge.<sup>255</sup> In a superior court felony trial in which life imprisonment is a potential sentence, the Commonwealth and defendant are each entitled to twelve peremptory challenges, and the Commonwealth, who bears the burden of proof, exercises the first challenge.<sup>256</sup> SDP trials confuse this neat division—while they are civil proceedings, the petitioner does not bear the burden of proof. Most

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1998) (holding that Commonwealth's burden is such that petitioner need not produce any evidence that he is no longer sexually dangerous). With respect to the requirement of proof beyond a reasonable doubt, it should be noted that Massachusetts has surpassed the constitutional minimum requirements of clear and convincing evidence, as articulated by the Supreme Court in *Addington v. Texas*, 441 U.S. 418 (1979), in the context of the traditional civil commitment scheme.

<sup>255</sup> See MASS. GEN. LAWS ANN. ch. 239, § 29 (West 2000) (governing number of peremptories in civil case); SUP. CT. R. 6 (governing order of peremptories).

<sup>256</sup> MASS. R. CRIM. P. 20(C)(1) (providing twelve peremptory challenges upon trial of indictment for a crime punishable by imprisonment for life).

judges resolve this dilemma by granting each side five peremptory challenges, but requiring the Commonwealth to exercise the first peremptory.<sup>257</sup> Taken individually, these decisions may appear trivial, but, in the aggregate, they reveal a revitalized effort on the part of judges to determine whether the governing principles of chapter 123A hearings will be predominantly civil or criminal—an effort that may profoundly influence the outcome of future jury proceedings.

### *b. Evidentiary Rulings*

Evidentiary rulings also highlight judicial attitudes toward the hybrid civil/criminal nature of SDP proceedings and undoubtedly shape jury decision making. In particular, jury verdicts may be powerfully influenced by judges' rulings on the admissibility of testimony about the quality of treatment at the Nemasket Correctional Center, the underlying reliability of predictions of dangerousness,<sup>258</sup> and the consequences of a finding of not sexually dangerous.

Judges ordinarily do not permit petitioners to offer evidence regarding the inadequacy of treatment. The rationale behind this evidentiary rule is that the commitment hearing is not the proper forum for determining whether a petitioner is receiving adequate treatment as its sole purpose is "to determine the single issue whether or not the petitioner is a sexually dangerous person."<sup>259</sup> The constitutionality of a petitioner's

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<sup>257</sup> See Interview with Judge 6, *supra* note 224.

<sup>258</sup> Another important evidentiary issue concerns the admissibility of hearsay statements. Massachusetts courts traditionally have permitted psychiatrists who testify at SDP commitment hearings to rely upon a wide variety of hearsay statements in forming an opinion as to petitioner's sexual dangerousness. See *Commonwealth v. Childs*, 360 N.E.2d 312 (Mass. 1977) (holding that materials other than personal interviews that may be used in writing psychiatric report include "court record" and transcript of testimony at prior hearings and trials, probation records, police and other reports, past criminal records, interviews with family and friends, observations by prison officials and treatment staff, interviews with victims of crimes of which individual has been convicted, and physiological and psychological tests). It is unclear, however, whether the reports produced by Qualified Examiners, which frequently summarize hearsay material, are themselves admissible. Chapter 123A states that psychological reports, disciplinary reports, and court records are admissible in evidence in release hearings, but does not explicitly address the admissibility of Qualified Examiner reports. See MASS. GEN. LAWS ch. 123A, § 9 (Pocket Part 2000). *Commonwealth v. Tucker*, 502 N.E.2d 948 (Mass. 1987), clarified this issue by distinguishing between reports admitted for the purpose of ascertaining the basis of the testifying expert's opinion (proper) and those admitted to prove substantive facts set forth in the report (improper). Under certain circumstances, however, compliance with *Tucker* might conflict with the principle of law under which an expert may rely on hearsay in forming an opinion, but may not repeat hearsay. See Interview with Judge 6, *supra* note 224. The extent to which these reports come into evidence, and for what purposes, remains an open question and one that may significantly affect jury deliberations.

<sup>259</sup> *In re Gagnon*, 625 N.E.2d 555, 557 (Mass. 1994) (quoting *In re Davis*, 421 N.E.2d 441, 444 (Mass. 1981)). One version of jury instructions used by a superior court judge cautions the jury that:

confinement at the Nemasket Correctional Center, however, is premised upon the promise of treatment.<sup>260</sup> Moreover, because a petitioner's refusal to participate in treatment often provides the principal source of evidence that the petitioner remains sexually dangerous,<sup>261</sup> both the SJC and trial courts recognize an exception to this rule where the Commonwealth relies upon evidence of this refusal to establish sexual dangerousness. In *In re Wyatt*,<sup>262</sup> for example, the SJC upheld Judge Brady's decision to permit cross-examination and rebuttal testimony regarding the inadequacy of treatment for the purpose of countering this type of evidence.<sup>263</sup> The *Wyatt* case highlights the ways in which jury trials may provide an important forum for debate over the significance of an inmate's failure to participate in treatment, in spite of the general (and misguided) prohibition against putting the treatment facility on trial.

A second related evidentiary issue concerns the ability of petitioners to challenge the underlying science of prediction upon which the jury's determination of future dangerousness depends. There is an enormous body of literature attacking the validity of predictions of future danger-

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There is no issue before you as to the wisdom or efficacy of the commitment system, or as to the adequacy or propriety of the management of the Treatment Center or of the treatment provided there, [or as to the propriety of any conduct of any Treatment Center staff toward the petitioner] and your verdict must not be influenced by any such concerns. Any evidence that you have heard regarding the treatment offered [or the conduct of the staff or management of the Treatment Center] has been admitted only for the purpose of informing your evaluation of whether the petitioner is presently a sexually dangerous person, and you may consider it only for that purpose.

Sexually Dangerous Person Instructions (on file with the *Harvard Civil Rights-Civil Liberties Law Review*).

<sup>260</sup> See *Doe v. Gaughan*, 808 F.2d 871, 877 (1st Cir. 1986) (petitioners are entitled to at least "minimally effective" treatment); *Commonwealth v. Davis*, 551 N.E.2d 39, 41 (Mass. 1990) (civil committees are not statutorily entitled to least restrictive conditions); *Commonwealth v. Page*, 159 N.E.2d 82, 85 (Mass. 1959) ("remedial" confinement of persons subject to MASS. GEN. LAWS ch. 123A (1986) commitment must, at a minimum, be differentiated from incarceration of convicted criminals).

<sup>261</sup> Indeed, according to jurors, the refusal to participate in treatment was a primary factor in the decision to find that petitioners remained sexually dangerous in at least three cases. See Interview with Judge 3, *supra* note 193. In one case, members of the jury commented that they genuinely had struggled to make a decision because they had wanted to credit the petitioner for the progress that he had already made in treatment, but did not feel that he had completed enough treatment to merit release. See Interview with Judge 1, *supra* note 222. Even more remarkable was a case in which the jurors voted to release the petitioner, but sent a note with the verdict in which they expressed their hopes and prayers that the petitioner would remain in treatment. See Telephone Interview with Bruce W. Carroll, *supra* note 177.

<sup>262</sup> 701 N.E.2d 337 (Mass. 1998).

<sup>263</sup> See *id.* at 343-46. Attorney Eliot Levine, who has successfully represented two petitioners in jury trials, notes that trial judges also permit petitioners to counter claims that the Nemasket Correctional Center offers "state of the art" therapy with evidence that the CAB has not identified a single person who has successfully graduated from this program. See Interview with Eliot Levine, Attorney at Law, Cambridge, Mass. (Jan. 26, 2000).

ousness.<sup>264</sup> Petitioners frequently attempt to call expert witnesses to inform the jury of such studies and to attack the validity of opinions offered by the state's Qualified Examiners. The Department of Correction maintains that trial courts generally should not permit petitioners to challenge the underlying science of prediction because the legislature not only requires the Qualified Examiners and CAB to make a prediction, but has specified a particular method of doing so.<sup>265</sup> Some superior court judges agree with this position and have imposed limits on expert testimony attacking the reliability of predictions of dangerousness.<sup>266</sup>

The arguments to exclude frontal attacks on predictive science and to limit testimony regarding the quality of treatment are both deeply troubling. The mere fact that the legislature has adopted a particular science and philosophy of treatment does not insulate those choices from public scrutiny. Juries can and should reject weak or unfounded scientific opinions where they find that these opinions are insufficient to justify further confinement. Moreover, to the extent that juries consider these factors anyway in evaluating the appropriateness of confinement, they will make more competent decisions with complete and accurate information regarding these seemingly peripheral issues. Without meaningful cross-examination on the reliability of the science of predictions, petitioners may be unable to hold the Department of Correction to its burden of proof beyond a reasonable doubt because jurors may assume that the science is unassailable.

A third evidentiary debate concerns the extent to which either the petitioner or the Department of Correction may introduce evidence about the consequence of a jury vote to release the petitioner. It is possible that a petitioner who has requested a chapter 123A review hearing may have time remaining on his criminal sentence or may have a term of probation after his release from the Nemasket Correctional Center.<sup>267</sup> The question, therefore, arises whether that petitioner can inform the jury that, regardless of its decision with respect to current sexual dangerousness, he will remain under some form of correctional supervision. A similar question arises in cases in which the petitioner has completed his criminal sentence. In this instance, the Commonwealth may seek to inform the jury that, if released, the petitioner will simply walk out the door with no strings attached and no requirement of continuing therapy. For the most part, judges severely restrict testimony of this nature, reasoning that it

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<sup>264</sup> See *supra* notes 12 and 152 and accompanying text.

<sup>265</sup> See Telephone Interview with Dan Less (Jan. 27, 2000) (notes on file with the *Harvard Civil Rights-Civil Liberties Law Review*) [hereinafter Less Interview II].

<sup>266</sup> See, e.g., Interview with Judge 4, *supra* note 193 (reasoning that the legislature is entitled to make the judgment that predictions of future dangerousness are reliable, even if there is alternative science to suggest that these predictions are unreliable).

<sup>267</sup> See Interview with Henry Lebensbaum, Attorney at Law, Cambridge, Mass. (Dec. 1, 1999); Interview with Eliot Levine, *supra* note 263.



distracts the jury from its task of determining whether the petitioner is a sexually dangerous person and alleviates the jury of its burden with respect to this important decision.<sup>268</sup> The difficulty with this rationale is that jurors invariably weigh the possibility of release in deciding whether a petitioner remains sexually dangerous.<sup>269</sup> Depriving jurors of this information does not discourage them from taking the likelihood of release into account, but instead encourages them to make decisions based on speculation.<sup>270</sup>

### c. Jury Instructions

One of the most contentious aspects of jury trials under chapter 123A is the content of jury instructions. The principal source of disagreement stems from the question of whether petitioners are entitled to an instruction that they are presumed not sexually dangerous.<sup>271</sup> The

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<sup>268</sup> See Interview with Judge 4, *supra* note 193 (noting that evidence either that petitioner will not be released immediately or that petitioner will have no supervision if released tends to minimize the seriousness of the decisions that jurors must make).

<sup>269</sup> Mr. VanLonkhuyzen's discussion of his experience as a juror suggests that many jurors equate the decision to find someone not sexually dangerous with the decision to release that person into the community. See Interview with William VanLonkhuyzen, *supra* note 229; see also Interview with John Swomley, *supra* note 68 (explaining that, since a number of jurors in Mr. Wyatt's first trial suggested that a key factor in their decision that Mr. Wyatt remained sexually dangerous was the lack of information about what would happen to Wyatt if they released him, it was decided that, at the second jury trial, Mr. Wyatt's brother would testify on Mr. Wyatt's behalf that, if released, Mr. Wyatt would come to live with his family in Ohio).

<sup>270</sup> A recent interview with jurors who served in the trial of Andrew Goldstein, a mental patient who shoved Kendra Webdale to her death in a New York subway, revealed that jurors "could not help worrying about" whether Goldstein would be released in a short time if they found him not guilty by reason of insanity. See Michael Winerip, *The Juror's Dilemma*, N.Y. TIMES MAG., NOV. 21, 1999, at 29. The author pointed out that, ironically, while many jurors believed that "[p]eople don't stay in mental institutions very long," "[t]he truth is, if Goldstein was [sic] judged insane, he would probably spend as much or more time locked away." See *id.* at 30. But see H. Richard Uviller, *The Defendant on the Couch*, N.Y. TIMES, OCT. 27, 1999, at A27 (expressing concern that the insanity defense puts jurors in the impossible position of having to think like doctors, when they should instead be deciding whether the defendant is guilty). The problem of jury speculation has also been noted in the context of capital punishment sentencing hearings, at which jurors are frequently prevented from learning about the unlikelihood of the defendant's eligibility for parole if sentenced to life in prison. See William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 610 (1999) (positing that juror misunderstandings about death penalty alternatives bias their sentencing decisions in favor of imposing death and concluding that jurors should not be required to make reasoned moral punishment decisions without full information about alternatives); see also *Simmons v. South Carolina*, 512 U.S. 154 (1994) (plurality opinion) (holding that, when a defendant's future dangerousness is at issue, due process requires that a jury be informed of the fact that state law makes the defendant ineligible for parole).

<sup>271</sup> A slightly less contentious issue with respect to jury instructions is how the judge explains a petitioner's failure to testify. See Interview with Judge 6, *supra* note 224. Like the presumption of nonsexual dangerousness, this question highlights the hybrid civil/criminal nature of SDP proceedings. Although the petitioner has a right not to testify,

*Wyatt* decision established that, while it is not error for a trial court to instruct the jury on presumption of innocence, petitioners are not constitutionally entitled to this instruction.<sup>272</sup> Interviews with superior court judges reveal a wide array of opinions with respect to this issue. In Judge Brady's view,<sup>273</sup> the presumption of nonsexual dangerousness is intermingled with the *Webster* jury charge defining proof beyond a reasonable doubt and is, therefore, mandatory.<sup>274</sup> At least five or six other judges who have presided over jury trials concur with Judge Brady that presumption of innocence is inherent in the *Webster* reasonable doubt charge.<sup>275</sup> However, several judges take the opposite view that presump-

this right is not absolute, as it is a civil proceeding in which the Department of Correction may call the petitioner as a witness. If the petitioner elects not to testify and the Department of Correction does not call him as a witness, judges instruct the jury that the petitioner has a right not to testify. If a petitioner testifies on his own behalf, but pleads the Fifth Amendment with respect to certain issues on cross-examination, however, the proper judicial explanation is less well defined. *See id.* A staff lawyer for the Nemasket Correctional Center recounted that, in one such situation, a judge instructed the jury that it could draw an adverse inference from the petitioner's refusal to answer certain questions. *See* Less Interview II, *supra* note 265.

<sup>272</sup> *See In re Wyatt*, 701 N.E.2d 337, 341 (Mass. 1998). For discussion of court's reasoning, *see supra* note 185 and accompanying text.

<sup>273</sup> *See* Interview with Judge Patrick Brady, *supra* note 216. Judge Brady was the trial judge in Frederick Wyatt's second jury trial. *See Wyatt*, 701 N.E.2d at 337.

<sup>274</sup> *See Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295 (1850). The *Webster* decision offers the following discourse on reasonable doubt in the context of a criminal trial:

Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether.

*Id.* at 17.

<sup>275</sup> *See* Interview with Judge 3, *supra* note 193; Interview with Judge 5, *supra* note 193; Interview with Judge 6, *supra* note 224; Interview with James Doyle, Somerville, Mass. (Jan. 4, 2000) (noting that approximately three of the six petitioners whom he has represented in jury trials have received a presumption instruction); Telephone Interview with Bruce W. Carroll, *supra* note 177 (identifying another judge who gave the presumption instruction). One model version of jury instructions generously made available by a superior court judge states the following with respect to the presumption of nonsexual dangerousness:

tion of innocence is intuitively distinct from the reasonable doubt standard and, therefore, not required under the law.<sup>276</sup>

One juror's account of a recent SDP trial illustrates the profound impact that the presumption instruction may have on the nature of jury deliberations and likelihood of release. The petitioner, Jeffrey Talbot, pled guilty in the early 1980s to rape and indecent assault and battery. At the time of his SDP commitment hearing in October 1999, he had been incarcerated and/or civilly committed for nearly twenty years.<sup>277</sup> The testimony at his trial revealed that Mr. Talbot had suffered a very disturbing childhood. He grew up with his biological mother and sister and never knew his father. His mother was a substance abuser who frequently hosted sex parties in which Mr. Talbot's sister would participate. He was raped on two occasions, once by his mother's boyfriend at one of her sex parties and once by a caretaker at one of his DSS placements. Mr. Talbot was found to be sexually dangerous by two Qualified Examiners and the CAB, but, at the SDP hearing, he presented the testimony of two state-qualified independent examiners that reached the opposite conclusion. When the Department of Correction subpoenaed his treating psychologist, she testified under protest that she could not offer an opinion as to Mr. Talbot's sexual dangerousness because it would impair the treatment process. On cross-examination, she testified that she and Mr. Talbot had discussed her testimony before trial and that he had been sympathetic to her predicament. The Department of Correction also presented testimony from a psychological education teacher who had failed Mr. Talbot.

After two and a half days of deliberation, a jury found that Mr. Talbot was not sexually dangerous. According to one of the individuals who

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The petitioner is presumed *not* to be a sexually dangerous person. The Commonwealth has the burden of proving beyond a reasonable doubt that he remains a sexually dangerous person. Although this is a civil case, the standard of proof beyond a reasonable doubt is required because a decision in this case impacts on the petitioner's liberty.

*See Sexually Dangerous Person Jury Charge: Adult Victim(s)* (on file with the *Harvard Civil Rights-Civil Liberties Law Review*) (emphasis in original).

<sup>276</sup> *See* Interview with Judge 1, *supra* note 222; Interview with Judge 2, *supra* note 170. One judge intimated that she adheres to the spirit, if not the word, of the presumption of innocence in her instructions to SDP juries. *See* Interview with Judge 4, *supra* note 193. Her model instructions refer to the "very high standard of proof" and urge the jury to recall that "[t]he petitioner has no burden to prove anything, or even to present any evidence at all," and that "[t]he petitioner is entitled to a verdict that he is not sexually dangerous unless the evidence presented by the Commonwealth satisfies you beyond a reasonable doubt that he is." *See Sexually Dangerous Persons Instructions*, *supra* note 259. According to an attorney who has tried a jury case before this judge, however, these instructions fall short of conveying either the letter or the spirit of presumed innocence. *See* Interview with Eliot Levine, *supra* note 263. Attorney Levine commented that, in his experience, most judges are not inclined to give the presumption instruction. *See id.*

<sup>277</sup> *See* Telephone Interview with Bruce W. Carroll, *supra* note 177.

served on the jury,<sup>278</sup> the jury ended its first day of deliberation with a vote of eight to four in favor of commitment. Among the jurors who initially sided with the Department of Correction, the majority placed great importance on the failure of the treating psychologist to give an opinion as to Mr. Talbot's sexual dangerousness and on her testimony that Mr. Talbot would benefit from more treatment. The possibility that the petitioner might reoffend was also important to many jurors, even those who voted in favor of release. For the most part, jurors did not seem particularly moved by the Qualified Examiners because, although these experts had met with Mr. Talbot and gone over his records, they felt that they did not really know him.<sup>279</sup> Over the course of the next two days, the jury gradually shifted in favor of Mr. Talbot, ultimately voting ten to two to release him.

Mr. VanLonkhuyzen, a juror who voted for release, identified a number of factors that he found persuasive, including the petitioner's minimal disciplinary record within the recent past and his expert's testimony regarding the irrelevance of treatment to future rates of recidivism.<sup>280</sup> The most important factor to Mr. VanLonkhuyzen and, in his view, the rest of the jury, was the judge's charge to the jury that Mr. Talbot should be presumed not to be sexually dangerous until proven otherwise.<sup>281</sup> The inclusion of this language in the jury instructions encouraged a number of hold-outs to change their minds and was critical to the outcome of the case. Even those jurors most reluctant to vote in favor of the petitioner ultimately felt that there was simply not enough evidence to overcome the presumption that Mr. Talbot was not sexually dangerous. In Mr. VanLonkhuyzen's view, it was not merely the reasonable doubt standard but, more specifically, the language of the presumption of innocence

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<sup>278</sup> Mr. VanLonkhuyzen, a local criminal defense lawyer, voluntarily contacted Mr. Talbot's attorney shortly after the trial to discuss the case with him. See Telephone Interview with Bruce W. Carroll, *supra* note 177. Mr. VanLonkhuyzen was kind enough to share his reflections on the factors that were most significant to the jury. See Interview with William VanLonkhuyzen, *supra* note 229.

<sup>279</sup> Indeed, Mr. VanLonkhuyzen commented that neither side's experts were particularly impressive. See Interview with William VanLonkhuyzen, *supra* note 229.

<sup>280</sup> See *id.* Mr. VanLonkhuyzen divided the jury into five camps, for which slightly different factors were most important. See *id.* He personally was most persuaded by the petitioner's minimal disciplinary history and by his expert's testimony that treatment does not help predict future recidivism. A second juror reasoned that the petitioner had raised a reasonable doubt merely by presenting testimony of a state-certified psychologist who found him not sexually dangerous. Two others took the position that they believed in forgiveness and that, irrespective of the evidence, the petitioner had been punished enough. Another camp felt that, although they did not like voting to release Mr. Talbot, the Department of Correction simply had not overcome the presumption of innocence. The two jurors who voted against Mr. Talbot simply could not get past the question of what if he were to reoffend. See *id.*

<sup>281</sup> See *id.*

instruction that truly conveyed the scope of the Department of Correction's burden of proof.<sup>282</sup>

#### *D. Prescription for the Future*

The creation of a jury right under chapter 123A provides an opportunity to reflect critically on the hybrid civil/criminal nature of Massachusetts's civil commitment scheme. Juries, it appears, possess certain characteristics that make them more willing than judges to make controversial release decisions that protect important liberty interests. On the other hand, trial procedures have the potential to guide jury discretion in ways that can either magnify or undercut these characteristics. Trial safeguards will become increasingly important under Massachusetts's new and more punitive civil commitment regime since juries will be responsible for making the initial decision to confine an individual beyond his criminal sentence. To the extent that chapter 123A survives judicial scrutiny, the freedom of petitioners to choose to have their cases heard by juries may serve as an important check on the liberty constraints that this punitive regime encourages. In order to ensure that this choice continues to be a meaningful one, however, trial judges and reviewing courts must do everything in their power to strengthen existing procedural safeguards. While Massachusetts juries, in the last two years, have demonstrated their capacity to protect unpopular liberty interests, they cannot make intelligent and informed judgments about the risk of future dangerousness without adequate knowledge of the context of confinement and the science of prediction.

As suggested above, a number of procedures may help safeguard individual liberty and prevent prosecutorial abuse in the SDP arena. First, given the difficulty of eliciting information about sensitive, often inflammatory sex-related matters, trial judges should question potential jurors on an individual basis and should consider providing each side with the same number of peremptory challenges as are available in the criminal context. Second, trial judges should permit petitioners to elicit testimony regarding the inadequacy of treatment and unreliability of the underlying science of prediction. Without this information, juries will rely upon supposition and speculation in assessing these issues and will not reach informed decisions about whether additional confinement is justified. Third, and most importantly, judges should incorporate the *Webster* language on presumption of innocence into their jury instructions on the reasonable doubt standard of proof. Absent this instruction, judges cannot ensure that the burden of proof with respect to sexual dangerousness remains with the state because juries may erroneously conclude that the

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<sup>282</sup> See *id.*

reasonable doubt standard of proof means something less than it does in the criminal context.

### Conclusion

At least rhetorically speaking, there is nothing new under the sun when it comes to civil commitment schemes for sex offenders. From their first incarnation as the sexual psychopath laws of the 1940s and 1950s to the modern sexually violent predator legislation upheld in *Kansas v. Hendricks*, specialized civil commitment laws for sex offenders have relied upon the same primary assumptions: that sex offenders suffer from a specific and identifiable mental disability and that, as a result of this disability, they are more likely than other criminals to commit dangerous crimes in the future. Similarly, opposition to modern civil commitment legislative schemes has originated from the same basic themes as those articulated over fifty years ago: that sexual dangerousness is not a mental illness, that mental health professionals are no more able to predict sexually violent behavior than any other form of criminal behavior, and that specialized civil commitment schemes for sex offenders violate prisoners' due process rights because they justify indefinite confinement on the basis of something less than the dual constitutional requirements of dangerousness and mental illness.

Nevertheless, there is something particularly disheartening about the most recent incarnation of Massachusetts's SDP scheme. The crafters of the new law not only willfully disregarded the findings of the 1990 Advisory Panel on Forensic Mental Health that demonstrated that Massachusetts's civil commitment scheme "neither enhance[s] . . . public safety nor successfully treat[s] . . . these offenders,"<sup>283</sup> but they also revised this scheme in ways that can only be understood as deliberately punitive. Both the substantive definitions and procedural mechanisms of the revised law betray a calculated legislative effort to abandon the rehabilitative ideal of traditional civil commitment schemes in favor of purely incapacitative goals. The current version of chapter 123A was not designed to treat, but to warehouse.

Of course, it has yet to be determined whether this new civil commitment scheme will survive judicial scrutiny. Indeed, there are numerous potential avenues of legal attack. First, litigants may be able to challenge the law's definition of mental abnormality as unconstitutionally vague under the state constitution. Second, litigants may be able to mount a substantive due process attack on the validity of the underlying science of prediction, on the ground that the legislature's finding that sex offenders pose a grave danger of recidivism is insufficient to overcome deficiencies in the statutory basis for confinement. Third, litigants could

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<sup>283</sup> Final Report, *supra* note 2, at 47.

argue that the timing of the commitment procedure renders the law penal, constituting a violation of the Double Jeopardy and Ex Post Facto Clauses of the United States Constitution. Alternatively, litigants could argue for a narrow construction of mental abnormality that would cover only those inmates that are mentally ill or suffer from a serious mental disorder.

Despite the practical injustice of Massachusetts's new law, as well as its many legal infirmities, neither repeal nor judicial invalidation is likely to occur in the current political environment. For this reason, SDP litigants may be forced to turn elsewhere for the protection of their politically unpopular civil liberty interests. Fortunately, Massachusetts juries have begun emerging as the unlikely champions of these civil liberties in the SDP arena. The legislature's decision to permit petitioners to request jury trials on the issue of whether they remain sexually dangerous has affected not only the procedural mechanisms, but also the outcomes, of commitment hearings under chapter 123A. In the two years since Frederick Wyatt became the first petitioner to be released by a Massachusetts jury, juries have released petitioners at nearly twice the rate of judges. While these numbers do not necessarily establish that juries will always be more protective of civil liberties than judges, or even that concern for liberty is driving jury verdicts, the numbers do suggest that juries may serve as important laboratories of justice for petitioners seeking to challenge their confinement as sexually dangerous persons.

Jury trials are transforming the landscape of civil commitment in Massachusetts, raising a host of procedural questions that go to the heart of the hybrid civil/criminal nature of chapter 123A. In order to counteract the effects of a fundamentally misguided law that aims to warehouse sex offenders, trial judges and reviewing courts must do everything in their power to preserve and enhance the role of Massachusetts juries under chapter 123A. Guided by appropriate procedural protections, juries may function as bulwarks of protection for an unpopular and vulnerable population. This result serves the interests of society as well as the individuals who are subject to confinement under chapter 123A. It serves society both by educating the public—through the individuals who serve on juries—that sex offenders are not monsters and by enabling community members to participate in the decision to subject a fellow community member to potential lifetime confinement. Individuals who are subject to chapter 123A confinement are aided by an additional tool with which to challenge an unfair and deliberately punitive law.

The recent flurry of jury trials under chapter 123A also serves an important storytelling function in the narrative of Massachusetts's civil commitment scheme. The legislators who enacted the jury right imagined that juries would function as the mouthpiece of the community in civil commitment proceedings. They also imagined that juries would "mini-

mize the possibility of dangerous individuals being released to the streets."<sup>284</sup> However, juries are not disregarding legal standards in order to keep petitioners incarcerated. Not only are they willing to release SDP petitioners, they seem willing to do so more frequently than judges ever did. The story underlying this surprise is that legislators, and the civil commitment law that they have enacted, may be quite out of touch with societal norms regarding the appropriate scope of individual liberty in the twilight zone between criminal and civil law. Jury verdicts are beginning to tell an alternative story, one that questions the fundamental premise that sex offenders are dangerous animals that do not deserve a meaningful opportunity for rehabilitation. In this sense, Massachusetts juries may prove to be not only laboratories of justice for the revised chapter 123A, but also vehicles of its ultimate demise.

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<sup>284</sup> State House News Service, *supra* note 32.