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Beverly Pearman

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## ***Kansas v. Hendricks: The Supreme Court's Endorsement of Sexually Violent Predator Statutes Unnecessarily Expands State Civil Commitment Power***

In 1993, just days before her twentieth birthday, Stephanie Schmidt was brutally raped and murdered by Don Gideon, a co-worker who had recently been released from jail after serving a sentence for rape.<sup>1</sup> In response to the tragedy, her parents, Gene and Peggy Schmidt, formed the Task Force on Sexual Offenders and lobbied Kansas lawmakers to pass a package of tough legislation targeting sex offenders.<sup>2</sup> That package included the Sexually Violent Predator Act (“the Act”),<sup>3</sup> which allowed for the involuntary civil commitment of sex offenders upon completion of their criminal sentences.<sup>4</sup> In 1995 Leroy Hendricks became the first sex offender committed under the Act.<sup>5</sup>

Hendricks was the type of criminal that Stephanie’s father described as the “worst of the worse” because of his propensity to continue committing sex crimes.<sup>6</sup> During his commitment hearing, Hendricks did not dispute such a characterization, testifying that only

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1. See Kelly A. McCaffrey, *The Civil Commitment of Sexually Violent Predators in Kansas: A Modern Law for Modern Times*, 42 U. KAN. L. REV. 887, 887 (1994); Greg Kuhl & Robert A. Cronkleton, *Employer Unaware of Gideon's Record*, KAN. CITY STAR, July 29, 1993, at C1; *60 Minutes: Stephanie's Law* (CBS television broadcast, Jan. 11, 1998) [hereinafter *60 Minutes*].

2. See McCaffrey, *supra* note 1, at 887; Jim Sullinger, *Tough Laws Urged for Sex Offenders*, KAN. CITY STAR, Nov. 3, 1993, at C1 (detailing the efforts of two legislators to propose bills on behalf of the task force).

3. KAN. STAT. ANN. §§ 59-29a01 to -29a17 (1994 & Supp. 1997). Since its enactment, the Kansas legislature has made several amendments to the Act. For instance, as originally enacted, the Act provided that the prosecuting attorney in the county where the offender was originally charged receive notice of a sexual predator’s pending release 60 days prior to that release. See KAN. STAT. ANN. § 59-29a03 (1994). Currently, however, notice of a sexual predator’s pending release must be given to the state attorney general 90 days prior to the release. See KAN. STAT. ANN. § 59-29a03 (Supp. 1997). Perhaps the most significant change since enactment is the addition of a multidisciplinary team to make a preliminary determination of whether the offender in question satisfies the statutory definition of a sexually violent predator. See *id.* § 59-29a03(d)-(e).

4. See KAN. STAT. ANN. § 59-29a03 (Supp. 1997) (setting out the process by which the attorney general is notified of the defendant’s release from prison); *id.* §§ 59-29a04 to -29a07 (describing the process of civil commitment).

5. See *Kansas v. Hendricks*, 117 S. Ct. 2072, 2076 (1997).

6. See *60 Minutes*, *supra* note 1 (interviewing Gene Schmidt as to why he lobbied for passage of the Act).

death could guarantee that he would not molest again.<sup>7</sup> Between 1955 and 1984 he was convicted six times for molesting children as young as seven years old,<sup>8</sup> a record that further validated a label of "the worst of the worse." Nonetheless, Hendricks challenged the Act alleging that it violated his rights under the Due Process, Ex Post Facto, and Double Jeopardy Clauses of the Constitution.<sup>9</sup> The Kansas Supreme Court agreed and struck down the Act on due process grounds,<sup>10</sup> but, in a five-to-four decision in *Kansas v. Hendricks*,<sup>11</sup> the United States Supreme Court reversed.<sup>12</sup>

This Note explores the facts of *Hendricks*, including the circumstances that led to Hendricks's commitment and the procedures demanded by the Act.<sup>13</sup> Next, the Note traces the development of substantive due process requirements for involuntary civil commitment proceedings ranging from those mandated by sexual psychopath statutes to those used for the continued confinement of defendants found not guilty by reason of insanity.<sup>14</sup> The Note also takes a close look at the Court's process for determining whether a sanction is civil or punitive either in intent or effect.<sup>15</sup> Finally, the Note considers the ramifications of the Court's ruling in *Hendricks*.<sup>16</sup> Specifically, the Note considers the consequences of confining people based upon a "personality defect"<sup>17</sup> as well as the potential for dealing with dangerous repeat sexual offenders through hybrid sanctions that draw from both criminal and civil models.<sup>18</sup>

Sexually violent predator statutes represent one of several attempts by state and federal government to protect the public from sexual offenders.<sup>19</sup> When the Court decided *Hendricks*, Kansas's Act

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7. See *In re Hendricks*, 912 P.2d 129, 143 (Kan. 1996) (Larson, J., dissenting), *rev'd sub nom.* *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997).

8. See *id.* (Larson, J., dissenting).

9. See *id.* at 133 (considering U.S. CONST. amend. V (Due Process Clause); *id.* art. I, § 9, cl. 3 (Ex Post Facto Clause); *id.* amend. V (Double Jeopardy Clause)).

10. See *id.* at 138.

11. 117 S. Ct. 2072 (1997).

12. See *id.* at 2086.

13. See *infra* notes 22-120 and accompanying text.

14. See *infra* notes 121-220 and accompanying text.

15. See *infra* notes 221-51 and accompanying text.

16. See *infra* notes 252-340 and accompanying text.

17. See *infra* notes 260-95 and accompanying text.

18. See *infra* notes 295-332 and accompanying text.

19. The preamble of the Act states that "[t]he legislature finds that a small but extremely dangerous group of sexually violent predators exist who . . . have anti-social personality features . . . [that] render them likely to engage in sexually violent behavior." KAN. STAT. ANN. § 59-29a01 (1994); see also John Kip Cornwell, *Protection and*

was the most comprehensive of the seventeen sexual predator statutes in the nation because it, unlike the other statutes, both applied retroactively and delayed treatment until after the offender served his or her prison sentence.<sup>20</sup> Now that the Supreme Court has approved this statutory scheme, twenty-five states are considering passing similar sexually violent predator acts.<sup>21</sup>

In September 1994, Hendricks was scheduled for release to a half-way house after serving nearly ten years for a 1984 indecent liberties conviction.<sup>22</sup> However, in accordance with the Act, the State filed a petition before his release date seeking commitment.<sup>23</sup> Hendricks then appeared with counsel before a judge and moved to dismiss the petition on constitutional grounds, but the court concluded that probable cause existed to support a finding that he was a sexually violent predator.<sup>24</sup> Hendricks requested a jury trial to determine if he qualified as a sexually violent predator and should be committed.<sup>25</sup> According to the Act, a sexually violent predator is any one "who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence, if not confined in a secure facility."<sup>26</sup> The jury determined that Hendricks satisfied this definition based upon

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*Treatment: The Permissible Civil Detention of Sexual Predators*, 53 WASH. & LEE L. REV. 1293, 1294-96 (1996) (describing the different types of laws, including Megan's Law and sexual predator acts, that states have passed to control sexual predators); Deborah L. Morris, Note, *Constitutional Implications of the Involuntary Commitment of Sexually Violent Predators—A Due Process Analysis*, 82 CORNELL L. REV. 594, 595 (1997) ("Public outcry over ever increasing incidents of sexual violence encouraged a number of state legislatures to enact laws requiring the involuntary commitment of sexual predators."); *Recent Legislation*, 108 HARV. L. REV. 787, 787-92 (1995) (discussing Washington's sex offender notification statute that authorizes "the use of 'modern day scarlet letters'" (quoting Jon Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357, 1357)).

20. See *Hendricks*, 117 S. Ct. at 2095 (Breyer, J., dissenting); Roxanne Lieb, *Washington's Sexual Violent Predator Law: Legislative History and Comparisons with Other States* (visited Feb. 22, 1998) <<http://www.wa.gov/wsipp/reports/violpred.html>> (providing details about and a comparison of seven states with sexual violent predator acts as of December 1996).

21. See 60 *Minutes*, *supra* note 1 (discussing the effect of the Court's decision in *Hendricks*).

22. See *Hendricks*, 117 S. Ct. at 2078; *infra* note 27 (providing details of the conviction).

23. See *Hendricks*, 117 S. Ct. at 2078.

24. See *id.* The judge reserved ruling on the Act's constitutionality. See *id.*

25. See *id.*; see also KAN. STAT. ANN. § 59-29a07(a) (Supp. 1997) (providing for a jury trial).

26. KAN. STAT. ANN. § 59-29a02(a).

evidence that during a thirty-year period he was convicted six times for sexually abusing children.<sup>27</sup> Also, two psychiatrists testified that he suffered from personality disturbances and pedophilia.<sup>28</sup>

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27. See *Hendricks*, 117 S. Ct. at 2078. The cycle of abuse began in 1955 when he exposed his genitals to two young girls. See *id.* He pled guilty to indecent exposure but did not go to jail until 1957, when he served a brief time after being convicted of lewdness with a young girl. See *id.* Starting in 1960, he served a two-year sentence for molesting two young boys while working at a carnival. See *id.* Shortly after his release for this offense, he was arrested for molesting a seven-year-old girl. See *id.* The State attempted to treat his deviant behavior at a state psychiatric hospital, and he was released in 1965 after being declared "safe to be at large." *Id.* Hendricks was then imprisoned from 1967 until 1972 for performing oral sex on an eight-year-old girl and fondling an eleven-year-old boy. See *id.* During this sentence, he refused to participate in an optional sex offender treatment program. See *id.* His stepdaughter and stepson testified at Hendricks's civil commitment hearing about his repeated sexual abuse of them that began in 1972 when he was paroled from prison. See *id.* at 2079 n.2. He was not imprisoned again until 1984 when he was convicted of taking indecent liberties with two 13-year-old boys. See *id.* at 2078. Pursuant to a plea arrangement, he was sentenced to 5 to 20 years. See *In re Hendricks*, 912 P.2d 129, 130 (Kan. 1996), *rev'd sub nom.* *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997). The State agreed to drop a third count of indecent liberties with a child and opted not to request sentencing in accordance with the Habitual Criminal Act. See *id.*

28. See *Hendricks*, 117 S. Ct. at 2079 n.2; AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 527-28 (4th ed. 1994) [hereinafter DSM-IV] (defining a pedophile as someone who is 16 years old or older, who is attracted to children in the same age range but at least five years younger than him, and who has "recurrent, intense sexually arousing fantasies" that involve sexual activity with children who are generally under 13 years old). But see Brief of Amicus Curiae, Washington State Psychiatric Ass'n in Support of Respondent at 17-18, *Hendricks* (Nos. 95-1649, 95-9075) ("The DSM-IV describes no personality disorder which is peculiar to sex offenders . . . [C]ourts can expect efforts to invent such a personality disorder merely by labeling a pattern of sex offenses as a personality disorder, which is then diagnosed from this pattern of offenses.").

States have generally been left to define mental illness as they choose. See, e.g., *Jones v. United States*, 463 U.S. 354, 364-65 n.13 (1983) (stating that because diagnosis by the psychiatric community is uncertain, the courts should defer to legislative judgment about insanity definitions). Courts and commentators have noted that this departure from clinical terms causes difficulties in diagnosing a defendant's mental condition and predicting future dangerousness. See *Ake v. Oklahoma*, 470 U.S. 68, 80-81 (1985) (explaining that while psychiatrists explain a diagnosis of a defendant in language that a jury can understand, psychiatrists often disagree about definitions of mental illness and predictions of dangerousness); *United States v. Brawner*, 471 F.2d 969, 978 (D.C. Cir. 1972) ("[P]sychiatrists and psychologists are called to adduce relevant information concerning what may for convenience be referred to as the 'medical' component of the responsibility issue. But the difficulty . . . is that the . . . expert comes, by testimony given in . . . a non-medical construct . . . , to express conclusions that . . . embody ethical and legal conclusions."); *Holloway v. United States*, 148 F.2d 665, 667 (D.C. Cir. 1945) (stating that psychiatrists can get confused when trying to "reconcile the therapeutic standards of their own art with the moral judgment of the criminal law"); John Q. La Fond, *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); Robert M. Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predators*

Hendricks agreed that he was a pedophile and testified that when he “‘get[s] stressed out,’ he ‘can’t control the urge’ to molest children,” that he knew his actions were harmful to children, but that treatment would not be effective.<sup>29</sup> The trial court held as a matter of law that pedophilia qualifies as a “mental abnormality” under the Act<sup>30</sup> and ordered him to be committed at Larned State Security Hospital, where he would remain until either the Secretary of the Department of Social and Rehabilitation Services (“the Secretary”) or the court determined that his “mental abnormality or personality disorder ha[d] so changed that [he] is safe to be at large and will not engage in acts of sexual violence if discharged.”<sup>31</sup> Hendricks is entitled to annual examinations, the results of which the Secretary will forward to a judge, who, at a hearing, will determine if probable cause exists to release him.<sup>32</sup> The Secretary also could authorize Hendricks to petition the court for release if the Secretary determines that the mental abnormality has changed so that Hendricks is no longer dangerous.<sup>33</sup>

Hendricks appealed his confinement in Larned, alleging that the Act violated the Due Process,<sup>34</sup> Double Jeopardy,<sup>35</sup> and Ex Post

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*Statute*, 15 U. PUGET SOUND L. REV. 597, 600-04 (1992) (explaining that diagnosis can be especially difficult with sex offenders because a variety of psychiatric symptoms have been attributed to them).

29. *Hendricks*, 117 S. Ct. at 2078-79 (quoting Hendricks’s testimony during his civil commitment hearing). Other defendants who may not be so forthright about their propensity to re-offend may pose more of a problem for a state trying to prove the defendant’s dangerousness. *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 109-10 (1992) (Thomas, J., dissenting) (discussing the difficulty of diagnosis); Wettstein, *supra* note 28, at 604-07 (detailing the difficulty psychiatrists have in predicting future dangerous behavior). Hendricks said in a recent television interview that he did not want to participate in treatment because he did not want to be forced to talk about himself and his feelings; however, after three years in the treatment program, he said he was now a different person and that he has decided to change. *See 60 Minutes, supra* note 1.

30. *See Hendricks*, 117 S. Ct. at 2079. Kansas defines “mental abnormality” for purposes of the Act as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.” KAN. STAT. ANN. § 59-29a02(b).

31. KAN. STAT. ANN. § 52-29a08.

32. *See id.* If probable cause does exist, then the court schedules a hearing in which the state has the burden of proving beyond a reasonable doubt that the person’s mental abnormality or personality disorder remains so that the person is “likely to engage in acts of sexual violence” if released. *Id.*

33. *See id.* § 52-29a10. The person also can petition the court without the Secretary’s approval, but if the court determines that such petition is frivolous, it may dismiss the petition without a hearing. *See* KAN. STAT. ANN. § 52-29a11 (1994); *infra* notes 116-20 and accompanying text (explaining the release procedure).

34. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or

Facto<sup>36</sup> clauses of the U.S. Constitution.<sup>37</sup> The Kansas Supreme Court determined that the Act violated Hendricks's substantive due process rights.<sup>38</sup> According to the court's interpretation of United States Supreme Court precedent, due process forbids a state from involuntarily committing someone absent a showing that the person is "both mentally ill and dangerous."<sup>39</sup> Although the Act demanded a finding that Hendricks suffered from a mental abnormality or antisocial personality, the Kansas court determined that such a finding was not "equivalent to the constitutional standard of mental illness."<sup>40</sup> The majority then criticized the Washington Supreme Court for upholding that state's sexually violent predator statute<sup>41</sup> and determining that a mental abnormality was the same as a mental illness.<sup>42</sup> In dicta, the majority wrote that the State should not create

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property, without due process of law.").

35. *Id.* ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . .").

36. *Id.* art. I, § 9, cl. 3 ("No bill of attainder or ex post facto law shall be passed.").

37. See *Hendricks*, 117 S. Ct. at 2079.

38. See *In re Hendricks*, 912 P.2d 129, 138 (Kan. 1996), *rev'd sub nom.* *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997).

39. *Id.* at 133-34; see also *Foucha v. Louisiana*, 504 U.S. 71, 75-76 (1992) (explaining that the Due Process Clause requires a state to prove mental illness and dangerousness before an individual can be involuntarily committed); *Jones v. United States*, 463 U.S. 354, 363-64 (1983) (holding that a verdict of not guilty by reason of insanity establishes the requisite findings of dangerousness and mental illness and thus permits involuntary commitment); *Addington v. Texas*, 441 U.S. 418, 420 (1979) (describing a Texas statute that required proof of mental illness and proof of whether hospitalization was required to protect the individual and others).

40. *In re Hendricks*, 912 P.2d at 137. The State's psychiatrist, Dr. Charles Befort, testified that Hendricks was a pedophiliac, but that he did not suffer from a mental illness or a personality disorder. See *id.* at 131. Nonetheless, Dr. Befort testified that Hendricks should be committed because pedophilia was a mental abnormality under the Act. See *id.* According to the Act, a mental abnormality is a "congenital or acquired condition" that affects "the emotional or volitional capacity" and "predisposes the person to commit sexually violent offenses in a degree" that makes the person "a menace to the health and safety of others." KAN. STAT. ANN. § 59-29a02(b) (Supp. 1997). In contrast, for purposes of traditional civil commitment, a mentally ill person is someone who suffers from "a severe mental disorder" requiring treatment, who cannot "make an informed decision [about] treatment," and who "is likely to cause harm to self or others." *Id.* § 59-29a02(h).

41. See *In re Hendricks*, 912 P.2d at 135 (referring to WASH. REV. CODE ANN. §§ 71.09.010-.902 (West 1992)); see also *In re Young*, 857 P.2d 989 (Wash. 1993) (holding that Washington's sexual predator statute is constitutional). But see *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995) (determining that Washington's sexual predator statute is unconstitutional because it does not require mental illness).

42. See *In re Hendricks*, 912 P.2d at 135 ("Simply stated, mental illness means whatever the Washington court says it means."). The Kansas court relied on *Foucha*, in which the Court determined that antisocial personality is not the same as mental illness. See *Foucha*, 504 U.S. at 78.

a new statute with its own interpretation of mental illness when it already had an involuntary civil commitment statute that satisfied due process.<sup>43</sup> Allowing the State to put sexually violent predators in their own category could lead to “the same reasoning [being] applied to anyone who commits any designated offense and is labeled ‘mentally abnormal’ or suffering from an ‘antisocial personality disorder.’”<sup>44</sup> Furthermore, the Kansas majority concluded that even though the Act mentions treatment for sexual predators, its “overriding concern” is “the segregation of sexually violent offenders from the public.”<sup>45</sup> Because the court struck the statute on due process grounds, it did not consider Hendricks’s *ex post facto* or double jeopardy claims.<sup>46</sup>

The United States Supreme Court reversed the Kansas Supreme Court<sup>47</sup> and held that under a substantive due process analysis, Kansas’s Act satisfied the two prerequisites for involuntary commitment: mental illness and future dangerousness of the defendant.<sup>48</sup> The Court determined that the State had satisfied these prerequisites by showing that the sexual offender’s dangerousness was linked to a mental abnormality, the combination of which made it virtually impossible for him to control his actions.<sup>49</sup> While the focal point of due process protection is freedom from physical restraint, the Court emphasized that this “liberty interest is not absolute.”<sup>50</sup> Involuntary commitment traditionally has overridden this freedom because of the government’s interest in protecting the public from those who cannot control their actions.<sup>51</sup> Because Kansas had

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43. See *In re Hendricks*, 912 P.2d at 136; see also KAN. STAT. ANN. §§ 59-2901 to -2986 (1994 & Supp. 1997) (mandating the procedures and requirements for civil commitment).

44. *In re Hendricks*, 912 P.2d at 136.

45. *Id.* This finding was an important factor for Justice Breyer in reaching the conclusion that the Act was punitive. See *Hendricks*, 117 S. Ct. at 2091-92 (Breyer, J., dissenting); *infra* notes 87-101 and accompanying text.

46. See *In re Hendricks*, 912 P.2d at 138. The dissent examined these claims, however, and rejected them. It first looked at the legislative intent and found the Act to be civil, not criminal. See *id.* at 151-53 (Larson, J., dissenting). Because *ex post facto* and double jeopardy protections usually apply only to criminal procedures, the dissent concluded that Hendricks’s claims had no basis. See *id.* at 153-54 (Larson, J., dissenting).

47. Justice Thomas wrote the opinion for the majority and was joined by Chief Justice Rehnquist and Justices O’Connor, Scalia, and Kennedy. See *Hendricks*, 117 S. Ct. at 2076.

48. See *id.* at 2080.

49. See *id.* (citing *Heller v. Doe*, 509 U.S. 312, 314-15 (1993); *Allen v. Illinois*, 478 U.S. 364, 366 (1986); *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 271-72 (1940)).

50. *Id.* at 2079 (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

51. See *id.* (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) (“There are



afforded proper procedures and evidentiary standards to offenders,<sup>52</sup> the Court held, the Act did not violate due process.<sup>53</sup>

The Court rejected Hendricks's contention that "mental abnormality" was a term coined by the Kansas legislature and that it failed to satisfy the due process requirement of mental illness.<sup>54</sup> The Court noted that it had used "a variety of expressions to describe the mental condition of those properly subject to civil confinement"<sup>55</sup> and that it traditionally allows state legislatures to define medical terms with legal significance.<sup>56</sup> These definitions are often inconsistent with medical definitions because the "legal" definitions also take into account " 'individual responsibility . . . and competency.' "<sup>57</sup> After determining that the Act itself satisfied the Court's substantive due process test, the Court then determined that Hendricks met the Act's requirements for mental abnormality not only because he was diagnosed as a pedophile but also because he admitted that he

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manifold restraints to which every person is necessarily subject for the common good.")). In *Jacobson*, because the dangerousness to society outweighed the individual liberty interest, the Court upheld a statute that allowed the State to use its police power to fine or arrest people who refused to be vaccinated. See *Jacobson*, 197 U.S. at 26-30. At least one commentator has described the type of confinement in *Jacobson* as jurisprudence of prevention. See Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 167-68 (1996) (discussing the *Jacobson* decision). Jurisprudence of prevention can be contrasted with therapeutic jurisprudence, a theory that supports the civil commitment of people who are not punished for crimes they commit because they suffer from a mental illness that caused them to commit the crime. See *infra* notes 260-63.

52. See KAN. STAT. ANN. §§ 59-29a03 to -29a11 (1994 & Supp. 1997).

53. See *Hendricks*, 117 S. Ct. at 2079-80; see also *Foucha*, 504 U.S. at 80 (holding unconstitutional a statute that allowed the state to continue holding someone found not guilty by reason of insanity on the sole basis that he was dangerous, even though he no longer suffered from a mental illness); *Addington v. Texas*, 441 U.S. 418, 426-27 (1979) (holding that the burden of proof on the State when civilly committing someone must be greater than a preponderance of the evidence).

54. See *Hendricks*, 117 S. Ct. at 2080-81. In concurrence, Justice Kennedy cautioned that the Court's precedents would not validate "mental abnormality" as a "solid basis" for commitment if in the future it was shown to be "too imprecise a category." *Id.* at 2087 (Kennedy, J., concurring).

55. *Id.* at 2080 (citing *Foucha*, 504 U.S. at 88; *Addington*, 441 U.S. at 425-26; *Jackson v. Indiana*, 406 U.S. 715, 732 (1972)).

56. See *id.* at 2081 (citing *Jones v. United States*, 463 U.S. 354, 365 & n.13 (1983)); Andrew Hammel, Comment, *The Importance of Being Insane: Sexual Predator Civil Commitment Laws and the Idea of Sex Crimes As Insane Acts*, 32 HOUS. L. REV. 775, 798-99 (1995) (explaining that the "Court's policy is to defer to legislative definitions of mental disease" even though it has been willing to address other issues surrounding commitment, such as procedural due process protections and the requisite burdens of proof).

57. *Hendricks*, 117 S. Ct. at 2081 (quoting DSM-IV, *supra* note 28, at xxiii, xxvii).

lacked the ability to control himself.<sup>58</sup> This admission, “coupled with a prediction of future dangerousness, adequately distinguished Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.”<sup>59</sup>

Next, the Court rejected Hendricks’s argument that the Act “establishe[d] criminal proceedings,” thus making his confinement a punishment.<sup>60</sup> The first question for the majority was one of statutory construction, which essentially entailed that the Court determine whether the Kansas legislature intended the Act to be civil or criminal.<sup>61</sup> The legislature’s intent was readily apparent to the majority because the legislature not only placed the Act in the probate code but also described the procedure as a civil commitment.<sup>62</sup> Because a civil label is not dispositive, the Court’s second consideration was whether Hendricks offered “the clearest proof” that the Act was in fact punitive in purpose or effect.<sup>63</sup> Hendricks failed to meet this burden because he did not show that the Act intended to serve the traditional goals of criminal

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58. *See id.*; *see also supra* notes 27-29 and accompanying text (detailing testimony at Hendricks’s trial). Professor Janus has argued that with the Court’s decisions in *Addington* and *Foucha*, the “jurisprudence of prevention is dead” because the Court has made it clear that commitment can be predicated only on combined factors of mental illness and dangerousness. Janus, *supra* note 51, at 185; *see infra* notes 132-50 and accompanying text (discussing the holding in *Addington*); *infra* notes 172-220 (discussing the holding in *Foucha*). But in *Hendricks*, the Court appeared to favor the jurisprudence of prevention, which balances the threat of dangerousness against a person’s liberty interest without requiring mental illness, because the Court appeared to be using “mental abnormality” as “window dressing.” Janus, *supra* note 51, at 165.

59. *Hendricks*, 117 S. Ct. at 2081. The dissent agreed with the outcome of the majority’s assessment of Hendricks’s due process claim. *See id.* at 2088 (Breyer, J., dissenting). Justice Breyer wrote for the dissent and was joined in his due process analysis by Justices Stevens and Souter. *See id.* at 2087 (Breyer, J., dissenting). Justice Ginsburg joined only in Parts II and III, which addressed only the *ex post facto* claim. *See id.* (Breyer, J., dissenting). Due process, according to Justice Breyer, allows Kansas to deem Hendricks mentally ill and dangerous for civil commitment reasons. *See id.* at 2088 (Breyer, J., dissenting). He provided three reasons to support his conclusion. First, psychiatrists recognize pedophilia as a “serious mental disorder” even if they do not label it a mental illness. *Id.* (Breyer, J., dissenting). Second, this abnormality causes a lack of volition to which Hendricks admitted and which the law recognizes as being “akin to insanity for purposes of confinement.” *Id.* at 2089 (Breyer, J., dissenting). Finally, this mental abnormality makes Hendricks dangerous to children. *See id.* (Breyer, J., dissenting).

60. *Id.* at 2081.

61. *See id.* at 2081-82; *see also infra* notes 225-51 and accompanying text (explaining the Court’s development of this test).

62. *See Hendricks*, 117 S. Ct. at 2082.

63. *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)); *see infra* notes 234-37 and accompanying text (discussing the Court’s analysis in *Ward*).

punishment—retribution and deterrence.<sup>64</sup> First, the Act was not retributive because it did not punish past conduct, but rather it used past conduct “to show the accused’s mental condition and to predict future behavior.”<sup>65</sup> Second, civil commitment under the Act could not function as a deterrent because an essential component of the personality abnormality as defined by the Act was the person’s lack of volitional control.<sup>66</sup> Moreover, the Court determined that even though the procedures in the statute mirrored some criminal procedures, this fact in itself did not make the Act punitive.<sup>67</sup> Similarly, the fact that someone is constrained does not “inexorably lead to the conclusion that the government has imposed punishment.”<sup>68</sup> Confining the mentally ill has long been considered a legitimate non-punitive government objective.<sup>69</sup>

However, Hendricks tried to show that the civil commitment was punitive for two key reasons: the period of commitment was indefinite, and the State never intended to provide offenders with treatment.<sup>70</sup> The Court rejected Hendricks’s first contention on the grounds that his confinement was “only potentially indefinite”<sup>71</sup> because the Act provided that the State intended to confine the offender only as long as he suffered from the mental abnormality that

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64. See *Hendricks*, 117 S. Ct. at 2082.

65. *Id.* (quoting *Allen v. Illinois*, 478 U.S. 364, 371 (1986)). Retribution in criminal law is based upon the idea that every crime requires payment in the form of punishment. See BLACK’S LAW DICTIONARY 1317 (6th ed. 1990); see also WHARTON’S CRIMINAL LAW § 2 (Charles E. Torcia ed., 15th ed. 1993) (stating that state punishment has replaced private revenge and that by denouncing crime society is promoting lawfulness). Confinement under the Act is not punishment in payment for a crime because the illegal act by the sex offender is merely used in the diagnosis of his condition and to predict if he will commit the act again. See *Hendricks*, 117 S. Ct. at 2082. If the offender is not found to suffer from a mental condition and also is determined not to be a threat to public safety, then he will be released. See *id.* If the civil commitment was retributive (served as payment for the criminal action), then all sex offenders would be civilly committed at the end of their prison sentence. See *id.*

66. See *Hendricks*, 117 S. Ct. at 2082.

67. See *id.* This same argument was rejected by the Court in *Allen v. Illinois*, in which the Court stated that “to provide some of the safeguards applicable in criminal trials cannot itself turn these proceedings into criminal prosecutions.” *Allen*, 478 U.S. at 372 (evaluating Illinois’s Sexually Dangerous Person Act that allowed the commitment of offenders in lieu of treatment); *infra* notes 244-51 and accompanying text (discussing the facts and holding in *Allen*).

68. *Hendricks*, 117 S. Ct. at 2083 (citing *United States v. Salerno*, 481 U.S. 739, 746 (1987)); see *infra* notes 200-07 and accompanying text (discussing *Salerno*).

69. See *Hendricks*, 117 S. Ct. at 2083 (citing *Salerno*, 482 U.S. at 747).

70. See *id.*; Reply Brief for Cross Petitioner at 8, 18, *Hendricks* (Nos. 95-1649, 95-9075).

71. *Hendricks*, 117 S. Ct. at 2083.

makes him dangerous.<sup>72</sup> The Court rejected his second argument regarding treatment because it determined that incapacitation can be a legitimate end to a civil statute, especially if no treatment is available.<sup>73</sup> The majority stated that Hendricks mistakenly presumed that treatment was available for pedophilia.<sup>74</sup> Nevertheless, even if his presumption was correct and treatment was available, the Court determined that making treatment a secondary concern did not make the Act unconstitutional.<sup>75</sup> Finally, because Hendricks was the first offender committed under the Act, the Court determined that the State should be allowed some time to develop its treatment program.<sup>76</sup>

Because the Court determined that the Act was not punitive, it rejected Hendricks's claims of double jeopardy and ex post facto violations.<sup>77</sup> The Double Jeopardy Clause prohibits a state from punishing a person twice for the same offense.<sup>78</sup> In determining that civil commitment did not constitute punishment, the majority first relied upon *Baxstrom v. Herold*,<sup>79</sup> in which the Court concluded that civil commitment can follow a prison term so long as the prisoner's case was reviewed in the same manner as those of all others who

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72. See *id.*; see also *infra* notes 116-20 and accompanying text (explaining the different avenues by which the offender can be released).

73. See *Hendricks*, 117 S. Ct. at 2084 (citing *Salerno*, 481 U.S. at 748-49; *Allen v. Illinois*, 478 U.S. 364, 373 (1986)); see also *infra* notes 200-07 and accompanying text (discussing the Court's decision in *Salerno*); *infra* notes 244-51 (discussing the Court's holding in *Allen*). Chief Justice Burger's concurrence in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), emphasized that even though some forms of mental illness are not treatable, the State may still confine someone as long as that person is still mentally ill and dangerous. See *id.* at 584 (Burger, C.J., concurring).

74. See *Hendricks*, 117 S. Ct. at 2083. The Court pointed out that the Kansas Supreme Court also rejected this assumption and dismissed treatment under the Act as being merely incidental. See *id.* at 2083-84 (citing *In re Hendricks*, 912 P.2d 129, 136, *rev'd sub nom. Kansas v. Hendricks*, 117 S. Ct. 2072 (1997)). See generally Wettstein, *supra* note 28, at 614-22 (explaining problems involved with treatment of sex offenders, from cost of the programs to delays in treatment to whether coerced treatment really works); Laurie J. Scott, *Can Offenders Reform?*, KAN. CITY STAR, Aug. 6, 1993, at C3 (discussing the merits and limitations of sex offender programs in prisons in Kansas and Missouri).

75. See *Hendricks*, 117 S. Ct. at 2084.

76. See *id.* at 2085 nn.4-5 (explaining that the Court has given states "wide latitude" in developing treatment programs). At oral argument, the State said it was now providing Hendricks and others committed under the Act with 31.5 hours of treatment. See *id.* at 2085; Transcript of Oral Argument at 14-16, *Hendricks* (Nos. 95-1649, 95-9075), available in 1996 WL 721073.

77. See *Hendricks*, 117 S. Ct. at 2085.

78. See *id.* (relying on *Witte v. United States*, 515 U.S. 389, 396 (1995)).

79. 383 U.S. 107 (1966).

were civilly committed.<sup>80</sup> In the alternative, Hendricks claimed that the State violated double jeopardy under the "same elements" test by punishing one act—taking indecent liberties with a child—two separate times because the act violated two separate statutes, both the criminal statute and the Act.<sup>81</sup> The same elements test considers whether each statute requires different proofs of fact; if not, then double jeopardy is violated.<sup>82</sup> The Court rejected this theory because the Act used Hendricks's criminal offense only for evidentiary purposes, not as grounds for punishment under the Act.<sup>83</sup> Also, the Court found that the same elements test did "not apply outside of the successive prosecution context."<sup>84</sup> In addressing Hendricks's final argument, the Court stated that the Ex Post Facto Clause prohibits punishing a person with additional punitive measures for a crime committed before the enactment of these measures.<sup>85</sup> The majority determined not only that the Act was not penal, but also that the Act did not criminalize past conduct because it evaluated the person's current mental state.<sup>86</sup>

In dissent, Justice Breyer argued that the Act was punitive, and thus in violation of the Ex Post Facto Clause, for several reasons.<sup>87</sup> First, the basic objective of the Act was incapacitation, which has long been recognized as an important purpose of criminal punishment.<sup>88</sup> Second, the dissent emphasized the majority's recognition and the Court's precedent that a civil label is not always dispositive and also noted the various criminal procedures adopted

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80. See *id.* at 115; *infra* notes 127-31 and accompanying text (discussing the significance of *Baxstrom*).

81. See *Hendricks*, 117 S. Ct. at 2086; see also *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (holding that double jeopardy is not violated as long as the offenses with which the defendant is charged each require proof of different elements).

82. See *Blockburger*, 284 U.S. at 304.

83. See *Hendricks*, 117 S. Ct. at 2086.

84. *Id.*

85. See *id.* (citing *California Dep't of Corrections v. Morales*, 514 U.S. 499, 505 (1995)).

86. See *id.*

87. See *id.* at 2090 (Breyer, J., dissenting). The dissent did not argue that the Act violated the Double Jeopardy Clause. Instead, it argued that using the Act to civilly commit Hendricks violated the Court's holding in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), by imposing a punishment on Hendricks that was greater than what was available in 1984 when he pled guilty to and was sentenced for taking indecent liberties. See *Hendricks*, 117 S. Ct. at 2090 (Breyer, J., dissenting); see also *Calder*, 3 U.S. (3 Dall.) at 390 (holding that a law inflicting greater punishment than was available when the crime was committed violates the Ex Post Facto Clause).

88. See *Hendricks*, 117 S. Ct. at 2090 (Breyer, J., dissenting) (relying on *Foucha v. Louisiana*, 504 U.S. 71, 99 (1992), *United States v. Brown*, 381 U.S. 437, 458 (1965), and 4 WILLIAM BLACKSTONE, COMMENTARIES \*11-\*12).

by the Act that make it appear punitive.<sup>89</sup> Third, the dissent pointed to factors that indicate the punitive nature of the Act.<sup>90</sup> These factors included whether treatment was provided, and if provided, whether it was delayed;<sup>91</sup> the state court's findings as to the purpose of the underlying state action;<sup>92</sup> whether any less restrictive alternative treatment is provided for in the Act;<sup>93</sup> and provisions in similar statutes in other states.<sup>94</sup> Treatment was an important concern for Justice Breyer because a reasonable person expects the State, when it confines someone for a personality disorder, to help that person "overcome that abnormality."<sup>95</sup> Finally, in addition to those features, Justice Breyer evaluated the Act in light of the following seven factors delineated in *Kennedy v. Mendoza-Martinez*:<sup>96</sup> (1) whether the sanction involves "affirmative disability or restraint;" (2) "whether it has historically been regarded as punishment;" (3) "whether [the penalty] comes into play only [after] a finding of scienter;" (4) whether the operation of the penalty promotes

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89. See *id.* at 2091 (Breyer, J., dissenting); see also *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 777 (1994) (recognizing that civil and criminal labels are not of paramount importance).

90. See *Hendricks*, 117 S. Ct. at 2091 (Breyer, J., dissenting) (citing *United States v. Ursery*, 116 S. Ct. 2135, 2142 (1996)).

91. See *id.* at 2091-92 (Breyer, J., dissenting); see also *infra* notes 244-51 and accompanying text (discussing *Allen v. Illinois*, 438 U.S. 364 (1986), in which the Court placed great significance on the treatment component of Illinois's Sexually Dangerous Person Act, 725 ILL. COMP. STAT. § 205/3 (West 1993)). Delay in treatment is a significant point in deciding if the Kansas legislature really intended to treat sexual offenders or if it was using treatment as a "sham," because the legislature recognized in the preamble of the Act that long-term treatment was better than treatment in prison. See KAN. STAT. ANN. § 59-29a01 (1994). In concurrence, Justice Kennedy said if a state used treatment only as "a sham or mere pretext, there would . . . [be] an indication of the forbidden purpose to punish." *Hendricks*, 117 S. Ct. at 2087 (Kennedy, J., concurring).

92. See *Hendricks*, 117 S. Ct. at 2092-93 (Breyer, J., dissenting); see also *supra* notes 34-46 and accompanying text (discussing the lower court's ruling). Justice Breyer contrasted the Kansas Supreme Court decision with that of the Illinois Supreme Court in *Allen* in which Illinois clearly intended treatment to be the goal of its Sexually Dangerous Persons Act because it committed the offender in the beginning instead of sending him to jail. See *Hendricks*, 117 S. Ct. at 2092 (Breyer, J., dissenting) (citing *Allen*, 478 U.S. at 370 (quoting *People v. Allen*, 481 N.E.2d 690, 692 (1985))).

93. See *Hendricks*, 117 S. Ct. at 2094-95 (Breyer, J., dissenting).

94. See *id.* at 2095 (Breyer, J., dissenting). Justice Breyer compared the Act to other statutes in effect at that time and found that Kansas, by following other states, could have structured the Act without punitive features. See *id.* (Breyer, J., dissenting). For instance, seven states "require consideration of less restrictive alternatives to commitment," and 10 states provide treatment to offenders soon after they are charged. See *id.* at 2095, app. at 2099 (Breyer, J., dissenting).

95. *Id.* at 2092 (Breyer, J., dissenting).

96. 372 U.S. 144 (1963). For a discussion of *Mendoza-Martinez*, see *infra* notes 229-33 and accompanying text.

retribution or deterrence; (5) “whether the behavior to which [the penalty] applies is already a crime;” (6) whether an alternative purpose is assignable for the penalty; and (7) whether the penalty is “excessive in relation to the alternative purpose assigned.”<sup>97</sup> After applying these factors to Hendricks’s case, Justice Breyer argued that each of them weighed in favor of finding the Act to be punitive.<sup>98</sup> Justice Breyer confined the dissent to Hendricks’s situation alone by listing types of statutes and state actions that would not offend the Ex Post Facto Clause.<sup>99</sup> His examples included statutes similar to the Act that were applied only prospectively; the imposition of consecutive, rather than concurrent, sentences; the lengthening of sentences through recidivism statutes; and retroactive statutes that did not impose a later punishment on top of an earlier one.<sup>100</sup> Thus, while the dissent found the Act to be unconstitutional in its application against Hendricks, it stated that it would approve other statutes as long as they made certain that the commitment of such offenders could not be construed as punishment.<sup>101</sup>

Kansas passed the Sexually Violent Predator Act in 1994 in response to public outrage against the rape and murder of Stephanie Schmidt by a repeat sex offender.<sup>102</sup> Sixteen other states had sexual

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97. *Hendricks*, 117 S. Ct. at 2098 (Breyer, J., dissenting) (quoting *Mendoza-Martinez*, 372 U.S. at 168-69).

98. *See id.* (Breyer, J., dissenting). Justice Breyer said that the *Mendoza-Martinez* factors were merely helpful but not dispositive in evaluating a sanction as punitive or civil. *See id.* (Breyer, J., dissenting). He did not detail his use of these factors but rather said each one balances “in favor of a constitutional characterization [of the Act] as ‘punishment.’” *Id.* (Breyer, J., dissenting).

99. *See id.* (Breyer, J., dissenting).

100. *See id.* (Breyer, J., dissenting).

101. *See id.* (Breyer, J., dissenting). While Justice Breyer revealed the types of statutes he would likely uphold in the future, in a concurring opinion, Justice Kennedy made it clear that, even though he joined the majority in full, he would be willing to strike down any civil acts in the future that use incapacitation to further the goals of either retribution or general deterrence or ones that define mental abnormality too imprecisely. *See id.* at 2087 (Kennedy, J., concurring). Along with the majority, Justice Kennedy determined that Kansas’s Act was not retributive or deterrent, and he accepted Kansas’s definition of mental abnormality because the definition distinguished Hendricks and other sexual predators from dangerous people who may commit crimes, but do not suffer from such an abnormality. *See supra* notes 54-69 and accompanying text (discussing the majority’s evaluation of the Act).

102. *See McCaffrey, supra* note 1, at 887-88. The Task Force on Sex Offenders was formed and lobbied the legislature to pass a package of sex offender laws. *See id.*; *see also* Sullinger, *supra* note 2, at C1 (detailing the efforts of two Kansas lawmakers to propose a bill on behalf of the Task Force). Members on the Task Force included Stephanie’s parents and representatives of the legislature, law enforcement, the legal community, and the community at large. *See McCaffrey, supra* note 1, at 887-88.

predator statutes at that time,<sup>103</sup> and Kansas chose to model its version on Washington's sexual predator law.<sup>104</sup> In the Act's preamble, the Kansas legislature stated that the purpose of the Act was to provide long-term care and treatment for sex offenders who suffered from an antisocial disorder that was "unamenable to existing mental illness treatment modalities" and that made them likely to reoffend.<sup>105</sup> These offenders were a small but dangerous group who needed long-term care because their chances of rehabilitation in a prison setting were poor;<sup>106</sup> however, under the Act, the treatment for these offenders was delayed until after they served prison time, if they were convicted of a sexually violent offense.<sup>107</sup>

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103. The other states with similar statutes were Arizona, California, Colorado, Connecticut, Illinois, Iowa, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, Oregon, Tennessee, Utah, Washington, and Wisconsin. See *Hendricks*, 117 S. Ct. app. at 2099 (Breyer, J., dissenting) (listing the sexual offense commitment statutes in effect at the time of *Hendricks*); Lieb, *supra* note 20 (detailing the requirements of the sexual predator statutes in effect as of February 1998). State and federal courts in Washington have ruled on Washington's sexually violent predator statute, with the state court upholding the statute as constitutional, but the federal court ruling that a personality disorder is not the same as a mental illness. Compare *In re Young*, 857 P.2d 989, 992 (Wash. 1993) (finding Washington's statute constitutional), with *Young v. Weston*, 898 F. Supp. 744, 754 (W.D. Wash. 1995) (finding Washington's sexual predator statute unconstitutional because it does not require the defendant to be mentally ill). For a discussion of the confusion among lower courts when evaluating sexual predator law, see Cornwell, *supra* note 19, at 1312-13.

104. See *In re Hendricks*, 912 P.2d 129, 131 (Kan. 1996), *rev'd sub nom.* *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (noting that Kansas modeled its statute after Washington's sexual predator statute, WASH. REV. CODE ANN. §§ 71.09.010-.902 (West 1992)). Washington passed its statute in response to the rape, murder, and sexual mutilation of a seven-year-old boy. See *Morris*, *supra* note 19, at 611.

105. KAN. STAT. ANN. § 59-29a01 (1994). The Kansas statute mirrors Washington's sexual offenders act in almost every section. See WASH. REV. CODE ANN. §§ 71.09.010-.902.

106. See KAN. STAT. ANN. § 59-29a01.

107. See KAN. STAT. ANN. § 59-29a03 (Supp. 1997). The offenses that the state defined as sexually violent include (but are not limited to) rape, indecent liberties with a child, criminal sodomy, indecent solicitation of a child, sexual exploitation of a child, and aggravated sexual battery, as well as an attempt, conspiracy, or criminal solicitation of a sexually violent offense or any act that at the time of sentencing or civil commitment is determined beyond a reasonable doubt to have been sexually motivated. See *id.* § 59-29a02(e) (1995).

Of the 17 states that have sex offender statutes, eight follow the same procedure as Kansas and commit the offenders after they have served their sentences. The other states substitute treatment for incarceration. Compare MINN. STAT. ANN. § 253B.185 (West Supp. 1997-98) (delaying treatment until after the offender has been incarcerated), and WIS. STAT. ANN. § 980.06 (West Supp. 1997) (delaying treatment until the offender has served prison time), with COLO. REV. STAT. ANN. § 16-11.7-105 (West Supp. 1997) (requiring all sexual predators sentenced or placed on probation after January 1, 1994, to undergo treatment while in prison or as part of probation), and 725 ILL. COMP. STAT. ANN. § 205/3 (West 1993) (implementing the treatment program in lieu of prison time).



Under the Act, the commitment process begins when the agency<sup>108</sup> that has custody of a sex offender notifies the attorney general of a pending release ninety days before such release is to occur, if the agency thinks the offender meets the criteria of a sexually violent predator as defined in the Act.<sup>109</sup> The attorney general, assisted by a prosecutor's review team, is responsible for deciding if probable cause exists that the person in question satisfies the Act's conditions of mental abnormality and future dangerousness and should be civilly committed.<sup>110</sup> The offender then proceeds through several hearings to determine his status as a sex offender under the Act, including a probable cause hearing before a judge,<sup>111</sup> followed by a trial, if probable cause is found.<sup>112</sup> This trial resembles a criminal proceeding, as the alleged sex offender is entitled to assistance by counsel, a court-appointed attorney if the offender is indigent, examination by experts to determine the offender's mental state, and a jury trial.<sup>113</sup> At trial, the attorney general has the burden of convincing the trier of fact beyond a reasonable doubt that the person is a sexually violent offender.<sup>114</sup> If such a determination is made, then the offender is turned over to the custody of the Secretary of Social and Rehabilitation Services for control and care until his condition changes to the extent that he is safe to enter society.<sup>115</sup>

The offender will not be released until it is determined by either the Secretary or by the court that his "mental abnormality or personality disorder has so changed that [he] is safe to be at large and will not engage in acts of sexual violence if discharged."<sup>116</sup> Offenders are entitled to annual examinations, the results of which the

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The Act applies not only to offenders who are convicted of a sexually violent offense, but also to other offenders who are charged with such offenses but found incompetent to stand trial or not guilty by reason of insanity. *See* KAN. STAT. ANN. § 59-29a03(a) (Supp. 1997).

108. An agency with jurisdiction over an offender "serving a sentence or term of confinement" for an offense covered by the Act can include the corrections department, the parole board, and the department of social and rehabilitation services. *See* KAN. STAT. ANN. § 59-29a02(f).

109. *See id.* § 59-29a03.

110. *See id.* § 59-29a03(e).

111. *See id.* § 59-29a05(a).

112. *See id.* § 59-29a06.

113. *See id.* The State may also be required to pay for the examination of the offender by an expert who will testify on the offender's behalf if the offender is indigent. *See id.* If the offender, the attorney general, and the judge all fail to request a jury, then the trial will be before a judge. *See id.*

114. *See id.* § 59-29a07(a). A jury verdict must be unanimous. *See id.*

115. *See id.*

116. *Id.* § 59-29a08.

Secretary can forward to a judge who may hold a hearing to determine if probable cause exists to release the sex offender.<sup>117</sup> If probable cause exists, then the state has the burden of proving beyond a reasonable doubt that the sex offender's mental abnormality or personality disorder remains.<sup>118</sup> Alternatively, the Secretary can authorize the sex offender to petition the court for release if the Secretary determines that the offender's mental abnormality has so changed that he is not likely to "commit predatory acts of sexual violence if released."<sup>119</sup> The sex offender can petition the court without the Secretary's approval, but in such a case the court may decide that the petition is frivolous and dismiss it without a hearing.<sup>120</sup>

In enacting its Sexually Violent Predator Act, Kansas did not develop a new model for dealing with sex offenders. In fact, statutes calling for the civil commitment of sexual deviants have been in existence for decades as the states have struggled to deal with what is considered to be a particularly dangerous class of offenders.<sup>121</sup> In 1940, the Supreme Court upheld such a statute in *Minnesota ex rel. Pearson v. Probate Court*.<sup>122</sup> Chapter 369 of the Minnesota statutes allowed for the commitment of people with a psychopathic personality, which was defined as the presence of conditions such as " 'emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment' " to the extent that a person is not responsible " 'for his conduct with respect to sexual matters and thereby dangerous to other persons.' "<sup>123</sup> The Court relied upon the state court's finding that the statute did not apply to sexual offenders as a whole, but only to those who showed habitual deviant conduct and a complete lack of ability to control themselves and therefore were likely to harm someone again.<sup>124</sup> Thus, proof of habitual deviant conduct satisfied the requirements of due process by

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117. *See id.*

118. *See id.*

119. *Id.* § 52-29a10.

120. *See* KAN. STAT. ANN. § 52-29a11 (1994).

121. *See* LINDA SLEFFEL, *THE LAW AND THE DANGEROUS CRIMINAL* 41-43 (1977) (explaining the theory and purposes of sexual psychopath statutes). Sleffel asserts that sexual psychopath statutes were passed in "two waves." *Id.* at 43. The first wave of statutes, in the 1900s, did not emphasize sex crimes as modern statutes do, but instead they targeted " 'mental defectives' " and the " 'feeble-minded.' " *Id.* The second wave of statutes, in the 1930s, emphasized providing treatment for sexual psychopaths. *See id.*

122. 309 U.S. 270 (1940).

123. *Id.* at 272 (quoting MINN. STAT. § 369-1 (1939)).

124. *See id.* at 273.

preventing the statute from being too vague and indefinite.<sup>125</sup> In regard to the general applicability of sexual psychopathic statutes, the Court concluded that even though a danger existed that the class of people subject to the statutes could have their basic liberties violated by abuses in administration or by the courts, such statutes "are not patently defective in any vital respect and we should not assume, in advance of a decision by the state court, that they should be construed so as to deprive appellant of the due process to which he is entitled under the Federal Constitution."<sup>126</sup>

A subsequent line of cases addressed further concerns about state infringement on the liberty of those involuntarily committed. For instance, *Baxstrom v. Herold*<sup>127</sup> concerned a prisoner who was certified insane by a prison doctor while serving a sentence for second-degree assault.<sup>128</sup> When Baxstrom's prison sentence was about to expire, the director of the state hospital filed a petition for his commitment.<sup>129</sup> Baxstrom was moved from the care of the department of corrections to the department of mental hygiene at the expiration of his sentence, but he was still detained in a hospital used to confine male prisoners, rather than being transferred to a civil hospital.<sup>130</sup> Here, the Court held that the state denied Baxstrom equal protection by treating him differently than others who were civilly committed in New York because he was not given the opportunity for a review by a jury and he was confined at the prison hospital without a determination that he was "dangerously mentally ill."<sup>131</sup>

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125. *See id.* at 274. The Court also upheld the statute on equal protection grounds, as it determined that the legislature had the authority "to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need was deemed to be clearest." *Id.* at 275.

126. *Id.* at 277. Minnesota's Sexual Psychopathy Personality Statute was challenged again in the 1990s in *In re Blodgett*, 510 N.W.2d 910 (Minn. 1994), and the Minnesota Supreme Court found the statute to be constitutional under the Due Process Clause because the court determined that psychopathic personality was an identifiable disorder. *See id.* at 914. For a recounting of the constitutional challenges to Minnesota's statute from *Pearson to Blodgett*, see Katherine P. Blakey, Student Article, *The Indefinite Commitment of Dangerous Sex Offenders Is an Appropriate Legal Compromise Between "Mad" and "Bad"—A Study of Minnesota's Sexual Psychopathic Personality Statute*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 237-42 (1996).

127. 383 U.S. 107 (1966).

128. *See id.* at 108.

129. *See id.*

130. *See id.* at 109.

131. *Id.* at 110. An equal protection claim was not raised in *Hendricks*, but the Court included *Baxstrom* in its foundation of precedent because the *Baxstrom* Court did not find the commitment of a prisoner after his prison term was served to be unconstitutional. *See Hendricks*, 117 S. Ct. at 2086; *supra* notes 79-80 and accompanying text.

More than ten years passed until the next landmark civil commitment case—*Addington v. Texas*.<sup>132</sup> In *Addington*, the Court held that due process imposes upon the state a burden of proof of at least clear and convincing evidence in civil commitment hearings.<sup>133</sup> At the request of Addington's mother, Texas civilly committed Addington for an indefinite period after he was arrested for threatening her.<sup>134</sup> Addington challenged the burden of proof placed on the State and argued that procedural due process required the State to have the same burden of proof in civil commitment hearings as it had in criminal proceedings—beyond a reasonable doubt.<sup>135</sup> The jury in Addington's civil commitment hearing was instructed that it only had to be convinced by clear and convincing evidence that he was mentally ill and that he required hospitalization for the protection of himself and others.<sup>136</sup> While the ultimate question presented to the Court concerned procedural due process, the Court still had to examine the substantive issues because "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."<sup>137</sup> The Court determined that under its *parens patriae* power, a state has a legitimate interest in caring for people who cannot care for themselves because of emotional disorders.<sup>138</sup> In dicta, the Court stated that because an individual's liberty is at stake, the State must show that the disability upon which commitment is predicated is more than "idiosyncratic behavior."<sup>139</sup> In addition to this *parens patriae* power, the State also has the authority through its police power to involuntarily confine those who pose a danger to themselves or others.<sup>140</sup> Thus, when someone with a mental illness can no longer care for himself and

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132. 441 U.S. 418 (1979).

133. *See id.* at 433.

134. *See id.* at 420. During the previous six years, Addington had been involuntarily committed seven times. *See id.*

135. *See id.* at 421-22.

136. *See id.* at 421.

137. *Id.* at 425 (citing *Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *In re Gault*, 387 U.S. 1 (1967); *Specht v. Patterson*, 386 U.S. 605 (1967)). Once the basis for the commitment passes the substantive due process test, the government interest can be implemented only in a fair manner. *See, e.g., United States v. Salerno*, 481 U.S. 739, 747 (1987) (holding that the pretrial detainment of a defendant did not violate due process because his confinement was not for an indefinite amount of time).

138. *See Addington*, 441 U.S. at 426; *Morris, supra* note 19, at 624-28. "*Parens patriae*" literally means "parent of the country" and refers to the State's serving as guardian of persons under a legal disability. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

139. *Addington*, 441 U.S. at 427.

140. *See id.* at 426.

poses a threat to himself or others, the State does not violate his substantive due process rights by committing the individual pursuant to its *parens patriae* and police powers.<sup>141</sup>

While the State has the ability to commit these individuals, due process requires a high standard of procedural protections in order to guard against error.<sup>142</sup> A preponderance of the evidence standard not only increases the risk of error but also does not appear to further the State's interest in committing these dangerous, emotionally unstable people.<sup>143</sup> While preponderance of the evidence is too low a threshold, the Court held that a beyond a reasonable doubt standard would be inappropriate for civil commitment hearings.<sup>144</sup> Even though distinguishing between the different standards of proof could be difficult, the Court held that the lowest burden of proof a state could require is the intermediate standard of clear and convincing evidence because it "reflects the value society places on individual liberty."<sup>145</sup> Because "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection,"<sup>146</sup> a higher burden of proof impresses upon the factfinder the importance of his conclusion and possibly reduces the chance of error.<sup>147</sup> The Court refused nonetheless to force the states to adopt the highest standard of proof for civil commitments because determining whether one is mentally ill and dangerous hinges upon interpretation of the facts by expert psychiatrists and psychologists.<sup>148</sup> Because psychiatric diagnosis lacks certainty, the Court doubted whether a state could ever demonstrate beyond a reasonable doubt

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141. See *id.* at 425-27 (balancing individual liberty interest with the State's interest in protecting people from those who cannot control their behavior); see also Janus, *supra* note 51, at 170-72 (explaining the Court's decision in *Addington* as planting the "seeds of rejection" regarding the jurisprudence of prevention); *infra* notes 260-63 and accompanying text (discussing Janus's ideas of jurisprudence of prevention and therapeutic jurisprudence).

142. See *Addington*, 441 U.S. at 426-27.

143. See *id.*

144. See *id.* at 432-33.

145. *Id.* at 425 (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971)). The Court did not preclude a state from adopting a beyond a reasonable doubt standard for civil commitments, even though the Court considered that standard to be too difficult for a state to satisfy in a civil commitment hearing. See *id.* at 432-33.

146. *Id.*

147. See *id.* at 427. A procedural due process question was not even raised in *Hendricks*, perhaps because Kansas's Sexually Violent Predators Act is in line with *Addington* in that it requires proof beyond a reasonable doubt that the person is a sexually violent predator. See KAN. STAT. ANN. § 59-29a07 (Supp. 1997); *supra* notes 108-20 and accompanying text (explaining procedural protections in the Act).

148. See *Addington*, 441 U.S. at 429. States can, however, choose to use a higher burden. See *id.* at 431.

that a person was both mentally ill and dangerous.<sup>149</sup> Instead, the beyond a reasonable doubt standard was reserved for criminal cases to avoid the temptation of applying it "too broadly or casually."<sup>150</sup>

*Jones v. United States*<sup>151</sup> clarified how the standards established in *Addington* applied to a criminal defendant found not guilty by reason of insanity. Jones was committed to a mental hospital after being acquitted by reason of insanity for attempting to shoplift a jacket from a department store.<sup>152</sup> After Jones had been in a mental hospital for fifty days, the trial court held a hearing in which it determined, based upon testimony by hospital staff, that Jones still suffered from paranoid schizophrenia and that he posed a danger to himself and others.<sup>153</sup> He was returned to the mental hospital and did not have another hearing until nine months later.<sup>154</sup> By this time, he had been committed for more than the maximum time he could have served in prison if he had been convicted of the shoplifting charge.<sup>155</sup> Therefore, he demanded that he be released unconditionally or that the State commit him pursuant to civil commitment standards, including a jury trial and a burden of proof of clear and convincing evidence.<sup>156</sup> In his appeal of the trial court's decision not to release him, he contended that his shoplifting trial was not constitutionally adequate to justify his resulting commitment for an indefinite amount of time.<sup>157</sup> He was found not guilty by reason of insanity by only a preponderance of the evidence, a standard that the Court in *Addington* had held was too low for civil commitment.<sup>158</sup> Automatic commitment for an acquittal such as his could only be justified, Jones argued, "for a period equal to the maximum prison sentence the acquittee could have received if convicted."<sup>159</sup> Otherwise, the length

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149. *See id.* at 429. *See generally* Wettstein, *supra* note 28, at 600 (describing the difficulty psychiatrists have in trying to fit their diagnoses of patients within either overinclusive or underinclusive legal definitions of mental illness).

150. *Addington*, 441 U.S. at 428.

151. 463 U.S. 354 (1983).

152. *See id.* at 359-60.

153. *See id.* at 360.

154. *See id.*

155. *See id.*

156. *See id.*

157. *See id.* at 362.

158. *See id.*; *Addington v. Texas*, 441 U.S. 418, 427 (1979).

159. *Jones*, 463 U.S. at 362-63. The Court stated that a not guilty by reason of insanity verdict determines that the defendant committed a criminal act and that he committed it because of a mental illness. *See id.* at 363. According to Congress, these two findings justify committing the acquittee as dangerous and mentally ill. *See* H.R. REP. NO. 91-907, at 73-74 (1970); S. REP. NO. 84-1170, at 13 (1955). The traditional approach to criminal and civil jurisprudence places defendants in one of two categories that commentators

of his commitment would become indefinite, thereby triggering the due process requirement of a higher burden of proof as determined in *Addington*.<sup>160</sup>

The Supreme Court rejected Jones's argument by first determining that a finding of insanity at the criminal trial established that he committed a crime because of a mental illness, a finding that was "sufficiently probative of mental illness and dangerousness to justify commitment" pursuant to the state's police power.<sup>161</sup> Jones argued that scientific evidence did not support the contention that *prior* dangerousness is a valid measure of *future* dangerousness;<sup>162</sup> however, the Court stated that the uncertainty of psychiatric diagnosis was the precise reason that courts are compelled to "pay particular deference to reasonable legislative judgments" about the relationship between mental illness and dangerousness.<sup>163</sup>

Next, the Court rejected Jones's contention that committing him indefinitely was unconstitutional, because the Court determined that the concern about error against which the higher burden in *Addington* was intended to protect was not present in Jones's case.<sup>164</sup> In contrast to *Addington*, whose sanity was challenged by the State, Jones asserted his insanity as an affirmative defense.<sup>165</sup> The Court decided the chance of error was greater in *Addington's* case because others were declaring him incompetent and what they might perceive as abnormal could actually be only idiosyncratic behavior that was outside the range of a mental disorder.<sup>166</sup> Because those seeking commitment could be wrong, the Court decided it would be improper

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have referred to as "mad," which means they are not punished or held criminally responsible for their crimes, or "bad," which means they will be punished. *See, e.g.,* Carol S. Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 784 (1997); Blakey, *supra* note 126, at 228-29.

160. *See Jones*, 463 U.S. at 363.

161. *Id.* at 363-64. Even though the defendant was absolved of responsibility for the criminal act because of mental illness, the commission of the act justified commitment because it indicated that he was dangerous. *See id.* at 364; *see also* *Lynch v. Overholser*, 369 U.S. 705, 714 (1962) (stating that once the State proves a defendant committed a crime, the offense is "strong evidence" that the defendant "could imperil 'the preservation of public peace'").

162. In his reply brief, Jones pointed to the lack of empirical evidence underlying Congress's enactment of its statutory scheme and the unavailability of research supporting it. *See Jones*, 463 U.S. at 364 n.13 (citing Reply Brief for Petitioner at 13-14, *Jones* (No. 81-5195)).

163. *Id.*

164. *See id.* at 366-67.

165. *See id.* at 356.

166. *See id.* at 367.

to ask Addington to “ ‘share equally . . . the risk of error.’ ”<sup>167</sup> On the other hand, Jones himself “advance[d] insanity as a defense,” so the Court concluded that the risk of error regarding his mental condition was diminished.<sup>168</sup>

Finally, the fact that Jones had been committed longer than the time he would have served in prison if he had been found guilty of shoplifting was not a constitutional violation because due process “ ‘requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.’ ”<sup>169</sup> Therefore, because the purpose of committing an insanity acquittee is to provide him with treatment, it is reasonable to hold him until he is no longer mentally ill or dangerous.<sup>170</sup> This time period can be indefinite because no one knows how long it will take the defendant to respond to treatment.<sup>171</sup>

In *Foucha v. Louisiana*,<sup>172</sup> the Court held that once a defendant responds to treatment and the mental illness goes into remission, due process requires the State to release that person, even if he is considered still dangerous.<sup>173</sup> Foucha was charged with aggravated burglary and illegal discharge of a firearm, but the testimony of medical doctors supported his insanity plea.<sup>174</sup> Therefore, he was found not guilty by reason of insanity and committed to East Feliciana Forensic Facility in October of 1984.<sup>175</sup> In 1988, the superintendent at East Feliciana, as well as a three-member panel, recommended that Foucha be discharged.<sup>176</sup> The same two doctors who examined him in 1984 testified that they could not certify that he would not be a threat to himself or others if released, even though his mental illness was in remission.<sup>177</sup> They diagnosed Foucha as suffering from “an antisocial personality, a condition that is not a mental disease and that is untreatable.”<sup>178</sup> He was returned to East Feliciana, and the state courts rejected his appeals.<sup>179</sup>

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167. *Id.* (quoting *Addington v. Texas*, 441 U.S. 418, 427 (1979)).

168. *See id.*

169. *Id.* at 368 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)).

170. *See id.*

171. *See id.*

172. 504 U.S. 71 (1992).

173. *See id.* at 77.

174. *See id.* at 73-74.

175. *See id.* at 74.

176. *See id.*

177. *See id.* at 74-75.

178. *Id.* at 75.

179. *See id.* The state supreme court held that he had not met the burden required by the statute proving that he was not dangerous, that *Jones v. United States* did not require



The Supreme Court reversed in a five-to-four decision.<sup>180</sup> The Court first looked to *Addington*, which held that the Due Process Clause required two statutory preconditions to commitment: mental illness and threat of danger to oneself and others proven by at least clear and convincing evidence.<sup>181</sup> In *Jones*, the Court had determined that the State can commit defendants found not guilty by reason of insanity without meeting this burden of proof because the inference of the defendant's threat to the community arises from the commission of a crime.<sup>182</sup> Like *Jones*, *Foucha* was not held responsible for his crime or punished because he had shown by a preponderance of evidence that he committed the crime incident to a mental illness.<sup>183</sup> Such a defendant can be released when he is either sane or no longer dangerous.<sup>184</sup> In other words, the Court determined that if due process requires *both* conditions to exist in order to commit the defendant involuntarily and indefinitely, due process also requires the State to release him when at least one of these conditions is no longer present.<sup>185</sup> Based upon the Court's holdings in *Addington* and *Jones*, the State no longer had a reason for confining *Foucha* because his mental illness was in remission.<sup>186</sup>

The State argued that *Foucha* should remain committed because his antisocial personality, combined with his occasional violent conduct at East Feliciana, showed that he was dangerous either to himself or others. The majority, however, rejected this argument on two grounds.<sup>187</sup> First, the State could not continue to hold him without a determination in a civil commitment hearing that he was mentally ill and dangerous.<sup>188</sup> The psychiatrists testified that he had an antisocial personality, but the Court did not equate this condition

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his release, and that neither due process nor equal protection was violated by the statute, which allowed confinement "based on dangerousness alone." *Id.* According to the Louisiana statute governing commitment proceedings, in deciding whether to release an insanity acquittee, a judge is to consider whether that person is a danger to himself or others. *See* LA. CODE CRIM. PROC. ANN. art. 654 (West 1981). The statute makes no reference to the defendant's mental condition. *See id.*

180. *See Foucha*, 504 U.S. at 72.

181. *See id.* at 75-76; *Addington v. Texas*, 441 U.S. 418, 426-27 (1979).

182. *See Foucha*, 504 U.S. at 76; *Jones v. United States*, 463 U.S. 354, 363-64 (1983).

183. *See Foucha*, 504 U.S. at 76.

184. *See id.* at 77.

185. *See id.*; Janus, *supra* note 51, at 174-77 (arguing that with its decision in *Foucha*, the Court completely rejected the jurisprudence of prevention); *infra* notes 260-63 and accompanying text (discussing Professor Janus's concepts of the jurisprudence of prevention and therapeutic jurisprudence).

186. *See Foucha*, 504 U.S. at 78.

187. *See id.*

188. *See id.* at 78-79.

with mental illness.<sup>189</sup> A convicted felon still has a liberty interest that prevents the state from transferring him to a mental institution without following constitutionally prescribed procedures, because his commitment must bear a relationship to the purpose for which he is being committed.<sup>190</sup> Thus, if his mental illness is in remission, then the purpose for which he was committed no longer exists.<sup>191</sup>

Second, the Court held that due process has a substantive component that prohibits “‘arbitrary, wrongful government actions regardless of fairness of the procedures used to implement them.’”<sup>192</sup> The Court stated that it had long recognized that freedom from restraint is a core interest and that such a freedom should not be minimized.<sup>193</sup> While the State’s police power does allow confinement for either the purpose of retribution or deterrence, the State is limited in what acts it can criminalize.<sup>194</sup> For instance, a jury absolved Foucha of responsibility for his crime by finding him not guilty by reason of insanity; therefore, he cannot be punished.<sup>195</sup> Thus, in *Foucha* the Court determined that it had been careful not to “minimize the importance and fundamental nature” of individual liberty even when the individual is an insanity acquittee or a convicted felon.<sup>196</sup> Furthermore, the Due Process Clause bars “arbitrary, wrongful government actions,” even if the actions are procedurally fair, because freedom from bodily restraint is a core interest.<sup>197</sup> The Court held that confining Foucha after his mental illness had gone into remission would be a wrongful intrusion on his core interests.<sup>198</sup>

The *Foucha* majority did point out that in very narrow circumstances it had allowed “limited confinement” based on the offender’s dangerousness alone.<sup>199</sup> For instance, in *United States v. Salerno*,<sup>200</sup> the Court held that the Bail Reform Act<sup>201</sup> did not violate

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189. *See id.* at 79.

190. *See id.*

191. *See id.*

192. *Id.* at 80 (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)).

193. *See id.*

194. *See id.*

195. *See id.*

196. *Id.*

197. *Id.*

198. *See id.* at 77.

199. *See id.* at 80.

200. 481 U.S. 739 (1987).

201. 18 U.S.C. § 3142(e) (Supp. V 1987) (current version at 18 U.S.C. §§ 3141-3156 (1994)). The Bail Reform Act authorizes a court to hold someone without bail while awaiting trial if the Government proves by clear and convincing evidence that “no release

due process for two reasons, even though pretrial confinement of the defendant was predicated on dangerousness alone.<sup>202</sup> First, the Court noted that the government had the general compelling interest of preventing crime and protecting the safety of others.<sup>203</sup> The Court held that the Bail Reform Act furthered this goal and was narrowly tailored to reach a small class of people who commit very violent crimes, such as those that carry a sentence of life imprisonment or death,<sup>204</sup> and whose dangerousness the State must prove by clear and convincing evidence.<sup>205</sup> The Court stated that in similar situations it has "repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."<sup>206</sup> Second, the Bail Reform Act did not violate due process because the duration of confinement under it was limited to the period of time before the defendant's trial began.<sup>207</sup>

In *Foucha*, however, the Court determined that the State did not have a "particularly convincing reason" to continue holding Foucha, and that by holding him, it was infringing upon his "fundamental right" to "freedom from physical restraint."<sup>208</sup> The *Foucha* majority held that dangerousness was "not enough to defeat Foucha's liberty interest under the Constitution in being freed from indefinite confinement in a mental facility."<sup>209</sup> In fact, it warned that allowing confinement based on dangerousness alone would grant the State license to hold indefinitely not only people acquitted by reason of

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conditions 'will reasonably assure . . . the safety of any other person of the community.' " *Salerno*, 481 U.S. at 741 (quoting 18 U.S.C. § 3142(e)).

202. See *Salerno*, 481 U.S. at 746-52; see also *Foucha*, 504 U.S. at 80-81 (explaining that *Salerno* is a narrow circumstance in which a defendant is detained based on dangerousness alone).

203. See *Salerno*, 481 U.S. at 750.

204. See *id.* at 747.

205. See *id.* The Court also relied on a finding by Congress that people who commit the crimes specified in the Bail Reform Act are more likely to be dangerous. See *id.* (relying on S. REP. NO. 98-225, at 6-7 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3188-90).

206. *Salerno*, 481 U.S. at 748. Still, the Court recognized that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Id.* at 755.

207. See *id.* at 748.

208. *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992).

209. *Id.* at 82. By rejecting the State's contention that Foucha's antisocial personality justified indefinite confinement, the majority refused to expand the legal concept of mental illness to include antisocial personality. See *id.*; see also James W. Ellis, *Limits on the State's Power to Confine "Dangerous" Persons: Constitutional Implications of Foucha v. Louisiana*, 15 U. PUGET SOUND L. REV. 635, 653 (1992) ("[The Court] also declined to permit a diagnosis of 'anti-social personality' to substitute for mental illness as a predicate for civil commitment.").

insanity, but also any convicted criminal who has a “personality disorder that may lead to criminal conduct” but that might not meet the legal standard of mental illness.<sup>210</sup> The majority noted that the next step would be to “substitut[e] confinement for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated criminal law.”<sup>211</sup>

In a concurring opinion, Justice O’Connor emphasized that the majority’s opinion in *Foucha* was meant to be applied narrowly to the specific Louisiana legislative scheme in question.<sup>212</sup> The uncertainty of a psychiatric diagnosis required courts to defer to state legislative judgment about the relationship between dangerous behavior and mental illness.<sup>213</sup> Thus, the State could not hold an insanity acquittee without “some medical justification,” but it could be permissible to hold an acquittee after he has regained sanity as long as the nature and duration of his commitment was limited to reflect “pressing public safety concerns related to the acquittee’s continuing dangerousness.”<sup>214</sup>

In dissent, Justice Thomas<sup>215</sup> wrote that *Foucha*’s liberty interest

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210. *Foucha*, 504 U.S. at 82-83. Due to the uncertainty of psychiatric diagnosis, the Court has opted to defer to legislative judgment about mental illness definitions. See *Jones v. United States*, 463 U.S. 354, 365 n.13 (1983). See generally *Janus, supra* note 51, at 185 (discussing the willingness of the states in sex offender statutes to challenge the Court to develop constitutional standards for mental illness); Eric S. Janus, *Toward a Conceptual Framework for Assessing Police Power Commitment Legislation: A Critique of Schopp’s and Winick’s Explications of Legal Mental Illness*, 76 NEB. L. REV. 1, 7 (1997) (discussing the role of medicine and science in developing a framework for the boundaries of the state’s use of police power to commit people civilly); Blakey, *supra* note 126, at 259-64 (discussing the Court’s consideration of mental illness definitions and concluding that it is a term that must be defined legally, not medically).

211. *Foucha*, 504 U.S. at 82-83; see also La Fond, *supra* note 28, at 693 (“Such a system of confinement would, in effect, be based solely on perceived dangerousness and would lead to an Orwellian world of ‘dangerousness courts,’ a technique of social control fundamentally incompatible with our constitutional system of ordered liberty.”).

212. See *Foucha*, 504 U.S. at 86-87 (O’Connor, J., concurring in part and concurring in the judgment).

213. See *id.* at 87 (O’Connor, J., concurring in part and concurring in the judgment).

214. *Id.* at 87-88 (O’Connor, J., concurring in part and concurring in the judgment).

215. Justice Thomas was joined by Chief Justice Rehnquist and Justice Scalia. See *id.* at 102 (Thomas, J., dissenting). Justice Kennedy also wrote a dissenting opinion and was joined by Chief Justice Rehnquist. See *id.* at 90 (Kennedy, J., dissenting). These four, along with Justice O’Connor, later formed the majority in *Hendricks*. See *Hendricks*, 117 S. Ct. at 2076.

Justice Thomas first stated that the Court’s procedural due process analysis of the statute in question was actually an equal protection analysis. See *Foucha*, 504 U.S. at 107 (Thomas, J., dissenting). He disagreed with the proposition that *Foucha* was entitled to

was not a fundamental right, as the majority asserted.<sup>216</sup> If freedom from bodily restraint were a fundamental interest, then every prison sentence would be subject to strict scrutiny.<sup>217</sup> He further asserted that as a more specific class, insanity acquittees did not have a fundamental right to freedom from bodily restraint because strict scrutiny had never been applied by the Court when it evaluated state laws governing involuntary confinement.<sup>218</sup> Moreover, because Foucha was entitled to release at least once every year or at any time upon request by the facility superintendent, Justice Thomas disputed the majority's contention that Foucha's confinement would be indefinite.<sup>219</sup> Thus, Justice Thomas concluded that the Court was perhaps striking down the law because it feared that the law could be applied to someone else in an unconstitutional manner, even though the law was constitutional as applied to Foucha.<sup>220</sup>

Despite Justice Thomas's objections, *Foucha* has become part of the Court's due process jurisprudence as it applies to civil commitment. First, due process prohibits the State from committing someone without two substantive elements, mental illness and a threat of dangerousness to society.<sup>221</sup> Second, for involuntary civil commitment, the State must prove the existence of the above two conditions by clear and convincing evidence.<sup>222</sup> Finally, one acquitted of a crime because of insanity can be held as long as the above two conditions exist, but once mental illness has gone into remission, the State may not continue to hold someone indefinitely based upon

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the same treatment as other civil committees because as an insanity acquittee, he had been found to have committed a crime beyond a reasonable doubt, but had avoided criminal liability because mental illness caused him to commit the crime. *See id.* at 108 (Thomas, J., dissenting). Acquittees can be distinguished from those civilly committed because by performing a criminal act, they have "already . . . manifested the reality of anti-social conduct." *Id.* at 110 (Thomas, J., dissenting) (quoting *Dixon v. Jacobs*, 427 F.2d 589, 604 (D.C. Cir. 1970)). So even though the State has no interest in punishing an insanity acquittee, it is not required to ignore the criminal act and absolve itself of the responsibility of protecting the public. *See id.* (Thomas, J., dissenting) (relying on *Hickey v. Morris*, 722 F.2d 543, 548 (9th Cir. 1983)). Because of his distrust of a psychiatrist's ability to make a precise determination that someone has "regained sanity," Justice Thomas argued that the State has a great interest in not releasing insanity acquittees prematurely. *See id.* at 109-10 (Thomas, J., dissenting).

216. *See Foucha*, 504 U.S. at 117 (Thomas, J., dissenting).

217. *See id.* at 118 (Thomas, J., dissenting).

218. *See id.* at 119 (Thomas, J., dissenting).

219. *See id.* at 123 (Thomas, J., dissenting).

220. *See id.* at 124 (Thomas, J., dissenting).

221. *See supra* notes 121-220 and accompanying text (discussing the development of the substantive due process requirements for civil commitment).

222. *See Addington v. Texas*, 441 U.S. 418, 433 (1979).

dangerousness alone.<sup>223</sup> The Court typically has been deferential to state definitions of mental illness, and thus it has not developed a clear standard of what mental illness is.<sup>224</sup>

Just as the Court has refused to waver from requiring mental illness and future dangerousness as the substantive basis for civil commitment, it has been relatively consistent in the test that it has used to determine if a statute is punitive or civil.<sup>225</sup> Basically, the test starts with a question of statutory construction: Did the legislature intend the statute to be civil or criminal?<sup>226</sup> If the State expressly intended the statute to be civil, the inquiry does not stop, but the party challenging the statute must provide “the clearest proof” that the act is “so punitive . . . in purpose or effect as to negate that intent[.]”<sup>227</sup>

When *Hendricks* was decided,<sup>228</sup> the Court often used factors developed in *Kennedy v. Mendoza-Martinez* to decide if the law in

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223. See *Foucha*, 504 U.S. at 77; *Jones v. United States*, 463 U.S. 354, 368 (1983).

224. See *Hendricks*, 117 S. Ct. at 2081; cf. *Jones*, 463 U.S. at 364 n.13; *Blakey*, *supra* note 126, at 259-64 (discussing the Court’s consideration of mental illness definitions and concluding that it is a term that must be defined legally, not medically).

225. The Court departed from this test in *United States v. Halper*, 490 U.S. 435 (1989), in which the Court determined when a civil penalty becomes punitive. See *id.* at 439. In *Halper*, the Court stated that because the constitutional protection against double jeopardy was “intrinsicly personal,” the civil-criminal determination is reached by evaluating “the character of the actual sanctions imposed on the individual by the machinery of the state.” *Id.* at 447. The Court then affirmed the district court’s determination that damages become punitive when they exceed any amount that “ ‘ ‘could reasonably be regarded as the equivalent of compensation for the Government’s loss.’ ” *Id.* at 439 (quoting *United States v. Halper*, 664 F. Supp. 852, 854 (S.D.N.Y. 1987) (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring)), *vacated*, 490 U.S. 435 (1989)).

The Court has since determined that the *Halper* analysis applies only to civil penalty cases, see *United States v. Ursery*, 116 S. Ct. 2135, 2142 (1996), and furthermore that *Halper* was a “deviation from longstanding double jeopardy principles [and it] was ill considered,” *United States v. Hudson*, 118 S. Ct. 488, 494 (1997). As a result, the *Hudson* Court “in large part disavow[ed] the method of analysis used in . . . *Halper* and reaffirm[ed] the previously established rule exemplified in *United States v. Ward*.” *Id.* at 491.

226. See, e.g., *United States v. Ward*, 448 U.S. 242, 248 (1980) (asking whether Congress labeled the statute at issue as civil or criminal); *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938) (holding that the question of whether a sanction is criminal or civil is a question of statutory construction).

227. *Ward*, 448 U.S. at 249; see also *Ursery*, 116 S. Ct. at 2148 (evaluating a forfeiture statute).

228. A few months following the *Hendricks* decision, the Court stated that the *Mendoza-Martinez* factors are “useful guideposts” in deciding whether a civil statute is punitive in effect. See *Hudson*, 118 S. Ct. at 493. The majority in *Hendricks*, however, did not use these factors, although it did make a passing reference to the one factor regarding scienter. See *Hendricks*, 117 S. Ct. at 2082.

question was punitive in effect.<sup>229</sup> The case involved two individuals, whose citizenship status was revoked in accordance with a federal statute, because they left the United States to avoid military service.<sup>230</sup> Even though the statute allowing this action was labeled civil, the Court held that revocation of citizenship was a punitive action; thus, the State was required to provide the defendants with procedural protections such as a jury trial.<sup>231</sup> In reaching this determination the Court laid out seven factors that were not exclusive but that should be considered in relation to a statute if it was not readily apparent that Congress intended the statute to be punitive.<sup>232</sup> Those factors are as follows: (1) whether the sanction involves “affirmative disability or restraint;” (2) “whether it has historically been regarded as punishment;” (3) “whether [the penalty] comes into play only [after] a finding of scienter;” (4) whether the operation of the penalty promotes retribution or deterrence; (5) “whether the behavior to which [the penalty] applies is already a crime;” (6) whether an alternative purpose is assignable for the penalty; and (7) whether the penalty is “excessive in relation to the alternative purpose assigned.”<sup>233</sup> The Court in *United States v. Ward*<sup>234</sup> described the *Mendoza-Martinez* factors as useful guideposts for evaluating civil statutes that are challenged as actually being punitive and thus potentially violating double jeopardy.<sup>235</sup> The plaintiff in *Ward* alleged that civil penalties levied under the Federal Water Pollution Control Act were actually criminal in purpose and effect, but the Court disagreed.<sup>236</sup> In reaching this decision, it first looked for explicit congressional intent, and then evaluated the Act with regard to the *Mendoza-Martinez* factors.<sup>237</sup>

In *United States v. Ursery*,<sup>238</sup> the Court applied a modified version of the *Mendoza-Martinez* factors in the evaluation of an in rem forfeiture of private property used to facilitate the commission of a drug felony.<sup>239</sup> The Court did not explicitly state that it was using

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229. 372 U.S. 144 (1963).

230. *See id.* at 144-51.

231. *See id.* at 165-66.

232. *See id.* at 168-69.

233. *Id.*

234. 448 U.S. 242 (1980).

235. *See id.* at 249.

236. *See id.* at 244 (citing 33 U.S.C. §§ 1251-1387 (1994)).

237. *See id.* at 248-49. The Court concluded that one factor—whether the act to which the penalty applies is a crime—weighed in favor of finding the act as punitive; however, this one factor was not enough to make the entire act unconstitutional. *See id.* at 249-51.

238. 116 S. Ct. 2135 (1996).

239. *See id.* at 2148 (discussing the federal statutes that authorized the forfeiture at

*Mendoza-Martinez* as a guide, but its analysis did take into consideration similar factors such as whether civil forfeiture is retributive or deterrent, whether forfeiture traditionally has been regarded as punishment, and whether the statute is linked to criminal activity.<sup>240</sup> It held that these factors did not offer the “clearest proof” that the “forfeiture proceedings . . . [were] so punitive in form and effect as to render them criminal.”<sup>241</sup> Also, in rem actions traditionally have been viewed as civil proceedings.<sup>242</sup> Furthermore, the “procedural mechanisms” in the challenged statutes revealed that Congress intended the forfeiture to be civil.<sup>243</sup>

The Court had previously used a modification of the *Mendoza-Martinez* factors in *Allen v. Illinois*,<sup>244</sup> a case that involved Illinois’s Sexually Dangerous Person Act.<sup>245</sup> The statute authorized the State to commit offenders who qualified as sexually dangerous persons in lieu of sending them to prison.<sup>246</sup> Allen argued that the statute was actually punitive, despite its civil label; thus, his statements to psychiatrists assessing his mental health were protected under his Fifth Amendment right against self-incrimination and should not have been used by the district court when it was deciding if he should be committed.<sup>247</sup> Once again, the Court began its analysis with statutory construction.<sup>248</sup> The Court determined that the statute was both labeled as civil and that it did not further either of the criminal law’s goals of retribution or deterrence.<sup>249</sup> The majority emphasized that treatment, not punishment, was the primary purpose of commitment.<sup>250</sup> The Court reasoned that the introduction of past

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issue in this case).

240. See *id.* at 2148-49; cf. *supra* text accompanying note 233 (describing the *Mendoza-Martinez* factors).

241. *Ursery*, 116 S. Ct. at 2148.

242. See *id.* at 2147 (citing *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984)). For a comprehensive discussion of civil forfeiture as an in rem civil proceeding, see generally Joi Elizabeth Peake, Note, *Bound by the Sins of Another: Civil Forfeiture and the Lack of Constitutional Protection for Innocent Owners in Bennis v. Michigan*, 75 N.C. L. REV. 662 (1997).

243. See *Ursery*, 116 S. Ct. at 2147.

244. 478 U.S. 364 (1986).

245. See *id.* at 365.

246. See 725 ILL. COMP. STAT. ANN. 205/0.01-12 (West 1992). Minnesota follows a similar approach and uses commitment in lieu of punishment. See MINN. STAT. ANN. §§ 253B.18-185 (West 1994 & Supp. 1998); see also Blakey, *supra* note 126, at 231-37 (explaining the history and procedure of Minnesota’s Sexual Psychopathic Personality Statute).

247. See *Allen*, 478 U.S. at 365-68 (referring to U.S. CONST. amend. V).

248. See *id.* at 368.

249. See *id.* at 368-70.

250. See *id.* at 373.



criminal acts did not make the measure punitive, as the prior acts were used merely to show a propensity for future sexually deviant behavior.<sup>251</sup>

Sexual predator statutes raise concerns not only about punishment, but also about infringement on an offender's substantive due process rights because this legislation does not fit neatly into the traditional constructs of civil or criminal jurisprudence.<sup>252</sup> Traditionally, criminal offenders are placed in one of two categories: they are either culpable for their conduct and thus confined in accordance with criminal law, or they show that they are not responsible due to a mental illness and thus are committed in accordance with the civil system.<sup>253</sup> Sex offenders, however, fall in between these two categories because they traditionally have been held criminally responsible for their crimes even though a mental abnormality, such as pedophilia, may have influenced their conduct.<sup>254</sup> This inconsistency led some states, such as Illinois and Minnesota, to use commitment and treatment in lieu of prison time, which, as evidenced in *Allen*, makes the statute appear less punitive.<sup>255</sup> Kansas's statute is more troublesome because it delays treatment until after the offender's prison term, enabling the State to lengthen the offender's confinement in the name of treatment.<sup>256</sup> In *Hendricks*, the Court missed an opportunity to address the unique problems posed by sexual predators<sup>257</sup> and instead treated *Hendricks* as an extension of, rather than an exception to, traditional civil commitment. Thus, the Court not only further confused substantive

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251. *See id.* at 371.

252. *Cf. Holloway v. United States*, 148 F.2d 665, 666 (D.C. Cir. 1945) (explaining that mentally ill defendants are not held morally responsible for their acts because they cannot tell right from wrong); Blakey, *supra* note 126, at 228-29 (describing the legal categories that defendants usually fall into as either "mad" or "bad," depending upon their degree of culpability).

253. *See United States v. Palesky*, 855 F.2d 34, 35 (1st Cir. 1988) (stating that commitment to a mental hospital is automatic and mandatory once a defendant is found not guilty by reason of insanity); *Anthony v. State*, 456 So. 2d 582, 583 (Fla. Dist. Ct. App. 1984) (same); *United States v. Mendelsohn*, 443 A.2d 1311, 1311-12 (D.C. 1982) (same); Blakey, *supra* note 126, at 228-29.

254. *See Blakey, supra* note 126, at 229-30.

255. *See* 725 ILL. COMP. STAT. ANN. § 205/3 (West 1993); MINN. STAT. ANN. § 253B.18-.185 (West 1994 & Supp. 1998); *Allen*, 478 U.S. at 373; *see also* Blakey, *supra* note 126, at 231-37 (explaining the history and procedure of Minnesota's Sexual Psychopathic Personality Statute).

256. *See Hendricks*, 117 S. Ct. at 2093-94 (Breyer, J., dissenting).

257. According to Linda Sleffel, sexual psychopath statutes developed during the early 1900s as states struggled to deal with sex offenders who were considered to be "a special class of offenders thought to be especially dangerous." SLEFFEL, *supra* note 121, at 41.

due process jurisprudence,<sup>258</sup> but it also failed to clarify the conceptual “muddle” of punishment.<sup>259</sup>

In terms of due process, until *Hendricks*, the Court had not wavered in requiring both mental illness and future dangerousness as the bases for involuntary civil commitment.<sup>260</sup> One commentator labeled this approach as therapeutic jurisprudence because the State is using its *parens patriae* authority<sup>261</sup> to commit people who, because of a mental illness, fall outside the bounds of the criminal law.<sup>262</sup> Jurisprudence of prevention, however, is based upon the State using its police power to confine people who are a threat to themselves or others, whether or not the disorder that causes the predicted violence arises from a mental illness.<sup>263</sup> In *Hendricks*, the Court deferred greatly to Kansas’s police power, even though it discussed the substantive due process issue in terms of *Foucha* and *Addington*.<sup>264</sup> In *Foucha* and *Addington*, the Court upheld the commitment of mentally ill persons as an action authorized by the state’s *parens patriae* and police powers pursuant to either involuntary civil commitment or a not guilty by reason of insanity verdict.<sup>265</sup> Both state powers were implicated because *Foucha* and *Addington* were found to be dangerous as well as incapable of taking care of

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258. Several commentators predicted that the Court would use sexual predator statutes as an opportunity to clarify the bounds of civil commitment. See, e.g., Janus, *supra* note 51, at 185-86 (proposing that the Court adopt the following rule for the substantive boundary for civil commitment: “Mental disorders justify civil commitment only when they disable the state from pursuing its legitimate interests through the primary system for liberty deprivation—the criminal justice system”); Blakey, *supra* note 126, at 642-43 (stating that the Court must determine whether there is a limit to state police power and if so, whether states that have adopted sexual predator acts have exceeded the scope of police power); Morris, *supra* note 19, at 639 (“[T]he Supreme Court conceivably will be prompted to more carefully delineate the limitations on the state’s authority to incapacitate individuals.”).

259. See Steiker, *supra* note 159, at 781.

260. See *The Supreme Court 1996 Term—Leading Cases*, 111 HARV. L. REV. 197, 266 (1997) [hereinafter *Leading Cases*].

261. See *supra* note 138 (defining *parens patriae* authority).

262. See Janus, *supra* note 51, at 160.

263. See *id.* The Court applied the jurisprudence of prevention before *Hendricks*, but usually only in cases that involved confinement for a limited period of time. See *United States v. Salerno*, 481 U.S. 739, 741 (1987) (allowing the pre-trial confinement of criminal defendants based upon dangerousness alone); *Jacobson v. Massachusetts*, 197 U.S. 11, 26, 39 (1905) (upholding a state statute authorizing the confinement of people suffering from contagious diseases). For indefinite commitment, though, the Court has typically applied therapeutic jurisprudence. See *Foucha v. Louisiana*, 504 U.S. 71, 78 (1992); *Addington v. Texas*, 441 U.S. 418, 426 (1979).

264. See *Hendricks*, 117 S. Ct. at 2079-81.

265. See *Foucha*, 504 U.S. at 77-79; *Addington*, 441 U.S. at 426.

themselves because of their mental illnesses.<sup>266</sup> In contrast, Hendricks was dangerous due to his propensity to commit sex crimes, but his mental condition did not render him incapable of caring for himself.<sup>267</sup> Thus, the State could not commit Hendricks through traditional civil commitment solely upon its *parens patriae* power.<sup>268</sup> Instead, the State committed him because he was dangerousness due to his propensity to commit sex crimes, but the Court examined his detainment as if his mental condition mirrored that of Foucha and Addington.<sup>269</sup> Sexual violent predator statutes, however, more closely resemble the exception the Court carved out in *Salerno* that permits the confinement of a select group of offenders based upon their dangerousness alone.<sup>270</sup>

By not distinguishing *Hendricks* and the purpose of the Act from traditional civil commitment, the Court reduced the constitutionally acceptable point at which the State can commit someone from mental illness to mental abnormality.<sup>271</sup> In fact, Kansas already had a civil commitment statute that defines a mentally ill person as someone who suffers from “a severe mental disorder” requiring treatment, who cannot “make an informed decision [about] treatment,” and who “is likely to cause harm to self or others.”<sup>272</sup> In the preamble to the Act, however, the Kansas Legislature clearly stated that sexual predators cannot be committed under the civil commitment statute because they do not meet the statutory requirements for mental illness.<sup>273</sup> Instead of “mental illness,” sexual predators suffer from a mental abnormality, or more specifically “antisocial personality features” that cannot be treated under “existing mental illness modalities and . . . render them likely to engage in sexually violent behavior.”<sup>274</sup> The Court unequivocally rejected antisocial personality

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266. See *Foucha*, 504 U.S. at 77-79; *Addington*, 441 U.S. at 426.

267. See KAN. STAT. ANN. § 59-29a01 (1994) (stating that sexual predators could not be committed through traditional civil commitment proceedings).

268. See *id.*

269. See *Hendricks*, 117 S. Ct. at 2080 (citing *Foucha*, 504 U.S. at 80; *Addington*, 441 U.S. at 426-27) (stating that involuntary commitment statutes that apply to a small group of offenders do not violate the Court’s understanding of liberty).

270. See *supra* notes 199-207 and accompanying text (discussing *United States v. Salerno*, 481 U.S. 739 (1987)).

271. See *Leading Cases*, *supra* note 260, at 259; see also La Fond, *supra* note 28, at 671-72 (explaining that mental abnormality has no clinical or diagnostic meaning); Wettstein, *supra* note 28, at 602 (“‘Mental abnormality’ is much broader than any conceivable psychiatric diagnosis of mental disorder or mental illness.”).

272. KAN. STAT. ANN. § 59-2902(h) (1994).

273. See *id.* § 59-29a01.

274. *Id.*

as being the equivalent of mental illness for the purposes of commitment in *Foucha*.<sup>275</sup> However, the majority in *Hendricks* accepted antisocial personality disorder as a basis for commitment<sup>276</sup> even though mental abnormality as defined by the Act differed significantly from mental illness under the state's civil commitment statute.<sup>277</sup>

The majority correctly stated that it has allowed the states discretion in defining the relationship between mental illness and dangerousness,<sup>278</sup> but courts also have considered testimony by psychiatrists in deciding to reject antisocial personality disorder or pedophilia as mental illnesses,<sup>279</sup> or in evaluating whether someone is truly mentally ill or simply displaying idiosyncratic behavior.<sup>280</sup> Also, in past decisions the Court showed more deference and respect for the individual's liberty interest.<sup>281</sup> For example, the majority in *Addington* emphasized that people sometimes exhibit "behavior which might be perceived by some as symptomatic of a mental or emotional disorder . . . . [However] such behavior is no basis for compelled treatment and surely none for confinement."<sup>282</sup> Sexual predator statutes rely upon the State's ability to confine people through its police power; thus, the reduced interest in individual liberty is a natural consequence because the threat of dangerousness is what matters, not the individual's illness and need for treatment.<sup>283</sup>

One can argue that a narrow reading of *Hendricks* allows the State to use civil commitment as the modern solution to the "particularly noxious and fearsome public problem" of "sexual predation."<sup>284</sup> Nevertheless, until further clarified by the Court,

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275. See *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992).

276. See *Hendricks*, 117 S. Ct. at 2081.

277. See KAN. STAT. ANN. § 59-29a02(b) (defining mental abnormality as a "congenital or acquired condition" that affects "the emotional or volitional capacity" and "predisposes the person to commit sexually violent offenses in a degree" that makes the person "a menace to the health and safety of others").

278. See *Hendricks*, 117 S. Ct. at 2081 (stating that courts defer to legislative judgment about mental illness because of the uncertainty of psychiatric diagnosis); *Jones v. United States*, 463 U.S. 354, 365 n.13 (1983) (same).

279. See *Foucha*, 504 U.S. at 74-75; *In re Hendricks*, 912 P.2d 129, 131 (Kan. 1996), *rev'd sub nom. Kansas v. Hendricks*, 117 S. Ct. 2072 (1997); see also Cornwell, *supra* note 19, at 1312-16 (highlighting lower court decisions that evaluated whether antisocial personality or personality disorder qualified as mental illness under due process).

280. See *Addington v. Texas*, 441 U.S. 418, 426-27 (1979).

281. See *Leading Cases*, *supra* note 260, at 267.

282. *Addington*, 441 U.S. at 426-27.

283. See *Janus*, *supra* note 51, at 165 ("Mental [abnormality] is simply window dressing . . .").

284. Cornwell, *supra* note 19, at 1336; see also McCaffrey, *supra* note 1, at 912

*Hendricks* has created an imbalance in the two-prong due process test heretofore mandated by the Court by allowing states to commit a sexual offender primarily on the predicted danger that he or she poses to others with only a token reference to the offender's mental condition.<sup>285</sup> This shift in focus is directly contrary to the Court's reasoning in *Foucha* when it warned against basing commitment on dangerousness alone.<sup>286</sup>

This shift in balance may appear to be harmless, but it could spiral out of control without more carefully defined limits.<sup>287</sup> Another plausible result is that *Hendricks* provides state courts with a "basis for deployment of civil commitment procedures in other contexts."<sup>288</sup> The Kansas legislature and the Court readily accept the contention that this class of sexually violent predators is very small and easy to identify, but as the majority in *Foucha* recognized, antisocial personality is a vague condition that could lead to the confinement of inmates or any insanity acquittees found to have an antisocial personality disorder but not a treatable mental illness.<sup>289</sup> At least one commentator has argued that "mental abnormality" is "too broad and elastic to avoid improperly encompassing a wide

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(describing the Act as "the best available alternative for protecting communities from this . . . extremely dangerous[] group of offenders"); Blakey, *supra* note 126, at 296 (concluding that Minnesota's sexual psychopath statute is "a powerful [social] instrument to achieve the sound social goals of the community").

285. Cf. KAN. STAT. ANN. § 59-29a01 (1994) (acknowledging that sexual predators do not have a recognizable mental illness that can be treated); *supra* notes 221-22 and accompanying text (explaining the traditional due process test).

286. See *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992); *supra* notes 208-11 and accompanying text (discussing the Court's holding in *Foucha*); see also Ellis, *supra* note 209, at 653 (recognizing that the Court in *Foucha* refused to expand the State's power to confine citizens based on dangerousness alone and refused to recognize antisocial personality as a mental illness); Janus, *supra* note 51, at 174-77 (explaining the Court's rejection of Louisiana's reliance on jurisprudence of prevention, which bases civil commitment upon dangerousness pursuant to the State's police power).

287. See Ellis, *supra* note 209, at 635 (arguing that the Court has not "announced comprehensive constitutional principles" addressing the balance between the state's interest in protecting the public and the individual's liberty interest); La Fond, *supra* note 28, at 698-99 (describing the "Teflon Slippery Slope" that will allow states to "use lifetime preventive detention on any group of offenders who have served their prison terms"); Steiker, *supra* note 159, at 818-19 (pointing out that Kansas's Act is moving toward a "slippery slope" of "pure preventive detention"); Morris, *supra* note 19, at 642-43 (predicting that the Court will define states' authority or develop a hybrid framework for treating sexual predators).

288. *Leading Cases*, *supra* note 260, at 266.

289. See *Foucha*, 504 U.S. at 82-83; see also La Fond, *supra* note 28, at 693 (arguing that a system of confinement not based on mental illness would lead to "an Orwellian world of 'dangerousness courts,' " which would conflict with our constitutional principles of liberty).

variety of individuals, resulting in indeterminate incarceration” because it can include “nearly any symptom, deficit, or historical detail.”<sup>290</sup> For instance, the Court’s rationale in *Hendricks* would support a statute that authorized the commitment of drunk drivers, spouse abusers, or drug addicts if it is shown that they suffer from an “abnormal personality.”<sup>291</sup> According to the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (“DSM-IV”), people who have an antisocial personality may have a history of arrests, may disregard others’ feelings, may be aggressive, and may have a record of physical assaults, such as spouse beating.<sup>292</sup> People with this disorder may also “display a reckless disregard for the safety of themselves or others . . . . [Such recklessness] may be evidenced in their driving behavior (recurrent speeding, driving while intoxicated, multiple accidents).”<sup>293</sup> While lawmakers may recognize that civil commitment is not the best alternative for drunk drivers, by “ratchet[ing] down the mental illness requirement” the Court has nonetheless opened the door for states to expand their use of civil commitment as a means of social control.<sup>294</sup> In *Hendricks*, only Justice Kennedy recognized that “mental abnormality” may prove to be “too imprecise a category to offer a solid basis for concluding that civil detention is justified.”<sup>295</sup>

Justice Kennedy raised a second concern as to “whether it is the criminal system or the civil system which should make the decision” about how long an offender should be confined.<sup>296</sup> Allowing the civil commitment of offenders after they have served prison time could in effect result in a life sentence, a result that did not trouble members of the Kansas Task Force.<sup>297</sup> However, the function of the civil

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290. Wettstein, *supra* note 28, at 602.

291. See La Fond, *supra* note 28, at 699; *Leading Cases*, *supra* note 260, at 259; Mark Hansen, *Danger vs. Due Process, Deciding Who Is Mentally Abnormal Is Key to Law*, A.B.A. J., Aug. 1997, at 43, 43.

292. See DSM-IV, *supra* note 28, at 646; Hammel, *supra* note 56, at 809 (stating that “fifty-eight percent of incarcerated felons display” antisocial personality traits (relying on NATHANIEL J. PALLONE, MENTAL DISORDERS AMONG PRISONERS: TOWARD AN EPIDEMIOLOGICAL INVENTORY 35 fig.4 (1991))); see also Brief of Amicus Curiae Washington State Psychiatric Ass’n in Support of Respondent at 18-19, *Hendricks* (Nos. 95-1649, 95-9075) (arguing that courts should not allow commitment based upon antisocial personality disorder because no evidence exists that people suffering from this disorder are unable to conform to societal controls).

293. DSM-IV, *supra* note 28, at 646.

294. *Leading Cases*, *supra* note 260, at 266.

295. *Hendricks*, 117 S. Ct. at 2087 (Kennedy, J., concurring).

296. *Id.* (Kennedy, J., concurring).

297. See *id.* (Kennedy, J., concurring) (repeating the words of Kansas Task Force member Jim Blaufuss, who said that if offenders get a life sentence, “ ‘So be it.’ ”).

system is not to punish an offender “after the State makes an improvident plea bargain on the criminal side.”<sup>298</sup> Both the criminal and civil systems have incapacitation as a goal, but using incapacitation as a form of retribution and deterrence is reserved for the criminal system alone.<sup>299</sup> However, in practice, deterrence and retribution have found a place in civil law in the form of civil fines, forfeitures, and punitive damages.<sup>300</sup> Similarly, the criminal law has become influenced by the mental health system through a shift to verdicts such as guilty but mentally ill.<sup>301</sup> By allowing for civil commitment after incarceration, Kansas has blurred the lines between the civil and criminal process even more.<sup>302</sup> The *Hendricks* majority determined that civil commitment under the Act is purely civil in purpose and effect,<sup>303</sup> but by focusing on deterrence and retribution in reaching this decision, the Court ignored the need for a clearer test that draws from both criminal and civil paradigms to determine when a civil sanction becomes punitive.<sup>304</sup> The Court’s

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298. *Id.* (Kennedy, J., concurring). *Hendricks* did not receive the maximum sentence because of a plea arrangement. See *In re Hendricks*, 912 P.2d 129, 130 (Kan. 1996), *rev’d sub nom.* *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997); *supra* note 27 (explaining the details of *Hendricks*’s plea arrangement).

299. See *Hendricks*, 117 S. Ct. at 2087 (Kennedy, J., concurring).

300. See *Steiker*, *supra* note 159, at 784-87.

301. See *id.*; *Morris*, *supra* note 19, at 624-25.

302. See *Leading Cases*, *supra* note 260, at 259; *cf.* *Steiker*, *supra* note 159, at 780 (describing the trend of the legal system to draw from cognitive and behavioral sciences to explain behavior and confine dangerous offenders). Academics have been troubled by the blurring of the civil and criminal distinction for some time. See generally John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 *YALE L.J.* 1875, 1891-92 (1992) (suggesting that the focus be placed upon enforcement incentives that would encourage regulatory agencies to use civil penalties rather than criminal processes); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 *YALE L.J.* 1795, 1803-13 (1992) (describing hybrid jurisprudence that has a punitive purpose but follows civil procedure); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 *B.U. L. REV.* 201, 214 (1996) (advocating the maintenance of the civil and criminal distinction because of the criminal law’s focus on moral blameworthiness).

303. See *Hendricks*, 117 S. Ct. at 2085; *supra* notes 47-86 and accompanying text (discussing the majority’s holding); *cf.* *Blakey*, *supra* note 126, at 243 (“The civil-criminal distinction is, in some sense, artificial; . . . it is an artifact made by law not found in nature.”).

304. See *Mann*, *supra* note 302, at 1871 (“While the legal community has always recognized that many sanctions do not fit into either [criminal or civil] paradigm, it has never developed a systematic jurisprudence to explain the substantive and procedural position of punitive civil sanction within the field of sanctioning.”); *Steiker*, *supra* note 159, at 819 (proposing a framework for determining when a sanction becomes punitive); see also *United States v. Hudson*, 118 S. Ct. 488, 494 (1997) (recognizing “that all civil penalties have some deterrent effect”) (citing *United States v. Ursery*, 116 S. Ct. 2135, 2145 n.2 (1996); *Department of Revenue v. Kurth*, 511 U.S. 767, 777 (1994)).

disagreement over what constitutes punishment was also evident in *United States v. Hudson*, a post-*Hendricks* case in which the majority disavowed *Halper* and used the *Mendoza-Martinez* factors as guideposts to determine whether a statute was punitive.<sup>305</sup> The opinion included four concurring opinions discussing how the Court should define punishment, thus leaving the definition unresolved.<sup>306</sup>

Traditionally, the goals of the civil paradigm have been to use corrective or compensatory actions to address a private wrong between two parties.<sup>307</sup> On the other hand, criminal law involves moral blame for a public wrong.<sup>308</sup> According to one commentator's theory, "civil commitment is interstitial to the criminal law" because criminal law is the primary means used by the State to control violent behavior, but civil commitment can be used when "the state's interests cannot be vindicated by the criminal law."<sup>309</sup> Civil commitment of a criminal offender rather than imprisonment is justified when the defendant's conduct is the result of a mental disorder, thus making the offender "unamenable to prosecution."<sup>310</sup> Kansas's Sexually Violent Predator Act, however, undermines this structure by allowing civil commitment after prison time has been served. In essence, the State takes an offender who was held criminally responsible for his conduct and transforms him into a blameless offender who cannot control himself and is likely to commit more crimes due to a mental abnormality.<sup>311</sup> Justice Kennedy appropriately noted in *Hendricks* that a concern arises as to

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305. See *Hudson*, 118 S. Ct. at 491, 493; *supra* text accompanying note 233 and accompanying text (stating the *Mendoza-Martinez* factors).

306. See *Hudson*, 118 S. Ct. at 496-97 (Scalia, J., concurring); *id.* at 497-500 (Stevens, J., concurring in judgment); *id.* at 500-01 (Souter, J., concurring in judgment); *id.* at 501-02 (Breyer, J., concurring in judgment).

307. See Mann, *supra* note 302, at 1805-13 (explaining the differences between criminal and civil law); see also Paul H. Robinson, *Supreme Court Review: Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693, 695-96 (1993) (explaining the options for dealing with blameless offenders).

308. See Mann, *supra* note 302, at 1805-13; Steiker, *supra* note 159, at 785-87; see also *Holloway v. United States*, 148 F.2d 665, 666 (D.C. Cir. 1945) ("This sense of justice assumes there is a faculty called reason . . . that enables an individual to distinguish between right and wrong and endows him with moral responsibility for his acts.").

309. Janus, *supra* note 51, at 209.

310. *Id.* at 210; see also *Foucha v. Louisiana*, 504 U.S. 71, 110 (1992) (Thomas, J., dissenting) (stating that the State has no interest in punishing an insanity acquittee); *supra* notes 158-60 and accompanying text (explaining the implication of a verdict of not guilty by reason of insanity).

311. See KAN. STAT. ANN. § 59-29a02 (1994) (defining a "sexually violent predator" as anyone "who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence").



whether commitment is being used to compensate for shortcomings on the criminal side.<sup>312</sup>

The majority decided the Act was not punitive by asking whether the legislature intended the statute to be civil and whether the party challenging the statute provided the “clearest proof” that it was so punitive in purpose or effect to negate that intent.<sup>313</sup> But then, by focusing on retribution and deterrence, the Court failed to provide judicial guidance as to specific factors that characterize punishment.<sup>314</sup> In contrast, Justice Breyer in dissent focused on characteristics of the Act that he concluded made it punitive despite express legislative intent to the contrary.<sup>315</sup> For instance, at the time of Hendricks’s commitment, Kansas had not funded treatment for him, it did not have any pending treatment contracts, and it had only hired a semblance of a treatment staff.<sup>316</sup> Also, the State did not consider a less restrictive alternative to commitment such as a half-way house.<sup>317</sup> Finally, he considered the seven factors advocated by the Court in *Kennedy v. Mendoza-Martinez* and concluded that Kansas was seeking only to confine Hendricks.<sup>318</sup> Still, Justice Breyer’s approach offered nothing more than guideposts that fail to provide a *rationale* for what actually constitutes punishment. As civil-criminal hybrids become more prevalent, the parameters of punishment need to be more clearly delineated in order to assure a meaningful analysis of double jeopardy and *ex post facto* claims.<sup>319</sup>

Professor Steiker has attempted to develop a framework that courts can use to evaluate a sanction and determine if it crosses the

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312. See *Hendricks*, 117 S. Ct. at 2087 (Kennedy, J., concurring).

313. See *id.* at 2082; *supra* notes 225-51 and accompanying text.

314. See *supra* notes 305-06 and accompanying text (discussing the Court’s struggles with punishment in *United States v. Hudson*, 118 U.S. 488 (1997)).

315. See *Hendricks*, 117 S. Ct. at 2090-98 (Breyer, J., dissenting).

316. See *id.* at 2093 (Breyer, J., dissenting).

317. See *id.* at 2094 (Breyer, J., dissenting).

318. See *id.* at 2098 (Breyer, J., dissenting); *supra* text accompanying note 233 (listing factors). This analysis is in line with the *Allen* Court’s approach because it found the treatment provision in lieu of sentencing to be compelling. See *Allen v. Illinois* 478 U.S. 364, 369-70 (1986); Hammel, *supra* note 56, at 800-01. Justice Breyer found the delay in treatment also to be troubling because it conflicted with Kansas’s acknowledgment that sexual offenders need long-term treatment outside of a prison setting. See KAN. STAT. ANN. § 59-29a01 (1994); *cf.* Wettstein, *supra* note 28, at 616-17 (emphasizing the need for immediate treatment).

319. *Cf.* Steiker, *supra* note 159, at 781-84 (explaining the need for a clear test for punishment because of the “destabilization of the criminal-civil distinction”). Professor Steiker explains that the framers of the Constitution were able to make a distinction between criminal and civil sanctions, but now courts have more difficulty maintaining this distinction. See *id.* at 783.

threshold of punishment.<sup>320</sup> Her test asks the following three questions: (1) “[W]hat is the state’s intent?”<sup>321</sup> (2) “[W]hat is the effect of the forfeiture [or sanction] on the defendant?”<sup>322</sup> and (3) “[W]hat is the public message or social meaning of the forfeiture of the defendant’s property [or confinement of the defendant] by the government?”<sup>323</sup> She applied the first two questions to *Hendricks* and came up with the same conclusion as the majority.<sup>324</sup> However, she failed to address the social meaning of *Hendricks*’s commitment as directed by the third question, despite her conclusion that sexually violent predator statutes may be leading to a “slippery slope [of] pure preventative detention.”<sup>325</sup>

Another commentator, Professor Schulhofer, addressed the “social meaning” of sexual offender statutes and concluded that “regulatory use of confinement [such as civil commitment] . . . should never *displace* the criminal process”<sup>326</sup> because the essential component of this country’s justice system is respect of “the individual’s capacity for autonomous choice.”<sup>327</sup> Social control is maintained through the criminal justice system, which takes away a person’s liberty only when she chooses to commit a harmful act, with the punishment being proportional to “the degree of personal fault.”<sup>328</sup> Traditional civil commitment does not violate the belief in autonomous choice because it steps into action only when the criminal process cannot adequately address a social problem.<sup>329</sup> For example, a civil law authorizing the quarantine of someone with a

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320. *See id.* at 819 (“I have offered Mendoza-Martinez some life-support by providing it with a rationale grounded in moral theory; we have yet to see what quality of life it can lead.”).

321. *Id.* at 815.

322. *Id.* at 816.

323. *Id.*

324. *See id.* at 817-18 (concluding that, despite a suspicion that Kansas merely wanted to lengthen sex offenders’ sentences, the State’s intent was non-punitive and the effect was prevention, not blame).

325. *Id.* at 818-19.

326. Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69, 93 (1996).

327. *Id.* at 90; accord Janus, *supra* note 51, at 192 (positing that commitment may actually be more harmful to a sex offender’s dignity because “[i]n criminal proceedings, the operative assumption is that the defendant is a free agent, a full human being”).

328. Schulhofer, *supra* note 326, at 90-91; see also Mann, *supra* note 302, at 1805 (explaining that a criminal offense requires mens rea); Blakey, *supra* note 126, at 228-30 (describing the two paradigms that offenders fall into as either “mad” or “bad”).

329. *See* Schulhofer, *supra* note 326, at 93; see also Janus, *supra* note 51, at 209 (explaining that civil commitment is secondary to criminal confinement, which is society’s primary means of social control).

communicable disease does not offend principles of autonomy because the contagious person is not at fault for contracting the malady, but she also cannot avoid giving it to others.<sup>330</sup> However, Professor Schulhofer contended that sexually violent predator statutes are overbroad and extend regulatory confinement to people who can make choices and respond to criminal sanctions.<sup>331</sup> This extension of civil commitment, “[i]n the absence of mental illness sufficiently serious to preclude criminal responsibility, . . . violates the first principle of limited government—to treat every mentally competent adult as a free and autonomous person responsible for his chosen actions—and only for his chosen actions.”<sup>332</sup>

The problems with the *Hendricks* Court’s analysis of whether the Act constitutes punishment parallel the opinion’s due process problems.<sup>333</sup> The majority tried to force the unique problem of sexual predators into the traditional paradigms of civil and criminal process. By doing so, it endorsed the paradox of punishing a sex offender first and then committing him after he has served his time, as if he is an insanity acquittee lacking culpability. Perhaps the Court sees sexually violent predator statutes as the best way to control the behavior of offenders who fall in between the traditional extremes of criminal responsibility and mental insanity.<sup>334</sup> However, similar to its shortcomings in its due process analysis, the *Hendricks* Court did not make clear to what extent it is willing to allow the civil and the criminal to blur together. Furthermore, it missed an opportunity to clarify what constitutes a showing of “clearest proof” in a challenge to a civilly-labeled sanction that may be criminal in effect.<sup>335</sup>

At the very least, *Hendricks* resolved the discrepancy among the lower courts as to the constitutionality of sexually violent predator statutes,<sup>336</sup> but the Court endorsed the Kansas model with such broad

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330. See Schulhofer, *supra* note 326, at 91.

331. See *id.* at 94-95 (“Preventive incapacitation of such individuals, as a substitute for reliance on the criminal process, is inconsistent with the core commitments of a free society, even if the eligibility criteria can be identified with the certainty and reliability of a litmus test.”).

332. *Id.* at 96; accord Janus, *supra* note 51, at 194-95 (arguing that treatment may benefit sex offenders, but they are generally considered to be competent and thus are entitled to make their own decisions about treatment).

333. See *supra* notes 260-82 and accompanying text (analyzing the Court’s substantive due process analysis).

334. See Blakey, *supra* note 126, at 228-29.

335. See *supra* notes 221-27 and accompanying text (discussing the factors the Court usually considers when determining whether a sanction is civil or criminal).

336. See *supra* note 103 (discussing conflicting lower court rulings on sexual predator laws).

language that it may have opened the door to increased use of civil commitment by the states as a means of social control.<sup>337</sup> The Court reduced the due process requirement of mental illness to mental abnormality in order to fit *Hendricks* in the *Addington* line of civil commitment cases.<sup>338</sup> Such a step was not necessary, as the Court had already carved out a limited number of exceptions to traditional civil commitment that predicated confinement on the basis of future dangerousness.<sup>339</sup> Nonetheless, the Court chose to treat *Hendricks* as an extension of traditional civil commitment—an extension that it may very well have to revisit in the future if states take their expanded police power too far. Furthermore, the Court endorsed the Kansas Sexually Violent Predator Act without any clear rationale for when such a measure blurs civil and criminal principles to the point that a “civil” sanction becomes criminal in effect. Double jeopardy and ex post facto claims to punitive civil sanctions cannot be adequately addressed until the Court recognizes that some sanctions, even though labeled civil or criminal, fall into a middle ground between civil and criminal law. Sexual predators pose a serious threat to society; perhaps Stephanie Schmidt’s father was correct in labeling them the “worst of the worse.”<sup>340</sup> Still, the Court could have tailored its opinion more narrowly to focus on the specific problem of sexual predation and thus avoided opening the door to future curtailment of the liberty interests of the next group that society deems to be a threat because of a personality defect less serious than pedophilia.

BEVERLY PEARMAN

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337. See *Leading Cases*, *supra* note 260, at 259; *supra* notes 287-95 and accompanying text.

338. See *supra* notes 268-83 and accompanying text (discussing *Addington v. Texas*, 441 U.S. 418 (1979), and subsequent cases).

339. See, e.g., *United States v. Salerno*, 481 U.S. 739, 747 (1987) (upholding the pre-trial confinement of criminal defendants based upon their dangerousness).

340. *60 Minutes*, *supra* note 1 (recounting an interview with the father of the young woman whose rape and murder prompted Kansas to pass the Act).

