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“THERE’S NO SUCCESS LIKE FAILURE/AND FAILURE’S NO SUCCESS AT ALL”¹: EXPOSING THE PRETEXTUALITY OF *KANSAS V. HENDRICKS*

Michael L. Perlin *

I. INTRODUCTION

I have spent my entire legal career thinking about the insanity defense. I have represented defendants who pled insanity, both successfully and unsuccessfully, and those who were institutionalized after a successful insanity plea.² I have taught about the insanity defense, have spoken about it endlessly, and have written about it perhaps more endlessly.³ And most of my recent writing and thinking has been devoted to my seeking answers to the question that I am convinced—beyond doubt—lies at the base of the insanity defense debate: why do we feel the way we do about “those people”?⁴ Why are we so beholden to myths, to stereotypes, to medieval

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¹ BOB DYLAN, *Love Minus Zero/No Limit*, on BRINGING IT ALL BACK HOME (Sony Music 1965).

² See, e.g., *State v. Fields*, 390 A.2d 574 (N.J. 1978) (insanity acquittees entitled to same periodic review rights as are civil patients) (represented defendant in state Supreme Court); *State v. Krol*, 344 A.2d 289 (N.J. 1975) (establishing dangerousness standard in cases involving release of insanity acquittees) (represented defendant at habeas hearings both prior to and subsequent to state supreme court decision).

³ See MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* (1994); Michael L. Perlin, *Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 5 (1996) [hereinafter Perlin, *Anthropology*]; Michael L. Perlin, *Psychodynamics and the Insanity Defense: “Ordinary Common Sense” and Heuristic Reasoning*, 69 NEB. L. REV. 3 (1990) [hereinafter Perlin, *Psychodynamics*]; Michael L. Perlin, “*The Borderline Which Separated You From Me*”: *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375 (1997); Michael L. Perlin, *The Insanity Defense: Deconstructing the Myths and Reconstructing the Jurisprudence*, in LAW, MENTAL HEALTH AND MENTAL DISORDER 341 (Bruce Sales & Daniel Shuman eds., 1996); Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599 (1989-90) [hereinafter Perlin, *Myths*].

⁴ Perlin, *Anthropology*, *supra* note 3, at 6-7.

concepts of good and bad, of mental illness and sin? Why has this population been seen as the “most despised” group of individuals in society?⁵

I believe that I have made some modest headway in answering some of these questions. My belief is supported by the way the media seems, in the wake of the Unabomber case, to be understanding some of the fundamental issues in ways that promise the possibility of a new insight into this population, and perhaps some coherent answers to the question I have posed.⁶

On the other hand, I realize that this is a kind of a *trompe l'oeil* illusion. If we are no longer focusing on insanity defendants as the most “despised” group in society, it is more likely because there is a new universe of “monsters” replacing them in our demonology: sex offenders, known variously, as mentally disordered sex offenders, or sexually violent predators, the ultimate “other.”⁷ The 1994 murder of Megan Kanka, within miles of my home, and the subsequent flurry of “Megan's Law”-type legislation has focused the public's attention and enmity on this category of criminal defendant.⁸ The sex offender, especially the one who preys on strangers' children, has become the lightning rod for our fears, our hatreds, and our punitive urges. Legislation passes within days of introduction and without debate, statutes⁹ are quickly upheld, and we feel, somehow, that we are “doing something” to combat the most nightmarish, least understandable, and least excusable criminal behavior. What we are doing is ominously returning to the days of what many of us had thought was a less enlightened, and thus discarded, past.

*Kansas v. Hendricks*¹⁰ returns us to this past, and does so with a vengeance. For *Hendricks*—in upholding a state law sanctioning long-term in-

⁵ Successful insanity defendants have traditionally been perceived as perhaps the “most despised” and most “morally repugnant” group of individuals in society. See Deborah C. Scott et al., *Monitoring Insanity Acquittes: Connecticut's Psychiatric Security Review Board*, 41 HOSP. & COMMUNITY PSYCHIATRY 980, 982 (1990).

⁶ See e.g., Fox Butterfield, *Unabom Trial Highlighting Ambiguity of Mental Illness*, N.Y. TIMES, Jan. 11, 1998, at A1; Ellen Goodman, *Bad or Mad? Inexact Sciences Meet at Juncture Where Evil Confronts Illness*, DALLAS MORNING NEWS, Jan. 11, 1998, at 6J; Gordon Witkin, *What Does It Take To be Crazy?* U.S. NEWS & WORLD REP., Jan. 12, 1998, at 7.

⁷ See Michael Perlin, *On “Sanism,”* 46 SMU L. REV. 373, 374 (1992); see also Lucy Berliner, *Sex Offenders: Policy and Practice*, 92 NW. U. L. REV. 1203 (1998); Eric S. Janus, *Foreshadowing the Future of Kansas v. Hendricks: Lessons from Minnesota's Sex Offender Commitment Litigation*, 92 NW. U. L. REV. 1279 (1998).

⁸ See generally *infra* text accompanying notes 25-28. On Megan Kanka's death, see Robert F. Freeman-Longo, *Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention?*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 303, 313 (1997).

⁹ See e.g., James Hacking, *Won't You Be My Neighbor?: Do Community Notification Statutes Violate Sexual Offenders' Rights Under the Constitution's Ban of Ex Post Facto Laws?*, 41 ST. LOUIS U. L.J. 761, 762 (1997); Kathleen Heaphy, *Megan's Law: Protecting the Vulnerable or Unconstitutionally Punishing Sex Offenders?*, 7 SETON HALL CONST. L.J. 913, 913 (1997); Brian Telpner, *Constructing Safe Communities: Megan's Laws and the Purposes of Punishment*, 85 GEO. L.J. 2039, 2039 (1997).

¹⁰ 117 S. Ct. 2072 (1997). See generally, 1 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL*, § 2A-3.3 at 75-92 (1998) (2d ed.).

stitutionalization of “sexually violent predators”¹¹—is not simply, in my mind, a constitutionally indefensible and intellectually muddled opinion. It is also a *pretextual* opinion.¹² Mental disability law is permeated by a kind of meretricious pretextuality that is outcome-driven, acontextual and amoral. The *Hendricks* case reflects this pretextuality, and in so doing, reveals to us much of what is wrong with the development of mental disability law jurisprudence. It is this theme upon which I will focus in this Article.

The United States Supreme Court's decision in *Hendricks* is a confused and confusing opinion.¹³ Yet, if the public were to be polled, I am confident that an overwhelming majority of American citizens would endorse the Court's decision, upholding the statute's constitutionality, and express puzzlement and outrage that law professors, psychiatrists and other scholars could even question the rationale of the opinion or worry about its potential constitutional implications. And that dissonance—the distance that we, as professors, are now removed from our fellow citizens—gives me some pause. No matter how countermajoritarian I would like my Supreme Court to be¹⁴ (and I often want it to be *very* countermajoritarian), I fear that the “tensile strength”¹⁵ of our system is always in peril if judicial declarations are simply too far removed from *any* kind of public political consensus. Having said this, however, I am convinced that the *Hendricks* decision is a bad decision. It is bad law, bad social policy, and bad mental health. It is a case of “degraded” status.¹⁶ It is also, as I have said, an extraordinarily *pretextual* decision. It is this pretextuality that requires some further consideration.

My Article will proceed in this manner. First, I will briefly discuss the historical roots that led us to a world in which *Hendricks* could be litigated. Then I will explain what I mean by “pretextuality,” and will show how pretextuality permeates all mental disability law. Next, I will briefly discuss the *Hendricks* case, and then focus on those aspects I find the most troubling. I will then discuss *Hendricks*'s pretextual bases, and in conclusion, seek to contextualize the implications of that pretextuality with both past and possible subsequent mental disability law developments.

My title is drawn from what is perhaps the most ambiguous couplet in Bob Dylan's elegiac love ballad, *Love Minus Zero/No Limit*. The narrator,

¹¹ *Hendricks*, 117 S.Ct. at 2080-86.

¹² See *infra* notes 35-52 and accompanying text.

¹³ See Michael L. Perlin, “Mixed-Up Confusion”: *Kansas v. Hendricks*, *Sexually Violent Predator Laws, and Empty Promises*, 2 HEALTH L.J. 3 (Fall 1997).

¹⁴ See, e.g., Suzanna Sherry, *Issue Manipulation by the Burger Court: Saving the Community from Itself*, 70 MINN. L. REV. 611, 650-52 (1986).

¹⁵ Perlin, *Myths*, *supra* note 3, at 613-15 (discussing concepts raised in Linda Fentiman, “*Guilty But Mentally Ill*”: *The Real Verdict is Guilty*, 12 B.C. L. REV. 601, 611 n.63 (1985) (quoting Professor Ernest Roberts)).

¹⁶ See Janus, *supra* note 7, at 1280-81.

in discussing his lover, sings, "She knows there's no success like failure/And that failure's no success at all." I have pondered, mostly unsuccessfully, the meaning of this lyric in the thirty-three years that have passed since, as a college student, I purchased my vinyl copy of Dylan's magnificent early album, *Bringing It All Back Home*. And it really never came to me until I sat down to write this paper. Our social policy in dealing with individuals like Leroy Hendricks has been a failure—a total failure. We seek to remediate those failures by the enactment of new legislation, such as the Kansas Sexually Violent Predator Act (SVPA), and label those enactments as a success (in spite of a startling lack of empirical evidence supporting that label). The reality, I have regretfully concluded, is that such laws are a failure (in some important ways, even more of a failure than what preceded them). And these failures—no matter what we *want* to believe—are no success at all.

II. A SHORT HISTORY¹⁷

Prior to the 1970s, most states had enacted statutes providing for the commitment of sexual offenders. These laws often provided for indefinite, potentially lifetime, institutionalization for those who were classified as "repetitive and compulsive" sex offenders,¹⁸ and were commonly seen as an appropriate use of the police power. These laws were also premised on a therapeutic basis: they assumed that mental health professionals could make accurate predictions about an offender's future behavior, and that some number of offenders might be treatable.¹⁹ By 1970, there were sex offender laws in sixty percent of all American jurisdictions.²⁰

However, by the time that the Supreme Court's "civil rights revolution" reached mental disability law,²¹ psychiatrists and lawyers were both beginning to challenge the assumption that sex offenders were both mentally ill and treatable. Influential professional organizations advocated the repeal of such statutes "because of the dubious theoretical and empirical relationship between a specific mental disability and sexually violent tendencies."²² After the Supreme Court ruled that sex offenders could not be committed to

¹⁷ The material *infra* accompanying notes 17-28 is generally adapted from PERLIN, *supra* note 10, at § 2A-3.3, at 75-76 (2d ed.).

¹⁸ See e.g., N.J. STAT. ANN. § 2A:164-3, *repealed by* L. 1978, N.J. STAT. ANN. § 2C:98-2 (West 1998). See generally Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 NW. U. L. REV. 1317 (1998).

¹⁹ See Jeffrey Klotz, *Sex Offenders and the Law: New Directions*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS ON THERAPEUTIC JURISPRUDENCE 131, 133 (David Wexler & Bruce Winick eds., 1997) (citing Robert Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 597 (1992)).

²⁰ See *id.* at 133.

²¹ See 1 Perlin, *supra* note 10, § 1-2.1 (2d ed.).

²² Klotz, *supra* note 19, at 133 (citing James Reardon, *Sexual Predators: Mental Illness of Abnormality? A Psychiatrist's Perspective*, 15 U. PUGET SOUND L. REV. 849 (1992)).

a treatment facility until they were found guilty—at a hearing with full procedural protections—of having committed the antecedent criminal acts,²³ sex offender statutes fell into disfavor, and many states began to repeal these laws.²⁴

This trend was sharply reversed, however, in 1990, when the state of Washington—responding to a particularly heinous murder²⁵—“revamp[ed] and resurrect[ed] its sex offender involuntary commitment system.”²⁶ Other states followed quickly, many in the wake of New Jersey’s enactment of “Megan’s Law.”²⁷ By 1997, Justice Breyer was able to locate at least seventeen states with some kind of “modern” sex offender statute.²⁸

All of these statutes are based on a legislative desire to protect the public from a group of offenders that is widely despised: criminals who sexually abuse and molest young children.²⁹ They differ in content, but share certain elements. In each case, the state must prove by a quantum of either “beyond a reasonable doubt” or “clear and convincing evidence” (1) a history of violent acts, (2) a current mental disorder or abnormality, (3) the likelihood of future sexually harmful acts, and (4) a nexus between all of the first three elements.³⁰ In most of these statutes, commitment is indefinite, and release is allowed when it is shown that the offender is no longer dangerous by reason of a mental disorder.³¹

Kansas enacted its Sexually Violent Predator Act (SVPA) in 1994 as a means of seeking the institutionalization of that “small but extremely dangerous group of sexually violent predators . . . who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [general involuntary civil commitment statute.]”³² It

²³ See *Specht v. Patterson*, 386 U.S. 605, 608-09(1967); see also *Humphrey v. Cady*, 405 U.S. 504, 512 (1972) (recommitment to facilities for sexual offenders required same bundle of procedural protections as those used in civil commitment hearings).

²⁴ See Klotz, *supra* note 19, at 133 (citing, *inter alia*, Mark Small, *The Legal Context of Mentally Disordered Sex Offender (MDSO) Treatment Programs*, 19 CRIM. JUST. & BEHAV. 127 (1992)).

²⁵ See Raquel Blacher, *Historical Perspective on the “Sex Psychopath” Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 914-15 (1995). On the way that one vivid case can drive an entire area of jurisprudence, see Perlin, *Psychodynamics*, *supra* note 3.

²⁶ Klotz, *supra* note 19, at 133; see Berliner, *supra* note 7, at nn.124-34 and accompanying text.

²⁷ N.J. STAT. ANN. § 2C:7-1 to 7-11.

²⁸ See *Kansas v. Hendricks*, 117 S. Ct. 2072, 2095 (1997) (Breyer, J., dissenting). A review of the articles written in the wake of *Hendricks* suggests that several additional states, perhaps as many as 30, are considering similar laws. See Meaghan Downey Kolebuck, *Kansas v. Hendricks: Is it Time to Lock the Door and Throw Away the Key for Sexually Violent Predators?* 14 J. CONTEMP. HEALTH L. & POL’Y 537, 561 n.168 (1998).

²⁹ See e.g., Jeffrey Klotz, *Sex Offenders and the Law: New Directions*, in MENTAL HEALTH AND LAW: RESEARCH POLICY AND SERVICES 257 (Bruce Sales & Saleem Shah eds., 1996).

³⁰ See Eric Janus, *The Use of Social Science and Medicine in Sex Offender Commitment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 347, 348-49 (1997) (citing statutes).

³¹ See *id.* at 349 (citing statutes).

³² *Hendricks*, 117 S. Ct. at 2077 (citing KAN. STAT. ANN. § 59-29a01 (preamble) (West 1997)).

established a separate commitment process for "the long-term care and treatment of the sexually violent predator," statutorily defined as: "[A]ny person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence."³³ It is this statute that was challenged in the *Hendricks* case.

III. ON PRETEXTUALITY³⁴

A. In General

My thesis is simple: the entire relationship between the legal process and mentally disabled litigants is often pretextual. By pretextuality, I mean simply that courts accept, either implicitly or explicitly, testimonial dishonesty and engage similarly in dishonest decisionmaking.³⁵ This pretextuality is poisonous. It infects all those involved in the legal process, breeds cynicism and disrespect for the law, demeans participants, reinforces shoddy lawyering, invites blase judging, and, at times, promotes perjurious and corrupt testifying. The reality is well known to frequent consumers of judicial

³³ KAN. STAT. ANN. § 59-29a02(a) (West 1997).

³⁴ The material *infra* accompanying notes 34-80 is generally adapted from MICHAEL L. PERLIN, "ON THE WATERS OF OBLIVION": SANISM, PRETEXTUALITY, AND THE DEVELOPMENT OF MENTAL DISABILITY LAW ch. 2D (1998) (forthcoming, title and chapter headings subject to change) [hereinafter PERLIN, OBLIVION]; see also Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625 (1993).

Beyond the scope of this paper is an inquiry into how *Hendricks* is also a *sanist* decision as well. See Michael L. Perlin, *On "Sanism,"* 46 SMU L. REV. 373, 374 (1992) (defining "sanism" as "an irrational prejudice, an 'ism,' of the same quality and character of other prevailing prejudices such as racism, sexism, heterosexism and ethnic bigotry that [is] reflected both in our legal system and in the ways that lawyers represent clients, [and that] infects both our jurisprudence and our lawyering practices"). We are especially sanist when it comes to questions concerning the sexuality of persons with mental disabilities. See, e.g., Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 N.Y.U. REV. L. & SOC. CHANGE 517, 537 (1993-94) [hereinafter Perlin, *Frontier*] (footnotes omitted):

Our attitudes toward the sexuality of persons with mental disabilities reflect and reify this myth. Society tends to infantilize the sexual urges, desires, and needs of the mentally disabled. Alternatively, they are regarded as possessing an animalistic hypersexuality, which warrants the imposition of special protections and limitations on their sexual behavior to stop them from acting on these "primitive" urges.

³⁵ See Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of "Ordinary Common Sense," Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131, 133 (1991). This is apparent specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends." Charles Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839, 840 (1974); cf. Edwin J. Butterfoss, *Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications in the Supreme Court's Fourth Amendment Pretext Doctrine*, 79 KY. L.J. 1 n.1 (1990-91) (defining "pretexts" to include situations where "the government offers a justification for activity that, if the motivation of the [police] officer is not considered, would be a legally sufficient justification for the activity" as well as for those activities for which the proffered justification is "legally insufficient").

services in this area: to mental health advocates and other public defender, legal aid, and legal service lawyers assigned to represent patients and mentally disabled criminal defendants, to prosecutors and state attorneys assigned to represent hospitals, to judges who regularly hear such cases, to expert and lay witnesses, and, most importantly, to the mentally disabled person involved in the litigation in question.

Pretextuality helps create a system that: (1) accepts dishonest testimony unthinkingly; (2) regularly subverts statutory and case law standards; and (3) raises insurmountable barriers that ensure the allegedly "therapeutically correct" social outcome and avoidance of the worst-case-disaster fantasy, the false negative. In short, the mental disability law system often deprives individuals of liberty disingenuously and for reasons that have no relationship to case law or to statutes.

This aspect of the mental disability law system is astonishingly "underconsidered" by advocates,³⁶ scholars and professional associations alike. Examining the way that "moral" experts testify in "sanist" courts promotes better understanding of the extent of the prevailing pretexts. This understanding will encourage new strategies for confronting the underlying biases, creating a new structure, and developing a new research agenda through which these issues can be examined openly.

How did pretextuality come to infect the legal system? The law prides itself on its fairness and its inherent sense of rationality.³⁷ The legal trial process presupposes an ascertainable "truth" as a basis for testimony,³⁸ and severe sanctions are imposed for the commission of perjury.³⁹ Psychiatry and psychology, in turn, reject notions of a unitary concept of "reason," pointing out that the range of human behavior is infinite, and that unconscious variables and processes, conflicts, anxieties and defenses are frequently the primary causes of behavior.⁴⁰ Mental health professionals also counsel practitioners not to impose their sense of "morality" on patients or

³⁶ On counsel's role in general, see Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39 (1992).

³⁷ See e.g., RONALD DWORKIN, LAW'S EMPIRE 243, 405-07 (1986); Ernest Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 954 n.14 (1988) (citing Thomas Aquinas, *Treatise on Law*, in SUMMA THEOLOGICA I-II QQ 90-105, reprinted in ON LAW, MORALITY, AND POLITICS 11-83 (W. Baumgarth & R. Regan eds., 1988)).

³⁸ See, for example, for relatively recent formulations, *State v. Stevens*, 558 A.2d 833, 840 (N.J. 1989), and *Pena v. State*, 780 P.2d 316, 334 (Wyo. 1989), both citing Note, *Other Crimes Evidence At Trial*, 70 YALE L.J. 763, 770-71 (1961); *Ex rel. Oklahoma Bar Ass'n v. Lloyd*, 787 P.2d 855, 859 (Okla. 1990); *Slaughter v. Commonwealth*, 744 S.W.2d 407, 414 (Ky. 1987). For a psychoanalytic view, see ALBERT EHRENZWEIG, PSYCHOANALYTIC JURISPRUDENCE 277-81 (1971).

³⁹ See, e.g., FLA. STAT. ANN. §§ 837.02 & 775.082 (West 1997) (up to 5 years and \$5000 fine); N.J. STAT. ANN. § 2C:28-1 (West 1998) (3 to 5 years); N.Y. PENAL LAW §§ 210.15 and 70.00(2)(d) (McKinney 1988) (up to 7 years).

⁴⁰ See MICHAEL MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 142 (1984); see generally, OTTO WILL, PROCESS, PSYCHOTHERAPY AND SCHIZOPHRENIA (1961), reprinted in PSYCHOANALYSIS, PSYCHIATRY AND LAW 680-84 (Joseph Katz et al. eds, 1967).

clients,⁴¹ nor to employ their authority as a defense in dealing with such clients.⁴²

Where these two systems intersect, something strange happens. Perhaps because of the "substantial gulf between scientific and legal discourse,"⁴³ perhaps because of the different training received by mental health professionals and lawyers,⁴⁴ perhaps because of the public's radically differing perceptions of the substance of law and the mental health professions,⁴⁵ those who are involved in both professional arenas must consider the way that these internal and inherent differences create tensions that have a measurable effect on what happens when these cultures collide, especially in the forensic mental disability system.

This collision can be viewed from several vantage points that have not been seriously explored: from the perspectives of the way that law, the system extolling "truth" as a highest virtue, adopts *pretextuality* as a means of dealing with information or situations that it finds troubling or dissonant, and the way that the mental health professions, the systems that counsel against attributions of "morality" in interpersonal dealings, impose a self-referential concept of *morality* in dealing with legal interactions. I believe that, if we are to understand *why* the historic relationship⁴⁶ between the law and the mental health professions is seen as a rocky one, characterized variously as an uneasy detente, a shotgun marriage or a *mariage de convenance*,⁴⁷ it is necessary to consider the question through these two filters of pretextuality and morality.

⁴¹ See, e.g., ROSEMARY BALSAM & ALAN BALSAM, *THE BOOK OF FAMILY THERAPY BECOMING A PSYCHOTHERAPIST: A CLINICAL PRIMER* 108-11 (1974); ALFRED BENJAMIN, *THE HELPING INTERVIEW* 140-43 (1969); 2 ROBERT LANGS, *THE TECHNIQUES OF PSYCHOANALYTIC PSYCHOTHERAPY* 294-97 (2d ed. 1976); 2 FREDERICK PERLS ET AL., *GESTALT THERAPY* 510-11 (2d ed. 1973); CARL ROGERS, *COUNSELING AND PSYCHOTHERAPY: NEWER CONCEPTS IN PRACTICE* 327 (1942).

⁴² See BENJAMIN, *supra* note 41, at 92-95.

⁴³ Harold Green, *The Law-Science Interface in Public Policy Decision Making*, 51 OHIO ST. L.J. 375, 405 (1990).

⁴⁴ Some psychiatrists see this difference as critical in explaining what they perceive as differences in the perspectives of the two professions. See e.g., MICHAEL PESZKE, *INVOLUNTARY TREATMENT OF THE MENTALLY ILL* 133-36 (1975) (law students' interest in law and psychiatry comes from students' desires "to learn how to punch holes and to show the psychiatrist up in court"); H. Richard Lamb, *Involutary Treatment for the Homeless Mentally Ill*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 169, 276 (1989) (discussing Szasz, Goffman and Laing as intellectually animating sources for "many attorneys").

⁴⁵ See e.g., Bentley, *The Infant and the Dream: Psychology and the Law*, in *PSYCHOLOGY, LAW AND LEGAL PROBLEMS* 35 (David Farrington et al. eds., 1979); S.B. Cohen, *The Evolutionary Relationship Between Psychiatry and Law*, in *PSYCHIATRY, LAW AND ETHICS* 69 (Armon Carmi et al. eds., 1986).

⁴⁶ See JUDITH NEAMAN, *SUGGESTION OF THE DEVIL: THE ORIGINS OF MADNESS* 67-110 (1975) (relationship dates back to Roman law and Justinian codes).

⁴⁷ See JONAS ROBITSCHER, *PURSUIT OF AGREEMENT: PSYCHIATRY AND THE LAW* 12 (1966) (citing F. A. WHITLOCK, *CRIMINAL RESPONSIBILITY AND MENTAL ILLNESS* (1963)). See generally 1 PERLIN, *supra* note 10, § 1-1 at 1-2 n.2 (2d ed.). Compare Michael L. Perlin & Robert L. Sadoff, *The Adversary System*, in *VIOLENCE: PERSPECTIVES ON MURDER AND AGGRESSION* 394 (Seymour Kutash et al. eds.,

Much of what lawyers say about forensic testimony is pretextual.⁴⁸ Much of what forensic mental health professionals who frequently wear the hat of expert witness say about individual cases is similarly pretextual, ostensibly for reasons of "morality."⁴⁹ And much of the way judges interpret forensic testimony is teleological.⁵⁰ I believe that these interpretive clues help explain much of the confusion in mental disability law.

Little of any of this can be coherently explained without refuge to such cognitive psychology constructs as heuristic reasoning, psychological reactance, and cognitive dissonance.⁵¹ The relationship between the mutually

1978) ("[T]he intersection of law and mental health stands at a significant focal point in the development of human behavior, at a point where motives, intents, and drives can and must be examined in the contexts of rights, obligations, duties and the social order.").

⁴⁸ See PERLIN, *supra* note 34, manuscript at 102-03.

⁴⁹ See *id.* at 106-11.

⁵⁰ See *id.* at 113-39.

⁵¹ See generally Perlin, *Psychodynamics*, *supra* note 3. For an interdisciplinary investigation of the role of cognitive dissonance in human behavior, see William Davis, *Economists' Uses for Cognitive Dissonance: An Interdisciplinary Note*, 73 PSYCHOLOG. REP. 1179, 1180 (1993).

Especially pernicious is the "vividness" effect. Behavioral scientists are aware of the power of what Dr. David Rosenhan has characterized as the "distortions of vivid information." As part of this phenomenon, "concrete and vivid information" about a specific case "overwhelms" the abstract data . . . upon which rational choices are often made." David Rosenhan, *Psychological Realities and Judicial Policies*, STAN. LAW., Fall 1984, at 10, 13-14. Thus, "the more vivid and concrete is better remembered, over recitals of fact and logic." Marilyn Ford, *The Role of Extralegal Factors in Jury Verdicts*, 11 JUST. SYS. J. 16, 23, (1986); see also Steven C. Bank & Norman G. Polythress, *The Elements of Persuasion In Expert Testimony*, J. PSYCHIATRY & L. 173 (1982). Studies have shown further that the "vividness" effect is actively present in judicial proceedings. See e.g., Brad E. Bell & Elizabeth F. Loftus, *Vivid Persuasion in the Courtroom*, 49 J. PERSONALITY ASSESSMENT 659, 663 (1985) (vivid information at trial may "garner more attention, recruit more attention from memory, be perceived as having a more credible source, and have a greater affective impact"); Ruth Hamill et al., *Insensitivity to Sample Bias: Generalizing from Atypical Cases*, 39 J. PERSONALITY & SOC. PSYCH. 578 (1980) (subjects presented with information about one welfare recipient generalized data to all recipients even when told the particular exemplar was "highly atypical of the population at large").

On the impact that vivid events have on police policies dealing with persons with mental disability, see Peter Finn & Monique Sullivan, *Police Handling of the Mentally Ill: Sharing Responsibility With the Mental Health System*, 17 J. CRIM. JUST. 1, 4 (1989). Our perceptions of judicial proceedings are also influenced. See, e.g., Shari Seidman Diamond & Loretta J. Stalans, *The Myth of Judicial Leniency on Sentencing*, 7 BEHAV. SCI. & L. 73, 87-88 (1989) (vividness of media stories about particularly violent criminal offenses has a "disproportionate impact" on public perceptions about crime); Albert W. Alschuler, *"Close Enough for Government Work": The Exclusionary Rule After Leon*, 1984 SUP. CT. REV. 309, 347-48 (fear that application of exclusionary rule might potentially free "next year's Son of Sam" will overwhelm empirically based arguments in support of rule); Richard E. Nisbett et al., *Popular Induction: Information Is Not Necessarily Informative*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 101, 113 (Daniel Kahneman et al. eds., 1982) (comparing "influenceability" by abstract and concrete information); Paul Slovic et al., *Facts Versus Fears: Understanding perceived Risk*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* at 463, 468; (impact of biased newspaper coverage on perceived risks in cases of various disaster scenarios); Loretta J. Stalans & Arthur J. Lurigio, *Law and Professionals' Beliefs About Crime and Criminal Sentences: A Need for Theory, Perhaps Schema Theory*, 17 CRIM. JUST. & BEHAV. 333 (1990) (lay persons rely disproportionately on unrepresentative impressions in forming beliefs about punishment and crime).

symbiotic systems of law and forensic mental health is an increasingly fragile one, and, as the acquittal of would-be presidential assassin John Hinckley demonstrated, one outrageous case can wipe out the results of years of study, collection of empirical data and reflective inquiry into any aspect of the mental health system.⁵² Finally, most of what is written—in both law and the mental health literature—utterly ignores both of my major premises as well as these two propositions.⁵³ I hope that this Article leads both lawyers and mental health professionals to come to recognize that, even if the pursuit of agreement⁵⁴ appears to be beyond us, we can at least acknowledge there are bridges to be built.

B. *Pretextuality and Mental Disability Law*

The relationship between empirical pretextuality and the trial of mental disability cases is an important and profound one. Pretextual devices, such as condoning perjured testimony, distorting readings of trial testimony, subordinating statistically significant social science data, and enacting prophylactic civil rights laws that have absolutely no “real world” impact, similarly dominate the mental disability law landscape. These devices usually flow from the same motives that inspire similar behavior by courts and legislatures in other cases.

Again, a few examples illustrate this point. Although the District of Columbia Code contains a provision authorizing patients to seek either periodic review of their commitment or independent psychiatric evaluations, in the first twenty-two years following the law's passage, not a single patient exercised his right to statutory review.⁵⁵ While Attorney General William French Smith told Congress that the insanity defense “allows so many persons to commit crimes of violence,” one of his top aides candidly told a

⁵² See generally, Perlin, *Myths*, *supra* note 3; cf. Jonas Rapoport, *Editorial: Is Forensic Psychiatry Ethical*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 205 (1984) (society's response to the Hinckley acquittal “placed the blame on the insanity plea and the psychiatrists”). It is necessary to acknowledge that there are at least two universes worthy of consideration in this context: the case such as Hinckley's that captures the attention of the whole nation, and the vivid case that may be unknown nationally but in which local interest is so heavy that its disposition may overwhelm a statewide legal system. See, e.g., William Fischer et al., *How Flexible Are Our Civil Commitment Statutes?* 39 HOSP. & COMMUNITY PSYCHIATRY 711 (1978) (commitment rates in one Washington county increased 100% following murder by mentally disabled individual who had been denied voluntary admission to psychiatric hospital).

⁵³ Cf. Thomas Guthel et al., *Participation in Competency Assessment and Treatment Decisions: The Role of the Psychiatrist-Attorney Team*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 446, 449 (1987) (discussing “critogenesis”—the “intrinsic risks of legal intervention” in medical decisionmaking); *But see* THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David Wexler ed. 1990) [hereinafter THERAPEUTIC JURISPRUDENCE] (critically investigating the impact of legal rules on the functioning of the mental health system).

⁵⁴ See generally ROBITSCHER, *supra* note 47.

⁵⁵ See *Streicher v. Prescott*, 663 F. Supp. 335, 343 (D. D.C. 1987); cf. *Kadmas v. C.W.*, 453 N.W.2d 806, 809 (N.D. 1990) (rejecting patient's argument that discharge hearings were “rare occurrence[s]”).

federal judicial conference that the number of insanity defense cases was, statistically, "probably insignificant."⁵⁶ When a state enacts a new statutory scheme to "treat" sex offenders, but fails to hire any professionals experienced in the provision of such treatment, that new statute is pretextual.⁵⁷

There are many other examples. In a case that turned on the question of whether a defendant had the requisite specific intent to attempt a bank robbery, a federal district court judge refused to allow a county jail psychiatrist to testify that he prescribed antipsychotic medications for the defendant for a particular purpose and a particular length of time. The judge reasoned that such testimony "might be interfering with the treatment of [other] prisoners in jails because [they] might ask for more drugs to create the impression they need more drugs."⁵⁸ The Ninth Circuit Court of Appeals affirmed this decision as "not manifestly erroneous," even though there was no evidence anywhere in the case that spoke to this issue.⁵⁹ Finally, and more globally, courts and commentators regularly assume that vigorous, independent, advocacy-focused counsel is now available to all mentally disabled litigants, in spite of an empirical reality that this is the case in very few jurisdictions.⁶⁰

⁵⁶ See Perlin, *supra* note 35, at 134 (quoting Ira Mickenberg, *A Pleasant Surprise: The Guilty But Mentally Ill Verdict Has Both Succeeded In Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943, 980 (1987), and Proceedings of the Forty-Sixth Judicial Conference of the District of Columbia Circuit, 111 F.R.D. 91, 225 (1985)).

⁵⁷ This issue was squarely before the Supreme Court in *Hendricks*. Compare the passage at 117 S.Ct. at 2085 (Hendricks' treatment program "may have seemed somewhat meager"), with that at 117 S.Ct. at 2093 (Breyer, J., dissenting) (at time of Hendricks's commitment, state had neither funded treatment programs nor entered into treatment contracts, and provided "little, if any, qualified treatment staff," concluding Hendricks received "essentially no treatment"). See *infra* text accompanying notes 81-143. See also Brian G. Bodine, *Washington's New Sexual Predator Commitment System: An Unconstitutional Law and An Unwise Policy Choice*, 14 U. PUGET SOUND L. REV. 105 (1990); John Q. La Fond, "The New 'Sexually Violent Predator' Law—America's Unique Sexual Offender Commitment Law" (April 1992) (unpublished paper presented at the American College of Forensic Psychiatry's Tenth Annual Symposium, San Francisco, CA, on file with author) (discussing WASH. REV. CODE § 71.09. (1970)). For comprehensive discussions of the issues that are central to this debate, see Janus, *supra* note 30, and Eric Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157 (1996).

⁵⁸ *United States v. Still*, 857 F.2d 671, 672 (9th Cir. 1988).

⁵⁹ *Id.* In another case, a testifying doctor conceded that he may have "hedged" in earlier testimony (as to whether an insanity acquittee could be released) "because he did not want to be criticized should [the defendant] be released and then commit a criminal act." *Francois v. Henderson*, 850 F.2d 231, 234 (5th Cir. 1988).

⁶⁰ See Perlin, *supra* note 36, at 40, 49, 54. Compare *In re Micah S.*, 243 Cal. Rptr. 756, 760 (Cal. Ct. App. 1988) (Brauer, J., concurring) ("As in other areas where counsel is furnished at public expense, every petition, however meritorious, is vigorously challenged. 'Cherchez l'avocat' is the battle cry of every appellate lawyer today.") (parental rights termination case) with Elliott Andalman & David L. Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal*, 45 MISS. L.J. 43, 72 (1974) (speculating that counsel was so inadequate in sample studied that patients' chances for release from hospital were enhanced if no lawyer was present), and George E. Dix, *Acute Psychiatric Hospitalization of the Mentally Ill in the Metropolis: An Empirical Study*, 1968 WASH

Police officers perjure themselves in dropsy cases "to ensure that criminals do not get off on 'technicalities,'"⁶¹ and trial judges condone such behavior to "mediate the draconian effect of imposed-from-above constitutional decisions,"⁶² such as *Mapp v. Ohio*.⁶³ In the same way, expert witnesses in civil commitment cases often impose their own self-referential concept of "morality" to insure that patients who "they believe should be certified" remain institutionalized.⁶⁴ Judges accept this testimony in light of their own "instrumental, functional, normative and philosophical" dissatisfaction⁶⁵ with decisions such as *O'Connor v. Donaldson*,⁶⁶ *Jackson v. Indiana*,⁶⁷ and *Lessard v. Schmidt*.⁶⁸ Just as judges, including former United States Supreme Court Chief Justice Burger in his appeals court days, express doubt that police testimony in dropsy cases requires special scrutiny,⁶⁹ they also express astonishment at the assertion that expert testimony in involuntary civil commitment cases may be factually inaccurate.⁷⁰

U. L.Q. 485, 540 (only two of 1700 contested cases resulted in patient's release). See generally 1 PERLIN, *supra* note 10, § 2B-6, at 220-223 (2d ed.); Michael L. Perlin & Robert L. Sadoff, *Ethical Issues in the Representation of Individuals in the Commitment Process*, 45 LAW & CONTEMP. PROBS. 161 (1982).

⁶¹ Tom Barker & David Carter, "Fluffing Up the Evidence and Covering Your Ass": Some Conceptual Notes on Police Lying, 11 DEVIANT BEHAV. 61 (1990); see generally, Christopher Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996).

⁶² Perlin, *supra* note 35, at 134; see also Myron Orfield, *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 121 (1992) (judges refuse to suppress evidence because of: (1) their personal "sense of justice"; (2) the fear of adverse publicity; and (3) the fear that such a decision might lead to reelection difficulties). For a rare candid judicial articulation of this position, see *Rogers v. State*, 332 So. 2d 165, 167 (Ala. Crim. App. 1976) (quoting trial judge, "In Alabama we had sensible [criminal procedure] rules until the damn Supreme Court went crazy."), *cert. denied*, 332 So. 2d 168 (Ala. 1976).

⁶³ 367 U.S. 543 (1961).

⁶⁴ See William O. McCormick, *Involuntary Commitment in Ontario: Some Barriers to the Provision of Proper Care*, 124 CAN. MED. ASS'N J. 715, 717 (1981).

⁶⁵ See Perlin, *supra* note 35, at 134.

⁶⁶ 422 U.S. 563 (1975) (right to liberty).

⁶⁷ 406 U.S. 715 (1972) (application of Due Process Clause to commitments following incompetency to stand trial findings).

⁶⁸ 349 F. Supp. 1078 (E.D. Wis. 1972) (application of substantive and procedural Due Process Clauses to involuntary civil commitment process).

⁶⁹ See *Bush v. United States*, 375 F.2d 602, 604 (D.C. Cir. 1967) ("[I]t would be a dismal reflection on society to say that when the guardians of its security are called to testify in court under oath, their testimony must be viewed with suspicion."). But see *People v. McMurty*, 314 N.Y.S.2d 194, 197 (N.Y. Crim. Ct. 1970) (Younger, J.) (disagreeing with Justice Burger's point of view); see also Orfield, *supra* note 62. *McMurty* is discussed in Comment, *Police Perjury in Narcotics "Dropsy" Cases: A New Credibility Gap*, 60 GEO. L.J. 507 (1971).

⁷⁰ Opinion testimony by psychiatrists is "routinely and unquestioningly accepted" at involuntary civil commitment hearings. Marilyn Hammond, *Predictions of Dangerousness in Texas: Psychotherapists' Conflicting Duties, Their Potential Liability, and Possible Solutions*, 12 ST. MARY'S L.J. 141, 150 n.71 (1980); see also *In re Melton*, 597 A.2d 892, 902 (D.C. 1991) (asking "Where else would the doctor go for such information?" in response to a patient's argument that it was violation of the hearsay rules for witness to base his medical conclusion on factual information given him by the patient's rela-

In addition, courts fantasize about feared pretextuality in cases where anecdotal myths prevail or where unconscious values predominate.⁷¹ For instance, the North Carolina Supreme Court credited a sheriff's lay opinion that a defendant whose competence to stand trial was at issue had learned to feign mental illness after speaking to state prisoners during his pretrial incarceration. The court gave less weight to the uncontradicted clinical testimony that the defendant was schizophrenic, mentally retarded, and suffering from acute pathological intoxication.⁷² The fear that defendants will "fake" the insanity defense to escape punishment continues to paralyze the legal system in spite of an impressive array of empirical evidence revealing: (1) the minuscule number of such cases; (2) the ease with which trained clinicians are usually able to "catch" malingering in such cases; (3) the inverse greater likelihood that defendants, even at grave peril to their life, will more likely try to convince examiners that they're "not crazy"; (4) the high risk in pleading the insanity defense (leading to statistically significant greater prison terms meted out to unsuccessful insanity pleaders); and (5) the fact that most of the small number of insanity pleaders who are successful remain in maximum security facilities for a longer period than they would have if convicted of the underlying criminal indictment.⁷³

Consider the recent New Jersey state case of *State v. Inglis*,⁷⁴ where the court, citing no authority, simply states, "[t]he insanity defense has a high potential of serving as an instrument of pretext."⁷⁵ None of the easily accessible, empirically grounded evidence⁷⁶ had any impact on the trial judge in *Inglis*, nor does it generally have such an impact on decisionmakers in other such cases. It is no wonder that, in writing about the United States Supreme Court's decision in *Parham v. J.R.*,⁷⁷ Professor Stephen Morse noted, "[a]s is so often true in mental health cases, the Court based its

tives). For discussion on the application of the hearsay rules to the involuntary civil commitment process in general, see 1 PERLIN, *supra* note 10, § 2C-4.13a, at 377-82 (2d ed.). See also *United States v. Charters*, 863 F.2d 302, 310 (4th Cir. 1988) (en banc). Appellate courts rarely consider whether mental disability law proceedings elicit or suppress "the truth." For thoughtful and conflicting visions, compare the majority opinion in *In Re Commitment of Edward S.*, 570 A.2d 917 (N.J. 1990), with Judge Handler's concurrence (statutory mandate requiring that involuntary civil commitment hearings be held in camera deemed inapplicable to cases involving insanity acquittees).

⁷¹ See Perlin, *supra* note 35, at 134.

⁷² See *State v. Willard*, 234 S.E.2d 587, 591-93 (N.C. 1977).

⁷³ See Perlin, *Myths*, *supra* note 3, at 648-55, 713-21.

⁷⁴ 698 A. 2d 1296 (N.J. Super. Ct. Law Div. 1997).

⁷⁵ *Id.* at 1298.

⁷⁶ See HENRY STEADMAN ET AL., *BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM* (1993).

⁷⁷ 442 U.S. 584 (1979) (limiting procedural due process rights of juveniles facing involuntary civil commitment); see generally 1 PERLIN, *supra* note 10, § 2C-7.1a (2d ed.).

opinion on a number of factual assumptions that are simply insupportable."⁷⁸

For a very different example, look at the Second Circuit's decision in *United States v. Schmidt*.⁷⁹ *Schmidt* was a criminal case, stemming from allegations that the defendant plotted to kill two federal agents, solicited others to commit the crime, and then escaped from custody. At the time of her trial, she was confined in a state prison's psychiatric treatment unit, and in fact, proffered an unsuccessful diminished capacity defense (proceeding pro se). Both her competence to stand trial and her competence to be sentenced were sharply contested, with the government insisting throughout that she was malingering. Yet, after her conviction, the government moved to have her committed to a mental institution, alleging that she suffered from a "serious mental disease."⁸⁰ The government's positions here are clearly inconsistent; of course, they are also pretextual.

In short, mental disability law is replete with textbook examples of both conscious and unconscious pretextuality in the law. This pretextuality is reflected consciously, in the reception and privileging of "moral" testimony that flouts legislative criteria, and unconsciously, in the use of heuristic devices in decisionmaking, and in the application of sanist attitudes toward such decisions.

IV. ON *HENDRICKS*⁸¹

A. *The Decision*

Leroy Hendricks had been convicted of taking "indecent liberties" with two teenaged boys, and was subsequently sentenced to a term of five to twenty years in state prison.⁸² Shortly before his scheduled release from prison, the state invoked the SVPA, seeking to have him civilly committed as a sexually violent predator.⁸³ At the subsequent jury trial, Hendricks testified as to his past history of sexual offenses and to his self-described inability to refrain from committing such offenses, stating that he "can't

⁷⁸ Stephen Morse, *Treating Crazy People Less Specially*, 90 W. VA. L. REV. 353, 382 n.64 (1987); see generally Michael L. Perlin, *An Invitation to the Dance: An Empirical Response to Chief Justice Warren Burger's "Time-Consuming Procedural Minuets" Theory in Parham v. J.R.*, 9 BULL. AM. ACAD. PSYCHIATRY & L. 149 (1981) (sharply criticizing *Parham* decision); Gail Perry & Gary Melton, *Precedential Value of Judicial Notice of Social Facts: Parham as an Example*, 22 J. FAM. L. 633 (1984) (same).

⁷⁹ 105 F.3d 82 (2d Cir. 1997).

⁸⁰ *Id.* at 84.

⁸¹ 117 S. Ct. 2072 (1997). See generally, Perlin, *supra* note 13; 1 PERLIN, *supra* note 10, § 2A-3.3 (2d ed.).

⁸² *Matter of Care and Treatment of Hendricks*, 912 P.2d 129, 130 (Kan. 1996), *reversed*, 117 S. Ct. 2072 (1997). Hendricks had been arrested and convicted at least 5 prior times on other charges stemming from sexual offenses committed against children or teenagers. See *Hendricks*, 117 S. Ct. at 2078.

⁸³ See *Care and Treatment of Hendricks*, 912 P.2d 129 (Kan. 1996).

control the urge.”⁸⁴ Expert witnesses testified that Hendricks’s diagnosis was “personality trait disturbance, passive-aggressive personality and pedophilia, “and that pedophilia qualified as a “mental abnormality” under the SVPA.⁸⁵ The State’s expert testified that Hendricks was likely to commit sexual offenses against children in the future if he were not to be committed; Hendricks’s expert testified that it was not possible to predict with any degree of accuracy the future dangerousness of a sex offender.⁸⁶

The jury unanimously found beyond a reasonable doubt that Hendricks was a sexually violent predator. Following this finding, the trial judge determined as a matter of state law that pedophilia was a “mental abnormality” under state law, and Hendricks was subsequently committed.⁸⁷

The Kansas Supreme Court reversed the order of commitment, agreeing with Hendricks that the SVPA violated the Due Process Clause of the Constitution. It further found that, in order to commit a person involuntarily in a civil proceeding, a State is required by “substantive” due process to prove by clear and convincing evidence that the person is both (1) mentally ill, and (2) a danger to himself or to others.⁸⁸ It then determined that the Act’s definition of “mental abnormality” did not satisfy what it perceived to be Kansas’s “mental illness” requirement in the civil commitment context, and as a result, held that Hendricks’s substantive due process rights were violated.⁸⁹

The United States Supreme Court, per Justice Thomas, reversed, and reinstated the order of commitment. First, the majority found that the statute’s use of the phrase “mental abnormality” satisfied substantive due process guarantees, citing *Foucha v. Louisiana*⁹⁰ for the proposition that the liberty interest in cases involving freedom from physical restraint is “not absolute,”⁹¹ and looking to *Addington v. Texas*⁹² for support of the proposition that “it thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty.”⁹³

Commitment ordinarily requires proof of dangerousness and “some additional factor” such as “mental abnormality” or “mental illness,” thus limiting involuntary civil confinement to those who “suffer from a voli-

⁸⁴ *Id.*

⁸⁵ *Id.* at 2079 n.2. For a detailed examination of diagnostic categories regarding sex offenders, see J. Michael Bailey & Aaron Greenberg, *The Science and Ethics of Castration: Lessons from the Morse Case*, 92 NW. U. L. REV. 1225, nn.2-13 and accompanying text (1998).

⁸⁶ *See id.*

⁸⁷ *Id.*

⁸⁸ Matter of Care and Treatment of Hendricks, 912 P.2d 129, 137 (Kan. 1996).

⁸⁹ *Id.* at 138.

⁹⁰ 504 U.S. 71, 80 (1992); *see generally* PERLIN, *supra* note 10, § 15.25A (1997 Cum. Supp.).

⁹¹ *Hendricks*, 117 S. Ct. at 2079.

⁹² 441 U.S. 418, 426 (1979); *see generally* 1 PERLIN, *supra* note 10, §§ 2C-5.1 to 2C-5.1b (2d ed.).

⁹³ *Hendricks*, 117 S.Ct. at 1079-80.

tional impairment rendering them dangerous beyond their control.”⁹⁴ The Kansas statute thus was like other statutes that the Court had upheld:

It requires a finding of future dangerousness, and then links that finding to the existence of a “mental abnormality” or “personality disorder” that makes it difficult, if not impossible, for the person to control his dangerous behavior. [citation omitted]. The precommitment requirement of a “mental abnormality” or “personality disorder” is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.⁹⁵

The Court rejected Hendricks’s argument that *Addington*⁹⁶ and *Foucha*⁹⁷ required proof of a *mental illness*, and that his “mental abnormality” was not such an illness (but was rather a term coined by the Kansas legislature). Stated the Court:

Contrary to Hendricks’ assertion, the term “mental illness” is devoid of any talismanic significance. Not only do “psychiatrists disagree widely and frequently on what constitutes mental illness,” but the Court itself has used a variety of expressions to describe the mental condition of those properly subject to civil confinement.⁹⁸

Pedophilia, the Court reasoned, was classified by “the psychiatric profession” as a “serious mental disorder;” this disorder—marked by a lack of volitional control, coupled with predictions of future dangerousness—“adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.”⁹⁹ Hendricks’s diagnosis as a pedophile, which qualifies as a “mental abnormality” under the Act, thus “plainly suffice[d]” for due process purposes.¹⁰⁰

⁹⁴ *Id.* at 2080.

⁹⁵ *Id.*

⁹⁶ 441 U.S. 418 (1979)

⁹⁷ 504 U.S. 71 (1992).

⁹⁸ *Hendricks*, 117 S. Ct. at 2079-80 (citing, in part, *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985)); see also *Addington*, 441 U.S. at 425-26 (using the terms “emotionally disturbed” and “mentally ill”); *Jackson v. Indiana*, 406 U.S. 715, 732, 737 (1972) (using the terms “incompetency” and “insanity”); cf. *Foucha*, 504 U.S. at 88 (O’Connor, J., concurring in part and concurring in judgment) (acknowledging State’s authority to commit a person when there is “some medical justification for doing so”); see generally 2 PERLIN, *supra* note 10, § 8.32; 3 PERLIN, *supra* note 10, § 17.17.

⁹⁹ *Hendricks*, 117 S. Ct. at 2079-80.

¹⁰⁰ *Id.* Interestingly, in a footnote, the majority noted:

We recognize, of course, that psychiatric professionals are not in complete harmony in casting pedophilia, or paraphilias in general, as “mental illnesses.” Compare Brief for American Psychiatric Association as Amicus Curiae 26 with Brief for Menninger Foundation et al. as Amici Curiae 22-25. These disagreements, however, do not tie the State’s hands in setting the bounds of its civil commitment laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes. Cf. *Jones v. United States*, 463

The Court also rejected Hendricks's argument that the SVPA established *criminal* proceedings, and thus violated both the Double Jeopardy and Ex Post Facto provisions of the Constitution. Turning first to Hendricks's double jeopardy arguments, it found that the Act implicated neither "of the two primary objectives of criminal punishment: retribution or deterrence,"¹⁰¹ reasoning—as to retribution—that the Act "does not affix culpability for prior criminal conduct" (noting further that a criminal conviction is not a prerequisite for commitment under the Act) and that no finding of criminal intent is required as a precedent to a commitment order ("an important element in distinguishing criminal from civil statutes").¹⁰² It also found that, as persons subject to the SVPA suffered from a mental condition that prevented them from "exercising adequate control over their behavior," the Act could not be seen as functioning as a deterrent.¹⁰³ Although the SVPA does involve an "affirmative restraint," that, in and of itself, does not mean that the Act imposes punishment: "If detention for the purpose of protecting the community from harm necessarily constituted punishment, then all involuntary civil commitments would have to be considered punishment. But we have never so held."¹⁰⁴

The Court rejected Hendricks's other arguments as to the Act's punitiveness as well. Although the Act allows for potentially indefinite commitment, that possibility is constitutionally trumped by the fact that duration is "linked" to the purposes of the commitment ("to hold the person until his mental abnormality no longer causes him to be a threat to others"); moreover, there is a built-in year-long limit to a single commitment (after which time, the lower court must again determine whether the individual still satisfies the commitment standard).¹⁰⁵

Hendricks argued further that the use of procedural protections that are traditionally found in criminal trials transformed the proceedings into criminal ones. The majority rejected this argument as well. Kansas's provision of these protections, the Court found, simply demonstrated the "great care" that the state had taken to confine only a "narrow class of particularly dangerous individuals . . . after meeting the strictest procedural standards," and this decision did not thus transform a civil commitment proceeding into a criminal one.¹⁰⁶

U.S. 354, 365, n.13 (1983) (parallel citations omitted). As we have explained regarding congressional enactments, when a legislature "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." *Id.* at 370 (internal quotation marks and citation omitted).

Id. at n.3.

¹⁰¹ 117 S. Ct. at 2081-82.

¹⁰² *Id.* at 2082.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 2083.

¹⁰⁶ *Id.*

Finally on this point, Hendricks claimed that the Act was punitive because it did not offer any legitimate "treatment." Here, the majority noted that "incapacitation" may be a legitimate end of the civil law, and added that it had never held that "the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others."¹⁰⁷ It would be of "little value," the opinion continued, "to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions."¹⁰⁸

Noting that states had "wide latitude" in developing treatment regimens, and that a state could serve its purpose "by committing sexually dangerous person[s] . . . to an institution expressly designed to provide psychiatric care and treatment," the Court concluded that Kansas had thus "doubtless satisfied its obligation to provide available treatment."¹⁰⁹ Beyond this, while it conceded that the specific treatment program offered Hendricks "may have seemed somewhat meager," the Court placed great weight on a statement made at oral argument by Kansas's counsel that, by that time, Hendricks was receiving more than thirty hours of treatment per week.¹¹⁰

On this point, it concluded:

Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent. We therefore hold that the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive.¹¹¹

The Court thus concluded that the Double Jeopardy Clause was not violated.¹¹² Similarly, because it had determined that the Act did not im-

¹⁰⁷ *Id.* at 2084. Added the Court: "A State could hardly be seen as furthering a 'punitive' purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease." *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 2085 n.4 (citing in part *Allen v. Illinois*, 478 U.S. 364, 373 (1986)); see generally 1 PERLIN, *supra* note 10, § 2C-4.11c (2d ed.).

¹¹⁰ *Hendricks*, 117 S. Ct. at 2085.

¹¹¹ *Id.*

¹¹² See *id.*

pose punishment, it ruled that its application did not present Ex Post Facto concerns.¹¹³

Justice Kennedy concurred in the judgment to express “caution against dangers inherent when a civil confinement law is used in conjunction with the criminal process, whether or not the law is given retroactive application.”¹¹⁴ Although he found from the record before the Court that the Kansas statute passed constitutional muster, he expressed this concern: “If . . . civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.”¹¹⁵

Justice Breyer dissented in an opinion joined in full by Justices Souter and Stevens, and in part by Justice Ginsburg. Although the dissenters agreed that the SVPA’s definition of “mental abnormality” satisfied substantive due process, they concluded that the failure to provide Hendricks with adequate treatment gave the Act a punitive cast, and, as a result, violated the Ex Post Facto Clause of the Constitution.

The dissent began with what it characterized as “the area of agreement” with the majority.¹¹⁶ Looking to *Foucha*¹¹⁷ and *Addington*¹¹⁸ as the sources of the rule that civil commitment of a person who was mentally ill and dangerous did not necessarily violate the Due Process Clause (assuming the commitment took place “pursuant to proper procedures and evidentiary standards,” Justice Breyer set out three reasons why he believed Kansas “acted within the limits that the Due Process Clause substantively sets.”¹¹⁹

First, although he conceded that there was controversy within the psychiatric profession as to whether a disorder such as pedophilia was a mental *illness* (referring, on this point to amicus briefs filed by the American Psychiatric Association, arguing that it was not, and by the Menninger Foundation, arguing that it was), he concluded that there was no question that it could be denominated a mental *disorder*. Although the fact that there was an intraprofessional dispute might help “inform the law by setting the bounds of what is reasonable, . . . it cannot here decide just how States must write their laws within those bounds.”¹²⁰

Second, Justice Breyer found that Hendricks’s abnormality, which included “a specific, serious, and highly unusual inability to control his ac-

¹¹³ See *id.* at 2086.

¹¹⁴ *Id.* at 2087 (Kennedy, J., concurring).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 2089 (Breyer, J., dissenting). Justice Ginsburg did not join in this portion of the dissent.

¹¹⁷ 504 U.S. 71 (1992).

¹¹⁸ 441 U.S. 418 (1979).

¹¹⁹ *Id.* at 2088.

¹²⁰ *Id.*

tions," was "akin to insanity for purposes of confinement," a sort of "irresistible impulse."¹²¹ Third, this mental abnormality made Hendricks dangerous, and, as Hendricks appeared to fall outside the limits of Kansas's general civil commitment statute, which allowed for commitment only of those who lacked capacity to make informed treatment decisions,¹²² it was permissible for Kansas to create separate legislation upon which to base confinement of a mentally disordered, dangerous person such as Hendricks.¹²³

Justice Breyer did not see *Hendricks* as a case that required the Court to determine whether the Due Process Clause *always* required treatment (if, for example, it forbade civil confinement of an untreatable, mentally ill, dangerous person), since Kansas argued that pedophilia was a *treatable* disorder, and at least two amicus groups made similar, uncontradicted, assertions.¹²⁴ The question to be asked, then, was this: does the Due Process Clause require a state to provide treatment that it concedes is available to a person whom it concedes is treatable?¹²⁵

Justice Breyer then turned his attention to the Ex Post Facto Clause argument.¹²⁶ He found the postcommitment institutionalization under the Act to bear "obvious" resemblances to criminal punishment.¹²⁷ First, testimony of a state official revealed that "confinement takes place in the psychiatric wing of a prison hospital where those whom the Act confines and ordinary prisoners are treated alike."¹²⁸ Second, he found that incapacitation, one of the basic objectives of the Act, was also an important purpose of punishment.¹²⁹ Third, the Act only imposes its sanctions on an individual who "has previously committed a criminal offense."¹³⁰ And finally, the procedural guarantees and standards of the Act are those "traditionally associated with the criminal law."¹³¹

These criteria, standing alone, would not be enough to transform a civil commitment into punishment, Justice Breyer conceded. But other factors were sufficient upon which to base a finding that the SVPA was a punitive

¹²¹ *Id.* at 2088-89.

¹²² See KAN. STAT. ANN. § 59-2902(h) (West 1997).

¹²³ See *Hendricks*, 117 S. Ct. at 2089 (Breyer, J., dissenting):

Because (1) many mental health professionals consider pedophilia a serious mental disorder; and (2) Hendricks suffers from a classic case of irresistible impulse, namely he is so afflicted with pedophilia that he cannot "control the urge" to molest children; and (3) his pedophilia presents a serious danger to those children; I believe that Kansas can classify Hendricks as "mentally ill" and "dangerous" as this Court used those terms in *Foucha*.

¹²⁴ See *id.* at 2090.

¹²⁵ See *id.*

¹²⁶ Justice Ginsburg joined in the remainder of the dissent.

¹²⁷ See *Hendricks*, 117 S. Ct. at 2090 (Breyer, J., dissenting).

¹²⁸ *Id.*

¹²⁹ See *id.* at 2090-91.

¹³⁰ *Id.* at 2091.

¹³¹ *Id.*

statute. First, the dissenters looked at the time when the petition for further commitment was filed against Hendricks: “when a State believes that treatment does exist, and then couples that admission with a legislatively required delay of such treatment until a person is at the end of his jail term (so that further incapacitation is therefore necessary), such a legislative scheme begins to look punitive.”¹³² And, they considered the teachings of *Allen v. Illinois*¹³³ that the availability of treatment was a “touchstone” in distinguishing whether a statute’s purpose was civil or punitive.¹³⁴

Considered through this lens, the SVPA, as applied to Hendricks, was a punitive statute, according to Justice Breyer. Treatment was *not* a significant objective of the Act (being “incidental at best”),¹³⁵ at the time of Hendricks’s commitment, in fact, the state had neither funded any treatment programs nor entered into treatment contracts and provided “little, if any, qualified treatment staff.”¹³⁶ The commitment program’s own director had stated that Hendricks was receiving “essentially no treatment.”¹³⁷

In addition, the fact that commitment proceedings under the SVPA did not begin until *after* offenders had served nearly their entire criminal sentence suggested that treatment was *not* a significant concern in the enactment of the law:

An Act that simply seeks confinement, of course, would not need to begin civil commitment proceedings sooner. Such an Act would have to begin proceedings only when an offender’s prison term ends, threatening his release from the confinement that imprisonment assures. But it is difficult to see why rational legislators who seek treatment would write the Act in this way—providing treatment years after the criminal act that indicated its necessity And it is particularly difficult to see why legislators who specifically wrote into the statute a finding that “prognosis for rehabilitation . . . in a prison setting is poor” would leave an offender in that setting for months or years before beginning treatment. This is to say, the timing provisions of the statute confirm the Kansas Supreme Court’s view that treatment was not a particularly important legislative objective.¹³⁸

Other factors compelled the same conclusion. As it applied to Hendricks, the Kansas law did not require consideration of using “less restrictive alternatives, such as postrelease supervision” as a term of commitment; such “less restrictive alternative” language is found in almost all involuntary civil commitment statutes, and its absence here “can help to show that

¹³² *Id.* at 2091-92.

¹³³ 478 U.S. 364, 367-73 (1986).

¹³⁴ *Hendricks*, 117 S. Ct. at 2092.

¹³⁵ *Id.* (quoting *Matter of Care and Treatment of Hendricks*, 912 P.2d 129, 136 (Kan. 1996)).

¹³⁶ *Id.* at 2093 (citing *Hendricks*, 912 P.2d at 131, 136).

¹³⁷ *Id.* (quoting *Hendricks*, 912 P.2d at 131, 136).

¹³⁸ *Id.* at 2094 (citation omitted).

[the] legislature's 'purpose . . . was to punish.'"¹³⁹ Finally, a consideration of contemporary sex offender statutes from other jurisdictions revealed *no other* jurisdiction that contained all of the punitive aspects of the Kansas law (as to timing of invocation of the SVPA process and failure to consider less restrictive alternatives):

Thus the practical experience of other States, as revealed by their statutes, confirms what the Kansas Supreme Court's finding, the timing of the civil commitment proceeding, and the failure to consider less restrictive alternatives, themselves suggest, namely, that for Ex Post Facto Clause purposes, the purpose of the Kansas Act (as applied to previously convicted offenders) has a punitive, rather than a purely civil, purpose.¹⁴⁰

The dissenters rejected Kansas's arguments to the contrary, and re-stated what they saw as the scope of the state's commitment power under *Addington v. Texas*:

[A] State is free to commit those who are dangerous and mentally ill in order to treat them. Nor does my decision preclude a State from deciding that a certain subset of people are mentally ill, dangerous, and untreatable, and that confinement of this subset is therefore necessary (again, assuming that all the procedural safeguards of *Addington* are in place). But when a State decides offenders can be treated and confines an offender to provide that treatment, but then refuses to provide it, the refusal to treat while a person is fully incapacitated begins to look punitive.¹⁴¹

Finally, the dissenters took issue with the majority's reading of the record below that had suggested that Hendricks was *untreatable*. A careful reading of the Kansas Supreme Court's decision, however, revealed to the dissenters that Hendricks was *treatable*, but remained *untreated*.¹⁴²

Because the SVPA imposed punishment on Hendricks, it thus violated the Ex Post Facto Clause, the dissenters concluded:

The statutory provisions before us do amount to punishment primarily because, as I have said, the legislature did not tailor the statute to fit the non-

¹³⁹ *Id.* at 2094 (quoting, in part, *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979)).

¹⁴⁰ 117 S. Ct. at 2094. Iowa also delayed civil commitment until the end of the offender's prison term and failed to require consideration of less restrictive alternatives. However, that law—see IOWA CODE ANN. § 709C.12 (West 1987)—applies only prospectively, thus avoiding constitutional problems under the Ex Post Facto Clause. *Id.*

¹⁴¹ 117 S. Ct. at 2094.

¹⁴² *See id.* The basis for the majority's conclusion that Hendricks was receiving treatment came from two sources, according to the dissenters: a statement made by counsel for Kansas at oral argument, and a trial judge's statement in the record of a habeas proceeding in Hendricks's case that took place a year after his commitment. Neither, the dissenters concluded, served as appropriate justification for the conclusion that Hendricks was receiving treatment at the time he filed suit. *See id.* at 2096.

punitive civil aim of treatment, which it concedes exists in Hendricks' case. The Clause in these circumstances does not stand as an obstacle to achieving important protections for the public's safety; rather it provides an assurance that, where so significant a restriction of an individual's basic freedoms is at issue, a State cannot cut corners. Rather, the legislature must hew to the Constitution's liberty-protecting line.¹⁴³

B. The Pretexts

Hendricks is a troubling opinion on at least eleven levels, and each level demonstrates its pretextuality. First, it indicates that a majority (albeit, a bare one) of the Supreme Court is comfortable with a statutory scheme¹⁴⁴ that has the potential of transforming psychiatric treatment facilities into de facto prisons and that uses mental health treatment as a form of social control,¹⁴⁵ in Howard Zonana's words, endorsing "the medicalization of deviancy,"¹⁴⁶ thus making the statutory promise of treatment an empty one. Professor Stephen McAllister, who helped represent Kansas in the *Hendricks* case, states flatly, "*Hendricks* is probably best understood and explained as a civil commitment case."¹⁴⁷ This pretext colors the remainder of the *Hendricks* opinion.

Second, the opinion suggests, that for social control purposes, the majority is comfortable with expansive legislative definitions of "mental disorder" that go far beyond what the drafters of the standard diagnostic nomenclature ever intended.¹⁴⁸ Assume that, in its next version of its *Diagnostic and Statistical Manual*, the American Psychiatric Association eliminated pedophilia as a "mental disorder," and either bypassed all discussion

¹⁴³ *Id.* at 2098 (citing THE FEDERALIST, NO. 78, p. 466 (C. Rossiter ed., 1961) (A. Hamilton)).

¹⁴⁴ As the Kansas law is the *most* punitive of any of the SVPA laws, *see id.* at 2095-96 (Breyer, J., dissenting), it is certainly reasonable to assume that any *less* punitive such law will also pass constitutional muster. *See* Eric Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 158 (1996) ("As the Court decides the sex offender cases, it will likely draw a bright line on the constitutional map of civil commitment.") (article published prior to the decision in *Hendricks*).

¹⁴⁵ *See* PERLIN, *supra* note 10, § 15.25A, text accompanying note 479.36 (1997 Cum. Supp.), discussing Justice Thomas's dissent in *Foucha v. Louisiana*, 504 U.S. 71 (1992), in this context; *see also*, MICHAEL L. PERLIN, *LAW AND MENTAL DISABILITY* § 4.38 (1994).

¹⁴⁶ Howard Zonana, *The Civil Commitment of Sex Offenders*, 278 SCIENCE 1248, 1248 (1997).

¹⁴⁷ Stephen McAllister, *Punishing Sex Offenders*, 46 KAN. L. REV. 27, 60-61 (1997).

¹⁴⁸ *See* Brief of Amicus Curiae American Psychiatric Association in support of Appellee, *Kansas v. Hendricks* (No. 95-1649) (available from LEXIS, GENFED, BRIEFS library):

When a State invokes this power, the reality of the confinement must support the claim that it is in the individual's interest. If "mental illness" were freely subject to legislative definition (through new terms like "mental abnormality" or otherwise), or if anyone "crazy" or "sick" enough to engage in repeated serious offenses could be civilly confined for that reason, the limits on deprivations of liberty to protect the public safety would quickly disappear. When an assertion of a *parens patriae* interest is not well grounded, the State either is acting to punish the individual, and thus has to meet the requirements for a valid criminal sanction, or is acting to serve others' interests by preventive detention, and thus has to meet the stringent standards for such action—neither of which Kansas can do.

of the condition or created a new category for pedophilia, for example, "violent sexually based behavior." Further assume that in response to that change, the legislature of the state of Kansas changes its SVPA laws to then read:

[A]ny person who has been convicted of or charged with a sexually violent offense and who suffers from a *condition characterized as violent sexually-based behavior* which makes the person likely to engage in the predatory acts of sexual violence.

Now assume a case comes up in Kansas that is identical to *Hendricks* in all aspects. Does anyone truly believe that that would cause this Supreme Court to reconsider the question of whether such a defendant could be institutionalized as a sexually violent predator? The fact that such reconsideration strikes us as implausible should suggest to us the extent to which *Hendricks* is a pretextual case.¹⁴⁹

Third, the opinion rejects the weight of contemporaneous research suggesting that treatment *is* available for "sexually violent predators" (such as *Hendricks*) that can significantly reduce the rate of recidivism.¹⁵⁰ Are SVPA offenders receiving treatment? Does treatment for sex offenders work? In her recent study, Professor Leonore Simon concluded that there is no empirical evidence to suggest that sex offenders have different recidivism rates than non-sex offenders.¹⁵¹ If she is right, what are the implications of this conclusion? Do the answers to these important questions matter to the Supreme Court? If *some* treatment works, is that the sort of treatment available to Leroy *Hendricks* or to others committed pursuant to SVPA laws? And if such treatment is not available, does that add another layer of pretext to the opinion?

Fourth, *Hendricks* strains to characterize a punitive statute—the *most* punitive of *any* of the new generation of SVPA laws—as "civil," in a way that can only be called "pretextual."¹⁵² Professor John LaFond has recently

¹⁴⁹ See Note, *Involuntary Commitment of Violent Sexual Predators*, 111 HARV. L. REV. 259 (1997) (discussing how *Hendricks* Court "ratcheted down the mental illness requirement" necessary for civil commitment).

¹⁵⁰ See e.g., Judith Becker & John Hunter, *Evaluation of Treatment Outcome for Adult Perpetrators of Child Sexual Abuse*, 19 CRIM. JUST. & BEHAV. 74 (1992); Janice Marques et al., *Effects of Cognitive-Behavioral Treatment on Sex Offender Recidivism*, 21 CRIM. JUST. & BEHAV. 28, 28-52 (1994); W.L. Marshall & W.D. Pithers, *A Reconsideration of Treatment Outcome with Sex Offenders*, 21 CRIM. JUST. & BEHAV. 10, 10-27 (1994). On the ways that social science is used in sex offender cases in general, see Janus, *supra* note 30. There is no current empirical evidence to suggest that sex offenders have different recidivism rates than do nonsex offenders. *But see* Berliner, *supra* note 7, at nn.36-65 (arguing that there is no single "sex offender" recidivism rate because sex offenders are a highly heterogeneous group).

¹⁵¹ See Leonore Simon, *The Myth of Sex Offender Specialization: An Empirical Analysis*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 387, 390, 401 (1997).

¹⁵² See 1 PERLIN, *supra* note 10, § 2D-2.1 (2d ed.).

argued that *Hendricks* is the “ultimate overlap of criminal and civil commitment”;¹⁵³ this overlap is clearly a pretextual one, that “will also further blur the relationship” between the two commitment processes,¹⁵⁴ and that augurs uneasy future jurisprudential developments in this area of the law. As a recent student note argues, after *Hendricks*, “the risk increases that a potentially lifelong deprivation of liberty via the civil system will be imposed to serve goals traditionally and rightfully reserved for the criminal system—retribution and deterrence.”¹⁵⁵ Again, Professor McAllister’s Essay—one enthusiastic about the opinion—supports this position.¹⁵⁶

Fifth, the *Hendricks* decision conflates and confuses legal and medical terminology.¹⁵⁷ Justice Thomas’s choice of language suggests that he is no more comfortable writing in this area of the law today than he was when he dissented five years ago in *Riggins v. Nevada*¹⁵⁸ or in *Foucha v. Louisiana*.¹⁵⁹

Sixth, much of the body of constitutional law regarding the right to refuse treatment draws on the barely remembered case of *Knecht v. Gillman*.¹⁶⁰ There, in 1973, the Eighth Circuit Court of Appeals told us, “The mere characterization of an act as ‘treatment’ does not insulate it from [Constitutional] inquiry.”¹⁶¹ *Knecht* was a refreshingly candid opinion that stripped bare the facade of punishment regimes couched in purportedly therapeutic language, and was one of the first moves away from a pretextual mental disability law jurisprudence in the early 1970s. A careful examination of the chronology and etiology of right-to-refuse-treatment law shows that this precept was central to all further developments in this area.¹⁶²

¹⁵³ John Q. LaFond, Comments at American Association of Law Schools Section on Law and Mental Disability Panel Discussion (January 1998).

¹⁵⁴ Note, *supra* note 149, at 266.

¹⁵⁵ *Id.*

¹⁵⁶ See McAllister, *supra* note 147, at 42-45.

¹⁵⁷ See, e.g., *Kansas v. Hendricks*, 117 S. Ct. 2072, 2080 (1997). The Court had rejected Hendricks’ argument that *Addington* and *Foucha* required proof of a *mental illness*, and that his “mental abnormality” was not such an illness (but was rather a term coined by the Kansas legislature). See *supra* note 98 and accompanying text.

¹⁵⁸ 504 U.S. 127 (1992); see PERLIN, *supra* note 10, § 5.65A (1997 Cum. Supp.); PERLIN, *supra* note 145, § 2.18; see generally Michael L. Perlin, *Decoding Right to Refuse Treatment Law*, 16 INT’L J.L. & PSYCHIATRY 151 (1993); Michael L. Perlin & Deborah A. Dorfman, *Is It More Than “Dodging Lions and Wastin’ Time”? Adequacy of Counsel, Questions of Competence, and the Judicial Process in Individual Right to Refuse Treatment Cases*, 2 PSYCHOLOGY, PUB. POL’Y & L. 114 (1996); Michael L. Perlin & Deborah A. Dorfman, *Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence*, 11 BEHAV. SCI. & L. 47 (1993) [hereinafter Perlin & Dorfman, *Sanism*].

¹⁵⁹ 504 U.S. 71 (1992). See PERLIN, *supra* note 10, § 15.25A (1997 Cum. Supp.); see generally, Perlin & Dorfman, *Sanism*, *supra* note 158.

¹⁶⁰ 488 F.2d 1136 (8th Cir. 1973).

¹⁶¹ *Id.* at 1140; see 2 PERLIN, *supra* note 10, § 5.05, at 232-33.

¹⁶² See, e.g., *Rennie v. Klein*, 462 F. Supp. 1131 (D. N.J. 1978). *Rennie* is discussed extensively in 2 PERLIN, *supra* note 10, §§ 5.10-5.37, at 252-326.

Hendricks turns this jurisprudence on its head by sanctioning extended punishment under the rubric of treatment, treatment which it candidly and disinterestedly concedes (giving the issue the most positive possible spin) is barely available. Calling a prison a hospital does not make it a hospital; at most, it can only assuage the consciences of those seeking to rationalize a pretextual decision. Interestingly, Professor McAllister states that sex offenders generally are accorded "the same civil rights as are other mental patients."¹⁶³ It strains credulity to even conjure a scenario in which a trial judge grants the application of a SVP to refuse the administration of anti-psychotic medicine.

Seventh, we now know that the money that is spent for such units—one million dollars a year for a unit housing thirteen pedophiles¹⁶⁴—comes from the state's mental health budget.¹⁶⁵ This results in a significant diminution of resources for those in Kansas who are genuinely mentally ill and who have traditionally received mental health treatment. The reality that this population is being deprived of scarce and needed resources is another pretext of the *Hendricks* case.

Eighth, on its facts, the *Hendricks* case appears to be an easy one. The defendant himself testified that, if released, he would, under stress, not be able to "control the urge" to molest children.¹⁶⁶ But this moment of candid self-reportage should not obscure the more complicated and persistent issue of the degree to which mental health professionals can predict future dangerousness.

Researchers have made tremendous gains in recent years in their understanding of the relationship between "dangerousness" and "mental illness," and the implications of these new findings. More conceptual light has been shed on this murky area of the law by the recent publication of research by the MacArthur Foundation's Network on Mental Health and the Law (the Network). For the past five years, the Network has conducted an extensive study of three areas that are essential to an informed understanding of mental disability law: competence, coercion, and risk.¹⁶⁷ On the question of the relationship between mental illness and dangerousness, John Monahan, the director of the MacArthur Network and the leading thinker in

¹⁶³ McAllister, *supra* note 147, at 44.

¹⁶⁴ Howard Zonana, Comments at American Association of Law Schools Section on Law and Mental Disability Panel Discussion (January 1998).

¹⁶⁵ *See id.*

¹⁶⁶ *Kansas v. Hendricks*, 117 S. Ct. 2072, 2081 (1997). He added that the only sure way he could keep from abusing children in the future was "to die." *Id.* at 278.

¹⁶⁷ *See* Bruce J. Winick, *Foreword: A Summary of the MacArthur Treatment Competence Study and an Introduction to the Special Theme*, 2 PSYCHOL., PUB. POL'Y & L. 3, 3 (1996); *The MacArthur Violence Risk Assessment Study*, 16 AM. PSYCHOL. L. SOC. NEWSLETTER No. 3, Fall 1996, at 1; *see also* Thomas Grisso & Alan Tomkins, *Communicating Violence Risk Assessments*, 51 AM. PSYCHOLOGIST 928 (1996).

this field of study,¹⁶⁸ concluded that while there appeared to be a “greater-than-chance relationship between mental disorder and violent behavior,”¹⁶⁹ mental illness makes “at best a trivial contribution to the overall level of violence in society.”¹⁷⁰

The *Hendricks* Court largely glides over this issue. But paradoxically, the substance of its decision—placing so many of its chips on the accuracy of certain dangerousness predictions—is likely to “reignite” the accuracy-of-prediction debate¹⁷¹ from precisely the opposite perspective taken by Monahan and his colleagues. Its failure to deal with Monahan's recent work is yet another pretext.

Ninth, *Hendricks* misses the point captured clearly and concisely by the Kansas Supreme Court:

Mental illness is defined in K.S.A. 59-2902(h) as meaning any person who: “(1) [i]s suffering from a severe mental disorder to the extent that such person is in need of treatment; (2) lacks capacity to make an informed decision concerning treatment; and (3) is likely to cause harm to self or others.” Here, neither the language of the Act nor the State's evidence supports a finding that “mental abnormality or personality disorder,” as used in 59- 29a02(a), is a “mental illness” as defined in 59-2902(h). Absent such a finding, the Act does not satisfy the constitutional standard set out in *Addington* and *Foucha*. Justice White, speaking for the majority of the United States Supreme Court in *Foucha*, clearly stated that to indefinitely confine as dangerous one who has a personality disorder or antisocial personality but is not mentally ill is constitutionally impermissible. 504 U.S. at 78. Similarly, to indefinitely confine as dangerous one who has a mental abnormality is constitutionally impermissible.¹⁷²

The Supreme Court's rejection of the spirit and the words of this section of the state court opinion is yet another pretext.

¹⁶⁸ Professor Monahan has been characterized as “the leading thinker on this issue” in *Barefoot v. Estelle*, 463 U.S. 880, 901, n.7 (1983), and *id.* at 920 (1983) (Blackmun, J., dissenting).

¹⁶⁹ John Monahan, *Clinical and Actuarial Predictions of Violence*, in 1 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY (David Faigman et al. eds., 1997) § 7-2.2.1, at 314. Clinicians were found to be no better than chance when it came to predicting violence among female patients. See *Mental Illness and Violent Crime*, NAT'L INST. JUST. RES. PREVIEW, Oct. 1996, at 1, 2.

¹⁷⁰ Monahan, *supra* note 169, at 315; see also, Jeffrey Swanson et al., *Psychotic Symptoms and Disorders and the Risk of Violent Behaviour in the Community*, 6 CRIM. BEHAV. & MENTAL HEALTH 309, 310 (1996) (mental disorder a “modest risk factor” for the occurrence of interpersonal violent behavior).

¹⁷¹ See Joseph McCann, *Risk Assessment and the Prediction of Violent Behavior*, 44 FED. LAW. 18, Oct. 1997, compare *Heller v. Doe*, 509 U.S. 312, 324 (1993) (psychiatric predictions of dangerousness in the cases of mentally ill persons “are inaccurate”).

¹⁷² *Matter of Care and Treatment of Hendricks*, 912 P.2d 129, 138 (Kan. 1996).

Tenth, any analysis of *Hendricks* from a therapeutic jurisprudence perspective¹⁷³ immediately highlights its underlying pretextuality. Professor Keri Gould recently asked these eight therapeutic jurisprudence-based questions about the *Hendricks* case:¹⁷⁴

- Is *Hendricks* therapeutic for the public or for victims?
- After *Hendricks*, does the allegedly “dispassionate” police power give way so as to satiate public rage?
 - Is it possible for *any* such scheme to be therapeutic without the provision of mandatory postrelease outreach?
 - Does the fact that therapy does not start (under the Kansas statute, at least) until after the defendant's sentence ends attenuate any potential therapeutic outcomes?
 - Is coerced sex offender treatment therapeutic?
 - Is there any incentive for a defendant to engage in any meaningful therapy programs while in prison if what is said during such participation can be used against the defendant after his sentence terminates?
- Will *Hendricks* lead to long-term commitments of those who “act out” sexually at civil mental hospitals?¹⁷⁵
- Will *Hendricks* lead some prosecutors to use involuntary civil commitment as a means of “boosting” criminal cases?

¹⁷³ “Therapeutic jurisprudence” is a new model by which we can assess the ultimate impact of case law and legislation that affects persons with mental disabilities. It studies the role of the law as a therapeutic agent, recognizing that substantive rules, legal procedures and lawyers' roles may have either therapeutic or antitherapeutic consequences, and questioning whether such rules, procedures and roles can or should be reshaped so as to enhance their therapeutic potential, while not subordinating due process principles. See e.g., *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (David Wexler & Bruce Winick eds., 1991); *LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (David Wexler & Bruce Winick eds., 1996); 1 PERLIN, *supra* note 10, §§ 2D-3 to 2D-3.1 (2d ed.); *THERAPEUTIC JURISPRUDENCE*, *supra* note 53; *THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW* (Bruce Winick ed., 1998); *Bibliography of Therapeutic Jurisprudence*, 10 N.Y.L. SCH. J. HUM. RTS. 915 (1993); Michael L. Perlin, *What Is Therapeutic Jurisprudence?* 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993); Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL., PUB. POL'Y & L. 193 (1995); David Wexler, *Applying the Law Therapeutically*, 5 APPL. & PREVEN. PSYCHOL. 179 (1996); David Wexler, *Putting Mental Health Into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27 (1992); David Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL., PUB. POL'Y & L. 220 (1995).

¹⁷⁴ Keri Gould, Remarks at American Association of Law Schools Section on Law and Mental Disability Panel Discussion (January 1998); see also Keri Gould, *If It's a Duck and Dangerous—Permanently Clip Its Wings or Treat It Till It Can Fly? A Therapeutic Perspective on Difficult Decisions, Short-Sighted Solutions, and Violent Sexual Predators After Kansas v. Hendricks*, 31 LOY. L.A. L. REV. 859, 880-81 (1998).

¹⁷⁵ On the issue of the right of mental patients to engage in voluntary sexual interaction, see, for example, Douglas Mossman, Michael L. Perlin & Deborah A. Dorfman, *Sex on the Wards: Conundra for Clinicians*, 25 J. AMER. ACAD. PSYCHIATRY & L. 441 (1997); Michael L. Perlin, “*Make Promises by the Hour*”: *Sex, Drugs, the ADA, and Psychiatric Hospitalization*, 46 DEPAUL L. REV. 947 (1997); Perlin, *Frontier*, *supra* note 34.

The answers to these questions, which I think should be relatively self-evident from the previous discussion, reflect the decision's pretextuality.

Eleventh, *Hendricks* is pretextual because, in the end, it is simply an authorization for the use of extensive preventive detention, dressed up in mental health language.¹⁷⁶ It is this pretext that, to some extent, swallows and engulfs all the others, and demonstrates the opinion's underlying meretriciousness. The "rhetoric and the result" of *Hendricks* may appeal to the general public, but the decision's failure to "offer a principle to cabin the potentially broad application of its revamped civil commitment jurisprudence"¹⁷⁷ is its ultimate pretext.¹⁷⁸

V. THE SUPREME COURT AND PRETEXTUALITY

If we look at the Supreme Court's mental disability law jurisprudence over the past two decades, we see instantly that, in large part, it is a jurisprudence of pretextuality. There are exceptions—*Riggins v. Nevada*,¹⁷⁹ *Foucha v. Louisiana*,¹⁸⁰ *Zinerman v. Burch*,¹⁸¹ *Cooper v. Oklahoma*,¹⁸² per-

¹⁷⁶ Stephen Morse, Comments at American Association of Law Schools Section of Law and Mental Disability Panel Discussion (January 1998); see also John Zanini, *Considering Hendricks v. Kansas for Massachusetts: Can the Commonwealth Constitutionally Detain Dangerous Persons Who Are Not Mentally Ill?*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427 (1997) (article written prior to *Hendricks* decision).

¹⁷⁷ Note, *supra* note 149, at 267.

¹⁷⁸ The dissent is also not without problems. Although it does reveal the punitive nature of the Kansas statute (exposing the pretextual nature of the majority opinion, and leading to the appropriate conclusion that the Ex Post Facto Clause *should* apply to the case), its discussion of civil commitment law, especially its conflation of civil commitment law and insanity law, as reflected in Justice Breyer's finding that *Hendricks*'s abnormality, including "a specific, serious, and highly unusual inability to control his actions"—was "akin to insanity for purposes of confinement," a sort of "irresistible impulse," *Kansas v. Hendricks*, 117 S. Ct. 2072, 2089 (1997), is confusing and somewhat circular. Its failure to conclude that the Kansas statute violates substantive due process, however, is the opinion's most troubling aspect. See generally Janus, *supra* note 144, at 213:

A system that compromises our traditional constitutional values cannot last. Sex offender commitment laws confuse too many important values. Obscuring the critical role that mental disorder plays in defining the state's police powers, these laws embrace a dangerous jurisprudence of prevention. We must find other, more truthful and more principled ways to prevent sexual violence.

¹⁷⁹ 504 U.S. 127 (1992) (affirming right of competent criminal defendants seeking to plead insanity to refuse antipsychotic medication).

¹⁸⁰ 504 U.S. 71 (1992) (limiting continued institutionalization in case of insanity acquittee who is no longer mentally ill).

¹⁸¹ 494 U.S. 113 (1990) (discussing procedural due process rights of "voluntary" patients in involuntary civil commitment process).

¹⁸² 116 S. Ct. 1373 (1996) (finding allocation of burden of proof by quantum of clear and convincing evidence to defendant seeking to be declared incompetent to stand trial to be unconstitutional).

haps *Mills v. Rogers*,¹⁸³ perhaps *City of Cleburne v. Cleburne Living Center*¹⁸⁴—but the dominant theme is one of pretextuality.

The Court's rationale in *Addington v. Texas*¹⁸⁵ for rejecting the criminal "beyond a reasonable doubt" standard in involuntary civil commitment cases—that "layers of professional review, and observation of the patient's condition and the concerns of families and friends generally will provide continuous opportunities for an erroneous commitment to be corrected"¹⁸⁶—is pretextual, as is its assumption that any person subject to that process must be "genuinely mentally ill."¹⁸⁷ Its misassumptions in *Parham v. J.R.*¹⁸⁸—about parent-child relationships, about the conduct of juvenile commitment hearings—are equally pretextual.¹⁸⁹ Other pretexts are clear in such cases as *Youngberg v. Romeo*,¹⁹⁰ *Washington v. Harper*,¹⁹¹ *Jones v. United States*,¹⁹² *Godinez v. Moran*,¹⁹³ *Pennhurst State School & Hospital v.*

¹⁸³ 457 U.S. 291 (1982) (establishing right of civil patients to refuse antipsychotic medication). See generally, 2 PERLIN, *supra* note 10, § 5.33.

¹⁸⁴ 473 U.S. 432 (1985) (applying Equal Protection Clause to challenge to local zoning ordinance excluding congregate residences for persons with mental disabilities). See generally, 2 PERLIN, *supra* note 10, § 7.22.

¹⁸⁵ 441 U.S. 418 (1979).

¹⁸⁶ *Id.* at 428-29.

¹⁸⁷ *Id.* at 429. See generally, 1 PERLIN, *supra* note 10, § 2C-5.1a, at 395-400 (2d ed.).

¹⁸⁸ 442 U.S. 584 (1979); see *supra* text accompanying notes 77-78.

¹⁸⁹ See David Ferleger, *Special Problems in the Commitment of Children*, in 1 LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 397, 404 (Paul Friedman ed., 1979) (*Parham* and companion decision "ignore the facts, distort the law and condemn children to second-class citizenship"); Perry & Melton, *supra* note 78, at 634 (listing "fifteen empirical assumptions [in *Parham*], many of them directly contrary to existing social-science research"). See generally, 1 PERLIN, *supra* note 10, § 2C-7.1a, at 467-77 (2d ed.).

¹⁹⁰ 457 U.S. 307 (1982) (right to habilitation). In supporting its conclusion that professionals in mental retardation "disagree strongly on the question whether effective training of all severely or profoundly retarded individuals is even possible," the Court cited to four articles from the journal *Analysis and Intervention in Disabilities*. *Id.* at 316-17 n.20. However, a reading of the very articles cited by the Court—articles never cited previously or subsequently by any other court in any reported opinion—shows that they considered only the "small fraction" of persons with mental retardation who were "permanently ambulatory" and "extremely debilitated," a grouping that is a tiny percentage of all institutionalized persons. Here, the Court's selection of social science data appears pretextual as well. See David Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 RUTGERS L.J. 595, 628-29 (1983), discussed in 2 PERLIN, *supra* note 10, § 4.33 at 184 n.636.

¹⁹¹ 494 U.S. 210 (1990) (limiting treatment refusal rights of convicted prisoners). See generally, PERLIN, *supra* note 10, § 5.64A at 252-63 (1997 Cum. Supp.) (discussing pretextual significance of Court's refusal to resolve debate as to significance of drugs' side-effects, and its improper reliance on *Parham*—a juvenile commitment case—for the proposition that a hearing officer need not be a judicial one); Perlin & Dorfman, *supra* note 158.

¹⁹² 463 U.S. 354 (1983) (limiting substantive and procedural due process rights of insanity acquittees). See generally, 1 PERLIN, *supra* note 10, § 3.43 at 325-35 (discussing Court's over-deference to legislative judgments, and criticizing majority's refusal to distinguish between nonviolent and violent crimes in this context); *id.* at 333 (quoting commentator arguing that decision reveals court's "unwillingness . . . to contradict public sentiment in such a controversial area").

Halderman,¹⁹⁴ *Shannon v. United States*,¹⁹⁵ and *Heller v. Doe*.¹⁹⁶ *Hendricks* builds on this sorry history of pretextuality.

The State of Kansas and its supporters may read the opinion as a success. But it is a jurisprudential failure. To return to the Dylan lyric that begins my title, failure is no success at all.

¹⁹³ 509 U.S. 389 (1993) (setting standard for competence to waive counsel or plead guilty same as for competence to stand trial). *See generally*, PERLIN, *supra* note 10, §§ 14.20A, 14.21A at 611-14, 616-18 (1997 Cum. Supp.); Michael L. Perlin, "Dignity Was the First to Leave": *Godinez v. Moran*, *Colin Ferguson*, and the trial of Mentally Disabled Criminal Defendants, 14 BEHAV. SCI. & L. 61 (1996) (criticizing pretextual bases of *Godinez* decision).

¹⁹⁴ 465 U.S. 89 (1984) (stating that Eleventh Amendment bars federal courts from ordering state officials to conform their actions to state law). *See generally*, 2 PERLIN, *supra* note 10, § 7.15, at 631-36; *id.* at 632 (quoting commentator arguing that true goal of *Pennhurst* Court was "to limit the lower federal courts' power to reform state and local social institutions on the basis of alleged federal law violations").

¹⁹⁵ 512 U.S. 573 (1994) (stating that defendant has no right in federal criminal trial to have jury informed of consequences of insanity acquittal). *See generally*, PERLIN, *supra* note 10, § 15.16A at 649-55 (1997 Cum. Supp.); *id.* at 655 (decision is either "naive, meretricious, or simply deceitful").

¹⁹⁶ 509 U.S. 312 (1993) (finding no equal protection violation in statute that established heightened standard for commitment of persons with mental illness and lesser standard for those with mental retardation). *See generally*, PERLIN, *supra* note 10, § 2C-5.1c, at 404-409 (2d ed.); *id.* at 130-31 (discussing pretextual nature of majority's discussion of right to refuse treatment issues).

