ON TREATMENT, PUNISHMENT, AND THE CIVIL COMMITMENT OF SEX OFFENDERS

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The civil confinement of sexual offenders is accelerating the topsy-turvy conversion of mental hospitals into prisons and prisons into mental hospitals.[1]

I don't really care if they're in a state mental hospital or if they're in jail for the rest of their life. I just want them behind bars. I don't want them out.[2]

INTRODUCTION

Perhaps the most vilified criminal in American society is the sex offender, particularly one who preys on young children.[3] To prevent the occurrence of sex crimes against children, states have constructed a mosaic of laws designed to educate the public and prevent repeat offenses. These laws often include registration and notification requirements,[4] as well as special involuntary civil commitment provisions[5]—the focus of this article. All fifty states now have some form of registration and notice laws,[6] and a substantial number of states are considering or have adopted civil commitment statutes.[7]

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1. Rael Jean Isaac, Editorial, *Put Sex Predators Behind Bars, Not on the Couch*, WALL ST. J., May 8, 1998, at A14 (quoting caption with editor's alteration of text).

2. *60 Minutes* (CBS television broadcast, Jan. 11, 1998) (quoting Maria Holdiay). Maria Holiday, the victim of a sex offense, discussed the Kansas Sexually Violent Predator Act. *See id.* The person who abused Ms. Holiday, a former police officer named Jack Spratt, was convicted of incest and child molestation and now is confined under the civil commitment law. *See id.*

3. As Larry Don McQuay, a convicted sex offender, stated, "[Without castration,] I am doomed to eventually rape, then murder my poor little victims to keep them from telling on me." Sam Howe Verhovek, *Texas Frees Child Molester Who Warns of New Crimes*, N.Y. TIMES, Apr. 9, 1996, at B7.

4. *See, e.g.*, ALASKA STAT. § 18.65.087 (Michie Supp. 1997); ARIZ. REV. STAT. ANN. § 13-3825 (West Supp. 1997); CAL. PENAL CODE § 290 (West Supp. 1998); DEL. CODE ANN. tit. 11, § 4120 (1995 & Supp. 1997); FLA. STAT. ch. 775.21(7) (West Supp. 1998); ME. REV. STAT. ANN. tit. 34-A, § 11143 (West Supp. 1997).

5. *See, e.g.*, KAN. STAT. ANN. §§ 59-29a01 to -29a17 (1994 & Supp. 1997). The Kansas sexual predator commitment law of 1994 is known as "Stephanie's Law," after Stephanie Schmidt, who was raped and murdered by a man recently released from prison. *See 60 Minutes*, *supra* note 2.

6. *See* David M. Boyers, *Emotion Over Reason: California's New Community Notification and Chemical Castration Laws Feel Good, But Fail "Sensible" Scrutiny*, 28 PAC. L.J. 740, 743 (1997); Robert Teir & Kevin Coy, *Approaches to Sexual Predators: Community Notification and Civil Commitment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 405, 406 (1997).

7. Washington and Kansas were two of the first states to adopt civil commitment statutes. *See* WASH. REV. CODE ANN. §§ 71.09.010-79.09.902 (West 1998); KAN. STAT. ANN. §§ 59-29a01 to -29a17 (1994 & Supp. 1997).

Although commitment statutes serve as an exemplar of government creativity and determination in denying sex offenders the opportunity to strike again, the laws raise the question of whether states have gone beyond constitutional boundaries in their efforts to prevent sexual predator recidivism. In 1997, the Supreme Court confronted the validity of sexual predator commitment laws in *Kansas v. Hendricks*.[8] *Hendricks* involved a challenge to Kansas's involuntary commitment scheme specifically designed for sexual predators.[9] The Kansas statute permitted the detention of sexually violent predators who were likely to be dangerous as a result of a "mental abnormality" or "personality disorder,"[10] and provided for potentially indefinite involuntary civil commitment despite the provision of what appeared to be incidental treatment.

In a 5-4 vote, the Supreme Court upheld the statute.[11] The Court dove headfirst into clarifying the permissible bounds of civil commitment statutes[12] and the associated distinction between criminal punishment and civil protection of society.[13] In placing the Kansas statute on the civil side of the line, the Court legitimized the use of a "mental abnormality" or "personality disorder" as the standard for civil commitment. The Court then attempted to avoid the slippery slope by requiring a minimum showing of "uncontrollable behavior" in support of detention.[14]

This paper argues that despite the best of intentions, the Kansas Legislature's sexual offender commitment law and the *Hendricks* decision are both misguided. Such sex offender laws constitute a circuitous, ineffective, and unconstitutional way to

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8. 117 S. Ct. 2072 (1997).

9. *See id.* at 2076.

10. *See id.* at 2074 (quoting KAN. STAT. ANN. § 59-29a02(a) (1994)).

11. *See id.* at 2072 (three Justices dissented and one dissented in part).

12. This highly volatile dividing line between civil and criminal legislation has been the subject of considerable debate. *See generally* Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. L. ISSUES 69 (1996).

13. *See* 117 S. Ct. at 2081-85. The friction between punishment and treatment goals is long-standing. Almost forty years ago, one commentator called it a "complex and often times highly emotional debate as to the correct boundary between legislative regulation and punishment." Note, *Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and its Use in the Lovett, Trop, Perez, and Speiser Cases*, 34 IND. L.J. 231, 231 (1959).

14. *See* 117 S. Ct. at 2080-81.

imprison a dangerous offender. While keeping a sex offender incarcerated may be laudatory from a political or social perspective, it should not be done on the pretext of treatment.[15] Detention without the provision of realistic treatment opportunities and without the narrow tailoring that would promote as much liberty as possible indicates that this form of commitment is really nothing more than a fancy substitute for imprisonment. Further, using the civil system to do the criminal justice system's work is neither administrable nor efficient—taxpayers will be paying a substantial and increased amount for wasted psychological care for "patients" housed in expensive psychiatric institutions, taking the space of more deserving, innocent mentally ill persons.[16]

These laws have additional problems. They could pave the way for the similar detention of other groups of dangerous offenders with "uncontrollable behavior"—such as drug abusers or drunk drivers[17]—and promote weak plea bargaining by prosecutors, who know that with these laws a "safety net" will always exist to save them from falling prey to poor plea bargains. Instead of civil commitment, legislatures should focus on how to keep sexual predators in prison with longer criminal sentences and appropriate treatment programs.

The Court in *Hendricks* fared no better from a judicial interpretation perspective, which provides a second reference for viewing the case. The Court exposed the difficulty of determining

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15. Some people believe that treatment can be successful. Kansas Attorney General Carla Stovall, who argued on behalf of Kansas before the Supreme Court in *Hendricks*, stated in an interview, "We can teach [sex offenders] how not to reoffend if they want to stop reoffending." *60 Minutes*, *supra* note 2.

16. In Florida, for example, approximately 8,000 adults and juveniles who fall within the definition of "sexual predator" are eligible for release this year. *See* Candace J. Samolinski, *When Predators Walk*, TAMPA TRIB., Mar. 1, 1998, at 1. Six hundred of these 8,000 are sufficiently violent to qualify right now for involuntary civil commitment under Florida's new law. *See id.* The cost of detaining these offenders far exceeds that which is normally expended on criminal inmates. *Compare* Samolinski, *supra* (reporting that the Florida Department of Children and Families estimates the annual cost of commitment at around $100,000 per offender), *with* CRIME STATE RANKINGS 122 (Kathleen O'Leary Morgan et al. eds., 5th ed. 1998) (listing the average cost of incarceration in local Florida jails in 1993 as $17,530 per inmate based on data from the United States Department of Justice, Bureau of Justice Statistics).

17. *See* Mark Hansen, *Danger vs. Due Process: Deciding Who is Mentally Abnormal is Key to Law*, A.B.A. J., Aug. 1997, at 43, 43; Stuart Taylor, Jr., *A Civil Libertarian's Nightmare*, LEGAL TIMES, Dec. 16, 1996, at 19.

how science and scientific terminology should be used in the law, if at all.[18] Justice Thomas, writing for the majority in *Hendricks*, addressed the law-science dichotomy as follows:

> Indeed, we have never required State legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance. As a consequence, the States have, over the years, developed numerous specialized terms to define mental health concepts. Often, those definitions do not fit precisely with the definitions employed by the medical community. . . . *Legal definitions . . . need not mirror those advanced by the medical profession.*[19]

This assertion by Justice Thomas is both instructive and troubling. While legal definitions often deviate from scientific understandings, Justice Thomas offered little in the way of guidance as to when such a deviation in meaning should occur and what substitute analysis should be used instead. If legal definitions do not conform to their scientific counterparts, what is to guide the courts? Without guideposts, the legal considerations and the rhetoric used in the law may stand the scientific and lay meanings on their collective head, with

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18. Not all use of science in the law is troubling. There are times when science can be used properly and without any adaptation in the law, such as DNA testing. *See* United States v. Hicks, 103 F.3d 837, 844-47 (9th Cir. 1996); United States v. Black Cloud, 101 F.3d 1258 (8th Cir. 1996). Scientific concepts can be used in the law for purposes completely separate from their scientific origins, such as the definitions of disease and illness in insurance contracts. *See* Katskee v. Blue Cross/Blue Shield, 515 N.W.2d 645, 649 (1994). The majority of the difficulties arise when the courts and legislatures try to straddle both uses, relying on the objectivity and legitimacy of science while at the same time modifying the original scientific understanding. When this occurs, a definitional incoherence arises that threatens to undermine the legitimacy of the legal term. Essentially, the law cannot have it both ways.

The use of science in law is not limited to *Hendricks*, 117 S. Ct. 2072 (1997). There are many other illustrations, especially in the area of constitutional law. In *Brown v. Board of Education*, for example, the Court turned to psychological studies about the effects of "separate but equal" treatment. 347 U.S. 483, 494-95 (1954). In *Roe v. Wade*, the Court relied on studies of mortality in childbirth and abortion to fashion a trimester framework for the constitutional right to choose to have an abortion. 410 U.S. 113, 149 (1973). In *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, the Supreme Court set forth the proper standard for admitting scientific evidence under the Federal Rules of Evidence. 509 U.S. 579, 579-80 (1993).

19. 117 S. Ct. at 2081 (emphasis added) (citations omitted).

damaging consequences.[20] Even if courts and legislatures are afforded guideposts, obtaining clarity in the relationship between law and science still will be difficult.[21]

This article concludes that if law is to incorporate scientific terminology and principles, legislatures and courts have an affirmative interpretive responsibility to provide a sufficiently express and precise articulation of each term's legal meaning, so as to parse good scientific evidence from bad. This is especially important if the legal term's meaning differs from the commonly accepted scientific meaning.[22] Yet, distinctive labeling alone is insufficient. Administrable terminology also must rest on solid legal principle. Unfortunately, the analysis in *Hendricks* does not meet either the labeling or content requirements.

This article has five parts. Part I describes sex offender commitment laws generally, presenting an overview of Supreme Court decision making about involuntary civil commitment and offering a recitation of the *Hendricks* case. Part II critiques the legal analysis of *Hendricks*, focusing on its administrability as well as its propriety in light of precedent, its costs to the state, and its legitimization of indefinite civil commitment for a subclass of uncontrollably dangerous persons. Part III explores the broader relationship of law and psychiatry in the context of scientific terms with legal significance. Finally, Part IV offers preferable alternatives to the *Hendricks* approach, and Part V offers some concluding observations.

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20. Why is the rhetoric of law important? It becomes apparent that legal rhetoric, while descriptive, can affect the meaning of scientific principles and correlatively, the rights and responsibilities of those affected. Even the label "scientific," for example, is not neutral, but has numerous connotations affecting the way it is interpreted or applied.

21. Specific problems arising from the inclusion of science in law are several: the science may not be sufficiently understood, leading to the misuse of medical terminology; the legal standard may not have been intended to have the same meaning as the term used in the scientific community, despite an identity of rhetoric; or the meaning of the law initially might have been the same as that used by the scientific community or the lay public but has since changed.

22. Examples of distinctive rhetoric include legal insanity, compensable injury, and legal palliative care.

I. BACKGROUND

A. Sex Offenders

The dilemma confronting law enforcement officials in preventing and deterring sex offenses germinates in the confusion surrounding the cause, constitution, and cure of the crimes. Assumptions about sex offenders are cloaked in half-truths and rumors, and are far from supported by conclusive studies. A common thread underlying the unique rules applying to sex offenders is that there is a "special depravity" associated with sexually related crimes, to the extent that sex offenders are perceived as "especially vile and loathsome people who really do not deserve to be treated like defendants in other crimes."[23] Sex offenders often share similar characteristics: they have been sexually traumatized, have problems with intimacy, cannot control angry sexual impulses, and are substance abusers.[24] Yet, there are many differences among them as well, preventing a clear "profile" from being developed.[25]

Offenders may violate the law in a number of ways, including pedophilia—the underlying behavior of the defendant in

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23. Richard I. Lanyon, *Scientific Status of the Concept of Continuing Emotional Propensity for Sexually Aberrant Acts*, 25 J. AM. ACAD. PSYCHIATRY L. 59, 60 (1997).

24. *See* Robert M. Wettstein, *A Psychiatric Perspective on Washington's Sexually Violent Predators*, 15 U. PUGET SOUND L. REV. 597, 601 (1992).

25. According to psychologist Richard I. Lanyon, there are five major theories of deviant sexuality that pertain to molesters:

> *Characterological View* [This view holds] (1) that all sexually deviant behaviors are theoretically and etiologically similar; and (2) that they represent a single type of psychopathology, specifically, a form of character disorder. . . .
>
> *Biological View* [This view indicates] that the deviance stems from biological factors. . . . [S]o far [this view] remains unsupported.
>
> . . . .
>
> *Modified Psychoanalytic View* [Some "regressed" molesters] have had a more normal psychosexual development but . . . have molested in response to situational stresses. . . .
>
> This modified psychoanalytic view came to be reflected in . . . DSM III . . . and . . . DSM-IV. . . .
>
> *Behavioral View* Behavioral views . . . concentrate on discovering and implementing ways of changing it [without requiring a theoretical framework]. . . .
>
> *Addiction View* The relatively new concept of sexual addiction has appeared significantly in the literature only within the past 10 years or so. These authors believe that some cases . . . have essential similarities to addictions and other compulsions . . . . Simply engaging in the behavior does not constitute an addiction.

Lanyon, *supra* note 23, at 60-62.

Hendricks. The requirements for pedophilia listed in the fourth edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-IV") include "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children" for a period of at least six months.[26] The pedophile must be sixteen years or older and the prepubescent child is generally age thirteen or younger.[27]

The treatability of sexual predators remains an open question. Many experts believe that there are no long-term treatment modalities.[28] As a result, some experts maintain that the chronicity of the problem can only be deterred through incapacitation and removal of offenders from society at large.[29] According to an editorial by Rael Jean Issac, a 1989 report on eight different studies of sex offenders found that in five of the eight studies, the treated group fared no better than the untreated group, and, in fact, had a higher rate of recidivism.[30] Other experts believe that medications such as Depo-Provera[31] and behavioral treatment can minimize, or even eliminate, pedophilia. However, there has been no conclusive proof of this hypothesis to date.[32]

Other mental disorders listed in the DSM-IV also result from a lack of impulse control. These include exhibitionism, sexual sadism, voyeurism, kleptomania, and pyromania.[33] Unlike schizophrenia and bipolar disorder, these illnesses do not seem

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26. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 528 (4th ed. 1994) [hereinafter DSM-IV].

27. *See id.* at 527.

28. *See* Lita Furby et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 27 (1989).

29. *See* Joint Appendix at 533, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (Nos. 95-1649, 95-9075).

30. *See* Isaac, *supra* note 1, at A14.

31. This medication and others cause "chemical castration" in the subject. *See* Linda S. Demsky, *The Use of Depo-Provera in the Treatment of Sex Offenders: The Legal Issues*, 5 J. LEGAL MED. 295, 296 (1984); Dennis H. Rainear, *The Use of Depo-Provera for Treating Male Sex Offenders: A Review of the Constitutional and Medical Issues*, 16 TOLEDO L. REV. 181, 187-92 (1984).

32. There have also been problems, legal and otherwise, with the involuntary administration of such medications. *See* People v. Gauntlett, 352 N.W.2d 310 (Mich. Ct. App. 1984); *"Chemical Castration": Another Use for Depo-Provera*, HASTINGS CENTER REP., Aug. 1979, at 10, 10.

33. *See* DSM-IV, *supra* note 26, at 525-26, 530, 532, 612-13, 614-15 (explaining the disorders).

to be organically based, but rather are behavior-oriented and not generally treated by psychotropic drugs.[34]

While sex offenders may be uniquely loathsome, the relevant data has not shown that sex offenders are more likely to be recidivist offenders than persons committing other types of crimes.[35] This result is due in part to the gross underreporting of sex crimes, making it difficult to discern the relevant recidivism rates.[36] Even when recidivism rates can be established, the studies on which they are based often have methodological shortcomings,[37] and the rates are not always indicative of sex offenders being considered "unique" criminals. For example, recidivism for sex offenders in Florida went down between 1989 and 1994, while recidivism for murderers went up.[38] This data belies the common belief that sex offenders have fewer self-restraints than other career criminals.[39]

B. Sex Offender Laws Generally

In addition to criminal laws, whose primary purposes are to deter and punish sexually violent conduct,[40] there are essentially three kinds of modern civil laws aimed at curbing recidivist sexual violence: registration, notification, and involuntary civil commitment laws. Unlike the sexual psychopath laws enacted in the early part of the twentieth century,[41] which provided for

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34. *See* Bruce C. Winick, *Ambiguities In the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOL. PUB. POL'Y & L. 534, 573 (1995).

35. *See* Samolinski, *supra* note 16, at 1.

36. *See* Furby et al., *supra* note 28, at 4.

37. *See id.* at 27 ("The differences in recidivism across these studies is truly remarkable; clearly by selectively contemplating the various studies, one can conclude anything one wants." (quoting Vernon L. Quinsey, *Sexual Aggression: Studies of Offenders Against Women*, *in* LAW AND MENTAL HEALTH: INTERNATIONAL PERSPECTIVES 84, 101 (D. Weisstub ed., 1984))).

38. *See* Samolinski, *supra* note 16, at 1 ("From 1989 to 1994, the percentage of sex offenders who committed sex crimes after their release went from 15 percent to 9.7 percent. By contrast, murderers who killed again went from 14.6 percent to 15.8 percent.").

39. *See id.* ("Among career criminals, police and mental health experts agreed they may be the most calculating and hardest to control."). Senator Charlie Crist, a co-sponsor of the Ryce Act from St. Petersburg, stated, "I think these criminals are some of the worst we have, because they prey on our children. There seems to be a high propensity for these kinds of criminals to re-offend." *Id.*

40. *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 9 (1968).

41. An example of such a law was found constitutional in *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940).

indefinite commitment without a prior criminal sentence and were essentially abandoned by states due to the difficulty in treating the detainees,[42] modern sex offender laws are aimed at preventing the recurrence of sexual violence and thus generally operate after a person has been convicted and served his sentence.[43] Registration laws require convicted sex offenders to register with the police in their place of domicile.[44] Notification laws, often passed in conjunction with registration regulations, require public notification of the whereabouts of released sex offenders.[45] These registration and notification laws are often called "Megan's Laws," after Megan Kanka, a child who was kidnaped, raped, and murdered by a recidivist sex offender.[46] As a result of the attention brought to the subject of sex offenders by the deaths of Megan Kanka and others,[47] these laws now exist in all states.[48] The federal government has promoted such laws by offering states pecuniary incentives.[49]

Commitment laws specifically designed for recidivist sex offenders have been adopted in at least seven states[50] and have

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42. *See* Isaac, *supra* note 1, at A14.

43. *See* Stephen R. McAllister, *The Constitutionality of Kansas Laws Targeting Sex Offenders*, 36 WASHBURN L.J. 419, 421 (1997). *But see* 4 KAN. STAT. ANN. §§ 59-29a02(a), 59-29a03(a) (Supp. 1997) (permitting action against someone who has been *charged* with a sexual offense under some circumstances).

44. *See* Boyers, *supra* note 6, at 743; Teir & Coy, *supra* note 6, at 406.

45. *See* Boyers, *supra* note 6, at 745-48; Teir & Coy, *supra* note 6, at 406.

46. Megan Kanka was raped and murdered by a twice-convicted sex offender after he was released from prison in July, 1994. The New Jersey law that resulted was adopted on October 31, 1994. *See* Patricia L. Petrucelli, Comment, *Megan's Law: Branding the Sex Offender or Benefitting the Community?*, 5 SETON HALL CONST. L.J. 1127, 1127 (1995); *see also* Simeon Schopf, *Megan's Law: Community Notification and the Constitution*, 29 COLUM. J.L. & SOC. PROBS. 117, 117 (1995).

47. In California, the kidnap, rape, and murder of twelve-year-old Polly Klaas by a convicted sex offender drew public outrage and spurred the passage of laws aimed to prevent repeat occurrences of such heinous crimes. *See* Tier & Coy, *supra* note 6, at 405-06.

48. *See* Note, *Prevention Versus Punishment: Toward a Principled Distinction In the Restraint of Released Sex Offenders*, 109 HARV. L. REV. 1711, 1712-14 (1996); Don Van Natta, Jr., *U.S. Judge Blocks State's Plan to Release Names and Addresses of Sex Offenders*, N.Y. TIMES, Mar. 8, 1996, at B6.

49. These incentives can be found in the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994, 42 U.S.C. § 14071 (1994 & Supp. II 1997).

50. The laws have been adopted in Arizona, California, Kansas, Minnesota, Florida, Washington and Wisconsin. *See* ARIZ. REV. STAT. ANN. §§ 13-4601 to -4613 (West Supp. 1997); CAL. WELF. & INST. CODE §§ 6600 to 6609.3 (West 1997); FLA. STAT. ANN. § 775.21 (West 1997 & Supp. 1998); KAN. STAT. ANN. §§ 59-29a01 to -29a15 (1994 & Supp. 1997); MINN. STAT. ANN. §§ 253B.01-.23 (West 1997); WASH.

been proposed in at least twenty-five more states.[51] These laws are gaining currency as no-lose political propositions, especially because they can be promoted as a form of getting tough on criminals while at the same time displaying compassion for the psychologically unsound individual.[52]

C. *A Brief Legal History of the Supreme Court and the Boundaries of Civil Commitment Law*

1. The Basic Framework: Government Powers and Limits

a. *The Essential Dichotomy: Protection vs. Punishment*

The states have broad police powers to protect their citizens' health, safety, welfare, and morals.[53] These powers extend from protecting citizens and punishing transgressors, to providing "compulsory treatment, involving quarantine, confinement or sequestration."[54] One such permissible form of compulsory treatment is involuntary civil commitment. Civil commitments are distinguished from criminal incarceration in several major respects. Civil detentions are intended to benefit the respondent through treatment and to protect society from a dangerous individual;[55] criminal incarceration may have rehabilitation as a goal, but the primary objectives are punishment and deterrence.[56] Civil detentions are preventive in nature, aimed at protecting against future dangerousness,[57] whereas criminal incarceration is backwards-looking, punishing a person because of prior actions.[58] The burden of proof in a civil commitment proceeding

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REV. CODE ANN. §§ 71.09.01-09.120 (West 1992 & Supp. 1998); WIS. STAT. ANN. §§ 980.01-.13 (West Supp. 1997).

51. *See 60 Minutes*, *supra* note 2.

52. *See* Frances Robles, *Sex Offender Bills Stir Debate: Proposals Would Keep Inmates Locked up Indefinitely*, MIAMI HERALD, Apr. 6, 1998, at 1B.

53. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

54. Robinson v. California, 370 U.S. 660, 666 (1962).

55. *See* Jones v. United States, 463 U.S. 354, 368 (1983).

56. *See* Foucha v. Louisiana, 504 U.S. 71, 80, 85 (1992).

57. *See id.* at 95-96.

58. *See id.*

may be by "clear and convincing" evidence,[59] which is less than the "beyond a reasonable doubt" standard required for criminal proceedings.[60] In civil commitment proceedings, the petitioner must establish that the respondent is suffering from a serious mental illness—usually a psychosis where the person loses touch with reality[61]—making the respondent dangerous to himself or others.[62] Criminal cases, on the other hand, do not require any showing of a mental illness, but instead require proof of a particular mental state or scienter.[63]

Usually, courts adopt a highly deferential approach to protective or preventive state legislation, such as civil commitment laws, applying an almost toothless rational basis level of scrutiny.[64] This level of scrutiny requires the law's challenger to show that the law is not rationally related to a legitimate governmental interest.[65] If, however, fundamental rights, such as the right to liberty, are violated through criminal punishment, the courts cease their deference and apply a form of heightened scrutiny, usually strict scrutiny.[66] This heightened scrutiny requires the State to show that the law is necessarily related to a compelling governmental interest.[67]

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59. *See* Addington v. Texas, 441 U.S. 418, 432-33 (1979).

60. These are the constitutional minimums required by the Due Process Clauses of the Fifth and Fourteenth Amendments. *See In re* Winship, 397 U.S. 358, 364 (1970).

61. A psychosis, such as schizophrenia, often involves hallucinations or delusions unsupported by reality. *See* DSM-IV, *supra* note 26, at 273. Neuroses, such as excessive anxiety, on the other hand, involve a misapplication or distortion of reality, but no loss of contact with it. *See* Harold I. Kaplan & Benjamin J. Sadock, *Psychiatric Report*, *in* 1 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 462, 475 (Harold I. Kaplan & Benjamin J. Sadock eds., 5th ed. 1989).

62. *See Addington*, 441 U.S. at 426.

63. *See* Morrisette v. United States, 342 U.S. 246, 250 (1952). This scienter standard is not part of the civil commitment proceeding. *See Addington*, 441 U.S. at 425-27.

64. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 486-88 (1955); United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). Ironically, the Supreme Court has shown a willingness to be less deferential to federal legislation, particularly when it interferes with areas traditionally governed by the states. *See* United States v. Lopez, 514 U.S. 549 (1995).

65. *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

66. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954); Korematsu v. United States, 323 U.S. 214 (1944).

67. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634, 642 (1973); Loving v. Virginia, 388 U.S. 1, 11 (1967).

The constitutionality of state laws regulating convicted sex offenders is often dependent on whether the laws are deemed criminal or civil,[68] because this designation determines what level of scrutiny should apply—a deferential rational basis analysis, consistent with the review of most social and economic civil legislation, or a higher strict scrutiny, consistent with punitive criminal laws depriving persons of their constitutional right to liberty.[69] To date, the Court has tended to view commitment-oriented restrictions as regulatory in nature, deserving of a lower level of scrutiny.[70] This view, treating some involuntary detention as nonpunitive in nature, leaves the definition of punishment in flux. Insight into this issue is readily obtained from a brief historical review of the major Supreme Court cases dealing with involuntary civil commitment.

2. Involuntary Civil Commitment and the Supreme Court

The 1940 case of *Minnesota ex rel. Pearson v. Probate Court*[71] presented the Supreme Court with its first modern challenge to the involuntary civil commitment of sexual offenders, which already had been occurring for years in some jurisdictions.[72] In *Pearson*, the Court upheld a Minnesota statute that permitted the involuntary commitment of persons who engaged in a habitual course of sexual misconduct, had an utter lack of power to control sexual impulses, and showed a likelihood of future harm.[73] The Court rejected both equal protection and vagueness challenges to the statute. Regarding the equal protection claim, the Court stated that some classes of people were more likely to be dangerous to the public than others and consequently could be treated differently as a group.[74] As for the vagueness challenge,

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68. *See* John Kip Cornwell, *Protection and Treatment: The Permissible Civil Detention of Sexual Predators*, 53 WASH. & LEE L. REV. 1293, 1305-08 (1996).

69. *See* Foucha v. Louisiana, 504 U.S. 71, 93 (1992).

70. *See, e.g.*, Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940).

71. 309 U.S. 270 (1940).

72. *See* Robert F. Schlesinger & Eugene F. Scanlon, *Sex Offenders and the Law*, 11 U. PITT. L. REV. 636, 642-43 (1950).

73. *See* 309 U.S. at 274.

74. *See id.* at 275 ("As we have often said, the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.").

the Court found that the requirements of the law were not unconstitutionally vague because they were administrable and subject to proof just like the elements of any crime prescribed by legislation.[75] Further, the Court ruled that the statute's procedural safeguards—from the right to a hearing, to the right to counsel, to the compulsory process of witnesses—also met due process requirements.[76]

In later cases, however, the Court evidenced particular concern about the potential involuntary commitment of individuals without the requisite due process safeguards. In the 1966 case of *Baxstrom v. Herold*,[77] for example, the Court struck down a New York law that permitted the involuntary psychiatric commitment of inmates at the conclusion of their prison sentences without a jury assessing the case.[78] The Court was loath to presume that the mere commission of a prior crime was sufficient to deny jury participation in a commitment proceeding.[79]

In 1975, the Court focused on the necessity of showing dangerousness as well as mental illness to civilly commit a person in *O'Connor v. Donaldson*.[80] The Court held that the Constitution demanded a showing of dangerousness, either to the community or to oneself, before involuntary commitment.[81]

Four years after *O'Connor*, the Court in *Addington v. Texas*[82] considered whether due process considerations permitted clear and convincing evidence as the standard by which a state may initially civilly commit a person.[83] The Court held that such a

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75. *See id.* at 274.

76. *See id.* at 275-77.

77. 383 U.S. 107 (1966).

78. *See id.* at 110.

79. *See id.* at 114-15; *see also* Humphrey v. Cady, 405 U.S. 504 (1972) (considering whether sex offenders could be given less process under the Constitution than persons convicted of other crimes or no crimes at all). In this case, the Court held that a person who was committed to a "sex deviate facility" under the Wisconsin Sex Crimes Act deserved at least an evidentiary hearing regarding the individual's renewal commitment. *See id.* at 508. The Court consequently remanded the case for a hearing, noting that there was no reason to treat sex offenders differently than those committed under the more generic Mental Health Act. *See id.* at 510.

80. 422 U.S. 563, 575 (1975).

81. *See id.*

82. 441 U.S. 418 (1979).

83. *See* 441 U.S. at 425. In Texas state court, the actual standard used by the judge in the proceedings was "clear, unequivocal, and convincing evidence." *See id.*

standard was constitutionally mandated.[84] The Court, perhaps prescient that a watering down of the "mental illness" standard might lead down the slippery slope, observed:

> At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such a behavior is no basis for compelled treatment and surely none for confinement.[85]

In succeeding years, the Court was willing to recognize narrowly drawn exceptions to the *Addington* requirement of proof by clear and convincing evidence of mental illness prior to authorizing civil detention. The Court permitted legislatures to deviate from the general rule in several specific situations. One such situation involved committing accuseds in order to evaluate whether they were incompetent to stand trial and not likely to regain competency in the reasonably foreseeable future. In the 1972 case of *Jackson v. Indiana*,[86] for example, the Court permitted involuntary detention for the testing and evaluation of accuseds without a showing of both dangerousness and mental illness, but only if confinement lasted a "reasonable" length of time.[87] In 1983, the Court in *Jones v. United States*[88] upheld a statute authorizing automatic civil commitment following a jury verdict of not guilty by reason of insanity.[89] The Court observed that its conclusion "accords with the widely and reasonably held view that insanity acquittees constitute a special class that should be treated differently from other candidates for commitment."[90] This "special class" analysis appeared to provide the opportunity for states to create specially directed civil commitment statutes.

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at 421 (quoting the jury instructions given at trial).

84. *See id.* at 431-33.

85. *Id.* at 426-27.

86. 406 U.S. 715 (1972).

87. *See id.* at 738.

88. 463 U.S. 354 (1983).

89. The Court placed great weight on the fact that a jury verdict of insanity preceded the commitment, providing evidence of dangerousness and mental illness. *See id.* at 364-66.

90. *Id.* at 370.

In addition to enforcing the requisite due process safeguards, the Supreme Court paid special attention to whether commitment statutes for sex offenders crossed over the line into criminal retribution, in violation of the Double Jeopardy[91] and Ex Post Facto[92] Clauses of the Constitution. Double jeopardy prohibits multiple punishments for the same offense,[93] whereas the Ex Post Facto Clause voids "any new [retroactive] punitive measure to a crime already consummated."[94] Thus, the clauses limit the states in imposing subsequent punishment on criminal offenders, while at the same time permitting preventive regulations for the public good.[95]

The Court attempted to refine the distinction between criminal punishment and civil regulatory prevention in its 1986 case, *Allen v. Illinois*.[96] *Allen* considered the constitutionality of the Illinois Sexually Dangerous Persons Act.[97] A respondent challenged the Illinois commitment scheme, claiming that the legislation was criminal in nature. Because the testimony of two evaluating psychiatrists was admitted into evidence over the respondent's objections, he alleged that his Fifth Amendment right against self-incrimination was violated.[98] The Court upheld the Illinois scheme, finding that "the State has indicated quite clearly its intent that these commitment proceedings be civil in nature; its decision nevertheless to provide some of the safeguards applicable in criminal trials cannot itself turn these

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91. U.S. CONST. amend. V.

92. U.S. CONST. art. I, § 10.

93. *See, e.g.*, United States v. Ursery, 518 U.S. 267 (1996); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (listing various factors that indicate whether a regulation will be considered punishment for constitutional purposes).

94. California Dep't of Corrections v. Morales, 514 U.S. 499, 505 (1995) (quoting Lindsey v. Washington, 301 U.S. 397, 401 (1937)).

95. One commentator noted, "[e]mploying traditional public health analysis, the Supreme Court has established the 'jurisprudence of prevention'—a deferential view of quasi-criminal efforts to restrain potentially dangerous individuals for the good of society." Note, *supra* note 48, at 1715-16.

96. 478 U.S. 364 (1986).

97. *See id.* The Act provided for the civil commitment of persons who suffer from a mental disorder along with "criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault." *Id.* at 366 n.1 (quoting the Illinois Sexually Dangerous Persons Act, ILL. REV. STAT. § 105-1.01 (1985) (currently codified in 725 ILL. COMP. STAT. 205/1.01 (West 1993))).

98. *See id.* at 366.

proceedings into criminal prosecutions requiring the full panoply of rights applicable there."[99]

The Court's willingness to sustain limited government preventive detention outside the context of mentally ill respondents was demonstrated in several cases decided in the mid-1980s. In *Schall v. Martin*,[100] the Court upheld a New York law authorizing preventive detention of juveniles in situations where there is a "'serious risk' that the juvenile, if released would commit a crime prior to his next court appearance."[101] The Court extended this exception in *United States v. Salerno*,[102] allowing preventive detention in the special context of a dangerous accused held pre-trial, even if no mental illness exists. In *Salerno*, the Court reviewed the constitutionality of the Federal Bail Reform Act of 1984,[103] which permitted the pre-trial detention of persons so long as "no release conditions 'will reasonably assure . . . the safety of any other person and the community.'"[104] By upholding the legislation, the Court found that protecting the community is a sufficient reason to detain an unconvicted person charged with a serious crime.

The most important case preceding the *Hendricks* decision, however, was probably *Foucha v. Louisiana*,[105] decided in 1992. In *Foucha*, the Court considered the constitutionality of a Louisiana statute providing for the indefinite involuntary commitment of individuals found not guilty by reason of insanity who were dangerous, but not mentally ill. The trial court found that the defendant, Mr. Foucha, had a personality disorder that was not considered a mental illness or, for that matter, a treatable disorder.[106] There was testimony that Mr. Foucha was not suffering from either a neurosis or psychosis and that he was in "good shape" mentally.[107] There was further testimony that

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99. *Id.* at 372.
100. 467 U.S. 253 (1984).
101. *Id.* at 278.
102. 481 U.S. 739 (1987).
103. *See id.*
104. *Id.* at 741 (quoting the Bail Reform Act of 1984, 18 U.S.C. § 3142(f) (1994 & Supp. II 1996)) (alteration in original).
105. 504 U.S. 71 (1992).
106. *See* State v. Foucha, 563 So. 2d 1138, 1141 (La. 1990). As the Supreme Court noted, "Louisiana does not contend that Foucha was mentally ill at the time of the trial court's hearing." 504 U.S. at 78.
107. 504 U.S. at 75 (quoting the testimony of one of the doctors at a hearing).

antisocial personality disorder is a "disorder for which there is no effective treatment."[108] The Court struck down the law, concluding that it violated due process because the acquittee no longer met the dual constitutional prerequisites of dangerousness and mental illness.[109] Despite the Court's actions, the meaning of *Foucha* for future cases was uncertain; it was not clear, for instance, whether mental illness and dangerousness would always be concurrent prerequisites to indefinite civil commitment.

While Justice White, writing for the 5-4 plurality in *Foucha*, recited *Jones v. Unites States* in apparent support of a rule always requiring a showing of dangerousness and mental illness,[110] Justice O'Connor's concurrence was not so clearly positioned. In her concurrence, which turned out to be the deciding vote, Justice O'Connor left the door open to the possibility of special involuntary civil commitment statutes receiving lower standards of judicial review. She observed that a state may confine individuals upon showings of dangerousness and "some medical justification."[111] The exact nature of this "medical justification," however, was not defined. Her standard permitted states to involuntarily detain even those who were not suffering from a full-blown mental illness, so long as there was a "connection between the nature and purposes of confinement."[112] The lynchpin of Justice O'Connor's decision appeared to be whether and what type of crime had been committed by the detainee.[113] She appeared to accept, along with the four dissenting Justices, that individuals who commit crimes have lesser privacy interests than those who do not commit crimes, consequently permitting a lower threshold for detention than the one applicable to individuals who had not engaged in prior criminal acts.[114] Thus, she was comfortable in striking down this law for the way it dealt with civil detainees while reserving an opinion on laws directed specifically at insanity

108. *Id.* at 82.
109. *See id.* at 85.
110. *See id.* at 73-86.
111. *Id.* at 88 (O'Connor, J., concurring in part and concurring in the judgment).
112. *Id.*
113. *See id.*
114. *See id.*

acquittees.[115] Perhaps to emphasize the conditions on which she joined the majority, she declared that she did "not understand the Court to hold that Louisiana may never confine dangerous insanity acquittees after they regain mental health."[116]

In striking down the Louisiana commitment statute, the Court also rejected the notion that if a disorder was officially recognized by the psychiatric community, the "mental illness" requirement for constitutional civil commitment would automatically be met.[117] Although the revised third edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-III-R") defined antisocial personality disorder as a mental disorder at the time of the case,[118] the constitutional requirements were not met in *Foucha*. Instead, the Supreme Court observed that if the State's approach prevailed, it "would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct."[119] Unfortunately, the Court would not say just what kind of mental illness would suffice to meet due process requirements. The precise parameters of the "mental illness" standard for the purposes of civilly committing a person were left for another day. After *Foucha*, it remained unsettled whether a state, in certain situations, could detain an insanity acquittee or others who have yet to be convicted of crimes, upon a showing lesser than continuing dangerousness and mental illness.[120]

Despite the uncertainty *Foucha* created, most state and lower federal courts upheld sexual predator laws.[121] Yet, the

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115. *See id.* at 86-87.

116. *Id.* at 87.

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

118. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 342-43 (3rd ed. rev. 1987) [hereinafter DSM-III-R]. The definition has changed somewhat in the DSM-IV, but antisocial personality disorder is still considered a mental disorder. In the DSM-IV, an antisocial personality disorder requires: (1) a current age of at least 18; (2) evidence of certain specified behaviors prior to the age of 15; (3) a pattern of certain specified irresponsible behaviors after the age of 15; and (4) antisocial behavior, other than that occurring during a schizophrenic or manic episode, which is related to the individual's lifestyle or habits. *See* DSM-IV, *supra* note 26, at 645-46.

119. *Foucha*, 504 U.S. at 82.

120. The Court in *Heller v. Doe*, a case decided in 1993, for example, concluded that prior instances of violent behavior were good predictors of future dangerousness. 509 U.S. 312 (1993).

121. *See, e.g., In re* Young, 857 P.2d 989 (Wash. 1993) (en banc); State v. Post,

Supreme Court's fuzziness in *Foucha* led at least one lower federal court and one state supreme court to strike down sexual predator laws.[122] The Supreme Court in *Hendricks* was left with the task of resolving this conflict.

D. Kansas v. Hendricks

1. The Kansas Regulatory Scheme

In July 1993, a coed at the University of Kansas named Stephanie Schmidt was brutally raped and murdered.[123] The perpetrator of this heinous crime was a convicted rapist.[124] Based largely on this incident, Kansas adopted the Sexually Violent Predator Act ("the Act") in 1994[125] to provide for the civil commitment of persons who are likely to engage in "predatory acts of sexual violence" as a result of either a "mental abnormality" or "personality disorder."[126] The Act was designed to create a "civil commitment procedure for the long-term care and treatment of the sexually violent predator,"[127] defining "sexually violent predator" as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence."[128] The statute defines "mental abnormality" as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others."[129]

The Act applies to individuals in several circumstances. It applies to incarcerated persons convicted of a sexually violent

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541 N.W.2d 115 (Wis. 1995).

122. *See* Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995); *In re* Care and Treatment of Hendricks, 912 P.2d 129 (Kan. 1996), *rev'd sub nom.* Kansas v. Hendricks, 117 S. Ct. 2072 (1997).

123. *See In re Hendricks*, 912 P.2d at 138 (Larson, J., dissenting); State v. Meyers, 923 P.2d 1024, 1031-32 (Kan. 1996).

124. *See Meyers*, 923 P.2d at 1031-32.

125. KAN. STAT. ANN. §§ 59-29a01 to -29a17 (1994 & Supp. 1997).

126. Kansas v. Hendricks, 117 S. Ct. 2072, 2076 (1997) (quoting KAN. STAT. ANN. § 59-29a02(a) (1994)).

127. *Id.* at 2077 (quoting KAN. STAT. ANN. § 59-29a01 (1994)).

128. *Id.* (quoting KAN. STAT. ANN. § 59-29a02(a) (1994)).

129. *Id.* (quoting KAN. STAT. ANN. § 59-29a02(b) (1994)).

offense and scheduled for release; persons charged with a sexually violent offense but found incompetent to stand trial; persons found not guilty by reason of insanity of a sexually violent offense; and persons found not guilty of a sexually violent offense because of a mental disease or defect.[130]

At the commitment hearing, the State has the burden of proving the elements of the Act beyond a reasonable doubt.[131] The State also is required to provide the assistance of counsel if the individual charged is indigent.[132] Finally, a person is eligible for release when "the person's mental abnormality or personality disorder has so changed that the person is safe to be at large."[133]

The preamble of the Act offers insight into the Kansas Legislature's intent in creating a special statute for this group of offenders in addition to Kansas's general involuntary civil commitment statute:

> [A] small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [general involuntary civil commitment statute]. . . . In contrast to persons appropriate for civil commitment under the [general involuntary civil commitment statute], sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure . . . is inadequate to address the risk these sexually violent predators pose to society.[134]

2. The Case Against Leroy Hendricks

The Act was applied for the first time against Leroy Hendricks. Hendricks was about to be released from prison in 1994 after serving almost ten years of a five-to-twenty-year sentence on a 1984 conviction for taking "indecent liberties" with

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130. *Id.* (citing KAN. STAT. ANN. §§ 59-29a03(a), 22-3221 (1995)).
131. *See id.*
132. *See id.* at 2077-78 (citing KAN. STAT. ANN. § 59-29a06 (1994)).
133. *Id.* at 2077 (quoting KAN. STAT. ANN. § 59-29a07(a) (1994)).
134. *Id.* (citing KAN. STAT. ANN. § 59-29a01 (1994)).

two thirteen-year-old boys.[135] Hendricks pleaded guilty in the 1984 cases. As part of the plea bargain, the State dropped one count and did not seek a longer prison term under the State's recidivism sentencing law.[136]

Hendricks had a long history of sexually abusing others, including convictions for indecent exposure to two young girls in 1955, lewdness in 1957, the molestation of two young boys in 1960, and the sexual assaults of an eight-year-old girl and an eleven-year-old boy in 1967.[137] Attempts to treat Hendricks had failed, and he admitted that when under stress, he "'can't control the urge' to molest children."[138]

At a jury trial to determine whether Hendricks should be involuntarily detained as a sexually violent predator under the Act,[139] Hendricks testified about his history of sexually abusing others.[140] The chief psychologist at the hospital where Hendricks was examined testified that, in his opinion, Hendricks was a pedophile likely to commit further sexual acts of violence against children. He also testified that pedophilia was a "mental abnormality" within the Act's definition.[141] Other evidence of Hendricks's pedophilia included the testimony of a physician employed by the State who related that Hendricks suffered from pedophilia, testimony by his stepdaughter and stepson about how he had molested them, and testimony by a clinical social worker that Hendricks had personality trait disturbance.[142] Based on this testimony, the jury found that Hendricks was a sexually violent predator, and the judge concluded that pedophilia

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135. *See id.* at 2078.

136. *See U.S. Supreme Court Upholds Kansas Law Allowing Indefinite Civil Commitment of Sexual Offenders*, 48 PSYCHIATRIC SERVICES 1093 (Aug. 1997).

137. *See* 117 S. Ct. at 2078.

138. *Id.* (quoting Hendricks's testimony as it appears in the Joint Appendix on Writ of Certiorari at 141).

139. The trial succeeded a probable cause hearing to determine whether there was probable cause to believe Hendricks was a sexual predator pursuant to the Act. At that hearing, a licensed clinical social worker testified that Hendricks met the criteria for pedophilia. *See* Joint Appendix on Writ of Certiorari at 24. This conclusion was drawn pursuant to the DSM-IV, *supra* note 26, at 527-28.

140. *See* 117 S. Ct. at 2078-79 (citing Joint Appendix on Writ of Certiorari at 131-90).

141. *See id.* at 2079 n.2.

142. *See id.*

satisfied the "mental abnormality" requirement of the Act.[143] Consequently, Hendricks was involuntarily committed.[144]

3. The Kansas Supreme Court

Hendricks objected to his commitment under the Act on several constitutional grounds, claiming the Act violated substantive due process, double jeopardy, and ex post facto requirements.[145] The Kansas Supreme Court struck down the law, holding that the "mental abnormality" threshold violated substantive due process requirements by failing to require a "mental illness" as a precondition to detention.[146] The court measured the sexually violent predator statute against the general requirements of civil commitment. Prior to civilly committing a person, due process requires Kansas to show the requisite mental illness by proving beyond a reasonable doubt that the individual suffers from a mental disease or defect that renders him a danger to himself or others. In light of this framework, the court found that the Act's condition of "mental abnormality" was an insufficient basis on which to require detention.[147]

The Kansas Supreme Court looked carefully at the legislative intent behind the statute. Based on the preamble of the Act, the court concluded that it was the primary goal of the legislature to incapacitate sex offenders and that the legislature, by virtue of only requiring a "mental abnormality," conceded that the treatment of such a group was illusory:

> Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent. The legislature concedes that sexually violent predators are not amenable to treatment under [the general involuntary civil commitment act]. If there is nothing to treat under [that

143. *See id.* at 2079.
144. *See id.*
145. *See id.* at 2076.
146. *In re* Care and Treatment of Hendricks, 912 P.2d 129, 138 (Kan. 1996), *rev'd sub nom.* Kansas v. Hendricks, 117 S. Ct. 2072 (1997).
147. *See id.*

> general commitment statute], then there is no mental illness.[148]

The court carefully reviewed the "mental abnormality" requirement. It held that the term failed to meet the minimum due process safeguards ensured by the "constitutional standard of mental illness."[149] This constitutional standard, as constructed in *Foucha v. Louisiana*[150] and *Addington v. Texas*,[151] would not support a "mental abnormality" minimum because "'[m]ental abnormality' is not a psychiatric or medical term but, rather, a legal term defined in the Act."[152] The court found that the *Foucha* and *Addington* standard would only be met if the general civil commitment requirements of the State had been surpassed—that a person "(1) [i]s suffering from a severe mental disorder to the extent 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."[153]

Essentially, the Kansas Supreme Court interpreted precedent as constitutionally requiring a showing of "mental illness," not "mental abnormality," coupled with acts occurring as a result of that particular mental illness. With this predicate, it was perhaps easy for the court to find that, because "Hendricks [was] not mentally ill, and the criminal offenses for which he was imprisoned were not the result of mental illness,"[154] his civil commitment was invalid.

a. The Dissent

The three dissenting justices on the Kansas Supreme Court distinguished *Foucha* on the basis that the Louisiana law in *Foucha* allowed for commitment without a "mental abnormality" and did not keep the burden of proof on the State.[155] The dissenters further supported judicial deference of legislative definitions, stating that "[t]he Supreme Court has declined to

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148. *Id.* at 136.
149. *Id.* at 137.
150. 504 U.S. 71 (1992).
151. 441 U.S. 418 (1979).
152. *In re Hendricks*, 912 P.2d at 138.
153. *Id.* (quoting KAN. STAT. ANN. § 59-2902(h) (1994)).
154. *Id.* at 138.
155. *See id.* at 147 (Larson, J., dissenting).

enunciate a single definition that must be used as the mental condition sufficient for involuntary mental commitments. The Court has wisely left the job of creating statutory definitions to the legislators who draft state law."[156] The dissent suggested that the constitutional minimum did not at all revolve around the showing of a mental illness:

> Yet it is not the incantation of "mental illness" that has constitutional significance, but the substance of the statute. Nor is mental illness an inflexible standard capable of precise meaning. . . .
>
> The question is not whether Hendricks fits some clinical definition of mental illness, but whether he fit [sic] a legislative classification that is more than mere idiosyncratic behavior "within a range that is generally acceptable."[157]

The dissent also cast a reproving eye at using psychiatry to anchor a legal concept, asserting that "[t]here is no justification for linking constitutional standards to the shifting sands of academic thought reflected in the DSM-IV and its frequent revisions."[158]

4. The United States Supreme Court

After the Kansas Supreme Court decision, the State of Kansas moved, and Hendricks cross-petitioned, for certiorari to the United States Supreme Court. The Supreme Court granted both petitions and, in a 5-4 decision, upheld the Kansas statute and reversed the judgment of the Kansas Supreme Court.[159]

Justice Thomas, writing for the majority, considered and rejected several constitutional challenges to the Kansas law—including due process, double jeopardy, and ex post facto claims. More specifically, the Court decided whether the law violated due process by only requiring a "mental abnormality" and not a "mental illness," and whether the law constituted punishment in violation of double jeopardy and ex post facto prohibitions.

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156. *Id.* at 148 (quoting State v. Post, 541 N.W.2d 115, 123 (Wis. 1995)).
157. *Id.* at 148 (quoting Addington v. Texas, 441 U.S. 418, 426-27 (1979)).
158. *Id.* at 149.
159. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2076 (1997).

a. Due Process of Law

i. Due Process Requirements

Due process of law generally protects individuals from governmental invasions of liberty interests, particularly freedom from physical restraint.[160] As Justice Thomas noted in *Hendricks*, however, that liberty interest is not absolute.[161] Instead, the government can at times justify "manifold restraints to which every person is necessarily subject for the common good,"[162] including the involuntary civil commitment of the dangerous mentally ill.

ii. Precedent

The Court rejected the Kansas Supreme Court's conclusion that a "mental abnormality" requirement violated substantive due process.[163] Justice Thomas indicated that "ordinarily,"[164] dangerousness in itself is not a sufficient ground on which to civilly commit a person, but that "proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality'" would suffice.[165] According to Justice Thomas, as long as some "mental abnormality" or "personality disorder" requirement is present, the class of persons subject to confinement is properly narrowed to "those who are unable to control their dangerousness."[166] This inability to control dangerous behavior toward others appeared to be the dispositive ingredient in the Court's legitimization of civil commitment laws aimed at a particular group of people.

In dismissing Hendricks's claim that precedent required a minimum showing of "mental illness" prior to involuntary civil

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160. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

161. *See* 117 S. Ct. at 2078.

162. *Id.* (quoting Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905)).

163. *See id.* at 2079 ("Kansas argues that the Act's definition of 'mental abnormality' satisfies 'substantive' due process requirements. We agree.").

164. *Id.* at 2080. The word "ordinarily" leaves the door open to some statutes that involuntarily commit people solely on the basis of dangerousness.

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

166. *Id.*

commitment, Justice Thomas stated that the Court's precedent had used a variety of terms in addition to "mental illness," specifically noting that Justice O'Connor, in her concurrence in *Foucha*, viewed commitment as appropriate when there is "some medical justification for doing so."[167] Thus, O'Connor's concurrence provided Justice Thomas with pivotal doctrinal support.

b. *Judicial Interpretation*

The most striking aspect of Justice Thomas's opinion on substantive due process was his resolution of whether a "mental illness" is a mandatory prerequisite to involuntary civil commitment. Justice Thomas made his position clear by jettisoning any requisite ties between psychiatric definitions and the legal standards for civil commitment. He declared that "the term 'mental illness' is devoid of any talismanic significance,"[168] and further justified its abandonment by observing that even "psychiatrists disagree widely and frequently on what constitutes mental illness."[169]

Justice Thomas made it clear that the proper level of judicial oversight of lawmaking in the civil commitment area would be very relaxed. "Indeed, we have never required State legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance."[170] In making this assertion, it followed that legislative definitions, which Justice Thomas categorized as "specialized terms to define mental health concepts,"[171] permissibly varied from those used in the medical profession. In light of the differing purposes of the medical and legal systems, the legal system's use of medical terms and concepts was not limited by medical understandings.[172]

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167. *Id.* at 2080-81 (quoting Foucha v. Louisiana, 504 U.S. 71, 88 (1992) (O'Connor, J., concurring in part and concurring in judgment)).

168. *Id.* at 2080.

169. *Id.* (quoting Ake v. Oklahoma, 470 U.S. 68, 81 (1985)).

170. *Id.* at 2081.

171. *Id.*

172. *See id.* (citing Jules B. Gerard, *The Usefulness of the Medical Model to the Legal System*, 39 RUTGERS L. REV. 377, 391-94 (1987)).

This framework of analysis was especially important in light of the Court's recognition that the psychiatric community was "not in complete harmony in casting pedophilia, or paraphilias in general, as 'mental illnesses.'"[173] Given this split in the medical community, the Court could have stated that the legislature overstepped its police powers by including this group in its involuntary commitment statute. Instead, Justice Thomas offered judicial restraint and deference. He emphasized that "it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes."[174] He quoted a passage from *Jones v. United States* in support of this proposition,[175] even though he also recognized a lack of congruity between *Jones* and *Hendricks*.[176]

c. *The Double Jeopardy and Ex Post Facto Claims*

The United States Constitution protects a person from double jeopardy in part by shielding criminal defendants from exposure to multiple punishments for the same offense.[177] Double jeopardy also prohibits ex post facto laws,[178] which are those laws that impose a "new punitive measure to a crime already consummated."[179] If a law enlarges the punishment of a criminal law and is then applied to a person's prior conduct, it also is considered an ex post facto law.[180] Thus, the essential issue raised by both double jeopardy and ex post facto claims is whether involuntary commitment after a criminal conviction is a form of prohibited punishment or a form of permissible civil regulation.

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173. *Id.* at 2081 n.3.

174. *Id.*

175. *See Hendricks*, 117 S. Ct. at 2081 n.3. Justice Thomas stated that "[a]s 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.* (quoting Jones v. United States, 463 U.S. 354, 370 (1983)).

176. *See* 117 S. Ct. at 2081 n.3.

177. *See* U.S. CONST. amend. V.

178. *See* U.S. CONST. art. I, § 10.

179. California Dept. of Corrections v. Morales, 514 U.S. 499, 505 (1995).

180. *See* Collins v. Youngblood, 497 U.S. 37, 43 (1990).

i. Civil Detention or Punitive Criminal Law?

According to Justice Thomas, the inquiry into whether a law is civil or criminal initially depends on the legislature's intent.[181] The Court will "ordinarily defer to the legislature's stated intent."[182] In evaluating the Kansas law in *Hendricks*, Justice Thomas observed that the legislature placed the law within the state probate code, a civil regulatory scheme.[183] Kansas also labeled the law "civil" and did not suggest that the law on its face was anything other than a civil commitment scheme.[184]

While the preceding analysis is usually dispositive of the legislature's intent, Justice Thomas added that this first level of review may be overcome if sufficient evidence is offered to show that "'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"[185] In undertaking a second level of review, Justice Thomas concluded that the State did not create punitive proceedings here because it did not act with punitive intent.[186] He noted that the Kansas statute was not designed for retribution or deterrence, "the two primary objectives" of the criminal law,[187] but rather "to protect the public from harm."[188] He stated:

> Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards;

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181. *See Hendricks*, 117 S. Ct. at 2081-82.

182. *Id.* at 2082.

183. *See id.*

184. *See id.*

185. *Id.* (quoting United States v. Ward, 448 U.S. 242, 248-49 (1980)) (alteration in original).

186. *See id.* at 2085.

187. *Id.* at 2082. Justice Thomas stated:

> The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct. . . .
>
> Moreover, unlike a criminal statute, no finding of scienter is required to commit an individual who is found to be a sexually violent predator . . . .
>
> Nor can it be said that the legislature intended the Act to function as a deterrent. Those persons committed under the Act are, by definition, suffering from a "mental abnormality" or a "personality disorder" that prevents them from exercising adequate control over their behavior.

Id.

188. *Id.*

> 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.[189]

Another salient issue was the lack of treatment provided by the law. Justice Thomas responded to this question by acquiescing in, for argument's sake, the Kansas Supreme Court's interpretation that treatment was not possible for this group of pedophiles and that the State's primary concern was segregating such offenders.[190] Even with this acquiescence, Justice Thomas still found that under certain circumstances, given the appropriate procedural safeguards, "incapacitation may be a legitimate end of the civil law."[191] Analogizing civil commitment to the confinement of persons "afflicted with an untreatable, highly contagious disease,"[192] Justice Thomas stated that the Court has never held that civil commitment of a dangerous person suffering from an untreatable mental illness is unconstitutional.[193] In essence, Justice Thomas advocated extreme judicial deference when reviewing special state civil commitment regulatory schemes involving a narrow subclass of dangerous persons.[194]

Justice Thomas was similarly deferential when evaluating the sparse treatment program associated with the Act, stating that "[a]lthough the treatment program initially offered Hendricks may have seemed somewhat meager, it must be remembered that he was the first person committed under the Act."[195] He concluded that the lack of treatment was not dispositive to the constitutional assessment of the law.[196]

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189. *Id.* at 2085.
190. *See id.* at 2084.
191. *Id.*
192. *Id.*
193. *See id.*
194. *See id.* at 2085 n.4 (citing *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982), for the "considerable discretion" states have in designing how to implement their responsibilities).
195. *Id.* at 2085.
196. *See id.*

d. Justice Kennedy's Concurrence

Justice Kennedy's concurrence reflected his concern with Hendricks's ex post facto challenge, particularly given that Hendricks had committed his crimes prior to the adoption of the Act. Justice Kennedy found that the Act was "within [the] pattern and tradition of civil confinement,"[197] and concluded that Hendricks fell within its purview regardless of whether the acts were committed prior to or after the adoption of the Act.[198] Justice Kennedy warned, however, that the civil system should not be used as a substitute for shoddy plea bargaining by a prosecutor, and that 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."[199]

e. Justice Breyer's Dissent

Justice Breyer's disagreement with the majority was not all-encompassing. Significantly, he agreed with the majority that the "mental abnormality" standard met due process requirements.[200] Justice Breyer also relied on *Foucha* in referencing his conclusion:

> 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*.[201]

Justice Breyer's underlying perspective of constitutional interpretation was important to his analysis. He stated that "[t]he Constitution does not require Kansas to write all of its civil

197. *Id.* at 2087 (Kennedy, J., concurring).
198. *See id.*
199. *Id.*
200. *See id.* at 2087-88 (Breyer, J. dissenting).
201. *Id.* at 2089.

commitment rules in a single statute or forbid it to write two separate statutes each covering somewhat different classes of committable individuals."[202] Justice Breyer consequently concluded that the boundaries of the general Kansas civil commitment statute and the Federal Constitution were "not congruent."[203]

Despite Breyer's partial agreement with the majority, he dissented because he believed that the implementation of the Act created a criminal law designed to inflict punishment, in violation of the constitutional prohibition against ex post facto laws.[204] He first recited several similarities between the Kansas law and traditional criminal punishments: both involve involuntary detention against one's will; both have basic objectives of incapacitation; and both involve a person who has "previously committed a criminal offense."[205] He then co-opted Justice Thomas's logic, asserting that "[i]f these obvious similarities cannot by themselves prove that Kansas'[s] 'civil commitment' statute is criminal, neither can the word 'civil' written into the statute . . . by itself prove the contrary."[206] To separate "civil" from "criminal," Justice Breyer examined "those features that would likely distinguish between a basically punitive and a basically nonpunitive purpose,"[207] including the treatment provided and the design of the statute to limit the amount of time in confinement.[208] Justice Breyer observed that, while the State conceded that Hendricks's condition was indeed treatable, the Act failed to provide minimally sufficient treatment opportunities.[209] In fact, the record supported the Kansas Supreme Court's conclusion, that "as of the time of Hendricks'[s] commitment, the State had not funded treatment, it had not entered into treatment contracts, and it had little, if any, qualified treatment staff."[210]

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202. *Id.*
203. *Id.*
204. *See id.* at 2088.
205. *Id.* at 2090-91.
206. *Id.* at 2091.
207. *Id.*
208. *See id.* at 2091-92.
209. *See id.* at 2097.
210. *Id.* at 2093.

II. A CRITIQUE OF THE CASE

> *[S]ometimes we make decisions we do not like. We make them because they are right . . . .*
>
> —Justice Lockett[211]

> *All of the loose ends presented in this discussion on the effect of altering the law can be pretty well tied together when it is realized that law is not pure science, that law loses its vital meaning if it is not correlated to the organic society in which it lives, that law is a present and prospective force, that law needs some stability of administration . . . .*
>
> —Justice Vinson[212]

It is perhaps all too easy to observe that Leroy Hendricks deserves to spend the rest of his life incapacitated and isolated from society because of his reprehensible crimes. The ease of this conclusion is contrasted by the difficulty of supporting it with a constitutional rationale. As the fractured analyses from the Kansas Supreme Court and the United States Supreme Court indicate, it might be an insuperable task to parse the two competing but intertwined rationales—prevention and punishment—that have very different constitutional consequences. A long line of precedent indicates that punishment is the one rationale that cannot be used to legitimize the Kansas Act, because then the Act would violate due process, double jeopardy, and ex post facto claims as a criminal punishment.

A critique of the case thus must focus on the Court's attempt to distill treatment from punishment, both as a general principle and as applied to Hendricks's detention. The inquiry also must embrace how the Court utilized precedent; the relationship between law and psychiatry when medical terms are given legal significance; and the impact of the case on other states, sexual predators in the criminal system, and mental health facilities.

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211. *In re* Care and Treatment of Leroy Hendricks, 912 P.2d 129, 138 (Kan. 1996) (Lockett, J., concurring in the court's decision striking down Kansas's involuntary civil commitment statute), *rev'd sub nom.* Kansas v. Hendricks, 117 S. Ct. 2072 (1997).

212. Warring v. Colpoys, 122 F.2d 642, 646 (D.C. Cir. 1941) (Judge Vinson later served as an associate justice on the United States Supreme Court).

A. The Court and the Criminal-Civil Dichotomy

The constitutionality of preventive detention laws often depends on whether the law is deemed a criminal measure designed to punish or a civil measure intended to treat, compensate, or prevent.[213] The distinction between the two is generally well-delineated.[214] Incarceration is clearly a criminal measure, and the preventive detention of a person with a severe mental illness who is dangerous to himself or others is clearly civil. With the advent of government regulations that pick up where criminal sanctions leave off, however, there are currently "[c]ountless examples [that] could be given in which a major question . . . is whether what is being done is punishment or something else."[215] Examples include laws prohibiting felons from holding union office,[216] laws suspending the driver's license of a person under the influence of intoxicating liquor,[217] and the special involuntary civil commitment in *Kansas v. Hendricks*.

In *Hendricks*, the Court examined the borders of this newly emerging criminal-civil fault line. Instead of maintaining the historical scheme, the Court effectively relocated the line between punishment and treatment. Unfortunately, the Court extended civil law into the territory of what formerly had been criminal law domain. The Court's methodology involved de-emphasizing the importance of real treatment opportunities, embracing judicial deference to legislative decision making, and selectively culling cases for supportive propositions.

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213. *See, e.g.*, Note, *supra* note 48.

214. Noted one commentator, "Government's capacity to punish is thought to be distinct from its efforts to treat illness, provide compensation, or administer regulatory programs." Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1356 n.170 (1991).

215. PACKER, *supra* note 40, at 20.

216. *See* De Veau v. Braisted, 363 U.S. 144, 160 (1960) (upholding the regulation as nonpunitive).

217. *See* Allen v. Attorney General, 80 F.3d 569, 577 (1st Cir. 1996) (upholding the regulation as within the State's police powers).

1. Civil Commitment in the Criminal Domain

It is more important to protect the rights of victims than the rights of criminals.

—Florida Senator Al Gutman, R-Miami[218]

When psychiatrist Dr. James D. Reardon testified before the Washington State Legislature as it considered enacting a sex offender commitment law, he was asked how violent sexual offenders should be labeled and where they should be detained. He answered, "Why not call them criminals and put them in prison?"[219] While the legislature did not adopt Dr. Reardon's suggestions, his forthright response accurately describes what Washington, Kansas, and other states with sexual offender commitment laws have adopted as a practical matter.

The detention of Leroy Hendricks is criminal in nature for several reasons, and not just because a psychiatrist like Dr. Reardon thought as much. The first and perhaps foremost reason is that the special detention of sexual "predators" within the context of the state laws appears to be based on a governmental intent to further punish and incapacitate sex offenders. This intent is derived from several sources, even though it is hidden by the wording of the law. Many of the sex offenders who will be committed, such as those with personality disorders or mental abnormalities, are not treatable and will not benefit from involuntary hospitalization, contrary to the Act's implication that successful treatment is possible.[220] Instead, these individuals essentially have behavioral problems, which are routinely dealt with in the criminal justice system, either through psychological services or behavioral incentives.[221]

The Kansas legislature's intent is also revealed by the fact that treatment is only afforded under the civil commitment scheme after the incarceration period has run its course,

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218. Robles, *supra* note 52, at 1B.

219. James D. Reardon, *Sexual Predators: Mental Illness or Abnormality? A Psychiatrist's Perspective*, 15 U. PUGET SOUND L. REV. 849, 851 (1992).

220. *See, e.g.*, GLEN GABBARD, PSYCHODYNAMIC PSYCHIATRY IN CLINICAL PRACTICE: THE DSM-IV, EDITION 527, 539 (1994); Richard Rogers & Ken Dion, *Rethinking the DSM-III-R Diagnosis of Antisocial Personality Disorder*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 21, 27 (1991).

221. *See* Winick, *supra* note 34, at 581.

indicating a less than wholehearted concern by the legislature for "healing" these "sick" individuals. As the American Psychiatric Association's *Task Force Report on Sexually Dangerous Offenders* noted, "The sexual predator statutes aim to achieve preventive detention of offenders who have completed their criminal sentences. The medical model of long-term civil commitment is used as a pretext for extended confinement that would otherwise be constitutionally impermissible."[222]

Further, the commitment period is not coextensive with treatment, since detention may persist long after efforts at treatment have failed. These punitive overtones are exacerbated by the failure of the law to attempt to monitor, oversee, and promote trial runs in society; instead, the frame of the law indicates that civil commitment occurs immediately and lasts indefinitely. The offender's status quo is thus changed from freedom to confinement, and while the law provides for release proceedings after the initial commitment, the offender's new address reflects the status of detainee—a disadvantageous posture.

Even arguments in favor of deeming the law "civil" actually support a "criminal" label. First, the Supreme Court noted that a lack of scienter in the law indicates its civil nature.[223] The fact that the law does not require a mental state, however, speaks to the legislature's effort to cloak the law in civil clothing, not to whether it was designed in fact to treat. One only has to look at the larger context of what the Kansas Sexually Violent Predator Act actually achieves to observe that it is not a "free-standing" civil law, but a law that has piggybacked on top of a criminal law. Second, the Supreme Court argued that because the law was based on uncontrollable behavior, it could not have been a criminal law designed to deter others.[224] Yet, the law is predicated on a person first having been charged with or convicted of a criminal offense, which itself includes requirements of both a mental state and a voluntary act. This voluntary act predicate appears to conflict with and undermine

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222. *Sexual Predator Statutes May Not Provide Panacea*, 11 CRIM. PRAC. REP. 415, 416 (1997) (quoting AMERICAN PSYCHIATRIC ASS'N, TASK FORCE REPORT ON SEXUALLY DANGEROUS OFFENDERS (forthcoming from the American Psychiatric Association)).

223. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2082 (1997).

224. *See id.*

the conclusion that pedophilia constitutes "uncontrollable behavior." Interestingly, it exposes "uncontrollable behavior" as a social construct and not an absolute reality.

The Court's own factors for distinguishing civil from criminal laws in *Kennedy v. Mendoza-Martinez,*[225] a case decided in 1963, further support the criminal nature of the Act. These factors include:

> whether the sanction has an affirmative restraint, how history has regarded it, whether it applies to behavior already a crime, the need for a finding of scienter, its relationship to the traditional aim of punishment, the presence of a non-punitive alternative purpose and whether it is excessive in relation to that purpose.[226]

An analysis of these factors support classifying the Kansas law as criminal. Hendricks was indeed confined; history long has viewed the conduct leading to his confinement as criminal subject to moral condemnation; his behavior was already a crime; scienter was already required for the underlying predicate offense, just like the crime of felony murder; the law's restrictions look like traditional punishment, meaning detention without significant efforts to rehabilitate; the statute is not designed to maximize or realistically pursue that purpose, although an alternative purpose of the law—namely treatment—exists; and even if the treatment goal is deemed legitimate, the potential length and nature of the confinement was certainly excessive when compared to a narrowly tailored program where treatment is the primary goal. Much like a suspect classification under equal protection analysis, this law deserved and demanded much closer scrutiny from the Justices, not just a cursory inspection of the civil-criminal demarcation.

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225. 372 U.S. 144 (1962).

226. *Hendricks*, 117 S. Ct. at 2098 (Breyer, J., dissenting) (citing *Mendoza-Martinez*, 372 U.S. at 144).

2. The Court's Analysis of Treatment

> *[Sexual Predator Laws are] not a bad thing in theory, but it's not logical to put someone in prison for five or ten years without treatment and then give them treatment. That's disingenuous.*
>
> —John Morin, psychologist[227]

Not only is the Court's conclusion about the civil nature of the Kansas law erroneous, but so is its analysis regarding treatment. The Court improperly minimized the importance of treatment as a general requirement for mental-illness-based civil detentions. The Court held that a law having some form of treatment obligation is still constitutional, even if treatment is not provided for in every case,[228] or it does not have treatment as its primary goal.[229] According to the Court in *Hendricks*, the crucial question is whether a law encompasses treatment, not whether it offers a realistic plan or makes treatment a priority.[230]

In approaching the question in this manner, the Court subtly elevated form over substance. It focused on whether the law provided for treatment, not on whether treatment was, in fact, received. Thus, the Court no longer had to examine the circumstances of a commitment to determine whether the law met the treatment minimum; it could now simply look at the face of the law.[231]

The shift in analysis also signified a modified rationale for the legitimacy of confinement. The Court subtly transformed the basis of civil detention statutes from treatment objectives to the prevention of dangerousness, with treatment permissibly becoming an incidental and secondary objective. Commitment based on antisocial personality disorder provides but one example. According to the DSM-IV, the required antisocial behavior must relate to a person's lifestyle, habits, or behavior patterns,[232] and can be culturally based.[233] This culturally based

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227. Robles, *supra* note 52, at 1B.

228. Hendricks did not receive any treatment.

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

230. *See id.* at 2084-85.

231. It was as if the Court decreed that looking at a menu would be sufficient to judge the quality of a restaurant.

232. *See* DSM-IV, *supra* note 26, at 645-46. There are 10 different behavioral patterns that qualify for this disorder and the individual must illustrate a pattern

behavior may be extremely difficult to treat in a conventional therapeutic setting and may be reduced simply to controlling dangerousness. This focus on dangerousness reflects a change from helping a person whose disease causes sexually reprehensible behavior, to denying freedom to a person whose behavior, perhaps culturally induced, must be "abnormal." The new focus also ignores the plain purposes of hospitalization, which are to treat and to heal.

This change in emphasis is especially apparent when sexual predator statutes are compared to emergency civil detentions. The traditional goals of an emergency civil incapacitation, from quarantines stopping the spread of disease to confinement preventing persons from harming themselves, revolve around the use of health care resources to benefit the treated individual and society at large.[234] Such emergency detentions are medically based and medically justified. Persons suffering from personality disorders, however, "rarely require hospitalization, at least not unless associated with another superimposed disorder."[235] Thus, the medical orientation of traditional civil detentions is noticeably lacking in *Hendricks*.

A look at pertinent precedent supports this critique of *Hendricks*. In *Allen v. Illinois*,[236] for example, the Court looked at treatment objectives as the distinguishing feature between civil and criminal laws.[237] Justice Breyer, in his dissent in *Hendricks*, acknowledged that *Allen* viewed treatment goals as "a kind of touchstone" in separating the civil from the criminal laws.[238] Even Justice Kennedy's concurrence warned about letting these laws slip away from the treatment function.[239] Thus, Justice Thomas misconstrued the point of the civil detention system when he said that, under appropriate circumstances, "incapacitation may be a legitimate end of the civil law."[240] Well-established precedent, from *Addington* to

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of four of the 10 since the age of 15, among other criteria. *See id.*

233. *See id.*

234. *See* John Q. La Fond, *An Examination of the Purposes of Involuntary Civil Commitment*, 30 BUFF. L. REV. 499, 501-06 (1981).

235. Winick, *supra* note 34, at 573 n.166.

236. 478 U.S. 364 (1986).

237. *See id.* at 370.

238. *Hendricks*, 117 S. Ct. at 2092 (Breyer, J., dissenting).

239. *See id.* at 2087 (Kennedy, J., concurring).

240. *Id.* at 2084.

Foucha, simply does not sanction incapacitation as the sole end of the civil law for indefinite commitments. Instead, the underlying rationale was always incapacitation in conjunction with treatment. It is morally inappropriate and economically ineffective to indefinitely deprive an untreatable person of his liberty through the civil law.[241]

Justice Thomas's attempt to compare the Kansas law to "persons afflicted with an untreatable, highly contagious disease"[242] is irrelevant at best and disingenuous at worst. Those individuals were confined in a different era—decades ago—and were quarantined only for so long as the disease was contagious.[243] Would individuals today who suffer from tuberculosis, AIDS, or any other communicable disease be permissibly subject to a civil commitment statute similar to Kansas's Act? Such a proposal would be clearly unconstitutional even if it could make it through a modern legislature. Yet, this kind of detention may be occurring with untreatable pedophiles under these laws. The data suggests that psychological treatment may be futile.[244] As one scientist wrote:

> It is possible that treatment, as generally understood, is too ambitious an aim for this group of people and better results could be expected by employing a management strategy that includes treatment as well as life-long vigilant supervision. This can only be achieved if psychiatric services, which are used in continuing care, get involved in the management of sex offenders.[245]

To be fair, the Kansas Act did contain treatment provisions. These provisions were derided by the Kansas Supreme Court, however, as "somewhat disingenuous,"[246] since the law only required "necessary" care and treatment[247]—that is, the care and

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241. *Cf.* Winick, *supra* note 34, at 581.

242. *Hendricks*, 117 S. Ct at 2084.

243. *See, e.g.*, Compagnie Francaise de Navigation à Vapeur v. Louisiana State Bd. of Health, 186 U.S. 380 (1902); Morgan's S.S. Co. v. Louisiana Bd. of Health, 118 U.S. 455 (1886).

244. *See* Adarsh Kaul, *Sex Offenders—Cure or Management?*, 33 MED. SCI. LAW 207, 208 (1993).

245. *Id.* at 207.

246. *In re* Care and Treatment of Leroy Hendricks, 912 P.2d 129, 136 (Kan. 1996), *rev'd sub nom.* Kansas v. Hendricks, 117 S. Ct. 2072 (1997).

247. *Hendricks*, 117 S. Ct. at 2093 (Breyer, J. dissenting) (quoting KAN. STAT.

treatment conforming to constitutional parameters.[248] As noted above, the State did not seek to treat Hendricks under the statute until just about the time the respondent was ready to conclude his prison sentence,[249] suggesting that treatment was only a veneer covering the true legislative intent—dressing up a criminal wolf in a civil sheep's clothing.

B. The New Rule Lacks Definitional Coherence

Even if, for argument's sake, the Court's definition of permissible special civil commitment is consistent with precedent and treatment requirements, it is otherwise deficient in several ways. First, the Court's "mental abnormality" standard lacks a sufficiently administrable definition and is unacceptably fuzzy, leading down a slippery slope. In essence, while Justice Thomas recognized that borrowed scientific rhetoric may have a separable meaning when used in the law, he failed to provide adequate contours to the legal meaning to create predictability and guidance. Thus, his conscription of science was dangerous and problematic. Second, resurrecting uncontrollable behavior—in other words, the "control" test—as a baseline standard for detention was a poor choice because it invites the psychiatric community to take over the design of "loss of control" and opens the door for states to detain other types of "uncontrollable" recidivist offenders. This control test has already failed in the past—why revive it? Third, the commitment of persons under the "mental abnormality" standard may propel considerations of genetic propensities as conditions for commitment instead of focusing on past conduct.

1. No Limiting Principles—Sliding Down the Slippery Slope of "Mental Abnormality" and "Personality Disorder"

A significant deficiency of *Hendricks* lies in its acceptance of the malleable standards of "mental abnormality" and "personality disorder." While the limiting principles of prior

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ANN. § 59-29a09 (1994)).

248. *See id.* at 2093.

249. *See id.*

cases were minimized by Justice Thomas, he threw the door wide open to creative interpretation of commitment laws by giving his approval to the standards of "mental abnormality" and "personality disorder."[250] Justice Thomas freely left the interpretations to the individual states, giving them great latitude in assigning the terms fixed meanings. In the DSM-IV, however, there is no limiting definition of "mental abnormality." In the general psychological literature, "abnormality" is simply defined as the deviation from the average population coupled with maladaptation.[251] Does this mean that everyone who acts outside this mythical mean of normality qualifies for the label of mentally abnormal? According to Dr. Robert Wettstein, Assistant Professor of Psychiatry at the University of Pittsburgh Medical School, a "'[m]ental abnormality' is much broader than any conceivable contemporary psychiatric diagnosis of mental disorder or mental illness. The definition is too . . . elastic . . . ."[252]

"Personality disorder" at least has more of a traditional medical orientation. The eleven personality disorders in the DSM-IV are placed in one of three types or clusters: (1) one in which people appear odd or eccentric; (2) one in which people appear dramatic, emotional, or erratic; and (3) one in which people appear anxious or fearful.[253] These disorders imply "rigid, maladaptive personality traits that result in significant functional impairment or subjective distress."[254] Further, these personality disorders have no organic source, are not treated through psychotropic medications, and look more like cultural phenomena than illnesses. In fact, some people with personality disorders called psychopaths are known for having:

> a stunning lack of conscience; their game is self-gratification at the other person's expense. . . .
>
> . . . .

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250. Is the term "abnormality" as precise and limited as the term "mental illness"? If no, and it is broader and more malleable, how should the term be defined? Can the law live with the psychological definition of abnormality? If not, are there any substitutes?

251. *See* LEE WILLERMAN & DAVID B. COHEN, PSYCHOPATHOLOGY 6 (1990).

252. Wettstein, *supra* note 24, at 602.

253. *See* DSM-IV, *supra* note 26, at 629-30.

254. JESS AMCHIN, PSYCHIATRIC DIAGNOSIS: A BIOPSYCHOSOCIAL APPROACH USING DSM-III-R 149 (1991).

> . . . Not surprisingly, many psychopaths are criminals, but many others remain out of prison, using their charm and chameleonlike abilities to cut a wide swath through society and leaving a wake of ruined lives behind them.
>
> Together, these pieces of the puzzle form an image of a self-centered, callous, and remorseless person profoundly lacking in empathy and the ability to form warm emotional relationships with others . . . .[255]

As several commentators have observed, individuals who have antisocial personality disorder "are viewed as unchangeable and therefore untreatable."[256]

The potential for inadministrable tests and a lack of guidance for the lower courts given this "non-definition" is great. As one commentator described it, "The Court's new standard of 'mental abnormality' or 'personality disorder' is too broad, vague, and manipulable to function meaningfully in the civil commitment context."[257] The standard raises interesting questions about how to determine normality, and because of the definition's pliability, invites political abuse.

This potential for abuse through a political agenda was addressed by Dr. James Reardon of the Washington State Psychiatric Association. Dr. Reardon testified before the Washington State Legislature that "[a] psychiatrist's definition of a 'mental disorder' includes the loss of contact with reality, confusion, loss of reason, or hallucinations."[258] Significantly, legislatures adopting such statutes were more interested in the behavior than in the illness, and ended up simply presuming that sexually abnormal behavior intoned a sexually abnormal mind.[259] A person's abnormal behavior, however, is not always caused by the person's mental illness, and a statute that does not reflect this fact inevitably sweeps too broadly.

The lack of predictability of the "mental abnormality" and "personality disorder" standards are further compounded by the uncertainty of the field of psychiatry. This uncertainty is

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255. ROBERT HARE, WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US 1-2 (1993).

256. Rogers & Dion, *supra* note 220, at 27.

257. *The Supreme Court, 1996 Term—Leading Cases*, 111 HARV. L. REV. 259, 267 (1997).

258. Reardon, *supra* note 219, at 851-52.

259. *See id.* at 852.

augmented by the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* ("DSM"), despite the manual's purpose of improving diagnostic consistency.[260] This problem of reliability is underscored by the lack of any major study supporting the use of the DSM by mental health clinicians.[261] For instance, while "personality disorder" is defined by the DSM-IV, it is culturally dependant and highly influenced by the environment and specific circumstances. Thus, the construct of a "personality disorder" can be bent and shaped by those who use it, giving rise to the specter of political agendas and capriciousness in its application. With the standard's cultural dependence, it is subject to constant reassessment of a kind that may be acceptable in psychiatry but unsuited for the law. Further, the myriad of subcultures in the United States, as well as the difficulty in identifying a dominant culture, contribute to undermining the predictability of defining "personality disorder" in practice.

2. Uncontrollable Behavior

The test adopted by Justice Thomas,[262] which requires a showing of uncontrollable dangerousness, mimics an older, effectively discarded test for insanity: the "control" test.[263] The control test of legal insanity[264] required an accused to have a mental illness and as a result of that illness, not be able to conform her conduct to the requirements of the law.[265] The test required that an accused be unable to control her behavior, and

260. *See* HERB KUTCHINS & STUART A. KIRK, MAKING US CRAZY DSM: THE PSYCHIATRIC BIBLE AND THE CREATION OF MENTAL DISORDERS 49-54 (1997).

261. *See id.* at 53.

262. Interestingly, Justice Thomas suggests he is simply perpetuating an existing test. "States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety." Kansas v. Hendricks, 117 S. Ct. 2072, 2079 (1997).

263. *See* ABRAHAM S. GOLDSTEIN, THE INSANITY DEFENSE 67-79 (1967); *see also* Parsons v. State, 2 So. 854, 866 (Ala. 1887). In *Parsons*, the court's standard included whether the defendant "lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed." *Id.*

264. *See Parsons*, 2 So. at 862.

265. *See id.* at 866-67.

not, as under the prevailing M'Naghten standard,[266] be unable to tell the difference between right and wrong or be unable to understand the nature of her conduct.[267]

Importantly, the control test never attained widespread acceptance and was viewed by the majority of jurisdictions as too malleable, leaving the insanity determination fully in the hands of psychiatrists and psychologists without any effective objective and predictive guidance.[268] Whether an accused was able to control behavior was a subjective and judgmental issue that often led to "dueling" experts who argued for a particular conclusion without objective criteria, factors, or considerations by which to measure and assess the testimony. Even Justice Thomas inadvertently recognized this analytical quicksand when he described the Kansas Act as requiring a showing of "'mental abnormality' or 'personality disorder' that makes it difficult, if not impossible, for the person to control his dangerous behavior,"[269] but failed to state the difference between "difficult to control" and "impossible to control." The results from the control test were unacceptable. As jurisdictions eventually recognized, the test was effectively void for vagueness—reasonable people necessarily had to guess as to the meaning of the rule and its application.[270] Consequently, the standard fell into desuetude. Even when limits were applied, the lack of clarity in the rule prevailed. The test created a marked difference between disorders where the offender simply failed to resist his impulses and the legal requirement of lacking the ability to control those impulses. For example, kleptomania has

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266. *See* M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843).

267. Thus, a person who has "an indescribable urge" for a Peter Paul Mounds candy bar and steals it, knowing that the theft is morally and legally wrong, may still be eligible to plead not guilty by reason of insanity under this standard.

268. *See* Brenda Barton, *When Murdering Hands Rock the Cradle: An Overview of America's Incoherent Treatment of Infanticidal Mothers*, 51 SMU L. REV. 591, 599 (1998) (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 320 n.95 (2d ed. 1986)); Ronald J. Rychlak & Joseph F. Rychlak, *Mental Health Experts on Trial: Free Will and Determinism in the Courtroom*, 100 W. VA. L. REV. 193, 225 (1997).

269. Kansas v. Hendricks, 117 S. Ct. 2072, 2080 (1997) (citing KAN. STAT. ANN. § 59-29a02(b) (1994)).

270. While the control test was never actually struck down as unconstitutional, it falls within the category of tests or laws that lack administrable standards and fail to provide clear notice or warning. *See generally* Houston v. Hill, 482 U.S. 451 (1987); Papachristou v. Jacksonville, 405 U.S. 156 (1972); Coates v. Cincinnati, 402 U.S. 611 (1971).

been defined as a "recurrent failure to resist impulses to steal items even though the items are not needed for personal use or for their monetary value,"[271] and pathological gambling as "a chronic and progressive failure to resist impulses to gamble."[272] Based on these definitions, kleptomaniacs and pathological gamblers would fall outside the requirements of the control test because these persons merely fail to resist, rather than lack an ability to resist, their impulses. One commentator noted that paraphilia[273] is similar, stating, "Paraphiliac behavior is seldom the result of spontaneous action. Instead, there is a series of behaviors or chain of events leading to the actual commission of the crime."[274]

This precedent and commentary should be instructive for Justice Thomas's resurrection of the test. In essence, there is no reason to believe that the control standard will fare any better when applied to sex predators than it has in the past. Courts and experts alike will be left to struggle with how to draw the line between the inability and ability to control behavior. For example, where would obsessive-compulsive behavior fall? Would obsessive gambling, shopping, or eating qualify? Justice Thomas leaves this line drawing for another day, and perhaps rightly so. Yet, Justice Thomas may not have anticipated the intensity of debate that will likely break out in the lower courts as a result of this standard.

A diversity of line drawing can be anticipated. Even with pedophiles, there is great debate as to whether their behavior is "uncontrollable." One leading commentator argues that pedophiles act in a controllable manner.[275] The same commentator also observes that a person's character or propensity "rarely furnishes the basis for a legal excuse."[276] Of

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271. DSM-IV, *supra* note 26, at 612.

272. DSM-III-R, *supra* note 118, at 324.

273. Paraphilia is defined in the DSM-IV as conduct having certain characteristics: "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons that occur over a period of at least 6 months." DSM-IV, *supra* note 26, at 522-23.

274. Gene Abel, *Paraphilias*, *in* 1 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1069, 1083 (Harold I. Kaplan & Benjamin J. Sadock eds., 5th ed. 1989).

275. *See* Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587 (1994).

276. *Id.* at 1602.

course, the difficulty of restraint may be perceived by the actor and others as if it were uncontrollable. But such is the case in many other contexts where everyday habits and propensities are extraordinarily difficult to overcome. For example, is cigarette addiction uncontrollable? Alcoholism? The likelihood of having a heart attack? Seeking a measuring device for what behavior is "uncontrollable" may be futile, indeed. One response may lie in determining whether the term "uncontrollable" is to be construed from a strictly legal perspective or with borrowed scientific rhetoric and analysis. The control test for insanity, for example, used both science and law, and in its vacillation only ended up being confusing and difficult to apply in practice.[277] In light of such experience, there has not yet been any predictable interpretation of uncontrollable behavior.

3. Who's Next?

The lack of an effective limiting principle provided by the Court appears to invite states to enact wide-ranging detention laws. While on its face this invitation may promote law and order, the new generation of laws may spill over to other groups of specially dangerous individuals—from spouse abusers, to those convicted of driving while intoxicated with narcotics or alcohol, to drug abusers, to any person with multiple convictions. By virtue of their multiple convictions, an individual might evidence an inability to conform his conduct with the law, and undoubtedly could be found to suffer from some sort of mental deficiency or abnormality that has caused him habitually to create danger to himself or others. Consequently, the individual will have met the dual-commitment requirements of a mental disorder and a prediction of future dangerousness. The detention of a spouse abuser who has engaged in repetitive spouse abuse—a part of the definition of battered women's syndrome—also would likely be constitutional. Such an abuser probably would be considered to have a personality disorder that caused him or her to repeatedly engage in violent conduct against a spouse, girlfriend, or boyfriend that would likely continue in the future.

277. *See* GOLDSTEIN, *supra* note 263, at 70-79.

In short, the net cast by a state's civil commitment statute may be wide enough to ensnare all recidivists. These laws would take the "three strikes and you're out" criminal laws one step further—to the point where, for an individual who has committed one prior crime, even the allegation of a second one could send the person to a lifetime of involuntary detention, albeit one labeled "civil."

4. A Genetic Propensity Test?

Of particular concern will be the possible use of genetics to predict the prospect of future dangerousness. Discoveries suggest that genes "increase the risk of particular mental illnesses."[278] In light of the fact that some of these genetic links are "pretty common,"[279] increased use of genetics may mean that people will be labeled as "mentally abnormal" based on their genetic propensities, coupled with their conduct. Even if genetic propensities are not the dispositive factors in predicting dangerousness, they still may be used to help distinguish the mentally abnormal from the mentally normal. In fact, recent studies have shown that mental illness really falls along a continuum from extremely mentally healthy to extremely mentally ill.[280] Stanford University neuroscientist Robert Sapolsky observed, "The idea of a continuum represents a major cognitive breakthrough for genetics. It suggests that a middling genetic load [of mental-illness genes] gives you a personality disorder, a lighter one gives you a personality quirk and a still lighter one gives you mainstream America."[281]

If this assessment by Dr. Sapolsky is true, genetic causality may help to explain "eccentric behavior" as a mental illness as well as to predict dangerousness. In fact, two psychiatrists recently wrote that many such eccentric behaviors actually are mild forms of mental illness.[282] If this type of assessment becomes widespread, geneticists could become standard expert witnesses at sex offender civil commitment hearings. Thus, if a

278. Sharon Begley, *Is Everybody Crazy?*, NEWSWEEK, Jan. 26, 1998, at 50, 52.
279. *Id.* at 52.
280. *See id.* at 52-53.
281. *Id.* at 53.
282. *See id.* at 52 (citing JOHN RATEY & CATHERINE JOHNSON, SHADOW SYNDROMES (1997)).

person has some but not all of the genes causing a particular mental illness, that person will have a "shadow syndrome."[283] If this conception of mental illness and sanity is true, then the "mental abnormality" requirement offers little, if any, restraint on government classification and commitment.

C. *The Court's Interpretation of Precedent*

The Hendricks decision can be viewed as a logical, if extreme, development in a 30-year-long process: the progressive triumph of the "dangerousness" standard over traditional grounds for civil commitment.[284]

The doctrine of *stare decisis* teaches that courts are bound by precedent unless there is sufficient justification to overrule existing law. The elasticity of this doctrine was tested in *Hendricks*. Prior to *Hendricks*, the Supreme Court approached civil commitment or detention cases piecemeal, handing out their jurisprudence one bite at a time. This was partly due to the fact that the line between criminal punishments and civil preventions was exceedingly difficult to draw, particularly as more and more states created comprehensive preventive regulatory schemes targeted at particular groups of individuals. Yet in several of the cases, such as *Addington v. Texas*[285] and *Foucha v. Louisiana*,[286] the Court appeared to erect a constitutional minimum for civil commitment—namely, continuing findings of dangerousness and mental illness. The Court in *Hendricks*, however, took full advantage of the elasticity of *stare decisis* and appeared to deftly sidestep—and even sweep aside—the precedent calling for a showing of mental illness before the State could involuntarily civilly commit persons. Those prior cases, including *Addington* and *Foucha*, suggested that the "mental illness" standard for indefinite commitment was nonnegotiable. In *Addington*, for example, the Court indicated that an "abnormality" standard would effectively provide no standard at all:

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283. *See id.* at 52.
284. Isaac, *supra* note 1, at A14.
285. 441 U.S. 418 (1979).
286. 504 U.S. 71 (1992).

> At one time or another, every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement.[287]

Nowhere in the cases had the Court recognized the more malleable and watered-down requirement of a mental abnormality as a sufficient basis for indefinite civil commitment. To overcome this omission, Justice Thomas used the argument that the Court never said it would always disapprove of laws utilizing alternative standards.[288] But then, the Court had no reason to ever make such a broad-reaching announcement. In fact, the Court usually brushes only so broadly as the individual case before it requires. By mixing in powerful judicial deference arguments with the tenuous point that the Court had never said never, Justice Thomas was able to retreat from the strong and assertive threshold levels of proof for civil commitment set in prior cases such as *Addington* and *Foucha*.

The Court also sanctioned the use of a "personality disorder" minimum as well as "mental abnormality"—so long as an "inability to control behavior" was also required.[289] This too was a far-reaching change from laws previously sanctioned by the Court for involuntary indefinite commitment—a change that flies in the face of the Court's holding in *Foucha*, which refused to adopt a "personality disorder" minimum.[290] The Court's reading of *Foucha* misinterpreted why the Court in that case refused to compromise on the "mental illness" test, a reason which rested miles away from the alleged reliance on a "talismanic" medical definition. The real meaning of the case was its refusal to blur the lines between psychiatric distinctions. As one commentator wrote, "People with problems that are social or behavioral in nature should not be lumped together with those whose problems are organic. Involuntary hospitalization may be therapeutically justified for the latter but will rarely be for the former unless they are willing and cooperative."[291] Thus, Justice Thomas

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287. *Addington*, 441 U.S. at 426-27.
288. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2081 (1997).
289. *See id.*
290. *See Foucha*, 504 U.S. at 82-83, 85.
291. Winick, *supra* note 34, at 581.

misappropriated Justice O'Connor's concurrence in *Foucha*, while at the same time ignoring the strong stand taken by the four other Justices with whom Justice O'Connor concurred. These Justices rejected the permissibility of singular judicial treatment through "special" civil commitment statutes, looking instead at general civil commitment statutes to set the constitutional parameters.[292]

Ironically, at the same time the Court trumpeted the theme of judicial deference in the civil commitment area, it simultaneously declared that states must still meet a broad-based constitutional minimum for special involuntary commitment: mental abnormality plus uncontrollable conduct posing a danger to others. In so doing, the Court went further than necessary. It now created a new sweeping framework of analysis—laws written to incapacitate the uncontrollably dangerous will be upheld so long as they: (1) are labeled and "intended" as civil; (2) affect persons exhibiting a mental abnormality or personality disorder; who (3) exhibit uncontrollable behavior posing a danger to others.

1. The Mandate of *Casey* in Applying *Stare Decisis*

The Court's prior "mental illness" standard was workable and should have been upheld. This proposition is consistent with the Court's primer on overruling prior standards articulated in *Planned Parenthood v. Casey*,[293] where the Court refused to overrule *Roe v. Wade*.[294] In *Casey*, Justice O'Connor, again the swing vote, observed that "a decision to overrule should rest on some special reason over and above the belief that a constitutional case was wrongly decided."[295] Permissible reasons include weakened precedent or a shift in factual assumptions upon which a case is based. Otherwise, overruling prior law exacts a "terrible price."[296] In light of this background, the *Casey* Court considered whether to overrule *Roe v. Wade*[297] and found that the seminal

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292. *See Foucha*, 504 U.S. at 75-80.
293. 505 U.S. 833 (1992).
294. 410 U.S. 113 (1973).
295. *Casey*, 505 U.S. at 864.
296. *Id.*
297. To overrule *Roe*, noted Justice O'Connor, "would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the

decision's framework for allowing the right to choose abortion had not been "unworkable."[298]

O'Connor's rationale also applies to the situation in *Hendricks*, where the Court should have followed the precedent of *Foucha* and *Addington* in maintaining the rule of law—precedent that was workable and still supportable by factual assumptions. While these cases were not expressly overruled, the Court effectively chose to interpret these cases in a way that required some sort of explanation. But, no such explanation was given.

2. Overtly Modifying Precedent

If, for argument's sake, the Court had wanted to overtly revise the "mental illness" standard in *Hendricks*, it probably could have constructed a justification for doing so. The psychiatric field upon which the legal standard was based is arguably in a state of flux[299] and subject to charges of inadministrability. Violence-based pre-trial detentions were already justified in *Schall v. Martin*[300] and *United States v. Salerno*.[301] The "mental illness" precedent also did not reflect the perhaps unique stature of sexual offenders in this country in the 1990s. Further, the expanding question of mental disorders could have been used to support the permissibility of "special" civil commitment statutes.

But the *Hendricks* court advanced no such rationales. Instead of directly confronting the Court's decision to modify existing precedent, Justice Thomas chose to offer the circumstantial rationale that these cases were distinguishable. This indirect evaluation undermined the principle of *stare decisis*. It would have been preferable for the Court to simply state that, in light of changing times, the standard for detention may be relaxed when very dangerous people are detained for as short a period of time as necessary, coupled with procedural safeguards.

Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law." *Id.* at 865.

298. *Id.* at 855 (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).

299. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 81-82 (1985).

300. 467 U.S. 253 (1984).

301. 481 U.S. 739 (1987).

Perhaps no such confrontation occurred because strong counterarguments exist against taking this direct approach. For example, the difficulty of relying on *Schall* and *Salerno* arises from the fact that they dealt with detentions for limited time periods as part of the criminal justice process, not independent, potentially lifelong "civil" restrictions. Further, the "changing times" rationale does not address the extent to which a lack of treatment occurred under the Kansas law.[302]

D. Principles of Statutory Construction: Legislative Intent and Judicial Deference

A significant aspect of the Court's opinion in *Hendricks* was the way it conceptualized its role in reviewing the legislative intent. While the Court's deference to the Kansas Legislature and its intent struck a distinctive judicial chord, the Court failed to explain adequately why the Kansas Supreme Court's interpretation of that intent was improper or why substantive due process did not demand a closer review. According to the Kansas Supreme Court, this statute was effectively a continuation of the incapacitation of a criminal inmate, only reclassified as civil incapacitation.[303] The court viewed the Act as punitive, as evidenced in part by the fact that "treatment is not a significant objective of the Act."[304] This is a far cry from Justice Thomas's approach, which in effect dismissed the Kansas Court's judgment. Although the United States Supreme Court is supposed to interpret legislative intent de novo, it is unclear why the Kansas Supreme Court's interpretation of the Act was so quickly dismissed. If anything, the conclusion reached by the Kansas Supreme Court should have served as a cautionary flag to the United State Supreme Court, requiring it to consider carefully what was in fact designed by the legislature, not what the Court wanted the legislature to design.

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302. Significantly, the "special" nature of sex predators, coupled with procedural safeguards such as periodic review and release upon abatement of violent propensities, may serve to counter the indefiniteness problems.

303. *See In re* Care and Treatment of Hendricks, 912 P.2d 129, 136 (Kan. 1996), *rev'd sub nom.* Kansas v. Hendricks, 117 S. Ct. 2072 (1997).

304. *Hendricks*, 117 S. Ct. at 2092 (Breyer, J., dissenting) (discussing opinion of the Kansas Supreme Court).

Substantive due process enables courts to "ratchet up" the level of scrutiny applied to a challenged regulation and protect individual freedom from governmental restraint. This "ratcheting up" failed to occur in this case. If the Court had applied strict scrutiny to the Kansas Act, it likely would not have been so quick to embrace the interpretation of the Act given by Justice Thomas, and the legislature's intent would have been seen as much darker and less pristine.

E. The Impact of the Case

1. Adopting Statutes in Other Jurisdictions

After *Hendricks*, the door is wide open for other jurisdictions to "jump on the bandwagon" and adopt similar statutes.[305] Moreover, because of the likely public support for these laws, states may be encouraged to blindly adopt more expansive regulations than the Kansas Act and push the limits of *Hendricks*. In Florida, for example, the legislature proposed and adopted its own sexual predator law.[306] This law was offered in response to a violent molestation, rape, and murder of a young boy named Jimmy Ryce.[307] The legislation permits the commitment of violent sexual predators to a psychiatric facility "for control, care and treatment."[308] Further, predators are not eligible for release unless their "mental abnormality or personality disorder" is ameliorated, permitting them to be "safe . . . at large."[309] While this law generally tracks the Kansas law, it is unclear what its ramifications will be or how far it will be expanded to respond to public animosity toward recidivist sex offenders.

In Colorado, the legislature enacted its Sex Offenders Act in 1968.[310] The statute provides that in lieu of sentencing a

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305. One commentator called these statutes "part of a trend sweeping the nation." Isaac, *supra* note 1, at A14.

306. *See id.*

307. *See id.*

308. Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act, ch. 98-64, § 9, 1998 Fla. Sess. Law Serv. 269, 273 (West) (to be codified in FLA. STAT. § 916.37).

309. *Id.*

310. The Colorado act, intended to restrain dangerous persons, related to the sentencing for convicted sex offenders. Colorado revised the definition of sex

convicted sex offender, a judge may alternatively mandate an indefinite civil confinement, with a potential duration of the offender's life.[311] In order to do so, the court must find that the sex offender poses a "threat of bodily harm to members of the public or is an habitual offender and mentally ill."[312] After *Hendricks*, however, Colorado may well be tempted to expand the reach of its law by discarding the bodily injury standard in favor of the control test, and dropping the "mental illness" prerequisite for "mental abnormality" or "personality disorder."

2. Creating a New Subgroup: The Uncontrollably Dangerous

Even if the "mental abnormality" requirement could be sufficiently cabined to avoid the slippery slope, the pragmatic implications of *Hendricks* argue against the Court's holding. The case may have laid the jurisprudential foundation for a new subgroup of persons, the uncontrollably dangerous, who can be detained indefinitely. The political implications of such a conception are powerful. The potential for creating such a subclass conjures up the specter of using civil commitment laws to weed out "undesirables," much as Russia did with political prisoners during the Stalin era. There, political dissidents were sent to "mental hospitals" for indefinite confinement.[313] As one political prisoner, Nizametdin Akhmeton, noted in a letter to a friend, "I am in a very bad way my friend. I fear that you will read my letter like a letter from a madhouse . . . . Of course, I am not ill. Yet, I am in an institution which has all the means of *making* me ill."[314]

Given the wide range of people eligible for commitment under the "uncontrollably dangerous" standard, political discretion may operate here as well, albeit on a smaller, even individual scale. The stakes are high if the creation of civil

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offenders in 1975 and it now includes rape, sexual assault, and incest, among other crimes. *See* Colorado Sex Offenders Act of 1968, COLO. REV. STAT. §§ 16-13-201 to -216 (1998).

311. *See* COLO. REV. STAT. § 16-13-203 (1998).

312. Specht v. Patterson, 386 U.S. 605, 607 (1967).

313. *See* George Alexander, *International Human Rights Protection Against Political Abuses*, 37 SANTA CLARA L. REV. 387, 390 (1997).

314. *Id.* at 390 n.13.

commitment laws to restrain the uncontrollably dangerous occurs. For example, from 1990 to the beginning of March 1997, the State of Washington released only two persons under its sexual offender commitment law.[315] The reluctance to let go of a person identified as a dangerous sex offender reflects this entrenched thinking. One of the sponsors of Florida's proposed detention law, for example, stated that he is not sure sexual predators can be cured and thinks that monitoring offenders is very important.[316] A mental health counselor who works with 300 sex offenders in Tampa warned that those who do not need treatment may still be trapped by the law's net and that the law could easily be applied to all sex offenders, since "[y]ou could say anyone who has committed a sex offense could be in danger of committing another one."[317]

F. The Cost of Commitment

1. Cost of Commitment vs. Cost of Jail

What so often is lost in the fervor to detain sexual predators through civil commitment law is the increased cost of operating in a civil mental health context as compared to a penal one. Simply put, the available data indicates that the cost of civil commitment will be much higher to a state than the equivalent cost of imprisonment and treatment. According to the Assistant Attorney General in charge of the State's civil commitment program, Washington pays $68,000 per year just for the housing and treatment of one committed person.[318] This expense, which excludes the legal costs of the commitment program,[319] is more than the expense of incarcerating an inmate for one year.[320]

The treatment program costs also will be high. Because of the difficulty in treating sex offenders, the programs will be

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315. *See* Isaac, *supra* note 1, at A14.

316. *See* Samolinski, *supra* note 16, at 1 (statement of Senator Gutman, a sponsor of the Ryce Act).

317. *Id.* (quoting mental health counselor Leo Cotter).

318. *See* Robles, *supra* note 52, at 1B (statement of Sarah Sappington, Esq.).

319. *See id.*

320. *See* CRIME STATE RANKINGS 122 (Kathleen O'Leary Morgan et al. eds., 5th ed. 1998) (listing the average cost of incarceration in local Washington jails in 1993 as $15,331 per inmate based on data from the United States Department of Justice, Bureau of Justice Statistics).

"enormously expensive" and hard to implement.[321] Florida's experience is illustrative. One Florida state agency predicted it would cost the State $100,000 per year for the detention of a single sex offender.[322] This amount is equivalent to the cost of placement in the state psychiatric hospitals,[323] but much greater than the cost of incarceration.[324] With 600 predicted sex offenders subject to a preventive detention statute, Florida would be socked with a bill of about $60 million per year. That same state agency estimated that expenses under such a law in Florida by the year 2000 would climb to $156 million per year.[325] Not only is the cost per person considerable, but jurisdictions that have adopted similar laws are now finding that many more people are being committed under the laws than expected, raising additional resource questions. In Wisconsin, the Attorney General estimated in 1994 that under its sexual predator law, there would be seven cases per year.[326] Since then, there have been in excess of 100 people committed, with almost 100 more cases waiting for disposition.[327] Given that the corresponding criminal detention costs are significantly lower, the data suggests that feasible alternatives to such laws, such as treatment while in prison, are worth considering.

Another hidden cost of such laws is the expense of legal challenges that are likely—or almost certain—to arise as a result of civil commitment. In particular, if state treatment programs continue to be lacking or nonexistent, a number of suits may be filed to force the states to provide "adequate" treatment.[328] These lawsuits will be particularly nettlesome to states trying to design treatment programs when there may be none that work.

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321. Isaac, *supra* note 1, at A14.

322. *See* Robles, *supra* note 52, at 1B (statement of Brent Taylor, attorney for the Department of Children and Families).

323. *See id.*

324. *See* CRIME STATE RANKINGS, *supra* note 320 (listing the average cost of incarceration in local Florida jails in 1993 as $17,530 per inmate based on data from the United States Department of Justice, Bureau of Justice Statistics).

325. *See* Samolinski, *supra* note 16, at 1.

326. *See* Isaac, *supra* note 1, at A14.

327. *See id.*

328. One commentator predicted a "wave of lawsuits from the committed criminals charging inadequate treatment of their 'mental abnormality.'" Isaac, *supra* note 1, at A14.

2. Squeezing Out the Deserving, Innocent Mentally Ill

One large expense of using the mental health system to incapacitate sex offenders involves opportunity costs. For every sexual offender housed in a psychiatric institution, there is conceivably one less bed to treat an "innocent" mentally ill person—meaning a person who has not committed a crime but who is in need of treatment. As one commentator noted, "The sexual predator statutes only impair state mental institutions' ability to serve the authentically mentally ill."[329] For example, in California there are 4,000 state hospital beds, over half of which are occupied by the criminally insane.[330] Under the State's sexually violent predator law, 178 felons have been transferred to one of the state psychiatric facilities.[331] Due to these circumstances, California Superior Court Judge Harold Shabo noted, "You are diverting very scarce mental health resources to what is basically a criminal population."[332]

California's experience undoubtedly typifies the consequences for other states as well. Since treatment of the mentally ill has not been a top legislative priority in many states, new sexually violent predator laws will have further dire consequences for those who truly need and would benefit from treatment in state psychiatric institutions.

A more cost-effective approach is to incarcerate individuals such as Leon Hendricks and provide them with psychiatric treatment opportunities in prison, if warranted. Prison is cheaper and does not waste the valuable psychological treatment resources of state hospitals.

3. Statutory Incentives for Plea Bargaining

In addition to the economic burdens that commitment statutes may produce, there are also costs to the integrity of the criminal justice system. If violent sexual predator commitment laws become widespread, they may serve as an incentive for

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329. *Id.*
330. *See id.*
331. *See id.*
332. *Id.*

prosecutors to pursue mediocre plea bargains with accuseds, knowing that the civil commitment laws should nab the offenders after their prison sentences end. The prosecutor already has an incentive to avoid trial since many of these sexual offense cases are difficult to prove. If there is a murder, for example, the physical evidence often does not yield enough clues for a prosecution. The well-publicized JonBenet Ramsey murder case, in which police have failed to charge anyone with the murder of a child found dead in her parents' Boulder, Colorado home, is illustrative.[333]

In cases where there was sexual assault but not murder, it is often the word of the defendant against the word of the complainant child. There may be little, if any, additional physical evidence. The child may not have come forward immediately, and may have at first refused to divulge what had happened due to fear and embarrassment. Thus, prosecutors may be hesitant to go to trial and risk an acquittal—and the complete release—of a sex offender. Instead, a plea bargain may be preferable because the succeeding civil laws would act as a "safety net" to capture the defendant once released from prison. Plea bargains are costly, however, both in terms of wasted judicial resources, since there are two planned proceedings, and because justice may not be done through the resulting criminal-civil bifurcation.

III. EXERCISING CAUTION AT THE INTERSECTION OF LAW AND PSYCHIATRY: SCIENTIFIC TERMS WITH LEGAL SIGNIFICANCE

When the DSM-IV categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood.[334]

[U]ltimately, it might mean that we're all a little bit crazy.
—Dr. Dean Hamer, behavioral geneticist[335]

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333. *See* Daniel Glick et al., *The Door the Cops Never Opened*, NEWSWEEK, July 13, 1998, at 32.

334. DSM-IV, *supra* note 26, at xxiii.

335. Begley, *supra* note 278, at 52.

Kansas v. Hendricks is instructive not only in the context of sexual offender laws, but also in the way it traverses the often delicate relationship between law and science. By brushing aside any requirement of identity, or even similarity between legal and scientific understandings of terminology, the Court in *Hendricks* legitimized the co-option of scientific terms without their standing scientific meaning.

This may have been a wise move. It is perhaps understandable that Justice Thomas would warn that "the term 'mental illness' is devoid of any talismanic significance,"[336] given his belief in the separability of scientific and legal terms, and that he would refrain from resting the minimum constitutional requirements of due process on psychiatric interpretation.[337] This perspective is attributable to the fact that the psychiatric classification of mental illness has been beset for a long time by validity[338] and reliability questions.

A. The History of Mental Illness and the DSM

The history of mental illness in this country as it relates to the DSM illuminates these validity and reliability issues. In the mid-1800s, the federal government recognized only one mental illness: insanity.[339] By 1952, the original DSM listed sixty mental illnesses.[340] Twenty years ago the number further ballooned to 145 mental disorders.[341] The DSM-IV now includes more than 400 recognized mental disorders.[342] These disorders notably include: dysthymic disorder, generalized anxiety disorder, nicotine dependence, paranoid personality disorder, hypoactive sexual desire disorder, obsessive-compulsive personality, and alcohol abuse.[343] The trend in increased recognition of new

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336. Kansas v. Hendricks, 117 S. Ct. 2072, 2080 (1997).

337. Justice Thomas's mistake was in failing to clarify the separate legal meaning of the adopted scientific terminology.

338. Two commentators defined validity as follows: "If mental disorder is a construct, an abstract idea held together by agreements, the construct's *validity* refers to the extent to which those agreements make sense." KUTCHINS & KIRK, *supra* note 260, at 21.

339. *See* DSM-IV, *supra* note 26, at xvii.

340. *See* Begley, *supra* note 278, at 52.

341. *See id.* at 52.

342. *See* DSM-IV, *supra* note 25 (listing 410 mental illnesses); *see also* Begley, *supra* note 278, at 52.

343. *See* DSM-IV, *supra* note 26.

mental disorders may be culturally generated and not simply due to empirical discoveries. As one commentator noted:

> If we consult a physician or other health care provider, we run into a phenomenon typical of our medical culture: there is often a difference between the way we feel and the label that gets attached to us--our "diagnosis." Modern scientific medicine generalizes individual people's feelings and fits them into ready-made diagnostic categories.[344]

The treatment of "neuroses" by the DSM is also illuminating. In the second edition of the DSM, a separate category for "neurosis" existed.[345] These neuroses included sleeping, anxiety, and personality disorders. In 1980, the category was abandoned in the DSM-III because the authors believed "there is no consensus in our field as to how to define 'neurosis.'"[346] The authors expressed their great concern that the categories were merely descriptive and did not comprise actual illnesses with an etiology.[347] Some of the diagnoses were assimilated into other categories and some dropped completely.[348]

Additional proposed disorders may lead to the further dilution of the mental disorder category. For instance, some psychologists are now advocating "road rage" as a certifiable mental illness, and others suggest that the DSM should include jury-duty disorder, a psychiatric disease caused by stressful jury duty.[349] Even the DSM-IV's definition of "mental disorder," which has not changed considerably from its recent predecessors, has struggled to provide predictable concrete standards:

> each of the mental disorders is conceptualized as a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e.,

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344. Ruth Hubbard, *Predictive Genetics and the Construction of the Healthy Ill*, 27 SUFFOLK U. L. REV. 1209, 1210 (1993).

345. *See* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 9 (3d ed. 1980).

346. *Id.*

347. *See id.* at 7.

348. *See id.* at 10. Some neuroses were added to the anxiety, somatoform, dissociative, or personality disorders. *See id.*

349. *See* Joe Sharkey, *You're Not Bad, You're Sick. It's in the Book*, N.Y. TIMES, Sept. 28, 1997, § 4 (Week in Review), at 1.

> impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom. In addition, this syndrome or pattern must not be merely an expectable and culturally sanctioned response to a particular event, for example, the death of a loved one. Whatever its original cause, it must currently be considered a manifestation of a behavioral, psychological, or biological dysfunction in the individual. Neither deviant behavior (e.g., political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfunction in the individual, as described above.[350]

The vagueness of the terms creates uncertainty. The uncertainty begins at the decision on whether to include a disorder in the DSM, and if so, in what form. These decisions are not empirical, but rather are made by a governing body subject to political pressures. Further, the adopted categories are neither empirically nor mathematically defined, leaving them subject to interpretation. The uncertainty created by the vagueness of the terms is problematic. Antisocial personality disorder provides but one example: why is it a disorder on the magnitude of other mental disorders, when it could be argued that such behavior is simply a social problem independent of mental dysfunction? The antisocial behavior required also must relate to a person's lifestyle, habits, or behavior patterns;[351] thus, this requirement is culturally based, making the disorder's definition highly malleable and subjective. Further, the DSM-IV modified the DSM-III-R definition of mental disorder by declaring that an expectable "culturally sanctioned" response will not qualify as a mental disorder.[352] What constitutes such a response, however, is empirically uncertain and otherwise unclear, and the DSM-IV offers no further explanation.

Even within the psychiatric profession, there is considerable disagreement about what should be included in the DSM. Perhaps most importantly, there is no agreed-upon definition of

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350. DSM-IV, *supra* note 26, at xxi-xxii.

351. *See id.* at 645-46. There are 10 different behavioral patterns that qualify for this disorder and the individual must illustrate a pattern of four of the 10 since the age of 15, among other criteria. *See id.*

352. *Compare id.* at xxi-xxii, *with* DSM-III-R, *supra* note 118, at xxii (note the addition of the words "culturally sanctioned" in DSM-IV).

"mental abnormality." Rather than providing a unifying coherence to mental illness, the constant shifting and expanding of the DSM undermines confidence in its reliability. The American Psychiatric Association is similarly vague with other terms anchoring mental illness definitions, including "expectability," "dysfunction," "impairment in the individual," and "causation."[353]

Given the uncertainty in what qualifies as a mental illness for psychiatrists or psychologists, the Supreme Court's skepticism about psychiatric definitions is understandable.[354] Although there must be considerable research showing a set of pathological symptoms in a large number of people before the DSM recognizes an illness,[355] critics of DSM classifications have not been allayed. Nor have critics been satisfied by the fact that mental disorders are determined independent of malleable social settings.[356] Nor is it entirely helpful that a mental disorder requires more than mere dysfunction, but dysfunction plus some other harmful effect to the person; or that a DSM definition categorizes illnesses based on symptomology, thereby avoiding a morass of causation issues.[357] Instead, critics fear that the DSM lacks the objective and testable review processes often associated with "hard" science. Even the Supreme Court has alluded to the fast-moving *terra firma* of psychiatry, observing that in proving dangerousness and mental illness, there appears to be a "lack of certainty and . . . fallibility of psychiatric diagnosis."[358]

The same problematic uncertainty attaches to the specific area of pedophilia and the likelihood of continuing dangerousness of this group as a whole. As psychologist Richard I. Lanyon noted, "We have concluded that the concept of a continuing emotional propensity for sexual aberrant acts has no supportable scientific referent. However, it can be viewed as representing a

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353. *See generally* DSM-IV, *supra* note 26.

354. *See* KUTCHINS & KIRK, *supra* note 260, at 30.

355. The standard for inclusion is somewhat analogous to that of habits under Federal Rule of Evidence 406.

356. Furthermore, classification of a set of symptoms as a mental disorder has far-ranging consequences. A psychiatric label may allow a person's psychological care to be paid for by employers or insurance companies, and may serve as the basis for an insanity defense, or provide the impetus for civil commitment. *See* DSM-IV, *supra* note 26, at xxi, xxiii.

357. *See* KUTCHINS & KIRK, *supra* note 260, at 31-32.

358. Addington v. Texas, 441 U.S. 418, 429 (1979).

reasonable consensus of various conceptually based clinical views."[359]

Whether one agrees with Lanyon's assessment or not, the assertion serves to highlight the judgmental conjecture that flies around the subject of sexually aberrant behavior. As Lanyon concedes, "The absence of definitive psychological concepts related to continuing emotional propensity makes the assessment task [of pedophilia] a difficult one, and the rather vague legal criteria that have been offered are of little assistance."[360]

Significantly, removing the anchor of psychiatry in determining legal meaning all too often leaves no viable alternative meaning.[361] While courts have long assigned different meanings to overlapping terminology, Justice Thomas omitted a very important instruction in *Hendricks*—guidance for the creation of workable legal definitions using scientific terminology.

This destabilization could have been avoided in *Hendricks* had the Court done more than merely declare judicial independence from scientific underpinnings. The Court could have spent some time in explaining and clarifying the parameters of constitutionally permissible legislation and either used science for its accepted meaning or made clear how the independent legal definition would operate. Further, if the Court allows legal definitions to deviate from the accepted medical meaning, it certainly cannot turn, as it did in *Hendricks,* to health care providers—psychiatrists and psychologists—to assist with the task of providing legal terms with new meaning. To do so circuitously returns the definitions to their medical underpinnings.

B. Jurisdictional Disputes—Who Labels Mental Disorders and Illnesses?

Hendricks squarely raises, but does not resolve, the issue of "professional jurisdiction"[362]—what role, if any, should mental

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359. Lanyon, *supra* note 23, at 63.

360. *Id.* at 64.

361. Several questions are raised. Does the label tell us how to think about a situation? Are mental illnesses a product of the particular historical context? What is mental abnormality?

362. Two commentators argue that "DSM is a claim for professional jurisdiction by the American Psychiatric Association. The broadness of this claim provides

health experts play in determining who should be civilly confined?[363] It may be difficult to understand how psychiatry can be excluded from the decision-making process in an area in which psychiatric input is often useful, if not dispositive. Yet jurisdictional disputes are about "turf" as much as about logic. Even the DSM-IV addresses this question, stating that "[t]he clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments."[364] The statement not only reflects differences in "jurisdiction," but also reveals the considerable incongruity in the objectives of law and science.

Two basic objectives of the law are to provide notice of minimum societal expectations about how people should act and to serve as an institutional dispute resolution mechanism when violations occur. As the Supreme Court stated regarding the Federal Rules of Evidence, "[t]he Rules of Evidence [are] designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes."[365] Truth is subjugated to the resolution of the dispute, particularly in light of limited resources.[366] Science, on the other hand, is free from such time restrictions—except those internally or institutionally generated—and functions to solve problems encompassing the relationship of humans to their natural environment, whether disputed or not. Science demonstrates "the state of the external world."[367] An objective of science is to maintain and improve the quality of life and society. In this regard, science is heavily bound up in social progress.[368]

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justification for the scope of psychiatric expertise and a basis for requests for governmental and private support." KUTCHINS & KIRK, *supra* note 260, at 11.

363. In particular, what does this decision portend for the slippery slope, where violent propensities of all persons, regardless of whom they are violent towards, will justify locking them up under the auspices of civil commitment? There is a real specter of legal definitions being stretched, distorted, and modified for the law in ways that do not fit the scientific context.

364. DSM-IV, *supra* note 26, at xxvii.

365. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993).

366. *See* Cassandra C. Colchagoff, *A New Era for Science and the Law: The Face of Scientific Evidence in the Federal Courts After* Daubert v. Merrill Dow Pharmaceuticals, Inc., 29 TULSA L.J. 735, 755 (1994).

367. Charles Kester, *Translation: The Language of Law, the Sociology of Science and the Troubles of Translation: Defining the Proper Role For Scientific Evidence of Causation*, 74 NEB. L. REV. 529, 545 (1995).

368. *See* Glenn H. Reynolds, *Between Pilate and Galileo*, 35 JURIMETRICS 349, 350-54 (1995) (reviewing STEVEN GOLDBERG, CULTURE CLASH: LAW AND SCIENCE IN

While both law and science seek the truth about reality, the law has another perhaps overriding objective—justice.[369] To achieve justice, the legal system functions as a voice of society, one that considers moral transgression, mental state at the time of conduct, excuse, and justification.

C. *Rhetoric and Tolerable Ambiguity in Law and Psychiatry*

> *"When I use a word," Humpty Dumpty said . . . , "it means just what I choose it to mean—neither more nor less."*
>
> *"The question is," said Alice, "whether you can make words mean so many different things."*
>
> —Lewis Carroll[370]

If the law uses, incorporates, or relies on scientific terms, what are the methods of construction that will assist courts in assigning predictable and fair meanings to those terms? How will courts minimize ambiguity? Justice Thomas, in *Hendricks*, utilized a variety of legal terms with scientific significance. These included the notion of "uncontrollable behavior," the concept of "mental abnormality," and the assessment of a "personality disorder." These terms have a multiplicity of meanings to lawyers and psychiatrists, depending on who is using them and how they are used.

To give them sufficiently articulable legal meanings, several things must occur. First, the law must supply intelligible and meaningful legal rhetoric. Second, there must be "good science" that can assist in giving the legal term meaning as it is applied to many individual circumstances.

AMERICA (1994)).

369. *See* Sheila Jasanoff, *What Judges Should Know About the Sociology of Science*, 77 JUDICATURE 77, 80 (1993) ("[T]he ultimate goal of the courts is the attainable one of dispensing justice, not the impossible one of finding objective truth.").

370. LEWIS CARROLL, *Through the Looking-Glass*, *in* THE COMPLETE WORKS OF LEWIS CARROLL 214.

1. Rhetorical Ambiguity

The level of tolerable ambiguity in the law often depends on the rhetoric[371] adopted in legal rules and principles.[372] The meaning of legal rhetoric, in turn, strongly depends on its context, especially the culture[373] in which it is interpreted. In

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371. The distinction between law and rhetoric is traceable to the Middle Ages when the art of "oratorical eloquence" became separated from the "*science* of logic and dialectic." Linda Levine and Kurt M. Saunders, *Thinking Like a Rhetor*, 43 J. LEGAL EDUC. 108, 110 (1993).

372. The subject of rhetoric has been accorded many meanings. "Because in our brief lives we catch so little of the vastness of history, we tend too much to think of language as being solid as a dictionary, with a granite-like permanence rather than as the rampant restless sea of metaphor, which it is." JULIAN JAYNES, THE ORIGIN OF CONSCIOUSNESS IN THE BREAKDOWN OF THE BICAMERAL MIND 51 (1976).

Rhetoric can provide a glimpse of the values and intentions of the speaker, so "that the way people talk about their lives is of significance, that the language they use and the connections they make reveal the world that they see and in which they act." CAROL GILLIGAN, IN A DIFFERENT VOICE 2 (1982). Rhetoric is "an art of constituting culture and community." James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 692 (1995).

373. Through their differing cultures, law and science have created disparate definitions of truth. The legal culture of truth is predicated on the belief that rigorous representation and oppositional argument will separate truth from falsehood. Thus, the law is structured not as an inquiry by a panel of experts or as a work in progress, but as an adversary system. In it, there are limitations of time and form of presentation, always with an emphasis on process. It is an unstated axiom in the legal system that proper process generally creates fairness and truth, regardless of substantive results. Cross-examination, oaths, and observations of demeanor are particular processes used as tools to test the truth, not numerous hypotheses, tests, trials, repetition, and confirmations, as in science. Law seeks the truth about events, but it views facts as contingent. *See* Jasanoff, *supra* note 369, at 82. There is no replication, even on appeal. The Supreme Court has observed that "[i]t is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data." *In re* Gault, 387 U.S. 1, 21 (1967).

The law's model of truth is normative, rendering strict replication irrelevant. *See* Peter H. Schuck, *Multi-Culturalism Redux: Science, Law, and Politics*, 11 YALE L. & POL'Y REV. 1, 6 (1993). The key question under this model is "truth related to what?" The law embraces its role as exercising the community's moral authority. This relic approach accepts that truth is dependent on the circumstances, context, and time, among other "environmental" factors. Furthermore, the truth need not be repeatable or testable, but its finality is essential. This can be seen in a jury's verdict, which is taken as the surrogate for the truth of what happened.

In addition to the finality of the "truth," the law's version is not subject to publication, at least regarding the particular facts and the inferences drawn from them. A key feature of the culture of law, however, is the publication of court opinions. *See* Murray Levine & Barbara Howe, *The Penetration of Social Science into Legal Culture*, 7 LAW & POL'Y 173 (1985). This view is reflected in the secrecy requirement of jury deliberations and the lack of reporting by juries in their verdicts

this respect, legal rhetoric must mediate the tension of being connected to the past through precedent while adapting to the present and future in a constantly changing society. One commentator distinguished science from law in the following manner, inadvertently exposing the rationale for the differences in rhetoric as well:

> While medical research looks to the future in terms of possibilities, our common law heritage is wedded to the past. Such historical perspective is nowhere more evident than in our support of individual property and proprietary rights which rest in the common law upon assurances of predictable means of enforcement from one generation to the next.[374]

Thus, in *Hendricks*, it was crucial for the Court to utilize cogent and predictable rhetoric in creating standards for courts and legislatures around the country. Without viable definitions of "uncontrollable behavior," and "mental abnormality," for example, the Court failed to connect the common law heritage to modern science, fostering inconsistent, impertinent, and conflicting definitions.

2. The Legitimacy of Science

> *Science is the American faith. We believe in things that can be proven.*[375]

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about particular facts.

The judges of truth in the legal system are not the experts but the triers of fact—either the judge or the jury. These judges of fact, particularly jurors, do not play an active role in the process to preserve neutrality and objectivity. These disparate cultures are brought together every time scientific evidence is offered in a court of law. If both science and law are believed to be engaged in similar inquiries to ascertain the truth about reality, scientific data will prosper as an aide to the adversary process. But if these methods and cultures of truth-finding conflict, and compete for primacy in method and truth definition, the question of how to reconcile these cultures becomes paramount. Which "truth" method is correct? Which is better? Of course, the answer may be neither, that each is a mode of experience that reveals a part of the truth of understanding and not the entire description. To reconcile the two, it is best to observe that each disciplinary methodology offers a piece of the truth, but not the totality. *See* Francis J. Mootz, *Desperately Seeking Science*, 73 WASH. U. L.Q. 1009 (1995).

374. Barry Brown, *Reconciling Property Law With Advances In Reproductive Science*, 6 STAN. L. & POL'Y REV. 73, 73 (1995).

375. John Veilleux, Note, *The Scientific Model In Law*, 75 GEO. L.J. 1967, 1967 (1987) (arguing that judge-made common law is like science in many important

While it is tempting to completely jettison psychiatry from the construction and interpretation of the legal definition of "mental abnormality" or "uncontrollable dangerousness," there are two weighty reasons for not doing so. First, science provides legitimacy for almost all definitions in modern American society. Second, it is difficult, if not impossible, to construct a workable objective and predictable mental health definition without science.

In the culture of the 1990s, science creates legitimacy, not only within scientific disciplines but when used in an interdisciplinary manner as well. Science connotes objectivity and reliability, particularly because the scientific method is based on testability and verification.[376] Science also has been at the forefront of the technological revolution, assisting people to live longer and in a healthier fashion. Thus, it is understandable that Justice Thomas, after declaring judicial independence from psychiatry, referenced it in support of a conclusion that pedophilia constitutes at least a mental abnormality.

3. Problem: Ensuring "Good Science" in the Law

Just because science possesses a presumption of reliability, that does not mean that all science is reliable. Discerning the border between reliable and unreliable science is sometimes extremely difficult, particularly in determining whether and when to utilize it in the law.

The fact that law functions differently than science dictates caution in the adoption of scientific terms with legal significance.[377] The history of the standards for admitting novel scientific testimony at trial provides a useful parallel. In *Frye v. United States*,[378] the United States Court of Appeals for the District of Columbia adopted a rule for the admissibility of the systolic blood pressure deception test, a precursor to the

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ways).

376. Its success has generated a backlash, however, so that other disciplines, such as law and religion, have balked at viewing the world through the lens of the scientific rhetoric. *See* David S. Caudell, *A Calvinist Perspective on Faith in Legal Scholarship*, 47 J. LEGAL ED. 19, 20 (1995).

377. The disciplines of law and science are both designed to solve problems and find the truth about reality. Despite many such commonalities, serious differences in objectives exist. *See supra* Part IV.B.

378. 293 F. 1013 (D.C. Cir. 1923).

polygraph. The court held that the deception test would be admissible if it was "generally accepted" in the scientific community.[379]

Recently, in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*,[380] the Supreme Court held that the *Frye* test was superseded by the Federal Rules of Evidence test for the admissibility of expert testimony.[381] Instead of utilizing the bright-line standard of *Frye*—"generally accepted in the scientific community"—the Court concluded that a more flexible, multiple-factor test provided the applicable standard of admissibility, requiring novel scientific evidence to be based on "scientifically valid principles."[382] The factors include whether the science is testable empirically, subject to peer review, and generally accepted in the relevant scientific community.[383] This approach attempts to ensure reliability and validity by screening out a variety of "junk science," which does not satisfy the "scientific knowledge" requirement.[384] The Federal Rules of Evidence consequently exclude unsupported conjecture and limit expert testimony to proof-oriented methodology.[385]

Ironically, *Daubert* does not offer any helpful hints on how to resolve conflicts that occur once science is introduced into the realm of law. Nor does *Daubert* provide assistance on how judges, without schooling or training in scientific principles, can detect good science from bad. The decision simply sets the threshold minimum for inclusion, but stops far short of designing a framework of coexistence.[386] A comparison of the nomenclature of science and the nomenclature of law, particularly in evaluating how their meanings change, helps to illustrate this unresolved conflict.

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379. *See id.* at 1014.

380. 509 U.S. 579 (1993).

381. *See id.* at 587. *Daubert* involved expert testimony offered in a suit against the makers of the drug Bendectin, which was claimed to have caused birth defects after being ingested by expectant mothers. *See id.* at 582.

382. *See id.* at 594-95, 597.

383. *See id.* at 593-94.

384. *See generally* Randolph N. Jonakait, *The Assessment of Expertise: Transcending Construction*, 37 SANTA CLARA L. REV. 301 (1997).

385. *See id.* at 305.

386. *See id.* at 315 n.42 (citing David L. Faigman, *Mapping the Labyrinth of Scientific Evidence*, 46 HASTINGS L.J. 555, 555 (1995)).

4. An Illustration: Defining "Illness" and "Disease"

The importance of using objective and understandable criteria for scientific terms with legal significance is seen in the 1994 Nebraska case *Katskee v. Blue Cross/Blue Shield.*[387] In *Katskee*, the Nebraska Supreme Court considered an appeal of a claim involving the interpretation of a health insurance policy. The plaintiff in the case sought coverage from the defendant health insurer on her policy for hysterectomy surgery.[388] Her physician, who had recommended the surgery, advised her that she had a genetic condition called breast-ovarian carcinoma syndrome.[389] At the time of the surgery, there was no imminent harm facing the patient; to the contrary, she simply had a genetic predisposition with no immediate deleterious impact. The legal question addressed by the court was whether the insurance policy, which included "illness" as a covered peril, applied to the plaintiff's surgery.[390] In effect, the issue in the case was what exactly the term "illness" in the insurance policy meant.

The court noted that the insurance policy defined "illness" as "bodily disorder or disease," but provided no further definitions.[391] If the policy or its individual terms were clear in their entirety, the court would have been bound to apply the words' plain meaning "as the ordinary or reasonable person would understand them."[392] If an ambiguity existed, however, the court observed that it could have referred to rules of construction and "look[ed] beyond the language of the policy to ascertain the intention of the parties."[393] Further, the court found that "a general principle of legal construction . . . holds that an ambiguous policy will be construed in favor of the insured."[394]

Significantly, the court referred to dictionaries and other judicial opinions as guides to determining whether an ambiguity existed. The court used both *Webster's Third New International Dictionary*[395] and *Dorland's Illustrated Medical Dictionary*[396] to

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387. 515 N.W.2d 645 (1994).
388. *See id.* at 648.
389. *See id.* at 647-48.
390. *See id.* at 647.
391. *Id.* at 649 (quoting the insurance policy).
392. *Id.* at 649.
393. *Id.*
394. *Id.*
395. The court recited Webster's definition of disease:

inform its definition of "illness," concluding that both the lay and medical definitions were consistent.[397] Consequently, the court relied on the lack of a dispute between lay and medical definitions to conclude that the language of the insurance policy with regard to "illness" was not ambiguous and thus was subject to the application of its plain meaning. In considering the plain meaning of the terms "illness," "bodily disorder," and "disease," the court held that the appellant's condition was an illness within the meaning of the policy.[398] The court further defined "health" essentially in terms of the risk of developing cancer, which the court described as "substantial,"[399] adding:

> Appellant's condition is a deviation from what is considered a normal, healthy physical state or structure. The abnormality or deviation from a normal state arises, in part, from the genetic makeup of the woman. . . . The recommended surgery is intended to correct that morbid state by reducing or eliminating that risk.[400]

Accordingly, the court appeared to create a new intermediary definition—that of the "healthy" ill. The court did not discuss how all people have varying degrees of health risks based on their genetic makeup, and that there may be considerable variation in what constitutes a "normal state." Nor did the court

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> an impairment of the normal state of the living animal or plant body or of any of its components that interrupts or modifies the performance of the vital functions, being a response to environmental factors . . . to specific infective agents . . . to inherent defects of the organism (as various genetic anomalies), or to combinations of these factors: Sickness, Illness.

Id. at 650 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 648 (1981)). Further, the court noted that the same dictionary defined disorder as "a derangement of function: an abnormal physical or mental condition: Sickness, Ailment, Malady." *Id.* (quoting WEBSTER'S, *supra*, at 652).

396. The court noted that Dorland's defines disease as:

> any deviation from or interruption of the normal structure or function of any part, organ or system . . . of the body that is manifested by a characteristic set of symptoms and signs and whose etiology, pathology, and prognosis may be known or unknown.

Id. at 650 (quoting DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 481 (27th ed. 1988)). Further, the court stated that disorder is defined as "a derangement or abnormality of function; a morbid physical or mental state." *Id.* at 650 (quoting DORLAND'S, *supra*, at 495).

397. *See* 515 N.W.2d at 650.

398. *See id.* at 652.

399. *Id.*

400. *Id.*

evaluate how substantial a "substantial likelihood" is, or whether there is any dispute in the medical field about this particular genetic propensity. Furthermore, the court attempted to explain why an illness could exist without any symptoms or actual onset of disease by describing the genetic variation—the syndrome and not the cancer—as "manifest" and evident from the family's medical history.[401] This subtle shift will raise eyebrows in the medical community, if not in the law.

The court, however, perhaps recognizing the potential effects of its interpretation, went to great lengths to limit the scope of its analysis. It cautioned that "[w]e are mindful that not every condition which itself constitutes a predisposition to another illness is necessarily an illness within the meaning of an insurance policy. There exists a fine distinction between such conditions . . . ."[402]

In essence, it appears that the court was defining the terms "illness" and "disease" for the purpose of compensation, not for the purpose of maximizing the chances of diagnosis and treatment or for targeting the common cultural understanding of illness. Its usage of medical terminology, therefore, was very different than that of the medical profession's usage, even though the court declared that the definitions were consistent in both the medical and nonmedical worlds. The case thus can be seen as a triumph of legal pragmatism—the application of workable, predictable rules to create fair dispute resolution. In a similar fashion, the case evidences the influence of hermeneutics in legal interpretation; it illustrates the judiciary defining words in a specific legal context, not against a universal backdrop.

IV. RECOMMENDATIONS

> *Neither art nor science knows anything of moral approval or disapproval.*
>
> —Oscar Wilde[403]

Sex offender commitment statutes provide but one illustration of an idea that is good in theory, but not in application. As evidenced by *Kansas v. Hendricks*, popular and

401. *See id.*
402. *Id.*
403. Quotations of Oscar Wilde, *in* WIT AND WISDOM OF OSCAR WILDE 25 (1967).

readily available answers often do not resolve difficult but important questions lying at the intersection of law and science. More specifically, *Hendricks* exposes the dangers of using science to solve thorny criminal law dilemmas, often resulting in the transposition of scientific terms and principles into legal constructs that do not correspond with their scientific counterparts. When this occurs, the result may not only violate the Constitution, but fail to achieve policy goals as well. Yet, the failure of some laws does not suggest the same fate for all. Some constitutional and perhaps helpful alternatives follow.

A. Convict and Treat

Sex offenders should be convicted for their original criminal acts and "treated" during their period of incarceration.[404] Special indeterminate sentencing statutes linked to treatment and predictions of dangerousness could be enacted for sex offenders. These sentencing schemes could maintain supervision, counseling, and treatment both during and after incarceration. The American Psychiatric Association's *Task Force Report on Sexually Dangerous Offenders* already calls for such indeterminate sentencing.[405]

Prosecutors should be asked to seek the maximum amount of jail time possible, if warranted, and extensive parole restrictions should be attached as well. If there is a reasonable likelihood of recidivism, these people should be tracked and specially treated by prosecutors, not handed off to the civil system.

Treatment may take the form of counseling, but more likely will involve medications or extrinsic behavioral techniques. Designing a treatment system should become more of a priority to legislatures—particularly since research and design can be of such great importance in the long run. This may mean setting

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404. The term "treatment" here is used very broadly to include whatever means necessary—behavior modification, vocational education, various therapies, medicines, etc.—to reduce the risk of recidivism.

405. *See Sexual Predator Statutes May Not Provide Panacea*, 11 CRIM. PRAC. REP. 415, 416 (1997) (citing AMERICAN PSYCHIATRIC ASS'N, TASK FORCE REPORT ON SEXUALLY DANGEROUS OFFENDERS (forthcoming from the American Psychiatric Association)).

aside money for research and seeking input on the community level to ensure a smooth transition from jail to freedom.

The focus also should be on the truly hard-core recidivist criminals, those who have shown the propensity to exhibit repetitive criminal behavior. Special sentencing provisions, parole requirements, and similar regulations could be developed for this group, which has demonstrated its persistence in harming others.

B. Avoid Political Posturing

These civil commitment laws, while superficially appealing, amount to political posturing when it is revealed that the actual effects and implications of the law are uncharted. If it is criminal detainment that is the goal of civil commitment, then legislatures should maintain the laws within the criminal system. If treatment is truly the aim, then a legislative scheme should be created with the input of those charged with such a responsibility—the psychiatric community.

C. Minimize the Borrowing of Scientific Rhetoric

While scientific terminology may be implanted into law for the purpose of enhancing its legitimacy, such speculative benefits, even if they do occur, may be outweighed by the costs. This tenuous balance suggests that scientific terminology and principles should be used cautiously. In this vein, coining new legal vocabulary is preferable to recycling old scientific terms, since the mere use of scientific terms does not obviate the need for interpretation and precise legal definition. The meanings of scientific terms often adhere to the context of their use, so that even the scientists may disagree on the meaning and application of the terms in a particular setting. Therefore, the "shortcut" of borrowing terminology from another discipline ends up being injudicious.

D. Education on Substantive Issues—Understanding What Is "Good Science"

In this era of exponential scientific advancement and discovery, "a legal verdict about right or wrong [often] hinges on

a scientific judgment of true or false."[406] Given the salient role of science in many legal determinations, it becomes even more important that judges, as well as juries, become knowledgeable in the relevant science.

To knowledgeable observers it is clear that not all science is "good science," meaning science that is reliable and dependable. The Executive Editor of the New England Journal of Medicine, Marcia Angell, has stated that "[s]cience is not for hire, but some scientists are."[407] Identifying when this problem of science-for-hire is occurring is often lost on the legal system. As Justice Breyer noted in a speech to the American Association for the Advancement of Science, "Courts must avoid that kind of serious scientific mistake which once led one court, for example, to hold that dropping an orange juice can caused breast cancer [and instead] must aim for decisions that, roughly speaking, approximately reflect the scientific 'state of the art.'"[408] In essence, Justice Breyer urged that "the law itself increasingly needs access to sound science."[409]

A primary mechanism for minimizing or altogether avoiding the difficulties attendant to integrating science into law is to educate legislators, judges, and attorneys about scientific principles. Scientific terms are not themselves science, and people using these terms should not do so loosely. Education, in the form of expert testimony on basic scientific principles or reviews of treatises to accomplish the same goal, can provide notice of the parameters of the scientific terminology and indicate the appropriate usage of the science. While scientific principles and terminology may be helpful in some legal contexts, they may not be effective in others.

1. Expert Testimony to Judges and Legislatures

One way to inform judges about science is to permit expert testimony to be presented to the judge.[410] While this would constitute the exception rather than the rule, judges are

406. Ellen Goodman, *Separating Science From Fiction in the Courtroom*, BOSTON GLOBE, Feb. 22, 1998, at E7.

407. *Id.*

408. *Id.*

409. *Id.*

410. *See* FED. R. EVID. 706(a) (allowing court appointed experts).

permitted to consult any source, excepting privileged information, in making admissibility determinations under the Federal Rules of Evidence.[411] Such expert testimony could be informal or use the structure of direct and cross-examination. This educational mechanism could occur based on the selection of an individual judge or through the stipulation of the parties in a case. If a judge or legislature is devoid of knowledge about a subject, however, chances are it is also devoid of knowledge about the biases and reputations of the experts in the field. Thus, one alternative is for the scientific community to select a group of "neutral" experts to serve as educators. In fact, the oldest scientific society in this country, the American Association for the Advancement of Science, has created a pilot project that will provide courts with the names of scientists who would assist the court in making informed rulings on admissibility of science—from rocket science to computer science.[412]

One fear resulting from the creation of a panel of scientific platonic guardians is that the experts would take over the legal system, substituting their judgment for that of the court or jury. Yet many argue that this is not so: "It would not mean the end of conflicting testimony. As anyone who has sat in on seminars about hormones, electromagnetic fields, or psychosis can tell you, there is room for legitimate disagreement among respected researchers."[413]

2. Education for Scientists

Many scientific experts are exposed to the legal process in its most adversarial context—at trial. These experts are attacked and defended, pricked and poked, often for a considerable fee. Thus, both the environment and the financial incentives may promote distorted or exaggerated testimony. Fears of the legal system and its influences may also influence experts to be more certain and concrete with their opinions than they might otherwise be. These influences indicate that it may be useful not only to educate the legal experts on science, but also to educate the science experts on the law.

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411. *See* FED. R. EVID. 104(a).
412. *See* Goodman, *supra* note 406.
413. *Id.*

Perhaps if scientists understood the legal process better, they would contribute to the better use of medical rhetoric. Formal classes in medical or graduate school, or informal sessions could assist experts in choosing their words with care.

E. Recognizing the Importance of Rhetoric

A conscious recognition of the importance of legal rhetoric also would be helpful. All too often, legal rules are constructed without careful consideration of the rhetoric used. Flowery terms or words requiring considerable interpretation are often employed, sapping the rule of predictability and clarity. Such an unconscious construction or creation of legal rules begets problems in the future.

If scientific terminology having different meanings is employed, clarifying its intended meaning is important. The easiest way to avoid difficulties is to minimize the use of terminology. This especially refers to terminology offered to create the appearance of objectivity or lend an air of legitimacy.

V. CONCLUSION

The involuntary commitment of sexually violent predators through legislation such as Kansas's "Stephanie's Law" has great allure. Known sex offenders would no longer be able to commit unspeakable, horrible crimes against children. Instead, they would be kept apart from society and possibly treated. Leroy Hendricks, a demonstrated pedophile and multiple sex offender, would be denied the chance to commit more crimes—perhaps forever.

Yet there is reason to believe that these laws are inefficient, unconstitutional, and buoyed by an irrational exuberance. Justice Lockett of the Kansas Supreme Court noted in his concurring opinion to the Kansas Supreme Court decision striking down "Stephanie's Law" that "[s]ometimes we make decisions we do not like. We make them because they are right . . . . Leroy Hendricks has an antisocial personality. But that is not enough to allow him to be committed for treatment to protect society."[414]

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414. *In re* Care and Treatment of Hendricks, 912 P.2d 129, 138-39 (Kan. 1996)

In *Kansas v. Hendricks*, Justice Thomas and the United States Supreme Court disagreed with Justice Lockett in considering and rejecting due process, ex post facto, and double jeopardy claims. Because the Court held that the law was civil in nature and not punitive, it survived these constitutional challenges. Justice Thomas's opinion, however, is problematic in both its legal analysis and its consequences. While it may appear to be a popular decision, it permits states to use an improper and costly means of civil detention when criminal prosecution is the only appropriate and otherwise efficient method of restraint. As the American Psychiatric Association's *Task Force Report on Sexually Dangerous Offenders* proclaimed: "The sexual predator statutes distort the traditional meanings of civil commitment, misallocate psychiatric facilities and resources, and constitute an abuse of psychiatry."[415]

Justice Thomas's analysis and holding also were not warranted in light of precedent. This precedent appeared to draw the constitutional line at "mental illness," and not at the lower line of the Act's more inclusive "mental abnormality" or "personality disorder" tests. Furthermore, the "mental abnormality" standard is extremely malleable. It potentially permits the civil commitment of other recidivists, such as drug dealers, spousal abusers, and DWI drivers. The lack of treatment afforded by the Kansas statute and the dearth of guidance to lower courts and legislatures all suggest *Hendricks* was wrongly decided. If these problems become magnified, the ruling likely will require clarification in later cases and will serve more to obfuscate rather than clarify the boundaries of permissible civil involuntary confinement.

In a larger sense, *Hendricks* yields additional lessons. Scientific terms given legal meaning create problems of predictability, efficacy, and even legitimacy. *Hendricks* showed how organic the law's rhetoric really is, and how scientific usage is only one touchstone in interpreting legal meaning.

The convergence of scientific rhetoric and the law creates problems in large part due to disparities in objectives,

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(Lockett, J., concurring), *rev'd sub nom.* Kansas v. Hendricks, 117 S. Ct. 2072 (1997).

415. *Sexual Predator Statues May Not Provide Panacea, supra* note 222, at 416 (citing AMERICAN PSYCHIATRIC ASS'N, TASK FORCE REPORT ON SEXUALLY DANGEROUS OFFENDERS (forthcoming from the American Psychiatric Association)).

methodologies, and cultures. Legal rhetoric is intended to adapt to particular fact settings and places, and, as evidenced by constitutional law, to change over time. Scientific rhetoric does not have such demands placed on it, and is often discarded when newer principles require description.

To minimize problems such as the ones occurring in *Kansas v. Hendricks*, legislators and judges should educate themselves and juries on scientific methodology and rhetoric. Courts and legislatures should avoid incorporating scientific rhetoric unless that rhetoric is clearly defined and adapted to the particular set of circumstances. The duty to provide clear and specific rhetoric is especially important when the circumstances of a crime—such as the heinousness of the criminal—may distort a court's interpretation of the law. Recognizing the importance of rhetoric, especially in the area of constitutional law, also should help in avoiding difficulties.

For laws pertaining to sex offenders to be effective and consistent with longstanding legal rules and principles, the boundaries between civil and criminal matters must be respected. Shortcuts will not work in the long run.