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Jon A. Bierman

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**KANSAS V. HENDRICK: MUSTN'T OUR SHEPHERDS PROTECT
EVEN THE WOLVES?**

I. INTRODUCTION

By any measure, Americans are under siege. In 1996, 95,769 women reported being raped to law enforcement.¹ While it is difficult to ascertain with any certainty the number of children molested each year in the United States, various surveys have determined that between nineteen and thirty-five percent of all women experienced some sort of childhood sexual victimization. Although the same statistics indicate that relatively fewer men are the victims of childhood sexual assault, the rate of incidence is still significant.² Because experts agree that only a small percentage of victims ever report their victimization, the actual numbers are assuredly higher than those reported.³ No one can reliably determine the percentage of these crimes that are committed by individuals suffering from some form of mental illness which compels their behavior.⁴ Regardless of the numbers involved, the anecdotes describing these violent depraved acts are such that any parent would welcome legislation designed to protect their children from those who would prey on them.

During a twenty-four year career as a sexual predator, Earl Shriner committed a number of acts of sexual aggression against children. These attacks included several rapes, a number of beatings and a stabbing. As is common to many sexual criminals, Shriner served time on and off in various state prison facilities. Shriner was forced to retire from his chosen field when he was arrested in 1987 for kidnapping a seven year old boy, raping the boy, strangling

1. U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 23 (1997). Reliable national figures are not available for the number of reported child sexual victimizations. This figure includes only reported incidences of "carnal knowledge of a female forcibly and against her will."

2. DAVID FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 132 Table 10-1, (1979). These statistics may be slightly inflated with regard to the issue of Kansas' Sexually Violent Predator Act by virtue of the fact that all of the three studies cited included "flashing" as a form of victimization. The Act does not include "flashing" as a sexually violent act for purposes of determining whether an individual is a sexually violent predator.

3. See ROBERT A. PRENTKY, PH.D., ET AL., CHILD SEXUAL MOLESTATION: RESEARCH ISSUES (1997).

4. *Id.*

him and then severing the boy's penis. Shriner was caught only because the boy lived and identified him to police.⁵

Westley Dodd molested children over a fifteen year period, beginning when he was only a child himself at the age of sixteen. For various acts of depravity forced on young children, Dodd served only a few months in jail during that entire period. Dodd was finally charged with and convicted of the murder of three children, including that of a four year old boy whom Dodd first raped and tortured. Proud of his actions, Dodd professed, prior to his execution, that if he ever escaped from prison he would "kill and rape again, and . . . [would] enjoy every minute of it."⁶

Americans' outrage at those responsible for the commission of these crimes recently found expression in a series of legislative attempts aimed at specifically deterring recidivism through indefinite involuntary commitment of variously defined Sexually Violent Predators ("SVPs") to mental institutions either in lieu of a prison sentence or upon the SVP's release from prison. This legislation has sparked an acrimonious debate between those defending the rights of the individual offender and those seeking to protect society from what has become an epidemic of sex crimes. The most recent and perhaps most portentous of these debates was recently heard before the United States Supreme Court in a case styled *Kansas v. Hendricks*.⁷

This Note first examines the Supreme Court's decision in *Hendricks* upholding a Kansas SVP statute providing for the indefinite commitment upon release from prison of "mentally abnormal" dangerous individuals who have committed sex crimes. The Court upheld the SVP statute over Hendrick's protest that it violates principles of due process, ex post facto, and double jeopardy.⁸ This Note then posits that the Court missed an opportunity to declare that all involuntarily civilly committed individuals enjoy a fundamental right to minimal state provided habilitative therapy designed to promote their recovery and eventual release. Finally, this Note argues that Kansas should not be allowed to legislate in contravention of well established constitutional principles in order to remedy a situation for which it is at least in part responsible.

II. HISTORY

A. *Prior Pertinent Supreme Court Decisions*

The U.S. Supreme Court has often heard challenges to legislation and other state actions that impose civil commitment on the mentally ill. Three of

5. See John Leo, *Sexual Predator Laws Should Be Upheld*, WIS. ST. JOURNAL, (1996).

6. *Id.*

7. 117 S.Ct. 2072 (1997).

8. *Id.* at 2085, 86.

these cases are particularly pertinent to the issue at hand: *Addington v. Texas*,⁹ holding that the risk of an erroneous judgment mandating involuntary indefinite civil commitment is such that the state must demonstrate by some standard greater than a preponderance of the evidence that an individual is indeed mentally ill and likely to be a danger to himself or others;¹⁰ *Allen v. Illinois*,¹¹ holding that an Illinois SVP statute which has as its primary aim the treatment of the SVP is not criminal in nature;¹² and *Foucha v. Louisiana*,¹³ holding that a criminal defendant acquitted by reason of insanity may only be committed to a state mental institution until such time as the acquittee can demonstrate his sanity irrespective of whether he remains dangerous.¹⁴

a. *Addington v. Texas*

In *Addington*, the Court considered an appeal of an individual adjudged both dangerous and mentally ill by the state of Texas. *Addington*, who had been repeatedly subjected to involuntary confinement on a temporary basis was charged with the crime of “assault by threat” when he threatened to physically harm his mother. Texas, rather than prosecuting *Addington*, chose to pursue a petition for involuntary civil commitment filed by *Addington*’s mother.¹⁵ At trial, the Court charged the jury that *Addington* was to be committed only in the event that it found *Addington* both dangerous and mentally ill by “clear, unequivocal and convincing evidence.”¹⁶

Addington challenged the judgment on the grounds that the evidentiary standard of “clear, unequivocal and convincing evidence” violated his due process rights and that the Court should have charged the jury to apply a “beyond a reasonable doubt” standard in considering whether the state had aptly demonstrated that he was both dangerous and mentally ill.¹⁷ The Court determined, after balancing *Addington*’s interest in remaining free against the state’s interest in protecting *Addington* from himself and protecting others from *Addington*, that application of the Texas standard afforded sufficient protection to *Addington* against an erroneous judgment.¹⁸

In determining that the “beyond a reasonable doubt” standard proffered by *Addington* as necessary to protect his due process rights was not required in a civil commitment proceeding, the Court concluded that a “civil commitment

9. 441 U.S. 418 (1979).

10. *Id.* at 432, 433.

11. 478 U.S. 364 (1986).

12. *Id.* at 374.

13. 504 U.S. 71 (1992).

14. *Id.* at 80.

15. *Addington*, 441 U.S. at 420.

16. *Id.* at 421.

17. *Id.*

18. *Id.* at 427.

proceeding can in no sense be equated with a criminal prosecution,”¹⁹ the situation in which the standard is typically employed.²⁰ In supporting this finding, the Court cited the Texas Supreme Court’s determination that “the State of Texas confines only for the purpose of providing care designed to treat the individual.”²¹

b. *Allen v. Illinois*

In *Allen*, the state of Illinois dropped the charge of sexual deviate assault filed against Allen for lack of probable cause and then sought to have him declared a “sexually dangerous person” under its Sexually Dangerous Persons Act²² (“the Illinois Act”).²³ After hearing testimony from the psychiatrists who had interviewed Allen, the trial court did find Allen to be a sexually dangerous person within the meaning of the Illinois Act and ordered him committed to a state psychiatric facility until such time as Allen was able to demonstrate that he no longer labored under the mental illness driving his predatory behavior.²⁴ Allen argued that the Order of the court should not be enforced and the judgment labeling him a sexually dangerous person should be overturned because it was obtained after presentation of testimony by psychiatrists who formed their opinions on the basis of Allen’s own words in violation of his Fifth Amendment right against self incrimination.²⁵

Because the privilege against self incrimination applies primarily in criminal proceedings,²⁶ the Court in deciding whether Allen’s privilege against self incrimination had been violated undertook a determination of whether the proceeding instituted against Allen was criminal in nature. The Court first looked to Illinois’ characterization of the statute as civil,²⁷ and then considered whether Allen had provided “the clearest proof” that “the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s purported] intention that the proceedings be civil.”²⁸ The Court, after considering and dismissing Allen’s arguments, determined that the Illinois Act was civil in nature primarily because “the State has a statutory obligation to provide ‘care and treatment for [persons adjudged sexually dangerous] designed to effect recovery’ . . . in a facility set aside to provide psychiatric care.”²⁹ Allen apparently

19. *Id.* at 428.

20. 17 Am.Jur. 2d Evidence § 168.

21. *Addington*, 441 U.S. at 428, n.4 *citing* *State v. Turner*, 556 S.W.2d 563, 566 (1977).

22. *See* ILL. REV. STAT., ch.38, § 105-1.01 (1985).

23. *Allen*, 478 U.S. at 365-66.

24. *Id.* at 366.

25. *Id.* at 367.

26. *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984).

27. *Allen*, 478 U.S. at 368.

28. *Id.* at 369.

29. ILL. REV. STAT., ch.38, § 105-8; *Id.*

challenged only the Illinois Act's facial constitutionality and adduced no evidence that Illinois' failed to provide even the minimum level of care provided for in the Illinois Act.

c. *Foucha v. Louisiana*

In *Foucha*, the appellant was committed to a state psychiatric facility after being found not guilty by reason of insanity of committing an aggravated burglary and illegally discharging a firearm. Four years after his commitment, the superintendent of the facility recommended Foucha's release based on a determination that Foucha was no longer suffering from a recognized mental illness. Following this recommendation, a "sanity panel" concurred with the superintendent's determination that Foucha was no longer mentally ill, but would not contend that Foucha was no longer dangerous based on several incidents which had occurred during Foucha's commitment and a determination that Foucha had an "antisocial personality", a condition not identified as a mental illness.³⁰ Because Louisiana law required that an involuntarily committed individual carry the burden not only of proving that he or she is no longer insane, but also no longer dangerous before obtaining release, the Louisiana Court of Appeals overseeing Foucha's request for release denied the request and the Louisiana Supreme Court upheld that denial.³¹

The U.S. Supreme Court overturned the Louisiana Supreme Court reasoning that i) keeping an individual confined to a psychiatric institution is a violation of due process unless a determination is made in a civil commitment proceeding that the individual is both dangerous and mentally ill,³² ii) because Foucha, although dangerous, was no longer mentally ill he was entitled to a hearing that complied with all of the procedural safeguards mandated by the Fourteenth Amendment and such safeguards were absent from his release hearing,³³ and iii) concepts of substantive due process are offended by the continued civil incarceration of an individual who is not both mentally ill and dangerous irrespective of the procedures employed.³⁴ Louisiana, the Court held, regardless of its interest in protecting the public could not confine an individual against his or her will as a mentally ill dangerous person regardless of whether the act which led to a determination of mental illness was criminal in nature.

B. *The Kansas Sexually Violent Predator Act*

30. *Foucha*, 504 U.S. at 72-5.

31. *Id.* at 75.

32. *Id.* at 77.

33. *Id.* at 79.

34. *Id.* at 80.

In 1994, the state of Kansas passed the Kansas Sexually Violent Predator Act (“the Act”) which provides for the involuntary civil commitment of individuals who suffer from either a “mental abnormality” or “personality disorder” which renders them likely to engage in sexually violent acts.³⁵ The Kansas legislature’s purported motivation in passing the Act is expressed in the Act’s preamble which explains that:

[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 commitment statute] . . . sexually violent predators generally have anti-social 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 violence is high.³⁶

The Act defines a SVP 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.³⁷

The legislature defined “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.³⁸

The Act affords a number of procedures designed to ensure that only those individuals who fall within its definitional purview are incapacitated as SVPs. Those procedures include an evaluation by mental health professionals,³⁹ a requirement that the state prove beyond a reasonable doubt that the individual is a SVP⁴⁰ and various procedures by which an incapacitated individual may obtain review of his or her status as a SVP in order to win release.⁴¹ In the event

35. *Hendricks*, 117 S.Ct. at 2076.

36. KAN.STAT.ANN. § 59-29a01 (1994).

37. *Id.* at § 59-29a02(a) (1994).

38. *Id.* at § 59-29a02(b) (1994). § 59-29a02(e)(1)-(10) of the Act defines sexually violent offenses to include rape, indecent liberties with a child, aggravated indecent liberties with a child, criminal sodomy, aggravated criminal sodomy, indecent solicitation of a child, aggravated indecent solicitation of a child, sexual exploitation of a child, aggravated sexual battery, or “any conviction for a felony offense in effect at any time prior to the effective date of this act, that is comparable to a sexually violent offense” as defined in the Act.

39. *Id.* at § 59-29a05 (1994).

40. *Id.* at § 59-29a07 (1994).

41. *Id.* at § 59-29a08, 10, 11 (1994); This provision of the Act provides for, inter alia, annual mental evaluations of the SVP by a professional retained by the SVP, an annual review of the SVP’s progress by the court, annual notice to the SVP of his right to petition for release, and the right of the SVP to have an attorney present at the annual review.

that an institutionalized SVP is unable to win release under any of these procedures, his or her commitment would continue indefinitely.⁴²

While there is little question that the drafters of the Act intended the Act primarily to protect the public from the threat posed by SVPs,⁴³ the Act, nevertheless, expressly established a “civil commitment procedure for the *long-term care and treatment* of the sexually violent predator.”⁴⁴

C. Leroy Hendrick’s Criminal History

Leroy Hendrick’s staunchest legal allies would concede that he is a dangerous man. Now 61 years old, Hendrick’s criminal history began when he plead guilty to indecent exposure after displaying his genitals to two young girls in 1956. In 1959, he was again convicted of a sexual offense for playing strip poker with a minor. In 1960, Hendricks was sentenced to three years imprisonment for molesting two young boys. Almost immediately upon release from prison, Hendricks was again arrested, this time for molesting a seven year old girl. He was released from prison in 1965 and only two years later, Hendricks was convicted for the molestation of a young boy and girl. It was during this period of imprisonment that Hendricks was diagnosed as a pedophile and was provided with what proved to be ineffective treatment.⁴⁵

The passing years did little to curb Hendricks sexual appetite for children. He was convicted once more in 1984 for engaging in sexual acts with two thirteen year old boys (one of whom was afflicted with cerebral palsy) and it is upon completion of this sentence that the state invoked the Act in an attempt to specifically deter Hendricks from the commission of violent sexual acts through his incapacitation.⁴⁶

Hendricks, during his commitment hearing, stated that he cannot control his impulses to molest children and that the treatment that the state provided in the past had been ineffective in suppressing his desires and would not be any more effective in the future and is in fact “bullshit.”⁴⁷

42. *Id.* at § 59-29a08.

43. KAN.STAT.ANN. § 59-29a01 (1994); *In re Hendricks*, 912 P.2d 129, 136 (Kan. 1996) (holding that “[i]t is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public); *Hendricks*, 117 S.Ct. 2072, 2083-2084.

44. KAN.STAT.ANN. § 59-29a01 (1994)(emphasis added).

45. *Hendricks*, 912 P.2d at 143.

46. *Id.*

47. *Id.* Now that the U.S. Supreme Court has decided that Kansas may institutionalize Hendricks until his psychological rehabilitation is effected, Hendricks’ eyes have apparently been opened to the virtues of Kansas’ treatment regimen. In an interview first broadcast on January 11, 1998 on CBS’ 60 minutes, Hendricks stated that he lacked interest in rehabilitation earlier because “it meant spilling [his] guts, letting somebody else know about [him], and [he] didn’t like that.” His forty years of preying on the public has, he claims, now come to an end because he “want[s] to stop the molesting, [he] want[s] to stop the hurting. [He] want[s] to heal [him]self.” Treatment, he believes, will give him this opportunity. If Ed Bradley could only have “known

D. Procedural History

Immediately prior to the expiration of his last prison sentence, the State of Kansas properly employed the procedures mandated by the Act in seeking Hendrick's civil commitment.⁴⁸ Hendricks requested, as was his right under the Act, a jury trial to determine his status as a SVP.⁴⁹ Based upon Hendrick's pedophilic history, his own testimony, the testimony of his evaluating psychiatrist and the testimony of various experts, the jury found beyond a reasonable doubt that Hendricks was a SVP as defined by the Act and was therefore subject to indefinite commitment.⁵⁰ Leroy Hendricks was the first person civilly committed under the Act.⁵¹

Hendricks appealed this decision to the Kansas Supreme Court claiming that the Act violated the substantive due process component of the 14th Amendment to the U.S. Constitution's Due Process Clause as well as the Constitutional principles of ex post facto and double jeopardy.⁵² The Kansas Supreme Court struck down the Act holding that it did not conform to the dictates of an earlier U.S. Supreme Court case, *Foucha v. Louisiana*.⁵³ *Foucha* held that an individual's fundamental right to remain free from involuntary civil commitment could only be abridged by the states upon a showing that the individual was both dangerous and mentally ill.⁵⁴ Because the Act requires only a finding that an individual suffers from a mental *abnormality* and not a mental *illness*, the Kansas Supreme Court found the Act facially unconstitutional and overturned Hendrick's commitment. Having invalidated the Act on substantive due process grounds, the Kansas Supreme Court reached no decision regarding Hendrick's ex post facto or double jeopardy arguments.⁵⁵

The U.S. Supreme Court granted a petition for certiorari filed by the State of Kansas appealing the decision of the Kansas Supreme Court as well as Hendrick's cross-petition.⁵⁶ It is this appeal which the U.S. Supreme Court decided in *Kansas v. Hendricks*.⁵⁷

[him] then and known [him] now." Unfortunately, it is unclear whether this near miraculous transformation was caused by the State of Kansas' treatment program or the shock treatment of a U.S. Supreme Court decision condemning Hendricks to a possible life behind bars.

48. *Hendricks*, 117 S.Ct. at 2079.

49. *Id.*

50. *In re Hendricks*, 259 Kan. 246, 253 (1996).

51. *Hendricks*, 117 S.Ct. at 2085.

52. *In re Hendricks*, 259 Kan. at 253.

53. 504 U.S. 71 (1992).

54. *Id.* at 74 (citation omitted).

55. *Hendricks*, 259 Kan. at 261.

56. *Hendricks*, 117 S.Ct. at 2076.

57. *Id.*

III. THE UNITED STATES SUPREME COURT'S DECISION

A. *The Plurality*

The U.S. Supreme Court granted certiorari to decide whether the Act violates principles of substantive due process, equal protection, and ex post facto.⁵⁸ The opinion of the Court, drafted by Justice Thomas and joined by Chief Justice Rehnquist as well as Justices O'Connor and Scalia overturned the Kansas supreme court holding that the rule set forth in *Foucha* for determining whether a civil commitment procedure violates an individual's substantive due process right to remain free from incarceration was misapplied.⁵⁹ The Court's decision, however, focused little attention on Hendrick's substantive due process argument and emphasized a determination that the proceedings envisioned in the Act are civil in nature.⁶⁰ This determination necessitated the Court's rejection of Hendrick's Ex Post Facto and Double Jeopardy arguments because those Constitutional provisions apply only in the criminal context.⁶¹

a. The Plurality's Substantive Due Process Analysis

The Court denied Hendrick's substantive due process claim almost summarily by declaring that while *Foucha* does dictate that the state may override an individual's fundamental right to be free from restraint upon a showing of both dangerousness and "mental illness", the term "mental illness" was not intended by the Court to "require State legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather [the Court has] traditionally left to legislators the task of defining terms of a medical nature that have legal significance."⁶²

The Court explained that while an individual's potential for dangerousness alone is not sufficient to justify commitment, the additional requirement of some sort of mental disorder (whether such disorder be termed an "abnormality", "illness" or "personality disorder") is intended to "limit involuntary civil confinement to those who suffer from *volitional impairment rendering them dangerous beyond their control*."⁶³ The plurality found Hendrick's lack of volitional control supported by both his diagnosis as a "pedophile" and Hen-

58. *Id.* at 2079.

59. *Id.*

60. *Id.* at 2081-6.

61. *Id.* at 2081.

62. *Id.*

63. *Id.* at 2080 (emphasis added). It is ironic that Justice Thomas, viewed almost exclusively as a judicial conservative, would state that pedophiles lack the willpower to resist raping children in light of the fact that this same statement implies that the pedophile acts almost involuntary and is therefore devoid of the necessary mental intent to sustain a criminal conviction. Also, as discussed *infra* note 78, the American Psychiatric Association does not recognize the astonishing lack of volitional control posited by Justice Thomas as symptomatic of pedophilia.

drick's own admission that "when he becomes 'stressed out' he cannot 'control the urge' to molest children."⁶⁴ Accordingly, the Court determined that Hendrick's was both dangerous and suffering from precisely the sort of mental disorder contemplated in *Foucha* and that Hendrick's fundamental right to remain free from restraint was therefore subject to abridgment by the Kansas legislature.⁶⁵

b. The Plurality's Ex Post Facto and Double Jeopardy Analysis

The Ex Post Facto clause of the U.S. Constitution⁶⁶ has been held to prohibit the imposition of any additional penalty for a crime already punished.⁶⁷ The protection against double jeopardy found in the bill of rights⁶⁸ has been interpreted to prohibit not only subsequent prosecutions for the same offense, but also the imposition of second criminal punishments for the same offense.⁶⁹ While Justice Thomas acknowledged the potential applicability of both clauses, he also stated that a finding that the challenged state action is criminal in nature is a prerequisite to application of either clause.⁷⁰ The Court concluded that the commitment proceeding described in the Act was civil in nature.⁷¹

The Court's determination that the Act contemplates a civil commitment proceeding rather than a criminal proceeding is predicated on a finding that the Kansas legislature intended the Act to create a civil proceeding⁷² and that Hendricks did not produce the "clearest proof" that the Act is sufficiently punitive to negate the Kansas' legislature's purported intent.⁷³ The Court relied on the Kansas legislature's inclusion of the Act in the Kansas probate code rather than the Kansas criminal code as well as the Act's language that provides

64. *Id.* at 2081 (citation omitted); Would Justice Thomas so readily accept Hendrick's own testimony as to Hendrick's inability to control his sexual urges were Hendrick's to offer such testimony as a defense in a criminal proceeding? Consider this question in light of the fact that the Court denied certiorari in a case in which a trial court refused to instruct a jury on the irresistible impulse insanity defense where the only evidence of the defendant's insanity was a statement made by the defendant that he could not control his urge to kill and rape. *State v. Gilbert*, 671 P.2d 640, *cert. denied* (U.S.) 104 S.Ct. 1429.

65. *Id.*

66. U.S. Const. Art. 1, § 9, cl. 3.

67. *Lindsey v. Washington*, 301 U.S. 397, 401 (1937)(finding an Ex Post Facto violation in the application of a state mandatory sentence law to the sentencing of a convict whose crime was committed while the sentence length was still a matter of judicial discretion).

68. U.S. Const. Amendment V.

69. *Witte v. United States*, 515 U.S. 389, 391 (1995)(stating that "the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits . . . multiple punishments for 'the same offence'").

70. *Hendricks*, 117 S.Ct. at 2085.

71. *Id.* at 2086.

72. *Id.* at 2082

73. *Id.*

for a “civil commitment procedure” in assessing the legislature’s intent.⁷⁴ The determination that the Act is not sufficiently punitive to negate that intent mandated a more complicated analysis.

Justice Thomas first argued that evidence of the Act’s non-punitive nature can be found in the fact that it is neither retributive nor intended to deter, two of the classical objectives of criminal sanctions.⁷⁵ Civil commitment is intended not to punish the SVP for prior acts, rather prior acts of sexual violence are considered by the state as evidence of dangerousness. In addition, the conditions under which the SVP is confined do not differ from those experienced by any other civilly committed individual. Consequently, a finding that the Act’s civil commitment scheme is punitive would dictate a finding that all civilly committed individuals are being punished by the state. Justice Thomas rejected this argument concluding that the Court has historically recognized that incarceration of the dangerously mentally ill is a legitimate non-punitive governmental objective.⁷⁶ In short, the Court held that when the objective of the state is to confine dangerous mentally ill individuals for the express purpose of protecting the public, such action necessarily does not have as its purpose the punishment of those individuals. This view is bolstered, the Court concluded, by the Act’s provision for indefinite incapacitation indicating the legislature’s concern that SVPs remain incarcerated only until such time as they are no longer mentally ill and no longer pose a threat to society. In contrast, a definite period of commitment would evidence an intent to confine an individual in retribution for prior criminal activity.⁷⁷

As to the issue of deterrent effect, the Court found that because SVPs, by definition, suffer from a disorder which precludes the exercise of reasoned self control, their diminished volitional capacity renders them unable to resist the temptation to offend regardless of the potential consequences. Because involuntary actions cannot be deterred, it would have been irrational for the Kansas legislature to intend involuntary civil commitment to serve as a deterrent. Justice Thomas refused to ascribe to the legislature such an unfulfillable intent.⁷⁸

The Court then considered and rejected Hendrick’s claim that the paucity of treatment provided by Kansas is in and of itself sufficient evidence of the Act’s punitive nature. Rather, Justice Thomas argued, the lack of treatment is

74. *Hendricks*, 117 S.Ct. at 2082.

75. *Id.*

76. *Id.* at 2083.

77. *Id.*

78. *Id.* at 2082. Interestingly, the Fourth Edition of the Diagnostic and Statistics Manual of Mental Disorders (“DSM-IV”), published by the American Psychiatric Association, does not indicate that compulsion or lack of volitional control is necessarily symptomatic of pedophilia. In fact, the DSM-IV relates that the recidivism rate of pedophiles is only between thirteen and eighteen percent. A disorder characterized by a lack of volitional control would likely have a significantly higher rate of recidivism.

evidence only of the fact that the mental disorder from which Hendricks suffers is untreatable⁷⁹ or that in the alternative, the Court has never mandated that lack of treatment renders a civil commitment statute criminal when the overriding concern of such a statute is segregation of dangerously mentally ill individuals from the public.⁸⁰

Having found the Act civil in nature, the Court held that under no circumstances could the Act be found to violate either principles of double jeopardy or ex post facto given the requisite predicate finding of each doctrine that the suspect state action is criminal in nature.

B. The Concurrence

Justice Kennedy's brief concurrence is entirely in accord with the findings of the plurality and is drafted only to express his concern that while the Act is not punitive in nature, the Court's decision should not be read to sanction state legislation which only purports to impose civil penalties but in actuality serves retributive or deterrent ends. Kennedy argues that at all costs the civil and criminal processes should remain distinct.⁸¹

C. The Dissent

The dissenting opinion, drafted by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg concurred with the plurality's disposition of Hendrick's substantive due process argument (albeit employing unique reasoning), but took issue with the Court's determination that the Act is not punitive in nature. Finding the Act punitive, the dissent necessarily reasoned that the Act violates both the Double Jeopardy and Ex Post Facto clauses of the U.S. Constitution.

Justice Breyer agreed with the plurality that nothing in federal substantive due process jurisprudence prevents the indefinite incarceration of dangerous individuals who suffer from a mental illness, abnormality, or disorder. He agreed that while *Foucha* may have relied upon the term "mental illness", the states retain a great deal of discretion in determining just what sorts of mental problems in conjunction with dangerousness render an individual amenable to involuntary civil commitment. The exact terminology employed to describe the mental problem, be it illness, abnormality or any other similar verbiage, is inconsequential, assuming that the mental problem from which the prospective civil committee suffers is the sort encompassed by *Foucha*. He also agreed that, regardless of its categorization, Hendrick's mental problem is exactly the sort anticipated by *Foucha*.⁸²

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

80. *Id.* at 2084.

81. *Id.* at 2087.

82. *Hendricks*, 117 S.Ct. at 2088.

Specifically, Justice Breyer found the American Psychiatric Association's recognition of pedophilia as a mental disorder,⁸³ combined with the testimony that Hendrick's pedophilia results in a "highly unusual inability to control his actions"⁸⁴ sufficiently compelling to warrant the conclusion that regardless of the terminology employed by the Kansas legislature in drafting the Act, the Act's application to Hendrick's case fulfills *Foucha's* mandate.⁸⁵

Finally, Justice Breyer admitted that *Hendrick's* case raised the question of whether, as a matter of substantive due process, the state must provide available treatment to an involuntarily committed mentally ill individual, but declined to answer that question, stating that the "same question is at the heart of [his] discussion of whether Hendrick's confinement violates the Constitution's Ex Post Facto clause."⁸⁶

The dissent, while conceding that an initial inquiry into the criminal or civil nature of state legislation must necessarily rely on the label attached to the legislation, argued that Hendricks was able by the "clearest proof" to establish that the Act is indeed criminal in nature despite its classification by Kansas.⁸⁷ Justice Breyer reasoned that because in *Allen v. Illinois*⁸⁸ the Court stressed the fact that Allen would receive treatment for his condition in finding the Illinois Act civil in nature, any civil commitment statute which postpones treatment of SVPs until their prison terms expire "begins to look punitive."⁸⁹

The dissenting Justices reasoned that this lack of treatment during criminal incarceration combined with the Act's categorization of treatment of the SVP as a tertiary rather than "primary objective" is sufficient evidence of the Kansas legislature's actual intention that the Act serve a punitive function. Justice Breyer identified additional evidence for this view in both the fact that, regardless of the Act's facial commitment to treatment, Hendricks was not initially provided with treatment after his commitment under the Act⁹⁰ and the fact that the Kansas supreme court itself determined that treatment was "'at best' an 'incidental' objective" of the Act."⁹¹

83. *Id.*

84. *Id.* at 2089; *see also* discussion *supra* note 78.

85. *Hendricks*, 117 S.Ct. at 2089.

86. *Id.* at 2090. As will be made clear in Section IV of this Note, the issue of whether an involuntarily committed individual is entitled to minimal habilitation designed to promote his or her eventual cure and release is not at the heart of a determination of whether Kansas' failure to provide treatment to Leroy Hendricks violated the Ex Post Facto and Double Jeopardy clauses of the U.S. Constitution.

87. *Id.*

88. 478 U.S. 364 (1986)(upholding the authority of the states to involuntarily commit dangerous mentally ill individuals who had not been convicted of a crime).

89. *Hendricks*, 117 S.Ct. at 2092.

90. *Id.* at 2094-95.

91. *Hendricks*, 117 S.Ct. at 2097.

Finally, Justice Breyer argued that it is incumbent upon the states to employ less restrictive measures than civil commitment (assuming that such measures exist) in order to avoid a finding that a civil commitment statute is punitive in nature. Justice Breyer attempted to demonstrate the existence of such less restrictive measures through a survey of seventeen other states' similar laws, all of which either provide for treatment of SVPs during their criminal incarceration, mandate a consideration of less restrictive measures, or apply only prospectively in contrast to the Act.

Justice Breyer found that the Act, regardless of its classification by Kansas as civil, is punitive and therefore criminal in nature and necessarily violative of the Ex Post Facto Clause. The Dissent ultimately opined that states may enact SVP statutes, providing that such statutes act only prospectively and meet the treatment requirements detailed previously.

IV. AUTHOR'S ANALYSIS

A. *Freedom from Restraint as a Fundamental Right*

While a great deal of scholarly comment can and surely will address the complex and controversial issues so thoughtfully considered by both the plurality and dissent in *Hendricks*, one of the issues which the Court failed to address is equally noteworthy. The Court virtually ignored the issue of whether Leroy Hendricks enjoys a fundamental right under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution to sufficient state provided habilitation to promote his recovery and eventual consequent release.

The principal issue on which the plurality and dissent disagree is primarily one of factual interpretation. Both agree that the legal test for whether state legislation is criminal or civil first requires consideration of the state's characterization of the Act and that a party challenging that characterization must demonstrate by "the clearest proof"⁹² that the state is either being disingenuous in its civil characterization or that, regardless of the state's actual motivation, the legislation is so punitive as to render it criminal in nature. The plurality determined that Hendricks had proffered insufficient evidence to meet this very strict standard. The dissent concluded that the Act's failure to provide for treatment during a SVP's criminal incarceration combined with the state's failure to provide Hendricks with meaningful treatment during his civil commitment was sufficient evidence of Kansas' ulterior motivation and the Act's punitive character. Any analysis of this aspect of the decision, while fascinating in its own right, ignores the more fundamental issue which neither the plurality nor the dissent adequately considered. Given that individuals do enjoy a fundamental right to remain free from incarceration (a right which may only be

92. *Id.* at 2082.

abridged by the states upon demonstration of a compelling interest in effecting such incarceration), do civilly confined individuals also enjoy a fundamental right to rehabilitative services designed to promote the individual's release?

Sufficient precedent exists to mandate an affirmative response to this constitutional query. The Supreme Court, in deciding the case of *Youngberg v. Romeo*⁹³ held that Youngberg, a profoundly mentally retarded man committed to a state psychiatric institution, enjoyed the fundamental right to "minimally adequate habilitation." Specifically, the Court stated that: "as [the Court had] recognized that there is a constitutionally protected liberty interest in . . . freedom from restraint . . . training may be necessary to avoid unconstitutional infringement of those rights."⁹⁴

Admittedly, this holding related to the more circumscribed concern of whether Youngberg required habilitation in order to promote his freedom from shackling and not to the more expansive concern at issue in *Hendricks* of freedom from restraint by incarceration. It is, however, not difficult, in light of both the Court's language in *Youngberg* and the policy motivations which drove the decision to postulate an expansion of the holding that includes the fundamental right that *Hendricks* should have asserted.

The Court, in *Youngberg*, endorsed Youngberg's assertion that he was entitled to at least minimal treatment to reduce *his aggressive tendencies*. Such training, Youngberg asserted, was essential if he was to remain free from the shackling imposed upon him by the institutional personnel charged with his care to control his aggressive behavior.⁹⁵ Likewise, Hendrick's civil commitment is premised on Kansas' compelling interest in protecting children against Hendrick's "uncontrollable" pedophilic tendencies. At least with regard to the fact that both of these cases involve an imposition on the freedom of two individuals based entirely on those individuals' inability to control violent impulses, both cases are analogous.

Even Justice Thomas has written that:

an incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that *freedom from restraint* is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments to the Constitution.⁹⁶

Given Justice Thomas' identification of incarceration with restraint, would it be possible for Justice Thomas to deny that Hendrick's fundamental right to habilitation can and should be a natural extrapolation of the principles laid down by the Court in *Youngberg*? Like Youngberg, *Hendricks*, as a result of

93. 457 U.S. 307 (1982).

94. *Id.* at 318.

95. *Id.*

96. *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992)(emphasis added).

uncontrollable aggressive tendencies (as determined by Justice Thomas)⁹⁷ has been incarcerated by the state and thereby subject to restraint. As was the case with *Youngberg*, it is conceded that there is at least the possibility that a minimal amount of habilitative therapy could alleviate Hendrick's aggressive, and in his case pedophilic, tendencies.⁹⁸ The *Youngberg* decision rested on the principal that because individuals enjoy a fundamental right to remain free from restraint, the state, if it abrogates that right in order to protect a compelling interest, must provide the minimal tools necessary for the individual to overcome this imposition.⁹⁹ In essence, both Hendricks and *Youngberg* were deprived of well recognized liberty interests relating to their physical liberty.

There is little language in *Youngberg* which might be construed so as to limit the holding's expansion to Hendricks. The majority in *Youngberg* asserted that:

the State is under a duty to provide respondent with such training as an appropriate professional would consider reasonable to ensure [the respondent's] safety and to facilitate [the respondent's] ability to function free from bodily restraints. It may well be unreasonable not to provide training when training could significantly reduce the need for restraints or the likelihood of violence.¹⁰⁰

Is not incarceration the most intrusive form of bodily restraint imaginable? Does not an incarcerated person lose far less when he is subject to restraint by shackling than a free person loses when incarcerated? The incarcerated individual who is shackled loses only the ability to move freely within his prison. By contrast, a free person, as a result of incarceration, loses his autonomy, an essential element of liberty. Once incarcerated, a formerly free individual is under the complete and total control of the state. Incarcerating a free person

97. See *supra* note 33 at 4.

98. The debate over whether there is any treatment which might benefit pedophiles was certainly not settled in the pages of this opinion, however, a survey of the most recent studies conducted by some of the most prominent researchers in the field indicates that there is at least agreement that some sexually violent predators are amenable to treatment. See J.K. Marques, et al., *Effects of Cognitive-Behavioral Treatment on Sex Offender Recidivism*, 21 CRIM. JUST. & REFORM 28 (1994); W.L. Marshall & W.D. Pithers, *A Reconsideration of Treatment Outcome with Sex Offenders*, 21 CRIM. JUST. & BEHAV. 10 (1994); Keith Hawton, *Behavioral Approaches to the Management of Sexual Deviations*, 143 BRIT. J. OF PSYCHIATRY 248 (1983); Robert J. Mcgrath, *Sex Offender Risk Assessment and Disposition Planning: A Review of Empirical and Clinical Findings*, 34 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 323 (1991); W.L. Marshall & A. Eccles, *Issues in Clinical Practice with Sex Offenders*, 6 J. INTERPERSONAL VIOLENCE 68 (1991); Charles M. Borduin, Scott W. Henggeler et al., *Multisystematic Treatment of Adolescent Sexual Offenders*, 34 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 105 (1990); Anthony Walsh, *Twice Labeled: The Effects of Psychiatric Labeling on the Sentencing of Sex Offenders*, 37 SOC. PROBS. 375 (1990).

99. *Youngberg*, 457 U.S. at 324.

100. *Id.*

is, therefore, a far greater imposition on individual liberty than is the shackling of an already incarcerated person. Accordingly, the fundamental right to remain free from restraint in the form of incarceration should be afforded greater protection than the right to remain free from restraint in the form of shackling imposed upon an already incarcerated individual. This right, if it is to be given anything more than lip service, can best be protected by a declaration that involuntarily civilly committed individuals are fundamentally entitled to the minimal habilitative therapy necessary to alleviate the mental illness which has rendered them subject to restraint by incarceration.

Certainly, critics of this argument will contend that its acceptance would impose upon the states an obligation to provide habilitation to those incarcerated as a result of their conviction for the commission of a crime and that it would also perhaps mandate that the goal of that treatment be release upon completion of the treatment regimen. This criticism would be made in error. As the Court noted in *Youngberg*, while it had “established that [the respondent] retains liberty interests in safety and freedom from bodily restraint . . . these interests are not absolute, indeed to some extent they are in conflict.”¹⁰¹ Simply because state action violates an individual’s fundamental rights under the Fifth or Fourteenth Amendments, does not necessarily render that state action unconstitutional. The Court, in determining whether the state’s violation of an individual’s fundamental right is valid, inquires into whether the state has a compelling interest in abridging that fundamental right and whether there are less restrictive means which the state could employ in furtherance of that compelling interest.¹⁰²

In *Youngberg*’s case, the state could not have demonstrated a compelling interest in denying him minimal habilitation designed to promote his freedom from restraint. In fact, if anything, habilitative therapy was in the interest of the state in that it might have prevented. *Youngberg* from assaulting either the attendants or the other patients, all of whom were owed a duty by the state.¹⁰³ In the case of a prisoner convicted of a criminal offense, the state does have a compelling interest in refusing to provide treatment or habilitation aimed at freeing the prisoner from the restraint of incarceration. Namely, the state can cite one of the primary purposes of criminal sanctions, general deterrence. No

101. *Id.* at 319, 320. *Youngberg*, 357 U.S. at 319-320.

102. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that an individual’s fundamental right to privacy in marriage may not be abridged by the state in order to further a less than compelling interest in preventing teen pregnancy); *Roe v. Wade*, 410 U.S. 113 (1973)(upholding a woman’s fundamental right to privacy as against the less than compelling right of the state to protect the fetus within the first two trimesters of pregnancy and to protect the mother within the first trimester); *Moore v. East Cleveland*, 431 U.S. 494 (1977)(finding a fundamental right for extended families to reside together despite legitimate governmental interests in preventing overcrowding).

103. 53 Am.Jur.2d Safety, Mentally Impaired Persons, § 98.

such similar interest exists in the case of involuntary civil commitment because “[those] persons committed under the Act are, by definition, suffering from a ‘mental abnormality’ . . . that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement.”¹⁰⁴

B. Why the Court Did Not Consider the Right to Minimal Habilitation in its Due Process Analysis.

It is not difficult to understand why the plurality failed to identify minimal habilitation as a fundamental right enjoyed by the involuntarily civilly committed. In *Foucha*, the very decision on which both the *Hendricks* plurality and dissent relied as an articulation of the test for determining the constitutionality of involuntary civil commitment procedures, Justice Thomas, in dissent, supported the continued civil commitment of a then sane insanity acquittee without requiring a showing that the individual was both dangerous and mentally ill.¹⁰⁵ Justice Thomas’ decision rested primarily on his finding that “there is a real and legitimate distinction between insanity acquittees and civil committees that justifies procedural disparities.”¹⁰⁶ The State, he argued, has a continuing interest in incarcerating those who avoided conviction based solely on a finding that they did not possess the mental faculties necessary to form *mens rea*.¹⁰⁷ If Justice Thomas was willing to find that the continued civil commitment of a person who has regained his sanity did not violate any fundamental right possessed by that individual, it is not particularly surprising to find Justice Thomas unwilling to postulate a new fundamental right which might result in the eventual remediation and consequent liberation of another civilly committed individual.

The question of why the dissent failed to identify the fundamental right of minimal habilitation is, while equally understandable, slightly more complicated. The dissent admitted that “[t]he basic substantive due process treatment question is whether that Clause requires Kansas to provide treatment that it concedes is potentially available to a person whom it concedes is treatable.” The dissent went on, however, to forestall a determination of this issue stating that “[t]his same question is at the heart of [its] discussion of whether *Hendricks*’ confinement violates the Constitution’s Ex Post Facto Clause.”¹⁰⁸ It is impossible, given the demonstrated legal acumen of dissenting Justices Breyer, Stevens and Souter, to believe that they really consider an exploration of whether *Hendricks* enjoyed a fundamental right to treatment the same as a dis-

104. *Hendricks*, 117 S.Ct. at 2082.

105. *Foucha*, 504 U.S. at 102-126.

106. *Id.* at 108.

107. *Id.* at 102.

108. *Hendricks*, 117 S.Ct. at 2090.

cussion of whether lack of treatment is sufficient evidence to demonstrate that a state civil commitment statute is sufficiently punitive so as to render the statute criminal in nature. The former inquiry is one of sweeping magnitude which would force all states that have enacted involuntary civil commitment legislation to provide for the treatment of their involuntarily committed populations. An affirmative finding in the latter inquiry would mandate only that states must offer treatment if they wish to avoid a finding that legislation which provides for the involuntary civil commitment of dangerously mentally ill individuals upon the expiration of their prison terms violates the U.S. Constitution's Ex Post Facto Clause.

The dissent also probably feared that their embrace of a heretofore unestablished fundamental right would expose them to unnecessary criticism. Substantive due process analysis in general and the recognition of a new fundamental right in particular are arguments of last resort in light of the concerns which have been expressed over the past six decades that invalidation on substantive due process grounds is an unwarranted invasion of the prerogative of the several states.¹⁰⁹ If the dissent's goal was to strike down the Act, it was far safer to avoid the stigma still associated with substantive due process analysis and to focus on the alleged Ex Post Facto violation.¹¹⁰

Finally, the remedy available to the dissent in the event that it recognized a fundamental right to minimal habilitation would not have mandated the invalidation of the Act. A finding that Hendricks enjoys a fundamental right to minimal habilitation would have resulted in the invalidation of the Act as violating the 14th Amendment to the U.S. Constitution only in the event that the Act failed to provide for that minimal habilitation. The Act, however, does purport to establish "a civil commitment procedure for the long-term care and treatment of the sexually violent predator."¹¹¹ The Act, as it reads, would therefore be constitutional. The only question that would remain is whether the Act as applied violates Hendricks' rights. The plurality concedes that the "treatment program initially offered Hendricks may have seemed somewhat meager."¹¹² The dissent implicitly endorses the finding of the Kansas Supreme Court that "as of the time of Hendricks' commitment, the State had not funded treatment, it had not entered into treatment contracts, and it had little, if any qualified treatment staff."¹¹³ Certainly, the manner in which the Kansas Act applied would violate an individual's right to minimal habilitation were that right to be established.

109. *See Bowers v. Hardwick*, 478 U.S. 186 (1986)(denying the claim that the fundamental right to privacy extends to the commission of acts of homosexual sodomy).

110. *Id.*

111. KAN.STAT.ANN. § 59-29a01 (1994).

112. *Hendricks*, 117 S.Ct. at 2085.

113. *Id.* at 2092 citing *In Re Hendricks*, 912 P.2d at 136.

Because the Act, on its face, does not offend the substantive component of the Fourteenth Amendment's Due Process clause, the Court could not have struck down the statute to remedy an unconstitutional application. Rather, the Court could only demand that Kansas apply the Act as written and provide Hendricks with the minimal habilitation to which he was entitled. Not only would this remedy not comport with the Court's ultimate finding that the Act is unconstitutional as a violation of the Ex Post Facto clause, but because Kansas did eventually provide treatment to Hendricks no continuing violation and therefore no remedy would have been available to Hendricks.¹¹⁴

A resort to a substantive due process argument was undesirable to the dissent because, were it accepted, it would have extremely broad application to all civil commitment statutes and it would expose the dissent to the criticism normally associated with the Supreme Court's articulation of a new fundamental right under the Fourteenth Amendment's Due Process clause. These reservations, coupled with the fact that a finding of a fundamental right to minimal habilitation would afford absolutely no relief to Hendricks, ensured that the dissent would advance no such argument.

C. *Kansas Cannot Offend the Constitution to Correct its Own Mistakes*

The public needs protection from SVPs. The statistics and anecdotes provided in the introduction to this Note provide ample support for this proposition. It is, however, evident that the rape of adults and the molestation of children is not a particularly new phenomenon.¹¹⁵ It is only recently that these crimes have come to the forefront of public awareness and only more recently that the punishments meted out to sexual offenders have come to be commensurate with the injuries these predators inflict on both their victims and society.¹¹⁶ Because the legislatures are understandably influenced by this powerful trend in public opinion, they seek both to sate the public appetite for security and retribution and to somehow make amends for the almost indifferent legislative approach taken in the past. Statutes like the Act which provide both for commitment of those who commit new sex crimes as well as the commitment of SVPs who have already completed prison terms are legislation aimed at accomplishing both of these objectives.

While this sort of legislation was upheld in *Hendricks*, the position of the dissent should be afforded great consideration. It is difficult to deliberate on

114. *Hendricks*, 117 S.Ct. at 2085, n. 5 (citing the determination by the Kansas trial court that heard Hendricks' habeas corpus petition that Kansas, as of August 28, 1995 (the trial date), was providing involuntarily committed SVPs with "31.5 hours of treatment per week").

115. FINKELHOR, *SEXUALLY VICTIMIZED CHILDREN* at 135. In fact, Finkelhor's research indicates that child sexual victimization has decreased in the western world dramatically over the last two centuries and at least significantly over the last hundred years.

116. *See infra* note 122, at 19.

the Act and at some visceral level not conclude that the Act's objective with regard to those who have already served their prison sentence is not an attempt by the state to take a proverbial second bite at the apple. The dissent, while it should also have determined that Hendricks enjoyed a right to minimal habilitation, was correct in its assertion that the lack of treatment afforded Hendricks after such treatment was declared to be a goal (albeit a tertiary goal) belies the assertion of the legislature that the Act is civil in nature. If the Act is not punitive and if, as has been conceded by the plurality, asserted by the dissent, and advanced by the majority of experts in the field¹¹⁷ many if not most SVPs are amenable to treatment, why did Kansas not comply with the Act and treat Leroy Hendricks' pedophilia? The only reasonable answer to this query is that the actual aim of the Act is to continue to punish those who have already served the sentence that Kansas previously and in retrospect improvidently deemed appropriate as punishment for an act of sexual violence.

If the principles embodied in the Ex Post Facto and Double Jeopardy clauses¹¹⁸ are to be given any real effect, the Kansas legislature, as well as the legislatures of the several states, ought to admit that the threat Hendricks and others like him pose to society is at least partially their doing. Hendricks was convicted on seven separate occasions over twenty-nine years of committing sex crimes against children.¹¹⁹ Of those crimes, five involved some sort of sexual assault. In 1960, Hendricks was arrested for the molestation of "two young boys while he worked for a carnival." Hendricks served only two years in a state prison for that crime. In 1967, Hendricks was convicted of "[performing] oral sex on [an] 8 year old girl and fondl[ing an] 11 year old boy." He served less than five years in prison for those offenses. Almost immediately upon his release in 1972, Hendricks forced his step-children to engage in various depraved acts.¹²⁰ Why was Hendricks free in 1984 to commit the crimes which led to his incarceration immediately prior to the proceedings at issue in the case?

Short of the imposition of the death penalty, there is no proportionality requirement implicit in the Eighth Amendment to the U.S. Constitution's prohibition against "cruel and unusual punishment."¹²¹ Even though this interpreta-

117. *See supra* note 99, at p.14.

118. 16A Am.Jur. 2d, Constitutional Law, § 635. The criminal law is to be enforced only when individuals are given fair warning that the conduct in which they are engaging is criminal. Ex Post Facto laws violate this principle by either punishing as criminal acts which have already been committed and were not criminal at the time they were committed or by imposing additional penalties against the perpetrators of criminal acts in excess of the penalties provided for at the time of commission.

119. *Hendricks*, 117 S.Ct. at 2077-78.

120. *Id.*

121. *Harmelin v. Michigan*, 501 U.S. 957 (1991)(upholding a state court sentence of life imprisonment for an individual convicted of possessing six hundred seventy-two grams of cocaine).

tion of the Eighth Amendment was not made rendered until 1991, as early as 1980 the Court had decided that while the proportionality requirement of the Eighth Amendment does apply to non-capital punishments, it did not preclude the states from passing legislation mandating life imprisonment for chronic recidivists.¹²² In fact, the only apposite modern U.S. Supreme Court decision overturning a state sentence as violative of the Eighth Amendment occurred in 1983 when the Court ruled that life imprisonment without the possibility of parole imposed upon an individual for the commission of only non-violent felonies was unconstitutional.¹²³

Consequently, there was nothing during Hendricks entire criminal career that prevented the Kansas legislature from enacting legislation that mandated at the very least longer sentences for his crimes and at the most the forfeiture of his life. By 1980, there was a Supreme Court decision which permitted Kansas to impose a life sentence on Hendricks, who had by that time committed six felonious sexual assaults on children. Even absent the 1980 decision, there was no contrary authority that prevented Kansas from at least attempting to impose a life sentence on SVPs and then later defending that legislation's constitutionality in the federal courts, much as they did in the case at hand. Simply stated, Kansas seeks now to legislatively correct a mistake made continuously over the last half century, a mistake that time and again loosed Hendricks on the people of Kansas. While there is no doubt that the public is deserving of protection from the likes of Leroy Hendricks, that protection cannot come at the expense of the U.S. Constitution. Leroy Hendricks should have been sentenced to life in prison or death in an electric chair long ago.

V. CONCLUSION:

It is beyond dispute that Leroy Hendricks is a dangerous man. He deserves to be segregated from the public and the public deserves to be protected from his violent depraved behavior. Toward this end, we should all be pleased and grateful for Justice Thomas' plurality opinion. This holding, however, ig-

Although the U.S. Supreme Court has yet to speak on the constitutionality of such statutes, both Mississippi and Louisiana provide for the imposition of the death penalty for child rape. Mississippi, in 1995, amended MISS. CODE ANN. § 97-3-65 to include the possibility of capital punishment for any person over the age of eighteen who engages in sexual intercourse with a child under the age of fourteen. Louisiana, in the same year, amended LA.REV.STAT. ANN. § 14:42 such that capital punishment might be imposed on any individual who commits "aggravated rape" against a child under the age of twelve.

122. *Rummel v. Estelle*, 445 U.S. 263, 265-266 (1980)(finding constitutional the application of a Texas mandatory life in prison recidivist statute to the case of a third felony conviction when the perpetrator's three felony convictions consisted of "fraudulent use of a credit card to obtain \$80 worth of goods or services, . . . passing a forged check in the amount of \$28.36 [and] . . . obtaining \$120.75 by false pretenses.")

123. *Solem v. Helm*, 463 U.S. 277 (1983).

nores previously established constitutional principles laid down in cases like *Addington v. Texas*,¹²⁴ *Allen v. Illinois*¹²⁵ and *Foucha v. Louisiana*.¹²⁶ These cases required, as the dissent contended, a finding that the Act violates the U.S. Constitution's Ex Post Facto and Double Jeopardy clauses. Equally, the holding in *Hendricks* recklessly ignores the possibility that Hendricks, as an involuntary civil committee, is entitled to minimal treatment designed to effect his cure and eventual release.

The Plurality has allowed the State of Kansas to violate the principles of the United States Constitution in order that Kansas might correct a mistake that it has consistently repeated in each legislative session prior to the enactment of the Act. Kansas never in the past chose, as was well within its power, to penalize child sexual molestation sufficiently that sexually violent predators would be specifically deterred from recidivism through incarceration. If there was concern in the Kansas legislature that long term imprisonment was too great a penalty for a single act of sexual violence towards a child (an assertion which I believe would be wholly insupportable), there has never been anything preventing Kansas from adopting a statute punishing recidivist child molesters with greater penalties upon conviction for a second or third offense.

The children of Kansas deserve protection, and while the Act might provide them some measure of protection from SVPs, any time government is hastily allowed to abrogate rights granted citizens under the U.S. Constitution for the sake of public safety, a very dangerous precedent is set.¹²⁷ If Kansas is allowed to continue the incarceration of offenders upon expiration of their prison terms merely by classifying the behavior which resulted in the imposition of a prison sentence as "mentally disturbed," there is very little preventing the Kansas legislature from declaring any eccentric behavior a sign of "mental abnormality." The children of Kansas may be somewhat safer from the likes of Leroy Hendricks, but are they now more vulnerable to the intrusions of their representatives in the Kansas legislature?

JON A. BIERMAN

124. *See supra* note 9.

125. *See supra* note 11.

126. *See supra* note 13.

127. *Korematsu v. United States*, 323 U.S. 214 (1944)(upholding the federal government's reliance on national security as a compelling interest justifying federal legislation that required the wartime internment of all Americans of Japanese descent). Although this footnote is in no way intended to equate the plight of Japanese-American's during World War II with that of Leroy Hendricks, the reference does provide insight into the potential for abuse inherent in a system which would routinely recognize valid compelling state interests.