

April 1999

Fighting the Devil We Don't Know: Kansas v. Hendricks, A Case Study Exploring the Civilization of Criminal Punishment and Its Ineffectiveness in Preventing Child Sexual Abuse

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Repository Citation

Cynthia A. King, *Fighting the Devil We Don't Know: Kansas v. Hendricks, A Case Study Exploring the Civilization of Criminal Punishment and Its Ineffectiveness in Preventing Child Sexual Abuse*, 40 Wm. & Mary L. Rev. 1427 (1999), <https://scholarship.law.wm.edu/wmlr/vol40/iss4/7>

FIGHTING THE DEVIL WE DON'T KNOW: KANSAS
v. HENDRICKS, A CASE STUDY EXPLORING THE
CIVILIZATION OF CRIMINAL PUNISHMENT AND
ITS INEFFECTIVENESS IN PREVENTING CHILD
SEXUAL ABUSE

In 1984, a jury convicted Leroy Hendricks of taking "indecent liberties" with two children.¹ He served all but a few months of his sentence and was scheduled to be released to a halfway house when the Kansas legislature promulgated the Sexually Violent Predator Act ("Act").² The Act provided for "a civil commitment procedure for the long-term care and treatment of the sexually violent predator."³ Hendricks objected to the Act on constitutional grounds, arguing that it violated the Double Jeopardy and Ex Post Facto Clauses of the U.S. Constitution, as well as his right to due process.⁴ Although the Kansas Supreme Court agreed that the Act violated Hendricks's right to due process,⁵ the U.S. Supreme Court did not. In *Kansas v. Hendricks*, the Court held that because "the Act does not establish criminal proceedings and . . . involuntary confinement pursuant to the Act is not punitive," it did not violate the Constitution.⁶

The Court's ruling had the effect of incarcerating an admitted pedophile indefinitely.⁷ Society's instinctive reaction might be one of intense satisfaction that the Court protected children by permitting a legislature to banish those who prey upon them. In the broader context, however, the analytical calisthenics that the Court performed to obtain that result have sobering implications. By defining the Act as civil in nature, the Court was able

1. See *Kansas v. Hendricks*, 521 U.S. 346, 353-54 (1997).

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

3. *Id.* § 59-29a01.

4. See *Hendricks*, 521 U.S. at 356.

5. See *In re Hendricks*, 912 P.2d 129, 138 (Kan. 1996), *rev'd*, 521 U.S. 346 (1997).

6. *Hendricks*, 521 U.S. at 369.

7. See *id.* at 363-64.

to circumvent the constitutional protections the founding fathers granted to criminal defendants.⁸ The Court also permitted the Kansas legislature to redefine the terms of permissible "involuntary confinement" to deny sexual offenders what few "civil" protections existed.⁹ *Hendricks* laid the framework for states to deprive sexual offenders of individual liberty by mere legislative action. By using a faulty analytical basis and then refusing to narrow its holding to child molesters, or even to sexual offenders, the Court opened the door for state legislatures to imprison "undesirables" without judicial impediment.¹⁰

Arguably, the deprivation of constitutional rights to those who commit child sexual abuse is a small price to pay to assure the safety of children.¹¹ On an ideological level, however, the unilateral deprivation of constitutional protections is objectionable.

8. Courts have interpreted the Ex Post Facto and Double Jeopardy Clauses to apply only to criminal acts. *See id.* at 369-70. The *Hendricks* Court specifically noted: [I]n *Baxstrom v. Herold*, we expressly recognized that civil commitment could follow the expiration of a prison term without offending double jeopardy principles. . . . The Ex Post Facto Clause, which "forbids the application of any new punitive measure to a crime already consummated" has been interpreted to pertain exclusively to penal statutes.

Id. (citations omitted) (quoting *California Dept. of Corrections v. Morales*, 519 U.S. 499, 505 (1995)).

The Supreme Court has applied this analysis in many different contexts over the last decade, generally to the detriment of the individual. *See, e.g.*, *United States v. Ursery*, 518 U.S. 267, 274, 277 (1996) (finding that the Double Jeopardy Clause was not invoked because the issue was *civil* in rem forfeiture); *Witte v. United States*, 515 U.S. 389, 396 (1995) (holding that double jeopardy is a prohibition against "punishing twice, or attempting a second time to punish criminally, for the same offense" (quoting *Helvering v. Mitchell*, 303 U.S. 399 (1938) (emphasis added))); *United States v. Salerno*, 481 U.S. 739, 748 (1987) (stating that the Bail Reform Act of 1984, 18 U.S.C. § 3141 (1994), was "regulatory in nature, and [did] not constitute punishment before trial in violation of the Due Process Clause").

9. *See infra* text accompanying note 246.

10. Immediately following the decision in *Hendricks*, state legislatures across the country announced plans to implement similar statutes. *See, e.g.*, Ceci Connolly, *Some States Racing to Grasp Baton of Power Passed by High Court*, WASH. POST, June 29, 1997, at A16 (noting passage of a violent sexual predator bill by the New York Senate two days after the Supreme Court released the *Hendricks* decision).

11. Some outraged victims of violent crime protest that courts should not even consider the attackers' constitutional protections on the theory that those attackers have forfeited their rights as a result of their heinous acts. *See, e.g.*, DAVID C. ANDERSON, *CRIME AND THE POLITICS OF HYSTERIA* 172-73 (1995) (relating victims' and family members' responses to the punishment of those responsible for their loss).

The Constitution strives to "establish Justice . . . and secure the Blessings of Liberty" to "We the People."¹² Permitting legislators to pick and choose to whom constitutional protections may apply places our entire judicial system on an insecure foundation.¹³ On a practical level, by upholding the Act, the Supreme Court squandered the opportunity to force lawmakers to confront the horrific realities of child sexual abuse and target its most frequent perpetrators.¹⁴

Despite the onslaught of publicity surrounding crimes committed by sexually violent strangers, the devastating truth is that most child sexual abuse is committed by a relative or friend of the victim.¹⁵ The incarceration of a handful of individuals is insufficient to address the widespread problem of sexual abuse.¹⁶ Legislators may propose and enact sexually violent predator statutes and claim to solve the problem, yet the implementation of such laws protects but a small minority of victims. By assuming that incarceration is the appropriate remedy, lawmakers and the Supreme Court, which endorsed the legislation, ignore the need to delve deeper into the "silent epidemic" of the sexual abuse problem in the United States and to think creatively about methods of prevention.¹⁷

The first section of this Note examines the traditional distinctions between "civil" and "criminal" detention and discusses the purposes and protections provided to individuals subject to each

12. U.S. CONST. preamble.

13. Arguments that constitutional rights are in fact selectively protected, particularly in a racial context, are beyond the scope of this Note. For an excellent presentation of that argument, see Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998).

14. See *infra* notes 245-46 and accompanying text.

15. See Alan R. Kabat, Note, *Scarlet Letter Sex Offender Databases and Community Notification*, 35 AM. CRIM. L. REV. 333, 339 (1998).

16. From the date of the Act's promulgation in May 1994, until November 1997, approximately 800 convicted sex offenders were evaluated under the Act's provisions. Only 12 (1.5%) were labeled "sexually violent predators" and subject to longer periods of incarceration. See Carla J. Stovall, *The Privilege of Arguing Before the United States Supreme Court*, 46 U. KAN. L. REV. 1, 13 (1997).

17. See Robert E. Freeman-Longo, *Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 303, 303 (1997); see also *infra* notes 176-201 and accompanying text (discussing the largely underreported problem of child sexual abuse in America).

type of imprisonment. The second section analyzes the Supreme Court's decision in *Hendricks*, including its acceptance of the classification of Leroy Hendricks as a "predator," and its complete deference to the Kansas legislature.¹⁸ The third section considers possible reasons for the Court's apparent willingness to abandon constitutional protections in certain areas. This Note concludes with a discussion of the implications and ramifications of the *Hendricks* decision on the problem of child sexual abuse.

INVOLUNTARY CONFINEMENT: PURPOSE, HISTORY, AND THE DISTINCTION BETWEEN CIVILITY AND CRIMINALITY

The Preamble of the Constitution insists that a major goal of the document is to "secure the Blessings of Liberty to ourselves and our Posterity."¹⁹ The Constitution ensures that liberty applies not only to society in general, but also to the rights of individuals to be free from unreasonable governmental intrusion.²⁰ This does not mean, however, that American citizens live free from any and all restrictions: "There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members."²¹ A balance exists between individual independence and societal benefits.

Until recently, the detention of individuals clearly had been categorized as either "involuntary civil confinement" or "criminal punishment."²² Involuntary civil commitment traditionally related only to individuals who were mentally ill, while government reserved criminal punishment for prisoners as retribution for their crimes against society. This section will distinguish between the two types of detainment and then explain how the Court obliterated those differences in *Hendricks*.

18. See *Kansas v. Hendricks*, 521 U.S. 346, 355, 358-59 (1997).

19. U.S. CONST. preamble.

20. This concept arises most notably in the Fourth Amendment, which ensures "[t]he right of the people to be secure in their persons . . . against unreasonable . . . seizures." U.S. CONST. amend. IV.

21. *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

22. See, e.g., *Addington v. Texas*, 441 U.S. 418, 428 (1979) (explaining the rationale for applying different standards of proof for involuntary civil commitment and criminal confinement).

Involuntary Civil Confinement

The American Bar Association has defined involuntary civil commitment as "the process by which mentally ill individuals who are dangerous to themselves [or to] others . . . are forced to receive mental health care, usually in an inpatient facility."²³ Unlike criminal incarceration, involuntary civil commitment may continue for an indefinite duration.²⁴ Individuals who are involuntarily confined are entitled to periodic review of their condition.²⁵ When they are deemed to have "recovered," they are released.²⁶ These distinctions are consistent with the traditional primary purposes of involuntary civil commitment: "treatment and protective isolation of the individual."²⁷

Prior to *Hendricks*, involuntary civil confinement was constitutional only if a state could prove by clear and convincing evidence²⁸ that an individual was: (1) mentally ill and (2) dangerous, either to the individual himself or to society at large.²⁹ Neither element alone was sufficient to warrant detention.³⁰ Civil commitment was justified under the state's *parens patriae* power.³¹ If an individual was incompetent, the state had a duty to provide for his care, and the focus of his detainment was treat-

23. LINDSAY G. ARTHUR ET AL., INVOLUNTARY CIVIL COMMITMENT: A MANUAL FOR LAWYERS AND JUDGES 3 (Jeanne A. Dooley & John W. Parry eds., 1988).

24. See, e.g., *State v. Turner*, 556 S.W.2d 563 (Tex. 1977) (articulating a mentally ill patient's rights with respect to involuntary civil commitment under Texas law).

25. See *id.* at 566.

26. See ARTHUR ET AL., *supra* note 23, at 58. But see *infra* note 240 (noting health care professionals' doubt that a psychiatrist *would* certify that a "sexually violent predator" could be released into the community).

27. ARTHUR ET AL., *supra* note 23, at 3.

28. See *id.*; see also *Addington v. Texas*, 441 U.S. 418, 418 (1979) (rejecting both the "beyond a reasonable doubt" and "preponderance of the evidence" standards for proving the need for involuntary commitment of an individual). The *Addington* Court was unwilling to adopt the strict "beyond a reasonable doubt" standard "in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment." *Id.* at 432. It is likely that similar thinking guided the *Hendricks* majority as it considered whether to require a finding of "mental illness" before an individual could be involuntarily committed. See *infra* notes 109-10 and accompanying text.

29. See ARTHUR ET AL., *supra* note 23, at 3.

30. See *id.*

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

ment.³² If an individual was not mentally ill, a state's civil detention of such an individual violated due process.³³

Largely because "psychiatrists disagree widely and frequently on what constitutes mental illness,"³⁴ the Court has utilized a plethora of words to describe a psychiatric condition that does not appear to be "normal," yet fails to reach the heights of "mental illness."³⁵ Prior to *Hendricks*, it was unclear whether an individual's condition had to be diagnosed as a mental disease, or whether something less was sufficient to satisfy the threshold issue.³⁶

The state also had to prove that the individual posed a danger to himself or to others.³⁷ Before *Hendricks*, proof of dangerousness was a considerable burden, because it required the state to establish a nexus between a finding of mental illness and the individual's dangerousness without relying solely upon evidence of the individual's past behavior.³⁸ Permissible factors to be consid-

32. *See id.*

33. *See Foucha v. Louisiana*, 504 U.S. 71, 75-76 (1992).

34. *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985).

35. *See, e.g., Heller v. Doe*, 509 U.S. 312, 314-15 (1993) (using the classification "mentally retarded"); *Addington*, 441 U.S. at 425 (characterizing the respondent as "emotionally disturbed"); *Jackson v. Indiana*, 406 U.S. 715, 732, 737 (1972) (referring to "incompetency" and "insanity").

36. *Hendricks* argued that a diagnosis of "mental illness" was required before the State could commit him. *See Kansas v. Hendricks*, 521 U.S. 346, 358 (1997). He argued further that a judicial determination of "mental abnormality" was insufficient to prompt commitment because it was a term created by legislators and did not carry any meaning within the psychiatric community. *See id.* at 359; *see also* Transcript of Oral Argument, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (No. 95-9075), available in 1996 WL 721073, at *48-51 (Dec. 10, 1996) [hereinafter Transcript] (discussing the terminology and requirements for a finding of mental illness).

37. *See ARTHUR ET AL., supra note 23*, at 11.

38. *See id.* at 11-12. *Hendricks* explicitly permitted a court to base its finding of the likelihood of future dangerousness on evidence of the individual's past behavior. *See Hendricks*, 521 U.S. at 357-58. The Act applies only to individuals who have been charged with or convicted of violent sexual crimes, although it does require a finding that the individual "suffers from a mental abnormality . . . which makes the person likely to engage in the predatory acts of sexual violence." KAN. STAT. ANN. § 59-29a02(a) (Supp. 1997). This apparent limitation is a fallacy, however, and does not screen anyone who had committed a sexual crime in the past from a determination of future dangerousness. As noted by the psychologist who served as the State's primary witness on the issue before the trial court, the "definition [of mental abnormality] is circular in that certain behavior defines the condition which is used to predict the behavior." *In re Hendricks*, 912 P.2d 129, 138 (Kan. 1996), *rev'd*, 521

ered in the evaluation of a person's dangerousness included the "imminence, likelihood, [and] severity of the threat,"³⁹ and "the individual's [personal] history, his . . . environment and demographic factors."⁴⁰

In an attempt to deal with the unique problems presented by pedophilia,⁴¹ the *Hendricks* Court expanded the standard for involuntary civil commitment and made it easier for the state to meet the burden of proof required to satisfy that standard. In *Hendricks*, the Court confronted one state legislature's attempt to incorporate repeat sexual offenders into the state's system of involuntary civil commitment by making it applicable to those who suffer from a "mental abnormality."⁴² Classifying sexual offenders in general, and pedophiles in particular, is difficult because the psychiatric community lacks consensus on whether these individuals are afflicted with a "mental illness."⁴³ Proving that an individual is a pedophile therefore does not necessarily satisfy the threshold requirement for traditional involuntary civil confinement. The Kansas legislature attempted to bypass the "mental illness" debate by using the phrase "mental abnormality."⁴⁴ The *Hendricks* Court held that it was unnecessary to establish "mental illness" per se to satisfy due process.⁴⁵ "[W]e have never required State legislatures to adopt any particular

U.S. 346 (1997).

39. ARTHUR ET AL., *supra* note 23, at 11-12.

40. *Id.* at 54.

41. *See infra* note 43 and accompanying text.

42. *See* KAN. STAT. ANN. § 59-29a02(a) (Supp. 1997).

43. The psychologist who testified for the State at the jury trial held to determine whether *Hendricks* qualified as a "sexually violent predator" acknowledged that "pedophilia in and of itself is not considered to be a personality disorder." *Hendricks*, 912 P.2d at 131; *see also* *Foucha v. Louisiana*, 504 U.S. 71, 109 (1992) (stating that courts should defer to the legislature in the psychological arena because of the "uncertainty of diagnosis in this field and the tentativeness of professional judgment" (quoting *Jones v. United States*, 463 U.S. 354, 365 n.13 (1983))).

44. *See Kansas v. Hendricks*, 521 U.S. 346, 358-59 (1997).

45. *See id.* Eight of the nine justices determined that such a diagnosis was unnecessary. *See id.* at 348; *id.* at 373-74 (Breyer, J., dissenting). Justice Ginsberg did not join in Part I of the dissent, which agreed with the majority opinion that the Act's "definition of 'mental abnormality' satisfies the 'substantive' requirements of the Due Process Clause." *Id.* at 373 (Breyer, J., dissenting).

nomenclature in drafting civil commitment statutes."⁴⁶ The Court stated that a "mental abnormality" was an "additional factor" that, when combined with a finding of "dangerousness," was sufficient to justify involuntary civil commitment.⁴⁷

Criminal Punishment

Philosophers continually have debated the purpose and morality of inflicting punishment upon individuals.⁴⁸ Most generally, punishment is defined as the intentional imposition of something presumed to be odious to the recipient, by a group deemed by the community as possessing the authority to mete out and enforce the sentence.⁴⁹ The individual's voluntary violation of the social code serves as the justification for the sentence.⁵⁰ Additionally, there is a general notion that the punishment should fit the crime.⁵¹ This concept protects the accused from unduly harsh punishment and ensures that the sentence imposed by the societal authority accurately reflects the individual's culpability.⁵²

As noted by the *Hendricks* Court, retribution and deterrence are the primary purposes of punishment.⁵³ Retribution is the theory of "just deserts"—that an individual who breaks society's code deserves to be penalized.⁵⁴ Deterrence, the idea that punishing offenders theoretically prevents others from similarly

46. *Id.* at 359.

47. *Id.* at 358.

48. See generally NIGEL WALKER, *WHY PUNISH?* (1991) (providing an excellent overview of the debate over the infliction of punishment from its origins to the present).

49. See *id.* at 1-2.

50. See *id.* at 2-3; see also Michael Corrado, *Punishment, Quarantine, and Preventive Detention*, 15 CRIM. JUST. ETHICS 3, 3-4 (1996) (generalizing that punishment is a reasonable response to crime).

51. See CICERO, *DE OFFICIIS* bk. I, ch. XXVI (John Higgenbotham trans., Univ. of Cal. Press 1967) (n.d.) ("One should also ensure that the penalty is not out of proportion to the crime."). This idea is crystallized in our federal law through the Constitution's protection against "cruel and unusual punishments." U.S. CONST. amend. VIII.

52. See generally MODEL PENAL CODE § 2.02 (1955) (defining culpability and providing a rationale for the imposition of criminal liability).

53. See *Kansas v. Hendricks*, 521 U.S. 346, 361-62 (1997).

54. See WALKER, *supra* note 48, at 9 (addressing the theory of retributivism).

breaking the law,⁵⁵ is an ancient concept, dating back to the origins of criminal law.⁵⁶

Another significant purpose of the infliction of punishment is to fulfill public expectations.⁵⁷ "[S]ociety, through the courts, must show its abhorrence of particular types of crime"⁵⁸ Some critics argue that this aspect has become disproportionately important in recent years, to the detriment of calculated reasoning.⁵⁹ Regardless of whether the criticism is accurate, it is clear that the need to give the appearance of responding to public concerns regarding crime plays a significant role in the drafting of criminal law.

The Distinction Between Involuntary Civil Commitment and Criminal Punishment, and its Role in Hendricks

Historically, the state has used two reasons to justify involuntary civil confinement. First, detention and treatment may prevent an offender whose mental illness renders him dangerous from committing *future* bad acts.⁶⁰ Alternatively, confinement may be retaliatory, and justified as a consequence of the person's *prior* bad acts.⁶¹ Involuntary civil commitment thus centers on

55. See PHILLIP MONTAGUE, PUNISHMENT AS SOCIETAL-DEFENSE 6 (1995).

56. See ARTHUR L. STINCHCOMBE ET AL., CRIME AND PUNISHMENT—CHANGING ATTITUDES IN AMERICA 79 (1980).

57. See WALKER, *supra* note 48, at 22.

58. *Id.* (quoting an English case, *R. v. Sargeant*, 60 Crim. App. 74, 77 (1974)).

59. See, e.g., John Q. Barrett, *Death for Child Rapists May Not Save Children*, NAT'L L.J., Aug. 18, 1997, at A21. Barrett's article discusses the Supreme Court's refusal to grant certiorari to a case challenging a Louisiana statute that permitted the use of capital punishment for rapists of children under the age of 12. See *Bethley v. Louisiana*, 520 U.S. 1259 (1997). Barrett noted that "death penalty litigation is an ordeal that could traumatize child victims," suggested that perpetrators known to the victims could use the potential for death as a tool to persuade the victim to keep the abuse a secret, and cautioned that "[w]e need to think about all this before a legislative rush to protect children swamps careful consideration." Barrett, *supra*, at A21; see also ANDERSON, *supra* note 11, at 180-81 (evaluating the furlough program that was at the core of the Willie Horton furor during the 1988 presidential campaign, and arguing that "eliminating the chance for rare replays of the Horton case would make no measurable contribution to overall crime reduction. But this was . . . an obscure point.").

60. See generally MONTAGUE, *supra* note 55, at 5 (discussing familiar justifications for punishment).

61. See *id.*

the individual's well-being and state of mind; criminal punishment, on the other hand, focuses on society by requiring the convicted felon to "pay" for his transgression, by securing the felon so he can no longer threaten the community, and by sending a message to other individuals who contemplate breaking the law.⁶² The Court's decision in *Hendricks* blurred the traditional distinction between the two permissible types of involuntary incarceration.⁶³

The State confined Hendricks, but did not diagnose him with a mental illness or afford him treatment.⁶⁴ Consideration of his potential dangerousness seemed to be the paramount, and perhaps the only, issue that concerned the majority of the Court.⁶⁵ Under traditional analysis, therefore, Hendricks would have been ineligible for involuntary civil commitment because only one of the necessary elements was present.⁶⁶ At the time the State detained him under the Act, Hendricks had completed nearly all of his sentence for committing indecent liberties with two children ten years earlier.⁶⁷ Using a traditional approach, he

62. See *id.* at 23-24.

63. Although the Court did not discuss the elimination of this distinction in *Hendricks*, the Court consciously knew that validating the Kansas statute would create a new category of incarceration. During oral argument, the Court characterized the Act as "a hybrid between a criminal statute and a civil statute." See Transcript, *supra* note 36, at *7. The Attorney General for the State of Kansas concurred with the description, stating, "It's a hybrid between criminal sentencing and treatment in lieu of punishment," although she insisted that the "hybrid" resulted in a *civil* commitment. *Id.*

64. See *In re Hendricks*, 912 P.2d 129, 136 (Kan. 1996), *rev'd*, 521 U.S. 346 (1997). Psychiatrists and psychologists differ in their opinions of whether pedophilia is a treatable disease. See *Kansas v. Hendricks*, 521 U.S. 346, 365-67 (1997). Hendricks himself appeared to believe that pedophilia is not a treatable illness. At the jury trial held to determine whether he should be deemed a "sexually violent predator," it was revealed that Hendricks had expressed to the state's physician his opinion that "treatment is bull—." *Id.* at 355. The question of feasibility of treatment, however, should be an objective evaluation and should not be left to the individual respondent to determine. The State believed that treatment was possible. See Transcript, *supra* note 36, at *12.

65. See *Hendricks*, 521 U.S. at 364.

66. See *supra* note 29 and accompanying text.

67. See Brief for Leroy Hendricks Cross-Petitioner at *2, *Hendricks* (Nos. 95-1649, 95-9075), available in 1996 WL 450661 [hereinafter Brief for Cross-Petitioner]; see also *infra* notes 72-91 and accompanying text (providing a more detailed depiction of the facts in *Hendricks*).

would have been ineligible for further criminal confinement because he would have had the protection of the Ex Post Facto Clause,⁶⁸ and/or the Double Jeopardy Clause.⁶⁹ In short, under the traditional guidelines for imposing involuntary incarceration, whether civil or criminal, Hendricks would have been released. What makes the *Hendricks* decision unique is that the Court fashioned its decision in a way that deprived Hendricks of the constitutional protections offered by either the civil or the criminal processes.⁷⁰ Even more disturbing for future cases, the Court did so without providing an express explanation for circumventing the safeguards intended to protect and promote individual liberty.⁷¹

KANSAS V. HENDRICKS: BACKGROUND

On November 26, 1984, the State of Kansas convicted fifty-year-old Leroy Hendricks of taking "indecent liberties"⁷² with two thirteen-year-old boys.⁷³ In compliance with the State's recommendation pursuant to a plea agreement, Hendricks was sentenced to a five-to-twenty year prison term.⁷⁴ After serving nearly ten years of his sentence, Hendricks was scheduled for release to a halfway house on September 11, 1994.⁷⁵

On May 11, 1994, the Kansas legislature enacted the Sexually Violent Predators Act,⁷⁶ which provided:

68. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law . . .").

69. *Id.* amend. V (providing, in pertinent part, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb").

70. See *Hendricks*, 521 U.S. at 357, 363.

71. See *infra* notes 115-18 and accompanying text (discussing possible reasons for the Court's willingness to write its opinion in vague terms).

72. See KAN. STAT. ANN. § 21-3503 (1994) (defining "indecent liberties with a child").

73. See *In re Hendricks*, 912 P.2d 129, 130 (Kan. 1996), *rev'd*, 521 U.S. 346 (1997).

74. See *Hendricks*, 521 U.S. at 353-54.

75. See *id.*

76. The Act was prompted by the rape, sodomization, and strangulation of 19-year-old Stephanie Schmidt by her coworker, a convicted rapist who had been released after serving a 10-year prison term. See Stovall, *supra* note 16, at 1.

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 treatment act for mentally ill persons . . . which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. . . . [S]exually 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. . . . [T]herefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary⁷⁷

The remainder of the Act sets forth a procedure for the involuntary commitment of individuals who had been convicted and incarcerated for a sexually violent offense.⁷⁸

The Act permitted the State to file a petition requesting that the individual be classified as a "sexually violent predator," which would trigger a procedure resulting in his involuntary incarceration.⁷⁹ Hendricks was the first person to be evaluated under the Act.⁸⁰ The Act entitled an offender to a hearing to determine whether he should be classified as a sexually violent predator.⁸¹ At his hearing, Hendricks moved to dismiss the petition, arguing that the Act was unconstitutional.⁸²

The lower court reserved its ruling on the constitutionality of the statute, but held that the Act provided for "civil rather than criminal or quasi-criminal" incarceration.⁸³ For that reason, the

77. KAN. STAT. ANN. § 59-29a01 (1994 & Supp. 1997).

78. See *id.* § 59-29a03(a)(1)-(4) (Supp. 1997). The statute also applied to individuals who were charged with an offense of sexual violence but who had been deemed incompetent to stand trial, tried for a sexually violent offense but had been found not guilty by reason of insanity, or tried and found not guilty of an offense of sexual violence when the jury answered affirmatively to special questions posed. See *id.*

79. See *id.* §§ 59-29a04 to 59-29a05 (Supp. 1997).

80. See Brief for Cross-Petitioner, *supra* note 67, at *1.

81. See KAN. STAT. ANN. § 59-29a07 (Supp. 1997).

82. See *In re Hendricks*, 912 P.2d 129, 130 (Kan. 1996), *rev'd*, 521 U.S. 346 (1997). Hendricks's motion also claimed that the State had breached the plea agreement. The district court dismissed the allegations of breach and Hendricks did not appeal. See *id.*

83. *Id.*

lower court held that the Fifth Amendment privilege against self-incrimination did not apply, and ordered Hendricks to testify and to comply with a psychological evaluation to assist the jury in its determination of whether he should be classified as a "sexually violent predator."⁸⁴

Denied the privilege against self-incrimination at his trial, Hendricks admitted to being a pedophile and testified that his history of sexual involvement with children began in 1955.⁸⁵ The State called a series of witnesses, including a psychologist who testified that Hendricks suffered from pedophilia (a condition that could be considered a mental abnormality), a girl to whom Hendricks had exposed himself to in 1955, and Hendricks's stepdaughter and stepson who testified that he had violated them repeatedly when they were children.⁸⁶ The jury ruled that Hendricks was "a sexually violent predator," and committed him.⁸⁷

Hendricks appealed his constitutional claims. The Kansas Supreme Court declared the Act unconstitutional because it violated Hendricks's right to substantive due process.⁸⁸ The State of Kansas then appealed and Hendricks cross-petitioned for certiorari on his Double Jeopardy and Ex Post Facto claims.⁸⁹ The Supreme Court granted both petitions and reversed the Kansas Supreme Court, holding that the Act's definition of "mental abnormality" was sufficient to satisfy due process.⁹⁰ The Court deferred to the legislature's stated intent to create a "civil" statute and held that because the Act was not penal in nature, Hendricks was not entitled to relief through either the Double Jeopardy or Ex Post Facto clauses.⁹¹

84. *See id.*

85. *See id.* at 131.

86. *See id.* at 143.

87. *See id.* at 131.

88. *See id.* at 138. Kansas's highest court did not address Hendricks's other claims after finding that the Act violated the Fourteenth Amendment.

89. *See Kansas v. Hendricks*, 521 U.S. 346, 350 (1997).

90. *See id.* at 356. "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." KAN. STAT. ANN. § 59-29a02(b) (Supp. 1997).

91. *See Hendricks*, 521 U.S. at 369.

KANSAS V. HENDRICKS: ANALYSIS OF THE COURT'S OPINION

In *Hendricks*, Justice Thomas wrote for a five member majority, joined by Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Scalia. During oral argument, Justice Scalia demonstrated an apparent lack of support for the Act,⁹² yet did not write separately to articulate his views on the subject. Justice Breyer wrote the dissenting opinion, joined in its entirety by Justices Stevens and Souter and by Justice Ginsberg as to Parts II and III.⁹³ The method of analysis and the language used in the majority opinion, more than the actual holding of the case, carry the most significant ramifications.

Setting the Stage: The Introductory Language of the Opinion

Justice Thomas crafted the initial language of the majority opinion to gain widespread support for the Court's ruling.⁹⁴ It began by stating that Hendricks had a "long history of sexually molesting children,"⁹⁵ and subsequently quoted a large section of the Act, which stated in part that "[a] small but extremely dangerous group of sexually violent predators exist."⁹⁶ Nothing in the statute suggested that this statement was a fact supported by research and scientific study. Rather, it was an opinion expressed by the Kansas legislature that the Court later accepted at face value.⁹⁷ Although the legislature was not necessarily in

92. For example, in objecting to Justice Kennedy's questioning, Justice Scalia facetiously suggested, "maybe we could preventatively detain everybody that's released because he's committed one crime and is likely to commit another one." Transcript, *supra* note 36, at *46. The author was present at the oral argument before the Supreme Court and witnessed this exchange.

93. Part I of the dissent agreed with the majority that the Act satisfied the requirements of due process. See *Hendricks*, 521 U.S. at 373-74 (Breyer, J., dissenting). Ginsberg's failure to join that portion of the opinion suggests that she would find the Act unconstitutional on due process grounds as well. See *id.* at 373 (Breyer, J., dissenting).

94. *Hendricks* received a significant amount of media coverage. See, e.g., Jerry Adler & Peter Annin, *Too Dangerous to Set Free?*, NEWSWEEK, Dec. 9, 1996, at 38; Joan Biskupic, *High Court Will Review State Sex Predator Laws: Extra Confinement Post Sentence at Issue*, WASH. POST, Dec. 11, 1996, at A15.

95. *Hendricks*, 521 U.S. at 351.

96. *Id.* at 351 (quoting KAN. STAT. ANN. § 59-29a01 (1994)).

97. See *id.* at 350-51.

error, it is disturbing that the Court found it unnecessary to test and evaluate the basic premise upon which the statute rested.⁹⁸

The Court also accepted the Kansas legislature's statutory acknowledgment that sexually violent predators did *not* have a mental disease or defect such that they qualified for involuntary civil commitment under the Act, and that the possibility of reforming sexually violent predators in a prison setting was poor.⁹⁹ The Court performed no independent analysis of the possibility of reforming sexually violent predators, nor did it even object to the classification of a group of individuals in one vilified group. Implicitly, the Court accepted, without analysis, the legitimacy of a legislature lumping together individuals with certain character traits under a single, stigmatic label.¹⁰⁰

Spinning the Facts

The Court's depiction of the facts not only helped engender support for the ultimate decision, but also created such a loathing for Hendricks as to dispel any sympathy the public might have for an individual who remained involuntarily confined even after he had served his debt to society. For example, the Court noted that "Hendricks' own testimony revealed a chilling history of repeated child sexual molestation and abuse," and quoted his statement that "the only sure way he could keep from sexually abusing children in the future was 'to die.'"¹⁰¹ The Court emphasized that other members of society had viewed Hendricks as an extremely dangerous individual: "The jury unanimously found beyond a reasonable doubt that Hendricks was a sexually violent predator."¹⁰² The Court's deliberate stress upon the consensus

98. This is consistent with the Court's extreme deference to the Kansas legislature's intent in promulgating the Act. *See id.* at 359-60; *see also infra* notes 148-50, 153-55 and accompanying text (discussing the Court's deferential treatment of the legislature).

99. *See Hendricks*, 521 U.S. at 351 (citing KAN. STAT. ANN. § 59-26a01 (1994 & Supp. 1997)).

100. The Court may have been taking its cue from state legislatures that draft involuntary civil commitment statutes to be predicated upon an individual's status. *See Eric S. Janus, Sex Offender Commitments: Debunking the Official Narrative and Revealing the Rules-in-Use*, STAN. L. & POL'Y REV., Summer 1997, at 71, 71.

101. *Hendricks*, 521 U.S. at 354.

102. *Id.* at 355. Although the legislature had declared the Act to be a "civil" statute,

of others regarding Hendricks's dangerousness was another attempt to garner public support against Hendricks and others similarly situated.

Rejection of the Concept of Absolute Individual Liberty

After setting the stage such that Hendricks would be viewed in the worst possible light, the Court then turned to the more theoretical concept of individual liberty. The Court began this portion of its argument by reiterating that citizens have no absolute right to liberty in all cases at all times.¹⁰³ It cited precedent to support the proposition that concern for "the common good" may take precedence over an individual's liberty.¹⁰⁴ The Court recognized an individual's right to be free from physical restraint, but then provided a lengthy discussion of the community's right to withhold that liberty.¹⁰⁵ The Court concluded: "It thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty."¹⁰⁶

Protect Society, Confine the Dangerous: The Heart of the Court's Argument

Dangerousness as the Key to Involuntary Civil Commitment

Having framed the factual history of the case, the Court proceeded to examine the Act.¹⁰⁷ It noted with approval that the

see KAN. STAT. ANN. § 59-26a01, the Kansas Supreme Court advised that the trial court should employ the "reasonable doubt" standard to determine whether Hendricks was a sexually violent predator. This standard typically is reserved for criminal proceedings. See *In re Hendricks*, 912 P.2d 129, 132 (1996), *rev'd*, 521 U.S. 346 (1997); see also *Addington v. Texas*, 441 U.S. 418, 428 (1979) (stating that the reasonable doubt standard is used in criminal trials). The *Hendricks* Court dismissed Hendricks's argument that the use of a reasonable doubt standard made the commitment hearings criminal in nature. See *Hendricks*, 521 U.S. at 364. The Court stated that providing additional safeguards to the individual failed to "transform a civil commitment proceeding into a criminal prosecution." See *id.* at 364-65.

103. See *Hendricks*, 521 U.S. at 356-57.

104. See *id.* (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)).

105. See *id.* at 357.

106. *Id.* at 358.

107. See *id.* at 350.

"Act unambiguously require[d] a finding of dangerousness [to the individual or to the community] as a prerequisite to involuntary confinement."¹⁰⁸ Significantly, the Court chose to begin its examination of the Act with the dangerousness determination. In previous cases, the threshold question had not been the threat the individual posed to society, but rather the state of his mental health.¹⁰⁹ In *Hendricks*, the Court bypassed the mental illness question and focused immediately on the "dangerousness" of the threat that Hendricks posed to society at large.¹¹⁰ This change in approach has severe implications, particularly when coupled with the Court's analytical manipulations that permitted it to find that Hendricks was sufficiently "mentally ill" to qualify for involuntary civil commitment.

Despite its ultimate classification of the Act as "civil," the Court was willing to look to elements of criminal behavior and procedure to support the Act's constitutionality. For example, the Court cited the permissibility of using past behavior to predict "future *criminal* conduct."¹¹¹ In this way, the Court accepted that *civil* detainment authorized by a *civil* statute was used permissibly to prevent *criminal* behavior. The Court did not address this inconsistency, seemingly relying on the apparent dangerousness of the individual as sufficient justification.

Sexual Predators are Mentally "Abnormal" and Qualify for Involuntary Civil Commitment

After establishing that dangerousness was an important, and possibly the central issue with respect to involuntary civil commitment, the Court stated that dangerousness was an acceptable basis for detainment only when "some additional factor" was present as well.¹¹² The Court found that a "mental abnormality" satisfied this "additional factor" test.¹¹³ These conclusions have

108. *Id.* at 357.

109. *See supra* notes 28-33 and accompanying text.

110. *See Hendricks*, 521 U.S. at 357-59.

111. *Id.* at 357 (emphasis added) (quoting *Schall v. Martin*, 467 U.S. 253, 278 (1984)).

112. *Id.* at 358.

113. *See id.* at 358-60.

two primary implications: first, that a "mental abnormality"—as opposed to a "mental illness"—is sufficient to warrant the civil confinement of a dangerous individual; and second, that the "additional factor" need not necessarily involve a consideration of the individual's mental health, although that consideration was the key to traditional involuntary civil commitment.¹¹⁴

The great uncertainty that surrounds the psychiatric community's articulation of "mental illness" and the questionable effectiveness of providing treatment for pedophiles are possible explanations for the Court's declination to restrict the requisite "additional factor" to a consideration of the individual's mental health.¹¹⁵ The Court discussed possible distinctions between a "mental abnormality" and "mental illness," and noted that experts disagree on whether pedophilia qualifies as a "mental illness."¹¹⁶ Apparently unwilling to join either side of the debate, the Court reasoned that the use of the phrase "mental abnormality" was the legislature's attempt to reconcile the uncertainty.¹¹⁷ The Court declared that it had never required legislatures to use any particular terminology and rejected Hendricks's argument that the Act was unconstitutional because it failed to require a finding of "mental illness."¹¹⁸

The Court neglected to explore at least two implications of its acceptance of the Kansas legislature's term "mental abnormality." First, in relegating the discussion to a semantic level, it ignored the fact that the term "mental abnormality" was a legislative construction that lacked any basis in the psychiatric community.¹¹⁹ Although psychiatrists and psychologists debate what

114. See *supra* notes 45-47 and accompanying text.

115. Justice O'Connor appeared to be especially concerned about the lack of certainty surrounding whether a pedophile could be deemed to be "mentally ill," and whether being a pedophile is a curable condition. See Transcript, *supra* note 36, at *44-46.

116. See *Hendricks*, 521 U.S. at 359.

117. See *id.*

118. *Id.* at 359-60 (emphasis added); *supra* notes 44-47 and accompanying text.

119. The Court noted and dismissed this concern, stating that traditionally legislatures have had

the task of defining terms of a medical nature that have legal significance. . . . Often, those definitions do not fit precisely with the definitions employed by the medical community. . . . Legal definitions, however,

specific elements characterize a "mental illness," that term signifies a degree of physiological disturbance supported by scientific studies and literature.¹²⁰ The term "mental abnormality," however, is a purely legislative attempt to incorporate into the Act individuals who might not fall within the technical definition of "mental illness."¹²¹ The term "mental abnormality" is a tool for consensus-building, not a signal bearing any academic or scientific support.

The Court also failed to recognize that because the phrase "mental abnormality" lacks a recognized definition, the term is much broader than "mental illness." The Act does not provide guidelines stipulating the elements of a "mental abnormality," nor identify entities with the power to determine what qualifies as an "abnormality."¹²² As written in the Act, it is the trier of fact who determines whether the individual exhibits "abnormal" tendencies.¹²³ Involuntary incarceration therefore becomes focused not on the individual, as in traditional involuntary civil commitment analysis,¹²⁴ but on the community's view of "normalcy."

Without more stringent guidelines, reliance upon societal determination is amorphous at best. Social concerns fluctuate with changing times, and what is deemed abnormal at one point in

which must "take into account such issues as individual responsibility . . . and competency," need not mirror those advanced by the medical profession.

Hendricks, 521 U.S. at 359 (quoting AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, at xxii, xxvii (4th ed. 1994)).

120. See ARTHUR ET AL., *supra* note 23, at 11.

121. See *Hendricks*, 521 U.S. at 359.

122. See KAN. STAT. ANN. § 59-29a02(b) (Supp. 1997).

123. See *id.* § 59-29a06 (Supp. 1997). *Hendricks* demanded a jury trial for the determination of his status as a sexually violent predator. See *Hendricks*, 521 U.S. at 354. The statute does not require one, however, and thus the definition of "mental abnormality" conceivably could rest within the hands of a single judge. The Court determined that the Act was a "civil" statute and therefore that the "criminal" protections of the Fifth Amendment did not apply, thus, presumably the Sixth Amendment right to an attorney would be unavailable as well. See *id.* at 367-70. The implication of *Hendricks*, therefore, is that an unrepresented individual who is deemed "dangerous" could be incarcerated if a trial judge decided that his behavior preceding his criminal sentence was "abnormal."

124. For a discussion of the traditional approach to involuntary civil commitment, see *supra* notes 28-40 and accompanying text.

history is acceptable in another. The deprivation of individual liberty thus becomes inextricably intertwined not with law and its precedent, or science and its objective studies, but with social mores that are subjective in nature and change quickly. The definition of "mental abnormality" is an uncertain foundation on which to support such an integral societal concept as "[t]he right of the people to be secure in their persons."¹²⁵ Although the "additional factor" test apparently is supposed to prevent legislators from confining people merely because they are deemed "dangerous," it is difficult to imagine a scenario in which the state could prove "dangerousness" without also being able to prove a claim of "mental abnormality." It seems that a mere finding of dangerousness *could* be sufficient to deprive an individual of his liberty, notwithstanding the language to the contrary in *Hendricks*.¹²⁶

By holding that the combination of dangerousness and an unidentified "additional factor" was enough to compel commitment, the Court stepped far wide of the traditional standard for involuntary civil commitment that demanded that the individual be diagnosed with a mental impairment.¹²⁷ The Court cited examples of acceptable "additional factors,"¹²⁸ but failed to define the term. The State of Kansas favored the phrase "mental abnormality," a term that described conditions that the Supreme Court characterized as "medically recognized."¹²⁹ The Supreme Court, however, articulated no such preference for a pseudo-medical term. Essentially, the Court stated that because the dominant group viewed pedophiles as "abnormal," legislators legitimately could deprive them of their liberty without any recognized medical or psychological justification.¹³⁰

125. U.S. CONST. amend. IV.

126. See *Hendricks*, 521 U.S. at 358 ("A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment.").

127. See *supra* text accompanying note 47.

128. *Hendricks*, 521 U.S. at 358. The Court looked to earlier cases in which it had upheld civil commitment statutes that employed mental health terminology. See *id.* (citing *Heller v. Doe*, 509 U.S. 312, 314-15 (1993) ("mental retardation"); *Allen v. Illinois*, 478 U.S. 364, 366 (1986) ("mental illness"); *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 271-72 (1940) ("psychotic personality").

129. See Transcript, *supra* note 36, at *23-24.

130. See *Hendricks*, 521 U.S. at 359-60.

Although it is difficult to argue that a pedophile does not suffer from some sort of mental illness, this holding opens the door for future legislators to commit others who have a much more distant connection to any type of mental illness, simply because the legislature deems them to be too "dangerous" to roam freely about the community.¹³¹ The Court thus provided an opportunity for a future expansion of the factors used to consider whether an individual has a "mental abnormality" that might not have any bearing upon the individual's mental health. After *Hendricks*, then, the central question in an involuntary civil commitment hearing is not the mental health of the individual, but rather whether that individual poses a danger to society, and whether he exhibits any character traits that are sufficiently compelling to serve as the necessary "additional factor" to warrant sequestering him from the community.¹³²

Evidence of Mental Abnormality: Reliance on Self-Incrimination

The Court determined that Hendricks's "lack of volitional control" evidenced his affliction with a mental abnormality.¹³³ In finding that Hendricks was incapable of exerting self-control, the Court relied heavily upon his own statements. The opinion twice quoted Hendricks's testimony that, "when he 'get[s] stressed out,' he 'can't control the urge' to molest children."¹³⁴ The Court concluded that Hendricks's diagnosis as a pedophile, combined with his own admissions that validated the diagnosis, and the "prediction of future dangerousness" were sufficient to sustain an imposition of involuntary civil commitment.¹³⁵ In essence, the Court found that pedophilia was a "mental illness" for the purpose of determining whether an individual suffering from that condition is subject to involuntary civil commitment.¹³⁶ The

131. During oral argument, the Court raised various hypothetical scenarios addressing this point. See Transcript, *supra* note 36, at *20-21, *31, *49 (discussing potential statutes aimed at arsonists, armed robbers, and murderers).

132. See *Hendricks*, 521 U.S. at 358.

133. *Id.* at 360.

134. *Id.* at 355, 360 (quoting *In re Hendricks*, 912 P.2d 129, 144 (1996), *rev'd*, 521 U.S. 346 (1997)).

135. *Id.* at 360.

136. See *id.*

Court's conclusion is not unreasonable, given the state of uncertainty in the psychiatric community¹³⁷ and the dire threat that pedophiles pose to children. By using Hendricks's self-incriminating statements as an analytical shortcut around a ruling that pedophilia did in fact constitute a "mental illness," however, the Court left several tacit questions unanswered.

The Court used Hendricks's admission that he could not prevent himself from desiring to molest children when he became "stressed out" against him, assuming that Hendricks, who may be mentally ill, was sufficiently capable of asserting a judgment about his own condition.¹³⁸ This framework brings to mind two questions: If an individual is mentally abnormal, should judicial judgment rest upon the direct testimony of that individual? If that individual is mentally abnormal, how is the testimony at all reliable?

Conversely, even if the individual is "normal," judicial reliance upon the individual's testimony creates an enormous incentive to lie. Hendricks was honest when he conceded, in graphic terms, that he was unable to testify with any certainty that he would be able to refrain from his pedophilia at all times in the future.¹³⁹ The Court used his admission and his past behavior to find him eligible for involuntary commitment.¹⁴⁰ Would the evidence of past behavior alone have been sufficient to commit him? The Court suggested that it might not, and that such an individual might require criminal commitment proceedings and the constitutional protections such criminalization would entail.¹⁴¹ It seems, therefore, that the Court will permit the state to deprive an honest offender of his constitutional rights by deeming the proceeding to be "civil," while rewarding a dishonest offender who claimed that he had completely "recovered" with the constitutional protections granted to criminal defendants.

137. See *supra* notes 115-16 and accompanying text.

138. See *Hendricks*, 521 U.S. at 355, 360.

139. See *supra* text accompanying note 101.

140. See *Hendricks*, 521 U.S. at 360.

141. See *id.* ("This admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through *criminal* proceedings.") (emphasis added)).

Deference to the Legislature: The Act is a Civil Statute

Hendricks argued that, despite the language used in the statute, the Act established criminal proceedings.¹⁴² The Court stated that Hendricks had three claims to support his contention that the Act was a criminal statute.¹⁴³ First, the "confinement's potentially indefinite duration [was] evidence of the State's punitive intent."¹⁴⁴ Second, the State's use of safeguards typically reserved for criminal hearings indicated the criminal nature of the proceedings.¹⁴⁵ Third, the State's failure to provide treatment revealed the legislature's intent to create a criminal statute.¹⁴⁶ Hendricks argued that because the proceedings were criminal, the resulting incarceration was criminal as well.¹⁴⁷ The Court disagreed. It held that "[t]he categorization of a particular proceeding as civil or criminal 'is first of all a question of statutory construction.'"¹⁴⁸

The majority did not address the Kansas Supreme Court's finding that treatment was an inseparable element of civil commitments, and summarily dismissed the Kansas court's assertion that "[i]t is clear that the primary objective of the Act is to continue incarceration and not to provide treatment."¹⁴⁹ The Kansas court had ample reason to believe that the legislative intent was, in fact, punitive: "The record reflects that treatment for sexually violent predators is all but nonexistent. The legislature concedes that sexually violent predators are not amenable

142. *See id.* at 361.

143. *See id.* at 362-65.

144. *Id.* at 363.

145. *See id.* at 364.

146. *See id.* at 365; *see also infra* note 228 (noting the lack of treatment available to Hendricks when he was committed under the Act).

147. *See Hendricks*, 521 U.S. at 361.

148. *Id.* (quoting *Allen v. Illinois*, 478 U.S. 364, 368 (1986)).

149. *In re Hendricks*, 912 P.2d 129, 136 (1996), *rev'd*, 521 U.S. 346 (1997). The Supreme Court stated:

Even if we accept this determination that the provision of treatment was not the Kansas Legislature's 'overriding' or 'primary' purpose in passing the Act, this does not rule out the possibility that an ancillary purpose of the Act was to provide treatment, and it does not require us to conclude that the Act is punitive.

Hendricks, 521 U.S. at 367.

to treatment under [the Act] In that light, the provisions of the Act for treatment appear somewhat disingenuous."¹⁵⁰

At the time the Kansas legislature passed the Act, "[t]he testimony before the Kansas Senate Judiciary Committee left little doubt about the actual intent and purpose of the Kansas legislation."¹⁵¹ The Attorney General of Kansas argued to the Committee, "[Y]ou have an opportunity to pass what might be the *most significant preventive criminal justice legislation* to be presented in this . . . session. . . . [The Act] *will act prospectively and be preventative of criminal conduct and not just punitive.*"¹⁵² It is evident that the Kansas Attorney General intended to use the statute as a criminal justice mechanism.

Although the dissent placed considerable emphasis on the findings of the Kansas Supreme Court with respect to state legislative intent,¹⁵³ the *Hendricks* majority ignored both the lower court and the Act's legislative history by restricting its analysis to the four corners of the document. The Court stated that it would give effect to the facial intent of the legislature unless "a party challenging the statute provides 'the clearest proof that the statutory scheme [is] so punitive either in purpose or effect

150. *Hendricks*, 912 P.2d at 136; see also *Hendricks*, 521 U.S. at 365-67 (discussing possible interpretations of the Kansas Supreme Court's opinion regarding treatment of offenders). The Kansas court's reading of the statute was indeed echoed by statements made by legislators at the time the Kansas legislature passed the Act. For example, one member of the Task Force that proposed the legislation said, "Because there is no effective treatment for sex offenders, this Bill may mean a life sentence for a felon that is considered a risk to women and children. SO BE IT!" *Id.* at 385 (Breyer, J., dissenting) (quoting statement of Jim Blaufuss).

151. Thomas J. Weilert, *Thoughts on the Cost of Freedom*, 46 U. KAN. L. REV. 17, 20 (1997).

152. *Id.* (quoting *Kansas Sexually Violent Predator Act: Hearing on SB525 Before the Senate Comm. on Judiciary*, 75th Legis. (Kan. 1994) (testimony of Robert T. Stephen, Attorney General)).

153. See *Hendricks*, 521 U.S. at 382-84 (Breyer, J., dissenting) ("We have generally given considerable weight to the findings of state and lower federal courts regarding the intent or purpose underlying state officials' actions"). Justice Breyer quoted a recent opinion that held that "ordinarily '[w]e must . . . accept the State Court's view of the purpose of its own law.'" *Id.* at 383 (Breyer, J., dissenting) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 830 (1995)). The dissent also cited precedent that "in close cases the label [attached to the statute by the legislature] is 'not of paramount importance.'" *Id.* at 380 (Breyer, J., dissenting) (quoting *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 777 (1994)).

as to negate [the state's] intention 'to deem it civil.'"¹⁵⁴ The Court stated that only in those "limited circumstances" will a court reclassify an allegedly civil statute as criminal.¹⁵⁵

Such extreme deference to the legislature prohibits any judicial scrutiny of legislative purpose. The Court imposed the burden of proof on Hendricks, and ultimately held that he failed to meet what it acknowledged to be a "heavy burden."¹⁵⁶ Hendricks had to rebut the presumption that the legislature was acting with pure intent, although the Court refused to consider the legislative history that demonstrated otherwise. Similarly, the majority apparently was not persuaded that imposition of physical restraints upon Hendricks's liberty was a punitive effect of the purportedly civil scheme.¹⁵⁷ To the contrary, the Court failed to address the proposition that the commitment represented a threat to individual liberty, despite precedent that "recognized that civil commitment for any purpose constitutes a significant deprivation of liberty."¹⁵⁸ Implicit in the Court's holding, then, is that the state's initial showing of dangerousness alone is sufficient, by itself, to create an allegedly rebuttable presumption that the state should revoke the individual's freedom.

A METHOD TO ITS MADNESS? POSSIBLE EXPLANATIONS FOR THE COURT'S APPARENT WILLINGNESS TO CIRCUMVENT CONSTITUTIONAL PROTECTIONS

As seen in *Hendricks*, characterizing a statute as nonpunitive prevents an individual from invoking the constitutional protections provided by the self-incrimination, Double Jeopardy and Ex Post Facto clauses.¹⁵⁹ This in itself presents a paradox. Only individuals who have committed crimes against society are

154. *Id.* at 361 (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

155. *Id.* The Court did not suggest what evidence it would have considered sufficient to negate the stated legislative intent.

156. *Id.*

157. *See id.* at 361-62.

158. *Addington v. Texas*, 441 U.S. 418, 425 (1979); *see also* *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (noting that involuntary commitment results in a "massive curtailment of liberty"); *In re Gault*, 387 U.S. 1, 49-50 (1967) (stating that a deprivation of liberty occurs whenever a person is "held against his will").

159. *See Hendricks*, 521 U.S. at 369-70; *supra* text accompanying note 91.

awarded considerable protections. The founders provided extra protections to criminal defendants because criminal proceedings potentially led to the deprivation of individual liberty.¹⁶⁰ They likely assumed that the consequences of civil proceedings would not put the respondent "in jeopardy of life or limb."¹⁶¹ When a civil proceeding has the same results as a criminal trial, however, there seems to be little justification for denying constitutional protections to the individual. Although the Court did conform to precedent by refusing to apply criminal protections in civil cases,¹⁶² that conformity stemmed from the civil label it placed on the *Hendricks* case, and not from the rationale underlying the protections. Perhaps the most critical question is why the Court chose not to grant these protections to certain individuals.

The most basic explanation appears to be the Court's concern for public safety. Contrary to traditional rationales justifying involuntary civil commitment with concern for the individual, the Court approved the Act despite the fact that its "chief purpose . . . [was] to afford protection for society, not to ensure treatment for the patient."¹⁶³ Throughout the opinion, the Court repeated the need to protect society.¹⁶⁴ The underlying assumption was that *Hendricks*, and others similarly situated, are inherently dangerous, and that the need to protect the public from the threat they pose so outweighs their individual rights that it is permissible to circumvent those rights to keep the dangerous isolated from the rest of the community.¹⁶⁵ This assumption led to the implicit understanding that an initial showing of dangerousness is sufficient to presume the validity of involuntary commitment.¹⁶⁶

160. See Leonard W. Levy, *The Bill of Rights*, in *THE AMERICAN FOUNDING: ESSAYS ON THE FORMATION OF THE CONSTITUTION* 295, 298-301, 309-10 (J. Jackson Barlow et al. eds., 1988).

161. U.S. CONST. amend. V.

162. See, e.g., *Addington*, 441 U.S. at 418 (rejecting the application of the "beyond a reasonable doubt" standard to a civil proceeding, because that strict standard is reserved for criminal defendants).

163. Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1291 (1966).

164. See *Hendricks*, 521 U.S. at 351, 356-57, 363-64, 371.

165. See *id.* at 356-60.

166. See *id.* at 363. The Court expressly stated that dangerousness alone would not

Other reasons might explain why the Court did not enforce the constitutional protections of those committed under the Act. The Court truly may have been concerned about individuals, like pedophiles, who are deemed to be "mentally ill" by a significant portion, but not the majority, of the psychiatric community. Given the limitations on current medical knowledge, it is likely that the Court was willing to expand the concept of "mental illness" to provide for uncertainties that exist within the realm of knowledge.¹⁶⁷ By failing to restrict the holding to sexual offenders, the Court might have recognized, albeit implicitly, that there are other habitual offenders, like serial killers, who are similarly situated, and that society might benefit from their confinement.

This reasoning is flawed, however, because it fails to address the sexual offender's culpability. At the time of Hendricks's conviction, the State could have imposed a significantly higher criminal penalty.¹⁶⁸ If the correlation between culpability and

be enough to warrant involuntary civil confinement. *See id.* at 358. For an explanation of the argument that the opposite is actually true, see *supra* text accompanying note 126.

167. It is clear that at least some of the Justices were concerned about the uncertain state of medical knowledge regarding mental illness in general and pedophilia in particular, especially with respect to the likelihood of recidivism. *See, e.g.,* Transcript, *supra* note 36, at *45 (recording Chief Justice Rehnquist's question in response to counsel's argument that it is impermissible to commit an individual based on a mere possibility that he might repeat the crime, "So what's the State supposed to do, just wait till he goes out and does it again?"); *see also* *Foucha v. Louisiana*, 504 U.S. 71, 109-10 (1992) (demonstrating Justice Thomas's hesitancy to rely on a "mental illness" label in the absence of a consensus by the psychiatric community); *supra* note 115 (describing Justice O'Connor's concern regarding the potential of curing pedophilia).

168. In some cases, it is unnecessary to increase criminal sentences. Prosecutors need only seek the most severe penalties available. Indeed, as Hendricks argued in his brief to the U.S. Supreme Court:

In 1984 . . . Hendricks was charged with three counts of taking indecent liberties with a child Each charge carried a maximum penalty of 5 to 20 years imprisonment. The court was authorized to impose consecutive sentences for each count and could have tripled each sentence under the habitual criminal act because of [his] prior convictions. The maximum allowable sentence for the offenses charged was therefore a total of 45 to 180 years. Had he received the maximum sentence, [he] would have first been eligible for parole in 2007, at age 73

Brief for Cross-Petitioner, *supra* note 67, at *3 (citations omitted). The State plea-bargained with Hendricks, and ultimately, the trial court sentenced him to 5 to 20 years in prison. *See id.* If the State had sought the maximum sentence, Hendricks

penance is to have any meaning, the legislature cannot be permitted to overturn a criminal sentence through legislative action, particularly when that action is taken *after* the criminal sentence has been fulfilled.¹⁶⁹ The Court's approach is unlikely to apply to the most heinous of criminals, because criminal sentences in those cases are such that this process would never arise. This Note in no way attempts to mitigate the seriousness of child sexual abuse. It simply suggests that the proper way to deal with such offenders is to impose the maximum criminal sentence, and not to create a linguistic quagmire that justifies the deprivation of an individual's constitutional rights.

The Court might have ruled as it did in response to public opinion and media pressure. Offenses against children, particularly sexual offenses, recently have received increased media attention and community interest.¹⁷⁰ The desire to shield children from sexual abuse has led to a variety of legislative actions on state and federal levels.¹⁷¹ The Court may have picked up on these recent trends and feared that promoting the rights of an individual pedophile over that of a legislature purportedly protecting its children would lead to public outrage, and might discourage the promulgation of other legislation designed to prevent child sexual abuse.

Finally, the Court may have considered Kansas's interest in attempting to lower its crime rate. Sexual offenses are insidious and difficult to prosecute because they are conducted in private and may leave no tell-tale signs of abuse.¹⁷² Some legal rules

would have been isolated from the community's children for at least 23 years in a constitutionally permissible manner. Nonetheless, many embrace civil commitment as a "humane" alternative to criminal punishment. See Melissa R. Saad, Note, *Civil Commitment and the Sexually Violent Predator: Stability Without Tyranny and Liberty Without Anarchy*, 75 DENV. U. L. REV. 595, 625 (1998).

169. The question of whether a legislature should be able to "correct" the sentence of an individual by taking action that applies to an offender currently serving a sentence is beyond the scope of this Note.

170. See Roger J.R. Levesque, *Prosecuting Sex Crimes Against Children: Time for "Outrageous" Proposals?*, 19 L. & PSYCHOL. REV. 59, 59-60 (1995).

171. See generally Carol L. Kunz, Comment, *Toward Dispassionate, Effective Control of Sexual Offenders*, 47 AM. U. L. REV. 453 (1997) (discussing the history and current status of sexual offender registration and notification laws in the United States).

172. See Levesque, *supra* note 170, at 65.

already reflect the need to treat sexual offenses differently because of their unique nature.¹⁷³ The Court simply may have considered the Act a natural extension of the need to treat sexual offenders differently. If this was the Court's rationale, however, it could have narrowed its holding by articulating its concerns regarding the prosecution of sexual offenses. The Court's failure to do so effectively extended an invitation to legislatures to incarcerate other "undesirables" through a "civil" procedure.

THE BIG PICTURE: THE EFFECT OF *HENDRICKS* ON CHILD SEXUAL ABUSE

The *Hendricks* decision and the Kansas Sexual Violent Predator Act resulted from efforts by the courts and the legislature to protect the nation's children from the horrors of sexual abuse.¹⁷⁴ Given that sexually violent predator laws fail to address the heart of the problem,¹⁷⁵ however, there is little reason to believe that such attempts will be an effective resolution.

The "Silent Epidemic"

Child sexual abuse is an enormous problem in the United States, yet it is a reality that a majority of Americans find almost impossible to face. "For most people . . . fathoming statistics like the familiar 'one in five children risk sexual abuse before they reach eighteen years of age,' is difficult."¹⁷⁶ We as a society are loathe to believe that adults brutalize children at such a catastrophic rate.¹⁷⁷ Denial is a classic response to claims

173. For example, recent revisions to the Federal Rules of Evidence have rejected a defendant's right to attack the character of the victim in a rape case, and have created new provisions that broaden the admissibility of evidence against sexual offenders. See FED. R. EVID. 412-15.

174. See Transcript, *supra* note 36, at *3-4.

175. This criticism also applies to community notification laws, commonly known as "Megan's laws." Both target strangers who prey upon unsuspecting children. The frightening reality, however, is that children are much more likely to be assaulted by relatives or family friends than by unknown third parties. See *infra* note 205 and accompanying text.

176. Freeman-Longo, *supra* note 17, at 308; see also PATRICK A. LANGAN & CAROLINE WOLF HARLOW, U.S. DEPT OF JUSTICE, CHILD RAPE VICTIMS 2 (1992) (delineating percentages of rape victims in certain age groups).

177. In part because of tremendous underreporting, it is impossible to generate

of child sexual abuse,¹⁷⁸ and it is only very recently that our society has begun to "confront[] a monster that's been hiding in the closet."¹⁷⁹ Sexual abuse frequently is unreported,¹⁸⁰ is committed in the absence of witnesses, and commonly leaves no outward signs of maltreatment,¹⁸¹ and therefore has been characterized as a "silent epidemic."¹⁸²

One significant reason that child sexual abuse has remained hidden so successfully for so long is that many incidents are not reported until years after the occurrence, if at all.¹⁸³ Crimes of sexual violence in general are less likely to be reported than other types of crime because of the shame, stigma, and variety of social pressures placed on the victim.¹⁸⁴ Child victims particularly

accurate and reliable statistics regarding the current number of children who are sexually abused each year. One study in the mid-1980s estimated that 210,000 new cases of abuse occur annually. See David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 4 (1986). Figures compiled by the U.S. Department of Justice in 1992 calculated 104,120 new cases of juvenile rape in that year alone. See LANGAN & HARLOW, *supra* note 176. In 1994, the National Center on Child Abuse and Neglect approximated that 150,000 new cases of child sexual abuse are reported annually. See Levesque, *supra* note 170, at 65. Even these figures likely are lower than the actual incidence of abuse. See *id.* at 64 (citing U.S. DEPT OF HEALTH AND HUM. SERVS., CHILD MALTREATMENT 1992: REPORT FROM THE STATES TO THE NATIONAL CENTER ON CHILD ABUSE AND NEGLECT 9-10 (1984)). Figures chronicling the percentage of the adult population that claims to have suffered sexual abuse during childhood also suggest that sexual abuse is underreported, perhaps as much as 80%. See William Winslade et al., *Castrating Pedophiles Convicted of Sex Offenses Against Children: New Treatment or Old Punishment?*, 51 SMU L. REV. 349, 363 (1998).

178. For example, during the late nineteenth century, many women reported to Sigmund Freud that they had been sexually molested as children. See McCord, *supra* note 177, at 2. Freud refused to believe the apparent extreme prevalence of child sexual abuse and he dismissed the claims as mere fantasies. See *id.*

179. JOHN HUBNER & JILL WOLFSON, *SOMEBODY ELSE'S CHILDREN: THE COURTS, THE KIDS, AND THE STRUGGLE TO SAVE AMERICA'S TROUBLED FAMILIES* 114 (1996) (quoting Judge Leonard P. Edwards, Santa Clara County Juvenile Court).

180. See *supra* note 177 and accompanying text.

181. See Karla-Dee Clark, Note, *Innocent Victims and Blind Justice: Children's Rights to be Free from Child Sexual Abuse*, 7 N.Y.L. SCH. J. HUM. RTS. 214, 217 (1990); see also Levesque, *supra* note 170, at 65 (relating the statistic that more than one-third of the victims of child sexual abuse exhibit no overt symptoms).

182. Freeman-Longo, *supra* note 17, at 303.

183. See *supra* note 177.

184. See Clark, *supra* note 181, at 225-26, 270-71.

are unlikely to report or assist in the prosecution of sexual offenses.¹⁸⁵ Those who commit child sexual abuse typically entrap the child within a sphere of secrecy that impresses the need for silence upon the child.¹⁸⁶ Many individuals who violate children, particularly the very young, are relatives or friends of the child.¹⁸⁷ Children who are assaulted by people whom they trust confront a severe loyalty conflict and tend not to reveal things they have been asked to keep a secret.¹⁸⁸ Also, because the conviction or acquittal of an accused sexual offender turns in large part upon the credibility of the victim,¹⁸⁹ many parents are reluctant to expose their child to the trauma of testifying in court, especially if the accused is a close relative,¹⁹⁰ and therefore never report the incident.

Other adults frequently provide vehement support for the alleged abuser;¹⁹¹ such support often exacerbates the victim's reluctance to report an incident. In cases in which the perpetrator is the child's relative, "there is often long-standing active or passive family collusion" to prevent the incest from becoming public knowledge.¹⁹² Many of the cases involve the spouse or boyfriend

185. See generally HUBNER & WOLFSON, *supra* note 179, at 114-16 (describing the development of child abuse reporting laws and the problems presented by child witnesses).

186. See Levesque, *supra* note 170, at 64-65.

187. See *id.* at 65 n.23; see also *infra* note 205 (providing statistics regarding the relationships between child sexual abusers and their victims).

188. See Brian Harmon, *Public Safety: Pedophiles Can Hide Under Many Guises: 'Predators' Come from All Backgrounds and Gain Trust of Victims*, DET. NEWS, Nov. 18, 1997, at D1, available in 1997 WL 5604491.

189. See Kim L. Hooper, *Child Molesting Case Goes to Jury: Defendant Faces Up to 50 Years in Prison If He Is Convicted of Assaulting 14-Year-Old Relative*, INDIANAPOLIS STAR, Oct. 18, 1997, at W02, available in 1997 WL 2907913; see also Clark, *supra* note 181, at 226 (stressing the importance of a child's testimony at trial due to a general paucity of other evidence).

190. See HUBNER & WOLFSON, *supra* note 179, at 116.

191. Douglas Holt, *Coach Has Support Despite Child-Sex Charges*, CHI. TRIB., Dec. 19, 1997, at 1, available in 1997 WL 16804370.

192. Andrew Cohen, Note, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims*, 74 GEO. L.J. 429, 430 n.4 (1985) (quoting C. Henry Kempe, *Sexual Abuse, Another Hidden Pediatric Problem: The 1977 C. Anderson Aldrich Lecture*, in CHILD ABUSE: COMMISSION AND OMISSION 97, 99 (Joanne Valiant Cook & Roy Tyler Bowles eds., 1980)).

of the victim's mother, therefore, it is believed that many mothers are "silent accomplices" to the abuse of their child.¹⁹³

"Despite the pressures placed on children to keep such incidents secret, allegations of sexual abuse are relatively simple to raise,¹⁹⁴ and can impart irrevocable harm to the accused, even if the charges subsequently are recanted or dismissed.¹⁹⁵ Consequently, concerns that a child might fabricate claims of sexual abuse abound.¹⁹⁶ Those fears, combined with the devastating impact false charges may have upon the accused, and the broad and ambiguous language of the child abuse laws¹⁹⁷ have generated complaints that the resulting "hysteria . . . has created the modern equivalent of a witch-hunt."¹⁹⁸ Judge Leonard P. Edwards, a prominent juvenile court judge in Santa Clara, California, explained the problem by analogy:

"For the first time in history, our society has decided to take the abuse of children seriously That means looking into every case, in much the same way that a mother listens to a five-year-old's complaints about an aching stomach or a sore throat. Usually, there is nothing wrong. But there is always the chance that the five-year-old isn't just tired and whiny; she is really sick."¹⁹⁹

Although sympathetic to the problem in theory, some parents who have battled the system against false allegations complain that it is too simple to activate an investigation that can quickly

193. See Levesque, *supra* note 170, at 65.

194. See Holt, *supra* note 191, at 1.

195. See, e.g., Henry Stern, *Lincoln Park Teacher Arrested*, PORTLAND OREGONIAN, Jan. 29, 1998, at C01, available in 1998 WL 4177787 (relating a father's outrage that charges of sexual abuse were levied against his son). The father stated: "[I]f [he] is innocent . . . all this publicity will destroy [him]. He's a teacher. You think he's going to get a job somewhere else after this?" *Id.*

196. See, e.g., Caren Benjamin, *Mother Ordered to Stand Trial*, LAS VEGAS REV.-J., Mar. 11, 1998, at 1B, available in 1998 WL 7210625 (stating that two sisters' previous experiences with the department of social services "taught [them] that allegations of sexual abuse could make people they wanted out of their lives disappear").

197. The imprecise language has led to a degree of overzealousness by teachers and social workers in presenting and pursuing accusations against victim's fathers and brothers. See HUBNER & WOLFSON, *supra* note 179, at 116-17.

198. *Id.* at 116.

199. *Id.* at 117 (quoting Judge Edwards).

snowball into persecution. "[I]t doesn't take much to 'start the nightmare. Someone—anyone!—can phone in an anonymous report and the next thing you know there is a social worker at your door, taking away your child.'"²⁰⁰ This criticism encourages people to deny the existence and the magnitude of the child sexual abuse problem.²⁰¹

Sexual Offenders: Not Just (or Even Predominantly) Strangers

Sexual offenders often are stereotyped as "dirty old men in the alley,"²⁰² but most child sexual abuse occurs at the hands of adults known to the victims.²⁰³ Although statistics must be used with caution,²⁰⁴ even conservative estimates demonstrate that relatives, friends, and acquaintances pose a much higher degree of risk than a stranger who seems to lurk in every shadow.²⁰⁵

Some psychologists blame the media for its fixation on sensational stories of child sexual abuse that give the public a distorted perception of the true nature of the problem:

[T]he sexual abuse cases that make national news and headlines do not represent the average sexual abuse cases in America. The sexual abuse that happens each day in America is not newsworthy. Therefore, the public's image of what sexual abuse is and who is a sexual abuser is usually based only

200. *Id.* at 116 (quoting the spokesman of the Coalition of Concerned Parents, Santa Clara County).

201. See Levesque, *supra* note 170, at 80.

202. See Clark, *supra* note 181, at 216 n.3 (quoting Dwight M. Wells, *Expert Testimony: To Admit or Not to Admit*, 57 FLA. B.J. 672, 672 (1983)).

203. See Levesque, *supra* note 170, at 65 n.23.

204. See *supra* note 177.

205. See Freeman-Longo, *supra* note 17, at 311 (stating that less than one percent of incidents of sexual abuse are committed by individuals who fit the "dangerous stranger" stereotype); see also HUBNER & WOLFSON, *supra* note 179, at 115 (describing the common misperception of the pervasive danger that unknown sexual offenders pose to children throughout the nation). Statistics published by the U.S. Department of Justice indicate that 15% of child rape victims between the ages of 12 and 17 are assaulted by strangers, while 20% are attacked by relatives, and 65% by friends or acquaintances. See LANGAN & HARLOW, *supra* note 176, at 2. Only 4% of the rapes against children under the age of 12 are committed by strangers. See *id.* Frighteningly, almost half of the individuals who rape very young children are relatives of the child. See *id.* The remaining 50% typically are friends or acquaintances of the victim. See *id.*

upon the most extreme cases that account for less than one percent of sexual abuse and sexual crimes in America. Unfortunately, these unique cases are often the catalyst and basis for developing new legislation to address sexual abuse. . . . [M]isinformation compromises our ability to create laws that will be effective in reducing sexual abuse.²⁰⁶

Such condemnation of the media, however, fails to recognize that juvenile proceedings are not a matter of public record. "Journalists . . . cannot cover the system in any on-going, comprehensive way because no one will talk to them except in the most vague generalities."²⁰⁷ As a result, "mainstream journalists frequently ignore the system until there is a catastrophe."²⁰⁸ Bound and gagged by juvenile confidentiality laws, journalists resort to generalities and nearly incomprehensible figures²⁰⁹ in an attempt to draw a picture of "ordinary" child sexual abuse.²¹⁰

The media's overemphasis on extreme cases is not solely responsible for perpetuating the image of a dangerous stranger stereotype as the typical offender. Politicians have much to gain by treating child sexual abuse as a crime perpetrated by mysterious, evil strangers with sordid criminal backgrounds. No one wants a child to be molested, and convicted sexual offenders generally exhibit a high rate of recidivism,²¹¹ therefore, politicians may sponsor bills against sexual offenders that they know will obtain popular approval.²¹² It is easy for a politician to take

206. Freeman-Longo, *supra* note 17, at 311.

207. HUBNER & WOLFSON, *supra* note 179, at viii.

208. *Id.*

209. See *supra* note 176 and accompanying text.

210. For an excellent first-hand account of the difficulties involved in obtaining journalistic information from a juvenile court, see HUBNER & WOLFSON, *supra* note 179, at vii-xiii.

211. See Brief of Petitioner at 36 n.24, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (Nos. 95-1649, 95-9075), available in 1996 WL 435941.

212. This is particularly true of community notification laws that require little commitment of personal prestige or public resources to implement. See Mike Hudson, *Megan's Law Deceptive: Experts Say 'It Tends to Give People a False Sense of Safety,'* ROANOKE TIMES & WORLD NEWS, Jan. 25, 1998, at A1, available in 1998 WL 5896343. The low degree of political risk corresponding with the inflated public perception of what such a limited law actually can accomplish has led one child advocate to characterize Megan's laws as "a bit of a flim-flam." *Id.* After the *Hendricks* Court ruled that a sexually violent predator statute need not include a treatment

the moral high ground and assert that he has done everything possible to combat the nightmare of child sexual abuse while his political opponents have refused to rush to the aid of potential victims by adopting his proposals.²¹³ For example, one editorial condemned Megan's laws as a "colossal waste of resources" because they "deflect[] attention from the real problem" that relatively few sexual offenses against children are committed by strangers.²¹⁴ In a vehement response, the senator who sponsored a community notification bill in the New York State legislature stated that "[o]ne life saved is never a colossal waste of resources."²¹⁵ The senator also blamed opposition to the bill on party politics: "The Republican-controlled New York [S]tate Senate has recently passed such a bill; and to no one's surprise, the Democrat-controlled Assembly, unfortunately, has not."²¹⁶ The senator did not respond to the charge that community notification laws obscure the more difficult reality that most sexual offenses are committed by adults who their victims know and trust.²¹⁷ Nor

provision in order to survive a constitutional challenge, see *Hendricks*, 521 U.S. at 365-68, such laws have become less expensive because funding need not be allocated for treatment. As a result, such statutes can be expected to gain popularity. See, e.g., Ben Z. Hershberg, *Man Gets 70 Years for Molesting Children*, COURIER-J. (Louisville), Oct. 29, 1997, at B03, available in 1997 WL 6651727 (quoting one prosecutor who obtained a 70-year prison term for a child molester: "Everybody would like to see people like this behind bars for a thousand years."); Michael G. Planty & Louise van der Does, *Megan's Laws Aren't Enough*, WALL ST. J., July 17, 1997, at A22 (arguing in favor of sexually violent predator laws and stating that "[i]f a soon-to-be-released offender is deemed mentally abnormal and continues to exhibit violent sexual behavior, please don't tell us he's moving in next door—tell us he'll be locked up indefinitely").

213. Child sexual abuse is such a highly emotional issue that there is no need for a politician to prove that his proposed solutions actually would be effective. See *infra* notes 238-39 and accompanying text.

214. Planty & van der Does, *supra* note 212, at A22.

215. Dean G. Skelos, *Letters to the Editor: Mark the Predators in Our Midst*, WALL ST. J., Aug. 12, 1997, at A15.

216. *Id.*

217. Only rarely do stories of respected community members who have been accused or convicted of child sexual abuse make the headlines. These articles typically comment that it is hard to believe that such "normal" individuals could be child molesters. See, e.g., Audra Ang, *Washington: Santa's Secret Stuns Community*, DAYTON DAILY NEWS, Nov. 16, 1997, at 2AA, available in 1997 WL 16061708 (describing a community's reactions to the admissions of child molestation by a man who traditionally had played Santa Claus at the local mall); Stephen Hunt, *Child Rapist*

did he address the fact that while "one life saved is never a colossal waste of resources,"²¹⁸ if used more effectively, those resources might be able to save *more* than one life. Widespread underreporting, the media, and political expediency therefore all contribute to the perpetuation of child sexual abuse as a "silent epidemic."²¹⁹

"Expressive Justice": A Bar to Breaking the Silence

Although statistics are unreliable, they are sufficiently accurate to reveal that child sexual abuse is a larger problem than is generally acknowledged by the American public.²²⁰ Equally clear is that the individuals who are most likely to molest children are least likely to be affected by child sexual abuse preventive legislation.²²¹ Why have legislators and the courts continued to focus upon what appears to be the periphery of a much larger problem?

One reason is that in spite of the compelling rhetoric,²²² sexual violent predator and other similar laws are not designed primarily to provide relief to the victim, nor to reduce the child sexual abuse rate.²²³ If the laws truly were focused on the victim, they

Going to Jail for 30 Years, SALT LAKE TRIB., Mar. 20, 1998, at B2, available in 1998 WL 4043827 (noting that a recently convicted violent sexual offender "seem[ed] an unlikely candidate for child molester" because he was "[a] Vietnam War hero active in Scouting and Little League . . . [and was a] community leader"); *Texas Priest Sentenced to Life in Prison for Altar Boy Assaults*, L.A. TIMES, Apr. 2, 1998, at A18 (reporting the conviction of a parish priest).

218. Skelos, *supra* note 215, at A15.

219. See Freeman-Longo, *supra* note 17, at 303.

220. See *supra* notes 176-82 and accompanying text.

221. Legislation such as the Act targets the previously convicted dangerous stranger, yet 96% of rape victims under 12 years old are brutalized by relatives or others they know. See *supra* note 205. Intrafamily sexual abuse is the least likely to be reported. See *supra* note 190 and accompanying text. These cases, therefore, are the least likely to lead to the prosecution and ultimate conviction of the perpetrator. Sexual violent predator laws and Megan's laws therefore provide no assistance to the children most in need of protection.

222. See, e.g., Pat Roberts, *Kansas Delegation Signs Supreme Court Brief*, Government Press Releases, Aug. 21, 1996, available in 1996 WL 11124518 (quoting Kansas State Representative, Todd Tiahrt: "Is there any higher right or responsibility a society has than to protect our children? In this case I am glad to voice my support for the children, of Kansas.").

223. See Levesque, *supra* note 170, at 83.

would specifically allocate resources for therapy and counseling or other measures to help the victim cope with the tragedy that had occurred.²²⁴ If statutes covering child sexual abuse were solely efforts to prevent child abuse, legislators would address all aspects of the problem, and would not be content to pinpoint the individuals who contribute the least to the problem proportionately.²²⁵

Similarly, despite the Supreme Court's deference to the purported civil purpose of the statute in *Hendricks*,²²⁶ sexual violent predator laws are not designed as a method to provide psychological treatment to sexual offenders. If rehabilitation were the objective of the legislation, sexual violent predator laws would resemble traditional involuntary civil commitment legislation, and treatment would be a central feature.²²⁷ Although the *Hendricks* Court was willing to accept the Kansas legislature's characterization of the Act as civil in nature, the Act's legislative history and the lack of treatment programs²²⁸ clearly demonstrate that the mental health and well-being of sexual offenders

224. Some psychologists believe that the threat of criminal prosecution is insufficient to protect children from sexual abuse, therefore they have urged policymakers to reconsider their approaches to protecting children. See, e.g., Freeman-Longo, *supra* note 17, at 304 ("[A] criminal justice model alone [which punishes but does not deter behavior] is not preventing sexual abuse from occurring. . . . [W]e must address sexual abuse as a multifaceted problem for which there is no singular or simple solution."); Levesque, *supra* note 170, at 84 ("The current child protection approach can never truly be 'child-friendly' because it is predicated on the incorrect perception that punishing offenders best serves children.").

225. The concern is that by restricting legislative efforts to offenders not known to the victim, lawmakers ignore the fact that even more children are hurt by "nonpredators." Resources are limited, and expending funds almost entirely on laws that safeguard against a proportionately minor number of cases takes money away from programs that might address the core of the child sexual abuse problem.

226. See *supra* notes 149, 153-55, and accompanying text.

227. See *supra* notes 23-33 and accompanying text.

228. The majority opinion recognized that "the treatment program initially offered *Hendricks* may have seemed somewhat meager," but noted that "it must be remembered that he was the first person committed under the Act." *Kansas v. Hendricks*, 521 U.S. 346, 367-68 (1997). The dissent, however, detailed precisely how "meager" the provisions for treatment had been. "[A]s 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. Indeed . . . *Hendricks*, according to the commitment program's own director, was receiving 'essentially no treatment.'" *Id.* at 384 (Breyer, J., dissenting) (citations omitted).

were not the impetus for drafting the Act as is the case in traditional civil commitment laws.²²⁹

Sexual predator laws focus on society at large, rather than upon any of the involved parties.²³⁰ Stunned and horrified by the cases of child sexual abuse that receive the most extensive media coverage, communities clamor for a solution, and legislators react by passing laws that are responsive to the media frenzy but that are not necessarily effective.²³¹ This phenomenon has been called "expressive justice," and characterizes "laws, policies, and practices that are designed more to vent communal outrage than to reduce crime."²³²

The interactive lawmaking described by the term "expressive justice" does more than direct legislators' attention to certain issues.²³³ It also permits them to avoid issues the public finds distasteful. Like Freud,²³⁴ "health professionals, relatives, and others may have [difficulty] in accepting the possibility that parents would deliberately abuse a child Professionals and members of the judiciary . . . may be almost unable to acknowledge that such acts can be and are committed by apparently caring mothers, fathers, and stepparents."²³⁵ Guilt also encourages denial. One expert explained that sexual abuse "is a personal violation, and parents are devastated when they learn that, in

229. See *id.* at 388-90 (Breyer, J., dissenting).

230. See Levesque, *supra* note 170, at 83 (arguing that prosecuting sex crimes "is for society, not the child").

231. See ANDERSON, *supra* note 11, at 270-71.

232. *Id.* at 14.

233. For example, consider the role that Mothers Against Drunk Driving (MADD) has played in focusing national attention on the need for more stringent prohibitions against and penalties for drunk driving. See, e.g., Kevin McGill, *MADD Tactics Fail to Win War: Lawmakers are Touched, Put Off*, NEW ORLEANS TIMES-PICAYUNE, Apr. 5, 1998, at B1, available in 1998 WL 6265781.

234. See *supra* note 178.

235. David P. Southall et al., *Covert Video Recordings of Life-Threatening Child Abuse: Lessons for Child Protection*, PEDIATRICS, Nov. 1, 1997, at 735, 740. Although this article by Southall and his colleagues discusses the use of covert video surveillance to record instances of nonsexual abuse of children in England, this analysis applies equally to cases of child sexual abuse. Cf. Holt, *supra* note 191, at 1 (citing child abuse experts who state that it is "extraordinarily difficult for parents to square the act of sexually abusing a child with their perceptions of trusted, well-known members of the community").

effect, they handed their child to a child molester. You'd rather believe that you haven't done that."²³⁶ Denial is an implicit impediment to change. Legislatures pass expressive laws as a reaction to public outcry.²³⁷ When there is widespread denial of a problem, there is no outrage over its continued existence. Politicians therefore have no impetus from the public to address the larger problem of sexual abuse by "nonpredators," and they focus their efforts, and the community's resources, on expressive laws that spring from a reaction to a particularly extreme case.

It does not seem to matter that sexual predator laws actually do little to arrest the particular problem. "[H]orrific emotionally charged headlines leave people with a sense of hopelessness and helplessness in addressing the problem."²³⁸ "[D]emanding [certain laws] and voting for them give[s] people a way to feel as if they are doing something, a way to handle fear."²³⁹ Handling our collective terror by enacting ineffective laws does little to combat the tide of child sexual abuse, yet it directly, and adversely, affects the community. Such legislation vilifies certain criminals so they have no hope of ever again becoming productive members of society, thus forever placing the burden of supporting those individuals on the community.²⁴⁰ It establishes a false and misleading sense of security²⁴¹ that encourages parents to

236. Holt, *supra* note 191, at 1 (quoting Lucy Berliner, Director of Research at the Harborview Sexual Assault Center in Seattle, Washington).

237. See ANDERSON, *supra* note 11, at 14 (stating that expressive laws are designed "to vent communal outrage").

238. Freeman-Longo, *supra* note 17, at 308.

239. ANDERSON, *supra* note 11, at 16.

240. Health care professionals acknowledge that individuals incarcerated under a sexual violent predator law are unlikely to be released, despite the state's argument that sexually violent predators would be granted periodic review and potential release—a characteristic that the State claimed made the Act distinct from a punitive law. See Weilert, *supra* note 151, at 22. Given a psychiatrist's potential susceptibility to civil liability if she releases a "former" sexually violent predator who subsequently commits another sexual offense, experts doubt that any psychiatrist would be willing to assume that magnitude of a responsibility. See *id.*; see also ANDERSON, *supra* note 11, at 271 (questioning the proposition underlying the concept of expressive justice that "evildoers are evil for life, that bad people may not be converted to good, [and] that lost souls may never be reclaimed," and arguing that the expense of incarcerating an offender for life is a practical reason to hope for rehabilitation and eventual reassimilation into society).

241. See Hudson, *supra* note 212, at A1.

believe unknown predators pose the greatest threat to their children's safety.²⁴² This erroneous belief frequently prevents parents from instilling necessary caution in their children. "Although parents often warn children about stranger danger, many fail to alert them to the danger that can exist within their own families."²⁴³ Perhaps most importantly, expressive laws remove the sense of urgency that typically surrounds well-publicized cases of child abuse. The compelling story is dropped from the headlines, people return to their ordinary routines, and the silent epidemic continues.²⁴⁴

HENDRICKS AS ISSUE AVOIDANCE: DEFINING THE PLAYING FIELD TO AVOID THE LAND MINE OF CONFLICTING RIGHTS

In *Hendricks*, the Supreme Court had the opportunity to shift the focus of child sexual abuse away from expressive laws that attempt to confine the offender who is a stranger to the victim but do nothing to remedy the more pervasive problem of known offenders. By couching the argument on the semantic distinction between criminality and civility, the Court did not address directly the inherent tension between the opposing parties' rights: the liberty rights of an individual against the right of a child to be free from harm. Performing linguistical and logical calisthenics, the Court arrived at its conclusion while avoiding fundamental questions regarding the permissibility of legislative annihilation of the constitutional rights of those confined under the Act. In doing so, the Court squandered an opportunity to expand the discussion of the child sexual abuse problem in America.

The Court was content to dismiss *Hendricks*'s Ex Post Facto and Double Jeopardy claims by applying labels to them. Accord-

242. See *supra* note 205 and accompanying text.

243. Alma E. Hill, *Child's Weapon Against Sex Abuse: 'No, Go, Tell': Safeguarding Kids Crucial But Complicated*, ATLANTA J. CONST., Jan. 26, 1998, at B03, available in 1998 WL 3673878.

244. See *supra* notes 176-93 and accompanying text; see also Robert Hanley, *Law Signed Barring Parole of Child Molesters Who Kill*, N.Y. TIMES, Apr. 4, 1997, at B4 (discussing implementation of a bill written in response to a rape and strangulation incident that occurred in 1973, and stating that "[l]egislative officials said the . . . measure lingered in the Legislature for two years because passions about the 1973 murder had long since subsided").

ing to the majority, these constitutional rights applied only to criminal laws; the Act was civil. Superficially, it was an open and shut case for the government. A different analytical approach, however, would have encouraged open debate regarding child sexual abuse, perhaps paving the way for future, more effective, less expressive laws, and would have avoided trampling principles of individual liberty.

Had the Court chosen to define the state's compelling interest in overcoming Hendricks's constitutional claims as "preventing child sexual abuse," the Court could have decided that sexual violent predator laws address too small a percentage of child sexual offenses to warrant the deprivation of an individual's constitutional rights.²⁴⁵ Benefits of this approach would be twofold. It would have served as the impetus, currently lacking in the minds of the general public, to force legislators to reevaluate the breadth of the child sexual abuse problem and the identity of its perpetrators. The Court missed its opportunity to spur creative thinking on the subject, and ultimately protect a greater number of children from the peril of child sexual abuse.

Moreover, the Court could have ensured the protection of individual constitutional liberties, rather than provide for their deterioration. The *Hendricks* Court deferred to the Kansas legislature's choice of the words "mental *abnormality*," which enabled the Court to circumvent protections that would have otherwise been provided to Hendricks in the civil context.²⁴⁶ By refusing to compel a legislature to have some basis for its classification, and then deferring to that same body with respect to the purpose of the statute, the Court in effect provided no review and paved the way for future representatives to steamroll constitutional rights with the most pretextual of justifications.

245. See Stovall, *supra* note 16, at 13 (providing statistics regarding the number of individuals committed under the Act).

246. See *Kansas v. Hendricks*, 521 U.S. 346, 355-57 (1997).

CONCLUSIONS AND IMPLICATIONS

In *Hendricks*, the Court appeared to be willing to sacrifice individual liberty in return for public safety. The Court focused its examination of involuntary civil commitment on the community, rather than following the traditional analysis that centered around the individual. One reason the Court may have been willing to alter the focus of the inquiry in this case was because of the state's duty to protect its children through its role as *parens patriae*.²⁴⁷ *Hendricks* may represent the Court's implicit decision that the state has a greater duty to protect its children than it does to safeguard the constitutional rights of an adult—even one whom some psychiatrists might deem mentally ill. The Court's conclusion might have protected a greater number of children from the horrors of child sexual abuse in the long run if it had found the Act unconstitutional, thereby forcing state legislatures to reexamine the problem and reevaluate their current method of addressing that problem.

Hendricks appears to set the stage for courts and legislatures to circumvent individual constitutional protections—both civil and criminal—in the name of promoting public safety.²⁴⁸ The Court's method of ensuring the "common good,"²⁴⁹ however, is questionable. Once the legislative branch attacks individual protections and the judicial branch sanctions the erosion of those protections, it is difficult to reestablish those constitutional rights in the future. As one of this country's founders warned long before the concept of American independence had taken

247. Interestingly, the mentally ill generally are included within the mantle of the *parens patriae* duty. See *supra* note 31 and accompanying text. The *Hendricks* Court was willing to extend its protection to children, but was unwilling to be as sympathetic to the "mentally abnormal," holding that exposing *Hendricks* to "meager" treatment was sufficient to satisfy the State's duty to him. See *Hendricks*, 521 U.S. at 367-68.

248. This trend is consistent with recent decisions regarding the Fourth Amendment, in which public safety in general, and the safety of police officers in particular, has been the justification for extremely broad searches and seizures. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1051 (1983) (extending the doctrine of *Terry v. Ohio*, 392 U.S. 1 (1968), to permit protective sweeps of areas to prevent a person from gaining control of a weapon and threatening the police officers and the public-at-large).

249. *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

root, "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."²⁵⁰

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250. Benjamin Franklin, *Historical Review of Pennsylvania*, in FAMILIAR QUOTATIONS, 348:2 (Emily Morison Beck ed., 1980) (1759).