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IF IT'S A DUCK AND DANGEROUS—PERMANENTLY CLIP ITS WINGS OR TREAT IT TILL IT CAN FLY?: A THERAPEUTIC PERSPECTIVE ON DIFFICULT DECISIONS, SHORT-SIGHTED SOLUTIONS AND VIOLENT SEXUAL PREDATORS AFTER *KANSAS v. HENDRICKS*

*Keri K. Gould**

I. INTRODUCTION

You remember the old joke[1] where the yuppie couple walks into a poultry butcher with a bird under one of their arms. "Help us, help us," they say, "how can we tell if this is a duck?" "Well," says the butcher, "first you look at it and see if it looks like a duck. Next listen to it and hear if it quacks like a duck. Then you should give it a little push to see if it walks like a duck. Finally," says the butcher, pausing dramatically, "take a whiff of the load it leaves as it walks away . . . if it looks, quacks, and walks like a duck, and then it dumps like a duck . . . THEN YOU KNOW IT'S A DUCK!"

In a perhaps perverse way, this anecdote can be seen as a parable formulating a useful pedagogic methodology to examine the three opinions comprising the Supreme Court's decision in *Kansas v.*

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1. Even though I am from Long Island, New York—home to Long Island Ducklings and the Big Duck—go on, look it up in the Historic Register—I'm sure this joke, told in a slightly more off-color and graphic manner, and perhaps with some regional differences, has had national exposure.

Hendricks[2] and some potential effects that the decision may have on others confined by the mental health system. To be effective as a teaching methodology, the narrative outline of the parable should, at first glance, be familiar, such that the reader can identify with the characters and the situations illuminated in the parable.[3] There must be an indeterminacy to the meaning of the parable so that the reader can struggle toward its meaning and relevance to his or her own life.[4] The goal of such a teaching strategy is to transform the reader's unfocused discomfort with not quite "getting it" into the reader's acknowledgment of the source of his or her frustration.[5] Once acknowledged, the hope is that the reader will then be able to journey onward to a fuller understanding of the conundrum posed and the answer to be determined.[6]

Professor Robert A. Burt, a constitutional scholar, suggests that parable methodology is a useful means of teaching some areas of constitutional law, specifically those cases which challenge racial segregation or the institutional treatment of retarded persons.[7] He explains that courts intrinsically utilize parable methodology in their opinions.[8] In comparing secular judicial conduct to the theological embrace of parable-teaching methodology, Professor Burt states, "[j]udicial invocation of the Constitution recurrently uses the same methods as these parables: converting all into needy outsiders by

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2. 117 S. Ct. 2072 (1997).

3. *See generally* Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455, 467-71 (1984) ("[T]he purpose [of the parable] is to confound insiders and outsiders, to unsettle those who are confident of their rectitude .... [T]he strategy is to heighten the listeners' sense of their own vulnerability.").

4. *See id.* at 469. When a contemporary moral or ethical question "is moved to a different time or place, it is possible to escape those cultural blinders and and least to get to the relevant issues presented." The parable should be presented "in a way that hopefully holds the reader's attention until the whole package can be considered." NORVAL MORRIS, THE BROTHEL BOY AND OTHER PARABLES OF THE LAW vii (1992).

5. *See* Burt, *supra* note 3, at 469.

6. *See id.* A parable will lead readers to acknowledge a question, not an answer. Once the proper question is taught, listeners will teach themselves the proper answer. *See id.*

This methodology is in keeping with recent theories of adult learning. *See, e.g.*, MARK TENNANT, PSYCHOLOGY AND ADULT LEARNING (2d ed. 1997).

7. *See* Burt, *supra* note 3, at 457.

8. *See id.* at 472. Professor Burt notes that parable methodology is available to courts because of their institutional qualities, including the special posture of judges as remote protectors of the Constitution, a document which commands almost divine sanctification within our legal system. *See id.* at 466-67.

confounding insider and outsider and then offering hope for ultimate protection by mapping a path back inside for everyone."[9]

Professor Norval Morris, an expert on crime and punishment, has written a collection of parables to illustrate criminal law debates on legal and ethical issues including the death penalty, the insanity defense, and child neglect. He calls these parables secular, agnostic parables which pose problems but are uncertain in their solution.[10] This Article suggests that parable methodology is a useful backdrop for analyzing another area of constitutional law as well, the violent sexual predator statutes which have proliferated over the last ten years. Specifically, the article will refer to the "duck" parable in examining the content of the three written opinions contained in the *Hendricks* decision. In addition, the Article will address some of the potential therapeutic and non-therapeutic effects of the decision on the roles of individuals within the mental health and criminal justice legal systems.

Returning to the duck parable, the reader may be discomforted when reading about duck excrement in this Article's introduction. The reader may also be bewildered as to the relevance between such a topic and a Supreme Court decision regarding violent sexual predators. Parable teaching methodology hopes, however, to transform this discomfort and bewilderment into a thoughtful discussion of how the judicial authors of the three opinions in *Hendricks* define the legal relationship between two of the state's methods of confininement—the criminal justice system and the mental health system—and what to call a new statutory construction which incorporates elements of both systems.

The underlying lesson of a parable appears to be finding the presumptive element, the addition of which will authoritatively end the controversy. The duck parable ends with the butcher's presumptive element: the load left, which in the butcher's mind, conclusively determines that the bird is indeed a duck. A law professor has the freedom to pursue parable inquiry throughout the semester or within the page limitations of an article. But in the case of a Supreme Court decision, the dialogic process ends, at least for the immediate future, when one side secures numerical dominance by virtue of judicial votes, over the other. When, as in the *Hendricks* case, when multiple opinions are filed, then the ambiguities which remain unanswered are

9. *Id.* at 471.
10. *See generally* MORRIS, *supra* note 4.

likely to resurface in other cases.

In *Hendricks,* the Supreme Court, in a 5-4 decision, with Justice Thomas writing for the majority, reversed the decision of the Kansas Supreme Court and upheld the constitutionality of the Kansas Sexually Violent Predator Act[11] (the Act). The Act "establishes procedures for the civil commitment of persons who, due to 'mental abnormality' or 'personality disorder' are likely to engage in 'predatory acts of sexual violence.'"[12] The majority held that the Act's use of the term "mental abnormality" instead of "mental illness" or "mental disease" was legally sufficient to qualify a person for a particularized form of civil commitment.[13] Additionally, the court found that the Kansas scheme satisfied substantive due process, and that the Act was clearly civil in nature.[14] This resulted in a finding that commitment pursuant to the Act was not punitive, thereby precluding any double jeopardy or ex post facto violation.[15]

The existence of an ex post facto violation was one of the most virulently fought issue in *Hendricks*.[16] This argument goes to the very heart of the elements which distinguish criminal punishment from civil commitment. The majority found that sexually violent predator (SVP) status and subsequent commitment was not construed as punishment, thereby dissipating any claim to an ex post facto violation.[17] Justice Breyer, in his dissent, construed the state's refusal or inability to provide treatment to Mr. Hendricks, a person whom the state had earlier classified as treatable, as antitherapeutic and punitive in nature and effect.[18] Directly contradicting the majority, Justice Breyer found that the statutory scheme was punitive and the commitment pursuant to the statute violated the Constitution's Ex Post Facto Clause.[19]

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11. *See Hendricks,* 117 S. Ct. at 2086.
12. *Id.* at 2076 (citation omitted).
13. *See id.* at 2080.
14. *See id.* at 2079-85.
15. *See id.* at 2085-86.
16. The Constitution's Ex Post Facto Clause prevents the government from punishing that which is not—or was not at the time—criminal or punishable, or from subsequently enhancing the agreed-upon punishment. *See* U.S. CONST. art. I, § 9, cl. 3. Hendricks claimed that his civil commitment as a sexually violent predator (SVP) additionally punished him for past conduct, namely the crimes for which he had previously been convicted and served time. *See Hendricks,* 117 S. Ct. at 2081.
17. *See Hendricks,* 117 S. Ct. at 2086.
18. *See id.* at 2097-98 (Breyer, J., dissenting).
19. *See id.* at 2098 (Breyer, J., dissenting).

Surprisingly to most mental health law practitioners and scholars,[20] neither side, except perhaps Justice Ginsberg who declined to join Part I of the dissent, took issue with the use of the term "mental abnormality" or "personality disorder," as distinguished from "mental illness" or "disease," as a predicate for civil commitment.[21]

The majority, comprised of Justices Thomas, Rehnquist, O'Connor, Scalia, and Kennedy—Kennedy who also submitted his own concurrence—put forth what can be viewed as an alarmingly expantionist, sanist,[22] and pretextual[23] analysis of the facts and relevant

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20. *See, e.g.*, Fred Cohen, *Supreme Court Finds Sexually Violent Predator Law Constitutional*, 1 SEXUAL ASSAULT REPORT 7 (Sept./Oct. 1997); Eric S. Janus, *Preventing Sexual Violence: Setting Principled Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 158 (1996) (citation omitted) ("Dating back some twenty years, the Court's civil commitment decisions now point squarely to 'mental disorder' as the pivotal concept in ascertaining the outer bounds of the state's power to use civil commitment.").

21. This is particularly surprising in light of the Supreme Court's relatively recent mental health law case, where it held that the Constitution mandates a finding of mental illness or mental disease and dangerousness to support civil commitment. *See* Foucha v. Louisiana, 504 U.S. 71, 86 (1992). In particular, *Foucha* held that dangerousness, without mental illness, even if combined with an anti-social personality disorder, could not form the predicate for civil commitment. *See id.*

22. Sanism is "an irrational prejudice . . . of the same quality and character of other prevailing prejudices such as racism, sexism, heterosexism and ethnic bigotry that have been reflected both in our legal system and in the way that lawyers represent clients . . . . [Sanism] similarly infects both our jursiprudence and our lawyering practices . . . . It is largely socially acceptable and largely unacknowledged." Michael L. Perlin, *On "Sanism"*, 46 SMU L. REV. 373, 374 (1992); *see also* Michael L. Perlin & Deborah A. Dorfman, *Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence*, 11 BEHAV. SCI. & L. 47, 49 (1993).

23. "'Pretextuality' is the way in which courts often accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (frequently meretricious) decision making, specifically where witnesses, especially *expert* witnesses, show a high propensity to distort purposely their testimonial ends." Michael L. Perlin, *"Make Promises by the Hour": Sex, Drugs, the ADA, and Psychiatric Hospitalization*, 46 DEPAUL L. REV. 947, 956 (1997) (citation omitted) [hereinafter Perlin, *Promises*]. The testimony of forensic experts and the decisions of legislators and fact-finders reflect the pretexts of the forensic mental health system. *See* Michael L. Perlin & Keri K. Gould, *Johnny's in the Basement/Mixing Up His Medicine: Therapeutic Jurisprudence and Clinical Teaching* 3 (on file with *Loyola of Los Angeles Law Review*) [hereinafter Perlin & Gould, *Johnny's*]; *see also* Deborah A. Dorfman, *Through a Therapeutic Jurisprudence Filter: Fear and Pretextuality in Mental Disability Law*, 10 N.Y.L. SCH. J. HUM. RTS. 805, 812-19 (1993) (discussing how pretextuality is played out in the legal context); Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of "Ordinary Common Sense," Heuristic Reasoning and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131 (1991) (examining the relationship be-

law. Justice Breyer, joined by Justices Stevens, Souter, and Ginsberg—Parts II and III only—grounded his dissent in a way which espoused the principles of therapeutic jurisprudence by promoting the evaluation of a therapeutic outcome.[24]

This Article analyzes the *Hendricks* decision by parable and through the lens of therapeutic jurisprudence.[25] Having already exposed the reader to a brief overview of teaching by parable, the discussion turns to therapeutic jurisprudence and the *Hendricks* decision. Lastly, the Article highlights some potential therapeutic and non-therapeutic effects of the *Hendricks* decision. Specifically, it focuses on the possible effects that this decision may have on the lives of people who are viewed as having a mental abnormality, particularly in the area of the right to sexual expression for institutionalized persons, the potential benefits and negative consequences to persons committed to the sexual predator units, and how this new construct may impact prosecutorial decision making and lawyering.

II. THERAPEUTIC JURSIPRUDENCE

Therapeutic jurisprudence (TJ) is the "study of the role of the law as a therapeutic agent."[26] It is an interdisciplinary means of analyzing legal interactions, all of which may have potentially therapeutic or non-therapeutic consequences. The consequences may be explicit or they may require an interdisciplinary approach to decipher.

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tween the law and the mental health profession) [hereinafter Perlin, *Morality*]; Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 627 (1993) (asserting that the "relationship between the legal process and mentally disabled litigants is often pretextual") [hereinafter Perlin, *Pretexts*].

24. *See Hendricks*, 117 S. Ct. at 2097-98 (Breyer, J. dissenting).

25. For a therapeutic jurisprudence analysis of the case law that established the civil rights of involuntary civilly committed persons, see Michael L. Perlin et al., *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?*, 1 PSYCHOL., PUB. POL'Y, & L. 80 (1995).

26. David B. Wexler, *Some Thoughts and Observations on the Teaching of Therapeutic Jurisprudence,* 35 REVISTA DE DERECHO PUERTORRIQUENO 273, 274 (1996) [hereinafter Wexler, *Some Thoughts*]; *see generally* ESSAYS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1991) (describing the theory and potential practical applications of therapeutic jurisprudence); LAW IN A THERAPEUTIC KEY; DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996) [hereinafter DEVELOPMENTS] (discussing the role of therapeutic jurisprudence in various fields of law); THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed., 1990) [hereinafter THERAPEUTIC JURISPRUDENCE] (a collection of essays arguing that the law should be more sensitive to mental health discipline).

However, therapeutic jurisprudence encourages "the exploration of ways in which, consistent with principles of justice, the knowledge, theories, and insights of the mental health and related disciplines can help *shape* the development of the law."[27] The challenge of therapeutic jurisprudence is to reach "beyond the boundaries of law professors and academic mental health professionals" to "include the perspectives of practitioners and consumers," and to blur the lines between theory and practice to set the stage for law reform.[28]

Although therapeutic jurisprudence seeks to identify therapeutic consequences, it by no means suggests that therapeutic considerations should trump other factors in evaluating a legal practice or outcome.[29] "Most often, [therapeutic jurisprudence] proposes rules, pro-

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27. Wexler, *Some Thoughts, supra* note 26, at 274.

28. Michael L. Perlin, Transcript of Remarks at Loyola Law School Mental Disability Colloquium (Nov. 15, 1997) (transcript on file with *Loyola of Los Angeles Law Review*).

Therapeutic Jurisprudence has captured the attention of prominent forensic experts, academic psychologists, psychiatrists, and practitioners. *See, e.g., Special Section*, 64 AM. J. ORTHOPSYCHIATRY 172 (1994); *Special Theme: Therapeutic Jurisprudence*, 1 PSYCHOL., PUB. POL'Y, & L. 3 (1995); Symposium, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993); *Symposium*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 243 (1994).

For literature discussing the therapeutic consequences of attorney roles, see Janet B. Abisch, *Mediational Lawyering in the Civil Commitment Context: A Therapeutic Jurisprudence Solution to the Counsel Role Dilemma*, 1 PSYCHOL., PUB. POL'Y, & L. 120 (1995) (discussing mediational lawyering in the civil commitment context); Jan C. Costello, *"Why Would I Need a Lawyer?" Legal Counsel and Advocacy for People with Mental Disabilities, in* LAW, MENTAL HEALTH, AND MENTAL DISORDER 15 (Bruce D. Sales & Daniel W. Shuman eds., 1995) (establishing how counsel's role is perceived by various participants in the system); Keri K. Gould, *A Therapeutic Jurisprudence Analysis of Competency Evaluation Requests: The Defense Attorney's Dilemma*, 18 INT'L. J.L. & PSYCHIATRY 83 (1995); Keri K. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?*, 10 N.Y.L. SCH. J. HUM. RTS. 835 (1993) [hereinafter Gould, *Turning Rat*]; Perlin & Gould, *Johnny's, supra* note 23, at 9 (discussing the influences of therapeutic jurisprudence on clinical legal education); Robert F. Schopp, *Therapeutic Jurisprudence and Conflicts Among Values in Mental Health Law*, 11 BEHAV. SCI. & L. 31 (1993) (endorsing a priority for the deontic aspect of autonomy over well-being but allowing a balancing of the consequentialist component of autonomy against well-being).

29. *See* Perlin & Gould, *Johnny's, supra* note 23, at 9; David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship*, 10 N.Y.L. SCH. J. HUM. RTS. 759, 761 (1993); Wexler, *Some Thoughts, supra* note 26, at 274-75.

Other factors may include individual autonomy, integrity of the fact-finding process, community safety, and issues of efficiency and economy. *See* Wexler, *Some Thoughts, supra* note 26, at 275.

cedures, and roles intended to promote therapeutic effects or limit contratherapeutic effects for those directly involved."[30] Therapeutic jurisprudence includes interdisciplinary research to support informed legal decision making. In doing so, therapeutic jurisprudence may be seen as "a conceptual framework" seeking novel ways to maximize the areas of agreement between co-existing but traditionally non-collaborative systems.

Over the last seven years, since Professors David Wexler and Bruce Winick first introduced therapeutic jurisprudence, this method for examining mental health law has developed into a therapeutic approach to the law as a whole.[31] Therapeutic jurisprudence allows us to examine the dynamics of the law's impact on emotional life[32] from a variety of vantage points, including the judiciary.[33] Scholars recently have examined other constitutional cases in the area of mental disability law—*O'Connor v. Donaldson*,[34] *Wyatt v. Stickney*,[35] and *Lessard v. Schmidt*[36]—to determine whether the legacies of the placement of constitutional limitations on the civil commitment process have been therapeutic.[37] This Article continues to utilize therapeutic jurisprudence and parable methodology to examine the *Hendricks* decision and its potential effects on the intersection of criminal and civil confinement schemes.

30. Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence*, 1 PSYCHOL., PUB. POL'Y. & L. 161, 162 (1995) (footnote omitted).

31. *See generally* BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW (1997) (compiling a series of essays applying therapeutic jurisprudence to mental health law).

32. *See* Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL., PUB. POL'Y, & L. 193, 193-94 (1995); Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 39 ARIZ. L. REV. 25, 25 (1997).

33. *See* Judge Robert J. Kane, *A Sentencing Model for the 21st Century*, FED. PROBATION, Sept. 1995, at 10.

34. 422 U.S. 563 (1975) (discussing the constitutional right to liberty).

35. 325 F. Supp. 781 (M.D. Ala. 1971), 334 F. Supp. 1341 (M.D. Ala. 1971), 344 F. Supp. 373 (M.D. Ala. 1972), 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, rev'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (discussing the constitutional right to liberty).

36. 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded per curiam*, 414 U.S. 473 (1974), *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 421 U.S. 957-58 (1975), *reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976) (applying both substantive and procedural due process at an involuntary civil commitment hearing).

37. *See* Perlin, *supra* note 25, at 80.

III. FACTS OF *KANSAS V. HENDRICKS*

Leroy Hendricks has a long and sordid history of sexually abusing children.[38] His last conviction, by plea bargain, convicted him of taking "indecent liberties"—attempting to fondle—two thirteen-year-old boys.[39] The sentence was bargained down to five to twenty years, and the State agreed to drop one count and "refrained from requesting imposition of the Habitual Criminal Act."[40] Hendricks was scheduled for release to a half-way house when the Kansas Sexually Violent Predator Act was enacted and put into effect. Hendricks was the first person to whom the Act was applied.[41]

Pursuant to the Act, the District Attorney[42] filed a petition in district court seeking to civilly commit Mr. Hendricks involuntarily under the Kansas Sexually Violent Predator Act[43] upon his release from prison. At the probable cause determination hearing, Hendricks moved to dismiss the petition based upon insufficient factual allegations, failure to serve Hendricks with the petition, unconstitutionality of the Act, and breach of the plea agreement.[44] The court found that there was probable cause to believe that Hendricks was a sexually violent predator as defined by the Act and that he should be evalu-

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38. The petition filed by the District Attorney stated the following additional criminal history of prior sexual offenses from jurisdictions other than Kansas: a 1960 conviction for Indecent Liberties with a Child in Spokane, Washington and 1963 and 1967 convictions for Indecent Liberties with a Child in Seattle, Washington. *See In re Hendricks*, 912 P.2d 129, 130 (Kan. 1996). In addition, at Mr. Hendricks's commitment trial, both of his stepchildren testified to repeated, long-term sexual abuse by Mr. Hendricks. *See id.* at 143. (Larson, J., dissenting).

39. Kansas v. Hendricks, 117 S. Ct. 2072, 2078 (1997).

40. *In re Hendricks*, 912 P.2d at 130.

41. *See Hendricks*, 117 S. Ct. at 2085; *see also* Cohen, *supra* note 20, at 7; Nola Foulston & Carla J. Stovall, *Supreme Court to Consider Kansas Law Keeping Predators Confined*, 31 THE PROSECUTOR, Mar.-Apr. 1997, at 26.

42. The statute was later amended to have the Attorney General file the initial petition. *See* KAN. PROB. CODE ANN. § 59-29a04 (West 1994 & Supp. 1996).

43. *See Hendricks*, 912 P.2d at 130. The Kansas Act was modeled after a similar statutory scheme enacted in Washington in 1990. *See id.* at 131. Similar sex offender involuntary civil commitment statutes at that time had been adopted in Wisconsin, Minnesota, California, and Arizona. *See* WIS. STAT. ANN. §§ 980.01-.13 (West Supp. 1997)); MINN. STAT. ANN. § 253B.02 (West Supp. 1997)); 1995 Cal. Stat. 762-63 (codified as amended at CAL. WELF. & INST. CODE §§ 6600-08 (West Supp. 1998)); 1995 Ariz. Sess. Laws 257 (codified as amended at ARIZ. REV. STAT. ANN. §§ 13-4601 to 4609 (West Supp. 1997)); *see also* Amicus Brief, American Civil Liberties Union, Kansas v. Hendricks. Since that time and especially since the *Hendricks* decision, more states have passed similar legislation.

44. *See Hendricks*, 912 P.2d at 130.

ated at the State Hospital.[45] The court reserved ruling on the constitutionality of the statute and whether the plea agreement estopped the State.[46] Hendricks, on advice of counsel, initially refused to participate in the psychiatric evaluation at the state hospital. The district court then ordered him to comply with the exam, ruling that the Act was civil in nature and that Mr. Hendricks had no right against self-incrimination.[47] Hendricks then requested a jury trial to determine "beyond a reasonable doubt" whether he fulfilled the elements of a sexually violent predator, as defined by the Kansas Act.[48] After hearing testimony from Mr. Hendricks, Charles Beford, the chief psychologist at Larned State Hospital, and William Logan, a forensic psychiatrist who testified on behalf of Hendricks, the jury found Hendricks to be a sexually violent predator.[49] He was transferred and involuntarily confined to the Larned State Hospital.[50] The court, however, reserved ruling on the constitutional claim.[51] Hendricks appealed.

On appeal, the Kansas Supreme Court invalidated the Act, stating that a precommitment condition of mental abnormality did not satisfy substantive due process requirements that civil commitment must be predicated on a finding of mental illness.[52] The majority did not address the ex post facto or double jeopardy claims. The state appealed to the United States Supreme Court. Hendricks filed a cross-petition reasserting the federal double jeopardy and ex post facto claims.

IV. JUSTICE THOMAS AND THE MAJORITY OPINION

Just as the butcher in the duck parable found the presumptive element with which to categorize the bird as a duck, the Justices in the Supreme Court made choices upon which elements of the Kansas Sexually Violent Predator Act they could presumptively rely on to determine whether it was civil or punitive in nature. In order to define the relationship between the mental health system, driven by in-

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45. *See id.*
46. *See id.*
47. *See id.*
48. *See id.* at 130-31.
49. The jury found that Hendricks suffered from pedophilia, a mental abnormality under the Act, and that he was likely to engage in predatory sexually violent behavior when released to the community. *See id.*
50. *See id.* at 131.
51. *See id.* at 130.
52. *See id.* at 138.

capacitation, and the criminal system, driven by incarceration and retribution, the Justices had to weigh "whether the 'great safeguards' of the Constitution dictate a principled stopping place for the drive toward prevention."[53] The violent sexual predator cases are difficult, since they push even the most liberal policymakers and commentators to set the outer boundaries of constitutional protections for some of the most reviled members of society.[54] Justice Thomas, writing for the majority, found that the hybrid Act acceptably combined the two systems while retaining their essential distinguishing elements.[55] Justice Kennedy, in his concurrence, was willing to agree with the majority for the moment but warned that if the line blurred between the two systems in the future, then the statute would violate the Constitution.[56] Justice Breyer, using a therapeutic jurisprudence analysis of the statute, found that the lines had blurred between the essential constructs that legally support criminal incarceration or civil incapacitation.[57] To begin with, there is no suggestion that persons subject to SVP status are not responsible by the time they become subject to the allegedly civil commitment.[58] Nonetheless, it is important to examine the locus from which the legality of control over a person's liberty, probably for that person's lifetime, is found.[59]

The majority opinion was, unsurprisingly, a "sanist" opinion

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53. Janus, *supra* note 20, at 157.

54. As one commentator has noted:

> [T]he fact that sexually violent predators—particularly those like Hendricks who preyed on children—are being incarcerated twice for the same offense based on a questionable prediction that they are likely to repeat this type of sexual violence is not going to engender much sympathy from most people. There is little doubt that the public would like to see such people incapacitated permanently.

John W. Parry, *Executive Summary and Analysis*, 21 MENTAL & PHYSICAL DISABILITY L. REP. 435, 435 (1997).

55. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2081-85 (1997). The civil and criminal justifications for involuntary confinement assume different purposes with "attendant stigmas, procedures, and conditions of confinement." Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 121 (1996). "A punitive purpose is a necessary condition for criminal confinement, whereas civil incapacitation does not aim to punish." *Id.* The Eighth Amendment prohibition of cruel and unusual punishment establishes the limits of the conditions for criminal confinement, while civil confinement should seek to limit intrusion to only that necessary to meet the state's reason to detain. *See id.* at 121-22.

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

57. *See id.* at 2088 (Breyer, J., dissenting).

58. *See* Morse, *supra* note 55, at 135 ("Nonresponsibility is usually a necessary condition of justifiable involuntary civil commitment. . . .").

59. *See* Janus, *supra* note 20, at 191.

which uses a pretextual agenda to reinstate the Kansas Violent Sexual Predator Act. Clearly diminishing the tide of prior precedent,[60] Justice Thomas held that constitutional minimums were met under the following conditions: the state provided no treatment during the purportedly civil commitment; the state found that meaningful treatment was impossible; or the state provided something significantly less than full treatment, because treatment had been statutorily relegated to a concern ancillary to confinement.[61] Indeed, the majority found that the entire statutory scheme of the Kansas Sexual Predator Act was merely a benign method for restraining undesirable and potentially dangerous behavior.[62]

Justice Thomas has persistently engaged in anti-therapeutic decision making in each of the seven mental disability cases decided since he first joined the Supreme Court. Justice Thomas has consistently sided with whichever position most narrowly construes the rights of persons with mental disabilities, the position which promotes the continued institutionalization, incarceration, or segregation of such persons, or the position which tends to deny any less restrictive alternatives.[63] In doing so, he has resorted to outdated research

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60. *See* O'Connor v. Donaldson, 422 U.S. 563, 574-76 (1975) (holding that a state may not constitutionally confine an individual once treatment has ended); *see also* Youngberg v. Romeo, 457 U.S. 307, 324 (1982) (holding that a state is obligated to provide reasonable treatment and that it may be unreasonable not to provide treatment where it reduces the need for confinement).

61. Justice Thomas wrote:

> [T]he Kansas court's determination that the Act's 'overriding concern' was the continued 'segregation of sexually violent offenders' is consistent with our conclusion that the Act establishes civil proceedings, . . . especially when . . . coupled with the State's ancillary goal of providing treatment to those offenders, if such is possible . . . . [W]e have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others.

Hendricks, 117 S. Ct. at 2084 (citation omitted).

62. *See id.* at 2085-86.

63. The seven mental disability cases in which Justice Thomas has taken part include the following: *Hendricks*, 117 S. Ct. 2072, 2076-86 (authoring the majority opinion upholding the Kansas Sexual Predator Act); Shannon v. United States, 512 U.S. 573, 575-88 (1994) (authoring the majority opinion, which held that the Insanity Defense Reform Act did not require a jury instruction regarding the consequences of a not guilty by reason of insanity verdict); Simmons v. South Carolina, 512 U.S. 154, 178-85 (1994) (joining the dissent regarding the consequences of not instructing the jury as to whether life imprisonment carried with it the possibility of parole); Godinez v. Moran, 509 U.S. 389, 391-402 (1993) (authoring the majority opinion, which held that the standard for competency to plead guilty or waive the right to counsel was the same standard as competency to stand trial); Heller v. Doe, 509 U.S. 312, 314-34 (1993) (joining the majority

and empirical studies, frequently reaching back over a century and inaccurately stating or taking out of context findings which support his position. This, unfortunately, recurs in his jurisprudence, as one commentator noted regarding a past mental health law case:

> Thomas's opinion [in *Foucha*] is astounding for several reasons. First, he relies on legal scholarship that precedes (by 10-40 years) the Court's application of the due process clause to cases involving the institutionalization of mentally disabled criminal defendants. Second, he relies on a mid-1950's characterization of psychiatric precision in diagnosis . . . .
>
> Third, Justice Thomas's twin foci on the sanist judges' worst fears about insanity acquittees—that they "faked" the insanity defense in the first place and that the improper use of the defense will allow for the speedy release of serial killers—is a profound demonstration of how sanist judges distort social science evidence.[64]

Even other Justices have noted his disingenuous work.[65] In *Hen-*

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opinion regarding involuntary commitment of mentally retarded persons); Riggins v. Nevada, 504 U.S. 127, 146-57 (1992) (Thomas, J., dissenting) (dissenting from the majority, which held that the defendant could not be forcibly drugged for the trial without considering less restrictive alternatives, including deciding whether the drugs are medically appropriate and essential for the defendant's safety or the safety of others); Foucha v. Louisiana, 504 U.S. 71 (1992) (Thomas, J., dissenting) (dissenting from the majority, which held that a dangerous but not mentally ill acquittee could not be involuntarily held in a psychiatric center).

64. Perlin & Dorfman, *supra* note 22, at 61.

65. For example, Justice White in *Foucha v. Louisiana* noted that

> Justice Thomas in dissent complains that Foucha should not be released based on psychiatric opinion that he is not mentally ill because such opinion is not sufficiently precise . . . [but] more to the point, medical predictions of dangerousness seem to be reliable enough for Justice Thomas to permit the State to continue to hold Foucha in a mental institution, even where the psychiatrist would say no more than that he would hesitate to certify that Foucha would not be dangerous to himself or others.

Foucha, 504 U.S. at 76 n.3.

Later, Justice White reiterated that Justice Thomas's reliance on the Model Penal Code was "misplaced" and that Thomas "fail[ed] to mention" that a "current" provision had not been amended since 1962 and that related explanatory notes "expressly concede that related . . . provisions . . . are unconstitutional" and finally, that Thomas's quotation from the Commentary was "importantly incomplete." *Id.* at 83-84 n.6.

In the same case Justice O'Connor noted the inaccuracy of Justice Thomas's research, saying that, "Justice Thomas claims that 11 states have laws comparable to Louisiana's . . . but even this number overstates the case." *Id.* at 89. (O'Connor, J., concurring in part and concurring in the judgment).

dricks Justice Thomas found the entire scheme to be entirely benign—treatment need not be mandated, mental illness need not be found, and that the legislature calls the statute civil is dispositive without any serious inquiry.[66] Justice Thomas held that since the legislature's intent was to write a civil commitment statute, the court can only reject that legislative intent when there is "'the clearest proof' that 'the statutory scheme' [is] so punitive either in purpose or effect as to negate [the State's] intention to make it 'civil.'"[67] The Kansas Act, he found, there was no punitive intent, and deterrence was not a function of the statute.[68] The stated purpose of the claimed civil commitment was to hold the defendant until his mental abnormality no longer caused him to be a *threat* to others. The Act's overriding concern is the segregation of sexually violent offenders consistent with civil proceedings.[69] Thomas said that committees under the Act are afforded the same status as others who have been civilly committed.[70] The majority opinion is indifferent to seeking a therapeutic outcome. Justice Thomas is unconcerned with treatment issues, content to have SVP committees treated in a manner very similar to prisoners and he constrains the constitutional rights afforded involuntary civil committees under recent Supreme Court cases.

V. THE KENNEDY CONCURRENCE

If Justice Kennedy were the butcher in our parable, we would be left not knowing if the bird was a duck, or, to mix in another fable, an ugly duckling which might turn out to be a swan. The Kennedy concurrence may turn out to be the most important, and certainly the most far-sighted portion of the *Hendricks* decision. Kennedy's concurrence was, at best, a tentative alliance with the majority in its application of the Act to *Hendricks* at the time. Beyond this, however, Kennedy took a hard look at the future and cautioned against the practice of using "a civil confinement law . . . in conjunction with the criminal process, whether or not the law is given retroactive application."[71] Kennedy went right to the heart of the interstitial debate, stating that Kansas could not take what might have been an appro-

66. *See Hendricks*, 117 S. Ct. at 2081-85.
67. *Id.* (citing United States v. Ward, 448 U.S. 242, 248-49 (1980)).
68. *See id.* at 2082.
69. *See id.* at 2083.
70. *See id.*
71. *Id.* at 2087 (Kennedy, J., concurring).

priate criminal sentence—life—and call it a civil commitment.[72] His rationale was that if the "purpose of the Kansas law had been to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish."[73] Kennedy continued that confinement of persons "who, by reason of mental disease or mental abnormality, constitute a real, continuing, and serious danger to society ... [may be] permitted . . . provided there is no object or purpose to punish."[74]

Unlike Thomas, who was unconcerned with psychiatric diagnosis as long as someone called it a mental abnormality, Kennedy seemed relieved that Hendricks had been diagnosed as having pedophilia which was "at least described in the DSM-IV."[75] This, Kennedy felt, somehow seemed to give it medical validity.[76]

Kennedy brought up an important point missed by the majority. The state cannot use civil commitment as a safety net for sweeping up the mistakes made by prosecutors.[77] In *Hendricks* the state agreed to a plea bargain. In the plea bargain the state gave up the right to incarcerate Mr. Hendricks for more than twenty years, gave up the right to classify him as a habitual criminal, and dismissed a third count of indecent liberties.[78] We do not know why the state supported, or perhaps even offered, the plea agreement. It is unclear whether the prosecutor was inexperienced, made a mistake, or if the decision was based upon a lack of evidence which would have become obvious at trial. The decision may have been premised upon a concern for the young victims. In any case, the State must stand by the bargains entered into and cannot expect the civil commitment process to substitute for the sentences lost. As Kennedy stated,

> the concern instead is whether it is the criminal system or the civil system which should make the decision in the first place. If the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function [because] . . . while incapacitation is a goal common to

72. *See id.* (Kennedy, J., concurring).
73. *Id.* (Kennedy, J., concurring).
74. *Id.* (Kennedy, J., concurring) (citation omitted).
75. *Id.* (Kennedy J., concurring).
76. *See id.* (Kennedy, J., concurring).
77. *See id.* (Kennedy, J., concurring).
78. *See In re* Hendricks, 912 P.2d 129, 155 (Kan. 1996) (Larson, J., dissenting).

> both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.[79]

Kennedy narrowly construed the *Hendricks* decision. His concurrence may be seen as an invitation for future litigation if "civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, [because] our precedents would not suffice to validate it."[80]

VI. JUSTICE BREYER'S DISSENT

In his dissent Justice Breyer used a classic therapeutic jurisprudence analysis of the Kansas Violent Sexual Predator Act. First, he opined that Kansas could classify Hendricks as a person subject to either its initial civil commitment law in effect or under the new Violent Sexual Predator Act.[81] In doing so Justice Breyer acknowledged the professional debate over whether Hendricks's psychiatric condition could be considered a mental illness. He condoned psychiatric debate because it "helps to inform the law" but does not decide it.[82] This is precisely the use of social science data urged by David Wexler when he states that the interdisciplinary insights of therapeutic jurisprudence should not trump other legal or civil rights concerns.[83] In Justice Breyer's analysis, treatment clearly determined for him whether the Act was civil or so punitive in effect as to render it criminal, triggering ex post facto concerns.[84]

Justice Breyer next pointed out that this was not a case where the subject was untreatable; indeed, the Kansas Attorney General said during oral argument that Hendricks could be treated.[85] However, the SVP program did not provide Hendricks with any significant treatment.[86] These two findings framed the legal question. The due process clause forbade Hendricks's confinement unless Kansas provided the treatment which it conceded was available.[87]

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79. *Hendricks*, 117 S. Ct. at 2087 (Kennedy, J., concurring).
80. *Id.* (Kennedy, J., concurring).
81. *See id.* at 2088 (Breyer, J., dissenting).
82. *Id.* (Breyer, J., dissenting).
83. *See* Wexler, *Some Thoughts*, *supra* note 26, at 274-75.
84. *See Hendricks*, 117 S. Ct. at 2088-90 (Breyer, J., dissenting).
85. *See id.* at 2090 (Breyer, J., dissenting).
86. *See id.* (Breyer, J., dissenting).
87. *See id.* (Breyer, J., dissenting).

Breyer then cut to the heart of his argument by saying that he found an ex post facto violation because the Kansas statutory scheme inflicted a greater punishment on Mr. Hendricks.[88] Involuntary secure confinement imposes additional punishment upon individuals previously incarcerated for a criminal offense. "[W]here so significant a restriction of an individual's basic freedoms is at issue, a State cannot cut corners."[89]

Justice Breyer, citing reasoning that is much more in line with recent Supreme Court decisions in the mental disability field. For instance, the decisions in both *Riggins v. Nevada*[90] and *Foucha v. Louisiana*[91] looked much more toward the medical appropriateness of the proposed intervention. Breyer continued with an extensive analysis of *Allen v. Illinois*,[92] which looked to the laws concerning treatment as an important distinguishing feature.[93] He then applied a therapeutic jurisprudence test to determine a reasonable, therapeutic outcome:

- where the State believes treatment exists but delays treatment until the end of prison so that further incapacitation is necessary—it begins to look like punishment;
- where the legislature finds treatment goals incidental at best—it begins to look like punishment;
- when, at the time of Hendricks commitment, the State had not funded treatment, entered into treatment contracts, or hired qualified treatment staff—it begins to look like punishment;
- when there is no requirement that the committing authority consider less restrictive alternatives—it begins to look like punishment;
- when the Kansas statute is more restrictive than all but one other sexual predator statute—it begins to look like punishment.[94]

So in looking at all considerations, is it a duck or is it punishment? To make this determination and the concomitant effect that such a finding would have on the viability of the Act, Breyer looked toward the potentially therapeutic basis for the policy behind the

88. *See id.* (Breyer, J., dissenting).
89. *Hendricks*, 117 S. Ct. at 2098 (Breyer, J., dissenting).
90. 504 U.S. 127 (1992).
91. 504 U.S. 71 (1992).
92. 478 U.S. 364 (1986).
93. *See Hendricks*, 117 S. Ct. at 2091-93. (Breyer, J., dissenting).
94. *See id.* at 2092-95 (Breyer, J., dissenting).

legislative scheme.[95] Justice Breyer pointed out that a nonpunitively motivated legislature which confines a person because of a dangerous mental abnormality, would seek to help the individual overcome that abnormality particularly since potentially effective treatment exists.[96]

Additionally, this particular statute when compared to similar statutes of other states, is almost alone in deferring diagnosis, evaluation, and commitment until after the prison sentence is served and without consideration of less restrictive alternatives.[97] To summarize, if it quacks it's a duck, and in this case, Breyer concluded, the duck was punishment.

VII. POTENTIAL THERAPEUTIC AND NON-THERAPEUTIC EFFECTS OF THE *HENDRICKS* DECISION

However splintered the opinions on *Hendricks* may be, the Court found the Kansas statutory scheme constitutional. There were thirty-eight states that filed amicus briefs supporting the State of Kansas, and once the Supreme Court held for Kansas, several more states enacted similar sexual predator statutes.[98] This Article next examines some of the potential therapeutic and contra-therapeutic effects which may follow the enactment of such statutes. The Article then discusses three groups that will be affected by this decision. The three groups include persons subject to commitment as sexually violent predators; the lawyers who seek to commit persons pursuant to the SVP statutes; and persons with mental disabilities who may be at risk for administrative transfer to a SVP facility.

One possible benefit resulting from the *Hendricks* decision is the greater availability of funding to develop and implement new or more successful treatment modalities for violent sexual predators. The availability of adequate treatment within the institution would be a great benefit to the SVP and to the public. The structure of the Kansas statute, however, does not seem to support this goal. First, the Act does not even contemplate treatment until after the SVP has served his time in prison.[99] As Justice Breyer illustrated in his dissent, the deferment of diagnosis, evaluation, and commitment proceedings while the criminal sentence is served and until a few weeks prior to the individual's anticipated release cannot be considered

95. *See id.* at 2087-98 (Breyer, J., dissenting).
96. *See id.* at 2092 (Breyer, J., dissenting).
97. *See id.* (Breyer, J., dissenting).
98. *See* Cohen, *supra* note 20, at 14.
99. *See Hendricks*, 117 S. Ct. at 2088 (Breyer, J., dissenting).

therapeutic for a number of reasons, including that the nexus between the forbidden behavior and any therapy is too attenuated.[100]

Second, the potential for increased loss of liberty while the individual is serving his criminal sentence gives the individual little incentive to abide by the institutional rules. This lack of incentive is especially true because the continued retention is not based upon "good behavior" while the individual is imprisoned, but rather upon the acts which originally put him in prison, acts which the inmate is completely powerless to change.[101] People who experience unfair legal procedures have less respect for the law and legal authorities and are less likely to accept judicial decisions.[102] This can lead to a "gradual erosion of obedience to the law."[103] Within the correctional context, this erosion would be measured by compliance or noncompliance with institutional rules.[104] Query if such noncompliance would not then be used to ratchet up the prosecutor's resolve and ability to induct the individual into the next type of detention, in this case a form of civil commitment.

It is also disconcerting that the *Hendricks* decision may open the floodgates to prosecutors who will routinely use civil confinement to augment and boost criminal sanctions. Justice Kennedy was mindful of this probability. In his concurrence, he warned that if the civil system was being co-opted because of improvident criminal plea bar-

100. *See id.* at 2093-94 (Breyer, J., dissenting).

101. *See* Gould, *Turning Rat, supra* note 28, at 839.

Tom Tyler's work in procedural justice also empirically illustrates that persons involved in felony cases are more influenced by procedural fairness rather than the leniency of the sentence they receive. *See generally* Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings,* 46 SMU L. REV. 433 (1992) (discussing the therapeutic effects of the commitment process).

102. *See* Daniel W. Shuman & Dr. Jean A. Hamilton, *Jury Service—It May Change Your Mind: Perceptions of Fairness of Jurors and Nonjurors,* 46 SMU L. REV. 449, 451 (1992).

103. *Id.*

104. The basis for most inmate complaints turns on treatment issues. When inmates feel that they are treated capriciously, psychological stress is created. *See* James Bonta & Paul Gendreau, *Reexamining the Cruel and Unusual Punishment of Prison Life,* 14 LAW & HUM. BEHAV. 347, 361 (1990). Disturbingly, one of the few studies of inmate perception of sentencing structures found that 20% of those interviewed, the majority of whom were serving time for serious crimes, believed that switching to a system of determinate sentencing, where there could be no time diminution for "good behavior" would "likely increase [the] violence both in and outside of prison." Calvin J. Larson & Bruce L. Berg, *Inmates' Perceptions of Determinate and Indeterminate Sentences,* 7 BEHAV. SCI. & L. 127, 132 (1989).

gains, then it was not performing its acceptable function.[105] Unethical prosecutors could also use the threat of civil commitment to coerce criminal pleas.[106] Defendants may choose to plead to longer sentences if coupled with an agreement that the prosecutor's office will not seek to civilly commit the defendant as an SVP at the expiration of his criminal sentence. Because of the potential abuses inherent in sex offender statutes, at least one commentator found them "explicitly intended to circumvent the traditional strict constitutional limitations on the state's power to incarcerate."[107]

In doing so, this also may allow prosecutors to be less concerned with preserving evidentiary issues or to maintain a more relaxed investigatory posture in cases where the defendant may be eligible for future SVP status. In any case it relieves the prosecutor from having to consider any alternative sentencing options. As Justice Breyer noted, incarceration and release or even incarceration, therapy, and release, may not be the best way to modify sexual offender behavior.[108] It may be that the best way to guard against recidivist behavior is long-term monitoring, perhaps some type of long-term out-patient commitment or probationary status.[109]

The last issue to discuss is perhaps the most perplexing. Defining rights of people with mental disabilities to engage in sexual activity "is one of the most threatening issues confronting clinicians, line workers, administrators, advocates, and attorneys who are involved in mental health care related work, as well as the families of indi-

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

106. Prosecutors are held to a high ethical standard. *See* Roland Acevado, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987, 1004-05 (1995). They "have a duty to seek justice [and] not merely to convict." *Id.* at 1005. This duty also includes an oversight function where the prosecutor must remain mindful of his or her responsibilities to protect the community, quench the victim's desire for revenge, safeguard the defendant's rights, and ensure that the criminal proceeding is fair and efficient. *See id.*

107. Eric S. Janus, *Sex Offender Commitments: Debunking the Official Narrative and Revealing the Rules-in-Use*, 8 STAN. L. & POL'Y REV. 71, 72-73 (1997) ("The rules the courts actually use to decide sex offender cases—'rules-in-use'—reflect the real patterns of decisions which may be quite different from the espoused rules.").

108. *See Hendricks*, 117 S. Ct. at 2094 (Breyer, J., dissenting) (stating "that the statute, at least as of the time Kansas applied it to Hendricks, did not require the committing authority to consider the possibility of less restrictive alternatives").

109. *See* Robert A. Prentky et al., *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 L. & HUM. BEHAV. 635 (1997).

viduals with mental disabilities."[110] *Hendricks* has sanctioned a more lenient definition of mental disability that will permit people to be civilly committed. This raises concerns regarding how these committments might impact people confined to civil and forensic wards or hospitals, as well as people who are living in group homes or other managed living situations.

People with mental disabilities have long been labelled with contradicting stereotypes and have been demonized with regard to their sexuality. On the one hand, there is an assumption of infantilization. This is a denial that people with mental disabilities, and especially those who may be institutionalized, have the same sexual urges, feelings, and needs as have the rest of us.[111] On the other hand, there is a concomitant fear that the mentally disabled have primitive hypersexuality which may be fearfully unleashed in dangerous ways.[112]

The fact remains that, just like the non mentally disabled population, the vast majority of people with mental disabilities have so-called "normal sexual urges" and, if given the chance, they seek to express those urges in socially appropriate ways. For instance, among institutionalized psychiatric patients, two studies found that the incidences of interpersonal relationships involving "physical behaviors" was about three to five percent on the acute care (short-term) ward,[113] but sexual interaction appears to be more common on wards where the length of stay is longer than a few weeks.[114] It seems reasonable to speculate that this is because patients are able to know

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110. Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 N.Y.U. REV. L. & SOC. CHANGE 517, 520 (1993-94) [hereinafter Perlin, *Last Frontier*]; *see also* Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 2 U. ILL. L. REV. 315 (1997) (regarding mentally retarded individuals who engage in sexual activity); Douglas Mossman et al., *Sex on the Wards: Conundra for Clinicians*, 25 J. AM. ACAD. PSYCHIATRY L. 441 (1997) (regarding institutionalized psychiatric patients).

111. *See* Perlin, *Promises*, *supra* note 23, at 969. This, of course, is just another broad-reaching sanist attitude, where people without mental disabilities need to separate "us" from "them," to distinguish, without empirical evidence, that "[m]entally ill individuals are different and, perhaps, less than human." Perlin, *Last Frontier, supra* note 110, at 536.

Professor Denno also explored how "throughout history society has viewed mentally retarded persons as either asexual and childlike or hypersexual and at risk of producing offspring 'as defective as themselves.'" Denno, *supra* note 110, at 315.

112. *See* Perlin, *Promises*, *supra* note 23, at 969.

113. Keimer et al., *Co-patient Relationships on a Short-term Psychiatric Unit*, 37 HOSP. COMMUNITY PSYCHIATRY 166 (1986).

114. *See* Keimer, *supra* note 113, at 166.

each other better and become more comfortable with each other on the longer-term units.[115] Although responding to an inpatient's expressions of sexuality "is a common issue in clinical practice," tolerance of sexual expression often depends on which staff member is on duty.[116] The question remains whether the response of a staff member, who is seeking to prohibit sexual expression, can serve as a predicate to transfer a civil committee to the specialized sexual offender unit.

First let us examine what, if any, rights to sexual freedom are granted to persons involuntarily committed to a psychiatric setting. In 1972 Federal District Court Judge Frank Johnson in *Wyatt v. Stickney*[117] articulated a broad range of civil rights to which all civilly committed persons were entitled.[118] These rights were adopted in most states as a standard "Patient's Bill of Rights."[119] The portion of the *Wyatt* standards that guaranteed patients the right to "suitable opportunities for . . . interaction with members of the opposite sex"[120] was only adopted by four states.[121] But, with the numerous Supreme Court cases establishing individual rights to procreation,[122] reproductive decisions,[123] contraception,[124] and marriage[125] the scope of privacy rights in this area has been greatly enlarged. Yet, the recognition of these privacy rights has not translated into state recognition of a patient's right to personal or interpersonal sexual relationships.[126] Clinicians have begun to recognize that sexual freedom can have therapeutic value and should be considered in designing appropriate ward

115. *See* Mossman, *supra* note 110, at 443.

116. *Id.* "These findings suggest that mental health professionals, like most citizens, judge inpatient's [sic] behavior based on conventional social norms and prejudices rather than by legal standards. One study correlated a lower tolerance for inpatient sexual behavior with staff members who are older, less educated, and more religiously observant." *Id.* (citation omitted).

However, the "actual reporting on and decision making about inpatient sexual behavior often depends on the tastes and whims of ward staff and is influenced by a variety of emotional, moral and practical issues that have not been discussed in professional publications." *Id.* at 444.

117. 344 F. Supp. 373 (M.D. Ala. 1972).

118. *See id.*

119. *See id.*

120. *Id.* at 381.

121. There has also been no follow-up litigation establishing that this phrase confers a right to sexual interaction. *See* Mossman, *supra* note 110, at 454.

122. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

123. *See* Roe v. Wade, 410 U.S. 1133 (1973).

124. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

125. *See* Loving v. Virginia, 388 U.S. 1 (1967).

126. Perlin, *Last Frontier*, *supra* note 110, at 531.

standards.[127] This indicates that institutions have an obligation to discuss these matters and work with the patients in establishing appropriate parameters to sexual activity. One such possibility is the incorporation of model policies concerning consensual sexual relations.[128]

In the midst of a cautiously more liberalized view of sexuality in persons with mental disabilities, the Supreme Court decided *Kansas v. Hendricks*. What, if any, impact might this decision have on the way treatment centers view sexual expression among persons with mental disabilities? The first issue is whether patients who may be considered "difficult" by some staff members or "disliked" by others because they assert themselves in an inappropriate manner, are at risk of being transferred to one of the repressive, specialized sexual offender units? All of the SVP statutes demand that there be a prior sexual criminal conviction or charge before an individual can be given SVP status. How much of a charge must be filed? Must it be a criminal charge, or is an incident report filed at a hospital sufficient? Most states have an administrative regulation which allows the Commissioner of Mental Health—or whatever the title is in any given state—to administratively transfer a patient from a less secure to a more secure institution if the patient poses a safety threat. Will the State Department of Mental Health allow certain patients to be administratively transferred to specialized SVP units as they now allow for the administrative transfer between forensic and civil wards or facilities?[129] What due process rights will such patients have to reject such an administrative transfer?

The more difficult situation facing a committee in this context is the person who repeatedly masturbates in the day room, to the displeasure of the staff.[130] Will the institution be able to ship this patient to the SVP institution because he or she has become a bother to the civil hospital's staff? The Kansas Act provides that SVPs may not be housed with the "regular" civil patients, but this portion of the statute

127. *See* Susan Stefan, *Whose Egg Is It Anyway?: Reproductive Rights of Incarcerated, Institutionalized and Incompetent Women*, 13 NOVA L. REV. 405, 455 (1989).

128. For an example of a model policy concerning consensual sexual relations among long-term psychiatric inpatients, see Mossman, *supra* note 110, at 455.

129. *See, e.g.*, N.Y. MENTAL HYGIENE LAW § 29.11(a) (McKinney 1997) ("Subject to his regulations, the commissioner may order or approve the transfer of a patient from one facility to another appropriate facility.").

130. The staff has the power to control all aspects of a patient's life, even in terms of telephone privileges, access to lawyers, cigarettes, etc.

has yet to be tested.

The Act only mandates that someone is eligible if they have been charged with a sexual offense.[131] Would an institutional incident report serve as a proper "charge?" What if there was an inconclusive investigation following the incident report? Will the sexual predator institution become a dumping ground for the hard-to-handle mentally ill? Or, will this statute become a means for hospitals to avoid having to deal with the sexual rights or needs of their patients.

VIII. CONCLUSION

Both the majority opinion and the dissent argued heatedly as to whether the system of likely life-long incapacitation envisioned by the Kansas Violent Predator Statute is punishment, some other constitutionally acceptable alternative basis for civil commitment,[132] or something else—other than treatment, although there may be some incidental treatment.[133] The *Hendricks* case muddles the lines between criminal and civil grounds for detention and provokes concerns for persons outside the initial purview of the sexual predator label. The new civil commitment construct encourages our society to become far too acculturated to revenge by enlarging the boundaries of criminal justice procedures spill over into the civil arena.

131. *See* KAN. PROB. CODE ANN. § 59-29a04 (West 1994 & Supp. 1996).

132. *See Hendricks*, 117 S. Ct. at 2097 (Breyer, J., dissenting).

133. This seems to oppose prior Supreme Court "right to treatment" cases that held that treatment may not be promised as a basis for civil commitment and then not provided, and beneficial treatment may not be withheld if it will help minimize the length of confinement or create other fundamental constitutional deprivations. *See* Youngberg v. Romeo, 457 U.S. 307 (1982); O'Connor v. Donaldson, 422 U.S. 564 (1975); *see also* Parry, *supra* note 54, at 436.