"Punishing" Sex Offenders

Stephen R. McAllister[*]

INTRODUCTION

For many people, it is difficult, at best, to muster any sympathy for sex offenders, especially repeat offenders who victimize children. Indeed, for many it is easy to justify any punishment, legal disabilities, or indignities inflicted on pedophiles and rapists on the ground that such people "deserve anything they get." Certainly, recent state legislative activity suggests that "the people" and their representatives believe society cannot be tough enough on some of these offenders.

Thus, what may fairly be characterized as a nationwide trend toward more aggressive measures for dealing with sex offenders has resulted in many new sex offender laws during the past several years.[1] One measure that Kansas enacted in 1994 is the Kansas Sexually Violent Predator Act.[2] That law provides for the involuntary civil commitment of dangerous sex offenders who suffer from a "mental abnormality" at the time of their release from prison. Several other states have enacted the same or similar laws.[3] The states, including Kansas, frequently have adopted strong sex

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* Associate Professor of Law, University of Kansas School of Law. The research for this article was supported by a grant from the University of Kansas General Research Fund. Professor McAllister served as a special assistant attorney general for the State of Kansas in its successful defense of the Kansas Sexually Violent Predator Act, KAN. STAT. ANN. § 59-29a01 to -a15 (1994 & Supp. 1996), in the Supreme Court of the United States. In Kansas v. Hendricks, 117 S. Ct. 2072 (1997), the Supreme Court rejected substantive due process, double jeopardy and ex post facto challenges to the Kansas law.

1. *See generally* Stephen R. McAllister, *The Constitutionality of Kansas Laws Targeting Sex Offenders*, 36 WASHBURN L.J. 419, 420-21 (1997).

2. KAN. STAT. ANN. § 59-29a01 to -a15 (1994 & Supp. 1996).

3. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13 to 4601-13-4613 (West Supp. 1996); CAL. WELF. & INST. CODE § 6600-6609.3 (West Supp. 1997); MINN. STAT. § 253B (West Supp. 1997); WASH. REV. CODE ANN. § 71.09 (West 1992 & Supp. 1997); WIS. STAT. ANN. § 980.01-980.13 (West Supp. 1996). Given that more than 30 states expressed support for Kansas in *Hendricks*, *see* Amici Curiae Brief of the State of Washington, *et al.*, in Support of Petitioner, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (No. 95-1649) (filed in support of petitioner on the merits and joined by 35 states that do not currently have such laws); Amici Curiae Brief of the State of Washington, *et al.*, in Support of Petitioner, State v. Hendricks, 116 S. Ct. 1540 (1996) (filed in support of petitioner on petition for writ of certiorari and joined by 30 states that do not currently have such laws) it seems likely that many more states may adopt and implement such sex offender civil commitment statutes.

An older form of sex offender civil commitment statutes--"sexual psychopath" laws--are still on the books in some states, but generally are not used with frequency today. *See, e.g.*, V. Woerner, Annotation, *Statutes Relating to Sexual Psychopaths*, 24 A.L.R.2d 350 (1952) (describing such laws and the cases addressing them). The sexual psychopath laws, which the Supreme Court generally has upheld against constitutional challenge, *see* Allen v. Illinois, 478 U.S. 364 (1986), Minnesota ex

offender measures in response to highly publicized and brutal--sometimes gruesome--sex crimes, often committed by repeat offenders.[4]

Not surprisingly, the first time Kansas invoked the Sexually Violent Predator Act, the sex offender subjected to the law's provisions, Leroy Hendricks, contended that the statute was unconstitutional on numerous grounds, including that it violated substantive due process, equal protection, double jeopardy, and ex post facto principles. Hendricks also asserted that the law in essence created a criminal rather than a civil proceeding. That argument, if correct, would mean that all constitutional criminal procedure protections would apply to proceedings under the Kansas law, including measures for which the Kansas statute did not provide. Perhaps the most important of these, as a practical matter, would have been the Fifth Amendment privilege against self-incrimination, which is important in this context because of the State's desire to obtain psychological or psychiatric evaluations of sex offenders such as Hendricks.

Although it might have been easy to dismiss these arguments in light of the strong public support for the Kansas law and its public safety aspects, the Kansas Supreme Court held (by a 4 - 3 vote) that the law was unconstitutional because it permits the involuntary commitment of persons who are not really "mentally ill." The analytically misguided majority opinion concluded that the statute was infirm because the law's definition of "mental abnormality" (the triggering mental condition requirement) did not equate with the traditional Kansas civil commitment

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rel. Pearson v. Probate Court, 309 U.S. 270 (1940); discussed *infra* Part I.B., differ from the most recent generation of sex offender commitment statutes, however, in that they provide for civil commitment in lieu of incarceration or punishment, rather than a combination of the two.

4. See, *e.g.*, In re Hendricks, 259 Kan. 246, 266, 912 P.2d 129, 140 (1996) (Larson, J., dissenting) (recognizing that the Kansas Sexually Violent Predator Act was motivated in part by the rape and murder in July 1993, of Stephanie Schmidt, a Kansas college student, by a convicted rapist recently released from prison); State v. Myers, 260 Kan. 669, 679, 923 P.2d 1024, 1031 (1996) (recognizing the same motivation for the Kansas Sex Offender Registration Act). Similar heinous crimes have motivated legislation targeting sex offenders in other states. For example, in the State of Washington, which enacted the first sexually violent predator civil commitment statute in 1990, there was a tremendous public outcry following the May 1989 crime of Earl Shriner, a previously convicted sex offender, who sexually abused and mutilated a young boy. *See* Carla B. Keegan, *Washington's Sexually Violent Predator Statute: Constitutionally Sound and the Best Alternative for the Problem of Violent Predators*, 20 PUGET SOUND L. REV. 157, 159 (1996); James Popkin *et al.*, *Natural Born Predators*, U.S. NEWS & WORLD REP., Sept. 19, 1994, at 66. Similarly, in New Jersey, public outcry following a convicted sex offender's rape and murder of a young girl, Megan Kanka, following his release from prison, in July 1994, was a primary motive for the enactment of the sex offender registration and community notification measure popularly referred to as "Megan's Law." *See, e.g.*, Simeon Schopf, *"Megan's Law": Community Notification and the Constitution*, 29 COLUM. J. L. & SOC. PROBS. 117, 117 (1995); Anna Quindlen, *Megan's Law*, S.F. CHRON., Aug. 9, 1994, at A19.

statute's definition of "mental illness." In other words, the majority apparently assumed that there is only one acceptable definition of "mental illness" for constitutional purposes and that it is the definition set forth in the traditional Kansas civil commitment statute. Because of that conclusion, the Kansas Supreme Court majority did not address other constitutional challenges to the statute.

The State of Kansas then sought certiorari review of the substantive due process issues in the Supreme Court of the United States. Hendricks opposed that request, but argued that, if the Court accepted review on the substantive due process issues, it should also review the double jeopardy, ex post facto, and equal protection questions. Seeing the merit of possibly resolving the statute's constitutionality in one fell swoop, the State did not oppose Hendricks's request that the Supreme Court review the additional issues the Kansas Supreme Court majority had not addressed.[5]

Thus, in *Kansas v. Hendricks*,[6] the parties addressed, and the Supreme Court decided, two primary constitutional challenges to the Kansas Sexually Violent Predator Act. The first challenge was a substantive due process claim unique to the civil commitment context. As suggested above, Hendricks argued, and the Kansas Supreme Court agreed, that because the Kansas statute contains a different definition of the mental condition necessary to invoke its provisions ("mental abnormality" as defined in the statute) than the traditional Kansas civil commitment statute ("mentally ill" as defined in that statute), the sex predator statute violated fundamental notions of fairness (*i.e.*, substantive due process). In effect, Hendricks argued that the Kansas Legislature had provided for the involuntary commitment of sex offenders who are not really "mentally ill."

In response to Hendricks's substantive due process challenge, the State of Kansas argued that there is a long history of civil commitment in the United States (predating the Constitution), including the civil commitment of various types of sex offenders. Moreover, Kansas argued that the "mental abnormality" requirement in the statute requires the State to prove that a person such as Leroy Hendricks is suffering from a serious

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5. The State's decision not to oppose Hendricks's suggestion was, however, a calculated risk. By increasing the number of grounds on which Hendricks could challenge the statute, the State risked a determination that the statute was unconstitutional, but without necessarily ensuring that any five Justices would agree on a particular basis or rationale. In other words, if two Justices found the statute violated substantive due process principles, two found that it violated double jeopardy, and one Justice found that it violated equal protection, Kansas would have lost the case, even though there was no majority for a particular rationale. In order to win the case, on the other hand, Kansas had to persuade five Justices to reject each and every one of the challenges raised in the case. Ultimately, the gamble paid off, but it was a gamble nonetheless.

6. 117 S. Ct. 2072 (1997).

and medically significant mental condition before commitment is permitted.[7] Given the medical uncertainty surrounding the diagnosis and treatment of mental conditions (both Hendricks and Kansas had significant psychiatric and/or psychological organizations file amicus curiae briefs on their behalf), Kansas argued that the courts ultimately must accord significant deference to reasonable legislative choices in this context,[8] as the Supreme Court itself had done many times in past civil commitment cases.[9]

The Supreme Court unanimously rejected the substantive due process challenge to the Kansas sex offender commitment statute.[10] The author has elsewhere addressed the substantive due process question in some detail.[11] Therefore, this Article focuses on the second major challenge the Supreme Court rejected in *Kansas v. Hendricks*.

In addition to the substantive due process issue, sex offender civil commitment statutes raise the question of whether such measures impose "punishment" on sex offenders, thus triggering constitutional double jeopardy and ex post facto principles, and possibly other constitutional criminal procedure protections. The question is important because increased "punishment" necessarily can only be applied *prospectively*, to offenders who committed their crimes after the effective dates of such legislation. The second question, then, was whether the Kansas statute, as applied to sex offenders like Hendricks who committed crimes prior to the law's effective date, impose a second "punishment" in violation of double jeopardy and ex post facto principles.

Hendricks argued that the Kansas statute was passed in response to a highly publicized sex crime in Kansas (the rape and murder of a college student by a rapist recently released from prison), was motivated by punitive intent (as evidenced in some of the legislative history, especially testimony from some of the law's supporters), and effectively gave Hendricks a life sentence.[12] Moreover, Hendricks contended that, at the time he was committed under the law, and for many months thereafter, the State provided him with virtually no "treatment," resulting in a

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7. *See* Brief of Cross-Respondent at 6-14, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (No. 95-9075).

8. *See id.* at 12-13.

9. *See, e.g.*, Jones v. United States, 463 U.S. 354 (1983); Jackson v. Indiana, 406 U.S. 715 (1972); Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940).

10. *See Hendricks*, 117 S. Ct. at 2079.

11. *See* Stephen R. McAllister, *Sex Offenders and Mental Illness: A Lesson in Federalism and the Separation of Powers*, 3 PSYCHOL., PUB. POL'Y & THE LAW ___ (forthcoming 1998); McAllister, *supra* note 1, at 449-54.

12. *See* Brief of Cross-Petitioner at 4-8, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (Nos. 95-1649, 95-9075).

punitive effect (basically simple incarceration) and further demonstrating the State's punitive motives.[13]

Kansas responded that the law should be presumptively constitutional because on its face the law demonstrates two legitimate, civil, non-punitive purposes: treatment and incapacitation.[14] The State also argued that the law's sponsors intended it to establish a legitimate civil commitment procedure and treatment program, and that the current treatment program provided to persons such as Hendricks is substantial.[15]

The Supreme Court ultimately rejected Hendricks's "punishment" challenge, but the issue divided the Court 5 - 4.[16] Although civil commitment may be a unique option with a unique history and unique policy concerns in the sex offender context, the constitutional "punishment" argument arises with virtually every legislative attempt to adopt and implement public safety measures that affect sex offenders. It is a primary constitutional issue, for example, in current challenges to the validity of state sex offender registration and notification provisions (the so-called "Megan's laws").[17] Thus, more so than the substantive due process issue, the "punishment" issue in *Kansas v. Hendricks*, and the Supreme Court's resolution of it, may have implications for future constitutional litigation in the sex offender context.

Part I. of this Article provides an overview of the problem of distinguishing criminal "punishment" from civil, regulatory measures. Part I.A. explains the nature of the problem and demonstrates how this inquiry is an essential prerequisite to applying constitutional provisions,

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13. *See id.* at 29-30.

14. *See* Brief of Cross Respondent at 6-14, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (No. 95-9075).

15. One difficulty in the latter respect, however, is that the record on "treatment" was fairly weak. Hendricks was the first person committed under the law, so the "program" in existence when he arrived at Larned Correctional Mental Health Facility was not very organized or significant. Several months later, however, when he challenged the adequacy of the treatment in a state habeas proceeding, a state trial judge concluded that there was substantial evidence that the State had created a legally adequate treatment program. Although Hendricks sought to make this proceeding part of the record in the Kansas Supreme Court, that court refused the attempt and thus the evidence never became part of the formal record. In the Supreme Court of the United States, however, excerpts from the state habeas proceedings were included in the Joint Appendix the parties filed, and both sides argued the significance of that proceeding regarding the Kansas "treatment" program. *See* Joint App. at 389-455, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (Nos. 95-1649, 95-9075). From the State's perspective, the situation was particularly frustrating because the current treatment program is extensive and expensive, with people like Hendricks receiving essentially a full-time treatment regimen. There was no simple or effective way, however, under appellate court procedures, to make that information part of the formal record of the case.

16. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2076 (1997).

17. *See* McAllister, *supra* note 1, at 436-41; Stephen R. McAllister, *Neighbors Beware: The Constitutionality of State Sex Offender Registration and Notification Laws*, 29 TEXAS TECH L. REV. ___ (forthcoming 1998) [hereinafter McAllister, *Neighbors Beware*]; Schopf, *supra* note 4, at 128-38.

such as the Double Jeopardy and *Ex Post Facto* Clauses, to those affected by a law having retroactive effect. Part I.B. discusses the Supreme Court's prior cases involving the civil commitment of sex offenders and explains how Kansas used them in the litigation and why they undermined Hendricks's argument that the Kansas statute "punished" him.

Parts I.C. and I.D. focus on the aspects of the "punishment" issue, which most clearly divided the Supreme Court–the timing, nature and extent of the Kansas "treatment" program for committed sex offenders. In particular, Part I.C. discusses the Kansas treatment program for sex offenders such as Leroy Hendricks and the problems Kansas and Hendricks faced in arguing from the record in *Kansas v. Hendricks*. Part I.D. then addresses the legal question of whether postponing commitment until after an offender has served a criminal sentence has any constitutional significance. The point of the discussion in these two subsections is to provide context for the Supreme Court's ultimate decision on the "punishment" question.

Part II of the article describes the Supreme Court's decision in *Kansas v. Hendricks*, with particular emphasis on the "punishment" issue. Part II thus summarizes Justice Thomas's opinion for the Court, Justice Kennedy's concurrence, and Justice Breyer's dissent. All three opinions have some important things to say about deciding what measures impose "punishment" for constitutional purposes.

Finally, Part III identifies a few "lessons" that can be drawn from the *Hendricks* decision. These lessons include a healthy respect for federalism and separation of powers issues in the civil commitment context, and some clarification of what the Court appears to have endorsed as the general framework for analyzing constitutional "punishment" claims. Part III also briefly considers the implications of the *Hendricks* decision for constitutional challenges to other sex offender measures, such as registration and community notification.

I. THE CONSTITUTIONAL "PUNISHMENT" QUESTION IN *KANSAS V. HENDRICKS*

A. The Nature and Importance of the Question

1. The "Punishment" Premise

The primary basis for the argument in *Hendricks* that the Kansas sex offender commitment statute violated double jeopardy and ex post facto principles was that the law's provisions impose "punishment," rather than serve remedial or regulatory (*i.e.*, civil) purposes. Hendricks's counsel asserted that the Kansas law should be deemed "criminal" rather than

"civil" for constitutional purposes because the effect of the law, especially assuming (as Hendricks's counsel did) that little or no treatment is provided to those committed under the statute, is to impose additional "punishment" on sex offenders who already have served their criminal sentences.[18]

In contrast, Kansas argued that the statute on its face created civil procedures, making it presumptively not punitive.[19] The State also argued that the Supreme Court already had established that state statutes that provide for the civil commitment of sexually dangerous persons with mental conditions for long-term care and treatment generally are not criminal in nature and do not impose "punishment" for constitutional purposes.[20] Kansas argued that, for constitutional purposes, the Kansas statute was indistinguishable from the laws at issue in those earlier cases and, therefore, was not a criminal statute and did not impose punishment.[21]

2. The Double Jeopardy and Ex Post Facto Issues in *Kansas v. Hendricks*

As *Kansas v. Hendricks* demonstrates, recent sex offender measures typically have generated constitutional double jeopardy and ex post facto challenges. The double jeopardy argument is that such measures effectively constitute an additional "punishment" that is imposed on an offender who already has been tried, convicted, and sentenced (in other words, already put "in jeopardy"). The ex post facto claim is that the "punishment" such measures impose was not authorized by law–and thus the offender had no notice that they might be imposed–at the time the offender committed the crime. For both claims the critical constitutional premise is that laws such as the Kansas sex offender civil commitment law impose "punishment." Even if one accepts that premise, however, double jeopardy and ex post facto arguments are not available to challenge the *prospective* application of these laws. Rather, the "punishment" question is critical only for the limited class (though it is very large in number) of sex offenders who committed their crimes before such measures were enacted.

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18. *See* Brief of Cross-Petitioner at 22-36, *Hendricks* (Nos. 95-1649, 95-9075).

19. *See* Brief of Cross-Respondent at 6-14, *Hendricks* (No. 95-9075).

20. *See* Allen v. Illinois, 478 U.S. 364 (1986) (rejecting Fifth Amendment self-incrimination claim in proceeding under a state statute providing for the civil commitment of certain sex offenders in lieu of sentence of imprisonment); *see also* Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940) (rejecting due process and equal protection challenges to state "sexual psychopath" law); *see* discussion *infra* Part I.B.

21. *See* Brief of Cross-Respondent at 4-17, *Hendricks* (No. 95-9075).

In addressing the "punishment" problem, the Supreme Court has been relatively consistent in resorting to a two-step general approach to decide whether a statute is punitive. In *United States v. Ursery*,[22] an important double jeopardy case, the Court emphasized that the first inquiry is into legislative intent.[23] If the legislative intent is civil or regulatory rather than punitive, then a presumption arises[24] that the law *is* civil or non-punitive for constitutional purposes. The challenger then has the burden, in the second step of the inquiry, to demonstrate by the "clearest proof"[25] that the statute is "so punitive in fact"[26] that it nonetheless must be deemed punitive for constitutional purposes. On occasion, but not consistently, the Court has looked to some or all of the following factors in making that determination:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [all of which are] relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.[27]

Unfortunately, the Supreme Court has not explained when these factors are relevant, nor has the Court made clear how they should be applied or what weight they are to be given when they do become relevant. The resulting uncertainty in the Court's constitutional "punishment" jurisprudence has been noted by lower courts in recent cases involving constitutional challenges to sex offender legislation[28] and long has been apparent to legal commentators generally.[29]

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22. 116 S. Ct. 2135 (1996).

23. *See id.* at 2142, 2147.

24. *See id.* at 2148 n.3.

25. *Id.* at 2142, 2148.

26. *Id.* at 2147.

27. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (footnotes omitted).

28. *See, e.g.*, Artway v. Attorney Gen. of N.J., 81 F.3d 1235, 1262 (3d Cir. 1996); State v. Myers, 260 Kan. 669, 681-87, 923 P.2d 1024, 1033-36 (1996); Doe v. Poritz, 142 N.J. 1, 65, 72, 662 A.2d 367, 405-06 (1995).

29. *See, e.g.*, Maria Foscarinis, Note, *Toward a Constitutional Definition of Punishment*, 80 COLUM. L. REV. 1667, 1667, 1670-78 (1980); Note, *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, 109 HARV. L. REV. 1711, 1717 (1996); Note, *Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and Its Use in the* Lovett, Trop, Perez, *and* Speiser *Cases*, 34 IND. L.J. 231, 273 (1959).

a. Double Jeopardy Principles

The Supreme Court has interpreted the Fifth Amendment's double jeopardy prohibition, as applied to the States by virtue of the Fourteenth Amendment's Due Process Clause, to apply to the following three situations: (1) a second prosecution for the same offense following an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[30] Sex offender civil commitment legislation does not implicate the first or second double jeopardy categories.[31] Rather, the important question is whether such measures impose additional "punishment" for the same offense.

The double jeopardy prohibition on multiple punishments for the same offense can arise even in the context of proceedings that a legislature has designated as "civil."[32] For example, the Supreme Court has indicated that an in personam civil monetary penalty, or a tax that is triggered only by the commission of criminal conduct and which is vastly disproportionate to the harm caused, may constitute "punishment" for double jeopardy purposes.[33] In *Ursery*, however, the Court clarified that such situations represent the rare case.[34]

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30. *See, e.g., Ursery*, 116 S. Ct. at 2139-40; 116 S. Ct. at 2149 (Kennedy, J., concurring). Justices Scalia and Thomas, however, take the position that "the Double Jeopardy Clause prohibits successive prosecution, not successive punishment." *Id.* at 2152 (Scalia, J., concurring).

31. Only *convicted* sex offenders are subject to these laws, so the first double jeopardy category is never in issue. Nor can the registration and notification provisions of these laws be deemed a "second prosecution" of convicted offenders. *Cf.* Kansas v. Hendricks, 117 S. Ct. 2072, 2086 (1997) (holding that an involuntary civil commitment proceeding against a convicted sex offender who has completed his sentence does not constitute "second prosecution" or define "offense" for double jeopardy purposes).

32. *See id.* at 2082 ("Although we recognize that a 'civil label is not always dispositive,' we will reject the legislature's manifest intent only where a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'") (citations omitted).

33. *See, e.g.*, Department of Revenue v. Kurth Ranch, 511 U.S. 767, 783 (1994); United States v. Halper, 490 U.S. 435, 448-50 (1989).

34. *See Ursery*, 116 S. Ct. at 2144-47.

b. Ex Post Facto Principles

In the ex post facto context,[35] the Supreme Court has at most indicated that not all burdens imposed on an offender after an offense has been committed necessarily constitute punishment for constitutional purposes.[36] "To fall within the *ex post facto* prohibition, a law must be retrospective—that is 'it must apply to events occurring before its enactment'—and it 'must disadvantage the offender affected by it' by altering the definition of criminal conduct or increasing the punishment for the crime."[37] Moreover, the Court has declared that the question of whether a retroactive "legislative adjustment" is of "sufficient moment" to constitute "punishment" for ex post facto purposes "must be a matter of degree."[38] Typically, the Court has identified three categories of ex post facto laws that the Constitution prohibits: (1) laws that punish as a crime conduct that was not criminal when committed, (2) laws that retroactively increase the punishment for a crime after its commission, and (3) laws that deprive a defendant of a legal defense that was available at the time the crime was committed.[39] Laws such as the Kansas sex offender civil commitment statute do not implicate the first and third ex post facto categories. Rather, again the important question is whether such laws retroactively increase the punishment of people like Leroy Hendricks for past crimes.

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35. The ex post facto prohibition of Article I, section 10, applies to the states, while the prohibition of Article I, section 9, clause 3, applies to Congress. "So much importance did the convention attach to [the ex post facto prohibition], that it is found twice in the constitution . . . ." Kring v. Missouri, 107 U.S. 221, 227 (1883), *overruled by* Collins v. Youngblood, 497 U.S. 37 (1990). *See also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.9(b) (5th ed. 1995) ("The Constitution contains two *ex post facto* clauses: one that applies to the states and one that applies to the federal government.") (citations omitted).

36. *See* California Dep't of Corrections v. Morales, 514 U.S. 499, 508 (1995) ("Respondent nonetheless urges us to hold that the *Ex Post Facto* Clause forbids any legislative change that has any conceivable risk of affecting a prisoner's punishment. . . . Our cases have never accepted this expansive view of the *Ex Post Facto* Clause, and we will not endorse it here."); *Collins*, 497 U.S. at 41 ("Although the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact,' it has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to *penal* statutes which disadvantage the offender affected by them.") (emphasis added). *See generally* Calder v. Bull, 3 U.S. 386 (1798).

37. Lynce v. Mathis, 117 S. Ct. 891, 896 (1997) (citations omitted) (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)).

38. *Morales*, 514 U.S. at 509 (quoting Beazell v. Ohio, 269 U.S. 167, 171 (1925)).

39. *See Collins*, 497 U.S. at 42. The Court has declined invitations to expand constitutional ex post facto prohibitions to other categories of laws. *See id.* at 49-52.

B. *The Supreme Court and Sex Offender Civil Commitment Laws*

Kansas v. Hendricks was not the first case in which the Supreme Court or the United States had been asked to determine the constitutional validity of a sex offender civil commitment statute.[40] Indeed, although there are some unique features to the Kansas law, the Supreme Court was not writing on a blank slate by any means. In the context of civil commitment, and with respect to both the substantive due process and punishment issues, the Court had decided a number of relevant cases that, overall, had established several general constitutional requirements for civil commitment.[41]

Moreover, in two important cases the Court addressed the constitutionality of state sex offender civil commitment statutes, both times upholding the state laws against various challenges.[42] The statutes at issue in those cases differed in some respects from the Kansas law in *Hendricks*,[43] and the parties in *Hendricks* argued the significance of those earlier decisions in their briefs at length.[44] A brief review of the two cases illustrates some of the history of sex offender civil commitment in the United States. Overall, it is a history that probably favored Kansas in the *Hendricks* litigation, and it is a history that probably limits the importance of the Court's decision in *Hendricks* for resolving constitutional challenges to sex offender measures outside of the civil commitment context.

In the first case, *Minnesota ex rel. Pearson v. Probate Court*,[45] the Supreme Court summarily rejected equal protection and due process challenges to a state statute that subjected sex offenders with "psychopathic personalit[ies]" to civil commitment proceedings.[46] In *Pearson*, the Minnesota Supreme Court had construed the Minnesota statute

> to include those persons who, by an habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire.[47]

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40. *See, e.g.*, United States v. Ursery, 116 S. Ct. 2135 (1996); Allen v. Illinois, 478 U.S. 364 (1986); Addington v. Texas, 441 U.S. 418 (1979); Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940).

41. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71 (1992); *Addington*, 441 U.S. 418.

42. *See Allen*, 478 U.S. 364; *Pearson*, 309 U.S. 270.

43. *See Allen*, 478 U.S. at 368; *Pearson*, 309 U.S. at 274.

44. *See* Brief of Cross-Petitioner at 4-14, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (Nos. 95-1649, 95-9075) (discussing *Allen*); *id.* at 30-31, 41, 44-45 (discussing *Pearson*); Brief of Cross-Respondant at 17-20, 26-27, *Hendricks* (No. 95-9075) (discussing *Allen*); *id.* at 26 n.9 (discussing *Pearson*).

45. 309 U.S. 270 (1940).

46. *See id.* at 274-75.

47. *Id.* at 273 (quoting Minnesota *ex rel.* Pearson v. Probate Court, 287 N.W. 297, 302 (1939), *aff'd*, 309 U.S. 270 (1940)).

The Supreme Court of the United States rejected any notion that the law violated substantive due process or that sexual psychopaths subject to the law were denied equal protection, finding that the question was simply "whether there is any rational basis for such a selection,"[48] and observing that "[w]e see no reason for doubt upon this point."[49]

The law at issue in *Pearson* is known as a "sexual psychopath" law, a category of civil commitment statutes that originated in the 1930s in an effort to provide long-term care and treatment to recidivist sexual offenders, rather than punishing them criminally.[50] Sexual psychopath statutes "recognize that the sexual psychopath is neither normal nor legally insane and, for that reason, requires special consideration . . . ."[51] The objectives of such statutes were two-fold: "(1) to protect society by sequestering the sexual psychopath so long as he remains a menace to others, and (2) to subject him to treatment to the end that he might recover from his psychopathic condition and be rehabilitated."[52]

Like the Supreme Court in *Pearson*, state courts generally upheld these statutes against various constitutional challenges, including substantive due process, equal protection, double jeopardy, ex post facto, and self-incrimination challenges.[53] One state supreme court, for example, concluded that sexual psychopaths are persons whom the State has "the power to classify as mentally ill and the right to confine and attempt to cure."[54] By 1960, at least twenty-six states and the District of Columbia had some form of sexual psychopath law[55] and, indeed, Hendricks himself was civilly committed under such a law in the state of Washington in 1964.[56] By 1990, approximately half the states had repealed their sexual psychopath laws as part of a trend to punish rather than treat sex offenders.[57] Some states, however, continue to utilize either the 1930s sexual psychopath laws, or modern versions.[58]

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48. *Id.* at 274.

49. *Id.*; *see also* Katherine T. Blakey, *The Indefinite Civil Commitment of Dangerous Sex Offenders Is an Appropriate Legal Compromise Between "Mad" and "Bad"--A Study of Minnesota's Sexual Psychopathic Personality Statute*, 10 NOTRE DAME J.L., ETHICS & PUB. POL'Y 227, 237-41 (1996) (discussing the *Pearson* decision).

50. *See* Racquel Blacher, Comment, *Historical Perspective of the "Sex Psycopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 897-98 (1995).

51. V. Woerner, Annotation, *Statutes Relating to Sexual Psychopaths*, 24 A.L.R.2d 350, 351 (1952).

52. *Id.*

53. *See id.* at 352, 354-62.

54. State *ex rel.* Sweezer v. Green, 232 S.W.2d 897, 902 (Mo. 1950).

55. *See* Blacher, *supra* note 50, at 903.

56. Joint App. at 141-44, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (Nos. 95-1649, 95-9075).

57. *See* Blacher, *supra* note 50, at 906-07.

58. Minnesota, for example, has both the content of its original sexual psycopath statute, see MINN. STAT. § 526.09-11(1), *repealed by* Laws 1994, 1st Sp., c.1, art. 1, *reenacted by same at*

In the second important case, *Allen v. Illinois*,[59] the Supreme Court held that commitment proceedings under the Illinois Sexually Dangerous Persons Act were not "criminal" and therefore did not implicate the Fifth Amendment's privilege against self-incrimination.[60] Of the two cases, *Allen* probably is the more significant, both because it is more recent than *Pearson* (and psychiatric knowledge certainly has advanced since the 1930s) and because the *Allen* Court rejected several arguments that were very similar to the arguments made in *Kansas v. Hendricks*.[61]

In *Allen*, the Court observed that the question of whether a statute creates a criminal proceeding "is first of all a question of statutory construction."[62] Pointing out that the Illinois statute on its face declared the proceedings to "'be civil in nature,'"[63] the Court nonetheless recognized that "the civil label is not always dispositive."[64] Rather, the Court acknowledged that if a party challenging the "civil" label could provide "'the clearest proof'" that the statute was sufficiently punitive in purpose or effect, the Court would consider the statute "criminal" for constitutional purposes.[65] The Court had little difficulty, however, in determining that the Illinois statute was civil in nature, not criminal.

In reaching that conclusion, the Court relied principally on the fact that the Illinois law provided for care and treatment, not punishment, for persons adjudged sexually dangerous.[66] The Court in *Allen* rejected the argument that commitment proceedings are criminal if they are premised on the commission of a sexual offense.[67] In doing so, the Court

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MINN. STAT. §§ 253B.02, subd. 18a, 253B.185, and a more recently-enacted sexually dangerous persons statute. The Minnesota Legislature made it clear in the language of the statute that it intended to leave the language and substance of the older sexual psycopath law in effect, thereby leaving prosecutors with the option to proceed under either civil commitment statute.

> (a)Nothing in this act shall be construed to create grounds for relief or a cause of action for persons previously committed under Minnesota Statutes, sections 526.09, and 526.10. As provided in Minnesota Statutes, section 645.37, this act's repeal of sections 526.09, 526.10, 526.11, and 526.115, and their reenactment as sections 2 (253B.02, subdivision 18a) and 4 (253B.185), shall be construed as a continuation of the earlier repealed provisions. Judicial decisions interpreting or applying the repealed sections shall continue to apply to the same extent as if the repeal and reenactment had not occurred.
>
> (b)Sections 1 and 3 (253B.02, subdivisions 7a and 18b) [pertaining to sexually dangerous persons] are not a reenactment of any prior law.

Laws 1994, 1st Sp., c.1, art. 1, § 5.

59. 478 U.S. 364 (1986).
60. *See id.* at 375.
61. *See id.* at 370-75.
62. *Id.* at 368.
63. *Id.*
64. *Id.* at 369.
65. *Id.* (quoting U.S. v. Ward, 448 U.S. 242, 249 (1980)).
66. *See id.* at 369-70.
67. *See id.* at 370.

observed: "That the State has chosen not to apply the Act to the larger class of mentally ill persons who might be found sexually dangerous does not somehow transform a civil proceeding into a criminal one."[68] Moreover, the Court pointed out that the State also had to prove that the person suffered from a mental disorder and presented a continuing danger to society.[69] Thus, the requirement of antecedent criminal conduct "is received not to punish past misdeeds, but primarily to show the accused's mental condition and to predict future behavior."[70] Furthermore, the Court in *Allen* also rejected the argument that the State's use of procedural safeguards usually found in criminal trials made the proceedings criminal rather than civil,[71] declaring that, "as we noted above, the State has indicated quite clearly its intent that these commitment proceedings be civil in nature; its decision nevertheless to provide some of the safeguards applicable in criminal trials cannot itself turn these proceedings into criminal prosecutions requiring the full panoply of rights applicable there."[72]

The Court in *Allen* also rejected the contention that a punitive purpose was demonstrated by the placement of persons adjudged sexually dangerous in maximum-security institutions that also housed mentally ill inmates, observing as follows:

> [T]he State serves its purpose of *treating* rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment. That the Menard Psychiatric Center houses not only sexually dangerous persons but also prisoners from other institutions who are in need of psychiatric treatment does not transform the State's intent to treat into an intent to punish. Nor does the fact that Menard is apparently a maximum-security facility affect our analysis . . . .[73]

After pointing out that in *Addington v. Texas*,[74] the Court had recognized both *treatment* and *incapacitation* as legitimate non-punitive state objectives in the mental health context,[75] the Court further declared that "Illinois' decision to supplement its *parens patriae* concerns with measures to protect the welfare and safety of other citizens does not render the Act punitive."[76] Thus, the Court concluded that the petitioner

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68. *Id.*

69. *See id.* at 370-71.

70. *Id.* at 371.

71. The Court noted that, "[i]n his attempt to distinguish this case from other civil commitments, petitioner places great reliance on the fact that proceedings under the Act are accompanied by procedural safeguards usually found in criminal trials." *Id.* at 371.

72. *Id.* at 372.

73. *Id.* at 373.

74. 441 U.S. 418 (1979).

75. *See Allen*, 478 U.S. at 373.

76. *Id.*

had not demonstrated that the conditions of confinement were "incompatible with the State's asserted interest in treatment."[77] Finally, the Court explained that:

> Had petitioner shown, for example, that the confinement of such persons imposes on them a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case. But the record here tells us little or nothing about the regimen at the psychiatric center, and it certainly does not show that there are no relevant differences between confinement there and confinement in the other parts of the maximum-security prison complex. Indeed, counsel for the State assures us that under Illinois law sexually dangerous persons must not be treated like ordinary prisoners. We therefore cannot say that the conditions of petitioner's confinement themselves amount to "punishment" and thus render "criminal" the proceedings which led to confinement.[78]

The State of Kansas argued, apparently with some success, that *Pearson* and *Allen* largely undermined Hendricks's contentions that the Kansas law violated substantive due process principles or necessarily imposed punishment on him.[79] In its brief addressing the "punishment" issue, Kansas relied heavily on the *Allen* decision.[80] Essentially, Kansas argued that the Court in *Allen* already had rejected the arguments Hendricks was making to attack the Kansas law, and that, although the Kansas statute is somewhat different from the Illinois statute,[81] it was not different enough to change the outcome.

A key component of the Court's reasoning in *Allen*, however, was Illinois's emphasis on treatment, both in terms of the State's declared objectives and in the actual treatment being provided to those committed under the law.[82] Hendricks challenged the Kansas statute in both respects, arguing that the legislature did not enact the statute with treatment in mind and that Kansas in fact failed to provide treatment to him.[83] As it turned out, four Justices were receptive to those arguments. The majority, however, rejected them, for reasons explained more fully below.

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77. *Id.*

78. *Id.* at 373-74 (citation omitted).

79. *See* Brief of Cross-Respondent at 6-14, 30-32, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (No. 95-9075).

80. *See id.* at 6-14.

81. *See* discussion *infra* Part I.D.

82. *See Allen*, 478 U.S. at 368-69, 373.

83. *See, e.g.*, Brief of Cross-Petitioner at 14, 19, 25-29, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (Nos. 95-1649, 95-9075).

C. *The "Treatment" Question*

The questions of 1) whether the Kansas Legislature intended to provide treatment to committed sex offenders, 2) what kind of treatment is provided to involuntarily committed sex offenders in Kansas, and 3) the conditions in which persons such as Hendricks receive that treatment, ultimately became the focal point of the Supreme Court's 5 - 4 split on the "punishment" issue in *Kansas v. Hendricks*. The Supreme Court's opinions are summarized in this respect in the next section. By way of background, however, it may be helpful to briefly set forth the record before the Court and the situation in Kansas regarding the "treatment" of involuntarily committed sex offenders.

Hendricks argued to the Court as though it were an uncontroverted fact that sex offenders committed under the Kansas statute were not receiving psychiatric or psychological treatment.[84] As a litigation strategy, Hendricks's argument apparently was a good one. Ultimately, he persuaded four Justices that Kansas essentially provided him no treatment.[85] Moreover, because of the lack of record evidence on the treatment issues, the State was in a difficult position. Although the treatment program in place at the time of oral arguments before the Supreme Court was (and remains so today) an extensive, impressive, and humane program, there was no real way for Kansas to document that for the Court. Indeed, only in response to direct questions from the Court about the kind of treatment program that existed in December 1996, was the Attorney General really able to say anything about the current program.

Hendricks's assertion that no treatment existed, although perhaps a good litigation strategy in light of the limited evidence in the record, was significantly contradicted by the express factual findings made by two Kansas trial courts *after* hearing the testimony on which Hendricks relied, as well as much additional testimony that Hendricks did not mention or cite in his briefs. For example, in denying Hendricks's motion for a new trial following his commitment proceeding, the trial court concluded that "the Secretary of Social and Rehabilitation Services has established a treatment program."[86] In a state *habeas corpus* proceeding Hendricks initiated the following year,[87] a different trial judge again concluded–after

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84. *See id.* at 14, 19, 29.

85. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2090-98 (1997) (Breyer, Stevens, Souter, and Ginsburg, JJ., dissenting).

86. Joint App. at 387, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (Nos. 95-1649, 95-9075).

87. As explained in Part III below, the Justices of the Supreme Court disagreed on whether this proceeding could or should be considered in determining what kind of treatment Kansas was providing to Hendricks and others committed under the Kansas law. The dispute arose because,

hearing the testimony of various state officials—that "the allegation that no treatment is being provided to any of the petitioners or other persons committed to the program designated as a sexual predator treatment program is not true. I find that they are receiving treatment."[88] In fact, that trial judge expressly found, among other things, that "it is clear that the physical facilities [sic] of a treatment program exist," that "some staff personnel exist," that "[s]ome treatment programs are in place," such as "group therapy" and "ward milieu," and that "the materials and instrumentalities of treatment are present."[89] To be sure, at the time Hendricks was committed, and during his first several months or more at Larned, Kansas's sex offender treatment program was still evolving, but the State argued in the Supreme Court that those facts did not mean that Kansas was not providing constitutionally adequate treatment to Hendricks.

In the Supreme Court, Hendricks's counsel further asserted that sex offenders committed under the Act are confined like criminal felons, citing bits of testimony from a single state official given in a pretrial proceeding in the case.[90] Hendricks's case was the first one under the Kansas Act and, therefore, at the time of the testimony on which he relied, *no one* had been committed under the Act, so the testifying official was, at best, only speculating. Even so, the actual testimony probably did not support Hendricks's contention that he was not receiving treatment and was instead being confined like a criminal felon.

Initially, Hendricks was committed to the Larned State Hospital, a state mental institution.[91] Several months later, Hendricks was transferred to the Larned Correctional Mental Health Facility,[92] and that is where he (and others committed under the Kansas law) is housed today. The Larned Correctional Mental Health Facility is operated overall by Kansas correctional officials, but it consists of five separate wings,[93] like spokes on a wheel, with the sex offenders housed and treated in a unit under the supervision of the Kansas Department of Social and Rehabilitative Services and separate from the inmate population,[94] as is required by the

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although Hendricks's counsel initiated this proceeding, sought to make it part of the record in the Kansas Supreme Court, and desired to have it included in the Joint Appendix the parties filed in the Supreme Court of the United States, strictly speaking the state habeas proceedings were never officially made a part of the record of the case. *See* discussion *infra* Part III.

88. Joint App. at 453-54, *Hendricks* (Nos. 95-1649, 95-9075).

89. *Id.* at 453.

90. *See* Brief of Cross-Petitioner at 12, 19, 30, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (Nos. 95-1649, 95-9075).

91. *See id.* at 14.

92. *See* Joint App. at 425, *Hendricks* (Nos. 95-1649, 95-9075).

93. *See id.* at 77-78.

94. *See id.* at 49-50.

Kansas law.[95] The Larned Correctional Mental Health Facility does not house members of the general prison population—it is used for the treatment of inmates suffering from mental conditions—nor is the sex predator unit operated or staffed by the Department of Corrections.[96]

At most, the testimony on which Hendricks relied suggested that sex offenders might use some of the same physical facilities and would receive food, laundry, and non-psychological medical services from the same source—the Larned State Hospital[97]—as inmates receiving mental treatment at the Larned facility.[98] Sex offenders committed under the Kansas law, however, generally are segregated from inmates receiving mental treatment.[99] Moreover, committed sex offenders generally are accorded the same rights as any other involuntarily committed mental patient in a state mental institution,[100] including the right to wear their own clothes, to keep personal items such as toiletries, to keep and spend money, to make and receive telephone calls, to receive visitors each day, to refuse to work, to be paid for any work they agree to perform, and to have their own rooms.[101] There was *no* evidence in the record that committed sex offenders were *actually* incarcerated under the same rules and conditions as either the felons in the general Kansas prison population or even as the inmates receiving mental health treatment at the Larned Correctional Mental Health Facility.

In any event, Kansas argued that any challenge to the implementation of the law should be brought as an action seeking to compel the State to comply with the statute's treatment requirements.[102] Kansas contended that questions regarding the nature of the Kansas treatment program should not form a legal basis for declaring the law unconstitutional, as Hendricks—and several of his *amici*—claimed. Indeed, the Kansas law expressly requires and emphasizes that the "commitment of persons under this Act shall conform to constitutional requirements for care and treatment."[103] Thus, Kansas argued that, if Hendricks and his *amici* wanted to challenge the Kansas treatment as constitutionally inadequate,

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95. *See* KAN. STAT. ANN. § 59-29a07(a) (1994 & Supp. 1996).

96. Instead, the sex offender unit is staffed and operated by the Department of Social and Rehabiliatative Services. *See* Joint App. at 57, 59-60, *Hendricks* (Nos. 95-1649, 95-9075).

97. *See id.* at 79-80.

98. *See id.*

99. *See id.* at 57, 59-60.

100. *See id.* at 50-51.

101. *See id.* at 52-56.

102. *See* Brief of Cross-Respondent at 26-28, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (No. 95-9075).

103. KAN. STAT. ANN. § 59-29a09 (1994 & Supp. 1996).

their remedy was to file suit seeking to compel compliance with constitutional treatment requirements.[104]

That particular argument by the State apparently was unsuccessful. Although none of the Supreme Court opinions mention the notion that the adequacy of the treatment program should not serve as a basis for invalidating the entire statute, both the majority and the dissent directly addressed the "treatment" issues and the arguments that Hendricks raised.[105] Fortunately for the State, the record contained at least the evidence described above, and a majority of the Court was unwilling to second-guess the specifics of the Kansas treatment program. Apart from the essentially factual question of what kind of treatment program Kansas was providing to Hendricks, however, there remained a somewhat more difficult legal question, which is addressed in the next subsection.

D. Treatment Following Punishment

As explained above,[106] the Supreme Court's decisions in *Pearson* and *Allen* demonstrate that the Kansas sex offender civil commitment statute is not completely unprecedented. Nor, in light of *Pearson* and *Allen*, was Kansas necessarily on shaky constitutional ground in *Hendricks*. There is perhaps one constitutionally important difference, however, between the earlier vintage sexual psychopath laws—such as the state statutes upheld in *Pearson* and *Allen*—and the recently enacted sex predator statutes, such as the Kansas law. The original sexual psychopath statutes generally provided for treatment in lieu of criminal punishment.[107] In contrast, the Kansas Sexually Violent Predator Act and its counterparts provide for involuntary treatment *after* criminal punishment.[108]

The original sexual psychopath statutes operated on the premise that a sex offender was either "bad" or "mad," but not both. In effect, a sex offender either entered the criminal justice system and was punished, or was dealt with through the civil process and treated for mental infirmities. The sex predator statutes adopt a different premise, which recognize that at least some sex offenders may be both mad and bad. Under that premise, it may be appropriate for the state both to punish the offender through the criminal process and then to require the person to undergo treatment if a continuing mental infirmity exists at the time the offender has completed that sentence.

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104. *See* Brief of Cross-Respondent at 26-28, *Hendricks* (No. 95-9075).

105. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2083-85 (1997) (Thomas, J., majority opinion). *See id.* at 2092-94 (Breyer, J., dissenting).

106. *See* discussion *supra* Part I.B.

107. *See* KAN. STAT. ANN. § 59-2901 to -2944 (repealed 1996).

108. *See* KAN. STAT. ANN. § 59-29a01 to -a15 (1994 & Supp. 1996).

Relying on *Allen*, Kansas argued that the distinction should make no difference for constitutional purposes. Although the statute at issue in *Allen* provided for treatment in lieu of criminal punishment, commitment under the statute was "for an indeterminate period,"[109] and could have extended beyond the length of the criminal sentence the person otherwise would have received.[110] In the Kansas statute, however, within the limited context of sex offenders having certain mental conditions, the Kansas Legislature determined that punishment generally is the appropriate goal while recognizing that some sex offenders suffer from mental conditions that make them a continuing danger to society and therefore appropriate candidates for continuing care and treatment at the conclusion of their criminal sentences.

The Supreme Court had never declared that an *Allen*-type statute was the only constitutionally permissible statute for dealing with sex offenders. In *Hendricks*, Kansas argued that the decision to establish a flexible system, permitting the combination of civil commitment and punishment as determined (with rigorous procedural safeguards) to be appropriate in individual situations, is both reasonable and humane in light of current medical knowledge and firmly established societal notions of individual responsibility and accountability.[111] Kansas asserted that most sex offenders recognize the difference between right and wrong, and therefore are culpable under the tests for criminal mens rea utilized in most jurisdictions, including Kansas.[112] Such offenders therefore deserve to be punished for their conduct. Moreover, it is appropriate for society to condemn their actions.

At the same time, some sex offenders suffer from identifiable mental conditions or disorders that distinguish them from the vast majority of citizens who do not commit such offenses. In addition, treatment for those conditions may permit them to lead relatively normal lives in the future without committing sexual offenses against children and women.[113] Indeed, the prospect of commitment until they no longer suffer from such conditions and therefore present no danger to the community may even motivate more sex offenders to engage in meaningful participation in treatment programs in prison when they otherwise might decline to do so. They no longer would be able, as Hendricks was, to simply serve their

109. Allen v. Illinois, 478 U.S. 364, 372 (1986).

110. *See id.* at 377 (5-4 decision) (Stevens, J., dissenting) (recognizing the Seventh Circuit's finding that "the sexually-dangerous-person proceeding authorizes for longer imprisonment than a mere finding of guilt on an analogous criminal charge").

111. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2083-85 (1997).

112. *See id.* at 2081-82.

113. To date, all those who have been civilly committed under the Kansas law have been male pedophiles.

terms of imprisonment secure in the knowledge that they will be released whether or not they have faced their psychological problems.[114]

Nonetheless, it was the "treatment after punishment" aspect of the Kansas law that made the constitutional "punishment" issue in *Kansas v. Hendricks* conceptually difficult. Although the Supreme Court divided 5 - 4 on the "punishment" issue, the split appears to be based more on the factual dispute regarding whether Hendricks received meaningful treatment after being committed rather than upon a conceptual disagreement over the "mad" and "bad" distinction. Justice Kennedy's concurrence, however, appears aimed at highlighting the fundamental question of how to decide whether a particular situation or problem is a matter for the criminal or civil justice systems.[115] In this respect, the importance of *Kansas v. Hendricks* may extend beyond the civil commitment context even though the *Hendricks* Court never attempted to answer the ultimate question Justice Kennedy raised: how do we decide what matters are appropriate for either the criminal process, the civil system, or some combination of the two?

II. *KANSAS V. HENDRICKS*

A. Justice Thomas for the Majority -- Deference to the States

In *Kansas v. Hendricks*, the Court analyzed the "punishment" premise generally, and then briefly considered the double jeopardy and ex post facto challenges specifically.[116] Relying primarily on *Allen v. Illinois*,[117] *United States v. Ward*,[118] *United States v. Ursery*,[119] and *United States v. Salerno*,[120] the Supreme Court rejected the arguments that the Kansas sex offender civil commitment statute either created a "criminal" proceeding or imposed "punishment" for constitutional purposes.[121] Instead, the Court explicitly held that "the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive."[122] The Court's analysis, however, followed, and to some extent depended upon its resolution, of the substantive due process challenge to the statute.

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114. Indeed, Hendricks himself refused all offers of treatment while in prison for his most recent offenses. *See* Joint App. at 178-80, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (Nos. 95-1649, 95-9075).

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

116. *See id.* at 2081.

117. 478 U.S. 364 (1986) (distinguishing "civil" proceedings from "criminal" proceedings for the purposes of the Self-Incrimination Clause).

118. 448 U.S. 242 (1980) (analyzing a double jeopardy case).

119. 116 S. Ct. 2135 (1996) (analyzing a double jeopardy case).

120. 481 U.S. 739 (1987) (analyzing a substantive due process case).

121. *See Hendricks*, 117 S. Ct. at 2081-85.

122. *Id.* at 2085.

For that reason, a brief description of the substantive due process portion of the Court's opinion is set forth below, followed by a discussion of the Court's analysis of the "punishment" issue.

1. Substantive Due Process

The *Hendricks* majority opinion began by acknowledging that freedom from physical restraint is a constitutionally protected liberty interest, but pointed out that such freedom is not absolute.[123] The Court noted that civil commitment has existed in the United States for more than 200 years,[124] and that the Court itself has generally endorsed the propriety of such involuntary restraint so long as it "takes place pursuant to proper procedures and evidentiary standards."[125]

The Court then observed that the Kansas statute requires proof of dangerousness in the form of evidence of past sexual offenses, not just a prediction of dangerousness in the abstract.[126] Opining that a "finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment,"[127] the Court declared that it has upheld involuntary civil commitment statutes when the dangerousness requirement is coupled with some form of mental condition requirement.[128] According to the Court, "[t]hese added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control."[129] The Court concluded that the Kansas statute's requirement of a "mental abnormality" or "personality disorder" is "consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness."[130]

The Court next observed that:

> Hendricks nonetheless argues that our earlier cases dictate a finding of "mental illness" as a prerequisite for civil commitment, citing *Foucha*, and *Addington*. He then asserts that a "mental abnormality" is *not* equivalent to a "mental illness" because it is a term coined by the Kansas Legislature, rather than by the psychiatric community.[131]

123. *See id.* at 2079.
124. *See id.* at 2079-80.
125. *Id.* at 2080.
126. *See id.*
127. *Id.*
128. *See id.*
129. *Id.*
130. *Id.*
131. *Id.*

The Court quickly rejected this argument. The Court responded that "[c]ontrary to Hendricks' assertion, the term 'mental illness' is devoid of any talismanic significance."[132] Quoting from several of its own prior decisions, the Court pointed out that it previously had recognized that mental health professionals themselves disagree widely and frequently on what constitutes mental illness and that the Court itself had used a variety of expressions to describe the mental conditions that might properly subject a person to involuntary civil commitment.[133] The Court then easily concluded that the Kansas statute satisfies constitutional requirements, both in general and as applied to Hendricks, who was diagnosed as suffering from a pedophilia disorder that he admittedly could not control.[134]

2. "Punishment"

Having concluded that the Kansas statute does not violate substantive due process principles, the Court then turned to the "punishment" issues. The Court described Hendricks's "punishment" argument as follows:

> The thrust of Hendricks' argument is that the Act establishes criminal proceedings; hence confinement under it necessarily constitutes punishment. He contends that where, as here, newly enacted "punishment" is predicated upon past conduct for which he has already been convicted and forced to serve a prison sentence, the Constitution's Double Jeopardy and *Ex Post Facto* Clauses are violated.[135]

The Court declared that "[t]he categorization of a particular proceeding as civil or criminal 'is first of all a question of statutory construction.'"[136] Thus, the Court first enquired whether the Kansas Legislature intended the statute to establish civil proceedings.[137] The Court rather easily concluded that "[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm."[138]

The Court then invoked the *Ursery*[139]/Ward[140] presumption that a statute which, on its face, provides for civil proceedings will be deemed criminal "only where a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or

132. *Id.*
133. *See id.* at 2080-81.
134. *See id.* at 2081.
135. *Id.*
136. *Id.* (quoting Allen v. Illinois, 478 U.S. 364, 368 (1986)).
137. *See id.* at 2081-82.
138. *Id.* at 2082.
139. *See* United States v. Ursery, 116 S. Ct. 2135 (1996).
140. *See* United States v. Ward, 448 U.S. 242 (1980).

effect as to negate [the State's] intention' to deem it 'civil.'"[141] The Court found that Hendricks had "failed to satisfy this heavy burden."[142]

For instance, the Court declared that the Kansas statute does not implicate "either of the two primary objectives of criminal punishment: retribution or deterrence."[143] Specifically, the Court rejected Hendricks's argument that the statute was criminal because its invocation is premised on the commission of prior sexual offenses.[144] The Court relied on *Allen v. Illinois*[145] in pointing out that Hendricks's prior convictions were used "solely for evidentiary purposes, either to demonstrate that a 'mental abnormality' exists or to support a finding of future dangerousness."[146] Moreover, the Court noted that even some persons who had never been convicted, for example, because they were found incompetent to stand trial or not guilty by reason of insanity, could be committed under the Act.[147] The Court also rejected the argument that commitment under the statute depended upon proof of criminal intent.[148] For essentially the same reason, as well as the fact that persons committed under the statute are held under different conditions than prison inmates, the Court concluded that the Kansas legislature did not intend the law to serve a deterrent purpose.[149]

The Court pointed out that not all involuntary detention is necessarily punitive,[150] and rejected the argument that Hendricks's potentially indefinite commitment transformed the statute into a criminal measure.[151] Instead, the Court concluded that the law is tailored to its objective—to treat a person like Hendricks until it is safe to release him.[152] The Court also rejected Hendricks's somewhat curious argument that because Kansas had provided some criminal procedure-type safeguards in the statute—such as a jury trial, a requirement of proof beyond a reasonable doubt, and the right to counsel—the law should be deemed to create criminal proceedings.[153]

Lastly, in resolving the "punishment" question, the majority turned to the argument on which the Court divided 5 - 4. That argument was that

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141. *Hendricks*, 117 S. Ct. at 2082 (alterations in original) (quoting *Ward*, 448 U.S. at 248-49).
142. *Id.*
143. *Id.*
144. *See id.*
145. 478 U.S. 364 (1986).
146. *Hendricks*, 117 S. Ct. at 2082.
147. *See id.*
148. *See id.*
149. *See id.*
150. *See id.* at 2083.
151. *See id.*
152. *See id.*
153. *See id.*

Kansas had failed to provide legitimate "treatment" to Hendricks, making commitment under the statute punitive in effect. The majority rejected the argument for several reasons.

First, the majority pointed out that incapacitation also is a legitimate, civil, non-punitive purpose in the civil commitment context.[154] Second, the Court found no support in its cases for the proposition that people suffering from serious mental conditions who present a danger to society cannot be involuntarily committed simply because there is no "cure" for their conditions.[155] Third, the majority noted that the Kansas statute itself refers to committing persons such as Hendricks to the Secretary of the Department of Social and Rehabilitative Services "for control, care and treatment."[156]

Finally, the Court examined the record regarding the "treatment" available and provided to Hendricks. Acknowledging that the initial treatment program "may have seemed somewhat meager,"[157] the Court observed that "it must be remembered that he [Hendricks] was the first person committed under the Act. That the State did not have all of its treatment procedures in place is thus not surprising."[158] The majority then emphasized that Hendricks is under the supervision of SRS, not the Department of Corrections, and is housed separately from prison inmates.[159] Moreover, the Court pointed out that, at oral argument, Kansas Attorney General Carla Stoval represented (accurately) that Hendricks and others committed under the Act now receive approximately 31.5 hours of active treatment per week.[160] The Court also pointed out that in the state habeas proceeding Hendricks filed after his commitment, the state trial judge heard evidence regarding the Kansas treatment program and found it constitutionally adequate.[161]

Ultimately, the Court held that "the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive."[162] The Court then declared that "[o]ur conclusion . . . thus removes an essential prerequisite for both Hendricks' double jeopardy and *ex post facto* claims."[163] The Court then briefly discussed and rejected those two claims specifically.[164]

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154. *See id.* at 2084.
155. *See id.*
156. *Id.* (citing and quoting KAN. STAT. ANN. § 59-29a07(a) (1994 & Supp. 1996)).
157. *Id.* at 2085.
158. *Id.*
159. *Id.*
160. *See id.*
161. *See id.* at 2085 n.5.
162. *Id.* at 2085.
163. *Id.*
164. *See id.* at 2085-86.

B. Justice Kennedy Concurring–The Civil - Criminal Distinction

Justice Kennedy fully joined the Court's opinion, but wrote a concurring opinion to warn that civil commitment should not be used as a substitute for the criminal process.[165] He stated his desire to "caution against dangers inherent when a civil confinement law is used in conjunction with the criminal process."[166] In his view, the Kansas statute requires a finding of dangerousness and adequately defines a mental condition that justifies involuntary commitment.[167] He also found that "[t]he Kansas law, with its attendant protections, . . . is within [the] pattern and tradition of civil confinement."[168]

Justice Kennedy noted, however, that "[n]otwithstanding its civil attributes, the practical effect of the Kansas law may be to impose confinement for life."[169] He acknowledged that a "common response to this [observation] may be, 'A life term is exactly what the sentence should have been anyway,'"[170] and that such a sentence may well have been appropriate for Hendricks himself.[171] Nonetheless, Justice Kennedy declared that courts should be concerned about "whether it is the criminal system or the civil system which should make the decision in the first place."[172] In his view, "[i]f 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."[173]

Justice Kennedy opined that although incapacitation is a legitimate goal of both the civil and criminal systems, retribution and deterrence must be reserved for the criminal process.[174] Thus, he cautioned that if "civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it."[175]

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165. *See id.* at 2087 (Kennedy, J., concurring).
166. *Id.*
167. *See id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *See id.*
172. *Id.*
173. *Id.*
174. *See id.*
175. *Id.*

C. *Justice Breyer for the Dissenters–Kansas Is Punishing Leroy Hendricks*

The dissent, written by Justice Breyer, agreed with the majority's resolution of the substantive due process issue. Indeed, in the first sentence of his opinion, Justice Breyer declares, "I agree with the majority that the Kansas Act's 'definition of "mental abnormality"' satisfies the 'substantive' requirements of the Due Process Clause."[176] The dissent, however, ultimately concluded that the Kansas statute violated ex post facto principles because Hendricks did not receive meaningful "treatment" at the time he was initially committed.[177] Therefore, in the dissent's view, the statute imposed "punishment" for constitutional purposes, at least with respect to Hendricks himself. (The dissent, however, appeared to contemplate the possibility that later commitments would not necessarily violate ex post facto principles so long as a meaningful treatment program was in place at the time of those commitments).

The dissent found the law "punitive" for several reasons. First, based on a review of the record, the dissent concluded that no effective treatment exists, that the Kansas legislature was aware of that fact and did not care, and that no real treatment program was in place when Hendricks was committed under the statute.[178] Second, the dissent opined that it was significant that persons such as Hendricks are committed under the law only after they have served their prison sentences.[179] Third, the dissent questioned the law's failure to provide for "less restrictive alternatives, such as postrelease supervision [and] halfway houses."[180] Fourth, the dissent concluded that the Kansas statute is unique among state sex offender civil commitment laws in that it 1) delays commitment until after a criminal sentence is served, 2) does not provide for less restrictive alternatives, and 3) applies retroactively.[181]

The dissent also found the record evidence regarding the Kansas treatment program to be lacking.[182] Indeed, the dissent argued that the evidence from the state habeas proceeding could not be considered.[183] Moreover, the dissent disavowed any reliance upon the Kansas Attorney General's statements at oral argument.[184] The dissent's view was that

176. *Id.* at 2087-88 (Breyer, J., dissenting) (quoting majority opinion at 2079).
177. *See id.* at 2098.
178. *See id.* at 2093.
179. *See id.* at 2093-94.
180. *Id.* at 2094.
181. *See id.* at 2095.
182. *See id.* at 2096-97.
183. *See id.* at 2096.
184. *See id.* at 2096-97.

once these sources of information were eliminated, there remained no evidence that Kansas provided meaningful treatment to Hendricks.[185] Despite its opposition to the majority's use of the state habeas proceedings, the dissent then selectively emphasized evidence from the state habeas proceeding, which it deemed to undermine the State's position that treatment was being provided.[186]

A few other aspects of the dissent merit mention. Throughout the opinion, the dissenters argued that cases such as *Allen v. Illinois*[187] and *United States v. Salerno*[188] were distinguishable.[189] The dissent also briefly discussed and analyzed the *Kennedy v. Mendoza-Martinez*[190] factors for determining whether a law creates civil or criminal proceedings.[191] Finally, the dissent emphasized that the Kansas law would not be unconstitutional as applied prospectively.[192]

III. THE LESSONS OF *KANSAS V. HENDRICKS*

A. Federalism and the Separation of Powers[193]

Although the Court was closely divided on the question whether the Kansas statute–as applied to Hendricks–imposed additional "punishment" on him in violation of constitutional ex post facto principles, the Court was effectively unanimous[194] in rejecting the substantive due process argument that the Kansas statute does not require proof of a mental condition sufficiently severe to warrant involuntary civil commitment. That was the argument that the Kansas Supreme Court majority incorrectly endorsed in striking down the Kansas statute,[195] and it is the argument

185. *See id.* at 2097.
186. *See id.*
187. 478 U.S. 364 (1986).
188. 481 U.S. 739 (1987).
189. *See Hendricks*, 117 S. Ct. at 2091-93, 2097-98.
190. 372 U.S. 144 (1963).
191. *See Hendricks*, 117 S. Ct. at 2098.
192. *See id.*
193. *See generally* McAllister, *supra* note 11 (applying federalism and the separation of powers to the Kansas Sexual Predator Act).
194. The author says "effectively" unanimous only because Justice Ginsburg, who joined the dissent except for Justice Breyer's discussion of the substantive due process/"mental illness" challenge, does not appear to have taken any position on this question. *See Hendricks*, 117 S. Ct. at 2087. Her prior opinions, however, would strongly suggest that she is not likely to engage in intrusive scrutiny of state civil commitment statutes on substantive due process grounds. *See, e.g.*, Montana v. Egelhoff, 116 S. Ct. 2012, 2024 (1996) (Ginsburg, J., concurring) ("States enjoy wide latitude in defining the elements of criminal offenses . . . .") (discussing a substantive due process challenge to a state's refusal to recognize a defendant's voluntary intoxication as a defense to a criminal charge).
195. *See* In re Hendricks, 259 Kan. 246, 259, 912 P.2d 129, 137 (1996).

that Hendricks and his *amici*, including the American Psychiatric Association, pushed in their briefs before the Court.[196] The Court's unanimous rejection of the argument, however, speaks volumes about 1) the Court's reluctance to rely upon the opinions of any particular segment of the mental health profession, especially when the professionals themselves have reached no consensus, 2) the Court's commitment to federalism, and 3) the separation of powers notion that medical and policy questions sometimes are best resolved by a legislative body rather than a court.

Thus, in *Kansas v. Hendricks* the Court as a whole issued a ringing endorsement of longstanding federalism and separation of powers principles in the civil commitment context. Both the majority and the dissent recognized and affirmed the proposition that the courts generally will give deference to the substantive requirements of state civil commitment statutes. In this respect, the Court's decision in *Hendricks* serves to clarify the appropriate roles of the state legislatures, the mental health community, and the federal and state courts in shaping the nature and substance of involuntary civil commitment laws.

In particular, the *Hendricks* majority reaffirmed that those concerns compel the Court to adopt a deferential approach:

> Indeed, we have never required State legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance. As a consequence, the States have, over the years, developed numerous specialized terms to define mental health concepts. Often, those definitions do not fit precisely with the definitions employed by the medical community. The legal definitions of "insanity" and "competency," for example, vary substantially from their psychiatric counterparts. Legal definitions, however, which must "take into account such issues as individual responsibility . . . and competency," need not mirror those advanced by the medical profession.[197]

The Court recognized that not all psychiatric professionals necessarily would characterize Hendricks's mental condition, pedophilia, as a mental condition that would justify involuntary civil commitment.[198] The Court nonetheless declared that such disagreements within the profession "do not tie the State's hands in setting the bounds of its civil commitment

196. *See* Brief of Respondant at 20-23, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (Nos. 95-1649, 95-9075); Brief for the American Psychiatric Association as Amicus Curiae at 21-27, Kansas v. Hendricks, 117 S. Ct. 2072 (1997) (Nos. 95-1649, 95-9075).

197. *Hendricks*, 117 S. Ct. at 2081 (citations omitted) (quoting AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxii, xxvii (4th ed. 1994)).

198. *See id.* at 2081 n.3 (citing the amicus curiae briefs of the American Psychiatric Associatior (which said pedophilia is not enough) and the Menninger Foundation (which said that it is)).

laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes."[199]

The dissent likewise acknowledged the significance of disagreement within the mental health community on issues of diagnosis and treatment. In Justice Breyer's words,

> [T]he very presence and vigor of this debate is important. The Constitution permits a State to follow one *reasonable* professional view, while rejecting another. *The psychiatric debate, therefore, helps to inform the law by setting the bounds of what is reasonable, but it cannot here decide just how States must write their laws within those bounds.*[200]

Again, like the majority, the dissent also rejected the argument that there is essentially a single constitutional definition of "mental illness":

> The Kansas Supreme Court's contrary conclusion [that the Kansas statute failed to satisfy substantive due process requirements] rested primarily upon that court's view that Hendricks would not qualify for civil commitment under Kansas' own state civil commitment statute. The issue before us, however, is one of constitutional interpretation. The Constitution does not require Kansas to write all of its civil commitment rules in a single statute or forbid it to write two separate statutes each covering somewhat different classes of committable individuals. Moreover, Hendricks apparently falls outside the scope of the Kansas general civil commitment statute because that statute permits confinement only of those who "lac[k] capacity to make an informed decision concerning treatment." The statute does not tell us why it imposes this requirement. Capacity to make an informed decision about treatment is not always or obviously incompatible with severe mental illness. Neither Hendricks nor his *amici* point to a uniform body of professional opinion that says as much, and we have not found any. Consequently, the boundaries of the federal Constitution and those of Kansas' general civil commitment statute are not congruent.[201]

Thus, *Kansas v. Hendricks* is consistent not only with the Court's past civil commitment cases but also with the heightened respect that a majority of the Court has demonstrated for federalism and separation of powers principles during the past three terms.

B. Punishment

A major difficulty in assessing the constitutionality of ostensibly civil, regulatory laws that may have constitutionally significant punitive effects has always been the Supreme Court's reluctance or inability to articulate a standard for determining what constitutes "punishment" under the

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199. *Id.* (citation omitted).

200. *Id.* at 2088 (Breyer, J., dissenting) (emphasis added) (citations omitted).

201. *Id.* at 2089 (citations omitted) (quoting KAN. STAT. ANN. § 59-2902(h) (1994 & Supp. 1996)).

Constitution.[202] In this respect, the Court's decision in *Kansas v. Hendricks* does not improve the situation significantly, however, *Hendricks* does provide clarification and guidance on at least two aspects of this inquiry.

First, and perhaps most importantly, the Court in *Hendricks* reiterated the basic, two-step framework that it previously had articulated in pure double jeopardy cases like *United States v. Ward*[203] and *United States v. Ursery*.[204] That approach involves first considering the face of the statute, and perhaps its legislative history, to determine whether the legislature intended the law to establish civil or criminal proceedings.[205] If a court engaging in this inquiry determines the statute is civil in nature, then the burden is on the party challenging the statute to provide "the clearest proof" that the statute is so punitive in effect that it nonetheless must be considered criminal for constitutional purposes.[206] Thus, although Hendricks argued that the *Ward/Ursery* framework was not applicable outside of the pure double jeopardy context, or perhaps even the civil forfeiture context at issue in *Ursery*,[207] the Court in *Hendricks* emphatically rejected that notion.[208] Instead, it now appears that the *Ward/Ursery* framework is the starting point of the "punishment" analysis, irrespective of the context or circumstances.

Second, the Court expressly recognized the congruence between the double jeopardy and ex post facto inquiries by declaring that "[o]ur conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks' double jeopardy and *ex post facto* claims."[209] The majority's opinion therefore clarifies that double jeopardy and ex post facto challenges generally should succeed or fail together, meaning that in the sex offender context they are not really independent constitutional claims but, rather, alternative theories. Indeed, *Hendricks*

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202. Indeed, some scholars seriously question even more fundamentally the notion that there is a clear (or perhaps even useful) distinction between civil and criminal laws. *See, e.g.*, Symposium, *The Intersection of Tort and Criminal Law*, 76 B.U. L. REV. 1 (1996) (compiling various articles addressing the distinction at a fundamental level). Nonetheless, the Supreme Court in *Hendricks* continued to endorse and rely upon the distinction for constitutional purposes.

203. 448 U.S. 242, 248-49 (1980).

204. 116 S. Ct. 2135, 2142 (1996).

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

206. *Id.* at 2082 ("Although we recognize that a 'civil label is not always dispositive,' we will reject the legislature's manifest intent only where a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'") (citations omitted).

207. 116 S. Ct. at 2138.

208. *See Hendricks*, 117 S. Ct. at 2082.

209. *Id.* at 2085.

strongly suggests that the Court will not draw a significant distinction between the two.

What remains unclear, however, even after recent "punishment" cases like *Ursery* and *Hendricks*, is the substance of the "punishment" inquiry. The Court still has not endorsed any particular set of criteria or factors. In *Hendricks*, for example, the majority cited *Kennedy v. Mendoza-Martinez*[210] once, but never purported to examine or apply the factors.[211] The dissent, on the other hand, expressly stated, discussed, and applied several of the *Kennedy* factors.[212] For the time being, it appears the Court is content to continue with an ad hoc approach to each case, with the determination often depending in large part on the history behind the particular practice under consideration (civil forfeiture in *Ursery*,[213] civil commitment in *Hendricks*[214]).

C. *Other Sex Offender Legislation*

A fair and important question is whether the Court's decision in *Kansas v. Hendricks* has implications for other sex offender laws. The short answer is probably not. Although the Supreme Court's constitutional decisions that shape and guide the "punishment" inquiry will apply generally to sex offender laws, the history, practices, and policies implicated in contexts outside of civil commitment are sufficiently different that *Hendricks* probably is of limited value in determining which sex offender measures may impose "punishment" and which do not.

The most widespread response to the sex offender recidivism problem has been legislation requiring that convicted sex offenders *register* with law enforcement authorities upon their release from incarceration. Virtually all states,[215] with the financial encouragement of the federal government,[216] now have sex offender registration laws. Many states also provide for some form of community notification or public access to the registrant information, although there is considerable variation among the states in this more controversial aspect of the legislation.[217] Perhaps the

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210. 372 U.S. 144 (1963).

211. *See Hendricks*, 117 S. Ct. at 2082.

212. *See id.* at 2098 (Breyer, J., dissenting).

213. 116 S. Ct. at 2138.

214. *See Hendricks*, 117 S. Ct. at 2076.

215. See McAllister, *Neighbors Beware*, *supra* note 17, at ___ n.42, for a list of the state sex offender registration statutes.

216. *See* The Violent Crime Control and Law Enforcement Act of 1994 (commonly known as the Jacob Wetterling Act), 42 U.S.C. § 14071 (1994); *see also* Megan's Law, Pub. L. 104-145, 110 Stat. 1345 (May 17, 1996).

217. See McAllister, *Neighbors Beware*, *supra* note 17, at ___ nn.44-49 and accompanying text, for a description of the state variations.

best-known form of this legislation is the so-called "Megan's Law," which originated in New Jersey.[218] The constitutionality of these measures currently is being litigated,[219] and it seems likely that the Supreme Court will be required to settle the validity of these important public safety laws in the very near future.

The federal statute that provides financial incentives for the states to enact and implement sex offender registration and notification systems does not adopt any position on whether such systems should be applied retroactively, or only prospectively.[220] Thus, the decision whether to apply such measures retroactively–and in so doing at least raise the possibility of constitutional double jeopardy and ex post facto problems–may well vary from state to state. Many of the state statutes do, however, apply retroactively.

Kansas v. Hendricks does not appear to add significantly to the constitutional analysis of these laws. On the one hand, civil commitment seems a far more serious intrusion on personal liberty interests than either registration or community notification. Thus, the argument could be made that, if the more intrusive measure (civil commitment) is constitutional, then, by definition, lesser measures should be permitted. On the other hand, the registration and notification measures are so different from civil commitment, and have such a different history (or lack thereof), that they might still be deemed unconstitutional, although this author has argued elsewhere that such laws in general should be upheld.[221] In the end, the Supreme Court's decision in *Kansas v.*

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218. *See* N.J. STAT. ANN. §§ 2C:7-1 to -11 (West 1995 & Supp. 1997).

219. *See, e.g.*, E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997) (upholding New Jersey's "Megan's Law" against constitutional challenges, but dividing 2 - 1 in some respects); Doe v. Pataki, 120 F.3d 1263 (2d Cir. 1997) (upholding New York's registration and public access law); Russell v. Gregoire, ___ F.3d ___, 1997 WL 539074 (9th Cir. Sept. 4, 1997) (upholding the State of Washington's registration and notification law).

220. *See* McAllister, *supra* note 17, at ___ n.42.

221. *See id.* In that article, I assert that registration statutes almost uniformly should be upheld while notification statutes present a closer constitutional question with the ultimate determination depending heavily upon the precise provisions a particular state has adopted. In deciding the constitutionality of these important public safety laws, I articulate a proposed standard which derives from the Court's recent jurisprudence, including *United States v. Ursery* and *Kansas v. Hendricks*. The guidelines I suggest for determining whether a statute imposes "punishment" for constitutional purposes are as follows:

> (1) *Legislative Intent/Purpose* -- The first consideration should be the legislative intent or purpose behind the statute at issue, with the critical question being whether the legislature intended the provisions to be civil and non-punitive. This inquiry probably should be conducted solely by reference to the language of the statute itself, without resort to legislative history. If, on the face of the statute, the legislature's intent or purpose is to create a criminal provision or to impose punishment, that should be the end of the inquiry and the statute should be deemed to impose "punishment" for constitutional purposes.

Hendricks may serve primarily as background and context for a decision on the constitutionality of the Megan's laws. It seems unlikely, however, that *Hendricks* will provide much guidance in the ultimate resolution of the constitutional issues sex offender registration and notification laws raise. Nor will *Hendricks* resolve the constitutionality of sex offender measures such as chemical castration or non-removable identification bracelets.

IV. CONCLUSION

Kansas v. Hendricks is an important decision, both for Kansas and the country. The Supreme Court's decision provides the states with an important alternative in dealing with the problems created by some of society's most dangerous sex offenders. In upholding the Kansas sex offender civil commitment law, the Supreme Court correctly concluded that Kansas had not crossed the line distinguishing civil and criminal laws. The Supreme Court also endorsed important federalism and separation of powers principles by continuing to give States reasonable discretion to legislate in the mental health context.

The Court's decision in *Hendricks*, however, as important as it is, probably will not have a significant impact in determining the validity of other recent measures targeted at sex offenders, including state sex offender registration and notification statutes. That is because, in light of the history of civil commitment in America, and the Supreme Court's prior decisions, *Hendricks* probably is best understood and explained as

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(2) *Historical Inquiry* -- If, however, the legislative intent or purpose is to create a civil provision that is regulatory and non-punitive, a court should then proceed to the second step of the analysis, an examination of the historical pedigree of the provisions at issue. Measures that historically have been considered criminal or punitive in nature should be deemed to impose "punishment" for constitutional purposes. If the practices at issue have not historically been considered punishment, then the statute probably should be deemed not to impose "punishment" for constitutional purposes.

(3) *Objective Effects Analysis* -- In the event there is no historical precedent for a particular measure, and thus no historical evidence regarding its punitive or non-punitive nature, then the inquiry should proceed to an *objective* determination, as best possible, of the actual effects of the laws in light of any legitimate, regulatory and non-punitive purposes they serve. The Supreme Court has in the past acknowledged the importance of making an objective assessment, observing recently that "whether a sanction constitutes punishment is not determined from the defendant's perspective." Moreover, "[t]he Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature." Only if a court were to reach this third and final phase of the analysis would the *Kennedy* factors be of any real potential usefulness.

See id. at ___ (citations ommitted).

a civil commitment case. The Court did not attempt to use the case as a vehicle for articulating its "punishment" jurisprudence more generally, nor can the opinions in the case be fairly read to provide much guidance in that respect.