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THE NEWLY FOUND "COMPASSION" FOR SEXUALLY VIOLENT PREDATORS: CIVIL COMMITMENT AND THE RIGHT TO TREATMENT IN THE WAKE OF *KANSAS V. HENDRICKS*

I. INTRODUCTION

Society has long dealt with perpetrators of sexual violence differently from persons accused of other crimes. Why are sex offenders singled out? Do we fear harm from sexual perpetrators so much more than harm from murderers, robbers, or drunk drivers? Perhaps so, as these criminals attack victims so personally and intimately; victims of sexual assault and counselors of victims have copiously documented experiences of abuse and recovery in psychological and popular literature.[1] Are sex offenders really any more "sick" or "deviant" than other criminals who step outside behavioral norms established by our criminal laws?[2] Perhaps society's discomfort with sexuality in general, and with sexual deviance in particular, explains the unique approach to sexual perpetrators.[3] These competing motivations, on the one

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[1] *See, e.g.*, ELLEN BASS & LAURA DAVIS, THE COURAGE TO HEAL—A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE (1988) (describing self-help strategy and recounting survivors' stories); LISA MANSHEL, NAP TIME (1990) (recounting ordeal of bringing child abuser to justice); GLADYS DENNY SHULTZ, HOW MANY MORE VICTIMS? SOCIETY AND THE SEX CRIMINAL (1965) (relating personal experience of sexual assault and proposing societal solutions); NEIL WEINER & SHARON E. ROBINSON KURPIS, SHATTERED INNOCENCE—A PRACTICE GUIDE FOR COUNSELING WOMEN SURVIVORS OF SEXUAL ABUSE (1995) (describing psychological effects of abuse and treatment strategies).

[2] John Monahan & Sharon Kantorowski Davis, *Mentally Disordered Sex Offenders*, *in* MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE 191, 191 (John Monahan & Henry J. Steadman eds., 1983) (describing California legislative hearing on sex offender commitment statute where legislator's comment that "*any* sex offender is mentally messed up, so let's lock the SOBs up and get on with the business of the other people of California" elicited resounding applause (emphasis in original)).

[3] C. Peter Erlinder, *Minnesota's Gulag: Involuntary Treatment for the "Politically Ill,"* 19 WM. MITCHELL L. REV. 99, 158 (1993) (relying on James Madison's formulation that the majority will use its power to disadvantage of persons it finds "most obnoxious" and suggesting that society finds sexual predators "obnoxious"); Stephen J. Morse, *Blame and Danger: An Essay on Preventative Detention*, 76 B.U. L. REV. 113, 134 (1996) (noting that many people cannot fathom deviant sexual behavior so they tend to think something must

hand to protect society from harm inflicted by sex offenders, and on the other hand to correct the perceived deviance of perpetrators, account for the divergent legal approaches to this class of offenders. Given society's demonstrated abhorrence of sexual deviants, however, any suggestion that sex offender laws are enacted out of an altruistic interest in "care and treatment" of sexual offenders is inherently insincere.[4]

In order to address public demands for safety,[5] state legislatures have devised a variety of approaches regarding sex offenders, particularly addressing concerns of reoffense or recidivism.[6] Several states have enacted community registration and notification laws, or "Megan's Laws."[7] In some states, judges can commit persons convicted of sex crimes to a sex offender treatment program prior to or as a part of sentencing.[8] Other states allow separate civil commitment hearings for convicted sex offenders who have reached the end of their prison sentences but whom the state still considers dangerous.[9]

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be wrong with sexual deviants); Robert Teir & Kevin Coy, *Approaches to Sexual Predators: Community Notification and Civil Commitment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 405, 416 (1997) (noting psychoanalytic theories of 1930s advocated "treatment" of sexual deviants).

[4] Donaldson v. O'Connor, 493 F.2d 507, 521 (5th Cir. 1975), *vacated* 422 U.S. 563 (1975) ("To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.").

[5] Morse, *supra* note 3, at 116 (noting that absolute safety is impossible without drastic intrusions on individual liberty).

[6] *See, e.g.*, *In re* Young, 857 P.2d 989, 992 (Wash. 1993) (noting that Community Protection Act of 1990 was passed in response to citizens' concerns regarding recidivist sex offenders, particularly one recent sexual attack on young Tacoma boy); *see also* Morse, *supra* note 3, at 139 (casting doubt on assumption that sexual offenders are more likely to reoffend than other types of criminals).

[7] *E.g.*, O.C.G.A. § 42-9-44.1 (1997); LA. REV. STAT. ANN. § 15:546(A) (West Supp. 1998); MISS. CODE ANN. §§ 45-33-17, -19 (Supp. 1997); N.D. CENT. CODE § 12.1-32-15 (1997); TENN. CODE ANN. § 40-39-106 (1997); *see* Teir & Coy, *supra* note 3, at 405-06 (referring to New Jersey case of Megan Kanka, seven-year-old girl raped and killed by man with record of sex offenses); Dale Russakoff, *Out of Grief Comes a Legislative Force: From Megan's Laws to Jimmy's and Jenna's*, WASH. POST, June 15, 1998, at A1 (describing trend of "memorial laws" named after juvenile victims of violent crimes).

[8] COLO. REV. STAT. ANN. §§ 16-13-201 to -216 (West 1998) (providing for commitment in lieu of sentencing); 725 ILL. COMP. STAT. ANN. 205/8 (West 1992) (allowing indefinite commitment as substitute for prosecution).

[9] *In re* Linehan, 557 N.W.2d 171, 175 (Minn. 1996) (affirming civil commitment of fifty-four-year-old sex offender under "sexually dangerous persons" act who spent most of his life in criminal justice system).

The Supreme Court in *Kansas v. Hendricks*[10] recently upheld just such a post-sentencing commitment statute. The statute was premised on concerns for public safety and crime prevention,[11] but nominally suggested a state objective of "care and treatment" of sex offenders.[12] The Supreme Court in *Hendricks*, however, did not squarely resolve the issue of whether the state must actually provide treatment to persons committed as sexually violent offenders in order to justify the confinement.[13] Unless treatment is provided, sex offenders committed under statutes such as Kansas's are locked away under the pretense of rehabilitation, with no real possibility of release. Thus, if a state deprives an individual's liberty for a rehabilitative purpose, it must provide treatment to effectuate that rehabilitation.[14] If states do not provide treatment, they reveal their true legislative purpose as ensuring safety to the public at large rather than caring for the "sick" offender. The nod to "treatment" in the language of sex offender statutes, such as in the Kansas Act, fails to save such acts from constitutional challenges of impermissible preventative detention unless states provide treatment.[15]

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[10] 117 S. Ct. 2072, 2076 (1997).

[11] KAN. STAT. ANN. § 59-29a01 (1994) (describing sexual offenders as "extremely dangerous," noting high likelihood of reoffense, and pledging need for legislature to address "risk").

[12] KAN. STAT. ANN. § 59-29a02(a) (noting that legislature established Act to provide "care and treatment of the sexually violent predator").

[13] The majority in *Hendricks* dodged the treatment issue on alternative grounds, first suggesting that the Court has "never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others." *Hendricks*, 117 S. Ct. at 2084. Second, the Court suggested that the Kansas Supreme Court's decision could be read as concluding that Hendricks' condition was treatable and that the state had provided "meager" treatment. *Id.* at 2085. In dissent, Justice Breyer, joined by Justices Stevens and Souter and Justice Ginsberg in part, noted that the case did not require the Court to decide if treatment is always required as a part of commitment, that is, whether an untreatable, mentally ill, and dangerous person could be civilly committed. *Id.* at 2089 (Breyer, J., dissenting).

[14] Paul Holland & Wallace J. Mlyniec, *Whatever Happened to the Right to Treatment?: The Modern Quest for a Historical Promise*, 68 TEMP. L. REV. 1791, 1792 (1995) (describing right to treatment argument in relation to juvenile detainees).

[15] State v. Post, 541 N.W.2d 115, 135-36 (Wis. 1995) (Abrahamson, J., dissenting) (joining many judges from Wisconsin and other jurisdictions who have found that similar statutes create unconstitutional preventative detention); Morse, *supra* note 3, at 135 (noting that civil commitment of sexual predators is unjustified and does little to enhance public safety).

In light of heart-wrenching stories of sexual abuse and public demands for safety, the *Hendricks* case presented the Supreme Court with compelling facts on which to uphold the Kansas commitment strategy. After all, the statute prevented the release of a man whose history of sex crimes, incarceration, and institutionalization spanned nearly two decades, and who admitted he still had sexual desires for children but could not control his urges.[16] Faced with that evidence, the Court would have been hard-pressed to strike down the Kansas statute by finding that such a predator received inadequate treatment for his disorder, or that perhaps he could never be treated effectively.[17] Nevertheless, this Note will argue that the issue of treatment of sexual offenders committed to psychiatric facilities cannot, on a constitutional level, and should not, on a policy level, be so readily dismissed.

Part II of this Note will review the constitutional requirements of civil commitment generally as outlined by the Supreme Court and interpreted by lower courts, particularly in reference to commitment of sexual offenders.[18] Part III will examine the constitutionality of civil commitment statutes drafted particularly for sex offenders.[19] Part IV will take a closer look at the legal issues regarding treatment as an element of civil commitment of sex offenders.[20] Part V will examine the appropriateness of confining so-called sexually dangerous persons under a treatment model, and will conclude that the purported state objective of providing treatment is disingenuous and a facade for the true

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[16] *In re* Hendricks, 912 P.2d 129, 130-31 (Kan. 1996) (describing Hendricks's testimony stating that he first exposed himself to two girls in 1955 and spent almost half his life in prison or psychiatric institutions), *rev'd sub nom.* Kansas v. Hendricks, 117 S. Ct. 2072 (1997); *Hendricks*, 117 S. Ct. at 2074 (describing testimony where Hendricks agreed he is a pedophile, is not cured, and cannot control his urges when "stressed out").

[17] Hendricks himself told a psychologist at the state security hospital that "treatment was bullshit." *In re* Hendricks, 912 P.2d at 143 (Larson, J., dissenting); *see also* Leading Cases, *Involuntary Commitment of Violent Sexual Predators*, 111 HARV. L REV. 259, 266 (1997) (noting that *Hendricks* may be read narrowly in light of its "peculiar factual circumstance" but likely will be applied as extension of states' civil commitment powers); *see, e.g., In re* Haga, 943 P.2d 395, 397 (Wash. 1997) (rejecting Haga's constitutional challenges in cursory discussion based on Supreme Court holding identical Kansas statute constitutional in *Hendricks*).

[18] *See infra* notes 23-50 and accompanying text.

[19] *See infra* notes 51-84 and accompanying text.

[20] *See infra* notes 85-180 and accompanying text.

objective of indefinitely detaining a particularly disfavored class of criminals.[21] Finally, Part VI will examine more principled alternatives available to state legislatures facing the problem of sexual violence.[22]

II. CONSTITUTIONAL REQUIREMENTS FOR GENERAL CIVIL COMMITMENT STATUTES

Civil commitment statutes for sexual offenders are derivations of general civil commitment statutes in most states which authorize involuntary hospitalization of mentally ill persons.[23] Involuntary commitment to a psychiatric facility violates an individual's constitutionally protected liberty interest.[24] Such interference is constitutionally permissible, however, if the individual is both dangerous and mentally ill.[25] The state must prove both elements to continue the confinement.

A state cannot involuntarily commit a mentally ill individual who is not dangerous. The Supreme Court in *O'Connor v. Donaldson* established the right of a mentally ill individual who poses no danger to himself or others to live freely in the community.[26] In that case, the state had confined Donaldson to a state hospital for fifteen years based on a diagnosis of paranoid schizophrenia. Over the years, Donaldson repeatedly, though unsuccessfully requested release, arguing that he was not mentally ill, or even if he was, that the hospital was not providing treatment for his illness.[27]

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[21] *See infra* notes 181-223 and accompanying text.

[22] *See infra* notes 224-240 and accompanying text.

[23] States explicitly recognize that their general civil commitment laws do not reach the alleged "sexually violent predators" and draft sex offender statutes with that fact in mind. *See, e.g.*, KAN. STAT. ANN. § 59-29a01 (1994) (describing sexual predators as dangerous, but lacking "mental disease or defect that renders them appropriate for involuntary treatment pursuant to [general involuntary commitment statute]").

[24] Humphrey v. Cady, 405 U.S. 504, 509 (1972) (noting that involuntary commitment involves "massive curtailment of liberty").

[25] Kansas v. Hendricks, 117 S. Ct. 2072, 2075 (1997) ("[T]his Court has sustained a commitment statute if it couples proof of dangerousness with proof of some additional factor, such as a 'mental illness' or 'mental abnormality' "); Addington v. Texas, 441 U.S. 418, 433 (1979) (holding that state must prove by clear and convincing evidence that individual is both mentally ill and dangerous).

[26] 422 U.S. 563, 576 (1975).

[27] *Id.* at 565-66.

The hospital superintendent maintained that although Donaldson was not dangerous to himself or others, the state could continue to confine him because he was mentally ill and would have difficulty adjusting to life outside the hospital.[28] The Supreme Court, however, rejected that argument and held that concerns about a mentally ill person's standard of living in the community or the public's reactions to his eccentricities were insufficient to overcome Donaldson's fundamental liberty interest.[29]

Likewise, a state generally cannot infringe an individual's liberty interest merely by demonstrating the person is dangerous. The Supreme Court has refused to allow civil confinement of individuals who are not mentally ill but who nevertheless pose a danger to themselves or others except under narrow circumstances. Based on that principle, two individuals in *United States v. Salerno*[30] challenged their pretrial detentions under the Bail Reform Act of 1984.[31] The state had detained the challengers on multiple charges including Racketeer Influenced and Corrupt Organizations Act violations, mail and wire fraud, extortion and various criminal gambling violations.[32] The Court rejected the challengers' due process claim and upheld the pretrial detention scheme for individuals arrested for serious crimes. In such cases, the state need not show the detainee is mentally ill because of the compelling government interest as well as the specific, identifiable threat to the public.[33]

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[28] *Id.* at 567-68.

[29] *Id.* at 575 ("[T]he mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution. . . . Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."). *But cf.* John Q. La Fond, *An Examination of the Purposes of Involuntary Civil Commitment*, 30 BUFF. L. REV. 499, 535 (1981) (advocating for commitment on finding of mental illness alone, in narrow situations, rather than forcing state "to abandon many citizens afflicted with serious mental illness to a lifetime of abject suffering based on a conclusive presumption of rational choice").

[30] 481 U.S. 739, 741 (1987).

[31] 18 U.S.C. §§ 3141-3156 (1994); *see Salerno*, 481 U.S. at 741 (describing Act as allowing federal courts to detain arrestee pending trial if government demonstrates that it cannot arrange for release of suspect in manner that would assure safety of community and others).

[32] *Salerno*, 481 U.S. at 743.

[33] *Id.* at 750-51 (discussing government's interest in preventing crime by arrestees and congressional finding that serious offenders are likely to commit dangerous acts in the community after arrest).

The Court in *Foucha v. Louisiana*,[34] however, refused to sustain post-sentence civil commitment on the basis of dangerousness alone. In that case, the state initially committed Foucha on a verdict of not guilty by reason of insanity.[35] Foucha was tried for burglary and illegal discharge of a firearm.[36] After four years of confinement, the court reviewed Foucha's condition.[37] Doctors testified that Foucha's mental illness was in remission, but that he had an "antisocial personality, a condition that is not a mental disease and that is untreatable."[38] As to the element of dangerousness, one doctor equivocally testified that he would not "feel comfortable" certifying that Foucha would not be a danger to himself or others.[39] The Court nevertheless rejected Foucha's continued confinement and distinguished the *Salerno* federal confinement scheme from the Louisiana commitment statute. The Bail Reform Act was carefully limited in its application and afforded ample procedural protections, while the Louisiana scheme broadly permitted indefinite confinement and placed the burden of proving *lack* of dangerousness on the patient himself.[40]

The *Foucha* decision resulted in considerable confusion and disparate interpretation by lower courts addressing the mental illness element of civil commitment.[41] The Supreme Court has never clearly articulated a definition of "mental illness" that passes constitutional muster,[42] instead deferring to legislative judgments

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[34] 504 U.S. 71, 75 (1992).

[35] *Id.* at 74.

[36] *Id.* at 73.

[37] *Id.* at 74.

[38] *Id.* at 75.

[39] *Id.*

[40] *Id.* at 81-82. The Louisiana statute provided for commitment to a psychiatric hospital of defendants deemed not guilty by reason of insanity. Either the hospital or the acquittee could initiate release proceedings. If the court recommended release, the state held a hearing to assess dangerousness. If the patient failed to prove he was not dangerous, the court ordered him returned to the institution. *Id.* at 73.

[41] *See* John Kip Cornwell, *Protection and Treatment: The Permissible Civil Detention of Sexual Predators*, 53 WASH. & LEE L. REV. 1293, 1312-16 (1996) (describing lower courts' treatment of Supreme Court precedent and outlining standards for civil commitment).

[42] State v. Post, 541 N.W.2d 115, 123 (Wis. 1995) (noting that Supreme Court has used numerous terms to describe mental condition of persons subject to civil commitment); Deborah L. Morris, Note, *Constitutional Implications of the Involuntary Commitment of Sexually Violent Predators—A Due Process Analysis*, 82 CORNELL L. REV. 594, 638 (1997) (noting that Supreme Court has not defined term "mental illness").

to define psychological conditions that justify commitment.[43] Despite the detailed discussion of mental condition and commitment in *Foucha*, that opinion provides lower courts with limited guidance. Justice O'Connor's concurrence with the four-Justice *Foucha* plurality further obscures the constitutional requirement. Justice O'Connor noted that a state might constitutionally commit an acquittee, such as Foucha, who had regained sanity, if the detention were narrowly tailored to a state interest and if there were a "medical justification."[44]

Lower courts might interpret *Foucha* as holding that some, but not all, mental conditions may be classified as "mental illness" for the purpose of civil commitment.[45] The difficulty state legislatures face is in drawing that line. Some states have interpreted *Foucha* to stand for the proposition that "antisocial personality disorder" is not a mental illness per se and thus cannot sustain commitment.[46] At least one court, through some careful hair-splitting, rejected a challenge to the statutory language of "personality disorder" by suggesting that the objectionable term in *Foucha* was "antisocial personality."[47] Other courts have relied on *Foucha*

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[43] Jones v. United States, 463 U.S. 354, 365 n.13 (1983) (noting that "courts should pay particular deference to reasonable legislative judgments"); *In re* Young, 857 P.2d 989, 1017 (Wash. 1993) (noting need for deference given uncertainty of psychiatric diagnoses); Andrew Hammel, *The Importance of Being Insane: Sexual Predator Civil Commitment Laws and the Idea of Sex Crimes as Insane Acts*, 32 HOUS. L. REV. 775, 795 (1995) (noting that O'Connor's concurrence in *Foucha* advocated judicial deference to legislative judgment).

[44] *Foucha*, 504 U.S. at 87-88 (O'Connor, J., concurring) (suggesting that detention narrowly tailored in nature and duration to public safety concerns, which Louisiana scheme was not, might be permissible but rejecting dissenters' view that acquittees could be "confined as mental patients absent some medical justification for doing so").

[45] *See* Erlinder, *supra* note 3, at 141 (describing possible interpretations of holding in *Foucha*).

[46] *E.g.*, Young v. Weston, 898 F. Supp. 744, 750 (W.D. Wash. 1995) (relying on *Foucha* in holding that "mere presence of antisocial personality, or other personality disorder falling short of mental illness, is constitutionally insufficient to support indefinite confinement").

[47] *In re* Young, 857 P.2d at 1006-07 n.12 (noting that "personality disorder" is a recognized mental disorder, whereas "antisocial personality" was labeled "Condition Not Attributable to a Mental Disorder" (citing AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-III-R (3d ed. rev. 1987)). "Antisocial personality disorder," however, is considered a mental disorder in the current DSM-IV. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV (4th ed. 1994) [hereinafter DSM-IV]. Because of the difficulty in precisely describing mental illnesses, as well as the changing definitions even among professionals, courts generally do not rely on the DSM as conclusive authority. *See, e.g., In re* Linehan, 557

to afford legislatures broad discretion in defining the mental condition of individuals subject to civil commitment.[48]

The elasticity of the mental illness requirement as defined in *Foucha* has found particular favor with courts construing sexual predator statutes. Such statutes typically provide broad definitions of "mental disorder" or "mental abnormality" rather than specific medical definitions of "mental illness."[49] Thus, the manner in which a state defines the mental condition that will support commitment is significant in deciding whether treatment must also be an element of the confinement.[50]

III. CIVIL COMMITMENT OF SEXUAL OFFENDERS

The sex offender commitment statute upheld in *Hendricks*, patterned after a Washington statute,[51] encompasses the traditional elements of mental illness and dangerousness required for civil commitment but is specially tailored to the target population. The state can commit an individual deemed a "sexually violent predator," which is a person (a) convicted or charged with (b) a sexually violent offense (c) who suffers from a mental abnormality or personality disorder (d) which makes the person likely to engage

N.W.2d 171, 176-77 (Minn. 1996) (describing dispute between experts regarding diagnostic categories of mental illness as defined by DSM); Cornwell, *supra* note 41, at 1321-22 (describing difficulty of reliance on DSM due to multiple revisions). The DSM is a standardized nomenclature of mental disorders developed by a team of physicians and designed for use by clinicians and researchers. DSM-IV at xv-xvii.

[48] State v. Post, 541 N.W.2d 115, 123 (Wis. 1995) ("The [Supreme] Court has wisely left the job of creating statutory definitions to the legislators who draft state laws"). The Wisconsin Supreme Court also cited Justice O'Connor's concurrence on "medical justification" for commitment, concluding that continuing treatment aimed at reducing a patient's dangerousness provided such justification. *Id.* at 127-28.

[49] *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2080-81 (1997) ("Contrary to Hendricks' assertion, the term 'mental illness' is devoid of any talismanic significance. . . . Indeed, we have never required State legislatures to adopt any particular nomenclature in drafting civil commitment statutes.").

[50] *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 75 (1992) (finding Foucha suffered from condition that was not mental illness and was not treatable).

[51] WASH. REV. CODE § 71.09.010-.090 (1992 & West Supp. 1998); *see also In re* Hendricks, 912 P.2d 129, 131 (Kan. 1996) (noting that 1994 Kansas statute followed Washington scheme).

in acts of sexual violence.[52] In addition to these substantive elements, the Act provides various procedural requirements for commitment.

The Kansas procedure for commitment and release is as follows: Just before an inmate is due for release, the prosecuting attorney presents the defendant to the judge to show probable cause that the criminal is a sexually violent predator.[53] On finding probable cause, the judge orders the individual transferred to an appropriate facility for professional evaluation.[54] To commit the individual, the state then must prove beyond a reasonable doubt in a civil trial that the individual is a sexually violent predator.[55] If that burden is met, the person is transferred to a mental health treatment facility.[56] On the basis of an annual review[57] or on the recommendation of the hospital superintendent,[58] the court can order release after a hearing to determine whether the person's mental abnormality has so changed that the person is not likely to commit predatory acts of sexual violence if released. The state still bears the burden of proving beyond a reasonable doubt that the individual is not safe to be at large and likely will engage in acts of sexual violence if released.[59]

Sex offender commitment statutes have faced an array of constitutional challenges, all of which the Supreme Court rejected in *Hendricks*.[60] One series of challenges raised by alleged sexually

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[52] *Hendricks*, 912 P.2d at 132 (citing KAN. STAT. ANN. § 59-29a02(a) (1994 & Supp. 1996)); *see also* Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 187-88 (1996) (describing elements of sex offender commitment schemes as (1) past conduct, (2) mental disorder, and (3) likelihood of future harm).

[53] KAN. STAT. ANN. § 59-29a04 (1994 & Supp. 1996); *see also Hendricks*, 912 P.2d at 132-33 (outlining statutory scheme for commitment and release). Other states provide different criteria and procedures for commitment. A comparative survey of those statutes is beyond the scope of this Note, but elements of other approaches will be discussed more specifically regarding the issue of treatment. The Kansas statute is illustrative of civil commitment schemes generally and is of particular significance after the Supreme Court's ruling on its constitutionality in *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997).

[54] *Id.* § 59-29a05.

[55] KAN. STAT. ANN. § 59-29a06-a07(a).

[56] *Id.* § 59-29a07.

[57] KAN. STAT. ANN. § 59-29a08.

[58] *Id.* § 59-29a10.

[59] *Id.*

[60] *Hendricks*, 117 S. Ct. at 2076 ("Hendricks challenged his commitment on, inter alia, 'substantive' due process, double jeopardy, and ex post facto grounds.").

dangerous persons rests on procedural due process grounds. The Supreme Court has recognized that commitment to a mental hospital produces "a massive curtailment of liberty"[61] which thus requires due process protection.[62] The Kansas statute, however, overcomes the various procedural due process flaws of earlier commitment statutes. First, the statute requires a hearing (before a jury if demanded) both for initial commitment and for subsequent release.[63] Second, the individual facing commitment has a right to counsel.[64] Third, the Kansas scheme requires proof beyond a reasonable doubt that the individual is a sexually dangerous person, a standard exceeding the clear and convincing evidence standard required for general civil commitments.[65] Finally, the Kansas statute places the burden of proof on the state[66] rather than on the person facing commitment. This provision overcomes one of the flaws in the Louisiana statute rejected in *Foucha*.[67] These provisions in the Kansas statute comply with Supreme Court precedent on due process in civil commitment.[68]

States enacting sex offender commitment schemes also face substantive due process challenges. "This Court repeatedly has recognized that civil commitment for any purpose constitutes a

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[61] Humphrey v. Cady, 405 U.S. 504, 509 (1972).

[62] Addington v. Texas, 441 U.S. 418, 425 (1979).

[63] KAN. STAT. ANN. §§ 59-29a06, 59-29a10.

[64] *Id.* § 59-29a06.

[65] *Id.* § 59-29a10; *see also Addington*, 441 U.S. at 425-31 (evaluating merits of higher and lower standards in light of individual's deprivation of liberty, state's interest in commitment, and uncertainty of psychiatric diagnosis).

[66] KAN. STAT. ANN. § 59-29a10.

[67] *See* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (noting that under statute state carries burden to prove "by clear and convincing evidence that the individual is mentally ill and dangerous" (quoting Jones v. United States, 463 U.S. 354, 362 (1983))); *see also supra* notes 34-44 and accompanying text (discussing problems with statute in *Foucha*).

[68] *See* Vitek v. Jones, 445 U.S. 480, 494-95 (1980) (requiring procedural due process protections, including notice, hearing, opportunity to present witnesses, independent decisionmaker, statement of reasons, and availability of counsel for transfer of prison inmate to mental hospital); Specht v. Patterson, 386 U.S. 605, 610 (1967) (holding that due process requires full hearing with presence of counsel, right to confront witnesses, and right to present evidence for person committed as sex offender in lieu of incarceration); Baxstrom v. Herold, 383 U.S. 107, 111-12 (1966) (finding equal protection violation because general civil commitments require judicial review before jury, but statute under review allowed post-sentence commitment only on administrative and judicial ruling that individual "may require care and treatment").

significant deprivation of liberty that requires due process protection."[69] An individual's liberty interest is important and fundamental but can be subordinated to compelling state interests, addressed by narrowly drawn laws.[70] Substantive due process claims are pivotal to the issue of the right to treatment because of the justifications states rely on for depriving the liberty of sexually dangerous persons.

In the context of civil commitment, the Supreme Court has established as a matter of due process that "the nature and duration of commitment must bear some reasonable relation to the purpose for which the individual is committed."[71] The two state purposes most commonly asserted to justify civil commitment are protection of society under the state's police power and protection of an incompetent individual under the parens patriae power.[72] Under their police powers, states have authority to ensure public health and safety by protecting the community from persons who are dangerous.[73] Accordingly, a state may incapacitate an individual because a dangerous person's liberty interest is outweighed by the government objective of preventing harm to others[74] and preserving an organized society.[75] Police power is a particularly salient justification for commitment of sexual offenders who are perceived as extremely dangerous.[76]

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[69] *Addington*, 441 U.S. at 425.

[70] United States v. Salerno, 481 U.S. 739, 750-51 (1987) (recognizing "importance and fundamental nature" of person's liberty interest which must be balanced against "greater needs of society"); *In re* Young, 857 P.2d 989, 1000 (Wash. 1993) (describing "strict scrutiny test" for state laws that impinge on fundamental rights).

[71] *Jones*, 463 U.S. at 368 (quoting Jackson v. Indiana, 406 U.S, 715, 738 (1972)).

[72] *See, e.g.*, *Addington*, 441 U.S. at 426 (noting that state has legitimate interest under parens patriae and police powers); Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL'Y & L. 161, 183 (1995) ("Civil commitment statutes reflect the state's police power and parens patriae authority.").

[73] *Addington*, 441 U.S. at 426.

[74] State v. Post, 541 N.W.2d 115, 128 (Wis. 1995) ("The balance can favor danger-preempting confinement under proper circumstances"); *In re* Blodgett, 510 N.W.2d 910, 919 n.2 (Minn. 1994) (Wahl, J., dissenting) (describing legislative intent to "make possible the control of dangerously psychopathic persons without having to wait for them to commit a shocking crime").

[75] Youngberg v. Romeo, 457 U.S. 307, 320 (1982) ("In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance 'the liberty of the individual' and 'the demands of an organized society.' " (citation omitted)).

[76] *See In re* Young, 857 P.2d 989, 992 (Wash. 1993) (noting legislature determined "exceptional risks" of sexual predators justified special civil commitment statute).

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Parens patriae traditionally referred to states' paternalistic protection of juveniles,[77] but the power also extends to protection of other disabled or incompetent persons, including mentally ill individuals.[78] Under parens patriae power, states' interest in civil commitment is to provide care and treatment to citizens who are unable to care for themselves.[79] In exercising its parens patriae power, a state acts in the best interests of the persons it seeks to protect.[80] In civil commitment, the "best interest" of the afflicted individual is to provide care and treatment in order to rehabilitate him so that he can successfully reenter society.[81]

Alleged sex offenders also challenge commitment statutes under the double jeopardy and ex post facto clauses of the Constitution.[82] In defense of such claims, a state must demonstrate that the commitment is civil and non-punitive in nature.[83] In the face of such a challenge, a demonstration by the state that the intent and effect of the commitment scheme is to treat, rather than to punish, becomes particularly compelling.[84] Thus, a state may premise its commitment statute on treatment in order to rebut constitutional challenges but may, in fact, have no actual interest in improving the welfare of persons it commits as sexually violent predators.

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[77] *See In re* Gault, 387 U.S. 1, 16 (1967) (describing origins of juvenile justice system); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 104-05 (1909) (noting power of court of chancery to intervene in best interests of child).

[78] 3 WILLIAM BLACKSTONE, COMMENTARIES 47 (defining parens patriae as state acting as "the general guardian of all infants, idiots, and lunatics"); Gilbert T. Venable, Note, *The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers*, 27 U. PITT. L. REV. 894, 895 (1966) (describing origin of parens patriae as English King's power to protect children and "idiots").

[79] Addington v. Texas, 441 U.S. 418, 426 (1979).

[80] *See* O'Connor v. Donaldson, 422 U.S. 563, 583 (1975) (describing due process limits on curtailment of individual liberty interest under parens patriae power).

[81] *See, e.g.*, Cameron v. Walsh, No. 95-10904-PBS, 1996 U.S. Dist. LEXIS 11691, at *19 (D. Mass. July 23, 1996) (describing legislative purpose behind sexual predator act in response to challenge that statute was aimed at punishment rather than treatment); M. Cherif Bassiouni, *The Right of the Mentally Ill to Cure and Treatment: Medical Due Process*, 15 DEPAUL L. REV. 291, 300 (1966) (noting that commitment on parens patriae grounds is to "care, treat and restore [the mentally ill individual] to a useful role in society").

[82] *See, e.g.*, Kansas v. Hendricks, 117 S. Ct. 2072, 2081 (1997) (rejecting ex post facto and double jeopardy claims).

[83] *E.g., In re* Young, 857 P.2d 989, 996-97 (Wash. 1993) (considering whether legislature intended statute as civil and whether effect of statute is so punitive as to negate that intent).

[84] *Id.* at 997 (finding Washington statute civil rather than criminal because it "focused on treating petitioners for a current mental abnormality").

IV. TREATMENT AS AN ELEMENT OF SEX OFFENDER COMMITMENT

In sex offender commitment acts, states may use treatment as a "hook" on which the commitment scheme can be found constitutional, even though they have no real interest in actually "caring for" sexually violent predators. For example, the Kansas statute at issue in *Hendricks* contains incongruous statements suggesting that the legislature premised the statute on care and treatment but lacked any actual intention to provide such treatment to sex offenders.[85] The Kansas Supreme Court, in adjudging the state statute unconstitutional, offered a similar critique: "It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental at best. The record reflects that treatment for sexually violent predators is all but nonexistent."[86]

The *Hendricks* case involved a challenge to the Kansas Sexually Violent Predator Act of 1994[87] brought by Leroy Hendricks. Hendricks pled guilty in 1984 to two counts of indecent liberties with two thirteen-year-old boys and was serving a five to twenty-year sentence.[88] In 1994, Hendricks was scheduled for release to a halfway house, but the state filed a petition to commit Hendricks as a sexually violent predator under the Act.[89] Hendricks challenged the petition on various factual and procedural grounds and further suggested the Act was unconstitutional.[90] At trial, Hendricks testified that he was sixty-years-old and that his history of sexual involvement with children began in 1955, when he exposed himself to two girls.[91] Hendricks further described himself as a pedophile who could not control his urges to molest children and admitted he was not cured of the condition.[92] A psychologist

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[85] *See infra* notes 103-106 and accompanying text (describing inconsistent language in Kansas act).

[86] *In re* Hendricks, 912 P.2d 129, 136 (Kan. 1996), *rev'd sub nom.* Kansas v. Hendricks, 117 S. Ct. 2072 (1997).

[87] KAN. STAT. ANN. § 59-29a01 (1994).

[88] *Kansas v. Hendricks*, 117 S. Ct. 2072, 2078 (1996); *In re* Hendricks, 912 P.2d at 130.

[89] *Hendricks*, 117 S. Ct. at 2078.

[90] *In re* Hendricks, 912 P.2d at 130.

[91] *Id.* at 130-31.

[92] *Hendricks*, 117 S. Ct. at 2078-79; *In re* Hendricks, 912 P.2d at 131.

testified for the state, asserting that he did not believe Hendricks was mentally ill or had a personality disorder, but concluding that Hendricks was a pedophile, which the doctor believed satisfied the definition of "mental abnormality" in the statute.[93] A jury determined beyond a reasonable doubt that Hendricks was a sexually violent predator and ordered him committed to the Larned State Hospital.[94] Hendricks challenged the ruling in part on evidence that the hospital had no treatment program in place for sexually violent predators.[95] Nevertheless, the Court denied his motion to dismiss, or in the alternative for a new trial, and Hendricks was transferred to the hospital.[96]

Hendricks subsequently petitioned the Supreme Court for certiorari under the due process, ex post facto, and double jeopardy clauses of the Federal Constitution. The Supreme Court heard the case but rejected all of Hendricks's challenges and held the Kansas Act constitutional.[97] Hendricks's due process challenge turned on the statutory definition of "mental abnormality."[98] The Court relied on *Foucha*[99] to hold that a statute is not required to specify "mental illness" per se[100] and held that Kansas' statutory definition sufficed for due process purposes.[101]

The Court also considered Hendricks's claimed right to treatment on ex post facto and double jeopardy grounds, both of which require a non-punitive statutory purpose.[102] The Kansas legislature, however, did not clearly identify a non-punitive purpose. Instead it expressed the state purpose in two inconsistent statements. The legislature explained its rationale in seeking a special commitment

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[93] *In re* Hendricks, 912 P.2d at 131.

[94] *Hendricks*, 117 S. Ct. at 2079; *In re* Hendricks 912 P.2d at 131.

[95] *In re* Hendricks, 912 P.2d at 131.

[96] *Id.*

[97] *Hendricks*, 117 S. Ct. at 2076, 2098.

[98] KAN. STAT. ANN. § 59-29a02(b) (1994 & Supp. 1996) (" 'Mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others."); *Hendricks*, 117 S. Ct. at 2079.

[99] Foucha v. Louisiana, 504 U.S. 71, 88 (1992) (O'Connor, J., concurring) (asserting that "medical justification" authorizes commitment).

[100] *Hendricks*, 117 S. Ct. at 2080.

[101] *Id.* at 2081.

[102] *Id.* at 2082.

strategy for sexually violent offenders[103] in the preamble to the Kansas Sexually Violent Predator Act:[104] On the one hand, the legislature noted that sexual predators generally have disorders which are "unamenable to existing mental illness treatment modalities" and that the "prognosis for rehabilitating sexually violent predators in the prison setting is poor."[105] On the other hand, the state provided for commitment of sexually violent predators "for control, care and treatment" at a facility operated by the department of social and rehabilitation services.[106] The *Hendricks* Court conceded that the treatment program the state offered Hendricks was "meager" but justified the virtually non-existent level of care because the Kansas program was new.[107] At the time of Hendricks's commitment, Kansas had no funding or staff in place for the program; Hendricks himself remained in a mental health facility for ten months without the treatment prescribed by statute.[108] The apparent inconsistencies in statements by Kansas's legislature,[109] as well as the difficulties—or perhaps reluctance—of the state to implement its own legislative mandate, provide a useful starting point for considering whether treatment should be requisite to commitment as a matter of constitutional law and as a matter of sound policy.

A. LEGAL PRECEDENT FOR THE TREATMENT REQUIREMENT

The Supreme Court has never squarely held that mentally ill individuals have a constitutional right to treatment[110] as a part

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[103] *Hendricks*, 117 S. Ct. at 2077 (quoting KAN. STAT. ANN. § 59-29a01).

[104] KAN. STAT. ANN. § 59-29a01 ("The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons. . . .").

[105] *Id.*

[106] *Id.* (quoting KAN. STAT. ANN. § 59-29a07(a)).

[107] *Id.* at 2085.

[108] *Id.* at 2093 (Breyer, J., dissenting).

[109] *See supra* notes 103-106 and accompanying text (describing legislature's inconsistent expressions); *cf.* Leading Cases, *supra* note 17, at 262-63 (describing *Hendricks* decision and noting that Justice Thomas, writing for majority, "detected a degree of ambiguity in the Kansas Supreme Court's resolution" regarding treatment requirement).

[110] Youngberg v. Romeo, 457 U.S. 307, 317 (1982) ("As a general matter a state is under no constitutional duty to provide substantive services for those within its border."); David W. Burgett, *Substantive Due Process Limits on the Duration of Civil Commitment for the*

of involuntary commitment, but several cases suggest such a conclusion.[111] The *Hendricks* majority, in avoiding the issue of right to treatment, completely ignored some of these cases, failed to distinguish others, and relied on still others only for very general principles not specifically related to the right to treatment.

First, the Supreme Court in *Jackson v. Indiana* held that indefinite pretrial commitment of a deaf, mute criminal defendant was unconstitutional.[112] In *Jackson*, the Court held that due process requires that the commitment bear some reasonable relation to the purpose for which the individual is committed.[113] Accordingly, Indiana rationalized Jackson's pretrial commitment as helping him attain competency to stand trial by providing care and treatment in a state facility.[114] Jackson could never achieve fitness for trial, however, because no Indiana institution provided training or treatment that could improve his particular condition.[115] Therefore, the Court held that continued detention of Jackson was not reasonably related to the purpose of his commitment and hence, was unconstitutional.[116] The *Hendricks* majority failed to discuss *Jackson* at all in deciding whether treatment was necessary to sustain the Kansas sex offender commitment statute. The only reference to *Jackson* by the *Hendricks* majority was in support of the proposition that the "mental illness" element of

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Treatment of Mental Illness, 16 HARV. C.R.-C.L. L. REV. 205, 213 n.32 (clarifying that "right to treatment" does not suggest affirmative right to state services, but rather condition on state's rights to confine its citizens). *See generally* Morton Birnbaum, *The Right to Treatment*, 46 A.B.A. J. 499 (1960) (advocating right to treatment for individuals confined in public institutions).

[111] *See generally* Cornwell, *supra* note 41, at 1326 (citing cases that suggest existence of right to treatment).

[112] 406 U.S. 715, 731 (1972) (invalidating commitment on equal protection and due process grounds because state applied more lenient commitment standard and more stringent release standard to defendant than to civilly committed individuals not charged with criminal offenses).

[113] *Id.* at 738.

[114] *Id.* at 735.

[115] *See id.* at 728 (noting record established that no treatment or training was available at any state institution); *see also* THOMAS MAEDER, CRIME AND MADNESS: THE ORIGINS AND EVOLUTION OF THE INSANITY DEFENSE 129-30 (1985) (describing testimony of two psychiatrists regarding Jackson's mental deficiency, inability to learn sign language, and dim prognosis, as well as other evidence in record establishing that state hospital could do nothing to improve his condition).

[116] *Jackson*, 406 U.S. at 738-39.

commitment statutes can be described with a variety of expressions.[117]

The next Supreme Court decision to touch on the right to treatment was *O'Connor v. Donaldson*,[118] regarding the fifteen-year custodial confinement of a man diagnosed with paranoid schizophrenia.[119] In ruling that proof of mental illness, without proof of dangerousness, was insufficient to sustain involuntary commitment, the Court declined to reach the question of Donaldson's right to treatment.[120] The lower court, however, specifically held that an involuntarily committed individual has "a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition."[121] The Supreme Court noted, but did not affirm, that portion of the lower court decision and remanded the case on a different question.[122] Despite the equivocal stance on treatment expressed in the *O'Connor* opinion, many patients' rights advocates viewed the decision as a vindication of the right to treatment, and lower courts have continued to issue right to treatment decisions after *O'Connor*.[123] Nevertheless, the only reference to *O'Connor* in the *Hendricks* majority's treatment discussion is a quote from Chief Justice Burger's concurrence regarding the power of a state to commit dangerous, mentally ill persons.[124]

In addition, the Supreme Court in *Allen v. Illinois*[125] discussed the right to treatment with respect to the Illinois Sexually Dangerous Persons Act. In deciding whether an alleged sexually dangerous person could claim the Fifth Amendment privilege against self-

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[117] Kansas v. Hendricks, 117 S. Ct. 2072, 2080 (1997) (noting that statute upheld in *Jackson* used terms "incompetency" and "insanity").

[118] 422 U.S. 563, 564 (1975) (holding confinement of nondangerous, mentally ill individual unconstitutional).

[119] *Id.* at 569 (describing evidence that Donaldson's confinement was regime of custodial care, not program designed to treat his illness).

[120] *Id.* at 573-74 & n.8; ROBERT D. MILLER, INVOLUNTARY CIVIL COMMITMENT OF THE MENTALLY ILL IN THE POST-REFORM ERA 104 (1987) (describing narrow holding in *O'Connor*).

[121] Donaldson v. O'Connor, 493 F.2d 507, 520 (5th Cir. 1974), *aff'd*, 422 U.S. 563 (1975).

[122] *O'Connor*, 422 U.S. at 577 (remanding on question of immunity of state agent).

[123] MILLER, *supra* note 120, at 105 (citing examples of lower court cases affirming right to treatment).

[124] Kansas v. Hendricks, 117 S. Ct. 2072, 2084 (1997) (noting that power to commit is not defeated by fact that likelihood of recovery may be low).

[125] 478 U.S. 364, 365 (1986).

incrimination, the Court had to decide whether the commitment scheme was civil or criminal in nature. The Illinois statute avowed an objective of "care and treatment" and disavowed any interest in punishment.[126] Therefore, the court found that the statute was not punitive and held that the defendant could not invoke the Fifth Amendment privilege.[127] Justice Breyer, dissenting in *Hendricks*, relied on the "treatment" analysis in *Allen*, noting that because Kansas's objective was to treat rather than to punish sexually dangerous persons, the state had a "statutory obligation to provide 'care and treatment . . . designed to effect recovery.' "[128]

The *Hendricks* majority also relied on *Allen* in its two alternative analyses of the treatment requirement. The Court first suggested that a state may commit an individual without providing any treatment.[129] In drawing that conclusion, Justice Thomas cited *Allen*,[130] as well as *United States v. Salerno*,[131] for the general proposition that incapacitation alone may be a legitimate state end.[132] Justice Thomas, however, failed to mention distinguishing facts of those two cases. In *Allen*, the Court said in dicta that a state has authority under its police power to protect the community from danger.[133] That case, however, did not rely on the police power justification since Illinois clearly *did* provide treatment and thus was acting under its parens patriae authority.[134] Furthermore, Justice Thomas did not mention that the *Salerno* holding was limited to the context of pretrial detention, a distinction relied on by the *Foucha* Court, in rejecting the broad right of states to commit on the basis of dangerousness alone.[135]

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[126] *Id.* at 369-70.

[127] *Id.* at 375.

[128] *Hendricks*, 117 S. Ct. at 2092 (Breyer, J., dissenting) (citing *Allen*); Leading Cases, *supra* note 17, at 264 (noting Breyer's reliance on *Allen*).

[129] *Hendricks*, 117 S. Ct. at 2084.

[130] 478 U.S. at 373.

[131] 481 U.S. 739, 748-49 (1987).

[132] *Hendricks*, 117 S. Ct. at 2084.

[133] *Allen*, 478 U.S. at 373 (citing Addington v. Texas, 441 U.S. 418, 426 (1979)).

[134] *Id.* (noting that Illinois's decision to supplement its parens patriae concerns with measures to protect safety of other citizens did not render statute punitive).

[135] *See supra* notes 33, 40 and accompanying text (describing holdings in *Salerno* and *Foucha*).

As an alternative to the conclusion that public safety alone could justify commitment, Justice Thomas suggested that the Court might conclude that treatment was the overriding purpose of the Kansas legislature and that the state did provide such treatment.[136] In that portion of the analysis, Justice Thomas again cited *Allen* for the rule that "the State has a statutory obligation to provide 'care and treatment.' "[137] The majority concluded that Kansas met its obligation by providing "meager" treatment to Hendricks.[138]

In sum, courts attempting to apply *Hendricks* in subsequent cases are likely to be leery of the precedential value of the "treatment" portion of the decision. First, it rests on independent, alternative grounds, and second, it was directed only at the double jeopardy and ex post facto challenges, which require the statute to be "non-punitive." The Court crafted an opinion through cursory treatment of earlier cases and managed to avoid establishing a clear rule on the right to treatment of civilly committed sex offenders.

In contrast, two leading lower court decisions, decided before *Hendricks*, have held that civilly committed individuals have a constitutional right to treatment. Not surprisingly, the *Hendricks* majority did not mention either case. First, in *Rouse v. Cameron*,[139] Judge Bazelon of the District of Columbia Circuit Court, affirmed the right to treatment of an individual committed to a psychiatric facility as not guilty by reason of insanity. Second, the Fifth Circuit in *Wyatt v. Aderholt*,[140] after examining appalling conditions in state-operated mental health facilities in Alabama,[141] held that "the provision of treatment to those the state

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[136] *Hendricks*, 117 S. Ct. at 2084.

[137] *Id.* at 2085 (quoting *Allen*, 478 U.S. at 373, and Illinois statute regarding state purpose in treating sexually dangerous persons and describing treatment available in Kansas).

[138] *Id.*

[139] 373 F.2d 451, 455-56 (D.C. Cir. 1966).

[140] 503 F.2d 1305, 1306 (5th Cir. 1975), *aff'g* Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *implemented in* 344 F. Supp. 373 (1972); *see* MILLER, *supra* note 120, at 104 (describing *Wyatt* as establishing constitutional right to treatment).

[141] *Wyatt*, 503 F.2d at 1310 (describing conditions in hospital with 5000 inmates, patients with open wounds, urine and feces on the floor, malnourished patients, accidental deaths of patients due to inadequate supervision, and ratio of one master's level social worker for every 2500 patients).

has involuntarily confined in mental hospitals is necessary to make the state's actions in confining and continuing to confine those individuals constitutional."[142] Other circuit courts, as well as lower federal and state courts, have relied on *Wyatt* as establishing a constitutional right to treatment.[143]

A recent district court case, also decided before *Hendricks*, discussed the constitutional right to treatment specifically in the context of sexually violent predators. The petitioner in *Cameron v. Walsh*[144] was a fifty-three-year-old man, who was confined to a wheelchair, diabetic, blind and suffering from heart disease.[145] He was transferred to a state treatment center for sexually dangerous persons after six years of incarceration for various offenses, including assault with intent to commit rape.[146] The court examined Cameron's right to treatment claim in the context of a double jeopardy challenge, which, like the Fifth Amendment challenge in *Allen*,[147] turned on finding that the commitment scheme was not punitive in purpose or effect.[148] Cameron's double jeopardy claim was precluded by his previously filed civil rights suit,[149] but the court held that since the facility to which Cameron was committed actually provided *some* treatment, he could not suggest that the state had a punitive intent in keeping him there.[150]

Despite the Supreme Court's failure to provide a clear rule on the right to treatment for mentally ill persons, the Court has issued a

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[142] *Id.* at 1315.

[143] *See, e.g.*, Woe v. Cuomo, 729 F.2d 96, 98 (2d Cir. 1984) ("Courts have long recognized that the due process clause of the Fourteenth Amendment does not permit states to deprive mentally ill individuals of their freedom for therapeutic purposes unless some level of treatment is actually provided."); *Id.* at 100 (referring to *Wyatt*); Ohlinger v. Watson, 652 F.2d 775, 778 (9th Cir. 1980) (citing *Wyatt* and noting that "[a]dequate and effective treatment is constitutionally required because, absent treatment, appellants could be held indefinitely as a result of their mental illness").

[144] No. 95-10904-PBS, 1996 U.S. Dist. LEXIS 11691, at *1 (D. Mass. July 23, 1996).

[145] *Id.*

[146] *Id.* at *3 (indicating that defendant pled guilty to kidnapping, larceny of motor vehicle, assault with intent to commit rape, and threatening to commit crime).

[147] *Allen v. Illinois*, 478 U.S. 364, 380 (1986).

[148] *Cameron*, 1996 U.S. Dist. LEXIS 11691, at *19.

[149] *Id.* at *27 (describing petitioner's claim under 42 U.S.C. § 1983 (1994 & Supp. I 1998)).

[150] *Id.* Note the similar reasoning in *Kansas v. Hendricks* where the Supreme Court suggested that if the Kansas commitment statute did require the state to provide treatment, "meager" treatment was sufficient. 117 S. Ct. 2072, 2085 (1997).

definitive holding regarding the right to "habilitation"[151] of mentally disabled persons. Mentally retarded individuals involuntarily committed to state institutions have a constitutionally protected liberty interest in receiving minimally adequate training or habilitation.[152] The Court stated this rule in the leading case of *Youngberg v. Romeo*,[153] based on the due process challenge of a profoundly retarded thirty-three-year-old man with the mental capacity of an eighteen-month-old child, who could not talk and was unable to perform basic self-care skills independently.[154] Romeo conceded that no amount of training would enable him to live outside of an institution.[155] Thus, the liberty interest he claimed was not the right to be released from confinement but the right to be free from physical restraints while in the hospital.[156] The Court agreed that Romeo had a constitutional right to minimally adequate training in light of his liberty interests in safety and freedom from unreasonable restraints.[157]

Circuit courts have interpreted *Youngberg* generally as requiring states to provide mentally retarded persons with habilitation according to prevailing practice standards.[158] Some commenta-

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[151] "Habilitation" refers to training and skills development for persons with mental retardation. Youngberg v. Romeo, 457 U.S. 307, 309 n.1 (1982). The term is distinguished from "treatment" because mentally retarded individuals are not viewed as "ill," but rather as learning disabled. *Id.*

[152] *Id.* at 322 (finding respondent entitled to minimally adequate training by balancing individual liberty interest against relevant state interests); *id.* at 324 (relying on *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), holding that conditions of confinement must comport with purpose of confinement).

[153] 457 U.S. 307 (1982).

[154] *Id.* at 309.

[155] *Id.* at 317.

[156] *Id.* The record documented several instances of injuries to Romeo from his own violence and from reactions of other patients to his aggression. *Id.* at 310. Hospital staff physically restrained or "shackled" Romeo routinely to prevent him from harming himself or others. *Id.* at 310-11 & n.4. Romeo asserted a right to training or habilitation to reduce his aggressive behavior and improve his self-care skills, which would accordingly reduce the need for physical restraints. *Id.* at 318.

[157] *Id.* at 322; *cf.* Erlinder, *supra* note 3, at 134 (describing substantive due process test in *Youngberg* as balance of individual liberty interests against demands of organized society).

[158] S.H. v. Edwards, 860 F.2d 1045, 1046 (11th Cir. 1988); Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1246 (2d Cir. 1984); Phillips v. Thompson, 715 F.2d 365, 368 (7th Cir. 1983); *see also In re* Young, 857 P.2d 989, 1005 (Wash. 1993) (relying on *Youngberg* for proposition that involuntarily committed individuals are entitled to more treatment than persons confined for punishment).

tors suggest *Youngberg* stands for the right to treatment for all types of commitments.[159] The *Hendricks* majority, however, failed even to mention, much less to distinguish, the *Youngberg* holding.

In reviewing cases on the right to treatment, what is startling is not the suggestion that sexual perpetrators should receive treatment for their disorders, but that the Supreme Court has managed to hedge on the question of the right to treatment for civilly committed sexual offenders. The Court's equivocation allows states to have their cake and eat it too; states can purport to confine sexual predators for "care and treatment" but can, without violating the Constitution, refuse to provide any treatment at all. This formulation appears particularly flawed after consideration of the prevailing state policy justifications for civil commitment of sexual offenders.

B. STATE JUSTIFICATIONS FOR COMMITMENT OF SEXUAL OFFENDERS

Sexual predator commitment statutes usually are premised on state police powers and parens patriae powers.[160] Police power authorizes the state to deprive one person's liberty for the welfare of society generally, but the power cannot be expanded to justify preventative detention without offending current Supreme Court precedent. Likewise, the parens patriae power justifies state action on behalf of vulnerable citizens; yet, states do not truly consider sex offenders vulnerable. Therefore, both of these theories of state power over individual liberty fail to provide constitutional justification for civil commitment of sex offenders.

1. Police Power. The Supreme Court has suggested that if a state justifies its sexual predator commitment act on police power, the state may not be required to provide any treatment at all.[161]

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[159] Erlinder, *supra* note 3, at 134-35 (describing *Youngberg* as general test for determining substantive due process rights of persons committed under "Psychopathic Personality statute[s]"); K. Edward Greene, *Mental Health Care for Children: Before and During State Custody*, 13 CAMPBELL L. REV. 1, 20 (1990) (noting that although majority in *Youngberg* did not address treatment rights of all persons in mental institutions, analysis is appropriate for evaluating rights of civilly committed mentally ill individuals).

[160] *See supra* notes 71-81 and accompanying text (describing state policy justifications).

[161] Kansas v. Hendricks, 117 S. Ct. 2072, 2084 (1996) (noting that incapacitation may be legitimate state end, relying on *Allen v. Illinois*, 478 U.S. 364, 373 (1986), and *United States v. Salerno*, 481 U.S. 739, 748-49 (1987)).

The state, under its police power, may incapacitate mentally ill individuals for the purpose of protecting society from dangerous tendencies of sexual predators.[162] Under this view, a state's interest in protecting the public health and safety of the population as a whole justifies depriving a single individual's liberty.[163] For example, states rely on police powers as the constitutional basis for quarantine laws. An individual with a contagious disease may be confined in order to protect society from infection—even if no treatment is available.[164] Similarly, the state interest in public health also justifies invasion of an individual's right to privacy. For example, the state may compel individuals to undergo treatment for dangerous, contagious diseases.[165]

In the context of commitment of sexually dangerous persons, some courts, including the *Hendricks* Court in its first of two "treatment" analyses, assert that police power alone may justify indefinite preventative detention.[166] But a brief review of Supreme Court precedent on civil commitment belies such a suggestion. The narrow context for pretrial detention of dangerous arrestees in *Salerno*,[167] as well as the refusal of the *Foucha*[168]

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[162] Addington v. Texas, 441 U.S. 418, 426 (1979); *see also* State v. Post, 541 N.W.2d 115, 133 (Wis. 1995) (stating that "the state has a compelling interest in protecting the public from dangerous mentally disordered persons").

[163] Janus, *supra* note 52, at 167.

[164] Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) (noting that persons are subject to burdens, such as vaccination, in order to secure general comfort, health and prosperity of state); Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. of Health, 186 U.S. 380, 388 (1902) (cited by majority in *Hendricks* for proposition that state can civilly detain such persons even in the absence of treatment); *see* State v. Fulton, 166 N.W.2d 874, 885 (Iowa 1969) (comparing procedure and purpose of sex offender commitment to quarantine for contagious and infectious diseases).

[165] *See* McCormick v. Stalder, 105 F.3d 1059, 1061 (5th Cir. 1997) (finding state interest in preventing spread of tuberculosis in prison population justified compelled medical treatment of inmate); Reynolds v. McNichols, 488 F.2d 1378, 1382 (10th Cir. 1973) (upholding city ordinance allowing involuntary detention and treatment of persons suspected of having venereal diseases).

[166] Kansas v. Hendricks, 117 S. Ct. 2072, 2084 (1997); *see, e.g.*, O'Connor v. Donaldson, 422 U.S. 563, 583-84 (1975) (Burger, J., concurring) (suggesting that state can exercise police power to "protect society from the dangers of significant antisocial acts or communicable disease"); Minnesota *ex rel.* Pearson v. Probate Ct., 309 U.S. 270, 275 (1940); Bailey v. Gardenbring, 940 F.2d 1150, 1154 (8th Cir. 1989); *In re* Blodgett, 510 N.W.2d 910, 914 (Minn. 1994).

[167] United States v. Salerno, 481 U.S. 739, 749-50 (1987).

Court to uphold commitment without a showing of mental illness cut against suggestions that states may involuntarily commit individuals under police powers on the basis of dangerousness alone.[169] To conclude otherwise is contrary to one of the most fundamental notions of our criminal justice system. Individuals may be confined as punishment because they commit affirmative acts, not merely because they have dangerous inclinations.[170] Therefore, the potential danger that sex offenders present to society is insufficient to justify indefinite commitment after their punitive detention term ends. Accordingly, most states recognize that the mental illness element in sexual predator laws, and not just the element of dangerousness, is essential to the commitment schemes.[171] Nevertheless, "pathologizing" sexual offenders and "medicalizing" the problem of sexual violence is an inappropriate solution to this social problem.[172]

2. Parens Patriae. As the police power justification is insufficient to sustain sexual perpetrator commitment schemes, states turn to their parens patriae authority. Parens patriae is the power of the state to act on behalf of juveniles or other individuals who

[168] Foucha v. Louisiana, 504 U.S. 71, 85 (1992) (denying power of state to detain dangerous individual indefinitely without medical justification).

[169] Erlinder, *supra* note 3, at 152-53 (rejecting suggestion that predicted dangerousness alone justifies detention); Janus, *supra* note 52, at 163 (describing "jurisprudence of prevention" which balances state interest in safety against individual interest in liberty, ignoring mental disorder element in civil commitment).

[170] State v. Post, 541 N.W.2d 115, 136 (Wis. 1995) (Abrahamson, J., dissenting) ("Although the end result may seem attractive, under our constitutions the state cannot simply lock people up on the supposition that they will be dangerous in the future when they have already served their sentences for crimes committed in the past."). "[N]o temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know." CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 180 (Sanford H. Kadish & Stephen J. Schulhofer eds., 1995) (citing William Blackstone).

[171] *See* Dan W. Brock, *Involuntary Commitment: The Moral Issues, in* MENTAL ILLNESS: LAW AND PUBLIC POLICY 147, 154 (Baruch A. Brody & H. Tristram Engelhardt, Jr. eds. 1980) [hereinafter LAW AND PUBLIC POLICY] (distinguishing civil commitment from incarceration on basis that civil commitment lacks condemnation or assignment of guilt).

[172] *See* Morse, *supra* note 3, at 129 ("We cannot justly solve our social problems by 'medicalizing' them and then granting the state otherwise unjustified powers to control the lives of citizens."); *see also infra* Section V.A. (discussing medical model in relation to commitment of sexual predators).

are unable to care for themselves.[173] A state may deprive an individual's liberty not because of the threat to others in society but because of the risk that the individual will harm himself. For example, a state may limit the liberty of a child or incompetent individual in order to protect that vulnerable person from harm.[174] The parens patriae power turns on an individual's "incompetence," therefore labelling sex offenders "mentally ill" is crucial to invoke this power.

Nevertheless, states still have to rely on broad assumptions about mental illness and sexual deviance to rely on their parens patriae authority. Individual liberty is predicated on the belief that people are capable of rational thought.[175] Mentally ill people, by contrast, are deemed incapable of rational thought. Accordingly, they are not legally responsible for their acts[176] and the state may restrict their individual liberties.[177] It is at this point that the logic behind the parens patriae justification for civil commitment of sexual offenders breaks down—states do not and cannot show

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[173] Addington v. Texas, 441 U.S. 418, 426 (1979) ("The state has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for themselves."); State v. Copeland, 765 P.2d 1266, 1271 (Utah 1988) (noting that because parens patriae is premised on state caring for those who cannot care for themselves, power is implicated only when individual cannot make own evaluation of need for treatment); Bassiouni, *supra* note 81, at 299-300 (describing parens patriae power of state to protect individual from harming himself and accompanying duty to confine such individual for care and treatment); Janus, *supra* note 52, at 171 (asserting that parens patriae power depends on existence of mental illness for its internal logic).

[174] Cecelia M. Espenoza, *Good Kids, Bad Kids: A Revelation About the Due Process Rights of Children*, 23 HASTINGS CONST. L.Q. 407, 414 (1996) (noting that parens patriae power emerged from perceived need to protect vulnerable children and power justified state action contrary to liberty interest of children); Rolf E. Sartorius, *Paternalistic Grounds for Involuntary Civil Commitment: A Utilitarian Perspective, in* LAW AND PUBLIC POLICY, *supra* note 171, at 137, 139 (noting that if individual has condition which renders him dangerous to himself as well as incapable of rational decision to act in less dangerous way, state may legitimately interfere with his liberty to prevent him from harming himself).

[175] Bassiouni, *supra* note 81, at 298 (noting power of state to restrain persons incapable of respecting public order); Teir & Coy, *supra* note 3, at 414 (suggesting that society allows independent choice and conduct so long as under rational control).

[176] Bassiouni, *supra* note 81, at 298 (describing state's parens patriae power over people who are unable to respect public order due to their "legal irresponsibility").

[177] Cornwell, *supra* note 41, at 1332 (noting that "involuntary commitment is appropriate only for those incompetent to make rational decisions about their care or treatment"); Teir & Coy, *supra* note 3, at 414 ("The mentally ill . . . enjoy a diminished amount of individual liberty because they are incapable of making the rational choices that are necessary to participate as full members of society.").

that sexual offenders as a class, are incapable of rational thought.[178] Moreover, the fact that one of the elements of civil commitment of sexual offenders is a prior criminal act[179] suggests that states certainly do not consider these individuals "legally irresponsible"[180] since the state, in prosecuting offenders, already held them responsible for their acts.

V. DOES PARENS PATRIAE JUSTIFY STATE ACTION?

In order to commit sexual offenders involuntarily under its parens patriae powers, a state must first demonstrate that the individual is "incompetent" or "sick."[181] Second, the purpose of the commitment must bear some reasonable relation to the confinement; that is, the state must show its purpose is "care and treatment."[182] The problem with the parens patriae justification is that sex offenders may not be "sick" or "incompetent" and, moreover, they may not be treatable.

A. ARE SEXUAL OFFENDERS "SICK" OR "INCOMPETENT"?

The power of a state to infringe individual liberty under its parens patriae power turns not on what the individual "did," but on what the individual "is."[183] This distinction relates to the question under *Foucha*[184] regarding the "mental illness" or "mental

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[178] *See* Teir & Coy, *supra* note 3, at 425 (stating without reservation that sex offenders can recognize difference between right and wrong).

[179] *See supra* note 52 and accompanying text (describing elements of sexually violent predator commitment schemes including past conduct).

[180] Morse, *supra* note 3, at 135 ("Nonresponsibility is usually a necessary condition of justifiable involuntary civil commitment . . . but proponents of newer [sex offender commitment] laws provide no coherent theory to suggest that sexual offenders as a class are not responsible.").

[181] *See supra* notes 173-174 and accompanying text (describing basis of power).

[182] Brock, *supra* note 171, at 171 ("Where involuntary commitment is on paternalistic grounds of incompetence, mental illness and treatability, the involuntary hospitalization and provision of treatment is for the person's own good.").

[183] *See In re* Gault, 387 U.S. 1, 15 (1967) (describing parens patriae and goal of juvenile justice system as determining what a child "is" and how he became what he is, rather than determining guilt or innocence); Morse, *supra* note 3, at 121 (noting that sex offender commitments are more harmful to individual dignity because they label or classify offenders, rather than punish acts of free will).

[184] Foucha v. Louisiana, 504 U.S. 71 (1992).

abnormality" requirement for sex offender commitment.[185] But even if *Foucha* can be read to afford states broad discretion to define "mental illness" in their sex offender statutes,[186] those definitions may still be insufficient to justify state deprivation of liberty under parens patriae. The parens patriae power turns on finding the individual incapacitated or incompetent and thus in need of protection by the state.[187]

In its substantive due process discussion, the *Hendricks* Court suggested that lack of competency and responsibility were important elements of states' statutory definitions of "mental illness" or "mental abnormality."[188] Consider, however, the definition of mental abnormality in the statute under which Kansas committed Leroy Hendricks: " 'Mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others."[189] This definition emphasizes the "menace to . . . others" presented by sexual offenders which involves the police power, but the definition says nothing to suggest incapacity or need for protection of the committed individual himself, consistent with the state's parens patriae power. The definition does suggest that sexual offenders suffer from a "volitional" impairment,[190] which renders them "incapable" of resisting certain actions. The definition does not suggest that such "volitional" impairment causes sexually dangerous persons to endanger *themselves*, but rather that the impairment predisposes them to hurt others. Thus, the

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[185] *See supra* notes 41-52 and accompanying text (discussing confusion over definition of mental illness element of commitment).

[186] *See supra* notes 43, 48 (noting deference to state legislative determinations).

[187] Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOL. PUB. POL'Y & L. 534, 587 (1995) (noting that parens patriae power is premised on presumed incapacity of minors and of mentally disabled persons to protect or care for themselves).

[188] Kansas v. Hendricks, 117 S. Ct. 2072, 2081 (1996) (distinguishing legal definitions from medical definitions by noting that legal definitions must "take into account such issues as individual responsibility . . . and competency") (citing DSM-IV, *supra* note 47, at xxiii, xxvii).

[189] KAN. STAT. ANN. § 59-29a02(b) (1994).

[190] *Hendricks*, 117 S. Ct. at 2081 (noting Hendricks's lack of volitional control which, along with dangerousness, suggests that sexual offenders should not be dealt with exclusively in the criminal justice system).

definition fails to describe a person in need of state care and protection.

The Kansas statute also provides for commitment of individuals with personality disorders.[191] The term "personality disorder" is a recognized medical diagnostic category[192] and may be a sufficient predicate for commitment under *Foucha*.[193] Nevertheless, that diagnostic category in no way suggests that the individual is "incompetent" or in need of protection from self-harm. Thus, the condition cannot trigger a state's parens patriae authority to deprive an individual of his liberty.[194]

B. DO STATES REALLY AIM TO "TREAT" SEXUAL OFFENDERS?

Civil commitment statutes for sex offenders are not enacted by legislatures out of compassion for persons they deem "sexually dangerous."[195] Given society's disdain for sexual deviants[196] and the fact that many sex offender commitment statutes are

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[191] KAN. STAT. ANN. §§ 59-29a01, 59-29a02(a) (allowing commitment of persons convicted of or charged with sexually violent offense who suffer from a "mental abnormality" or "personality disorder").

[192] DSM-IV, *supra* note 47, at 629-73 (describing first diagnostic criterion of personality disorder: "[a]n enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture").

[193] Foucha v. Louisiana, 504 U.S. 71, 87-88 (1992) (O'Connor, J., concurring); *In re* Blodgett, 510 N.W.2d 910, 916 (Minn. 1994) ("We do not read *Foucha* to prohibit Minnesota's commitment program for psychopathic personalities."); *see supra* note 47 (discussing antisocial personality disorder). *But see* Morse, *supra* note 3, at 126 (noting that person diagnosed with "antisocial personality disorder" is unlikely to be involuntarily committed under general civil commitment standard because he seems too rational to qualify as nonresponsible).

[194] Schopp, *supra* note 72, at 187 (noting that statutory definition of sex offenders does not suggest impairment of processes that would undermine individual's status as competent practical reasoner); Winick, *supra* note 187, at 587 (noting that assumption that mental illness substantially impairs decision-making capacity is not true for many conditions).

[195] *In re* Hendricks, 912 P.2d 129, 136 (Kan. 1996) (noting that legislature's "overriding concern" was detention of sexual offenders and treatment with goal of reintegration was "incidental, at best"), *rev'd sub nom.* Kansas v. Hendricks, 117 S. Ct. 2072 (1997); State v. Post, 541 N.W.2d 115, 139 (Wis. 1995) (Abrahamson, J., dissenting) ("[T]o suggest that [the commitment] law is merely a benign exercise of the State's parens patriae authority . . . is to ignore the reality of the political context in which this law was passed and the manner in which it was drafted." (quoting Wisconsin circuit court in *State v. Carpenter*, No. 94-CF-1216 (Dane County July 22, 1994))).

[196] *See supra* notes 2-3 and accompanying text (describing society's views of sex offenders).

enacted in response to public outrage,[197] such a suggestion seems almost laughable. The political reality runs contrary to the parens patriae justification for commitment. The premise of parens patriae is that the state incapacitates an individual in order to treat and rehabilitate him so that he can reenter society as a full and productive member.[198] States do not, however, appear to enact sex offender commitment laws out of an interest in returning "recovered" sexual predators to the community. In fact, these statutes seem to be enacted for the very purpose of *preventing* such reintegration.

The juvenile justice system provides a useful comparison for considering states' actual motivations with respect to treatment and rehabilitation of persons detained under parens patriae. States originally limited their parens patriae power to care and custody of vulnerable children. More recently, states have extended the reach of the parens patriae power to authorize commitment of "ill" or "incompetent" adults. The current trend in juvenile justice, however, has been away from the idea of protecting wayward children and towards placing individual responsibility on juveniles for their antisocial acts. States increasingly reject the appropriateness of parens patriae authority over disruptive juveniles,[199] yet they invoke that same authority to "care for" the disfavored class of sexual offenders. These policy approaches are inconsistent and the stark contrast between them betrays the true legislative intent behind sex offender commitment laws.

At its inception, the juvenile justice system relied on the parens patriae theory, with the objective of providing treatment and rehabilitation to help delinquent children become productive

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[197] *See, e.g., In re* Young, 857 P.2d 989, 992 (Wash. 1993) (describing political context for passage of Washington Community Protection Act).

[198] *E.g.*, Hill v. State, 661 N.E.2d 1285, 1290-91 (Mass. 1996) (emphasizing that commitment of sexually dangerous persons is intended to provide individual with opportunity to overcome his uncontrollable sexual urges so that he can successfully reenter society); Bassiouni, *supra* note 81, at 300 (noting parens patriae objective of restoring individual to useful role in society).

[199] *See, e.g.*, Santana v. Collazo, 714 F.2d 1172, 1176 (1st Cir. 1983) (rejecting suggestion that parens patriae authority requires states to provide treatment as a part of incarceration of juvenile delinquents).

citizens.[200] Early twentieth-century reformers advocated a juvenile justice system to provide treatment and rehabilitation of "delinquents" rather than punishment and incarceration in the adult penal system. As a part of the reformed approach, states relaxed the formality and procedural rules of adult adjudication.[201] Juveniles traded the procedural protection of the adult courts for the rehabilitative benefits of the juvenile system.[202] Nevertheless, the reality of the juvenile system was that juveniles got the "worst of both worlds"[203] because states failed to provide care and treatment to their delinquent charges.

In response to such criticism, courts have expanded procedural protections for juveniles,[204] but states have not yet improved treatment in juvenile detention facilities.[205] Increasingly, delinquent children *are* held legally responsible for their actions.[206] They are no longer presumed incapable of rationally exercising free will and thus in need of protection and care.[207] In light of the demise of informal juvenile proceedings, as well as changing

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[200] *In re* Gault, 387 U.S. 1, 15 (1967) (noting belief of early juvenile justice reformers that role of society was to determine "what had best be done in [the child's] interest and in the interest of the state to save him from a downward career").

[201] CHILDREN IN THE LEGAL SYSTEM 742-45 (Samuel M. Davis, et al. eds. 1997) (describing origins and philosophy of juvenile justice system).

[202] McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971) (noting that juvenile system denies certain due process safeguards, which is constitutionally acceptable since purpose of incarceration is rehabilitation, not punishment); Martarella v. Kelley, 349 F. Supp. 575, 600 (S.D.N.Y. 1972) (providing that effective treatment is the quid pro quo of society's right to exercise its parens patriae power). *But cf.* O'Connor v. Donaldson, 422 U.S. 563, 585-87 (1975) (Burger, C.J., concurring) (rejecting quid pro quo theory of state's obligation to provide treatment in exchange for deprivation of liberty); Greene, *supra* note 159, at 33 (noting Burger's rejection of quid pro quo theory).

[203] Kent v. United States, 383 U.S. 541, 556 (1966) (asserting that juveniles got neither procedural protections of adult courts nor "solicitous care and regenerative treatment" intended for children).

[204] *In re* Gault, 387 U.S. at 18-20 (expanding procedural protections including notice of charges, right to counsel, right to confrontation and cross-examination as well as privilege against self-incrimination for children in delinquency hearings).

[205] Holland & Mlyniec, *supra* note 14, at 1791 (noting juvenile institutions "have historically been understaffed, unhealthy, and devoid of rehabilitative programming").

[206] Espenoza, *supra* note 174, at 416 (noting that juveniles are now held strictly accountable for their crimes in contrast to older view that they were morally incapable of committing crimes).

[207] *Cf.* Holland & Mlyniec, *supra* note 14, at 1795 (noting that early juvenile court statutes rejected notion of free will and sought origin of juvenile delinquency elsewhere).

notions of juvenile responsibility for bad behavior, states have little legal incentive to provide treatment and rehabilitation to juvenile offenders.[208]

The inappropriateness of the parens patriae power as a justification for commitment of sexually violent predators is evident when compared to states' approaches to juveniles under the same theory. First, sexual predator statutes were not sparked by public sympathy whereas compassion was the impetus for early juvenile reform.[209] Second, sex offenders were never promised treatment and rehabilitation in exchange for relaxed legal process, the premise of reform in juvenile courts. In fact, sex offender statutes typically contain a range of procedural protections.[210] Finally, states have never suggested that sex offenders lack free will or are legally irresponsible which was the perception of juvenile offenders. In fact, most sex offender laws require as an element of commitment that the individual have been previously charged with or convicted of a sexual offense.[211] Given these distinctions, the inappropriateness of parens patriae power in the context of sexual predators becomes evident. The origins and assumptions underlying states' power to deprive the liberty of juveniles for their own protection do not apply to sex offender detentions. States invoke their parens patriae power to justify commitment but lack a sincere interest in the "treatment and care" of sexually violent predators.

C. ARE SEXUAL OFFENDERS "TREATABLE"?

The *Hendricks* Court left unanswered the question of whether sexual offenders are treatable.[212] Indeed, the majority did not

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[208] Santana v. Collazo, 714 F.2d 1172, 1176 (1st Cir. 1983) (rejecting class action claim of right to treatment in juvenile detention camp in Puerto Rico, in part, on state's power to confine juveniles solely to protect society); Holland & Mlyniec, *supra* note 14, at 1794 (tracing decline of right to treatment in juvenile justice after recent judicial decisions). *But cf.* JOHN P. WILSON, THE RIGHTS OF ADOLESCENTS IN THE MENTAL HEALTH SYSTEM 247 (1978) (concluding that juveniles' right to treatment was gaining recognition by courts and legislatures in previous era).

[209] *In re* Gault, 387 U.S. at 26 (noting themes of compassion, goodwill, benevolence, and paternalism in early conceptions of juvenile court).

[210] *See supra* notes 63-68 and accompanying text (describing various procedural due process protections in sexual predator acts).

[211] *See supra* note 52 (outlining elements of sexual offender commitment statutes).

[212] Kansas v. Hendricks, 117 S. Ct. 2072, 2084 (1997) (rejecting Hendricks's assertion that he was denied available treatment but not definitively concluding that Kansas considered Hendricks untreatable).

consider determination of that crucial question essential to its holding, which was based on alternative grounds.[213] Justice Breyer, in his dissent, suggested that Kansas *did* concede that treatment was available for Hendricks's condition; thus, the dissent framed the issue instead as whether the state had to provide the treatment it conceded was available.[214]

The *Hendricks* Court's awkward response to the "treatability" of sexual offenders reflects the lively dispute on that point among scholars.[215] Resolution of the question, however, is crucial to the parens patriae justification for commitment.[216] If a state deprives an individual's liberty because he is unwell and dangerous yet fails to provide any treatment for that condition, the commitment becomes a life sentence.[217] "Treatment" is the "key" that unlocks the hospital door.[218]

How, then, does a state "treat" a legislatively created condition?[219] Most sex offender commitment statutes define "sexually dangerous persons" very generally, and thus the definitions do not

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[213] *Id.* (rejecting Hendricks's ex post facto and double jeopardy claims on basis that either incapacitation alone may be legitimate non-punitive state end or that Hendricks did receive treatment for his condition and thus his commitment was not punitive in purpose or effect).

[214] *Id.* at 2090 (Breyer, J., dissenting) (citing Kansas attorney general's response during trial that Hendricks was treatable and suggesting that no one argued to the contrary).

[215] RONALD M. HOLMES, THE SEX OFFENDER AND THE CRIMINAL JUSTICE SYSTEM 168 (1983) (describing various therapeutic approaches to sex offenders); SANDRA L. INGERSOLL & SUSAN O. PATTON, TREATING PERPETRATORS OF SEXUAL ABUSE 79 (1990) (noting lack of research on treatment of perpetrators); ADELE MAYER, SEX OFFENDERS: APPROACHES TO UNDERSTANDING AND MANAGEMENT 62 (1988) (arguing that mental health professionals appear to be advocating therapy in absence of proven methodologies); Monahan & Davis, *supra* note 2, at 199 (describing study which noted that "none of these data prove that any particular treatment is effective in helping to rehabilitate sex offenders").

[216] MAYER, *supra* note 215, at 82 ("The mistaken assumption of 'treatability' has been based largely on a needed rationale to justify implementation of therapeutic programs.").

[217] *See In re* Blodgett, 510 N.W.2d 910, 923 (Minn. 1994) (Wahl, J., dissenting) (questioning how Blodgett can show he is no longer in need of treatment when "the very psychiatrists who are charged with treating him say there is no treatment for an antisocial personality disorder").

[218] *See* KAN. STAT. ANN. § 59-29a08 (1994) (providing for release on showing that "person is safe to be at large and will not engage in acts of sexual violence if discharged"); MINN. STAT. § 253B.18, subd. 15 (1992) (providing that sexual predator may be confined indefinitely until he shows to satisfaction of commission and special review board that he is no longer dangerous and no longer in need of treatment).

[219] Erlinder, *supra* note 3, at 133 ("Hospitalization and medical treatment cannot cure a legislatively created category.").

accurately reflect the myriad diagnoses that may describe people who commit sex crimes.[220] Nevertheless, states typically recommend similar treatment for the entire category of offenders.[221] The over-generalization in diagnosis and treatment interventions for sex offenders may, in part, explain the lack of success in "curing" sexual offenders.[222] In fact, there is no reason to believe that sex offenders are any more "treatable" than other criminals generally.[223] States must assume that sexual predators are treatable in order to justify indefinite commitment; states purport to rehabilitate rather than just detain. Until it is clear that treatment could actually help these offenders overcome their sexual tendencies, however, states cannot single them out as a class for preventative detention.

VI. PROPOSED ALTERNATIVES

The preceding sections of this Note described the legal precedent for a constitutional right to treatment[224] and suggested that the Court in *Hendricks*[225] failed adequately to address that prece-

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[220] *See, e.g.,* Monahan & Davis, *supra* note 2, at 196 (describing diagnoses given to sex offenders evaluated for California program, including "sexual deviation," "personality disorders," "pedophilia," and "psychosis").

[221] MAYER, *supra* note 215, at 79. *See generally* Carl Warren Gilmore, *Treating Sex Offenders*, WIS. LAW. Oct. 1994 at 20, 21-23 (describing assessment procedures and standard programming established by Wisconsin Department of Corrections to serve some 600 sex offenders annually).

[222] *In re* Blodgett, 510 N.W.2d at 918 n.1 & 925 n.15 (Wahl, J., dissenting) (noting limited success of treatment of committed offenders in Minnesota facilities and citing William D. Erickson, The Psychopathic Personality Statute, Need for Change 3, 19 (1991) (unpublished paper presented by the Commissioner of Human Services to the Minnesota Legislature)). Dr. Erickson reported that of 21 men committed under the sex offender statute, only one was making reasonable progress in treatment, none were mentally ill, and none were taking psychotropic medications. *Id.* at n.15. Cornwell, *supra* note 41, at 1329 (conceding reports of poor outcome in treatment programs for sex offenders by medical community but urging flexibility so that clinicians might modify treatment to make it more effective); Hammel, *supra* note 43, at 810 (noting that studies report disappointing results in treatment for sex offenders, particularly for target population of sexual predator laws).

[223] MAYER, *supra* note 215, at 82-85 (noting that sex offenders share many characteristics with other criminals and hypothesizing about therapeutic approach); Morse, *supra* note 3, at 140 (rejecting justification for preventive detention on basis that sexual predators are "specially treatable").

[224] *See supra* Part IV.A.

[225] Kansas v. Hendricks, 117 S.Ct. 2072 (1997).

dent.[226] In addition, this Note scrutinized the police power and parens patriae power justifications for civil commitment of sex offenders, finding these justifications inadequate to sustain the massive liberty infringement.[227]

The issue of sexual violence is serious and compelling for the public and for state officials.[228] Nevertheless, civil commitment of sexual predators in absence of treatment is an appropriate response to that concern. Thus, states should closely examine their true purpose in confining sexually dangerous persons. If the true state concern is safety and protection of the public, state legislators can increase the underlying sentence for sex crimes.[229] That approach seems most closely aligned with states' actual objective in drafting sexual predator statutes—removing a disfavored class of criminals from the streets. Increased sentencing also has the benefit of presenting few administrative complexities,[230] aside from the pre-existing problems of overcrowding and limited resources for penal facilities. Such a solution, furthermore, would not present the potential constitutional deficiencies characteristic of civil commitment.[231]

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[226] *See* Leading Cases, *supra* note 17, at 268-69 (concluding that *Hendricks* Court failed to define parameters of civil commitment clearly and thus gave states broad authority to commit sex offenders indefinitely).

[227] *See supra* Part IV.B.

[228] Cornwell, *supra* note 41, at 1336 (describing sexual predation as "particularly noxious and fearsome public problem"); Erlinder, *supra* note 3, at 158 (noting that government "must find a way to respond to the legitimate public concern" over sexual violence); Tier & Coy, *supra* note 3, at 426 (asserting that sexual predators are a "serious, recurrent, and difficult problem facing our society").

[229] Tier & Coy, *supra* note 3, at 426 (noting that "longer jail terms [for sex offenders] may be warranted in some circumstances"); Marna J. Johnson, Comment, *Minnesota's Sexual Psychopathic Personality and Sexually Dangerous Person Statute: Throwing Away the Key*, 21 WM. MITCHELL L. REV. 1139, 1187 (1996) (suggesting that longer sentences are one way to deter sexual violence).

[230] *Cf. infra* notes 232-238 and accompanying text (describing various issues facing states implementing treatment programs).

[231] *See* Erlinder, *supra* note 3, at 158 (advocating longer sentences rather than civil commitment and noting that even if legislature mandates life sentence for re-offenders, "society would be well-protected without creating the threat to personal liberty posed by [commitment statutes]"). *But cf.* Cornwell, *supra* note 41, at 1336 (suggesting that enhanced prison sentences are "virtually unimpeachable constitutionally" and expressing concern that states will define "appropriate punishment" based on fear of recidivism rather than on proportional blame).

On the other hand, if the state's true concern is rehabilitation, that purpose should be clearly stated in the legislative act, and the state must actually provide care and treatment aimed at improving the condition of these "sick" persons so that they can return to the community as productive members. States face many difficulties implementing treatment programs for sex offenders. First, states may lack adequate resources to establish treatment programs.[232] Lack of funding, however, does not justify a state's failure to comply with its constitutional mandate of providing treatment when such treatment is the justification for infringing on individual rights.[233] Second, states will actually have to resolve the issue of whether sex offenders are treatable.[234] In considering that question, states may need to move away from a general, all-inclusive statutory definition of "mental abnormality" to describe all sexual predators and towards more particularized definitions of the various conditions from which these individuals suffer. Such clarification is necessary to facilitate appropriate and effective treatment, rather than relying on the assumption that all sex offenders will benefit from the same therapeutic interventions.[235] States will also need to identify those individuals whose deviant behavior stems not from illness, but from the exercise of free will and who thus should be punished rather than treated. Considerable resources will need to be invested to allow individualized assessments of treatment needs and culpability.[236]

Furthermore, states may have to consider specific treatment issues such as the efficacy of "compelled" treatment for persons with sexual disorders. Certain treatment strategies may be

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[232] Burgett, *supra* note 110, at 258-59 (describing potential drain on state mental health resources from civil commitment process); Hammel, *supra* note 43, at 811-12 (noting that treatment programs "will have to be comprehensive and quite expensive to be effective" and suggesting that California program failed to treat all eligible offenders due to lack of funds). *But cf.* INGERSOLL & PATTON, *supra* note 215, at 92-94 (suggesting that sex offender treatment programs might not incur overwhelming costs).

[233] Wyatt v. Aderholt, 503 F.2d 1305, 1315 (5th Cir. 1974) (noting that inadequate resources cannot justify state's deprivation of individual's constitutional rights).

[234] *See supra* Section V.C. (discussing treatability of sex offenders).

[235] INGERSOLL & PATTON, *supra* note 215, at 22 (describing different treatment approaches for various types of offenders).

[236] Tier & Coy, *supra* note 3, at 426 (distinguishing sex offenders who are appropriately handled through increased jail sentences from those who truly suffer from mental abnormality and thus should receive treatment).

ineffective for offenders who do not undergo treatment voluntarily.[237] Moreover, if states commit sex offenders at the end of their penal sentences rather than providing treatment during incarceration, they will need to consider the implications of delaying treatment. After several years of imprisonment, offenders may have less insight into their actions and incarceration itself may exacerbate their pathologies.[238] Therefore, states might consider providing treatment well before offenders' penal sentences expire.

This Note calls for states to approach the serious problem of sexual violence through principled and honest laws. By contorting the legitimate state power of civil commitment over dangerous, mentally ill individuals to encompass sexually violent predators, states undermine their authority. States increase the social stigma and perception of dangerousness on all mentally ill persons by lumping the "obnoxious"[239] class of sex offenders together with other persons suffering from serious, chronic mental illnesses. As a corollary, civil commitment of sex offenders in lieu of longer punitive detention undermines the legitimacy of states' criminal justice systems. By committing rather than jailing, states suggest that sex offenders are less responsible and less blameworthy for their wrongs than other criminals. If the state views sex offenders as "sick" it should help them; if the state views them as "bad" it should jail them. What a state constitutionally cannot do is indefinitely imprison persons it has labelled mentally ill. States should not sacrifice the integrity of their separate systems for care and protection of mentally ill people, on the one hand, and for social control of criminals, on the other hand, in order to respond to public pressures regarding sexual violence.[240]

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[237] Gilmore, *supra* note 221, at 56 (describing range of attitude of inmates towards treatment); *see* HOLMES, *supra* note 215, at 168 (describing treatment approach which requires admission of guilt as "the first step towards rehabilitation").

[238] INGERSOLL & PATTON, *supra* note 215, at 99-100 (quoting treatment specialist who suggested that sex offenders come out of prison with worse fantasies, more violence, and more anger than before incarceration).

[239] Erlinder, *supra* note 3, at 158 (noting James Madison's theory that society will use its power to disadvantage of "most obnoxious" persons and suggesting that "sexual predators are certainly a minority most of society justifiably finds 'obnoxious' ").

[240] Janus, *supra* note 52, at 212-13 (describing principle of "criminal interstitiality" which draws constitutional line between punishment and civil commitment); Morse, *supra* note 3, at 154 (asserting that "legitimacy of both criminal and civil confinement systems depends

VII. CONCLUSION

Society disapproves of individuals who violate its behavioral norms. That notion is the basis of punishment in the criminal justice system. Among violators of society's laws, we are particularly disdainful of persons who commit violent acts of sexual deviance. Those acts offend both our behavioral standards and our moral standards. The acts injure us in personal and intimate ways. Accordingly, states have singled out sexual offenders for special treatment.

Many states have enacted special sexual predator laws that borrow from general civil commitment statutes authorizing detention of mentally ill and dangerous persons. The purpose of civil commitment is to provide care and treatment to mentally ill persons so they can return to society. Civil commitment is appropriate for mentally ill people because their conditions posed risks to the public *and* to themselves. Civil, as opposed to criminal, detention is constitutionally justified because mentally ill people are vulnerable or incompetent and thus in need of state protection. In contrast, sexual predators are not considered vulnerable or incompetent but rather extremely dangerous and blameworthy. Thus, the use of civil commitment in the context of sexual predators is an inappropriate response to a serious social problem.

Nevertheless, states have seized the power of civil commitment to authorize indefinite preventative detention of a particularly disfavored class of criminals. To commit sexual deviants under civil commitment statutes, states have had to stretch the definition of "mental illness" to fit a diverse class of criminals whose deviant tendencies stem from a wide range of biological and developmental origins.[241] States cannot, however, show that sex offenders, as a class, are any more "sick" than other criminals who have violated societal norms of behavior. Thus, the special commitment laws are unjustified.

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on maintaining the distinction between them"); Schopp, *supra* note 72, at 192 (concluding that sex offender commitment laws "undermine moral force of both mental health and criminal law").

[241] Leading Cases, *supra* note 17, at 268-69 (concluding that *Hendricks* gives states authority to "lock up indefinitely anyone who is found to fall into the nearly boundless category of mentally abnormal—from the most profoundly insane to those who fall through the cracks of the criminal justice system").

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Civil commitment is a massive infringement of individual liberty. In order to justify such infringement as a matter of due process, states must show a reasonable relation between a compelling state interest and the purpose of the commitment. The two sources of state power invoked to authorize civil commitment are police power and parens patriae power. Both of these powers, however, fail to justify civil commitment of sex offenders. Police power allows states to detain dangerous people who pose a risk to society. The Supreme Court, however, has limited that power to very specific situations which do not encompass sexual predator laws.

Parens patriae power allows states to detain vulnerable persons who pose a risk to themselves. This state power, however, fails to justify civil commitment of sexual predators for several reasons. First, states do not really consider sex offenders to be vulnerable. Second, even if states do consider sex offenders to be "ill," they do not seek to rehabilitate them and return them to society. Finally, even if states had such a goal they cannot show that treatment is effective in "curing" sexual predators. Accordingly, states detain sex offenders under the pretense of providing care and treatment but in reality the individuals stand little or no chance of release.

The United States Supreme Court in *Kansas v. Hendricks* recently upheld a Kansas statute which allows the state to detain certain convicted sex offenders indefinitely in mental health treatment facilities. Unfortunately, the Supreme Court in the long line of precedential cases preceding *Hendricks* has equivocated on the right to treatment of persons detained under all types of civil commitment laws. The *Hendricks* court perpetuated that ambiguity by failing to hold that Kansas must provide treatment in conjunction with civil detention of sexually dangerous persons. The Court, therefore, has left a loophole through which states can keep prior sex offenders off the streets indefinitely. A legislative statement that commitment is intended for "care and treatment" may be enough to rebut a due process challenge even if no treatment is actually provided.

This Note concludes, however, that such a result is unprincipled and violates the premises of both criminal detention and civil commitment. In light of the shortcomings of current justifications for committing sexual offenders, states should address the serious problem of sexual violence and public demands for safety through

one of two distinct approaches. States which act primarily out of concern for protecting society from dangerous sexual predators should employ their pre-existing criminal justice systems to punish and incarcerate those criminals. States which act out of concern for the "ll" or deviant offender himself should treat and rehabilitate that incompetent individual. By maintaining distinctions between their criminal and mental health laws, states more effectively address the serious problem of sexual violence without eroding their legal authority in each system.

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